Oregon State Bar CLE Seminars

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Legal Malpractice Limits Under *Alfieri v. Solomon*

1 Ethics (Oregon specific) credit

From the Oregon State Bar CLE seminar *Controversial Issues in Mediation,* presented on March 13, 2020

Chapter 1

Legal Malpractice Limits Under *Alfieri v. Solomon*

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Oregon Rules of Professional Conduct (1/11/2018)

RULE 1.0 TERMINOLOGY

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(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

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RULE 1.4 COMMUNICATION

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(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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Phillip ALFIERI, Petitioner on Review,
v.
Glenn SOLOMON, Respondent on Review.

CC 1203–02980
CA A152391
SC S062520.

Supreme Court of Oregon, En Banc.

Argued and Submitted on May 12, 2015.
Decided Dec. 10, 2015.

Mark McCulloch, Farleigh Wada Witt, Portland, argued the cause and filed the brief for the petitioner.

Thomas W. Brown, Cosgrave Vergeer Kester, Portland, argued the cause and filed the brief for the respondent.

Rankin Johnson, IV, Law Office of Rankin Johnson IV, LLC, Portland, filed the brief for amicus curiae Oregon Trial Lawyers Association.

BALMER, C.J.

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The issue presented in this case is one of first impression: to what extent do the confidentiality provisions of Oregon's mediation statutes, ORS 36.100 to 36.238, prevent a client from offering evidence of communications made by his attorney and others in a subsequent malpractice action against that attorney? The trial court granted defendant's ORCP 21 E motion to strike certain allegations in plaintiff's complaint and then dismissed the complaint with prejudice under ORCP 21 A(8) for failure to state a claim. The Court of Appeals affirmed in part and reversed in part, holding that ORS 36.220 and ORS 36.222 barred some, but not all, of plaintiff's allegations, and that the trial court erred in dismissing the complaint with prejudice before a responsive pleading had been filed. *Alfieri v. Solomon,* 263 Or.App. 492, 329 P.3d 26 (2014). We agree that ORS 36.220 and ORS 36.222 limit the subsequent disclosure of mediation settlement terms and certain communications that occur in the course of or in connection with mediation. We disagree, however, as to the scope of communications that are confidential under those statutes. We also disagree with the Court of Appeals as to whether the trial court erred in dismissing plaintiff's complaint with prejudice because no responsive pleading had been filed. For the reasons set out below, we affirm in part and reverse in part the decision of the Court of Appeals and remand to the circuit court for further proceedings.

I. BACKGROUND

We state the facts, accepting as true all well-pleaded allegations in the complaint and drawing all reasonable inferences in plaintiff's favor. *Bailey v. Lewis Farm, Inc.,* 343 Or. 276, 278, 171 P.3d 336, 337 (2007). Plaintiff retained defendant, an attorney specializing in employment law, to pursue discrimination and retaliation claims against plaintiff's former employer. In the course of that representation, defendant filed administrative complaints with the Oregon Bureau of Labor and Industries and thereafter a civil action against the former employer for damages on plaintiff's behalf. After limited discovery, plaintiff, represented by defendant, and plaintiff's former employer entered into mediation under the terms and conditions

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set forth in

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ORS 36.185 to 36.210. Before meeting with the mediator and plaintiff's former employer, defendant advised plaintiff about the potential value of his claims and the amount for which he might settle the lawsuit. Plaintiff and his former employer, along with their respective lawyers and the mediator, attended a joint mediation session and attempted to resolve the dispute. However, no resolution was reached. After the session ended, the mediator proposed a settlement package to the parties. In the weeks that followed, defendant provided advice to plaintiff about the proposed settlement. At defendant's urging, plaintiff accepted the proposed terms and signed a settlement agreement with his former employer. One of the terms to which plaintiff agreed was that the settlement agreement would be confidential. After the parties signed the agreement, defendant continued to counsel plaintiff and provide legal advice regarding the settlement.

Some months after the mediation ended, plaintiff concluded that defendant's legal representation had been deficient and negatively affected the outcome of his case. Plaintiff sued defendant for legal malpractice, alleging that defendant had been negligent and had breached his fiduciary duty to plaintiff through his work both on the underlying civil action and the mediation. Plaintiff asserted that had defendant properly and completely pleaded his claims and reasonably prepared for trial he would have received a favorable jury verdict and been awarded substantially more monetary relief than he obtained by settlement. To assert those claims, plaintiff pleaded facts that disclosed certain terms of the confidential settlement agreement and that pertained to communications made by various persons involved in the mediation process.

Specifically, plaintiff's allegations disclosed facts about the mediator's settlement proposal to the parties, defendant's conduct during the mediation, and private attorney-client discussions between plaintiff and defendant regarding the mediation. Those private attorney-client discussions—which occurred outside the mediation session and without the involvement of either the mediator or plaintiff's former employer—concerned the valuation and strength of plaintiff's claims, whether plaintiff was obligated to accept

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the mediator's proposal and sign the settlement agreement, and whether the agreement was enforceable. Although some of those discussions took place before or while the mediation was still in progress, others occurred when plaintiff signed the settlement agreement or thereafter.

Defendant responded by moving to strike many of the allegations in plaintiff's complaint, arguing that they contained material that was confidential and inadmissible under two provisions of Oregon's mediation statute, ORS 36.220 and ORS 36.222. ORS 36.220 provides in part: "Mediation communications are confidential and may not be disclosed to any other person" and "parties to a mediation may agree that all or part of the terms of a mediation agreement are confidential." ORS 36.220(1)(a), (2)(b).[1] To the extent that a mediation agreement or communication is confidential under ORS 36.220, it is "not admissible as evidence in any subsequent adjudicatory proceeding, and may not be disclosed by the parties or the mediator in any subsequent adjudicatory proceeding." ORS 36.222(1).

The mediation statute contains definitional provisions that describe the scope of what falls within those confidentiality and admissibility restrictions. "Mediation" is defined as:

> "[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."

ORS 36.110(5). A "'Mediation agreement' means an agreement arising out of a mediation,

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[1] Unlike mediation communications, which are confidential under the statute, the terms of a mediation agreement are not confidential unless the parties expressly agree to make them so. *See* ORS 36.220(2)(a) (terms of mediation agreements not confidential); ORS 36.220(2)(b) (parties may agree to make all or part of mediation agreement confidential).

including any term or condition of the agreement." ORS 36.110(6). "'Mediation communications' 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

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other person present at, the mediation proceedings." ORS 36.110(7)(a).[2]

The trial court granted defendant's motion to strike, in part, and struck substantial portions of plaintiff's complaint. In addition to striking allegations that disclosed the settlement amount and other confidential settlement terms, the trial court struck several allegations because they disclosed confidential mediation communications. Those allegations included that:

- The mediation was "largely unsuccessful because defendant substantially lowered his recommendation for settlement from amounts he told plaintiff before the mediation the lawsuit would likely settle for."
- Following the mediation session, the mediator suggested a particular settlement amount to the parties, and that "[o]ver the course of the next several days, plaintiff made several attempts to reject the proposed offer but defendant pressured plaintiff into eventually agreeing to the mediator's proposal."
- Defendant failed "to reasonably advocate for plaintiff in the mediation of the lawsuit" with plaintiff's former employer.
- Defendant recommended that plaintiff settle for the mediator's proposed amount.
- Defendant failed to advise plaintiff that the mediator's proposal "was not enforceable" because plaintiff's former employer "had not accepted it on time."
- Defendant had advised plaintiff "that he was bound to the terms of the Agreement even though [plaintiff's former employer] failed to pay within the time required by the terms of the Agreement."

Defendant also filed a motion to dismiss plaintiff's complaint under ORCP 21 A(8) for failure to state ultimate

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facts sufficient to state a claim for relief, on the basis that, in the absence of the allegations that defendant argued should be stricken, plaintiff had not alleged facts sufficient to establish his damages or that defendant caused those damages. After granting defendant's motion to strike, the trial court also granted the motion to dismiss and dismissed the complaint with prejudice.

Plaintiff appealed, and the Court of Appeals, as noted, affirmed in part and reversed in part. The Court of Appeals concluded that the trial court did not err in striking those allegations that disclosed the terms of the settlement agreement and the allegation that described the mediator's settlement proposal to the parties. With respect to the other allegations that referred to mediation-related communications, the Court of Appeals distinguished between those communications that took place while the mediation process was still underway and those that occurred after the settlement agreement was signed.

Looking to the text of the mediation statute and interpreting the definitional terms in ORS 36.110, the court agreed that discussions between plaintiff and defendant that occurred in preparation for, during, and after the mediation conference—but before the signing of the settlement agreement—were "mediation communications" made "in the course of or in connection with" the mediation "process." The court concluded

[2] The second paragraph of the statute, ORS 36.110(7)(b) adds to the definition of "mediation communications" certain written materials, including "memoranda, work products, documents and other materials" created in the course of or in connection with mediation. That paragraph is not at issue in this case.

that this was true even for attorney-client communications exchanged privately outside of mediation proceedings and without the participation of either the mediator or plaintiff's former employer. The court concluded that communications that occurred post-signing, however, were not "mediation communications" because the mediation had already ended and that the trial court had erred in striking the allegations referring to those.

Finally, the Court of Appeals concluded that it was error for the trial court to dismiss

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the complaint with prejudice because, under ORCP 23 A, a plaintiff is entitled to amend a complaint once as a matter of right before a responsive pleading is filed and it was conceivable that plaintiff could still allege and prove his claims. We granted plaintiff's petition for review.

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On review, plaintiff argues that the Court of Appeals erred in its reading of ORS 36.220 and ORS 36.222. Plaintiff acknowledges that he agreed with his former employer to make the settlement agreement confidential. Instead, plaintiff focuses on the applicability of those statutory provisions to subsequent attorney malpractice actions and to private attorney-client discussions that occur outside of mediation proceedings. Plaintiff argues that the allegations struck from his complaint did not contain "mediation communications" within the meaning of ORS 36.110(7)(a) because the communications described were not part of the "mediation," in that they did not involve assistance or facilitation by a mediator. Plaintiff further argues that mediation confidentiality is a privilege that belongs to the mediating parties and that the legislature did not intend for attorneys who represent mediating parties to invoke the benefit of that protection. Finally, plaintiff argues that allowing attorneys to use mediation confidentiality as a shield against malpractice claims is inconsistent with the express purpose of mediation confidentiality and contrary to public policy. Allowing such a rule, plaintiff contends, would lead to the unreasonable result of protecting lawyers who engage in unethical—and even criminal—conduct in the course of mediation from investigation and prosecution.

Defendant responds that, properly construed, "mediation communications" include all communications that are made to a party or its agent that support, aid, or facilitate the resolution of a dispute with the aid of a mediator until that effort finally and definitively ends. Defendant asserts that this includes all communications between a mediating party and that party's attorney in the mediation. Defendant further asserts that, as a lawyer representing a party to a mediation, he qualified as "any other person present at, the mediation proceedings," so that statements that plaintiff made to him concerning the mediation fall within the plain and ordinary meaning of ORS 36.110(7)(a). In addition, defendant notes that the legislature considered and provided for several exceptions to mediation confidentiality, but that none relate to a subsequent action by a party against that party's own lawyer for alleged malpractice in connection with the mediation. Defendant argues that the legislature's

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failure to include such an exception in the mediation statute evinces a deliberate policy choice. Finally, defendant asks this court to reverse the Court of Appeals decision holding that the trial court erred in dismissing plaintiff's complaint with prejudice.

II. ANALYSIS

A. *Defendant's Motion to Strike*

The parties do not dispute the legal standards that apply to the trial court's disposition of plaintiff's motion to strike. A court may strike "any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading." ORCP 21 E(2). We generally review orders to strike for abuse of discretion. *See, e.g., Lane County Escrow v. Smith, Coe,* 277 Or. 273, 286, 560 P.2d 608 (1977); *Cutsforth v. Kinzua Corp.,* 267 Or. 423, 428,

517 P.2d 640 (1973).[3] However, where a court's exercise of discretion turns on a legal question, such as the meaning of a statute, we review that determination as a matter of law. *See, e.g., State v. Sarich,* 352 Or. 601, 615, 291 P.3d 647, 655 (2012) (when reviewing order of trial court for abuse of discretion, reviewing court must first determine whether, as a matter of law, trial court applied correct legal standard). Because the trial court's ruling on

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defendant's motion to strike, and its subsequent dismissal of the complaint, both turn on the interpretation of Oregon's mediation statute, ORS 36.100 to 36.238, we review those actions for legal error to determine whether the court applied the law correctly. *See, e.g., Pereira v. Thompson,* 230 Or.App. 640, 659, 217 P.3d 236 (2009) (applying legal error standard to review of motion to strike where trial court's grant of motion turned on predicate legal question of whether allegations were actionable under claim for legal malpractice).

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The parties do not dispute that unless an exception to the statutory prohibition on disclosure applies, mediation communications that are confidential under ORS 36.220 and inadmissible under ORS 36.222 cannot form the basis of a legal claim and thus may be struck from a complaint pursuant to ORCP 21 E. Whether the trial court erred in ruling on the motion to strike, therefore, turns on whether the court correctly interpreted the term "mediation communications" as it applies in ORS 36.220 and ORS 36.222. We approach that question with the goal of determining the legislature's intent. *State v. Gaines,* 346 Or. 160, 171, 206 P.3d 1042 (2009). We look primarily to the statute's text, context, and legislative history, although we may look also to general rules of statutory construction as helpful. *Id.* at 171–72, 206 P.3d 1042.

Because "there is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes," we begin with the text of the statute. *Id.* at 171, 206 P.3d 1042 (citations and internal quotation marks omitted). ORS 36.220 provides that "[m]ediation communications are confidential and may not be disclosed to any other person." ORS 36.220(1)(a). If a communication is confidential under ORS 36.220, it is inadmissible in "any subsequent adjudicatory proceeding." ORS 36.222(1). To determine whether the allegations that were struck from plaintiff's complaint fall within those provisions, we look to the definitions of the operative terms "mediation" and "mediation communications." Each is statutorily defined in ORS 36.110, and we examine each in turn below.

1. *The Definition of "Mediation"*

As previously noted, the term "mediation" refers to a particular scope of activity as defined by the mediation statute, which provides:

> "'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 the resolution is agreed to by the parties or the mediation process is terminated."

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ORS 36.110(5). The parties do not dispute that plaintiff and his former employer were engaged in "mediation" within the meaning of the statute, and that the settlement agreement that they signed resulted from that process. Plaintiff and defendant differ, however, in their view of what activity is properly considered part of that

[3] Although the Oregon Rules of Civil Procedure were first promulgated in 1978, the grounds for a motion to strike under ORCP 21 E were taken from the prior statutory scheme. *See* Council on Court Procedures, Rule 21 (comment), in *Legislative History Relating to Promulgation of Oregon Rules of Civil Procedure, Vol. 5,* 48, 51–52 (1979) (describing history of rule). *See also former* ORS 16.100 (1977), *repealed by* Or. Laws 1979, ch. 284, § 199 (setting out rule for when sham, frivolous, irrelevant, or redundant material may be struck from pleadings). As such, our cases prior to 1978 on the standard of review for the grant of a motion to strike remain pertinent.

mediation. Plaintiff argues that "mediation" encompasses only the activity that occurs in the presence of the mediator. Defendant focuses on the statutory reference to a "process" and argues that "mediation" includes all activity that facilitates the resolution of the dispute, until the point at which a settlement agreement is signed or the mediation process is otherwise definitively ended. As discussed below, the text supports a narrower interpretation of "mediation" and, in turn, "mediation communications," than defendant's contention that all communications that are related to the "mediation process" are confidential, regardless of when and where they occur.

Looking to the text and context of ORS 36.110(5), we conclude that plaintiff has the better argument. It is a familiar rule that in construing statutes we should not simply consult dictionaries and interpret words in a vacuum. *State v. Cloutier,* 351 Or. 68, 96, 261 P.3d 1234 (2011). "Dictionaries, after all, do not tell us what words mean, only what words *can* mean, depending on their context and the particular manner in which they are used." *Id.* (emphasis in original). The term "process" is broad in connotation,

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indicating "the action of passing through continuing development from a beginning to a contemplated end" or "a particular method or system of doing something." *Webster's Third New Int'l Dictionary* 1808 (unabridged ed. 2002). However, ORS 36.110(5) narrows that term by describing more specifically that "'[m]ediation' means a process *in which* a mediator assists and facilitates" the resolution of the parties' dispute. (Emphasis added.) The words "in which a mediator assists and facilitates" follow the noun "process" without being set off by commas. Those words therefore operate as a restrictive clause, limiting the frame of reference and therefore the meaning of the preceding noun. *See* Bryan Garner, *Garner's Dictionary of Legal Usage* 888–89 (3rd ed. 2011) (describing rule on use of commas to indicate restrictive versus nonrestrictive clauses); *cf.*

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Blacknall v. Board of Parole, 348 Or. 131, 140, 229 P.3d 595 (2010) (reiterating and applying grammatical principle that a phrase set off by commas functions as parenthetical). Thus, in context, the meaning of "process" here appears more limited and refers only to those aspects of the mediation in which the mediator is directly involved.

That understanding of the text is supported by the subsequent clause in the same sentence that mediation "includes all contacts between a mediator and any party or agent of a party." ORS 36.110(5). Exemplars of that kind are not necessarily exclusive. *See State v. Kurtz,* 350 Or. 65, 74–75, 249 P.3d 1271 (2011) (concluding that use of term such as "includes" or "including" typically signals that legislature did not intend list of particulars that follows to be exhaustive). Nonetheless, "[w]hen, as here, the legislature uses a general term in a statute and also provides specific examples, those specific examples provide useful context for interpreting the general term." *Schmidt v. Mt. Angel Abbey,* 347 Or. 389, 403–04, 223 P.3d 399 (2009) (applying principle to criminal statute).

Here, the legislature's decision to specify that "mediation" includes *all* contacts between the mediator and the parties (or their agents) is particularly instructive. First, it implies that other types of interactions not mentioned, such as private conversations between a party and his or her attorney, may not necessarily be part of the mediation itself. Second, it confirms that the legislature understood "mediation" to refer, at its most essential level, to the assistance and facilitation that the mediator provides. The legislature's inclusion of that exemplar thus lends further support to the conclusion that the meaning of the term "mediation," as statutorily defined, refers to the part of the mediation process in which the mediator is directly involved.

That understanding of the definition of "mediation" is consistent with the wide range of mediation types that the statute covers. *See* ORS 36.155 to 36.175 (community-based mediation programs in individual counties); ORS 36.179 (program for mediations in which public bodies are parties); ORS 36.185 to 36.200 (mediation of civil disputes in collaboration with circuit courts). Parties sometimes meet with a

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mediator at a specified time and location to resolve their dispute according to a well-defined framework, but not always. *See* Office of the State Court Administrator, *Appropriate Dispute Resolution Deskbook* §§ 2 to 5 (2nd rev. 1997) (describing Oregon mediation programs existing at that time by county and type, complete with applicable rules and sample forms); 1 *Arbitration and Mediation* §§ 15.17–24 (Oregon CLE 1996 & Supp. 2008) (describing how mediation works and various styles used in Oregon). Mediation can take place in person or by phone, and in some cases, the mediator acts as an intermediary, communicating with each party separately rather than meeting with all participants at once. *See* Exhibit G, Senate Committee on Business, Law and Government, Senate Bill (SB) 160, Feb. 27, 1997 (accompanying statement of DeEtte Wald Beghtol, mediator and participant in workgroup that drafted SB 160, describing modes of mediation frequently used by programs to be covered by the law). Some mediations involve only a mediator and two parties that have a dispute, while others have a variety of participants. Community-based mediations in particular may include a range of interested persons or entities. *See id.* (describing broad participation in many

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community mediations). Ensuring flexibility to accommodate a wide range of mediation types was one of the legislature's stated goals. *See* ORS 36.105 ("The Legislative Assembly declares that it is the purpose of ORS 36.100 to 36.238 to: * * * (2) Allow flexible and diverse programs to be developed in this state, to meet specific needs in local areas and to benefit this state as a whole through experiments using a variety of models of peaceful dispute resolution."). The more narrow definition of "mediation" set out in ORS 36.110(5) serves that goal while accommodating the many types of mediation that the legislature understood and expected to occur pursuant to Oregon's mediation statute.

Considering the text of ORS 36.110(5), in context, we conclude that "mediation" includes only that part of the "process" in which a mediator is a participant. Separate interactions between parties and their counsel that occur outside of the mediator's presence and without the mediator's direct involvement are not part of the mediation, even if they are related to it.

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2. *Definition of "Mediation Communications"*

We turn next to the meaning of the term "mediation communications." ORS 36.110(7) states in part: "'Mediation communications' 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." On the face of the statute, then, whether something is a "mediation communication," depends on three elements: (1) whether it is a "communication," (2) its connection to a "mediation," and (3) the identity of the recipient.

First, to come within that definition, a statement must be a "communication." Because the statute does not define that term, we look to its plain meaning and ordinary use. *State v. Dickerson,* 356 Or. 822, 829, 345 P.3d 447 (2015). Looking to the dictionary definition of that term, a "communication" may be either "facts or information communicated," or "the act or action of imparting or transmitting"—in other words, the process by which information is exchanged. *Webster's* at 460. In this case, the parties do not dispute that conversations and disclosures between an attorney and client may be considered "communications." The same is true for statements made by a mediator to disputing parties or other statements made in the course of mediation proceedings.

Second, the communication must be made "in the course of or in connection with a mediation." An activity occurs "in the course of" something else when it occurs as part of a specified process or during a specified period or activity. *Oxford Dictionary of English* 400 (3rd ed. 2010). Likewise, the phrase "in connection with" is typically understood to mean a "relationship or association." *Portland Distributing v. Dept. of Rev.,* 307 Or. 94, 99, 763 P.2d 1189 (1988). *See also Webster's* at 480–81 (word "connection" refers to state of being "connected"—"joined or linked together" or having "parts or elements logically related"). It follows then, that a

communication is "in the course of" a mediation when it occurs as part of an actual mediation proceeding, and "in connection with" a mediation when it is made outside of such

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proceedings but relates to the substance of the dispute and its resolution process.

The question remains, however, whether the mediation must be ongoing or whether a communication can be "in connection with" a mediation once the dispute has settled. The definition of "mediation," discussed above, suggests that the mediation must be ongoing for a communication to be "in connection with" it, because the legislature expressly limited the temporal scope of "mediation" to activity occurring before "a resolution is agreed to by the parties or the mediation process is terminated." ORS 36.110(5). For that reason, we conclude that communications can only be "in connection with" a mediation for purposes of the statute if the mediation has not yet ended. As such, communications that occur after a settlement agreement is signed are not "mediation communications" within the meaning of ORS 36.110(7)(a) and are neither prohibited from disclosure under ORS 36.220 nor inadmissible

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under ORS 36.222.[4] A communication is thus "in the course of or in connection with" a mediation only if it is made during and at a mediation proceeding or occurs outside of a proceeding but relates to the substance of the dispute being mediated and is made before a resolution is reached or the process is otherwise terminated.

Third, to be confidential, the communication must be *made to* one of the recipients specified in ORS 36.110(7)(a) : "a mediator, a mediation program or a party to, or any other person present at, the mediation proceedings." Interpreting those terms is relatively straightforward. The first three categories are defined in the statute. "'Mediator' means a third party who performs mediation," including that person's agents and employees. ORS 36.110(9). "'Mediation program' means a program through which mediation is made available and includes the director, agents and employees of the program." ORS 36.110(8). A "party" is a person, agency or body who "participates in a mediation and has a direct

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interest in the controversy that is the subject of the mediation." ORS 36.234.[5]

Because the fourth category of recipients—"other person[s] present at, the mediation proceedings"—is not defined, we look to the plain and ordinary meaning of the words that form that category. In that context, the term "proceedings" can mean "a particular way of doing or accomplishing something," "a particular action or course of action" or "a particular thing done." *Webster's* at 1807. Given that "mediation" is the part of the conflict resolution process in which a mediator directly participates, it follows that "mediation proceedings" are the actual mediator-facilitated discussions through which mediation occurs, whether they take place at a formal meeting of the parties with the mediator, or at individual sessions with the mediator. As the statute contemplates, third parties may be present at, and participate in those discussions. *See* ORS 36.195(2) (stating that in civil mediations conducted under the provisions of ORS 36.185 to 36.210, "[a]ttorneys and other persons who are not parties to a mediation may be included in mediation discussions at the mediator's discretion, with

[4] It is unclear on the face of plaintiff's complaint when some of the communications in question occurred. The complaint, for example, refers to certain communications that took place on the day the settlement agreement was signed without stating whether they preceded or followed the actual signing. The timing of those communications, as well as whether they occurred at a mediation proceeding, are questions of fact for the trial court.

[5] For purposes of applying the mediation statute, the term "party" here can also include other persons, such as attorneys or others who are agents of mediating parties, who speak on behalf of mediating parties. *See* ORS 36.110(5) ("'Mediation' * * * includes all contacts between a mediator and any party *or agent of* a party * * *." (Emphasis added.)). *See, e.g., Bidwell and Bidwell,* 173 Or.App. 288, 294, 21 P.3d 161 (2001) (holding that written settlement communications between attorneys on behalf of two mediating parties were confidential "mediation communications" under ORS 36.220).

the consent of the parties"). To fall within the category of an "other person present at, the mediation proceedings" then, a person must be a direct observer or participant in the mediator-facilitated discussion in which the communication was made.[6]

The legislative history confirms that interpretation. *See* Exhibit E, Senate Business, Law and Government Committee, SB 160, Feb. 27, 1997 (accompanying statement

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of Donna Silverberg, Acting Director of Oregon Dispute Resolution Commission,[7] and official

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representative of work-group that drafted SB 160, describing that mediation statute seeks to provide assurance to parties by rendering all mediation communications confidential as a general rule, whether the communications are made to "a mediator, a mediation program or other party or *person present at the mediation session* " (emphasis added)).

Identifying the basic elements of "mediation communications" as set out in the text of ORS 36.110(7)(a) does not end our inquiry, however. To discern whether the kinds of communications at issue in this case fall within the scope of that provision, we must answer a more fundamental question: to *whose* communications does the definition set out in ORS 36.110(7)(a) apply? Because ORS 36.110(7)(a) is written in the passive voice—"'Mediation communications' means all communications that are made ..."—the legislature did not explicitly state whose speech it is directed at. *See State v. Klein,* 352 Or. 302, 309, 283 P.3d 350 (2012) (noting that because legislature wrote statutory definition of "aggrieved person" in the passive voice—"a person against whom the interception *was directed* "—who or what does the "directing" is not explicitly stated (emphasis in original)). Defendant argues that the legislature's use of passive voice in ORS 36.110(7)(a) means that provision was intended to apply to any communication by any person. However, whether that is correct is less clear than the words of the statute, in isolation, might suggest.

The legislature often uses the passive voice in drafting statutes, but its significance for statutory interpretation varies. In some circumstances, we have concluded that the legislature's use of the passive voice conveys its intent that a statute apply more broadly. *See, e.g., Powerex Corp. v. Dept. of Rev.,* 357 Or. 40, 46–47, 346 P.3d 476 (2015) (use of passive voice in ORS 314.665(2)(a) indicates that application of statute does not depend on identity of actor). At other times,

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however, the legislature's use of the passive voice adds nothing to the meaning of a provision and instead generates ambiguity as to how the law should be applied. *See, e.g., State v. Serrano,* 346 Or. 311, 322, 210 P.3d 892 (2009) (use of passive voice in OEC 505(1)(a) not reflective of how marital communications privilege intended to operate); *Brentmar v. Jackson County,* 321 Or. 481, 487, 900 P.2d 1030 (1995) (use of passive voice in land use statute created ambiguity as to who was authorized to act). For the reasons discussed below, we conclude that the legislature did not intend its use of the passive voice in ORS 36.110(7)(a) to bring the

[6] Defendant argues that his private attorney-client discussions with plaintiff are confidential "mediation communications" because defendant was a "person present at, the mediation proceedings" under ORS 36.110(7)(a). That argument is unavailing because, as discussed, that provision applies only to the extent that the communications were made "in the course of" mediation proceedings. Plaintiff has not argued, and nothing in the record suggests, that the mediator participated in any of those discussions.

[7] The Oregon Dispute Resolution Commission (ODRC) was the entity charged with providing services in support of the legislative mandates set forth in Oregon's mediation statute. Established by the Oregon legislature in 1989 and funded through 2003, the ODRC's membership included private individuals who worked in the field of alternative dispute resolution, judges, and elected officials. An ODRC workgroup was responsible for drafting the text of the legislation that created the confidentiality provisions in Oregon's current mediation statute.

statements of all possible speakers within the definition of "mediation communications," but that the legislature intended the statute to apply more narrowly.

Although the legislature did not specify the speakers to whom ORS 36.110(7)(a) applies, as described above, it did specify the persons *to whom* the communication must be made for it to be a "mediation communication."[8] That definition applies only to the extent that a communication is made "in the course of or in connection with a mediation *to* a mediator, mediation program, party to or any other person present at, a mediation proceeding." (Emphasis added.) When a communication is made "in the course of" a mediation, both sides of the communication will ordinarily consist of individuals identified in ORS 36.110(7)(a), because they will be present at the mediation proceedings, physically or by telephone. But when a communication takes place outside of mediation proceedings and is thus only "in connection with" a mediation, it may involve one of the persons identified in

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the statute and another person not among those listed.

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As a result, if ORS 36.110(7)(a) were interpreted to apply to communications made by any person, situations could occur where only half of the conversation is confidential. For example, under that interpretation, in an exchange outside of mediation proceedings between plaintiff (here a mediating party) and defendant (plaintiff's attorney and therefore neither a party, a mediator or mediation program representative, or, in this scenario, a person present at mediation proceedings), every statement pertaining to the mediation made by defendant *to* plaintiff *would be* confidential, but, because of the limitation on the receiving parties in the statute, plaintiff's response would not.[9]

That outcome—the protection of a third party's statements but not those of the mediating party—is fundamentally at odds with the legislature's central goal of protecting the ability of *mediating parties* to speak openly without fear that their words might be used against them later.*See* Tape Recording, Senate Business, Law and Government Committee, SB 160, Feb. 27, 1997, Tape 75, Side A (statement of Rep. Bryan Johnston, SB 160 sponsor, that fundamental goal of legislation is to protect parties' ability to speak openly in private mediation sessions); Tape Recording, Senate Business, Law and Government Committee, SB 160, Feb. 27, 1997, Tape 75, Side A (testimony of Silverberg, describing definition of "mediation communications" as protecting the confidentiality of what parties say in mediation). Thus, because interpreting ORS 36.110(7)(a) to apply to all speakers would lead to results that are contrary to the legislature's fundamental objective of ensuring confidentiality in the first place, we cannot conclude that the legislature intended its use of the passive voice in ORS 36.110(7)(a) to mean that communications made by *any* person may be mediation communications.

If the legislature did not intend ORS 36.110(7)(a) to apply to communications made by any person whatsoever,

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[8] In contrast, although California's statute providing for the confidentiality of mediation communications is also stated in the passive voice, the confidentiality of a communication is *not* limited according to the identity of the recipient. *See* Cal Evid Code § 1119(a) ("No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery * * *."). The Supreme Court of California has concluded that the scope of confidentiality pursuant to California Evidence Code Section 1119 extends to attorney-client communications, even outside the mediation itself. *See Cassel v. Superior Court,* 51 Cal.4th 113, 128, 119 Cal.Rptr.3d 437, 244 P.3d 1080, 1090–91 (Cal.2011) (interpreting rule and holding that communications between a disputant and his or her own counsel are confidential mediation communications, notwithstanding that they occur without either the mediator or other disputants present).

[9] As previously noted, communications made outside of mediation proceedings by an attorney representing a mediating party could be "mediation communications" if made on that party's behalf. *See* 358 Or. at 398 n. 5, 365 P.3d at 108 n. 5 (discussing application of statutes to persons acting as an agent for a mediating party). However, an attorney does not speak on behalf of a client where, as here, he or she communicates with that client privately for the purpose of facilitating the rendition of professional legal services to that client.

[358 Or. 402]

to whose communications did the legislature intend it to apply? To answer that question, we return to the text, placing it against its proper contextual background.

As discussed, "mediation" is a conflict resolution "process" whereby parties attempt to arrive at a mutually acceptable resolution of their dispute. *See* ORS 36.110(5). Within that process, every communication assumes a response. Thus, while the statute's drafters were concerned first and foremost with protecting mediating parties' ability to speak freely, they referred not only to "communications" but also to "mediation discussions" and "conversations." *See* ORS 36.195(2) ("Attorneys and other persons who are not parties to a mediation may be included in mediation discussions."); Tape Recording, Senate Business, Law and Government Committee, SB 160, Feb. 27, 1997, Tape 75, Side A (statement of Silverberg, describing how mediation confidentiality is meant to protect the confidentiality of "conversations" that parties have in mediation sessions). Most often, it is the persons identified in ORS 36.110(7)(a) who make up both sides of those exchanges.

Considering the statutory text in light of that context, the legislature's decision to define "mediation communications" as "[a]ll communications that are *made* * * * *to* a mediator, a mediation program or a party to, or any other person present at, the mediation proceedings," ORS 36.110(7)(a) (emphasis added), suggests that the legislature intended that provision to apply only to discussions *between* those persons identified in the statute. In other words, to be a confidential mediation communication, a communication must be both *made to* one of the persons listed in ORS 36.110(7)(a) and *made by* one of those same persons.

The statutory provisions for waiver of mediation confidentiality confirm that understanding. In the absence of an applicable

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exception under ORS 36.220, mediation communications may only be disclosed in a subsequent legal action if certain specified persons agree. Except for the catchall category of third parties who make or receive mediation communications while present at mediation proceedings, those persons who may waive confidentiality are the same ones enumerated in ORS 36.110(7)(a). *See*

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ORS 36.222(2) ("A party may disclose confidential mediation communications or agreements in any subsequent adjudicative proceeding if all parties to the mediation agree in writing to the disclosure."); ORS 36.222(3) ("A mediator may disclose confidential mediation communications or confidential mediation agreements in a subsequent adjudicatory proceeding if all parties to the mediation, the mediator, and the mediation program, if any, agree in writing to the disclosure."). The facts that the statute allows for confidentiality to be waived, and that the consent of only those persons is required, signal that the speakers to whom the definition of "mediation communications" is meant to apply is similarly limited.

Aside from looking to the text and context of a statute, we may also consider its legislative history to see whether it confirms our understanding of what the legislature intended. *Comcast Corp. v. Dept. of Rev.,* 356 Or. 282, 301–05, 337 P.3d 768 (2014). Although the legislature did not engage in extensive debate on the issue, the proponents of the legislation did discuss the meaning of "mediation communications" and how the confidentiality rules set out in ORS 36.220 and ORS 36.222 would apply. As already noted, the legislature expected and intended that communications that disputing parties make in the course of mediation—and those that mediators make in response—would be covered. *See, e.g.,* Tape Recording, Senate Business, Law and Government Committee, SB 160, Feb. 27, 1997, Tape 75, Side A (statement of Silverberg that goal of law is to "guarantee consumers of mediation services that the conversations and communications they have in a mediation session are confidential" and that mediation should provide "a confidential setting" for disputants to "air their differences"). Likewise, the legislative history indicates that the legislature understood the scope of confidentiality to extend to communications made by other participants in mediation proceedings. *See* Tape Recording, Senate Business, Law and Government Committee, SB 160, Feb. 27, 1997, Tape 74, Side B (testimony

of Beghtol noting that other persons, such as friends and family, who participate in mediation sessions will be "included under the confidentiality umbrella"). Nothing in the legislative history, however, suggests that the legislature intended ORS 36.110(7)(a) to apply to statements made

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by other persons not identified in the statute, such as an attorney giving private advice to his or her client outside of any mediation proceeding.

In sum, considering the text of ORS 36.110(7)(a) in light of its context and history, we conclude that the term "mediation communications" includes only communications exchanged between parties, mediators, representatives of a mediation program, and other persons while present at mediation proceedings, that occur during the time that the mediation is underway and relate to the substance of the dispute being mediated. Private communications between a mediating party and his or her attorney outside of mediation proceedings, however, are not "mediation communications" as defined in the statute, even if integrally related to a mediation.

3. *Application of the Confidentiality Provisions of the Mediation Statute*

We now return to the question of whether the trial court erred in granting defendant's motion to strike. As already discussed, the trial court struck several categories of allegations from plaintiff's complaint. First, the trial court struck an allegation that disclosed a communication from the mediator to the parties: that after the failed mediation conference, the mediator suggested a particular settlement amount. Second, the trial court struck an allegation that pertained to communications apparently made by defendant during the formal mediation session: that defendant had failed "to reasonably advocate for plaintiff." Third, the trial court struck allegations that described private attorney-client discussions that occurred between

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plaintiff and defendant before and after the mediation proceedings, including that defendant "pressured plaintiff into eventually agreeing to the mediator's proposal" and that defendant gave certain advice to plaintiff regarding the effectiveness and enforceability of the settlement agreement.

We have concluded that statements that mediators make to parties regarding their dispute are "mediation communications" within the meaning of ORS 36.110(7)(a) and ORS 36.220, and thus inadmissible under ORS 36.222. The trial court therefore was correct in striking the allegation

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in plaintiff's complaint that disclosed the mediator's suggestion to the parties of settlement terms.

Likewise, statements that an attorney makes in the course of participating in mediation proceedings are also "mediation communications." Such statements are made by "a person present at, the mediation proceedings," in the course of mediation, to persons listed in ORS 36.110(7)(a) —the mediator, parties to the mediation, or persons present at the "mediation proceedings." *See also* ORS 36.195(2) (providing that attorneys may participate in civil mediation proceedings). The allegation that defendant failed "to reasonably advocate for plaintiff in the mediation" appears to refer to defendant's conduct in the formal mediation session between plaintiff and his former employer. To the extent that is true, the trial court was correct in striking it.[10] If that

[10] We recognize that our interpretation of the relevant Oregon statutes may make it difficult, in some circumstances, for clients to pursue legal malpractice claims against their attorneys for work in connection with mediations. After Oregon's mediation statute was enacted, that issue was considered by the drafters of the Uniform Mediation Act. The Uniform Act provides that mediation communications that would otherwise be confidential may be disclosed for purposes of litigating a subsequent attorney malpractice action. *See* Uniform Mediation Act § 6(a)(6) (2001) (providing exception to mediation privilege where mediation communications are "sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on

allegation refers instead to communications made outside of a mediation proceeding, the trial court was still correct if defendant was speaking on plaintiff's behalf in connection with the mediation to qualifying recipients. *See* ORS 36.110(5) ("'Mediation' * * * includes all contacts between a mediator and any party *or agent of* a party * * *." (Emphasis added.)). *See, e.g., Bidwell and Bidwell,* 173 Or.App. 288, 294, 21 P.3d 161 (2001) (holding that written settlement communications between attorneys on behalf of two mediating parties were confidential "mediation communications" under ORS 36.220). On remand, the trial court may resolve any factual dispute as to the nature of that allegation.

The trial court erred, however, in striking the third category of allegations from plaintiff's complaint, pertaining to private attorney-client discussions between plaintiff

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and defendant. Private discussions between a mediating party and his or her attorney that occur *outside* mediation proceedings, whether before or after those proceedings, are not "mediation communications" within the meaning of ORS 36.110(7)(a), even if they do relate to what transpires in the mediation. Therefore, because those allegations are neither confidential under ORS 36.220 nor inadmissible under ORS 36.222, the trial court erred in striking them from plaintiff's complaint.[11]

B. *Dismissal of Plaintiff's Complaint*

We turn to the trial court's order dismissing plaintiff's complaint with prejudice. When this case was before the trial court, plaintiff neither filed, nor sought leave to file, an amended complaint at any point, before or

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after the final order of judgment dismissing the complaint with prejudice was entered. However, plaintiff argued in the Court of Appeals that the trial court erred in dismissing the complaint with prejudice because ORCP 23 A allows a plaintiff to amend its complaint once as a matter of right, before a responsive pleading has been served and a motion to dismiss is not a responsive pleading. *See Balboa Apartments v. Patrick,* 351 Or. 205, 212, 263 P.3d 1011 (2011) (so stating). The Court of Appeals agreed. Citing recent decisions of that court interpreting ORCP 23 A, the Court of Appeals held that the trial court erred because "plaintiff had to be allowed an opportunity to amend [the] complaint once, as a matter of right, before the trial court dismissed [the] complaint with prejudice." *Alfieri,* 263 Or.App. at 504, 329 P.3d 26 (citing *O'Neil v. Martin,* 258 Or.App. 819, 838, 312 P.3d 538 (2013), *rev. den.* , 355 Or. 381, 328 P.3d 697 (2014)).[12]

[358 Or. 407]

As we explain below, we reverse: A party is not entitled to amend its complaint once the court has allowed a motion to dismiss the complaint in its entirety under ORCP 21. Rather, once such a motion has been granted, the right to amend as a matter of course is extinguished and a plaintiff must seek leave to amend, which the trial court may grant in its discretion.

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conduct occurring during a mediation"). The legislature may wish to consider statutory changes based on the Uniform Mediation Act.

[11] While private attorney-client discussions that occur outside of mediation proceedings are not confidential "mediation communications," they may be privileged under OEC Rule 503. *See* OEC 503(1)-(3) (describing scope of privilege). The attorney-client privilege, however, may not be claimed by an attorney when the client seeks disclosure. *See* OEC 503(3) (privilege may only be claimed by the client or some other person on the client's behalf). Further, there is no privilege, "[a]s to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer." OEC 503(4)(c).

[12] The Court of Appeals relied primarily on two cases: *Lamka v. KeyBank,* 250 Or.App. 486, 281 P.3d 639 (2012), and *O'Neil v. Martin,* 258 Or.App. 819, 822, 312 P.3d 538 (2013), *rev. den.,* 355 Or. 381, 328 P.3d 697 (2014). For the reasons discussed in this opinion, those cases were wrongly decided.

We begin with the text of the applicable rules of civil procedure. In this case, two provisions are especially relevant. ORCP 23 A establishes the general rule for when a party is entitled to amend a pleading. It provides in part: "A pleading may be amended by a party once as a matter of course at any time before a responsive pleading is served * * *." As noted, that provision is understood to confer on parties an absolute right to amend within the timeframe prescribed. Because a motion to dismiss is not a responsive pleading, *see* ORCP 13 B (listing types of pleadings allowed in action), that rule seems to apply. *See also* ORCP 21 A ("Every defense, in law or fact, to a claim for relief in any pleading * * * shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss * * *."). However, when a motion to dismiss has been granted, ORCP 25 A is triggered. It provides in part: "When a motion to dismiss or a motion to strike an entire pleading or a motion for a judgment on the pleadings under Rule 21 is allowed, the court may, upon such terms as may be proper, allow the party to amend the pleading."

In this case, those two rules—ORCP 23 A and ORCP 25 A—appear to conflict. ORCP 23 A gives parties an unqualified right to amend once as a matter of course, which continues until a responsive pleading has been served. ORCP 25 A, however, provides that once a motion to dismiss a complaint in its entirety has been allowed, the court may "allow" an amendment. The word "allow" in this context is a legal term of art, meaning "to give consent to," "approve," or "to grant permission." *Black's Law Dictionary* 92 (10th ed. 2014). If "the court may, upon such terms as may be proper, allow the party to amend," one can infer that the court may also *disallow* an amendment. *See*

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Friends of Columbia Gorge v. Columbia River, 346 Or. 415, 426–27, 212 P.3d 1243 (2009) (stating rule that unless context is ambiguous, we interpret the word "may" according to its ordinary usage, as conveying discretionary authority). Thus, although the text does not say so expressly, ORCP 25 A suggests—contrary to the rule in ORCP 23 A—that a plaintiff may no longer amend as a matter of right once a court has granted a motion to dismiss its entire complaint.

As a basic rule of statutory construction, we construe statutes to give effect, if possible, to all their provisions. *Crystal Communications, Inc. v. Dept. of Rev.,* 353 Or. 300, 311, 297 P.3d 1256 (2013). *See also* ORS 174.010 ("[W]here there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."). Given the apparent inconsistency between

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ORCP 23 A and ORCP 25 A, we must determine whether they can be harmonized.

Analyzing the text, in context, we conclude that ORCP 23 A and ORCP 25 A were intended to operate as independent, alternative provisions. Although both rules relate to the same subject—the procedure by which parties may amend their pleadings—they apply in different circumstances. ORCP 23 A applies to the period between when a pleading—whether a complaint or answer—is served until a responsive pleading is served, or if none is permitted, 20 days has elapsed. *See* ORCP 23 A (describing timeframe when a party may amend its pleading "once as a matter of course"). In contrast, ORCP 25 A is triggered only when certain motions under ORCP 21 have been filed and granted. *See* ORCP 25 A (stating that rule applies "when a motion to dismiss or a motion to strike an entire pleading or a motion for a judgment on the pleadings under ORCP 21 is allowed"). Under those circumstances, a responsive pleading from the moving party is no longer required because the court has determined that all of the claims fail as a matter of law. As a result, the rule set out in ORCP 23 A that a party may amend once as a matter of course before a responsive pleading is served is inapplicable. We therefore conclude that ORCP 25 A, providing that a *court* "may" allow a party to amend when certain motions, including a motion to dismiss, are granted, operates as an exception to the more general rule in ORCP 23 A that a *party* may

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amend as a matter of course before a responsive pleading has been served.

That conclusion is supported by the text of ORCP 25 B, a related provision that sets out the rules for when a party that amends after a motion waives certain defenses or objections. ORCP 25 B specifically describes the avenues by which a party may amend its complaint:

> "If a pleading is amended, *whether pursuant to sections A or B of Rule 23 or section A of this rule or pursuant to other rule or statute,* a party who has filed and received a court's ruling on any motion directed to the preceding pleading does not waive any defenses or objections asserted in such motion by failing to reassert them against the amended pleading."

(Emphasis added.) As the text of ORCP 25 B illustrates, a party can amend its pleadings in a variety of ways, including: as a matter of course before a responsive pleading is served; with leave of the court after a responsive pleading has been served; by express or implied consent when additional issues are raised; and with leave of the court after certain motions under ORCP 21 have been granted. Although more than one avenue to amendment might occur over the life of a case, each operates independently of the others when it is invoked by a party seeking to amend.

That ORCP 23 A and ORCP 25 A were not intended to apply simultaneously, but to operate as alternative rules for the amendment of pleadings under different circumstances, is also supported by the text of ORCP 21 A, which governs how motions may be made and the court's authority to respond. It provides in part: "If a court grants a motion to dismiss, the court may enter judgment in favor of the moving party *or grant leave to file an amended complaint.* " (Emphasis added.) With the inclusion of those words, the drafters sought to make clear the court's discretionary power to determine whether, after granting a motion to dismiss, to allow the plaintiff to replead, or whether to instead enter a judgment.[13] *See* Council on Court Procedures, (1982 p

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romulgation),promulgation), Rule 21, comment ("To cure any ambiguity in the ability of the court to allow leave to amend after a motion to dismiss has been granted, Rule 21 A will be amended to specifically refer to leave to amend under ORCP 25.

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The amendment would also make it clear that judgment may be entered if leave to amend is not granted.").[14]

The history of ORCP 25 A confirms that it was intended to act as an exception to the general rule under ORCP 23 A that a party may amend as a matter of course before a responsive pleading is served. Although the first part of ORCP 23 A was taken almost verbatim from the text of FRCP 15(a) as it existed when the Oregon Rules of Civil Procedure were first promulgated,[15] *see* Council on Court Procedures, Proposed Rules of Civil Procedure, Rule 23 (comment), in *Legislative History Relating to Promulgation of Oregon Rules of Civil Procedure, Vol. 6,* 64 (1979) (discussing history of rule), the words in ORCP 25 A were drawn from an existing Oregon statute for which no

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[13] Initially, the wording of that provision differed slightly. *See* ORCP 21 A (1982) ("When a motion to dismiss has been granted, judgment shall be entered in favor of the moving party unless the court has given leave to file an amended pleading under Rule 25."). When the Council on Court Procedures changed ORCP 21 A to its present form, it intended to clarify, not modify, the options available to the court upon the grant of a motion to dismiss. *See* Council on Court Procedures, (2000 promulgation), Rule 21, comment (describing effect of changes), *available at* http://counciloncourtprocedures.org/Content/Legislative_History_of_Rules/ORCP_21_promulgations_all_years.pdf (accessed Dec. 2, 2015).

[14] *Available at* http://counciloncourtprocedures.org/Content/Legislative_History_of_Rules/ORCP_21_promulgations_all_years.pdf (accessed Dec. 2, 2015).

[15] In 1978, FRCP 15(a) read as follows: "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend at any time within 20 days after it is served." FRCP 15(a) (1977). FRCP 15(a) has since been amended and that language altered.

analogous federal rule existed. *See id.* (describing statutory source of that part of rule).[16] The provision from which ORCP 25 A was drawn, *former* ORS 16.380, provided that if a demurrer[17]

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was sustained, "the court may in its discretion allow the party to amend the pleading demurred to, upon such terms as may be proper." *Former* ORS 16.380 (1977), *repealed by* Or. Laws 1979, ch. 284, § 199.[18] Accordingly, once the court had determined that a complaint failed to state a claim for relief, it had discretion as to whether to allow the plaintiff to amend. *See Speciale v. Tektronix,* 38 Or.App. 441, 445, 590 P.2d 734 (1979) (noting that under *former* ORS 16.380, once demurrer had been granted, "an application for leave to plead over [was] addressed to the discretion of the trial court"). Thus, while federal courts had interpreted FRCP 15(a) as granting plaintiffs an unqualified right to amend as a matter of course before a responsive pleading was served, even if a motion to dismiss had been granted, *see* Wright and Miller, *Federal Practice and Procedure Vol. 6* § 1483 (1971) (describing majority rule), the drafters of the Oregon Rules of Civil Procedure declined to adopt such a rule in Oregon. Rather, by adopting the one set out in ORCP 25 A, they chose to preserve the court's discretion to allow, or disallow, the amendment of a dismissed pleading. That intent is reflected in the original commentary to that rule, which states: "If a motion to strike an entire pleading or to dismiss is allowed, the court retains discretion to allow *or not allow* an amended pleading." Council on Court Procedures, Commentary to Oregon Rules of Civil Procedure Pleading, 14–15, in *Legislative History Relating to Promulgation of Oregon Rules of Civil Procedure, Vol. 3* (1979) (emphasis added).[19]

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[358 Or. 412]

We conclude, therefore, that ORCP 25 A was intended to operate as an exception to the general rule in ORCP 23 A that a party may amend once as a matter of right before a responsive pleading has been served. Even after a motion under ORCP 21 is filed, a plaintiff remains free to amend its complaint once as a matter of right. However, once the court has granted a motion to dismiss or strike an entire pleading, or a motion for judgment on the pleadings under Rule 21 is otherwise allowed, a plaintiff may no longer amend as a matter of course, but must seek leave of the court to do so. If leave is sought, the court, applying the same principles that guide the amendment of pleadings after a responsive pleading has been served, may decide whether to allow it. In such a case, "leave shall be freely given when justice so requires." ORCP 23 A. *See, e.g., Family Bank of Commerce v. Nelson,* 72 Or.App. 739, 746, 697 P.2d 216 (1985), *rev. den.,* 299 Or. 443, 702 P.2d 1111 (1985) (reversing as

[16] Originally, the text of ORCP Rule 25 A was set out in ORCP 23 D. Fredric Merrill, *Oregon Rules of Civil Procedure: 1984 Handbook* 55 (1984). In both its original form as ORCP 23 D and as it exists today in ORCP 25 A, the relevant text (the first sentence of the rule) remains the same. *Compare* Council on Court Procedures, Proposed Rules of Civil Procedure, Rule 23, in *Legislative History Relating to Promulgation of Oregon Rules of Civil Procedure, Vol. 6,* 63 (1979) (original text of ORCP 23 D) *with* ORCP 25 A.

[17] Before the promulgation of the Oregon Rules of Civil Procedure, parties would file a "demurrer" rather than a motion to dismiss for failure to state a claim. *See* Council on Court Procedures, Commentary to Oregon Rules of Civil Procedure Pleading, 9–10, in *Legislative History Relating to Promulgation of the Oregon Rules of Civil Procedure, Vol. 3* (1979) (describing change in terminology). As a practical matter, a demurrer is equivalent to a motion to dismiss today. *See Black's Law Dictionary* at 526 (describing demurrer as "a pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer").

[18] *Former* ORS 16.380 provides in full: "After a decision upon a demurrer, if it is overruled, and it appears that the demurrer was interposed in good faith, the court may in its discretion allow the party to plead over upon such terms as may be proper. If the demurrer is sustained, the court may in its discretion allow the party to amend the pleading demurred to, upon such terms as may be proper."

[19] Before the Oregon Rules of Civil Procedure were finalized, they were organized according to a lettered scheme. Originally, the rule set out today in ORCP 25 A was draft Rule L(4). The relevant portion of that rule remained the same in all subsequent drafts of the rule.

abuse of discretion trial court denial of leave to amend complaint where defendant failed to demonstrate prejudice). However, when ORCP 25 A is triggered, for example, by the grant of a motion to dismiss, and the plaintiff does not seek leave to amend, the court may, in its discretion, order the complaint dismissed with prejudice.

We reverse the Court of Appeals' determination that the trial court erred in dismissing plaintiff's complaint with prejudice. The case must be remanded, however, given our conclusion that the trial court applied an incorrect legal standard in ruling on defendant's motion to strike. On remand, the trial court will have the opportunity to apply the legal standards set out in this opinion to the motion to strike and then consider whether defendant's motion to dismiss is well taken. If the trial court again dismisses the complaint in its entirety, plaintiff may seek leave to amend. If the plaintiff does so, the trial court may then decide, in its discretion, whether to allow the amendment.

For the reasons discussed above, the decision of the Court of Appeals is affirmed in part and reversed in part. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

Chapter 4

MEDIATION CONFIDENTIALITY

THOMAS W. BROWN
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§ 4.1 CONFIDENTIALITY

The Oregon Legislature has determined that "when two or more persons cannot settle a dispute directly between themselves, it is preferable that the disputants be encouraged and assisted to resolve their dispute with the assistance of a trusted and competent third party mediator, whenever possible, rather than the dispute remaining unresolved or resulting in litigation." ORS 36.100. To achieve that end, an essential ingredient is mediation confidentiality, which the Oregon Legislature has provided for in ORS 36.220 to 36.238.

This chapter explores that statutory scheme as applied to both private disputes and disputes involving public bodies, as well as the limited judicial interpretation of the statutory text to date.

> COMMENT: The importance that confidentiality plays in the mediation process—while not uniformly embraced by commentators—has been repeatedly recognized by courts and commentators alike. *See, e.g*, *In re Grand Jury Subpoena Dated December 17, 1996*, 148 F3d 487, 492 (5th Cir 1998) ("Confidentiality is critical to the mediation process because it promotes the free flow of information that may result in the settlement of a dispute."); Charles B. Craver, *The Use of Mediation to Resolve Community Disputes*, 48 Wash U JL & Pol'y 231, 245 (2015) ("Confidentiality is a critical aspect of mediation endeavors so that the disputants can speak openly about their interests, concerns, and desires. If they were to think that their candid disclosures could be used against them in

subsequent proceedings, few would be forthcoming and little progress could be made.").

§ 4.1-1 The Statutory Scheme

The statutory scheme that governs mediation confidentiality has been developed over many years. It is dense and intricate, consisting of the legislature's definition of key terms in ORS 36.110 and their incorporation in ORS 36.220 and 36.222, which specify how to determine what constitutes a confidential mediation communication or agreement and how they are treated in subsequent adjudicatory proceedings.

The Oregon Supreme Court examined several parts of ORS 36.110, ORS 36.220, and ORS 36.222 in *Alfieri v. Solomon*, 358 Or 383, 394–95, 365 P3d 99 (2015). The Oregon Court of Appeals construed parts of ORS 36.110 not addressed in *Alfieri* in *In re Marriage of Bidwell*, 173 Or App 288, 294, 21 P3d 161 (2001) (differentiating "communications that are *made*" to someone from "*materials* prepared for, or submitted in connection with, mediation"—for purposes of applying ORS 36.220(3)). But many aspects of ORS 36.110, ORS 36.220, and ORS 36.222 will require construction in future cases through application of the methodology for construing legislative enactments adopted in *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 859 P2d 1143 (1993), as supplemented by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009).

What follows will hopefully help Oregon lawyers understand the existing statutory scheme, the judicial guidance that exists to date for determining what qualifies as confidential, and the principles that will control future construction of the statutory scheme. But, like many statutes, gaining that understanding is not a simple or easy process—it does not involve a straight line—but requires careful attention to multiple statutory provisions, application of the limited existing judicial guidance, and application of the well-settled principles applicable for determining their intended meaning where judicial guidance does not presently exist or is unclear.

§ 4.1-2 Private-Party Mediations

§ 4.1-2(a) Applicable Definitions

§ 4.1-2(a)(1) *Mediation*

The term *mediation* is defined as

> 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.

ORS 36.110(5); *see also* ORS 36.110(8) ("'Mediation program' means a program through which mediation is made available and includes the director, agents and employees of the program."); ORS 36.110(9) ("'Mediator' means a third party who performs mediation. 'Mediator' includes agent and employees of the mediator or mediation program and any judge conducting a case settlement conference.")

In *Alfieri v. Solomon*, 358 Or 383, 365 P3d 99 (2015), the Oregon Supreme Court interpreted ORS 36.110(5). In doing so, the court concluded that the legislature intended the statutory definition of *mediation* to mean only those aspects of the "process" of assisting or facilitating the resolution of a dispute in which a "mediator" is "present," "directly involved," or a "direct participant" with mediation parties, their counsel, and other people "present at a mediation proceeding." *Alfieri*, 358 Or at 394–95.

§ 4.1-2(a)(2) *Mediation Agreement*

"'Mediation agreement' means an agreement arising out of a mediation, including any term or condition of the agreement." ORS 36.110(6). While no Oregon appellate court has addressed that term, it would seemingly encompass a settlement agreement resulting from a mediation or an agreement, for example, terminating a mediation. Most importantly, the term *mediation agreement* expressly covers "any term or condition" of such an agreement.

§ 4.1-2(a)(3) *Mediation Communications*

The term *mediation communications* means the following:

> (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.

ORS 36.110(7).

§ 4.1-2(a)(3)(i) Communications "in the Course of or in Connection with a Mediation" (ORS 36.110(7)(a))

In *Alfieri v. Solomon*, 358 Or 383, 365 P3d 99 (2015), the Oregon Supreme Court considered whether certain settlement-related communications made before, during, and after an in-person mediation session fit within the definition of *mediation communications* under ORS 36.110(7)(a). *Alfieri*, 358 Or at 385–86. *Alfieri* was a legal malpractice case in which the client alleged his attorney mishandled mediated settlement negotiations of the client's employment claims. *Alfieri*, 358 Or at 386. The lawyer had represented the client in an in-person mediation session that was unsuccessful, but afterwards the client accepted the mediator's settlement proposal. *Alfieri*, 358 Or at 386–87. In the subsequent malpractice action, the client alleged his lawyer had given substandard advice during the in-person mediation session and also afterward with regard to accepting the mediator's settlement proposal. *Alfieri*, 358 Or at 386–87. The lawyer defended by contending the client's allegations constituted inadmissible mediation communications and successfully moved to strike the allegations in the trial court. *Alfieri*, 358 Or at 388.

> NOTE: The attorney-client privilege does not apply to attorney-client communications relating to a claim for legal malpractice. OEC 503(4)(c).

The Oregon Supreme Court held that communications made during the in-person mediation session, including those between the lawyer and client, were confidential mediation communications and inadmissible. *Alfieri*, 358 Or at 405. Also the postsession communications emanating from the mediator were also protected mediation communications. *Alfieri*, 358 Or at 404–05. The court held, however, that private attorney-client communications made before or after the in-person session did not constitute protected mediation communications:

> Private discussions between a mediating party and his or her attorney that occur *outside* mediation proceedings, whether before or after those proceedings, are not "mediation communications" within the meaning of ORS 36.110(7)(a), even if they do relate to what transpires in the mediation.

Alfieri, 358 Or at 406.

In reaching its decision, the court considered the following issues: (1) the meaning of the term *communication*; (2) when a communication is made "in the course of or in connection with a mediation"; (3) the scope of statutory recipients of a communication; and (4) the scope of persons whose communications are subject to ORS 36.110(7)(a).

As to the first issue, the court concluded that a "communication" is "a process in which information is exchanged." *Alfieri*, 358 Or at 396. Thus, as the court observed, "conversations and disclosures between an attorney and client may be considered 'communications.' The same is true for statements made by a mediator to disputing parties or other statements made in the course of mediation proceedings." *Alfieri*, 358 Or at 396.

As to the second issue, the court concluded that a communication is made

> "in the course of or in connection with" a mediation only if it is made during and at a mediation proceeding or occurs outside of a proceeding but relates to the substance of the dispute being mediated and is made before a resolution is reached or the process is otherwise terminated.

Alfieri, 358 Or at 397 (holding that "communications that occur after a settlement agreement is signed are not 'mediation communications' within the meaning of ORS 36.110(7)(a)").

COMMENT: The court did not clarify what a "mediation proceeding" is but, reading the court's opinion as a whole, the term appears to mean not just a face-to-face communication, but also a mediator-facilitated "process" handled in other ways, such as by telephone, video conference, e-mail, or text messaging. *See Alfieri*, 358 Or at 400 (referring to telephone calls as "communications" that may occur "in the course of" a "mediation").

As to the third issue, the court concluded that "the communication must be *made to* one of the recipients specified in ORS 36.110(7)(a): 'a mediator, a mediation program or a party to, or any other person present at, the mediation proceedings.'" *Alfieri*, 358 Or at 397. In construing these terms, the court made the following conclusions:

(1) The terms *mediator* and *mediation program* have the meanings defined in ORS 36.110(7) and (8). *Alfieri*, 358 Or at 397.

(2) The term *party* has the meaning specified in ORS 36.234 (a "person, state agency or other public body. . . [who] participates in a mediation and has a direct interest in the controversy that is the subject of the mediation"). *Alfieri*, 358 Or at 397–98 & n 5 (noting that the term includes "other persons, such as attorneys or others who are agents of the mediating parties, who speak on behalf of mediating parties" (citing ORS 36.110(5))).

(3) The term *other persons present at mediation proceedings* means any person who is "a direct observer or participant in the mediator-facilitated discussion in which the communication was made." *Alfieri*, 358 Or at 398.

NOTE: Attorneys and nonparties are not automatically part of every "mediation." *See* ORS 36.195(1) ("Unless otherwise agreed to in writing by the parties, the parties' legal counsel shall not be present at any scheduled mediation sessions conducted under the provisions of ORS 36.100 to 36.175); ORS 36.195(2) ("Attorneys and other persons who are not parties to a mediation may be included in mediation discussions at the mediator's discretion, with the consent of the parties, for mediation held under the provisions of ORS 36.185 to 36.210").–

Regarding the fourth issue, the court first observed that

> [w]hen a communication is made "in the course of" a mediation, both sides of the communication will ordinarily consist of individuals identified in ORS 36.110(7)(a), because they will be present at the mediation proceedings, physically or by telephone. But when a communication takes place outside of mediation proceedings and is thus only "in connection with" a mediation, it may involve one of the persons identified in the statute and another person not among those listed.

Alfieri, 358 Or at 400. Seeing the fourth issue that way, the court concluded—drawing from other provisions in ORS 36.100 to 36.238, and their legislative history—that "a communication must be both *made to* one of the persons listed in ORS 36.110(7)(a) and *made by* one of those same persons." *Alfieri*, 358 Or at 402. The court further observed:

> As a result, if ORS 36.110(7)(a) were interpreted to apply to communications made by any person, situations could occur where only half of the conversation is confidential. For example, under that interpretation, in an exchange outside of mediation proceedings between plaintiff (here a mediating party) and defendant (plaintiff's attorney and therefore neither a party, a mediator or mediation program representative, or, in this scenario, a person present at mediation proceedings), every statement pertaining to the mediation made by defendant *to* plaintiff *would be* confidential, but, because of the limitation on the receiving parties in the statute, plaintiff's response would not.

Alfieri, 358 Or at 401.

COMMENT: This observation—critical to the court's analysis—overlooked ORS 36.220(7), which provides, in relevant part, that "[a] party to a mediation may disclose confidential mediation communications to a person if the party's communication with that person is privileged under ORS 40.010 to 40.585 or other provision of law." Given that statute, private communications between an attorney and a client outside the context of an actual mediation proceeding, that involve the substance of the dispute being mediated, and occur before a "mediation" begins or ends, would appear to properly be a "mediation communication," at least in most circumstances. *But cf.* ORS 40.225(4)(c) (providing exception to lawyer-client privilege "[a]s to a communication relevant to

an issue of breach of duty by the lawyer to the client or by the client to the lawyer").

From the court's analysis of the foregoing issues, which it found relevant to determining the legislature's intended meaning of *mediation communications*, the court concluded, in relevant part:

> [C]onsidering the text of ORS 36.110(7)(a) in light of its context and history, we conclude that the term "mediation communications" includes only communications exchanged between parties, mediators, representatives of a mediation program, and other persons while present at mediation proceedings, that occur during the time that the mediation is underway and relate to the substance of the dispute being mediated. Private communications between a mediating party and his or her attorney outside of mediation proceedings, however, are not "mediation communications" as defined in the statute, even if integrally related to a mediation.

Alfieri, 358 Or at 404.

NOTE: The court did not make clear exactly what it meant by a "mediation is underway" or when a communication "relates to the substance of the dispute being mediated." Again, those concepts will need to be flushed out in future cases, absent legislative action.

In sum, *Alfieri* makes clear that statements made by a mediator to mediation participants; statements made by mediation participants to the mediator during a "mediation proceeding"; and statements made by a mediator, a party (including an agent of a party acting as an agent), or a mediation participant present at a "mediation proceeding" to a mediator, a party, or another present mediation participant "in connection with" a mediation are "mediation communications" for purposes of ORS 36.110(7)(a). On the other hand, private discussions between a mediating party and his or her attorney that occur outside "mediation proceedings," whether before or after those proceedings, are not "mediation communications" within the meaning of ORS 36.110(7)(a), even if they relate to what transpires in the mediation. *See Alfieri*, 358 Or at 404–05.

COMMENT: Unfortunately, *Alfieri* did not clarify some very important things, like exactly when a "mediator" is "present," "directly involved", or "directly participating" in the "process" of

assisting or facilitating the resolution of a dispute. But, given that the court recognized that mediations take many forms and involve many different processes, *Alfieri*, 358 Or at 394–95, and in light of the legislature's stated goal of resolving disputes through mediation along with its generally expressed policy choice in favor of mediation confidentiality, *Alfieri*, 358 Or at 403, the court *seemingly intended* that "present," "directly involved," or "directly participating" are to be viewed in a common sense, practical way; that is, a "mediator" need not be physically present in a room with other "mediation participants"—or must not actually be on a telephone call or video conference, or be copied on all mediation-related text messages or e-mails, with "mediation participants"—for communications by or among mediation participants or their agents acting as agents to be deemed "mediation communications" under ORS 36.110(7)(a). *But cf. Alfieri*, 358 Or at 398 n 6 (suggesting contrary conclusion).

COMMENT: How trial attorneys and judges will view *Alfieri* poses some real challenges. Trial lawyers will have to deal with—and trial judges will have to resolve—not just disputes over whether or which statements, materials, or agreements are confidential, but the implications any finding of confidentiality may have on claims for which some relevant, discoverable information cannot be obtained before trial or for which otherwise relevant, admissible evidence cannot be introduced in evidence during trial. *See* OEC 106 (describing "rule of completeness"). While similar issues certainly arise in other contexts where privileges are involved, the issues will be much more challenging where mediation confidentiality is also involved, particularly in mediation-based legal negligence cases.

§ 4.1-2(a)(3)(ii) Written Materials and Documents "Prepared for or Submitted in the Course of or in Connection with a Mediation" (ORS 36.110(7)(b))

In *In re Marriage of Bidwell*, 173 Or App 288, 294, 21 P3d 161 (2001), the Oregon Court of Appeals construed what is now ORS

36.110(7)(b) in the context of whether certain letters exchanged by the parties' attorneys were "mediation communications." In resolving that dispute, the court observed that the "materials" covered by subsection (b) of the definition "include the sort of supporting documents that litigants frequently exchange in order to convince the mediator, and each other, of the merits of their respective proposals." *In re Marriage of Bidwell*, 173 Or App at 294. So, too, the court concluded, would be "[m]aterials that are the products of a mediation process . . . [such as] draft mediation agreements." *In re Marriage of Bidwell*, 173 Or App at 294. As to the letters in question, the court said:

> Both 1999 letters embodied the type of communication to which subsection (8)(a) applies. They were direct settlement communications made to one of the disputants' representatives. The letters had no independent significance apart from the communications that they contained and, thus, were unlike the sorts of prepared or submitted collateral materials covered by ORS 36.110(8)(b). In addition, although each letter reflected a different phase of negotiations, each was sent in connection with the mediation. Both letters followed the mediation conference closely in time, referred to mediation, and were sent before the director of the mediation program referred the case back to this court for decision. Therefore, we conclude that the April and May letters were mediation communications within the meaning of ORS 36.110(8)(a).

In re Marriage of Bidwell, 173 Or App at 294–95 (footnote omitted). *But see* ORS 36.220(3) ("Statements, memoranda, work products, documents and other materials, otherwise subject to discovery, that were not prepared specifically for use in a mediation, are not confidential.").

§ 4.1-2(b) Mediation Confidentiality (ORS 36.220–36.222)

Just as the legislature carefully crafted key definitions in ORS 36.110, it carefully crafted the mediation statute's operative provisions, ORS 36.220 and ORS 36.222, which specify when "mediation communications" or "mediation agreements" are confidential in private-party mediations. Specifically, the legislature chose to treat differently mediation communications and mediation agreements, as well as to enumerate exceptions for certain mediation communications. These legislative choices establish a policy that, by default (*i.e.*, unless the parties agree otherwise), protects all mediation communications as confidential while

leaving unprotected the terms of any mediation agreement. ORS 36.220(1)–(2). Any mediation communication or agreement that is confidential, or agreed to be confidential, cannot be disclosed through discovery or otherwise admitted in evidence in any "subsequent adjudicatory proceeding." ORS 36.222. There are, however, some permanent exceptions to confidentiality, which the parties cannot circumvent by agreement. ORS 36.220(3)–(7).

§ 4.1-2(b)(1) Scope of Mediation Confidentiality

ORS 36.220 covers when mediation communications or mediation agreements are confidential:

> (1) Except as provided in ORS 36.220 to 36.238:
>
> (a) Mediation communications are confidential and may not be disclosed to any other person.
>
> (b) The parties to a mediation may agree in writing that all or part of the mediation communications are not confidential.
>
> (2) Except as provided in ORS 36.220 to 36.238:
>
> (a) The terms of any mediation agreement are not confidential.
>
> (b) The parties to a mediation may agree that all or part of the terms of a mediation agreement are confidential.

Thus, ORS 36.220(1) and (2) treat differently confidentiality for mediation communications and mediation agreements, while leaving mediation parties free to alter the default statutory treatment should they wish to do so.

ORS 36.220 also limits mediation confidentiality in several ways, beyond when the parties decide to alter the statutorily provided treatment for mediation communications and mediation agreements. The following items are excluded from the scope of mediation confidentiality and cannot be made confidential by agreement:

(1) "Statements, memoranda, work products, documents and other materials, otherwise subject to discovery, that were not prepared specifically for use in a mediation, are not confidential." ORS 36.220(3).

(2) "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." ORS 36.220(4).

(3) A confidential mediation communication relating to child abuse or elder abuse may be disclosed to the extent required by the mandatory-reporting statutes. ORS 36.220(5); *see also* ORS 36.222(6).

(4) A confidential mediation communication may be disclosed if "necessary to prevent a party from committing a crime that is likely to result in death or substantial bodily injury to a specific person." ORS 36.220(6).

(5) A confidential mediation communication may be disclosed by a party to a person with whom that party's communication is privileged under the Oregon Evidence Code (ORS 40.010–40.585) or other provision of law.

§ 4.1-2(b)(2) Admissibility of Mediation Communications

Like ORS 36.220, ORS 36.222 provides a default rule that protects mediation confidences from being disclosed or admitted into evidence in any subsequent adjudicatory proceedings. *See, e.g.*, *Alfieri v. Solomon*, 358 Or 383, 392, 365 P3d 99 (2015) (legal malpractice suit by client against former attorney); *Fehr v. Kennedy*, 387 F App'x 789, 791 (9th Cir 2010) (same); *Bank of New York Mellon v. Stabenow*, No 3:16-CV-01590-MO, 2017 WL 1538156, at *4 (D Or Apr 25, 2017) (statements made during mediation cannot be used to support later claim under Fair Debt Collection Practices Act against mediation participant); *see also* ORS 36.222(7) (detailing the scope of limitations on admissibility and disclosure in subsequent adjudicatory proceedings, including preventing disclosure during any discovery conducted (voluntary or compelled) as part of a subsequent adjudicatory proceeding).

Like ORS 36.220, ORS 36.222(2) allows a party to disclose confidential mediation communications or agreements in subsequent adjudicatory proceedings if all parties agree in writing. Similarly, the mediator may disclose if he or she, as well as all parties to the mediation, agree in writing. ORS 36.222(3). However, mediation confidentiality does not apply "to the extent necessary to prosecute or defend" any proceeding to enforce, modify, or set aside a mediation agreement (ORS 36.222(4)) or any action for damages or other relief by a party against a mediator or mediation program (ORS 36.222(5)).

§ 4.1-2(c) Summary

After *Alfieri* and *Marriage of Bidwell*, Oregon lawyers have some guidance in identifying what statements, materials, or agreements involving private-party disputes are confidential, and the limitations on disclosure in subsequent adjudicatory proceedings. *See Alfieri v. Solomon*, 358 Or 383, 365 P3d 999 (2015); *In re Marriage of Bidwell*, 173 Or App 288, 21 P3d 161 (2001). But, unfortunately, *Alfieri* failed to both provide clarity in construing the legislature's intended meaning of "mediation" and "mediation communications," and failed to consider ORS 36.220(7) in construing the latter term. For these reasons, Oregon lawyers are necessarily faced with having to ask courts (or the legislature) for further guidance on what those key terms mean and how they are applied under ORS 36.220 and ORS 36.222. Hopefully, any future requests will lead to answers that clearly ensure that mediation confidentiality in private-party mediations is defined and applied in ways that realize the legislature's clear policy choices favoring the resolution of private disputes through mediation and recognizing the critical role that mediation confidentiality plays in realizing both mediation participation and, more importantly, mediation success.

> PRACTICE TIP: Future requests may arise in one or more of the following contexts: (1) motions brought pursuant to ORCP 21 A(8) or ORCP 21 D; (2) motions brought pursuant to ORCP 36 C; (3) motions brought pursuant to OEC 104; and (4) motions similar to those previously mentioned brought through similar rules applicable to private-party arbitrations conducted in Oregon.

§ 4.1-3 Mediations Involving a Public Body or State Agency

Oregon's mediation statutes confer different and somewhat less protective confidentiality standards upon mediations in which state agencies or public bodies are involved. *See* ORS 36.224 (mediations involving state agencies); ORS 36.226 to 36.228 (mediations involving public bodies).

The statutory language suggests the legislature sought to balance a policy favoring confidential mediations and a competing policy favoring governmental transparency. The legislature also sought to give agencies and public bodies flexibility to adopt their own regulations governing

confidentiality and admissibility with regard to mediation communications. Before representing clients in a mediation involving a state agency or other public body, Oregon lawyers should become familiar with the particular rules, regulations, ordinances, or other policies governing mediation confidentiality for that agency or public body.

§ 4.1-3(a) State Agency as Party or Mediator

The statutory scheme recognizes that state agencies sometimes participate in mediation, either as a party or as a mediator. ORS 36.224(1). However, the statutes treat state agencies differently from private parties and other public bodies for purposes of mediation confidentiality. *Compare* ORS 36.224(1), *with* ORS 36.222(1), *and* ORS 36.226(1). The term *state agency* is defined to include virtually any subdivision of state government operating within the executive branch. ORS 36.110(11).

Unless a state agency has adopted regulations that provide for mediation confidentiality, communications exchanged in a mediation involving a state agency "are *not* confidential and may be disclosed or admitted as evidence in subsequent adjudicatory proceedings." ORS 36.224(1) (emphasis added).

ORS 36.224 recognizes nevertheless that state agencies may benefit from the mediation confidentiality available to private parties. The statute therefore provides authority for state agencies to promulgate regulations to provide for the confidentiality of mediation communications and to limit the admissibility of such communications.

The legislature tasked the Attorney General with developing a set of model rules designed to protect the confidentiality of mediation communications in mediations where state agencies are involved. ORS 36.224(2). An agency may adopt the model rules without undertaking the usual rulemaking procedures. ORS 36.224(4).

Numerous state agencies have adopted mediation confidentiality rules or implemented the model rules promulgated by the Attorney General.

- Department of Administrative Services (OAR 125-140-0010 to 125-140-0020)

- Department of Justice (OAR 137-008-0100 to 137-008-0120)
- Department of State Land (OAR 141-001-0020)
- Oregon State Treasury (OAR 170-001-0020; OAR 170-080-0002)
- Department of State Police (OAR 257-090-0010)
- Department of Veterans' Affairs (OAR 274-007-0001 to 274-007-0002)
- Department of Corrections (OAR 291-001-0110 to 291-001-0115)
- Department of Human Services (OAR 407-014-0200 to 407-014-0205)
- Department of Consumer and Business Services (OAR 440-055-0008 to 440-055-0010)
- Employment Department (OAR 471-008-0000)
- Department of Education (OAR 581-001-0110 to 581-001-0115)

The Attorney General has promulgated two sets of model rules. One set applies generally to mediations in which an agency is a party to the mediation or where the agency acts as mediator in a dispute over which the agency has regulatory authority. OAR 137-005-0052(3). The second set of rules applies to an agency acting as mediator of interpersonal disputes among agency employees. OAR 137-005-0054(1). Both sets of rules expressly provide that words and phrases used in the regulations have the same meaning as in the mediation statutes. OAR 137-005-0052(1); OAR 137-005-0054(2).

§ 4.1-3(b) General Model Rules Applicable to State Agency Mediations

The first set of model rules, OAR 137-005-0052, essentially creates a mediation-confidentiality scheme for state agencies that is similar—but not identical—to that conferred upon private parties under ORS 36.220 to 36.222. Subsection 6 of the regulation provides that the mediator may not disclose or may not be compelled to disclose mediation communications

and that such communications are inadmissible in subsequent administrative, judicial, or arbitration proceedings. OAR 137-005-0052(6).

Subsection 7 of the model regulation provides that mediation communications "are confidential and may not be disclosed to any other person, are not admissible in any subsequent administrative, judicial or arbitration proceeding" subject to the following conditions: (1) the parties must sign an agreement to mediation specifying the extent to which mediation communications are confidential; and (2) the agency must sign the confidentiality agreement if the mediator is employed by the state agency or is acting on its behalf. OAR 137-005-0052(7). Hence, unlike private-party mediations, confidentiality under the model regulation requires a written agreement of the agency and other parties to protect mediation confidentiality. However, written agreements to mediate are not themselves confidential under OAR 137-005-0052(8)(q).

The Attorney General's model rules contain a large number of exceptions to mediation confidentiality. OAR 137-005-0052(8). Many of the following exceptions are the same as or similar to the exceptions from confidentiality applicable to private-party mediations under ORS 36.220:

- "Any statements, memoranda, work products, documents and other materials" that are subject to discovery and were not prepared for use in mediation may be disclosed and used as evidence in a subsequent proceeding. OAR 137-005-0052(8)(a).
- A document that was a public record as defined in the public records law, ORS 192.410, before the mediation remains subject to disclosure. OAR 137-005-0052(8)(b).
- A mediation communication is not confidential if it must be disclosed to prevent the commission of a crime likely to result in injury or death, or to further the investigation of a felony involving physical violence. OAR 137-005-0052(8)(c).
- Communications relating to elder or child abuse made to a mandatory reporter are not confidential. OAR 137-005-0052(8)(r)–(s).

- Licensed professionals who are obligated by law to report the misconduct of other licensed professionals may disclose that information as necessary to make a report. OAR 137-005-0052(8)(d).
- The parties may agree in writing that all or part of the mediation communications may be disclosed. OAR 137-005-0052(8)(e).
- A party may unilaterally disclose mediation communications where the disclosure is itself a privileged communication. OAR 137-005-0052(8)(f). However, a party may disclose mediation communications for the purpose of obtaining advice about the subject of the mediation only if all parties agree. OAR 137-005-0052(8)(f).
- Parties to a mediation may disclose mediation communications to enforce, modify, or set aside a mediation agreement, and such communications are admissible in a judicial or similar proceeding for that purpose. OAR 137-005-0052(8)(i).
- Mediation communications may be disclosed and are admissible in a lawsuit between a party to a mediation and a mediator or mediation program. OAR 137-005-0052(8)(j).

Other exceptions to mediation confidentiality under the model rules differ substantially from the statutes governing private-party mediations:

- An agency employee may disclose mediation communications to another agency employee for the purpose of carrying out the work of the agency. OAR 137-005-0052(8)(g).
- The employee receiving the communication is bound by the same confidentiality requirements as the disclosing employee. OAR 137-005-0052(8)(g).
- An agency may disclose mediation communications to the extent the agency director, administrator, or board determines that disclosure of the communication is necessary to protect public health or safety. OAR 137-005-0052(8)(n).

- In an agency-involved mediation conducted as part of collective-bargaining negotiations, the following are not confidential and may be introduced into evidence: (1) a request for mediation; (2) a communication from the Employment Relations Board Conciliation Services establishing the time and place of mediation; (3) a final offer submitted to the mediator; and (4) a strike notice. OAR 137-005-0052(8)(k).

In addition, *written* mediation communications in an agency-involved mediation receive less confidentiality protection under the Attorney General's model rules than in private-party mediations. A party who made or prepared a written mediation communication may unilaterally disclose that party's own communication—as long as it is not otherwise confidential under applicable law and does not disclose the confidential mediation communications of the mediator or another party. OAR 137-005-0052(8)(h). Also, written mediation communications prepared by or for an agency are presumptively not confidential and may be admissible unless they are (1) attorney-client communications; (2) attorney work product; (3) prepared exclusively for the mediator or caucus session and not disclosed to the other party; (4) prepared at the written requested of the mediator; or (5) constitute settlement proposals shared with the mediator or other party. OAR 137-005-0052(8)(m).

Mediation agreements are not confidential under the Attorney General's model rules and may be introduced in judicial or similar proceedings, unless the agreement is exempt from public records disclosure under ORS 192.410 to 192.405. OAR 137-005-0052(8)(o).

§ 4.1-3(c) Model Rules Applicable to Workplace Interpersonal Mediations

The Attorney General has issued a second set of model rules applicable to employee interpersonal mediations within a state agency. OAR 137-005-0054(1). For the most part, the rules and exceptions mirror those of the more general rules applicable to mediations involving a state agency. *See* OAR 137-005-0054(5) (providing that mediator cannot be compelled to disclose mediation communications); OAR 137-005-0054(6)

(confidentiality of mediation communications); OAR 137-005-0054(7) (exceptions to confidentiality).

§ 4.1-3(d) Mediation Involving Other Public Bodies

The mediation statutes define *public body* to have the same meaning as ORS 174.109, which includes most local government entities, public corporations, and other government subdivisions such as school districts. ORS 36.110(10); ORS 174.109; ORS 174.116; ORS 174.117.

Mediations involving public bodies other than state agencies generally receive the same confidentiality protections as private-party mediations. ORS 36.226(1). The same is true with respect to mediations involving claims within the workers' compensation system. ORS 36.224(5). In these situations, mediation communications are presumed to be confidential and may not be disclosed or admitted in a later adjudicatory proceeding. ORS 36.226(1). However, public bodies can adopt policies that provide for some or all mediation communications to be disclosed. ORS 36.226(2). The public body must provide notice of the policy to all parties in mediations subject to the policy. ORS 36.226(2). If a mediation involves two or more public bodies and at least one private party, the mediation communication and any mediation agreements are not confidential if one of the public bodies has a policy limiting confidentiality. ORS 36.228(2)–(3).

Mediation communications and mediation agreements are not confidential if *all* parties to the mediation are public bodies, unless the communications are exempt from disclosure under the public records laws, ORS 192.311 to 192.478. ORS 36.228(1). But that rule does not apply to mediation of workplace interpersonal disputes. ORS 36.228(1).

Mediation agreements involving public bodies are not confidential unless the agreement or some portion of it is exempt from disclosure under the public records laws, ORS 192.311 to 192.478. ORS 36.230(1)–(2). Mediation agreements are required to be confidential under certain narrow statutory circumstances stated in ORS 17.095(2). ORS 36.230(3). Similarly, mediation agreements arising from workplace interpersonal disputes are confidential unless the public body has adopted a policy that provides for disclosure. ORS 36.230(4).

§ 4.1-3(e) Public Records Law versus Mediation Confidentiality

Although the mediation confidentiality statutes include references to the public records law, the latter does not specifically mention mediation confidentiality as an exception to disclosure. *Compare* ORS 36.228(1), *and* ORS 36.230(2) (confidentiality of mediation involving public bodies), *with* ORS 192.345 (public records conditionally exempt from disclosure). ORS 36.236(2) provides that nothing in the mediation confidentiality statutes "relieves a public body from complying with" its obligations under the public records laws.

However, the references to the public records laws contained in the mediation confidentiality statutes appear to provide that if mediation communications involving a state agency or public body are confidential under the mediation statute or applicable regulations, those communications may not be disclosed in response to a public records request. *See, e.g.*, ORS 36.224(6) (providing that mediation communications made confidential by agency rule are not subject to public disclosure). Indeed, a provision of the public records law requires the Attorney General to catalog every statute that creates an exemption from public records disclosure. ORS 192.340. The current catalog specifically lists the mediation confidentiality statutes applicable to state agencies and public bodies as providing an exemption from public records disclosure. *See* <https://justice.oregon.gov/PublicRecordsExemptions> (listing ORS 36.224, ORS 36.226, ORS 36.230, and ORS 36.262) (last visited July 10, 2018).

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Mediation Confidentiality: Are there two interpretations of *Alfieri v. Solomon*?

By Dan Keppler[1]

Oregon's mediation statutes create a zone of confidentiality to encourage negotiated settlements through confidential and frank discussions among litigants, lawyers, and mediators. Communications that qualify as "mediation communications" under the statutory definition cannot be disclosed and are inadmissible in any adjudicatory proceeding, unless the parties consent to the disclosure in writing. ORS 36.110 (7), ORS 36.220 (a) and (b); ORS 36.222(1) and (2).[2]

That policy clashes with other policies when a client asserts a legal malpractice claim against a lawyer that arises from a mediated settlement. In a legal malpractice action, communications between lawyer and client, are not privileged under an exception to the lawyer-client privilege. OEC 503 (4)(b). This exception allows relevant lawyer-client communications to be admitted into a legal malpractice trial. There is no similar exception, however, to the mediation confidentiality statutes. If a communication between a lawyer and client constitutes a mediation

[1] The opinions expressed are solely those of the author.

[2] ORS 36.110 provides in part:
"(5) '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."
"(7) 'Mediation communications' 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."

ORS 36.220 provides in part:
"(a) Mediation communications are confidential and may not be disclosed to any other person.
(b) The parties to a mediation may agree in writing that all or part of the mediation communications are not confidential."

ORS 36.222 provides in part:
"(1) Except as provided in ORS 36.220 to 36.238, mediation communications and mediation agreements that are confidential under ORS 36.220 to 36.238 are not admissible as evidence in any subsequent adjudicatory proceeding, and may not be disclosed by the parties or the mediator in any subsequent adjudicatory proceeding.
(2) A party may disclose confidential mediation communications or agreements in any subsequent adjudicative proceeding if all parties to the mediation agree in writing to the disclosure.
(3) A mediator may disclose confidential mediation communications or confidential mediation agreements in a subsequent adjudicatory proceeding if all parties to the mediation, the mediator, and the mediation program, if any, agree in writing to the disclosure."

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communication, it is generally inadmissible, even if relevant to the claims or defenses in a legal malpractice case. *See* ORS 36.222 (1).

The Oregon Supreme Court and Court of Appeals confronted this policy tension with divergent outcomes in *Alfieri v. Solomon*, 358 Or 383 (2015) and *Alfieri v. Solomon*, 263 Or App 492 (2014). These decisions explored the boundaries of when discussions between the plaintiff client and the defendant lawyer constitute inadmissible mediation communications.

Both courts focused on three separate phases[3] of a mediated dispute and considered when private communications between a lawyer and client constituted inadmissible mediation communications:

- Phase I: In-person mediation session with the parties, lawyers, and mediator all in attendance.

- Phase II: Post-mediation session negotiations among the parties and their lawyers in which the mediator has made one or more settlement proposals, but not as part of an in-person session.

- Phase III: Discussions among the parties and their lawyers after a settlement is reached.

The Court of Appeals decision in *Alfieri* adopted a bright-line rule that reflected an expansive view of the statutory definitions of "mediation" and "mediation communications." The court held that all lawyer-client communications in Phase I and Phase II described above constitute part of the mediation process. It concluded that all communications made "in the course of or in connection with" the mediation process, including those between attorney and client, constitute inadmissible mediation communications. 263 Or App 501–02. It further held that after the parties reached a settlement, in Phase III, the mediation process ended and communications were admissible.

The Supreme Court rejected the Court of Appeals' approach in favor of a more restrictive view of mediation and mediation communications under the statutes. The Supreme Court held that private communications between attorney and client that occurred both in Phase II and III were not inadmissible mediation communications because the mediator was not directly involved at those stages. 358 Or 404–06.

[3] The *Alfieri* opinions do not refer to three phases. This is the author's invention to help make sense of the decisions.

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With respect to Phase I, the Supreme Court's opinion lends itself to two different interpretations on the issue of whether private discussions between a lawyer and client during an in-person mediation session are inadmissible mediation communications.

Under one interpretation of the Supreme Court's *Alfieri* opinion, all discussions between or among all participants at an in-person mediation session (Phase I) constitute inadmissible meditation communications—including private conversations between lawyer and client. But private attorney-client communications made in subsequent negotiations held after the in-person mediation session (Phases II and III) are *not* mediation communications, even if related to the mediation. *See Alfieri*, 358 Or at 404–406.

Under a second interpretation of *Alfieri*, private communications between an attorney and client can never be mediation communications—even if they occur during an in-person mediation session (Phase I)—so long as the mediator is out of earshot of the private communication. *See Alfieri*, 358 Or at 395.

The source of ambiguity in *Alfieri* stems from the court's requirement that in order for a conversation to be a protected mediation communication, it must occur in the "presence" of the mediator or in a situation where the mediator has "direct involvement." *Id.* at 395. Also, the opinion defines "mediation proceedings" in a way that is unclear as to whether a private conversation between lawyer and client during an in-person mediation session is part of the mediation proceeding. *Id.* at 398 and fn. 6.

The question for a future court is, what does it mean for the mediator to be present or to have direct involvement during an in-person mediation session?

Overview of the Facts (from both *Alfieri* opinions)

The defendant lawyer in *Alfieri* represented the plaintiff client in an employment discrimination action against the client's former employer. 358 Or at 385. The parties participated in an in-person mediation session in which no resolution was reached. *Id.* at 386.

After the in-person session ended, the mediator proposed a settlement package to the parties. Over the course of 16 days following the mediation, the lawyer continued to advise the client on the merits of the mediator's settlement proposal. 358 Or at 386; 263 Or App at 494–95. Both the client and his former employer signed the settlement agreement, but the employer was late in funding the agreement, and the lawyer continued to advise the client on the enforceability of the settlement. 358 Or at 388; 263 Or App at 495.

Thereafter, the client sued the lawyer for legal malpractice, claiming that the lawyer mishandled the in-person mediation session. The client further alleged that the lawyer gave negligent advice about the strength of the client's case, the merits of the settlement proposal, and the post-signing enforceability of the settlement. 358 Or at 386–87.

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Hence, the client's allegations fell into the three distinct timeframes: Phase I: events during the in-person mediation session; Phase II: events during the subsequent 16-day negotiation period leading to the signed settlement agreement; and Phase III: events that occurred after the settlement agreement was signed:

Phase I: In-person mediation session	Phase II: Post-session negotiations leading to settlement	Phase III: Post-settlement issues

The defendant lawyer moved to strike all allegations in the client's malpractice complaint, alleging that they referred to inadmissible mediation communications under ORS 36.110 (7), 36.220 (1)(a) and 36.222 (1). 358 Or at 387–88. The trial court struck most of the allegations and also granted the lawyer's motion to dismiss. 358 Or at 388–89.

The Court of Appeals' Opinion

The Court of Appeals affirmed in part. It held that all communications during the failed in-person mediation session and those involving the later settlement discussions were inadmissible mediation communications—including communications between the lawyer and the client. 263 Or App at 501–02. It also held that the mediation terminated upon the signing of the settlement agreement, and the attorney's post-settlement advice to the client was admissible. *Id.* at 502–03.

The court reasoned that under the definition statute, ORS 36.110 (5), mediation was a "process" that continued during the 16 days of negotiations beyond the in-person mediation conference, until the settlement agreement was signed or the parties otherwise terminated the process:

> "Thus, during the post-mediation conference period, plaintiff [the client] took a series of actions that occurred closely in time after the mediation conference that specifically dealt with whether plaintiff should accept the mediator's proposed settlement. That *process* culminated in plaintiff's assent to a resolution of the outstanding legal issues and incorporated at least some of the terms of the mediator's settlement proposal. Plaintiff's execution of the agreement, and, in turn, the parties' assent to a resolution of the issues, brought an end to the mediation process.
>
> Accordingly, the communications between plaintiff and defendant [the lawyer] during the post-mediation conference period and the mediator's communications with the parties occurred 'in the course of or in connection with' the mediation process, and, as such, were confidential."

Alfieri, 263 Or App at 501 (italics in original).

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In short, the Court of Appeals held that all communications concerning events in Phases I and II—including those between the lawyer and client—were inadmissible mediation communications. Communications during Phase III were not mediation communications and were admissible:

Lawyer-client discussions inadmissible as mediation communications under Court of Appeals' holding:		
Phase I: In-person mediation session	Phase II: Post-session negotiations leading to settlement	Phase III: Post-settlement issues

The Supreme Court Opinion

The Supreme Court reversed in part and affirmed in part. It held that the definition of mediation should be construed more narrowly and limited to those "aspects of the mediation in which the mediator is directly involved." 358 Or at 393.

The court conducted a granular textual analysis of the definition of mediation communications and concluded that only communications among those people enumerated in the statute can qualify as mediation communications. This includes "a mediator, a mediation program, or a party to, or any other person present at, mediation proceedings." ORS 36.110 (7)(b).

Under the court's methodology, to qualify as a mediation communication, a statement must be: (1) a communication; (2) made in connection with a mediation; and (3) made to a mediator, a party to the mediation or to [or from] a person present at the mediation. *Id.* at 396.

Within this framework, the court determined that a communication is made in connection with a mediation only if it occurs during a formal mediation proceeding or, if made outside the proceeding, it relates to the substance of the dispute being mediated until resolution is reached or the process is terminated. *Id.* at 397.

The Supreme Court examined the legislative history and noted that "Nothing in the legislative history * * * suggests that the legislature intended ORS 36.110 (7)(a) to apply to statements made by other persons not identified in the statute, such as an attorney giving private advice to his or her client outside of any mediation proceeding." *Id.* at 403–04.

It concluded that "mediation communications" encompass "only communications exchanged between parties, mediators, representatives of a mediation program, and other persons while present at mediation proceedings, that occur during the time that the mediation is underway and relate to the substance of the dispute being mediated. **Private communications between a mediating party and his or her attorney outside of mediation proceedings**, however, are not 'mediation communications' as defined in the statute, even if integrally related to a mediation." *Id.* at 404 (emphasis added).

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Accordingly, the court held that the trial court correctly struck three kinds of allegations from the malpractice complaint:

- "[S]tatements that mediators make to parties regarding their dispute are 'mediation communications' within the meaning of ORS 36.110 (7) (a) and ORS 36.220, and thus inadmissible under ORS 36.222." *Id.* at 404. [This probably applies to Phases I and II.]

- "[S]tatements that an attorney makes in the course of participating in mediation proceedings are also 'mediation communications.'" *Id.* at 405. [This seems to apply to Phase I.]

- "The allegation that defendant failed 'to reasonably advocate for plaintiff in the mediation' appears to refer to defendant's conduct in the formal mediation session between plaintiff and his former employer. To the extent that is true, the trial court was correct in striking it. If that allegation refers instead to communications made outside of a mediation proceeding, the trial court was still correct if defendant was speaking on plaintiff's behalf in connection with the mediation to qualifying recipients." *Id.* [This appears to apply to Phase I and II].

The court concluded, "Private discussions between a mediating party and his or her attorney that occur *outside* mediation proceedings, whether **before or after those proceedings**, are not 'mediation communications' within the meaning of ORS 36.110 (7)(a), even if they do relate to what transpires in the mediation." *Id.* at 406 (emphasis added).

In a key footnote, the court stated, "We recognize that our interpretation of the relevant Oregon statutes may make it difficult, in some circumstances, for clients to pursue legal malpractice claims against their attorneys for work in connection with mediations." *Id.* at 405, fn.10.

The First Interpretation

Based on the Supreme Court's language above, it appears that mediation confidentiality applies categorically to communications during Phase I, but not with respect to Phases II or III:

Lawyer-client discussions inadmissible as mediation communications under Supreme Court holding:		
Phase I: In-person mediation session	Phase II: Post-session negotiations leading to settlement.[4]	Phase III: Post-settlement issues

[4] Under the Court's holding, it appears that post-session (Phase II) communications directly with a mediator or mediation program would still be protected mediation communications but not lawyer-client communications. 358 Or at 405 ("Mediation * * * includes all contacts between a mediator and any party or *agent* of a party * * *.") (quoting *Bidwell and Bidwell*, 173 Or App 288, 294, 21 P3d 161 (2001) (emphasis and ellipses in original).

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Under this holding, it seems that all communications—including attorney-client consultations—made during the formal in-person mediation session (Phase I) are protected by mediation confidentiality and not admissible in a subsequent legal malpractice case. However, communications made between lawyer and client after the formal mediation proceeding has ended (Phases II or III) are not covered by the mediation confidentiality and may be admissible in a legal malpractice case.

The Second Interpretation

Although the above quotations and the holding do not address the issue directly, other passages of *Alfieri* can be read to suggest that private conversations between attorney and client during the formal in-person mediation session (Phase I) are not protected mediation communications.

In reaching its conclusion that a mediation proceeding or the mediation process is limited in scope, the Supreme Court made statements that private lawyer-client conversations in which the mediator is not present or directly involved may not be part of the mediation proceeding and therefore are not mediation communications:

> "Considering the text of ORS 36.110 (5), in context, we conclude that 'mediation' includes only that part of the 'process' in which a mediator is a participant. Separate interactions between parties and their counsel **that occur outside of the mediator's presence and without the mediator's direct involvement are not part of the mediation**, even if they are related to it."

Alfieri, 358 Or at 395 (emphasis added).

This passage suggests that when an attorney and client speak privately during an in-person mediation (Phase I), out of earshot of the mediator, that such conversation is not actually part of the "mediation proceeding" and therefore does not constitute a protected mediation communication.

If correct, this interpretation of *Alfieri*, modifies application of the mediation privilege to the three phases outlined above:

Lawyer-client discussions inadmissible as mediation communications under Supreme Court holding:		
Phase I: In-person mediation session ***except*** when mediator is not "present" i.e. out of earshot of the private conversation	Phase II: Post-session negotiations leading to settlement	Phase III: Post-settlement issues

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This interpretation of *Alfieri* places trial courts and parties in a difficult position in a legal malpractice case arising from a mediated settlement. The court presumably must assess what attorney-client conversations occurred or what advice was given during mediation when the mediator was present.

Future litigation will determine the extent to which a client or attorney in a legal malpractice case may rely on private advice given during mediation—either to support a legal malpractice claim or to defend such a claim.

FG:8492474.4

FORMAL OPINION NO 2019-195

Communication; Delegation of Settlement Authority to Lawyer

Facts:

Client wishes to hire Lawyer to pursue a lawsuit against Defendant. Client travels often, has a time-consuming job, and is concerned he will not have sufficient time to communicate with Lawyer about decisions related to his lawsuit, including settlement issues. Moreover, Client trusts Lawyer's judgment and experience and is confident that Client would defer to Lawyer's judgment on case-related issues in any event. To make things easier, Lawyer and Client agree that Client will delegate all authority over settlement decisions to Lawyer. Lawyer and Client place no parameters on what terms the Lawyer may accept and simply agree that Lawyer will contact Client when the case is finally settled.

Question:

May Client delegate all settlement authority to Lawyer?

Conclusions:

No.

Discussion:

The proper allocation of authority between a lawyer and client is addressed in Oregon RPC 1.2(a), which provides, in pertinent part:

> (a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. . . .

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In addition, Oregon RPC 1.4 provides:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Oregon RPC 1.0(g) defines *informed consent* as an "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonable available alternatives to the proposed course of conduct."

An attorney may not ethically obtain from a client an advance *blanket* authorization over all settlement decisions. Under Oregon RPC 1.2(a), a decision to settle must be made by the client, not the lawyer. *See* OSB Formal Ethics Op No 2005-54. An agreement between a lawyer and a client to delegate all settlement authority, regardless of the circumstances, to the lawyer would violate Oregon RPC 1.2(a). Such an agreement would also violate Oregon RPC 1.4, because an attorney is obligated under RPC 1.4 to inform the client adequately about any settlement offer so that the client can make an *informed* decision about whether to accept or reject the offer. *See In re Bailey*, 25 DB Rptr 19 (2011) (sanctioning lawyer for accepting a settlement offer without notifying or consulting with client); *see also* Ariz State Bar Ethics Op No 06-07 (2006).

Nor can Lawyer resolve the ethical problem by merely asking Client to waive his right to control settlement decisions. Unlike other Oregon RPCs, such as the current conflict rules in Oregon RPC 1.7, Oregon RPC 1.2(a) contains no language allowing a lawyer to seek a client's consent to a waiver of the client's right to make settlement decisions. And even if seeking such a waiver were permissible, it would be virtually impossible for a client to provide *informed* consent to such a decision at the outset of a representation. At that time, the facts and circumstances of a case are not fully developed, and the terms and conditions of a settlement will likely not have been fully explored or determined.

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Notably, there are other mechanisms available to Lawyer to address the possibility that Client's unavailability will impede the ability to settle a case. A client "may authorize a lawyer to negotiate a settlement that is subject to the client's approval or to settle a matter on terms indicated by the client." *Restatement (Third) of the Law Governing Lawyers* § 22, cmt c (2000). Absent such authority, however, a lawyer may not settle a client's case in the client's absence. *See* OSB Formal Ethics Op No 2005-33.

It is important to emphasize that this opinion only addresses a client's *blanket* delegation of settlement authority to his or her lawyer. A blanket delegation of settlement authority means the client has placed no restrictions whatsoever on the settlement terms the lawyer may accept on the client's behalf. The same ethical considerations are not necessarily implicated when the client and lawyer discuss settlement beforehand and the client agrees to give the lawyer authority to settle a claim within pre-agreed parameters—even broad parameters that confer significant discretion to the lawyer.

Nothing prevents a client from providing a lawyer with advance authorization to agree to a settlement within pre-agreed parameters as long as that client places some outer limit on the lawyer's discretion and the client has sufficient information available at the time to make an informed decision about providing such authorization under Oregon RPC 1.4.[1] Whether or not a client is capable of making such an informed decision will likely depend on a variety of factors, including, without limitation, the range of settlement authority that the client seeks to provide to the lawyer, the complexity of the case, the procedural posture of the case, the level of factual investigation and/or discovery that has taken place, the client's sophistication level, the monetary value of the

[1] *See* ABA Model Rule 1.2 cmt [3] ("At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.").

claims at issue, and the importance of the claim to the client's overall financial, personal, and other objectives.

Approved by the Board of Governors, September 2019.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 7.4 (client communication), § 7.5-1 (abiding by client's decision; scope of representation), § 9.6 (informed consent), § 18.3-1 (scope of representation; allocation of authority), § 20.2-1 (informed consent) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 20–27 (client and lawyer authority) (2000).

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California Evidence Code § 1129 (2020 Edition)

(a) Except in the case of a class or representative action, an attorney representing a client participating in a mediation or a mediation consultation shall, as soon as reasonably possible before the client agrees to participate in the mediation or mediation consultation, provide that client with a printed disclosure containing the confidentiality restrictions described in Section 1119 and obtain a printed acknowledgment signed by that client stating that he or she has read and understands the confidentiality restrictions.

(b) An attorney who is retained after an individual agrees to participate in the mediation or mediation consultation shall, as soon as reasonably possible after being retained, comply with the printed disclosure and acknowledgment requirements described in subdivision (a).

(c) The printed disclosure required by subdivision (a) shall:

(1) Be printed in the preferred language of the client in at least 12-point font.

(2) Be printed on a single page that is not attached to any other document provided to the client.

(3) Include the names of the attorney and the client and be signed and dated by the attorney and the client.

(d) If the requirements in subdivision (c) are met, the following disclosure shall be deemed to comply with the requirements of subdivision (a):

Mediation Disclosure Notification and Acknowledgment

To promote communication in mediation, California law generally makes mediation a confidential process. California's mediation confidentiality laws are laid out in Sections 703.5 and 1115 to 1129, inclusive, of the Evidence Code. Those laws establish the confidentiality of mediation and limit the disclosure, admissibility, and a court's consideration of communications, writings, and conduct in connection with a mediation.

In general, those laws mean the following:

- All communications, negotiations, or settlement offers in the course of a mediation must remain confidential.
- Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings.
- A mediator's report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body.
- A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring at, or in connection with, a mediation.

This means that all communications between you and your attorney made in preparation for a mediation, or during a mediation, are confidential and cannot be disclosed or used (except in extremely limited circumstances), even if you later decide to sue your attorney for malpractice because of something that happens during the mediation.

I, _____ [Name of Client], understand that, unless all participants agree otherwise, no oral or written communication made during a mediation, or in preparation for a

mediation, including communications between me and my attorney, can be used as evidence in any subsequent noncriminal legal action including an action against my attorney for malpractice or an ethical violation.

NOTE: This disclosure and signed acknowledgment does not limit your attorney's potential liability to you for professional malpractice, or prevent you from (1) reporting any professional misconduct by your attorney to the State Bar of California or (2) cooperating with any disciplinary investigation or criminal prosecution of your attorney.

[Name of Client] _____

[Date signed] _____

[Name of Attorney] _____

[Date signed] _____

(e) Failure of an attorney to comply with this section is not a basis to set aside an agreement prepared in the course of, or pursuant to, a mediation.