

Office of Dispute Resolution Task Force

December 23, 2015

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

RE: Final Report and Submission of *Draft Policy Establishing Standards for Mediators Accepting Court-Referred Domestic Relations Cases Pursuant to § 13-22-311, C.R.S.*
Office of Dispute Resolution Task Force of the Chief Justice

Dear Chief Justice Rice:

It has been our privilege to serve on the Chief Justice's Office of Dispute Resolution Task Force.¹ You will recall that then-Chief Justice Bender appointed the Task Force on August 22, 2013 "to consider and propose draft standards for court-referred mediators in Colorado." We have worked diligently to craft a final draft of standards as directed. We have listened carefully to the various stakeholders throughout the State of Colorado, in numerous – and sometimes contentious – meetings. Mediator credentialing in Colorado has been debated for over 25 years, and consensus remains elusive. Nevertheless, certain themes did emerge, and a majority of our members came to an explicit draft policy.

Enclosed please find a comprehensive proposal for establishing standards for mediators accepting court-referred domestic relations cases (the attached proposal explains why the policy is limited to DR cases). It is important to note that the recommendations of the Task Force apply only to "court-referred" mediation – cases where a judicial officer requires the parties to engage in mediation – and that they allow individual Districts to impose higher requirements. As a Task Force, we were sensitive to the fact that we were appointed by the Chief Justice of the Colorado Supreme Court. Our duty as a Task Force was to the judicial branch and the citizens it serves. Accordingly, we viewed our charge as making a recommendation that would improve the judicial branch and elevate the experience of citizens of the State of Colorado with the judicial branch of government.

¹ The Task Force consisted originally of District Court Judge Todd Jay Plewe, Magistrate Randall Lococo, Ms. Holly Panetta – Court Programs Manager and ODR Director, and Mr. Bill Delisio – Family Law Manager of the Colorado Judicial Department. Mr. J. Gregory Whitehair, private attorney and mediator representing the CBA ADR Section, was added to the Task Force on July 11, 2014; Ms. Helen Shreves, private attorney mediator representing the CBA Family Law Section, and Ms. Fonda Hamilton, private non-attorney mediator, were added on January 22, 2015.

Although this Final Report and draft proposal represent the majority opinion of the Task Force, we did not reach full consensus on all facets of the proposal. Nevertheless, we did all agree that:

- 1) The creation of a court roster of mediators is a resource that would be useful for the increasing number of self-represented parties, especially in domestic relations cases; and
- 2) Any mediator included on a court roster should, at a minimum, complete a criminal background check and some level of training related to mediation and the specifics of domestic relations cases.

The major difference in opinion among Task Force members on the above two issues is whether such a roster should be **mandatory and exclusive** (subject to court-ordered exceptions) or **voluntary only** (and essentially self-policing); and to a lesser extent, whether the proposed training is sufficient. The majority of the Task Force believes that all mediators eligible for court-referred DR cases should be **required** to comply with minimum standards for inclusion on a court roster, and that only rostered mediators should be allowed to accept appointments (with exceptions subject to court approval). Should the Chief prefer developing a **voluntary** court roster of DR mediators, all Task Force members recognize that as a legitimate, alternative solution.

As historical context, mediation has become the standard throughout the State of Colorado in domestic relations and juvenile cases, and is mandatory in many Colorado judicial districts. Colorado has a robust mediation community that typically provides excellent services to the Courts and citizens. There is concern that quality mediation services are not as available in rural communities.

The present impetus for the credentialing of mediators in Colorado is rooted in the “access to justice” movement. Most Colorado litigants in domestic relation cases are *pro se*:

- 66% of DR cases filed in FY2014 had no attorney involved – every party was *pro se*
- 75% of parties in DR cases in FY2014 did not have an attorney

There is a need to provide these *pro se* litigants a “safe space” to resolve their disputes when they are court-ordered to participate in mediation. The Task Force worried that judicial officers are currently requiring persons (primarily *pro se* parties) to participate in mediation without any safeguards. Safety is particularly important in domestic relations cases so we can best protect vulnerable children and splintering Colorado families.

In October 2013 the Task Force circulated a *Draft Policy Establishing Standards for Mediators Accepting Court-Referred Cases Pursuant To §13-22-311, C.R.S.* The Task Force submitted an “Interim Report” to the Chief Justice and an “Interim Report” to the Office of Dispute Resolution Advisory Committee in August 2014. A second *Draft Policy Establishing Standards for Mediators Accepting Court-Referred Cases Pursuant To §13-22-311, C.R.S.* was circulated in October 2014.

The October 2013 *Draft Policy* and October 2014 *Draft Policy* were distributed widely to the public, the courts, the mediation community, and the private bar. The draft policies generated spirited discussion and comment. The draft policies have been posted for public access on the Colorado Judicial Branch website at: <http://www.courts.state.co.us> on the Office of Dispute Resolution Advisory Committee page.

In making its recommendations, the Task Force always worked within the confines of the Colorado Dispute Resolution Act § 13-22-301, C.R.S. *et seq.* (“CDRA”), and even brought in a member of the Attorney General’s staff to act *ex officio* in our work sessions. This is important to note because CDRA was enacted in 1983 and CDRA did not anticipate the credentialing of mediators. Many states have incorporated the credentialing or certification of mediators statutorily, and certainly Colorado could, as well. The recommendation of the Task Force does not require or anticipate the amendment of CDRA or any statutory enactment.

The Task Force recognizes that there would be a significant fiscal note if our recommendation were adopted. Many have criticized our proposal because of its cost. We did not make a recommendation as to how the program would be funded although we realize that financial considerations will absolutely have to be considered.

Finally, as noted above, the various draft policies generated a great deal of discussion around the state. The overwhelming majority of persons and groups responding to the Task Force acknowledged that, at a minimum, criminal background checks and some training should be required of mediators in court-referred domestic relation cases. But there was a wide array of feedback collected in our efforts. In short, the opposing and alternate positions can be categorized as follows:

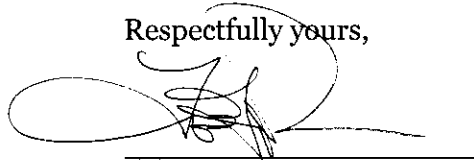
1. The current system is fine and working; the Task Force is addressing a non-existent problem.
2. All mediators and ADR professionals should be certified and governed by a state agency separate and independent from the judicial branch.
3. Credentialed mediators should be required in all “court-referred” cases and not just in domestic relations cases.
4. The training and educational background required in the Draft Policy of the Task Force is inadequate.
5. Membership on the court-annexed roster of mediators should be voluntary, and compliance with any standards or minimum education would be self-policing; parties should be free to stipulate to non-rostered mediators. Some process would be provided to confirm a criminal background check, achievement of suggested training, and perhaps agreement to be subject to a voluntary complaint process outside of ODR or the Office of the State Court Administrator.

These opposing positions have merit and have been fully considered, though the Task Force has been advised that several constituencies plan nonetheless to submit to you separate recommendations and responses to our draft proposal.

We are grateful and honored that we could participate in this important process. Our final draft is imperfect, but it was truly a collaborative effort and it represents our thoughtful deliberation and consideration of extensive public input. Mediation in Colorado courts is an important discussion.

We are willing and ready to complete further work at your request. It would be a privilege to continue our efforts. At this point, we will not actively meet or work unless further directed.

Respectfully yours,

A handwritten signature in black ink, appearing to read 'Todd Plewe', written over a horizontal line.

Honorable Todd Jay Plewe