

Agenda Item No.:	C
Topic:	Confidentiality and Inadmissibility of Mediation Communications Administrative Rulemaking
Presentation Title:	Consent Item
Date of Presentation:	January 3, 2024
Contact Information:	Ryan Miller, Admin. Rules Specialist-Protection Div. ryan.miller@odf.oregon.gov

SUMMARY

The purpose of this agenda item is to seek approval from the Board of Forestry (Board) to permanently adopt by reference the Oregon Department of Justice Model Rule, Oregon Administrative Rule (OAR) 137-005-0052. The Protection Division adopted this model rule by reference temporarily to bring the division’s administration of contested cases and hearings up to date, in Oregon Administrative Rule 629-041-0200, and is currently effective through 01/07/2024.

CONTEXT

The original version of OAR 629-041-0200, prior to the temporary rule adoption, included many out-of-date references and was not practicably usable by the agency in matters of Mediation Communications under the protection division.

The Department of Justice has adopted a Model Rule that may be used by agencies in accordance with the Administrative Procedure Act. Oregon Revised Statue (ORS) 183.341 (1) allows agencies to adopt all or part of the model rules by reference without complying with the rulemaking procedures under ORS 183.335.

In July of 2023, the Agency adopted the DOJ Model Rule by reference as a temporary rule. Permanent administrative rule adoption of the DOJ Model Rule by reference is the necessary next step prior to the expiration of the temporary rule adoption.

RECOMMENDATION

Board approve the adoption of the DOJ Model rule as defined in 137-005-0052 by reference in OAR 629-041-0200.

Board direct the agency’s protection division to proceed with the permanent Oregon Administrative rulemaking filing.

NEXT STEPS

With Board approval, the permanent rule will be filed with the Secretary of State by January 7, 2024.

ATTACHMENTS

- (1) Temporary Administrative Order DOF 16-2023
- (2) OAR 629-041-0200
- (3) OAR 137-005-0052

OFFICE OF THE SECRETARY OF STATE

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ARCHIVES DIVISION

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TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

DOF 16-2023

CHAPTER 629
DEPARTMENT OF FORESTRY

FILED

07/12/2023 10:44 AM
ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Temporary Rule change made by reference to DOJ Model Rule OAR 137-005-0052.

EFFECTIVE DATE: 07/12/2023 THROUGH 01/07/2024

AGENCY APPROVED DATE: 07/10/2023

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Filed By:
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NEED FOR THE RULE(S):

The current rule 629-041-0200 is out of date with content and references. Updated DOJ Model rule is now available for adoption.

JUSTIFICATION OF TEMPORARY FILING:

The current ruleset, OAR 629-041-0200, is out of date with invalid references. Adoption of the current DOJ Model Rule by reference, OAR 137-005-0052, via temporary rule allows for immediate use of these updated model rules. Permanent Rule Making to follow.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

OAR 137-005-0052 DOJ Model Rule

AMEND: 629-041-0200

RULE TITLE: Confidentiality and Inadmissibility of Mediation Communications

RULE SUMMARY: Collaborative Dispute Resolution Model Rules adopted by reference.

RULE TEXT:

Pursuant to ORS 36.224, the Department of Forestry adopts by reference OAR 137-005-0052 as promulgated by the Attorney General effective as of November 13, 2018.

STATUTORY/OTHER AUTHORITY: ORS 526.016, ORS 526.041

STATUTES/OTHER IMPLEMENTED: ORS 36.220-36.238

PERMANENT FILING

For internal agency use only.

Agency and Division Name Administrative Rules Chapter Number

Rules Coordinator Email Telephone

Filing Contact Address Email Telephone

FILING CAPTION

Agency Approved Date: []

Effective Date: []

Rulemaking Notice Filing Date: []

RULEMAKING ACTION

List each rule number separately (000-000-0000). Attach clean text for each rule at the end of the filing.

ADOPT:

AMEND:

REPEAL:

RENUMBER:

RULE SUMMARY:

Include a summary for each rule included in this filing.

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Department of Forestry

Chapter 629

Division 41

PROTECTION ADMINISTRATION

629-041-0200

Confidentiality and Inadmissibility of Mediation Communications

Pursuant to ORS 36.224, the Department of Forestry adopts by reference OAR 137-005-0052 as promulgated by the Attorney General effective as of November 13, 2018.

[ED. NOTE: To view attachments referenced in rule text, click here for PDF copy.]

Statutory/Other Authority: ORS 526.016 & ORS 526.041

Statutes/Other Implemented: ORS 36.220-36.238

History:

DOF 16-2023, temporary amend filed 07/12/2023, effective 07/12/2023 through 01/07/2024

DOF 3-2005, f. & cert. ef. 1-7-05

DOF 7-2004(Temp), f. 9-10-04, cert. ef. 9-15-04 thru 3-13-05

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Department of Justice

Chapter 137

Division 5

COLLABORATIVE DISPUTE RESOLUTION MODEL RULES

137-005-0052

Mediation Confidentiality

- (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 192.311 to 192.478.
- (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 40.190 (OEC Rule 408), notwithstanding any provisions to the contrary in section (8) of this rule.
- (5) Mediations Excluded. Sections (6) - (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 (8) of this rule.
- (7) Confidentiality and Inadmissibility of Mediation Communications. Except as provided in section (8) 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) 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 document that, before its use in a mediation, was a public record as defined in ORS 192.311(5) remains subject to disclosure to the extent provided by ORS 192.311 to 192.478 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 192.311 to 192.478, 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, except to the extent the terms of the agreement are exempt from disclosure under ORS 192.311 to 192.478, 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 agreement to mediate is not confidential and may be introduced into evidence in a subsequent proceeding.

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

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

(9) 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.

Statutory/Other Authority: ORS 36.224, OL 2015 & ch 114 (SB 189)

Statutes/Other Implemented: ORS 36.224, 36.228, 36.230, 36.232, OL 2015 & ch 114 (SB 189)

History:

[DOJ 25-2018, minor correction filed 11/13/2018, effective 11/13/2018](#)

DOJ 13-2015, f. & cert. ef. 10-27-15

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

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