



# DISPUTE RESOLUTION

Resources and Information for State Agencies

Bulletin #2, Revised April 1999

Confidentiality In Mediation

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## RELATED RESOURCES AVAILABLE FROM DOJ:

- ✓ORS 36.224 Confidentiality Rules
- ✓ADR Model Rules
- ✓Sample Agreement to Mediate

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*This is one in a series of bulletins on topics related to the practice of dispute resolution in Oregon state government. This document and other Bulletins and "appropriate dispute resolution" resources are available at*

[www.doj.state.or.us/ADR/](http://www.doj.state.or.us/ADR/). A printed version of this document is available to state agencies upon request. For further information contact: ADR Coordinator, Dept. of Justice, 1162 Court St. NE, Salem, OR 97310 (503) 378-4620.

*In accordance with ORS 183.502, the Department of Justice encourages the use of collaborative problem-solving processes, which enable decision-makers and affected parties to jointly engage in problem-solving procedures and which produce mutually beneficial agreements. The Department is committed to the design, development and implementation of innovative, flexible and accessible conflict resolution processes and to assisting staff and clients in the use of these processes.*

## Mediation Confidentiality under ORS 36.220-36.238

Oregon Revised Statutes 36.220 to 36.238 (Senate Bill 160, 1997) authorizes state agencies to make mediation communications confidential. The statutes also allow agencies to limit the discovery and admissibility of mediation communications in subsequent proceedings. Except for certain mediations conducted by the Workers Compensation Board, the confidentiality and inadmissibility provisions of these statutes are available to state agencies only by adopting, with the approval of the Governor, mediation confidentiality rules developed by the Attorney General. This Dispute Resolution (DR) Bulletin highlights important considerations for agencies that wish to participate in confidential mediations, provides step-by-step instructions for rule adoption and includes a sample "Agreement to Mediate" that will facilitate compliance with the notice requirement of the rules.

## Advantages of Confidentiality in Mediation

Mediation is a process in which a third party assists two or more parties to a controversy in reaching a mutually acceptable resolution of the dispute. 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.

Confidentiality in mediation may also:

- Provide for a more informal and candid discussion of a controversy.
- Allow the mediator and the parties to explore underlying issues and interests.
- Reduce the need for an attorney to guard the client's disclosure, enabling the principal parties to take a more direct and prominent role in the negotiations.
- Allow information to be given out selectively (e.g., a party in a caucus session may ask a mediator not to share information with the other party).
- Cover either (1) all mediation communications, (2) only those mediation communications in mediations in which the mediator is an employee or agent of the agency, or (3) only those mediation communications between the mediator and a party to the mediation that are not in the presence of any other party to the mediation

# Some Concerns with Mediation Confidentiality

Under Oregon's Public Records Law and Public Meetings Law, any member of the public may inspect public records and attend public meetings in order to see and understand how government operates. This ability of the public to monitor the decision-making processes of public agencies is essential to open government and the public's confidence in its government. The public access and oversight that is the core of open government could be adversely impacted by confidentiality in mediations involving state agencies. Mediation confidentiality may also 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.

If the agency does not disclose a mediation communication that could have prevented a crime or injury.

The advantages and disadvantages of mediation confidentiality described in this section must be balanced for each mediation to ensure that confidentiality is implemented in ways that do not harm open government.

# Balancing Inadmissibility in Subsequent Proceedings with Agency Responsibilities

Achieving a proper balance is also an issue with respect to the inadmissibility and non-discoverability of mediation communications. When mediation communications are non-discoverable and inadmissible in subsequent proceedings, that means the statements of mediation participants cannot be obtained through discovery and cannot be used as evidence in later proceedings. Protection against discovery and admissibility of mediation communications in

subsequent proceedings may be needed whether or not the mediation is "confidential." Without an agency rule that limits discovery and admissibility, parties to a mediation may not be fully candid in their discussion of the controversy and of acceptable resolutions. An agency may wish

to limit discovery and admissibility in all subsequent administrative, judicial and arbitration proceedings or only in subsequent administrative proceedings of the agency.

On the other hand, limiting discovery and admissibility in subsequent proceedings may hinder the agency's ability to effectively implement the law or agency policy. For example, when the action of a regulatory agency is necessary to protect the public, inadmissibility rules might prevent critical admissions of unlawful conduct that were made during mediation communications from being introduced into evidence in a subsequent proceeding. In other cases, the agency may find that inadmissibility rules are unnecessary as the agency is unlikely to conduct subsequent administrative proceedings involving the subject matter of the mediation and neither the parties nor the agency are concerned about the use of mediation communications in subsequent judicial or arbitration proceedings.



## **Is Confidentiality or Inadmissibility Necessary for the Agency's Mediation?**

In implementing and administering their statutory programs, agencies often have authority over a wide variety of matters (e.g., denial of benefits, license revocation, overpayments, civil penalties, contracts) for which the agency may choose to offer mediation as a means of resolving disputes. Additionally, agencies may be a party in a matter over which another state agency or public body has authority and for which that other agency or body has offered a mediation. Because the need for confidentiality or inadmissibility may differ depending upon the type of matter, the agency should first attempt to identify the general types of matters in which the agency may be involved in a mediation either as a party as defined in ORS 36.234, or as the mediator of a dispute over which the agency has regulatory authority. (Note that for purposes of mediation confidentiality, the agency may be a party as defined in ORS 36.234, even though for purposes of the Administrative Procedures Act the agency is not a party as defined in ORS 183.310(6).) The agency should identify not only those matters that the agency itself might initiate, but also matters initiated by other state agencies, other public bodies or private parties in which the agency may be a party on a regular basis or even occasionally.

The agency should next determine if confidentiality or inadmissibility of mediation communications is necessary for each of the types of matters identified and, if so, to what degree.<sup>1</sup>

### **If Confidentiality or Inadmissibility Is Needed, How Can it Best Be Achieved?**

When confidentiality is necessary, the agency may draw on a variety of existing laws or procedures, as well as the rules developed by the Attorney General, to reach the appropriate balance between confidentiality and open government. Note that mediation communications *are* confidential without rule adoption when an agency is acting only as the mediator in a controversy so long as the agency does not have a direct interest in the controversy that is the subject of the mediation and does not have regulatory authority over the matter. ORS 36.220, 36.224. Also,

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<sup>1</sup> If the agency decides, for example, to adopt the "Combined Rule" in order to have confidentiality available in most mediations, but also wishes to keep communications in certain mediations as admissible or non-confidential, the agency may wish to add an exception, as provided in paragraph (5) of the Combined Rule, excluding certain mediations from the scope of the rule.

ORS 36.220 to 36.238 do not affect any confidentiality created by other laws, and confidentiality that an agency has under its own substantive statutes still applies in mediation. Mediation communications are also confidential under ORS 36.220 to 36.238 when the mediation is regarding a claim for workers' compensation benefits conducted pursuant to rules adopted by the Workers' Compensation Board. ORS 36.224(6).

Before the enactment of ORS 36.220 to 36.238, the two most commonly cited laws affecting the confidentiality and inadmissibility of certain mediation communications in mediations involving state agencies were the Public Records Law and Rule 408 of the Oregon Rules of Evidence. The Public Records Law, which ensures that the public has access to records relating to the conduct of the public's business, includes exemptions from disclosure for certain records. Generally, these exemptions permit a public body not to disclose certain public records; however, the exemptions do not make the records confidential or prohibit their disclosure, but rely on other laws outside of the Public Records Law to do so. Oregon Evidence Code Rule 408 makes settlement offers inadmissible. Rule 408 applies only to admissibility in court proceedings, however, and provides no protection against discovery of mediation communications.

The agency should consider whether the exemptions from disclosure under the Public Records Law and existing confidentiality laws and the inadmissibility provided in Rule 408 for settlement offers are sufficient, or whether additional confidentiality and inadmissibility for mediation communications are necessary. If additional confidentiality or inadmissibility is needed, the agency may need to adopt mediation confidentiality rules pursuant to ORS 36.224.

### **If an Agency Needs to Adopt a Confidentiality Rule, Which Rule Is Best?**

The Department of Justice (DOJ) and the Department of Administrative Services (DAS) recommend that all agencies adopt the "Combined Rule (7/16/98) - Confidentiality and Inadmissibility of Mediation Communications." The "Combined Rule" will cover all mediations involving an agency except those the rule expressly excludes. The rule limits what the mediator may disclose. It allows the parties to agree in writing to limit what they may later disclose or use in court from the mediation. Adoption of this rule also ensures that:

- A. The agency will be able to engage in confidential mediations for tort claims, litigation, and labor agreements. DOJ and DAS have found that it is often useful if the parties agree that what they tell each other in mediation will remain confidential or inadmissible.
- B. The agency's rule will match those of DAS and other agencies. If a mediation involves a private party and more than one agency, ORS 36.28 bars confidentiality unless all the mediating agencies' have rules providing for confidentiality.
- C. The agency's rule for confidentiality in mediation will agree with the state's laws and policies on open government.

### **The Simplified Workplace Interpersonal Dispute Rule**

The "Combined Rule" covers mediations in which the agency is a party or is mediating a dispute as to which the agency has regulatory authority. An agency may also have an interest in using mediation to resolve interpersonal workplace disputes within the agency. Confidentiality may be useful in that employees are often reluctant to participate in mediation if they believe that whatever they say could be taken out of context and shared with their co-workers or supervisor.

Candor in mediation may be fostered through employment policies that make it clear that employees are expected not to share information from interpersonal workplace mediations with their co-workers. Alternatively, an agency may adopt the "Simplified Workplace Interpersonal Dispute Rule (7/16/1998)." This rule allows the parties to agree in writing to limit what they may later disclose or use in court from the mediation of disputes among agency employees. This rule can be easily adopted along with the Combined Rule.

Even after an agency adopts the "Workplace Rule," the rule requires an agency to exercise its discretion in determining which disputes are mediated confidentially. Whether or not an employee makes accusations of inappropriate or discriminatory behavior, the agency should consider whether confidentiality for mediation communications might preclude the agency from identifying patterns of inappropriate behavior or from acting on discriminatory or dangerous behavior. The agency should also consider whether confidentiality is advisable when matters that are the subject of an

interpersonal workplace dispute are also before another forum, such as an equal rights complaint.

### **Large, Multi-Party Mediation Rule (Rule T)**

The mediation of disputes involving a large number of parties presents special problems. Securing an agreement to participate in a confidential mediation (which generally is required by the rules developed by the Attorney General) may be impractical in mediations involving dozens of parties. The mediations may extend for many months and not all of the mediation "sessions" may need the same degree of confidentiality. Some sessions may also be subject to open meetings laws, making confidentiality impractical. To accommodate these types of mediation, the Attorney General has developed Rule T specifically for large, multi-party mediations.

### **Other Mediation Confidentiality Rules (Rules A - S)**

While DOJ and DAS have recommend that all agencies adopt the "Combined Rule," other rules are available to state agencies with special needs and circumstances. Rules A to S were published in the Oregon Bulletin in January and February 1998, and may be adopted in a variety of combinations to meet the needs of agencies that wish greater or lesser confidentiality than provided in the "Combined Rule." These rules are arranged in sets and cover mediation confidentiality and inadmissibility, caucus sessions communications and workplace interpersonal dispute mediation. Instructions for the adoption of these rules are found in the January 1998 Oregon Bulletin. An agency wishing to adopt any of these rules should work with their assigned counsel.

<b>Links To Mediation Confidentiality Rules Online:</b>	
<b>Combined Rule</b>	<a href="http://www.doj.state.or.us/adr/combo.shtml">http://www.doj.state.or.us/adr/combo.shtml</a>
<b>Simplified Workplace Rule</b>	<a href="http://www.doj.state.or.us/adr/work.shtml">http://www.doj.state.or.us/adr/work.shtml</a>
<b>Rules A - S</b>	<a href="http://www.doj.state.or.us/adr/rulea-s.shtml">http://www.doj.state.or.us/adr/rulea-s.shtml</a>
<b>Rule T</b>	<a href="http://www.doj.state.or.us/adr/rule-t.shtml">http://www.doj.state.or.us/adr/rule-t.shtml</a>

# Steps for Adoption of Mediation Confidentiality Rules Pursuant to ORS 36.224

These instructions are the same as those found in the August 1998 Oregon Bulletin for adoption of the "Combined" and "Workplace Rule."<sup>2</sup>

## 1. Modify the Rules as Permitted

When adopting the mediation confidentiality rules, an agency may not modify the rules except where indicated by blanks or italicized text in brackets in the rules. In the case of the "Combined Rule," the permitted changes include additional exceptions to mediation confidentiality and limitations and what types of mediation the rule applies to. References in the rule such as "OAR  */this rule / (7)* " must be replaced with the appropriate agency rule number (e.g., OAR 999-018-0200(7)).

## 2. Submit Request to Governor

After editing the rule as permitted, but before publishing a notice of rulemaking, or adopting temporary rules, the agency must obtain approval from the Governor for adoption of any mediation confidentiality rules. The agency must submit to the Governor's Office a "Request for Approval to Adopt Mediation Confidentiality Rules." The request must include: a complete set of the rules the agency proposes to adopt, a description of the types of cases or matters the agency anticipates will be mediated, the name of the agency contact person and his/her phone number. If the agency opts to exclude certain mediations or additional mediation communications from the rule, the request must also include an explanation of how the proposed rulemaking balances the public interest in facilitating effective and efficient dispute resolution and the public interest in open government. The agency must send copies of its request simultaneously to the Department of Justice (DOJ) ADR Coordinator and the

<sup>2</sup> Instructions for adoption of:

- Rules "A - S" are in the January 1998 Oregon Bulletin (at [http://arcweb.sos.state.or.us/rules/0198\\_Bulletin/0198\\_mediation\\_bulletin.html](http://arcweb.sos.state.or.us/rules/0198_Bulletin/0198_mediation_bulletin.html)) and
- Rule "T" is in the February 1998 Oregon Bulletin (at [http://arcweb.sos.state.or.us/rules/0298\\_Bulletin/0298\\_mediation\\_bulletin.html](http://arcweb.sos.state.or.us/rules/0298_Bulletin/0298_mediation_bulletin.html).)

Dispute Resolution Commission (DRC) Public Policy Coordinator.

## 3. DOJ and ODRC Advise Governor

In all cases, the DOJ ADR Coordinator and the DRC Public Policy Coordinator will make a recommendation to the Governor within 10 business days, whether or not to approve the request. Any recommendations not to approve the request will include reasons for that recommendation and suggestions for curing any deficiencies.

## 4. Governor's Decision

The Governor will make a decision on the Request for Approval within 30 days of the agency's submission of the Request for Approval. Because the Combined Rule and Simplified Workplace Interpersonal Dispute Rule provide for the confidentiality of mediation communications while preserving the state's policy of open government, the Governor's office has indicated that approval of the agency's request should be routine if the agency has made no changes to the rule. If the request is denied, an explanation of the reasons why it has been denied will be attached. The explanation may include suggested changes that may assist approval in the future.

## 5. Rulemaking Action

If approved by the Governor, the agency may proceed to take rulemaking action to adopt the mediation confidentiality rules. The agency must follow the rulemaking procedures in ORS 183.325 to 183.355. The agency may adopt the rules as temporary rules, if the agency satisfies the requirements of ORS 183.335(5).

## 6. Notify ODRC

The agency must notify the Dispute Resolution Commission upon adoption of mediation confidentiality rules. DRC shall maintain a list of all agencies that have adopted such rules. ORS 36.224(5).

# The Mediation Confidentiality Rule in Practice

	<b>IF THE PARTIES</b> (as defined in ORS 36.234)	<b>AND THE MEDIATOR</b> (as defined in ORS 36.110(10) ) <b>IS</b>	<b>THEN CONFIDENTIALITY</b> <b>IS</b>
1	Are all private parties	Private, public body (other than state agency) or state agency that has no regulatory authority over matter in mediation	Assumed
2	Include a public body (other than a state agency) and a private party	Private, public body (other than state agency) or a state agency that has no regulatory authority over matter in mediation.	Assumed
3	Include a public body (other than a state agency) and a private party	A state agency with regulatory authority over matter in mediation.	Only available if agency adopts an approved rule
4	Include a state agency and a private party	Any type	Only available if agency adopts an approved rule
5	Include public bodies (one of which has non-confidentiality policy/law) and a private party	Any type	Not available
6	Are all public bodies	Any type	Not available

## Mediators Cannot Also Be Parties

ORS 36.220 to 36.238 apply only to "mediation" facilitated by a "mediator" as those terms are defined in ORS 36.110(6) and (10). If the agency has a direct interest in the controversy, agency staff would not be a "third party" and therefore would not meet the definition of a "mediator." For example, if a licensing agency uses its staff to facilitate the settlement of a matter in which the agency has proposed to revoke a license, the staff would not be a "third party" because the agency has a direct interest in the controversy. If the agency wanted a confidential mediation of this licensing matter, the agency could use a private mediator or a mediator from another agency; the mediation would then be confidential to the extent provided in the agency's confidentiality rules.

## Mediator Disclosures Treated Differently than Disclosures by Parties

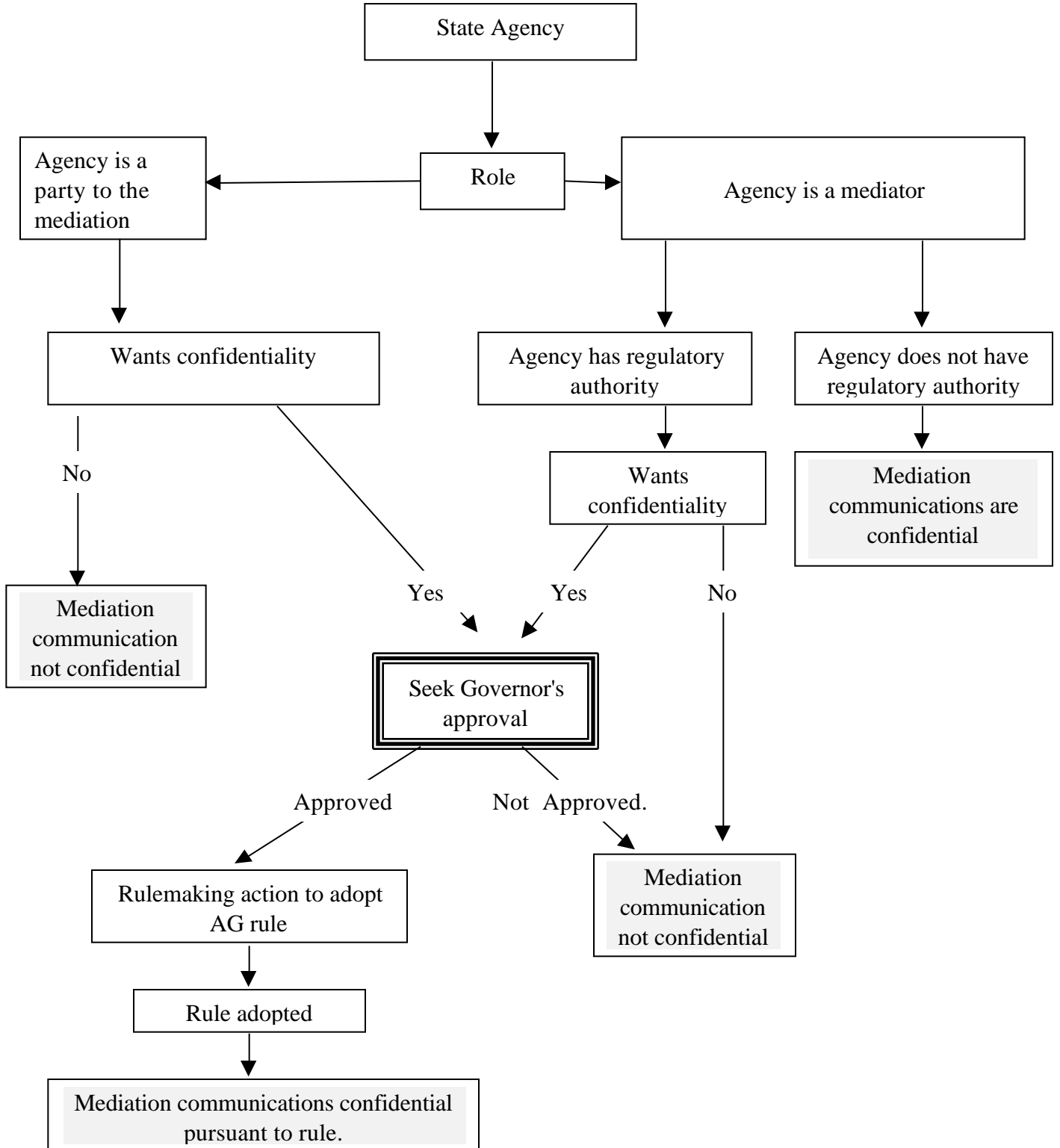
The "Combined Rule" and "Workplace Rule" treat disclosures by mediators differently from disclosures by the parties to a mediation. This is consistent with confidentiality statutes, and the practice of most mediators, to limit disclosures by the mediator, regardless of whether or not the parties may disclose mediation communications. These limitations on mediator disclosures are viewed as important both to preserve the mediator's impartial status and to ensure that discussions with a mediator cannot be taken out of context and used later in the mediation or in subsequent proceedings. The parties' behavior with the mediator may also be artificial or guarded if they know that the mediator may later be called on to offer his or her opinion as to the sincerity of the parties' negotiations or the strength of their positions.

## Use an "Agreement to Mediate" Incorporating Provisions of ORS 36.224.

Since mediation is a process that can vary widely in how it is implemented, an Agreement to Mediate or a pre-mediation agreement is commonly used to memorialize the ground rules and conditions of the mediation as understood and established by the mediators and parties. A sample agreement is available in the 1997 edition of the Attorney General's Administrative Law Manual and is available on the DOJ web site at [www.doj.state.or.us/ADR](http://www.doj.state.or.us/ADR). The sample agreement to mediate fulfills the confidentiality notice requirements of ORS 36.224 and incorporates: (1) the elements of a pre-mediation agreement (also known as an "agreement to collaborate") described in the Attorney General's Model Rule OAR 137-05-0030; and (2) a confidentiality agreement as required by the rules developed by the Attorney General pursuant to ORS 36.224.

# Flowchart - Confidentiality of Mediation Communications for State Agencies under ORS 36.224

(Assumes no other public bodies are parties to the mediation)



## Terms and Concepts Defined

*Refer to ORS 36.110 for a definition of “mediator,” “mediation,” “public body,” “state agency” and other terms. Refer to ORS 36.234 for a definition of the term “party.”*

**Agreement to Mediate** - refers to the agreement executed prior to a mediation and that specifies the ground rules and confidentiality under which the mediation will be conducted. The agreement to mediate should not be confused with the “mediation agreement” as the latter is the agreement at the conclusion of a mediation that resolves the issues in controversy.

**Admissible** - refers to those documents, statements and other materials that properly may be submitted into evidence in an adjudication. Oregon Evidence Code Rule 408, “Offers of Compromise,” is an example of a rule of evidence that makes inadmissible certain offers of compromise. Such offers are not confidential but are inadmissible as evidence.

**Discovery** - refers to the devices that may be used by one party in a litigation or in certain administrative proceedings to obtain information from another party in order to assist in the preparation of one’s case. A confidentiality rule or statute that makes certain communications not subject to discovery is usually included with provisions making the communication inadmissible. Such provisions effectively say that disclosure of mediation communication cannot be compelled and, if disclosed, the communication cannot be admitted into evidence.

**Mandatory reporting** - is a duty to report something. This is different from non-confidentiality - in which a person is not obligated to keep a communication confidential but is also not required to report the communication. For example, a “mandatory reporter” such as a registered nurse is obligated to report child abuse under ORS 419B.010.

**Mediation communication** - is defined in ORS 36.110(8) and does not include the “mediation agreement.”

**Disclosure** - The Public Records Law is an example of a law that requires the “disclosure” of certain records in response to a public records request. In the case of mediation, disclosure involves the sharing of mediation communications with persons who were not a party to the communication.

**Public Meetings** - ORS 192.610 to 192.690 establish

Oregon’s policy of open decision-making by governing bodies by providing public access to certain governmental meetings. Many mediations are not required to be open to the public under the provisions of the Public Meetings Law.

**Public Records** - ORS 192.410 to 192.505, the Public Records Law, gives the public a right to inspect any nonexempt public record containing information relating to the conduct of the public’s business. This is different from “mandatory disclosure” in that the public body does not have a duty to report or publish the record, only to make it available for inspection upon request. Note that ORS 192.502(9) exempts from disclosure “public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.” Because ORS 36.224 expressly authorizes confidentiality rules, mediation communications made confidential by adoption of the rules developed by the Attorney General would be exempt from public records disclosure.

**Privileged Communication** - is a communication between an individual and a specified person in professional confidence (i.e., attorney-client, physician-patient) that the professional is not permitted to disclose. ORS chapter 40 recognizes these evidentiary privileges. ORS 36.220 to 36.238 and the rules developed by the Attorney General permit a party to disclose a confidential mediation communication to another person so long as the disclosure is a privileged communication under ORS chapter 40.

## Don’t Get Confused... Model Rule OAR 137-005-0050

The Attorney General’s Model Rule OAR 137-005-0050 is captioned “Confidentiality of Collaborative Dispute Resolution Communications.” This rule is different from and does not affect the rules developed by the Attorney General pursuant to ORS 36.224. The Model Rule does not directly govern the confidentiality of mediation communications, but clarifies which confidentiality rules or law apply to mediation and to collaborative processes other than mediation. Model Rule 137-005-0050 defines “mediation” and “party” differently from how those terms are used elsewhere in the Model Rules to conform to the definition of those terms in ORS 36.110 and 36.244.

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