

Colorado Law on Mediation: A Primer

by Steven C. Choquette

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This column is sponsored by the CBA Alternative Dispute Resolution Committee. The articles printed here describe recent developments in the evolving field of ADR, with a particular focus on issues affecting Colorado attorneys and ADR providers.

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This article provides an overview of mediation law in Colorado. It discusses the Dispute Resolution Act, appellate opinions, court rules, rules of professional conduct, judicial canons, model standards, and the Uniform Mediation Act.

In 1988, a commentator wrote in this publication that “mediation as a defined process is in its infancy in Colorado. . . .”¹ Given its current prevalence and successful usage in our state, mediation probably has reached at least adolescence by now. Nonetheless, the amount of Colorado authority available to guide mediators, advocates, and disputants remains limited. This article provides a brief overview of Colorado’s statutory, case law, court rule, and other authority regarding mediation, and briefly discusses other materials that may be of value to mediation participants.²

The Statutory Framework

The Dispute Resolution Act, CRS §§ 13-22-301 *et seq.* (“Act”) took effect on July 1, 1983.³ The general assembly has amended the Act four times since then, most recently in 1998.⁴ The Colorado Court of Appeals has declared that the Act “governs the use of mediation as an alternative to litigation,” and “applies to all mediation services or dispute resolution programs conducted in the state, including those conducted by a private mediator.”⁵ The Act contains twelve sections currently in force, and one repealed section.⁶ See Appendix 1 for a summary of the Act.

Other Colorado Statutes

In addition to the Act, forty-four Colorado statutes address mediation in some manner. Very few of these mediation-related provisions are addressed in appellate decisions.⁷ See Appendix 2 for a summary of these other Colorado statutes addressing mediation.

Colorado Case Law

Colorado appellate courts have directly or indirectly addressed the Act, and thereby Colorado law concerning mediation, in just four cases since the Act took effect in 1983. These cases provide guidance with respect to courts’ power to require mediation, enforcement of mediated settlements, and mediation communications.

Courts’ Power to Require Parties to Mediate

Colorado’s Constitution provides that “[c]ourts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.”⁸ The Colorado Supreme Court has held, however, that “[a] burden on a party’s right of access to the courts does not violate this public policy provided the burden is reasonable.”⁹

In two cases, the Colorado Supreme Court has implicitly concluded that § 13-22-311 of the Act imposes such a reasonable burden on a party’s right of access, having expressly noted that the section empowers courts to compel parties to mediate their dispute.¹⁰ The Court evidently concluded that this power to refer parties to mediation is appropriate because it is in the interest of the “just, speedy, and economic resolution of disputes.”¹¹ However, in an extraordinary proceeding initiated under Colorado Appellate Rule 21, the Court ruled that trial courts must abide by one of CRS § 13-22-311’s mandatory exemptions, and signaled that trial courts must carefully

consider parties' requests to forego mediation under the section's discretionary exemption.

In *Pearson v. District Court*¹² the trial court issued two orders, the first requiring the divorced parties to mediate a post-decree parenting time dispute and the second requiring them to mediate a motion to modify child support.¹³ Seven calendar days after the entry of the second order, the former wife moved for reconsideration of both orders, claiming that during the marriage: (1) her former husband was physically and emotionally abusive; (2) there were numerous incidents of physical violence; and (3) her former husband was convicted of assault and domestic violence in relation to one of those incidents. As a result, the former wife indicated that she suffered severe anxiety and shook uncontrollably when interacting with her former husband. After two district court judges denied the former wife's motion to reconsider,¹⁴ she filed an original proceeding in the Colorado Supreme Court.

CRS § 13-22-311(1) provides that a court "shall not refer the case to mediation services . . . 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 mediation services. . . ."¹⁵ The Court held that due to the former wife's "verified, uncontroverted claim of physical and psychological abuse by [her former husband] and established . . . unwillingness to participate in mediation,"¹⁶ the trial court was precluded from referring the case to mediation.¹⁷ The Court disagreed with the former husband's contention that the trial court could excuse a party from mediation only when that party filed a declaration of abuse and unwillingness to participate in mediation before the trial court entered the order to mediate, or filed a motion within five days of the entry of the court's order to mediate demonstrating compelling reasons why the mediation should not be ordered.¹⁸

Concerning the first contention, the Court noted that the trial court had entered its orders referring the parties' dispute to mediation *sua sponte*, and concluded that "nothing in section 13-22-311 requires a party to anticipate a mediation order."¹⁹ Thus, "when seeking excusal from mediation for physical or psychological abuse, a party need not file a declaration of abuse prior to the entry of a mediation order."²⁰ Concerning the second contention, the Court held that the statute's five-day deadline for seeking excusal from

mediation does not apply when a party claims physical or psychological abuse.²¹ Rather, the Court concluded that § 13-22-311(1) contains no time limitations for filing a declaration of opposition to a mediation order based on such abuse.²²

The Court concluded that the five-day objection requirement applies only when a party seeks relief from a mediation order under § 13-22-311(1)'s discretionary exception. In that event, the party must not only timely file a motion objecting to mediation, but also demonstrate "compelling reasons why mediation should not be ordered."²³ Thus, "[t]he discretionary 'compelling reasons' excusal, which is subject to the five-day rule, exists independently of the mandatory excusal for physical or psychological abuse."²⁴ Based on this reasoning, the Court made its rule to show cause absolute and directed the trial court to vacate the two mediation orders.²⁵

Enforcement of Mediated Settlements

Section 13-22-308 of the Act is entitled "Settlement of Disputes." Subsection (1) of that section provides:

If the parties involved in a dispute reach a full or partial agreement, the agreement upon the 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.²⁶

In 2003, the Colorado Court of Appeals analyzed this section in *National Union Fire Insurance Company of Pittsburgh, PA v. Price*.²⁷ Price was the personal representative of an estate. In that capacity, she pursued tort claims against two insurers following the decedent's death in a private airplane crash. The parties attended mediation before a private mediator, during which each party was represented by counsel.²⁸

Following mediation, the insurers contended that the parties had reached a final, oral settlement agreement. Price, on the other hand, asserted that the parties had not finalized the agreement and refused to perform the alleged settlement. When the insurers petitioned the trial court to enforce the agreement, Price contended that the Act prohibited the court from enforcing an oral agreement "because the statute permits the enforce-

ment of a mediated agreement only if the parties produce a signed, written agreement and present it to the court for approval."²⁹ After hearing evidence that included testimony from the mediator, the trial court concluded that the parties had reached a final, oral agreement during mediation and held that it could enforce that agreement.

On appeal, Price contended as a matter of first impression that the trial court erred because the Act "does not permit the compelled enforcement of an oral agreement reached in mediation. . . ."³⁰ The Court of Appeals agreed and reversed the trial court's enforcement of the alleged oral settlement agreement. The court held that the first two sentences of § 13-22-308(1) establish the following "conditions precedent to court enforcement" of a mediated settlement agreement:

1. The parties must reach some full or partial agreement.
2. All parties must agree to reduce the agreement to writing.
3. All parties must approve the writing.
4. All parties must sign the written agreement.
5. The written agreement must be presented to the court.
6. The agreement becomes enforceable as an order of the court only after the court approves it.³¹

The court of appeals concluded that § 13-22-308(1) "describes the only method for obtaining court enforcement of a mediated settlement agreement. As such, court enforcement of an oral settlement agreement is necessarily barred."³² The court added that this interpretation of § 13-22-308(1):

is consistent with the stated goals of the 1991 amendment to the Act which brought § 13-22-308(1) to its current form. The meaning of § 13-22-308(1) is plain. Our interpretation of it gives a consistent, harmonious and sensible effect to all parts of the Act and accomplishes the legislature's stated goal of strengthening the confidentiality afforded to the mediation process.³³

In a 2004 decision that does not mention § 13-22-308, the Colorado Supreme Court reached a conclusion consistent with *Price*. In *Krystkowiak v. W.O. Brisben Companies, Inc.*,³⁴ the Court held that a founder, member, and sometime-spokesperson for a nonprofit neighborhood association was not individually bound by the association's written mediation-related settlement agreement with a developer after he refused to sign the agreement.³⁵

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Recently, the Colorado District Court of Boulder County entered an order finding that a divorcing husband who mediated the terms of a separation agreement *pro se* was bound by the mediator's electronic recording of the terms of the agreement reached. There was no appeal of the district court's order and it is not binding precedent, but it may supply useful guidance to mediators and parties.

In *Reggio v. Bravo*³⁶ the parties conducted mediation regarding the terms of their separation agreement with an experienced mediator.³⁷ At the conclusion of the mediation, the mediator tape-recorded, in the parties' presence, a summary of their agreement. Both parties acknowledged on the tape that the agreement set forth by the mediator was their agreement.³⁸ They also signed a written agreement, to which the tape was then attached, stating in relevant part:

The parties have been present and listened to [the mediator] read a settlement of the issues that have been resolved in [case number] onto an audio tape, which will remain in [the mediator's] custody. This tape recording is agreed by the parties to be considered an admissible electronic writing of their settlement. It is labeled Exhibit "A" and is incorporated herein as part of this written settlement of the issues resolved. . . . The parties agree that Exhibit "A" represents a settlement of the limited issues and matters addressed therein. They further agree that Exhibit "A" is not part of the mediation process and therefore the Rules and Statutes precluding its admissibility are not applicable.³⁹

Following the mediation, the wife's counsel prepared a written agreement for the parties' execution, reflecting the terms set forth in the audio recording. The husband refused to sign that agreement, contending that its provisions regarding decision-making and the minor child's travel outside the country did not reflect the agreement.⁴⁰ The parties proceeded to hearing on this dispute, and the district court reviewed the tape.⁴¹

Without reference to *Price*, the court held that the parties had entered into an enforceable settlement agreement that was not unconscionable. The court approved the settlement agreement and ordered that the husband was bound by its terms.⁴² Although the court's order does not state as much, it appears that the mediator's document designated a "settlement," which both parties signed and

which included language indicating that the document and attached recording were not mediation communications and were admissible in court, factored into the court's decision to uphold and enforce the settlement terms.

Nature of and Protections Extended to Mediation Communications

Three years before the Colorado Court of Appeals decided *Price*, a commentator provided a thorough and useful analysis of the Act's inherent creation of a "mediation privilege" in Colorado.⁴³ Overall, the *Price* court's construction of the Act's confidentiality provision, § 13-22-307, and related definition of "mediation communication"⁴⁴ was consistent with the commentator's assessment of the Act.

As indicated above, testimony by the mediator was one of the trial court's bases for concluding that the parties in *Price* had reached a final, enforceable oral settlement during their mediation.⁴⁵ The trial court admitted the mediator's testimony over *Price*'s objection,⁴⁶ after concluding "that the Act bars admission of mediation communication to the same extent that the rules of evidence prohibit the admission of settlement discussions to prove negligence or liability."⁴⁷

Reversing the trial court's decision, the court of appeals noted that the general assembly's 1991 amendments to the Act struck language from § 13-22-307(1) that had equated mediation proceedings with settlement negotiations.⁴⁸ Further, with the amendments, the general assembly had enacted § 13-22-307(2), which the court concluded "reflects the legislature's intent to distinguish mediation communication from general settlement negotiations by creating even stronger protections for mediation communication."⁴⁹

The court of appeals also found that the general assembly's simultaneous addition of a definition of "mediation communication"⁵⁰ "reinforces the legislature's intent to keep all stages of mediation confidential."⁵¹ The new definition and the amended confidentiality provisions are harmonious, the court concluded, because both allow disclosure of mediation communication when the parties consent in writing and, "[m]ore importantly, the definition expressly excludes [from protection as a mediation communication] a 'final written agreement' that has been 'fully executed,' which § 13-22-308(1) similarly recognizes as the only form of a mediated settlement

agreement that a court can enforce."⁵² The court continued:

Taken together, these sections express the legislature's intent to create a blanket prohibition against disclosing mediation communication, whether or not the communication concerns a settlement, unless the parties consent or an exception applies. Taking into consideration the bar against admitting mediation communication into evidence, it is logical, therefore, that the existence and terms of a settlement agreement could not be proved without a signed writing that reflects those terms.⁵³

In late 2003, the Colorado Supreme Court granted *certiorari* in the *Price* case on two issues.⁵⁴ However, the Court soon dismissed the appeal on the parties' motion.⁵⁵

In a subsequent decision, *American Guarantee and Liability Insurance Company v. King*,⁵⁶ the court of appeals reaffirmed the nature of and protections extended to mediation communications, stating that "mediation communications enjoy greater protection than settlement communications under [Colorado Rule of Evidence ("C.R.E.")] 408."⁵⁷ However, the court did not further address the mediation communication issue, because the appellant had preserved on appeal only a C.R.E. 408 issue related to a mediator's statements during mediation.⁵⁸

One interesting and undecided issue is whether the Act's confidentiality—or "mediation privilege"—provisions will apply to the various "ancillary forms of alternative dispute resolution" ("ADR") defined and provided for under the Act. The commentator who examined those provisions posited that they do not apply to ancillary forms of ADR, because "the language of the privilege is clearly limited to mediation."⁵⁹ The issue has not been decided in a published appellate decision but may be ripe for legislative attention, given the Act's objective of promoting the use of both mediation and ancillary forms of ADR, as well as the general assembly's avowed support of "the resolution of disputes without the necessity for litigation."⁶⁰

Court Rules

Four Colorado Rules of Civil Procedure ("C.R.C.P.") expressly address either mediation or the Act. Rule 16.2, concerning court-management of domestic relations cases, includes a subsection concerning ADR.⁶¹ On request of the parties and written consent, the court may conduct con-

ferences "as a form of alternative dispute resolution pursuant to section 13-22-301" of the Act.⁶² The parties also may consent to the use of dispute resolution services by third parties, and Rule 16.2 reaffirms the court's power to refer the parties "to mediation or other forms of [ADR] by third parties pursuant to §§ 13-22-311 and -313."⁶³

The Colorado Rules of Civil Procedure concerning attorney discipline and disability proceedings provide that Attorney Regulation Counsel must participate in managing and supervising a Colorado Supreme Court-initiated and Colorado Bar Association-implemented mediation process.⁶⁴ Further, those overseeing the disciplinary process may offer, as an alternative to discipline, to have an attorney participate in mediation in a diversion program.⁶⁵ Finally, those acting as mediators in relation to disciplinary proceedings are immune from liability, and testimony provided to mediators in relation to disciplinary proceedings is "absolutely privileged and no lawsuit shall be predicated thereon."⁶⁶

Several other Rules of Civil Procedure do not expressly address mediation or the Act, but do concern settlement and may therefore implicate mediation or the Act.⁶⁷

Rules of Professional Conduct

Colorado Rule of Professional Conduct 2.1 (Advisor), states:

In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.⁶⁸

The Comment to this Rule states:

The last sentence of Rule 2.1 addresses the issue of alternative dispute resolution ("ADR"). Common forms of ADR include arbitration, mediation, and negotiations. Depending upon the circumstances, it may be appropriate for the lawyer to discuss with the client factors such as cost, speed, effects on existing relationships, confidentiality and privacy, scope of relief, statutes of limitation[s], and relevant procedural rules and statutes.⁶⁹

Comments to three other Rules of Professional Conduct also discuss mediation. The Comment to Rule 1.5 (Fees) states that if the Bar has established a media-

tion procedure for the resolution of fee disputes, a lawyer "should conscientiously consider submitting to it."⁷⁰ The Comment to Rule 2.2 (Intermediary) notes that "[t]he Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties."⁷¹ The Comment to Rule 6.1 (Voluntary *Pro Bono* Public Service) notes that acting as a mediator can be an activity that "improve[s] the law, the legal system, or the legal profession."⁷²

Judicial Canons 5 and 8

Judicial Canon 5 (A Judge is Encouraged to Participate in Extra-Judicial Activities) states that a judge should not act as an arbitrator or mediator except as provided in Canon 8.⁷³ The text of Canon 8 (Applicability) contains no reference to mediation, but the Comment states that "acting as a mediator or arbitrator is not deemed to be the practice of law."⁷⁴ Presumably, this means that a part-time judge could mediate disputes for pay even in his or her own judicial district, without running afoul of Canons 5 and 8, because

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he or she would not be practicing law when doing so. If that is the case, however, it may be that the “applicability” exception created by the Comment to Canon 8 swallows the foregoing rule set out in Canon 5(E). It does not appear that the issue has been addressed in a published decision.⁷⁵

Other Materials

There is a trend in the expanding field of mediation toward articulating standards of conduct and ethics for Colorado mediators. The available guidelines are not extensive, but have arisen from careful reflection, discussion, research, and debate among Colorado’s most active mediators. One of these is the Colorado Model Standards of Conduct for Mediators (“Model Standards”),⁷⁶ the key topics of which are “The Principle of Self Determination”; “Impartiality”; “Competence”; “Confidentiality”; “Quality of the Process”; “Truth in Advertising and Solicitation”; “Compensation, Fees, and Charges”; and “Dual Relationships.” These Model Standards have been described and examined elsewhere.⁷⁷

The Colorado Bar Association’s ADR Section recently has undertaken an extensive examination of and report on the issue of the unauthorized practice of law in mediation.⁷⁸ The Section’s draft report on this matter remained under consideration when this article went to press, but the recommendations therein have implications for both lawyers and non-lawyers serving as mediators.⁷⁹

Uniform Mediation Act

On August 16, 2001, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Mediation Act (“UMA”).⁸⁰ To date, the UMA has not been enacted in Colorado, but adoption of the UMA—either as drafted or with Colorado-specific amendments related to the Act, the Model Standards, or other sources—certainly has been a topic of discussion. Other commentators have supplied a very helpful overview of the UMA, and carefully compared its provisions to both the Act and the Model Standards.⁸¹

Conclusion

The dearth of Colorado appellate decisions on mediation-related issues presumably is indicative of mediation’s efficacy in resolving Colorado disputes. The Act and the few cases construing it should be the first stopping place of every mediator, advocate, and disputant assessing a mediation-related legal issue. The other authorities noted in this article, as well as many useful articles about the topic that have been published in *The Colorado Lawyer*, also merit careful consideration. As mediation in Colorado leaves adolescence and enters adulthood, there no doubt will be other authorities and resources to consult.

NOTES

1. McWilliams, “Mediation Revisited: Amendments to the Colorado Dispute Resolu-

tion Act,” 17 *The Colorado Lawyer* 1298, 1299 (July 1988).

2. A discussion of federal statutes, rules, and cases governing mediation in the U.S. District Court for the District of Colorado is beyond the scope of this article. Relevant law includes 28 U.S.C. §§ 651-58; F.R.Civ.P. 16(c)(9); D.C.Colo.L.Civ.R. 16.6; F.R.App.P. 33; and 10th Cir. R. 33.1 and 33.2. See also *Pueblo of San Ildefonso v. Ridlon*, 90 F.3d 423 (10th Cir. 1996) (attorney admonished for failure to comply with F.R.App.P. 33 and 10th Cir. R. 33.1).

3. See 1983 Colo. Sess. Laws 624-26.

4. See 1988 Colo. Sess. Laws 605-608; 1991 Colo. Sess. Laws 369-73; 1992 Colo. Sess. Laws 298-302; 1998 Colo. Sess. Laws 724.

5. *Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Price*, 78 P.3d 1138, 1140 (Colo.App. 2003), citing CRS §§ 13-22-303 and 13-22-312, cert. granted, 2003 WL 22700762 (Colo. 2003) (No. 03SC527), appeal dismissed (Jan. 29, 2004).

6. See Appendix 1 to this article.

7. See *In re Marriage of Lishnevsky*, 981 P.2d 609 (Colo.App. 1999), cert. denied (Colo. 1999) (sole statutory remedy for claims by child support obligor that support is not being spent for benefit of children is referral to mediation as per CRS § 14-10-115(b)(3)(III), and that option is discretionary with district court); *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo.App. 1995) (because “authorization” in Workers’ Compensation Act refers to physician’s status as health care provider legally authorized to treat injured worker, CRS § 8-43-205 did not require mediation of the propriety of thermographic diagnostic studies performed on the worker).

8. Colo. Const. art. II, § 6.

9. *Huizar v. Allstate Ins. Co.*, 952 P.2d 342, 346 (1998).

10. *Pearson v. District Court*, 924 P.2d 512, 515-16 (Colo. 1996); see also *Halaby, McCrea & Cross v. Hoffman*, 831 P.2d 902, 907 (Colo. 1992) (finding that trial judge referred parties to mediation under CRS § 13-22-311 “[i]n the interests of just, speedy, and economic resolution of the dispute”).

11. *Pearson*, supra, note 10.

12. *Id.*

13. *Id.* at 514.

14. *Id.* at 514.

15. *Id.* at 516, quoting CRS § 13-22-311(1); emphasis in original.

16. *Id.* at 516 (footnote omitted).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 516-17.

22. *Id.* at 517.

23. *Id.*, quoting CRS § 13-22-311(1).

24. *Id.* at 517.

25. *Id.*

26. CRS § 13-22-308(1). Section 13-22-308 used to include a subsection (2), but the general assembly deleted that subsection in a 1991 amendment of the Act. See 1991 Colo. Sess. Laws 371.

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27. *Price, supra*, note 5.
 28. *Id.* at 1139.
 29. *Id.* at 1139.
 30. *Id.* at 1140.
 31. *See id.* at 1140.
 32. *Id.* at 1141.
 33. *Id.*
 34. *Krystkowiak*, 90 P.3d 859 (Colo. 2004).
 35. *Id.* at 862, 866–67. The Supreme Court's conclusion that *Krystkowiak* was not bound by the neighborhood association's written settlement agreement derived not only from his refusal to sign the agreement, but also from the following: (1) pursuant to the provisions of Colorado's Nonprofit Corporation Act, CRS §§ 7-121-101 through -137-301, the default governance structure of which the neighborhood association's articles of incorporation and bylaws did not deviate, *Krystkowiak's* membership in the association did not individually bind him to the association's contract; and (2) because *Krystkowiak* retained his First Amendment right to dissociate from the neighborhood association, he was immune from suit for alleged tortious interference with the association's contract based on his individual petitioning activity. *See id.* at 862, 868–72.
 36. *Reggio*, Case No. 05 DR 667-5 (Colo. Dist. Court, Boulder County 2005).
 37. *Reggio*, Court's Final Orders at 1, Case No. 05 DR 667-5 (Colo. Dist. Court, Boulder County, Nov. 1, 2005).
 38. *Id.*
 39. *See id.* (The quoted text does not come from the court's Final Orders, but from a blank, sample form entitled "Stipulated Settlement of Issues in the Dissolution Case," drafted by the mediator, James R. Christoph, Esq., for use in cases such as *Reggio v. Bravo*, and supplied by Christoph to the author.)
 40. *Reggio, supra*, note 37.
 41. *Id.*
 42. *Id.* at 2.
 43. Kenney, "The Mediation Privilege," 29 *The Colorado Lawyer* 65 (Nov. 2000).
 44. CRS § 13-22-302(2.5).
 45. *Price, supra*, note 5 at 1139-40.
 46. *Id.*
 47. *Id.* at 1141, *citing* C.R.E. 408.
 48. *Id.*, *citing* 1983 Colo. Sess. Laws 625.
 49. *Id.*
 50. *See* CRS § 13-22-302(2.5).
 51. *Price, supra*, note 5 at 1141.
 52. *Id.*
 53. *Id.*
 54. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Price*, 2003 WL 22700762 (Colo. Nov. 17, 2003) (No. 03SC527), *appeal dismissed* (Jan. 29, 2004). The Court granted *certiorari* on the following issues: "[1] whether the [Act] requires that a settlement agreement reached through mediation be in writing and signed by

all parties in order to be enforceable; and (2) whether the Act treats a party's oral assent to a settlement agreement, at the close of the mediation, as a 'mediation communication' which cannot be used to prove that a settlement was reached in mediation."

55. *See* note 54, *supra*. Given Colorado law indicating that a settlement agreement need not be in writing to be enforceable, *see, e.g., South Carolina Ins. Co. v. Fisher*, 698 P.2d 1369, 1372 (Colo.App. 1984), it is unfortunate that there is no Colorado Supreme Court guidance on § 13-22-308 of the Act. Note that the court of appeals distinguished the *South Carolina Ins. Co.* case in deciding *Price*. *See Price, supra*, note 5 at 1142.

56. *King*, 97 P.3d 161 (Colo.App. 2003), *cert. denied*, (Colo. 2004).

57. *Id.* at 169.

58. *Id.* Interestingly, when limited to a review based solely on Colorado Rule of Evidence 408, the *King* court concluded that the trial court had not abused its discretion by admitting statements and opinions a mediator expressed during the mediation, for the limited purpose of demonstrating in relation to bad faith claims that the appellant-workers' compensation insurer knew before it sued an injured employee and his wife for subrogation that the mediator did not believe the insurer had a viable subrogation claim. *Id.* at 169–70.

59. Kenney, *supra*, note 43 at 65 and note 16.

60. House Joint Resolution 97-1020.

61. C.R.C.P. 16.2(i).

62. C.R.C.P. 16.2(i)(1). Notably, the parties must withdraw this consent jointly.

63. C.R.C.P. 16.2(i)(2).

64. C.R.C.P. 251.3(c)(11).

65. C.R.C.P. 251.13(a).

66. C.R.C.P. 251.32(e).

67. *See, e.g.,* C.R.C.P. 16(b)(6) and (7) (requiring parties to "explore the possibilities of a prompt settlement or resolution of the case," and certify to the district court that they have done so); C.R.C.P. 121 § 1-17 (court settlement conferences).

68. Colo.RPC 2.1.

69. Comment to Colo.RPC 2.1. For a helpful discussion of the implications of this ADR-related change to Colo.RPC 2.1, *see* Dauer and McNeill, "New Rules on ADR: Professional Ethics, Shotguns, and Fish," 21 *The Colorado Lawyer* 1877 (July 1992).

70. Colo.RPC 1.5, Comment.

71. Colo.RPC 2.2, Comment.

72. Colo.RPC 6.1(b)(3), Comment. Although the Comment does not say as much, it seems reasonable to assume that the drafters' intent was to include acting as a mediator either without compensation or for substantially reduced compensation. *Cf.* Comments to Colo. RPC 6.1(a) and 6.1(b)(1).

73. Judicial Canon 5(E).

74. Judicial Canon 8 and Comment.

75. *But see People ex rel. Colo. Bar Assn. v. Lindsey*, 283 P. 539 (Colo. 1929) (disbarment of juvenile judge justified where he had acted as an attorney, not a "friend, mediator, and arbitrator" (as he claimed), in: assisting party before him in a case to locate out-of-state counsel; counseling that party and the out-of-state counsel in contesting a will disinheriting minor children who also were subject to his jurisdiction as a judge; entering an order in the case before him approving the settlement of the will contest; and accepting "gifts" of money for providing that assistance and advice). *See also* Judicial Canon 6, which concerns and regulates the ability of judges to "receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code. . . ."

76. The Colorado Model Standards of Conduct for Mediators ("Model Standards") are available at: <http://www.courts.state.co.us/chs/court/mediation/modelstandards.pdf>.

77. Ortner and Shields, "Colorado Now has Model Standards of Conduct for Mediators, 29 *The Colorado Lawyer* 45 (June 2000). *See also* Carr, Kenney, Savage, and Willis, "The Uniform Mediation Act: Its Potential Impact on Colorado Mediation Practice—Part III," 31 *The Colorado Lawyer* 101 (July 2002) (comparing the Uniform Mediation Act with the Colorado Model Standards of Conduct for Mediators).

78. *See* "Report of the Alternative Dispute Resolution Section of the Colorado Bar Association, Recommended Guidelines Regarding Unauthorized Practice of Law Issues in Mediation," adopted Oct. 7, 2005, available at: <http://www.cobar.org/group/index.cfm?category=1224&EntityID=CAAD>.

79. *See, e.g., id.* at "Overview/Abstract."

80. The Uniform Mediation Act ("UMA") is available at <http://www.pon.harvard.edu/guests/uma> and http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.

81. Carr, Kenney, Savage, and Willis, "The Uniform Mediation Act: Its Potential Impact on Colorado Mediation Practice—Part I," 31 *The Colorado Lawyer* 61 (May 2002) (overview of the UMA); Carr, Kenney, Savage, and Willis, "The Uniform Mediation Act: Its Potential Impact on Colorado Mediation Practice—Part II," 31 *The Colorado Lawyer* 67 (June 2002) (comparing UMA with the Act); Carr, Kenney, Savage, and Willis, "The Uniform Mediation Act: Its Potential Impact on Colorado Mediation Practice—Part III," 31 *The Colorado Lawyer* 101 (July 2002) (comparing UMA with the Colorado Model Standards of Conduct for Mediators). ■

See Appendix 1 on page 28 and Appendix 2 on page 30.

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Appendix 1

CRS §§ 13-22-301 <i>et seq.</i> : The Dispute Resolution Act	
Section 13-22-301	provides that the Act "shall be known and may be cited as the 'Dispute Resolution Act.'"
Section 13-22-302	defines nineteen words and phrases used in the Act.
Section 13-22-303	establishes the Office of Dispute Resolution ("ODR") within the Colorado Judicial Department, and provides that a director appointed by the Chief Justice of the Colorado Supreme Court heads ODR. The Chief Justice determines the director's compensation. ¹
Section 13-22-304	discusses the employment status, responsibilities, and qualifications of ODR's director and, subject to the Chief Justice's approval, permits the director to appoint additional employees to administer ODR.
Section 13-22-305	concerns the establishment of "dispute resolution programs" ² in one or more Colorado judicial districts; requires ODR's director to "establish rules, regulations, and procedures for the prompt resolution of disputes" in all such programs; ³ and mandates the Chief Justice's approval of all such rules, regulations, and procedures. ⁴ It specifies that "persons" ⁵ involved in a dispute are eligible for the "mediation services" ⁶ set forth in the section "before or after the filing of an action in county or district court." ⁷ Each "party" ⁸ using ODR's mediation services or "ancillary forms of alternative dispute resolution," ⁹ must pay a Colorado Supreme Court-prescribed fee, ¹⁰ but the director has discretion to waive any fee. ¹¹ Fees received must be transmitted to the state treasurer and credited to a dispute resolution fund created in § 13-22-310. This section precludes any "mediator or the director" from making or imposing any "adjudication, sanction, or penalty," ¹² and provides that the liability of mediators "shall be limited to willful or wanton misconduct." ¹³
Section 13-22-306	grants ODR's director authority to contract with mediators or "mediation organizations" ¹⁴ "on a case-by-case or service or program basis," to implement the dispute resolution programs described in § 13-22-305. ¹⁵ Under this section, such contracted mediators or mediation organizations are explicitly subjected to the rules, regulations, procedures, and fees set by the director. The director also must define the tasks of such mediators or mediation organizations. This section permits the director to use "qualified volunteers," an undefined term, "to assist in mediation service or dispute resolution program efforts." ¹⁶
Section 13-22-307	addresses the confidentiality of mediation proceedings, with extensive reference to the defined term "mediation communication," ¹⁷ as well as several undefined terms including "dispute resolution meetings," "dispute resolution proceeding," and "any communication provided in confidence to the mediator or a mediation organization." ¹⁸ With four stated exceptions, the section precludes parties, mediators, and mediation organizations from voluntarily disclosing "any mediation communication or any communication provided in confidence to the mediator or a mediation organization," and protects such parties from having to disclose involuntarily "any information concerning" such communications "through discovery or compulsory process." ¹⁹ The stated exceptions arise when: (1) all parties and the mediator consent in writing to disclose; (2) the mediation communication "reveals the intent to commit a felony, inflict bodily harm, or threaten the safety of a child under the age of 18 years"; (3) a statute requires the mediation communication to be made public; or (4) disclosure is "necessary and relevant to an action alleging willful or wanton misconduct of the mediator or mediation organization." ²⁰ A mediation communication "disclosed in violation of this section shall not be admitted into evidence in any judicial or administrative proceeding." ²¹ However, this section does not prevent the discovery or admissibility of otherwise-discoverable evidence merely because it was presented in the course of a mediation service or dispute resolution proceeding. ²² Further, this section does not prevent gathering information for research, educational purposes, or evaluating or monitoring the performance of a mediator, mediation organization, mediation service, or dispute resolution program, as long as the parties or the specific circumstances of their controversy are not identified or identifiable. ²³
Section 13-22-308	addresses the reduction to writing, presentation to the court, and enforceability of full or partial settlement agreements between parties participating in mediation.
Section 13-22-309	is the now-repealed section. It previously required the director of ODR to provide annual reports on various topics to the Chief Justice, the general assembly, and the Governor. ²⁴
Section 13-22-310	concerns the creation of and funding sources and appropriation for a "dispute resolution fund." ²⁵
Section 13-22-311	provides that, with two mandatory exceptions and one discretionary exception, "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." ²⁶ The Colorado Supreme Court has confirmed that this language "grants the trial court authority to order mediation." ²⁷ The mandatory exceptions are: (1) the court "shall not" refer a 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 other party and states that it is thereby unwilling to enter into mediation services or dispute resolution programs"; ²⁸ and (2) a court cannot refer a civil case for mediation services or dispute resolution programs when the only remedy sought is injunctive or similar equitable relief. ²⁹ The discretionary exception provides that a 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." ³⁰ Such compelling reasons may include, but are not limited to, "the costs of mediation would exceed the requested relief," and "previous attempts to resolve the issues were not successful." ³¹ Parties whose cases a court refers for mediation services or dispute resolution programs may select such services or programs from either ODR or private mediators or mediation organizations. ³² On completion of the ordered mediation services or dispute resolution programs, either counsel for a party (if required to do so by local rule or court order) or the mediator must supply the court with a written statement certifying that the parties have met with the mediator. ³³ This section also grants parties and mediators an important power over pending court proceedings: If the

CRS §§ 13-22-301 *et seq.*: The Dispute Resolution Act (*cont.*)

Section 13-22-311 (cont.)	mediator and the parties agree that the parties are engaging in good-faith mediation and so inform the court, the court must continue any pending hearing in the action to a date certain. ³⁴ Finally, a party's failure to pay the mediator is not a basis to deny that party the right to proceed in court. ³⁵
Section 13-22-312	provides that the Act applies "to all mediation services or dispute resolution programs conducted in this state," whether conducted through ODR, a mediator, or a mediation organization. ³⁶
Section 13-22-313	provides any court of record with discretionary power to refer a case to "any ancillary form of dispute resolution," which forms may include, but are not limited to: arbitration, early neutral evaluation, med-arb, mini-trial, multi-door courthouse concepts, settlement conferences, special masters, summary jury trials, "or any other form of alternative dispute resolution which the court deems to be an effective method for resolving the dispute in question." ³⁷ Each of the ancillary forms of ADR specifically listed in this section is defined in § 13-22-302. ³⁸ The same two mandatory exemptions and one discretionary exemption set forth in § 13-22-311 also appear here, ³⁹ although their scope and application have not been litigated to date. ⁴⁰ Again, an overarching limitation is that "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." ⁴¹

NOTES

1. The Office of Dispute Resolution's ("ODR") current director is Cynthia A. Savage. ODR is accessible online at: <http://www.courts.state.co.us/chs/court/mediation/odrindex.htm>.
2. This term is defined at CRS § 13-22-302(3).
3. CRS § 13-22-305(1).
4. CRS § 13-22-305(5).
5. The Act does not define the term "persons," but "person" is included in the Act's definition of "party." *Compare* CRS § 13-22-305(2) *with* CRS § 13-22-302(6).
6. This term is defined at CRS § 13-22-302(3).
7. CRS § 13-22-305(2).
8. This term is defined at CRS § 13-22-302(6).
9. This phrase is not defined in CRS § 13-22-302, but is referenced in CRS § 13-22-313, and therein numerous other types of dispute resolution that are defined in § 13-22-302 are discussed. *Compare* CRS § 13-22-313 *with* CRS § 13-22-302(1), (2), (2.3), (4.3), (4.5), (7), (8), and (9).
10. CRS § 13-22-305(3).
11. *Id.*
12. CRS § 13-22-305(5).
13. CRS § 13-22-305(6). This limitation on liability originally appeared in § 13-22-306(2), *see* 1983 Colo. Sess. Laws 625, and therein arguably applied to all mediators in Colorado. In 1988 amendments, the general assembly relocated this provision to § 13-22-305(6), but therein provided that "The liability of mediators *involved with the office of dispute resolution* shall be limited to willful or wanton conduct." 1988 Colo. Sess. Laws 606 (emphasis added). *Note:* Due to a printing error, the added language is not capitalized in the Session Laws. In 1991 amendments to the Act, the general assembly omitted the foregoing italicized phrase, resulting in the present language of CRS § 13-22-305(6). *See* 1991 Colo. Sess. Laws 370. Between that change, the global-applicability language of CRS § 13-22-312, and appellate courts' construction of the Act (*see* text note 5 and related text), it is reasonable to assume that the liability limitation applies to all mediators providing mediation services or dispute resolution programs in Colorado.
14. This term is defined at CRS § 13-22-302(2.7).
15. CRS § 13-22-306.
16. CRS § 13-22-306. The Act provides no guidance as to qualifications of volunteers. In addition, in light of this section's phrasing, it is unclear whether qualified volunteers are "subject to the rules, regulations, procedures, and fees set by the director [of ODR]." The author found no indication that the issue has been raised or decided.
17. *See* CRS §§ 13-22-307(2) and (3); 13-22-302(2.5).
18. *Compare* CRS § 13-22-307(1) and (2) *with* CRS § 13-22-302.
19. CRS § 13-22-307(2).
20. *See* CRS § 13-22-307(2)(a)–(d).
21. CRS § 13-22-307(3).
22. CRS § 13-22-307(4).
23. CRS § 13-22-307(5).
24. *See* 1998 Colo. Sess. Laws 724.
25. CRS § 13-22-310(1) & (2).
26. CRS § 13-22-311(1).
27. *Pearson v. District Court*, 924 P.2d 512, 515–16 (Colo. 1996).
28. CRS § 13-22-311(1).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. CRS § 13-22-311(2).
34. CRS § 13-22-311(3). By comparison, D.C. Colo. LCivR 16.6 provides only that Colorado's federal judges and magistrates "may stay the action in whole or in part during a time certain or until further order" (emphasis added). The Act's mandatory-continuance provision may in some circumstances provide an additional incentive for litigants in Colorado state courts to pursue mediation.
35. CRS § 13-22-311(4).
36. CRS § 13-22-312 (emphasis added). Based on the language of this Section, it is unclear whether the Act applies to a mediator who resides and generally practices outside Colorado when she or he mediates a Colorado case in Colorado, or to a mediator based either in Colorado or another state, who mediates a case being litigated in Colorado in some other state or country for the convenience of the parties. The Act does not explicitly resolve these issues and they have not been raised or decided in a published Colorado appellate decision.
37. CRS § 13-22-313(1).
38. *See* CRS § 13-22-302(1), (2), (2.3), (4.3), (4.5), (7), (8), and (9).
39. *See* CRS § 13-22-313(1) and (6). *See supra*, notes 26–35 and related text concerning CRS § 13-22-311; text notes 12–25 and related discussion of *Pearson*, *supra*, note 27.
40. *Cf. Pearson*, *supra*, note 27, in which the Colorado Supreme Court decided issues related to one mandatory exemption and the discretionary exemption in CRS § 13-22-311. *See* text notes 12–25 and related discussion of *Pearson*.
41. CRS § 13-22-313.

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Appendix 2

Colorado Statutes Addressing Mediation	
CRS § 7-30-107(1)	a non-profit association may "institute, defend, intervene, or participate in . . . arbitration, mediation, or any other form of [ADR]"
CRS § 7-90-102(52)	"mediation" included in Colorado Corporations and Association Act's definition of "proceeding"
CRS § 8-1-115(3)(a)	allowing director of Division of Labor to release information in connection with a mediation "if there exists an overriding need for access to such information"
CRS § 8-1-122(1)	requiring director of Division of Labor to "inquire . . . into methods of avoiding or adjusting labor disputes through peaceable and conciliatory mediation and negotiations"
CRS § 8-1-123	requiring director of Division of Labor to "do all in his power to promote the voluntary arbitration, mediation, and conciliation of disputes arising under an existing written agreement between employers and employees and to avoid the necessity of resorting to strikes, lockouts, boycotts, blacklists, discriminations, and legal proceedings in matters of employment"
CRS § 8-3-113	empowering director of Division of Labor to appoint mediators in labor disputes on his or her own initiative or at any party's request; instructing director of Division of Labor to "take immediate steps to effect mediation, if possible" on receiving notice of employees' intention to strike; and directing Division of Labor to "prescribe reasonable rules of procedure for mediation under this section"
CRS § 8-40-201(12) and (13)	defining "mediation" and "mediator" under the Workers' Compensation Act
CRS § 8-43-205	providing procedures for and mandating that Division of Labor develop a program to implement mediation of workers' compensation claims. <i>Note:</i> subsection (2) of this section contains a confidentiality provision arguably narrower than that in § 13-22-307 of the Act
CRS § 9-1.5-104.3	requiring "notification association" to create voluntary alternative dispute resolution program, including mediation, for owners, operators, excavators, and other interested parties to resolve disputes concerning damages to persons or property arising from the excavation of underground facilities
CRS § 10-16-121	precluding Commissioner of Insurance from acting to "arbitrate, mediate, or settle disputes" between an insurance carrier, its intermediaries, or a healthcare provider network "arising under or by reason of a provider contract or its termination," and instead directing that "early dispute resolution mechanisms available in contract law shall be used to resolve such disputes"
CRS § 10-16-707	precluding Commissioner of Insurance from acting to "arbitrate, mediate, or settle disputes" between a managed care plan and a healthcare provider "concerning a provider's inclusion or termination from the network"
CRS § 12-43-215	exempting mediators who resolve judicial disputes under the Dispute Resolution Act from article 43 of Title 12, which concerns the state's licensure and regulation, via various boards, of psychologists, social workers, professional counselors, and marriage and family therapists
CRS § 12-43-403(2)(i)	"social work practice" may include mediation
CRS § 12-43-406(1)	practice of social work includes mediation
CRS § 13-3-113(2)(b) and (4)	creates the "family-friendly court program," and provides that one purpose of the program is to "serve as a central location for the dissemination of information to families about resources and services relating to . . . mediation. . . ."
CRS § 13-20-803.5	prescribing circumstances in which construction defects claimant may initiate suit, "unless the parties have contractually agreed to a mediation procedure, in which case the mediation procedure shall be satisfied prior to bringing an action"
CRS §§ 13-22-502, -503(2) and (4), -504, and -507	defining and addressing mediation in the context of resolving international commercial and noncommercial disputes
CRS § 14-10-124(8)	court may order mediation pursuant to CRS § 13-22-311 to assist parties in formulating, implementing, or modifying a parenting plan, and may allocate the cost of mediation between them
CRS §§ 14-10-115 (1.5)(b)(I) and -115(3)(b)(III)	providing parameters for parents and children to seek, and courts to order, mediation in relation to post-secondary education expenses and assuring that child support payments are spent for the benefit of children
CRS § 14-10-128.1	addressing courts' appointment of "parenting coordinators" in relation to whether mediation is either inappropriate or has been unsuccessful
CRS § 14-10-129.5	permitting courts to require parties to mediate disputes concerning parenting time and requiring the provision of mediation services as per § 13-22-305 of the Act
CRS § 14-10.5-104 (1)(a)(I)	authorizing state to develop a parenting time enforcement program that includes "both voluntary and mandatory" mediation
CRS § 19-1-117.5(1)(c)	courts can require parties to mediate disputes concerning grandparent visitation rights, and requiring the provision of mediation services as per § 13-22-305 of the Act

Colorado Statutes Addressing Mediation (*cont.*)

CRS § 19-2-309.5 (4)(a)(II)(J)	Division of Youth Corrections may include victim/offender mediation in community accountability program intended reintegrate juvenile delinquents into the community
CRS § 19-6-104(3.5)	precluding delegates of child support enforcement unit from negotiating or mediating the allocation of parental responsibilities in any proceeding to seek an order of support
CRS § 22-25-104.5 (2)(b)(VII)	creating "law-related education program" to reduce "gang or other antisocial behavior and substance abuse by persons in the public schools through education," and providing that topics for instruction may include "the alternative dispute resolution approach, including mediation and conflict resolution"
CRS § 22-33-103.5(7)	requiring each school district to designate a homeless child liaison, and mandating that such liaison "assist in the mediation of any disputes concerning school enrollment"
CRS § 24-4-107	exempting agencies with "statewide territorial jurisdiction . . . in . . . arbitration and mediation functions" from rule-making and licensing procedures generally applicable to state agencies under Colorado's Administrative Procedures Act
CRS § 24-32-3209	defining mediation and providing procedures allowing "neighboring jurisdictions" to request—and requiring the recipient of such a request to participate in—mediation to address disputes concerning "comprehensive plans" and annexation petitions
CRS § 24-34-305(i.5)	authorizing Civil Rights Commission "[t]o intervene in racial, religious, cultural, age, and intergroup tensions or conflicts for the purpose of informal mediation using alternative dispute resolution techniques"
CRS § 24-34-306 (2)(b)(II)	requiring director of Civil Rights Division, on concluding that probable cause exists to credit allegations of a charge alleging a discriminatory or unfair practice to "order the charging party and the respondent to participate in compulsory mediation," and to "[i]mmediately endeavor to eliminate such discriminatory or unfair practice by conference, conciliation, . . . persuasion and . . . the compulsory mediation required by this subparagraph. . . ."
CRS § 24-50-604 (1)(k)(I)(D)	empowering director of Department of Personnel to establish and operate an employee assistance program, which may include "[e]mployer and employee mediation"
CRS § 24-60-702, arts. IV(1), VII(B), and XI(B)(1)(b)	empowering interstate commission of the Interstate Compact for Juveniles to provide for dispute resolution among compacting states, requiring it to promulgate a rule "providing for both mediation and binding dispute resolution for disputes among the compacting states," and indicating that the commission may impose alternative dispute resolution upon a defaulting state as a "penalty"
CRS § 24-60-280, arts. V(a)(15), VIII(d)(4)(x), and IX(b)(3)	creating powers and duties regarding dispute resolution and mediation for interstate commission of Interstate Compact for the Supervision of Adult Offenders
CRS § 26-5.7-103	authorizing establishment of family reconciliation services, including mediation, "to develop skills and support within families to resolve problems related to homeless youth or family conflicts"
CRS § 26-7.8-103(1)(c)	requiring homeless prevention activities program to provide "mediation services to assist persons in avoiding eviction and foreclosure"
CRS § 29-22-104 (5)(b)(I) and (6)(b)	requiring temporary committee to recommend administrative process "to ensure prompt mediation of disputes concerning claims [of governmental entities] for reimbursement" of costs of hazardous substance removal, containment, or mitigation; requiring executive director of Department of Public Safety to create a list of qualified, knowledgeable, volunteer ombudsmen, mediators, and arbitrators to resolve such disputes; requiring director to adopt rules by which the parties to such disputes may obtain services of such volunteers; and granting such volunteers civil immunity for good faith actions
CRS § 35-1-104(1)(I)	empowering and obligating the Department of Agriculture "[t]o act as a mediator or arbitrator in any controversy or issue that may arise between producers and distributors or any agricultural products concerning the grade or classification of such products"
CRS § 36-7-302(4)(a)	authorizing executive director of Department of Natural Resources to "contract with a mediator or other third party" to facilitate accomplishment of Colorado Roadless Areas Review Task Force's duties
CRS § 38-12-216	specifying that either management or owner of mobile home park "may" agree to submit controversy to mediation prior to filing of a forcible entry and detainer lawsuit
CRS § 38-33.3-124	declaring that litigation is a "particularly inefficient means of resolving neighborhood disputes"; encouraging common interest communities to adopt protocols making use of mediation or arbitration as alternatives or preconditions to the filing of a complaint between a unit owner and an association; providing that either common interest ownership association or unit owner "may" submit their controversy to mediation before commencing suit, terminate the mediation without prejudice, present any agreement reached to the court as a stipulation, and seek relief from court for subsequent violation of that stipulation

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