

Best Practices Guide for Colorado Court-Ordered Mediation

Mission of CJI and its ADR Subcommittee

One of CJI's missions is to support research into best practices and innovative programs to best serve the citizens of Colorado and improve efficiency and effectiveness of the judiciary. To this end, CJI actively supports and promotes the expanded use of Alternative Dispute Resolution methods by the judiciary in order to help facilitate the efficient resolution of disputes.

The Project

The current project of the CJI ADR Subcommittee is to draft and publish a Best Practices Guide for Colorado Court-Ordered Mediation. CJI is uniquely positioned to embark upon this project as a neutral party bringing together the various stakeholders in the ADR process, e.g. judicial officers, ADR professionals and attorneys. The use of and resources for mediation vary widely throughout Colorado and are inconsistent even within judicial districts. There currently appears to be no standard practice, nor judicial training for the use of mediation; nor is there a feedback loop among judicial officers, mediators and attorneys. The project attempts to meet those needs by developing guidelines and rationale for the use of mediation, and to provide a forum for communication between judicial officers and mediators.

The project will consist of five phases: (1) data collection and analysis, (2) literature review, (3) drafting, (4) circulation for comment, and (5) redrafting and publication

1. **Data Collection.** In September, 2016, Judicial Conference panel attendees used responder software to provide answers to questions about their use of court-ordered mediation. By October 28, 2016, all judicial officers were asked to respond to a 29 question Survey Monkey about their use and preference for ordering mediation in their docket. In November, 2016, ADR conference attendees will be asked to answer questions about the most effective judicial procedures and practices in the use of court-ordered mediation. The data will be analyzed with the assistance of Sharon Sturges of ODR, Marianne Lizza-Irwin and others to be appointed between November 2016 and February 2017.
2. **Literature Review.** There is currently a paucity of Best Practices Guides for the use of the judiciary when ordering mediation. Only Alabama and Utah seem to have published recent editions, but various academics and mediation groups have published literature on the subject. An extensive review will be conducted to compare national standards and concerns to those issues facing Colorado courts. Select members of the drafting committee will be asked to conduct the review between now and March.
3. **Drafting.** It is planned that the Drafting Committee will begin its work in mid to late March 2017 with the goal of producing a rough draft by the end of the year. It is envisioned that the drafting committee will be comprised of 15-20 individuals, representing the various significant stakeholders in the process, divided into sub-groups initially to draft component parts of the Guide. It is anticipated that the Guide will consist of some general principles, followed by a series of checklists forming a decision tree assisting a judicial officer in ordering mediation, rather than suggesting a one-size-fits-all template. The Committee as a whole will meet by teleconference as frequently as it determines necessary, but hopefully not more than every other month.
4. **Circulation for comment.** If the rough draft is completed in time, it may be presented for comment to the Judicial ADR Conferences in 2017. In addition, we hope to circulate it through SCAO, the CBA, and ADR networks. The committee will determine the length of the comment period.
5. **Redrafting and Publication.** The Committee will be reconvened to consider the comments and submit a final draft by the middle of 2018. *The Colorado Lawyer* is being asked to publish an article either on the first draft seeking comment, or to publish the final draft.

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Subcommittee

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3. Domestic Relations Mediation (MCR 3.216)

“Mediation” under this rule is essentially the same process as outlined above, however, MCR 3.216 also provides for “evaluative mediation,” which offers parties the option of having a willing mediator recommend proposed settlement terms for any issues that the parties cannot resolve on their own. The court cannot order parties to evaluative mediation. Parties must voluntarily participate in this process and they are not bound by any recommended terms provided by the mediator. The mediator’s proposed settlement terms are not revealed to the court and there are no sanctions for rejecting the mediator’s proposals.

Evaluative mediation can be a useful tool where parties are unable to generate options and would like the mediator to offer recommendations. However, once the recommendations are provided, the mediator risks losing effectiveness as a mediator in facilitating further settlement discussions because the mediator may be perceived as exhibiting favoritism or as no longer being neutral. For this reason, evaluative mediation generally takes place toward the end of the parties’ negotiations and after they have truly failed to reach consensus.

The “best practices” identified for general civil mediation also apply in the divorce context, with several additions.

- (a) Best Practice: At a minimum, courts should check for active personal protection orders and open child abuse and neglect cases, and if found, should not order the parties to mediation without first conducting a hearing.

Under MCR 3.216(C)(3) parties who are subject to a PPO or who are involved in a child abuse and neglect proceeding may not be referred to mediation without a hearing to determine whether mediation is appropriate. Additionally, under MCR 3.216(D)(3) additional cases that may be exempt from mediation include:

- (1) Child abuse or neglect.
- (2) Domestic abuse, unless attorneys for both parties will be present at mediation sessions.
- (3) Inability of one or both parties to negotiate for themselves at the mediation, unless attorneys for both parties will be present at the mediation sessions.
- (4) Reason to believe that one or both parties’ health or safety would be endangered by mediation.
- (5) For other good cause shown.

Careful attention to domestic violence screening will help ensure that parties are not inappropriately brought together. Additional information and guidance for courts on domestic violence appears in the SCAO publication, “Domestic Violence Screening Protocol for