

# **MEDIATING EMPLOYMENT CASES**

## **ISB Dispute Resolution Section**

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*Presented By*

**Grant T. Burgoyne**

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Strindberg & Scholnick, LLC  
1516 W. Hays Street  
Boise, Idaho 83702  
208-336-1788  
[grant@idahojobjustice.com](mailto:grant@idahojobjustice.com)

1. Mediator as a Facilitator, Evaluator or Both
2. Special Considerations in Employment Cases
  - a. EEOC and IHRC as mediators or parties to mediation
  - b. Overcoming impasse
    - i. Tax treatment of consideration
    - ii. Remedying systemic discrimination and retaliation
    - iii. Protecting the employee after reinstatement
  - c. Settlement terms
    - i. Avoiding retaliatory terms
    - ii. Non-waivable statutory rights
    - iii. Special considerations in releasing ADEA claims
    - iv. Non-disparagement clauses
    - v. Intellectual property and non-competition
3. Common Mistakes Made by the Attorneys
  - a. Not preparing the clients for mediation
  - b. Mediating too early
  - c. Mediating only to meet a court-imposed deadline
  - d. Not providing the Mediator requested information (strengths and weaknesses)
  - e. Hiding the ball from the mediator and the other side
  - f. Not providing a calculation/estimate of **all** damages
  - g. Not negotiating seriously prior to mediation
  - h. Misleading the opposition about what to expect at mediation
  - i. Making unreasonable opening offers and counter offers
4. Some Mistakes Made by Mediators
  - a. Not holding pre-mediation conferences when needed
  - b. Not delaying the mediation when the time isn't right
5. The Duty of Good Faith in Mediations
  - a. Should such a duty be made more explicit?
  - b. Does confidentiality unduly inhibit enforcement?
  - c. Remedies:
    - i. Recess and Order
    - ii. Sanctions
    - iii. Contempt of court
    - iv. Breach of Contract

**Grant T. Burgoyne**  
**Strindberg & Scholnick, LLC**  
**Boise, Idaho**

**Grant T. Burgoyne** is with the law firm of Strindberg & Scholnick, LLC where his practice focuses on employment and civil rights cases. He is a certified professional mediator with 30 years of experience in litigation, administrative law, mediation, arbitration, employment law, commercial law, personal injury and civil rights law. Mr. Burgoyne received his B.A. from the University of Idaho and his J.D. from the University of Kansas. He is a member of the Idaho State Bar, a member and former Chair of the Employment and Labor Law Section, and a member of the Dispute Resolution Section. He is also a member of the Federal Bar Association, and the Idaho Trial Lawyers Association. He is admitted to practice law in Idaho, the Federal District Court for Idaho and the Ninth Circuit Court of Appeals. He is an Idaho State Senator, a member of the Idaho Criminal Justice Commission and a member of the Idaho Supreme Court's Guardian and Conservatorship Committee. Mr. Burgoyne was an adjunct professor of employment law at Boise State University from 2002 to 2007, has lectured and written widely on legal issues, and is a co-author of the *Idaho Employment Policies Handbook* (Idaho Law Foundation, 1998; rev. eds. 2001, 2012).