April 21, 2016

Mediation Confidentiality Rules Advisory Committee

Meeting Minutes

Attendees: Sam Imperati, Kevin Grant (*phone*), Turner Odell, Thom Brown and Bill Ryan. For DOJ: Mike Niemeyer, Amy Alpaugh, Steve Wolf and Molly Manos (Note taker).

Attachments: OAR 137-005-0050; OAR 137-005-0052; APA Manual Definitions for Collaborative Dispute Resolution.

Introduction and Overview

Mike Niemeyer described the background and history of this committee beginning with Senate Bill 189 (2015). That legislation changed the process for the development and adoption of mediation confidentiality rules by state agencies. It required DOJ to adopt mediation confidentiality rules, which agencies may subsequently adopt by reference (as they do with other model rules.)

Rules 137-005-0052 and 137-005-0054 were adopted, and rule 137-005-0050 was amended, in October of 2015. During that rulemaking process a few issues were identified that required additional discussion. The Attorney General reconvened the advisory committee on March 14th and April 21st 2016 to consider these additional issues.

Steve Wolf reiterated that there is a fundamental policy tension between the benefits of mediation confidentiality (as provided in ORS 36 and related rules) in mediations in which the government is involved and in the transparency of government activities (as provided in the opens records and open meetings laws) and DOJ must be sensitive to how changes to one impact the other.

Committee Discussion.

1. Concerns regarding the Attorney General's Public Records Law Reform Task Force. Sam Imperati expressed concern about the Taskforce with regard to mediation confidentiality. Mr. Imperati indicated that the mediation community would be quite concerned about any efforts to limit or change current confidentiality protections for mediation and they would expect to be notified if DOJ or the Taskforce has that intention. Mike Niemeyer suggested that Mr. Imperati should continue to be in direct contact with Michael Kron regarding the Taskforce activities.

2. Miscellaneous Questions Regarding DOJ Mediation Confidentiality Rules Before entering into the discussion of the main agenda item (*Confidentiality prior to execution of an agreement to mediate*) committee members expressed some concerns and offered a few suggestions regarding the 137-005 model rules:
    a. It was pointed out that there is a lack of punctuation in OAR 137-005-0052(5) at "*Sections (6) (9) of this rule…*"
    b. Regarding OAR 137-005-0050(4)(b)(E):

i. Is it DOJ's intent that this be limited to disclosures by "agencies" only? [*Imperati*]
ii. Steve Wolf and Amy Alpaugh indicated that they would look into that concern.

c. Terms used in OAR 137-005-0050 and 137-005-0030:
i. "Collaborative DR" terminology is unclear throughout, as well as terms "disclosures" and "participants/party"…..[*Thom Brown*]
ii. There was a discussion about the distinction between "Collaborative DR Process" and "mediation" and the extent to which it matters. It was noted that there are no statutory confidentiality protections for collaborative dispute resolution, other than mediation, and that OAR 137-005-0050 makes it clear that those activities are still subject to the Public Records law.
iii. Mike Niemeyer noted that one reason for all the different terms was the need to distinguish between "*Alternative Dispute Resolution*" which is defined in ORS 183.502 as including arbitration, and mediation and other collaborative processes in which the neutral third-party is not a decision-maker. *See Attachment C for the APA Manual explanation for various ADR Definitions*.

3. <u>Confidentiality of communications that occur before an agreement to mediate is executed and when a state agency is involved</u>.
a. The issue:
i. Turner Odell emphasized how this issue impacts the complex multi-party cases that are done by the Oregon Consensus Program at PSU. They are subject to the public records law but, through their mediators and facilitators, need to have candid early conversations with the parties if they are going to be helpful in resolving public policy controversies that might otherwise go unaddressed.
ii. Sam Imperati also expressed concern that some difficult public disputes may not be resolved if the parties are unable to have candid discussion early in the process. He indicated that these early conversations, prior to the execution of an agreement to mediate, may include conference calls with all parties and the mediator.

b. What is the status quo? What is confidential under the current rules before an agreement to mediate has been executed?
i. Is it mediation? Is it a mediation communication?
1. Amy Alpaugh and Steve Wolf indicated that the mediation confidentiality statute (ORS 36.110- 36.238) and related DOJ rules will need to be looked at in light of the recent Supreme Court decision in Alfieri. This includes when a communication is or isn't a mediation communication. See: ALFIERI v. SOLOMON http://www.publications.ojd.state.or.us/docs/S062520.pdf
2. Sam Imperati stated that the statute was clear about when mediation began: With the first contact between a party and the mediator.
3. ORS 36.110 states:
a. *(5) "Mediation" means a process in which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy and includes all contacts between a mediator and any party*

or agent of a party, until such time as a resolution is agreed to by the parties or the mediation process is terminated.

b. *(6) "Mediation agreement" means an agreement arising out of a mediation, including any term or condition of the agreement.*

c. *(7) "Mediation communications" means: (a) All communications that are made, in the course of or in connection with a mediation, to a mediator, a mediation program or a party to, or any other person present at, the mediation proceedings; and (b) All memoranda, work products, documents and other materials, including any draft mediation agreement, that are prepared for or submitted in the course of or in connection with a mediation or by a mediator, a mediation program or a party to, or any other person present at, mediation proceedings.*

ii. Disclosure to a mediator who is a public body.

1. Turner Odell noted that OAR 137-005-0052(6) would be helpful to the Oregon Consensus Program if OAR 137-005-0052(6) ("Disclosures by Mediator ") could be amended to make it clearer that mediators have confidentiality for their early communications with parties, before the agreement to mediate is executed.
2. There was a discussion of the extent to which PSU is a state agency for the purposes of ORS 36 and the extent to which the DOJ rules might apply to the Oregon Consensus Program. It was recommended that the program get legal advice (DOJ no longer provides legal advice to Higher Education.)

c. Responses to this issue/ Possible solutions

i. Sam Imperati indicated that they had been reading 137-005-0052(6) as being tied to (7) and the execution of the agreement to mediate. Some additional language would be helpful to make it clearer that this isn't the case.

ii. Steve Wolf indicated that while 137-005-0052(6) provides confidentiality protections for the mediator prior to the execution of the agreement to mediate DOJ would need to be able to identify a significant problem with the current situation if we are going to ask the Attorney General to increase confidentiality (i.e. reduce transparency) for the parties to mediation from what we have in the current rules.

4. "Retroactivity" of confidentiality protections for Mediation Communications.

a. The issue:

i. What happens to communications that occur in mediation before the Agreement to Mediate is executed, once that agreement is executed?

b. Discussion

i. A number of committee members spoke to the practical difficulties of executing an agreement to mediate early in the process and the importance of protecting those early communications once the agreement to mediate is signed.

ii. DOJ recognized that the current rule might plausibly be interpreted to provide some protection for these early communications once an agreement is signed, but it would be risky to assume that judges would necessarily interpret it that way. It's best to execute the agreement to mediate as early

as possible if parties are concerned about the disclosure of sensitive communications.

iii.

5. Next Steps.
    a. Steve Wolf offered a summary of the meeting and possible next steps:
        i. DOJ will take a look at the typo concern: Lack of punctuation in OAR 137-005-0052 at "*Sections (6) (9) of this rule….*")
        ii. DOJ will also take a look at the concern that OAR 137-005-0050(4)(b)(E) allows the agency, but not other parties, the ability to use a communication in a subsequent proceeding. The rule states (emphasis added):
            *"May be used by the **agency** in any subsequent proceeding to enforce, modify or set aside an agreement arising out of the collaborative DR process;"*
        iii. With regard to the "retroactivity" issue DOJ will take a look at how the language in the current rule might impact the confidentiality of mediation communications that occurred prior to the execution of an agreement to mediate but any changes to the rules that would expand or clarify the confidentiality of these communications would need to be balanced with its impact on government transparency.
        iv. With regard to any rule changes to clarify or expand the confidentiality of communications to mediators described on OAR 137-005-0052(6), or any other expansion of confidentiality protections, information would need to be presented to the Attorney General that there was a compelling problem with the status quo.

    b. Kevin Grant offered to reach out to Oregon Mediation Association members regarding their experience with confidentiality prior to the execution of the agreement to mediate.

Meeting Adjourned

ATTACHMENT A

Adopted 10/27/2015

137-005-0050
Confidentiality of Collaborative Dispute Resolution Communications
(Highlighted areas were topics of committee discussion)

(1) For the purposes of this rule,

(a) "Agreement to mediate" means a written agreement to mediate executed by the parties establishing the terms and conditions of the mediation, which may include provisions specifying the extent to which mediation communications will be confidential.

(b) "Mediation" means a process in which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy and includes all contacts between a mediator and any party or agent of a party, until such time as a resolution is agreed to by the parties or the mediation process is terminated.

(c) "Mediation agreement" means an agreement arising out of a mediation, including any term or condition of the agreement.

(d) "Mediation communication" means:

(A) All communications that are made, in the course of or in connection with a mediation, to a mediator, a mediation program or a party to, or any other person present at, the mediation proceedings; and

(B) All memoranda, work products, documents and other materials, including any draft mediation agreement, that are prepared for or submitted in the course of or in connection with a mediation or by a mediator, a mediation program or a party to, or any other person present at, mediation proceedings.

(e) "Mediator" means a third party who performs mediation. Mediator includes agents and employees of the mediator or mediation program.

(f) "Party" means a person or agency participating in a mediation who has a direct interest in the controversy that is the subject of the mediation. A person or agency is not a party to a mediation solely because the person or agency is conducting the mediation, is making the mediation available or is serving as an information resource at the mediation.

(2) If the agency is a party to a mediation or is mediating a dispute as to which the agency has regulatory authority:

(a) The agency may choose to adopt either or both the Model Rule for Confidentiality and Inadmissibility of Mediation Communications in OAR 137-050-0052 or the Model Rule for Confidentiality and Inadmissibility of Workplace Interpersonal Mediation Communications in 137-050-0054, in which case mediation communications shall be confidential to the extent provided in those rules. The agency may adopt the rules by reference without complying with

the rulemaking procedures under ORS 183.335. Notice of such adoption shall be filed with the Secretary of State in the manner provided by ORS 183.355 for the filing of rules.

(b) If the agency has not adopted confidentiality rules pursuant to ORS 36.220 to 36.238, mediation communications shall not be confidential unless otherwise provided by law, and the agency shall inform the parties in the mediation of that fact in an agreement to collaborate pursuant to OAR 137-005-0030 or other document.

(3) If the agency is mediating a dispute as to which the agency is not a party and does not have regulatory authority, mediation communications are confidential, except as provided in ORS 36.220 to 36.238. The agency and the other parties to the mediation may agree in writing that all or part of the mediation communications are not confidential. Such an agreement may be made a part of an agreement to collaborate authorized by OAR 137-005-0030.

(4) If the agency and the other participants in a collaborative DR process other than a mediation wish to make confidential the communications made during the course of the collaborative DR process:

(a) The agency, the other participants and the collaborative DR provider, if any, shall sign an agreement to collaborate pursuant to OAR 137-005-0030 or any other document that expresses their intent with respect to:

(A) Disclosures by the agency and the other participants of communications made during the course of the collaborative DR process;

(B) Disclosures by the collaborative DR provider of communications made during the course of the collaborative DR process;

(C) Any restrictions on the agency's use of communications made during the course of the collaborative DR process in any subsequent administrative proceeding of the agency; and

(D) Any restrictions on the ability of the agency or the other participants to introduce communications made during the course of the collaborative DR process in any subsequent judicial or administrative proceeding relating to the issues in controversy with respect to which the communication was made.

(b) Notwithstanding any agreement under subsection (4)(a) of this rule, communications made during the course of a collaborative DR process:

(A) May be disclosed if the communication relates to child abuse and is made to a person who is required to report abuse under ORS 419B.010 to the extent the person is required to report the communication;

(B) May be disclosed if the communication relates to elder abuse and is made to a person who is required to report abuse under ORS 124.050 to 124.095 to the extent the person is required to report the communication;

(C) May be disclosed if the communication reveals past crimes or the intent to commit a crime;

(D) May be disclosed by a party to a collaborative DR process to another person if the party's communication with that person is privileged under ORS Chapter 40 or other provision of law;

(E) May be used by the agency in any subsequent proceeding to enforce, modify or set aside an agreement arising out of the collaborative DR process;

(F) May be disclosed in an action for damages or other relief between a party to a collaborative DR process and a DR provider to the extent necessary to prosecute or defend the matter; and

(G) Shall be subject to the Public Records Law, ORS 192.410 to 192.505, and the Public Meetings Law, ORS 192.610 to 192.690.

(c) If a demand for disclosure of a communication that is subject to an agreement under this section is made upon the agency, any other participant or the collaborative DR provider, the person receiving the demand for disclosure shall make reasonable efforts to notify the agency, the other participants and the collaborative DR provider.

Stat. Authority: ORS 183.341 & 183.502; OL 2015, ch 114 (SB 189)
Stats. Implemented: ORS 36.110 & 36.220 - 36.238; 2015 SB 189
Hist.: JD 3-1997, f. 9-4-97, cert. ef. 9-15-97; DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 7-2015(Temp), f. 5-22-15, cert. ef. 5-26-15 thru 11-21-15; DOJ 13-2015, f. & cert. ef. 10-27-15

ATTACHMENT B

Adopted 10/27/2015

137-005-0052
Confidentiality and Inadmissibility of Mediation Communications
(Highlighted areas were topics of committee discussion)

(1) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110 and 36.234.

(2) Nothing in this rule affects any confidentiality created by other law. Nothing in this rule relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690. Whether or not they are confidential under this or other rules of the agency, mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.

(3) This rule applies only to mediations in which the agency is a party or is mediating a dispute as to which the agency has regulatory authority. This rule does not apply when the agency is acting as the "mediator" in a matter in which the agency also is a party as defined in ORS 36.234.

(4) To the extent mediation communications would otherwise be compromise negotiations under ORS 40.190 (OEC Rule 408), those mediation communications are not admissible as provided in 40.190 (OEC Rule 408), notwithstanding any provisions to the contrary in section (8) of this rule.

(5) Mediations Excluded. Sections (6) (9) of this rule do not apply to:

(a) Mediation of workplace interpersonal disputes involving the interpersonal relationships between this agency's employees, officials or employees and officials, unless a formal grievance under a labor contract, a tort claim notice or a lawsuit has been filed; or

(b) Mediation in which the person acting as the mediator will also act as the hearings officer in a contested case involving some or all of the same matters; or

(c) Mediation in which the only parties are public bodies; or

(d) Mediation in which two or more public bodies and a private entity are parties if the laws, rule or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential; or

(e) Mediation involving 15 or more parties if the agency has designated that another mediation confidentiality rule adopted by the agency may apply to that mediation.

(6) Disclosures by Mediator. A mediator may not disclose or be compelled to disclose mediation communications in a mediation and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless:

(a) All the parties to the mediation and the mediator agree in writing to the disclosure; or

(b) The mediation communication may be disclosed or introduced into evidence in a subsequent proceeding as provided in subsections (c)–(d), (j)–(l), (o)–(p) and (r)–(s) of section (8) of this rule.

(7) Confidentiality and Inadmissibility of Mediation Communications. Except as provided in section (8) of this rule, mediation communications are confidential and may not be disclosed to any other person, are not admissible in any subsequent administrative, judicial or arbitration proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of a subsequent proceeding, or introduced as evidence by the parties or the mediator in any subsequent proceeding so long as:

(a) The parties to the mediation sign an agreement to mediate specifying the extent to which mediation communications are confidential; and,

(b) If the mediator is the employee of or acting on behalf of a state agency, the mediator or an authorized representative of the agency signs the agreement.

(8) Exceptions to Confidentiality and Inadmissibility.

(a) Any statements, memoranda, work products, documents and other materials, otherwise subject to discovery that were not prepared specifically for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding.

(b) Any document that, before its use in a mediation, was a public record as defined in ORS 192.410 remains subject to disclosure to the extent provided by ORS 192.410 to 192.505 and may be introduced into evidence in a subsequent proceeding.

(c) A mediation communication is not confidential and may be disclosed by any person receiving the communication to the extent that person reasonably believes that disclosing the communication is necessary to prevent the commission of a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential and may be disclosed in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(d) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule is not confidential and may be disclosed to the extent necessary to make such a report.

(e) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential or that all or part of the mediation communications may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential, privileged or otherwise prohibited from disclosure under state or federal law.

(f) A party to the mediation may disclose confidential mediation communications to a person if the party's communication with that person is privileged under ORS Chapter 40 or other provision of law. A party to the mediation may disclose confidential mediation

communications to a person for the purpose of obtaining advice concerning the subject matter of the mediation, if all the parties agree.

(g) An employee of the agency may disclose confidential mediation communications to another agency employee so long as the disclosure is necessary to conduct authorized activities of the agency. An employee receiving a confidential mediation communication under this subsection is bound by the same confidentiality requirements as apply to the parties to the mediation.

(h) A written mediation communication may be disclosed or introduced as evidence in a subsequent proceeding at the discretion of the party who prepared the communication so long as the communication is not otherwise confidential under state or federal law and does not contain confidential information from the mediator or another party who does not agree to the disclosure.

(i) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications and such communications may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.

(j) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications are not confidential and may be disclosed and may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(k) When a mediation is conducted as part of the negotiation of a collective bargaining agreement, the following mediation communications are not confidential and such communications may be introduced into evidence in a subsequent administrative, judicial or arbitration proceeding:

(A) A request for mediation, or

(B) A communication from the Employment Relations Board Conciliation Service establishing the time and place of mediation, or

(C) A final offer submitted by the parties to the mediator pursuant to ORS 243.712, or

(D) A strike notice submitted to the Employment Relations Board.

(l) To the extent a mediation communication contains information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, that portion of the communication may be disclosed as required by statute.

(m) Written mediation communications prepared by or for the agency or its attorney are not confidential and may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding to the extent the communication does not contain confidential information from the mediator or another party, except for those written mediation communications that are:

(A) Attorney client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege, or

(B) Attorney work product prepared in anticipation of litigation or for trial, or

(C) Prepared exclusively for the mediator or in a caucus session and not given to another party in the mediation other than a state agency, or

(D) Prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation, or

(E) Settlement concepts or proposals, shared with the mediator or other parties.

(n) A mediation communication made to the agency may be disclosed and may be admitted into evidence to the extent the agency director, administrator or board determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public's health or safety, and the communication is not otherwise confidential or privileged under state or federal law.

(o) The terms of any mediation agreement are not confidential and may be introduced as evidence in a subsequent proceeding, except to the extent the terms of the agreement are exempt from disclosure under ORS 192.410 to 192.505, a court has ordered the terms to be confidential under ORS 17.095 or state or federal law requires the terms to be confidential.

(p) In any mediation in a case that that has been filed in court or when a public body's role in a mediation is solely to make mediation available to the parties the mediator may report the disposition of the mediation to that public body or court at the conclusion of the mediation so long as the report does not disclose specific confidential mediation communications. The agency conducting the mediation or making the mediation available or the mediator may use or disclose confidential mediation communications for research, training or educational purposes, subject to the provisions of ORS 36.232.

(q) An agreement to mediate is not confidential and may be introduced into evidence in a subsequent proceeding.

(r) Any mediation communication relating to child abuse that is made to a person required to report child abuse under ORS 419B.010 is not confidential to the extent that the person is required to report the communication.

(s) Any mediation communication relating to elder abuse that is made to a person who is required to report elder abuse under ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication.

(9) When a mediation is subject to section (7) of this rule, the agency will provide to all parties to the mediation and the mediator a copy of this rule or a citation to the rule and an explanation of where a copy of the rule may be obtained. The agreement to mediate also must refer to this rule. Violation of this provision does not waive confidentiality or inadmissibility.
Stat. Auth.: ORS 36.224, OL 2015, ch 114 (SB 189)
Stats. Implemented: ORS 36.224, 36.228, 36.230, 36.232, OL 2015, ch 114 (SB 189)
Hist.: DOJ 7-2015(Temp), f. 5-22-15, cert. ef. 5-26-15 thru 11-21-15

ATTACHMENT C
ADR Definition pages from Attorney General's APA manual

VI. COLLABORATIVE DISPUTE RESOLUTION

A. GENERALLY

Effectively preventing and managing the disputes and controversies state agencies face each day involves a variety of processes and skills from good interpersonal communication and negotiation to the more formalized contested case hearings and litigation. Unless otherwise prohibited by law, the APA authorizes agencies to use alternative dispute resolution (ADR), including collaborative forms of dispute resolution such as mediation, facilitation and collaborative rulemaking. ORS 183.502(1).

The Attorney General's Model Rules on ADR were developed in consultation with state agencies and dispute resolution professionals. They are designed to assist agencies in the assessment and appropriate use of collaborative dispute resolution processes, which are a sub-category of ADR. Agencies need not adopt the Model Rules to use informal ADR processes.[493]

Merely by adopting the Model Rules, an agency is not required to use collaborative dispute resolution processes in all (or any) controversies, unless the agency determines that it is appropriate for the particular matter. Nothing in the rules requires an agency to provide collaborative dispute resolution or to reach settlement in a dispute.

Reasons for using collaborative DR are to increase agency efficiency, to increase public and agency satisfaction with the process and results of dispute resolution, and to reduce the cost of resolving disputes. ORS 183.502(8). There are also circumstances when a collaborative approach would not be the best choice. Model Rules 137-005-0020 and 137-005-0022 provide guidance on when a collaborative process is appropriate. A summary of the Model Rules that apply to various collaborative DR processes is on p. A-93.

B. DEFINITIONS

The Model Rules define some dispute resolution terms specifically for purposes of the rules. This section explains how the terms may be used differently in other contexts. Additional terms are defined in the Glossary in Appendix F.

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[493] These rules, like all of the Model Rules, may be adopted by reference. ORS 183.502(3).

1. Appropriate, Alternative, and Collaborative Dispute Resolution

ADR is a commonly used abbreviation that may refer to either alternative dispute resolution or appropriate dispute resolution. "Alternative dispute resolution" generally refers to any procedure that is used in lieu of an adjudication, including litigation, to resolve issues in controversy. Such alternative dispute resolution procedures include settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration and hybrid forms like mediation-arbitration. Many of these "alternative" methods are not collaborative and are outside the scope of the Model Rules.

"Appropriate dispute resolution" includes any process that is deemed to be appropriate for resolving a particular dispute. Thus, litigation might be an "appropriate" dispute resolution option in certain cases, and mediation might be "appropriate" in others. The Model Rules encourage agencies to examine a dispute or controversy to determine what dispute resolution process may be appropriate.

The Model Rules address a specific type of ADR process that is termed "collaborative dispute resolution" or "collaborative DR." Collaborative DR describes any process in which participants engage in joint problem-solving or conflict resolution with the aim of producing mutually beneficial agreements. In a collaborative process, participants often work directly with each other to (1) communicate their interests and needs, (2) agree on a flexible, informal and creative process to manage conflicting interests, (3) generate and evaluate options, (4) develop a mutually acceptable agreement, and (5) implement the agreement. Collaborative DR includes processes like mediation and facilitation in which a third party assists the parties to reach consensus or resolve a dispute.

For the purposes of the Model Rules, the definition of collaborative dispute resolution process has been narrowed to exclude the facilitation of routine meetings, informal dispute resolution practices such as telephone conciliation, and processes that result only in oral agreements. The definition of collaborative dispute resolution provider also has been narrowed to exclude providers who function solely as ombudspersons or customer service representatives. These exclusions are not intended to

prohibit or discourage such practices, but merely to permit their use without constraints imposed by the Model Rules.

2. Parties, Participants and Disputants

"Parties," "participants" and "disputants" are all terms for persons involved in a dispute or dispute resolution process. The term "party" is defined in ORS 183.310(7) to describe persons other than the agency. That definition is retained for purposes of the Model Rules, except for Model Rule 137-005-0050, which pertains to the confidentiality of collaborative DR communications and which adopts the definition of "party" used in ORS 36.234, to include the agency.

Because the APA definition of "party" excludes the agency, that term is too narrow to describe those who participate in collaborative dispute resolution processes. Therefore, the term "participant" is used in these rules to describe the persons or entities, including agencies that are participating in a dispute resolution process. Model Rule 137-001-0005(8). The term "disputant" is used to describe persons or entities, including the agency, involved in an actual dispute or controversy. Model Rule 137-001-0005(5). In some cases, only a few of the "disputants" involved in a controversy may choose to become "participants" in a collaborative DR process. In other cases, a collaborative dispute resolution process, such as collaborative rulemaking, may be used when there is not yet any dispute, so that none of the "participants" are actually "disputants."

3. Conveners, Facilitators, Mediators and Providers

The Model Rules focus primarily on collaborative DR processes that involve "providers" who assist the participants in the resolution of conflict. Model Rule 137-001-0005(3), (4). Providers may be mediators, facilitators, conveners or others. Typically, a facilitator would work with large groups of people, structuring meetings and recording ideas to reach consensus on a policy or plan of action. A mediator often would work with smaller groups of two or three people to develop a mutually acceptable resolution to a conflict.

Practice Tip

Generally, the distinction between "facilitation" and "mediation" is not significant for purposes of the Model Rules. In practice, one provider may describe a process as facilitation and another provider describe the same process as mediation. Regarding confidentiality, however, the distinction between mediation and other collaborative processes is critical. ORS 36.220 to 36.238 govern the confidentiality of "mediation" communications only. "Mediation" is defined at 36.110(5)

Conveners are another type of collaborative DR provider. The convener's role is to evaluate the feasibility of various processes for resolving a contentious rulemaking issue or a complex public policy dispute. The convener works with the interested parties to develop a process that includes all sides. It is easy to underestimate the value of this convening function, but getting everyone to agree to a collaborative DR process is often the most time-consuming step in the entire process. In complex public policy disputes and collaborative rulemaking, the convener is often a third party and not an agency employee. Once the collaborative process is convened, the convener may change roles and act as the facilitator or mediator of the process.

4. Collaboration and Consensus

Collaboration and consensus are terms that can refer to either a dispute resolution process or an outcome. "Collaboration" is a process in which the participants explore their interests and search for creative solutions that fully meet all of their interests. The goal of collaboration is to reach a mutually acceptable agreement, which is sometimes described as "consensus." Model Rule 137-001-0005(1) defines consensus as "a decision developed by a collaborative DR process that each participant can accept." For complex disputes, the participants may need to define consensus differently in order to better meet the objectives of the process. Some alternative ways to articulate consensus are listed on p. A-92.

"Compromise" is only one type of process or outcome; it is not always appropriate for state agencies. Compromise attempts to find an intermediate position or trade-off through which the participants can obtain at least part of their objectives. Party A wants $2,000, party B wants $5,000, they compromise and agree on $3,500. Outcomes like this

that simply "split the difference" may not meet the needs of any of the disputants and may be unavailable to the agency if it is required to follow a rule or statute that limits what the agency can offer in a negotiation.

5. ADR Programs

An agency may use a collaborative process on an occasional or case-by-case basis. The agency may also wish to look more systematically at its dispute resolution processes for classes of cases that lend themselves to collaborative dispute resolution. The assessment criteria in Model Rule 137-005-0020 could be used to identify types of cases that the agency will refer to a collaborative process. For example, the agency may decide that it will routinely use mediation in cases involving certain issues, dollar amounts, or rights. The agency could then specify in its adoption of the Model Rules that they apply to those particular cases.

Practice Tip

Rather than merely adding a mediation program to see if it will improve the handling of disputes, the agency should ask: How could our dispute resolution (DR) process be more efficient, more cost-effective and produce better outcomes? The goal is a more effective state government, not proliferation of any particular DR mechanism.

An agency that elects to carry out a program of mediation or other ADR process must inform the Department of Justice, the University of Oregon's Mark O. Hatfield School of Government and the Department of Administrative Services, and may obtain assistance in the implementation and development of the program from those agencies. ORS 183.502(2).

6. Complex Public Policy Controversies

The term "complex public policy controversies" refers to multi-party controversies that include at least one governmental participant and that affect the broader public, rather than only a single group or individual. Model Rule 137-005-0022(1). A controversial prison siting or a policy to limit development along the Columbia River are examples of issues that could result in complex public policy controversies. While a simpler dispute, such as professional license revocation, might use a mediation process that follows a well-defined and familiar protocol, the management of a complex public policy controversy often involves the