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ARCHIVES DIVISION

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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 731
DEPARTMENT OF TRANSPORTATION

FILED

08/31/2023 12:18 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Adoption of Attorney General's Model Rule for Confidentiality and Inadmissibility of Mediation Communications

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 09/21/2023 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

A public rulemaking hearing may be requested in writing by 10 or more people, or by a group with 10 or more members, within 21 days following the publication of the Notice of Proposed Rulemaking in the Oregon Bulletin or 28 days from the date the Notice was sent to people on the agency mailing list, whichever is later. If sufficient hearing requests are received, the notice of the date and time of the rulemaking hearing must be published in the Oregon Bulletin at least 14 days before the hearing.

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NEED FOR THE RULE(S)

ODOT needs to update its mediation confidentiality rule and chooses to adopt the Attorney General's Model Rule by reference.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

None

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

This rulemaking adopts the Attorney General's Model Rule for mediation confidentiality and will not have any impact on racial equity.

FISCAL AND ECONOMIC IMPACT:

None

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

None

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

This rule does not apply to small businesses and therefore they were not involved in its development.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

Adoption of a model rule does not involve any decision making that would require input from a rule advisory committee.

AMEND: 731-001-0720

RULE SUMMARY: ODOT is updating its mediation confidentiality rule by adopting the Attorney General's Model Rule.

CHANGES TO RULE:

731-001-0720

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) 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;¶~~

~~(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, 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) or (o)-(p) of section (9) of this rule.¶~~

~~(7) Confidentiality and Inadmissibility of Mediation Communications. Except as provided in sections (8)-(9) of this rule, mediation communicPursuant to ORS 36.224, the Department of Transportations 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 731-001-0720(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 731 dopts by reference OAR 137-0015-0720(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 (when agency Date 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 Oregon Department of Transportation Director 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 17.095 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 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. Violation of this provision does not waive confidentiality or inadmissibility⁰⁵², as adopted by the Attorney General of the State of Oregon, effective October 27, 2015.

Statutory/Other Authority: ORS 36.224, 184.616, 184.619

Statutes/Other Implemented: ORS 36.224, 36.228, 36.230, 36.232