Gus J. Solomon Inn, American Inns of Court, Portland, Oregon

MEDIATION

Current Trends in Complex Case Settlements

Presentation of Inn Group 1 (October 2006)

Scott Sorensen-Jolink - Master Judge & Group Leader
Paul Conable - Barrister
Billie Jean Eidson - Associate
Sara Kobak - Associate
Sarah Lora - Associate
Kendra Matthews - Barrister
John Parsons - Master Bencher
Karen Saul - Master Bencher
Robert Taylor - Associate
Geoffrey Wren - Master Judge

The presentation was a panel discussion led by the Group based on researched recent areas of difficulty encountered in the settlement of complex litigation cases. The panel members made oral presentations then answered hypothetical questions. The panelists were:

Scott Sorensen-Jolink, Esq., Sorensen-Jolink, Trubo, Williams, Scherzer and Strom LLP, J.D., 1976, Northwestern School of Law at Lewis and Clark College, Portland, Portland, Oregon B.A., Politics and Psychology, 1972, Luther College, Decorah, Iowa; Oregon Practitioner working primarily in the area of Family Law, 1977–present. Mediation offered as part of the practice beginning in 1985. Member, American Academy of Matrimonial Lawyers, 1995 to present; Consultant to PLF and plaintiff's counsel on nine malpractice cases; 1995 to present President, OSB Section on Family and Juvenile Law, 1981-82 Founding Member, OSB Section on Family and Juvenile Law. Various committees and task forces in the Family Law field including Ad Hoc Committee that effectively instigated the commencement of mandatory mediation procedures in Family court in Multnomah County, Ad Hoc Committee that reviewed and redrafted the contempt code and consulted on legislative strategy with OSB representatives and sections.

Samuel J. Imperati (general mediation) Samuel J. Imperati, Executive Director, Institute for Conflict Management, Inc., Portland; B.A., Santa Clara University (1974); J.D., U.C. Davis – King Hall (1979); member of the Oregon State Bar since 1979; ICM is a national provider of mediation, facilitation and training services; AV-rated attorney and has been involved in more than 2,500 disputes – some he even started; mediating everything from "admiralty to zoning" and has been highly effective in resolving complex matters, public policy issues, and cases where emotions run high; served as a Judge Pro Tem, Chair of the OSB ADR Section, Chair of the Multnomah County Local Responsibility Committee, and member, Oregon Mediation Association; recently selected by peers for inclusion in the 2006 edition of The Best Lawyers in America for mediation.

Michael J. Scott (primarily construction related mediation) Oregon State Bar, admitted 1983; Continuing Legal Education (CLE) Committee member, 1994-97; Construction Law Section member (Chairperson, 1987-88); Debtor/Creditor Section member; Oregon Construction Law CLE, Chapter on Construction Liens, Oregon State Bar, Author (1989, 1993, 1997) Co-Author (2004); Law for Design Professionals in Oregon, Chapt. "Mock Mediation of a Condominium Project," Lorman Business Center, Inc. (2003).

Stan Sitnick (not-for-profit sector), Assistant Professor, Portland State University, Portland, Oregon; B.A. from Georgetown University (1966). (Honors Program--major in History). J.D. from the University of Chicago Law School (1969) (Member of Law Review).

WILLAMETTE LAW REVIEW

VOLUME 33 NUMBER 3 SUMMER 1997

MEDIATOR PRACTICE MODELS: THE INTERSECTION OF ETHICS AND STYLISTIC PRACTICES IN MEDIATION

Samuel J. Imperati

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WILLAMETTE LAW REVIEW
Volume 33, Number 3
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MEDIATOR PRACTICE MODELS: THE INTERSECTION OF ETHICS AND STYLISTIC PRACTICES IN MEDIATION*

SAMUEL J. IMPERATI**

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* A preliminary version of this Article appeared under the title, *Mediator and Arbitrator Ethics* in *Arbitration and Mediation*, Chapter 25, Oregon State Bar Continuing Legal Education (1996).

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I. Scope

This Article addresses mediator ethics and stylistic practices at the operational level and specifically examines the practical implications of the *Model Standards of Conduct of Mediators* (*Model Standards*),[1] as compared with other professional ethical codes governing mediation. While this Article compares national standards with those in the State of Oregon, the reader will come to understand the broad implication of this discussion and how it transcends both legal and professional boundaries.[2] Thus, this Article explores ethical issues and practical questions that regularly arise in mediation, along with some possible answers. It also proposes an additional model standard designed to ensure that the parties and the mediator have mutually and clearly defined expectations.

This discussion is valuable for mediators because it provides

1. The *Model Standards* are a joint ethical code promulgated by the Society of Professionals in Dispute Resolution (SPIDR), the American Arbitration Association (AAA), and the American Bar Association (ABA). *Reprinted at* 5 World Arb. & Mediation Rep. 223 (1994).

2. The author does not necessarily hold the positions set forth in this Article. Several of the issues and positions are presented to provoke discussion in the hope of giving mediators, parties, and advocates further guidance on how best to create a workable ethical code that will serve the legitimate interests of adverse parties who are attempting to resolve their dispute.

the opportunity to view ethics from the parties' perspective. Several issues and positions are presented to provoke dialogue with the intention of giving mediators, parties, and advocates further guidance on how best to create a clear, workable understanding on how mediation will be conducted. This will assist adverse parties in resolving their dispute or, at a minimum, clearly define the expectations between the parties and the mediator.

In this Article, the term "ethics" connotes the moral codes or philosophical standards that place mediators in accordance "with the rules or standards governing the conduct of the members of the profession."[3] "Stylistic practices" are those operational practices that mediators currently use, which will be contrasted with the ethical codes. A "model" is a combination of ethical codes and stylistic practices that individual mediators apply in practice. Because mediation takes place at the intersection of logic and emotion, clear collaborative ground rules are essential. Thus, agreement as to which model will be used in a particular mediation is necessary to increase the likelihood of success and user satisfaction.

Part II examines three stylistic models used in mediation: "facilitative," "evaluative," and "empowerment and recognition" as background to this Article. Part III provides a precursory discussion of mediator ethics and various professional ethical codes. Part IV addresses the differences between these codes and specifically discusses each standard of the *Model Standards*. Part V offers a practical guide for mediators to define ethical behavior, and concludes the Article by proposing an additional standard to make the *Model Standards* more usable and internally consistent.

As a supplement to this discussion, a "Mediator Practices Styles & Ethical Exploratory Survey" was conducted in 1995, in which over forty Northwest SPIDR members were asked questions dealing primarily with ethics and style.[4] The survey results are important in highlighting mediator conduct and will be referenced throughout this Article. The profile of the SPIDR

3. The American Heritage Dictionary of the English Language 450 (New College ed. 1981).

4. This exploratory survey was conducted March 11, 1995 at the SPIDR Northwest Annual Conference in Portland, Oregon.

mediators puts questions relating to practice area, style, model, and ethics into perspective. The survey was created by a licensed psychologist[5] and an attorney,[6] both of whom mediate, for the purpose of exploring the disparity between what practicing mediators say *should* happen in mediation and what actually *does* happen. The following table summarizes the results of the participants surveyed and their mediation experience.

NORTHWEST CHAPTER SPIDR EXPLORATORY SURVEY[7]

QUESTION	RESPONSE
Gender	54% female; 46% male
Education and professional background	34% business; 32% legal; 17% communication and community organizing
Mediation experience	46% have been mediating more than 5 years; 20% have been mediating 3-5 years
Frequency of mediation	30% mediate less than once a month; 25% mediate once a month; 28% mediate once a week
Field in which most mediation work is done	34% business; 32% legal; 17% communication and community organizing; 10% psychology
Length of typical mediation	28% 2-4 hours; 15% 4-6 hours; 22% more than one day
Percentage of vocational time spent in mediation	40% spend 1 to 20% of time in mediation 25% spend 21 to 40% of time in mediation 13% spend 41 to 60% of time in mediation
Number of paid mediations in the last 12 months	55% stated up to 12 40% stated from 13 to 52
Number of voluntary or unpaid mediations in the last 12 months	85% stated up to 12

5. Ruth Parvin, Ph.D., J.D.
6. Samuel J. Imperati, J.D.
7. Survey by Author.

A summarization of the Table 1 survey result shows that the majority of mediators surveyed are female and are professionally educated in either business or law. Additionally, two-thirds have been mediating longer than three years and spend between 20% and 40% of their time mediating. Eighty-five percent of surveyed mediators say they are paid for their services, in addition to doing pro bono mediation.

The intended impact of this study was to determine from mediators what is espoused as the "best" mediation practice and what mediators actually do, thus beginning a dialogue about how the process of mediation should work, both theoretically and practically. Additionally, the survey was an effort to begin collecting data on the practice of mediation in an attempt to compare what the consumers of mediation services desire and what the profession of mediation currently provides. The survey supports the author's contention that mediators must make efforts to reduce the incongruity between mediator's current practices and parties' expectations.

II. COMPETING PRACTICES: STYLISTIC MODELS OR DIFFERENT PROCESSES?

The Preface to the *Model Standards* defines mediation as:

> [A] process in which an impartial third party—a mediator—facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute. A mediator facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem solving to enable the parties to reach their own agreement.[8]

Was it the *Model Standards* authors' intent to define mediation in such a way as to encourage one model of mediation over another, thereby eliminating particular mediation models? Or did they attempt to define the process of mediation broadly enough to include stylistic diversity in the profession? The answers to these questions drive the debate surrounding mediator practice models and ethics. An exploration of the continuum of practice models becomes the starting point for further discussion.

The principal question regarding the continuum of models

8. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Preface (1995).

is: "Should the mediator evaluate—make assessments, predictions, or proposals for agreements—or merely facilitate the parties' negotiation without evaluating?"[9] Mediators, whether they know it or not, usually have a predominant orientation based on a combination of their personality, experiences, education, and training.[10]

ETHICS OR STYLISTIC PRACTICE?	
FACILITATIVE (Least Interventionist)	EVALUATIVE (Most Interventionist)

Although few professional mediators occupy the continuum's polar extremes, for purposes of analysis it will be helpful to explore those extremes and eventually fashion a workable ethical and practical standard for the mediation profession.

An important aspect of any human interaction is to have a predictable process. The more predictable the process, the more comfortable the users will be in choosing that process over various other alternatives—for example, litigation, which most parties are more familiar with than mediation. If a consensus on ethics and process is not reached, the profession and those it serves will suffer when the public's expectation of a mediator's behavior is inconsistent with reality. This risk exists because of competing mediator practice models.

The two theoretical models for discussion, "facilitative" and "evaluative," are described below. The differences in the models demonstrate how parties easily may become disenfranchised with a process that appears unpredictable. As a result, parties may participate less than fully in the process.

This continuum also is an example of mediation's growing pains. The struggles of a profession attempting to guide itself are the result of those pains. "The more sophisticated mediation techniques become, and the more attorneys and their clients learn about mediation, the more that people with problems are being drawn to mediation . . . ."[11] Mediation commentator

9. Leonard L. Riskin, *Mediator Orientations, Strategies, and Techniques*, 12 ALTERNATIVES TO THE HIGH COST OF LITIG. 111, 111 (1994).

10. *Id.* at 111, 113.

11. Richard C. Reuben, *The Lawyer Turned Peacemaker*, A.B.A. J., Aug. 1996, at

Kimberlee Kovach suggests a possible explanation for the growing pains:

> A major obstacle in determining ethics for mediators is that mediation has yet to be formally established as a profession. Assuming movement in that direction, the development of ethical standards appears to be occurring contemporaneously with the creation of the profession. Additional problems face the mediator. There is a built in inconsistency in the development of "standards" for mediators. The entire premise of mediation is its lack of rigidity. Mediation is a flexible process, and that flexibility is one of mediation's key benefits.[12]

This growth process is complicated because mediation is a profession that draws from several occupations, each with ethical standards that may not apply in the mediation context. Additionally, the standards may conflict and the philosophical bases for the standards may collide, or both, leading to a substantive struggle within the mediation profession over what is the "best" ethics and practice model. Again, Kovach describes the dilemma.

> There are no definitive standards of competency and, in fact, testing for mediators in the traditional sense is not advised. In order to encompass the variety of mediator styles, it would seem that ethics must likewise possess elasticity. Yet flexibility is not normally a component of ethics. Moreover, setting and enforcing guidelines of any nature seem almost antithetical to the mediation process. But, because of the impact mediators can have on individual lives, there is a need for some type of guidance concerning certain mediator actions. The challenge is creating guidelines which are sufficiently specific in directing mediator conduct, while simultaneously allowing for some flexibility in the process.[13]

A. *The Facilitative Model*

The continuum of mediation models measures the level of intervention of the mediator. The facilitative model of mediation is premised on the assumption that the mediator is totally neutral and does not present personal views on the merits of the

54, 56. Seventy-seven percent of attorneys surveyed indicate that their clients willingly use mediation. *Id.* at 57.

12. KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 190 (1994).

13. *Id.*

case.[14] In other words, a facilitative mediator is theoretically the least interventionist and, at most, would offer an option for settlement only after it becomes clear that the parties cannot generate one on their own.[15] For a facilitative mediator, a "good" settlement is one that the parties can accept, even if one side should or could achieve a better result in a courtroom.[16] Such a mediator is not apt to remedy a substantive power imbalance between the parties by giving the weaker party helpful factual or legal information. However, a facilitative mediator will ensure that both parties have a full opportunity to be heard on all issues.[17]

Achieving agreement regarding the standards and criteria to be used in mediation is a paramount facilitative task.[18] The goal is to ensure that neither party feels coerced into settlement and that they both believe that the settlement is mutually beneficial.[19] Under the facilitative model, the mediator's focus is on the parties' "interests," as opposed to "positions" and the arguments used to support those positions.[20] The mediator usually meets with the parties in joint session only. The mediator raises, and helps the parties manage, relationship issues such as marital, business, governmental, and social issues that are preventing the parties from reaching an agreeable solution. The mediator aids the process by keeping the parties focused on their goal of reaching a mutually beneficial solution. "In its 'purest' form, mediation is facilitative . . . [yet it is rare] for the mediator not to intrude somewhat in the process."[21]

14. JOHN W. COOLEY, MEDIATION ADVOCACY 18 (1996).

15. *Id.* at 19. This is a "combined facilitative-evaluative approach."

16. *See* Robert A. Baruch Bush, *"What Do We Need A Mediator For?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 20 (1996) ("[p]arties usually prefer the consensual processes, even where the outcomes they receive in these processes are unfavorable.").

17. *Id.*

18. KOVACH, *supra* note 12, at 84 ("The mediator's introduction also serves as the vehicle through which rules of the procedure are introduced.").

19. Mediation is "a private, voluntary, informal process where a party-selected neutral assists disputants to reach a mutually acceptable agreement." KOVACH, *supra* note 12, at 1.

20. A party's position is what the party wants, whereas a party's interest is the business or personal need underlying their position.

21. Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOTIATION J. 217, 228 (1995) (book review).

In the SPIDR Northwest survey, only 8% of mediators identified the facilitative style as "best."[22] Yet, mediators are reluctant to say that the evaluative style is better. The style most frequently acknowledged publically by mediators is the facilitative style. But the reality is that if mediators are actually practicing a form of mediation that is not facilitative, and if, in fact, it is more evaluative, then the profession of mediation is doing a disservice to the public by espousing one style while practicing another. Thus, mediation as a profession needs to be more accurate when describing the potential varieties of mediation services available so that the parties can select for themselves the most applicable model or process for their dispute.

B. *The Evaluative Model*

A mediator who subscribes to the evaluative[23] model pushes for a settlement, often by presenting the mediator's own views on the relative merits of the case.[24] On the continuum, such an evaluative mediator would be termed an interventionist because he or she offers options at all stages of the mediation, whether subtly or overtly.[25] An evaluative mediator who believes that injustice is being done may intervene to direct the settlement in a fashion consistent with the mediator's notion of justice. Under the evaluative model, the focus is on the parties' "positions" as opposed to "interests."[26] Occasionally, the focus may be on perceived positions of parties not even represented, such as the public.[27]

The evaluative mediator is involved substantively in resolving the dispute.[28] He or she usually meets with the parties separately, shuttling between them. A settlement may be reached

22. *See supra* notes 4-7 and accompanying text.

23. The term "directive" sometimes is used synonymously with the term "evaluative."

24. COOLEY, *supra* note 14, at 20.

25. *Id.* at 18.

26. Lela P. Love, *The Top Ten Reasons That Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 939 (1997).

27. For example, in a product liability mediation, the manufacturer may desire to keep the mediation settlement confidential. A highly evaluative mediator might seek the incorporation of what was perceived to be the public interest in making the matter public.

28. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION 64, 69 (1994).

based on strengths and weaknesses or the cost of not settling, rather than on a mutually beneficial solution. Relationship issues are not usually the focus of the mediation.

In the SPIDR Northwest survey, 6% of mediators thought the "best" mediation style was evaluative.[29] Although "many practicing mediators have an evaluative orientation . . . most mediation trainers, teachers, and professors do not teach evaluation as a permissible component of mediation."[30] At some point, a mediator can become so evaluative that one is compelled to ask whether the process has been transformed into a different ADR process. "Evaluative behavior, as well as any other mediation technique, becomes undesirable if and when it tends to compromise the free consent of the parties."[31] This is predicated on the underlying premise of the *Model Standards* that mediation is based on party self-determination.[32]

C. *The Empowerment and Recognition Model*

Another perspective of the mediator's role is known as the "empowerment and recognition model and is located on the facilitative or less interventionist end of the continuum."[33] Under this concept, the mediator encourages the parties to choose independently whether and how to resolve their dispute, while respecting one another in the process.[34] Proponents of this model view other mediator models, especially the evaluative model, as flawed because nonmediation processes can accomplish the goals of efficiency and the protection of rights more effectively.[35] For example, arbitration is much more expeditious and the courts assure greater protection of rights. Under the empowerment and recognition model, the mediator's job is to

29. *See supra* notes 4-7 and accompanying text.
30. Kimberlee K. Kovach & Lela P. Love, *"Evaluative" Mediation Is an Oxymoron*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 31, 31 (1996).
31. Lawrence M. Watson, Jr., A Time and Place for Evaluative Mediation (The Florida Experience) 10 (Oct. 1996) (unpublished paper of the American College of Civil Trial Mediators, on file with author).
32. The Model Standard of Self-Determination is addressed more fully, *infra* notes 82-89 and accompanying text.
33. *See* Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role, and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 267 (1989).
34. *Id.*
35. *Id.* at 263.

guarantee the parties the fullest opportunity for self-determination and mutual acknowledgment.[36] A distinguishing characteristic of this model is that the mediator must ensure the disclosure of all relevant information to the parties and must consider all possible options and advice before final decisions are made.[37]

In the experience of the author, the empowerment and recognition model seldom is applied in business settings. This is primarily because the parties are not comfortable with full disclosure of all internal business information. Full disclosure is inconsistent with maintaining a competitive advantage over one's rival. In negotiation, information is a form of power: the greater the information disparity, the greater advantage. Therefore, mediating parties share information to reward a concession, or alternatively, withhold information to punish an opposing party. Most trial attorneys will not encourage their clients to participate in mediation if full disclosure is required.

36. In that approach, mediators focus on two kinds of activities. First, they focus on supporting—and not supplanting—the parties' own deliberation and decisionmaking processes. That is, wherever opportunities arise for parties to think about and make choices—about participation, procedures, goals, issues, options, evaluative criteria, whether an agreement should be reached and on what terms—at all of these "party decision points," the mediator helps the parties enrich the informational environment, clarify and consider their own goals, options and preferences of fostering empowerment in mediation. It relates directly to the enhancement of participation, control and self-determination that the above discussion identifies as one of mediation's most valued products.

At the same time, in the approach we have been advocating, mediators focus on inviting, encouraging and supporting the parties' presentation to and reception from one another of each other's perspective and new and altered views of one another, at all points where the opportunity arises—with one important proviso. The proviso is that the parties themselves wish to engage in this dimension of the discussion. There are usually many points in a mediation where such opportunities are presented. We argue that mediation practice should include in its focus a constant attention to those points, and a conscious, intentional attempt to work with them whenever the parties are voluntarily interested in doing so. We have called this the practice of fostering recognition, and it relates directly to the enhancement of interpersonal expression and communication, that also is identified here as a highly valued product of mediation.

Bush, *supra* note 16, at 29-30 (footnotes omitted).
37. Bush, *supra* note 33, at 278.

D. Preliminary View of Ethical Standards and Stylistic Practice Models

The *Model Standards* indirectly address the ethics-stylistic practice issue. The *Model Standards* allow a mediator to mediate only when he or she "has the necessary qualifications to satisfy the reasonable expectation of the parties."[38] Although the *Model Standards* deal primarily with procedural expertise, they also refer to the parties' expectations regarding practice models.[39] The *Model Standards* seem to endorse the facilitative model over the evaluative model. They focus on self-determination as the fundamental principle of mediation, relying on "the ability of the parties to reach a voluntary, uncoerced agreement."[40] The comments to the *Model Standards* state that "the primary role of the mediator is to *facilitate*[41] a voluntary resolution of a dispute."[42] However, as discussed above, this does not necessarily preclude the evaluative approach if the parties make an informed decision to select it after full disclosure.

The similarities between the *Model Standards* and other ethical codes, as well as their differences, help to highlight further the relationship between ethics and stylistic practices. If the *Model Standards* are interpreted facilitatively, then they may ignore some of the more creative and successful developments in the practice of mediation. If, however, the *Model Standards* include a more evaluative style, then they may fail to serve as a clear and effective guide for ethical mediator conduct. As a result, the debate as to which style is best rests in part upon the nature of the existing codes, which are explored in Part III, as well as a prenegotiation discussion between the parties, their representatives, and the mediator. The debate, however, cannot stop here. Mediators should explore the parties' desires and needs before they unilaterally impose a model on unwitting parties. To fail to do so is to diminish the parties' right of self-

38. MODEL STANDARDS, *supra* note 1, Standard VI cmt.

39. *Id.* Standard I.

40. *Id.* Standard I.

41. "Facilitate" means make easy or make easier, as opposed to "evaluate," which is defined as examining and judging. AMERICAN HERITAGE DICTIONARY, *supra note* 3, at 469.

42. MODEL STANDARDS, *supra* note 1, Standard VI. The focus is on the mediator's facilitative role in the process: "The parties decide when and under what conditions they will reach an agreement. . . ." *Id.*

determination.[43]

III. Overview of Relevant Ethical Codes

As mediation began to grow in popularity, various professional groups established unique codes of ethics governing their mediating members. Beginning in 1992, however, mediation practitioners realized that multiple ethical codes were not serving the profession properly and focused on the development of one universal ethical code to guide all mediators. The *Model Standards*, incorporating the philosophies of the SPIDR, the ABA, and the AAA, were developed for the purpose of providing a "general framework for the practice of mediation."[44] The *Model Standards* were published "to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes."[45] Additionally, the Introductory Note to the *Model Standards* states that these standards were developed "to serve as a general framework for the practice of mediation. The effort is a step in the development of the field and a tool to assist practitioners in it—a beginning, not an end. The model standards are intended to apply to all types of mediation."[46]

Although the *Model Standards* for mediators have been developed by merging the philosophies of SPIDR, the ABA, and the AAA, there is no single organization to which all mediators belong. "With a number of codes in existence, it is very difficult, at any given time, for the mediator, not to mention the parties, to determine exactly what code of ethics should be followed. Fortunately, in most instances the code provisions are essentially consistent, although cases of inconsistency do exist."[47] The relevant ethical codes explored in this Article are:

(1) SPIDR, ABA, AAA, *Model Standards of Conduct for Mediators* (*Model Standards*);[48]

(2) Oregon Mediation Association (OMA), *Standards of*

43. *See supra* note 38.

44. The *Model Standards* have been approved by SPIDR and the AAA. However, as of January 1997, the ABA has not adopted these standards. *See supra* note 1.

45. MODEL STANDARDS, *supra* note 1, Preface.

46. *Id.* Introductory Note.

47. KOVACH, *supra* note 12, at 192.

48. MODEL STANDARDS, *supra* note 1.

Mediation Practice (OMA *Standards*);[49]

(3) Oregon State Bar (OSB), *Code of Professional Responsibility* (the DRs);[50]

(4) American Bar Association (ABA), *Model Rules of Professional Conduct* (*Model Rules*);[51]

(5) Oregon Dispute Resolution Commission (ODRC), *Standards of Mediator Conduct*, for court-annexed cases.[52]

What happens in the event of an ethical violation of the *Model Standards*? Unfortunately, the processing of ethical violations has not risen to the same level of institutional formality as in other professions primarily because: (a) there is not one particular mediation organization to which all mediators must belong; (b) few states have licensing requirements for mediators; (c) mediators tend to have primary professions of origin that generally include ethical codes; and (d) there have been few reported complaints on mediator misconduct, in part because mediation is a relatively new and unfamiliar process and in part because mediation is a confidential process, and the disputes emanating from its use or abuse also tend to be handled on a confidential basis. In general, if a mediator commits a *Model Standards* violation, no authoritative body exists that is empowered to enforce the standard or correct the abuse. This is because the *Model Standards* act more as an inspirational framework than as a rigid code of mediator ethics.

Under the OMA's *Standards of Mediation Practice*, no explicit procedure exists for dealing with mediators who act unethically.[53] However, within a possible range of sanctions or punishments, OMA can revoke the membership of any member whose conduct is deemed unethical.[54] There has been only one case of alleged unethical conduct in OMA's history, and that case is currently under investigation.[55]

The OSB has disciplinary authority over Oregon lawyers. The applicability of the disciplinary rules depends, in certain

49. Oregon Mediation Association, Standards of Mediation Practice (1993).
50. Oregon Code of Professional Responsibility (1994).
51. Model Rules of Professional Conduct (1983).
52. Or. Admin. R. 718-40 (1993).
53. *See* Oregon Mediation Association, *supra* note 49.
54. Interview with Gloria Bryen, former OMA Executive Director (Feb. 2, 1997).
55. According to Bryen, the investigation is currently on-going and the alleged violation has not been disclosed. *Id.*

cases, on whether the lawyer is practicing law, in which cases the DRs apply; however, in other cases, the DRs apply even if lawyers are not practicing law. The DRs are applied on a case-by-case basis.[56] The procedure begins with the filing of a complaint through the Oregon State Bar. No formal discipline has ever been imposed on an Oregon lawyer acting as a mediator.[57]

The only Oregon disciplinary rule that addresses mediation[58] on its face is DR 5-106.[59] However, that rule fails to address most of the practical ethical dilemmas facing mediators who are members of the Oregon State Bar. The rule states:

> (a) A lawyer may act as a mediator for multiple parties in any matter if the lawyer clearly informs the parties of the lawyer's role and they consent to this arrangement.
>
> (b) A lawyer serving as a mediator may draft a settlement agreement but must advise and encourage the parties to seek independent legal advice before executing it.
>
> (c) A lawyer serving as a mediator may not act on behalf of any party in court nor represent one party against the other in any related legal proceeding.
>
> (d) A lawyer shall withdraw as mediator if any of the parties so request, or if any of the conditions stated in DR 5-106(A) are no longer satisfied. Upon withdrawal, the lawyer shall not continue to act on behalf of any of the parties in the matter that was the subject of the mediation.[60]

As a general proposition, the DRs apply to attorneys who mediate. However, some DRs apply only if the attorney is "practicing law" or if an "attorney-client" relationship or the potential for one exists.[61] Because in the traditional sense an Oregon lawyer-mediator does not "represent" clients as an advocate, the conflict-of-interest provisions of DR 5-105 involving multiple clients do not apply.[62]

56. Oregon Code of Professional Responsibility, *supra* note 50.
57. Interview with Jeff Sapiro, Oregon State Bar Disciplinary Counsel (Mar. 7, 1997).
58. The United States Bankruptcy Court for the District of Oregon has established a court-annexed mediation program. General Order 93-1 (Sept. 28, 1993). Although no ethics provision was included in the order, mediators are held to the same disqualification standards as are bankruptcy judges for bias, prejudice, or questionable impartiality. *See* 28 U.S.C. §§ 144, 455 (1994).
59. Oregon Code of Professional Responsibility, *supra* note 50, DR 5-106.
60. *Id.*
61. *Id.*
62. Oregon State Bar Legal Ethics Op. 101 (1991).

Under the facilitative model, an attorney who mediates is not practicing law during the mediation, even if he or she is regularly engaged in a traditional attorney capacity outside of the mediation session. Even from the evaluative perspective, parties are not likely to regard their relationship with the mediator as one of attorney and client. Under the ODRC model, the mediator clearly does not represent clients as an advocate in the traditional sense in a mediation.[63]

> Specifically, in order for a mediator's conduct in advising parties about the legal aspects of a particular dispute to be considered the practice of law, the party to the mediation must view the mediator as her lawyer and assume that she is receiving legal advice for her personal benefit . . . I cannot imagine a situation where parties to the mediation will be confused about the mediator's role and mistakenly assume that the mediator is functioning as a lawyer.[64]

However, some Oregon mediators routinely use an evaluative model and have been known to give an opinion on the merits of the case. Are these mediators practicing law when they provide opinions? Are they practicing law when they prepare the settlement documents for the parties? The ODRC suggests that client perception is important. However, client misperceptions should not shield unethical conduct.

The scope of professional liability coverage in Oregon may provide some answers. The Professional Liability Fund (PLF) is the mandatory malpractice carrier in Oregon. The PLF is required to provide malpractice coverage to all Oregon lawyers in private practice.[65] Lawyers who limit their services to ADR services are not required to purchase PLF coverage.[66] Thus, one can reasonably conclude that the practice of ADR is not the private practice of law.

Thus, if the mediation does not involve the practice of law, certain ethical issues appear to be avoided. Fees earned would be for mediation, not legal services; therefore, dividing fees

63. OR. ADMIN. R. 718-40 § 3(a) (1993).

64. Bruce Meyerson, *Lawyers Who Mediate Are Not Practicing Law*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 74, 74 (1996).

65. OR. REV. STAT. § 9.080(2) (1995).

66. OREGON STATE BAR ADR REPORT, Summer 1996, at 6-8. A benefit of SPIDR membership, however, is the option of obtaining professional liability insurance.

would not be an issue.[67] Also, ethical issues surrounding the formation of a partnership with a nonlawyer or aiding in the unlawful practice of law would not apply.[68] To avoid the unauthorized practice of law, however, nonlawyer-mediators should not give legal advice.[69] As a result, to the extent that the evaluative method involves dispensing legal advice, nonlawyer mediators are effectively prohibited from selecting that mediator style.

The Oregon Supreme Court has approved model supplemental local rules for judicial districts that adopt mediation programs, giving the local Mediation Commission the discretion to "monitor the performance of mediators."[70] These local rules enable the presiding Judge to "remove a listed mediator."[71] The presiding Judge has the authority to refer a complaint against a mediator to an advisory panel for a recommendation on whether to remove the mediator from the list of civil case mediators.[72] Few Oregon judicial districts have adopted the local rules, and no complaints of record exist.

The final code is the ABA *Model Rules of Professional Conduct*. Rule 2.2 uses the term "common representation" in the mediation context.[73] The implication is that, under the *Model Rules*, the lawyer-mediator is practicing law. However, "[i]f mediation is the practice of law . . . we must refer to lawyers' ethics codes. Trouble is, they provide little, if any guidance about issues like: confidentiality (among parties and with mediators), conflicts of interest, fees, and unauthorized practice. . . ."[74]

The *Model Rules* require the attorney to determine whether mediation reasonably can lead to a resolution compatible with the interests of all the parties and whether each of the parties is

67. *See* OREGON CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 50, DR 3-102.

68. Oregon State Bar Legal Ethics Op. 20, 101 (1991).

69. OREGON CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 50, DR 3-101.

70. DISPUTE RESOLUTION COMMITTEE, OREGON JUDICIAL CONFERENCE, ALTERNATIVE DISPUTE RESOLUTION DESKBOOK, App. B, Model Supplemental Local Rule 050 (First Revision, July 1994).

71. *Id.*

72. *Id.*

73. MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 51, Rule 2.2. OSB DR 5-106 states that "[a] lawyer may act as a mediator." OREGON CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 50, DR 5-106.

74. Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 57, 60 (1996).

able to make informed decisions.[75] However, the ABA Section on Dispute Resolution has proposed a new rule addressing mediation.[76] The new rule would expand on DR 5-106 in the following respects:

(1) It recognizes that parties occasionally mediate involuntarily pursuant to a legal requirement;

(2) It creates a higher level of responsibility when working with an unrepresented party or a party whose attorney does not attend the mediation;

(3) It clarifies the mediating attorney's ethical responsibilities with regard to mediating a dispute involving a past or present client represented in a matter unrelated to the mediation; and

(4) It specifically prohibits charging a fee that is contingent on the outcome of the mediation.

Why refer to the *Model Rules*, given its nonbinding nature and the fact that the *Model Standards* may supersede it? While the *Model Rules* by their nature are not binding and may be superceded by the *Model Standards*, during this transition period it is important to note that a mediator may selectively adhere to the rules. A mediator could selectively adhere to the *Model Rules* in order to rectify perceived power imbalances between the parties or the advocates. However, an advocate and a party will not appreciate the mediator empowering the other side if it is detrimental to their position. Furthermore, the advocate will not be amused by the mediator directing the negotiations toward his or her view of a settlement that is in the best interests of the "commonly represented" client under Model Rule 2.2.[77] Therefore, Model Rule 2.2 by definition needs to be abolished because it puts the mediator in an impossible position.

The focus of this Article centers around the *Model Standards*, the OMA's *Standards of Mediation Practice*, the OSB's *Code of Professional Responsibility* (the DRs), and the ABA's *Model Rules*. The principles of these codes are clear on their face, but the real tension exists in their application, which Part IV explores.

75. Model Rules of Professional Conduct, *supra* note 51, Rule 2.2(a)(2).

76. As of January 1997, the ABA has not adopted these mediation rules.

77. Model Rules of Professional Conduct, *supra* note 51, Rule 2.2.

IV. Differences Among the Codes and Comparisons to the Model Standards

The following chart provides an overview of the differences among the codes.

Summary Chart of Ethical Standards

ETHIC	COMBINED CODE	OMA	OSB	ABA
Self-Determination	Standard I.			
Impartiality	Standard II.	Responsibilities to the Parties-1		
Conflicts of Interest	Standard III.	Responsibilities to the Parties-1 & General Responsibilities	DR 5-106(a) DR 5-106(b)	Rules of Professional Conduct 2.2(a)(2)-3
Competence	Standard IV.			
Confidentiality	Standard V.	Responsibilities to the Parties-3	DR does not specifically address, but ORS 36.205 is operative	
Quality of the Process	Standard VI.			
Advertising and Solicitation	Standard VII.	Responsibilities to the Profession and the Public-2		
Fees	Standard VIII.	Defining the Process-5		Rules of Professional Conduct 2.2(a)(2)-4
Obligations to Mediation	Standard IX.	Responsibilities to the Profession and the Public-1		
Informed Consent	Standard i. Comments	Responsibilities to the Parties-2		
Full Disclosure	Standard VI.	Defining the Process-3	OAR 718-40-100(3)(c)	
Additional Roles	Standard VI. Comments	Defining the Process-6	DR 5-106(b)	
Independent Advice & Info.	Standard VI. Comments	Defining the Process-2	DR 5-106(a)	

One method of attempting to resolve the incongruity among the various ethical codes and mediator styles is to address each section of the *Model Standards* and, where appropriate, compare them to other ethical codes. The *Model Standards* provide a clear framework on which to base an examination of all other professional mediator codes.

A. *The Model Standards*

The *Model Standards* cover nine concerns that frame ethical issues for mediators. A brief discussion of the framework and component parts of each of the *Model Standards* will be followed by an analysis of the differences between the codes and their practical implications.

> (1) *Self-Determination:* A mediator shall recognize that mediation is based on the principle of self-determination by the parties.
>
> (2) *Impartiality:* A mediator shall conduct the mediation in an impartial manner.
>
> (3) *Conflicts of Interest:* A mediator shall disclose all actual and potential conflicts of interest reasonably known to the mediator. After disclosure, the mediator shall decline to mediate unless all parties choose to retain the mediator. The need to protect against conflicts of interest also governs conduct that occurs during and after the mediation.
>
> (4) *Competence:* A mediator shall mediate only when the mediator has the necessary qualifications to satisfy the reasonable expectations of the parties.
>
> (5) *Confidentiality:* A mediator shall maintain the reasonable expectations of the parties with regard to confidentiality.
>
> (6) *Quality of the Process:* A mediator shall conduct the mediation fairly, diligently, and in a manner consistent with the principles of self-determination by the parties.
>
> (7) *Advertising and Soliciting:* A mediator shall be truthful in advertising and soliciting for mediation.
>
> (8) *Fees:* A mediator shall fully disclose and explain the basis of compensation, fees, and charges to the parties.
>
> (9) *Obligation to the Mediation Process:* Mediators have a duty to improve the practice of mediation.[78]

The mediator's role under the *Model Standards* is to facili-

78. MODEL STANDARDS, *supra* note 1, Standards I-IX.

tate a voluntary, uncoerced resolution to the dispute, the fundamental principle being self-determination for the disputing parties.[79] In further support of the importance of the parties' ability to resolve their own disputes, the *Model Standards* place less emphasis on a mediator's substantive expertise in the underlying area of the dispute.[80] The *Model Standards* give more credence to a mediator's ability to satisfy the parties' reasonable expectations.[81]

1. *Standard I: Self-Determination*

The *Model Standards* define self-determination as a "fundamental principle of mediation" based on "the ability of the parties to reach a voluntary, uncoerced agreement."[82] Under this Standard, the charge of mediators is limited to "provid[ing] information about the process, rais[ing] issues, and help[ing] the parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute."[83] In the comments section of this Standard, the mediator is advised to "make the parties aware of the importance of consulting other professionals . . . to help them make informed decisions."[84] However, Standard I fails to address which ethical obligations a mediator owes the parties concerning the choice of different mediation models.[85]

DR 5-106(A) requires the lawyer-mediator to "clearly [inform] the parties of the lawyer's role" and to obtain their "consent to this agreement."[86] The OMA *Standards* also require the "informed consent" of mediating parties "prior to the beginning of substantive negotiations."[87] The OMA *Standards* also specify the subjects that should be discussed before the mediation begins. The mediator should explain that mediation "is not arbitration, legal representation or therapy and that the mediator will

79. *Id.* Standard I.
80. *Id.* Standard IV.
81. *Id.* Standard VI.
82. *Id.* Standard I.
83. *Id.*
84. *Id.* Standard I cmt.
85. *See id.* Standard I.
86. OREGON CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 50, DR 5-106(A).
87. OREGON MEDIATION ASSOCIATION, *supra* note 49, Responsibilities to the Parties 2.

not decide any issues for the parties."[88] The OMA *Standards* also require the mediator to inform participants of their right to withdraw from mediation "at any time and for any reason, except as is required by law."[89]

Reading these OMA sections together supports the proposition that a mediator is obligated ethically to discuss the different mediation models with the parties and obtain their informed consent before proceeding. The disclosure obligations of the selected model necessarily include disclosure of the model that the mediator will use. This does not appear to be a common practice among mediators. To the extent that such informed consent is practiced, it is done in a cursory fashion, directing the parties toward the mediator's preferred model, be it facilitative or evaluative.

2. *Standard II: Impartiality*[90]

a. *Overview*

Impartiality is a foundation stone of mediation. It is difficult for any person to be truly impartial, but the mediator must maintain neutrality and conduct an impartial process in order for mediation to work. All parties expect the mediator to be neutral; if they suspect otherwise, the parties are unlikely to value the mediator's involvement and make meaningful contribution to the resolution of the dispute.

The beginning point for this analysis on impartiality in-

88. *Id.* Defining the Process 2.
89. *Id.* Responsibilities to the Parties 4.
90. The following are practice ethical scenarios:

(1) You are mediating your first small claims case. The plaintiff wants $1,000 for this contract claim, of which $750 is for pain and suffering. Neither party is aware that noneconomic damages are unavailable in this case as a matter of law. You are convinced that the case will settle if the plaintiff knows this. What do you do, if anything?

(2) The attorneys for the parties hire you to mediate. The plaintiff has been having trouble proving damages. You read a recent study and know that the land in question is probably worth $150,000. There is a huge skill imbalance between the two attorneys. The unsophisticated plaintiff's attorney is unaware of this study, probably never will discover it, and seems willing to settle the case for $5,000. The defense attorney is very sophisticated. You know you can't come right out and tell the plaintiff that the land is worth $150,000 based on the study. Instead, you ask him if he plans to attend that Continuing Legal Education program on condemnation law next week, knowing that the new study will be discussed there. Is this ethical? Would it make a difference if the parties are unrepresented?

volves conflicts of interest. Under the *Model Standards*, the mediator has a duty to disclose all actual and potential conflicts that are reasonably known or that could reasonably be seen as raising a question about impartiality.[91] The mediator also has a duty to guard against prejudice based on "personal characteristics, background or performance at the mediation."[92]

The duty of impartiality exists under all of the mediation models and is mandated by all of the various codes of conduct discussed.[93] The mediator's ethical obligation to disclose biases or interests may cause the parties to question the mediator's impartiality. This is because the parties and their advocates, if any, may not trust any third-party intervention that may limit their control over negotiation results. If they perceive that the mediator is favoring one party over another, they are less likely to explore the issues fully and are more likely to be guarded in their exchange of information and the exploration of possible settlement points. The impartiality concept raises some additional issues worthy of consideration by the parties and the mediator:

(1) Can a mediator ethically agree in advance to accept full payment from only one side of the mediation? The answer, at least as to existing common practice, is yes, with the appropriate premediation disclosures and informed consent of all parties.[94]

(2) What are the ramifications of using "captive mediators"—mediators or service providers routinely used by a given party who is a frequent litigant—for example, an insurance company? A "reasonable person" obviously would see this as a question of impartiality.[95] A mediator has the obligation to inform both parties of the frequency with which the mediator mediates for a given party, institution, or advocate.[96] Again, this disclosure would be designed to alleviate any ethical implication through the informed consent of the parties by full disclosure of a mediator's current or past affiliations.

(3) What is the role of the mediator, if any, in protecting the public interest if the only parties at the table are private

91. MODEL STANDARDS, *supra* note 1, Standard III.
92. *Id.* Standard II cmt.
93. *See supra* notes 48-52 and accompanying text.
94. MODEL STANDARDS, *supra* note 1, Standards II & V.
95. *Id.*
96. *Id.*

interests? The answer to this question may depend on the mediator's ethical code and the parties' fully informed decisions.

The practical solution for a party or the attorney advocate in mediation is to ask the mediator how he or she handles these situations. If the parties make an informed decision, the likelihood of an ethical problem is diminished and confidence in the process of mediation is increased substantially.[97] This is desirable regardless of the mediation model.

b. *Impartiality and Professional Advice: "Legal Information" versus "Legal Advice"*

The resolution of the debate over legal information versus legal advice affects the mediator's duties of impartiality and neutrality. Commentator Carrie Menkel-Meadow believes that:

> [T]he issue has been too readily applied to one of two categories: the impossibility of giving neutral legal advice . . . or the suggestion that legal information, neutrally given, is not "legal advice" . . . .
>
> Most third parties would agree that informing parties of their legal rights and responsibilities can almost never be neutral—the law, after all, almost always requires interpretation and application to specific facts. Nevertheless, there may be an important role for the neutral third-party to be sure that (even if it advantages one party) is part of the decision making process. The law, after all, is likely to provide the parties with some sense of their alternatives to a mediated agreement and is relevant in deciding whether to settle or to litigate.[98]

The philosophical differences between the evaluative model and the facilitative model track the competing views regarding whether communicating a legal statement constitutes offering "legal advice" or "legal information."[99] The former is the predicted application of the law to the facts at issue.[100] The latter is a generic statement of the law without reference to how that law will be applied to the facts of the case being mediated. For example, a mediator in a land-use appeal says, "The appeal period in a land-use action is 21 days." This statement is legal information. If the mediator says, "The appeal period in this case is 21 days, which has run, giving you a complete defense," the mediator is giving legal advice. As a practical matter, however, perhaps there is no difference between the two statements if the legal information enlightens one party regarding a defense of which that party previously was unaware.[101]

A lawyer mediating a case may draft a settlement agreement but "must advise and encourage the parties to seek independent legal advice before executing it."[102] Is there a practical difference between an oral agreement, a memorandum of understanding, and a settlement agreement?[103] Do the parties without counsel present at the mediation have a binding agreement before they seek legal advice, such that they can sue successfully in the event of nonperformance, or is the agreement not final until lawyers approve it? What if the parties decline

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97. Further concerns include: How does a mediator, who notes an unidentified substantial legal issue or provides legal or factual information, maintain impartiality? How does an Oregon mediator fulfill the obligation of impartiality and, at the same time, satisfy the requirements in OR. ADMIN. R. 718-40-100(3)(c) regarding full disclosure when the mediator believes that one party is not fully disclosing all relevant information to the other party, but the other party does not realize it? *See* OR. ADMIN. R. 718-40-100(3)(c) (1993).

98. Carrie Menkel-Meadow, *Professional Responsibility for Third-Party Neutrals*, 11 ALTERNATIVES TO THE HIGH COST OF LITIG. 129, 131 (1993).

99. The following are practice scenarios:

(1) You go to your office early before your mediation and boot up LEXIS. You discover that the U.S. Supreme Court just issued a decision on the time limits for filing preference claims in a Chapter 11 bankruptcy. You go to the mediation and during the joint session realize that the case is right on point and that one party has a complete win. Neither party is aware of the new case. What, if anything, do you do?

(2) You are mediating a small claims case and tell one party in caucus that the judge who will be hearing the case if it doesn't settle hates doing the small claims docket and is a stickler on the law regardless of the equities. You suggest that the party weigh that information in the analysis. The plaintiff says he'll get an attorney and demand a jury trial. You tell him the law does not provide for that because of the amount in dispute. You also tell him a small claims case is not appealable. Is this ethical?

100. In judicial settlement conferences, cases often are evaluated as opposed to facilitated. However, like the various mediation models, each judge evaluates or facilitates in varying degrees.

101. The distinction between legal information and legal advice is further complicated by a 1991 change in DR 5-106(A). *Former* DR 5-106 stated that a mediator should give advice only "in the presence of all parties in the matter." That provision was commonly construed to mean legal advice. DR 5-106 was amended to delete the quoted language. The 1991 OSB business session transcript suggests that the purpose of the amendment to DR 5-106 was to allow the mediator to advise one party privately. Requiring the presence of all parties interfered with the mediator's ability to provide "reality therapy" in the evaluative sense.

102. OREGON CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 50, DR 5-106.

103. *See generally* Kaiser Found. Health Plan v. Doe, 136 Or. App. 566, 903 P.2d 375 (1995) (settlement agreement valid), *modified on other grounds*, 138 Or. App. 428, 908 P.2d 2850 (1996); *cf.* The Cadle Co. v. Castle, 913 S.W.2d 627 (Tex. Ct. App. 1995) (settlement agreement invalid).

independent legal advice? When the mediator is preparing the settlement agreement, is he or she practicing law such that the OSB Professional Liability Fund will provide coverage if there is attorney "malpractice"? Must the mediator be a member of the Oregon State Bar in order to prepare a settlement agreement or run the risk of the unauthorized practice of law?[104] If these questions are answered in a restrictive way, will these restrictions thwart the settlement of cases in mediation? To do so would be inconsistent with the legislative intent in Oregon.[105] If there are too many restrictions on who the mediator is—lawyer, psychologist, other professional—then there will be a smaller pool of mediators; and thus, fewer mediations will take place.

Regardless of that issue, if there are more restrictions on what the mediator can do to help the parties reach an agreement, the mediator will have fewer tools to help the parties reach a resolution. Each of those tools, however, must be evaluated for its potential impact on the mediator's impartiality.

3. *Standard III: Conflicts of Interest*

Under the *Model Standards*, a conflict of interest is defined as "a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination."[106]

> The ideal of the completely disinterested mediator is often achievable, but it is not unusual for a mediator to know a party or a witness or to have some knowledge of the underlying facts or issues. If the relationship to persons or facts is substantial, the proposed mediator should step aside; if the mediator believes the interest is insubstantial, the parties should be advised of all relevant information and decide for themselves whether to disqualify or to waive.[107]

104. *See* State ex rel. Oregon State Bar v. Lenske, 284 Or. 23, 31 n.4, 584 P.2d 759 (1978). *See also* Oregon State Bar Legal Ethics Op. 101, 115; OREGON CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 50, DR 3-101.

105. It is the policy and purpose of ORS 36.100 to 36.210 that, when two or more persons cannot settle a dispute directly between themselves, it is preferable that the disputants be encouraged and assisted to resolve their dispute with the assistance of a trusted and competent third party mediator, whenever possible, rather than the dispute remaining unresolved or resulting in litigation.

OR. REV. STAT. § 36.100 (1995).

106. MODEL STANDARDS, *supra* note 1, Standard III.

107. Robert B. McKay, *Ethical Considerations in Alternative Dispute Resolution*, 45 ARB. J. 15, 23 (1990).

Again, the only plausible solution in determining whether a conflict of interest exists is to inform the parties that the possibility may exist and let them determine bias for themselves. This would apply regardless of the mediator's style.

4. *Standard IV: Competence*

As with any profession, competence is a prerequisite for a meaningful outcome.[108] The *Model Standards* state: "A person who offers herself or himself as available to serve as a mediator gives parties and the public the expectation that she or he has the competency to mediate effectively."[109] Did the drafters of the *Model Standards* unwittingly suggest that the mediator needs to have some modicum of subject matter expertise in the dispute being mediated in order to fulfill the ethical implications of this standard? Or were the authors of this standard referring to process competence as opposed to subject matter expertise or familiarity? It may have been left ambiguous purposefully; after all, the Introduction to the *Model Standards* states the standards are "a beginning, and not an end."

A mediator cannot engage effectively in an evaluative-type mediation if the mediator does not have subject matter expertise. However, a facilitative mediator would not need subject matter expertise because he or she does not give information, opinions, or predictions. In the legal setting, parties often look to mediators to have both process familiarity and subject matter expertise.[110] Whether the mediator is facilitative or evaluative, some subject matter understanding usually is required simply to help the parties communicate effectively and reach resolution. Efficient communication would be thwarted if the parties had to

108. OR. REV. STAT. § 36.210 (1995), as amended by SB 160 B-Engrossed (LC743) 1997 (Mediators and programs providing services under ORS 36.100-36.210 and mediators and programs providing services that the ODRC determines comply with the standards established under ORS 36.175 are not civilly liable except for bad faith, malice, or willful and wanton disregard of another's rights, safety, or property.). In part, competency is ensured by giving the user of professional services a cause of action for failing to perform the professional service in a manner consistent with community standards. *See* Oregon Uniform Jury Instruction, Nos. 45.01 and 45.02.

109. MODEL STANDARDS, *supra* note 1, Standard IV.

110. In the SPIDR Northwest survey, 64% of respondents answered that a competent mediator needed "both process expertise and subject matter familiarity." *See supra* notes 4-7 and accompanying text.

explain terms of art, customs, or standards of the community or industry which the mediator did not know or fully understand.

5. Standard V: Confidentiality

Maintaining confidentiality is critical to the integrity of the mediation process. Confidentiality encourages candor, allows a full exploration of the issues, and increases the likelihood of settlement. It also minimizes the inappropriate use of mediation as a discovery technique.[111]

a. Model Standards

Under the *Model Standards*, a mediator is not allowed to disclose information that a party expects to be confidential "unless given permission by all parties or unless required by law or other public policy."[112] When appropriate, researchers may gain access to statistical data and, with the parties' permission, may review files, observe mediation, and interview participants.[113]

The general rules are modified to allow "[t]he parties [to] make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations."[114] However, the *Model Standards*, on the surface, do not allow these same parties the discretion to choose which mediation model best suits their dispute. Is this paternalism, philosophical zealousness, or inadvertence?

b. The Oregon Statutory Scheme: The 1997 Legislative Changes

The 1997 Oregon Legislature amended or repealed key laws relating to the confidentiality of mediation communications.[115] These changes were significant and seek to define when mediation communications are or are not confidential. The new law specifically addresses confidentiality provisions for public and state agencies differently;[116] and directs the Oregon Attorney

111. COOLEY, *supra* note 14, at 60-62.
112. MODEL STANDARDS, *supra* note 1, Standard V.
113. *Id.* Standard V cmt.
114. *Id.*
115. SB 160 B-Engrossed, 69th Leg., 1997 (will be codified at OR. REV. STAT. ch. 670).
116. *Id.* §§ 3, 5.

General, in conjunction with the Oregon Dispute Resolution Commission, to develop rules related to confidentiality in mediation communications as well as institute a pilot program for civil matters handled by the State of Oregon.[117] The new legal provisions apply only to mediations commenced on or after October 4, 1997.

SB 160's Summary states:

• Revises laws relating to confidentiality of mediation communications. Defines mediation communications. Specifies that mediations [sic] communications are confidential and terms of mediation agreements are not confidential, subject to exceptions or written agreement providing otherwise.
• Specifies that communications in mediations in which state agencies are party are not confidential. Directs Attorney General to develop rules providing for confidentiality of communications in mediations in which state agencies are party.
• Specifies confidentiality provisions for public bodies other than state agencies.
• Provides that confidential mediation communications and mediation agreements may not be disclosed or admitted in evidence in subsequent judicial or administrative proceeding. Specifies exceptions.
• Authorizes action at law for disclosure of confidential mediation communications. Requires showing that disclosure was made in bad faith, with malicious intent or in manner exhibiting willful, wanton disregard of rights, safety or property of another party.
• Directs Attorney General to establish collaborative dispute resolution pilot programs for civil actions.[118]

c. Statutory Exceptions

The exceptions to mediation confidentiality are statutorily based and include the parties' written agreement as to what is and is not confidential, material otherwise subject to discovery, certain public record documents, privileged communications, disclosure allowed for reporting,[119] research and training, and

117. *Id.* § 17.
118. *Id.*, Summary.
119. The Oregon Court of Appeals has a Settlement Conference Program. The purpose of this confidentiality exception is to examine and evaluate the use of mediation as an effective tool for cases on appeal. As of May 5, 1997, 343 cases went through

mediation communications with a public body or state agency.

d. Other Exceptions

(i) Child and Elder Abuse

Two notable exceptions to the confidentiality of mediation communications are: "A mediator may disclose confidential mediation communications directly related to child abuse or elder abuse if the mediator is a person who has a duty to report child abuse under ORS 419B.010[120] or elder abuse under ORS 124.050 to 124.095."[121] This makes sense for mandatory reporters, but what about other nonduty-bound mediators? Most mediators address this issue in their form agreement to mediate.

(ii) Future Crimes

The new law provides that, "a mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or substantial bodily injury to a specific person."[122] As above, disclosure of this limit on confidentiality is essential to ensure informed consent surrounding the mediation ground rules.

the program. Of those cases, 40% fully settled, 6% partially settled, and 7% were dismissed, for an overall disposition rate of 53%, compared to 22% in the control group of 935 cases. Judy Henry, Director of Court of Appeals Settlement Program (unpublished statistic).

120. Prior to 1993, there was a duty for any "public or private official" in his or her "official capacity" to report suspected and actual cases of child abuse. OR. REV. STAT. § 419B.010. *Former* ORS 418.740(3) did not include "mediator" in the definition of "public or private official," but did include "lawyer." *Id.* The 1993 Legislature deleted the "official capacity" language so that any public or private official is required to report regardless of the circumstances in which he or she comes in contact with the alleged victim or perpetrator. *Id.*; 1993 Or. Laws 546, § 141. However, the exception for information gained through some privileged communication is maintained. OR. REV. STAT. § 419B.010.

121. S.B. 160, *supra* note 115, § 2(6).

122. *Id.* § 1(6). DR 4-101(C)(3) uses the term "lawyer's client" and states that the lawyer "may" reveal future crimes. OREGON CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 50, DR 4-101(C)(3). A party to the mediation is probably not a "client" of a mediator who happens to be an attorney, thus allowing free disclosure of future crimes. Parties to a mediation likely would find such a result surprising. If the mediator is not an attorney, the DRs would not apply allowing similar free disclosure.

(iii) Workers' Compensation Cases

Under the new law, mediation communications "in any mediation regarding a claim for workers' compensation benefits conducted pursuant to rules adopted by the Workers' Compensation Board are confidential, are not subject to disclosure under ORS 192.410 to 192.505 and may not be disclosed or admitted as evidence in subsequent adjudicatory proceedings . . . ."[123]

(iv) Public Records Law versus Statutory Mediation Confidentiality

In general, the Public Records Law opens to public access any documents governmental bodies use.[124] The law provides certain enumerated exceptions[125] allowing a governmental body to keep some records confidential, such as documents involving filed or contemplated litigation.[126] However, documents are not protected from disclosure after the litigation is completed.[127]

The 1995 Oregon Legislature resolved the question of whether ORS 36.205 supersedes the Public Records Law by stating that the confidentiality statute does "not apply to any dispute resolution service or mediation proceeding conducted by a public body. Nothing in . . . [these statutes] relieve[s] an agency using alternative means of dispute resolution from complying with [the Public Records Law]. . . ."[128] The 1997 Oregon Legislature addressed the issue in further detail. The Oregon Dispute Resolution Commission provided the following summary chart.

123. S.B. 160, *supra* note 115, § 3(6).

124. OR. REV. STAT. §§ 192.410-192.505 (1995).

125. ORS 192.501 and 192.502 need to be reviewed prior to mediation to determine what exceptions, if any, apply to a mediation with a public body. These exceptions must also be read with the provisions of SB 160. *See supra* note 115.

126. OR. REV. STAT. § 192.501(1) (1995).

127. *Id.*

128. *Id.* § 36.205(1).

SB 160 CONFIDENTIALITY IN MEDIATION COMMUNICATIONS

[illegible]	[illegible]	[illegible]	[illegible]
Confidential?	Yes	Yes	No
Exceptions	By written agreement		Workers Comp cases, confidential — pursuant to rules adopted by Workers Comp Board
[illegible]		Not confidential by written policy, with notice to all parties	Yes, can be confidential by Attorney General rule, approved by Governor
Confidential?	No		
Exceptions	By agreement of the parties	When Public Record Law allows; by court order; and in workplace interpersonal disputes with dollar limit at $1,000 for training, counseling, or equipment that remains public property	When Public Record Law allows; by court order; and in workplace interpersonal disputes with dollar limit at $1,000 for training, counseling, or equipment that remains public property—only as allowed by AG rule, approved by Governor
[illegible]		No	No

- Exceptions to confidentiality include: parties agree not confidential; work prepared prior to mediation is not confidential; documents that are public before mediation occurs do not become confidential; communications to a mandatory reporter, related to child or elder abuse, are not confidential only to reporter; and if party or mediator reasonably fear serious harm to another.
- Allows for disclosures for reporting, research, training, and other educational purposes.
- In cases in which various public agencies are parties, if one agency has a policy or rule that does not allow for confidentiality, then the mediation is not confidential for all.

e. *Conclusion*

The applicable jurisdictional law and the parties' expectations of confidentiality must be consistent. If they are not consistent, the parties will be surprised and probably disadvantaged by the revelation of information that they otherwise would not have revealed had they known it could be made public. The mediator should inform participants of the confidentiality exceptions before substantive mediation communications begin and obtain the parties' consent. Otherwise, where confidentiality does not exist, parties might disclose information that eventually could

harm their legal position or even subject them to criminal prosecution. Informing participants that confidentiality is not absolute reduces this risk. Without informed consent, mediation could intensify rather than resolve conflict between the parties.

6. *Standard VI: Quality of the Process*

The *Model Standards* state, "A quality process requires a commitment by the mediator to diligence and procedural fairness."[129] Additionally, "The parties decide when and under what conditions they will reach an agreement or terminate a mediation."[130] These tenets create the framework for the requirement that parties should decide the appropriate role or mediation model for the mediator.

Offering any advice, whether legal, financial, or psychological, while mediating disputes is strongly discouraged.[131] The *Model Standards* distinguish mediation from practicing law or other professions, such as therapy.[132] The parties are encouraged to consult with other professionals to aid them in making informed decisions.[133]

However, the *Model Standards* comments regarding professional advice give neither the parties nor the mediator any practical guidance on the gray line that exists between offering information and offering professional advice. It is at this intersection that the debate over facilitative versus evaluative is waged. A facilitative mediator is reluctant to give any advice, whether legal, financial, or psychological, whereas an evaluative mediator will offer advice, albeit often cloaked as information. Given the diversity of the mediation profession and the variety of interest groups that it serves, is it even possible to have one universal definition of when mediator information becomes "legal advice," "financial advice," or "psychological advice?"[134]

---

129. MODEL STANDARDS, *supra* note 1, Standard VI.
130. *Id.*
131. *Id.* Standard VI cmt.
132. *Id.*
133. *Id.* Standard I cmt.
134. Advice is the application of profession-specific information to the operative facts being explored, with the recommendation that the recipient of that information act consistently with such recommendation. In contrast, professional information is the pronouncement of a generally accepted principle of law, business, or psychology made without the intent that the recipient will act on the recommendation without independent verification.

Do the fundamental tenets of the profession (i.e., the *Model Standards*) obligate mediators to use collaborative processes to explore with the parties the underlying process needs surrounding their dispute?[135]

Hundreds of excellent Oregon mediators are not OSB members. A large number of them belong to OMA and mediate both court and noncourt cases. The OMA *Standards*[136] and the ODRC *Standards of Mediator Conduct*[137] for "listed civil case mediators"[138] are very similar—and, in some cases, identical. As a practical matter, the SPIDR Survey showed that over 46% of mediators questioned stated that lawyers were almost never present in mediation.[139] Both OMA and ODRC *Standards* seek to address this by stating that "in mediation in which disputants personally represent their own individual interests and substantial legal issues exist, the mediator shall encourage participants to obtain desired individual legal advice and individual legal review of any mediated agreement as is reasonably necessary for the parties to reach an informed agreement."[140] Likewise, both standards require the mediator to ensure "full disclosure of relevant information in the mediation process."[141]

Whether an advocate selects a mediator who adheres to the OMA and OAR *Standards* is extremely important. A mediator may be obligated ethically to reveal more to the pro se party than a mediator who is not bound by the OMA and OAR *Standards* would be. This is because the Oregon State Bar Disciplinary Rules do not impose these disclosure requirements on

135. The argument has been made that the role of disinterested observer is almost certainly not what the parties expect of a mediator. The selection of a mediator, whether the voluntary choice of the parties or required by statute, is a call for assistance in finding an answer to a problem shared by two or more individuals or organizations. McKay, *supra* note 107, at 21.

136. OREGON MEDIATION ASSOCIATION, *supra* note 49.

137. OR. ADMIN. R. 718-30-050 (1995).

138. OR. ADMIN. R. 718-30-050(1)(c) (1995); OR. ADMIN. R. 718-40-100(2)(a) (1995) (which the Oregon Supreme Court has adopted as Model Supplemental Local Rules (SLRs)).

139. *See supra* notes 4-7 and accompanying text.

140. OR. ADMIN. R. 718-40-100(3)(b) (1993); OREGON MEDIATION ASSOCIATION, *supra* note 49, Defining the Process 2.

141. OR. ADMIN. R. 718-40-100(3)(c) (1993); OREGON MEDIATION ASSOCIATION, *supra* note 49, Defining the Process 3. This mandate would shock most lawyer-mediators for the reasons mentioned in the text.

Oregon attorneys who mediate.[142] It is doubtful that the parties who use mediation services understand that this significant discrepancy in the codes could lead to a different result, depending on which ethical code the mediator chooses. Therefore, parties cannot participate voluntarily in a process predicated on their self-determination if they are mediating behind a veil of ignorance.

Some members of the mediation community argue that imposing the OMA and ODRC *Standards* is a deviation from the facilitative model because the standards can involve the mediator taking an active role in balancing substantive knowledge between the parties. Others argue that mediators have a societal obligation to ensure that justice is done and public policy is protected.[143] This represents an example of how the OSB and the OMA unintentionally create ethical confusion by propounding contradictory standards. This fact alone raises the question: Who should determine which ethical guidelines the mediator must follow? The mediator or the parties? Regardless of the answer, the parties must be informed of the mediator's ethical obligations under the mediator's respective ethical codes before substantive mediation communications begin.

Additionally, did OMA unwittingly create a considerable burden on its mediators, legally trained or not, by requiring the mediators to recognize when a "substantial legal issue" is present? In the Northwest SPIDR survey, 64% of mediators felt that "process expertise and subject matter familiarity" were necessary to ensure mediator competence.[144]

Within the context of mediation, the mediator's acknowledging a "substantial legal issue" without the parties' informed consent may destroy at least one party's view of the mediator's impartiality. This likely will subvert the process of mediation because disclosure of a "substantial legal issue" usually empowers one party over another.[145] Parties seeking a mediator may select

142. *See* OREGON CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 50.

143. Interviews with Joshua Kadish, J.D., former Chair, Oregon State Bar ADR Section, OMA member, and family law mediator (July 1997).

144. *See supra* notes 4-7 and accompanying text.

145. Kovach & Love, *supra* note 30, at 31. Kovach and Love argue further that such "mediator evaluation tends to perpetuate or create an adversarial climate. Parties try to persuade the neutral of their positions," rather than seek to discover the opposing party's interests. *Id.*

one who will not derail the resolution of the dispute by raising uncovered "substantial legal issues."

The only practical solution for mediators would be to rely on the parties' right to self-determination and informed consent. Specifically, the mediators and the parties should agree on how the mediator should behave if he or she spots a "substantial legal issue." "Just because a mediator has a law degree—or even an up-to-date license to practice—does not mean that he or she will give accurate legal advice, prediction, or evaluation."[146] Therefore, the issue can be resolved by allowing the parties to determine whether, and under what circumstances, the mediator will raise the "substantial legal issue." The mediator's impartiality is less likely to be questioned and the parties will more readily accept the practical ramifications of this form of mediation intervention.

7. *Standard VII: Advertising and Solicitation*

The *Model Standards* state that all advertising or communication regarding mediation services or qualifications must be truthful.[147] The comments provide that a mediator may refer to meeting a specific public or private entity's qualifications only if there is a procedure for such certification.[148] Oregon does not have a formal process for certification, although a work group convened by the ODRC and the OMA recently spent two years studying this topic and is in the process of publishing a joint report on their findings.[149] Attorneys who mediate also should note the requirements found in DR-2 Advertising, Solicitation, and Legal Employment.[150]

Oregon's attorney-mediators struggle to accurately describe the models they employ in advertising. Of the 161 mediators listed in the "Oregon Lawyers' ADR Resource Directory 1995-96," who describe their "philosophy/style," 25% describe their

146. Menkel-Meadow, *supra* note 74, at 61.

147. MODEL STANDARDS, *supra* note 1, Standard VII.

148. *Id.* Standard VII cmt.

149. This report will be available in the Summer of 1997 and can be obtained by contacting the Executive Director, Oregon Dispute Resolution Commission, 1174 Chemeketa St. N.E., Salem, OR 97310. Telephone: (503) 378-2877. E-mail: odrc@ijc.apc.org.

150. *See* OREGON CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 50, DR 2-101 to 2-111. *See also* Oregon State Bar Legal Ethics Op. 108 (1994); John R. Bates and Van O'Steen v. State Bar of Arizona, 433 U.S. 350 (1977).

style as either "variable" or "flexible."[151] Approximately 10% used the descriptive word "facilitative," and only 1% use the term "directive" (i.e., evaluative).[152]

Two things can be noted from these advertisements. First, most mediators (64%) do not advertise their style, forcing potential parties to speculate. Second, of those who do advertise their style, a majority describe themselves as "flexible" or "variable," terms that fail to describe a particular mediation style. Mediation needs a common vocabulary to help eliminate confusion over stylistic and practical behaviors. Adoption of a uniform vocabulary, especially in advertising, will lead to more consistent expectations by mediation consumers. Without it, the ambiguity between mediator styles and the parties' expectations will continue, to the detriment of the mediation profession. Finally, if the mediator engages the parties in a collaborative dialogue using the questions that appear in Section V, there is an even smaller chance of misunderstanding.

8. *Standard VIII: Fees*

Under the *Model Standards*, a mediator must "fully disclose and explain the basis of compensation, fees, and charges," and the fees must be "reasonable."[153] The comments further state that no fee can be contingent on the result or amount of settlement.[154] This bar on contingent fees ties in philosophically with the tenets of mediator impartiality and conflicts of interest. The comments also address the sharing of fees by co-mediators (reasonable allocation) and fees for referral (which should not be accepted).[155] For attorneys who mediate, DR 2-107 addresses similar issues.[156]

Mediators should disclose factors about mediation style that may affect the fee charged. For example, a mediator may need to point out that, in general, a facilitative mediation takes longer than an evaluative mediation.[157]

151. Oregon Lawyers' ADR Resource Directory 1995-96.

152. *Id.*

153. MODEL STANDARDS, *supra* note 1, Standard VIII.

154. *Id.* Standard VIII cmt.

155. *Id.*

156. OREGON CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 50, DR 2-107 (division of fees among lawyers).

157. A study of human nature indicates that it takes less time to tell a party what

9. *Standard IX: Obligation to the Mediation Process*

The *Model Standards* impose a duty on the mediator to actively improve the practice of mediation by educating the public, making mediation accessible, correcting abuses, and improving his or her own skills.[158] In addition, Standard VI imposes an affirmative duty on the mediator to recommend other options, such as arbitration, counseling, neutral evaluation, and other processes.[159] These standards certainly encourage mediators to grapple with stylistic practices that are incongruent with the emerging ethical standards of the profession.

V. Conclusion and Proposal

None of the four ethical codes examined—the OSB, the OMA, the ABA, or the *Model Standards*—completely encompass the continuum of mediation models that highlight the dilemma mediators face when seeking ethical guidance. Thus, even if mediation participants are familiar with these codes, that familiarity in and of itself will not help them predict the mediator's style. This is an additional reason the mediator should seek the informed consent of all parties because participants generally do not understand the various ethical codes governing mediators and the intersection of practice styles within the ethical codes. Thus, additional duties are imposed on the mediator to seek the informed consent of all participants because the parties do not understand the process. According to Menkel-Meadow, "[t]hese more complex issues [i.e., mediation style and philosophy] can be dealt with temporarily by requiring third-party neutrals to specify in advance what philosophies and methods they use so that clients and consumers can select, on an informed basis, what kind of third-party neutral they want."[160]

Thus, informed consent will rest on the mediator's disclosing the continuum of mediation models and ethical codes and will allow the participants to determine the mediation model best suited for their individual needs. The mediator then can

to do than it takes to ask them questions that enable them to explore for themselves what is in their best interest. A facilitative mediator tends to ask questions, whereas an evaluative mediator tends to make declaratory statements. A mediator must convey this information impartially so that the parties can make a fully informed decision.

158. Model Standards, *supra* note 1, Standard IX cmt.

159. *Id.* Standard VI cmt.

160. Menkel-Meadow, *supra* note 98, at 131.

attempt to match the most applicable ethical standard to the style of mediation the participants chose, or the mediator can withdraw on grounds that he or she cannot "satisfy the reasonable expectation of the parties."[161]

The facilitative model should not be used as a default. If the parties are laboring under the misunderstanding that the mediator will raise an issue or an option, then that assumption is influencing the parties' decision whether or not to settle because of the absence of input from the mediator. One cannot simply assume that the facilitative model is better ethically or stylistically because the parties may be assuming just the opposite. The Northwest SPIDR survey found that 58% of mediators feel that the typical parties to a mediation expect a combination of directive (evaluative) and facilitative styles.[162] In other words, the parties may expect an evaluative model just as likely as a facilitative model.

As the mediation profession matures, it is important to remember that the purpose of mediation is to allow the parties to settle their disputes on their own terms. Parties to a mediation are more likely to be satisfied with the process and the outcome if they clearly understand what to expect during the mediation and the mediator fulfills that expectation. A discussion between the prospective mediator and the parties will resolve most of the issues raised in this Article.[163]

As a practical matter, in the real world of conflict, each party, at some level, desires the mediator to be "facilitative" with them and "evaluative" with regard to the other side's position. To resolve this dilemma, a mediator must explain the process of mediation in such a way as to conform the parties' expectations to the selected mediation model. While there is no standard explanation, there are critical decision points that serve as a guide. In addition to exploring any ambiguities in operationalizing the controlling ethical code, the mediator should consider discussing one or more of the following decision points with the parties,

161. Model Standards, *supra* note 1, Standard IV.

162. *See supra* notes 4-7 and accompanying text.

163. Robert A. Baruch Bush led a workshop entitled, "Can We Have It Both Ways? Mediation as a Facilitative or an Evaluative Process" (Seattle, Washington, Apr. 1997). This Article supports the position that, in fact, the parties can have it both ways.

thus securing their agreement and determining how the mediation will proceed:

(1) Will we use a facilitative, evaluative, combination, or some other model for this mediation? What do these terms mean to you? Can the model change, and if so, under what circumstances?

(2) Will we use an "interest-based" or "rights-based" approach?

(3) Is your relationship with the other party or adherence to the law more important to your belief that the process and resolution is just? What will you look for when determining fairness?

(4) Are there time or financial constraints affecting your choice of mediation models?

(5) Will the parties meet only in joint session, only in private caucus, or both? Under what circumstances and conditions, if any, will the process move from joint session to caucus or vice versa?

(6) Will there be premediation submissions to the mediator? If so, will they be confidential? Will they be shared with the other side, in whole or in part?

(7) Must both parties fully disclose all relevant information, or is it appropriate for a party and/or the mediator to have information that the other party does not have?

(8) How much subject matter expertise should the mediator have, and when and how should such expertise be used?

(9) Should the mediator offer options or propose settlement terms?[164] If yes, under what circumstances?

(10) Should the mediator offer opinions? If yes, under what circumstances?

(11) Should the mediator raise issues, claims, or defenses? If yes, under what circumstances?

(12) Should the mediator make the parties aware of the importance of consulting other professionals? If yes, under what circumstances?

(13) Should the mediator intervene if one party is about to accept a settlement when, in the mediator's opinion, that party is likely to achieve a more favorable result in court or elsewhere?

(14) Should the mediator raise or advocate for the interests or rights of a party missing from the mediation? If yes, under what circumstances?

164. ORS 36.195(3) allows the mediator to "propose settlement terms either orally or in writing."

(15) Should the mediator offer "legal information" as contrasted with "legal advice"? If yes, under what circumstances?

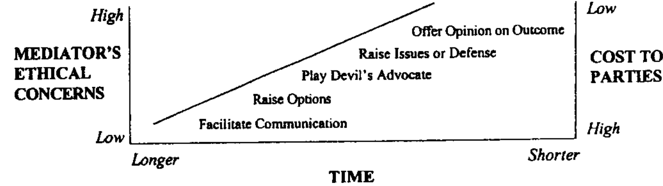
(16) What exceptions to confidentiality, if any, will be observed in this mediation?

(17) Should the mediator rectify "power imbalances" between the parties? If yes, under what circumstances?

(18) Should the mediator raise or suggest other ADR processes (e.g., mini-trial, summary jury trial, arbitration)? If yes, under what circumstances?

(19) When, if ever, should the mediator declare the mediation over?[165] More specifically, should the mediator withdraw or postpone a session if a party cannot participate because of drug or alcohol use or other physical or mental incapacity?

The following graph can help mediators visualize some of the aforementioned questions.



It is time for the mediation profession to draw on its strength, the use of collaborative processes, to convene the various interests groups to explore and develop a practical code that encourages the parties to pick the mediation model that works for them. The *Model Standards* are a first step toward such a code that incorporates the complexity of mediation styles and ethical dilemmas. It would be inappropriate, however, to legislate one model to the exclusion of another.[166]

165. *Id.*

166. The *ABA's Standard of Practice for Family and Divorce Mediation*, while currently being reviewed, is an example of a code whose ethical and stylistic underpinnings are evaluative. STANDARD OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (1984). Conversely, the *North Carolina Dispute Resolution Commission's Standards of Professional Conduct for Mediators* are facilitative. NORTH CAROLINA DISPUTE RESO-

In the interim, this author proposes the following amendment to the *Model Standards* in an effort to guide the mediator in helping the parties reach an informed collaborative decision on what will happen during the mediation:

> The mediator has a duty to impartially inform all participants of the continuum of existing stylistic models and which model(s) the mediator practices. Additionally, the mediator is obligated to inform the parties of the mediator's profession, the relevant ethical codes governing his or her behavior, and the practical impact of those codes on the specific mediation. Only then can a mediator reasonably expect the parties to possess enough relevant information to make an informed, self-determined decision regarding the most appropriate model of mediation for their particular dispute.

Comments:

> (1) The Model Standards do not endorse a particular mediation model. To appreciate the applicability of the various practices, participants should be fully informed and the mediator should fully advise the participants of the practical decision points that need to be made during the mediation.
>
> (2) The mediator should understand that regardless of the participants' preferences, evaluative mediation by its very nature requires a heightened ethical responsibility.[167]

Without the proposed model standard, the confusion inherent in the status quo will continue. The risk of continued incongruity between the expectations of mediation users and mediation, as it is practiced, is the erosion of public confidence in the process. Ultimately, when the parties are not informed

LUTION COMMISSION'S STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS (1996).

167. According to Lawrence M. Watson, President of the American College of Civil Trial Mediators, the evaluative mediation model is beneficial as long as:

> (1) Evaluation is evenly applied to both parties.
>
> (2) Evaluation fairly recognizes both strengths and weaknesses of both sides.
>
> (3) Probing, confrontational, or potentially embarrassing evaluative questions and observations are restricted to private caucus.
>
> (4) Both parties feel their side of the story has been understood and appreciated.
>
> (5) A mediator's evaluative data is received as "input" rather than "determination."

Thus, after disclosure and the parties' informed consent, an evaluative model can serve to resolve a dispute ethically as long as the parties' self-determination is not compromised. Watson, *supra* note 31, at 6.

thoroughly of the ethical and practical aspects of mediation, it is not unreasonable to suggest that they may look on the one mechanism that offers the best hope of resolving future disputes—mediation—in the same negative vein as litigation.[168] Mediation, as a growing profession, should seek to foster a reputation built not on perception, but on clear understanding of mediation's great success in the resolution of disputes. Engaging the parties in a collaborative process to establish ground rules for the practical decision points during the mediation will help balance the tension between mediation's aspirations and its actual practice. Only with such a process can we honor the fundamental tenets of mediation and the public it serves.

168. In a Harris Executive Poll of 400 senior executives at Business Week Top 1000 corporations, 62% of the executives indicated a belief that the current legal system significantly hinders U.S. competitiveness in the global marketplace. Michele Galen, *Guilty*, BUSINESS WEEK, Apr. 13, 1992, at 60-65.

The Advocate's Mediation Checklist

"What works . . . what doesn't!"

By

Sam Imperati, JD

Initiating settlement discussions and mediation are tools to be used by counsel at strategic times and for specific purposes. Mediation is considered the most effective of all ADR options because the parties maintain control of the controversy and because of its flexibility. The following is a summary of negotiation issues in a caucus-based mediation model. The process begins with an evaluation of the appropriateness of settlement. Beginning in 1968, Neil Rackham of Huthwaite Research Group collected and quantified data through direct observation of negotiations to show how the skilled negotiator behaves. Rackham selected and studied forty-eight negotiators during 102 negotiations who met the following criteria for "the successful negotiator:" a) the successful negotiator is rated as effective by both sides, b) the successful negotiator has a track record of significant success, and c) he successful negotiator has a low incidence of implementation failure. The italicized findings below are findings from that survey.

A. "To Settle or Not to Settle. . . That is the Question!" 2
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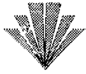

A. "TO SETTLE OR NOT TO SETTLE... THAT IS THE QUESTION!"

1. The following list of factors often help determine if settlement is appropriate:

A.	Factors Favoring Settlement	YES	NO
	(a) A business or personal relationship could continue or be resumed		
	(b) It is desirable to better control the dispute process		
	(c) The position of each side has merit, and a trial could well result in either side prevailing		
	(d) Further litigation preparation and the litigation would be too costly and protracted		
	(e) A speedy resolution is important		
	(f) The dispute raises highly technical or other complex factual or legal issues		
	(g) A jury trial should be avoided because of the "sympathy" factor for one side		
	(h) The law on the determinative legal issues is well settled		
	(i) Need to avoid an adverse precedent		
	(j) Publicity about the case or its outcome should be avoided		
	(k) No further discovery is required C or limited expedited discovery will suffice C for each side to assess its strengths and weaknesses		
	(l) The client wants to be meaningfully involved at every step		
	(m) A candid presentation by each side of its best case will help promote a better understanding of the issues		
	(n) A strong presentation will give one side or the other a more realistic attitude about the case		
	(o) A neutral could help diffuse the emotion or hostility which may bar a settlement of the dispute		
	(p) The neutral's evaluation could help break the stalemate		

	(q) There is a potential for a runaway result		
	(r) A creative or unique remedy is needed		
	(s) Fear of attorney fees and costs awarded on de novo trial of mandatory arbitration award		
B.	**Factors Weighing Against Settlement**		
	(a) The case can most probably be disposed of on a motion		
	(b) At least one side requires a judicial decision for its precedential value		
	(c) There is no bona fide dispute; the other side=s case is without merit		
	(d) The advantages of delay run heavily in favor of one side		
	(e) There is nothing to lose		
	(f) The other side has no motivation to settle		
	(g) More time must elapse before each side=s positions and the settlement possibilities can all be evaluated		
	(h) One side is refusing to settle so as to send a message to others who are not parties to the case		
	(i) There is a need for continuing court supervision of one of the parties		

2. When to initiate discussions re: settlement or mediation? Some common opportune points include:

   a. Pre-filing
   b. Just after filing
   c. Post key "depos"
   d. Upon completion of discovery
   e. Post-filing/Pre-argument of dispositive motions
   f. Just before trial/arbitration
   g. During trial/arbitration
   h. Post-trial/arbitration

3. If you decide to initiate settlement/mediation discussions, how can you convince the other side if they are reluctant?

4. If you decide to mediate you will need to agree on:

a. Confidentiality issues
b. Model of mediation ("evaluative" or "facilitative")
c. Mediation time and location (neutral site?)
d. Mediator compensation: Who pays under what circumstances
e. Position papers: confidential, full exchange or partial exchange

B. Selecting a Mediator With "The Right Stuff!"

Mediators have been trained in different styles and it is important to understand their approach. What kind of experience? What kind of training? What is the style or school of mediation to which the mediator ascribes? How will the mediation be conducted? How much use of joint meetings or private caucuses? Will the mediator ever separate you from your client? Will the mediator assess the situation and express an opinion regarding an outcome?

1. To begin, obtain possible candidates from:

   a. Other lawyers
   b. Court's list of mediators
   c. Provider organizations

2. Interview potential mediators:

   a. Obtain their resume and references (both attorneys from last 3 mediations)
   b. Will the other side and your client find them credible when it's time for "reality therapy?"
   c. What is their legal expertise in the subject matter (needed for an "evaluative mediator")? When considering retired judges, determine if their style is adjudicatory such that the mediation would proceed more like a settlement conference. Is this what you want?
   d. Review their Standard Rules of Mediation/Agreement to Mediate.
   e. Note the mediation structure preferred by the mediator (e.g., length of session, caucus, joint session, opening statements by attorneys and/or parties, etc. Ask them to define a "successful" mediation. Do they direct their comments primarily to the attorney or party? When do they declare an "impasse" and how do they handle it).
   f. Ask about "confidentiality" and exceptions. Insist upon a signed Agreement to Mediate.
   g. What is their style ("evaluative" or "facilitative")?
   h. Training: how much/what type?
   i. What mediator ethical codes do they adhere to?
   j. Neutral location and amenities (e.g., computer, phones, fax, espresso!)
   k. Length of typical session: allow for an entire day (9:00 a.m.-9:00 p.m.)

C. Settlement Discussion/Pre-Mediation Preparation

Plan a negotiating strategy with your client. While you should always come with an open mind because new perspectives, and often, new information are revealed in the session, you should still think about a strategy for your moves. Remember, if you are using a neutral, s/he is condensing

weeks or months of negotiation into a single day (mediation is sometimes called "Turbo-charged Negotiation"). Do not, in any event, be constrained by your negotiating plan. Remain flexible with the process, but never let the mediator control your side of the negotiation. You and your client are in charge.

1. Be able and willing to try your case if the matter doesn't settle!

2. Confer with your client on:

   a. The advocate's role during the discussions - prepare them for the fact that you will not be stylistically aggressive
   b. The client's role during the discussions
   c. The role of the mediator, the typical mediation process

3. Determine who needs to be there:

   a. Attorney, CPA
   b. Party with full settlement authority
   c. Consider experts and consultants

4. Learn as much as possible about your client's and the opponent's:

   a. Stated facts (depositions not necessarily required but informal discovery exchange may be helpful)
   b. Understanding of the law
   c. Negotiating style
   d. Issues
   e. Perceived business & personal needs
   f. expectations
   g. Perceptions and decision-making style
   h. Outside influences on the negotiation
   i. Openness to creativity
   j. Value of ongoing relationship, if any

5. Do some "reality testing" with your client.

6. Do unresolved legal matters impact your willingness to settle?

7. What is the relationship between the advocates?

8. Summarize the history of settlement negotiations? What obstacles to settlement have you observed? Are there other factors affecting the negotiations, such as a spouse or supervisor "leaning" on the party, precedential value of the case, public visibility, etc.? How can these factors be overcome? *(The skilled negotiator made twice as many comments regarding long-term considerations of issues, with the average negotiator focusing on the short-term.)*

9. What are some creative, non-economic options for settlement? *(The skilled negotiator*

considered twice as many outcomes and options per issue as the average negotiator.)

10. What external objective standards of legitimacy could be applied to the settlement options to frame them as reasonable?

11. What proposals for settlement do you think your client would be willing to make? What proposals do you think the other side would be willing to make? *(The skilled negotiator made three times as many comments to their clients about areas of anticipated common ground.)*

12. Does your client representative have FULL authority to settle the case (not just a "bottom line")? Does the opposing party representative have similar authority?

13. Ensure that your party or party representative will be present for the entire session. Reserve the full day if you are mediating. Be sure others who may have bearing on the decision are available, even if only by telephone, on the day of the negotiations.

D. PREPARING THE CONFIDENTIAL SETTLEMENT/MEDIATION PAPER:

Prepare a confidential settlement/mediation booklet. (5-10 pages). Make copies for yourself, your client, and the mediator if you are using one. Send the booklet for the mediator to review at least ten (10) days before the session. Seasoned mediators will begin the process even before the parties arrive at the scheduled mediation session.

1. This summary analysis should cover the following:

   a. Factual summary and procedural status of the case
   b. Identification and bullet-style analysis of the key factual and/or legal issues
   c. History of the settlement discussions including last demand/offer and "whose court you think the ball is in"
   d. Identification of the underlying business and personal interests of both parties (expressed or, as more often the case, unexpressed); i.e., what does the client need? What motivating factors underlie the dispute? Include the underlying interests/needs of both parties from a non-monetary perspective (e.g., are there practical alternatives to a monetary settlement?).
   e. A bullet-style description of the strengths and weaknesses of your case. Don't pull any punches.
   f. A bullet-style description of what you think the other party asserts to be its factual/legal strengths, along with your candid response
   g. Your view as to the past and present barriers to settlement

2. The paper should also include the alternatives to reaching an agreement (e.g., if you proceed to trial, arbitration or appeal):

   a. What is the likely outcome (assess the numerical probability)? (E.g., "If you try this case 100 times, what percentage of the time are you going to win? When you do prevail, what is the likely range of the award?)
      BATNA ---"Best Alternative to a Negotiated Agreement"

WATNA ---"Worst Alternative to a Negotiated Agreement"
MLATNA ---"Most Likely Alternative to a Negotiated Agreement"

b. What are the expected fees and costs (and the value of lost opportunity time)?
c. How long until the trial or arbitration?
d. Predict the length of the proceeding
e. What is the probability of appeal, cost of appeal, and likely outcome on appeal?

3. Provide or have available this additional information:

   a. Highlighted copies of the key documents and a summary of any other information that will assist the neutral in working with the parties
   b. Copies of the current pleadings
   c. Copies of relevant appellate decisions (highlighted)
   d. Summary of documentary evidence
   e. Summary of damages claim
   f. Accounting of fees and costs to date

4. Consider sending a separate settlement/mediation brochure (without confidential information) to the other party in advance of the session.

5. Stop negotiating if you're going to mediate...save your moves for the session to create momentum toward resolution!

E. At the Mediation

1. In the initial joint session, the mediator usually makes an opening statement. This is designed to set a specific tone and is likely to include the following:

   a. Introductions by the persons present
   b. Summary of the mediator's background and experience
   c. Discussion of the mediator's role as distinguished from judge, arbitrator or fact-finder
   d. Discussion about impartiality and disclosures surrounding it
   e. Presentation on the voluntary and confidential nature of the process
   f. Outline of how the day is likely to proceed and a summary of the ground rules
   g. Solicitation of the participants to negotiate in good faith and the signing of the Mediation Agreement
   h. Opportunity for opening statements by attorneys and/or parties

F. MEDIATION JOINT SESSION OR FACE TO FACE NEGOTIATIONS WITH OTHER SIDE

Effective representation in mediation involves a unique advocacy style. There are two ways to convince your opponent--directly or indirectly through a mediator during the mediation caucus process. Please consider the following:

1. "Good Stuff:"

   a. Thorough preparation
   b. Visual aides are helpful and show you are willing to try your case
   c. Introduce yourself and your clients to everyone and identify their roles.
   d. Prepare a ten-minute summary of your case for your opening remarks. It should include:
      (1) Facts -- undisputed and disputed
      (2) Key issues *(The skilled negotiator only used an issue sequencing process half as often as the average negotiator, to control the order that events would occur.)*
      (3) Law -- undisputed and disputed
      (4) Key witnesses and other proof
      (5) Damages analysis with back-up documentation
   e. Use a communication style that conveys:
      (1) A willingness to "explore" the problem vs. "debate" the issues
      (2) Empathy, if sincere
      (3) Confidence that settlement will be reached
      (4) You can get further with nice words and a gun than with just a gun!
   f. Direct your remarks to the other party, if present. The target of persuasion is not the neutral. The one who must find your arguments convincing is the party who must compromise their claim or defense. This is not the place for grandstanding. It is an opportunity for direct and concise communication. *(The skilled negotiator tended to give an advance indication of the class of behavior they were about to use six times more often than the average negotiator. For example, instead of merely asking a question, the skilled negotiator prefaced with, "Can I ask you a question," to label their behavior and prepare the other party. This was true for all behaviors except disagreeing, in which the skilled negotiator was only half as likely to label in advance of disagreeing compared to the average one. The skilled negotiator is more likely to begin with the reasons and lead up to the disagreement.)*
   g. Be attentive and actively listen to the neutral and the other side. When the opposing party or counsel has completed their presentation, ask non-argumentative questions to clarify any matters. *(The skilled negotiator asked more than twice as many questions during negotiation as compared to the average negotiator.)* Communicate to the other side that you understand their position. There is a difference between understanding and agreeing. If you can articulate their perspective, you are closer to a meaningful settlement. *(Skilled negotiators tested the other party=s understanding of a previous statement more than twice as often as the average negotiator, and summarized the*

previous points of the discussion almost twice as often.)

h. Attack the problem, not the person! *(Average negotiators used heated, emotional or value-loaded behaviors to either attack the other party or defend their position more than three times as much as skilled negotiators, leading to "attack/justify/blame.")* Tie any settlement proposal to an external objective standard. *(In counting the number of times a negotiator made statements about what was going on insider his or her mind [e.g., feelings of fairness and motives for proposals] research showed the skilled negotiator offered feelings commentary almost twice as often.)*

2. "Bad Stuff:"

   a. Adversarial banter *(Average negotiators used phrases that are not very persuasive, but cause irritation by implication, five times more often than skilled negotiators. For example, they used "generous offer" instead of "reasonable offer".)*
   b. "Jury" pitch
   c. "Bottom-lining" from the start of the process
   d. "Retreating" from your last settlement position

3. Should you allow your client to speak?

   a. Safe (confidential & privileged subject to exceptions)
   b. "Yes" when:
      (1) Client will be an attractive, compelling, or sympathetic witness.
      (2) To defuse hostilities.
      (3) To give the client their desired "day in court."
   c. "No" when:
      (1) Client talks and talks and talks. . .
      (2) Client cannot control emotions and is looking for revenge.
      (3) Client makes a poor impression.

G. THE FIRST MEDIATION CAUCUS ("I'VE GOT A SECRET & I PROMISE NOT TO TELL!")

This is primarily an "information-gathering" session by the mediator. At the beginning, confirm that the mediator will maintain confidences.

1. It's time for "reality therapy!"

   a. Objectivity
   b. Candor
   c. Open mind

2. Let your client talk with the mediator, particularly about the client's view of the case.

3. Let your client "vent" in the safety of the caucus. The parties have both facts and feelings that impact their decision-making process. Allow time for emotion. Good mediators encourage it.
4. Be prepared to respond to the mediator about:

   a. Strengths: Where are you strong and where is the other side weak?
   b. Weaknesses: Where is the other side strong and where are you weak?
   c. Alternatives: If the conflict is not resolved, what will happen? (BATNA, WATNA, MLATNA) (See section D.2.a., above)
   d. Perspectives:
      (1) Theirs: What is driving the controversy? What do they need to agree on resolution? Why? What new information can you present to the other side that will change their perspective?
      (2) Yours: What is driving the controversy? What do you need to agree on resolution? Why? What new information do you want from the other side to change your perspective?
   e. List Underlying Business and Personal Needs and Interests:
      (1) Yours
      (2) Theirs
      (3) Common
   f. Options: Brainstorm multiple options for resolution. Separate the process of inventing from the process of deciding. Average negotiators made twice as many counter-proposals during negotiations. Counter-proposals immediately introduce an additional option before addressing the one on the table, and decreases the other party=s receptiveness.)
   g. Negotiation: Consider that offers might be tied to legitimate objective standards and let the mediator discuss the standard or formula with the other side. Throwing a number against the wall to see if it sticks is rarely effective.

5. Trust your mediator.

6. Instruct the mediator as to what information is/is not confidential.

7. This First Caucus process will then be done with the other party or parties.

H. THE SECOND (& LATER) MEDIATION CAUCUSES

The mediator will use this session to create momentum toward settlement by refocusing the parties on: previous areas of agreement, their underlying interests, the underlying interests of the other party, option analysis, risk analysis and transmittal of settlement proposals. In additional caucuses, parties should:

1. Be willing to listen to different points of view.

2. Consider the information transmitted from the other side and transmit new information to them. "Documents are worth a thousand words!"

3. If appropriate, allow new information to impact your risk analysis/settlement parameters.

4. Use the mediator as a sounding board for "reality testing" and to "float" settlement proposals.

5. Be willing to explore creative solutions to the problem. The mediator is likely to give assignments for you to work on while the caucus with the other party takes place. Most likely you will be asked to explore the risk analysis in further detail and generate at least three options for settlement that have not yet been proposed to the other side.

6. As the subsequent caucus sessions continue, the mediator will build the momentum and assist in clarifying the common ground. Often, the mediator will recommend a joint session to hammer out details if the parties are close to a settlement.

I. NEGOTIATION TIPS & TACTICS

1. Seek <u>competitive</u> results in a <u>cooperative</u> manner!

2. It doesn't matter who calls first to invite settlement discussions. It does matter who makes the first offer that puts the dispute on the "playing field." If you need a settlement and they won't open, then put the best principled proposal you can on the table that will keep them negotiating. Present it with your logic and rationale in a confident but not arrogant manner. Do not make a concession until they step onto the "playing field."

3. Develop a rational basis for each item presented in your opening position. This allows the other party to understand the rational reasons behind your demands, and helps explain your entitlement to ultimate goals.

4. Never lead with your "bottom line." You might as well say, "See you in court!" Fully understand your bottom line prior to negotiating, and try to uncover theirs. Recognize there is a point, below which, the negotiations will not go.

5. Start bargaining with less important topics, in order to develop a cooperative mood and make progress. This will pay off later when more significant, but contentious subjects are discussed.

6. Ask the other side about each element of its perceived position. What exactly do they hope to obtain and what is the rational basis? What are the hidden motivational factors influencing their articulated demands? Go behind stated positions to unveil the underlying needs creating their positions.

7. Through patient probing, learn as much as you can about the other side's range of choices, preferences, strengths and weaknesses, without overstating, or underestimating, your own.

8. Ask questions to elicit information from the other side in a non-threatening way. Build relationships whenever possible.

9. Allow them to ask questions of you, but respond as briefly as possible without playing "hide the ball." They are more likely to believe your answer than your unsolicited statement.

10. If they come up with an initial proposal "from the parking lot," very calmly ask them a series of questions that elicit the external, objective standards that support (or likely don't support) their position. Build from the bottom up by dividing their proposal into its component parts and asking for the supporting data for each number.

11. Once they are on the "playing field," your next proposal should be no closer to your goal than their position is from your goal.

12. Any subsequent movement on your part must have an objective rationale or be in response to their objective rationale. Do not move for the sake of movement . . . it is a sign of weakness.

13. Take advantage of the power of factual and legal arguments, appropriate and persuasive emotional appeals, as well as public policy. Rather than surprising the other party, make assertions that bring up points not considered by them before.

14. Offer a rationale. Explain to the other party why they can't get what they asked for. They will feel satisfied even though they didn't get it because they heard reasons for your decision. This makes them feel taken care of.

15. Rather than making negative threats, use affirmative promises to induce a reciprocal change in positions.

16. Your opponent is more likely to move:

    a. Based upon an agreement (e.g., "If you'll do X, I'll do Y");
    b. Then in response to a caution (e.g., "If that happens, then X is likely to do Y");
    c. Then in reaction to intimidation (e.g. "I'll clean your clock in the courtroom").

17. To get past "No!" and beyond impasse:

    a. Avoid emotional reactions and escalation. Refocus on your fundamental interests. Try to separate the "person" from the "problem."
    b. Don't argue. Diffuse their negative emotions, including fear and hostility. Listen to their points and acknowledge their feelings without agreeing. Use "VECS." Try to re-frame their position in order to problem-solve.
    c. Bridge the gap between their interests and your own. Show how it's in their interests to agree to a mutually beneficial solution. Use "Positive Reframing."
    d. Educate them to the consequences of their approach, including potential gains and losses for both sides. Focus on process and objective criteria. Brainstorm options, prioritize needs, gather and share data.

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18. When you enter the "resolution zone," go slowly. 75% of the work happens in the last 25% of the allocated time. Patience is a virtue!

19. Develop the power to walk away. Don't pass the point where you=re no longer willing to walk away, based on your emotional investment and the time and effort spent negotiating, rather than on your best interests.

20. Your final proposal must entice your opponent to say "yes" from the perspective of their most likely alternative, moderated by their risk-averseness, assuming they have realistically evaluated the matter.

21. Do you want to be right or successful? Sometimes you have to choose. As a result, you may need to create a dynamic where you have to say "yes" to their proposal so they feel they won!

22. Beware of "Oh, by the way!" Get all terms on the table and negotiate the package. Nothing is final until both sides have agreed to all the deal points.

J. WHAT, NO SETTLEMENT?

1. What is the obstacle and how can it be overcome?

   a. Can you obtain factual/legal stipulations or procedural agreements on additional discovery or time lines?
   b. Are court rulings on motions necessary?
   c. Is more time needed ("I will settle no case before its time!")?
   d. Consider hybrid processes: Med-ALOA (Mediation and Last-Offer Arbitration), Neutral Evaluation, and Arbitration.
   e. Discuss bifurcation (settle some issues. . . try others).
   f. Be open to the mediator's suggestions concerning impasse-busting techniques (e.g., Conditional Offer, Confidential Settlement Number, Mediator=s Solution, One-Text Procedure, etc.)

K. YES, WE HAVE A SETTLEMENT!

The mediator will return the parties to the joint session format if they have been in caucus to summarize essential terms of the agreement. Each participant will be asked if the mediator's summary was accurate and whether they agree that the matter is settled. In order to avoid unanticipated problems occasionally created by "settlement remorse," and the "Oh, by the way" phenomenon, it is good mediation practice to have the attorneys and the parties sign a memorandum of essential terms if more detailed memorialization must be deferred because of the constraints of time or technology. In a perfect, although not always practical world, the final settlement documents are executed at the conclusion of the mediation or negotiation. At the final joint mediation session:

1. Ask yourself: Have all bases been covered - are there any loose ends? Do we have a binding and enforceable settlement? Remember: "It's not over until it's over." *See,*

Kaiser v. Doe, 136 Or. App. 566, 903 P.2d 375 (1995) (settlement agreement valid), *modified on other grounds*, 138 Or. App. 428, 908 P.2d 2850 (1996): *cf.* The Cadle Co. v. Castle, 913 S.W.2d 627 (Tex. Ct. App. 1995) (settlement agreement invalid).

2. Memorandum of Understanding on Essential Terms and Conditions will be prepared. All parties and counsel should sign it before anyone leaves.

3. Mediator can act as a scrivener at the mediation session and/or act as mediator/arbitrator for language disputes in final documents

4. Mediator testifies only as to the authenticity of "Memorandum of Understanding of Essential Terms and Conditions," and nothing more, absent agreement of all parties and the mediator

5. Bring your boilerplate settlement agreement, edited to include language unique to this case, to the mediation session. Bring it on your laptop and/or on disc (saved as Word Perfect, Word and ASCII).

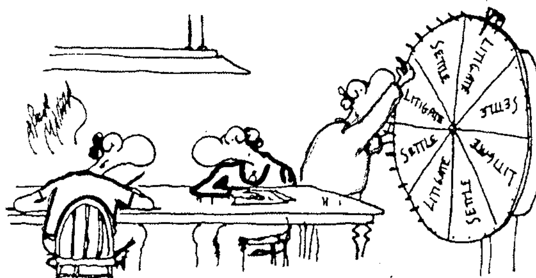
6. In lieu of written agreement, consider putting the settlement on the court record with formal documents to follow.

L. Debrief

After the case is finalized, call your mediator to do a bilateral debrief/post-mortem of the process.

Sources

"Negotiation Techniques," by Charles B. Craver, in *Negotiation* (3rd Ed.) (1999). "Secrets of Power Negotiating," by Roger Dawson. "Step into My Parlor: A Survey of Strategies and Techniques for Effective Negotiation," by Terry Anderson. "Winning at the Sport of Negotiation" by Kathy Aaronson. *Interactive Negotiations: Prepare It. Do It. Analyze it,* by Latz Negotiation Institute (2000). "Achieving Integrative Agreements," by Dean G. Pruitt, in *Negotiating in Organization.* "Characteristics of Effective Negotiators" from: "The Negotiation of Settlements: A Team Sport," by James G. Zack, Jr., from *Negotiation* (3rd Ed.), Roy J. Lewicki, et al. (1999), pp. 327-340. "Negotiation Theory" Table adapted from "Understanding Competing Theories of Negotiation," by John S. Murray, from *Negotiation Journal*, April 1986. Also from: "Consider Both Relationships and Substance When Negotiating Strategically," by Grant T. Savage, John D. Blair, and Ritch L. Sorenson, from *Negotiation* (3rd Ed.) (1999).



"Where did you get this mediator, anyway?!"

Institute for Conflict Management, Inc.

Dispute Resolution Services
Mediation, Facilitation, Team Building, ADR Training

September 29, 2006

TO: ______________ ______________
______________ ______________
______________ ______________
______________ ______________

RE: ________________________, **Case Number:** __________

Greetings:

Thank you for selecting the Institute for Conflict Management, Inc. (ICM) to mediate this dispute. Our website can be found at: http://www.mediate.com/ICM. As you know, mediation is a voluntary process that affords all parties the best opportunity to explore a dispute in a confidential environment and reach agreement. I can personally attest to its success in cases ranging from "admiralty to zoning." Pursuant to our agreement, this mediation is scheduled for:

Date:	**Wednesday, October 25, 2006**
Time:	**9:30am – Until Completion**
Location:	______________________________
	______________________________

Enclosed please find for your review our form Agreement to Mediate and my résumé. The Agreement to Mediate will control until all parties and the mediator agree to change it. We can sign the original at the session, but if you have any problems with the agreement, please let me know immediately.

Our fee, plus expenses, is to be split evenly between the parties unless otherwise agreed in writing prior to the mediation. As noted in paragraph eight (8) of the Agreement, a **$500.00 deposit** is due from each party, to be sent **no later than October 14, 2006.** (ICM's tax identification number is 93-1120384.)

Please be sure that each party, or as a less desirable option, a party representative with ***complete authority*** to fully resolve all issues is present. **Please notify me immediately if this is not possible**. We cannot proceed meaningfully without the actual decision makers at the table.

11524 SW Vacuna Court Portland, OR 97219-8901
Tel (503) 244-1174 Fax (503) 244-1038 SamImperati@comcast.net

In advance, I request that you send me a **confidential case summary** to help me prepare for the mediation. (If possible, please email this document in Word Perfect or Word. My address is: SamImperati@comcast.net. The exhibits can be sent under separate cover.) This analysis should be sent to me by **October 16, 2006** and should cover the following:

1) a brief review of the procedural status of the case;
2) a brief factual overview;
3) identification of the key factual and legal issues in dispute including a detailed "damages" analysis;
4) a bullet-style list of your factual/legal strengths;
5) a candid, bullet-style list of the other party's factual/legal strengths, along with your response;
6) the underlying business or personal needs of *both* parties from a non-monetary perspective;
7) a history of settlement discussions including the last proposals and "whose court you think the ball is in;"
8) your view as to the past and current barriers to settlement including your thoughts as to the other side's realistic view of the case;
9) highlighted copies of the key documents and pleadings;
10) a summary of any other information that will assist me in working with you; *and*
11) a list of the key parties, witnesses and professionals so I can check for "conflicts."

I am confident we will be able to work together toward a satisfactory resolution and I look forward to assisting you in that process.

Sincerely,

Samuel J. Imperati, J.D.
Executive Director

Attachments: Agreement to Mediate
Résumé

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Mediator Approaches

(Painting with the broad brush of generalization to note commonly asserted differences. These differences are frequently observed in the breach.)

Approach	"Transformative"	"Facilitative"	"Evaluative"
Negotiation Theory	Interest-Based Relational	Interest-based Preference	Rights-Based Distributive
Mediator's Value	Process	Process	Results
Central Actor	Client	Client	Attorney-Focused
Meetings	Joint Session Only	Joint Session Preference	Caucus Preference
Options	Only from Parties	Options if can't develop on own	Always
Legal Information	Never	Maybe	Yes
Opinions	Never	On Process	On Process and Outcome
Reference Points	Relationship	Relationship Preference	Legal Rights & Responsibilities
Communication Style	Listen	Explore	Argue
Goal	Fairness and "Resolution"	Prefer "Resolution"	Power and "Settlement"
Decision-Making Reference Points	Perceptions & Subjective Standards	Combination	Evidence & Objective Standards
Length of Sessions	Longer	In-between	Shorter
Underlying Values	Self-Determination	Both	Protection of Rights
Disclosure Expectations	Full Disclosure	Full Disclosure Preference	"Secret" Information OK
Length Assumption	One or More Sessions	One or More Sessions	One Session
Mediator's Skills	Process Expertise	Process Expertise and Subject Matter Familiarity	Process Familiarity and Subject Matter Expertise
Party's Interests	Non-Economic	Economic and Non-Economic	Primarily Economic
Negotiation Style	Collaborative	Combination	Aggressive

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BINDING MEMORANDUM OF UNDERSTANDING:
ESSENTIAL TERMS AND CONDITIONS OF SETTLEMENT

THIS MEDIATION BEING CONCLUDED, THE PARTIES AGREE AS FOLLOWS:

If any of the provisions do not apply, strike and initial the inapplicable language:

1. This is a final, binding and enforceable agreement resolving all issues that were raised or could have been raised between the parties signing below that arise from or relate to the matters presented in this mediation described as ________________. ("Dispute"), unless specifically noted herein.

2. Each party agrees to mutually release the other, their heirs, representatives, principals, successors, agents, employees, officers and directors, and attorneys of all claims, known or unknown, arising from or relating to the Dispute. Except as otherwise provided herein, each party will bear their own costs and expenses (including attorney fees) incurred up to and including the Effective Date as defined in Section 12, below.

3. All pending legal actions shall be promptly dismissed with prejudice and without attorney fees or costs to either side.

4. All terms of settlement shall be confidential except as otherwise provided under Oregon Law. The parties further agree not to initiate or cause to initiate any claim or investigation against any other party with any governmental agency or professional association.

5. (a) ________________________ shall pay to ________________________________
the sum of $________________________, on or before the ____ day of ____________, time being declared to be of the essence.

   (b) ________________________ shall pay to ________________________________
the sum of $________________________, on or before the ____ day of ____________, time being declared to be of the essence.

   (c)

   (d)

   (e)

   (f)

   (g)

6. The parties agree that: ***(Select only one)***

☐ A. This Memorandum shall act as the final settlement document between the parties and may be fully enforced as a complete settlement agreement in accordance with Oregon law. *Therefore, Sections 7 and 8 below do NOT apply.*

As a result, this settlement agreement contains the other standard settlement terms generally accepted in the legal community where the mediation is held for this type of dispute, including but not limited to the following: Oregon law applicability; Venue: ____________; severability; survivability; binding effect; notice provisions; legal representation; actual authority to bind; no admissions; doubtful and disputed claims, each party responsible for own taxes, hold harmless, indemnification and defense, attorney fees to prevailing party, integration, merger, mutually written, number, gender caption, equitable and injunctive relief, execute necessary documents, etc.

Additional documents necessary to implement this settlement shall include:

____

____

☐ B. Final settlement documents will be draft by the parties or their respective legal counsel in accordance with the terms and conditions contained herein. *Therefore, Sections 7 and 8 below DO apply.*

7. The parties agree to complete and sign all final settlement documents on or before ____________________. However, inability to reach agreement on the final form or content of the documents will not invalidate this settlement according to the terms contained in this Memorandum, which may be fully enforced according to its terms.

8. If the parties cannot agree on the final form or content of the settlement documents, the matter will be resolved by: ***(Select only one)***

☐ A. Final, binding and non-appealable arbitration in lieu of trial by a jury or judge. The arbitration shall be conducted in accordance with ORS 36.300 ET. Seq. by the Mediator before whom this matter was mediated (hereinafter referred to as "the Arbitrator"). The Arbitrator shall be empowered to provide any additional language and terms necessary or appropriate to effectuate the settlement outlined in this Memorandum, based upon (a) all relevant information (confidential or otherwise) provided during the mediation, and (b) all other relevant information submitted to the Arbitrator by the parties. The format of the arbitration proceeding shall be within the sole discretion of the Arbitrator and may include "Mediation-Arbitration." The Arbitrator's fees shall be charged at the rate currently prevailing in the legal community in which the arbitration is held, and shall be divided equally between the parties and paid in advance. The Arbitrator shall not be held liable in an action or proceeding for damages alleged to have resulted from any act or omission in the performance of their roles as mediator, mediator-arbitrator, and/or arbitrator, and shall have all other immunities and protections provided under Oregon law.

☐ B. Submission to the court with jurisdiction in accordance with then existing law.

9. All parties agree that prior to signing they have thoroughly reviewed this Memorandum and understand and agree with the terms and provisions contained herein. They further agree that in the completion of this Memorandum, the Mediator has acted solely as a scrivener, and not as a lawyer or advisor for either side. The parties represent that they have had a full and complete opportunity to consult with their respective legal counsel prior to signing, acknowledge that this Memorandum supersedes all prior agreements or negotiations, oral or written, and acknowledge that the mediator has recommend that they seek independent legal advice before signing this agreement.

10. The Mediator may authenticate this Memorandum and the signatures of the parties (if executed in his presence), but cannot otherwise be compelled to testify, produce, or give any other evidence in any proceeding. Signed counterparts and a copy of this Memorandum shall have the same force and effect as an original.

11. In the event suit, action or arbitration is filed to enforce or interpret this Memorandum, the prevailing party shall have a right to recover from the losing party all costs and attorney fees in accordance with Oregon law.

12. Effective Date of this settlement: ________________________________.

IT IS SO AGREED:

______________________________/_____		______________________________/_____	
Party	Date	Party	Date
______________________________/_____		______________________________/_____	
Party	Date	Party	Date

APPROVED:

______________________________/_____		______________________________/_____	
Attorney for____________________	Date	Attorney for____________________	Date
______________________________/_____		______________________________/_____	
Attorney for____________________	Date	Attorney for____________________	Date

Updated: October 14, 2006

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Institute *for* Conflict Management, Inc.

A. THE COMPANY

"ICM" is a Northwest-based, national provider of mediation, facilitation, strategic planning, team-building, organizational development, and conflict resolution training services. ICM brings years of experience in managing, presenting, and resolving matters in a thorough, clear, and balanced fashion. We have provided services to a diverse array of organizations, including: public agencies, state agencies, counties, cities, private companies, trade associations, law firms, law schools, and bar associations. Our goal is "resolution," not just "settlement," where parties walk away equally unhappy!

We have extensive experience in the intersection of business, policy, politics, science, and law. Because of our multi-disciplinary experience, we are very successful in integrating complex technical, scientific, and business data into multi-stakeholder, politicized, policy development forums, and private matters. ICM's approach combines classic facilitation with the result-oriented tools of mediation to help diverse groups reach consensus in a focused exploration of the technical merits, financial cost-benefits, regulatory landscape, and community impacts. We do it in a way that is impartially transparent, technically sound, and easily understood by the stakeholders.

We have successfully developed an approach and organizational infrastructure that saves time and money without compromising quality. We bring insight, creativity, enthusiasm, humor, and a "Get It Done!" attitude to the table. As demonstrated over the course of several years and numerous successes in high conflict settings, we commit to you our availability to accomplish your goals on time and within budget. Our record of accomplishment is replete with projects that have enjoyed the confidence of sponsors, stakeholders, parties, and the public.

We have all of the resources necessary to support our projects. As a small business, we have the flexibility to provide additional resources and staffing to fulfill contract requirements in a timely and cost-effective manner. We are nimble, responsive, and get the job done. Additionally, ICM is well versed in the law and the field's ethical practices.

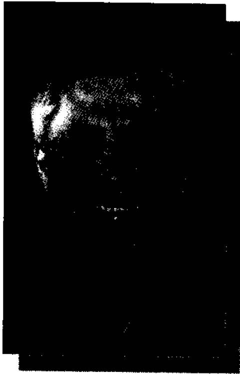
We are hard working, diligent and readily available to perform work during the duration of the contract. We never take on more projects than we can handle as this is a disservice to everyone and contrary to our professional standards and reputation interests. ICM has general scheduling control over its current projects allowing us to pace work consistent with the needs of our clients. Additionally, we will work seven days a week and evenings to produce quality, timely product. Because we are small, we can respond immediately to last-minute work demands.

As principal and project manager, Sam Imperati will be fully engaged in personally providing the requested services. As for quality assurance, ICM takes full responsibility for its work. Because your matter will be managed and provided by the same person, there is complete integration of all activities required by your scope of work, ensured by the up-front negotiation of client-driven training objectives and post-service questionnaires to demonstrate successful completion.

B. REPRESENTATIVE USERS OF OUR SERVICES

- Advanced Data Concepts
- Alaska State Bar Association
- Alaska Federal & State Judges,
- Atkinson School of Management
- American Arbitration Association
- Bonneville Power Administration
- Bristol-Meyer Squibb
- California Canned Peach Growers
- Campaign for Equal Justice
- Chevron
- Cities of: Bend, Lake Oswego, Portland, Tigard
- Counties of: Clack., Mult. & Wash.
- Counselors of Real Estate
- Dow Corning
- EDS Corporation
- Executive Officers Club
- Federal Court Clerks Association
- Federal Judicial Center
- Fred Meyer, Inc.
- Fujitsu America
- GE Capital
- Goodwill Industries
- Heery International
- Hillsboro Chamber of Commerce
- Hydaburg Fisheries & Tribe
- Idaho Bar Association
- Idaho Federal & State Judges
- InFocus Systems, Inc.
- Institute of Internal Auditors
- Institute for Professional in Taxation
- Johns Landing Chamber of Commerce
- Lewis and Clark Law School
- Liberty Northwest
- Long Term Care Ombudsman Office
- Marion and Washington County
- Metro. Fire Officer Academy
- Metro. Public Defenders
- Multnomah County
- Multnomah Co. Sheriff's Office
- National Association of Securities Dealers
- National Assoc. Regulatory Attys.
- Pacific University
- Portland General Electric
- Portland, Salem & Tigard Public Schools
- Project Management Institute
- National Association of Securities Dealers (NASDAQ) Dispute Resolution Program
- Nike
- Ninth Circuit & Oregon Courts of Appeals
- Northwest Alternative Dispute Resolution
- Northwest Association of Fire Trainers
- NW Natural
- Oregon DAS, DEQ, DLCD, DOT, DOJ, EMPL, PUC, WCB & WCD
- Oregon Executive MBA Program
- Oregon Health Science University
- Oregon & Idaho State Bar Associations
- Planned Parenthood/Death with Dignity
- Port of Portland
- Portland Community College
- Portland General Electric
- Portland Metropolitan Area Realtors
- Professional Liability Fund
- Providence Hospitals, Olympia & Portland
- Safeway, Inc.
- State Accident Insurance Fund
- Seminar Group
- Shell Oil
- Standard Insurance Company
- State Farm
- Swedish Medical Center
- Universities of Idaho and Washington
- U.S. Bank
- U.S. Bankruptcy/District Courts: Southern District of New York, Western District of Pennsylvania, California and Oregon
- U.S. Immigration & Naturalization Service
- U.S, Forest Service
- U.S. Soil Conservation Service
- USF Reddaway
- VA Medical Centers/Councils: NY, OR-WA, LA
- Waggener Edstrom
- Washington Assoc. of Medical Staff Services
- Washington State Bar Association
- WA, OR & ID Mediation Associations
- Western Conference of Workers Compensation Insurers
- Women Entrepreneurs of Oregon
- Women's Transportation Seminar
- Xerox

C. SAM IMPERATI, JD



SAM is the Executive Director of the Institute *for* Conflict Management, Inc. He has been highly effective in resolving complex disputes, facilitating public policy issues, mediating multi-party cases, managing matters where emotions run high, and training individuals and groups to help them navigate the intersection of logic and emotion. His peers recently selected him for inclusion in the 2006 edition of *The Best Lawyers in America* for mediation.

Sam has been an attorney for over twenty-six years, is AV rated, and has managed more than 2,000 disputes – some he even started! His legal background includes plaintiff and defense work, management and labor, along with litigation and appeals. He was formerly Assistant Corporate Counsel with Nike, in private practice, and has handled litigation and mediated everything from "Admiralty to Zoning." He has served as a Judge Pro Tem, as Chair of the Oregon State Bar Alternative Dispute Resolution Section, and as an Executive Committee member of the Portland Neighborhood Mediation Center Advisory Committee. Mr. Imperati has been a member of the Association for Conflict Resolution (ACR), the Oregon Mediation Association (OMA), the International Association of Public Participation (IAP2), and the American Society of Training and Development (ASTD). He was on the Oregon State Bar Ethics Committee and was Chair of the Multnomah Local Professional Responsibility Committee.

As a seasoned mediator, Mr. Imperati is accustomed to being a guest at the parties' negotiation, working under deadlines, and collaboratively developing effective press relations, along with public involvement processes. His law review article, "Mediator Practice Models: The Intersection of Ethics & Stylistic Practices in Mediation," *33 Willamette Law Review 703* (1997), explores the practical and ethical issues surrounding the competing practice styles of mediators. His credibility rests solely on his ability to remain neutral and impartial. The codes of ethics to which he subscribes mandate, and his professionalism depends on, his strict adherence to these principles. His judicial and Bar ethics service underscore his reputation for competent fairness.

Mr. Imperati's specific skills lie in his ability to organize mass amounts of information in a short period, synthesize it, present it clearly, and facilitate/mediate a large, diverse group of stakeholders. He displays a tireless work ethic, models impartiality, and has endless energy. Mr. Imperati has the ability to motivate people and to break apparent impasse. He creates an environment where stakeholders can explore the issues rather than debate them. Simply stated, he gets the job done.

Frequently, each party wants him to be "facilitative" with them and "evaluative" of the other side's position. In response, he uses "result-oriented" processes, effective option generating, realistic risk analysis, numerous impasse-breaking techniques and diligent follow-up. He has been highly effective in resolving complex and controversial public policy issues.

Mr. Imperati graduated *magna cum laude* from the University of Santa Clara, and from the University of California at Davis – King Hall Law School, where he was a law review, volume editor. He co-authored two articles on water law and worked at California's State Water Resources Control Board. He was co-founder/editor of *Environs*, an environmental law and policy publication and did a judicial internship with the Ninth Circuit Court of Appeals in Seattle.

D. PROFESSIONAL ACTIVITIES (PRESENT AND PAST)

- Oregon Court of Appeals Settlement Conference Panelist and Trainer
- Oregon Dispute Resolution Commission Advisory Committee
- U.S. Dept. of Justice-U.S. Attorneys Offices (OR) Qualified Third-Party Neutral
- Oregon State Agency Mediator Roster
- Portland and East Portland Metropolitan Associations of Realtors: Panel of Mediators
- Portland Civil Rights Mediation Program Service
- Register of Mediators: U.S. Bankruptcy Courts (S. District of New York & Oregon)
- Oregon Work Group on Mediator Competencies Service
- OSB Debtor-Creditor Section ADR Subcommittee Service
- ODOT Right of Way Roster of Neutrals
- Lane County Community College Panel of Mediators
- U.S. General Services Administration Nationwide Source List ADR Provider
- OSB ADR Legislation Contact and OSB House of Delegates Service
- OSB Fee Arbitration Panel
- OSB Bar Counsel – Region 5
- OSB Workers Compensation Section Executive Committee
- U.S. District Court's Environmental Mediation Pilot Project
- OMA's Standards and Practices Committee
- Court-Connected Mediator Qualifications Advisory Committee

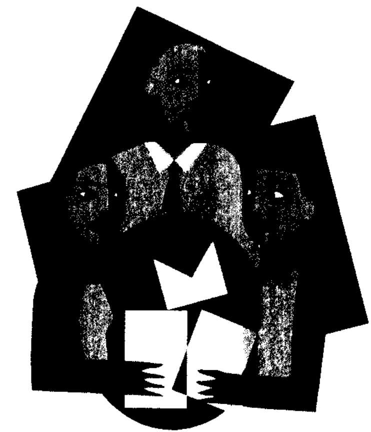
E. SAMPLE MEDIATIONS AND PROJECTS

The following successful projects speak to our qualifications, experience, approach, and ability to maintain neutrality more than any bold assertions. ICM has provided situation/conflict assessment, facilitation, mediation, visioning, organizational development, community outreach, administrative support, meeting minutes, press relations, and final reports as noted below. Conflict resolution processes require a clear definition of what constitutes "success." Despite best efforts and quality situational/conflict assessments, even the best-designed process has to be adjusted in "real time" once the project is up and running. There is usually a crisis of confidence during the early stages that needs to be managed promptly and respectfully. We are particularly adept at solving such crises and charting a new course with the fully informed consent of the sponsors and stakeholders.

1. ***Confidential Private Sector Mediations (1992-2006):*** Mr. Imperati mediates pre-litigation, litigation, and appellate disputes in everything from "Admiralty to Zoning." These matters are often complicated, large scale, high stakes, contentious, on a short timetable, and involve competing technical information. **Examples: Business, Construction, Employment, Environmental, Real Estate and Workplace.** *Mediation Program Reference: Susan Schneider, 503.459.2156, Portland Metropolitan Assn of Realtors Dispute Resolution Services Manager, 5331 SW Macadam Ave Ste 207, Portland, OR 97239-3832. Private references available upon request if client/party grants permission.*

2. ***Governor's Vehicle Emissions Workgroup (2005):*** ICM successfully situation assessed and facilitated a diverse group of citizen, environmental, and business interests (eleven) appointed by Oregon's Governor to consider the adoption of California motor vehicle emission standards. Washington had already passed legislation adopting the standards contingent upon Oregon's adoption. The Workgroup was specifically charged with providing information on the costs, benefits, and impacts of the California emission requirements and with identifying the pros and cons of various implementation features associated with the California program. Like your contemplated process, this one did not require consensus as its goal. Instead, it was used "to produce a guidance document" based upon "a rich deep discussion of the issues." The discussion involved both technical and policy issues. The report can be found at: www.deq.state.or.us/aq/aqplanning/orlev/docs/05Nov02WorkgroupRpt.pdf. *References: David Van't Hof, 503.986.6534, Governor's Office, Sustainability Office, Public Service Building, 255 Capitol St NE, Room 126, Salem, OR 97301; David Collier, 503.229.5177, Oregon DEQ Air Quality Division, 811 SW 6th Ave., Portland, OR 97204*

3. ***Oregon DEQ Visioning (2005-2006):*** ICM is currently working with DEQ's leadership team to develop a long-term vision for the Agency's air quality work. This ongoing assessment and facilitation process is taking a critical look at the status quo, predicting federal and local trends, both scientific and political, and charting a collaboratively developed set of goals, along with the operational infrastructure to implement those goals, in a tight budget environment. The process also involves collateral team building and issue resolution where staff disagrees over the future course of the Agency. Finally, ICM is developing a decision-making tool to quantify inherently subjective positions and convert them into value-based decisions. *Reference: Andy Ginsburg, 503.229.5397, Oregon DEQ Air Quality Division, 811 SW 6th Ave., Portland, OR 97204*



4. ***Portland's Veterans Affairs Medical Center (2004-2005):*** ICM recently completed a time sensitive and financially restrained budget reduction process involving department heads, doctors, administrators and support staff. The Committee developed and recommended a budget evaluation process for this fiscal year and future budget cycles, along with specific budget reduction strategies that meet the PVAMC Mission and Vision. *Reference: Judy McConnachie, 503.220.8262 ext. 54541, Portland VA Medical Center, 3710 SW US Veterans Hospital Rd., Portland, OR 97239*

5. ***South Corridor and Delta Park-Lombard Workforce Diversity Discussion Group (2003-2005):*** ICM facilitated a 20-person group in a turbo-charged, highly political environment and assisted them in developing a consensus report, which was accepted by Portland's City Council. The group's mission was "to identify public and private partnerships within the Portland metro area to promote the jobs that will be created by public transportation projects and to foster the development of career opportunities for women, minorities, and a low-income workforce that reflects the diversity of people within the community." *References: Kate Deane, 503.731.8245, ODOT Region 1, 123 NW Flanders, Portland, OR 97219; Bruce Watts, 503.962.2217, Tri-Met, 710 NE Holladay St., Portland, OR 9723; and Steve Iwata, 503.823.7734, Portland Office of Transportation, 1120 SW 5th Ave., Rm. 800, Portland, OR 97204*

6. ***Air Quality Strategy – Columbia River Gorge (2003-2006):*** Forest Service, EPA, Gorge Commission, Native Tribes, Oregon and Washington, several counties, numerous special interests, and the public developing air quality strategies via a collaborative process. This highly political and budget constrained, technical/scientific project has the public process component on hold for the next 1-2 years while the scientific studies proceed. Mr. Imperati facilitated the redesign process of the technical study in the shadow of competing politics, priorities, perceptions and turf issues, while simultaneously keeping stakeholders and the broader public informed. ICM has spent approximately 250 hours on this multi-year, on-going project. *Project Reference: Bob Elliott, 360.574.3058, Southwest Clean Air Agency, 1308 NE 134th Street, Vancouver, WA 98685*

7. ***Bi-State Governors' I-5 Task Force (2001-2002):*** The I-5 Partnership brought together Washington and Oregon citizens. Governors Locke and Kitzhaber appointed a 28-person, bi-state Task Force of community, business and elected representatives to develop a multi-modal, "Recommended Strategic Plan for the I-5 Corridor" between I-84 in Oregon and I-205 in Washington. The recommended "I-5 Bi-State Coordination Accord," delivered on schedule, was labeled "historic" by the Task Force Chairs and the committee, as a whole. The process was engineering-intense, policy-conflicted, and political in nature. It involved several technical sub-committees, numerous technical consultants, and required the facilitation/mediation of communications between governmental agencies whose interests were not always neatly aligned. ICM also assisted with public involvement. "WTS Project of the Year." This project is a highlighted case study of the Policy Consensus Initiative (PCI). Information can be found at: http://www.policyconsensus.org/casestudies/docs/WA_OR_stratplan.pdf. Additionally, PCI produced a video on this project as a guide to the principles of consensus making. A "clip" can be found at: http://www.policyconsensus.org/publications/videos/OR_video.html. The film features an in-depth look at how Oregon resolved a complex public policy issue. Representatives of each key stakeholder, including Oregon Gov. John Kitzhaber, environmental groups, developers, and state transportation officials, are featured. *Reference: Kate Deane, 503.731.8245, ODOT 1, 123 NW Flanders, Portland, OR 97219*

8. ***Portland Public Schools – District, Unions, City, County and Portland Business Alliance (2003):*** The participants met over the course of five months to produce a consensus report, on schedule, with findings and recommendations for the creation of a balanced and competitive compensation package for teachers. It involved detailed benefit and salary analysis, and was conducted in the aftermath of a near-strike labor negotiation and in the shadow of a pending Unfair Labor Practice claim. Elected officials were at the table. Mr. Imperati also served as press point of contact, and ICM provided the bulk of the process support. This joint-venture facilitation used WBE Confluence Northwest as the lead contracting firm. *References: Carol Turner, Formerly of Portland Mayor Katz's Office, 503.287.2265, 3860 NE Alameda St., Portland, OR 97212*

9. *ODOT Access Management Advisory Committee (AMAC) (1999-2001):* The Oregon Department of Transportation (ODOT) charged AMAC with the task of addressing implementation issues related to portions of the 1999 Oregon Highway Plan (OHP). The AMAC process, as designed by ICM, included facilitated assessment of complex, interrelated transportation planning issues; development of draft rule language; and recommendations for changes to the OHP. In addition to facilitating the AMAC process and technical subcommittees, ICM assisted ODOT with the post-AMAC, pre-adoption, public hearing process, and with the initial implementation phase of the new rules. We were re-hired to facilitate AMAC II and AMAC 2.5. This project is a highlighted case study of the Policy Consensus Initiative (PCI). It can be found at: http://www.policyconsensus.org/casestudies/docs/OR_transportation.pdf. *Reference: Craig Greenleaf, 503.986.4121, ODOT TDD Planning Section, Mill Creek Office Building, 555 13th Street NE, Salem, OR 97301*

10. *Bend, Oregon, Transportation System Plan (2000):* The Bend Transportation Advisory Committee (BTAC) process was an ICM-designed, facilitated exploration of local issues under the state's Transportation Planning Rule. BTAC developed recommendations for changes to the December 1999 Draft Transportation System Plan (TSP), offered priorities for the five-year Transportation Capital Improvement Plan, and explored funding options to implement the TSP. The project involved the coordinated work of several subcommittees, along with an intense public involvement program. The project received the 3CMA award for Best Community Visioning Process. *Reference: Deborah McMahon, 541.480.3266, 4974 SW Elkhorn Ave., Redmond, OR 97756*

11. *Government Camp, Oregon Revitalization (2003):* Clackamas County and the Government Camp Revitalization District Advisory Committee are exploring and negotiating core area improvements and related financing issues surrounding the maintenance of those improvements. The process was done with the political backdrop of differing community attitudes toward development, safety, community character, and economic viability. ICM acted as the facilitator/mediator for this process. *Reference: David Queener, 503.353.4322, Clackamas County, Sunnybrook Service Center, 9101 SE Sunnybrook Blvd., Clackamas OR 97015*

12. *Additional Matters*

- Land Use Dispute with Measure 37 Backdrop
- Reorganization of a City Transportation Department
- Environmental Remediations in Alaska
- Landslide – Highway Construction Dispute
- Historic Columbia River Highway Consensus Process
- Non-Conforming Historic Sign Dispute
- Inter-agency Dispute: State land, facilities and operations
- Memorial Siting: City, neighborhood and memorial sponsors
- Public Event Sponsorship: Competing non-profits
- Regional ESA Streamlining

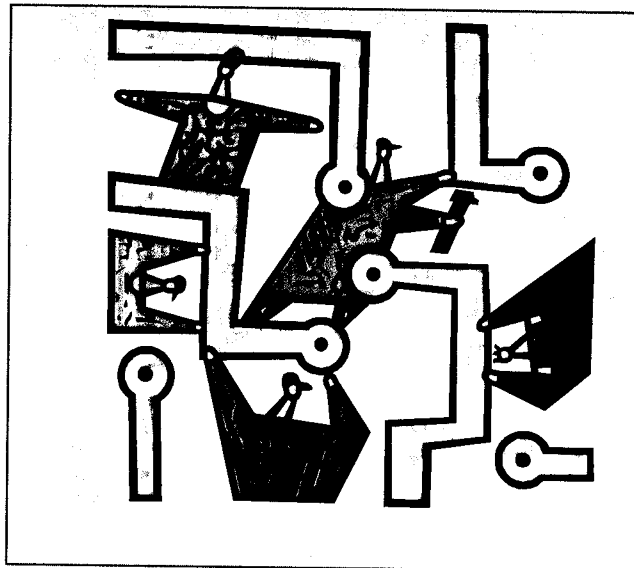
F. WRITING SAMPLES

Our work product can be found on the web:

1. ***Columbia River Gorge Air Quality Project.*** The Work Plan Addendum and Redesigned Technical Study were reviewed by the various stakeholders and public before it was approved by the Columbia River Gorge Commission. Website: www.gorgeair.org.)

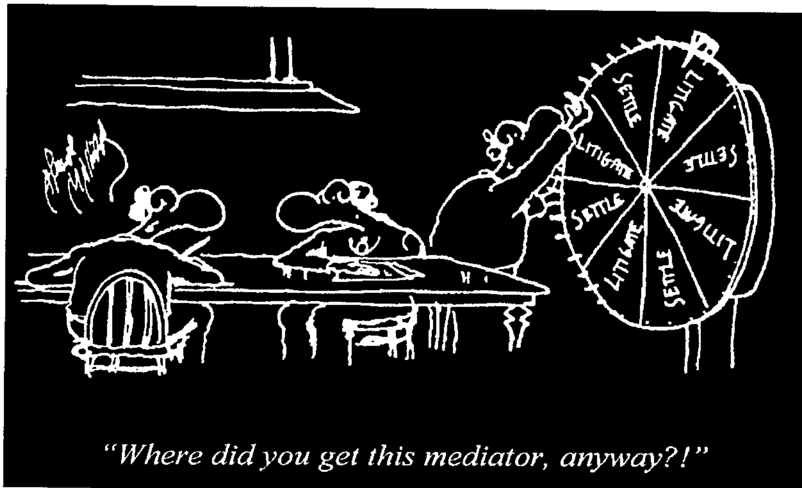
2. ***Portland/Vancouver I-5 Transportation and Trade Partnership Final Strategic Plan.*** The plan was reviewed by the various stakeholders and the public before it was approved by the participating jurisdictions. Website: www.I-5Partnership.com.)

3. ***Portland Public Schools and Portland Association of Teachers Compensation and Health Benefits Advisory Committee Report.*** This consensus report was used by the parties during their collective bargaining. Full Report: www.patpdx.org/report.htm.)



F. References

1. *Ken Andrichik*, 646.835.5701, National Association of Securities Dealers, 125 Broad St., 36th Floor, New York, NY 10004
2. *Marty Borrevik*, 503.226.4211 ext. 5413, NW Natural, 220 NW 2nd Ave., Portland, OR 97209
3. *Chris Carey*, 503.788.6147, Portland Community College, 2305 SE 82nd Ave., Mt. Scott Hall 103, Portland, OR 97216
4. *David Collier*, 503.229.5177, Oregon DEQ Air Quality Division, 811 SW 6th Ave., Portland, OR 97204
5. *Leslie Copland*, 503.443.7248 x6248, Waggener Edstrom, 3 Centerpointe Dr, Ste 300, Lake Oswego, OR 97035
5. *Michael Costanzo*, 503.464.7265, PGE, World Trade Center Plaza 121 SW Salmon Street, Portland 97204
6. *Kate Deane*, 503.731.8245, ODOT Region 1, 123 NW Flanders, Portland, OR 97219
7. *Lea Anne Doolittle*, 503.220.2408, NW Natural VP, P.O. Box 8905 Portland, Oregon 97255-0001
8. *Bob Elliott*, 360.574.3058, Southwest Clean Air Agency, 1308 NE 134th Street, Vancouver, WA 98685
9. *Andy Ginsburg*, 503.229.5397, Oregon DEQ Air Quality Division, 811 SW 6th Ave., Portland, OR 97204
10. *Craig Greenleaf*, 503.986.4121, ODOT TDD Planning Section, Mill Creek Office Building, 555 13th Street NE, Salem, OR 97301-4178
11. *Susan Schneider,* 503.459.2156 Portland Metropolitan Assn of Realtors, Dispute Resolution Services Manager, 5331 SW Macadam Ave Ste 207 Portland, OR 97239-3832
12. Ken *Van Osdol*, 503.378.8048, SAIF, 400 High St SE, Salem, OR 97312-1000
13. *David Van't Hof*, 503.986.6534, Governor's Office, Sustainability Office, Public Service Building, 255 Capitol St NE, Room 126, Salem, OR 97301



"Where did you get this mediator, anyway?!"

G. TRAINING

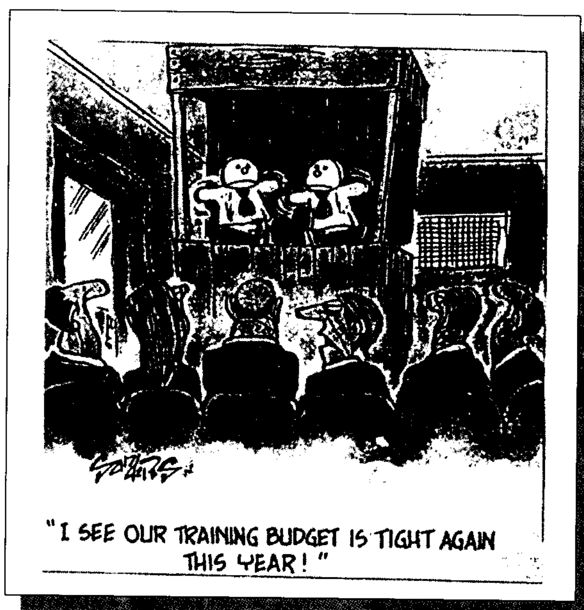
Mediation, Conflict Resolution, Negotiation, Public Policy Facilitation, Diversity, Conferences, Retreats, and Forums

In the area of training, ICM has provided services to a diverse array of clients, including: public agencies, state agencies, counties, cities, private companies, trade associations, law firms, law schools, and bar associations.

As demonstrated over the course of numerous years and successes across the country, we are availability to accomplish the highest quality training services on time and within budget. Our record of accomplishment is replete with projects that have enjoyed sponsor and participant confidence. We will help you meet your demands for classroom training and help you train internal resources.

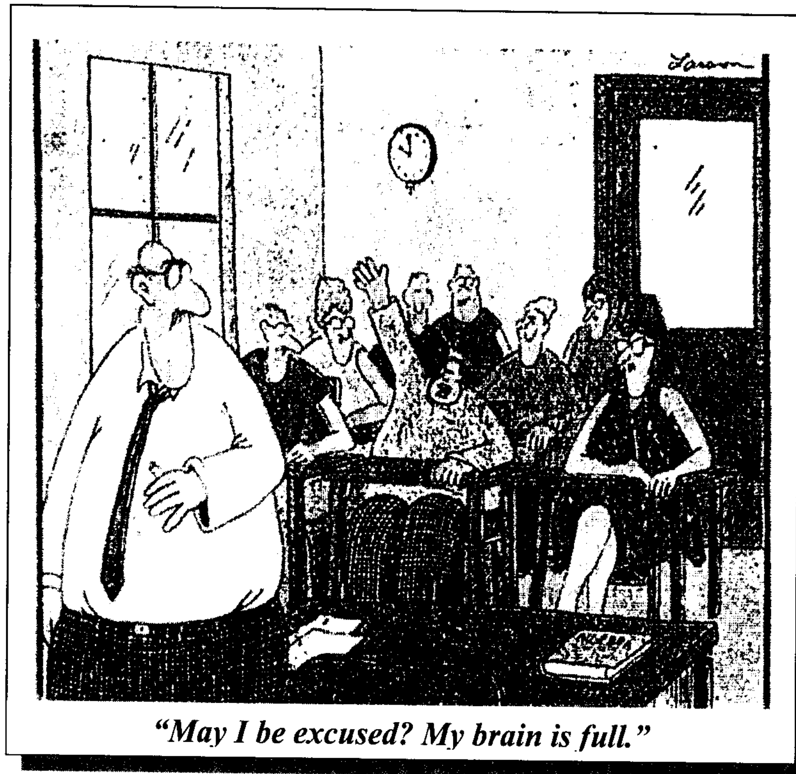
People do not learn when lectured to for hours on end. Developing skills through practice is very important to adult learners. Our programs emphasize interactive exercises including role-plays, communication and listening exercises, group dialogue, open forum for questions, as well as lecture punctuated by illustrative "war stories." Commercial video presentations are also available. We give people *experience* as well as information to cement their learning into new habits. The key benefits of ICM trainings are:

1. **Highly acclaimed for practical approach**
2. **National reputation for excellence**
3. **Dynamic trainers**
4. **Clear objectives**
5. **Experience in customized program design**
6. **Workplace experience**
7. **Practical workbooks and checklists**
8. **Resource list for further learning**



"I SEE OUR TRAINING BUDGET IS TIGHT AGAIN THIS YEAR!"

H. WHAT OTHERS HAVE SAID



"May I be excused? My brain is full."

*Sam Imperati did a nice job of exploring the legal and practical issues of the claim in a realistic, yet non-judgmental way, helping my client feel he was being fair. He also did a nice job of allowing me to counsel my client without interference, and he kept the process moving. * This was my first mediation. Sam knew this and was respectful and reasonable. Additionally, his sense of humor was a breath of fresh air. * Sam was excellent ... * Sam did an excellent job in mediating a case, which was very contentious... ** My *gratitude for your services on Tuesday. Your wit, wisdom and easy nature put me immediately at ease in a very stressful situation. Ultimately putting a stop to further wrangling was priceless. But you already know that. ... Again, thanks. It was a pleasure meeting you but, with all due respect, hope to never see you in a professional capacity again. *Thank you so much for your skilled delivery of services ... Your diligence contributed to an important and very necessary community dialogue. The skills you brought to bear in this process helped bring the strong and divergent views of this group together, Your insights and tenacity also allowed the group to achieve the outcome of a thorough and thoughtful report to the community ..."* **Mediation Participants.**

Thank you for your dedication and professionalism while facilitating my Vehicle Emissions Workgroup. Your patience, hard work and commitment are deeply appreciated by my staff and me. I am hopeful your efforts and those of the workgroup will help result in Oregon adopting vehicle emission standards. Once again, thank you for all your hard work and effort to finalize the report. My best wishes to you and your family for the holidays. November 30, 2005, **Governor Ted Kulongoski**

I'd like to thank you ... for your efforts regarding access management.... Development and management of a process that produced a draft rule implementing the department's access management policies is a major accomplishment on your part. The fact that you accomplished this during a legislative session further demonstrates your expertise, perseverance, and patience.... Collaborative processes are new to ODOT, and negotiating with many interest groups, some with competing and conflicting needs, coupled with a subject as complicated and misunderstood as access management, seemed a nearly impossible feat. Skepticism does not begin to describe the feelings I had about this process at the start – and you came through for ODOT, our customers, and all Oregonians. While I do not particularly enjoy the thought of another collaborative

process of this magnitude, I would welcome it much more willingly now, as a result of your work and the final results. August 18, 1999, **Grace Crunican, ODOT Director**

Pleasantly surprised – worth attending even if not required. Informative, thought provoking, entertaining – what's not to like? Humor in a mandatory attendance situation is appreciated – interactive element enjoyable! This was much more valuable than I anticipated. Came for required credits but thought the program was valuable. Comfortable atmosphere. Interesting hearing different perspectives. Good discussion on difficult topics. Intelligent exchange of ideas. Interaction with others and hearing personal examples. Good discussion regarding values vs. ethics... practical solutions. The exercises were most helpful, which surprises me, as I normally don't like interactive program. I thought the child abuse reporting portion of the program was thoughtful and concise. What an enjoyable way to get compulsory credits! The banter and discussion was engaging. I think I learned more than I would have purely because of the give and take with my colleagues. The instructor was both interesting and entertaining – in a difficult subject. **ICM's Elimination of Bias and Child Abuse Reporting Sample Evaluations**

On behalf of all of the circuit mediators, I write to thank you for your presentation at our conference in San Francisco this fall. Your program was full of inspiring observations and useful techniques, and your style was both highly professional and highly entertaining. My only regret was that we did not set aside a full day for you ... Your program was the highlight of the conference for me and, from what I have heard since, for most, if not all the other participants. The [Federal Judicial Center] is now fully aware of your expertise as a mediator and a teacher. I expect you will be hearing from them about future programs. November 12, 2003, **David Lombardi, Jr., Chief Circuit Mediator – Ninth Circuit**

"Thank you for a most informative and useful four days. Your obvious enthusiasm, communication skills and well-organized material made the four days go quickly . . . Having taught Constitutional Law for eight years at the law school level I truly appreciate great teachers and how difficult it is to hold the attention of a diverse group for eight hours a day . . . Your willingness to share of your own personal experiences was part of what made the course so exceptional." **Robert F. Utter, Former Chief Justice, WA Supreme Court**

"I gained inestimable knowledge that will be used frequently and hopefully effectively as I go through my daily responsibilities as an Affirmative Action Officer. Your mediation program has provided me with the tools to build a 'magic wand' in our complaint process." **Ray Ruiz, Associate Director, OHSU EEO Department**

"I attended your CLE yesterday. I was expecting the usual eye-glazingly-boring presentation where I retain nothing b/c it is so mind numbing even pinching myself won't keep me awake.
You were refreshingly enjoyable & substantively useful! As you obviously have figured out, keep us laughing & we can pay attention to what you're saying. .... Thanks for not only doing the CLE, but making it enjoyable!" **Katelyn Randall, Oregon Tax Court**

"Many thanks for all you did to help promote the use of mediation when you came to speak to the judges in our District and the advocates who were interested in representing their clients in mediation . . . One attorney that I have known for quite some time told me he finally understands and appreciates the process of mediation and thinks your training should be a required course." **Le Parker, CJRA Admin. Analyst, U.S. District Court, Boise**

"Absolutely, the best and most professional training I've every attended. Very useful and practical."
Compiled Evaluation, Northwest Institute for Dispute Resolution

"This material could be extremely dull, boring and sleep inducing. Sam, through humor, class participation, examples and most important enthusiasm made this course not only educational but also a lot of 'fun.'"
Alfred E. Monahan, President Monahan Group, Inc.

"Imperati should create a weekly syndicate TV Mediation show - it would sell - our country needs it!!"
Stanley D. Moore, Mediator/Lawyer, Winston & Cashatt

"Thanks so much for the terrific presentation you gave to the Executive Officers Club ...You were a big hit! You managed to combine a great deal of solid, nuts and bolts information with just the right dose of humor. ... As someone who also gives speeches, I take my off my hat to you – you had our group in the palms of your hands. Our business executives absolutely loved you." **Chuck Whitlock, chairman Executive Officers Club**

"It was clear that you took the time and effort to get to know us and our needs . . . [so] that your training could be customized to our . . . environment . . . Your legal background, professionalism, and humor certainly contributed to the quality of your training and led to the exceptional feedback that was received from all participants in the process . . . [Your] retreats . . . have certainly been the highlight of our training . . . solidifying and focusing [those] who participate on our council." **Stuart Collyer & Laura Morehead, Co-chairs, Partnership Council, VA Medical Center**

"Best substance and energy of any CLE that I've had - great job!" **G. Richard Bevan, Hollifield & Bevan**
"Your Basic Mediator Skills Training course was one of the very best I have ever attended in my long career . . . new concepts were readily understandable. The written materials were also first-rate." **Larry Custer, Principal, Management Technology Assoc.**

"Your mediation training was unreservedly terrific! It approached a 'transformative' experience for a lawyer steeped in the litigation process and demonstrated a different way of thinking about conflict resolution." **Jas. Adams, Oregon Assistant Attorney General, Appellate Division**

"The purpose of this letter is to once again thank you for the mediation training ... Since I last communicated with you, I have done a tremendous amount of mediating and arbitrating. I am booked 12 of the next 14 working days. ... I recently successfully mediated my third murder case ..." **Monte B. Carlson**

"Mr. Imperati is, without a question, the best trainer I have encountered . . . [His] ability to understand his audience's working environment, and adapt his material accordingly, is amazing. [His] energy, humor, and rapport with his audience make him remarkably effective. He makes complex concepts clear, and stimulates learning by enticing the audience to participate." **James L. Crouser, First Vice President, Institute of Internal Auditors**

"ICM really worked with us to customize the training sessions to meet the individual needs of our organization [and] . . . to make ADR a part of our culture." **Tom Barkin, Asst. Commissioner, Oregon Public Utility Commission**

"[T]hank you for a spectacular introduction to mediation! The coverage of negotiation technique, the mediation process, ethics and mediation administration made this training a perfect fit for our needs. [I]t takes significant talent to turn a four-day session into an entertaining learning experience." **Kenneth Andrichik, Director of Mediation, NASD**

". . . I gained insights into the nuances of mediation that I would find difficult to obtain by any other means . . . [T]he breadth of your experience as mediators, lawyers, and training professionals added an essential practical dimension to the course. [It] . . . sparked interest in encouraging more judges to use certain

'mediation' skills at their settlement conferences . . . [M]ost importantly, you have given the trainees an excellent foundation of their future roles as mediators or attorneys of parties in mediation." **Robert J. Niemic, Esq., The Federal Judicial Center**

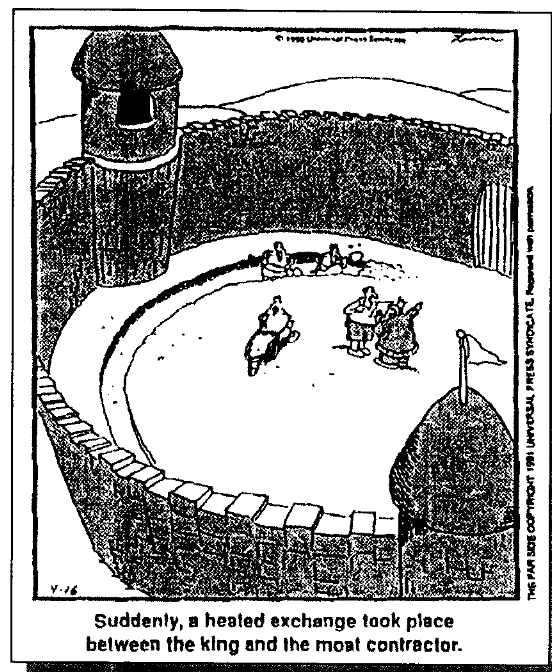
"Mr. Imperati's funny, self-critical life stories made the conference! He is the best teacher I have ever had . . . not only does he change how you visualize and will handle dispute resolution, but he ultimately transforms how you deal with all conflict in your everyday life." **Elsie M. Boldman, Prosecuting Attorney's Office, Ada County (ID)**

"While your ability to communicate with students through example, modeling, humor, and just plain bluster is nothing short of an art form, it is your surprising sincerity that hits between the eyes." **University of Idaho Law Student**

I. FEES

Our professional charges are competitive in the market of high quality providers. In the spirit of collaborating, we work with our customers to satisfy mutual financial interests. Therefore, our rates are subject to negotiation to satisfy our collective needs. We are open to discussing a project fee and monthly retainer payment approach. We have never failed to reach an agreement if price is the only obstacle to a long-term and satisfying partnership.

Thank you for considering the Institute for Conflict Management, Inc.



Suddenly, a heated exchange took place between the king and the moat contractor.

SCOTT ◆ HOOKLAND LLP
LAWYERS

MICHAEL J. SCOTT, is the managing partner of Scott ◆ Hookland LLP. Scott ◆ Hookland LLP is located in the Portland, Oregon suburb of Tigard. Mike is a frequent speaker and author for both bar and trade organizations on design and construction-related issues. His practice and his presentations have addressed the owners', general contractors', subcontractors', material suppliers', rental equipment companies' and design professionals' perspectives and obligations.

Mike's practice includes acting as an advocate in litigation, arbitration and mediation. He has also acted as a neutral in over 500 alternative dispute resolution matters. Mike's advocate and neutral practices relate primarily to real estate, design, and construction law issues and have included single family residences, Native American projects, condominiums, public improvements and private commercial developments.

Michael J. Scott
born Pendleton, Oregon, January 4, 1956

Admitted to bar:
1983, Oregon; 1984 U.S. District Court, District of Oregon; 1989 U.S. Claims Court.

Education:
Pacific University, Forest Grove, Oregon (B.A., with high honors, 1978); Northwestern School of Law of Lewis and Clark College, Portland, Oregon (J.D., 1983).

Professional Activities:
Oregon State Bar, Member: Continuing Legal Education (CLE) Committee 1994-1997; Construction Section, Chairperson, 1987-88; Debtor/Creditor Section
Oregon Law-Related Education Program nka Classroom Law Project, Member: 1985-90 and Chairperson, 1988-90, State Board of Directors.
Lewis & Clark Law School Alumni Association, President 1990-91.
Multnomah County and Washington County Bar Associations; American Bar Association

Community Activities:
Beaverton Barbarians Ruby Club, Head Coach, 2006-
Friends of Beaverton Football, President 2005-
Beaverton Football Association, Inc. , President 1999-2004, Coach 1999-2004,
Tualatin Valley Youth Football League, Wellnitz Sportsmanship Award Recipient 1999, 2000, 2001 and 2004, Lomardi/Montavon Division Co-President 2000-2003, THPRD Field Liaison 2000-2003
Raleigh Hills Little League, Coach/Manager 1995-2002; T-Ball Coordinator 1998-2002;
Tigard Chamber of Commerce, President 1989-90

Recent Publications:
Construction Defect Claims, Clark County Washington Bar Association, Co-Author (2005)
Oregon Construction Law CLE, Chapter on Construction Liens, Oregon State Bar, Author (1989, 1993, 1997) Co-Author (2004)
Law for Design Professionals in Oregon, Chapt. " Mock Mediation of a Condominium Project", Lorman Business Center, Inc. (2003)
Construction Claims and Bankruptcy Court, Multnomah County Bar CLE, Co-Author (2002)
Oregon and Washington Construction Lien and Bond Law, Lorman Education Services, Co-Author (2001)
Article: Contract Formation - The Contractor/Subcontractor's Perspective, The Seminar Group, Co-Author (2001)
Oregon Credit and Collections Issues, Associated Floor Covering Contractors and World Floor Covering Assoc., Co-Author (2001)
Oregon Construction Lien and Bond Claim Issues, Washington County Bar Association, Co-Author (2001)
Oregon Construction Law: Claim Avoidance and Dispute Resolution, Lorman Education Services, Co-Author (2001)
Oregon Construction Lien and Bond Law Lorman Education Services, Co-Author (2000)
2000 Oregon Construction Lien and Bond Claims, NACM Oregon, Inc., Co-Author (2000)
Oregon Construction Law: Practical Approaches for the New Millennium, Lorman Education Services, Co-Author (2000)
Oregon and Washington Construction Lien and Bond Law, NACM, Inc. - Oregon, Co-Author (1999)
Construction Lien Law in Oregon, Lorman Education Services, Co-Author (1999)
Residential Construction in Oregon: Legal and Practical Perspectives, Lorman Ed. Services, Co-Author on Selected Chapters (1999)
Oregon and Washington Construction Lien and Bond Law, Lorman Education Services. Co-Author (1998)
1997 Oregon Construction Lien Claims, NECA, Co-author (1997)
Oregon Law for Design Professionals, Chaps. on Neg., Immunity, Ex. Witness, Construction Lien Claims, Lorman, Co-author (1997)
Construction Law, Chapter on Oregon Construction Lien and Bond Claims, Law Seminars International, Co-author (1997)
Building Your Dream: How to Do it Right, A joint publication of Washington Mutual, the Construction Section of the Oregon State Bar, Stewart Title Insurance and the Oregon Construction Contractors Board, Co-Author (1996).

Personal Information:
Married, wife Laurie, with two children, Stephen and Matt

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CURRENT EMPLOYMENT

- **Assistant Professor, Portland State University**: Half-time core faculty member in Master's Program in Conflict Resolution, teaching courses in negotiation and mediation.
- **Mediator/Facilitator in private practice**: Provide a broad range of mediation and conflict resolution services primarily in workplace and public policy settings and including resolution of civil litigation. Provide facilitation services for organizational problem solving and conflict resolution system design.
- **Trainer in private practice**: Provide training to governmental units, businesses and organizations in conflict resolution, interest-based negotiation, mediation, team-building and intercultural communication.
- **Consultant for Indian Dispute Resolution Services**: Provide training, mediation and facilitation services for IDRS, a national non-profit Indian organization. Services include training in special education mediation for California SELPA programs.

PAST EXPERIENCE

- Program Coordinator, Clackamas County Dispute Resolution Center: Ten years of experience as director of a community-based mediation program serving county residents in a wide variety of cases involving neighborhood, community, landlord/tenant, governmental, workplace, family, school and criminal disputes. Responsible for program management and development, training and supervision of staff and volunteers, mediation of sensitive and complex cases and professional trainings in conflict resolution and mediation.
- U.S. Speaker and Specialist Grant, U.S. Department of State: Provided mediation training for school administrators and government officials in Windhoek, Namibia.
- Attorney in practice of general civil law.
- Consultant and Developer of public-interest law projects, including Oregon State Bar Interest on Lawyer Trust Accounts (IOLTA) Program.
- Litigation Director for Oregon Legal Services and Multnomah County Legal Aid Service
- Consultant to National Legal Services Corporation in the areas of lawyer training and program evaluation.
- Adjunct Professor: Northwestern School of Law (Lewis and Clark College).

EDUCATION

B.A. Georgetown University
J.D. University of Chicago Law School

PROFESSIONAL AFFILIATIONS

Executive Committee, Alternative Dispute Resolution Section of Oregon State Bar
Board of Directors, Oregon Law Foundation
Board of Directors, Oregon Mediation Association (1993-1999)
Member, American Association of University Professors (AAUP)
Admitted to practice law: District of Columbia, Oregon

SCOTT SORENSEN-JOLINK
Attorney at Law
Sorensen-Jolink, Trubo, Williams, Scherzer and Strom LLP
1020 SW Taylor Street, Suite 880
Portland, Oregon 97205

College Education

B.A., Politics and Psychology, 1972, Luther College, Decorah, Iowa

Legal Education

J.D., 1976, Northwestern School of Law at Lewis and Clark College, Portland, Oregon

Law Practice

Partner, Sorensen-Jolink, Trubo, Williams, Scherzer and Strom LLP

Practitioner working primarily in the area of Family Law, 1977–present. Mediation offered as part of the practice beginning in 1985.

Other Legal Work Experience

Oregon Legislature, Senate staff, 1977
Juvenile Rights Project, represented juveniles under Student Appearance rule, 1976-77
Multnomah County Juvenile Court, Law Clerk, 1975-76
Metropolitan Youth Commission, Project Developer for the Youth Justice Clinic and Legislative Lobbyist, 1974-75
Multnomah County Recognizance Office, Volunteer Recognizance Officer, 1973-74

Professional Organizations, Boards and Committees

Member, American Academy of Matrimonial Lawyers, 1995 to present
Consultant to PLF and plaintiff's counsel on nine malpractice cases, 1995 to present
Member, OSB Disciplinary Review Board, 1991-96
Member, MBA Insurance committee, 1988-1996
Member, OSB Insurance and Bar-Sponsored Benefits and Programs Committee, 1987-1995

OSB Disciplinary Committee Member, Multnomah County Legal
Professional Responsibility Committee, 1984-87
President, OSB Section on Family and Juvenile Law, 1981-82
Member, Sub-Committee on legislation, OSB Section on Family and
Juvenile Law, 1977-85
Founding Member, OSB Section on Family and Juvenile Law
Various committees and task forces in the Family Law field,
including Ad Hoc Committee that effectively instigated the
commencement of mandatory mediation procedures in
Family court in Multnomah County, Ad Hoc Committee
that reviewed and redrafted the contempt code and consulted
on legislative strategy with OSB representatives and sections.
Member of various CLE planning committees and presenter at CLE's
in the field of Family Law, normally one or more each year.
Member, Oregon State Bar, 1977 to present

Public Activities

Co-Chair, Architecture and Remodel Committee, First Congregational
Church, Portland, 2003-2005
President, Hillside Neighborhood Association Board, City of Portland,
1988-90
Member, Hillside Neighborhood Association Board, 1987-90
Coach of children's sports teams, 1985-1997
Member of various other community boards, church committees and
committees of Ecumenical Ministries, 1977-present

Personal

Born	-June 6, 1950 in Minnesota
Married	-Wife Leslie Sorensen-Jolink, Esq. Labor and Employment Arbitrator
Admitted	-Oregon State Bar, 1977