

This document shows changes to the temporary rules, which are set to expire on 11/21/15.

137-005-0050

Confidentiality of Collaborative Dispute Resolution Communications

(1) For the purposes of this rule,

(a) “Agreement to mediate” means a written agreement to mediate executed by the parties establishing the terms and conditions of the mediation, which may include provisions specifying the extent to which mediation communications will be confidential.

[(a)] **(b)** “Mediation” means a process in which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy and includes all contacts between a mediator and any party or agent of a party, until such time as a resolution is agreed to by the parties or the mediation process is terminated.

(c) “Mediation agreement” means an agreement arising out of a mediation, including any term or condition of the agreement.

[(b)] **(d)** “Mediation communication” means:

(A) All communications that are made, in the course of or in connection with a mediation, to a mediator, a mediation program or a party to, or any other person present at, the mediation proceedings; and

(B) All memoranda, work products, documents and other materials, including any draft mediation agreement, that are prepared for or submitted in the course of or in connection with a mediation or by a mediator, a mediation program or a party to, or any other person present at, mediation proceedings.

[(c)] **(e)** “Mediator” means a third party who performs mediation. Mediator includes agents and employees of the mediator or mediation program.

[(d)] **(f)** “Party” means a person or agency participating in a mediation who has a direct interest in the controversy that is the subject of the mediation. A person or agency is not a party to a mediation solely because the person or agency is conducting the mediation, is making the mediation available or is serving as an information resource at the mediation.

(2) If the agency is a party to a mediation or is mediating a dispute as to which the agency has regulatory authority:

(a) The agency may choose to adopt either or both the Model Rule for Confidentiality and Inadmissibility of Mediation Communications in OAR 137-050-0052 or the Model Rule for Confidentiality and Inadmissibility of Workplace Interpersonal Mediation Communications in 137-050-0054, in which case mediation communications shall be confidential to the extent

provided in those rules. The agency may adopt the rules by reference without complying with the rulemaking procedures under ORS 183.335. Notice of such adoption shall be filed with the Secretary of State in the manner provided by 183.355 **for the filing of rules**.

(b) If the agency has not adopted confidentiality rules pursuant to ORS 36.220 to 36.238, mediation communications shall not be confidential unless otherwise provided by law, and the agency shall inform the parties in the mediation of that fact in an agreement to collaborate pursuant to OAR 137-005-0030 or other document.

(3) If the agency is mediating a dispute as to which the agency is not a party and does not have regulatory authority, mediation communications are confidential, except as provided in ORS 36.220 to 36.238. The agency and the other parties to the mediation may agree in writing that all or part of the mediation communications are not confidential. Such an agreement may be made a part of an agreement to collaborate authorized by OAR 137-005-0030.

(4) If the agency and the other participants in a collaborative DR process other than a mediation wish to make confidential the communications made during the course of the collaborative DR process:

(a) The agency, the other participants and the collaborative DR provider, if any, shall sign an agreement to collaborate pursuant to OAR 137-005-0030 or any other document that expresses their intent with respect to:

(A) Disclosures by the agency and the other participants of communications made during the course of the collaborative DR process;

(B) Disclosures by the collaborative DR provider of communications made during the course of the collaborative DR process;

(C) Any restrictions on the agency's use of communications made during the course of the collaborative DR process in any subsequent administrative proceeding of the agency; and

(D) Any restrictions on the ability of the agency or the other participants to introduce communications made during the course of the collaborative DR process in any subsequent judicial or administrative proceeding relating to the issues in controversy with respect to which the communication was made.

(b) Notwithstanding any agreement under subsection (4)(a) of this rule, communications made during the course of a collaborative DR process:

(A) May be disclosed if the communication relates to child abuse and is made to a person who is required to report abuse under ORS 419B.010 **to the extent the person is required to report the communication**;

(B) May be disclosed if the communication relates to elder abuse and is made to a person who is required to report abuse under ORS 124.050 to 124.095 **to the extent the person is required to report the communication**;

(C) May be disclosed if the communication reveals past crimes or the intent to commit a crime;

(D) May be disclosed by a party to a collaborative DR process to another person if the party's communication with that person is privileged under ORS Chapter 40 or other provision of law;

(E) May be used by the agency in any subsequent proceeding to enforce, modify or set aside an agreement arising out of the collaborative DR process;

(F) May be disclosed in an action for damages or other relief between a party to a collaborative DR process and a DR provider to the extent necessary to prosecute or defend the matter; and

(G) Shall be subject to the Public Records Law, ORS 192.410 to 192.505, and the Public Meetings Law, **ORS** 192.610 to 192.690.

(c) If a demand for disclosure of a communication that is subject to an agreement under this section is made upon the agency, any other participant or the collaborative DR provider, the person receiving the demand for disclosure shall make reasonable efforts to notify the agency, the other participants and the collaborative DR provider.

Stat. Authority: ORS 183.341 & 183.502; OL 2015, ch 114 (SB 189)

Stats. Implemented: ORS 36.110 & 36.220 - 36.238; 2015 SB 189

Hist.: JD 3-1997, f. 9-4-97, cert. ef. 9-15-97; DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 7-2015(Temp), f. 5-22-15, cert. ef. 5-26-15 thru 11-21-15

137-005-0052

Confidentiality and Inadmissibility of Mediation Communications

(1) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110 and 36.234.

(2) Nothing in this rule affects any confidentiality created by other law. Nothing in this rule relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690. Whether or not they are confidential under this or other rules of the agency, mediation communications are exempt from disclosure under the Public Records Law to the extent provided in **ORS** 192.410 to 192.505.

(3) This rule applies only to mediations in which the agency is a party or is mediating a dispute as to which the agency has regulatory authority. This rule does not apply when the agency is acting as the "mediator" in a matter in which the agency also is a party as defined in ORS 36.234.

(4) To the extent mediation communications would otherwise be compromise negotiations under ORS 40.190 (OEC Rule 408), those mediation communications are not admissible as provided in **ORS** 40.190 (OEC Rule 408), notwithstanding any provisions to the contrary in section (9) of this rule.

(5) Mediations Excluded. Sections (6)–[(10)] (9) of this rule do not apply to:

(a) Mediation of workplace interpersonal disputes involving the interpersonal relationships between this agency's employees, officials or employees and officials, unless a formal grievance under a labor contract, a tort claim notice or a lawsuit has been filed; or

(b) Mediation in which the person acting as the mediator will also act as the hearings officer in a contested case involving some or all of the same matters; or

(c) Mediation in which the only parties are public bodies; or

(d) Mediation in which two or more public bodies and a private entity are parties if the laws, rule or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential; or

(e) Mediation involving 15 or more parties if the agency has designated that another mediation confidentiality rule adopted by the agency may apply to that mediation.

(6) Disclosures by Mediator. A mediator may not disclose or be compelled to disclose mediation communications in a mediation and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless:

(a) All the parties to the mediation and the mediator agree in writing to the disclosure; or

(b) The mediation communication may be disclosed or introduced into evidence in a subsequent proceeding as provided in subsections (c)–(d), (j)–(l), (o)–(p) and (r)–(s) of section (9) of this rule.

(7) Confidentiality and Inadmissibility of Mediation Communications. Except as provided in section[s](8)–[(9)] of this rule, mediation communications are confidential and may not be disclosed to any other person, are not admissible in any subsequent administrative, judicial or arbitration proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of a subsequent proceeding, or introduced as evidence by the parties or the mediator in any subsequent proceeding **so long as:** [.]

(a) The parties to the mediation sign an agreement to mediate specifying the extent to which mediation communications are confidential; and,

b) If the mediator is the employee of or acting on behalf of a state agency, the mediator or an authorized representative of the agency signs the agreement.

[(8) Written Agreement. Section (7) of this rule does not apply to a mediation unless the parties to the mediation agree in writing that the mediation communications in the mediation will be confidential and/or nondiscoverable and inadmissible. If the mediator is the employee of and acting on behalf of a state agency, the mediator or an authorized agency representative must also sign the agreement. The parties' agreement to participate in a confidential mediation must refer to this mediation confidentiality rule.]

[(9)] **(8)** Exceptions to Confidentiality and Inadmissibility.

(a) Any statements, memoranda, work products, documents and other materials, otherwise subject to discovery that were not prepared specifically for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding.

(b) *[Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential or privileged under state or federal law.]* **Any document that, before its use in a mediation, was a public record as defined in ORS 192.410 remains subject to disclosure to the extent provided by ORS 192.410 to 192.505 and may be introduced into evidence in a subsequent proceeding.**

(c) A mediation communication is not confidential and may be disclosed by any person receiving the communication to the extent that person reasonably believes that disclosing the communication is necessary to prevent the commission of a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential and may be disclosed in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(d) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule is not confidential and may be disclosed to the extent necessary to make such a report.

(e) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential or that all or part of the mediation communications may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential, privileged or otherwise prohibited from disclosure under state or federal law.

(f) A party to the mediation may disclose confidential mediation communications to a person if the party's communication with that person is privileged under ORS Chapter 40 or other provision of law. A party to the mediation may disclose confidential mediation communications to a person for the purpose of obtaining advice concerning the subject matter of the mediation, if all the parties agree.

(g) An employee of the agency may disclose confidential mediation communications to another agency employee so long as the disclosure is necessary to conduct authorized activities of the agency. An employee receiving a confidential mediation communication under this subsection is bound by the same confidentiality requirements as apply to the parties to the mediation.

(h) A written mediation communication may be disclosed or introduced as evidence in a subsequent proceeding at the discretion of the party who prepared the communication so long as the communication is not otherwise confidential under state or federal law and does not contain confidential information from the mediator or another party who does not agree to the disclosure.

(i) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications and such communications may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.

(j) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications are not confidential and may be disclosed and may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(k) When a mediation is conducted as part of the negotiation of a collective bargaining agreement, the following mediation communications are not confidential and such communications may be introduced into evidence in a subsequent administrative, judicial or arbitration proceeding:

(A) A request for mediation, or

(B) A communication from the Employment Relations Board Conciliation Service establishing the time and place of mediation, or

(C) A final offer submitted by the parties to the mediator pursuant to ORS 243.712, or

(D) A strike notice submitted to the Employment Relations Board.

(l) To the extent a mediation communication contains information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, that portion of the communication may be disclosed as required by statute.

(m) Written mediation communications prepared by or for the agency or its attorney are not confidential and may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding to the extent the communication does not contain confidential information from the mediator or another party, except for those written mediation communications that are:

(A) Attorney client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege, or

(B) Attorney work product prepared in anticipation of litigation or for trial, or

(C) Prepared exclusively for the mediator or in a caucus session and not given to another party in the mediation other than a state agency, or

(D) Prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation, or

(E) Settlement concepts or proposals, shared with the mediator or other parties.

(n) A mediation communication made to the agency may be disclosed and may be admitted into evidence to the extent the agency director, administrator or board determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public's health or safety, and the communication is not otherwise confidential or privileged under state or federal law.

(o) The terms of any mediation agreement are not confidential and may be introduced as evidence in a subsequent proceeding, a court has ordered the terms to be confidential under **ORS 17.095** or state or federal law requires the terms to be confidential.

(p) In any mediation in a case that that has been filed in court or when a public body's role in a mediation is solely to make mediation available to the parties the mediator may report the disposition of the mediation to that public body or court at the conclusion of the mediation so long as the report does not disclose specific confidential mediation communications. The agency conducting the mediation or making the mediation available or the mediator may use or disclose confidential mediation communications for research, training or educational purposes, subject to the provisions of ORS 36.232.

(q) **An [written agreement executed pursuant to Section (8) of this rule] agreement to mediate is not confidential and may be introduced into evidence in a subsequent proceeding, except to the extent the terms of the agreement are exempt from disclosure under ORS 192.410 to 192.505.**

(r) Any mediation communication relating to child abuse that is made to a person who is required to report child abuse under *[the provisions of]* ORS 419B.010 is not confidential to the extent that the person is required to report the communication. *[under the provisions of 419B.010.]*

(s) Any mediation communication relating to elder abuse that is made to a person who is required to report elder abuse under *[the provisions of]* ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication. *[under the provisions of 124.050 to 124.095.]*

(10) When a mediation is subject to section (7) of this rule, the agency will provide to all parties to the mediation and the mediator a copy of this rule or a citation to the rule and an explanation of where a copy of the rule may be obtained. **The agreement to mediate also must refer to this rule.** Violation of this provision does not waive confidentiality or inadmissibility.

Stat. Auth.: ORS 36.224, OL 2015, ch 114 (SB 189)

Stats. Implemented: ORS 36.224, 36.228, 36.230, 36.232, OL 2015, ch 114 (SB 189)

Hist.: DOJ 7-2015(Temp), f. 5-22-15, cert. ef. 5-26-15 thru 11-21-15

137-005-0054

Confidentiality and Inadmissibility of Workplace Interpersonal Mediation Communications

(1) This rule applies to workplace interpersonal disputes, which are disputes involving the interpersonal relationships between this agency's employees, officials or employees and officials. This rule does not apply to disputes involving the negotiation of labor contracts or matters about which a tort claim notice or a lawsuit has been filed.

(2) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110 and 36.234.

(3) Nothing in this rule affects any confidentiality created by other law.

(4) To the extent mediation communications would otherwise be compromise negotiations under ORS 40.190 (OEC Rule 408), those mediation communications are not admissible as provided in 40.190 (OEC Rule 408), notwithstanding any provisions to the contrary in section (9) of this rule.

(5) Disclosures by Mediator. A mediator may not disclose or be compelled to disclose mediation communications in a mediation and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless:

(a) All the parties to the mediation and the mediator agree in writing to the disclosure; or,

(b) The mediation communication may be disclosed or introduced into evidence in a subsequent proceeding as provided in subsections (c) or (h)–(l) of section (7) of this rule.

(6) Confidentiality and Inadmissibility of Mediation Communications. Except as provided in section (7) of this rule, mediation communications in mediations involving workplace interpersonal disputes are confidential and may not be disclosed to any other person, are not admissible in any subsequent administrative, judicial or arbitration proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of a subsequent proceeding, or introduced into evidence by the parties or the mediator in any subsequent proceeding so long as:

(a) The parties to the mediation and the agency [*have agreed in writing to the confidentiality of the mediation; and*] **sign an agreement to mediate specifying the extent to which mediation communications are confidential; and,**

(b) The person agreeing to the confidentiality of the mediation on behalf of the agency:

(A) Is neither a party to the dispute nor the mediator; and

(B) Is designated by the agency to authorize confidentiality for the mediation; and

(C) Is at the same or higher level in the agency than any of the parties to the mediation or who is a person with responsibility for human resources or personnel matters in the agency, unless the agency head or member of the governing board is one of the persons involved in the interpersonal dispute, in which case the Governor or the Governor's designee.

(7) Exceptions to Confidentiality and Inadmissibility.

(a) Any statements, memoranda, work products, documents and other materials, otherwise subject to discovery that were not prepared specifically for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding.

(b) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential or privileged under state or federal law.

(c) A mediation communication is not confidential and may be disclosed by any person receiving the communication to the extent that person reasonably believes that disclosing the communication is necessary to prevent the commission of a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential and may be disclosed in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(d) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential or that all or part of the mediation communications may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential, privileged or otherwise prohibited from disclosure under state or federal law.

(e) A party to the mediation may disclose confidential mediation communications to a person if the party's communication with that person is privileged under ORS Chapter 40 or other provision of law. A party to the mediation may disclose confidential mediation communications to a person for the purpose of obtaining advice concerning the subject matter of the mediation, if all the parties agree.

(f) A written mediation communication may be disclosed or introduced as evidence in a subsequent proceeding at the discretion of the party who prepared the communication so long as the communication is not otherwise confidential under state or federal law and does not contain confidential information from the mediator or another party who does not agree to the disclosure.

(g) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications and such communications may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.

(h) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications are not confidential and may be disclosed and may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements

(i) To the extent a mediation communication contains information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, that portion of the communication may be disclosed as required by statute.

(j) The mediator may report the disposition of a mediation to the agency at the conclusion of the mediation so long as the report does not disclose specific confidential mediation communications. The agency or the mediator may use or disclose confidential mediation communications for research, training or educational purposes, subject to the provisions of ORS 36.232.

(k) Any mediation communication relating to child abuse that is made to a person who is required to report child abuse under *[the provisions of]* ORS 419B.010 is not confidential to the extent that the person is required to report the communication. *[under the provisions of 419B.010.]*

(l) Any mediation communication relating to elder abuse that is made to a person who is required to report elder abuse under *[the provisions of]* ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication. *[under the provisions of 124.050 to 124.095.]*

(8) The terms of any agreement arising out of the mediation of a workplace interpersonal dispute are confidential so long as the parties and the agency so agree in writing. Any term of an agreement that requires an expenditure of public funds, other than expenditures of \$1,000 or less for employee training, employee counseling or purchases of equipment that remain the property of the agency, may not be made confidential.

(9) When a mediation is subject to section (6) of this rule, the agency will provide to all parties to the mediation and to the mediator a copy of this rule or a[n] **citation to the rule and an**

explanation of where a copy of the rule may be obtained. **The agreement to mediate also must refer to this rule.** Violation of this provision does not waive confidentiality or inadmissibility.

Stat. Auth.: ORS 36.224, OL 2015, ch 114 (SB 189)

Stats. Implemented: ORS 36.230(4), OL 2015, ch 114 (SB 189)

Hist.: DOJ 7-2015(Temp), f. 5-22-15, cert. ef. 5-26-15 thru 11-21-15