

# Draft

## Minutes for the Rules Advisory Committee – Attorney General’s Mediation Rules July 16, 2015 at 1:00 PM DOJ Robertson Building Redwood Room

Present:

- Mike Niemeyer, ADR Coordinator Oregon Department of Justice
- Amy Alpaugh, Assistant Attorney General, Oregon Department of Justice
- Thom Brown, ADR Section of the Oregon State Bar
- Kevin Grant, President, Oregon Mediation Association
- Bill Ryan, Assistant Director, Aquatic Resource Management, Oregon Department of State Lands
- Turner Odell, Oregon Consensus and Oregon Solutions, National Policy Consensus Center  
Portland State University
- Sam Imperati, President, ICMResolutions, Inc.

1. Mike Niemeyer discussed the purpose of the group, went over the agenda and provided background on the purpose and development of the mediation confidentiality rules.
2. Amy Alpaugh discussed Senate Bill 189 (2015), which precipitated the need to adopt permanent rules.
3. Issues discussed:
  - The confidentiality exemption for a licensed professional to report alleged misconduct;
  - The appellate court mediation program using a mediation agreement form that does not reference or incorporate the mediation confidentiality rules;
  - Suggestion to begin by thinking about the form of agreement to mediate and work backwards to determine the rules;
    - Confidentiality of discussions about whether to enter into a mediation (i.e. the process of “assessment” in complex public policy disputes) where no signed agreement to mediate results; suggestion that the rules make those discussions confidential in addition to providing that the mediator not disclose them;
    - It was noted that current rules are structured so as to protect disclosures by the mediator prior to the execution of an agreement to mediate.
  - Question about what is meant by other collaborative dispute resolution;
    - It was noted that the use of alternative dispute resolution and “other collaborative dispute resolution” in the model rules was aimed at being consistent with the use of those terms in ORS 183.502<sup>1</sup> (see below.)

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<sup>1</sup> **183.502 Authority of agencies to use alternative means of dispute resolution; model rules; amendment of agreements and forms; agency alternative dispute resolution programs.**(1) Unless otherwise prohibited by law, agencies may use alternative means of dispute resolution in rulemaking proceedings, contested case proceedings, judicial proceedings in which the agency is a party, and any other decision-making process in which conflicts may arise. The **alternative means of dispute resolution may be arbitration, mediation or any other collaborative problem-solving process designed to encourage parties to work together to develop mutually agreeable solutions to disputes.** Use of alternative means of dispute resolution by an agency does not affect the application of ORS 192.410 to 192.505 to the agency, or the application of ORS 192.610 to 192.690 to the agency.

- Suggestion that agreements to mediate should incorporate the rules;
- Discussed the crimes exception being broader in the AG's model rules than for private mediations as it encompasses past crimes;
- Suggestion to consolidate/clarify language about proceedings in OAR 137-005-0052(7);
- Discussed the purpose of the exception in OAR 137-005-0052(9)(b) for public records not specifically prepared for use in mediation;
- Discussed wording OAR 137-005-0052(8) in the affirmative rather than the negative and putting it before OAR 137-005-0052(7);
- Discussed other potential clerical edits;
- Discussed the procedure for agencies to adopt the temporary and permanent rules;
- Discussion of the difference between disclosure and use of report by licensed professional of alleged misconduct;
- Discussed timing to adopt permanent rules – notice must go out in September.

#### 4. Fiscal Impact

Bill Ryan stated that he couldn't think of any fiscal impacts that would result from the permanent rules. Amy Alpaugh observed that the process change established by SB 189 and implemented in the rules would save agencies the expense of having to go through formal rulemaking to adopt the rules. Sam Imperati said that clarifying rule language would likely expedite the process to obtain agreements to mediate and save the state money. None of the participants raised any costs for private mediators associated with the rules.

#### 5. Procedure going forward:

Group agreed that future communications could be via email rather than through convening another meeting.

Mike Niemeyer indicated that with regard to the issue of greater confidentiality for the participants in an assessment process there was a tension between public policies favoring government transparency and policies favoring efficient, effective and confidential, collaborative dispute resolution. To modify the rules to change the status quo it would be helpful to get additional input regarding the consequences of the current policy which requires parties to execute an agreement to mediate, and cite relevant agency rules, if the parties are to enjoy the confidentiality protections of ORS chapter 36.

#### 6. Adjourned at 3:00 PM.