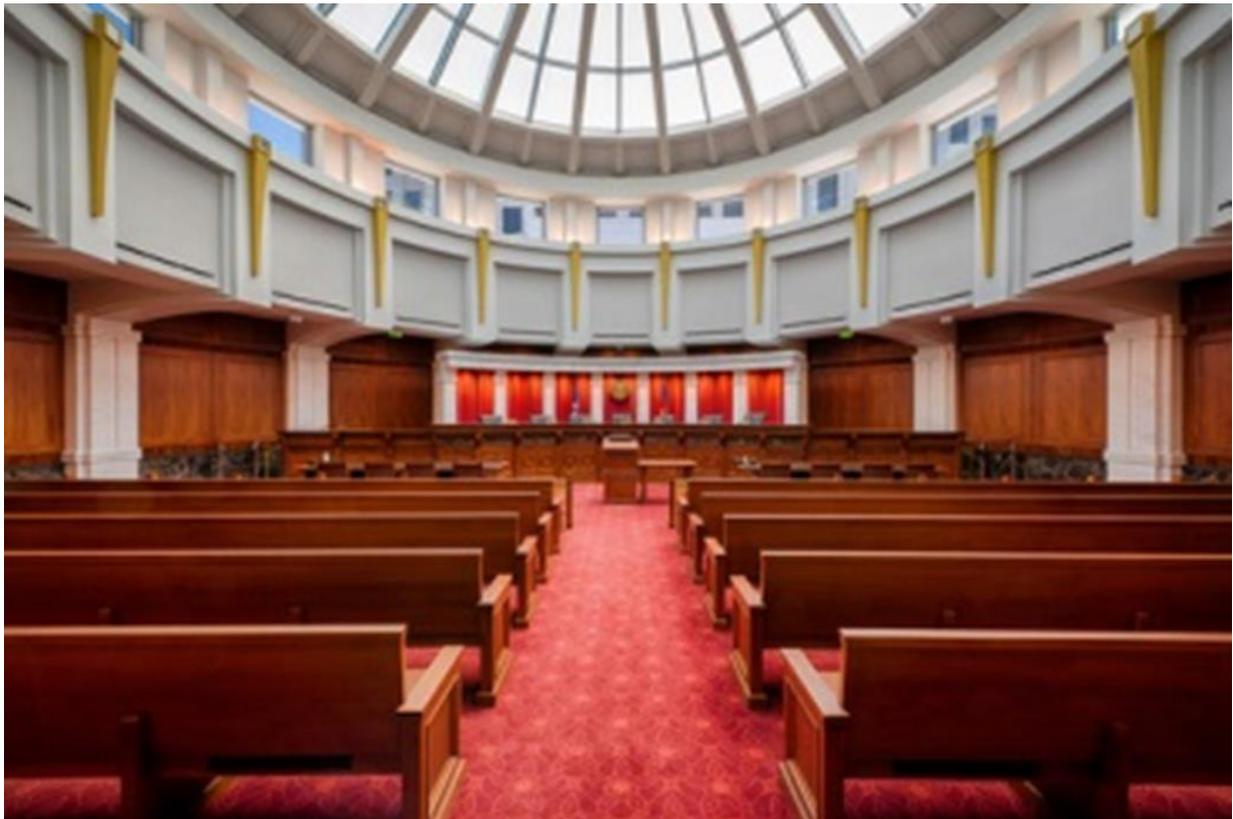


Mediation Guide for Colorado Courts



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It is my pleasure to introduce this *Mediation Guide for Colorado Courts*.

The *Guide* was the brainchild of the Colorado Judicial Institute and the product of many contributors, including the Supreme Court Administrator's Office and its Office of Dispute Resolution. Based in part on statewide practice surveys of courts and practitioners, this non-mandatory guide to alternative dispute resolution, or ADR, addresses applicable Colorado laws on confidential mediation, topic areas of highest and best ADR use, the Colorado Code of Conduct for Mediation, best practices for counsel representing a party in mediation, issues that come up with unrepresented parties using ADR, and some future-casting and suggestions for local judge-led meetings to help improve our ADR practices across the state.

I look forward to hearing about your experience with the *Guide*.



Nathan B. Coats
Chief Justice, Colorado Supreme Court

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Preface and Methodology

Any publication of this scope is the result of countless contributors and consultations, many of whom are catalogued at the back of this Guide in Appendix C. However, special acknowledgment goes to the Colorado Judicial Institute's Alternative Dispute Resolution Subcommittee, which conceived of this project to further two of the Colorado Judicial Institute's ("CJI") missions: supporting research into judicial best practices, funding, and supporting innovative programs to better serve Colorado's citizens by improving the judiciary's efficiency and effectiveness.

CJI actively supports and promotes the ever-expanding use of alternative dispute resolution methods ("ADR") by the judiciary to help facilitate the efficient resolution of disputes. To further this cause, the Subcommittee undertook an array of judicial and practitioner surveys, partnered closely with the Office of Dispute Resolution ("ODR") and the Colorado State Court Administrator's Office, interviewed a broad spectrum of stakeholders, and invited each contacted group to contribute to this Guide. In the process, the participants learned that the use of, and resources for, mediation for example vary widely throughout Colorado. There also appears to be no standard practice for mediation referral; neither is there a feedback loop among judicial officers, neutrals, and attorneys to discuss best practices. This Guide attempts to close that gap by developing guidelines and rationales for the use of mediation, and to provide a forum for communication between and among judicial officers and their staff, lawyers for parties, and mediators. We hope you find this Guide of use in your day-to-day practice helping Colorado disputants achieve fair and efficient case outcomes.

The methodology for drafting and compiling this Guide consisted of four phases over the course of two years.

- a. **Data Collection.** In September 2016, Judicial Conference panel attendees used responder software to provide answers to questions about judicial officer use of court-ordered mediation. Immediately thereafter, CJI and ODR surveyed Colorado judicial officers concerning their use and preference for ordering mediation. In November 2016, at the Colorado Statewide ADR Conference, panel attendees used responder software to provide answers to questions about the most effective judicial procedures and practices in the use of court-ordered mediation. Soon thereafter, ODR and the Mediation Association of Colorado ("the MAC) sent similar surveys to ADR professionals. In the spring of 2017, all members of the Colorado Bar Association received a brief survey soliciting their input on the best court-ordered mediation practices, and the CBA ADR Section received a much more

detailed survey. The data was analyzed and distributed to members of the guide drafting and review Committees.

- b. Literature Review. The Colorado Statutes, Civil Rules, Rules of Professional Conduct, and the Colorado Code of Judicial Conduct were reviewed and compiled. A literature review was conducted by professors from the University of Denver, Sturm College of Law (“DU”) and the University of Colorado School of Law (“CU”), comparing national standards and concerns to those issues facing Colorado courts. A summary of these materials were then distributed to members of the drafting and review committees.
- c. Drafting. The drafting committee consisted of fifteen members, including the original panel members, representing all of the stakeholders in the court-ordered ADR process, *e.g.*, judicial officers, court administrators, ADR professionals, representatives of CBA sections, and attorneys. This Appendix C sets forth the drafting committee roster.
- d. Review and Redrafting. The thirty-member review committee consisted of stakeholder representatives from a broad range of organizations. The review committee reviewed the preliminary draft from the perspective of the representative stakeholders and submitted comments to the drafting committee. An outline of the preliminary draft was presented at the 2017 Statewide ADR Conference. The drafting committee then published a first draft for initial circulation, which was then distributed to a second group of stakeholder organizations (*i.e.*, Chief Judges, CBA sections, ODR contractors and ADR organizations). The comments received through the three-month review period were then considered by both the drafting and review Committees, which restructured, modified, and edited the guide accordingly.

I. Introduction: Goal of this Guide

Trial judges and magistrates continue to find that the creative use of a court-ordered dispute resolution strategy in many cases produces a speedy, efficient, cost-effective, and, because it is the result of shared decision-making – highly durable resolution for litigants. Effectively applied, quality dispute resolution is not only useful as a case management tool, it is a thoughtful way to maximize litigant satisfaction, providing a sense of party control over the outcome, and at least some insight into how each side’s case might fare under fire, all in a confidential setting.

This Guide does not mandate the use of mediation in general or of any specific approach, as that should be a case-by-case decision by the court and the parties; rather, it is intended to provide insight and tools once mediation is under consideration. The goal is for courts and litigants to learn more about the protocols of court-referred mediation, for lawyers and litigants to gain insight into a court’s rationale for the timing and scope of ADR orders, for counsel to better understand and address client interests in the private negotiation setting, and for ADR professionals to better understand their function in the case resolution process. Ultimately, a further hope is to increase global understanding of the benefits of informal conflict resolution.

II. Current Status of Judicial Mediation Practices in Colorado

Court-ordered mediation has become an essential part of the civil justice process in Colorado.¹ In a recent voluntary survey, the CJI ADR Subcommittee found that virtually all responding judicial officers referred at least some of their cases to mediation. Indeed, numerous judicial officers have standard case management orders requiring *all* cases to be mediated prior to a hearing, absent allegations of abuse. That said, the timing of mediation referrals varies widely, with some courts ordering referral once a case is at issue, while others wait until after mandatory disclosures are complete or a temporary orders motion is filed. Other judicial officers wait until after full discovery but before a contested orders or summary judgment hearing.

According to the CJI survey, judicial officers rarely, if ever, order mediation by a specific named mediator. This latter result is in keeping with the Colorado Dispute Resolution Act (CDRA), which allows parties in a court case to select any neutral they wish. Colo. Rev. Stat. § 13-22-311(1).

¹ Judicial Department statistics indicate more than 99% of civil district and county court cases in Colorado settle before a trial or a final orders hearing, a large portion brought to closure with the help of paid, private mediators. Judicial Department, statistic from 2012 to 2016 comparing total District and County Court Civil filing to trials held.

At the appellate court level in Colorado, mediation has historically not been ordered; however, many parties on their own choose to mediate one or more appellate issues. Notably, the United States Court of Appeals for the Tenth Circuit has an active voluntary mediation program. Details can be found online at <https://www.ca10.uscourts.gov/cmo>.

III. The Law of Court-Referred Mediation

The Colorado Dispute Resolution Act (“CDRA”) provides for discretionary referral by trial courts of any and all cases to mediation, unless the case involves only injunctive or other equitable relief, or when there is physical or psychological abuse alleged by a party. Even if ordered, however, within the ensuing five days, a party may for “compelling reasons” move the court for an exception to the mediation order. *See* Colo. Rev. Stat. § 13-22-311 (“Compelling reasons may include, but are not limited to, that the costs of mediation would be higher than the requested relief and previous attempts to resolve the issues were not successful.”).

This discretionary authority to refer cases to mediation is further reflected in the Colorado Rules of Civil Procedure: Rules 16(b)(7) and 16.1(f) direct that each case management order “confirm that the possibility of settlement was discussed,” provide settlement prospects, and list proposed dates for any “agreed-upon or court-ordered mediation or other alternate dispute resolution.” In addition, Rule 16.2(i) for use in domestic relations cases provides explicitly for jointly consented third-party dispute resolution, as well as court-referred third-party mediation or other ADR.² Moreover, Rule 121, Section 1-17 allows parties to ask a non-presiding judge to conduct a settlement conference in “any civil case.”

Once a referred mediation is complete, the mediator (or in many courts, a party, typically plaintiff’s counsel) must file “a written statement that the parties have met with the mediator.” § 13-22- 311(3). When the parties and mediator “agree and inform the court that the parties are engaging in good faith mediation, any pending hearing in the action ... shall be continued to a date certain.” *Id.*

Finally, no litigant may be barred from proceeding in court simply for failure to pay its share of mediation fees or expenses. § 13-22-311(4).

² This Rule also provides, at 16.2 (i)(1) for a jointly consented ADR use of the judge or magistrate assigned to the case. Empirical evidence suggests this practice is rare.

Practice Tip:

Absent consent of the parties *and* of the mediator, or some explicit statutory exception, mediators are precluded from revealing mediation-related communications made to or at the behest of the mediator, save whether the parties have met with the mediator, and/or whether any full or partial written resolution has been executed by all affected parties.

IV. CDRA's Strict Confidentiality

In Colorado, mediation confidentiality is a creature of statute, with sparse interpretive case law. CDRA contains some of the most protective confidentiality provisions in the nation, providing a broad statutory privilege prohibiting any “mediation communication” from admission into evidence. CDRA defines “mediation communication” as:

- any oral or written communication³
- prepared or expressed for the purposes of, in the course of, or pursuant to
- any mediation services proceeding or dispute resolution program proceeding.

Colo. Rev. Stat. § 13-22-302 (2.5). CDRA defines “covered proceedings” as “a process by which parties involved in a dispute, whether or not an action has been filed in court, agree to enter into one or more settlement discussions with a mediator in order to resolve their dispute.” Colo. Rev. Stat. § 13-22-302 (3). The core of CDRA is its confidentiality *proviso* found at Colo. Rev. Stat. § 13-22-307, which, absent narrow exceptions, prohibits a *party, mediator, or mediation organization*, from voluntarily disclosing *any* mediation communication or communication provided in confidence, through discovery or compulsory process.

The statutory enforcement mechanism is simple: any mediation communication disclosed in violation of this section “shall not be admitted into evidence in *any* judicial or administrative proceeding.” Colo. Rev. Stat. § 13-22-307.

³ Including without limitation “any memoranda, notes, records, or work product of the mediator, mediation organization, or party.” *Id.*

CDRA's Exceptions

The definition of protected mediation communication found at Colo. Rev. Stat. § 13-22-302 (2.5), explicitly excludes (unless the parties all agree to keep these confidential as well) the following:

- 1) the parties' written agreement to enter into the mediation proceeding, and
- 2) any "fully executed," "final written agreement" reached as a result of the mediation proceeding.

Additionally, CDRA provides the following six exceptions to confidentiality:

- 1) when all parties *and* the mediator consent in writing;
- 2) when the covered communication reveals an intent to commit a felony;
- 3) when the covered communication reveals an intent to inflict bodily harm,
- 4) when the covered communication threatens the safety of a child under 18;
- 5) when the communication is required by statute to be made public; or
- 6) Where disclosure of the communication is "necessary and relevant" to an action alleging "willful or wanton misconduct" of the mediator or mediation organization.

Colo. Rev. Stat. § 13-22-307(2). Further, like Colorado Rule of Evidence 408, there is the following *caveat* to confidentiality: "Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a" mediation proceeding. Colo. Rev. Stat. § 13-22-307(5).

The state legislature recognized that review or discussion of actual mediation cases could be a valuable mediator review and feedback tool "so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable [de-identified]." Colo. Rev. Stat. § 13-22-307(5). In addition, CDRA permits information collection for research or educational purposes, again so long as the information is de-identified. Thus, while taking care to prevent disclosure of confidential and case specific information, and maintaining awareness of appearances, judicial officers, attorneys, and ADR providers can at a general level engage in productive conversations designed to improve the effectiveness and efficiency of court-ordered mediation.

CDRA Case Law

The Colorado Supreme Court has provided some clarification regarding the scope of CDRA's protection, holding that mediation communications "are limited to those made in the presence or at the behest of" the mediator. *Yaekle v. Andrews*, 195 P.3d 1101, 1110 (Colo. 2008) (deeming admissible a communication outside of the mediator's presence or behest that then formed a binding settlement contract).

The Limits of Colorado Rule of Evidence 408

It is probably fair to say that most evidence class graduates come away with the view that Rule 408 provides a broad confidentiality protection much like what CDRA provides for mediation communications, but caution should be exercised: the Rule generally applies only to party-party communications, and contains numerous exceptions and narrowing court interpretations.

Rule 408. Compromise and Offers to Compromise

- (a) **Prohibited uses.** Evidence of the following is not admissible on behalf of any party, when offered to provide liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:
 - (1) Furnishing or offering or promising to furnish accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise the claim; and
 - (2) Conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.
- (b) **Permitted uses.** This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and providing an effort to obstruct a criminal investigation or prosecution.

Voluntary Mediation, Opting Out, and Sanctions

Not all mediations or ADR events must await the order of a judicial officer. In every case the parties may ask at virtually any time (in district court by motion, orally or informally in county and small claims court). Unless issues exist such as domestic violence, extreme circumstance, or good cause as noted above, the court has the discretion to then order mediation.

Sometimes, parties may seek to opt out of a mediation order by filing a motion under CDRA § 13-22-311. Absent a compelling reason, however, judges should push back and work with the parties to schedule mediation. Tension of course exists with an order mandating mediation, as it is supposed to be a voluntary process freely entered by both sides. It is widely known that some parties attend with no good faith intention to participate or attempt to settle, but they know better than to literally violate a court order. Frustratingly, it is impossible to get an inside view of this behavior as judicial officers cannot inquire into, and mediators cannot disclose, the level of anyone's participation in a mediation because of the strictly confidential nature of the process under CDRA. Even in these cases, though, a judicial officer who takes mediation seriously and admonishes the parties to do the same may cut down on phantom participation.

Judges do nonetheless have the authority to sanction a party or parties for failure to schedule, failure to appear, or a general failure to comply with a mediation order. Because mediation is confidential, once again the court cannot inquire into the substance of the

mediation, nor should the judge hear or be told any information regarding what occurred in the failed effort. Rather, the court should only assess the facial scope of noncompliance.

Failure to schedule ADR may result in an award of costs and/or attorney fees incurred by the other party, or a delay in the hearing. Wholesale failure to attend a scheduled event in a civil matter may result in sanctions that can include vacating the trial date and/or awarding any costs and fees incurred by the attending party. In DR cases, the judge may vacate any scheduled hearing and award costs and attorney fees, but caution should be used in vacating a trial date given the multiple interests, including those of any children involved.

V. When Mediation Meets the Unauthorized Practice of Law

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.” § 13-22-302 (4). Neither CDRA nor the Colorado Supreme Court currently mandate or suggest minimum training or screening requirements for non-ODR mediators or impose any kind of credentialing oversight. Nonetheless, in order to have a fundamental understanding of the classic mediation process, it has become standard practice in Colorado for practitioners to attend a basic forty-hour mediation training that includes opportunities for role-playing to hone facilitative skills, and to co-mediate at least several early forays.

While many other states have specific prerequisites for mediation training and/or credentialing, in Colorado, there are no “certified” mediation trainers or accredited certification programs. The best private offerings involve not only well-taught principles of mediation but also offer plenty of opportunities for role-play sessions, *e.g.*, the Colorado Bar Association, area law schools, and private firms both within and outside Colorado.

This lack of regulation and oversight has supported an ongoing debate about the permitted

For more than thirty years, questions have been raised about whether mediator credentials should be adopted in Colorado. The most recent effort took place in 2013 when a task force appointed by Chief Justice Bender was charged with exploring the question for court-referred cases. After holding dozens of public and private meetings, the task force drafted a proposal for a voluntary credentialing roster in domestic relations cases, which included the following:

- Completion of a 40-hour mediator training course;
- Ongoing education in domestic relations and mediation;
- Completion of a successful background check; and
- A complaint process.

Throughout this statewide effort, no consensus could be reached in the mediation community, with some finding the minimum requirements too low for consumer protection, and others believing that there was no significant problem requiring a judicial department solution. In the end, the Colorado Supreme Court declined to adopt the task force proposal.

scope of substantive mediator input into the mediation process given (a) the prohibition on non-lawyers engaging in the unauthorized practice of law, particularly in domestic relations; and (b) the assertion by many lawyer-mediators that they are “not practicing law.”

The Colorado Supreme Court has exclusive jurisdiction over the unauthorized practice of law.⁴ See Colorado Rules of Civil Procedure, Chapter 19, Rules 228-240.2. Colorado Statute, Colo. Rev. Stat. § 12-5-101, limits the practice of law to a person who has obtained a license from the Colorado Supreme Court Rule 228 provides the definition of the practice of law and includes the power to prohibit its unauthorized practice. There is, however, no clear definition of the “unauthorized practice of law.” The primary case on this topic is *Denver Bar Association v. Public Utilities Commission*, 391 P.2d 467, 471 (Colo.1964) (holding that a person is engaged in the practice of law when he or she is acting “in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counselling, advising and assisting him in connection with these rights and duties....”).

The confusing ground between mediating and practicing law has prompted several clarifying efforts:

(a) A *REPORT OF THE ALTERNATIVE DISPUTE RESOLUTION SECTION OF THE COLORADO BAR ASSOCIATION, Recommended Guidelines Regarding Unauthorized Practice of Law Issues in Mediation (approved by the Executive Council of the Colorado Bar Association on Jan. 12, 2007)*. This report, at pp.10-11, suggests that mediators may spot issues and offer detail and clarification as well as propose language in the drafting of an MOU. (This is, however, only a Bar Association report and has not been approved by the Colorado Supreme Court.)

(b) A later Colorado Supreme Court website post dated March 10, 2011, in the section regarding the unauthorized practice of law, refers to “the practice of law” and states that a non-lawyer generally cannot, among other things, provide legal advice, select documents, draft legal documents, or interpret the law. Relevant to domestic relations practice, the same posting asked, “Can a non-lawyer help me select or prepare pleadings in my divorce case or in any other state court matter.” The answer was “No. Inherent in the selection and preparation of court pleadings is the provision of legal advice and non-lawyers cannot provide legal advice to others.” Thereafter the posting did affirmatively refer to self-help programs and public forms and instructions published under the authority of the state Supreme Court.

(c) When CDRA passed in 1983, the legislature had this to offer in defining a “settlement conference”: “an informal assessment and negotiation session conducted by a *legal professional* [undefined] who hears both sides of the case and *may advise the*

4.

parties on the law and precedent relating to the dispute and suggest a settlement.” § 13-22-302 (7) (emphasis added).

(d) There are significant limitations on complaining about mediators, given the confidentiality restrictions in CDRA and the lack of direct supervision or credentialing. Attorney-mediators may be governed by the Office of Regulatory Counsel when the matter relates to the practice of law. Licensed Professional Counselor mediators are governed by the Department of Regulatory Agencies (“DORA”). Depending on the mediator’s background and professional licensing, other regulatory agencies may provide oversight.

The tension between these various directives and guides will require future case decisions to resolve. Compounding the challenge, CDRA limits mediator liability to “willful or wanton misconduct,” arguably limiting the scope of discipline that Attorney Regulation might be able to pursue against a mediator, whether an attorney accused of violating the ethics Rules, or a non-lawyer allegedly practicing law.

VI. ROLE OF THE COURT, CASE APPROPRIATENESS, TIMING, AND CASE TYPES

CHECKLIST: The judicial officer’s checklist for a discussion about mediation with the parties and counsel should emphasize that:

- ✓ The mediator is a neutral;
- ✓ Parties are expected to participate in mediation actively and in good faith;
- ✓ The mediator cannot give legal advice;
- ✓ Mediators have different levels of experience and expertise, and parties should consider the complexity and substantive law of their case in choosing a provider;
- ✓ The parties must pay for the costs of the mediation unless there are special provisions made for the parties by the court or the provider;
- ✓ There may be penalties or sanctions for an individual party or parties who refuse to participate in the mediation in the face of a mediation order; and
- ✓ The outcome of the mediation, if the parties are able to resolve the matter, is likely to be much more customized (and final) than a decision by a judicial officer or a jury.

*Judges and Magistrates who have taken courses to obtain a mediation certificate report that the skills presented have enhanced their judicial practice significantly. Classes are available through the National Judicial College, the Colorado Bar Association, and many private providers.

Based upon CJI survey results, case management orders typically impose mediation, provide suggested options for locating a mediator, and set a deadline for completing the mediation. Although every case has its unique aspects, some common approaches and best practices can be identified. For instance, the timing of a mediation order and the wording used by the court help maximize settlement opportunities. Moreover, given the surge of unrepresented litigants (the so-called *pro se* tsunami), few of whom are familiar with either court procedures or mediation, a thoughtful communication from the court about often-successful ADR efforts can make a huge difference.

The Importance of the Judicial Officer in Explaining the Process

Many litigants come to court for the first time in their civil, domestic relations, or probate case. The majority of parties have not spoken to or retained counsel, and are likely to have little understanding of how cases are managed, what documents must be filed, the timelines for filings and case processing, what hearings or status conferences must be held, and how cases are finally resolved. Although case management orders or separate orders

for mediation may include a brief explanation of the process, parties are much more likely to have success in their mediation if the judicial officer takes the time to explain mediation (or other suggested option), and why the parties are being ordered to attend.

Judicial officers should educate themselves to understand the mediation process and, optimally, have a brief status conference with the parties to discuss the mediation process and the benefits to the parties of resolving their case themselves, privately, with the assistance of a mediator.

Understanding the Issues of the Case and the Parties' Needs

Certainly, review of the court record is essential to deciding whether and when to issue a mediation order, but often, the bare allegations are not very enlightening. Consequently, a best practice is to prioritize the issue of mediation in each and every status conference with counsel and the parties. An educated judicial officer can often help the parties choose the best time to conduct mediation as well as the style of mediation and the requisite sophistication (and thus cost) of the neutral. This exercise may also provide the judicial officer with a better understanding of the disputed issues if the case must be tried.

“Best” Timing for an Order to Mediate

While it can be comfortable to have a routine, one size does not always fit all. When mediation is ordered too early in a highly complex case, for instance, the mediation can fail because the parties lack sufficient information to reach an educated and reasonable resolution. On the other hand, when mediation is ordered so late in a case that the parties have become entrenched and intransigent (and essentially spent the money that might have funded a compromise), the mediation has a significantly smaller chance of success. Again, it is a best practice for the court to have a status conference with the parties and counsel relatively early, to hear pros and cons regarding the timing of the mediation order.

Practice Tip:

Research suggests that the best time to order a case to mediation is sometime after mandatory disclosures but before extensive discovery. Parties are then able to make informed decisions and provide background information, including disclosure documents, in position statements or discussions with the mediator.

Role of Court Staff

Court staff have an important role in encouraging and promoting successful mediation and managing the procedural follow-up when orders issue. In Colorado, every judicial district in the State of Colorado has a Family Court Facilitator (“FCF”) and a Self-Represented Litigant Coordinator (“SRLC”). The court staff is also tasked with inputting the proper ADR codes into the judicial computer system - ICON/Eclipse, jPOD.

Because the majority of Colorado litigants in domestic relations cases are self-represented, the FCF and the SRLCs have the important role of explaining the mediation process to litigants. They should explain to the litigants mediation in general and the judge's mediation policy in particular, and assist the parties with (but not suggest or dictate) a referral to an ODR or private mediator or service.

Statutorily Mandated or Authorized Mediation

As noted above, many Colorado substantive and procedural statutes suggest, authorize, or mandate alternative dispute resolution, including mediation. *See* Appendix B, Relevant Colorado Statutes and Judicial Department Forms. Highlighted below are a few typical case-types traditionally well-benefited by timely and professional ADR efforts. Mediation in legal areas such as family matters, child support, probate, FED's and other statutorily regulated areas may require particular subject matter knowledge on the part of the mediator. While mediators cannot give legal advice, attorney-mediators can assist the parties in selecting documents necessary to resolve the disputed matters. This is particularly important in domestic and probate cases where JDF forms are used regularly. Mediators can also assist the parties in preparing the written memorandum of understanding that the parties then file with the court. Mediators in these technical areas should be familiar with the forms and have subject matter knowledge to competently assist the parties.

Domestic Relations/APR

Domestic relations and allocation of parental responsibilities (APR) cases can be difficult, time consuming, resource intensive, and highly emotional. Litigants are often self-represented, and their despair relating to the break-up of their family can be exacerbated by the complexity of the divorce process. Add to this the discretion of judicial officers to make whatever orders he/she believes are most equitable for the adults and in the best interests of the children, when the court has little, if any, neutral information about the family, and conflict and misunderstandings are inevitable. These cases are highly suited to mediation because of the need for the parties to resolve conflict early, so they can move forward with their lives, yet ensure a smooth ongoing relation, typically as co-parent.

As outlined in Appendix A, many ADR processes can be used in domestic relations cases (e.g., mediation, Early Neutral Assessment, Parenting Coordinator/Decision-Maker, etc.), but mediation can be especially effective, because it can be done in the early stages of the dissolution of marriage process (prior to temporary orders), and again later in the case if the permanent orders issues remain unresolved. The need to get parties on a dispute resolution track as quickly as possible cannot be over-emphasized: ongoing conflict can be very expensive for the parties, and can be endangering to the children.

Judicial officers should strongly consider whether early mediation to resolve temporary support, temporary parenting, and other interim issues could put the parties on a dispute

resolution track that will likely lead to settlement of the entire case, and promote the formation of a business relationship between the parties for co-parenting. In more complex cases, full disclosures and discovery can pave the way for successful negotiations to resolve permanent orders. As in probate matters discussed next, complex domestic relations cases have many tax, bankruptcy, and related issues that can often best be addressed by mediators with significant education and/or experience in this area of the law.

As noted, under CDRA, whenever there is an allegation of domestic violence by a party, and any party objects to mediation, the court cannot force the parties to mediate. However, some mediators have special training in mediating cases with a history of domestic violence, and these mediators can be very effective if the parties are willing to attend mediation, whether by caucusing (placing parties in separate rooms and shuttling back and forth), appearance by telephone, or special techniques to address power imbalances between the parties. In cases where a protective order has been issued, it is important that the court include a provision in the Temporary Protection Order (“TPO”) or Permanent Protection Order (“PPO”) regarding limited contact to accomplish mediation, should the parties agree to mediation.

Probate

While no Colorado statute mandates mediation in probate cases (either in decedent’s estates or in protective proceedings), mediation can be especially useful given the significant emotional and family-relationship-based issues, and the “forever” relationship of kin. Decedent’s estates are covered in the Colorado Probate Code, Colo. Rev. Stat. §§ 15-10-101, *et seq.* Guardianships are covered more specifically in Colo. Rev. Stat. §§ 15-14-301 *et seq.* Conservatorships are found in Colo. Rev. Stat. §§ 15-14-401 *et seq.*

Like DR matters, probate disputes can be difficult, time consuming, resource intensive, and highly emotional, often stemming from high conflict familial relationships, or unexpected disposition or distribution of a decedent’s property. Courts are also called upon to resolve disputes related to the administration of an estate or trust, or disputes of guardianship or conservatorship, with sometimes sharply inconsistent party, non-party, and fiduciary needs or desires. Well-timed, insightful, best-interest mediation by a probate specialist can actually begin a healing process in a fractured family, and can provide highly customized and creative (even quirky) resolutions in contrast to the more constrained and traditional range of judicial rulings. The right mediator can also ensure all-necessary-stakeholders involvement, and be an early warning system for any competency breakdowns.

On that note, Probate judges should remain alert to the issue of diminished capacity in the mediation process, being prepared to conduct a *Sorensen* hearing (*In re Marriage of Sorensen*, 166 P.3d 254 (Colo. App. 2007) with regard to whether the alleged incapacitated person can participate in mediation and what assistance, technological or otherwise, is necessary to assist the person. The judicial officer should also consider whether court-appointed counsel or a guardian *ad litem* is appropriate for the allegedly incapacitated

person. Judges should always be cognizant that even where the person is adjudicated incapacitated, he or she may have sufficient capacity to participate in mediation with legal or technological assistance as Colorado law permits post-adjudication representation by counsel for incapacitated persons. Colo. Rev. Stat. § 15-14-319.

Criminal Cases/Restorative Justice

Use of ADR in criminal cases is not widespread. However, judges in Colorado have successfully used settlement conferences to help reach plea agreements in criminal cases.

Any discussion of dispute resolution in criminal cases logically involves a reference to restorative justice, an effective and proven tool in bringing a deeper level of healing and resolution to victim and perpetrator alike. However, restorative justice should not be confused with mediation. Restorative justice is different protocol, specifically authorized by statute, with known practitioners who can be called upon in the proper case.

Victim-offender dialogue can also be a useful process when restitution is disputed, whether causation or amount. Property crimes may be most appropriate for victim-offender dialogue. Ordering mediation in criminal cases is a delicate balancing act. Victim's rights as guaranteed by the Colorado Constitution and statutes must be respected. Transparency in criminal proceedings is a concern if mediation is ordered (including the rights of the press and public to observe proceedings), so confidentiality issues can be complicated. Note that all parties, including victims, must agree to the mediation.

A retired judge with criminal experience may be most effective in conducting settlement conferences in criminal cases. At the same time, lay people can also be effective in this context as restorative justice practitioners and victim-offender dialogue coaches need not be attorneys or judges.

Construction Defect Cases

Construction defect cases can be time-consuming and expensive, with multiple parties, multiple involved properties, and multiple experts on causation and damages. The Colorado Construction Defect Action Reform Act (CDARA), Colo. Rev. Stat. [§§ 13-20-801 et seq.](#), was originally enacted in 2001. The statute as amended sets forth procedures for bringing construction defect claims against a "construction professional," and specifically provides that whenever a construction contract includes a mediation provision, completion of the mediation is a condition precedent to filing suit. §13-20-803.5(6). Consequently, if the matter has somehow been filed before that necessary step, helping the parties find an experienced mediator familiar with the complexities of construction defects, roles of the parties, and facilitation skills for this type of case is an essential consideration (which is no less important if pre-filing mediation fails and the matter lands in court).

Homeowner and HOA Disputes

A significant number of Coloradans live within a controlled community of some kind, with disputes ranging from covenant compliance to board improprieties, as well as suits against construction professionals (see above) and other vendors serving the community. The Colorado Common Interest Ownership Act, Colo. Rev. Stat. § 38-33.3-12 (“CCIOA”), encourages common interest communities to adopt protocols that make use of mediation or arbitration as alternatives to or preconditions upon the filing of an internal complaint between a unit owner and an association and many homeowners’ associations have adopted alternative dispute policies. Early referral of these cases to ADR can be very effective. High emotion and imbalance of power can be ameliorated by an experienced mediator.

Personal Injury and Wrongful Death

These cases have all the complexity of many commercial cases, but with a sharp personal dimension, often on both sides. Discovery tactics and proportionality fights can become weapons not tools, Add to this an insurance carrier typically working behind the scenes and involved in making many of the decisions regarding case handling (i.e., the tripartite relationship) and these cases can be unreasonably extended. Judges may consider mediation or other ADR early in these cases, after initial written discovery and party depositions and prior to retention of experts. In complex and higher damages cases, mediation following disclosure of experts and summary judgment decisions is more common.

County Court

Mediation is highly effective in County Court civil cases, such as landlord-tenant and security deposit disputes. Here, the parties are often unrepresented and often simply need a neutral to bring them together and allow each side to save face. At the same time, judges and attorneys must be mindful of the cost to underfunded litigants, as well as the risk of manipulation by more informed or well-funded parties, taking more time not less when such a settlement is presented to the court. .

Mediation can be addressed in the court’s trial management order as well as at the pre-trial conference. Some county courts have a mediation scheduling program available for the parties to select dates and times for mediation. These programs are very successful in FED actions, neighbor disputes, collection matters, tort, and breach of contract cases. Allowing the parties’ mediation to occur immediately before trial on the day of trial may be the most cost effective and efficient alternative. Such an order recognizes the small amounts of the claims, alleviates the need for the parties to take time from work or other personal activities on more than one day and insures they will be prepared for the mediation process since they are prepared for trial.

This procedure can be especially useful in cases involving *pro se* litigants. County Court Judges may also wish to consider mediation to resolve some non-domestic violence County

Court protection order cases, as well as in protection order cases between extended family members, neighbors, and students. Mediation should, on the other hand, rarely if ever be ordered in protection order cases involving domestic violence, certainly not where a party objects (see CDRA discussion above).

Small Claims Court

Several Colorado judicial districts are utilizing effective Small Claims Court mediation programs. Small Claims Court mediation programs typically involve:

- a. Volunteer attorneys and/or mediators – mediating cases in the courthouse on the day set for trial; or
- b. Community Mediation programs.

In small claims cases, many courts have mediators available if the parties wish to mediate immediately before their trial. Mediation has proven effective in resolving small claims cases and litigants report a high satisfaction rate.

IX. The Role of the Mediator

The role of mediator-as-ringmaster is critical to mediation success, whether facing a hostile room or a room that may be close to resolution. Flexibility, judicious demeanor, the right blend of push and pull and standing still – all are part of the art. But at base, the mediator (or arbitrator or facilitator) is a NEUTRAL and should at a minimum adhere to CDRA and to the Colorado Model Standards of Conduct for Mediators endorsed by the Colorado Bar Association ("CBA"), Colorado Judicial Institute ("CJI"), Colorado Department of Law ("DOL"), Colorado Council of Mediators and Mediation Organizations ("CCMO") (now known as The "MAC", see below), and the Office of Dispute Resolution ("ODR") of the Colorado Judicial Department. The following is an abbreviated overview of the standards:

- The mediator is to be an impartial and objective facilitator in an attempt to assist the parties in creating a solution to their dispute outside of the litigation process (Model Standards of Conduct for Mediators, Standard I, and Preamble). The mediator's training and background are thus of great importance (Model Standards of Conduct for Mediators, Standard IV). The parties are generally permitted to select their own mediator by consensus. However, judges may be called upon to direct a mediator when the parties are at an impasse concerning mediator selection.
- The mediator is not a judge *per se*, although many mediators are retired judges, and sitting judges may serve as mediators under certain circumstances. Unlike arbitrators, the mediator may not impose a solution upon the parties. (Colo. Rev. Stat. § 13-22-311; Model Standards of Conduct for Mediators, Standard I).

- The mediator sets the pre-mediation conference requirements for the parties to provide information to the mediator, to permit the mediator to understand issues before the court, and those issues which the parties wish the mediator to facilitate. This is commonly known as the “confidential mediation statement” and is provided by each party.
- The mediator must disclose to the parties, in advance, any conflicts or potential conflicts the mediator may have in conducting the mediation (Model Standards of Conduct for Mediators, Standard III). This includes prior or on-going business relationships with any of the parties, the mediator’s business interests, or prior knowledge concerning the parties or their dispute.
- The mediator should frame the issues to be addressed during the mediation and ensure that the parties agree on that agenda.
- The mediator must determine whether or not the parties will mediate in a common room or exclusively in separate caucus areas.
- The mediator must explain the process the mediation will follow to all of the parties, whether in a common setting or separately. The mediator should explain to the parties that the mediator is not acting as a judicial officer; is not an attorney for any party to the mediation, including unrepresented parties; and that the parties should consult with their own attorney with regard to any legal conclusions or propositions the mediator may make concerning the case. This is especially important if there are unrepresented parties in the mediation. (Model Standards for the Conduct of Mediators, Standard I).
- The mediator must ensure the confidentiality of information provided by any party as to any other parties, unless the mediator is authorized to disclose such information to other parties. (§ 13-22-311; Model Standards of Conduct for Mediators, Standard V).
- The mediator should evaluate the setting of the mediation for its suitability. This is especially so if any parties to the mediation has special needs, including nutritional, physical limitations such as hearing deficits or the inability to sit for extended periods of time. The mediator shall take into account allegations of

abuse or other situations which might jeopardize the conduct of the mediation. (§ 13-22-307; Model Standards of Conduct, Standard VI).

- The mediator must be cognizant of the potential for limitations of understanding of the parties due to diminished capacity (See Colo. R. Prof. Conduct 1.14). If the mediator believes any party to have cognition deficits which impact the mediation, he or she must bring those to the attention of appropriate parties and their legal representatives.
- The mediator's role is to draw out the core, underlying issues which are present in the dispute. This is done through open-ended questions and follow-up questions as necessary.
- Ideally, proposals for solutions and settlement should come from the parties themselves. The mediator may, however, be called upon to propose solutions or alternatives to assist the proposal-making process. Mediators should never advocate one solution over another (including his/her own) or direct the parties away from any particular solution, unless such positions are illegal or unethical. (Model Standards of Conduct for Mediators, Standard I).
- The mediator should use his or her background knowledge and experience in developing creative solutions to the dispute which can provide effective remedies to the disputes. The mediator is not bound by statutory restrictions, except to the extent the creative solutions of the mediator would violate statute or ethical guidelines. The mediator may suggest outside resources which might help facilitate solution to the dispute. (Model Standards of Conduct for Mediators, Standard IV).
- The mediator should be prepared to assist the parties and their attorney(s) in drafting a mediation agreement reflecting the points agreed to during the mediation. The mediator can suggest language, but cannot impose such language upon the parties. The mediator's job is to facilitate.
- If attorneys are present, the mediator should ensure the signature of all parties is obtained upon the mediated agreement, including those of their legal representatives, and of the mediator. This facilitates turning the agreement into a court order as necessary and in accordance with Colorado law. (§ 13-22-308).

- In the event the parties do not come to agreement, or only partial agreement, the mediator may make a brief point of fact statement in writing to the court ONLY that settlement was not reached, or was partially reached. The mediator may not discuss nor comment upon the mediation proceedings, including any signals about the parties' level of participation. (§ 13-22-311).
- The mediator must keep all discussions, information, and data, and other communications obtained by the mediator as a part of the mediation process, confidential even after completion of the mediation (successful or unsuccessful) except to the extent required by law concerning elder or child abuse or other mandatory reporting requirements of the law. (§ 13-22-307; Model Standards for the Conduct of Mediators, Standard V).

VII. The Attorney Role in Mediation

The parties in a mediation setting have a much more active role than they do in a court proceeding. Ideally, they are to stay informed, be fully advised of their legal rights obligations, and the potential personal and financial impacts of various settlement scenarios, participate in all discussions in good faith, and ultimately, make the final decision on the outcome.

To provide this level of client information and engagement, retained counsel must wear an advocate's hat while honoring the cooperative and non-adjudicative nature of a mediation session, allowing wide berth for the mediator and the parties themselves to participate actively, potentially creating an outcome that the attorney might never have considered (or might even secretly dislike). This "split persona" can be an attorney's most difficult engagement. Some of the key issues that counsel should consider include:

- Is individual party empowerment and autonomy a useful goal in the process?
- Will the parties need to have a relationship after this litigation such that party involvement in the process will be important?
- Is each party sufficiently well informed to communicate directly and to make decisions with a lesser level of counsel involvement than in court?
- Is each party competent, capable, and sufficiently in control of their emotions that the party will not require counsel to carry the discussion?
- Is each party in a position to reach a decision, i.e., adequate disclosures from the other side, the right people at the table, ability to execute an agreement?

Selection of the Mediator

It can be a challenge to assist the parties in finding a mediator who is cost-effective, sufficiently knowledgeable about the subject of the mediation, and capable of providing an approach likely to achieve settlement. Of course, most capable mediators are very busy, and landing a mediation date can be difficult. Counsel must balance the need for swift resolution with the risk of a failed mediation due to hasty compromise on the right neutral.

If the parties and their counsel fail to reach agreement regarding the identity of the mediator, each counsel should provide to the court sufficient information to support selection of a mediator by the court.

Engagement and Payment of Mediator

The mediator's fee agreement is with the parties, though some mediators will expect the representing attorney to also commit to payment (this conflict can be solved in many cases with prepaid and refundable retainers). Regardless, counsel whose client engages a mediator has the burden to ensure that the mediator is paid for the mediation.

Mediation Preparation

For mediation to be most successful, counsel should assist the parties in the following pre-mediation tasks:

- a. The parties are under an obligation to exchange all information requested by the mediator and relevant to the issues being mediated.
- b. Each party should have a clear understanding of the issues being mediated.
- c. Preliminary conversations should have occurred with the client and with the other party (through counsel) as to the goals of each party in the mediation.
- d. Optimally, at least one settlement proposal should have been made to the other party in advance of mediation.
- e. A settlement stipulation or agreement should have been thought through and provided in draft to the client, and optimally upon the client's approval to the other party (through counsel).
- f. Depending upon the approach of the particular mediator and counsel's preference, a Confidential Statement to Mediator should be delivered prior to the mediation. Contents of the Confidential Statement could include:
 1. A frank assessment of the strengths, weaknesses, and settlement preferences of each party, to the extent known;
 2. A social history of the conflict;
 3. Information regarding previous attempts at settlement; and
 4. Confidential discussions of known "hot buttons" of each party that could impede successful negotiations.

When a mediation order is entered, the Court can direct the parties to exchange information, update mandatory disclosures, or complete discovery in advance of the mediation. It is not usual for mediators to request a Confidential Settlement Statement from the parties prior to the mediation.

Counsel must prepare clients for mediation by discussing the mediation protocol such as rules about clear, respectful communications, and not interrupting or threatening the other party. Counsel must model compliance with these rules in the mediation, and mediators must be prepared to tactfully control disorderly or rude counsel.

Mediators can be expected to take affirmative measures to redress power imbalances in the mediation, so that the outcome of the mediation is not achieved by improper means that may affect the voluntariness of the settlement. This may include some comment or redress where the forcefulness or experience of each counsel is sharply divergent. If either party's counsel believes that the mediation should proceed by separate caucusing, or "shuttle" mediation, such a request should be made in advance of the mediation, if known by counsel. If shuttle mediation is suggested by the mediator or opposing counsel, counsel

should remain open-minded, as shuttle mediation may be necessary to manage the conflict or emotionality of issues in the mediation. In addition, shuttle mediation may make mediation possible in fact of a history of violence that would otherwise make mediation inappropriate.

Attorneys not Attending Mediation

At times, parties may be unrepresented, or elect to attend mediation without counsel, with the hope of minimizing costs and resolving matters absent the perceived “posturing” of counsel. Moreover, with short mediation deadlines, either established between the parties or by the Court, there may be an inability to set mediation dates that work for the parties, the mediator, and the parties’ counsel.

Some counsel take this opportunity to second-guess any draft or provisional agreement, or even to upend an agreed resolution by the parties. And some clients will have “settlor’s remorse” and ask their counsel to help unravel the now-regretted deal. In still other cases, agreement is never reached, or terms are incomplete or somehow improper despite mediator involvement, which might have come out differently with counsel attending.

Attorneys Attending Mediation

When an “evaluative” mediation process⁵ is selected, counsel may be asked by the mediator to prepare more extensive materials, such as fact summaries, exhibits, and briefs of legal issues. Sometimes, both sides will agree to share some or all of these materials with the opposition in advance. Counsel’s role in an evaluative mediation is typically very active, as this is closer to arbitration or a court setting than to the wide-ranging quest for creative solutions spawned by the parties themselves.

When counsel participate in a facilitative mediation, they still assist their clients in the mediation, but the clients have the greater responsibility to speak and negotiate for themselves, evaluating alternatives in view of their own priorities, with counsel their only to assist. Of course, plans can change during battle and the role of counsel can shift, whether at the behest of the client or due to the impatience of the attorney.

Preparing a client for a facilitative mediation will generally involve more work than where counsel takes the lead. The focus here is preparing the client with an eye to key legal and practical issues, as well as assisting clients in brainstorming to develop solutions. However, counsel who work in a facilitative capacity will frequently remind clients throughout the mediation that the choices regarding settlement alternatives are the client’s alone, upon sound advisement by counsel.

Clients frequently turn to counsel in mediation for advice about the fairness or appropriateness of each potential resolution discussed. Very dependent clients will fail to

⁵ See Appendix D for definitions on the styles of mediation. In short, an evaluative mediator focuses on predicting the merits in court, as opposed to “facilitating” party solutions.

exercise independent judgement and may defer to counsel to control the mediation, once again taxing counsel's ability to wear the hat of advocacy and the hat of compromise and client autonomy.

Counsel's Conduct in Support of the Mediation Process

Counsel's conduct and support for the process can be the linchpin to success at mediation, and the following actions are recommended:

- Discuss the qualifications, knowledge, and gifts of the mediator in advance of mediation.
- Have a frank discussion with the client in advance of mediation regarding the risks and costs of continuing with the litigation, including a realistic budget through appeal.
- Have a frank discussion with the client regarding reasonable goals and expectations in mediation, given the risks at trial.
- Encourage the client to understand that compromise and flexibility will be required for settlement.
- Encourage the client to make a settlement proposal and to understand the wide range of reasonable settlement and trial prospects given the facts and legal issues in the case.
- Attend mediation with an open mind regarding various aspects of the fact pattern, the legal issues, and the possible avenues for resolution.
- Prepare draft final documents and discuss these with the client, and consider sending these to the other side to get standard settlement agreement provisions in front of the parties prior to the mediation.
- Encourage the client to listen with an open mind to everything that is offered for information regarding the goals and interests of the other side, so as to craft counterproposals in mediation that may meet the specific needs of the other side without sacrificing the client's interests.
- Help the client understand that much can be learned in mediation about possible future settlement and probable trial strategies, even if settlement is not achieved in the session.
- Be prepared to encourage the client to set a date for further mediation if ANY progress appears to have been made at the mediation.

Counsel should avoid any thought that mediation is a side show, or a "check the box" exercise prior to the real work of trial. A properly prepared mediation is every bit as challenging and rewarding an exercise for counsel and the client as a hearing or a trial. Counsel have a responsibility to settle cases when they can, in service to the client, as well as supporting judicial economy.

The courts have a role to play in encouraging counsel to consider that mediation is every bit as important an avenue to meet the client's needs and demonstrate professional proficiency as courtroom appearances by counsel.

X. CONSIDERATIONS IN SELECTING A MEDIATOR

This chapter highlights information relevant to both the parties' selection of a mediator and factors judicial officers may wish to consider in providing information to parties regarding the choice of a mediator. As noted above, there is no statewide overview or certification of mediators, and so there are attorney/retired judge mediators as well as non-attorney mediators such as counselors, therapists, ministers, educators, and corporate managers who handle court-ordered mediations in Colorado, with widely varying experience in the process and the subject matter. ODR, Court Mediation ServicesSM, and Jefferson County Mediation Services are options for mediation where the parties cannot agree on a mediator, or a lower fee or no fee is required, though there are many private mediators who will take cases on a sliding scale. The Colorado Bar Association, its ADR Section, and the MAC also have lists of available mediators. Some district courts have lists of mediators, not endorsed by the Court but listed as available in the district. The ADR order can also address general options for locating mediators.

Mediator Qualifications

Other guidelines applicable to mediators in general, in addition to CDRA definitions, are set forth below.

Colorado Model Standards of Conduct

As described above, the Colorado Model Standards of Conduct for Mediators reinforce ethical standards for mediators and provide a framework for mediation practice. These Standards of Conduct have been endorsed by the Colorado Bar Association ("CBA"), Colorado Judicial Institute ("CJI"), Colorado Department of Law ("DOL"), Colorado Council of Mediators, and the Office of Dispute Resolution of the Colorado Judicial Department, and are intended for voluntary statewide use. These are available at the following link:

<http://www.coloradomediation.org/docs/code%20of%20conduct.pdf>

ABA Model Standards

The American Bar Association Model Standards provide detailed guidance for mediators concerning ethics, confidentiality, conflict of interest, and preservation of the integrity of the mediation process.

https://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf

Association of Family and Conciliation Courts (AFCC)

The Association of Family and Conciliation Courts strives to improve the lives of children and their families through conflict resolution. Their guidelines and references can be found at <http://www.afccnet.org/Resource-Center/Practice-Guidelines-and-Standards>.

Knowledge of Law

While it is not always necessary for neutrals to have a detailed understanding of the law relating to a specific dispute, in certain types of cases a neutral with substantive knowledge of the law may be more effective. For instance, in domestic cases, especially where the parties are appearing *pro se*, a mediator familiar with parenting plans, the best-interest-of-the-child rubric, the child support guidelines, and the tax implications of property division may more successfully guide the parties to an agreement in compliance with the law and which more fully addresses the many issues that arise. Similarly, in a case with complicated legal issues subject to Summary Judgment or other motion practice, an attorney neutral with prior practical experience in the applicable area of law may be in a better position to assist the parties in exploring the pros and cons of their cases and the risks of proceeding to trial.

Mediation Style

As described in Appendix D, there are varying types of mediation styles. Consideration should be given to the type of mediation style and to whether a settlement conference should be ordered. Depending on the parties and the mediator, the process can be fluid, with more than one style of mediation occurring in the mediation. Explanation to the parties of these processes and styles may help direct them to the appropriate mediator.

Conflicts of Interest

Challenges to the mediation result can occur when a party, after the fact, learns that the mediated agreement was the result of actions of a conflicted mediator. The Model Standards of Conduct Standard III sets forth standards regarding actual and potential conflicts of interest. A mediator is to ***avoid a conflict of interest or the appearance of a conflict of interest during and after mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.***

A mediator should disclose the existence of such relationships, which the parties can then agree to waive. However, the mediator should consider whether the relationship is one that even after disclosure is significant enough that the mediator should decline the case or withdraw. In addition, the mediator should consider whether the parties are sufficiently sophisticated to waive the disclosed conflict. For instance, factors such as whether the parties are represented, are native English speakers, are involved in business or

professional activities where issues of conflict commonly arise; or the level of education, training, or other professional experience of the parties may impact whether a waiver is sufficient.

In cases where one of the parties is not English speaking, a bilingual mediator may have a conflict of interest if the mediator acts as the interpreter or if the mediator understands or relates in language to one party more than the other.

Practice Tip:

The Office of Dispute Resolution has a [Tip Sheet](#) guide for parties seeking information to assist in choosing a mediator.

Cultural Differences in Mediation

Just as cultural differences impact the court proceedings, the same is true in mediation. Understanding the cultural needs and knowledge of the parties is an important factor in providing a balanced and neutral mediation. Cultural competence in mediation refers to a mediator's ability to understand how culture and/or cultural differences impact a dispute and find ways to overcome cultural differences, respecting all cultural differences in the process.

Language Considerations, Bilingual Mediators, and the Need for Interpreter Services

Judicial officers will find that language considerations and resulting barriers can impact the access to justice for litigants. There are numerous resources available for assistance with language interpretation needs. Many mediators are bilingual, though note the potential conflict of interest described above. Bilingual mediators should have taken a competency exam. This is required of bilingual mediators who are professionals with the MAC, for instance. Interpreter services may be available through the courts for mediation. If not, the cost can be prohibitive for parties.

The [Office of Language Access](#), Colorado Judicial Branch, provides interpretation services for mediation at no cost to the parties for cases in which the parties use an Office of Dispute Resolution contract mediator. If parties use a private mediator, they will need to arrange and pay for a private interpreter.

XI. Special Considerations for Pro Se Parties

Selection of an ADR neutral can be a very different experience for represented and *pro se* parties. Generally represented parties will rely on the expertise of counsel to advise them in the selection of the ADR neutral or ADR service. *Pro se* parties, however, when ordered

to mediation are often unfamiliar with the concept of ADR, the role of the mediator, or the process in which to locate ADR services. Pre-trial orders directing *pro se* parties to mediation may simply create confusion unless such Orders provide some direction with respect to resources available to select a neutral. Additionally, *pro se* parties may look to the neutral as a source to advise them on the law or on their chances of prevailing. While neutrals cannot act as counsel, attorney mediators can assist parties in the selection of forms and explaining the court process. It is, however, important for the court to remind parties that neutrals, whether or not lawyers, are not acting as attorneys and *cannot* provide legal advice to either party.

Power Imbalances between the Parties

The mediation process can be influenced by real or perceived power imbalances between the parties created by a variety of factors such as the financial resources of the parties, each side's understanding of the legal process or the substantive law, the represented or *pro se* status of parties, and the past relationships between the parties including emotional abuse, physical abuse, domestic violence, or criminal actions. Power imbalances are not always obvious but when they are apparent as they can be with a *pro se* party, care in the selection of the neutral with experience and training in dealing these difficult situations might assist the process to proceed in a more balanced way.

Practice Tips: What types of power imbalance may be present?

Physical and/or emotional abuse: Mediation may not be appropriate especially if the previously abused party is not represented. If mediation is ordered, even if both parties are represented, the neutral should have specific experience or training to deal with these issues and have knowledge of techniques to protect the disempowered person. Likewise, especially in the case of *pro se* litigants, consideration should be given to whether the previously abused party should have a representative accompany them to the ADR sessions.

Money: Financial imbalances can impact both *pro se* and represented parties. A party with stronger financial resources can use costs as a weapon by only agreeing to use the most expensive neutral or ADR options or by increasing the cost of the mediation session by engaging in non-productive behaviors. Advising parties of lower cost ADR options with skilled neutrals can assist the less financially able party to participate in mediation effectively. Further, experienced mediators will be aware of techniques to utilize to address these types of financial power imbalances.

Lack of representation: When one party is represented and one is not, the *pro se* party can feel intimidated by the legal posturing of the represented party's attorney. While neutrals cannot give legal advice, having a mediator experienced in the area of law relative to the dispute can, through appropriate reality checking, assist the *pro se* party understand the law, issue identification, and judicial expectations.

Cost of Mediation

In District Court matters where both parties are represented cost of the neutral is generally less of a consideration; often the parties have already been made aware by counsel that use of ADR will be required before trial. (Rates vary from free, to \$100.00 (CMS Civil and domestic), \$120.00 (ODR for domestic, \$150.00 for civil) per hour to \$400.00 or more per hour.) *Pro se* parties, especially in County Court, are often unrepresented because they cannot afford an attorney. ADR, especially for parties with no prior experience, is viewed as another unnecessary expense. Education by the court as to the value of ADR and direction toward available lower cost ADR alternatives can help encourage these parties to view ADR as a benefit not a burden.

Where the case has less monetary value, such as cases filed in Small Claims and County Court, the parties may be reluctant to spend resources on a mediator. In these cases, both *pro se* and represented parties may view a neutral's fees as unjustified and unnecessary. In low monetary value cases, providing the parties with less expensive options, such as a community mediation program, can potentially lessen the parties' reluctance. Additionally, even in low value cases, explanation by the court on the benefits of mediation can refocus the parties from the cost to the value of mediation. For instance, in an eviction proceeding the court can remind tenants that a confidential mediated settlement can often relieve them from the negative impact of a judgment which will have to be disclosed to future landlords, with the resultant difficulty in obtaining a lease or the requirement to pay higher rent.

Landlords might be reminded of speed and cost savings of a negotiated settlement versus obtaining a sheriff eviction.

In instances where one or both parties is acting out of “principle” or seeking “justice” and thus viewing any form of compromise as losing, mediation may be viewed by the parties or their attorneys as a waste of time and resources. In these instances, the court might remind the parties, especially *pro se* parties who often do not understand the legal constraints imposed on court rulings, that a skilled neutral is often able to assist the parties in arriving at creative individual party-driven solutions that are outside of the court’s powers to order.

Neutral’s Substantive Knowledge of the Law

While it is not always necessary for neutrals to have a detailed understanding of the law relating to the dispute, as discussed above, it can certainly help. Additionally, when one or both of the parties are *pro se*, settlement discussions may not move forward because one or more of the parties does not understand the law and the restraints placed on the court by statutes or case law which limit the court’s options when entering a verdict at trial. In eviction cases for example tenants may view the case from their perspective of fairness without understanding the limits placed on the court by Colorado statutes and contract law. A neutral who understands eviction law and can speak to the tenant from experience may have more success in assisting the parties to find common ground than one who has never read a lease.

Pro se parties may not understand the procedure or evidence rules that impact what information the court will consider. A mediator who is versed in court rules and procedure may be better able to assist the parties (avoiding representing either party or providing legal advice), through appropriate questions, so that the parties may come to understand the limitations imposed on the court by procedure and evidence rules.

Sources to Locate a Neutral

Attorneys for represented parties will generally have mediators or mediation services that they routinely use. Unrepresented parties, however, may need assistance identifying available mediation services. A search on the internet reveals a wide variety of resources available to persons seeking to resolve disputes with the assistance of a neutral third party. Mediator fees, however, can vary from free in limited instances to \$400.00 or more per hour. Likewise, mediators have a variety of backgrounds from retired judges, lawyers, social workers, psychologists and others with a variety of degrees or business experience relating to dispute resolution. Courts can assist *pro se* parties by including references to mediation service providers in the mediation order or by providing the parties with lists of mediation referral resources.

Mediation orders might remind the parties of the court’s procedure for requesting leave from the order and the consequences of not complying with the order. Again, while

attorneys for represented parties might be aware of the procedures, *pro se* parties likely will not.

Mediators typically do not file documents with the court, so parties should be made aware that any completion of mediation forms must be filed by the parties, though courts often ask any represented party to handle such filings. If the court has a preferred form, then the form could be provided to the litigants for completion by the neutral.

Memorandum of Understanding

Following a fully or partially successful mediation proceeding Colo. Rev. Stat. § 13-22-308, provides that if requested by the parties the agreement “shall be reduced to writing and approved by the parties and their attorneys, if any.” If this agreement is then signed by the parties, “the agreement may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court.” The neutral assists the parties in preparing the agreement, often referenced as a Memorandum of Understanding (“MOU”). Depending on whether the parties are represented by counsel the MOU may read more or less like a legal contract. It is not ultimately the responsibility of the neutral to insure that the MOU will be acceptable to the court, since the neutral does not practice law and is not obligated to ensure that the parties’ agreement comports with the law (though every effort should be made to steer parties away from violative agreements where recognized..

When parties are represented there is generally no issue; however, when one or both parties are *pro se*, a mediator who has experience with and an understanding of the law in the particular area is often able to assist the parties to express their agreement in a manner that takes into account the legal requirements (though always caught in the not-a-lawyer challenge). In some instances, such as domestic cases where Colorado has specific parenting plan forms and worksheets for child support, the parties are provided with a guide without relying on the mediator. In others, such as an eviction resolution, when a court has specific requirements that an agreement ought address, providing those templates to the parties prior to the mediation process is helpful, again keeping the mediator from practicing law in a context where an unrepresented party may be pressuring the point.

XII. Mediation Organizations in Colorado

The Office of Dispute Resolution (“ODR”) was formed under CDRA and is tasked with establishing mediation services throughout Colorado’s judicial districts, subject to budgetary restraints. The ODR has chosen since 1985 to meet this directive by contracting with local private mediators as independent contractors. ODR mediators have completed forty hours of general mediation training, have been a lead mediator in a minimum of 20 cases, are familiar with the subject matter for cases in which they mediate, accept state pay

for indigent clients, undergo judicial background checks, and agree to complete ten hours of continuing mediation education annually.

As noted above, the judicial department's ODR contract mediators have been a resource for parties to turn to across Colorado since 1985, particularly for litigants of low or moderate means given the ODR's fee orders. ODR mediations accept state pay for those litigants who cannot afford mediation services. Those seeking a reduced rate for mediation must fill out a Judicial Department Form [211](#) to be approved for a reduced rate. This request must be approved prior to the mediation session.

CDRA does not, however, require litigants to use only ODR contractors. Neither does it dictate licensure or credentialing of any kind, thus permitting mediation by attorney and non-attorney alike.

Not surprisingly, and consistent with Colorado's population growth, the vast majority of non-ODR private mediators are found in the metro areas, and their numbers continue to climb dramatically. Many of these mediators have joined together, either in formal business settings or as members of standards groups. For instance, the Mediation Association of Colorado ("the MAC") is the only professional mediation membership organization in Colorado and for its "Professional Mediators" requires background checks, a 40-hour mediation course, 100 hours of mediation as a solo or lead mediator, as well as 10 continuing education credits per year (including substantive and ethics).

Membership is also growing in CBA's Alternative Dispute Resolution Section and its ABA counterpart. Membership in all of these groups is voluntary.

There are also a number of community mediation centers across Colorado that offer an alternative for interested litigants. Two examples include The Conflict Center in North Denver, which relies on private donations; and the widely-known Jefferson County Mediation Services, which is funded by Jefferson County.

Although there is no statewide roster of mediators, efforts are constantly made by each of these organizations as well as individual mediators to make their availability and qualifications known to interested disputants. In addition, the United States District Court for the District of Colorado, maintains a voluntary, self-policing roster of mediators available for federal disputes. This roster is available on the Court's website at <http://www.dcolomediators.org/>.

XIII. COMMUNICATION AMONG JUDICIAL OFFICERS, ATTORNEYS, AND MEDIATORS TO IMPROVE LOCAL PRACTICES

The Value of Institutionalized Feedback Loops

It is the considered view of the judges and others who helped prepare this Guide that it would be of great benefit if each judicial officer or judicial district institutionalized a mechanism for regular, periodic, voluntary communication with attorneys in their jurisdiction representing clients subject to court-ordered ADR services, as well as the professionals who provide those ADR services, the court personnel who administer the ADR process (such as Family Court Facilitators or case managers and SRLCs), and all other ADR stakeholders. The purpose is to improve the structure, policy, and outcomes of the use of court-annexed ADR in the jurisdiction or before that judicial officer. While extreme caution must be taken to maintain confidentiality of ADR sessions and communications as discussed below, the communications contemplated in this section would not violate confidentiality as long as the guidelines established herein are followed.

Judicial Officer Meeting Jointly with Local Attorneys and Mediators

A judicial officer may want to establish a periodic schedule for a joint meeting with attorneys, mediators, and court personnel who participate in the mediation in that district. Such meetings may be scheduled quarterly but not less than semi-annually. Such a meeting will provide a safe and open environment for a free and candid exchange of issues and recommendations to improve the policies, process, and procedure of court-ordered ADR in that division. Extreme care should be taken to avoid disclosure of confidential or case specific information.

The judicial officer may want to set a structured agenda for such meetings, thus preventing an open forum for complaints, while directing the discussion to constructive suggestions for improvement. A sample agenda may include specific topics or issues of concern, such as

- a. case type referred;
- b. appropriateness of cases for referral;
- c. preparation for mediation proceedings;
- d. methods of memorializing agreement of some of the issues referred to mediation, or partial resolution of such issues;
- e. methods of reporting stipulations *vis a vis* MOUs,
- f. reviewing and interpreting MOUs or agreements reached during mediation,
- g. incorporating MOUs and mediated agreements into Court orders,
- h. effectiveness of judicial sanctions to encourage good faith participation in mediation;

- i. persons necessary to be present in person at the mediation;
- j. deadlines for completion of mediation and how that may relate to disclosure and discovery;
- k. additional provisions in a Case Management Order or Order to Mediate which would assist attorneys and mediators in the process; and
- l. effectiveness of sanctions for failure to comply with mediation.

A judicial officer may want to establish a periodic schedule to meet with only the attorneys who participate in mediation in that district, offering a safe and open environment for a free and candid exchange of issues and recommendations to improve the use of court-ordered mediation in that division.. The attorneys can educate the judicial officer about the realities that take place within sessions, and the judge can educate the attorneys about his/her philosophy toward court-ordered mediation and its use As noted, extreme care should be taken to avoid disclosure of confidential or case specific information. Care should also be taken to avoid discussion of individual mediators or associations.

By the same token, a judicial officer may want to establish a periodic schedule to meet with only the mediation professionals who provide court-ordered services in that district, providing the same kind of safe exchange discussed above. The mediators can educate the judicial officer about the realities of local sessions, particularly in sessions without attorneys present; and the judicial officer can inform mediators about his/her philosophy toward and expectations of court-ordered mediation. The judge also has an opportunity to communicate the considerations, criteria and factors used in issuing a mediation order. Again, extreme care must taken to avoid disclosure of confidential or case specific information. Care should also be taken to avoid discussion of individual attorneys or law firms.

The judicial officer may want to solicit from the mediators specific items of concern or suggestions for improvement of mediation order practice in that division. Such discussions are particularly helpful to enlighten both the judicial officer and mediator in *pro se* domestic relations cases.

The standard scheduling for such meetings may be meeting twice per year, depending upon the caseload and case assignment of the division.

Survey of Attorneys and Mediation Providers

The Chief Judge or District Court Administrator may want to establish a mechanism by which attorneys, ADR professionals, or unrepresented parties can provide confidential feedback to the court system regarding local court-ordered ADR through the use of an electronic or paper-based surveys “suggestion box” made available in each case to all participants in court-ordered mediation. The information would be compiled by the office of that District Administrator, who would first redact all confidential information before

Practice Tip:

Resolution System Institute has a mediation survey “toolkit” available on-line at:
<https://www.aboutrsi.org/model-surveys>

forwarding concerns or suggestions about the process and procedure of the court-ordered mediation to the judicial officers. Such information should be distributed to all judicial officers in that district no more than quarterly to avoid identification of particular comments to individual cases. Data could be compiled by the court administrator to provide insight to the court system and individual judicial officers and mediators regarding the use of court-ordered mediation.

The practice of institutionalizing such discussion among the stakeholders of the court-annexed ADR process will help the judicial officer tailor the process to his/her individual case assignments and personal style. The feedback to the stakeholders also improves the quality of future mediation by enabling attorneys and mediators to understand the judicial expectations. Thus, an atmosphere of cooperation and collaboration toward a common goal of satisfactory dispute resolution may be achieved.

XIV. THE FUTURE OF MEDIATION AND ADR IN COLORADO COURTS

In a recent ODR survey of the twenty-two judicial districts in Colorado, eighteen (82%) require parties to engage in mediation prior to scheduling a contested domestic relations hearing. For other types of civil cases, eight (36%) of the twenty-two judicial districts mandate mediation prior to a contested trial. Moreover, many Colorado small claims courts have established small claims court mediation as a formal, or informal, method to assist litigants in resolving disputes. Given these statistics and local practices, it is clear that judicial officers promote mediation to parties as an option for parties to resolve issues on their own terms and rely on mediation as an essential case management tool.

Most cases in Colorado are informally resolved and do not go to a contested trial. The latest statistics indicate that over 99% of civil cases are resolved without a formal trial. Given this fact, judicial officers can assume a leadership role in helping parties understand the benefit and time of ADR. ADR is good case management and should be inserted into a case at a point to optimize settlement, typically after initial disclosures are complete, but before extensive discovery. To recognize this benefit of, the authors of this Guide believe that mediation should be formalized into all civil case management rules, not just domestic relations cases, again excepting domestic violence matters or other good cause showings.

Colorado courts are addressing access to justice issues (including accessing legal information) facing those who are self-represented in Colorado courts.⁶ These concerns, coupled with advances in technology and smartphone ownership, strongly support the use

⁶ This issue is significant, especially in domestic relations cases, as the most recent data indicate 67% of domestic relations cases do not have attorney involvement and 75% of cases involve *pro se* parties. See <https://www.courts.state.co.us/judicialnet/pa/page.cfm?Page=367>

of online dispute resolution services as a means to resolve many types of disputes. In many cases, small dispute amounts leave clients, who may otherwise file a case in court, walking away from a claim due to the time and expense associated with seeking legal advice and/or filing a claim and court appearances, time from work, etc. This is especially true for parties who reside in rural areas, or have transportation issues, or reduced mobility.

Currently, many neutrals offer clients the ability to participate in private dispute resolution via telephone. This service could be extended to provide virtual mediation services via videoconferencing as current online meeting platforms allow document sharing, confidential break-out rooms, speaker muting, simultaneous translation, and other options.⁷ Such online dispute resolution service must be convenient for consumers in that the interface must meet consumer ease standards as well as reliability, the latter of which may be challenging if broadband internet services are unavailable.

Additionally, Colorado citizens would benefit from increasing the availability of informal dispute resolution service providers such as community dispute resolution programs. One example of this type of community dispute center is Jefferson County Mediation Services, a community mediation program funded by Jefferson County and professionally managed, but “staffed” by volunteer mediators. This would provide parties the benefit of conflict resolution services before having to file in the courts, or to secure agreements to be adopted by the courts as an order.

In short, the next iteration of dispute resolution in Colorado should embrace and harness currently available technologies to provide swift resolution and convenience to parties in conflict. More local dispute resolution services should be made available to Colorado citizens. Finally, ADR should be incorporated into Colorado case management rules in order to guide parties in maximizing settlement processes, options, and opportunities.

⁷ Technology could assist mediators and clients by helping them connect. For example, one could easily envision an “app” for clients to receive and review information regarding mediators, such as education, experience, rates, and availability. *See, e.g.*, Hawai’i State Court’s new app: <http://www.courts.state.hi.us/hawaii-courts-mobile-app>

XV. ADDITIONAL RESOURCES

The following links may be helpful to those seeking further training or information:

- American Arbitration Association (AAA) – Denver Regional Office
<http://info.adr.org/denver-regional-office/>
- Better Business Bureau (BBB) – Mediation and
<https://www.bbb.org/bbb-dispute-handling-and-resolution/>
- CDR Associates – Collaborative Decisions Resources
<http://cdrassociates.org/>
- Colorado Bar Association – Alternative Dispute Resolution Section (CBA ADR)
<http://www.cba.cobar.org/index.cfm/ID/20090/CAAD/Alternative-Dispute-Resolution-/>
- Colorado Collaborative Divorce Professionals (CCDP)
<http://www.coloradocollaborativedivorceprofessionals.com/>
- Colorado Office of Dispute Resolution (ODR)
<https://www.courts.state.co.us/Administration/Unit.cfm?Unit=odr>
- Colorado Small Claims Court Programs – (some with mediation)
https://www.courts.state.co.us/Self_Help/Local_Small_Claims.cfm
- Early Neutral Evaluation
Cindy Perusse, *Early Neutral Evaluation as a Dispute Resolution Tool in Family Court*,
THE COLORADO LAWYER (May 2012) at 37.
<http://cololawyer.com/wp-content/uploads/2013/10/Early-Neural-Evaluation-as-a-Dispute-Resolution-Tool-in-Family-Court.pdf>
- Judicial Arbiter Group (JAG)
<http://jaginc.com/>
- Judicial Arbitration and Mediation Services, Inc. (JAMS)
<https://www.jamsadr.com/jams-denver>
- The Mediation Association of Colorado
<http://coloradomediators.org/>
- Tribal Mediation
Indigenous Peacemaking Initiative: <http://peacemaking.narf.org/about-us/>

Links to National Resources

- American Bar Association (ABA) – Alternative Dispute Resolution (ADR)
https://www.americanbar.org/groups/dispute_resolution.html
- ABA-ADR Task Force on Improving Mediation Quality Report (2008)
<https://www.americanbar.org/content/dam/aba/migrated/dispute/documents/FinalTaskForceMediation.authcheckdam.pdf>
- Association for Conflict Resolution (ACR)
<https://acrnet.org/>
- Association of Family and Conciliation Courts (AFCC)
<http://www.afccnet.org/>
- Early Neutral Evaluation
Wayne D. Brazil, *Early Neutral Evaluation or Mediation- When Might ENE Deliver More Value*, 14 Disp. Resol.Mag.10 (2007), Available at:
<http://scholarship.law.berkeley.edu/facpubs/165>
- Mediation.Com – National Mediation Website
www.mediate.com
- Mediation-Arbitration (Med-Arb)
Mark Batson Baril and Donald Dickey, *MED-ARB: The Best of Both Worlds or Just a Limited ADR Option?* Available at: <https://www.mediate.com/pdf/V2%20MED-ARB%20The%20Best%20of%20Both%20Worlds%20or%20Just%20a%20Limited%20ADR%20Option.pdf>
- National Academy of Distinguished Neutrals
<http://www.nadn.org/>
- National Association for Community Mediation (NAFCM)
<http://www.nafcm.org/>
- Transformative Mediation
<http://www.beyondintractability.org/essay/transformative-mediation>

Links to Forms

- Colorado Court ADR Forms – Links to PDF and Word Documents

https://www.courts.state.co.us/Forms/By_JDF.cfm

<u>JDF 607</u>	ADR/Mediation Order (Civil Case)
<u>JDF 608</u>	Motion Re: Exemption from Mediation/ADR Order
<u>JDF 609</u>	Order Re: Exemption from Mediation/ADR Order
<u>JDF 1118</u>	Mediation/ ADR Order (Domestic Case)
<u>JDF 1307</u>	Motion re: Exemption from Mediation
<u>JDF 1308</u>	Order re: Exemption from Mediation
<u>JDF 1337</u>	Certificate of Mediation/ADR Compliance
<u>JDF 211</u>	Request to Reduce Payment for ODR Services -<u>Instructions</u>

APPENDIX A: QUICK ADR REFERENCE GUIDE

Process	Appropriate Use	Timing	Roles of Neutral/Party/Attorney
<p><u>Negotiation:</u> Parties or attorneys directly or indirectly community to reach a settlement agreement</p>	<p>When parties have a need to terminate the dispute with a less adversarial method or when there is an ongoing relationship to consider. No safety issues.</p>	<p>Continuing as facts develop.</p>	<p>Not applicable/ Negotiates directly in written or orally, or through attorney/ May negotiate on behalf of client</p>
<p><u>Early Case Management Conference:</u> Initial contact between the court and parties to a case to discuss the court's case management process and to understand issues unique to the case in order to anticipate disclosures, discovery and potentially complex issues.</p>	<p>Parties could benefit from meeting with the judicial officer to discuss the trajectory and management of the case, including a Case Management Stipulation or Order that addresses motion practice, proportional discovery, and the timing and type of ADR processes best suited to party needs. Opportunity for parties to mutually agree on ADR process, ADR provider,</p>	<p>Very early in the litigation; typically the first court-ordered event after the response. In domestic relations cases, this is the Initial Status Conference. C.R.C.P. 16.2(c)(1) unless a stipulated case management plan, with Certificate of Compliance with Exchange of Mandatory Disclosures filed, then the ISC is exempt.</p> <p>C.R.C.P. 16.2(i)(1)-(2). Upon request of both parties, a judge or magistrate may conduct pre-trial conferences "as a form of alternative dispute resolution," provided that both parties consent in writing to this process." Also allows parties to consent to use a third-</p>	<p>Neutral is Judicial Officer</p> <p>Parties ask questions and discuss process</p> <p>Counsel participate, if parties are represented</p>

	and timing.	party ADR and the court to order ADR by third parties pursuant to Colo. Rev. Stat. § 13-22-311.	
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<p><u>Early Neutral Assessment (Domestic Cases):</u> ENA is a voluntary, evaluative, confidential process during which the parties (and their attorneys) provide relevant information to a mental health/legal expert, female/male team. The multidisciplinary team provides an assessment of the information as well as problem solving options to settle case. Typically completed within one month.</p>	<p>Cases in which there are young children, no domestic violence, mental health/drug/alcohol or other safety issues.</p>	<p>When parties attend their initial status conference they often request a Child and Family Investigator (CFI) or request a hearing to determine parenting time. When this occurs, the family court facilitator (FCF) asks for additional information to determine whether or not the case is appropriate for ENA. If it is appropriate the FCF explains the ENA process to all parties and obtain agreement. Judicial officers’ “pitch” is critical. Should be completed within 45 days of ISC.</p>	<p>ENA neutrals are appointed</p> <p>The Parties participate fully</p> <p>Counsel may be present but are not permitted to “drive the process.”</p>
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<p>Mediation: Facilitated dialogue using a neutral third party to explore achieving a mutually agreeable resolution to the dispute.</p>	<p>Frequently used where the parties' interests in the dispute include: developing a creative solution; maintaining confidentiality; preserving an ongoing relationship;</p> <p>Narrowing the issues in dispute; or high emotions are present.</p> <p>Mediation can also be effective in resolving or narrowing sub-disputes involving discovery, standstill agreements, protective orders, etc.</p>	<p>Mediation can take place as soon as the parties have sufficient information to assess their risks in moving forward and the benefits of attempting an early resolution of all or a portion of the dispute.</p> <p>At the Early Case Management Conference or ISC, consider asking parties to mutually select a mediation provider who can be available as needed throughout the case life to assist in resolving disclosure, discovery, and ultimate issues in the case. Unless the parties request otherwise, mediation should almost always be conducted before case evaluation unless ENA for a domestic case. ENA should be completed as soon as possible after case filing.</p>	<p>Mediator is Neutral</p> <p>Parties participate and any determinations are consensual.</p> <p>Counsel may attend or may review agreements prior to execution.</p>
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<p><u>Expert Hearing:</u> A “battle of the experts.” The process is helpful in disputes over business valuations, assessing economic damages, professional malpractice, products liability, and other disputes involving experts. The parties, with the assistance of the neutral, establish the ground rules for the hearing.</p>		<p>Typically used after sufficient document and information exchange for experts to formulate their preliminary opinions. Can be used to streamline discovery by narrowing the issues in dispute. The hearing can also immediately precede mediation, or substitute for the parties’ opening statements. It can also be used in the course of mediation to address impasses arising from conflicting expert opinions.</p>	<p>Neutral is the Judicial Officer</p> <p>Parties participate directly only if Pro Se.</p> <p>Counsel “drive the process.”</p>
<p><u>Mini-trial:</u> Decision makers require significant education on the realistic risks, benefits, and potential costs of ongoing litigation, or to evaluate opposing counsel and the potential jury appeal of their claims and defenses.</p> <p>The parties, with the assistance of the neutral,</p>		<p>Can be a stand-alone process, but is effectively used prior to mediation taking place. If used prior to mediation, the outcome often takes the place of the opening statement or is used to deal with an impasse that arises during mediation.</p>	

establish the ground rules for the mini-trial.			
<u>Early Neutral Fact Finding</u> : Third party neutral used to resolve contested threshold legal and/or factual issues have a significant impact on the litigation.	Can be used to narrow or focus issues, for example claims involving insurance coverage, construction defects, alleged code or contract violations, applicable standards of care in malpractice claims, and appropriateness of class action certification.	<p>As early as possible in the litigation.</p> <p>A mutually respected subject matter expert voluntarily selected by the parties implements agreed upon ground rules, the voluntary exchange of information, and other functions determined by the parties.</p> <p>Often helpful in setting the stage for a subsequent mediation.</p> <p>The neutral is generally not a mediator who may have already been selected by the parties.</p>	<p>Fact-Finder is Neutral</p> <p>Parties participate directly only if Pro-Se</p> <p>Counsel “drive the process”</p>
<u>Case Evaluation</u> : Independent assessment of the merits of case, <i>e.g.</i> , monetary value of their case.		<p>Typically conducted after discovery and motion practice has been completed.</p> <p>Consider either a specialized panel, or asking whether one of the other “expert” forms of evaluation would be more helpful.</p> <p>Should almost always take place after mediation. If scheduled before mediation, it can significantly lengthen case age and litigation costs.</p>	

<p><u>Settlement Conference</u> (judicial or non-judicial): Evaluates case strengths and weaknesses, assists parties to settle.</p>	<p>Parties could benefit from a judicial or third-party assessment to determine whether any common ground can be found to reduce the issues to be tried, or to avoid trial altogether.</p>	<p>Historically, used to overcome impasse or convened as the last event before trial, however, can be convened after any significant case milestone to evaluate a resolution or explore ADR options.</p>	
<p><u>Med/Arb</u>: Hybrid form of ADR which starts with mediation, but if mediation is unsuccessful, and the parties agree, neutral will issue a ruling immediately after the mediation. On request of the parties, the same neutral can act as the mediator and then as the arbitrator.</p>	<p>Parties have a need for a quicker resolution and are willing to be bound by a neutral's decision if mediation is unsuccessful.</p>	<p>Typically used after most or all discovery and motion practice has been completed.</p>	

<p><u>Arbitration:</u> Impartial third parties selected by court, attorney, or parties, who acts as a private judge in rendering findings of fact and ruling on contested issues.</p>	<p>May be helpful where the parties desire to select private decision maker and achieve greater confidentiality than available at trial; little concern with creating precedent or preserving appellate rights; may be quicker and less expensive than a trial.</p> <p>An effective dispute resolution tool where the parties desire a “high-low” agreement to minimize upside exposure and yet guarantee some level of recovery for a party.</p>	<p>Under the Revised Uniform Arbitration Act, parties can agree to engage in arbitration at any time during the litigation process. Colo. Rev. Stat. §§ 13-22-201 <i>et seq.</i></p>	
<p><u>Summary Jury Trial:</u> Attorneys typically present evidence to a jury in a single day with binding results.</p>	<p>Most often used when the cost of a full trial is not warranted and preserving appellate rights is not important. The parties want a decision from a jury rather than a single arbitrator or panel of</p>	<p>Often follows a ruling on a dispositive motion or when parties want a jury determination in</p> <p>In lieu of a ruling on a pending dispositive motion.</p> <p>Can be used instead of a mediation-arbitration hybrid.</p>	

	arbitrators.		
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<p><u>Collaborative Law:</u> Interest –based confidential negotiations, with collaborative counsel and a collaborative divorce process facilitator/mediator.</p>	<p>Most commonly used in divorce, estate and family business disputes, where parties need a relationship after the dispute is resolved.</p>	<p>Timing: Can be commenced at any stage, but is most commonly undertaken at the beginning of the case. Information gathering continues throughout the process, but is required prior to attainment of agreements.</p>	<p>Neutrals include Collaborative Divorce Process Facilitator/Mediator and Financial Neutral</p> <p>Parties are assisted by professionals on collaborative team— but control the process</p> <p>Each party has individual counsel.</p>
<p><u>Tribal Mediation:</u> Parties are urged to engage in mediation with an elder, to resolve the dispute consistent with tribal values</p>	<p>A specialized, culturally sensitive mediation process offered by tribal government to resolve disputes without a hearing</p>	<p>Timing: Can be commenced at any state, but is most commonly undertaken at the beginning of the case.</p>	<p>Neutral Includes a tribal mediator, or panel</p> <p>Parties speak for themselves</p> <p>Each party may have counsel or a tribal advocate</p>

APPENDIX B: RELEVANT COLORADO STATUTES, CIVIL RULES, AND JUDICIAL DEPARTMENT FORMS

Title	Statute #	Description
The Colorado Dispute Resolution Act (CDRA)	CRS §§ 13-22-301 <i>et seq.</i>	Authorizes and regulates court referrals to mediation and ancillary forms of ADR
Mediators' exemption from mental health professional licensure	CRS § 12-43-215	Exempting mediators resolving judicial disputes under CDRA from licensure requirements as psychologists, social workers, professional counselors, and marriage and family therapists
Social Workers	CRS § 12-43-403(2)	Licensed social workers may include mediation practice
Construction Defects	CRS § 13-20-803.5 (6)	When construction contract includes mediation provision, completion of mediation is condition precedent to filing suit.
Uniform Arbitration Act	CRS § 13-22-201 <i>et seq.</i>	Governs arbitrations by agreement made after August 4, 2004.
Colorado International Dispute Resolution Act	CRS § 13-22-501 <i>et seq.</i>	Authorizes court referral under CDRA to mediation or arbitration in cases involving international commercial and noncommercial disputes
Structured Settlement Protection Act	CRS § 13-23-101 <i>et seq.</i>	Governs payments and transfer of court-approved structured settlements
Uniform Dissolution of Marriage Act	CRS § 14-10-124(8)	Court may order mediation pursuant to the CDRA to assist parties in formulating, implementing, or modifying a parenting plan
Uniform Dissolution of Marriage Act	CRS §§ 14-10-115	Court may order mediation pursuant to the CDRA to assist parties in formulating, implementing, or modifying child support
Uniform Dissolution of Marriage Act	CRS § 14-10-128.1	Court shall not appoint parenting coordinator unless, among other findings, mediation is inappropriate or been unsuccessful
Uniform Dissolution of Marriage Act	CRS § 14-10-129.5	Court may order mediation prior to hearing to enforce parenting time order or schedule

Parenting Time – Federal Child Access and Visitation Program	CRS § 14-10.5-104 (1)(a)(I)	Authorizing state to develop a parenting time enforcement program that includes “both voluntary and mandatory” mediation
Mobile Home Park Act	CRS § 38-12-216	Mobile Home park and home owner may submit dispute to mediation prior to filing suit
Colorado Common Interest Ownership Act	CRS § 38-33.3-124	Authorizes mediation in disputes involving common ownership association and unit owner

Colorado Rules of Civil Procedure

Settlement Conference	C.R.C.P. 121 Section 1-17	Allows parties to ask a non-presiding judge to conduct a settlement conference in any civil case
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Colorado Rules of Professional Conduct

Fees	CRPC 1.5A Comment [9]	A shall submit fee disputes to established CBA mediation procedures
Attorney as Advisor	CRPC 2.1	“A lawyer should advise the client of alternative forms of dispute resolution”

Colorado Code of Judicial Conduct (2010)

Judges’ Extrajudicial Activities- Arbitrator /Mediator	Rule 3.9	“A judge shall not act as an arbitrator or a mediator...unless expressly authorized by law.”
	Rule 3.9 Comment [1]	“This Rule does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of assigned judicial duties.”
Code Applicability	II.	Senior judges, while under contract pursuant to the senior judge program, and retired judges, while recalled and acting temporarily as a judge, are exempted from prohibition of Rule 3.9 (Service as Arbitrator or Mediator)

	III.	A judge who serves on a part-time basis is exempted from prohibition of Rule 3.9 (Service as Arbitrator or Mediator)
	III. Comment [2]	Acting as a mediator or arbitrator is not deemed to be the practice of law.
	IV.	An Appointed Judge, during period of appointment, is exempted from prohibition of Rule 3.9 (Service as Arbitrator of Mediator)

APPENDIX C: ACKNOWLEDGMENTS AND COMMITTEE RECOGNITION

CJI and ODR wish to express their gratitude to the many individuals who have donated their time, talents, and perspectives to produce this Guide, and special gratitude is accorded Judge Karowsky, CJI, ADR Subcommittee Chair, along with Judge Karowsky’s assistant, C

KEY:

- *Executive Committee
- #Drafting Committee
- ^Review Committee
- +Colorado Judicial Institute – Alternative Dispute Resolution Committee
- & Editors

<u>CONSTITUENCY</u>	<u>NAME</u>	<u>COMPANY</u>
Office of Dispute Resolution Director, State Court Administrator’s Office	Sharon Sturges, Director*#^&	Office of Dispute Resolution
District Court Judge– Retired	Judge Angela Arkin (ret)*#	Judicial Arbiters Group, Inc.
District Court Judge	Judge Todd Plewe*#	22 nd Judicial District
theMAC Mediator-Private-Non-Attorney	Sara Johnson*#^ Richard Fullerton#^	Bilingual Mediation Services Constructive Options
CJI- ADR Subcommittee	Diana Powell*#^+ Lynn J. Karowsky, Chair*# Marianne K. Lizza- Irwin#^ Judge Robert Hawthorne+	Gutterman, Griffiths Retired County Court Foothills Mediation and ADR Colorado Court of Appeals
CBA Family Law Rep	William King#^ Helen Shreves&	Family Law Dispute Resolution
Family Court Facilitator	Joel Borgman^	Denver District Court
County Court Judge	Jonathan Shamis^	5 th Judicial District

Program Manager - Self Help Litigant Coordinator (“Sherlock”) Program	Penny Wagner, Program Coordinator^	Colorado State Court Administrator’s Office
CBA Elder Law Section Chair	Michael A. Kirtland^	Kirtland & Seal, LLC
CBA Business Law Rep	Nicole M. Black^	Lewis Brisbois LLP
CBA Construction Law Rep	Carrie A. Rodgers^	Moye White
CBA Labor & Employment Rep	Jon Olafson^ and Elizabeth Kearney^	Polsinelli PC
CBA Litigation Rep	Lorraine Parker^	Parker Lipman LLP
CBA Real Estate Rep	Geoffrey Anderson^	Sweetbaum Sands Anderson PC
Colorado Trial Lawyers Association Representative	Michael J. Rosenberg^	The Gold Law Firm
Colorado Defense Lawyers Association Representative	John R. Chase^	Montgomery Amatzio Chase Bell Jones LLP
Academia	Prof. Tamra Pearson d’Estrée, Ph.D.^ Prof. Carol Larkin#^	University of Denver
CBA ADR	Marianne K. Lizza- Irwin, Chair Jeanne Busacca, Rep^ Patricia M. Ayd#^	Foothills Mediation and ADR Busacca & Floyd, P.C. Consilia Conflict Res, LLC
Mediator-Private	Collie Norman^ Tom Moorhead^ Greg Whitehair*#^&	Judicial Arbiter Group, Inc. IP Resolution Co.
CBA Trust & Estate Section, ADR Subcommittee	Judge Jean Stewart^	Retired Denver Probate Judge

APPENDIX D: MEDIATION STYLES

Facilitative Mediation

For facilitative mediation, the mediator uses mediation skills to help the parties exchange ideas and proposals to achieve settlement. The skills may include active listening, oversight to be sure the parties are listening to each other and feeling heard, restatement of each party's perspective to the other party, summing up and re-characterization of the parties' differences of perspective, mediator-led brainstorming and similar techniques, based on the mediator's training and experience.

Mediation is confidential. The mediation statute and Colorado Rules of Evidence prevent calling the mediator as a witness in a later proceeding, except in rare circumstances solely to verify that mediation occurred or that a Memorandum of Understanding or other document was executed at mediation. Review Rule 408 of the Colorado Rules of Evidence and associated commentary, as well as the Colorado Dispute Resolution Act, Colo. Rev. Stat. §§ 13-22-302, 307. No party is permitted to testify or otherwise offer evidence of what occurred at mediation beyond the written agreement of a party, subject to very narrow statutory exceptions. All proposals and similar memoranda exchanged at mediation are confidential and cannot be used in evidence. However, no information available or required to be produced outside the mediation acquires a confidential character by virtue of being exchanged at mediation.

Settlement in mediation is voluntary, and even if the parties are ordered to mediate, they are never ordered to settle in mediation. This is the form of ADR where the parties retain maximum control over their own affairs. No informal or oral agreement or proposal in mediation is binding, and no written draft of a memorandum is binding, until there is a signed written agreement. (A writing to be binding will generally have been SIGNED by both parties, but the statute admits narrow exceptions which may need to be briefed in a particular case.)

Evaluative Mediation

Evaluative mediation has all the same features as facilitative mediation, but goes further in terms of the mediator being requested by the parties to provide the mediator's perspective on the issues being mediated. If the mediator is a licensed attorney with litigation experience in the subject matter in dispute, the attorney-mediator's training and experience may help the parties evaluate settlement options for the case.

Early Neutral Assessment

Early Neutral Assessment, begun in Minnesota as Early Neutral Evaluation (ENE) is used in domestic relations matters, particularly involving parenting disputes, to provide the parents with the benefit of an early assessment by a mental health professional and an experienced family law attorney, in the hope that settlement can be reached between the parents without further Court involvement. ENA is considered inappropriate where there

are domestic violence allegations. ENA is part of a triage approach to divert or “funnel” disputes away from the litigation track where appropriate.

Collaborative Law

Collaborative law involves a collaborative approach to settlement of a dispute. In a collaborative divorce, the parties enter into a collaborative agreement whereby they agree to a process to reach settlement of a matter without involvement of the Court. Each party is represented by such party’s own counsel, there is generally a collaborative process facilitator/mediator, and there may be a financial neutral, as well as various other experts and advisors, as the parties determine.

Collaborative law is most frequently used for disputes regarding divorce, parenting, estate and probate, and family businesses, where the parties will likely have an ongoing relationship after the dispute is resolved. Developing better problem-solving skills for the parties to use in their future interactions is among the goals of the collaborative process.

Transformative Mediation

Transformative mediation is a variation of mediation in which the focus is not on immediate solution to a particular problem, but rather the focus is on empowerment and mutual recognition of the parties. While this type of mediation does not necessarily have a focus to resolve the dispute that is subject to a court case, it generally will be helpful to settle disputes once the focus on empowerment bears fruit. Transformative mediation may be particularly appropriate in cases where the parties will continue to parent together, or where there is another reason why the relationship of parties and their ability to handle conflict constructively is a significant issues.