



Oregon State Agency Dispute Resolution Programs and Collaborative Problem-Solving Activities¹

**Mike Niemeyer, ADR Coordinator
Oregon Department of Justice**

1) CONFLICT AND CONFLICT RESOLUTION IN STATE GOVERNMENT	3
ARE WE CREATING CONFLICT, RESOLVING IT, OR JUST MOVING IT AROUND?	3
AGENCIES HAVE OPTIONS FOR HOW THEY MANAGE CONFLICT.....	3
ACHIEVING CANDID DIALOGUE AND OPEN GOVERNMENT.	4
IS RESOLVING YESTERDAYS DISPUTE REALLY THE WAY TO A FABULOUS FUTURE?	4
HIGHER GROUND, COMMON GROUND OR COFFEE GROUNDS?	5
CONFLICT & CONFLICT RESOLUTION TRENDS IN GOVERNMENT.	7
<i>The Headlines.</i>	7
<i>The numbers.</i>	8
<i>Required Job Skills for Public Employees.</i>	8
<i>Other Indicators.</i>	8
<i>An Informal Survey of Public Employees with ADR- Roles</i>	10
2) COLLABORATIVE PUBLIC POLICY	12
WHEN MAKING POLICY, AGENCIES SHOULD... ..	12
WHEN MAKING POLICY, AGENCIES MUST... ..	12
WHEN MAKING POLICY, AGENCIES MAY... ..	13
<i>Agencies may seek the views of the public or provide information forums.</i>	13
<i>Agencies may use a feedback or consultation process.</i>	13
<i>Agencies may seek agreement or consensus with affected stakeholders.</i>	14
3) MANAGING DISPUTES.....	17
PRINCIPLED PROCESS DECISIONS.	17
<i>Which process is most likely to be satisfactory to the state and other parties?</i>	17
<i>Which process will be most efficient?</i>	17
<i>Which process will be most effective?</i>	18
<i>Direct settlement negotiations make sense when</i>	19
<i>The use of a third-party mediator or facilitator is advisable when:</i>	20
<i>An adjudicated outcome is best when</i>	20
PRINCIPLED AGREEMENTS.	21
GOOD CONFLICT MANAGEMENT SYSTEMS.....	22
AVOIDING UNNECESSARY CONFLICT: GOOD INFORMATION.....	23
AVOIDING UNNECESSARY CONFLICT: GOOD PARTNERSHIPS.	23
<i>“Community Solutions Team” (now the Governor's Economic Revitalization Team).</i>	24
<i>The Columbia Basin Fish and Wildlife Authority</i>	24
<i>Oregon Solutions.</i>	24
WORKPLACE DISPUTE RESOLUTION AND ORGANIZATIONAL DEVELOPMENT.	24
<i>The Workplace Dispute Resolution Project</i>	25

¹ This report was first published April 2, 2009

<i>AFSCME/OHSU Workplace Partnership</i>	25
<i>The State Employee Mediator Program (SEMPR)</i>	25
<i>OD consultants and private workplace mediators</i>	25
CLAIMS AGAINST THE STATE, RISK MANAGEMENT & LITIGATION SETTLEMENT	26
FACILITY SITING.	27
<i>Controversy over Cornelius Group Home</i>	28
<i>Junction City Prison Advisory Committee (PAC)</i>	29
CONTRACT, PUBLIC IMPROVEMENT AND HIGHWAY CONSTRUCTION DISPUTES.....	29
<i>State contracts include dispute resolution clauses</i>	29
MEDIATOR PROCUREMENT.	30
THE AGENCY AS THE PROVIDER OF MEDIATION SERVICES (NON-REGULATORY).	31
<i>Community Dispute Resolution</i> ,.....	31
<i>Department of Consumer & Business Services, Regulatory Streamlining Roster</i>	31
<i>Department of Corrections Serious & Violent Crime Facilitated Dialogue Program</i>	31
<i>Employment Relations Board, State Labor Mediator</i>	32
<i>Department of Justice, Oregon State Mediator Roster & Mediator Price Agreements</i>	32
<i>PSU Oregon Consensus Program</i>	33
<i>ODOT Right of Way, Eminent Domain Mediation</i>	34
DISPUTES INVOLVING REGULATED PROFESSIONS AND INDUSTRIES	35
<i>Adoption & Child Welfare Mediation</i>	36
<i>Construction Contractors Board, Dispute Resolution Program</i>	37
<i>Education Dept, Special Education Mediation Services</i>	37
<i>Employment Department</i>	37
<i>Injured Workers, Ombudsman for</i>	38
<i>Land Use Board of Appeals (LUBA) Mediation</i> ,	38
<i>Liquor Control, Oregon Commission</i>	38
<i>Public Utilities Commission Consumer Complaints Section</i>	38
<i>Public Utilities Commission Hearings Section, Mediation</i>	39
<i>Vocational Rehabilitation Services (OVRs)</i>	39
<i>Workers Comp, Medical Review Unit</i> ,	39
<i>Workers Comp, Vocational Assistance Dispute Resolution</i>	40
<i>Workers Comp, Premium Audit Mediation Program</i> ,.....	40
<i>Workers Comp, Hearings Division, Mediation Program</i> ,	40
AGENCY DISPUTE RESOLUTION & COLLABORATIVE PROBLEM-SOLVING OPTIONS	42

1) Conflict and Conflict Resolution in State Government

ARE WE CREATING CONFLICT, RESOLVING IT, OR JUST MOVING IT AROUND?

To the property owner whose pristine view will soon include a new highway or to the ATV enthusiast who encounters a state park “*Hikers Only*” sign, their conflict may seem to be the creation of government. But for the solitude-seeking hiker or the rural commuter, government has successfully solved *their* problem and resolved *their* conflict. It could also be observed that, like some law of thermodynamics, the conflict was neither created nor resolved, but instead shifted from one forum to another. The following report reviews the impacts, trends and activities of Oregon’s dispute resolution programs and collaborative problem-solving efforts over the last two years.

AGENCIES HAVE OPTIONS FOR HOW THEY MANAGE CONFLICT.

State government is the place where citizens, their elected officials, and agencies negotiate the development, refinement, implementation and enforcement of public policy. While conflict is an inevitable and necessary component of this process, and of a civil society, the effective, fair and efficient resolution of conflict is not so inevitable. State agencies increasingly have choices in how they manage conflicts and solve complex problems and these process choices significantly affect the quality of life for Oregonians and the effectiveness of its government.

Like the capitol building itself, the functions of government operate between a firm foundation and a high ceiling. The law gives state agencies their specific authority and establishes minimum requirements for how the agency must conduct its business. Agencies are required, for example, to provide notices of certain agency actions, to make records available to the public and to conduct certain meetings in public. As with all foundations, these legal requirements are a starting point. High above this foundation are the hopes and aspirations for Oregon. The hope that government will be a trustworthy steward of public resources, produce good, fair, effective and efficient public policies and provide forums for peacefully resolving conflict. The Oregon constitution articulates some of these aspirations by declaring that “*governments are founded on their authority, and instituted for their peace, safety, and happiness.*” Oregon Constitution Article 1, Section 1.



Between the foundational requirements of government, and our aspirations for it, is a large rotunda containing the negotiable, discretionary, voluntary and creative processes needed to achieve those higher goals. Research here in Oregon and nationally has shown that collaborative processes have a place in this rotunda, in building trust, and in achieving creative and durable solutions to complex public problems. ORS 36, ORS 183.502 and various Executive Order 00-09 allow, but do not require, agencies to use processes that encourage parties to work together to develop mutually agreeable solutions to disputes.²

ACHIEVING CANDID DIALOGUE AND OPEN GOVERNMENT.

We recognize that some candor may be needed for parties to identify, discuss, and solve problems effectively. Unlike litigation, which relies on depositions and other forms of discovery, mediation depends largely on the voluntary disclosure of information by the parties as part of the negotiation process. This voluntary disclosure is often essential to get to the root of a problem, and yet such disclosure may be forthcoming only if the parties have some assurance that the information will not be used against them later. One solution to this challenge is ORS 36.224, which allows state agencies to participate in confidential mediation, but only after adoption of mediation confidentiality rules.

The availability of mediation confidentiality notwithstanding, agencies must still determine if the state's interests are better served by confidentiality or by greater transparency. Oregon has a long-standing policy of open government. The public has a right, for example, to inspect agency records and to attend public meetings. As a state, Oregon values effective dispute resolution and creative solutions to complex problems. Openness provides for greater public confidence in government. Too much confidentiality may raise concerns: if the public perceives the mediation process as "secretive" or "back room"; if a pattern of unlawful actions or behavior never comes to light because complaints are handled through individual, confidential mediations; if persons in disputes with the agency believe that their situations are being handled differently from those of other persons in similar situations; if the public is excluded from observing how the agency is handling issues in which the public has an interest; or, if the agency does not disclose a mediation communication that could have prevented a crime or injury. For more on mediation confidentiality see: <http://www.doj.state.or.us/adr/adr32.shtml>.

IS RESOLVING YESTERDAYS DISPUTE REALLY THE WAY TO A FABULOUS FUTURE?

By definition, the field of dispute resolution is about solving problems and resolving disputes. Although we see "interest-based" problem-solving as more enlightened, in that it seeks to solve a problem in a way that meets the interests of each party, it is still problem-focused. But in the areas of organizational

² ORS 183.502. Authority of agencies to use alternative means of dispute resolution: (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.

development³ and in psychotherapy some practitioners and theorists have suggested that the fastest way to a better future may be to focus on current strengths and on a vision of a more positive future. Rather than focusing on and solving problems (e.g., “Why is it that no one trusts each other in this workgroup?”), the topic of inquiry is around what the group or individual wants more of (e.g., “When have you experienced a high degree of trust? When has the agency been very successful at engaging the public?”)

For state agencies, like any large employer, a diagnosis of the “problem” is usually done before the agency seeks help with a workplace conflict. For HR professionals, mediators, and private consultants, the request may be for “communication skills training,” but a closer examination reveals that the employees are communicating just fine; the problem is they don’t trust each other. Rather than continuing to diagnose why there is a lack of trust, perhaps it would be more efficient to take a closer look at where trust was incredibly strong, and to build on that.

In several recent workplace mediations involving government agencies here in Oregon, employees had an opportunity to address past “offenses” but were then asked questions such as, “Can you think of a time when the relationship was going well,” or “Describe a time when things were going great.” This line of inquiry resulted in a significant decrease in the tension in the mediation and in a helpful discussion of what a better future might look like.

“What if, instead of seeing organizations as problems to be solved, we saw them as miracles to be appreciated? How would our methods of inquiry and our theories of organizing be different?”

“Appreciative inquiry, as a method of changing social systems, is an attempt to generate a collective image of a new and better future by exploring the best of what is and has been.”

Gervase R. Bushe Ph.D., “Advances in Appreciative Inquiry as an Organization Development Intervention” Published in the Organization Development Journal, Fall 1995 Vol. 13, No.3, pp.14-22.

HIGHER GROUND, COMMON GROUND OR COFFEE GROUNDS?

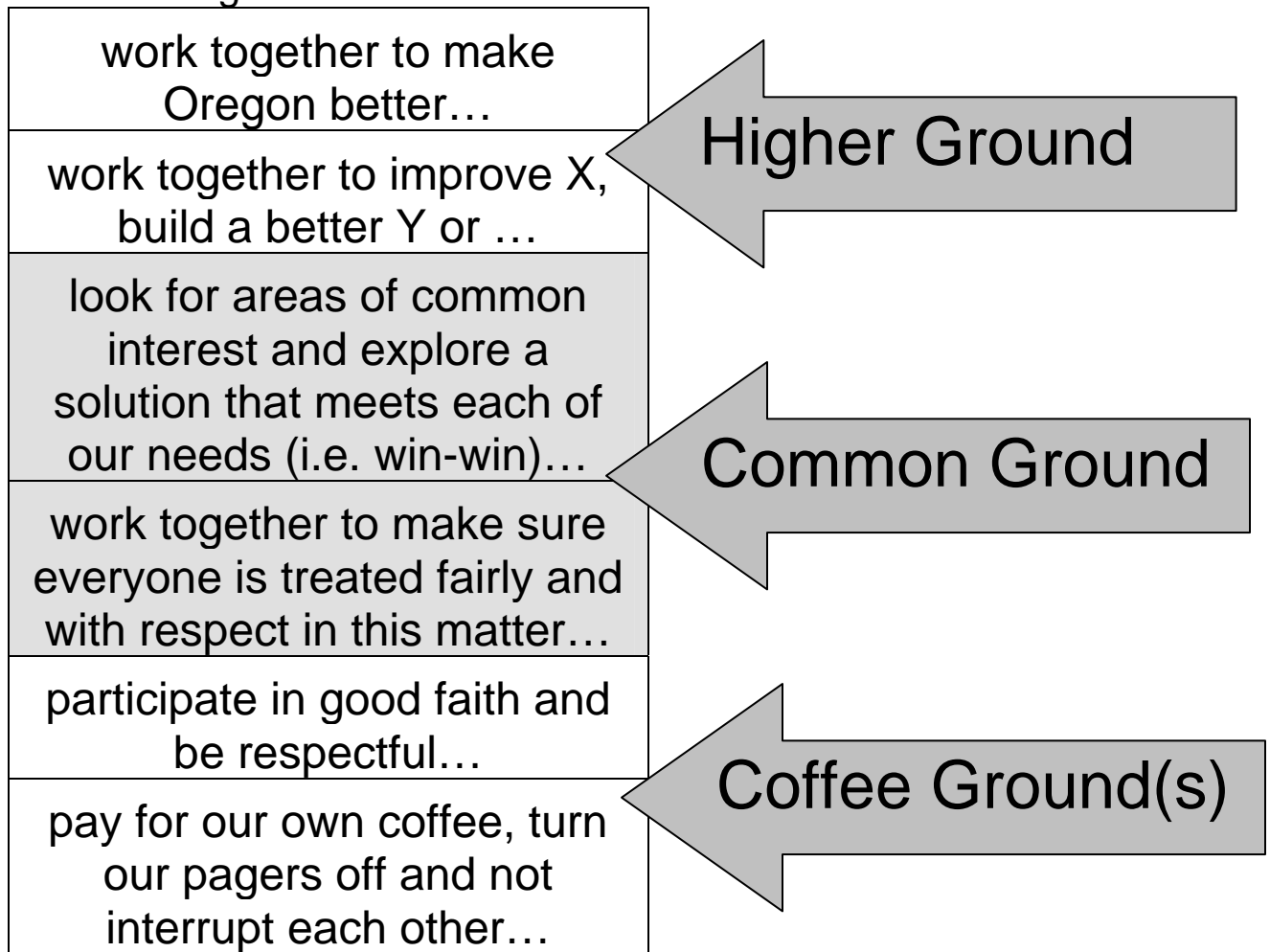
We’ve all been in a collaborative process that began with someone clarifying the “ground rules.” These rules typically establish minimal expectations for participants. Maybe we are thinking too small. Frank Dukes and John Stevens encourage parties to seek a bigger commitment:

3 *Appreciative Inquiry In Organizational Life.* In *Research in Organizational Change and Development: Volume 1* David Cooperrider & S. Srivastva (1987), pp.129-169. Greenwich, CT: JAI Press. Online at: <http://www.stipes.com/aichap3.htm>.

Also see *A Fusion of Strengths: A Positive Revolution in Change Leadership* (Aug 1, 2004) David Cooperrider at <http://appreciativeinquiry.case.edu/uploads/A%20Positive%20Revolution--draft.doc>.

“More essential than basic ground rules such as “no interruptions” and “listen first, ask questions later,” this establishing of “relatedness” among members can help create authentic community and sustainable agreements. It involves helping groups articulate the values that members hold dear, develop the principles that will guide their efforts, and set clearly the shared expectations that will be honored throughout their work. Going even beyond attempts at “win-win” solutions, ... group members can find that they can “connect with others in ways that affirm both oneself and the other,” transcend self-interest and “seek not just common ground but also the common good.”⁴

Can we all agree to...



⁴ Dukes, Frank and Stephens, John: *Reaching for Higher Ground in Conflict Resolution: Tools for Powerful Groups and Communities*. See: <http://www.virginia.edu/insideuva/2001/02/dukes.html>.

The Headlines. What conflicts grabbed the headlines here in Oregon? What do these cases have to say about the rule of law, “collaborative” governance, and “appropriate” dispute resolution? What would Snowball do?

On September 12, 2007, Oregon Department of Fish and Wildlife (ODFW) staff and law enforcement personnel served a search warrant on James Filipetti and Francesca Mantei and seized a black

tailed doe and a black tailed buck from their residence. Neither Mantei nor Filipetti had a license to hold the deer, as is required by state law. The black tailed doe, named “Snowball” by Filipetti and Mantei, quickly became a cause celebre⁵ in the news as members of the public began pressuring ODFW to return the doe to Filipetti and Mantei. Not being in the pet deer business, ODFW declined to return the doe. While ODFW determined it could not return the doe because Filipetti and Mantei did not have the necessary permits to possess the deer, and could not get the necessary permits, the Clackamas County District Attorney declined to prosecute the case. In October 2007, Filipetti and Mantei filed a Motion for Return of Things Seized Pursuant to Search Warrant, seeking return of the doe. DOJ argued in Clackamas County Circuit Court that Filipetti and Mantei couldn’t get the doe back because they could not legally possess the doe without the necessary permits which they did not have. Judge Miller in Clackamas County disagreed and determined that the private parties were entitled to the doe because they possessed it at the time it was seized under a search warrant. Judge Miller ordered ODFW to return the doe within 48 hours. ODFW stayed the order by filing a notice of appeal. The state ultimately won its case, affirming its authority to protect wildlife and the public, and Snowball is now at a commercial wildlife park near Roseburg, but the legal costs for this case were high.

Oregon Unemployment over 10%
Economist Projects State Revenue Shortfall
LNG Terminal
Wolves in Oregon!
OHSU v Clark
Home Mortgage Crisis hits Oregon



⁵ The public response was huge, as evidenced by this quote from KGW news: “KGW viewers nearly crashed our web site with the [volume and passion of their comments](#) after watching [video on live TV](#) Wednesday night as Oregon Dept. of Fish and Wildlife [removed two black-tailed deer](#) from the home of a Molalla Family that had taken in an injured doe five years ago. Viewers moved by the family's five-year investment in providing care and a home for the impaired deer ["Snowball" and its offspring "Bucky,"](#) given they apparently could not have survived if left or set free in the wild. Yet rules are rules, and the [ODFW points out that the family broke the law](#) five years ago when they aided and took "Snowball" in, and they've been in violation ever since. We have received literally HUNDREDS of posts in our online survey. In our (unscientific) [online poll](#), 99% of respondents want the deer to stay with the family.”

The numbers. In addition to big, headline-grabbing disputes, another measure of conflict and its impacts to state government and to Oregon is the *volume* of disputes received by state agencies. Calls to unemployment insurance centers, for example, went from 78,125 in January 2008 to 103,445 in January 2009. In response, the Oregon Employment Department added staff to speed processing of unemployment insurance claims and to answer calls. 86,690 calls were made to the DOJ Financial Fraud/Consumer Protection hotline between July 1, 2006 and June 30, 2008. There were 31,399 referrals to the Office of Administrative Hearings in 2007 and 2008.⁶ The Construction Contractors Board receives about 4,500 complaints in a year. The Manufactured Communities Resource Center receives about 3,000 calls per year from persons with questions or concerns about the many aspects of park living and so on.

Required Job Skills for Public Employees. Public employees at all levels must have the skills to work collaboratively with diverse and challenging groups. Facilitation and consensus-building skills are often listed as requirements for state agency job announcements. For example:⁷

- *“The ideal candidate will have skill and experience in interpersonal, team and large group communications; conflict resolution; and negotiating skills.”*
- *“Facilitation of state and local political and organizational relationships may sometimes include negotiation between groups and individuals with strong disagreement.”*
- *“Demonstrated ability to work collaboratively with diverse groups.”*
- *“...effectively leads groups to consensus, works well with others to accomplish team objectives, identifies situations needing persuasion/negotiation and effectively reaches conclusions, actively listens. Effectively leads groups to consensus...”*
- *“The _____ is responsible to create and advocate for enabling legislation, and to work in collaboration and partnership with state and local agencies, ... and the public to promoteservices.”*
- *“Develop programs and service plans for youth in collaboration with field staff and community partners.”*
- *“Gain consensus on implementation.”*
- *Participate in resolution of disputes where rule interpretations or policy clarifications are needed.*
- *Conduct negotiations and alternate dispute resolution with agency officials, Department of Justice attorneys, and industry representatives.*

Other Indicators. When it comes to indicators of conflict and conflict resolution trends in state government, the current recession and its impact on the state budget is the “800lb gorilla.” The legislature is considering 30% cuts to 2009-

⁶ See: http://www.employment.oregon.gov/EMPLOY/OAHOC/docs/OAH_Operations.pdf.

⁷ From the State Jobs website.

2011 state agency budgets and state courts have cut operating hours and services. With an increasing need for services, and declining revenues, state agencies will be squeezed along with public employees, the vendors who provide goods and services to agencies and Oregonians who rely on state services or support.

What do log haulers, homeowners who are experiencing a residential home foreclosure, and medical marijuana users have in common? They are the subject of legislation that includes mediation to resolve disputes. 2009 Alternative Dispute Resolution (ADR) related bills included:

- *SB 628 - Requires mediation between trustee and grantor before sale to foreclose residential. The current form of this bill (-1 amendments) set a mediator rate of \$125 an hour for maximum of 3 hours. It also has DCBS creating a roster of pro bono mediators. Testimony on this bill on 3/31/09 noted that there are currently 55 residential foreclosures a day in Oregon. This program would also create a need for low cost advocates for borrowers. Mediator qualifications include being a member of the Bar or qualified under Chief Justice Rule and received training in HUD settlement formulas.*
- *HB2348 - The Interstate Compact on Educational Opportunity for Military Children. The Interstate Commission shall promulgate a rule providing for both mediation and binding dispute resolution for disputes as appropriate.*
- *HB 3327 - Requires contractor to request mediation by Construction Contractors Board before bringing action or suit.*
- *HB 3117 - Exempts certain programs from mediation and negotiated resolution requirements for proposed publicly funded post-secondary programs that would have significant adverse impact.*
- *SB 281 - Requires that parties and attorneys in certain tort actions must participate in some form of dispute resolution within one year after action is filed instead of within 270 days after action is filed.*
- *SB 518 - Parties may not waive dispute resolution in certain cases arising out of provision of health care.*
- *SB 384 - Allows contractor who has public contract with Department of Transportation to request that board review contract in event of dispute between contractor and department.*
- *SB 388 - Medical marijuana (mediation available to resolve disputes).*
- *SB311 - Increases amounts recoverable in tort actions against public bodies.*
- *HB 2303 - An action brought by a service member to enforce a right or remedy under 50 U.S.C. App. 501 et seq. is not subject to court-ordered arbitration.*

An Informal Survey of Public Employees with ADR- Roles

Twenty one public employees, with ADR training or responsibilities, responded to a March 2009 survey indicating that they had a wide variety of ADR-related roles and experiences (Interestingly, 45% had experience as volunteer mediators.) Among these public employees there was a high degree of interest in using mediation skills at work

but limited opportunities to do actual 3rd party mediation. There was also the recognition that there were few “specialized” ADR positions in government but instead ADR principles and skills were a more common part of the position descriptions for public employees. There was a high degree of interest in continuing education and in coordination with other public ADR programs.

Regarding the success of public mediation programs, one respondent noted that mediation is available in their program but the parties don’t often choose it. One respondent felt that ADR in their state agency was becoming more legalistic with attorneys involved more (driving up costs). The increase in telephone-conference mediation over face-to-face was also see as an undesirable trend.

Some indicated that 3rd-party facilitated public policy mediation would still be used but only for the disputes with larger (e.g. statewide) impacts. A respondent stated *“Organizational leadership needs to value the role of ADR in business operations. In*

2. Please describe your ADR-related role(s) (please select all that apply):		
		Response Percent
Volunteer practitioner (mediator or facilitator)		45.0%
Paid practitioner (mediator or facilitator)		15.0%
ADR Program Administrator		35.0%
ADR Trainer		10.0%
ADR Consultant		10.0%
ADR Program Staff		20.0%
Educator		0.0%

3. Please describe your practice areas (please select all that apply):			
		Response Percent	Response Count
Community Mediation		25.0%	5
Workplace mediation		30.0%	6
Litigation Settlement Mediation		30.0%	6
Public Policy Facilitation or mediation		25.0%	5
Workplace Dispute Mediation or facilitation		10.0%	2
Family, domestic relations and child welfare mediation		15.0%	3
Elder Mediation		5.0%	1
ADA		5.0%	1
Court-Annexed		5.0%	1
Other (please specify)		50.0%	10

the past, more has been paid for professional consultants to review agencies and make recommendations than for ADR to elicit first hand perspectives from consumers and stakeholder and facilitate corrective actions that are applicable on a large scale or case-by-case.”

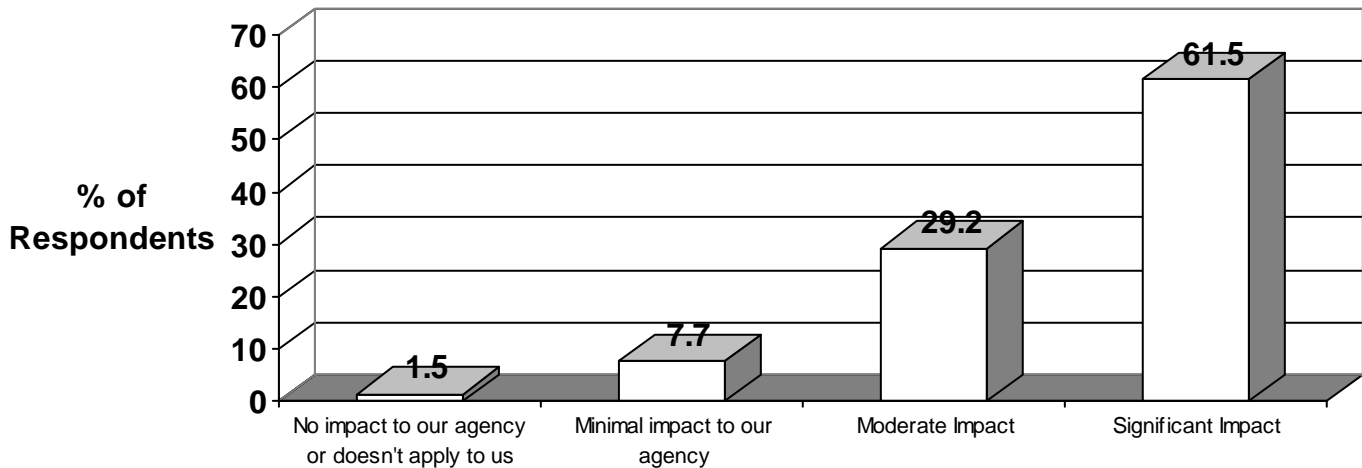
Regarding unassisted collaboration (e.g., direct negotiation or use of stakeholder advisory committees) it was noted that there are huge opportunities to expand but opportunities for outside, professional facilitation will probably continue at current levels. There was speculation regarding how the current fiscal crises would impact conflict and dispute resolution activities. Social service and health-related agencies have seen a surge in client contacts. There was also the hope that “*management, hr, unions could work out some general protocols for use of ADR in workplace.*” When asked to articulate short term (1 year) goals, the survey respondents provided the following:

	Goal	Measure
Awareness		
	Increase our Publicity and Outreach Presentations	We're trying to have at least one presentation per month.
	Greater Public awareness	Survey the public
	Develop website to communicate purpose of our program	
	More training on public policy/program ADR	
	Scheduled division wide discussions on strategies for ADR successes	
Increase ADR Provider resources		
	Add more folks to our Roster	
	Resolve more vocational disputes by letters of agreement.	Number of agreements in 2009 versus 2008
	Develop Facilitation Training and offer classes	Classes offered and attendance at those classes
	Recruit volunteer mediators	By the increased number of trained volunteers
	Create a volunteer facilitator resource available to state government	Measured use of that resource
Programmatic Goals		
	Create a learning community around facilitation	Regular meetings and attendance
	Resolve vocational disputes more quickly.	Length of time to resolve disputes in 2009 versus 2008
	Keep on going with the current budget cuts.	Dedicating staff for the continued effort.
	Improve Spanish language skill to be more effective with Hispanic workers.	Number of agreements that involve Hispanic workers.
	Identify more opportunities for applying ADR	
	Increase the Advisory Committee's role	By seeing their increased participation
	Encourage additional staff to attempt ADR conferences.	
Personal/Professional Development & Networking		
	Seek a position that will allow me to better utilize my skills and training in ADR.	Be actively employed in a position that utilizes my ADR abilities on a regular basis.
	Successfully mediate a dispute as a member of the State Mediators Roster	Both mediated parties will be pleased with and successfully implementing a workable solution.
	Have some exciting news to report at the second annual ADR Conference!	
	To become part of the mediation network and observe others mediate	I get an opportunity to mediate.

2) Collaborative Public Policy

Oregon state agencies make use of a wide variety of processes to engage the public in policy development (rulemaking), program and project implementation, and facility siting. This section discusses the permanent and temporary advisory committees that advise Oregon state agencies on policy development and implementation and the required and optional steps agencies take when dealing with contentious policy issues.

What is the significance of contentious or controversial public policy disputes for your state agency? (n=69)



WHEN MAKING POLICY, AGENCIES SHOULD...

Oregonians not only expect good public policies, they care about how those policies are developed. Oregon law and Executive Orders 96-32 and 00-09 encourage transparency, public involvement and collaboration in the formation of public policy, *“It is the policy of this state that whenever possible the public be involved in the development of public policy by agencies and in the drafting of rules. ... The agency may appoint an advisory committee that will represent the interests of persons likely to be affected by the rule ...”* ORS 183.333(1). State agencies should also take tribal interests into account when developing policies or implementing programs that affect Tribal interests.

WHEN MAKING POLICY, AGENCIES MUST....

When creating rules, state agencies *must* comply with public meetings laws and with requirements for agency rulemaking found in the Administrative Procedures Act. These requirements include providing notice of rulemaking action and convening a fiscal impact advisory committee when requested by 10 persons. Agencies may be required by law to create certain advisory committees.

Agencies may seek the views of the public or provide information forums. Although it may not be required, an agency may seek the views of the public or provide information using public hearings or other forums. If the agency wants to learn the views of the affected public or provide the public with information, an information exchange, such as a public hearings, project poster session, open house, tour or fact sheet may be used. Usually any citizen can participate. Government uses the process to inform the public and the public provides comment on the public policy or project.

Standing, Stakeholder Advisory Committee Example:

The Ginseng Advisory Committee was created to provide assistance to the department of Agriculture in the administration of the Ginseng Management Program. It consists of five members appointed by the director per OAR 603-060-0060.

Agencies may use a feedback or consultation process. If the basic issues are complex or controversial, and the agency wishes to secure advice while retaining the ability to make a unilateral decision, the agency may use a feedback or consultation process by creating, for example, a stakeholder advisory committee. These processes typically have a defined, rather than open membership; participants represent interest groups and the outcome is a recommendation to the agency head, a board or commission, or the governor. Well over 100 permanent advisory committees⁸ assist state agencies and elected officials. These are created by statute and usually specify the number of committee members and the types of interests that should be represented by its members. These standing committees and task forces are typically facilitated or chaired by a committee member or agency staff, rather than by a third-party facilitator.

Rulemaking Advisory Committee Example:

[State Parks ATV Rulemaking Advisory Committee](#)
An Administrative Rule Advisory Committee was formed to advise the Oregon Parks and Recreation Department on criteria for determining when ATV access should not be granted in a closed section of the ocean shore. The advisory committee included representation from park management, enforcement officers and an ADA advocacy group. Three Public hearings were held in North Bend, Newport and Salem.

In addition to these standing advisory committees, agencies also convene advisory committees for a limited duration to accomplish a specific task such as developing an administrative rule, providing advice on a facility siting or public improvement project, and preparing a report or resolving a dispute.

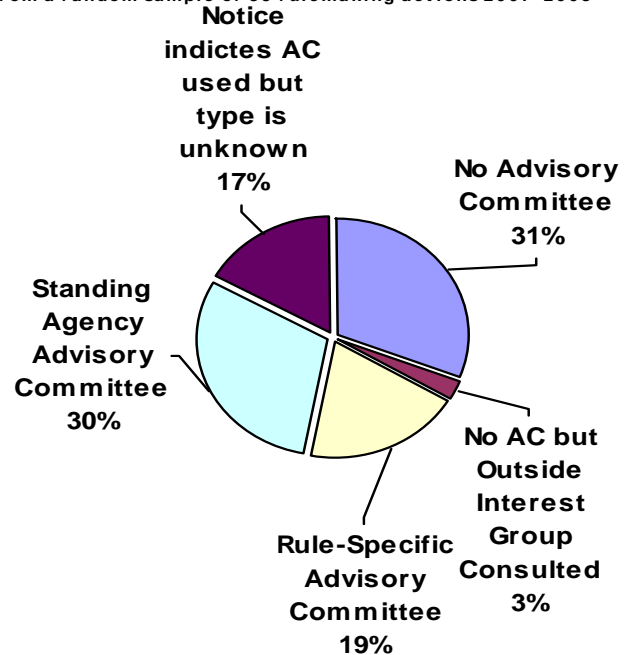
⁸ Other examples include the [Acupuncture Advisory Committee](#); [The State Parks ATV Advisory Committee](#); the [Oregon Bicycle and Pedestrian Advisory Committee](#) the [Oregon Bicycle Advisory Committee](#); [Oregon Medical Marijuana Program Advisory Committee](#); [Motorcycle Safety Advisory Committee](#); [Christmas Tree Advisory Committee](#); [Boiler Code Review Committee](#); [Committee for Family Forestlands](#); [Elevator Code Review Committee](#); [Federal Forestlands Advisory Committee](#); [Governors advisory on DUII](#); [Winter Recreation Advisory Committee](#); [Historic Columbia River Highway Advisory Committee](#); [Recreational Vehicle Code Review Committee](#); [Hatchery Research Center Advisory Committee](#); and the [Ginseng Advisory Committee](#).

State agencies filed 890 rulemaking notices in the period of July 1, 2007 through June 30, 2008. Of those, 561 included a notice of a rulemaking hearing.⁹ Thirty-five of these rulemaking notices were examined to evaluate public involvement in the agency rulemaking. In the statement of need form, 66% of agencies indicated that they had used a rulemaking advisory committee for that rulemaking. Some agencies who indicated that they had used an advisory committee apparently were referring to their own Board or Commission. A few agencies who indicated that they had not used a rulemaking advisory committee

nevertheless had consultation with a standing stakeholder advisory or a technical assistance committee in the development of the rule. Presumably, these agencies did not count these as advisory committees, for purposes of the rulemaking notice, because they had not consulted with the committee on the fiscal impact of the rule, a requirement of all advisory committees per ORS 183.333(3). Chart A shows that advisory committees created for a specific rulemaking are rare (19%). Of this 19%, a small percentage could be expected to be operating as Collaborative Rulemaking Advisory Committees.

Chart A - Advisory Committee Involvement in Rulemaking

From a random sample of 35 rulemaking actions 2007-2008



Agencies may seek agreement or consensus with affected stakeholders. If the agency wants to reach a joint agreement with affected and involved stakeholders, an agreement-seeking/decision-making process is used. These processes involve the development of an agreement that binds the participants, usually making decisions by consensus. These committees may meet over a few months or for a year or more to complete their work and generally use an outside contractor (provider) to facilitate the process. The Provider selection is usually done by a subcommittee representing key stakeholders in the process. As these processes are always custom designed to meet the objectives of the participants, the contractor must have extensive skill and experience with process design and should have some familiarity with the political realities and

⁹ From Julie Yamaka, Administrative Rules Manager, Oregon Secretary of State Archives Division, 12/8/2008.

laws that govern public meetings and policymaking.

The facilitator is usually expected to conduct an assessment, design the process and conduct meetings aimed at agreement or a consensus decision. These mediations and facilitations include the largest dollar amount contracts. In a sampling of contracts for complex public policy mediations, the average of 19 contracts was \$68,570, with a range of \$3,900 to \$290,000. For additional information on consensus-based rulemaking (also referred to as “collaborative rulemaking” or “negotiated rulemaking”), see: <http://www.doj.state.or.us/adr/adr3.shtml>.

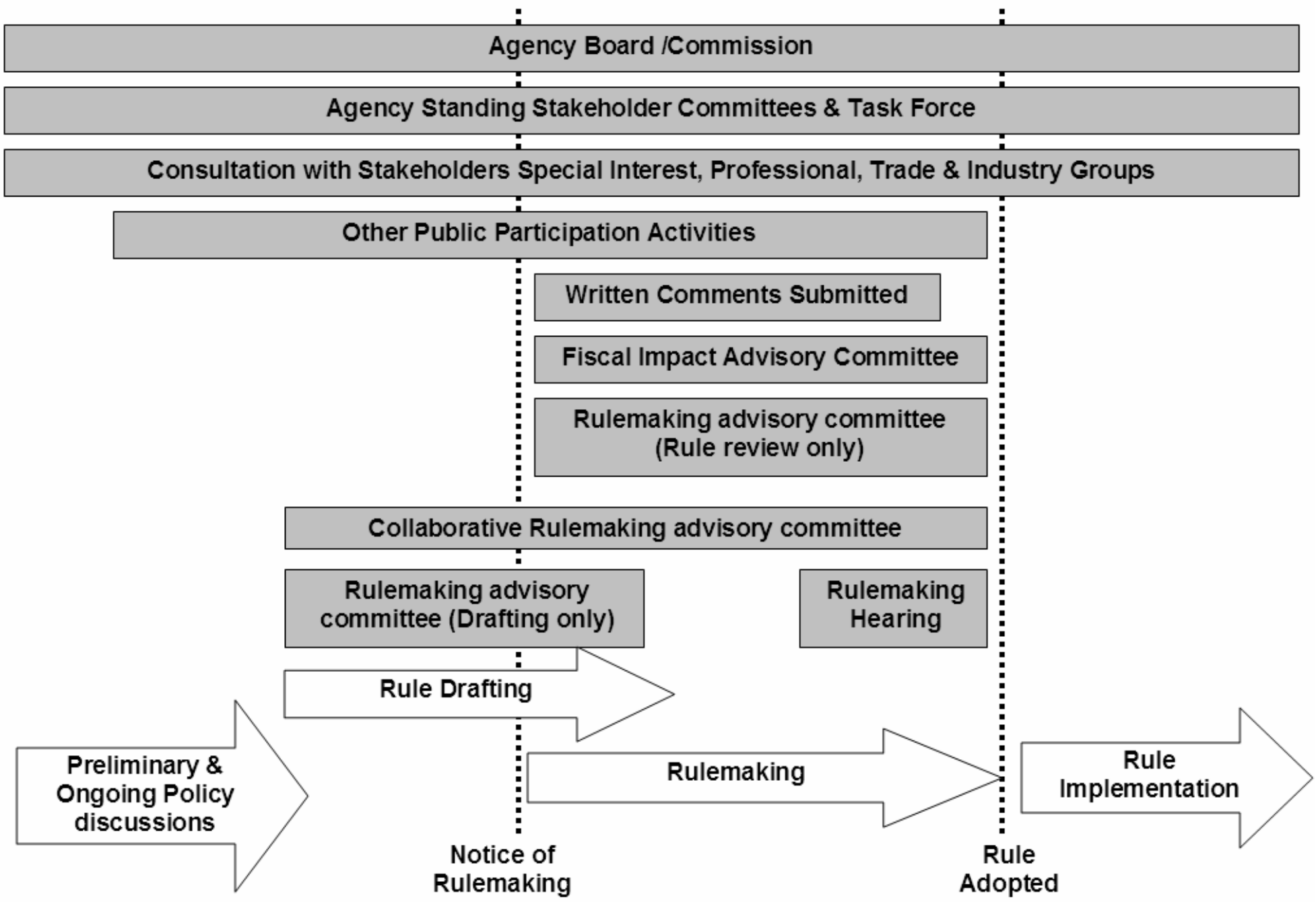
Consensus-Seeking Advisory Committee, Example:

The Oregon Department of Fish and Wildlife created the Wolf Advisory Committee. The committee was guided by a professional facilitator (Paul DeMorgan of Resolve) and chose to make substantive decisions by consensus, but allowed for a majority vote if consensus was unattainable. The committee included:

1. Livestock Producer
2. Trapper
3. Hunter
4. Wolf Conservationist
5. Range/Forest Conservationist
6. Wildlife Biologist/Researcher
7. Public Lands Manager
8. County Commissioner
9. Tribes
10. Educator
11. Economist
12. Rural Oregon Resident
13. 2 Citizens-At-Large
14. ODFW Staff (Regional Manager, Wildlife Biologist)
15. DOJ Assistant Attorney General

The committee operating principles are available at: http://www.doj.state.or.us/adr/doc/wolf_advisory_committee_operating_principles.doc

Public Participation in Agency Rulemaking



3) Managing Disputes

PRINCIPLED PROCESS DECISIONS.

With the expansion of dispute resolution options over the last 20 years, Oregon state agencies now have a variety of processes to choose from when resolving a particular controversy. Which process is best? What criteria should be applied when there are several options available? ORS 183.502(8) tells state agencies that the best process is one that is efficient, effective, and that is satisfactory to the agency and the public. ORS 36.100 also declares a preference for using collaborative forms of dispute resolution, including mediation. But state agencies must also be concerned that the outcome is legal and that an assessment of fairness also includes the broader public interest. The parties might be happy but is the agreement or solution legal? Is it consistent with the way the law, rules or policy have been applied in similar situations? Is it good for Oregon? Is it good public policy? We also must be concerned the process to get to this solution was efficient (i.e., the state spent fewer resources to achieve this outcome than would have been required using any other process), and was qualitatively better than we could have achieved through any other means (i.e., we might have come to an agreement or solved this using a different process or approach but we likely wouldn't have gotten as good a result). The desired outcomes for Oregon dispute resolution programs are codified in ORS 183.502(8), "The purpose of the agency alternative dispute resolution programs is to: (a) Increase agency efficiency; (b) Increase public and agency satisfaction with the process and results of dispute resolution; and (c) Decrease the cost of resolving disputes."

Which process is most likely to be satisfactory to the state and other parties? ORS 183.502(8) includes as a goal for agency dispute resolution programs, "Increase public and agency satisfaction with the process and results of dispute resolution." In an adjudicatory process like a jury trial, someone clearly wins and someone loses and one party will obviously be happier with the outcome than another. Obviously an advantage of a collaborative process is that it holds out the possibility that all parties can achieve a satisfactory outcome.

Which process will be most efficient? The most EFFICIENT process will be the one that is likely to achieve the desired outcomes at the lowest cost. In the case of a lawsuit involving a vehicle accident, for example, the ultimate liability is often within a predictable range (e.g., \$150,000 to \$400,000) regardless of whether the matter is resolved in a jury trial, mediation or through direct negotiations. With an average legal cost of \$9,500 for mediation and \$60,000 for trial, mediation would clearly be a more efficient process, and a better choice than a jury trial, should direct negotiations be unproductive. In other cases, however, where 100 million dollars or an important legal principle is involved, the cost of the process may be insignificant when compared with what is at stake. While settlement-mediation is usually less expensive than taking a matter to trial, the use of a collaborative, consensus-based stakeholder committee may not be less expensive than litigation, a contested case hearing or other option. If the desired outcome is

a creative solution, or a policy that has broad stakeholder support, a collaborative process may ultimately be more efficient.

Which process will be most effective? An effective conflict management process is one that achieves the party's specific (e.g., completing construction of new highway), and general (e.g., building greater trust between the agency and the community, ensuring consistent application of agency policy). For state agencies, effectiveness ultimately is measured by the extent to which agency activities make Oregon a better place.¹⁰ Oregon state agencies are held accountable for actual performance in advancing the goals for Oregon. From 2001 through 2008, the Oregon Department of Justice participated with the US EPA and other state and federal agencies in an evaluation of Oregon natural resources cases to determine if collaborative approaches to complex public policy problems resulted in outcomes that were better for Oregon's environment than the outcomes that might have been achieved through an alternative approach, such as litigation.

Oregon has been a pioneer in the use of performance-based measurement. It is not sufficient to show that agencies are working hard or have large numbers of cases, customers or activities. Agencies must show that their activity is leading, in some measurable way, to a better Oregon, that there is less hunger, less child abuse or cleaner water. These are articulated in Oregon Benchmarks, Key Performance Measures and Agency Operational Measures. KPM's are aligned with the agency strategic plans and reflect the outcomes that impact Oregon citizens. With respect to conflict management related performance measures, agencies have established measurable goals¹¹ for:

- *Increased Public Participation.* Some state agencies have set specific goals for increasing public participation in agency decisions and activities. The Oregon Board of Licensed Professional Counselors and Therapists measures the "Percentage of stakeholders involved in annual rules review, board meetings, and peer advisory committees." The Department of Land Conservation and Development tracks the "Number of stakeholder groups, including state, local, and tribal governments, who actively participate in workgroups that advise LCDC or DLCD on policy, operations or projects." The Teachers Standards and Practices Commission tracks the "Number of ad hoc committees appointed by Commission representing broad range of stakeholders."

¹⁰ See Oregon Shines III: http://www.oregon.gov/DAS/OPB/docs/BdUp08/Oct/OSIIIBusinessPlan_09-09-08_Final.pdf Oregon Shines and the Oregon Benchmarks are not specific to state government, but look at the broad progress of Oregon society

¹¹ Although no longer in existence the Oregon Dispute Resolution Commission worked with a variety of stakeholders to create statewide ADR-related performance measures for Oregon including: Percentage of Oregon residents with a community-based dispute resolution program serving their geographic area this year (87% in 2000 and 93% in 2001); Percent of all parties indicating that the collaborative processes they participated in consumed fewer resources than any alternative approach that could have been used to resolve the controversy (70% in 2001); Percentage of collaborative processes in community disputes that achieved agreement (75% in 2001); Percentage of collaborative processes (Public policy controversies) that achieved agreement (83% in 2001).

- *More ADR or settlement and less litigation.* To achieve more timely compliance, enhancing safe construction, the Department of Consumer and Business Services, Building Codes Division has set a target of “100% of cases closed through the use of alternative dispute resolution rather than proceeding to hearing.” The Employment Relations Board has a goal of “40% of cases assigned to an ALJ are settled or withdrawn prior to hearing” and the Board of Nursing has a goal of “resolving 97% of complaints via stipulated agreement or default on notices in lieu of contested case hearing.”
- *Conflict Avoidance through better Coordination.* The Oregon Department of Energy has a goal for “Coordination and efficiencies across offices and programs are increased” and the Department of Administrative Services tracks collaborative efforts with local partners by measuring the “number of collaborative projects since 2000 that have contributed to creating quality communities.” DLCD measures “Percent of state agencies with programs affecting land use that have agreed with DLCD on a process to align strategic goals, objectives, performance measures and projects.”
- *Durability & Quality of the Resolution/Agreement.* The Construction Contractors Board measures the “Percent of licensed contractors operating in Oregon that fail to pay in full final Dispute Resolution (claims) final orders for damages” and the Bureau of Labor and Industries has a goal of “85% of orders on appeal to the Oregon Court of Appeals are upheld.” DCBS tracks the “Percent of Workers’ Compensation Board decisions affirmed on appeal to the Judiciary” and DLCD has a goal of “100% of agency appeals of local land use decisions are upheld by LUBA and the Courts.”
- *Disputes Resolved Quickly.* The Department of Environmental Quality measures the “Percent of total permits that are expired (backlogged),” and BOLI has a goal of “65% of complaints are fully investigated within 180 days (statute allows up to 1 year).” The Construction Contractor’s Board has a goal of an “Average of 120 days to issue a dispute resolution claims final order.”
- *Perception of Procedural Fairness.* The Construction Contractors Board has a goal of “85% of people who are parties to claims perceive that the claims process is fair.”

Direct settlement negotiations make sense when:

- The agency needs the support or cooperation of the other parties to reach an optimal solution (i.e., we aren’t able to get what we want through unilateral action, avoiding the issue altogether or splitting the baby in the middle – we must actively engage the other parties to find a workable solution).
- The problem is more than just a distributive bargaining exercise. (“Distributive bargaining” refers to dividing a fixed pie or deciding who gets what portion of a limited resource.)
- The solution to the problem isn’t obvious.

- The parties can't run the risk of an adverse ruling or want greater control or predictability over the outcome than if this matter was resolved by a judge or jury.
- There is an on-going relationship with a party that is of value.
- There is no single result that we need achieve; we have a lot of flexibility in how we resolve this.
- The parties, and/or their counsel, are known to be reasonable and settlement discussion would likely be fruitful.
- The alternative (e.g., trial, contested case, new laws) would likely be difficult, costly or lengthy, given the issues involved.
- There may be benefits in one or more of the parties hearing directly from the principles without communications being filtered through their attorney.
- Major settlement efforts have not been attempted yet.
- The other side may be able to offer something more creative and more satisfactory than what would be available via litigation.

The use of a third-party mediator or facilitator is advisable when: A settlement is advisable (see criteria above under “negotiation makes sense..”) but direct negotiations with the other side have been unsuccessful because:

- A party, or their counsel, has unrealistic ideas regarding what they can achieve if this went to a judge or jury – and a mediator with experience in these matters may be able to help each side be more realistic about what the outcome at trial might be.
- There are strong emotions, a stalled negotiation process, or poor communication, and a skilled mediator could help improve communication, generate creative ideas, overcome impasse or address strong emotions better than the parties can do on their own.

An adjudicated outcome is best when: Most disputes involving state agencies are resolved before the matter gets to a hearing or trial. Of 435 cases going to the DOJ Trial Division, for example, 61% were dismissed, 29% settled and only 10% resulted in a verdict. Although not frequently used, there are good reasons the state takes a case to court. An adjudicated outcome makes sense when:

- The case involves important and unresolved legal principles.
- The constitutionality of an established agency practice is at stake.
- The defendants or their attorney are liable to take advantage of a settlement or protracted settlement discussions to the detriment of the public.
- The resolution of this matter needs to be seen as sufficiently punitive so as to discourage others from similar conduct.
- The case can likely be resolved quickly and effectively in court.

- Quick court action is needed for an immediate action on a dangerous or illegal practice.
- The matter involves support of agency policy, which settlement may undermine (the agency is holding the line on an issue).
- There are other, similar or related cases and we need to be concerned about consistency in the outcome of this matter.
- Substantial settlement efforts have already been made.
- The other party is unlikely to engage in meaningful settlement discussions.
- We perceive the case will cost less to litigate than to resolve through other means.
- This case is subject to some form of mandatory ADR.

PRINCIPLED AGREEMENTS.

State agencies care that an agreement addresses their specific interests in the matter and advances the agency mission, but agencies must also ask:

- Is the agreement consistent with statutes, rules and agency policy?

A court “shall remand the order to an agency if it finds that the agency’s exercise of discretion is...inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency...” ORS 183.482(8)(b)(B).

- Does the agency have the authority to agree to this?

*“An agency is a creature of statute. It has no inherent power, but only such power and authority as has been conferred upon it by its organic legislation. * * * This power includes that expressly conferred by statute as well as such implied power as is necessary to carry out the power expressly granted.”*
Ochoco Const., Inc. v. Department of Land Conservation and Development,
 295 Or 422, 426-427 (1983).

- Is it good public policy?

- Is this agreement sufficiently transparent? For settlement agreements arrived at through mediation, ORS 36.230 prohibits the agreement from being confidential. ORS 17.095 also provides that, in litigation in which a public body, officer or employee is a defendant in an action under ORS 30.260 to 30.300 or ORS 294.100, the public body, officer or employee shall not enter into a confidential settlement or compromise except as ordered by the court.

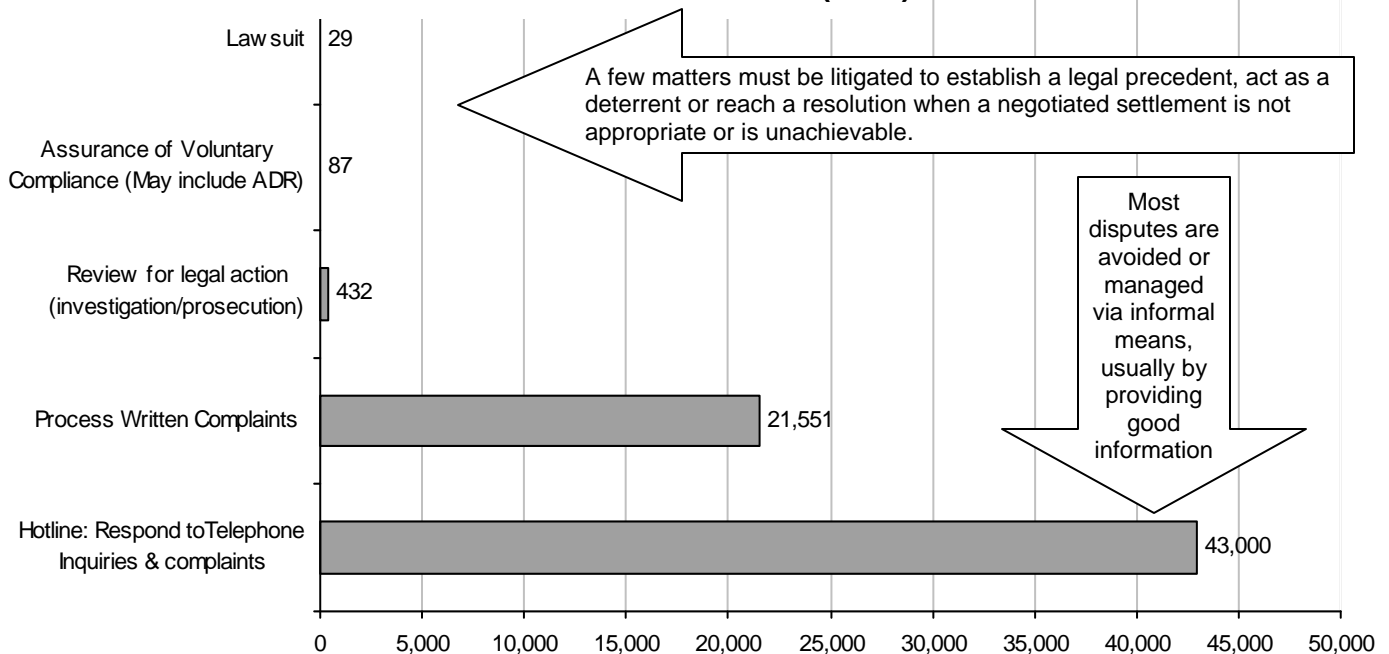
- Does the solution take into consideration the things that might change in the future? Is the agreement or solution likely to be durable? (i.e., *we likely won’t have to deal with the same problem again later.*)

- Are the process and outcome likely to result in an increase in trust among those entities whose cooperation may be needed to effectively implement this solution or agreement?
- Is it timely?
- Is the process to get to this solution efficient? (i.e., the state spent fewer resources to achieve this outcome than would have been required using any other process.)
- Is the outcome *qualitatively* better than we could have achieved through any other means? (i.e., we might have come to an agreement or solved this using a different process or approach but we likely wouldn't have gotten as good a result.)
- Are we satisfied that this outcome won't undermine established agency policies or practices or that we can articulate clearly and adequately the reasons for any inconsistency?
- Is the outcome enforceable and implementable?
- Are the process and outcome consistent with the ethical standards that apply to me as a public official? Can I be sure that the outcome won't expose me to personal liability?

GOOD CONFLICT MANAGEMENT SYSTEMS.

State agency dispute resolution activities occur within a system of formal and informal processes that seek first to avoid unnecessary conflict and, when unavoidable, use the least costly means to resolve the dispute. Disputes are resolved, initially, at the lowest level. Disputing parties are encouraged to resolve the dispute informally, through direct negotiation. There are incentives for cooperation; if informal negotiations are unsuccessful, negotiation may be aided by a 3rd party mediator or facilitator. The system is accessible to all and fair. The following is an example taken from the DOJ Consumer Protection Section but similar charts could be constructed for eminent domain cases at ODOT Right of Way, ODOT construction contract disputes at the construction contractor's board, the public utilities commission and many other state agencies.

**Chart #C - Dispute Resolution System Example:
Consumer Protection-Financial Fraud Section (2008)**



AVOIDING UNNECESSARY CONFLICT: GOOD INFORMATION.

While some conflicts are an unavoidable and necessary part of the democratic process, many potentially costly conflicts can be avoided by making reliable information available and by creating partnerships that aid in more effective communication between agencies and the participants and stakeholders in critical projects and programs. In addition to making information available on agency websites, some agencies operate hotlines that respond to citizen concerns and provide reliable program information. Agency hotlines include, but are not limited to: The [Department of Revenue Taxpayer Assistance service](#); the [Public Utility Commission Consumer services](#); or, the [Department of Justice Consumer Protection Hotline](#). These centers receive tens of thousands of contacts each year, resolving most concerns without the need for additional assistance.

AVOIDING UNNECESSARY CONFLICT: GOOD PARTNERSHIPS.

Agencies also use multi-jurisdictional committees to improve coordination, avoid unnecessary conflicts and better manage interagency conflicts when they do occur. For

“The existing compartmentalized organizational structure of government, an invention of the early 20th century, is ill equipped to meet the many interconnected issues facing Oregon in the 21st century.”

From the 2007 ERT report at: http://www.gert.oregon.gov/Gov/ERT/docs/2007_ERT_Report_Final.pdf

example:

“Community Solutions Team” (now the Governor's Economic Revitalization Team). The ERT is a six-member coordination team within the Governor's Office headed by the Governor's Intergovernmental Relations Director that coordinates economic and community development among eight key state agencies. For more information see <http://www.gert.oregon.gov/>.

The Columbia Basin Fish and Wildlife Authority is another example of an intergovernmental organization which seeks to improve interagency coordination. Membership consists of four state and two federal fish and wildlife management entities and eleven Indian tribes of the Columbia River Basin. Our members are the legally recognized managers of the fish and wildlife resources. These responsibilities are theirs through federal and state statutes, treaties and court actions. The Authority is a consensus organization. All actions supported by CBFWA are developed through a consensus process and only consensus positions are communicated on Authority letterhead. Consensus focuses the agency and tribal actions into a single direction, providing the Northwest Power Planning Council and the Bonneville Power Administration with recommendations representing the best available information from the fish and wildlife managers. See [CBFWA New Directions Workplan](#) (10/1/2004). The members identified three general objectives or areas of involvement through the Authority: (1) Coordinate the fish and wildlife activities; (2) Facilitate Northwest Power Planning Council's Fish and Wildlife Program; and, (3) Interact with the water and land planning and management authorities.

Oregon Solutions. “In order to achieve sustainable solutions, we often need to work across sectors, jurisdictions, interests, and issues. Oregon Solutions provides the mechanism and the place for this type of problem-solving to occur. Using a new model, the [Community Governance System](#), we work with communities to bring diverse partners to the table to reach an agreement.” See: <http://www.orsolutions.org/>, or phone (503) 725-9092.

WORKPLACE DISPUTE RESOLUTION AND ORGANIZATIONAL DEVELOPMENT.

The current, terrible economic situation has created a public and private sector workforce under stress. Some agency employees have been laid off, some have been given furlough days, and there will likely be deeper impacts in the next biennium. What does this mean for workplace conflict and employment disputes?

Like any workplace, Oregon state agencies also see conflicts between employees and among workgroups. The solution to these workplace conflicts, and the process used to arrive at a solution varies depending on the nature of the conflict. The fact that Bob yelled at Betty during the last staff meeting could be due to ongoing interpersonal conflict between the two, or the fact that their job duties overlap in confusing ways (organizational sources of conflict), or that they have different cultural or communication issues (Bob comes from a law enforcement background and Betty has a social-services orientation). For many employees the

problem is not seen as a conflict at all, but the result of the flawed nature of their co-worker or supervisor. The solution is simple, someone in authority needs to order the flawed person to relocate, to a different planet. While some behaviors warrant formal investigation and may result in a dismissal, most workplace conflicts are ones in which the staff will need to find a way forward together. Examples of collaborative, workplace dispute resolution programs in Oregon state agencies include:

The Workplace Dispute Resolution Project at the Oregon Employment Department was established by a “Letter of Agreement.” The project mediates workplace disputes using a specially trained, joint labor-management panel. Human resources staff also facilitate workgroup conflicts as part of this project. As with similar programs, about 50% of cases don’t proceed to mediation as the responding party does not agree to mediate, usually due to a lack of trust in the other employee. For more information contact: Bill Sexton, Asst. Human Resources Manager, Oregon Employment Department, Phone: 503 947-1297, Fax: 503 947-1318.

AFSCME/OHSU Workplace Partnership. The Workplace Partnership Initiative is a combination of training and facilitation provided by AFSCME and OHSU Human Resources staff to a department or work unit designed to prepare members and supervisors to make decisions, solve problems and plan for the future together. For more information contact: Local President Mike Bandy, Phone: 503-494-5958, Email: bandym@ohsul.edu, or Local 328 Staff Diane Lovell, Phone: 503-239-9858, ext. 117, Email: lovell@oregonafscme.com.

The State Employee Mediator Program (SEMPR). The Department of Justice (DOJ) developed and administers a Roster of Oregon with state agency employees with skills in mediation and facilitation. The State Employee Mediator Program was developed for state agencies seeking a fast and economical way to resolve workplace interpersonal disputes and other conflicts in their agency. See: <http://www.doj.state.or.us/adr/adr10.shtml>. Oregon is also a partner with the Federal Shared Neutrals Program of the Oregon Federal Executive Board, see: http://www.bdiweb.org/oregon.feb.gov/ofeb_pages/ofeb_sharedneutrals.htm. Agencies are authorized to share employee-mediators pursuant to ORS 183.502(9).

OD consultants and private workplace mediators. In addition to these workplace dispute resolution programs, agencies also hire consultants, mediators and facilitators to help resolve conflicts in the workplace, debrief a challenging project, effect positive organizational change or build stronger teams. Examples of workplace and organizational development contracts that can be found in the [Department of Administrative Services ORPIN system](#) include:

- The State of Oregon Department of Human Services (DHS) issued a request for proposals for organizational change-related, consulting services to support the Program Management Office for the DHS Transformation Initiative. DHS expected to award a single contract, not to exceed

\$150,000.00 for the period starting March 2, 2009, through February 28, 2010.

- A “Request for Proposals” was issued by the Oregon Watershed Enhancement Board for “Mid-Coast Watershed Council Mediation and Assistance.” The not-to-exceed contract amount was \$15,000.
- In August of 2007, the Oregon Youth Authority hired Ellen Craine of Mediation Works for “*Development of a written agreement on behavioral expectations and norms created by and for all staff members.*” Contract value was \$1,230.
- In late 2006 and early 2007, the Oregon Youth Authority hired mediator Claire Bell to “*provide mediation services as a venue to resolve workplace challenges. The mediation services will assist Agency in having a plan to facilitate a good working environment.*” The contract not-to-exceed amount was \$15,000.
- The Oregon Youth Authority conducted an Intermediate solicitation for a consultant to co-develop with OYA a 24-hour leadership training session to “*help managers improve skills at: Leading others with purpose; Understanding power and influence; Building teams and collaboration; Understanding and building interpersonal relationships; Elicit and receiving feedback; Motivating others and helping staff excel at work; Successfully managing conflict and Goal planning and setting clear expectations.*”

CLAIMS AGAINST THE STATE, RISK MANAGEMENT & LITIGATION SETTLEMENT

The Trial Division of the Department of Justice defends the State, its agencies and officials in civil litigation brought in state and federal courts. The Division advocates the State's interest in these cases, and resolves them favorably and efficiently through dispositive motions, negotiated settlements, trials, or other appropriate dispute resolution procedures. Trial Division attorneys also work with attorneys in other divisions to ensure consistency and coordinate the full range of legal services provided by the Department. The cases assigned to the Trial Division cover a wide variety of subjects, including:

- Negligence and other tort claims for money damages.
- Breach of contract and commercial actions.
- Suits for declaratory and injunctive relief.
- Employment-related claims.
- Taking of private lands for governmental purposes (condemnation).
- Natural resources and environmental law cases.
- Constitutional challenges to laws and government programs.
- Inmate civil rights and collateral challenges to criminal convictions (habeas corpus and post-conviction relief).

Work is also coordinated with the Risk Management Section of the Department of Administrative Services in managing claims made against the state and defending the state in court. Oregon takes a business approach to managing risk and resolving claims against the state. Risk Management is the state's manager for self-insurance, insurance and risk control. The primary goal of Risk Management is to *“assist state government with avoiding unnecessary costs of loss while achieving its mission. The major kinds of loss we work to prevent or pay include: employee injuries; loss to state buildings, contents and vehicles; employee theft or dishonesty and tort liability claims alleging the failure of state agencies or employees to perform duties owed by law. These include negligence and almost anything the state can do or fail to do that causes persons or their property harm.”*

Mediation is one of the options available to Risk Management when direct settlement discussions are not successful in resolving legitimate claims. Between 1994 and 1999 the Department of Administrative Services (DAS), Risk Management resolved 13,356 claims without litigation and only 1,352 claims were litigated (2%).

Settlement mediators are often selected based on their subject matter and courtroom experience. The attorney's typically have a role in the selection of an acceptable mediator and often rely on their familiarity with the mediator's reputation as a judge or litigator. This type of mediator will often cite their settlement statistics, “I have a better than 90% settlement rate.” A high settlement rate may be a comfort to parties who want an assurance that they won't be wasting their time and money in a fruitless settlement negotiation. But parties who hire a mediator who stakes his or her reputation on their settlement rate may be disappointed when the party finds that they are being pressured to accept undesirable settlement terms. Mediators appointed by courts in mandatory mediations and sitting judges can provide very valuable insights into a case's merits but are also able to place pressure on parties that a privately-hired mediator can't.

Litigation settlement mediation typically begins with a pre-mediation questionnaire from the mediator asking, “What are the strengths and weakness of your case?”; “What have you tried to do to settle this?”; and, “What was your last settlement offer?”. The mediator may evaluate the strengths or weaknesses of each side's position and use predictions of possible outcomes at trial, as a means to move the parties into the “middle.” Caucuses are common and attorneys are directly involved with the negotiations. These mediators usually fetch the highest hourly rates but the mediations themselves are usually no more than a day or two in length and an average contract amount is \$5,370, with a range of \$500 to \$21,000 (based on an average of 31 mediation contracts between DOJ trial division and mediators).

FACILITY SITING.

A common area of conflict is the siting of facilities, which are generally recognized as necessary, but may not be welcomed “in my backyard.” Prisons,

half-way houses and group homes, waste disposal facilities and power plants fall into this category. These may be government run facilities, or the facility may be a private project subject to government regulation.

Controversy over Cornelius Group Home.

The controversy between the city of Cornelius and a secure residential treatment facility for people found "guilty except for insanity" of serious crimes is a good example of the conflicts and competing public interests involved in facility siting disputes. Advocates for the disabled and mentally ill point to the need to

move recovering mental health patients out of institutions like the Oregon State Hospital to better transition them into a normal lifestyle. Like everyone, the disabled also have a right to live where they wish, free from discrimination.

Neighbors, on the other hand, don't want to take the risk. The concern heightened when the state closed Connell House in June 2007 after a resident escaped by climbing the fence.

Officials from Cornelius and the state's Department of Human Services have been discussing how to handle Connell House. "We want to work in partnership with the city and Luke-Dorf and take what's been a very difficult year and move forward", said Micky Logan, a DOJ lawyer representing the

Department of Human Resources. Ultimately the operators agreed to change the nature of the facility and operate it as a regular residential treatment facility, a step down from the "secure" status that caused so much concern in the neighborhood. For additional information on Siting Community Residences for Individuals under

Over the course of nine months, the **Psychiatric Security Review Board (PSRB) Siting Workgroup** held seven meetings. The membership of the group was appointed by the Governor's Office and included a balanced representation of public safety and victim interests, mental health consumers and advocates, local government officials, state legislators and other stakeholders including some of those involved in the Cornelius group home matter. The leadership of the National Alliance on Mental Illness, the Oregon State Sheriff's Association, and other groups were asked to nominate a representative to sit on the panel. The workgroup was convened by the Governor's Public Safety and Human Services advisors, who charged the workgroup with identifying ways to enhance the understanding of Oregon's system for managing individuals placed within the jurisdiction of the PSRB, and to reach consensus on ways to strengthen the process for siting residential treatment facilities that serve these individuals. The Governor's Office identified the following four touchstones to guide the workgroup's ultimate recommendations:

- Protect the Public Safety;
- Protect the Safety and Individual Rights of Individuals with Mental Illness;
- Support Effective Treatment of Persons with Mental Illness; and,
- Recognize the Realities of State and Partner Budget Considerations.

Psychiatric Security Review Board (PSRB) Siting Workgroup report:
http://governor.oregon.gov/Gov/pdf/psrb_siting_wkgrp_report_final.pdf

the Jurisdiction of the Psychiatric Security Review Board see:
http://www.communitycares.info/wp-content/uploads/2008/09/justice-630724-v1-psrb_siting_task_force_presentation.pdf.

Junction City Prison Advisory Committee (PAC). Before the Oregon Department of Corrections (DOC) begins construction of a new prison, a Prison Advisory Committee (PAC) is created. The purpose of the PAC is to serve as a citizen advisory group to the DOC regarding construction activities, correctional issues and other DOC activities and practices that may affect communities in the region. The PAC also is used to promote effective communication between the community and DOC. See: <http://www.oregon.gov/DOC/PUBAFF/docs/pdf/IB-15-JunctionCity.pdf>.

Wind Energy Facility Siting Advisory Committee. On August 7, 2008, the Land Conservation and Development Commission (LCDC) directed the department to appoint an advisory committee and initiate an administrative rulemaking project for wind power generation facilities on farmland. The project is intended to provide clarification and guidance on the siting of wind power generation facilities on farmland. LCDC appointed an advisory committee to advise the department and the Commission (see below). Based on input and recommendations from the advisory committee, LCDC anticipates adopting new administrative rules in December of 2008. See: http://www.oregon.gov/LCD/wind_energy_facility_siting_on_farmland.shtml.

*CONTRACT, PUBLIC IMPROVEMENT AND
HIGHWAY CONSTRUCTION DISPUTES.*

State contracts include dispute resolution clauses. Most state agency contracts include terms and conditions that provide for the negotiated or mediated resolution of contract disputes. ORS 183.502(4) requires agencies to consider the addition of ADR clauses in their contracts. Dispute resolution clauses often describe a process that escalates from low-level staff to high-level management negotiation, and eventually mediation, before resorting to litigation. Most agencies do not have authority to agree to the binding arbitration clauses found in many private contracts.

Example of mediation in a contract dispute

In January 2008, a mediator was hired by the Oregon Department of Corrections to “design, assess the feasibility of, convene or conduct a process to assist Agency and the City of Lakeside to reach a mutually acceptable resolution of the Matter or to otherwise facilitate communication between individuals in an agreement-seeking process concerning the Matter.” In this case, the “Matter” was “receipt of sewage treatment services provided to Agency’s Shutter Creek Correctional Institute from the City of Lakeside (City)” The agency and the City each paid \$100/hr, half of the contractor’s usual rate. (State maximum of \$5,000.)

The ODOT Construction Contracts Dispute Resolution program currently maintains a list of about 30 mediators that it uses to select contractors to assist in

the resolution of highway construction disputes. These disputes often involve disputes over large dollar amounts. The agency has a robust partnering process in place in most of these contracts to prevent disputes from occurring in the first place and construction contracts include certain [dispute resolution mechanisms](#) to avoid a matter becoming a formal claim. Dispute resolution services may include arbitration, mediation or neutral fact-finding. Primary criteria for contractor selection is their creditability among all the disputing parties. The program has had about 12 dispute resolution contracts in the last 12 months, most of which are for a “to not exceed” amount of under \$5,000. For additional information contact: Lori Butler, TSS/Construction Support Unit, Phone: 503) 986-3007, Email: Lorraine.E.Butler@state.or.us

Example of mediation for a construction dispute:

The Oregon Department of Transportation entered into a Construction Contract with Hamilton Construction Company for the I-5, N. Santiam – Kuebler Boulevard project located on the Pacific Highway in Marion County. This is an approximately \$63 million design-build contract. Due to the complexities of the project, ODOT and the Construction Contractor mutually agreed to utilize the services of a Third Party Neutral to assist with resolving dispute issues that might occur during the Project. Maximum amount of \$138,000.

MEDIATOR PROCUREMENT.

The state of Oregon regularly enters into [personal services contracts](#) with ADR Providers for a wide variety of dispute-resolution, mediation, facilitation, organizational development and training services. Many agencies contract for these services on a case-by-case basis while some agencies, who have a recurring need for the same service, make use of their own rosters of ADR providers. About a dozen agencies maintain their own roster of mediators to meet the specialized needs of their particular program. Three agencies, the Department of Justice, the Department of Consumer and Business Services, Regulatory Streamlining Program and the PSU Oregon Consensus Program also maintain rosters that are available to any state agency.

DOJ and DAS encourage agencies to select the ADR Provider using a process known as “mutual selection.” Under this process, the agency and the other parties to a dispute examine the Roster and may contact mediators or facilitators to obtain more information on their experience, fees, availability, dispute resolution style, etc. The agency and the other parties then select a mediator or facilitator acceptable to everyone. (If there are many parties involved in a project the agency may wish to select a mediator from the list with the help of a few representative parties.) For agencies subject to DAS rules, mutual selection may be used in any of the procurement processes. See “Hiring a Mediator” at http://www.doj.state.or.us/adr/doc/doj_adr_bulletin_1_v4_2007.doc.

The following section, “The agency as provider of mediation services,” includes some examples of highly specialized rosters for state agency programs. These rosters are typically developed through a “Request for Qualifications” process and can be accessed from the Department of Administrative Services

contracting system known as ORPIN at <http://orpin.oregon.gov/open.dll/welcome>.

THE AGENCY AS THE PROVIDER OF MEDIATION SERVICES (NON-REGULATORY).

Some non-regulatory¹² state agency programs have authority to resolve disputes between members of the public in matters over which the agency does not have regulatory authority. Agencies also contract for mediators or maintain their own list or mediator rosters.

Community Dispute Resolution, Oregon Office of. The University of Oregon [Oregon Office of Community Dispute Resolution](#) is housed at the Appropriate Dispute Resolution Center of the University of Oregon's School of Law. The Oregon Office for Community Dispute Resolution provides state funds to 20 community programs in 25 Oregon counties. One million dollars goes to the community programs each biennium to support the 900 volunteer mediators who respond to over 6,500 conflicts each year. For additional information contact: Carrie Heltzel, Administrator, Oregon Office for Community Dispute Resolution, University of Oregon School of Law, 1515 Agate Street, Room 330C, 1221 University of Oregon, Eugene, OR 97403-1221, Phone: 541-346-1623, Email: cheltzel@uoregon.edu. LAWS/RULES: [ORS 36](#) and [OAR 571 Division 100 rules](#).

Department of Consumer & Business Services, Regulatory Streamlining Roster. To encourage regulatory streamlining and to make consultants/facilitators available in a timely and efficient manner, the Department of Administrative Services (DAS), on behalf of the Department of Consumer and Business Services (DCBS), the Office of Regulatory Streamlining has established multiple price agreements with consultants/facilitators qualified to perform consulting/facilitating services. The list of contractors includes facilitators with five years minimum experience in one or more of the following areas: Team building/retreats; Conflict resolution; Leadership/coaching; Communications; Business analysis; Strategic planning/performance measures; Quality initiatives/process improvement; Facilitation; and Internal investigations/assessments. For additional information see: http://egov.oregon.gov/DCBS/RSL/contract_services.shtml or contact: Kristen Miller, Assistant to the Office of Regulatory Streamlining, Phone: (503) 947-7866, Email: kristen.i.miller@state.or.us.

Department of Corrections Serious & Violent Crime Facilitated Dialogue Program. The FDP is a victim/survivor-initiated and victim/survivor-driven process. Victim/survivors must contact the Department of Corrections (ODOC) Victim Services Office to express interest in the program. All requests for dialogue are carefully assessed by ODOC Victim Services in collaboration with the Advisory Committee to determine if the case is appropriate to move forward. If accepted, two facilitators are assigned to arrange individual meetings with both the victim/survivor and offender to prepare for the meeting. After the dialogue occurs,

¹² For ADR programs in regulatory agencies see the next section "Disputes Involving Regulated Professions and Industries."

the facilitators will follow-up with all participants. There is no set time frame for completing the dialogue process. The dialogue process varies for each case and is dependent upon all parties' readiness to meet. The victim/survivor or offender can stop the process at any time if either party does not wish to continue. In rare cases, the program may suspend the process. For additional information contact: Karen Roddy, ODOC Victim Services, Toll Free: 888-749-8080, Phone: 541-922-6091. See: http://www.oregon.gov/DOC/TRANS/CC/victim_issues.shtml.

Employment Relations Board, State Labor Mediator. The mediation of labor disputes was the first form of mediation to be put into law and is a required step in the resolution of certain labor disputes. The Employment Relations Board Conciliation Service provides facilitation services to assist parties during their interest-based bargaining or problem solving process. Services provided by facilitators include assisting in setting agendas, providing facilitation and/or recording services during the entire bargaining process or a specific problem, providing facilitation and/or recording services to labor-management committees, assisting parties in staying in an interest-based process, working with facilitators within the group to improve their skills, and other needs identified by the parties. Contact: Robert C. Nightingale, State Conciliator, Phone: 503-378-6471 x 242 or, James A. Adams, Mediator, Phone 503-378-6471 x233.

The Oregon Department of Justice, Division of Child Support provides grants to community dispute resolution programs for mediation services for parental access and visitation. For example, Linn-Benton Mediation Services received a \$63,788.00 grant for mediation of parenting time plans (The grant expires in September 2010.) Multnomah County also has a grant-funded PAV program designed to serve low-income parents who have child support orders, but do not have parenting plans on file with the Court. (See <http://www.co.multnomah.or.us/dcj/fcourt.shtml#pav>.)

Department of Justice, Oregon State Mediator Roster & Mediator Price Agreements. Since 1997 DAS has issued an RFQ on behalf of DOJ inviting potential mediators and facilitators to submit their qualifications for being on the State Mediator Roster. The purpose of the RFQ is to add new providers to the Roster and to ensure that those currently on the Roster are still interested in being on that list. The Roster is provided as a convenience to state agencies seeking the names of qualified ADR providers and is found at

<http://www.doj.state.or.us/adr/adr26.shtml>.

This roster lists 70 mediators and facilitators who meet certain minimum qualifications and are available for ADR services to all state agencies. An RFQ will be issued in Spring 2009 to allow additional providers to apply for this roster. Twenty six mediators and facilitators have

Mediator Price Agreement Example 1.

In the summer of 2008 the Department of State lands hired Chris Sheesley for the mediation of a contested case matter involving a boat dock lease. The agency was able to quickly hire the mediator via a Price Agreement. The mediation was ultimately successful with the parties reaching an agreement.

also entered into Price Agreements with the state. These contractors can be quickly assigned to a project by executing a "Service Order Contract form". These Price Agreements have recently been extended to 2010.

Manufactured Communities

Resource Center, Oregon Housing & Community Services (OHCS) administers the Manufactured Communities resource Center. The program was created by the 1989 Oregon Legislature for three primary purposes: 1) To assist park owners and residents in resolving concerns associated with their parks and living situations through informal dispute resolution, and to engage in activities that might lead to improvements in manufactured dwelling park relationships; 2) To provide technical assistance, information about the laws, and information about available resources that might assist in the voluntary resolution of disputes; and 3) To maintain statistics and information about manufactured dwelling parks in Oregon, including a list of manufactured dwelling park names and locations throughout the state for use by legislators and the general public. The MDPO Program is funded by an annual assessment imposed on all owners of manufactured dwellings that are considered personal property. In Oregon, there are approximately 1,500 manufactured dwelling parks with over 63,000 manufactured dwelling spaces. The MCRC responds to an average of 3,000 calls per year from persons with questions or concerns about the many aspects of park living, and provides information about options that may help resolve concerns. For additional information contact: Theresa Wingard or Ken Pryor, Oregon Housing & Community Services, Manufactured Dwelling Park Community Relations, 725 Summer Street NE, Salem OR 97301, Phone 503-986-0999 or 800-453-5511.

PSU Oregon Consensus Program.

The Oregon Consensus Program, Portland State University, Hatfield School of Government "*is the State of Oregon's program providing a neutral forum and expert assessment, mediation and facilitation services to help public bodies and stakeholders resolve conflicts, make decisions, and develop public policy collaboratively and effectively across Oregon.*" For additional information contact Elaine Hallmark, Director. Phone: 503-725-9019. Fax: 509-725-9099. Email: elaineh@pdx.edu or, Cat McGinnis, Program

Mediator Price Agreement Example 2.

In August 2008 a state agency with an employment dispute was able to go to the [DOJ website](#), review mediator resumes and select Sue Leeson for a time-sensitive mediation. The agency took advantage of the fact that the mediator had a price agreement with the state, greatly expediting the contracting process. The dispute was successfully resolved.

OCP Example: In December of 2008 the Oregon Department of Transportation Rail Division hired the Portland State University Oregon Consensus Program to provide a mediator for a dispute involving a railroad right of way. The ODOT Fee Agreement for Mediation and Facilitation Services was for an amount not to exceed \$10,000.

For a report on OCP mediator contract activity see

http://www.orconsensus.pdx.edu/documents/FundSandDisbursementsinceptionto12_31_07.pdf

Coordinator Phone: 503-725-9070 Fax: 503-725-9099. Email: consensus@pdx.edu. Web: <http://www.orconsensus.pdx.edu/index.php>

The Oregon Department of Agriculture Farm Mediation Program. The

Farm Mediation Program helps farmers and others parties address agricultural-related problems that may involve contract disputes, employment issues, nuisance complaints, trespass, landlord-tenant agreements, family farm transfers and partnership workouts, and any other farm-related conflict. The program has contracts with private mediators for mediation services. (Initial price agreement contracts had an anticipated value in the range of \$15,000 per Contractor over a 24 month period). Call the Farm Mediation Program at the Oregon Department of Agriculture, at 1-503-986-4558 or 1-800-347-7028 to see if mediation can help.

The Oregon Department of Agriculture Farm Mediation Program “has demonstrated its value to mediation participants and the State of Oregon. Cases ranging from financial mediation (between farmers and their creditors) in the early years of the program, to nuisance complaints, contracts, and farm labor issues in later years have successfully been resolved in over 80% of the cases.

Most recent cases (past three years) have been farm labor related, and 91% of those cases have been successfully resolved through a settlement negotiated in mediation. The cases handled by the farm mediation program, while dealing with private party disputes, can be very complex. Many are multi-party disputes. The farm labor cases, for example, average 10 participants per mediation, sometimes involving a farmer as employer, a farm labor contractor, the employees, and their legal counsel. These cases average 9 hours and deal with very technical labor laws. Other cases generally average 2-3 hours to resolve. Well over 500 parties have participated in mediation through the program over the past decade.

Participant Satisfaction Survey Findings: Over 92% of those who used the farm mediation program to resolve a dispute indicated they would recommend the program to someone else. 86% of mediation participants indicate that the settlement reached in mediation is a "fair or somewhat fair" resolution of the issues. 90% of participants rated the mediators as good or very good at conducting the mediation in a professional manner.”

From [The Use of Mediation to Resolve Agricultural Labor Disputes.](http://www.cnr.berkeley.edu/ucce50/ag-labor/7article/article23.htm) <http://www.cnr.berkeley.edu/ucce50/ag-labor/7article/article23.htm>

Additional Information is available at <http://www.oregon.gov/ODA/mediation.shtml>.

ODOT Right of Way, Eminent Domain Mediation, The ODOT Right of Way Section, Mediation Program resolves disputes between ODOT and a property owner related to the acquisition of property by Eminent Domain. The program uses private mediators with fees split between ODOT and the property owner (unless the parties agree on another arrangement.) In 1996 ODOT handled 579 eminent domain files 9% of which went to condemnation. Of these 51 condemnation cases, 47 were settled, one was resolved through dispositive

motion, two had “other” dispositions,” and only one went to trial. In 2008 ODOT had 309 acquisition files 8% of which proceeded to condemnation. Of this 8% all were settled through direct negotiations or mediation (i.e. no cases went to trial.) The ADR program also consults and provides technical guidance in the selection of property acquisition cases that are appropriate for mediation or other dispute resolution procedures and manages the cases from inception through resolution. The unit processes all condemnation files to the complaint stage, and makes timely court filings to assure that the project certification deadlines are met. The program maintains a list of private mediators who's fees are split between ODOT and the property owner (unless the parties agree on another arrangement.) For additional information contact Philip Johnson at (503) 986-6563. The ODOT Right of Way manual, explaining the ADR Program, is available at http://www.oregon.gov/ODOT/HWY/ROW/docs/row_manual_chapter_8.pdf.

DISPUTES INVOLVING REGULATED PROFESSIONS AND INDUSTRIES

A core function for many state agencies is the regulation of industry and the licensing of professionals. These agencies respond to complaints, conduct investigations into violations of statutes and agency rules and discipline licensees and regulated industries when the statutes or rules are violated. Agencies typically issue a notice of agency action and engage in negotiations to bring these licensees into compliance. The vast majority of agency actions are resolved through direct negotiations.¹³ In a few cases the issue is resolved with the assistance of an outside mediator or is adjudicated before an administrative law judge. When direct negotiations aren't successful, the agency conducts a contested case hearing and issues a final order.

Regulatory agencies frequently have a multi-layered system for resolving conflicts between the regulated or licensed entity and the public. These systems typically begin with an informal process (such as a telephone or online complaint process) for providing information and

Resolution of Licensing Disputes, Example:

The Oregon Board of Nursing managed 64,619 licensees in 2004 and received about 700 conduct complaints (about 1% of total.)

About 70% of all complaints are closed without disciplinary action. Of the rest, 98% are resolved through a stipulated agreement.

Mediation of a Contested Case Example:

In December of 2007 the Department of State Lands hired Steven Schell to mediate a contested case involving an alleged violation of ORS 196.810. The maximum contract amount was \$7,000;

¹³ Regarding the Board of Nursing data (See textbox example above) see <http://www.oregon.gov/OSBN/pdfs/publications/2003-04StatisticalReport.pdf> and http://www.oregon.gov/DAS/OPB/docs/APPR07/Nursing_0709PM.pdf

resolving disputes between the public and the regulated industry. These systems usually include more formal investigation and regulatory action against the regulated industry with an opportunity for a contested case hearing.

When assisting with the resolution of disputes between the regulated entity and the public, agencies typically have authority to require the licensee or regulated industry to comply with the conditions of their license. Agencies usually don't have authority to order the licensee to make the complainant whole, but the agency may be able to encourage settlements between the licensee and a complainant. (In some cases full relief for the aggrieved party may only be available via a separate civil action if a negotiated resolution can't be achieved.) Examples of this type of dispute resolution program include the Construction Contractors Board and the [Medical Review Unit](#) in the Workers Comp Division of the Department of Consumer & Business Services.

One interesting example of the use of collaboration in a contested case process is the Water Resources Department [Klamath Basin Alternative Dispute Resolution](#). In this case the agency sought to negotiate a regional resolution to the water problem involving hundreds of water rights claims, thereby avoiding a long and expensive adjudication process. The Oregon Water Resources Department is charged with administering an adjudication on behalf of the state Circuit Court. Through the KBA/ADR, Oregon offers an option whereby the major water users, tribes, federal agencies, other governments, interest groups and citizens can both work together to quantify and recognize historic use rights, and collaborate on strategies that will help restore the watershed, ensure long-term sustainability and address future supply needs. The expected outcome is a negotiated agreement among these participants, which will settle the water rights disputes and offer long-term guidance for watershed management. For additional information see <http://www.wrd.state.or.us/OWRD/ADJ/index.shtml> .

Adoption & Child Welfare Mediation Also referred to as “Legal Assistance Mediation” and “Post-adoptive communications Mediation Services” this Department of Human Services program expanded to serve children, birth parents, and adoptive parents interested in open adoption. Mediation Services, available through the adoption program, provides an opportunity for the birth parent(s) to come to agreement on the level of openness which best serves the individual needs of the child. Openness is the sharing of information between relatives and adoptive parent(s) as determined on a continuum. Under Oregon law (ORS 109.305), the Post Adoption Communication Agreement is legally enforceable and is a written agreement between the birth parent(s) and adoptive parents based on a thoughtful, informed decision-making process for communication following the legalization of the adoption. Mediators assist the parties in creating post-adoption communication agreements. DHS created master contracts with mediators to improve efficient administration. Last year the program completed a five year contract with about 24 mediators. (The current contract set the mediator rate at \$100 and expires in April 2011.) For additional information contact Adoption Services 503-945-5651 or Heather Mowry, Contract Coordinator, Phone: 503-945-

6841 or, Sharon Bolen, Phone: (503) 945-5848. Program rules are available at: http://www.dhs.state.or.us/policy/childwelfare/manual_1/i-g16.pdf.

Construction Contractors Board, Dispute Resolution Program The mission of the Construction Contractor's Board (CCB) is to, "Safeguard the consumer's rights related to contracted improvements to real property while promoting a fair, equitable, and competitive environment in the construction industry." The CCB handles 4,000 to 5,000 disputed claims against contractors each year through: Education via notice provision and warnings; Settlement discussions in on-site meetings; Settlement options proposed through proposed orders; Settlement discussions with hearings officers; contested case hearings; and binding arbitration. About 75 percent of homeowner claims are settled with a Board mediator/investigator meeting at the jobsite with the homeowner and contractor. For more information contact William Boyd (503) 378-4621 x.4028; william.j.boyd@ccb.state.or.us 24-Hour Contractor Inquiry Line 503-378-4610 or 888-366-5635 Telephone 503-378-4621 or visit: <http://ccbed.ccb.state.or.us/WebPDF/CCB/tips/how2help.pdf> Also see "Resolving Disputes With Your Contractor" available at: <http://ccbed.ccb.state.or.us/WebPDF/CCB/Publications/DRS%20Info%20for%20Complainants.pdf>.

Education Dept, Special Education Mediation Services The Department of Education, Office of Special Education (OSE) has offered mediation services to Oregon parents and school districts since 1983. A state mediation system was established in response to: (1) concerns expressed by parents and educators regarding the ineffectiveness of due process hearings and complaint investigation procedures for resolving special education disputes, and (2) recommendations from parents, educators and advocates for an alternative dispute resolution procedure. The program has about 14 mediators on contract (The contract ending 6/30/2009 had an hourly rate of \$78/hr.) For additional information contact Steven Woodcock, (503) 947-5797, Special Education - Education Specialist, Office of Special Education, 255 Capitol Street NE Salem, OR 97310-0203. Also see the "Mediation Handbook: at <http://www.ode.state.or.us/services/disputeresolution/mediation/medhandbook.pdf> and the "Procedural Safeguards Update" at <http://www.ode.state.or.us/pubs/proceduralsafeguards/k-18/englishk18.pdf> .

Employment Department The agency is responsible for employment services, labor market information, unemployment insurance, childcare in Oregon and for the Oregon Central Administrative Hearings Panel (the state agency that adjudicates contested case proceedings for many state agencies.) The agency follows a federally mandated process for resolving complaints over service equity; Collaborative rulemaking and problem-solving (interagency); Management (and sometimes the union) involved in workplace disputes, including a consensus-based, representative Worksite Committee; Formal grievance and Mediation Program for internal disputes. LAWS/RULES: ADR Rules, Policies, and Procedures: Legal Service Access Policy A 6 (1); Mediation Confidentiality Rules

[OAR 471-008-0000](#); Administrative Decisions on Benefits and Claims [OAR 471-030-0039](#); Amended Monetary Determinations and Continuous Jurisdiction [OAR 471-030-0048](#) and [471-031-0145](#); Precedent Decisions [OAR 471-030-0200](#); One Percent Penalty [OAR 471-031-0067](#); Tax Compromise Policy [OAR 471-031-0080](#).

Injured Workers, Ombudsman for Formerly the “Workers' Compensation Ombudsman” the ombudsman serves as an independent advocate for injured workers. The office investigates and attempts to resolve workers’ compensation related complaints. In addition, the office provides information to injured workers to enable them to protect their rights and makes recommendations for improving ombudsman services and the workers’ compensation system. For more information contact Jennifer Flood, Ombudsman (503) 378-3351 or 1-800-927-1271. 350 Winter St. NE, Salem 97301-3878; PO Box 14480, Salem 97309-0405. Email: oiw.questions@state.or.us. Statutory Authority: ORS 656.709

Land Use Board of Appeals (LUBA) Mediation, All parties to a LUBA appeal may, at any time, stipulate that the appeal proceeding be stayed to allow the parties to enter into mediation. Mediation can often be an efficient and cost effective means of resolving the conflicts giving rise to an appeal. For additional information contact Kelly Burgess, 550 Capitol Street NE, Suite 235, Salem, Oregon 97301-2552. Email kelly.burgess@state.or.us. Phone: 503-373-1265. LAW/RULES: [ORS 197.860](#).

Liquor Control, Oregon Commission The agency’s mission is “To effectively regulate the sale, distribution, and responsible use of alcoholic beverages in order to protect Oregon’s public health, safety, and community livability.” The Commission provides dispute resolution services for problematic licensees in dispute with law enforcement agencies or neighborhoods; Securing private mediation for disputes over neighborhood livability issues. The Executive Director is Steve Pharo and the agency’s ADR Contact is Judith Bracanovich: (503) 872-5108. judith.bracanovich@state.or.us. For Portland residents “*If you live in Portland and feel your concerns about a liquor business aren’t being resolved, or you are not getting the results you want, you may contact the neighborhood mediation center at 503-823-3152. For additional information contact Resolutions Northwest Neighborhood mediation program at 827 NE 44th Ave., suite 300, Portland, or 97213. Phone 503-595-4890 or Email info@resolutionsnorthwest.org*”

Public Utilities Commission Consumer Complaints Section, The Consumer Services staff can help resolve billing and service conflicts between customers and companies that provide telecommunications, electric, gas and water services. They maintain extensive records that provide information about the quality of service utility customers receive. Complaints can be filed by calling the PUC toll-free 1-800-522-2404 (voice) and 1-800-648-3458 (TTY). TTY users can call 711. They also accept complaints through their website and via US mail. For additional information contact: Phil Boyle, Manager, Consumer Service Section, Public Utilities Commission. Email: puc.consumer@state.or.us. Web <http://www.puc.state.or.us/PUC/consumer/comppro.shtml>

Public Utilities Commission Hearings Section, Mediation, The Oregon PUC encourages parties to resolve issues in contested cases and rulemakings informally, through negotiation or mediation. *“If mediation is desirable, the PUC can provide a list of Administrative Law Judges (ALJs) or professional mediators. Unless requested by the parties, ALJs serving as mediators will not be involved in any hearings arising from the dispute. If you are interested in informal resolution of this case, you should contact the other parties and discuss your desire for negotiation or mediation. If you wish to discuss using a mediator, please call Mike Grant, Chief ALJ, at (503) 378-6102. He can discuss the services that the PUC offers and the desirability of using negotiation and mediation to resolve the issues in the case.”* Also see

http://www.puc.state.or.us/PUC/admin_hearings/guidelines_settle.shtml

Vocational Rehabilitation Services (OVRs) Oregon's Office of Vocational Rehabilitation Services (OVRs) assists Oregonians with disabilities to achieve and maintain employment and independence. Services include: Vocational Counseling and Guidance, Evaluation, Physical Restoration, Vocational and other training services, Information and referral, Job Development and Job Search Assistance. OVRs is a state and federally funded program that works in partnership with the community and with business to develop employment opportunities for people who have disabilities. Vocational Rehabilitation programs are custom-designed for each individual. For problems that can't be resolved by talking with a counselor or the branch manager OVRs has a dispute resolution program that includes Formal Mediation and an Impartial Fair Hearing. Program rules can be found at:

<http://www.obne.state.or.us/DHS/vr/vr-rules.shtml> . For additional information see

http://oregon.gov/dhs/vr/dispute_resolution.shtml or contact the OVRs Dispute

Resolution Coordinator at 500 Summer St NE, E-87, Salem, OR 97301-1120.

Voice: 503-945-6253, Toll-Free: 1-877-277-0513. Toll-Free TTY: 1-866-801-0130.

Fax: 503-947-5025. For outside help to resolve problems, the Oregon Client

Assistance Program provides assistance to individuals who are receiving services

or desire to receive services from OVRs. They can be contacted at: Oregon Client

Assistance Program, Disability Rights Oregon, 620 SW 5th Ave, 5th Floor,

Portland OR 97204-1428. Voice: 503-243-2081, Toll-Free: 1-800-452-1694. TTY:

503-323-9161, Toll-Free TTY: 1-800-556-5351. Fax: 503-243-1738. E-mail:

welcome@oradvocacy.org

Workers Comp, Medical Review Unit, Seven reviewers with professional medical expertise and a paralegal specialist identify and investigate complex issues in response to disputes arising from the provision of medical services to injured workers. The reviewer facilitates early resolution of the dispute through negotiation and education. If, however, the dispute cannot be resolved through negotiation, the reviewer coordinates the collection of pertinent data from available resources and prepares an inclusive medical/legal record for review. In addition, the reviewer conducts medical/legal research relevant to the issues in dispute. An administrative assistant coordinates any consulting physician involvement by selecting a physician or panel of physicians. The reviewer authors relevant questions to be asked of the consulting physician(s), and incorporates the

consultation report in the final decision analysis. Finally, the reviewer prepares a legal order based on conclusions of law, the Oregon Revised Statutes, and Oregon Administrative Rules. The orders may be appealed to the Central Hearings Officer Panel and then to the Court of Appeals. For more information contact Medical Section: 503-934-6049, Fax: 503-934-6050, E-mail: wcd.medicalquestions@state.or.us

Workers Comp, Vocational Assistance Dispute Resolution The Vocational Assistance Program is now part of the Employment Services Team (EST) within the Benefit Services Section of the Department of Consumer and Business Services. Their primary purpose is to resolve vocational disputes between Oregon injured workers and insurers. Consultants engage in a variety of processes to resolve disputes. If the parties reach agreement, the consultant will issue a formal letter of agreement—or an order of dismissal if the parties reach an agreement not covered under the vocational assistance rules. If the dispute is not resolved by agreement or dismissal, the consultant completes an investigation, renders a decision and issues a Director's Order. A Director's Order generally includes finding of facts, applicable rules and statutes, conclusions of law and a decision. The orders may be appealed to the Central Hearings Officer Panel and then to the Court of Appeals. For more information contact Delmi Hernandez, Manager Rehabilitation Review Unit at (503) 947-7797.

Workers Comp, Premium Audit Mediation Program, Workers' Compensation insurers are required to maintain a premium audit program, which seeks to achieve and maintain equitable premium charges to Oregon employers. The Alternative Dispute Resolution (ADR) Program was developed in 1990 and implemented in response to an overwhelming backlog of premium audit cases. In addition to the mediation process, the ADR Program mediator often works with petitioners to educate them and help them better understand worker's compensation premium calculation, classification system and other requirements involved in what is a very complex and often misunderstood system. In the first year, out of 237 hearing requests there were 169 requests for mediation. Since 1991 there have been more than 1,090 hearing requests, and more than 893 requests for mediation. Out of the 893 requests for mediation there have been over 727 resolutions. The Director of the Department of Consumer and Business Services prescribes by rule the guidelines for the premium audit program system for workers' compensation insurance in the State of Oregon. The program operates under the Attorney General's model rules of procedure (March 1999 version) and confidentiality rules [OAR 836-005-0500, 836-005-0510, 836-005-0520, 836-005-0530, 836-005-0540, 836-005-0550, and 836-005-0560](#). For more information contact Ed Lanssens, Mediator, Consumer Protection Section. Phone (503) 947-7255. Also see: <http://www.cbs.state.or.us/external/wcb/index.html>.

Workers Comp, Hearings Division, Mediation Program, This program mediates: Mental stress cases, Complex occupational disease claims, Cases with old dates of injury that have both accepted and denied conditions, Cases that also include claims under ORS chapter 659, the Americans With Disabilities Act, and

other employment-related issues, cases with permanent total disability benefit claims and any case the parties consider appropriate for settlement. The program is voluntary; all parties must want to mediate the dispute. If a case doesn't settle, it's put back on the docket. The ALJ who mediated the case won't preside at the hearing, and there is no communication between the mediator and the trial ALJ. For more information Call the WCB Mediation Coordinator Kerry Garrett at 503-934-0104 (Salem) or toll free anywhere in Oregon at 1-877-311-8061. Email WCB Mediation Coordinator [Kerry Garrett](#) or Complete the online services [form](#).

AGENCY DISPUTE RESOLUTION & COLLABORATIVE PROBLEM-SOLVING OPTIONS

Agency Activity		Process options for creative problem-solving
Development of Policy and Rules And Program and project implementation	Informing the public	Open House
		Tour or Site Visit
		Press Release or Fact Sheet
	Soliciting input from the public	Public Meeting
		Focus Group
		Survey
	Consulting with the Public	Forum
		Samoan Circle
		Policy Dialog
		Open Space
Charrettes		
Collaborating with the Public	An advisory committee that does not seek consensus or agreement	
Collaborating with the Public	An advisory committee that DOES seek consensus or agreement (e.g., Collaborative Rulemaking Committee)	
Enforcement of Administrative Rules	Investigatory and Pre-Notice	Interest-based & Integrative negotiations
		Mediation using a private mediator
	Informal disposition of contested case	Negotiation
		Mediation using a private mediator
		Mediation using a state-employee-mediator from another agency
		Mediation using an ALJ in pre-hearing conference
	Mediation using an ALJ not assigned to the case	
Declaratory ruling		
Contracting & Procurement	Contract negotiations & dispute resolution clauses	Interest-based & Integrative negotiations
		Contract clauses aimed at pre-dispute cooperation (e.g., partnering agreements)
		Contract clauses that detail step-by-step dispute resolution protocols
	Resolution of Contract Disputes	Interest-based & Integrative negotiations
		Negotiation at progressively high levels within the organizations
		Mediation
		Arbitration (limited to agencies with specific statutory authority)
		Med-Arb
Litigation & Risk Management		Interest-based & Integrative settlement negotiations
		Mediation using a private mediator
		Early Neutral Evaluation
		Stipulation to certain facts, interpretation of data
		Settlement conference
Civil Enforcement & Civil Penalties		Interest-based & Integrative negotiations
		Mediation
		Assurance of voluntary compliance (UTPA)