

## **PROPOSED NEW RULES GOVERNING COURT-CONNECTED MEDIATION SERVICES**

The Alternative Dispute Resolution Commission has recommended proposed new Rules Governing Court-Connected Mediation Services for the Supreme Court's consideration. *See* Proposed Rules 29-101, 29-102, 29-103, and 29-104. If you would like to comment on the proposed new rules set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://nmsupremecourt.nmcourts.gov/> or sending your written comments by mail, email, or fax to:

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Your comments must be received by the Clerk on or before April 15, 2015, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

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### **[NEW MATERIAL]**

**29-101. Court-connected mediation services.** These rules shall be known as the Rules Governing Court-Connected Mediation Services and shall provide minimum standards for all courts offering court-connected mediation or settlement facilitation services. For convenience, all such services are referred to in these rules as "mediation services." Nothing in these rules is intended to preempt any other Supreme Court rules addressing mediation or settlement facilitation.

A. **Applicability.** These rules apply only to court-connected mediation services. They are not intended to apply to settlement conferences held by judges, nor do they apply to mediations in which disputants independently retain a private mediator, whether or not the dispute has been filed in court.

B. **Self-determination.**

(1) Self-determination, in which the decision-making authority rests with the parties themselves, is the core value of court-connected mediation services.

(2) Courts may mandate referral to mediation, but shall not require parties to settle. There shall be no adverse response by courts to nonsettlement by the parties in mediation. For that reason, parties may opt out of mediation at any time at their own discretion.

(3) A mediator facilitates negotiations between parties and assists the parties in trying to reach a settlement, but does not have the authority to impose a settlement on the parties or to coerce them into settlement.

C. **Confidentiality.** Except as otherwise provided in the Mediation Procedures Act, Section 44-7B-1 et seq. NMSA 1978, or by applicable law, all mediation communications are confidential, are not subject to disclosure, and shall not be used as evidence in any proceeding. Mediators, mediation parties, and non-party participants shall be bound by this rule of confidentiality. Nothing in these rules shall prevent the discovery or admissibility of any evidence

that is otherwise discoverable or admissible, merely because the evidence was presented during a mediation.

D. **Immunity of mediators.** Mediators appointed by a court pursuant to the court-connected mediation services policies and procedures adopted by that court are considered arms of the court and as such are immune from liability for conduct within the scope of their appointment.

E. **Access.** Access to mediation services shall be provided to all litigants without discrimination on the basis of race, ethnicity, color, creed, gender, gender identity, sexual orientation, national origin, or physical or mental ability.

F. **Language access services in mediation.** Mediation services shall be provided in a manner that complies with the court's Language Access Plan. A court shall provide information to the public, the bar, judges, and court personnel regarding the availability and procedures of its court-connected mediation services.

[Adopted by Supreme Court Order \_\_\_\_\_, effective \_\_\_\_\_.]

**Committee commentary.** – In accordance with the New Mexico Supreme Court's adoption of the National Center for State Court's report, Advancing Alternative Dispute Resolution in the New Mexico Judiciary, Key Strategies to Save Time and Money, and the establishment of the Statewide ADR Commission with its charge to improve and expand ADR in New Mexico Courts, these rules provide guidance and support to courts to provide court-connected mediation services of consistently high quality. The rules recognize that court-connected mediation services need to be designed and implemented in ways that take account of local needs and circumstances.

Over the years, courts in New Mexico have developed a great variety of court-connected mediation services. Most district courts offer mediation in cases where child abuse or neglect is alleged or where child custody is contested, and some also offer mediation in civil, probate, and other cases.

Court procedures for referral of cases to mediation also differ. Some courts issue sua sponte orders directing parties to mediation, others issue referral orders only at the request of parties.

There is also variation in the providers of mediation services. Some courts have staff mediators, others refer cases to private mediators, some do both. Of those courts that refer cases to private mediators, some courts maintain a roster of approved mediators, and may or may not have identified specific qualifications for mediators. In some courts, parties to a lawsuit may request that the court order referral to a particular mediator, regardless of whether that mediator is on a court roster of mediators who meet the court's qualifications.

Most courts allow parties to select any person as a mediator regardless of their qualifications.

Some courts provide mediation services at no cost to parties; in others, parties pay the mediators, either in accordance with a fee schedule set by the court or in accordance with private arrangements between the parties and the mediator.

Chapter 40, Article 12, the "Domestic Relations Mediation Act", allows courts, among other things, to establish child custody mediation programs. Sections 40-4-8(B) and 40-4-9.1(G) NMSA 1978 direct courts to refer contested custody cases to mediation "if feasible". The Supreme Court has adopted Rule 1-125 NMRA, Domestic Relations Act Mediation Programs, which applies to court-connected mediation programs established pursuant to the Domestic Relations Mediation Act. Where applicable, this rule complements, not replaces, the provisions of Rule 1-125.

Courts are encouraged to exceed the minimum standards provided by these rules wherever possible. When developing or modifying existing court-connected mediation services, courts are encouraged to refer to various relevant national standards. Three such sets of standards are:

- (1) The National Standards for Court-Connected Mediation Programs, which were developed in 1993 by the Center for Dispute Settlement in Washington, D.C., and the Institute of Judicial Administration in New York City, through a grant from the State Justice Institute. The National Standards are available at <http://courtdr.org/files/NationalStandardsADR.pdf>.
- (2) The Model Standards of Practice for Family and Divorce Mediation, which were developed in 2000 by the Symposium of Standards of Practice. They are available at <http://www.afccnet.org/ResourceCenter/CenterforExcellenceinFamilyCourtPractice/ctl/ViewCommittee/CommitteeID/17/mid/495>.
- (3) The Model Standards of Conduct for Mediators, which were developed in 2005 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution. The Model Standards of Conduct for Mediators are available at [http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model\\_standards\\_conduct\\_april2007](http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007).

The National Standards and both sets of Model Standards are also available at <https://alternativedisputeresolution.nmcourts.gov>.

Many states have also developed rules for court-connected mediation services as well. The Resolution Systems Institute ("RSI") has collected statutes and rules from many courts on their website, [www.courtdr.org](http://www.courtdr.org).

[Commentary adopted by Supreme Court Order \_\_\_\_\_, effective \_\_\_\_\_.]

**29-102. Definitions.** For purposes of these rules, the following definitions shall apply:

A. **Court-connected mediation services.** "Court-connected mediation services" means any service that provides mediation in court cases and is created or administered by a court, or a court agency such as the Administrative Office of the Courts, including mediation services provided by private entities to which a court refers cases for mediation, but not including mediation services provided by private entities independently selected and paid by the parties.

B. **Mediation.** "Mediation" means a process in which a mediator

- (1) facilitates communication and negotiation between the parties to assist them in reaching a voluntary agreement regarding their dispute; or
- (2) promotes reconciliation, settlement, or understanding between and among mediation parties.

C. **Mediation communication.** "Mediation communication" means a statement—whether oral, written, verbal, or nonverbal—that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

D. **Mediation party.** "Mediation party" means a person who is not a mediator and who participates in a mediation and whose agreement is necessary to resolve the dispute. Where the term "party" appears in these rules, it means "mediation party".

E. **Mediator.** "Mediator" means an individual who is designated by a court as a mediator and who conducts a mediation.

F. **Non-party participant.** "Non-party participant" means a person, other than a mediation party or mediator, who is present and may participate in the mediation, including a person consulted by a mediation party to assist the mediation party with evaluating, considering, or

generating offers of settlement, or who is an observer present to watch and listen to the mediation for educational or other administrative purposes, or who is a mediation program administrator.

**G. Person.** “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government or governmental subdivision, agency or instrumentality, public corporation, or any other legal or commercial entity. [Adopted by Supreme Court Order \_\_\_\_\_, effective \_\_\_\_\_.]

**Committee commentary.** – The definitions of “mediation”, “mediation communication”, “mediation party”, “mediator”, “non-party participant”, and “person” are all derived from the Mediation Procedures Act, 44-7B-1 et seq., NMSA 1978. The MPA, however, applies to all mediated disputes; this rule applies only to disputes that are mediated within the context of a case filed in a New Mexico state court.

*Paragraph A:* The determining characteristic of a court-connected mediation service is whether a specific referral is made by a judge or other court personnel to a particular mediator. The referral may be formal, e.g., in a referral order, or informal, e.g., a direction from the bench. Confusion may arise about what exactly a court-connected mediation service is, because many mediators accept both referrals from a court and also private clients who contact them outside of the court procedures. The dispositive question does not turn on who the mediator is, but rather on whether the parties are acting in accordance with specific direction from a court, regardless of the form the court’s direction takes. *See also* Rule 29-103 NMRA and Commentary to Subparagraph (B)(3) and Paragraph C regarding qualifications of mediators.

*Paragraph D:* The definition of “mediation party” in Paragraph D is adapted from the definition of the same term in the Mediation Procedures Act. It is much broader than the standard legal definition of “party”. Black's Law Dictionary defines "party" as follows: “‘Party’ is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or in equity, the party plaintiff or defendant, whether composed of one or more individuals and whether natural or legal persons; all others who may be affected by the suit, indirectly or consequently, are persons interested but not parties. *Golatte v. Mathews*, D.C.Ala., 394 F.Supp. 1203, 1207.” This view is supported by provisions of both NM rules and statutes, *see e.g.*, Rule 1-004(B)(1) NMRA (“The summons shall be substantially in the form approved by the Supreme Court and must contain the name of the court in which the action is brought, the name of the county in which the complaint is filed, the docket number of the case, the name of the first party on each side, with an appropriate indication of the other parties, and the name of each party to whom the summons is directed;”).

*Paragraph F:* It is important that courts and mediators recognize that in some circumstances, the resolution of a dispute that led to a lawsuit may require the participation in mediation of non-parties to the lawsuit in order to reach an agreement that will resolve the underlying dispute, even though only the parties to the lawsuit can resolve the case filed in court. Courts and mediators should therefore consider, under some circumstances, inviting non-parties to participate in mediation. These persons are therefore included in the definition of “non-party participants”. Non-party participants may also include attorneys, counselors, or advocates present at the request of the named parties in accordance with Rule 29-101(B) NMRA. If the parties agree, courts may also provide for the presence of observers for administrative or educational purposes. For instance, a court may provide for mentoring or coaching of less-experienced mediators through attendance and observation of mediation sessions, subject to the agreement of the parties.

Non-party participants are bound by the rules of confidentiality in Rule 29-101(C) NMRA. Non-party participants are not bound by the mediation agreement, if any.

Because party self-determination is the core value of court-connected mediation services, the mediation parties have control of who is present during the mediation. Ideally, parties who want to include a non-party participant in the mediation will raise the question with the other parties and the mediator before the mediation session. Sometimes, however, parties will simply bring a non-party to the mediation session without prior disclosure or discussion. If the presence and participation of non-parties has not been worked out in advance of mediation, reaching consensus on the presence and participation of non-parties will usually be one of the first issues to be addressed at the mediation. If the parties cannot reach consensus as to the presence and participation of the non-parties, the party objecting to the presence and participation of any non-party ultimately has the right to opt out of the mediation rather than be coerced into attending when they are uncomfortable. In the case of observers, either party may decline to have them present without resorting to opting out of mediation.

[Commentary adopted by Supreme Court Order \_\_\_\_\_, effective \_\_\_\_\_.]

### **29-103. Structure of court-connected mediation services.**

A. **Policies and procedures.** Each court that offers mediation services shall adopt clearly stated written policies and procedures establishing the structure and procedures of the services, and the qualifications of those who serve as mediators.

B. **Minimum requirements.** At a minimum, policies and procedures for court-connected mediation services shall address the following:

- (1) cases eligible for referral to mediation;
- (2) referral procedures;
- (3) mediator qualifications and assignment, including how mediators are selected, and how an assigned mediator may be replaced;
- (4) payment of fees, if any, by the parties, including provisions to make mediation available regardless of the parties' ability to pay;
- (5) data that will be collected for administrative purposes;
- (6) a procedure to address any grievances about the mediation service or mediators;
- (7) how cases shall be reviewed for capacity issues including domestic abuse prior to referral to mediation;
- (8) the procedures to be followed if capacity issues including domestic abuse are identified by the parties or the court prior to referral or by the mediator during mediation; and
- (9) procedures for parties to opt out of mediation.

C. **Qualifications of mediators.** Courts are responsible for determining that the mediators to whom they refer cases are qualified. Court policies and procedures shall address the following:

(1) *Qualifications.* Minimum qualifications for mediators to whom cases are referred. Qualifications of mediators to whom the courts refer cases should be based on their skills. Different categories of cases may require different types and levels of skills. Skills can be acquired through training and experience;

(2) *Performance.* To ensure that a mediator's performance is of consistently high quality, courts should establish procedures to allow mediation parties to evaluate the mediator's performance;

(3) *Professional development.* Courts may require mediators to participate in educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

D. **Disclosures.** A court's policies and procedures regarding mediation services may require disclosure of only the following information regarding mediations:

(1) whether the mediation parties and their attorneys, if any, appeared for mediation;

(2) whether a mediation occurred or has terminated;

(3) the date, time and place of a mediation;

(4) the persons in attendance at a mediation;

(5) whether a mediator received payment for the mediation;

(6) whether a written agreement was signed by the parties;

(7) the outcome of the mediation for administrative purposes, such as fully settled, partially settled, or no settlement, which do not reveal the content of the mediation or any agreements made during mediation; and

(8) other administrative facts which do not reveal the content of the mediation or any agreements made during mediation.

E. **Supervision of mediation services.** The court shall designate a particular person or persons to be responsible for administration of its mediation services, or to act as liaison with private, court-referred mediators.

[Adopted by Supreme Court Order \_\_\_\_\_, effective \_\_\_\_\_.]

**Committee commentary.** – These provisions provide guidance to courts when planning and implementing mediation services. They carefully do not tell courts how to exercise their discretion, only that they need to give thoughtful consideration to the listed items and determine how best to address them given the needs and resources of that court. For example, policies and procedures for child custody mediation services in one district court may refer all divorce and parentage cases involving minor children to court staff to develop custody and timesharing agreements. Another district court might refer all such cases to private mediators for the same purpose. And yet another district court might refer only cases in which the parents filed a request for referral to mediation.

The Statewide ADR Commission offers assistance in the planning and implementation process, from planning guides to sample policies and procedures and knowledgeable Commissioners and others to act as consultants. The Commission has established a website at <https://alternativedisputeresolution.nmcourts.gov> that includes a "Toolbox" providing access to forms, samples, research, and links to other relevant websites.

*Subparagraphs (B)(3) and Paragraph C:* Many states with rules governing court-connected mediation services require a minimum of a 40-hour basic mediation training plus annual continuing education for mediators providing court-connected services. Given the current dearth of mediation training outside of Santa Fe and Albuquerque, and the consequent shortage of trained mediators outside of those areas, these provisions do not require specific training, e.g., a 40-hour basic training, for mediators, and they do not require courts to certify mediators who provide court-connected mediation services. They do, however, require courts to consider what kinds of cases they want to refer to mediation, and determine the qualifications a mediator should have to competently mediate that kind of case.

There is at present no single, commonly-accepted body that certifies or establishes qualifications or credentials for mediators. In October 2011, the Dispute Resolution Section of the American Bar

Association created a Task Force on Mediator Credentialing. Task force members reviewed literature and interviewed leaders of domestic and international organizations and experts from states and court systems with different approaches to credentialing. The task force issued a Final Report in August 2012.

One question addressed by the task force was, “Is there a need for credentialing?” “Task force members agree that the need for credentialing is likely to be strongest in certain settings: 1. When a court ... requires disputants to use, or sponsors or refers disputants to, specific programs or mediators. Some court systems ... mandate that parties go to mediation through a specific program as a condition of obtaining a hearing. Others sponsor programs or refer disputants to individual mediators, for example by maintaining a panel of approved neutrals. In such situations disputants may reasonably believe that the court or agency has endorsed the competence of the program or providers. When this occurs, courts and agencies have a responsibility to ensure that the program and neutrals in question are competent. Certification is one method to accomplish this.” [Emphasis added.]

Subparagraph (B)(7) and Rule 29-104(G) NMRA: These paragraphs concern the parties’ capacity to mediate. Subparagraph (B)(7) of this rule requires courts to consider capacity issues when developing court-connected mediation services. Rule 29-104(G) NMRA addresses mediators’ obligations regarding capacity issues that may be identified during mediation.

“Capacity” in its broadest sense refers to “the ability to understand the nature and effects of one's acts.” Black's Law Dictionary. Capacity is therefore crucial to expression of the core mediation value of party self-determination. If parties do not understand the process, issues, or settlement options, or have difficulty participating in a mediation, the parties’ capacity to mediate, and by extension their ability to make decisions in their own best interests, is adversely affected.

Mediation should only take place in cases where all parties have the capacity to exercise self-determination during the mediation process. The concept of capacity to mediate is neither intended to be a mental health diagnosis nor a specific judicial finding. Capacity to mediate potentially implicates a wide array of impediments. Examples of impediments to the mediation process may include but are not limited to: domestic abuse; neglect or abuse of a child; status as a protected individual or vulnerable adult; mental illness, brain injuries, or other mental impairment; impairment from alcohol or other substances.

Some forms of incapacity to mediate may be temporary, such as intoxication, and mediation may be rescheduled for another time. Other forms of incapacity to mediate may be longer term, such as mental illness or brain injuries or a history of domestic abuse, and may mean that mediation should be avoided altogether. Assessment of the parties’ capacity to mediate is an on-going process in each case in which both courts and mediators have a role.

Courts should recognize that capacity issues may impact a party’s ability to exercise self-determination in the mediation process and consider whether and what kind of pre-referral review should be performed. States vary greatly in their approach to pre-referral review. There are many roads a court may take to meet this requirement. For instance, a court may decide that only a certain type of case, e.g., domestic relations, should be reviewed prior to referral. A court may decide that where a party is represented by counsel no further review is necessary, regardless of the type of case. A court may decide that the burden of informing the court and the mediator of capacity issues rests entirely on a party. Review for capacity issues may be as rudimentary as an Odyssey search to identify cases of domestic violence or criminal cases involving enumerated domestic violence offenses between the parties. Review of the record in cases in which referral is contemplated may reveal capacity issues.

Mediators should be trained to recognize capacity issues, including domestic abuse, so that they can take appropriate action if it appears during mediation. Although other issues may affect capacity to mediate, domestic abuse is the only capacity issue specifically addressed in statutes or rules in New Mexico or other states. Some states by statute, court rule or Supreme Court publication, either explicitly or implicitly, require screening for domestic abuse. *See, e.g., Neb. Rev. Stat. Section 43-2939 (2007)*: <http://nebraskalegislature.gov/laws/statutes.php?statute=s4329039000> (requiring parenting mediators to screen for enumerated capacity issues prior to meeting with the parties); NMSA 1978, Section 40-4-8B (prohibiting mediation in child custody cases where “a party asserts or it appears to the court that domestic violence or child abuse has occurred,” unless certain enumerated conditions are met) [emphasis added]; Ohio Supreme Court Rule 16, Mediation (“(B) (1) Required provisions for all mediation rules. A local mediation rule shall include all of the following provisions: ... (b) Procedures for screening for domestic violence both before and during mediation.”); Michigan Supreme Court's Office of Dispute Resolution's publication entitled “Domestic Violence and Child Abuse/Neglect, Screening for Domestic Relations Mediation, Model Screening Protocol”.

It is important to note that domestic abuse may influence parties not only in family cases but also in such seemingly unrelated cases as landlord-tenant or personal injury (e.g., the injured party is in a relationship where domestic violence is present, and the non-party partner is controlling the injured party's decisions regarding procedure of the case). “Domestic abuse” is not a commonly-defined term, and can mean slightly different things in different contexts. Various statutory schemes define it differently. The U.S. Department of Justice, Office on Violence Against Women, offers this definition of domestic violence: “A pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.” *See* <http://www.ovw.usdoj.gov/domviolence.htm>.

Examples of other definitions may be found in the statutes referenced below:

1. The Family Violence protection Act, Subsections D and E of Section 40-13-2 NMSA 1978;
2. The enumerated crimes included in the Crimes Against Household Members Act, Sections 30-3-10 through 30-3-18 NMSA 1978;
3. Domestic violence as defined in Section 40-4-8 NMSA 1978;
4. Domestic violence as defined in the Violence Against Women Act, 42 U.S.C. Section 1392(a)(6).

Screening for capacity to mediate is a new concept in the mediation field and development of screening protocols and tools is on-going. At this time, some screening protocols have been developed for domestic abuse, but there is no screening protocol for general capacity issues. Screening for domestic abuse may enhance both the quality of mediation services provided and the safety of mediation participants. The extent of screening will vary according to the nature of each case and the resources available to a court. Samples of screening protocols for domestic abuse as well as the statutes and rules referenced above are available at <https://alternativedisputeresolution.nmcourts.gov>.

*Subparagraph (B)(8)*: Courts may decide that cases in which domestic abuse or other capacity issues appear should not be referred to mediation, or they may decide to leave the door

open to judicial discretion in referral decisions. Some states use screening for this purpose, e.g., Michigan. The Michigan Supreme Court's Model Screening Protocol opens with this statement: "This screening protocol is designed to identify parties involved in divorce or child custody actions for which mediation may be inappropriate because of domestic violence or child abuse, and to maximize safety and fairness in the mediation process."

In New Mexico, NMSA 1978, Section 40-4-8(B)(1), directs that contested child custody cases be referred to mediation "if feasible unless a party asserts or it appears to the court that domestic violence or child abuse has occurred, in which event the court shall halt or suspend mediation unless the court specifically finds that: (a) the following three conditions are satisfied: 1) the mediator has substantial training concerning the effects of domestic violence or child abuse on victims; 2) a party who is or alleges to be the victim of domestic violence is capable of negotiating with the other party in mediation, either alone or with assistance, without suffering from an imbalance of power as a result of the alleged domestic violence; and 3) the mediation process contains appropriate provisions and conditions to protect against an imbalance of power between the parties resulting from the alleged domestic violence or child abuse; or (b) in the case of domestic violence involving parents, the parent who is or alleges to be the victim requests mediation and the mediator is informed of the alleged domestic violence". [Emphasis added.] These procedures may be considered as a model for other cases where capacity issues have been identified.

*Subparagraph (B)(9)*: Party self-determination is the core value of court-connected mediation services. For this reason, Rule 29-101(B) NMRA incorporates a strong opt-out provision to allow mediation parties who do not feel comfortable going forward for any reason to opt out of the mediation rather than be coerced into attending when they are uncomfortable. Rule 29-103(B)(9) NMRA explicitly directs courts to develop procedures to allow parties to opt out of mediation. Further, in light of *Carlsbad Hotel Associates, L.L.C. v. Patterson-Uti Drilling Company, L.P., L.L.P.*, 2009-NMCA-005, 145 N.M. 385, 199 P.3d. 288, good faith participation should not be required by any court-connected mediation service.

*Subparagraph (C)(3)*: Examples of professional development for court-connected mediators may include, but are not limited to, mentoring and observation by skilled and experienced mediators, workshops, emailed "tips" and information, roundtable discussions, advanced mediation training, webinars, conference calls, email list serves, participant surveys, books and written articles.

*Paragraph D*: See Rule 29-101(C) NMRA regarding "Confidentiality".

*Paragraph G*: Designation of a specific person or persons to be responsible for administering the court's mediation services ensures consistency of application, thereby avoiding any appearance of arbitrariness or capriciousness while still protecting the discretion of judges to refer or not refer cases to mediation.

[Commentary adopted by Supreme Court Order \_\_\_\_\_, effective \_\_\_\_\_.]

**29-104. Ethical standards for mediators.** These standards apply only to mediators who mediate in court-connected mediation services. Failure to comply with an obligation or prohibition imposed by a standard may be a basis for removal of a mediator from a court roster. These standards do not give rise to a cause of action for enforcement of this rule or for damages caused by alleged or perceived failure to comply with an obligation or prohibition imposed by a standard.

A. **Impartiality.** Impartiality is at the heart of a mediator's ethical responsibilities. A mediator shall maintain impartiality toward all parties. Impartiality means freedom from favoritism or bias either by appearance, word, or action, and a commitment to serve all parties as opposed to a single party. At a minimum, a mediator shall comply with the following:

(1) a mediator shall not accept or give a gift, request, favor, loan, or any other item of value to or from a party, attorney, or any other person involved in any pending or scheduled mediation process, except that a mediator may accept payment of fees for mediation services;

(2) a mediator shall not use information disclosed during the mediation process for private gain or advantage nor shall a mediator seek publicity from a mediation effort to enhance the mediator's position; and

(3) if at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

**B. Conflict of interest.** A conflict of interest arises when any relationship between the mediator and the parties or the subject matter of the dispute compromises or appears to compromise the mediator's impartiality. A mediator shall refrain from entering or continuing in any dispute if he or she perceives that participation as a mediator would be a clear conflict of interest. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation.

(1) A mediator shall disclose any known, significant current or past personal, professional, or pecuniary relationship with any party or attorney involved in the mediation. If a mediator has represented, treated, or advised either party or their attorneys in any capacity, the mediator shall disclose that professional relationship. A mediator shall disclose any clear or potential conflict of interest as soon as practical after the mediator becomes aware of it.

(2) After a mediator discloses a current or prior personal or professional relationship or pertinent pecuniary interest, the parties may choose to continue with the mediator.

(3) The duty to disclose is a continuing obligation throughout the mediation process.

**C. Representations by mediator.** A mediator shall not make inaccurate statements about the mediation process, its costs and benefits, or the mediator's qualifications, including the following:

(1) a mediator shall not make claims of specific results or promises which imply favor of one party over the other;

(2) a mediator shall not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications;

(3) a mediator shall refrain from promises and guarantees of results and shall not advertise statistical settlement data or settlement rates; and

(4) a mediator shall accurately represent her or his qualifications. A mediator shall only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it specifically grants such status to the mediator.

**D. Disclosure of Fees.** When costs and fees are paid by the parties directly to the mediator, the mediator shall provide written information to the parties that includes costs, fees, and time and manner of payment. The parties and the mediator shall enter into a written agreement that describes costs, fees, and time and manner of payment before beginning the mediation. This requirement applies even if the mediator's fees are set by court order. The assessment of fees shall comply with the following:

(1) no commissions, rebates, or other similar forms of remuneration shall be given or received by a mediator for the referral of clients; and

(2) fees shall not be based on the outcome of the mediation. A mediator shall not enter into a fee agreement which is contingent upon the result of the mediation or the amount of the settlement.

E. **Confidentiality.** In the absence of a statute to the contrary, the mediator shall treat information revealed in a mediation as confidential, except for the following:

(1) information that is statutorily mandated to be reported;

(2) information that, in the judgment of the mediator, reveals a danger of serious physical harm to a party or third person;

(3) information that the mediator informs the parties will not be protected, provided that the mediator informs the parties at the initial meeting of any limitations on confidentiality; and

(4) a mediator may inform the court of the following information regarding the mediation, if the court's policies and procedures regarding mediation services require it:

(a) whether the mediation parties and their attorneys, if any, appeared for mediation;

(b) whether a mediation occurred or has terminated;

(c) the date, time and place of a mediation;

(d) the persons in attendance at a mediation;

(e) whether a mediator received payment for the mediation;

(f) whether a written agreement was signed by the parties;

(g) the outcome of the mediation for administrative purposes, such as fully settled, partially settled, or no settlement, which do not reveal the content of the mediation or any agreements made during mediation; and

(h) other administrative facts which do not reveal the content of the mediation or any agreements made during mediation, except any written agreements required to be presented to the court.

F. **Role of mediator.**

(1) A mediator shall not make decisions for the parties. At no time and in no way shall a mediator coerce any party into an agreement or make a substantive decision for any party. Depending on the mediation model being utilized, a mediator may make suggestions for the parties' consideration, but all decisions shall be made voluntarily by the parties themselves.

(2) Consistent with standards of impartiality and preserving party self-determination, and only if requested by the parties, a mediator may offer a personal or professional opinion but may not decide the dispute, or direct a resolution of any issue.

(3) The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and shall not be done.

(4) If the court requires or the parties request, a mediator may document the outcome of the mediation. Such documentation may be on forms approved by the court, where such forms are available.

(5) If the named parties are not represented by counsel at the mediation, the mediator shall afford the parties the opportunity for review of any agreement by an independent attorney or other consultant before it is signed.

G. **Parties' capacity to mediate.**

(1) If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator shall explore the

circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.

(2) If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from, or terminating the mediation.

[Adopted by Supreme Court Order \_\_\_\_\_, effective \_\_\_\_\_.]

**Committee commentary.** – The National Standards, at 8.1, provides: “Courts should adopt a code of ethical standards for mediators, together with procedures to handle violations of the code.” The Commentary elaborates: “In creating a code of ethics, courts should consider the dual purposes of such a code: the promotion of honesty, integrity and impartiality in mediation, and the effective operation of a mediation program. . . . Each court should consider existing standards when drafting its code. . . .” Standard 8.1 continues: “Any set of standards should include provisions that address the following concerns: a. Impartiality[,] b. Conflict of Interest[,] c. Advertising by Mediators[,] d. Disclosure of Fees[,] e. Confidentiality[,] f. Role of Mediators in Settlement.” After reference to many codes of ethics adopted by courts and professional associations throughout the country, the National Standards themselves include suggested language for the six listed concerns. The Model Standards of Conduct for Mediators list nine standards which address those areas, except “role of mediator in settlement,” and add self-determination, competence, quality of the process, and advancement of practice. The Model Standards of Practice for Family and Divorce Mediation list self-determination, qualifications of mediators, impartiality, fees, confidentiality, advertising, competence, as well as several other standards relating to the quality of process and families in particular. This rule draws from provisions in all of the above-referenced documents, as well as provisions in New Mexico statutes and mediator ethical codes from other states.

[Commentary adopted by Supreme Court Order \_\_\_\_\_, effective \_\_\_\_\_.]



STATE OF NEW MEXICO  
SECOND JUDICIAL DISTRICT

ALAN M. MALOTT  
DISTRICT JUDGE

April 13, 2015

POST OFFICE BOX 488  
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FAX: 505-841-5458

Mr. Joey Moya  
Clerk of the Court  
New Mexico Supreme Court  
PO Box 848  
Santa Fe, NM  
FAX: 505 827 4837

SUPREME COURT OF NEW MEXICO  
FILED

APR 13 2015

RE: Proposed Rule 29 101  
Court Connected Mediation Services

Dear Mr. Moya:

I appreciate the opportunity to have communicated with the Court over the last several years concerning development of statewide ADR programs. All members of the 2<sup>nd</sup> Judicial District Court Civil Division join in this comment.

In this instance my colleagues and I focus on the most recent iteration of Rule 29-101 and, more specifically, on proposed Rule 29-101(B)(2) & (C) which provides:

*B(2) Courts may mandate referral to mediation but shall not require parties to settle. There shall be no adverse response to nonsettlement. . . . For that reason, parties may opt out of mediation at any time at their own discretion.*

*C . . . all mediation procedures are confidential and shall not be used as evidence in any proceeding.*

*(emphasis added).*

As has been pointed out in past communications with the Court and the Committee, this language would undercut the requirement of good faith participation set out in the Second Judicial District Court's very successful mediation process under LR 2-602 and would directly contradict the requirement of good faith participation established in *Carlsbad Hotel Assoc., LLC v. Patterson-UTI Drilling Co.*, 2009 NMCA 005.

The trial court's ability to require parties, and often their indemnitors who may have their own agenda, to attend and participate in good faith is an important factor in the successful mediation of civil cases. I cannot tell you how many times parties initially reluctant have resolved their case in whole or in part as a result of being required to participate in a mediation

conference. Just a few hours before composing this letter, I conducted a Mediation for a colleague under LR 2-602 in which the parties had formally moved to be excused from mediation because their positions were too divergent and past negotiations had been both antagonistic and unsuccessful. The assigned judge required their attendance and, after less than two (2) hours, I was able to bring them to a satisfactory settlement of all their issues. A three (3) day Jury trial is no longer required. See: *Davis v. Crego*, D 202 CV 2014 1472. This is not an uncommon circumstance and the value of leaving discretion in the trial judge as to whether or not participation may be required cannot be over stated.

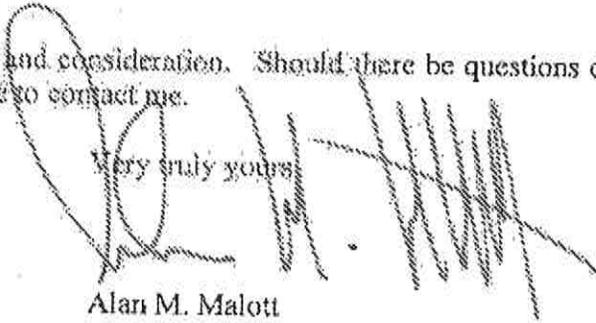
Additionally, the Second Judicial District Court's Mortgage Alternatives Program, a pilot program developed in cooperation with the New Mexico Attorney General and funded entirely through outside sources, has been lauded by a Legislative task force as a major resource in addressing the effects of the residential mortgage foreclosure crisis on New Mexico citizens; the Court is certainly no stranger to those issues. E.g., *Bank of NY v. Romero*, 2014 NMSC 007. The MAP Program is enabled through LR 2-602, as a "court connected" program. It has been my privilege to have helped develop MAP and to have served as its administrator. This project has effected resolution of more than 100 foreclosure matters in its first ten (10) months of operation. We have had numerous incidents where parties have initially resisted foreclosure Mediation only to reach an accord when required to attend and participate in good faith.

Similarly, proposed 29-101(C) would prohibit the court's inquiry into allegations of bad faith participation and the court's ability to address those fairly rare, but still significant, occurrences. The trial court must be able to require attendance and good faith participation and enforce its decision in the face of a litigant's recalcitrance, much as it has power generally to regulate its docket, promote judicial efficiency and deter frivolous conduct. *State ex rel. NM Hwy. & Trans. Dept. v. Baca*, 1995 NMSC 033.

I do not pretend to be expert in Mediation as applied to Domestic Relations or other subject areas, but I have considerable experience and success in applying those principles and procedures in civil litigation through both thirty (30) years of private practice and some six (6) years on the trial court. Though there may be some reluctance to believe it, there are parties for whom continued delay and contention are a calculated tactic. Given the economic and demographic realities of our service, the trial court's continued discretion to require mediation conferences upon good faith participation is invaluable, and removing that discretion, as proposed Rule 29-101(B)(2) would do, will adversely impact ongoing, successful, programs while creating no discernable benefit for the court, the bar, or the public interest. In fact, doing so will likely increase the number of trials and the delays in getting to trial.

As Justice Chavez agreed in his email to then Chief Judge Ted Baca in November 2012, "autonomy is essential and one size fits all does not work." The Second Judicial District has pioneered effective ADR Programs in New Mexico through LR 2-602 (Mediation) and LR 2-603 (Arbitrations). One element of our success is the ability to require good faith participation in the process. I urge the Court to reconsider the "one size fits all" approach of proposed Rule 29-101(B)(2) and (C) which would strip the trial court of its discretion and, with that, of a valuable case management tool.

Thank you for your attention and consideration. Should there be questions or if further information is desired, please feel free to contact me.



Very truly yours

Alan M. Malott  
District Court Judge

AMM/slg

I concur with the foregoing comments.

  
Nan G. Nash  
Chief Judge

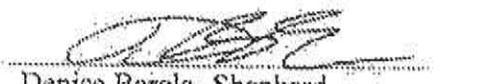
  
C. Shannon Bacon  
Presiding Civil Judge

  
Clay P. Campbell  
District Judge

  
Carl Butkay  
District Judge

  
Nancy J. Franchini  
District Judge

  
Beatrice I. Brickhouse  
District Judge

  
Denise Barela-Shepherd  
District Judge

  
Victor S. Lopez  
District Judge

  
Valerie M. Huling  
District Judge

**Mediation Rules**

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**From :** Muriel McClelland <murielmcc@aol.com>

Wed, Apr 15, 2015 08:39 AM

**Subject :** Mediation Rules

**To :** nmsupremecourtclerk@nmcourts.gov

This version is a vast improvement over the initial proposed rules. Although the Committee Commentary can be useful, I don't know that so much commentary is necessary to effectuate the rules and may encourage confusion.

Muriel McClelland  
Muriel McClelland  
Sent from my iPad

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SUPREME COURT OF NEW MEXICO  
FILED

APR 15 2015





STATE OF NEW MEXICO  
SECOND JUDICIAL DISTRICT

SUPREME COURT OF NEW MEXICO  
FILED

April 15, 2015

Mr. Joey Moya  
Clerk of the Court  
New Mexico Supreme Court  
PO Box 848  
Santa Fe, NM  
Sent via facsimile: (505) 827 4837

APR 15 2015

RE: Proposed Rule 29-101 (Court Connected Mediation Services)

Dear Mr. Moya:

We appreciate the opportunity to provide commentary on the above referenced proposed rule. The Family Court in the Second Judicial District Court encourages the continued development and expansion of statewide ADR programs. Our colleague, Judge Alan Malott, submitted a letter of comment expressing his concerns about not requiring good faith participation in mediation. We fully concur with Judge Malott's analysis and concerns and request that you consider this letter in support of his position on the proposed rule.

Thank you for your consideration of our letter of support. Please do not hesitate to contact us if you require further information.

Sincerely,

Elizabeth E. Whitefield  
Presiding Judge, Family Court

Deborah Davis Walker  
District Court Judge

Debra Ramirez  
District Court Judge