

INTERIM REPORT
OFFICE OF DISPUTE RESOLUTION TASK FORCE
AUGUST 2014

The *Office of Dispute Resolution Task Force* was appointed on August 22, 2013. The *Order of Appointment* charged the *Task Force* “to consider and propose draft standards for court-referred mediators in Colorado.” The creation of this Task Force followed the Chief Justice and Chief Judges Council review of the ODR Advisory Committee’s 2012 recommendation to establish standards for mediators in all court-referred cases. This report is being submitted to Chief Justice Rice for her information and consideration of the recommendations outlined below.

The Chief Judges Council articulated the following guidance regarding the development of standards for court-referred mediators:

The Chief Judges Council recognizes the many benefits of mediation and the Council appreciates the efforts of the ODRAC to create a uniform regulatory system for mediators. The diverse circumstances existing among the judicial districts appear to be the most significant hurdle facing the Committee when attempting to draft statewide standards. One size won’t fit all in this instance and if the standards are too restrictive, the less populated judicial districts will likely be detrimentally impacted through losing the few people who now perform this service. If a component of the standards requires oversight of the mediators by the individual districts, the larger districts with many mediators may spend a great deal of time performing this task.

With these considerations in mind, the Council suggests that the Committee consider requiring a background check and some level of training for mediators. Also recommended would be inclusion of a process to grant an exemption of certain requirements in those districts where there would otherwise be an insufficient number of mediators to meet the needs of the district. Oversight of compliance with the regulations should be through a central entity and not the individual districts.

The *Task Force* originally consisted of: District Court Judge Todd Jay Plewe; Magistrate Randall Lococo; Ms. Holly Panetta – Court Programs Manager and ODR Director; and Mr. Bill Delisio – Family Law Manager of the Colorado Judicial Department; Mr. J. Gregory Whitehair, private attorney and mediator, was appointed to the Task Force on July 11, 2014.

On October 29, 2013, the *Task Force* submitted a DRAFT POLICY ESTABLISHING STANDARDS FOR MEDIATORS ACCEPTING COURT-REFERRED CASES PURSUANT TO §13-22-311, C.R.S. The Task Force members met with then Chief Justice Bender and incoming Chief Justice Rice to discuss next steps. The Task Force members confirmed Justice Rice’s commitment to their continued work on this project and were directed to circulate the policy and to gather feedback.

The DRAFT POLICY was distributed widely to the public, the courts, the mediation community, and the private bar. The DRAFT POLICY generated spirited discussion and comment. The DRAFT POLICY is posted for public access on the Colorado Judicial Branch website at: <http://www.courts.state.co.us> on the [Office of Dispute Resolution Advisory Committee](#) page.

The *Task Force* views the DRAFT POLICY as an effort to help ensure quality mediation / ADR in the State of Colorado in court referred cases. This is viewed by the *Task Force* as an effort to improve the system in conjunction with other access to justice initiatives.

Since submission of the DRAFT POLICY, the *Task Force* members have engaged in the following activities:

- 10/31/13 – Attendance and presentation at Statewide ADR Conference (Judge Plewe, Holly Panetta)
- 12/9/13 – Meeting with Chief Justice Bender and Chief Justice Rice (Judge Plewe, Holly Panetta, Magistrate Lococo, Bill Delisio)
- 1/ 24/14 – 3/9/14 – Online Survey sent to various organizations and individuals
- 2/7/14 – Town Hall Meeting in Denver (Judge Plewe, Bill Delisio, Holly Panetta, Greg Whitehair)
- 2/19/14 – Teleconference with ODR Mediators (Judge Plewe, Bill Delisio, Holly Panetta, Magistrate Lococo)
- 3/17/14 – Meeting with judges and court staff in El Paso County (Judge Plewe, Holly Panetta)
- Meeting with El Paso County Bar Association members (Judge Plewe, Holly Panetta)
- 3/17/14 – Meeting with Chief Judge, District Administrator and ADR manager in Pueblo County (Judge Plewe, Holly Panetta)
- 3/27/14 – District Administrator meeting (Holly Panetta)
- 4/9/14 – Meeting with concerned ADR professionals and Chief Justice Rice (Holly Panetta)
- 4/9/14 - Attended Mediator Association of Colorado Board meeting (Magistrate Lococo)

- 4/17/14 – Attended mediation subcommittee meeting of the Elder Law Bar Association (Holly Panetta)
- 4/18/14 – Attended Executive Council of Family Law Section of CBA via telephone (Judge Plewe)
- The *Task Force* has attempted to reach out via email, telephone, or in person to the Chief Judge in each Colorado judicial district.
- The *Task Force* is has been open to email and telephone calls. Most of this contact has come through Holly Panetta who shares the correspondence with *Task Force* members.
- Beginning in May 2014, J. Gregory Whitehair has met with representatives of JAMS, JAG, the ADR Section of the Colorado Bar Association, and the Business Council of the CBA.

Below is a generalized synopsis of the feedback / comment received by the Task Force:

1. Most individuals responding to the survey support *some* form of credentialing in court-referred cases. The concepts of a criminal background check, a 40-hour course, continuing education, and some type of minimal complaint process were all mentioned favorably.
2. The concept of a “Mediating in Colorado Courts” course has received very positive feedback. Many suggestions were made regarding the content of such a course.
3. There was some criticism voiced that the online survey used by the *Task Force* was somewhat biased, and did not ask questions in an open-ended way.
4. Many believe that the standards proposed by the *Task Force* are set too low.
5. Some individuals oppose any type of regulation of mediators in court-referred cases. They argue that there is not a material problem and they have not seen any significant complaints. This group contends if there is a problem at all, the problem is the dramatic increase in self represented parties.
6. The idea of “grandfathering” current mediators who have not taken a 40-hour course has been criticized by some, and welcomed by others.
7. Some commented that licensed attorneys and retired judges should not have to comply with any credentialing requirements for mediators in court-referred cases. Conversely, many argue that no exceptions should be made for licensed attorneys or retired judges as the roles of attorney, judge, and mediator are distinctly different.

8. One line of comment recommends that the current ODR program be expanded. They argue that the ODR program should receive enhanced funding and emphasis from the State Court Administrator's Office and the Colorado Legislature. These proponents argue that ODR already certifies mediators in the form of contracting thus suggesting special knowledge for credentialing oversight.
9. Some have taken the opportunity to voice their frustration with the traditionally limited number of ODR contractors. Others have noted that expanding ODR's list of contractors would dilute the number of referred cases and undermine the contract corps' commitment to this work.
10. Some individuals question whether the Supreme Court has the legal authority to require mediator credentialing in court-referred cases and suggest further that the Office of Dispute Resolution does not have the authority to regulate non-ODR mediators in court-referred cases.
11. Many respondents, including members of the Bar Association, particularly the Business Law Council and the ADR section, believe that the only place for credentialing is in domestic relations cases, not in general civil litigation cases. In the domestic relations arena, some question the competence of certain mediators, particularly those without legal training in family law, to facilitate acceptable agreements for Court approval. Others note that parties in domestic relations cases are the most likely to be ordered to attend mediation, are often self-represented, and are likely to be unfamiliar with the judicial process and system. NOTE: The most recent statistics for fiscal year 2013 show that 66% of all domestic relations cases statewide did not have an attorney involved – and that 76% of parties statewide in domestic relations cases did not have an attorney. Contrast this with typically represented parties in most other general litigation settings.
12. The complaint process proposed by the *Task Force* in the DRAFT POLICY has received criticism.
13. Some judges and court staff have argued that individual judicial districts should have the authority to maintain their own mediation / ADR programs. These districts want any new policy to specifically allow a judicial district to maintain or create in-house mediation programs.
14. Rural areas have expressed concern that new or increased credentialing standards may result in a reduced number of mediation options in rural judicial districts. Along these lines, rural jurisdictions are concerned that if standards are too onerous, potential and current mediators may not see the credentialing process as financially viable.
15. The proposal by the *Task Force* that certain case types (i.e. small claims and FED) should be exempt from the credentialing requirement has been criticized.

16. It has not yet been established whether a credentialing protocol for court-referred mediators would have due process rights.
17. Some have noted that any credentialing program or oversight function will likely require increased monies from the General Fund, a levy on affected mediators to compensate for the oversight, or both.

CURRENT RECOMMENDATIONS OF ODR TASK FORCE

The proposal submitted in October of 2013 has reignited a substantive discussion about mediator credentialing in the Colorado ADR and legal communities. The *Task Force* members will continue their effort to inform and visit with interested groups and persons regarding the proposal.

The *Task Force* recommends:

- A. Credentialing of Mediators in Domestic and Juvenile Cases
 - B. Development of Complaint Process
 - C. Permit Judicial Districts to Set Local Standards
 - D. Development of Best Practice Training for Court-Referred Mediation
 - E. Ongoing Outreach to Domestic Relations Bench
- A. Credentialing of Mediators in Domestic and Juvenile Cases: The original *Task Force* members continue to support the credentialing effort in court-referred cases. They view this effort as an access to justice issue and a means to improve the system as opposed to a means to solve a problem. Much criticism has been levied that there is not a general mediation “problem” to be fixed. The *Task Force* responds as a whole that any recommendations for change are intended to elevate and improve mediation within the court context throughout the State of Colorado.

After considering feedback and comment to date, the *Task Force* is of the view that the original suggestion of across-the-board credentialing should be modified to initially require mediator “credentialing” in “court referred” domestic relations cases (DR and JV case types) only.

Anecdotally, the main complaints and concerns related to mediation in court-referred cases arise in DR cases. DR is a high conflict arena and a highly specialized area of the law, with complex issues and a majority of pro se parties. Mediators in DR cases are frequently working with unsophisticated parties, and are sometimes themselves under-trained in the nuances of complex DR orders.

Importantly, virtually all contested domestic relations cases involve Colorado’s most precious resource – its children. And children deserve the best outcome and service possible when their rights are at stake in court-referred mediation.

- B. Development of Complaint Process for Court Referred Mediators: The *Task Force* recognizes that the complaint system set forth in the DRAFT POLICY needs to be reworked. Several meaningful alternatives have been suggested and are under consideration. This will include consideration of any due process issues.
- C. Permit Judicial Districts to Set Local Standards: So long as the minimum statewide standards are met, the *Task Force* is sensitive to the desire of individual judicial districts to maintain their own mediation / ADR programs with higher standards than those proposed by the *Task Force*. Individual judicial districts should also be permitted to maintain or create an in-house mediation program under the direction of each Chief Judge.
- D. Development of Best Practice Training for Providing Mediation in Court Referred Cases: The *Task Force* would like to see the “Mediating in Colorado Courts” course developed and offered as soon as possible as an interim step.
- E. Ongoing Outreach to DR Bench: The *Task Force* is concerned with the lack of input to date from domestic relations judicial officers. Offers to present at judicial conference have been declined. The *Task Force* believes that affected judicial officers should be pressed for further comment and suggestions. The *Task Force* seeks help in this regard from the Judicial Department.

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