

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

**I. INTRODUCTION**

The following policy is adopted to assist the administration of justice through the referral and training of court mediators pursuant to section §13-22-311, C.R.S.<sup>1</sup> It is intended to apply to all mediators who accept court-referred cases pursuant to section §13-22-311, C.R.S., including those mediators who are volunteer, paid privately, and those paid with state funds.

The Colorado Dispute Resolution Act, §13-22-301, et seq, was established in 1983. The statute created the Office of Dispute Resolution (hereinafter “ODR”) and a 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. The statute defines a mediator as “a trained individual who assists disputants to reach a mutually acceptable resolution of their disputes by identifying and evaluating alternatives.”

In 1985, ODR began contracting with mediators to provide services in Colorado Courts. ODR mediators raised the bar and set the standard in Colorado. ODR and its contract mediators have been a driving force in establishing effective mediation in Colorado Courts. ODR requires its contract mediators to be qualified and to follow ethical standards (including requiring training and criminal background checks). Since 1985, mediation has evolved and become an invaluable tool in the Colorado Courts. Colorado judicial officers regularly refer cases to mediation.

ODR mediators are still providing an excellent service; however, statewide, ODR mediators are handling a smaller percentage of court referred cases than previously. The role of ODR as a “mediation service provider” is decreasing. The increased demand for mediators in court referred cases has resulted in a growing private sector of mediators not associated with ODR. This is a positive change evidencing the growth of mediation as a profession in Colorado, and the widespread acceptance of mediation in Colorado Courts. Because of this evolution, it is now appropriate for ODR to shift its focus from being a “mediation service provider” to ensuring that all mediators providing services in court referred cases are qualified and ethical.

§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.”

The Office of Dispute Resolution Advisory Committee (“ODRAC”) recommended in its October 2012 Report that standards be drafted to ensure mediators accepting court-referred cases in Colorado meet minimal standards such as an acceptable background check and minimum 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; 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

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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).

appropriate measure to insure that litigants engage with scrupulous, trained mediators pursuant to §13-22-311, C.R.S.

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 and to provide a structure for ensuring conduct that better serves consumers in Colorado. The standards do not, however, exhaust the ethical and professional considerations that should inform a mediator of his or her duties. Violation of a standard does not in and of itself give rise to a cause of action nor should it 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 AND EXISTING CHIEF JUSTICE DIRECTIVES**

This policy sets forth a comprehensive set of standards for all court-referred mediators 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. 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 “Credentialed Mediator Roster” (hereinafter “the roster”). (Mediators listed on the roster may also be referred to as “credentialed” and the process outlined in this policy may be referred to as “credentialing”). All mediators providing mediation services 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 minimum requirements set forth in this policy. The minimum requirements are as follows:**

- A) Basic Mediation Training** - A 40 hour mediation training or mediation program approved by ODR is mandatory for all credentialed mediators. 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** – It is recognized that there are many mediators currently practicing effectively in the state of Colorado. It is not the intent of this policy 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 of a 40 Hour Mediation Training completed prior to the effective date of this policy; or
  2. Evidence of a level of experience in court-referred mediation in Colorado demonstrated by a signed acknowledgement form or letter from a Colorado state judicial officer, a Colorado District Court Administrator or Family Court Facilitator employed by the State of Colorado. An acceptable acknowledgement form will be made available by the ODR.<sup>2</sup>

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<sup>2</sup> The “level of experience” satisfaction requirement was included specifically to allow persons who are exceptionally qualified and have demonstrated the same (people who are known to the courts), from being excluded. This “exception” has particular application to rural areas or where there may be few people who 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

- C) **“Mediating in Colorado Courts” Training** – All credentialed mediators are required to successfully complete the program “Mediating in Colorado Courts” developed by ODR within three years of credentialing. This training is an 8 hour program focused on training mediators to work more effectively within the Colorado Courts. The training is intended to supplement rather than replace the 40 Hour Basic Mediation Training. This training is important to ensure procedural fairness for all participants in the Colorado legal system.
- D) **Continuing Education Requirements** – Mediators must complete 24 hours of continuing education every three years. The program providing continuing education must be approved in advance by ODR. The ODR will develop policies and procedures regarding the approval and reporting process for continuing education.<sup>3</sup>
- E) **Education** – All credentialed mediators must be high school graduates or have obtained a GED or its equivalent. This requirement does not apply to teen mediation programs.
- F) **Complaint Process** – All credentialed 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 credentialed mediators are required to obtain a fingerprint-based criminal background check through the Colorado Bureau of Investigation at their own expense.
1. Credentialed mediators must provide updated criminal history information as requested by ODR.
  2. The 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 credentialed mediators are required to submit to the ODR upon application and renewal a completed affidavit and disclosure document, titled “Affidavit of Mandatory Consent and Disclosure: For Eligibility to accept Court-referred Mediation cases and Placement on Credentialed Mediator Roster.”

#### IV. RESPONSIBILITIES OF THE COURT

- A) In every order requiring parties to engage in alternate dispute resolution, 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, magistrate, or water referee 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, may refer a 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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required to have basic mediation training without exception. The training requirement states what is expected and what will be required in the future.

<sup>3</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 8 hours each year to obtain CE credits, similar to attorneys and CLE.

2. Any waiver granted shall be in writing, state the good cause, and be a matter of public record in the case.
- C) The chief judge of any judicial district may, in his or her discretion, exempt any or all of the following case types from the requirements of this policy by issuing an administrative order: small claims cases, or cases under the Forcible Entry and Detainer statute ((FED, §13-40-101 et. seq. C.R.S.) including evictions governed by the Mobile Home Park Act (§38-12-200 et. Seq. C.R.S.)).

## **V. COMPLAINT PROCESS**

A) Any complaint regarding the performance of a mediator performing court-referred mediation will be submitted electronically to the ODR Director via the “Mediator Complaint Form” located on the ODR website: A paper copy of the complaint form may also be printed from ODR website or obtained through the mail by contacting ODR.

B) Within 30 days of receiving a “Mediator Complaint Form,” the ODR Director or designee shall screen the complaint and shall determine whether formal investigation is necessary.

C) If the ODR Director or designee determines that a formal investigation is necessary, the formal investigation shall be conducted by a three person panel consisting of the ODR Director or designee (any designee must be an employee of SCAO), a credentialed non-attorney mediator and credentialed attorney mediator. Only the ODR Director or designee may be a current state employee. The Chief Justice of the Colorado Supreme Court or designee shall appoint three non-attorneys and three attorneys to serve on these panels. The ODR Director shall select the members of each specific complaint panel.

D) The panel’s decisions as to whether a complaint is founded or unfounded and as to what, if any, action is necessary are final decisions and are not appealable. If a formal investigation is conducted, the panel will issue its decision in writing signed by all three panel members. The decision must be issued within 120 days after receiving a “Mediator Complaint Form”.

E) No later than 120 days after receiving a “Mediator Complaint Form,” the ODR Director or designee shall ensure that a written response is provided to the complainant.

## **VI. SANCTIONS**

Failure of a mediator to comply with this policy may result in removal of the mediator from the roster. A decision to remove a mediator from the roster must be unanimous by the panel.

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

The ODR shall promulgate and disseminate policies governing the mediator credentialing and 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>4</sup>
2. The mediator shall decline appointment, withdraw, or request technical assistance when a case is beyond the mediator's competence.
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.

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<sup>4</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 profession 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.

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.