

Oregon  
State  
Bar

CLE  
Seminars

# Arbitration and Mediation Issues in Disputes over Real Estate Sales Agreements



Getting Better Results with Mediation and  
Arbitration in Oregon Series

*Cosponsored by the Alternative Dispute  
Resolution Section*

Wednesday, January 12, 2022

Noon–1:30 p.m.

1.5 General CLE credits (ID 80751)

# ARBITRATION AND MEDIATION ISSUES IN DISPUTES OVER REAL ESTATE SALES AGREEMENTS

## SECTION PLANNERS

**The Honorable Daniel Harris (ret.) (Planning Chair),** *Harris Mediation & Arbitration, Wilsonville*  
**The Honorable Channing Bennett,** *Marion County Circuit Court, Salem*  
**Lisa Brown,** *Lisa Brown Attorney LLC, Lake Oswego*  
**Kelly Doyle,** *Doyle Law, Oregon City*  
**Philip Johnson,** *Oregon Employment Relations Board, Salem*  
**Rudy Lachenmeier,** *Attorney at Law, Neskowin*  
**Tegan Schlatter,** *Law Offices of Kathryn Reynolds Morton, Portland*  
**Jeremy Vermilyea,** *Vermilyea Law PC, Vancouver, Washington*

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## TABLE OF CONTENTS

Presentation Slides: Mediating Disputes Involving Real Estate Agreements . . . . .	1
About the Presenters . . . . .	1
Program Agenda . . . . .	3
Attachment A: PMAR Agreement Rules 2018 . . . . .	21
Attachment B: Sample Opening Email to Counsel . . . . .	23
Attachment C: Sample Form—Binding Memorandum of Understanding: Essential Terms and Conditions of Settlement . . . . .	25



# Mediating Disputes Involving Real Estate Sales Agreements

January 12, 2022

## 1. Welcome, Introductions & Agenda

**Dan Harris** practiced law, 1983-97; served as circuit court judge (Jackson County), 1997-2013 (primarily handled the civil docket); designated civil settlement judge for 16 years. After judicial service: Harrang Long Gary Rudnick (2013-15); full-time ADR practice based in Portland (2013-present) [www.harrismediator.com](http://www.harrismediator.com)

**Sam Imperati** has been practicing law since 1979 and mediating/facilitating fulltime since 1992. He is the Executive Director of ICMresolutions, a NW based, national provider of ADR services. Sam is the longest serving PMAR mediator. [www.icmresolutions.com](http://www.icmresolutions.com)

[Cartoon omitted]

*Puppet show; two puppets dressed in business suits fighting; one audience member says to another, "Our training budget is tight again this year!"*

2

## Required Icebreaker for MCLE Credit!

Lawyers are more intelligent and better looking than the average person.

- A) Agree
- B) Strongly Agree
- C) This goes without saying but bears repeating!

3

## Getting to Know You

### 1) Your primary work?

- A) Advocate
- B) Mediator/Arbitrator
- C) Combination

### 2) Real Estate as percentage of your practice?

- A) 0 to 24%
- B) 25 to 49%
- C) 50 to 74%
- D) 75 to 100%

4

## Program Agenda

- 1) Welcome, Introductions, and Getting to Know You Polls
- 2) Types of Real Estate Mediations
- 3) The Decision to Mediate and When to Mediate
- 4) PMAR Program Overview
- 5) Issues, Challenges & Approaches
- 6) How to "Plead" the Typical PMAR Dispute
- 7) Managing the Intersection of Logic and Emotion
- 8) Breaking Impasse
- 9) Participant Q and A
- 10) Adjourn

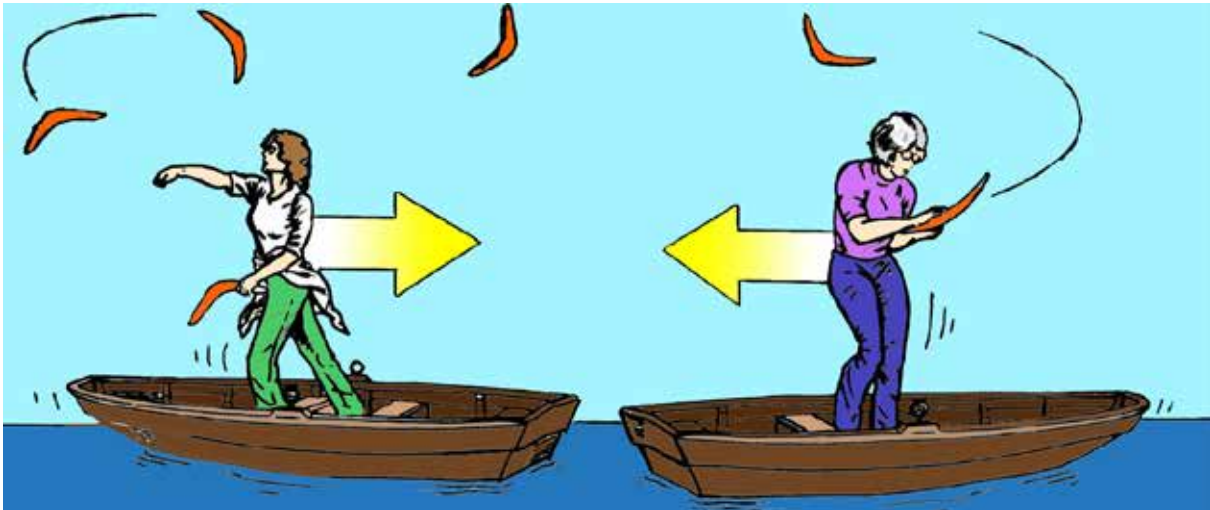
5

## 2. Types of Real Estate Mediations

- A) PMAR, ASP, others
- B) Commercial
- C) Other (e.g., Condos and Homeowner Associations)
- D) Today, we will focus on the mediation of residential disputes

6

### 3. The Decision to Mediate and When to Mediate



7

### 4. PMAR Program Overview



- A) Brief History and Jurisdiction by Contract
- B) PMAR Procedures and Panel
- C) PMAR Forms: <https://pmar.org/disputes-buyers-sellers/>

8



## D. 2021 PMAR Statistics

Mediation Requests Filed: 56

Property Condition – 25

Misrepresentation – 12

Earnest Money Dispute – 7

Specific Performance – 7

Rescission – 2

Breach of Contract – 2

Commission Dispute – 1

Cases Involving Brokerage – 15

Cases with Counsel – 51

Open Files: 17

Closed Files (includes prior year): 52

Closed Files that were Mediated: 33

Settled: 23 (70%)

Not Settled: 10 (30%)

Files that were Withdrawn/Declined: 19

Average Mediator Hours Billed: 7.7 @  
\$325 = ~\$2,500

9

## 5. Issues, Challenges, and Approaches

A) ADR Clause in Sales Agreement

B) PMAR Agreement to Mediate

C) Starting the Process

D) Opening Email to Counsel

E) Advocate Best Practices

- "Advocate" vs. "Team Player"
- Pre-mediation Memos
- Pre-mediation conversation with mediator
- "Spinning the Mediator"

10

## Issues, etc., continued

### A) ADR Clauses in Sales Agreement

#### 37. FILING OF CLAIMS:

- a) All matters relating to Sale Agreement ... etc.
- b) Filing a Claim for arbitration = S/L compliance

#### 38. EXCLUSIONS:

- a) Mortgages, lien, and FED
- b) Exclusively between REALTORS®
- c) Resolved under the Professional Standards Ethics and Arbitration provisions of the NAR
- d) Court filing for provisional process ... but DR still applies

#### 39.1. SMALL CLAIMS BETWEEN BUYER AND SELLER: Brought there.

#### 39.2. MEDIATION AND ARBITRATION:

- a) If Buyer's and/or Seller's Agent is a member of NAR, all Claims through local program (PMAR)
- b) If not available, mediate through ASP
- c) Arbitration through ASP
- d) Prevailing party fees and costs available if offer or agree to mediate prior to, or promptly upon, the filing for arbitration.

11

## Issues, Challenges, and Approaches, continued

### B) PMAR Agreement to Mediate (Attachment 1)

### C) Starting the Process

### D) Opening Email to Counsel (Attachment 2)

### E) Advocate Best Practices

- Advocate vs team player
- Pre-mediation memos
- Pre-mediation conversation with mediator
- "Spinning the Mediator"

12

## 6. How to "Plead" Typical PMAR Dispute

**Pop Quiz:** How do you plead the typical claim that the seller did not properly disclose problems?

- A) Breach of Contract
- B) Negligent Misrepresentation
- C) Fraud
- D) All Three
- E) Other

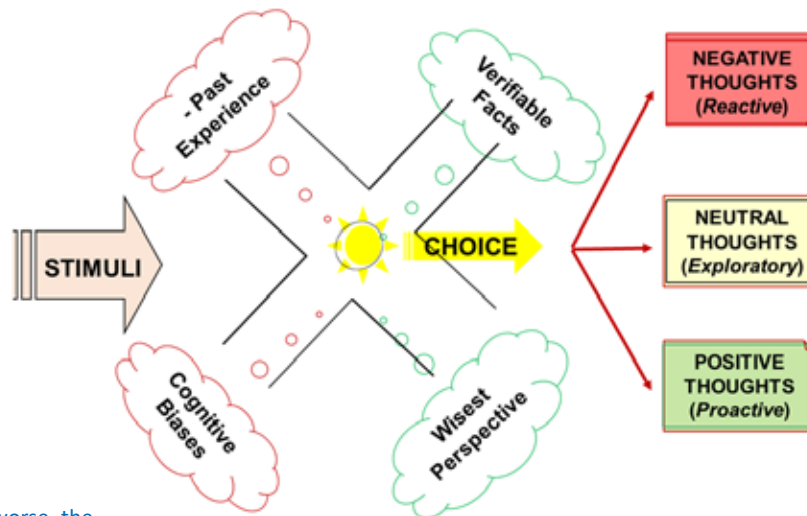
13

## How to "Plead," continued

- A) Contract
- B) Negligent Misrepresentation
- C) Fraud
- D) Differing Burdens of Proof and Available Damages
- E) Impact on Attorney Fees
- F) Setting Stage for Arbitration

14

## 7. Managing the Intersection of Logic and Emotion

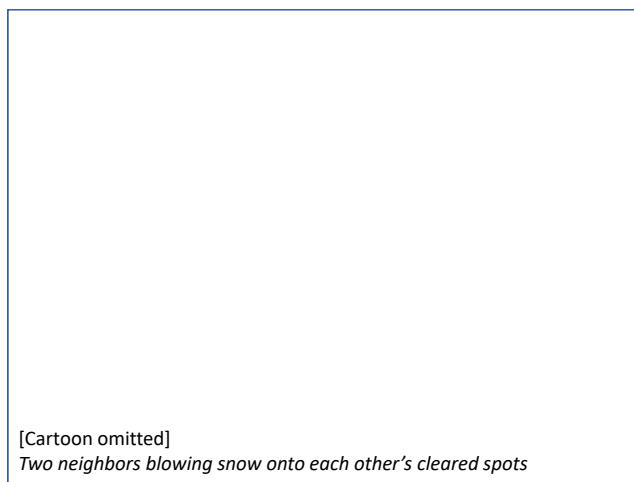


Emotions are, for better or worse, the dominant driver of most people when they are making meaningful decisions.

15

### Conflict

*When someone insists that they are right, and you are wrong.*



... and so it Begins,  
The "Attack-Justify-Blame" Spiral

16

## Parties Polarize and Entrench

[Cartoon omitted]

*Two opposing groups of “see no evil, hear no evil, speak no evil” men facing each other; one group’s sign says “Yes to War,” the other’s “No to War.”*

**We accept no evidence that doesn’t fit our mindset.**

17

## Typical Mediation Impasse

[Cartoon omitted]

*Two groups on a tiny cliff island playing tug-of-war with broken rope; sharks circling in water below*

***“I’m NOT settling. That’s my BOTTOM Line.  
It’s a matter of PRINCIPLE!”***

18

## Why: Automatic Cognitive Processes

[Cartoon omitted]

*Man seated at office desk, speaking into telephone: "Your offer's a crumpled little ball on my desk."*

Are Habit-Bound and Inhibit Clear Thought

19

## Understanding How People Think

### System 1

- Generally automatic, affective (emotional).
- "Mental Shortcuts" - heuristics
- Efficient - few resources needed
- Examples:
  - localize the source of a specific sound
  - complete the phrase "war and ..."
  - display disgust when seeing a gruesome image
  - read a text on a billboard
  - drive a car on an empty road

### System 2

- Slow, effortful, conscious, rule-based
- Used to monitor System 1
- Takes lots of resources
- Examples:
  - dig into your memory to recognize a sound
  - determine the appropriateness of a behavior in a social setting
  - count the number of A's in a certain text
  - park into a tight parking space

Parties rely on System 1 more than they like to admit

Thinking, Fast and Slow (2013)  
by Daniel Kahneman

20

## Cognitive vs. Implicit Biases vs. Logical Fallacies

- 1) **Logical Fallacies** = A flaw in reasoning. They are illusions of thought and are often used to fool people.
  - System 2
  - Can be learned and avoided
- 2) **Cognitive Biases** = Shortcuts in our thinking make our judgments “irrational”. Our mind misfires in predictable ways and can cause errors in judgement.
  - System 1
  - All judgment and decision errors – not learned but pre-programmed
  - Can only hope to adjust afterward, can’t avoid!
- 3) **Implicit Biases** = The attitudes that affect our understanding and decisions in an unconscious manner. Typically referring to social prejudices.
  - Can be both favorable and unfavorable assessments
  - Activated without our awareness – System 1
  - Built on learned social stereotypes

<https://yourlogicalfallacyis.com/>

<https://yourbias.is/>

<http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>

21

## The Challenges of Being Human!

- **Self-Serving Bias:** A cognitive process that is distorted by the need to maintain and enhance self-esteem. Ascribing success to own efforts, but ascribing failure to external factors.
- **Naïve Realism:** The human tendency to believe we see the world objectively and without bias. We assume that others who do not share the same views must be ignorant, irrational, or biased.
- **Cognitive Dissonance:** The uncomfortable feeling people get when holding two “competing” ideas in mind at once. This compels us to get rid of the troubling thoughts by rationalizing our behavior or dehumanizing others.

22

## Goal: “Resolution” or “Settlement”

“Build a Relationship and Fix the Problem” or  
“Build a Case and Fix Blame”

Element	“Resolution”	“Settlement”
Definition	Durable, Satisfying Solution	Walk Away Equally Unhappy
Getting the Deal	Slower	Faster
Acceptance	Sooner	Later
Result	Success	Compliance
Maintenance	Low	High
Approach	“Collaborative”	“Competitive”

23

## 8. Breaking Impasse: *There must be 50 Ways!*

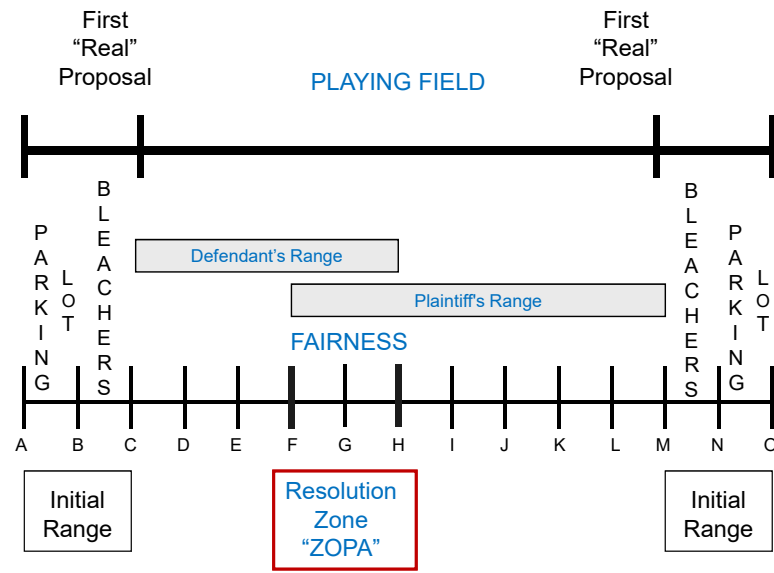
- A) Setting the Stage
- B) Use of the Mediator’s Proposal
- C) Memo of Essential Terms and Conditions
- D) Use of a “Czar Clause”



24



## A) Setting the Stage: The Typical “Settlement Dance”

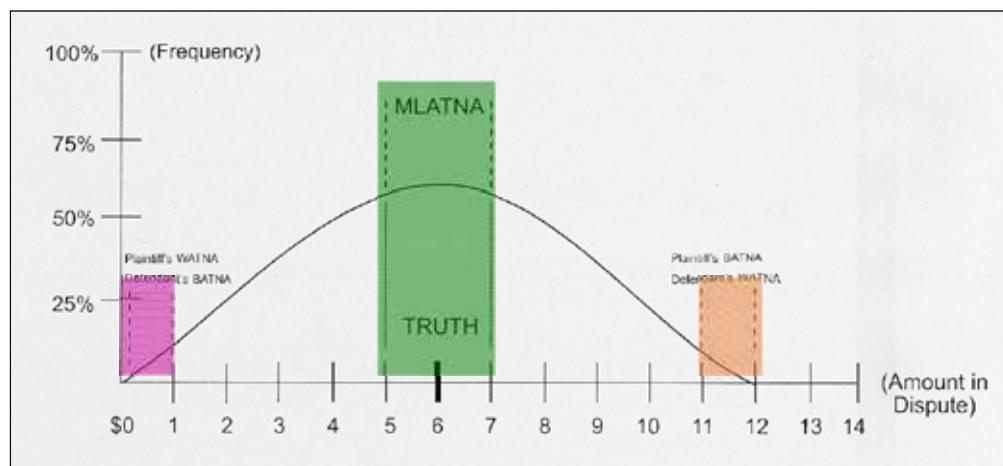


The Three Impasses

25

## Visualizing Unbiased “BATNA”

*“Best Alternative To a Negotiated Agreement”*

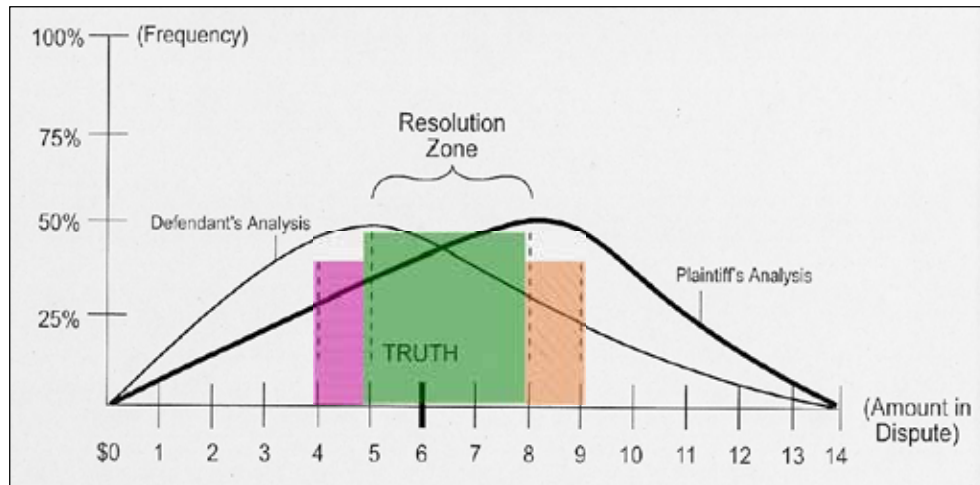


**WATNA** = Worst Alternative to a Negotiated Agreement

**MLATNA** = Most Likely Alternative to a Negotiated Agreement

26

## Mediator's Analysis of "Biased" BATNA and the "Resolution Zone"



The "Resolution Zone" is Usually  
Bordered by the Peaks of the Two Curves

27

## Litigation Outcome Survey: Only 15% Got it Right!

4,500 cases and 9,000 settlement decisions studied

Compared trial results with rejected pre-trial  
offers/demands

Obtained results equal to or worse:

Plaintiffs: 61% of time

Defendants: 24% of time

Average Decision Error:

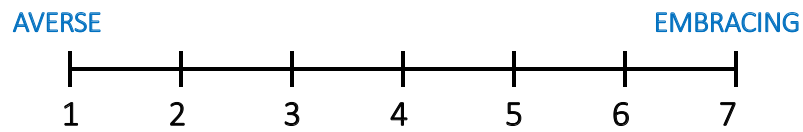
Plaintiffs: \$43,100

Defendants: \$1.14M

Randall L. Kiser, et. al, Let's Not Make a Deal:  
... 5 J Empirical Legal Studies 551-91 (Sept.  
2008) Updated 2010 ~ Beyond Right and  
Wrong: ...

28

## Manage Dissonance in Risk Preferences



Clients?

Attorneys?

Mediator

[Cartoon omitted]

*Office meeting; boss says to person giving presentation, "You say it's a win-win, but what if you're wrong-wrong and it all goes bad-bad?"*

29

## Father Guido Sarducci's Five Minute Impasse Breaking University



30

## 1. Conditional Offer Technique

**Defined:**

An offer/proposal that may be disclosed only if a certain condition is met.

**Conditions may be:**

**Movement:**

“You’re at 13. If they move off 1, what would you put on the table?”

**To specific place:**

“You’re at 13. If they move from 1 to 2, what may I convey?” (Encourage parallel moves)

**Range:**

“You’re at 13. There at 1. If they go above 2, what may I convey?”

**Response:**

May get a conditional response to a conditional offer.

31

## 2. Confidential Settlement Proposal

**Defined:** Mediator obtains what is “pretty damn close” to their bottom line – not their actual bottom line! The structure allows for private testing of a proposal only the mediator will know.

**Three Possibilities:**

- 1) Numbers are the same and the case settles
- 2) Numbers “overlap” – never seen it happen!
- 3) The “gap” is:
  - a) Not bridgeable: mediation is over
  - b) Might be bridgeable: ask for new confidential numbers
  - c) Bridgeable: ask if they want you to:
    - i) Disclose gap in general terms
    - ii) Disclose actual number(s)
    - iii) Mediator’s Proposal (Frequent Pick)

32

## Breaking Impasse, continued

- 3) Use of the Mediator's Proposal
- 4) Memo of Essential Terms and Conditions (Attachment 3)
- 5) Use of a "Czar Clause"

[Cartoon omitted]  
*Two persons seated at table across from each other,  
caption "I'll listen to your unreasonable demands if you'll  
consider my unacceptable offer."*

33

## When All Else Fails, Try Humor

- Study found people exposed to a funny video before negotiating more easily came to resolutions
- People who laugh in response to a conflict are more likely to shift their thinking from one solution to seeing many
- Humor can be used to relieve tension and help manage emotions.
- Refocusing attention on less threatening aspect of event can reduce threat.



Whitney Meers, *The Funny Thing About Mediation: A Rationale for the Use of Humor in Mediation*, 10 Cardozo Law Review 657 (2009). Jacquelyn Smith, 10 Reasons Why Humor Is a Key to Success at Work, FORBES.COM, May 2013

34

## 9. Participant Q and A

**Request:** Please put the additional topics/questions you would like us to cover in the Questions box.

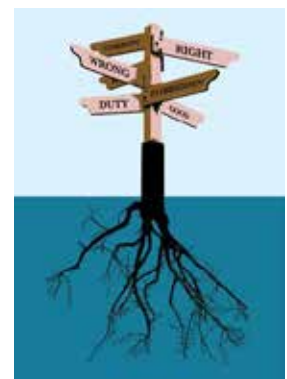


35

## Mediator Ethics CLE: March 2, 2022

[Cartoon omitted]  
*Moses displaying the 10 Commandments, man in group says, "Lets just go with the commandments and work out ethics later."*

1. Self-Determination
2. Impartiality
3. Conflicts of Interest
4. Competence
5. Confidentiality
6. Quality of Process
7. Communications by Mediator
8. Fees and Other Charges
9. Advancement of Mediation Practice



36

## Resources on How Mediators Think

- What if Jon Stewart and Stephen Colbert Reacted to Simon & Rhoades on Imperati on Bush and Folger! Mediate.com (September 2015).
- Ironically, Bush and Folger are Evaluative, Mediate.com (May 2015).
- Veils and Cloaks of Ignorance: Under-used Tools for Conflict Resolution, 30 Ohio St. Journal of Dispute Resolution 45 (2014-15).
- Why Does Anyone Mediate if Mediation Risks Psychological Dissatisfaction, Extra Costs and Manipulation? Three Theories Reveal Paradoxes Resolved by Mediator Standards of Ethical Practice, 29 Ohio St. Journal of Dispute Resolution (2014).
- If Freud, Jung, Rogers and Beck Were Mediators, Who Would the Parties Pick and What Are the Mediator's Obligation, 43 Idaho Law Review 643 (2007).
- Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation, 33 Willamette Law Review 703 (1997)

Links to above articles at: <http://www.mediate.com/icm/pg23.cfm>

37

## Next Steps



As a result of today's session, I'm going to:

- 1) Peruse ADR in Oregon  
<https://ebiz.osbar.org/ebusiness/ProductCatalog/Product.aspx?ID=4126>
- 2) \_\_\_\_\_
- 3) \_\_\_\_\_

38

## 10) Adjourn



**Go Forth and Mediate!**

**We're Out!**  
[Glad You Came](#)

39



**AGREEMENT TO MEDIATE – OREGON****Case Name:** \_\_\_\_\_ **Number:** \_\_\_\_\_

We, the undersigned participants, agree to utilize the mediation services of \_\_\_\_\_ (“Mediator”) to facilitate a settlement of the civil dispute between us, and acknowledge and accept the following terms and conditions:

1. The parties agree to submit this matter to mediation under the terms and conditions of ORS 36.180 to 36.210 and the Dispute Resolution System (“DRS”) of the Portland Metropolitan Association of Realtors® (“PMAR”). The Mediator shall act as an advocate for resolution and shall use his/her best good faith efforts to assist the parties in reaching a mutually acceptable settlement. The Mediator will maintain impartiality toward all parties.
2. Mediation is a voluntary process for settlement negotiation. In this context, mediators act as neutrals exclusively and do not represent any party or otherwise practice law. As a result, the Mediator will not give legal advice. Likewise, the Mediator is not a judge, nor does the Mediator have the power or authority to force a settlement on the parties. Participants are encouraged to consult with their own attorney regarding their legal rights and responsibilities and are advised to seek independent legal advice before executing the documents.
3. All statements made during the mediation process are deemed to be absolutely privileged and inadmissible for any purpose in any proceeding, unless expressly agreed otherwise in writing and signed by the parties. Except as provided, herein, the parties will not subpoena or otherwise require the Mediator to testify or produce records, reports, notes, or other documents reviewed, received, or prepared by the Mediator during the course of the mediation process.
4. The Mediator may hold a private meeting or “caucus” with one participant. Information revealed in a private meeting is confidential and will not be disclosed by the Mediator unless the participant authorizes disclosure.
5. The hourly rate for all mediators will be \$325.00 per hour, and shall be shared equally between all parties. Unless agreed otherwise by all parties, all mediations shall be scheduled for a minimum of four (4) hours. If there are two (2) parties to the mediation, an initial deposit of \$975.00 shall be paid by each party within ten (10) days following notice of scheduling of a mediation. If a mediation is scheduled within ten (10) days of the mediator’s appointment, all deposits shall be paid no later than three (3) business days prior to the date of mediation. If there are three (3) or more parties participating in a mediation (even if a single attorney represents the interests of two or more of them) the Mediator shall determine the amount and allocation of the initial prepaid deposit among them. A Mediator shall have the right to decline to provide mediation services if one or more of the parties fail or refuse to pre-pay any reasonable deposit, fee, charge or expense. However, the Mediator, in his/her sole discretion, may agree to allow the mediation to proceed upon reasonable assurances from the parties and their counsel that it will be promptly paid. Any dispute between the Mediator and the participants, including disputes regarding any potential conflicts of interest or payment of Mediator fees, costs or expenses, shall be submitted to PMAR, whose decision shall be final and binding. PMAR shall have the right in its sole discretion to remove and/or substitute a Mediator, should it decide that such action is in the best interest of the parties and the mediation process. The following refund policy shall apply to all Mediator fees:
  - (a) If a mediation is cancelled by agreement of all parties at least seven (7) days before its scheduled date, the prepaid fee, less the fees, costs or expenses actually incurred by the Mediator, shall be refunded.
  - (b) If a mediation is cancelled by agreement of all parties within seven (7) days of its scheduled date, the Mediator shall be entitled to retain one-half of the total deposit or the actual fees, costs and expenses actually incurred, whichever is higher, and the balance shall be refunded.
  - (c) If the mediation fails to last a minimum of four (4) hours, or such other minimum as agreed to by the parties in advance of the scheduled mediation, the Mediator shall be entitled to retain all prepaid fees up to that minimum together with all actual costs and expenses actually incurred.
  - (d) Refusal by any party to participate in a scheduled mediation shall not constitute grounds for a refund of any prepaid fees, costs and expenses (excepting only such costs and expenses not actually incurred) unless all parties have agreed that the refusing party need not participate, in which case the remainder of this refund policy shall apply;
  - (e) Additional unpaid Mediator fees, costs and expenses shall be paid by the parties within ten (10) days of the date of issuance of the Mediator’s billing statement, with interest accruing on any unpaid sums at the rate of 1.5% per month thereafter.
6. This agreement incorporates by reference all statutory provisions governing the mediation process that are not otherwise inconsistent herewith. The additional Rules of Mediation listed on the reverse side are expressly a part of the Agreement. The PMAR Guide to Mediation and DRS rules previously agreed to by the parties are hereby incorporated into this Agreement.

BY MY SIGNATURE BELOW, I HEREBY ACKNOWLEDGE THAT I HAVE REVIEWED THIS AGREEMENT TO MEDIATE AND THE RULES OF MEDIATION ON THE REVERSE SIDE AND AGREE TO THE TERMS THEREOF.

_____ PARTY	_____ DATE	_____ ATTORNEY	_____ DATE
_____ PARTY	_____ DATE	_____ ATTORNEY	_____ DATE

## RULES OF MEDIATION

1. Definition of Mediation. Mediation is a process in which an impartial person, the Mediator, facilitates communication between the participants to promote settlement, partial agreement, or understanding among them. The Mediator does not have the authority to decide any issue, but will attempt to facilitate the voluntary resolution of the dispute by the parties. The Mediator may suggest ways of resolving the dispute and offer an opinion (not legal advice), but may not impose his/her own judgment on the issues for that of the parties. The Mediator will not and cannot impose a settlement in the case. The participants are responsible for negotiating a settlement acceptable to them. The Mediator does not warrant or represent that settlement will result from the mediation process or that a settlement is in the best interests of any or all parties.
2. Ground Rules and Commitment to Participate in Good Faith. While no one is asked to commit to settle their case in advance of mediation, all participants commit to participate in the proceedings in good faith with the intention to settle. All participants also agree to abide by the following GROUND RULES: A) Comment Constructively & Specifically, B) One Speaker at a Time, C) Mutual Respect, D) Attack the Problem, Not the Person, E) Explore All Options Fully & Specifically, F) Keep an Open Mind.
3. Authority of Representatives. PARTY REPRESENTATIVES MUST HAVE AUTHORITY TO SETTLE AND ALL PERSONS NECESSARY TO THE DECISION TO SETTLE SHALL BE PRESENT OR AVAILABLE BY TELEPHONE.
4. Time and Place of Mediation. The Mediator shall fix the time, duration, and location of each mediation session.
5. Privacy. Mediation sessions are private. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the participants and with the consent of the Mediator.
6. Confidentiality. All statements made during the entire mediation process (including pre and post mediation session communications) are deemed to be absolutely confidential, privileged, and inadmissible for any purpose in any proceeding. The mediation process begins as soon as the Mediator is contacted by any of the participants and ends when the Mediator or one of the parties declares the mediation terminated. Confidential information disclosed to a Mediator by the parties or by anyone during the course of the mediation process shall not be divulged by the Mediator unless the participants authorize disclosure or disclosure is authorized by law. Except as provided herein, the Mediator shall not be compelled to divulge any documents/records or to testify in regard to the mediation process in any proceeding or forum. The parties shall not subpoena or otherwise require the Mediator to testify or produce documents received, reviewed or prepared by the Mediator during the course of the mediation process, except in regards to a Memorandum of Settlement, as discussed below.
7. No Stenographic Record. There shall be no stenographic record of the mediation process and no person shall tape record any portion of the mediation session. The Mediator and the participants shall be allowed to take personal notes during the mediation session.
8. No Service of Process at or near the site of the Mediation Session. No subpoenas, summons, complaint, citations, petitions, writs, or other process may be served at or near the site of any mediation session upon any person entering, attending, or leaving the session.
9. Termination of Mediation. The parties should strive to reach a mutual settlement during the scheduled mediation meeting. However, if the parties concur that further mediation may be successful, they may continue the process by telephone or meeting. The mediation shall be terminated: a) by declaration of the Mediator or b) by declaration of any one party that he/she no longer wishes to participate for any reason. However, unless or until a) or b) occur, the mediation process shall be deemed to be continuing, and all rules of mediation shall apply.
10. Fees, Costs and Jurisdiction. Any participant breaching these Rules shall be liable for and indemnify the non-breaching participants for all costs, expenses, liabilities, and fees, including attorneys' fees, which may be incurred as a result of such breach, including at trial, arbitration, or appeal therefrom.
11. Disputes. Any dispute between the Mediator and the participants, including those regarding any potential conflicts of interest or payment of Mediator fees, costs or expenses, shall be submitted to PMAR, whose decision shall be final and binding. PMAR shall have the right to remove and/or substitute Mediator, should it decide, in its sole and absolute discretion, that such action is in the best interest of the parties and the mediation process.
12. Interpretation and Application of Rules. The Mediator shall have sole authority to interpret and apply the Agreement to Mediate and these Rules.
13. Settlement. If the parties reach a settlement during mediation, they may request that the Mediator prepare a memorandum containing the essential terms and conditions of settlement ("the Memorandum of Settlement") which may be subsequently incorporated into a formal document or documents to be prepared by the parties. ***If a Memorandum of Settlement is signed by the parties, unless expressly agreed otherwise in writing and signed by the parties, it will not be "confidential" and could be used by either party in any subsequent legal proceeding or arbitration***
- 14.
15. ***. In the event of any subsequent legal proceeding or arbitration in which the Memorandum of Settlement, or any portion thereof, is sought to be enforced, the Mediator may be called to authenticate the document and signatures, but will not otherwise be required to testify or produce any other evidence. If the Mediator is brought into such proceeding, he/she shall be paid for all of his/her time at his/her prevailing rate for such services, by the party requesting the Mediator's participation.***

## Greetings:

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.” My background information is attached.

**Date and Time:** March 2, 9:30 AM to completion

**Location:** Zoom with Invite to follow

**By February 23, 2022, please complete the following tasks:**

- 1) Review, sign, and return PMAR’s form **Agreement to Mediate**.
- 2) Submit the required **advance deposit** in the amount of \$975.00 pursuant to paragraph five (5) of the Agreement to Mediate. (ICM’s tax identification number is 93-1120384.) Our fee, plus expenses, is to be split evenly between the parties unless otherwise agreed in writing.
- 3) In advance, please send me a **confidential case summary** (approximately 5-10 pages) in Word to help me prepare for the mediation. Any exhibits can be sent as a separate PDF file. This analysis should cover the following topics:
  - a) brief review of the procedural status of the case;
  - b) brief factual overview;
  - c) list separately the key factual and legal issues including a detailed “damages” analysis;
  - d) bullet-style list of your factual/legal strengths;
  - e) candid, bullet-style list of the other party's factual/legal strengths, along with your response;
  - f) underlying business or personal needs of *both* parties from a non-monetary perspective;
  - g) history of settlement discussions including the last proposals and “whose court the ball is in;”
  - h) your view as to the past & current barriers to settlement including your realistic view of the settlement range;
  - i) **highlighted** copies of the key documents;
  - j) summary of any other information or **highlighted** documents that will assist me in working with you; and
  - k) tell me specifically whether a party representative with complete authority to fully resolve all issues will be present because we cannot proceed meaningfully without the actual decisionmakers at the table.

Finally, I have attached a form mediation [Memo of Understanding](#) for your consideration. We will edit and complete it upon settlement. If you prefer your own version, please send me a Word version in advance.

I look forward to working with you. Please contact me with any questions, comments, concerns, or suggestions.

[Thanks, Sam](#)

**Sam Imperati, JD | Executive Director**



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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. Each party will bear their own fees, costs and expenses.

3) All pending legal actions shall be promptly dismissed with prejudice.

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 complaint, claim or investigation against any other party with any governmental agency or professional association.

5) Terms:

(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)

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 terms or documents necessary to implement this settlement shall include:

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- ☐ 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) Notwithstanding termination of the mediation, the terms of the Agreement to Mediate shall remain valid and enforceable.

12) 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.

13) 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

