

**PUBLIC UTILITY COMMISSION OF OREGON
ADMINISTRATIVE HEARINGS DIVISION REPORT
PUBLIC MEETING DATE: January 21, 2003**

REGULAR CONSENT EFFECTIVE DATE _____

DATE: December 26, 2002

TO: Commissioners Hemmingway, Beyer, and Smith

FROM: Ruth Crowley, Administrative Law Judge

REVIEWED BY: Terry Lambeth, Rules Project Leader

SUBJECT: AR 446: Preliminary Approval to Initiate a Rulemaking to Adopt a New Rule (OAR 860-016-0015) Pertaining to Confidentiality and Inadmissibility of Mediation Communications.

ADMINISTRATIVE LAW JUDGE RECOMMENDATION:

I recommend that the Commission give preliminary approval to open a rulemaking concerning confidentiality in mediation. The next step is to request approval from the Governor to open the rulemaking.

DISCUSSION:

The Oregon Department of Justice, in accordance with ORS 183.502, encourages the use of collaborative problem-solving processes, which enable decision makers and affected parties to engage in joint problem solving 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.

ORS 36.220 through 36.238 authorize state agencies to make mediation communications confidential. These statutes also allow agencies to limit the discovery and admissibility of mediation communications in subsequent proceedings. For most agencies, including the Commission, these confidentiality and inadmissibility provisions are available only by adopting, with the approval of the Governor, mediation confidentiality rules developed by the Attorney General.

The Department of Justice directs agencies to assess their needs and to then select an appropriate rule from those developed by the Attorney General pursuant to ORS 36.224. Most agencies wishing to provide for the confidentiality of mediation

communications need adopt only what is designated as the combined rule, which includes provisions for the confidentiality and inadmissibility of mediation communications, requires little editing, will provide consistency with the rules of other agencies, and takes into consideration the public interest for mediation confidentiality and the states interest in open government.

I recommend that the Commission approve the combined rule, attached to this memorandum, as its submission to the Governor. Approval of this rule initiates the procedure established by the Department of Justice for agency adoption of rules governing confidentiality in mediation. The next step is to request approval from the Governor to open a rulemaking on this issue. After the Governor's approval, the Commission's proposed rule will be published in the Secretary of State's Bulletin and the procedure from that point forward is as for other Commission rulemakings, except that state agencies are permitted little latitude for amendment to the proposed rule.

PROPOSED COMMISSION MOTION:

Grant preliminary approval to initiate a rulemaking to adopt a new rule (OAR 860-016-0015) governing confidentiality in mediation, as set forth in Appendix A attached, and ask the Governor for approval to open a rulemaking.

860-016-0015

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 the documents 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) through (10) 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;

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

(d) Mediation involving two or more public bodies and a private party if the laws, rules, 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) and (d), (j) through (l), or (o) and (p) of section (9) of this rule.

(7) Confidentiality and Inadmissibility of Mediation Communications. Except as provided in sections (8) and (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.

(8) Written Agreement. Section (7) of this rule does not apply to a mediation unless the parties to the mediation agree in writing, as provided in this section, 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 be in substantially the following form. This form may be used separately or incorporated into an "agreement to mediate."

Agreement to Participate in a Confidential Mediation

The agency and the parties to the mediation agree to participate in a mediation in which the mediation communications are confidential and/or nondiscoverable and inadmissible to the extent authorized by OAR 860-016-0015(7) and this agreement. This agreement relates to the following mediation:

a)

(Identify the mediation to which this agreement applies)

b) To the extent authorized by OAR 860-016-0015(7), mediation communications in this mediation are: (check one or more)

_____ confidential and may not be disclosed to any other person.

_____ not admissible in any subsequent administrative proceeding and may not be disclosed during testimony in or during any discovery conducted as part of a subsequent administrative proceeding, or introduced as evidence by the parties or the mediator in any subsequent administrative proceeding.

_____ 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 administrative, judicial, or arbitration proceeding, or introduced as evidence by the parties or the mediator in any subsequent administrative, judicial, or arbitration proceeding.

c)

_____ Name of Agency

_____ Signature of Agency's authorized representative _____ Date
(when agency is a party) or Agency employee acting

as the mediator (when Agency is mediating the dispute)

d)

Name of party to the mediation

Signature of party's authorized representative

Date

e)

Name of party to the mediation

Signature of party's authorized representative

Date

(9) 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) 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 Commission 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, except to the extent the terms of the agreement are exempt from disclosure under ORS 192.410 to 192.505, a court has ordered the terms to be confidential under ORS 30.402, or state or federal law requires the terms to be confidential.

(p) 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(4).

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

Stat. Authority: ORS 36.224

Stat. Implemented: ORS 36.224, 36.228, 36.230, 36.232 & 756.060

Hist.: New