

Policy for Investigating Complaints Against ADR Providers

Intent:

This policy is pursuant to the Utah Alternative Dispute Resolution Act, Title 78B, Chapter 6; the Utah Uniform Mediation Act, Title 78B, Chapter 10; the Judicial Council Rules of Judicial Administration, Rule 4-510.03 and the Utah Court-Annexed Dispute Resolution Rules, Rule 101 and 104.

Definitions:

(1) "Director" means the Director of the Utah State Court Office of Alternative Dispute Resolution. The Director maintains the roster of qualified ADR providers, and reviews and evaluates the performance of those ADR providers.

(2) "ADR Committee" means an ad hoc committee of the Judicial Council that advises and consults with the Director of the Office of Alternative Dispute Resolution.

(3) "Ethics Panel" means a panel made up of three members of the Judicial Council's ADR Committee who agree to review complaints made against ADR providers.

(4) "ADR provider" or "provider" means a neutral person who conducts ADR proceedings, who has met the qualifications to be included on the Utah State Court Roster of ADR providers, and was listed on that roster at the time the complaint was made.

(5) "Roster" means the list of those persons who have met the qualifications to provide dispute resolution services under the State Court ADR Program requirements. It includes the information supplied by such persons pursuant to Rule 4-510.03.

(6) "Complainant" means anyone, including the Director, having knowledge of the subject matter of a complaint and initiating the complaint about an ADR provider listed on the court roster.

(7) "Grievance" is an informal complaint that is not made in writing.

(8) "Formal complaint" is a complaint made in writing and signed by the complaining party.

(9) "Discipline by consent" means discipline agreed to by the provider.

(10) "Suspension" means a provider's name and contact information are temporarily removed from the State Court Roster of ADR Providers.

(11) "Removal" means the provider's name and contact information are removed from the State Court Roster of ADR providers.

Statement of the Policy:

(1) The Director will review complaints filed against a provider who is included on the State Court Roster of ADR providers. The Director will also review information received about a provider's conduct.

(1)(A) The Director will initiate a review upon receiving a complaint that a provider's conduct has violated :

- (i) a provision of the Code of Ethics for ADR providers (Utah Court Annexed Dispute Resolution Rules, Rules 101 and 104); or
- (ii) a provision of the Utah Alternative Dispute Resolution Act (Title 78B, Chapter 6); or
- (iii) a provision of the Utah Uniform Mediation Act (Title 78B, Chapter 10); or
- (iv) a provision of the Utah Uniform Arbitration Act (Title 78B, Chapter 31); or
- (v) a holding of a Utah court opinion relating to the practice of ADR;

or that a provider has:

- (vi) failed to meet or maintain the roster qualification requirements contained in Rule 4-510.03 of the Code of Judicial Administration; or
- (vii) been disciplined by any other jurisdiction or profession such that, when considered with the ethical responsibilities of an ADR provider, the best interests of the public are not served by continuing to include that provider on the State Court Roster of ADR providers, or;
- (viii) been convicted of a felony or a crime involving moral turpitude.

(1)(B) The Director will review all such complaints for facial merit.

(2) Procedure for filing complaints about a provider.

(2)(A) A complaint about a provider's conduct may be made by anyone having knowledge of the subject matter of the complaint. Complaints may be made to the Director or referred to the Utah State Court Office of Alternative Dispute Resolution.

(2)(B) A complaint need not take any particular form, and may be submitted by email. If the complaint is not made in writing, it will be considered only a grievance. When the complaint is in written form and signed by the complainant, it is considered a Formal Complaint. An email which identifies the name of the complainant is deemed to be signed.

(2)(C) The Director may, but is not obligated to, inform the provider of a grievance, perform an investigation of a grievance, or take any further action. The Director may notify the Chair of the ADR Committee of the grievance, and the Chair may determine that further action is indicated.

(2)(D) The Director will keep confidential grievances and Formal Complaints about a provider.

(2)(E) The Director may review and evaluate a provider's conduct in the absence of a grievance or a Formal Complaint.

(3) Notice of Formal Complaint

(3)(A) The Director will review all Formal Complaints for facial merit and send a copy of the Complaint to the Chair of the ADR Committee.

(3)(B) If the provider's conduct alleged in the Formal Complaint would be a violation of the provisions in Section (1), the Director will send the provider, by certified mail or electronically:

- (i) a written notice of the Formal Complaint,

- (ii) an outline of the provisions in Section (1) above that were alleged to have been violated, and
- (iii) a request for a written response from the provider within (20) business days of the Director's notice.

(3)(C) If the provider does not respond within the time period allowed, the Director may proceed with the imposition of discipline.

(4) Investigation of the Formal Complaint

(4)(A) Upon receiving the written response from the provider, the Director will evaluate the Formal Complaint together with the provider's response, and conduct an investigation into the allegations made in the complaint.

(4)(B) The Director's investigation may include, but is not limited to, interviews and telephone calls with the complainant, the provider, and other parties to the ADR process whose observations of the mediation communications may be relevant to the complaint; a review of court documents; and a review of mediation communication from the ADR process.

- (i) "mediation communication" is used above, as defined in §78B-10-102(2) of the Utah Uniform Mediation Act, including but not limited to oral and written statements prepared or exchanged for the mediation session;
- (ii) this investigation falls under the definition of exception to privilege as stated in §78B-10-106(1)(f), the Utah Uniform Mediation Act.

(4)(C) Any investigation, hearing, or appellate review of a disciplinary procedure about a provider's conduct of an ADR process is considered an exception to privilege under §78B-10-106(1)(f), the Utah Uniform Mediation Act, and therefore matters discussed in mediation and/or matters that would ordinarily be sheltered from the access of the Director, may be requested for use in an investigation of a complaint against a provider.

(4)(D) An ADR provider may be suspended or removed from the roster if the provider fails to cooperate with the Director's investigation. The Director will consult with the Chair of the ADR Committee in making that determination. The provider may request reconsideration by the Director or an evidentiary hearing as discussed in Section (9) of this policy.

(5) Procedures for review of discipline or sanction imposed on an ADR provider by another jurisdiction or profession.

Upon receipt of information that a provider on the roster has been disciplined or sanctioned by another jurisdiction or profession after that provider has been included on the roster, the Director may impose reciprocal discipline.

(6) Procedures for handling Formal Complaints that do not constitute of a violation of ethics rules.

(6)(A) If the Director conducts an investigation and determines that the allegations against a provider's conduct, if true, would not constitute a violation of provisions in Section (1), the Director will inform the complainant, the provider and the Chair of the Committee of that determination. The Director may take either of the following actions regarding the provider and the complainant:

(i) close the complaint, and inform the complainant, the provider, and the Chair that no further action will be taken; or

(ii) offer a facilitated meeting between the complainant and the provider to attempt to resolve the issues brought forward by the complainant. The facilitated meeting will be conducted by a trained mediator who is a member of the ADR Committee. The Chair will make the assignment of a mediator to facilitate the meeting.

(ii)(a) If the facilitated meeting resolves the issues, and the complainant withdraws the Formal Complaint, the Complaint will be closed and no further action will be taken. The Chair will be notified of the closure. If the facilitated meeting results in the ADR provider's accepting discipline by consent, those sanctions agreed upon will be administered according to Section (7) of this policy.

(ii)(b) If the facilitated meeting does not resolve the issues, any party to the facilitated meeting may request further action, including a hearing before an Ethics Panel.

(6)(B) Upon review of the Director's determination and the outcome of the facilitated meeting, if any, the Chair may determine that the Formal Complaint will be reviewed by an Ethics Panel.

(7) Procedures for handling Formal Complaints that constitute a violation of the provisions in Section (1).

(7)(A) If the Director determines through an investigation that the allegations about an ADR provider's conduct, if true, would constitute a violation of the provisions in Section (1), the Director may:

(i) notify the Chair of the ADR Committee, the complainant and the provider of the Director's request to refer the matter directly to an Ethics Panel; or

(ii) allow the provider to accept discipline by consent or request a hearing by an Ethics Panel.

(7)(B) If the ADR provider accepts discipline by consent, the Director will notify the complainant and the Chair of the ADR Committee of such action. The Committee will inform the public of public sanctions against a provider promptly after imposing such sanctions.

(7)(C) If the ADR provider fulfills the terms of the sanction within the time period allowed, the Formal Complaint will then be closed. If the provider fails to fulfill the terms of the sanctions, the original Formal Complaint may be reinstated.

(7)(D) If the ADR provider will not accept discipline by consent, the Director will notify the complainant and the Chair of the ADR Committee, and request referral of the Formal Complaint to an Ethics Panel.

(7)(E) The Director and the Chair of the ADR Committee may suspend an ADR provider from the court roster of providers pending a hearing by an Ethics Panel.

(8) Procedure for Convening an Ethics Panel.

(8)(A) The Director, the ADR provider and the complainant may each request a hearing before an Ethics Panel. The request will be made in writing to the Chair of the ADR Committee and must be submitted within (30) days of being notified of the Director's conclusion of the investigation.

(8)(B) The Chair will assign three members of the ADR Committee to serve on an Ethics Panel for the hearing, and will assign one of the members to chair the hearing.

(8)(C) When a hearing has been scheduled, the chair of the Ethics Panel will send written notice to the provider notifying him or her as to the time and place of the hearing.

(9) The Hearing Before an Ethics Panel

(9)(A) The hearing will be private and closed to the public. It will be recorded electronically. The ADR provider, the complainant and the Director may appear and participate in the hearing.

(9)(B) The hearing will be informal. Rules of civil procedure and rules of evidence will not apply; however, they may serve as a guide for the Ethics Panel. The standard of proof will be a preponderance of the evidence.

(9)(C) Any hearing, or appellate review of a disciplinary procedure about an ADR provider's conduct of an ADR process is an exception of privilege under §78B-10-106(1)(f) of the Utah Uniform Mediation Act.

(9)(D) The Director, the complainant and the ADR provider may each bring counsel and/or other representative to the hearing. The Director, the complainant and the provider may each submit written exhibits and call witnesses at the hearing.

(9)(E) If any party fails to appear, the Ethics Panel may proceed on the evidence before it. If the complainant fails to appear, the Panel may dismiss the Formal Complaint.

(10) The Determination of the Ethics Panel.

(10)(A) Based on the evidence submitted at the hearing, the Ethics Panel will make a determination as to whether or not the ADR provider's conduct violated a provision in Section (1) and inform the Director, the provider and the complainant, in writing, of the basis for its findings of fact and decision.

(10)(B) The Ethics Panel will file its determination with the Director, and the Director will hold it until the ADR provider has requested an appellate review of the determination. If the provider chooses to appeal an adverse determination, he or she must file a written appeal to the Director within (30) days of receiving notification of the Ethics Panel's determination. If the provider does not request a review within the time allotted, the determination of the Panel will be sent to the ADR Committee.

(10)(C) If the ADR provider chooses to appeal an adverse determination of the Ethics Panel and files it within the time allotted, the Director will forward the request to the Chair of the ADR Committee and the ADR Committee. The Committee will grant an appellate review to the provider.

(10)(D) In the event that the Ethics Panel determines an ADR provider has violated a provision contained in Section (1) above, the provider may be sanctioned for failure to comply with the Code of Ethics for ADR Providers as adopted by the Utah State Supreme Court or for failure to meet the requirements of state statute or rule. The Ethics Panel will determine the appropriate sanction(s).

(10)(E) The Ethics Panel's sanction may be imposed pending a review of the Panel's determination by the ADR Committee.

(11) The Appellate Review before the ADR Committee.

(11)(A) Upon request, the ADR Committee will receive a brief from the provider.

(11)(B) The appeal will be held before the ADR Committee, and the Chair of the Committee may request to meet in executive session. It will be private and closed to the public. The Chair of the Committee will conduct the meeting but may not vote if the Chair participated in prior disciplinary decision making. The members of the Ethics Panel may be present until the vote of the remaining members of the Committee.

(11)(C) The ADR Committee may hear oral argument from the provider.

(11)(D) The review by the ADR Committee is ordinarily confined to the record, which will consist of correspondence between the Director, the provider and the complainant; any evidence considered by the Ethics Panel; and the transcript of the hearing before the Panel, if one is prepared. The cost of the creation of the transcript will be the responsibility of the provider.

(11)(E) The ADR Committee will not substitute its judgment for that of the Ethics Panel in regard to the weight of the evidence or facts. It may, however, reverse or modify the original decision upon finding that the Ethics Panel's determination is:

- (i) in violation of constitutional provisions; or
- (ii) beyond the authority of the Ethics Panel in either substance or procedure; or
- (iii) arbitrary or capricious, or characterized by abuse of discretion, or clearly unwarranted discretion.

(11)(F) The ADR Committee will deliberate outside the presence of the parties to the original Ethics Panel hearing and the members of the Ethics Panel. The decision by the ADR Committee is final. The Committee will notify the Director, the Ethics Panel, the ADR provider and the complainant of its decision in writing.

(12) The Director, in consultation with the Chair of the ADR Committee, may enforce the following sanctions and may request that they be completed in a specified time period:

(i) Private sanctions which may include, either singly or with other sanctions:

- (a) written admonition by the Director;
- (b) re-taking and successfully passing the Court's ADR Ethics Rules Examination, and/or;

(ii) Public sanctions which may include, either singly or with other sanctions:

- (a) a written reprimand by the Director;
- (b) a requirement to repeat training or to attend additional training;
- (c) a requirement to observe a set number of sessions conducted by a senior ADR provider on the court roster;
- (d) a requirement that the ADR provider allow the Director or the Director's designee to observe a set number of ADR process sessions conducted by that provider and receive instruction and feedback as to the provider's conduct and competence, if necessary;
- (e) suspension from the court roster for a period of time sufficient to allow the ADR provider to reasonably fulfill the conditions of the sanctions, or for the provider to pursue the entire review process listed above;
- (f) removal from the State Court Roster of ADR providers.