December 2015

Chief Justice Nancy Rice
Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

RE: Proposed Policy Establishing Standards for Mediators

Dear Chief Justice Rice:

The undersigned individuals and organizations understand issues have been raised about the current system for providing mediation for court-referred domestic relations cases, particularly where parties are *pro se*.

The undersigned have serious concerns about the proposal submitted by the Task Force, entitled **DRAFT POLICY ESTABLISHING STANDARDS FOR MEDIATORS ACCEPTING COURT- REFERRED DOMESTIC RELATIONS CASES PURSUANT TO §13-22-311, C.R.S.,** ("the proposal"), that purports to address and resolve these issues.

These concerns include that the proposed credentialing will not solve the identified problems, that it will mislead the very consumers it purports to protect, that it will increase costs for parties and the courts, and that it violates provisions of the Colorado Dispute Resolution Act, sections 13-22-301, C.R.S., et seq. ("CDRA"). This letter will summarize, as briefly as possible, (1) the rationale for the proposed credentialing as understood by the undersigned, (2) the concerns about the proposal, and (3) possible alternatives to the proposal.

1. **Rationale as we understand it** (factors leading to the proposal).

    a. Because the court is ordering domestic relations parties to mediate, there needs to be some assurance on behalf of the court that the mediators are qualified and/or competent, with special concern for *pro se* parties.
    b. Problematic MOU's/settlement proposals submitted to the court and created with/by mediators.
    c. A need for a system to address complaints against mediators by unsatisfied parties and/or judicial officers.
    d. The desire to create a better system.

2. Concerns about the proposal

a. The proposal does not ensure competent mediators. It does, however, run the serious risk of misleading parties, particularly *pro se* parties, into thinking mediators on the proposed court Roster *are* competent by the fact they are included on the list. *See, e.g., Recommended Education/Training and Experience for Professional Mediators*, developed by representatives of ODR, the CBA ADR section, and CCMO (predecessor to the Mediation Association of Colorado also known as the MAC), after a 3-year process with extensive statewide feedback, and endorsed by the CCMO and endorsed as aspirational by the CBA in 2007 (attached). The current ODR mediators' qualifications far exceed those required by the proposal.

b. The proposal violates CDRA, which clearly envisions that some mediators are to be governed by ODR and some mediators are not to be governed by ODR, *see e.g.* sections 13-22-305 and 306, C.R.S., and that parties can choose their mediator from either, section 13-22-311(1), C.R.S., see also section 13-22-313(5), C.R.S.

c. The proposal will increase litigation and therefore increase the costs to the parties and to the courts. This will occur when; (a) parties petition the court to use another mediator, (b) mediators challenge any discipline and/or removal from the roster, and (c) parties challenge the court's inclusion of an incompetent mediator on the roster.

d. The proposal will be ineffective because mediators could simply change what their process is called, thus meaning the proposal would be inapplicable to them. The credentialing proposal does not address settlement conferences, med/arb or other ancillary processes that, for example, would be included in a court's order to use ADR.

e. No other state requires parties to use a credentialed mediator. Other states limit who judges can appoint as mediators; however, Colorado judges do not appoint mediators under CDRA, rather the parties are expressly allowed to choose their mediator, C.R.S. 13-22-311(1) and 313(5).

f. The proposal will not resolve the problem of inadequate and/or problematic MOU's/settlement agreements. The training required in the proposal is simply insufficient to rectify this problem. Additionally, because mediators are scribes who can only record the parties' agreements, the parties themselves may limit what is prepared by the mediator or, may prepare the documents

themselves. A form MOU/settlement agreement would better resolve this problem.

g. The proposed complaint process violates CDRA, which provides for confidentiality of mediation as provided for in Section 13-22-307, C.R.S. It further exceeds ODR's authority to establish rules, regulations and procedures for ODR mediators **only**. See section 13-22-305(1), C.R.S. Although the proposed process is detailed and provides opportunities to consider the mediator's input, it also violates non-ODR mediators' rights to due process by enabling ODR or the State Court Administrator ("SCA") to remove them from a court Roster with no right of appeal. In addition, the decision maker (the SCA or the SCA's designee) is not qualified because they may have no knowledge of mediation theory, skills, and practices leading to the potential for arbitrary and capricious decisions.
h. For these reasons, the proposal would actually create a system that is worse than the present system.

3. Alternatives to address the concerns which lead to the Task Force proposal

a. Create a list that will include anyone who requests inclusion. After or below each name include those items from the recommendations that they have accomplished. Some possibilities include a 40-hour mediation training, training in domestic issues, levels of training in domestic law, domestic mediation experience, and a recent criminal background check. There would be no credentialing of mediators, just certification of attendance at trainings and a criminal background check.
b. Expand the number and/or range of ODR mediators. The courts currently ensure that competent mediators are available for court-referred cases by contracting with ODR mediators, who must meet stringent qualifications, including background checks, and have better oversight than a roster can provide. ODR mediators have particular expertise in serving low-income, indigent, and *pro se* parties. This system provides access to court approved mediators while allowing parties to use non-ODR mediators at their discretion per the CDRA. This system has worked well for many years, except perhaps in a few rural areas. These rural areas can improve their access to ODR mediators through (a) contracting with additional mediators or (b) providing "circuit-rider mediators"

based in other districts.

c. Make the type and provider of any referral to alternative dispute resolution up to the parties, with a default to mediation and the list referred to in 3.a. above. If the parties cannot agree, make the default to ODR.
d. Create a form order for DR cases to ensure good orders resulting from mediation (as well as other assisted and non-assisted negotiations).
e. Create a system that provides incentives for all mediators to become better educated, such as Maryland's Program for Mediator Excellence (MPME), for which the groundwork has already been laid in Colorado.
f. Create an ombuds program, composed of a panel with representatives from ODR, the CBA ADR section, and the MAC, to address complaints about mediators, similar to that established by Maryland's MPME (see 3.e. above). Use ODR to process the complaints administratively for the ombuds program.
g. Create an administrative system for pro se divorces that do not involve children.

The following have authorized the use of their names, in lieu of their signatures, as evidencing their agreement with this letter:

Miles E. Davies, Esq.
President, Dispute Resolution Professionals, LLC
ODR Contract Mediator

Cynthia A. Savage, Esq.
Conflict Resolution Consultant
Retired ODR Director