

TO: Chief Justice Michael L. Bender - Colorado Supreme Court
FROM: Office of Dispute Resolution Advisory Committee
DATE: 10/29/12
SUBJECT: Proposal for court-referred mediation

I. Background and Purposes

In 1983 the Colorado Legislature passed the Colorado Dispute Resolution Act (“CDRA”) to provide a forum for persons to resolve disputes through mediation - alternate dispute resolution (“ADR”). (See C.R.S. §13-22-301 et seq.) The Act established the Office of Dispute Resolution (“ODR”) in the judicial department and created a position of director to administer the ODR. The director is appointed by, and responsible to, the Chief Justice for implementing programs to provide mediation services. This legislation also empowered courts of record to refer any case to ADR, mediation services or dispute resolution programs, subject to limitations.

The ODR operates a program to provide mediation services statewide and has developed policies and procedures for its program. Pursuant to CDRA, parties referred to mediation may select any mediator or seek the services of ODR. Other programs and individuals provide mediation/ADR services to the courts. Currently, ODR contracts with approximately 70 mediators/ADR professionals. These individuals are subjected to routine background checks and must meet minimal levels of training and experience. ODR has developed policies and procedures for its program; however, these policies only apply to the ODR program and mediators/ADR professionals contracted with the state.

Chief Justice Mary J. Mullarkey established the Office of Dispute Resolution Advisory Committee (“Committee”) by Order effective September 5, 2000. The existing Order, as amended, states in its preamble that, “[I]t is important to promote a statewide and systems perspective regarding alternative dispute resolution in Colorado and to continually improve the planning, administration, and integration of alternative dispute resolutions programs statewide as well as within the Judicial Branch.” The Committee consists of eighteen members who serve three-year terms and meet at least two times per year. The members of the Committee are appointed by the Chief Justice and represent a broad cross-section of the state, including all three branches of government and diverse ADR constituencies. The Committee was created for the following purposes:

1. To review and make recommendations concerning the creation, expansion, administration and evaluation of dispute resolution programs throughout the state;
2. To review and make recommendations concerning alternative dispute resolution policies throughout the state;
3. To advise the Director of the Office of Dispute Resolution concerning policies, procedures, and strategies for improving service delivery of Office of Dispute Resolution programs throughout the state; and

4. To review and make recommendations regarding fees for services offered by the Office of Dispute Resolution.

It is important to note that this proposal does not come from the ODR. The recommendations come from the Office of Dispute Resolution Advisory Committee. The Committee is independent from the ODR.

Further, this proposal is the position of the Office of Dispute Resolution Advisory Committee. It should not be construed to represent the position of the Colorado State Judicial Branch.

The Committee itself emphasizes what its functions do not include. First, this is an advisory committee with no decision-making or rule-making powers. It only reviews programs and policies and makes recommendations. Second, the Committee does not manage anyone.

The Committee has focused only on “court referred” mediation / ADR. The Committee believes that its primary purpose is to serve the judicial branch. The Committee is not making any recommendation related to mediation / ADR that is not court referred.

The Committee is concerned that there are currently no minimum qualifications set for mediators/ADR professionals in court-referred cases in the State of Colorado. These concerns have been the primary subject of the quarterly Committee meetings over the last year. The concerns of the Committee are discussed in section II below and suggested solutions are set forth in section III below. The Committee respectfully requests that the Chief Justice consider our concerns and suggestions for improvement. This recommendation represents the work and serious discussion of the Committee over many meetings.

II. Issues and Concerns – “Access to Justice”

By a vote of 11 to 1 of those in attendance at its May 11, 2012 meeting the Committee determined that there is a problem generally with court-ordered mediation in Colorado. The problem relates to the lack of qualifications for mediators/ADR professionals in court-referred mediations. The Committee believes that this is an “access to justice” issue because of the burgeoning number of pro se litigants in the Colorado state court system. State of Colorado judicial department data from fiscal year 2012 reveals that 68% of litigants in district court civil cases were pro se and that 62% of the litigants in district court domestic relations cases were pro se. The Committee is concerned that these pro se litigants are being required by a judge to mediate their cases and outside of the ODR program; there are no safeguards in place to insure that these litigants engage with a scrupulous, trained mediator/ADR professional.

The Committee conducted an informal email survey of Colorado judicial officers in May of 2012. The survey documented the institutionalization of court-referred mediation/ADR in Colorado courts. The survey shows that referral by a judicial officer to mediation/ADR has become commonplace in Colorado Courts. The data is informal and not scientific; however, it is revealing. The results of the informal survey are attached to this recommendation as Appendix A.

The Committee is concerned that there are currently no minimum qualifications set for mediators/ADR professionals in the State of Colorado. Essentially, any person can “hang a shingle” and mediate a court-referred case. The Committee identified the following areas of concern related to court referred mediators/ADR professionals at its May 11, 2012 meeting:

1. Criminal history or professional suspension/revocation. There is currently no mechanism to insure that non-ODR mediators/ADR professionals in court-referred cases do not have a criminal history and to insure that they are not currently under suspension or revocation from another profession.
2. Potential for abuse of client confidential information. The Committee is concerned that mediators/ADR professionals have access to confidential and sensitive information of litigants without background check safeguards.
3. Lack of substantive knowledge, particularly in domestic relations cases. The Committee is concerned that there is not a minimal educational requirement of “substantive” knowledge for mediators/ADR professionals in court-referred cases. A person can start mediating court-referred cases without any formal or informal training. For example, a mediator in Colorado can currently mediate a court referred divorce case without any substantive knowledge of divorce law and procedure.
4. Lack of process knowledge. The Committee is concerned that there is not a minimal educational requirement of “process” knowledge for mediators/ADR professionals in court-referred cases. A person can mediate cases without any formal or informal training as to the process of mediation.
5. No reporting mechanism for complaints. The Committee is concerned that there is currently no mechanism for filing or resolving complaints against mediators/ADR professionals in the State of Colorado. This is particularly disconcerting because of the high threshold that would have to be met to sue a mediator/ADR professional for malpractice.

The Committee also viewed the integrity of the court system, misrepresentation (false advertising), and the lack of a common definition / understanding of “mediation” as potential problems.

III. Recommendations and Approach

The ADR community and other interested parties across the state of Colorado have been discussing credentialing and certification of professional mediators/ADR professionals for the past 25 years. This subject is now being discussed in every state across the nation and around the world. The Committee has also discussed this subject at length. The Mediation Association of Colorado (the MAC) currently has minimum standards and guidelines in place for their professional member status, which includes minimum training, mentoring, continuing education, and a grievance process. The MAC standards and guidelines for its professional member status are substantially similar to the qualifications

required of ODR contractors. The Committee believes the purpose of credentialing of mediators/ADR professionals for "court-referred cases" is to provide the public, especially litigants who are ordered to attend mediation, with the assurance the mediator/ADR professional they hire is trained, experienced, and held to a specific degree of professionalism and accountability. This is especially important given the high number of cases and pro se litigants being ordered to mediation/ADR in the Colorado state court system.

This Committee respectfully proposes that a Chief Justice Directive be issued requiring that only "credentialed" mediators/ADR professionals be used in court-referred cases in the State of Colorado. The Committee voted 10 to 3 in favor of making this recommendation.

The Committee proposes the following recommendations for providing credentialing for mediators/ADR professionals. This credentialing process, which includes minimum standards and qualifications, would apply to ALL mediators and ADR professionals who handle court referred cases. The recommendations are minimal and simple with the goal of providing safeguards for litigants. The Committee does not want to create a difficult certification process for mediators/ADR professionals. The Committee specifically resolved to make broad, general recommendations and to leave the "nuts and bolts" of credentialing to another group or individual. Of course, the Committee could make more specific recommendations if the Chief Justice were to so direct.

Court Referred Mediator/ADR Professional Qualification Recommendations

- Criminal Background Check / Professional License Status Check
- Minimum 40 hour Mediation Training based on National Standards
- Domestic Relations Specialized Training
- Mentoring
- Continuing Education Requirements
- No JD or Minimum Higher Education Training Requirements
- Grievance or Complaint Process

Criminal Background Checks / Professional License Status Check – Since mediators/ADR professionals have access to confidential information and the party's financial documents in some cases, this Committee suggests that criminal background checks be done initially when a mediator/ADR professional applies to become a credentialed/court-referred mediator/ADR professional. This background check should be repeated systematically every few years to make sure this mediator/ADR professional is still qualified to remain on the list of credentialed court-referred professionals. This background check could include reviewing any licensing inquiries of persons who are currently licensed in a specific area. The Committee also believes it is important to insure that mediators are in good standing with other professional licensing agencies. For example, there is currently nothing to prevent a

disbarred or suspended attorney, or therapist with a revoked license from mediating court referred cases in the State of Colorado.

Minimum 40-Hour Mediation Training based on National Standards – The minimum standard for all credentialed /court-referred mediators and other ADR professionals who practice mediation is the comprehensive and extensive knowledge of the mediation process. While it may be preferable, specific subject matter legal knowledge is not required in all practice areas. This Committee recommends that all credentialed /court-referred mediators, and other ADR professionals who mediate cases for court-ordered cases, complete, at a minimum, a 40-hour basic mediation training course which itself meets accepted curricula guidelines and standards. The Committee recommends the use of the standards and guidelines for a basic 40-hour mediation training course, which have been promulgated by the Association for Conflict Resolution, a national organization, and adopted by the Mediation Association of Colorado and professional associations and credentialing programs in other states, as well.

Domestic Relations Specialized Training – Domestic mediation cases require more training and specific subject matter knowledge than other types of cases in this Committee’s opinion. Therefore, we are suggesting that mediators/ADR professionals, who handle court-referred cases in this area, be required to obtain specific subject matter knowledge and training pertaining to domestic issues and processes.

Mentoring – Training is important to becoming a good mediator/ADR professional, but mentoring is invaluable for new professionals to apply their knowledge of the mediation/ADR process while working alongside experienced professionals. Such participation could consist of direct involvement in intake interviews, review of pre-mediation documents, other work preparing for the mediation, observing or participating in mediation sessions, consultation, and the preparation of a record of the agreement reached by the parties.

Continuing Education Requirements – Learning new information and keeping abreast of new processes, procedures, theories, or the latest information is important. Mediators/ADR professionals should be required to complete continuing education each year.

No JD or Minimum Higher Education Training Requirements – Colorado’s mediators/ADR professionals have diverse backgrounds and education. This Committee suggests that no JD or minimum education or higher education requirements be established. For example setting minimum standards could affect such programs as teen mediation courts. Furthermore, Colorado has practicing, professional mediators/ADR professionals who have not obtained a higher education degree, but are highly skilled, experienced mediators and ADR professionals.

Grievance or Complaint Process – Because many parties are now ordered to attend mediation/ADR, there should be a system set up to allow those people to file a grievance or complaint. This is especially important for pro se parties to voice their concerns. There should also be a system to evaluate the effectiveness of mediation and parties’ experiences through the process. This could be done through an evaluation form or survey that parties file with the court.

The members of the Committee voting against the recommendation were concerned that there is not a problem with mediation in Colorado and that the focus should be on promoting best practices instead of regulating. The opinion was also expressed that the Committee's recommendations would require statutory implementation or amendment.

The Committee notes precedent to follow in implementing these recommendations. Recently, minimum qualifications were set by Chief Justice Directive for Child Family Investigators in domestic relations cases. We are suggesting that a similar path could be taken in regards to mediators and ADR professionals in court referred cases. However, there is nothing in this recommendation that would affect the fees charged by mediators and ADR professionals.

The recommendations in this proposal should be viewed as a starting point. The Committee is willing and able to help with the implementation of this recommendation if directed by the Chief Justice. The Committee is also willing and able to move in a different direction or change its focus if directed by the Chief Justice. The Committee recognizes that it is charged with serving the interests of the Colorado judiciary and the people of the State of Colorado.

The ODR Advisory Committee recognizes that there are many issues to be resolved related to this recommendation. These concerns will need to be addressed before implementation. A few of these issues include:

1. What will this cost and what are the sources of revenue for this type of program?
2. Who will regulate or administrate these credentialing recommendations?
3. How will mentoring be handled?
4. What will the standards be for criminal background checks and professional licensure review?
5. What will the standards be for the grievance processes and sanctions?
6. What will the standards be for continuing education?
7. What will the standards be for providing waivers for these qualifications?
8. What will the standards be for training?

The Committee believes that any implementation would have to be a public process with the opportunity to comment.

The Committee recommends that provision be made for "experienced" mediators / ADR professionals to be "waived" in as qualified to handle court referred mediation without having to complete the 40 hour course, a domestic relations course, or the mentoring component, as appropriate. Of course, criteria would have to be developed to identify experienced mediators / ADR professionals. These experienced mediators / ADR professionals should be subject to background checks and continuing education requirements.