



Community Solutions of Central Oregon

MODULE 5 Overview

Ethics and Standards

Oddly enough, anyone in the state of Oregon can hang out a shingle and claim that they are a mediator. There is no formal training required. However, if someone wishes to mediate in a Community Dispute Resolution Center, (there are 17 around the state) or in the Courts, they must complete the 32 Hour Basic Mediation Course. In addition, the Circuit Courts require an additional 8-10 hours of court training to be able to mediate small claims and landlord tenant cases.

Those who mediate in a Community Dispute Resolution Center or Circuit Court agree to abide by the Oregon Mediation Association's Core Standards of Mediation Practice. This is laid out in detail on pages 4-13.

Confidentiality is a very important aspect of mediation and what is and isn't confidential is laid out on page 14. There is an old adage in mediation that says "If you heard some information for the first time in mediation then it's confidential."

Read the Ethical Considerations on pages 15-16 because you may run across similar scenarios.

Ethical Responsibilities of the Mediator

Mediators should be aware of, guided by, and adhere to appropriate standards of conduct based on their membership in professional mediation associations. Below is a summary of the Core Standards of Mediation Practice adopted by the Oregon Mediation Association (the full text follows this summary):

- **Self-determination.** Mediators shall respect, value, and encourage the ability of each participant to make individual decisions regarding what process to use and whether and on what terms to resolve the dispute. Mediators shall honor the voluntary nature of mediation (except where mandated by a court) and shall respect a participant's choice to suspend or discontinue mediation.
- **Informed consent.** The mediator shall educate the participants about the mediation process to ensure their understanding of and their consent to engage in mediation and in reaching agreements in mediation, including providing opportunities for participants to consult with outside experts.
- **Impartial regard.** The mediator shall be free from favoritism or bias in both word and action toward all parties, and shall serve all participants as opposed to a single party. The mediator has a duty to disclose any potential or actual conflicts of interest.
- **Confidentiality.** The mediator shall inform the parties of the extent to which communications will be kept confidential, as well as any exceptions to confidentiality, and act accordingly.
- **Process and substantive competence.** The mediator shall accurately represent their knowledge, skills, abilities, and limitations and shall contract to provide services only if they are available to mediate the case in a timely manner and can provide the process and knowledge sets needed to satisfy the participant's reasonable expectations.
- **Good faith participation.** The mediator shall encourage participant good faith efforts to communicate and negotiate in a manner that supports open, honest dialogue; an open mind; and an interest in using the process to promote resolution of the issues.
- **Fees.** The mediator (or appropriate staff person) shall inform participants of the basis of any mediator compensation, fees, and costs, both verbally and via a written agreement prior to entering substantive discussions. Fees shall not be based contingent upon the outcome of the mediation.
- **Advertising and solicitation.** The mediator shall be truthful in advertising and solicitation activities and shall not make promises or guarantees of specific results. Mediators shall not identify in their advertising or solicitation activities individuals, organizations, or entities as mediation participants

without prior consent. Mediators shall not claim designations such as “certified”, “qualified”, or “advanced” unless such status has been granted to them by a granting entity. Mediators are not “certified” simply because they have received a certificate of training completion.

- **Dual roles and hybrid process.** The mediator shall engage only in the role for which the participants have consented (mediation, mediation-arbitration, arbitration-mediation). Mediators who undertake dual roles assume additional obligations and potential liabilities. Mediators shall not give legal advice and shall encourage parties to get independent legal advice when legal issues exist. Mediators shall consider the impact on their Impartial Regard when they are engaging in dual roles and hybrid processes.
- **Mediation practice.** The mediator shall act in a manner that enhances the integrity and quality of the mediation field.

Oregon Mediation Association (OMA)

Core Standards of Mediation Practice

Preamble

These Core Standards of Mediation Practice are designed as an educational tool to: (1) guide mediators in Oregon in the practice of mediation, (2) inform participants about mediation, and (3) promote public trust and confidence in mediation as an effective and productive process for resolving disputes. Each member of the Oregon Mediation Association (OMA) agrees to abide by these Core Standards when serving as a mediator. These Core Standards recognize that the role of mediator is complex, individual practice areas vary, and a full spectrum of personal, professional, and cultural diversity surrounds mediator approaches. These differences are valuable. These Core Standards should not be construed to favor or disfavor any approach.

These Core Standards guide mediators in demonstrating their professionalism and represent a next step in the ongoing development of mediation as a tool that truly allows participants a viable and reliable choice when determining the appropriate way to resolve their differences. The Core Standards and the Comments that follow each of them are not intended to dictate conduct in a situation, define “competency,” establish “best practices,” or create a “standard of care.” They are not intended to be disciplinary rules. The use of the word “should” is intended to guide, not limit the exercise of the mediator’s individual judgment in the actual application of these Core Standards in a situation. The chosen order and format of the Core Standards and Comments are not intended to reflect any relative priority. The Comments are provided to give additional guidance and aid in the interpretation of the Standard.

When these Core Standards conflict with or are silent on subjects covered by applicable laws, regulations, professional licensing rules, professional ethical codes, or contracts by which the mediator may be bound, mediators should be aware and make participants and others in attendance aware that those requirements may take precedence over these Core Standards.

Definitions

Mediation is defined in Oregon as “. . . 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 a resolution is agreed to by the parties or the mediation process is terminated.” (Oregon Revised Statutes 36.110(6))

Party is defined in Oregon as follows “. . . a person, state agency or other public body is a party to mediation if the person or public body participates in a mediation and has a direct interest in the controversy that is subject of the mediation.” (Oregon Revised Statutes 36.234)

Participant is used in these Core Standards as a substitute for the term party as defined above, because the term is less adversarial and better reflects the important differences between the mediation and adjudication processes. As used in these Core Standards, the term participant does not include the mediator, representatives, or others in attendance.

Approach is used in these Core Standards to signify the behaviors, philosophies, processes, styles, and techniques used by mediators to conduct mediation.

I. Self-Determination

Mediators respect, value, and encourage the ability of each participant to make individual decisions regarding what process to use and whether and on what terms to resolve the dispute.

Comments:

Self-determination is a fundamental principle of mediation that distinguishes it from other dispute resolution processes, including, but not limited to, litigation. Participants should be free to choose their own dispute resolution process, and mediators should encourage them to make their own decisions on all issues.

Mediators respect the culture, beliefs, rights, and autonomy of the participants. Mediators should defer their own views to those of the participants, recognizing that the collaborative interaction between the participants is often the key to resolution.

Mediators should educate participants about the continuum of mediation approaches and identify the approaches the mediator practices. Engaging the participants in a discussion to establish expectations about these approaches will help the participants give their Informed Consent to the approach best suited for their situation.

While a mediator cannot ensure that participants are making informed and voluntary decisions, mediators should help participants understand the process, issues, and options before them and encourage participants to make informed and voluntary decisions.

Mediators should encourage participants to consider the benefits of participation in mediation and agreement, as well as the consequences of non-participation and non-agreement.

Participation in mediation is usually a voluntary process. Even when mediation is “mandatory,” participants who are unable or unwilling to participate effectively in the mediation process should be free to suspend or withdraw from mediation. Mediators should respect a participant’s informed decision to continue or end the process.

II. Informed Consent

To fully support Self-Determination, mediators respect, value, and encourage participants to exercise Informed Consent throughout the mediation process. This involves making decisions about process, as well as substance, including possible options for resolution. Initially and throughout the mediation process, mediators further support Self-Determination by making appropriate disclosures about themselves and the specific mediation approaches they use.

Comments:

Informed Consent is a critical part of a participant’s ability to exercise Self-Determination.

Mediators should disclose or offer to disclose the information reasonably necessary for each participant to make informed decisions about whether to use the mediator and whether to participate in a specific mediation process and approach. Mediators should explain their approach, along with the roles of the mediator, participants, representatives, and others in attendance.

Mediators should seek participant agreement on the presence or absence of persons at the mediation.

Mediators should disclose information regarding conflicts of interest, fees, relevant relationships, process competency, and substantive knowledge of the subject matter in dispute. Mediator disclosures should be truthful and not misleading by omission.

Mediators should make ongoing, good-faith efforts to assess the freedom and ability of each participant to make choices regarding participation in the mediation and options for reaching agreement. In assessing the situation, the mediator should consider factors such as the abilities, learning style, language competency, and cultural background of each participant. Mediators should suspend, end, or withdraw from the mediation if they believe a participant is unable to give Informed Consent.

Mediators should make participants aware of the importance of consulting with other professionals to help them exercise Informed Consent and Self-Determination.

If a participant withdraws from a multi-participant mediation, the mediator may continue the mediation with the Informed Consent of the remaining participants. The mediator should explain to the participants, representatives, and others in attendance that the withdrawing participant is not bound by any subsequent agreement but continues to be bound by any confidentiality obligations in place prior to the withdrawal.

III. Impartial Regard

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.

Comments:

Mediators should make reasonable inquiry, based upon practice context, whether there are facts that a reasonable person would consider likely to create a potential or actual conflict of interest.

If there are any circumstances that reasonably raise a question as to the mediator's ability to demonstrate Impartial Regard, the mediator should disclose or offer to disclose information about those circumstances to the expressed satisfaction of all participants. Disclosure should include actual and potential conflicts of interest reasonably known to the mediator, as well as any present or prior relationship, personal or professional, between the mediator and any participant, representative, or other person in attendance. After disclosure or offer to disclose, a mediator may serve with the Informed Consent of all participants.

Mediators should guard against the potential impact on their Impartial Regard, even to the point of not serving, of a participant's personal characteristics, background, values, beliefs, or conduct during the mediation process. This also includes situations where the mediator's ability to demonstrate Impartial Regard is compromised or appears to be compromised because of the mediator's personal biases, views, or reactions to any position, argument, participant, representative, or other person in attendance.

Mediators should not influence participant decisions because of the mediator's interest in higher settlement rates, increased fees, or non-participant pressures from court personnel, program administrators, provider organizations, the media, the public, or others. Mediators do not knowingly misrepresent any material fact or circumstance during the mediation process.

Mediators should explain or offer to explain that they are not acting on behalf of or representing any participant. Whether participants have attorneys, mediators should advise them to seek independent legal advice and the review of any documents before signing them.

Mediators should avoid conflicts of interest when recommending or referring participants to other professionals for services.

IV. Confidentiality

Confidentiality is a fundamental attribute of mediation. Mediators discuss confidentiality issues as soon as practical and before confidential information is provided by anyone. Mediators are aware of, comply with, and make participants, representatives, and others in attendance aware of (or determine they already are aware of) laws and regulations regarding confidentiality, non-discoverability, and inadmissibility of mediation communications, as well as any applicable exceptions.

Comments:

Mediators should understand the laws and regulations regarding open meetings and public records, as well as any exceptions applicable to the cases they mediate.

In advance of receiving confidential communications, mediators should educate themselves and inform all participants about their reporting obligations (e.g., mandatory Child Abuse or Elder Abuse reporting) and how those obligations influence the way the mediators conduct mediation.

Mediators who meet with participants in private during mediation should not convey confidential mediation communications without the prior consent of the disclosing participant.

The obligation for mediators to protect the confidentiality of mediation communications includes the obligation not to communicate information about how participants acted during the mediation process.

Mediators should not use information acquired during mediation to gain personal advantage for themselves or others.

The definition of mediation in ORS 36.110 (6) can include facilitation, a process different from mediation. Thus, laws and regulations regarding confidentiality, non-discoverability, and inadmissibility of mediation communications, as well as any applicable exceptions, may apply to a facilitation process.

V. Process and Substantive Competence

Mediators fully and accurately represent their knowledge, skills, abilities, and limitations. They mediate only when they offer the desired approach and possess the level of substantive knowledge, skills, and abilities sufficient to satisfy the participants' reasonable expectations.

Comments:

Mediators should exercise their independent judgment when their abilities or availability are unlikely to satisfy the participants' articulated expectations. When exercising their judgment, mediators should consider factors such as the participants involved, their agreed-upon mediation approach, and the complexity, subject matter, and specific issues of the dispute.

Mediators should have, maintain, and improve their process skills and substantive knowledge necessary to reasonably satisfy the expectations of the participants in the matters they mediate.

Mediators should strive to satisfy the reasonable process expectations of the participants by raising timing and pacing issues with the participants, representatives, and others in attendance.

Mediators should have information regarding their training, education, and experience readily available for review by the participants prior to the mediation session.

Mediators should be aware of and comply with the requirements of the Americans with Disabilities Act (and similar federal, state, and local laws and regulations), along with the laws regarding domestic violence, child abuse, and elder abuse. Additionally, mediators should be aware of and comply with the laws and regulations concerning their obligations, if any, in situations where the mediation is being used to further illegal conduct.

VI. Good Faith Participation

Mediators explain to the participants, representatives, and others in attendance that they can improve the mediation process and probability of success when they participate with an open mind throughout the process.

Comments:

Mediators should promote honesty and candor and inform participants that the mediator is not a guarantor of the participants' Good-Faith Participation.

In a manner that does not violate Confidentiality, mediators should discuss with the participants any concerns regarding Good-Faith Participation and the impact of these concerns on the process and on the mediator's Impartial Regard.

VII. Fees

Mediators inform participants of the basis for any mediator compensation, fees, and costs, including the source of the payment, as soon as practical and prior to substantive discussions. Mediators charge reasonable fees, considering, among other things, the mediation service, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary in the community.

Comments:

Mediators should not charge fees in a manner that impairs the mediator's Impartial Regard. While a mediator may accept payments in unequal amounts from the participants, the mediator should be attentive to the real or perceived impact unequal payments may have on the mediator's Impartial Regard.

Mediators may pay for listings or membership in referral organizations or services and accept referrals from those organizations or services.

Mediators who charge fees should have written fee policies or agreements.

Mediators should promptly account for and return any unearned compensation, fees, and costs.

Mediators should not charge fees contingent on the substantive outcome of the mediation.

Mediators should consider the impact on their Impartial Regard if they give or accept anything of value for a referral. The payment or acceptance of anything of value for a referral will compromise the mediator's Impartial Regard if there is a resulting expectation of biased behavior or results from the mediator.

Mediators may accept or give symbolic gifts, incidental items or supporting services that are provided to facilitate the mediation or respect cultural norms, if such practice does not impact the mediator's Impartial Regard.

VIII. Advertising and Solicitation

Mediators are truthful and not misleading by omission in advertising and solicitation activities. Mediators do not make promises or guarantees of specific results.

Comments:

Mediators should not make themselves publicly available to serve unless they can meet participants' reasonable expectations that they are qualified.

Mediators should claim designations such as "certified," "qualified," or "advanced" only if such status has been granted to them by an entity that provides such designations to practitioners, the granting entity has a formalized procedure for granting such designations, that procedure is readily available for public review, the mediator currently holds the stated designation, and the mediator names the granting entity. Mediators are not "certified" simply because they have received a certificate of training completion.

Mediators should not solicit business in a manner that could impact their Impartial Regard or otherwise undermine the integrity of mediation as a viable process to resolve disputes.

In their advertising or solicitation activities, mediators should not identify individuals, organizations, or entities as mediation participants without their prior permission.

IX. Dual Roles and Hybrid Processes

Mediators engage only in the role(s) to which the participants consent during mediation or any hybrid process that includes mediation, e.g., "mediation - arbitration" ("med-arb") or "arbitration - mediation" ("arb-med"). Mediators do not provide participants with legal advice, therapy, counseling, or other professional services during mediation without the prior Informed Consent of the participants. Mediators do not engage in any other services for any of the participants involving the same or significantly related issues, unless the other participants provide their Informed Consent. Before providing such services, mediators consider the impact that providing additional services for any participant may have on the other participants' views of the mediator's Impartial Regard.

Comments:

Mediating toward a voluntary agreement between the participants differs substantially from other service relationships. A dual role is created when the mediator provides additional services to the participants. Providing referrals, information, facilitation, education, and/or training does not create a dual role.

Dual roles can be challenging. Mediators should discuss with participants the differences between the various services that could be provided by the mediator or others.

Mediators who undertake a dual role assume additional obligations and potential liabilities. For example, if they are licensed or regulated in other fields, their actions as mediators may be governed by the regulatory and ethical codes and rules of those other fields.

Mediators should consider the impact on their Impartial Regard when they are discussing with the participants the possible acceptance of a dual role. Mediators should recommend that participants seek independent professional advice before they give their Informed Consent to the mediator performing a dual role.

X. Mediation Practice

Mediators act in a manner that enhances the integrity and quality of the mediation field.

Comments:

Mediators should participate in outreach and education efforts to assist the public in developing an improved understanding of and appreciation for mediation.

Mediators should improve and promote mediation by sharing their knowledge and skills through training, mentoring, and networking with others.

Mediators should participate in mediation research whenever practical.

Mediators should be open to and provide opportunities for feedback from mediation participants to enhance their mediation skills.

Mediators should work toward making mediation accessible to everyone in Oregon, including providing services at a reduced rate or on a pro bono basis, as appropriate.

Mediators should foster diversity in the field by reaching out to individuals with differing backgrounds and perspectives.

Mediators should demonstrate respect for differing points of view within the field, seek to learn from other mediators, and work together to improve the practice of mediation.

Mediators who charge a fee are encouraged to have malpractice insurance.

Mediators should model conflict resolution skills and use mediation in their own activities when appropriate.

Mediators should offer to mediate any concerns about their conduct raised by participants in their mediations to promote understanding between the participants and the mediator.

Mediators should have a file storage policy and advise the participants about that policy.

Mediators should be aware of and abide by rules governing the unlawful practice of law and unauthorized practice of psychology.

Mediators should provide these Core Standards to the mediation participants as soon as practical.

Organizations and programs that maintain rosters of, approve, appoint, or provide mediators should make reasonable efforts to ensure that each of their mediators is aware of and has agreed to abide by these Core Standards.

Confidentiality
An Overview of Selected Statutory Provisions
See ORS 36-220

Mediation **communications** ARE confidential unless the parties agree in writing that all or part of them are not. **Mediation communications** are verbal and written communications made about a mediation to a mediator, mediation program, party to or person present at a mediation.

The terms of a mediation agreement are NOT confidential unless the parties agree that all or part of the terms shall be confidential.

Exceptions:

Any mediation communication relating **child abuse or elder abuse** made to a person required to report (Mandatory Reporter) child abuse (ORS 419B.010) or elder abuse (ORS 124.050 to 124.095) is not confidential.

Mediators *per se* are **NOT** mandatory reporters of child or elder abuse. However, mediators have an obligation to report if:

- they are concurrently in a profession which **is** required to report; or
- parties to a mediation have signed an Agreement to Mediate which states that such abuse will be reported.

A mediation communication is not confidential if the mediator or party to mediation reasonably believes disclosure 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.**

A mediator or mediation program may disclose otherwise confidential matters for use in **research, training or education purposes**, if the identity of the parties or mediation is not disclosed or if the parties agree in writing to waive confidentiality.

Civil Liability:

Mediators and mediation programs are not civilly liable for the disclosure of confidential mediation communication unless it was made in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another. (ORS 36.210)

The statute is silent as to liability of a party disclosing confidential communications.

Some Ethical Considerations

For the situation set out below, identify (1) what facts raise possible ethical concerns, (2) what relevant portions of the Oregon Mediation Association Core Standards of Mediation Practice provide guidance for those concerns, and (3) what result might be suggested by those standards.

- A. You are a mediator with a non-profit community mediation center. You received a call from a woman who complained about how she was rushed into buying a used car from a local dealer. There have been several transactions since the original purchase in which the dealer attempted to satisfy the woman. But now she wants \$3000 for all the aggravation she's endured. During your call to the dealer, he indicates the woman signed a waiver against any further claims, and he's sure they'll prevail if she takes them to court. However, he wants to get her off his back, so if you can get her to settle for \$2000, he'll pay the center \$500. And he would be willing to have this arrangement with the center in the future if any cases come up. The woman reluctantly acknowledges she signed the waiver, but feels it's only fair that the dealer pay for his arrogance and all the trouble he's put her through. Your center has been limping along financially, so this money would be beneficial and help support all the other good work you do. Additionally, it would be an incentive for this large local business to use mediation instead of court for its customer complaints.
- B. You are asked by an employer to mediate a dispute between two employees. The employer will pay your fees. You have received professional services from the employer in the past but have no present or ongoing relationship. You have never met one of the employees, and know the other one casually from your visits to the office. You don't believe this prior acquaintanceship will affect your ability to work with them. The employer suggests that a decision to retain or fire either or both employees might be affected by how the mediation goes and expects a report after the mediation. The employees have not been told that their jobs may be at risk but have agreed that you can report the results of the mediation to the employer.
- C. You are a mediator in Small Claims Court and have seen a disturbing pattern in claims filed by a used car sales company against customers who have had their cars repossessed for non-payment. You have a suspicion that the dealer may be doing something unethical, maybe even illegal. Only one of the cases you've seen with this dealer has gone to trial and in that case the dealer lost. Today, the dealer is negotiating a settlement in this case that still requires the purchaser to pay off a large debt at a very high interest rate, but also makes it possible for the purchaser to get another car right away. The purchaser seems eager to settle on these terms because he feels he won't be able to get a car any other way and he must have a car to get to work and support his family.

- You feel sorry for him and really would like to see him go to court because you think he may win.
- D. You are a mediator in private practice and are mediating a settlement for a divorcing couple. You have been impressed by their willingness to work toward a fair settlement and the husband seems delighted that his wife is willing to pay him generous spousal support, more than the prevailing guidelines would suggest. In a private meeting with each of the parties just prior to reaching the final terms, the wife discloses to you that she has secretly transferred funds during the marriage into her Swiss bank account of which her husband has no knowledge. You believe that the husband would have a claim to half of the account. The wife reminds you that you are bound by confidentiality and cannot tell her husband about the account. Furthermore, if you do disclose its existence, she will not sign the settlement agreement, will not pay her husband any spousal support, and will sue you for breach of confidentiality.
- E. You are mediating a case in Small Claims court in which a landlord is evicting his tenant. The tenant is agreeable to leaving but needs another week to get his things out. The landlord insists that the tenant must be out by tomorrow night. You know that if they must go to trial to settle the dispute, they won't get before a judge for another 9 days and after that it will be another 4 days before the sheriff will forcefully evict the tenant. You consider having a private meeting with the landlord in which you can clue him in about the time frame and urge him to give the tenant the week the tenant has requested.

MODULE 5 Summary
Personal Reflection

Key learning points for me from the material and exercises in this Module:

For my own personal growth as a mediator, I need to pay attention to: