

**DRAFT POLICY ESTABLISHING STANDARDS FOR MEDIATORS ACCEPTING COURT-REFERRED DOMESTIC RELATIONS CASES PURSUANT TO §13-22-311, C.R.S.**

**I. INTRODUCTION**

The following policy is intended to apply to any mediator who accepts a court-referred domestic relations case pursuant to section §13-22-311, C.R.S.,<sup>1</sup> including a mediator who volunteers, is paid privately, or receives state funds.

The Colorado Dispute Resolution Act, §13-22-301, et seq. (“CDRA”), was established in 1983. It is considered one of the strongest dispute resolution statutes in the country. CDRA created the Office of Dispute Resolution (ODR), and established the office of director, to be appointed by the chief justice. §13-22-305, C.R.S provides for dispute resolution programs to be established in judicial districts as designated by the chief justice, subject to moneys available. CDRA defines a mediator as “a trained individual who assists disputants to reach a mutually acceptable resolution of their disputes by identifying and evaluating alternatives.” CDRA does not otherwise address the requisite training of a covered mediator.

In 1985, ODR began contracting with mediators to provide dispute resolution services in Colorado courts. ODR mediators raised the bar and set an excellent quality standard in Colorado mediation. ODR and its contract mediators have been a driving force in establishing effective mediation in Colorado courts, particularly for litigants of low or moderate means. ODR requires all of its contract mediators to be experienced, meet certain training levels and to follow ethical standards (including training and criminal background checks). Mediation continues to evolve as a valuable tool in the Colorado courts, with most Colorado judicial officers regularly referring cases to mediation.

ODR mediators provide excellent service; statewide, however, ODR mediators are handling a smaller and smaller percentage of court-referred cases. There is a growing private sector of mediators not associated with ODR handling a large number of court-referred cases. This is a positive change evidencing the growth of mediation as a profession in Colorado, and the widespread acceptance of mediation in Colorado Courts. But as a consequence, ODR contractors are now involved in only a portion of court-referred mediations.

§13-22-311, C.R.S. provides authority for any court of record to refer any case for mediation or other dispute resolution service, subject to the availability of such service. The statute further states that “parties referred to mediation services or dispute resolution programs may select said services or programs from mediators or mediation organizations or from the office of dispute resolution [ODR].”

In its October 2012 report, the Office of Dispute Resolution Advisory Committee (“ODRAC”) recommended standards be drafted to ensure that mediators accepting court-referred cases in Colorado meet minimal standards, such as an acceptable background check and specified training. The Committee considered, among other things, the following factors in recommending minimum standards:

- that there are currently no minimum qualifications set for mediators in court-referred cases in the State of Colorado;
- that some persons performing and offering mediation services lack appropriate qualifications;
- that there are an increasing number of self-represented litigants in Colorado;
- that promoting minimum qualifications would help enhance and ensure access to justice for all litigants in Colorado;

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<sup>1</sup> FOOTNOTES IN THIS DRAFT ARE FOR REFERENCE TO THE REVIEWERS AND STAKEHOLDERS WHO MAY OFFER COMMENT ON THE DRAFT. IT IS NOT THE INTENT TO HAVE FOOTNOTES IN THE FINAL APPROVED policy. Any reference to §13-22-313 (referral to forms of dispute resolution other than mediation) was intentionally excluded as it over-broadened the charge given and unnecessarily expanded the professionals who would be covered (such as we were not originally concerned with formalized arbitration).

- that many civil cases are being referred to mediation by the Courts;
- that concerns have been expressed over the quality and outcome of some court-referred mediations; and
- that minimum qualifications and other safeguards are an appropriate measure to ensure that litigants engage with scrupulous, trained mediators pursuant to §13-22-311, C.R.S.

Domestic relations (“DR”) cases are a highly specialized area of the law and often involve high conflict. Moreover, an increasing majority of parties in DR cases are self-represented litigants. Mediation in these cases can be an ideal process for encouraging communication and resolving issues, taking account of the private nature of the DR case process and its important focus on preserving relationships. Mediators in DR cases also often work with unsophisticated parties and must be aware of the nuances related to DR cases.

For all these reasons, the task force recommends the establishment of a Domestic Relations Mediation Roster. This Roster will increase access to justice and promote the fair administration of justice in Colorado, all at a very low cost to the state and its taxpayers, and to the mediators affected.

The mediator standards, duties of the courts, and the model order set forth in this draft policy (hereinafter “policy”) have been drafted with recognition that the mediator’s role will be filled by people from different professions and backgrounds. These standards are intended to provide guidance to mediators in DR cases and to provide a structure for ensuring conduct that better serves consumers in Colorado. They should not be construed to suggest that a court referral of a potential mediation engagement constitutes a property interest or is otherwise subject to process beyond that described herein.

Notably, the standards do not exhaust the ethical and professional considerations that should inform a mediator of his or her duties. And violation of a standard shall not in and of itself give rise to a cause of action, or create any presumption that a legal duty has been breached, or that a professional ethical violation has occurred. The standards should be interpreted with reference to the purpose of a mediator as defined by the statute.

## **II. STATUTORY AUTHORITY**

This policy sets forth a comprehensive set of standards for court-referred mediators accepting domestic relations cases pursuant to section §13-22-311, C.R.S., irrespective of whether the mediator is an attorney or a non-attorney, volunteer, privately paid, or state paid. This policy also sets forth the duties of the courts when referring parties to mediation in domestic relations cases. Section §13-22-311, C.R.S., authorizes the courts to refer any case to mediation. The mediator may be an attorney, a mental health professional, or any other individual with appropriate training. The role of the mediator, as defined by statute, is to assist disputants to reach a mutually acceptable resolution of their dispute by identifying and evaluating alternatives. *(A model order will be included in a final policy).*

## **III. GUIDELINES FOR COURT REFERRALS AND MINIMUM REQUIREMENTS:**

**The Office of Dispute Resolution shall maintain a public “Domestic Relations Mediator Roster” for domestic relations cases (“the Roster”). (Mediators listed on the Roster may also be referred to as “DR-mediation credentialed” and the process outlined in this policy may be referred to as “DR mediation credentialing”). All mediators providing mediation services in domestic relations cases pursuant to §13-22-311, C.R.S. shall be listed on the Roster. To be listed on the Roster, a mediator must meet the following minimum requirements:**

- A) **Mediation Training** - A 40 hour basic or family mediation training or mediation program approved by ODR is mandatory for all mediators placed on the roster. The 40 hour mediation training or approved program must have been completed within two years immediately preceding the application to be eligible for credentialing. **A mediation program may include training pursuant to a “community mediation program” as long as the program is approved by ODR.**

**B) Two-Year Provisional Period** – There are many effective mediators currently practicing in the domestic relations arena in the state of Colorado. This policy is not intended to impede their continued practice. Therefore, for a period of 24 months from the effective date of this policy, the following will satisfy the basic mediation training requirement:

1. Evidence acceptable to ODR of a 40-Hour Mediation Training completed any time prior to the effective date of this policy; or
2. Evidence of a level of experience in court-referred DR mediation in Colorado demonstrated by a signed acknowledgement form or letter from a Colorado state judicial officer, a Colorado District Court Administrator, or a Family Court Facilitator employed by the State of Colorado.<sup>2</sup> A model acknowledgement form will be made available by ODR.<sup>3</sup>

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<sup>2</sup> Acknowledgement of experience providing mediation service does not imply that the judicial officer, District Court Administrator, or Family Court Facilitator has independent knowledge to verify the quality of the service provided or that the mediator is being endorsed as a “good” mediator by the signatory. Acknowledgement simply means that the signatory has personal knowledge that the mediator’s current practice serves parties in domestic relations cases.

<sup>3</sup> The “level of experience” satisfaction requirement is included to allow exceptionally qualified persons who have demonstrated the same (people known to the courts) to be included. This alternative has particular application to rural areas, or where only a few people have taken a 40-hour training, but who have demonstrated quality work. While the provisional period allows good practitioners to continue doing good work, future practitioners will be required to provide evidence of basic mediation training, without exception.

- C) **“Domestic Relations Mediation in Colorado Courts” Training** – Within one year of credentialing, all rostered mediators must successfully complete the program “Domestic Relations Mediation in Colorado Courts” developed by ODR. This training is an 8-hour program focused on training mediators to work more effectively within the Colorado courts in DR cases. The training supplements and does not replace the Mediation Training requirements. This DR-focused training is important to ensure procedural fairness for all DR participants in the Colorado legal system.
- D) **Continuing Education Requirements** – In addition to the above, rostered mediators must complete 12 hours of relevant continuing education every three years to retain listing on the Domestic Relations Mediator Roster. The program providing continuing education must be approved by ODR. ODR will develop policies and procedures regarding the approval and reporting process for continuing education.<sup>4</sup>
- E) **Education** – All rostered mediators must be high school graduates or have obtained a GED or its equivalent.
- F) **Complaint Process** – All rostered mediators are subject to a complaint process which may result in the removal of the mediator’s name and contact information from the Roster.
- G) **Background and Professional Licensure Checks** – All rostered mediators are required to obtain a fingerprint-based criminal background check through the Colorado Bureau of Investigation at their own expense.
1. Rostered mediators must provide updated criminal history information as requested by ODR.
  2. ODR shall develop policies and standards for the approval or denial of potential mediators based upon their criminal histories. Particular areas of concern include: fraud, moral turpitude, acts of domestic violence, and felony convictions.
  3. The results of an applicant’s background check and the status of a professional licensure are subject to review and can be grounds for denial.
  4. All rostered mediators are required to submit to ODR upon application and renewal a completed affidavit and disclosure document, titled “Affidavit of Mandatory Consent and Disclosure: For Eligibility to accept Court-referred Domestic Relations Mediation cases and Placement on DR-Credentialed Mediator Roster.”

#### **IV. RESPONSIBILITIES OF THE COURT**

- A) In every order requiring parties to engage in alternate dispute resolution in a DR case, the court shall indicate whether the order is pursuant to §13-22-311, C.R.S. or §13-22-313, C.R.S. If the order is pursuant to §13-22-311, the court shall require the parties to utilize a mediator on the Roster.
- B) Any judge or magistrate, may, in his or her discretion, at the request of all parties to a case, and upon a showing on the record of good cause, refer a DR case to mediation by a mediator not on the Roster.
1. Any request by a party for such a waiver shall be made in writing or on the record.

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<sup>4</sup> The task force considered both the MAC professional mediator requirements for continuing education and the requirements for ODR contractors. The task force ultimately decided to select a 3-year period of approximately 4 hours each year to obtain relevant, DR-mediation-related credits.

2. Any waiver granted shall be in writing, state the good cause, and be a matter of public record in the case.

## **V. PROGRAMS IN JUDICIAL DISTRICTS**

Individual judicial districts have the option to maintain and create their own DR mediation programs. At the discretion of the Chief Judge, individual judicial districts may maintain or create a “Judicial District Mediation Program” for DR cases. The judicial district may contract with, hire, designate or choose mediators to participate in their Judicial District Mediation Program. The mediators in the Judicial District Mediation Program must meet the minimum standards set forth in paragraph III above and be listed on the Domestic Relations Mediator Roster; however, an individual Judicial District Mediation Program may require higher standards.

Being listed on the Domestic Relations Mediator Roster does not entitle a Mediator to participate in a specific Judicial District Mediation Program. Individual judicial districts maintain the right and prerogative to determine the mediators that participate in their Judicial District Mediation Program.

## **VI. COMPLAINT PROCESS**

- A) Any complaint regarding the performance of a rostered mediator performing court-referred mediation will be submitted to the ODR Director using the “Mediator Complaint Form” located on the ODR website. Complaint forms should be submitted electronically using the ODR website, but may also be printed and mailed to the ODR Director.
- B) Upon receipt of a Mediator Complaint Form, the ODR Director or designee shall screen the complaint and shall determine whether formal investigation or action is necessary. Any determination not to pursue a formal investigation or action shall be communicated to the complainant.
- C) If the ODR Director or designee determines that a formal investigation or action is necessary, the ODR Director or designee shall conduct an investigation to determine whether the mediator’s performance has resulted in a violation of this policy. The ODR Director or designee’s investigation may include any of the following as appropriate: requesting a written response from the mediator; contacting the complainant or their attorney and/or the mediator to gather additional information (such contact and gathering may include written, phone, e-mail, or face-to-face contact); receiving information from any witness or source of information concerning the complaint; or conducting or convening a meeting at which the complainant and mediator can present information or positions. The ODR Director shall then render a written decision on whether the mediator’s performance was a violation of this policy and make any plan or resolution to resolve the complaint. Any decision shall be communicated to the complainant or their attorney and the mediator. The decision of the Director is final for all purposes. There shall be no right of appeal.
- D) If the mediator holds a professional license, the ODR Director may refer the complainant to the appropriate licensing authority, agency, court, or board as this complaint process will not determine whether a mediator has violated any law, another code of conduct, or other license-imposed rule or regulation.
- E) If the mediator is also an ODR contractor, ODR reserves the right to consider any complaints during the annual contract renewal process, and the State Court Administrator, as signatory to any contracts, reserves the right to terminate a mediator’s ODR contract.

## **VI. SANCTIONS**

Failure of a mediator to comply with this policy may result in removal of the mediator from the Roster.

## **VII. POLICIES GOVERNING CREDENTIALING AND ELIGIBILITY**

ODR shall promulgate and disseminate policies governing the Roster eligibility process, such as affidavits and renewal affidavits.

## **VIII. STANDARDS OF PRACTICE**

### **A) Principle of Self-Determination**

1. The mediator shall rely on and encourage the parties to reach a voluntary, informed agreement.
2. The mediator shall inform all parties that the process is consensual in nature, that the mediator is an impartial facilitator, and that the mediator shall not impose or force any settlement on the parties.
3. The mediator shall not make substantive decisions for any party.

### **B) Impartiality**

1. The mediator shall advise all parties of any prior or existing relationships or other circumstances giving the appearance of or creating a possible bias, prejudice, or partiality.
2. The mediator shall conduct the mediation in an impartial manner and should avoid conduct that gives the appearance of partiality.
3. If the mediator is unable to conduct the process in an impartial manner, the mediator shall withdraw.
4. The mediator should not accept from nor give to a party any gift, favor, loan, or any other item of value. This does not preclude the mediator from accepting reasonable fees for services rendered.

### **C) Competence**

1. The mediator should have training and education in the mediation process, as well as familiarity with the subject matter, including general principles of law, pertaining to any area in which the mediator is willing to serve.<sup>5</sup>
2. The mediator shall decline appointment, withdraw, or request technical assistance when a case is beyond the mediator's competence.

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<sup>5</sup> The Task Force considered at length the ODRAC education and credentialing subcommittee recommendations and follow up e-mails. The Task Force also reviewed other prior Advisory Committee discussions around the significant importance of subject-matter-specific knowledge. And also considered the Colorado Model Standards of Conduct for Mediators approved by CBA, CJI, CCMO (nka theMAC), and ODR and Standard # III (“III. A. The mediator should have training and education in the mediation process, as well as familiarity with the subject matter, including general principles of law, pertaining to any area in which the mediator is willing to serve. B. The mediator shall decline appointment, withdraw, or request technical assistance when a case is beyond the mediator’s competence. C. The mediator shall maintain professional competence in mediation skills.”) In addition, the Task Force decided to include the continuing educational requirements, setting the requirement for an ongoing “nuts and bolts” (“Mediating in Colorado Courts”) training (which would last no longer than 1 day and would be developed by ODR for presentation around the State and available on-line later), and emphasizing the importance the “access to justice” issue. And, as part of the continuing education requirement, mediators can and should gain education on subject-matter areas which would expand their court-referred practice. In the end, the Task Force decided that it had to rely on mediators to accept appropriate cases and reject inappropriate cases.

3. The mediator shall maintain professional competence in mediation skills.

#### **D) Confidentiality**

1. The mediator shall preserve and maintain the confidentiality of all mediation proceedings, except when required by law to disclose information.
2. The mediator should conduct the mediation to provide the parties with the greatest protection of confidentiality afforded by law and mutually agreed to by the parties, subject to and consistent with the Colorado Dispute Resolution Act.
3. The mediator shall advise and reach agreement with the parties concerning the limits and bounds of confidentiality and non-disclosure prior to the commencement of the mediation.
4. The mediator shall not disclose any communication made in private session, unless the mediator has confirmed that part or all of the communication may be shared with another party or any other person.
5. If the mediation is confidential, the mediator shall not permit observers or others to attend a mediation session without first obtaining an agreement of confidentiality.
6. The mediator shall maintain confidentiality in the storage and disposal of records and shall render anonymous all identifying information when materials are used for research, training, or statistical compilations.
7. The mediator shall take all appropriate action to protect the confidentiality of the process from requests for disclosure by any third party, including necessary legal action to quash a subpoena issued to compel the mediator's testimony or matters discussed during mediation.

#### **E. Quality of the Process**

1. The mediator should conduct the mediation fairly and diligently.
2. The mediator has an ongoing duty to assess the case and determine whether it is appropriate and suitable for mediation.
3. The mediator should assist the parties in evaluating the benefits, risks, and costs of mediation and alternative methods of problem solving available to them.
4. The mediator only should accept cases in which relevant deadlines can be met.
5. The parties and mediator should decide who will (and will not) attend the mediation.
6. The mediator shall not prolong unnecessarily or inappropriately a mediation session if it becomes apparent to the mediator that the case is unsuitable for mediation or if one or more parties is unwilling or unable to participate in the mediation process in a meaningful manner.
7. If one of the parties is unable to participate in a mediation process for psychological or physical reasons, the mediator should postpone or cancel mediation until such time as all parties are able and willing to resume.
8. If the parties insist on pursuing an agreement that the mediator knows or should know is in violation of the law and has advised the parties of such, the mediator shall terminate the mediation.

9. The mediator shall not misrepresent intentionally or knowingly material facts or circumstances in the course of conducting a mediation.

#### **F. Truth in Advertising and Solicitation**

1. The mediator shall be truthful in advertising and solicitation for mediation.
2. All advertising by a mediator shall represent honestly the services to be rendered.
3. The mediator shall not make or imply promises or guarantees of result.

#### **G. Compensation, Fees, and Charges**

1. If a fee is charged, the mediator shall give a written explanation of the fee structure, including related costs, and manner of payment to the parties prior to the mediation.
2. The mediator shall maintain adequate records to support charges for services and expenses and provide copies to parties upon request.
3. The mediator shall not enter into a fee agreement that is contingent upon the result of the mediation or the amount of settlement.
4. The mediator shall neither receive nor give commissions, rebates, or similar forms of remuneration for referral of clients for mediation, except for fees to an independent marketing agent.
5. The mediator shall not use confidential information obtained in a mediation for personal gain or advantage.

#### **H. Dual Relationships**

1. The mediator shall not provide psychotherapy or legal representation to any party during the mediation process.
2. If the mediator has at any time provided psychotherapy, legal representation, or other professional services in a confidential relationship to any of the parties, the mediator shall advise and fully disclose the nature of the prior relationship.