

**DRAFT POLICY ESTABLISHING STANDARDS AND A VOLUNTERY ROSTER FOR
MEDIATORS ACCEPTING DOMESTIC RELATIONS CASES PURSUANT TO
§13-22-311,
C.R.S.**

I. INTRODUCTION

The following policy is intended to create and maintain a voluntary Domestic Relations Mediator Roster (Roster) for mediators who accept a domestic relations case pursuant to section §13-22-311, C.R.S., including a mediator who volunteers, is paid privately, or receives state funds. A mediator whose name appears on the Roster is not recommended or endorsed by the Colorado courts; a mediator whose name appears on the Roster is an individual who has satisfied the basic minimum requirements of this policy and requested that their name be listed. The Roster is voluntary and a mediator need not be on the Roster to mediate a domestic relations case in the State of Colorado.

The Colorado Dispute Resolution Act, §13-22-301, et seq., C.R.S. (“CDRA”), was established in 1983. CDRA created the Office of Dispute Resolution (ODR), and established the office of director, to be appointed by the Colorado Supreme Court’s Chief Justice. Section 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 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 continue to provide excellent service; statewide, however, ODR mediators are handling a 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.

Section 13-22-311, C.R.S. provides authority for any court of record to refer any case for mediation with a trained mediator or other dispute resolution service, subject to the availability of such service.

In its October 2012 report, the Office of Dispute Resolution Advisory Committee (“ODRAC” or “Committee”) 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;
- 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.

Thereafter, the Chief Justice appointed a task force to consider and propose draft standards for court-referred mediators in Colorado (“Task Force”).

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.

Originally, the Task Force recommended a mandatory roster for DR cases. At the suggestion of the Chief Justice the Task Force has revised the recommendation to one of a voluntary roster. For all these reasons, the Task Force recommends the establishment of a voluntary Domestic Relations Mediator Roster. This Roster will increase equitable 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 establish minimal training requirements, to provide guidance to mediators in DR cases and to provide a structure for ensuring conduct that better serves consumers in Colorado. This policy should not be construed to suggest that a court referral of a potential mediation engagement or being placed on a Mediator Roster constitutes a property interest. Placement on the Mediator Roster is a privilege, not a right, and does not guarantee or ensure referrals and does not require any court or judicial district to make referrals or a recommendation of services.

Notably, the practice standards set forth herein do not exhaust the ethical and professional considerations that should inform a mediator of his or her duties. Any 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.

This voluntary Roster will provide DR litigants with a resource when selecting a mediator. Domestic relations litigants may select a mediator not on the Roster, however they do so without

the assurance of a criminal background check, minimal training, or a complaint process.

II. STATUTORY AUTHORITY

This policy establishes a voluntary Domestic Relations Mediator Roster. This policy sets forth a minimal set of standards for trained 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 AND MINIMUM REQUIREMENTS:

The Office of Dispute Resolution (ODR) 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 rostered” and the process outlined in this policy may be referred to as “DR mediation rostering”.) The Office of Dispute Resolution shall maintain the Roster and make it available to the public on its website. No other list of mediators shall be made available to the public by the Colorado state courts unless a judicial district has its own DR mediation program as set forth in paragraph V, below. 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 the Roster. 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 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.¹ A model acknowledgement

¹ 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

form will be made available by ODR.²

C) **“Domestic Relations Mediation in Colorado Courts” Training** – Within one year of being listed on the Roster, 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.

E) **Education** – All rostered mediators must be high school graduates or have obtained a GED or its equivalent.

F) **Complaint Process** – All rostered mediators agree to be subject to the complaint process set forth in this policy. This process may result in remedies as set forth in VI (F) below, including 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.

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 Placement on DR-Mediator Roster.”

H) **Mediators Have No Right or Entitlement to be Listed on the Roster.** Mediators,

signatory has personal knowledge that the mediator’s current practice serves parties in domestic relations cases.

² 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.

including those mediators listed on the Roster and those mediators applying to be listed on the Roster, have no present or future right and no entitlement whatsoever to be listed on the Roster.

IV. RESPONSIBILITIES OF THE COURT

Judicial Officers, Family Court Facilitators, Self-Represented Litigant Coordinators (Sherlocks), and Clerks of Court must permit parties to select their own mediator. A mediator need not be on the Roster to mediate a DR case. However, all Clerks of Court will have a current copy of the Roster and no other or list of mediators shall be made available by the court to the public unless a Judicial District has a policy pursuant to paragraph V.

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 so long as the minimum standards of this policy are met. 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. Submitting a Complaint. Persons wishing to complain about a Rostered Mediator concerning his or her conduct related to a mediation may lodge a complaint with 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. The ODR Director, in his or her sole discretion, may designate another manager or senior-administrator with mediation experience from the Court Services Division of the Colorado State Court Administrator’s Office, or the Supreme Court Administrator, to review any complaint.

B. Grounds for a Complaint. A complaint may be lodged and will be considered by the ODR Director where it alleges conduct which: (1) constitutes a violation of one or more of the Standards of Practice set forth in this policy, or (2) so negatively implicates the Rostered Mediator’s good character as it relates to his or her ability to perform the duties of a mediator that action to protect the justice system may be appropriate. The purpose of a good character inquiry is to help protect participants in mediation and the public, and to safeguard the judicial process. In assessing whether a Rostered Mediator’s conduct demonstrates a lack of good character, the ODR Director or designee may consider, without limitation, any of the following factors: whether such conduct would be considered a crime; the extent to which the conduct would interfere with a Rostered Mediator’s duties and responsibilities under the Standards of Practice; the underlying facts and circumstances of the conduct; the time that has elapsed since the conduct occurred; the seriousness of the conduct as it relates to the qualifications to be a

Rostered Mediator; any evidence of rehabilitation, or treatment or commitment for treatment for alcohol or substance abuse; or the Rostered Mediator's discipline, suspension or disbarment from any profession. A complaint alleging a fee or payment dispute will not be reviewed unless it alleges a violation of the Standards of Practice set forth in this policy.

C. Initial Review of a Complaint by the ODR Director or Designee. Within 30 days of receipt of a complaint, the ODR Director or designee shall initially review the complaint and determine whether the asserted conduct, on its face and if true, supports one of the grounds listed in Part B. If such determination is made, the ODR Director shall provide the Rostered Mediator with a copy of the complaint. The ODR Director or designee may dismiss the complaint at any time as a matter at his or her discretion or may elect to pursue additional action or conduct a formal investigation. Any determination to terminate the review and dismiss the complaint shall be final and shall be communicated in writing to the complainant.

D. Informal Resolution of a Complaint. If after the initial review the ODR Director or designee determines that additional action is necessary, he or she may attempt to resolve the matter informally or refer the complainant and Rostered Mediator to mediation conducted by a neutral and qualified mediator to resolve the issues raised by the complaint. Resolving the matter informally may include contacting the complainant or his or her attorney and/or the Rostered Mediator to gather additional information or conducting or convening a meeting (by phone or in person or as otherwise deemed appropriate by the ODR Director or designee) at which the complainant and Rostered Mediator can present information and positions. Mediation may proceed only if both the complainant and Rostered Mediator consent. If the complaint is resolved through informal resolution or mediation, the ODR Director or designee shall dismiss the complaint, unless the informal resolution or mediation results in sanctions to be imposed by the ODR Director or designee. If no informal resolution or mediated agreement is reached, the ODR Director or designee shall determine, at his or her sole discretion, whether to proceed further. Any decision not to proceed further shall be final and shall be communicated in writing to the complainant and Rostered Mediator.

E. Formal Investigation of a Complaint. If after the initial review, or after attempts at informal resolution or mediation, the ODR Director or designee determines that a formal investigation is appropriate, he or she may conduct an investigation to determine whether the complaint is founded and the Rostered Mediator's conduct involved a willful or wanton violation of one or more Standards of Practice set forth in this policy or so negatively impacts the Rostered Mediator's good character as it relates to his or her ability to perform the duties of a mediator that action to protect the judicial system is warranted. The Director or designee shall recuse him or herself from conducting the investigation if the matter involves a party or attorney with whom he or she has a familial, personal or financial relationship.

The ODR Director or designee's investigation shall include notice to the Rostered Mediator that a formal investigation has been initiated and provide an opportunity to respond in writing. In addition, the investigation may include any of the following as deemed appropriate: contacting the complainant or his or her attorney and/or the Rostered 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; requesting, receiving, and reviewing any other pertinent information, or conducting or convening an informal meeting at which the complainant and Rostered Mediator can present information or positions. Investigations concerning complaints arising from oral or written

communications which occurred in the course of the mediation in the presence of or at the behest of the mediator shall be limited to those situations where the allegations indicate a showing of willful and wanton misconduct. As part of any formal investigation, the Rostered Mediator shall respond to any request for information from the ODR Director or designee as soon as practicable. Failure to respond within 30 days of the date of the request may be grounds for sanctions. The ODR Director or designee shall render a decision in writing within 90 days of the initiation of the formal investigation and such decision shall be communicated to the complainant and the Rostered Mediator. A decision by the ODR Director or designee to dismiss the complaint as unsubstantiated shall be final with no right of appeal.

F. Ethics Panel to Make Recommendations as to Willful and Wanton Violations of this Policy. If after formal investigation, the ODR Director or designee determines that the Rostered Mediator's conduct has resulted in a willful and wanton violation of this policy or has otherwise negatively impacted his or her good character to be a mediator in the courts, the ODR Director or designee shall transfer the complaint and all information and documents related to the complaint to a three-person Ethics Panel for review and recommendation. The Ethics Panel shall be appointed by the State Court Administrator (SCA) or designee and shall include at least two Rostered Mediators, one attorney mediator and one non-attorney mediator. The Ethics Panel shall render its recommendation within 90 days and may take such action as it deems appropriate to make its determination including only reviewing the information and documents provided by the ODR Director or designee on the record, allowing for oral presentations of positions, or by holding an evidentiary hearing to resolve any outstanding factual issues. If the complaint is determined to be substantiated, the Ethics Panel shall render a written recommendation setting forth its reasoning and any plan or resolution to resolve the complaint. The Ethics Panel may recommend any of the following: additional training; confidential discipline; private or public admonishment; public reprimand; supervision by another Rostered Mediator; suspension from the Roster for a designated period of time; suspension from the Roster with conditions to be satisfied or resolved before being returned to the Roster; removal from the Roster; or any other sanction deemed appropriate by the Ethics Panel. The recommendations of the Ethics Panel shall be submitted to the SCA or designee for final decision. All decisions by the SCA or designee shall be final with no right of appeal. Any decision shall be communicated in writing to the complainant or their attorney, and to the Rostered Mediator. Following the issuance of a final decision, the Ethics Panel shall return all information and documents received for each case back to the ODR Director or designee.

G. Professionally Licensed Rostered Mediator. If the Rostered Mediator holds a professional license, at any point in the complaint process, the ODR Director or designee may refer the complainant to the appropriate licensing authority, agency, court, or board as this complaint process does not determine whether a mediator has violated any law, another code of conduct, or other license-imposed rule or regulation. If a formal investigation is initiated, the complaint shall be sent to the appropriate licensing authority. If the Rostered Mediator holds a professional license, certificate or privilege, nothing in this policy or its requirement that a Rostered Mediator subject him or herself to this complaint procedure limits any person from filing a complaint or seeking a remedy from a professional licensing authority, a professional certifying entity, The Colorado Supreme Court, the Colorado Department of Regulatory Agencies, or any other licensing or certifying entity.

H. Rostered Mediator as an ODR Contractor. If the Rostered Mediator is also an ODR contractor, ODR reserves the right to consider any complaints during the contract renewal

process, and the State Court Administrator, as signatory to any contracts, reserves the right to terminate an ODR contract mediator's ODR contract.

I. State Court Administrator to Keep Records. After any final decision related to a complaint, the ODR Director or designee shall convey to the State Court Administrator or designee any and all documents and things related to the complaint including a copy of the complaint; any response; all correspondence; any other documents or things associated with the complaint, review, and/or investigation; and a copy of any final decision. The State Court Administrator shall keep a copy of these records for three years after any final decision.

J. Mediators Have No Right or Entitlement to be Listed on the Roster. Mediators, including those mediators listed on the Roster and those mediators applying to be listed on the Roster, have no present or future right and no entitlement whatsoever to: (1) be listed or to remain listed on the Roster, (2) be assigned to mediate any cases, or (3) receive any benefit whatsoever from being listed on the Roster. Furthermore, applying for or being listed on the Roster is not intended to create any property, contract, employment, or due process rights for any mediator. The only process rights that a mediator is entitled to are those rights expressly set forth in this policy. A person applying to be listed on the Roster may be denied such privilege at the sole discretion of the ODR Director or designee or the Ethics Panel as set forth in this policy. Likewise, a person listed on the Roster may be removed from the Roster in accordance with the complaint process set forth in this policy. The decision of the ODR Director or designee to deny a mediator from being listed on the Roster shall be final with no right of appeal. All decisions will be made in writing and shall include basis for denial.

VII. POLICIES GOVERNING 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 and Non-Discrimination

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.

5. Rostered mediators shall not refuse services, manifest bias or prejudice or otherwise harass or discriminate against a party or any other individual based on a person's race, color, ethnicity, national origin, religion, age, gender, gender identity, sexual orientation, disability, marital status, socioeconomic status or political affiliation.

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.

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 or court order 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.