

To: The Honorable Chuck Riley Chair, Senate Committee on General Government and Accountability and Members of the Committee
From: Sam Imperati, JD, Executive Director of the Institute *for* Conflict Management, Inc.
Date: March 22, 2017
RE: SB 106 (2017)

I am a professional mediator. I am not testifying on the substantive public records and transparency issues. My issues are solely with the contemplated mediation process.

Here are my process concerns with the current bill and possible solutions.

1) Concerns:

- A) 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." ORS 36.110(5.)
- B) Using the word, "mediation," and then doing something that is not done in mediation will create user confusion, which is in no one's interest. I understand the intent to use the layperson's concept of mediation, but we have an entire statutory scheme (ORS Chapter 36) in addition to a robust mediation field in Oregon.
- C) Mediators are impartial. Using the word, "advocate," may imply to the requesting party that that "advocate" is there to represent them or that they are on the side of the requestor. It never ceases to amaze me when mediation participants expect me to make a decision. That is what arbitrators do – not mediators.
- D) ORS 36.110(9) defines a "mediator" as, "... a third party who performs mediation." (Emphasis added.) A "party" is defined in ORS 36.234 as "... a person, state agency or other public body is a party to a mediation if the person or public body participates in a mediation and has a direct interest in the controversy that is the subject of the mediation. A person or public body is not a party to a mediation solely because the person or public body is conducting the mediation, is making the mediation available or is serving as an information resource at the mediation." (Emphasis added.)
- E) I believe the public records advocate has a "direct interest in the controversy" given her statutory responsibilities. The advocate is doing more than "conducting the mediation" and "serving as an information resource" especially because they can make a lack of good faith determination, which

potentially results in an award of attorney fees and other relief. Again, this is what arbitrators do – not mediators.

- F) The above also raises a problem from a “standards of practice” perspective (ethics) perspective. The Oregon Mediation Association has promulgated Core Standards of Mediation Practice.

<http://www.omediate.org/pg61.cfm> Section III. IMPARTIAL REGARD states:

Mediators demonstrate Impartial Regard throughout the mediation process by conducting mediations fairly, diligently, even-handedly, and with no personal stake in the outcome. Mediators avoid actual, potential, or perceived conflicts of interest that can arise from a mediator’s involvement with the subject matter of the controversy or the participants, whether past or present, that reasonably raise a question about the mediator’s Impartial Regard. Where a participant or the mediator questions the mediator’s ability to give Impartial Regard and the issue cannot be resolved, the mediator declines to serve or withdraws if already serving. (Emphasis added.)

2) Possible Solutions:

- A) Do not have the “advocate” be the “mediator.” They are a “party.” I am happy to discuss viable “third party” alternatives like the Oregon Consensus program (the State’s mediation program,) community mediators, or private mediators. If there is no economic alternative, call the process something other than “mediation” so as not to encroach on a well-established field in Oregon. Possibilities include “conciliation,” “facilitation” or “dispute resolution.”
- B) “Ombuds,” “Ombudsperson,” or “Ombudsman” might be better terminology than “advocate.” might Please see the following materials from the ABA. <http://www.usombudsman.org/public-sector-ombudsman/>. It defines the role as:

Ombudsman perform an unusual role in government. While they receive complaints from the public, their job is not to become an advocate for the complainant or the governments they have jurisdiction over. Ombudsman are charged with collecting and evaluating all of the facts regarding a matter as a neutral investigator. They determine if there was an error, unfairness or harm by the agency involved, or no basis to the complaint. Ombudsman make recommendations to correct wrongs done to individuals to improve the administration of government. If their recommendations are not accepted and good reasons not given, the ombudsman may become an advocate for their implementation.

- C) Do not have the “mediator” (ombudsman, conciliator, facilitator, or dispute resolution provider,) regardless of title, be given the ability to make findings or issue advisory opinions. Instead, the “carrot and stick” approach can be to award attorney fees only if the parties have mediated, the case does not settle, and they ultimately prevail in court. This is the process used in many contracts, real estate disputes through the Portland Metropolitan Association of Realtors, and is analogous to the Offers of Judgment process found in the Oregon Rules of Civil Procedure, ORCP 54E.
- D) On the all-important issue of a neutral’s Impartial Regard, the American Bar Association says:

Appointment of an Ombudsman: Enabling legislation will determine the appointment process of an Ombudsman. As this office of an Ombudsman is one that must operate with the trust and respect of the community, it is recommended that the selection process be one that is not unilateral but is shared by appropriate legislative and/or administrative committees and bodies. The efficacy of an office is largely dependent upon a widely held view of the Ombudsman as a person of integrity, who works with non-partisan fairness and ethical behavior.

Please consider the above when making the appointment decision.

I have been communicating with the Oregon Mediation Association, the Oregon State Bar ADR Section, the Oregon Consensus program, and the community mediation programs. However, these comments are my own. I have no authority to speak for them, I am not representing them, nor am I lobbying on their behalf.

My volunteer efforts, to date, have been keeping colleagues in the loop and attempting to coordinate a unified response so as not to distract you from your crucial substantive work on the important public records transparency issues.

Thank you for your consideration of these procedural matters. I am happy to assist in any way.



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