INTRODUCTION TO MEDIATION

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Mediation has become an integral part of the civil justice process. Judges order mediations on most civil cases as a matter of course. Mediations may also be called settlement conferences or intervention. Mediation need not be performed by an attorney. There is no requirement in Colorado that an individual have a license in order to be a mediator.

Statutory Framework: The Colorado General Assembly in 1983 enacted the "Dispute Resolution Act" (DRA). *C.R.S. § 13-22-301, et seq.* This act established the Office of Dispute Resolution (ODR) in the judicial department of the state. The act also provided a framework for all mediators, not just those working for ODR.

The General Assembly provided that " '[m]ediation' means an intervention in dispute negotiations by a trained neutral third party with the purpose of assisting the parties to reach their own solution." *C.R.S. § 13-22-302(2.4)*. The DRA provides that individuals using the services of ODR are responsible for payment of a fee as established by the Colorado Supreme Court. Liability of mediators is limited to "willful or wanton misconduct." *C.R.S. § 13-22-305(6)*.

Those involved in mediation are granted confidentiality. *C.R.S. §13-22-307.* There are exceptions to the general rule of confidentiality.

> (2) Any party or the mediator or mediation organization in a mediation service proceeding or a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any mediation communication or any communication provided in confidence to the mediator or a mediation organization, unless and to the extent that:
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> (a) All parties to the dispute resolution proceeding and the mediator consent in writing; or
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> (b) The mediation communication reveals the intent to commit a felony, inflict bodily harm, or threaten the safety of a child under the age of eighteen years; or
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> (c) The mediation communication is required by statute to be made public; or
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> (d) Disclosure of the mediation communication is necessary and relevant to an action alleging willful and wanton misconduct of the mediator or mediation organization.

C.R.S. § 13-22-307. This section also provides that any communication disclosed in violation of this section shall not be admitted into evidence in any judicial or administrative proceeding. *C.R.S. § 13-22-307(3).*

The DRA provides that all resolutions of a dispute, in full or partial, shall be reduced to writing and approved by the parties and their attorneys, if they are represented. *C.R.S. § 13-22-308.* The DRA is applicable to all mediations and dispute resolution programs conducted within the state of Colorado. *C.R.S. § 13-22-312.*

The Colorado Supreme Court's decision in *Yaekle v. Andrews*, 195 P.3d 1101 (Colo. 2008) has established parameters for trial courts to determine if a settlement agreement has been entered into by the parties to a civil case. The decision examines in detail the DRA.

The supreme court reviewed the DRA and focused on two of its provisions. Section 308 states as follows:

> If the parties involved in a dispute reach a full or partial agreement, the agreement upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any. If reduced to writing and 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.

C.R.S. §13-22-308(1). The court was presented with the argument that section 308 provides the only means of enforcing a settlement between the parties. The court held that section 308 does not preclude enforcement of a settlement that has become a contract between the parties under common law principles.

The tougher question arose when the court reviewed section 307 which provides confidentiality to settlement proceedings. Section 307 reads, in part, as follows:

> Any party or the mediator or mediation organization in a mediation service proceeding or a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any mediation communication or any communication provided in confidence to the mediator or mediation organization.....

C.R.S. §13-22-307(2). Section 307 precludes disclosure of any communication made in a mediation, unless covered by one of the exceptions in the section.

The court examined the interaction between sections 307 and 308:

> Nonetheless, there may well be some cases wherein an agreement is reached among the parties in mediation, but, because all mediation communications are protected as confidential, a binding contract cannot be proven. In other cases, the final and fully executed agreement may be the only admissible evidence of a contract, and thus a court's determination as to whether or not a contract has been established at common law is determined from one document alone. However, protecting communications as confidential is distinctly different than requiring the abrogation of the common law in all mediation proceedings.

Yaekle v. Andrews, supra at 1110. Section 307 prevents disclosure of communications made during a mediation or with the mediator prior to or after the mediation. Section 307(3) provides that "[a]ny mediation communication that is disclosed in violation of this section shall not be admitted into evidence in any judicial or administrative proceeding."

The DRA grants to any court of record in the state the power to refer a case to mediation. A case may not be referred if a party objects because that party has been the victim of physical or psychological abuse by the other party. *C.R.S § 13-22-313*; *Pearson v. District Court, Eighteenth Judicial District, County of Arapahoe,* 924 P.2d 512 (Colo. 1996). A party may file an objection to referral to mediation within five days of the referral order, but such objection must be prefaced upon compelling reasons why mediation should not be ordered. *Id.* A judge of a court of record is then granted discretion to rescind the order. In addition, cases in which equitable relief only is being sought are excluded. *C.R.S. § 13-22-313(6)*.

Though no appellate court in Colorado has held that a trial judge can compel attendance of certain parties for a settlement conference, some courts have so held. *G. Heilman Brewing Co., Inc. v. Joseph Oat Corporation*, 871 F.2d 648 (7th Cir. 1987); *Pitman v. Brinker International, Inc.,* 216 F.R.D. 481 (D.Ariz. 2003). An appropriate motion should be filed if attendance of a party, insurance adjuster, or company official must be by telephone.

COLORADO DISPUTE RESOLUTION ACT

13-22-301. Short Title. This part 3 shall be known and may be cited as the "Dispute Resolution Act."

13-22-302. Definitions. As used in this part 3, unless the context otherwise requires:

(1) "Arbitration" means the referral of a dispute to one or more neutral third parties for a decision based on evidence and testimony provided by the disputants.

(1.3) "Chief justice" means the chief justice of the Colorado supreme court.

(1.7) "Director" means the director of the office of dispute resolution.

(2) "Early neutral evaluation" means an early intervention in a lawsuit by a court-appointed evaluator to narrow, eliminate, and simplify issues and assist in case planning and management. Settlement of the case may occur under early neutral evaluation.

(2.1) "Fact finding" means an investigation of a dispute by a public or private body that examines the issues and facts in a case and may or may not recommend settlement procedures.

(2.3) "Med-arb" means a process in which parties begin by mediation, and failing settlement, the same neutral third party acts as arbitrator of the remaining issues.

(2.4) "Mediation" means an intervention in dispute negotiations by a trained neutral third party with the purpose of assisting the parties to reach their own solution.

(2.5) "Mediation communication" means any oral or written communication prepared or expressed for the purposes of, in the course of, or pursuant to, any mediation services proceeding or dispute resolution program proceeding, including, but not limited to, any memoranda, notes, records or work product of a mediator, mediation organization, or party; except that a written agreement to enter into a mediation service proceeding or dispute resolution proceeding, or a final written agreement reached as a result of a mediation service proceeding or

dispute resolution proceeding, which has been fully executed, is not a mediation communication unless otherwise agreed upon by
the parties.

(2.7) "Mediation organization" means any public or private corporation, partnership, or association which provides mediation services or dispute resolution programs through a mediator or mediators.

(3) "Mediation services" or "dispute resolution programs" means 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.

(4) "Mediator" means a trained individual who assists disputants to reach a mutually acceptable resolution of their disputes by identifying and evaluating alternatives.

(4.3) "Mini-trial" means a structured settlement process in which the principals involved meet at a hearing before a neutral advisor to present the merits of each side of the dispute and attempt to formulate a voluntary settlement.

(4.5) "Multi-door courthouse concepts" means that form of alternative dispute resolution in which the parties select any combination of problem solving methods designed to achieve effective resolution, including but not limited to, arbitration, early neutral evaluation, med-arb, mini-trials, settlement conference, special masters, and summary jury trials.

(5) "Office" means the office of dispute resolution.

(6) "Party" means a mediation participant other than the mediator and may be a person, public officer, corporation, partnership, association, or other organization or entity, either public or private.

(7) "Settlement conference" means an informal assessment and negotiation session conducted by a legal professional who hears both sides of the case and may advise the parties on the law and precedent relating to the dispute and suggest a settlement.

(8) "Special master" means a court-appointed magistrate, auditor, or examiner who, subject to specifications and limitations stated in the court order, shall exercise the power to regulate all proceedings in every hearing before such special master, and to do all acts and take all measures necessary or proper for compliance with the court's order.

(9) "Summary jury trial" means summary presentations in complex cases before a jury empaneled to make findings which may or may not be binding.

13-22-303. Office of dispute resolution - establishment. There is hereby established in the judicial department the office of dispute resolution, the head of which shall be the director of the office of dispute resolution, who shall be appointed by the chief justice of the supreme court and who shall receive such compensation as determined by the chief justice.

13-22-304. Director - assistants. The director shall be an employee of the judicial department and shall be responsible to the chief justice for the administration of the office. The director may be but need not be an attorney and shall be hired on the basis of training and experience in management and mediation. The director, subject to the approval of the chief justice, may appoint such additional employees as deemed necessary for the administration of the office of dispute resolution.

13-22-305. Mediation services. (1) In order to resolve disputes between persons or organizations, dispute resolution programs shall be established or made available in such judicial districts or combinations of such districts as shall be designated by the chief justice of the

supreme court, subject to moneys available for such purpose. For all office of dispute resolution programs, the director shall establish rules, regulations, and procedures for the prompt resolution of disputes. Such rules, regulations, and procedures shall be designed to establish a simple nonadversary format for the resolution of disputes by neutral mediators in an informal setting for the purpose of allowing each participant, on a voluntary basis, to define and articulate the participant's particular problem for the possible resolution of such dispute.

(2) Persons involved in a dispute shall be eligible for the mediation services set forth in this section before or after the filing of an action in either the county or the district court.

(3) Each party who uses the mediation services or ancillary forms of alternative dispute resolution in section 13-22-313 of the office of dispute resolution shall pay a fee as prescribed by order of the supreme court. Fees shall be set at a level necessary to cover the reasonable and necessary expenses of operating the program. Any fee may be waived at the discretion of the director. The fees established in this part 3 shall be transmitted to the state treasurer, who shall credit the same to the dispute resolution fund created in section 13-22-310.

(4) All rules, regulations, and procedures established pursuant to this section shall be subject to the approval of the chief justice.

(5) No adjudication, sanction, or penalty may be made or imposed by any mediator or the director.

(6) The liability of mediators shall be limited to willful or wanton misconduct.

13-22-306. Office of dispute resolution programs - mediators. In order to implement the dispute resolution programs described in § 13-22-305, the director may contract with mediators or mediation organizations on a case-by-case or service or program basis. Such mediators or mediation organizations shall be subject to the rules, regulations, procedures, and fees set by the director. The tasks of the mediators or mediation organizations shall be defined by the director. The director may also use qualified volunteers to assist in mediation service or dispute resolution program efforts.

13-22-307. Confidentiality. (1) Dispute resolution meetings may be closed at the discretion of the mediator.

(2) Any party or the mediator or mediation organization in a mediation service proceeding or a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any mediation communication or any communication provided in confidence to the mediator or a mediation organization, unless and to the extent that:

(a) All parties to the dispute resolution proceeding and the mediator consent in writing; or

(b) The mediation communication reveals the intent to commit a felony, inflict bodily harm, or threaten the safety of a child under the age of eighteen years; or

(c) The mediation communication is required by statute to be made public; or alleging willful or wanton misconduct of the mediator or mediation organization.

(d) Disclosure of the mediation communication is necessary and relevant to an action alleging willful or wanton misconduct on the part of the mediator or mediation organization.

(3) Any mediation communication that is disclosed in violation of this section shall not be admitted into evidence in any judicial or administrative proceeding.

(4) 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 service proceeding or dispute resolution proceeding.

(5) Nothing in this section shall prevent the gathering of information for research or educational purposes, or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, mediation service, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.

13-22-308. Settlement of disputes. (1) If the parties involved in a dispute reach a full or partial agreement, the agreement upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any. If reduced to writing and 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.

13-22-309. Reports (Repealed)

13-22-310. Dispute resolution fund - creation - source of funds. (1) There is hereby created in the state treasury a fund to be known as the dispute resolution fund, which fund shall consist of:

(a) All moneys collected pursuant to section 13-22-305(3);

(b) Any moneys appropriated by the general assembly for credit to the fund; and

(c) Any moneys collected by the office from federal grants and other contributions, grants, gifts, bequests, and donations.

(2) All moneys in the fund shall be subject to annual appropriation by the general assembly. Any moneys not appropriated shall remain in the fund at the end of any fiscal year and shall not revert to the general fund.

13-22-311. Court referral to mediation - duties of mediator. (1) Any court of record may, in its discretion, refer any case for mediation services or dispute resolution programs, subject to the availability of mediation services or dispute resolution programs; except that the court shall not refer the case to mediation services or dispute resolution programs where one of the parties claims that it has been the victim of physical or psychological abuse by the party and states that it is thereby unwilling to enter into mediation services or dispute resolution programs. In addition, the court may exempt from referral any case in which a party files with the court, within five days of a referral order, a motion objecting to mediation and demonstrating compelling reasons why mediation should not be ordered. 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. Parties referred to mediation services or dispute resolution programs may select said services or programs from mediators or mediation organizations or from the office of dispute resolution. This section shall not apply in any civil action where injunctive or similar equitable relief is the only remedy sought.

(2) Upon completion of mediation services or dispute resolution programs, the mediator shall supply to the court, unless counsel for a party is required to do so by local rule or order of the court, a written statement certifying that parties have met with the mediator.

(3) In the event the mediator and the parties agree and inform the court that the parties are engaging in good faith mediation, any pending hearing in the action filed by the parties shall be continued to a date certain.

(4) In no event shall a party be denied the right to proceed in court in the action filed because of failure to pay the mediator.

12-22-312. Applicability. This part 3 shall apply to all mediation services or dispute resolution programs conducted in this state, whether conducted through the office of dispute resolution or through a mediator or mediation organization.

13-22-313. Judicial referral to ancillary forms of alternative dispute resolution.

(1) Any court of record, in its discretion, may refer a case to any ancillary form of alternative dispute resolution; except that the court shall not refer the case to any ancillary form of alternative dispute resolution where one of the parties claims that it has been the victim of physical or psychological abuse by the other party and states that it is thereby unwilling to enter into ancillary forms of alternative dispute resolution. In addition, the court may exempt from referral any case in which a party files with the court, within five days of a referral order, a motion objecting to ancillary forms of alternative dispute resolution and demonstrating compelling reasons why ancillary forms of alternative dispute resolution should not be ordered. Compelling reasons may include, but are not limited to, that the costs of ancillary forms of alternative dispute resolution would be higher than the requested relief and previous attempts to resolve the issues were not successful. Such forms of alternative dispute resolution may include, but are not limited to: arbitration, early neutral evaluation, med-arb, mini-trial, multi-door courthouse concepts, settlement conference, special master, summary jury trial, or any other form of alternative dispute resolution which the court deems to be an effective method for resolving the dispute in question. Parties and counsel are encouraged to seek the most appropriate forum for the resolution of their dispute. Judges may provide guidance or suggest an appropriate forum. However, nothing in this section shall impinge upon the right of parties to have their dispute tried in a court of law, including trial by jury.

(2) Ancillary programs may be established, made available, and promoted in any judicial district or combination of districts as designated by the chief judge of the affected district. Rules and regulations for ancillary forms of alternative dispute resolution shall be promulgated by the director of the office of dispute resolution.

(3) All rules, regulations, and procedures established pursuant to this section shall be subject to the approval of the chief justice.

(4) Nothing in this section shall preclude any court from making a referral to mediation services provided for in this article.

(5) All referrals under this section shall be made subject to the availability of alternative dispute resolution programs. Parties referred to ancillary forms of alternative dispute resolution may select services offered by the office of dispute resolution or by other individuals or organizations.

(6) This section shall not apply in any civil action where injunctive or similar equitable relief is the only remedy sought.