

**OFFICE OF THE EXECUTIVE SECRETARY
OF THE SUPREME COURT OF VIRGINIA**

**PROCEDURES FOR COMPLAINTS AGAINST CERTIFIED MEDIATORS,
MEDIATION TRAINERS, AND MEDIATOR MENTORS**

**Adopted by the Judicial Council of Virginia October 18, 2018
Effective Date: November 1, 2018**

1. GENERAL

- a. The purpose of these Procedures is to provide a means of enforcing the Standards of Ethics and Professional Responsibility for Certified Mediators (hereinafter the “Standards”), the Guidelines for the Training and Certification of Court-Referred Mediators, the Guidelines for the Certification of Mediation Training Programs, and the Mentor Guidelines (hereinafter the “Guidelines”).
- b. These rules apply to all proceedings involving complaints filed on or after July 1, 2011 against certified mediators in their capacities as mediators, trainers, and/or mentors.
- c. If a mediator’s certification is suspended or revoked under these Procedures, the mediator’s privileges to serve as a mentor or trainer shall also be suspended or revoked. If the mediator’s privileges to serve as a mentor or trainer are suspended or revoked, his or her certification as a mediator may also be suspended or revoked.
- d. If the complaint involves the conduct of a certified mediator in a mediation, the complaint will not be considered until the mediation is concluded.
- e. If the complaint involves a procedure that is a combination of mediation with another dispute resolution process, such as arbitration, the scope of review under these Procedures is limited to the mediation portion of the proceeding.
- f. The role of the mediator differs substantially from other professional roles. These Complaint Procedures do not apply to a certified mediator providing services in another professional role, unless it can be shown that the mediator was also clearly conducting mediation services, mediation mentoring services, mediation training services or the business of one of these services.
- g. See the “Initiation of a Complaint” section below for the time frame for filing a complaint.

2. DEFINITIONS

- a. Complainant – the initiator of a complaint
- b. Complaint – a written communication to DRS on the Mediation Complaint Form (OES Form ADR-1004) alleging misconduct or a violation of or failure to comply with the Standards and/or the Guidelines.
- c. Complaint Hearing Committee – The Complaint Hearing Committee is composed of six members: five certified mediators, at least one of whom is a mentor, at least one of whom is a mediation trainer, at least one of whom is an attorney, and at least one of whom is certified at the appellate level, and one active or retired judge. The six members shall be designated by the Executive Secretary and serve for two-year staggered terms. Members may be appointed for successive terms. If a member resigns, the Executive Secretary shall appoint a member to fill the unexpired term. If a member is temporarily unable to serve, the Executive Secretary shall appoint a member pro tempore.
- d. Complaint Review Panel – The Complaint Review Panel is composed of three members: two certified mediators, one of whom may be the intake attorney, and one active or retired judge. The three members shall be designated by the Executive Secretary and serve for two-year staggered terms. Members may be appointed for successive terms. If a member resigns, the Executive Secretary shall appoint a member to fill the unexpired term. If a member is temporarily unable to serve, the Executive Secretary shall appoint a member pro tempore.
- e. Decertification/Revocation – Removal of mediator, trainer or mentor privileges and functions for a defined period of time and/or until specified conditions are met. At the end of the decertification or revocation period, the respondent remains uncertified. If the respondent seeks certification after decertification or revocation, he or she must go through the certification application process.
- f. Disciplinary Record – any tangible or electronic record of:
 - 1) any proceeding in which the respondent has been found in violation of the Guidelines and/or the Standards, and
 - 2) any proceeding in which a complaint has been resolved by agreed terms and conditions as described in Sections 4.i and 4.j, and
 - 3) any actions taken under the Guidelines including (1) curtailment, modification, suspension or revocation of certification or status or (2) any

course for improvement.

- g. DRS – The Division of Dispute Resolution Services of the Office of the Executive Secretary (OES) of the Supreme Court of Virginia (or any subsequently authorized entity) is responsible for the oversight and certification of mediators providing services in court-referred cases, in mediation training programs, and as mentors.
- h. Executive Secretary - Executive Secretary of the Supreme Court of Virginia
- i. Guidelines – Guidelines is defined as the Guidelines for the Training and Certification of Court-Referred Mediators, the Guidelines for the Certification of Mediation Training Programs, and/or the Mentor Guidelines.
- j. Intake attorney – An attorney, familiar with mediation, employed by OES or DRS, whose duties shall include an initial review of complaints against certified mediators, mentors and certified mediation trainers.
- k. Party – The complainant or the respondent.
- l. Respondent – The mediator, trainer or mentor against whom a complaint is lodged.
- m. Standards – Standards is defined as the Standards of Ethics and Professional Responsibility for Certified Mediators.
- n. Suspension – Temporary removal of mediator, trainer and/or mentor privileges and functions for a defined period of time and/or until specified conditions are met. At the end of suspension, privileges and functions are automatically restored.

3. INITIATION OF A COMPLAINT

- a. The complaint procedure may be initiated by anyone with knowledge of the actions or behaviors raising concern, including any employee of OES. A complaint must be in writing on the Mediation Complaint Form (OES Form ADR-1004). The complaint must clearly identify: 1) the mediator, mentor or mediation trainer who is the subject of the complaint; 2) the person making the complaint; 3) the nature of any alleged misconduct or violation; 4) the date(s) the alleged misconduct or violation occurred; and 5) the complainant’s contact information.
- b. Any complaint must be received by DRS within two years of the alleged misconduct, except in unusual cases, where 1) the basis for the complaint was

discovered after the two-year period and could not reasonably have been discovered before and 2) the complaint alleges a serious ethical breach. If a complaint is dismissed for lack of facial sufficiency, the complainant may initiate a new revised complaint if the time limit has not elapsed. The time limitation for filing may also be tolled as set forth in paragraph 3.e. below.

- c. DRS will provide individuals who allege misconduct, violations or failure to comply with a Mediation Complaint Form (OES Form ADR-1004), and a copy of these Procedures, or direct them to the documents on the Virginia Judicial System website. Where a comment on an evaluation form raises ethics issue(s), DRS may provide the commenting individual with the same form and document.
- d. DRS will notify the mediator, trainer or mentor of the complaint and will send him or her a copy of the complaint.
- e.
 - 1) If the respondent resigns his or her certification or allows it to lapse while he or she is the subject of a complaint or the complaint proceeding, that decision, and the circumstances surrounding the complaint, will be taken into consideration if and when the respondent reapplies for certification. If and when the respondent becomes certified, DRS may reactivate the complaint proceeding.
 - 2) If a complaint is filed after the respondent resigns his or her certification or allows it to lapse, regarding an incident prior to the resignation or lapse, that decision to resign or allow certification to lapse, and the circumstances surrounding the complaint, will be taken into consideration if and when the respondent reapplies for certification. The time limitation for filing set forth in paragraph 3.b. above is tolled from the date of resignation or lapse to the date the respondent becomes certified.
- f. A complaint may be dismissed upon a request by a complainant to withdraw his or her complaint only with the agreement of DRS.

4. REVIEW OF COMPLAINTS

- a. Once DRS receives a complaint, it shall first determine whether it has jurisdiction to consider the complaint. If DRS does not have jurisdiction, the complaint will be dismissed for lack of jurisdiction and no further action will be taken. DRS will notify the complainant and respondent of the dismissal in writing.
- b. Once jurisdiction is established, an intake attorney will review the complaint to determine whether, assuming the allegations were true, the complaint as written is facially sufficient to state a claim that the respondent has violated or failed to comply with the Guidelines and/or the Standards.

- c. The intake attorney may in his or her discretion refer the complaint to the Complaint Review Panel to make the determination of facial sufficiency and carry out all the functions of DRS described in this Section. Two (2) out of three (3) members of the Complaint Review Panel shall constitute a quorum. Decisions of the Panel shall be made by a majority of those present.
- d. If the complaint would not constitute a violation of or failure to comply with the Guidelines and/or the Standards, assuming the allegations were found to be true, the complaint will be dismissed, and no further action will be taken. DRS will notify the complainant and the respondent of the decision in writing. If DRS dismisses the complaint, but believes remedial action or training may be beneficial, DRS may suggest that the respondent voluntarily participate in appropriate training or mentorship.
- e. If the complaint asserts facts that would, if true, constitute a violation of or failure to comply with the Guidelines or the Standards, DRS will send a letter indicating the nature of the concerns to the respondent with a copy to the complainant. The respondent has twenty (20) calendar days from the date of the DRS letter to send a written response to DRS with a copy to the complainant.
- f. If DRS receives no written response from the respondent within five (5) calendar days after expiration of the twenty (20)-day time period, DRS may immediately suspend the respondent's mediator and/or trainer certification and/or mentor status pending resolution of the complaint.
- g. If the written response addresses the concerns to DRS's satisfaction, DRS may dismiss the complaint. DRS will notify the complainant and the respondent of the decision in writing. If DRS dismisses the complaint but believes remedial action or training may be beneficial, DRS may suggest that the respondent voluntarily participate in appropriate training or mentorship.
- h. If DRS receives no written response from the respondent within the allotted time period, or if the response does not adequately address the concerns of DRS, DRS shall decide whether further information is necessary to determine how to proceed. If so, DRS staff will investigate the facts stated in the complaint. The investigation may include, but need not be limited to, review of any relevant documents and interviews of parties and witnesses.
 - 1) If after investigation, DRS determines the complaint is unfounded, DRS may dismiss the complaint and notify the parties in writing of the dismissal.
 - 2) If DRS determines no further information is necessary, or if the

investigation does not find the complaint to be unfounded, DRS may
(i) refer the complaint to the Complaint Hearing Committee, or
(ii) elect an option from subsections i. and j. below.

- i. Upon agreement of the complainant and the respondent, DRS may refer the complaint matter to a third party neutral for a facilitated meeting.
 - 1) If the meeting results in resolution of the complaint to the satisfaction of the parties and DRS, DRS shall not refer the matter to the Complaint Hearing Committee, unless and until it determines the respondent is not complying with the requirements, if any, of the facilitated resolution. Once the respondent has complied fully with the requirements, if any, the facilitated resolution shall become the final disposition of the complaint, and DRS shall so notify the parties in writing.
 - 2) If the meeting with a third party neutral does not result in resolution of the complaint to the satisfaction of the parties and DRS, DRS shall refer the complaint to the Complaint Hearing Committee and so notify the parties in writing.
- j. If DRS determines that the complaint is best addressed by remedial action, training or mentorship, then DRS may send a letter notifying the respondent that, based on the facts asserted in the complaint and the respondent's response, DRS proposes that the respondent agree in writing to specific terms and conditions, which may include, but are not limited to, any combination of sanctions listed in Section 8, to be completed within a specified period of time. The respondent must send a written response to DRS's proposal within ten (10) calendar days from the date thereof, indicating whether he or she accepts or rejects the proposed terms and conditions. The written response must be received by DRS within five (5) calendar days after expiration of the ten (10)-day time period.
 - 1) If the respondent agrees in writing to the specified terms and conditions, DRS shall not refer the complaint to the Complaint Hearing Committee, unless and until it determines that the respondent is not complying with the agreed terms and conditions. Once the respondent has complied fully, the specified terms and conditions shall become the final disposition of the complaint, and DRS shall so notify the parties in writing.
 - 2) If the respondent does not accept the proposed terms and conditions, DRS shall refer the matter to the Complaint Hearing Committee and so notify the parties in writing.

5. COMPLAINT HEARING COMMITTEE

- a. The Complaint Hearing Committee shall hear and address any complaints referred by DRS. The Complaint Hearing Committee shall consider DRS's concerns, the respondent's response to those concerns, if any, and the results of any investigation. The Complaint Hearing Committee shall then conduct an informal proceeding within sixty (60) calendar days after referral from DRS unless the Committee and respondent agree to a longer time frame.
- b. The Complaint Hearing Committee shall be convened as necessary to hear complaints. DRS may provide staff support for the Complaint Hearing Committee.
- c. Each time the Complaint Hearing Committee is called together to consider a complaint, it will select a Chair to handle the convening of meetings or conference calls and to run the informal proceeding.
- d. Decisions of the Complaint Hearing Committee shall be made by a majority of those present. Five (5) out of six (6) members of the Committee shall constitute a quorum.

6. CONFIDENTIALITY AND RECORDS RETENTION

- a. DRS, the Complaint Review Panel and the Complaint Hearing Committee may not disclose to the public any complaints or the disposition thereof, or any reports, information or records received and maintained relating thereto, except:
 - 1) to the extent necessary to investigate and dispose of any matter arising under these Complaint Procedures;
 - 2) to the extent necessary to implement and monitor the disposition of, or sanctions resulting from, any matter arising under these Complaint Procedures;
 - 3) in any subsequent trial or appeal of any disposition of, or sanctions resulting from, any matter arising under these Complaint Procedures;
 - 4) DRS may disclose to the public, and may publish in its newsletter, that the certification of a mediator, mentor or trainer has been suspended or revoked under these Complaint Procedures;
 - 5) DRS may disclose to the complaining party the disposition of the complaint; or
 - 6) upon written and notarized authorization by the respondent, or by a certified mediator, trainer and/or mentor, DRS may disclose:

- (i) whether complaints have been lodged against that respondent or that mediator, trainer and/or mentor and
 - (ii) what was the disposition of such complaints.
- b. Such complaints, dispositions, reports, information or records shall be considered personnel records and shall not be available for discovery or as evidence in any civil action, except by order of a court that has taken into consideration the confidentiality of the mediation process.
- c. For educational or research purposes, DRS may disclose a general description of the nature of the complaint and its resolution so long as the disclosures protect the anonymity of the respondent and any mediation participants.
- d. DRS will retain indefinitely the Disciplinary Records of any certified mediators, trainers or mentors. DRS may retain records regarding dismissed complaints.

7. THE HEARING

- a. The Complaint Hearing Committee shall conduct a proceeding that is private and is not open to the public. The parties may present witnesses, documents and other information that would be supportive of their position and helpful to the Hearing Committee in making its decision. Both the respondent and the complainant may bring counsel or a support person to the hearing. The Complaint Hearing Committee may elect to take testimony by telephone when appropriate, taking into consideration the cost and inconvenience of the witness appearing, and any cost, inconvenience and prejudice to the respondent. The Complaint Hearing Committee may elect to sequester witnesses. If any party fails to appear or to participate in good faith, the Complaint Hearing Committee may proceed on the evidence before it. If the complainant fails to appear, the Committee may dismiss the complaint for want of prosecution.
- b. DRS, the respondent, or the Complaint Hearing Committee may record the hearing electronically or by transcription. The entity seeking the recording will bear the cost of and the responsibility for the recording. Such record and/or transcript shall be made available to DRS, the respondent, the Complaint Hearing Committee, and to the Executive Secretary in the event of an appeal. Any recording and/or transcript shall be governed by the confidentiality requirements in Section 6 above.
- c. The rules of civil procedure and rules of evidence do not apply, but may serve as a guide for the Complaint Hearing Committee.
- d. If, after the hearing, the majority of the Complaint Hearing Committee finds that clear and convincing evidence establishes a violation of or failure to comply with

the Guidelines and/or the Standards, the Complaint Hearing Committee may impose any of the sanctions included in Section 8 below as it deems appropriate. If the respondent against whom a violation or failure to comply has been found has a Disciplinary Record, the facts and circumstances giving rise to such Disciplinary Record may be disclosed (1) to the Complaint Hearing Committee upon its request and (2) by the Complaint Hearing Committee in its letter decision. If the Complaint Hearing Committee does not find that clear and convincing evidence establishes a violation or failure to comply, it shall dismiss the complaint.

8. DECISION AND SANCTIONS

- a. The Complaint Hearing Committee shall make its decision and file a copy of its written decision with DRS within thirty (30) calendar days after the close of the hearing. DRS shall promptly mail to the respondent and complainant notice of such filing and a copy of the decision. If no request for reconsideration by the Executive Secretary of the Committee's decision is received from the respondent by the expiration of the time period allotted for such requests, the decision of the Complaint Hearing Committee shall become the final disposition of the complaint.
- b. If the Complaint Hearing Committee determines that sanctions are warranted, it may impose sanctions to be completed within a specified period of time, including, but not limited to, any one or more of the following:
 - 1) sending a formal letter identifying the corrective action necessary;
 - 2) notwithstanding the confidentiality requirements of Section 6 above, notifying the dispute resolution center, court, or other entity with which the respondent is affiliated, of sanction of suspended certification or decertification;
 - 3) requiring one or more consultations or co-mediations with a mentor selected from the list maintained by DRS;
 - 4) requiring group or individual training;
 - 5) restriction of certification by curtailment or modification of the type of cases to be mediated, mentored, or of the courses to be taught in the future;
 - 6) suspension of certification or mentor status for a specified term;
 - 7) revocation of certification or mentor status;
 - 8) reimbursement of fees or expenses received by the respondent for court-

referred mediations, training, mentorship or related work as agreed upon by the respondent and the Complaint Hearing Committee; or

- 9) reimbursement of any out-of-pocket expenses of the Complaint Hearing Committee members related to the Complaint Hearing Committee hearing.
- c. In those instances in which a sanction less than decertification has been imposed by the Complaint Hearing Committee and DRS determines that the respondent has not complied with the sanction, DRS may suspend the respondent's certification until compliance has been achieved. If the respondent objects to this suspension, he or she may, within ten (10) days of notice of his or her suspension, request a hearing before the Complaint Hearing Committee on the limited issue of whether he or she has complied with the sanctions. The Complaint Hearing Committee shall convene within sixty (60) days and deliver a written decision within thirty (30) days thereafter. A decision by the Complaint Hearing Committee is final.

9. RECONSIDERATION

- a. If sanctions are imposed by the Complaint Hearing Committee, the respondent may within fifteen (15) calendar days of the date of the notice of filing request reconsideration by the Executive Secretary. The written request must be received by the Executive Secretary within five (5) calendar days after expiration of the fifteen (15)-day time period.
- b. Upon receipt of a request for reconsideration, the Executive Secretary shall review all documents and other information that was considered by the Complaint Hearing Committee. Review shall be limited to the issues raised before the Complaint Hearing Committee. The Executive Secretary may return the complaint to the Complaint Hearing Committee, affirm the imposition of sanctions, or dismiss the complaint. The factual findings of the Complaint Hearing Committee shall be accepted unless clearly erroneous and the conclusions of law, including the sanctions, shall be reviewed de novo. This decision of the Executive Secretary is final and shall be set forth in a letter to the respondent, complainant and the Complaint Hearing Committee.
- c. Any decision of the Complaint Hearing Committee is stayed pending reconsideration by the Executive Secretary, or where the Executive Secretary returns the complaint to the Complaint Hearing Committee, pending reconsideration by the Complaint Hearing Committee.