

**REPORT
OF THE
ALTERNATIVE DISPUTE RESOLUTION SECTION
OF THE
COLORADO BAR ASSOCIATION**

**RECOMMENDED GUIDELINES REGARDING UNAUTHORIZED
PRACTICE OF LAW ISSUES IN MEDIATION**

**APPROVED BY EXECUTIVE COUNCIL OF
COLORADO BAR ASSOCIATION JANUARY 12, 2007**

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Overview/Abstract

The use of formalized mediation has grown steadily within Colorado over the past ten to fifteen years. During that time there has been an increasing concern regarding the proper boundaries between mediation and the practice of law. Concurrently, there have arisen various accommodations and authorizations in order to effectuate the benefits of the mediation process. Unfortunately, these have occurred in a patchwork fashion and are not always clear or consistent.

The purpose of this report is to advance the understanding of what constitutes the practice of law in Colorado in the mediation¹ context and to suggest how the practice of law can be avoided in that context or, where unavoidable, can be *authorized* for nonlawyer mediators.²

I. Value of Mediation

Mediation has become a fundamental resource for resolving disputes in Colorado. A great and rising percentage of disputes in Colorado are now mediated within the litigation path or specifically to avoid litigation. The courts rely on mediation as a method to secure “the just, speedy, and inexpensive determination of [an] action.”³ There is evidence that the use of mediation saves courts and parties resources and results in less re-litigation.⁴ There is also evidence of higher compliance rates with mediated agreements than with court judgments, as well as greater satisfaction and increased confidence in the judicial system on the part of consumers. Fourteen years after adopting the Colorado Dispute Resolution Act,⁵ the legislature encouraged even greater use of that act, stating, “Much time and money could be saved, the courts would be more accessible, and the public would be better served”⁶

One reason mediation has become such a valuable resource is that it works to resolve disputes by focusing on underlying interests. Although sometimes framed in legal issues, many disputes are not actually driven by the legal issues; they’re driven by emotional issues, and, if the emotional issues can be resolved, sometimes the legal issues fall into place without the need for judicial resolution.

The goal of this report is to recommend guidelines which further the ability of the citizens and the courts of Colorado to use mediation to its fullest benefit, while respecting restrictions on the unauthorized practice of law and the consumer protection intended by such restrictions.

1. This report assumes mediation in which the mediator is a trained neutral third party. See C.R.S. §13-22-302(2.4).

2. This Report does not consider matters relating to the provision of neutral services by licensed lawyers. The Alternative Dispute Resolution Section understands that the Colorado Supreme Court Standing Committee on Rules of Professional Conduct has appointed a subcommittee to consider, among related issues, the duties under those rules of a lawyer who gives legal advice in the course of providing services as a neutral mediator.

3. See C.R.C.P. 1(a) (The Colorado Rules of Civil Procedure “shall be liberally construed to secure the just, speedy and inexpensive determination of every action”).

4. See, e.g., Nancy Thoennes, Center for Policy Research, *Mediating Disputes Including Parenting Time and Responsibilities in Colorado’s 10th Judicial District: Assessing the Benefits to Courts* (2002).

5. C.R.S. §13-22-301 *et. seq.*

6. Colorado House Joint Resolution 97-1020. The full text of the resolution is as follows:

WHEREAS, The General Assembly of the State of Colorado finds and declares that it is in the public interest of this state that citizens be able to resolve civil disputes without having to resort to litigation; and

WHEREAS, Much time and money could be saved, the courts would be more accessible, and the public would be better served if the Judicial Department and the courts in each judicial district would fully utilize the practices permitted and promoted by the “Dispute Resolution Act”, part 3 of article 22 of title 13, Colorado Revised Statutes; now, therefore,

Be It Resolved by the House of Representatives of the Sixty-first General Assembly of the State of Colorado, the Senate concurring herein:

That the General Assembly of the State of Colorado encourages the Judicial Department and the courts in each judicial district to find ways and procedures to expand the use of the “Dispute Resolution Act” and to find and use other techniques and programs that will permit and encourage the resolution of disputes without the necessity for litigation.

Be It Further Resolved, That copies of this resolution be sent to the Chief Justice of the Colorado Supreme Court, the State Court Administrator, the chief judge of each judicial district in the state, and the court administrator of each judicial district in the state.

II. Definitions and Boundaries of UPL

A. The Practice of Law

The concept of “the practice of law” is not defined by Colorado rule or statute but is given meaning by case law. While acknowledging that “it is not easy to give an all-inclusive definition,” the Colorado Supreme Court has determined that “generally one who acts in a representative capacity in protecting, enforcing or defending the legal rights and duties of another and in counseling, advising, and assisting [another] in connection with these rights and duties is engaged in the practice of law.”⁷ The Court’s words make clear that providing legal advice to another person constitutes the practice of law. Because the selection and drafting of legal documents for another’s use involves giving legal advice, it may also be the practice of law.⁸

Under the Court’s explanation of the term “practice of law,” an unauthorized nonlawyer generally cannot:

1. Provide legal advice to another person;
2. Select legal documents on behalf of another person;
3. Draft legal documents on behalf of another person;
4. Interpret the law as it may apply to another person’s situation;
5. Represent another person in any legal transaction or matter; or
6. Prepare a matter for trial without the supervision of a lawyer.

B. When Is the Practice of Law Authorized?

The primary purpose for regulating the practice of law is to protect the public from harm that may result from the activities of dishonest, unethical, and incompetent providers.⁹ As a general rule, only lawyers licensed to practice law in the State of Colorado may practice law in this state. Qualifications for a Colorado law license include graduation from an ABA accredited law school, passage of an extensive bar examination, and determinations of character and fitness by the Colorado State Board of Law Examiners.¹⁰

Colorado is not “territorial” in its standards, however. When it can be sufficiently established that Colorado consumers are protected, other individuals may be authorized under some circumstances to practice law.

1. *Out-of-State Lawyers.* Colorado leads the nation in allowing out-of-state lawyers to practice law in Colorado under certain circumstances. If an out-of-state lawyer is licensed and on active status in another jurisdiction, is in good standing on all licenses, and has not established domicile or a place for the regular practice of law in Colorado, that out-of-state lawyer may practice law in Colorado in matters that do not require a state court appearance. By practicing law in Colorado, however, the out-of-state lawyer becomes subject to the Colorado Rules of Professional Conduct and rules of procedure regarding attorney discipline and disability proceedings and those remedies involving

7. *Denver Bar Association v. Public Utilities Commission*, 154 Colo. 273, 391 P.2d 467 (1964).

8. See March 28, 2003, *Report to the American Bar Association House of Delegates by the ABA Task Force on the Model Definition of the Practice of Law* (“ABA Task Force Report”).

9. *Id.* at p. 5; see also American Bar Association, *Standards for Imposing Lawyer Sanctions* (1991 and Supp. 1992), § 1.1.

10. See C.R.C.P. 201 *et. seq.*

injunctive proceedings contained in C.R.C.P. 234(a). *See generally*, C.R.C.P. Rules 220, 221, 221.1, and 222.

2. *Other Licensed Individuals.* Other individuals who are licensed by the State of Colorado may be given leeway to “practice law” in limited situations due to their specialized training and licensing requirements. For example, real estate brokers are licensed under C.R.S. 12-61-101, *et seq.* Brokers must pass an examination to demonstrate the competency of the applicant, and satisfy Colorado Real Estate Commission fitness and character requirements. Brokers must also comply with rules established by the Colorado Real Estate Commission or be subject to discipline. The Colorado Supreme Court authorized licensed brokers, on behalf of their clients, to select and fill in standard form legal documents approved by the Real Estate Commission in *Conway-Bogue Realty Investment Co. v. Denver Bar Assoc.*, 135 Colo. 398, 312 P.2d 998 (1957).
3. *Other Statutory Authorizations.* While the Colorado Supreme Court has exclusive jurisdiction to regulate the practice of law, the Court often defers to the legislature in its determination of appropriate exceptions to the practice of law. For example, an officer of a closely held entity, empowered by a resolution of that entity, is permitted by Colorado statute to represent the entity’s interests before courts of record and administrative agencies in certain matters.¹¹ Licensed collection agencies are also allowed under Colorado statute to engage in some conduct that may otherwise be considered to be the practice of law.¹² Likewise, federal statutes authorize accreditation of nonlawyers in some immigration and other federal agency matters.
4. *Trial Court Authorization.* Trial courts often rely upon individuals from other disciplines to assist with matters including probation requirements, the protection of a minor’s interests, or mediation requirements. This assistance is mandated by statute or Supreme Court rule or directive. Even if some of this assistance could be technically considered the practice of law but is otherwise necessary to complete the court-assigned task, such assistance is “authorized” if that particular conduct is approved by the trial court.
5. *Other Administrative Regulation Authorizations.* If a state or local agency regulation or practice authorizes participation by a nonlawyer, and if adequate protections are in place, then such participation that would otherwise be considered the practice of law will be allowed as the “authorized practice of law.” For example, business organizations and labor unions may represent employers or employees in employment matters before the state civil rights division or state department of labor; and engineers or development planners may participate and represent others in county commissioner and land use planning matters.

III. The Problem

Mediation in and of itself is not the practice of law. In Colorado lawyers and nonlawyers can provide such services. Further, mediators do not have clients in the mediation process, in the sense that a lawyer has a client to which the lawyer owes the special duties delineated in the Colorado Rules of Professional Conduct.

11. C.R.S. §13-1-127.

12. *See* C.R.S. §12-14-101 *et seq.* (the Colorado Fair Debt Collection Practices Act)

Nonetheless, there are times when the boundaries between the mediation process and the practice of law become blurred. In order to reach settlements that the parties consider satisfactory, mediators may knowingly raise issues and assist in their resolution. Under such circumstances the practice of law may sometimes occur within the practice of mediation: The mediator sometimes provides legal interpretation, renders legal advice, and selects or drafts legal documents for the parties. And sometimes it appears that the courts themselves expect that this will be done in certain contexts.

Any person who offers to serve as a professional mediator gives the parties and the public the expectation that the mediator has the training and competency to mediate effectively.¹³ The mediator should also have familiarity with the general principles of the law governing any area in which the mediator is willing to serve.¹⁴ That the mediator should be grounded in the law applicable to the area in which the mediator is serving, while avoiding the unauthorized practice of law, may seem to be a paradox. But there must be a difference between possessing sufficient knowledge about the subject matter to provide useful services and undertaking the kinds of activities that are themselves the practice of law.

While the Colorado legislature has promulgated the Colorado Dispute Resolution Act (“CDRA”) to address some mediation issues, the mediation profession in Colorado is largely unregulated and guided by non-mandatory rules of ethics. Whether a mediation is taking place voluntarily, subject to a court order or under the auspices of the Office of Dispute Resolution (“ODR”) within the Judicial Branch it arguably raises different issues with regard to the unauthorized practice of law.

IV. Avoiding the Unauthorized Practice of Law

A. Acting under Appropriate Authorization

As summarized in Section II.B, nonlawyers may be authorized to practice law in limited ways. Certain mediator practices which are considered the practice of law, such as the selection and drafting of documents which affect other persons’ legal rights, are authorized to a limited degree by the CDRA, by trial court orders and by administrative rules (the adopted rules for ODR mediators).

1. Authorization by CDRA

The Colorado Dispute Resolution Act (“CDRA”) implies the authorization of nonlawyers to mediate and to draft settlement agreements or memoranda of understanding as they are frequently termed in mediation.¹⁵ Under the CDRA, a mediator is “a trained individual who assists disputants to reach a mutually acceptable resolution of their disputes by identifying and evaluating alternatives.”¹⁶ Further, “[i]f 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.”¹⁷

The implication of the CDRA is that the settlement agreement may be drafted by the mediator, for approval by the parties and their attorneys, if any, and for signature by the parties. Because the

13. C.R.S. §13-22-302(4)

14. The Colorado Council of Mediators, *Mediators Revised Code of Professional Conduct*.

15. See § II.B.3 of this report.

16. C.R.S. §13-22-302(4)

17. C.R.S. §13-22-308

CDRA clearly does not require the mediator to be a lawyer, it thus serves as statutory authority for a nonlawyer mediator to draft a written settlement agreement. (The content of a drafted agreement is discussed below at Section IV.B.4.)

Although mediators help resolve many kinds of disputes, marital dissolution and post-dissolution disputes are treated specifically in this report because they are so numerous, a large percentage of these cases are filed *pro se*, courts expect full and comprehensive agreements, and court-approved forms are provided online and in most district court offices. Since the CDRA authorizes a nonlawyer mediator to draft a mediated agreement, it is appropriate for a mediator to assist the parties in the selection, use, and preparation of certain forms to assure coverage of issues and topics in the development of a mediated separation agreement, parenting plan and/or child support plan. Forms not central to the core objective of mediating the issues or required to reach an agreement for separation or parenting should not be used or drafted by a mediator, since that is not within the ambit of the CDRA's authorization to draft mediated agreements.

Examples of court-approved forms on the Colorado Judicial Department website which are central to the process of mediating marital dissolution and post-dissolution disputes and therefore are appropriate for use and drafting by the mediator in the mediation include Parenting Plan, Separation Agreement (With Children) or Partial Separation Agreement or Information for the Court, Separation Agreement (Without Children) or Partial Separation Agreement or Information for the Court. These forms or their equivalents may be used in mediation as the drafted agreement or memorandum of understanding under the authorization of the CDRA, whether intended for temporary orders, final orders, or post dissolution matters. Depending on the situation of the parties, supporting documents consisting of financial affidavits and child support worksheets may be required as part of a mediated agreement. Therefore, court-approved forms and computations for financial data, or comparable forms and computation software, may also be used or drafted in the mediation. These include : Financial Affidavit, and Worksheet A or B Child Support Obligation as appropriate.

Examples of forms or pleadings which the parties or their attorneys are free to draft, but which ought not be drafted by the mediator include motions, petitions, orders, and other procedural pleadings.

2. Authorization by Trial Court Order

Many courts across the state are ordering cases to "ADR," or mediation, under the courts' authority to assign tasks to individuals to assist the courts in handling cases. Since such mediation proceeds under court order, such orders serve to authorize the chosen mediators to "practice law" to the extent necessary to render their mediation services.

The Alternative Dispute Resolution Section proposes that a new, uniform court order be developed for use whenever a court wishes to order ADR or mediation so that it more clearly authorizes nonlawyer mediators to fulfill that order. The new, uniform court order should include the following:

When using mediation, the parties understand that:

- 1) The primary purpose of the mediator's service is to assist them to reach a mutually acceptable resolution of their dispute;
- 2) Whether the mediator chosen is or is not a lawyer, the mediator cannot and will not provide legal advice to either or both parties;
- 3) Any documents used and prepared by the mediator are to be ancillary to the mediation process and are not intended to constitute legal advice;
- 4) The mediator is not obligated to identify or resolve legal issues;
- 5) The parties' settlement may be waiving or compromising legal rights; and

6) It is the responsibility of the parties to obtain legal advice if they so choose.

Any mediator chosen by the parties who operates under a written agreement to mediate, which includes the disclosures in this order, shall be authorized by this court to act as the parties' mediator. In so doing, the mediator may develop and draft a memorandum of understanding that reduces the agreement of the parties to writing, if requested by the parties.

For domestic relations cases, the following might be included in the order:

Mediators may use the court-approved domestic relations forms, or comparable forms or computation software, to identify and help resolve the substantive issues and decisions of the parties. These include Parenting Plan, Separation Agreement (With or Without Children) or Partial Separation Agreement or Information for the Court, Worksheet A or B Child Support Obligation, and Financial Affidavit, or other court-approved forms designed for communicating to the court the substance of the parties' agreements, as such forms may be developed and published by the Colorado Judicial Department.

Such a court order would cover all court-ordered mediations, effecting an "authorization" for the mediators' "practice of law." For mediations that are not court ordered, the CDRA as described in Section IV.A.1 or the rules described in Section IV.A.3, or both, may provide the authorization needed for the nonlawyer to avoid engaging in the unauthorized practice of law.

3. Authorization by Administrative Rule

Office of Dispute Resolution (ODR) mediators are expressly authorized by the Colorado Supreme Court to draft a memorandum of understanding. The ODR is established by statute and authorized to establish its rules and procedures for ODR mediators, which rules and procedures are subject to the approval of the Chief Justice of the Colorado Supreme Court.¹⁸

The ODR Policies and Procedures Manual, its administrative rules and procedures, do not require its mediators to be lawyers. Further, the ODR rules and procedures state:

Mediators shall encourage parties to retain attorneys and to take interim and finalized memoranda to their attorneys for a review of their legal rights and responsibilities.

Mediators shall explain to parties that the memorandum is not a binding agreement until it is approved and signed by the parties and their attorneys. Mediators may also explain that, even if the memorandum is approved by the parties and their attorneys, it must be approved by the court.¹⁹

ODR is in the process of revising its Policies and Procedures Manual. It is anticipated that the revised Manual will address the issue of use of court-approved forms by mediators and will incorporate the final version of this report.

B. Recommended Practices

As described above, a nonlawyer mediator has a certain degree of protection when acting under a statute, court order or administrative rule. In other situations, such as a mediation that is not court-ordered or that occurs before litigation commences, nonlawyer mediators are advised to adhere to the

18. C.R.S. §13-22-303 and C.R.S. §13-22-305(4).

19. ADR Policies and Procedures Manual, page 28.

recommendations and best practices set forth below in this Section IV.B in order to minimize the potential for the unauthorized practice of law.

The risk that the mediator may be practicing law is mitigated when parties are represented by counsel, especially if counsel are present during mediation sessions. The following recommendations are made with particular emphasis on the situation where the parties do not have counsel or their counsel are not present, but these recommendations are not limited to those situations. They are made so that mediators will have guidance in their efforts to provide quality mediation services and either avoid the practice of law or provide only authorized legal services.

1. Written Agreement to Mediate

If the mediator is a lawyer, a lawyer-client relationship may be established if it is shown that a party to the mediation believed that the lawyer-mediator has expertise in legal matters and that the party sought and received advice from the lawyer-mediator on the legal consequences of the party's past or contemplated actions. The existence of a lawyer-client relationship may be inferred from the conduct of the party and the lawyer-mediator. The proper test is a subjective one, and an important factor is whether the party reasonably believed that such a relationship could and did exist. These principles were established in *People v. Bennett*, 810 P.2d 661 (Colo. 1991). Although *Bennett* involved a licensed lawyer and determined the existence of a lawyer-client relationship between that lawyer and another person, it likely has application, at least by analogy, to the nonlawyer mediator, if the mediation parties reasonably believe they are receiving legal advice from the mediator. Notifying the parties that the mediator is not hired to provide legal advice to the parties and is not a lawyer, if this is so, is thus an important step for a mediator to take to avoid the unauthorized practice of law; although it is not necessarily sufficient to preclude reliance by a party upon the legal advice given by the mediator during the process.

Especially when the disputants are not represented by legal counsel, the mediator should use a written agreement to mediate clarifying the mediators' role. The parties should be asked to sign that agreement before mediation services are provided. As summarized in the above proposed court order, such an agreement should include statements similar to the following:

- a) We understand that the primary purpose of the mediator's services is to assist the parties to reach a mutually acceptable resolution of the dispute.
- b) [*If the mediator is not a lawyer*] We understand that the mediator is not a lawyer and cannot provide legal advice to any party involved in mediation.
- c) [*If the mediator is a lawyer*] We understand that the mediator will not be acting as a legal advisor in the mediation and, accordingly, will not be providing legal advice to the parties in the mediation.
- d) We understand that any documents that are prepared in the course of the mediation will only be those that are ancillary to the mediation process and the recordation of our agreement and are not for the purpose of giving legal advice.
- e) We understand that the mediator is not obligated to identify or resolve legal issues, whether or not raised by us in the course of the mediation.
- f) We understand that we may be waiving or compromising legal rights by settlement of the dispute and our claims.
- g) We agree to obtain appropriate legal and other professional advice on any issue of interest to us, and not to rely upon the mediator for any such advice.

Before the parties sign the agreement to mediate, the mediator should orally call their attention to these statements.

2. Avoiding Giving Legal Advice During Mediation

In general, a mediator can give the parties information about the law so long as the mediator does not dispense legal advice. The line between the two may be difficult to draw, but the following may serve as an example. A mediator may not tell a party what statutes may apply to an issue, because the mere process of identification is a legal determination that some statutes apply and others do not. However, a mediator may give a copy of a statute to a party if a form on the court website contains a reference to that statute or if a party requests a copy of a specific statute. Further guidance on the distinction between legal information and legal advice may be found in the determination of the Colorado Judicial Department about what services a court clerk can and cannot render.²⁰

Further, when the parties' counsel are not present, a mediator should not give the parties predictions about how a particular issue is likely to be resolved by the court, because to do so would be to give legal advice. The following kinds of statements are permissible, for they do not constitute legal advice and do not violate the mediator's duty of impartiality: The mediator may make an observation which is an obvious matter of fact or logic, may give feedback from the perspective of how the mediator would react if he or she were a juror hearing this information, and may ask questions to reality-test a party's expectations and understanding of the best, or worst, alternative to a negotiated agreement ("BATNA / WATNA").²¹

A mediator should not:

- a) Hold himself or herself out as a lawyer for either or both of the parties;
- b) State that parties to a mediation do not need a lawyer;
- c) Advise parties about their legal rights or responsibilities, or imply that a party can rely on the mediator to protect her or his legal rights;
- d) Draft a final settlement agreement that goes beyond the issues agreed to by the parties.²²

20. See "Legal Advice vs. Procedural Information" at the Self-Help Center at www.courts.state.co.us, listing the following (numbering added): 1. We can answer general questions about how the court works. 2. We can provide you with contact information for legal services programs. 3. We can give you general information about court rules, terminology, procedures, and practices. 4. We can provide court schedules and information on how to get a case scheduled. 5. We can provide you with certain information from your case file. 6. We can provide to you or refer you to court forms and instructions. 7. We can review your forms by checking for signatures, notarization, correct county name, and case number. 8. We can answer general questions about court deadlines. 9. We can tell you whether or not an order has been issued and what the order is. 10. We cannot explain judicial decisions or let you speak to the judge outside of the courtroom. 11. We cannot refer you to specific lawyers, contact programs or lawyers for you, or give answers that involve legal advice. 12. We cannot advise you as to how the court rules and procedures will be applied to your case. 13. We cannot advise you whether you should bring your case to court or give you an opinion about what will happen if you bring your case to court. 14. We cannot provide you with information that has been restricted by court order or law. 15. We cannot tell you how you should complete the forms or complete the forms for you. 16. We cannot correct forms for you or tell you what corrections should be made. 17. We cannot tell you what to say in court. 18. We cannot talk to the judge for you or change an order from a judge.

21. For example, a mediator might ask: "Have you thought about what happens if you go to court and lose?" "How do you think you can prove that in court?" "Even if you win in court, can you collect from this party?" "How long will it take to collect if you proceed in court (through trial, possibility of appeal, attempts to collect, etc.?" "How much of your time and energy will it take to see this case through in court (and possible appeal)?" "How will proceeding in court affect your relationship with this person?" "How will taking an extremely adversarial stance affect your children?" Depending on the responses, the mediator may want to suggest the party consult an attorney for legal advice.

22. Association for Conflict Resolution, *Draft Report of the Task Force on the Unauthorized Practice of Law*, August 2002. See the further discussion in the fifth paragraph of Section IV.B.4.

3. Use of Court-Approved Forms During Mediation

a) Selection of Pleading Forms Generally

Generally a mediator should not select or use pleading forms. A mediator should recognize that the mediator's selection of pleading forms to be used by or for *pro se* parties may be considered to be the practice of law. The selection process may imply more or different issues than the parties have decided to mediate. Use of such forms may give rise to a misunderstanding that the mediator is giving legal advice. The use of particular forms may also provide additional legal rights that were not contemplated by the parties.

Likewise, the mediator needs to be particularly attentive to his or her conduct in connection with the parties' selection and use of pleadings.

b) In Dissolution of Marriage and Parenting Settings

Because *pro se* dissolution, parenting, and child-support matters make up such a large percentage of court filings, the Colorado Judicial Branch makes available to the public a set of forms and instructions for most actions and filings related to the dissolution of marriage and post-dissolution matters. Most district courts have the forms available in hard copy for purchase. These forms, and related checklists, instructions, and information brochures are also available at:

<http://www.courts.state.co.us/chs/court/forms/domestic/domestic.htm>.

Pro se parties may use any of these forms without a mediator's assistance; a mediator should neither instruct nor recommend to one or both parties which form to use or how to fill it out except as authorized by statute, trial court order or administrative rule as discussed in Section IV.A. However a mediator may provide the parties with the information as to the existence of, and how to obtain, the forms. The mediator may also provide the parties with copies of the checklists and the brochures available on the Court website, which, for example, explain the steps and process of obtaining a dissolution of marriage, both with and without children; and provide Self-Help Center information, such as the distinction between "legal advice" and "procedural information" in the context of court clerks and "what you need to know about representing yourself in court." The website is available at:

<http://www.courts.state.co.us/chs/court/forms/selfhelpcenter.htm>

4. Drafting and Filing Documents

An agreement or memorandum of understanding (sometimes referred to as an "MOU") is typically drawn up at the end of a mediation, to set forth the parties' understanding and agreement as to the resolution of their dispute. If the mediation utilized one or more of the approved domestic forms, *e.g.*, Separation Agreement or Parenting Agreement, then those forms, or comparable forms, generally serve as the mediated agreement.

The following suggestions are offered with a view toward accommodating the preparation of a memorandum of understanding, whether or not the mediator uses an approved domestic form, while enabling the mediator to avoid the unauthorized practice of law.

As referenced in Section IV.B.1, the recommended contents of the Agreement to Mediate, upon the drafting of the MOU, the mediator should remind the parties that the mediator has not given either or both parties legal advice and the mediator has not attempted to cover all potential legal rights of either party. In addition, the mediator should encourage the parties to retain attorneys and to take interim and

finalized memoranda to their attorneys for a review of their legal rights and responsibilities regarding any questions about the advisability and consequences of signing the agreement.

Mediators should also explain to the parties that a) the memorandum is not a binding agreement until it is approved and signed by the parties and their attorneys, if any, and b), even if the memorandum is approved by the parties and their attorneys, it must be approved by the court if it is intended that the memorandum be enforceable as a court order.²³

In drafting a memorandum of understanding, the mediator should take care not to insert legalese or boilerplate language nor to include matters not discussed by the parties. As a practical matter, the mediator may discover in drafting the MOU that some additional detail is needed, or that clarification would be helpful, beyond what the parties had discussed. In such a situation, the mediator may offer proposed language that captures the intent of the parties or raises new issues. It is important that the mediator draw the parties' attention specifically to any provisions that were not explicitly discussed in mediation, to ensure that the proposed language is acceptable to the parties.

A mediator should not:

- a) Utilize court case captions in a memorandum of understanding unless the memorandum utilizes a court-approved memorandum form;
- b) Sign a memorandum of understanding;
- c) Place her or his name in the caption block reserved for the name of the party or attorney filing the pleading.

Although a mediator should not sign a memorandum of understanding, it may be appropriate to place the name of the mediator in the body of an agreement, *e.g.*, "this matter was mediated by XX," or "in mediation with XX, the parties have reached the following agreements."

To avoid the use of pleadings by the mediator, the better course is for the agreement or memorandum of understanding to be a separate document which can be subsequently attached to the appropriate pleading by the parties or their counsel for filing with a court. If a dissolution of marriage case or post-dissolution motion has not yet been filed, the mediator may inform the parties of the necessity of filing but should neither assist nor file the case on the parties' behalf. If requested by all parties, the mediator may deliver the completed agreement to the court for inclusion in an open case.

V. Summary and Conclusion

Mediation is recognized as a valuable process to assist people in resolving disputes effectively and efficiently. Concerns over nonlawyer mediators potentially being charged with the unauthorized practice of law only stem from the desire to protect the public, not the desire to restrict the profession.

While mediation is not the practice of law, a number of actions that may occur in mediation are considered the practice of law. These include providing legal advice, selecting legal documents on behalf of the parties, drafting legal agreements, and interpreting the law as it may apply to the parties. This report has attempted to identify these potentially troubling areas and recommend guidelines to help mediators avoid being charged with the unauthorized practice of law. While adhering to the

23. Section 13-22-308, C.R.S.; *see also* National Union Fire Insurance Company v. Price, 78 P.3d 1138 (Co.App. 2003).

recommended practices should help any mediator avoid such situations, all mediators must understand that every case is different, and only the Colorado Supreme Court has the authority to determine what is or is not the unauthorized practice of law.

It is critical for mediators to understand that whether or not a mediator has given a party legal advice is primarily a subjective one, to be determined from the point of view of the party. Therefore, it is very important for all mediators to take steps to inform and reinforce to the parties that the mediator is not establishing an attorney-client relationship and is not giving the party legal advice. This should start with a written agreement to mediate, which clearly states that the mediator is not giving legal advice at any time in the mediation process. During the mediation, the mediator should be very clear that any opinions that could be perceived as legal advice must be clearly stated as personal opinions and not applying statutory or case law to the facts of the dispute. However, if the parties request an evaluation of their situation, the mediator may do so, but should be very careful about predicting any outcomes and in doing so qualify these opinions as personal. Finally, when drafting any agreement the parties have reached, it is important for the mediator to act primarily as a scrivener and reduce the parties' agreement to writing without adding extra legal issues. In marital dissolution matters, it is permissible for mediators to use the court-approved separation and parenting agreements as guides to and in lieu of drafting a memorandum of understanding.