Mediation: Practice and Polish

Cosponsored by the 
Alternative Dispute Resolution Section

Tuesday, October 11, 2016
1 p.m.–3 p.m.

2 General CLE or Practical Skills credits
SECTION PLANNERS

The Honorable Daniel Harris, Harris Mediation & Arbitration, Eugene
Gail McEwen, Attorney at Law, Salem
Michael Morris, Bennett Hartman Morris & Kaplan LLP, Portland
Tegan Schlatter, Law Offices of Kathryn Reynolds Morton, Portland

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   — Gary Berne, Stoll Stoll Berne Lokting & Shlachter PC, Portland, Oregon
   — Thomas Brown, Cosgrave Vergeer Kester LLP, Portland, Oregon
SCHEDULE

Noon  Registration and ADR Section Annual Meeting

1:00  In the Wake of Alfieri and Crimson Trace (Oregon Supreme Court)

- What do the appellate court decisions mean?
- A lawyer’s liability and the ethical implications in representing a client in a mediation
- Avoiding mediation-based legal malpractice claims without legislative action
- Should the legislature amend Oregon’s mediation law to avoid mediation-based legal malpractice claims?

Gary Berne, Stoll Stoll Berne Lokting & Shlachter PC, Portland
Thomas Brown, Cosgrave Vergeer Kester LLP, Portland

1:30  Building an ADR Practice

- What kind of practice do you want—mediation, arbitration, or both?
- Where to start—pro bono opportunities, court-annexed arbitration, and mediation
- Combining legal practice with an ADR business model
- Getting the word out and how to get selected for ADR work
- Building your ADR credibility

Jeffrey Batchelor, Batchelor Mediation + Arbitration, Portland
Judy Shipler Henry, Appellate Settlement Conference Program, Salem
Molly Jo Mullen, Molly Jo Mullen ADR, Portland

2:15  Mediation: The End Game

- Keep the conversation going to reach an agreement
- Strategies for closing the deal
- Best practices for formalizing the agreement

Moderator: The Honorable Daniel Harris, Harris Mediation & Arbitration, Eugene
Amy Angel, Barran Liebman LLP, Portland
Sharon Williams, Attorney at Law, Portland

3:00  Adjourn
Amy Angel, Barran Liebman LLP, Portland. Ms. Angel represents public and private employers in all stages of employment litigation, including advice and compliance, administrative complaints, and trial and appeal. She works with employers of all sizes and in a wide variety of industries, including construction, retail, manufacturing, agriculture, law, and health care. Ms. Angel serves as president of the Multnomah Bar Foundation and chair of the Oregon State Bar Alternative Dispute Resolution Section. Ms. Angel is a frequent speaker before businesses and trade organizations on cutting-edge issues for employers. She also provides onsite training for human resource professionals, supervisors, and employees on a variety of employment law topics, as well as conducting internal investigations and human resources audits.

Jeffrey Batchelor, Batchelor Mediation + Arbitration, Portland. Mr. Batchelor is a full-time mediator and arbitrator. He has served as a special master in Oregon’s U.S. District Court and as a discovery referee in the Multnomah County Circuit Court. He has successfully mediated and arbitrated hundreds of cases dealing with a wide range of disputes, from personal injury and wrongful death cases to commercial matters to employment-related claims. He was inducted into the Oregon Chapter of the National Academy of Distinguished Neutrals in 2014. Mr. Batchelor is the 2008 recipient of the Multnomah Bar Association Professionalism Award.

Gary Berne, Stoll Stoll Berne Lokting & Shlachter PC, Portland. Mr. Berne represents clients in a variety of matters ranging from investment fraud, ERISA, and insurance coverage claims to will contests, trust disputes, and class actions in both state and federal courts. He also represents members of the securities industry and other professionals in regulatory and compliance matters before the Securities and Exchange Commission, Financial Industry Regulatory Authority, and other regulatory agencies. Mr. Berne has written and spoken extensively about securities litigation, corporate governance, professional standards for lawyers, accountants, and the financial industry, trial practice, and federal practice. He serves as an arbitrator for the American Arbitration Association, the Financial Industry Regulatory Authority, and the Arbitration Service of Portland and regularly acts as a mediator in all types of commercial disputes. Mr. Berne is admitted to practice before the United States Supreme Court.

Thomas Brown, Cosgrave Vergeer Kester LLP, Portland. Mr. Brown is special counsel to his firm and previously served as the firm’s managing partner. His practice focuses on appeals, insurance coverage, professional liability defense, arbitration, and mediation. He is a Fellow in the American Academy of Appellate Lawyers, a Fellow in the Honorary Trial Society of Litigation Counsel of America (Emeritus), past chair of ALFA International, past president of the Multnomah Bar Association, and a member of the Oregon State Bar Alternative Dispute Resolution Section Executive Committee. On appointment by the Oregon Supreme Court, each month Mr. Brown hears motions for summary judgment as a circuit court pro tem judge. He writes and speaks about appellate, insurance coverage, attorney liability, law practice management, ADR, and professionalism issues. He is the 2013 recipient of the Multnomah Bar Association’s Professionalism Award. Mr. Brown is admitted to practice in Oregon and Washington, as well as before the United States Supreme Court.

The Honorable Daniel Harris, Harris Mediation & Arbitration, Eugene. Judge Harris is a full-time mediator and arbitrator offering dispute resolution services in metropolitan Portland, Salem, Eugene, and central and southern Oregon. He previously sat on the Jackson County Circuit Court bench, where he managed the civil docket and served as civil settlement judge. Prior to taking the bench, Judge Harris was in private practice, handling commercial and business disputes and transactions, employment advice and disputes, real estate and construction issues, personal injury and insurance claims, and government, regulatory, and land use matters. He is a member and past chair of the Oregon Commission on Professionalism.
Judy Shipler Henry, *Appellate Settlement Conference Program, Salem*. Ms. Henry has been the Director of the Appellate Settlement Conference Program since its inception in 1995. She privately mediates state and federal cases and arbitrates labor disputes for the Employment Relations Board. She also trains mediators locally and internationally and has taught conflict resolution, negotiation, and trial practice at Willamette University College of Law. Ms. Henry has mediated over 1,000 public and private cases and consulted on several thousand appellate mediations.

Molly Jo Mullen, *Molly Jo Mullen ADR, Portland*. In July 2015, Ms. Mullen withdrew from private practice and is currently developing her alternative dispute resolution practice. She is on a variety of mediation and arbitration panels providing services to attorneys and parties in active litigation, including the United States District Court mediation panel, the Oregon Patient Safety Commission mediation panel, and a number of county arbitration programs.

Sharon Williams, *Attorney at Law, Portland*. Ms. Williams is an attorney mediator. She also serves as court-appointed counsel for children in domestic relations cases in Multnomah and Washington counties. She is a Fellow in the American Academy of Matrimonial Lawyers, secretary and past president of the Oregon Academy of Family Law Practitioners, and a member of the Oregon Mediation Association, the Association of Family and Conciliation Courts, the Washington County Bar Association, the Multnomah Bar Association, the Oregon State Bar Family Law Section, the OSB Alternative Dispute Resolution Section Executive Committee, and the Multnomah County Mediation Commission.
Chapter 1

In the Wake of Alfieri and Crimson Trace (Oregon Supreme Court)

Gary Berne
Stoll Stoll Berne Lokting & Shlachter PC
Portland, Oregon

Thomas Brown
Cosgrave Vergeer Kester LLP
Portland, Oregon

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Gary Berne  
Stoll Berne  
August 4, 2014

**Liability Shields for Lawyers: Do Recent Oregon Mediation Act and Attorney-Client Privilege Cases Demand Greater Disclosure to Clients?**

A strict interpretation of the Oregon mediation statutes and evidence code trumps ethical considerations and gives protection to lawyers who have been sued for malpractice. That is the message from two recent Oregon appellate decisions on mediation confidentiality and attorney-client privilege. But the flip side is that the courts may have opened up a Pandora’s box of new disclosure requirements for Oregon lawyers.

*Alfieri v. Solomon* and *Crimson Trace Corp. v. Davis Wright Tremaine LLP* raise critical questions: If, per *Alfieri*, mediation communications between a client and the client’s own lawyer cannot be used in a subsequent malpractice case against the lawyer, can lawyers ethically shield themselves from malpractice liability by advising a client to mediate? And what happens when lawyers become concerned about conflicts and malpractice while they are representing a client and ask other lawyers in their firm for legal advice? Per *Crimson*, if the lawyers are seeking personal legal advice from other lawyers in the firm, those intra-firm conversations are privileged, and the lawyers need not disclose the content of the conversations if the client later sues them for malpractice. But if some lawyers in the firm are giving personal legal advice to other lawyers in the firm while the firm is still representing its client, must the lawyers obtain a signed conflict waiver from their client before they start giving protected legal advice to each other?

**ALFIERI**

In *Alfieri*, a client sued for malpractice following mediation of an employment lawsuit. Among other allegations, the client asserted that the attorney had not advised him that the former employer had not complied with terms of the settlement agreement, calling into question its enforceability. *Alfieri v. Solomon*, 263 Or App 492 (June 11, 2014).

The court strictly construed the mediation confidentiality provisions in ORS 36.220-36.238. All communications between the attorney and his client relating to the substance of the settlement agreement—from the time the parties entered mediation until mediation ended with a signed agreement—were held to be confidential and not admissible in evidence, even in a subsequent malpractice action. (In 2009, the Oregon federal court came to the same

The bottom line of *Alfieri* is that what happens in mediation stays in mediation—even if it effectively allows an attorney to get away with malpractice and maybe even an ethics violation.

The *Alfieri* court did not grapple with the ethical implications of its strict statutory construction, but Texas courts, interpreting a somewhat different statute, did and have allowed disclosure of information communications in cases of attorney malpractice and an executor’s breach of fiduciary duty. *Avary v. Bank of Am., N.A.*, 72 SW3d 779 (Tex App 2002), *Alford v. Bryant*, 137 SW3d 916 (Tex App 2004).

California has a broad mediation confidentiality statute. California courts have maintained mediation confidentiality in legal malpractice cases, but also have expressed dismay at the result. *Cassel v. Superior Court*, 51 Cal 4th 113 (2011); *Wimsatt v. Superior Court*, 152 Cal App 4th 137, 163 (2007) (“We believe that the purpose of mediation is not enhanced by such a result because wrongs will go unpunished and the administration of justice is not served.”). California is now considering a legislative fix. California Law Review Commission’s in-progress study at [http://www.clrc.ca.gov/K402.html](http://www.clrc.ca.gov/K402.html).

The solution might be for Oregon to adopt an exception to mediation confidentiality in legal malpractice cases, as at least fifteen states and the District of Columbia already have. The Uniform Mediation Act allows disclosure of information “sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation.” UMA § 6(a)(6).

Until Oregon adopts such a reform (or until *Alfieri* is reversed), attorneys are in an ethical bind. After *Alfieri*, lawyers must consider RPC 1.8(h)(1), which states, “A lawyer shall not . . . make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement.” And since the mediation statutes appear to require complete confidentiality that extends to all subsequent “adjudicatory” proceedings, ORS 36.222(7), the lawyer also has to consider RPC 1.8(h)(4) that prohibits limiting the client’s right to pursue a bar complaint—whether or not the client has independent advice.

An agreement to mediate, whether or not in writing or signed by the lawyer, effectively shields the lawyer from a malpractice claim. The situation is made even clearer where both the client and the lawyer sign a typical mediation agreement in which all signators agree to keep mediation communications confidential. So under RPC 1.8(h)(1), must the client have
independent representation to agree to enter into mediation? That may seem an absurd
conclusion, given the favor with which courts generally view mediation, but the RPCs would
seem to compel both disclosure and independent representation.

The analysis may be even simpler. RPC 1.4(b) requires the lawyer to “explain a matter to the
extent reasonably necessary to the permit the client to make informed decisions regarding the
representation,” and RPC 1.7(a)(2) and(b) require informed consent where there is “a
significant risk that representation . . . will be materially limited . . . by a personal interest of
the lawyer.” While the lawyer’s interest may remain aligned with the client’s, at the least,
clients may want to be informed that the lawyer has some special protections if the client
agrees to mediate.

The situation is further complicated because confidentiality must be waived by all parties. ORS
36.222(2). Therefore, even if a lawyer agrees that he or she will not claim the protections of
the mediation statutes, the other parties to the mediation still may assert confidentiality. (And
the lawyer may risk a later claim by the PLF that the lawyer has comprised the defense of the
malpractice claim.) So unless all parties agree to an advance confidentiality waiver, an unlikely
scenario, it may be impossible to escape the issues presented by Alfieri.

CRIMSON TRACE

In Crimson Trace Corp. v. Davis Wright Tremaine LLP [DWT], 355 Or 476 (May 30, 2014), the
Supreme Court held that communications between lawyers and their firm’s Quality Assurance
Committee [QAC] (in effect, “in-house” counsel) were privileged under Oregon Evidence Code
503 and need not be disclosed to the firm’s client in a subsequent legal malpractice action—even
though the communications concerned the very matter the lawyer was handling for the
client and occurred during the course of the underlying case.

A DWT attorney who had prosecuted a patent was part of the law firm team bringing an action
on behalf of Crimson to enforce the patent. The alleged infringers counterclaimed, asserting
that Crimson and DWT lawyers had deceptively omitted material information when they
submitted the patent to the Patent and Trademark Office. Concerned about conflicts of
interest, the DWT lawyers consulted with the QAC, and one emailed the client’s CEO: “Under
the circumstances, I should advise you that someone could argue I have a conflict of interest in
that I may be defending my partner at the same time as I am representing Crimson. * * * I
frankly don’t see this as an issue, but I do want you to know that you certainly have the right to
consult with independent counsel to fully consider this.”

In the ensuing malpractice action, the trial court found a “fiduciary exception” to the privilege,
ruling that the conflict of interest meant DWT could not assert attorney-client privilege. The
trial court reasoned that DWT did not disclose a potential conflict to Crimson, did not seek its consent to DWT’s continued representation, and did not seek to withdraw from representation in the litigation.

The Supreme Court, on mandamus, disagreed with the trial court. The Court concluded that OEC 503(4) was a complete enumeration of exceptions to the attorney-client privilege and did not include a “fiduciary exception”. Thus, the intra-firm communications need not be disclosed in a later malpractice case.

The court rejected an amicus argument that maintaining the privilege would condone the firm’s violation of its duty of loyalty to its current client: “OTLA’s argument is essentially one of policy. Our task is one of statutory interpretation.” Ethical considerations, the court held, should not be conflated with the scope of the privilege. *Crimson Trace*, 355 Or at 490.

As does *Alfieri*, *Crimson* creates an ethical problem for the lawyers: if a lawyer wants to maintain an attorney-client privilege when he or she discusses potential error with other lawyers in the firm, do the communications create a firm-wide conflict of interest that must be disclosed to the client and waived in writing if the firm continues to represent the client?

RPC 1.7(a)(1) and (2) say that a current conflict of interest exists if the representation of one client will be directly adverse to another client or if there is a “significant risk” that representation of the client will be materially limited by a lawyer’s responsibilities to another client (which could be a colleague at the firm or the firm itself) or a personal interest of the lawyer. RPC 1.10(a) imputes the conflict of interest to all lawyers of the firm: “While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so. . . . unless the prohibition is based on a personal interest of the prohibited lawyer . . . and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.”

When a lawyer talks to his in-house counsel, members of the in-house panel now have two clients whose interests may be adverse: The attorney seeking legal advice and the outside paying client the firm is representing. The lawyer and the firm can’t have it both ways—claiming privilege as a “client” but not disclosing that the firm is serving potentially adverse clients and not obtaining a written waiver.

In making the disclosure, a lawyer must communicate “adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” RPC 1.7(b) (requiring informed consent as part of waiver to allow continued representation despite current conflict of interest); RPC 1.0(g) (defining “informed consent”). Each affected client must consent to continued representation in writing. RPC 1.7(b)(4). And in some cases the conflict may be so severe that the lawyer must withdraw. Under RPC 1.7(b)(3),
the lawyer must ensure that continued representation “does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client.”

In the Crimson scenario, an attorney must disclose not only that the client may have a malpractice claim (a helpful form letter is available on the Professional Liability Fund website), but also that all members of the firm might have a conflict that must be waived in writing, thanks to the consultation within the firm. Under RPC 1.0(g), that letter is also required to recommend that the client seek independent legal advice to determine if consent should be given.

The best option may be to call the PLF before doing anything else. See Helen Hierschbiel, Mistakes Were Made: Regaining Your Stride After a Misstep, Oregon State Bar Bull. July 2014. A further option may be to call outside counsel.

The irony is that consultation within the firm may increase the risks that the client will make a claim because the lawyer now might have to obtain informed consent on two fronts: (1) consent to continue the representation despite a possible error by the lawyer, and (2) consent to continued representation despite the conflict created by the firms’ lawyers now representing both themselves and their client, information that might scare any client.

So for Oregon lawyers, the immediate issue is not whether Alfieri and Crimson Trace were correctly decided—these are difficult legal and policy issues. But the courts’ decisions to give no weight to the ethical rules create significant complications for Oregon lawyers.
Chapter 36 — Mediation and Arbitration

2015 EDITION

MEDIATION AND ARBITRATION

SPECIAL ACTIONS AND PROCEEDINGS

DISPUTE RESOLUTION

(Generally)
36.100 Policy for ORS 36.100 to 36.238
36.105 Declaration of purpose of ORS 36.100 to 36.238
36.110 Definitions for ORS 36.100 to 36.238

***

(Liability of Mediators and Programs)
36.210 Liability of mediators and programs

(Confidentiality of Mediation Communications and Agreements)
36.220 Confidentiality of mediation communications and agreements; exceptions
36.222 Admissibility and disclosure of mediation communications and agreements in subsequent adjudicatory proceedings
36.224 State agencies; confidentiality of mediation communications; rules
36.226 Public bodies other than state agencies; confidentiality of mediation communications
36.228 Mediations in which two or more public bodies are parties
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DISPUTE RESOLUTION

(Generally)

36.100 Policy for ORS 36.100 to 36.238. It is the policy and purpose of ORS 36.100 to 36.238 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. [1989 c.718 §1; 2003 c.791 §9]

36.105 Declaration of purpose of ORS 36.100 to 36.238. The Legislative Assembly declares that it is the purpose of ORS 36.100 to 36.238 to:
(1) Foster the development of community-based programs that will assist citizens in resolving disputes and developing skills in conflict resolution;

(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;

(3) Find alternative methods for addressing the needs of crime victims in criminal cases when those cases are either not prosecuted for lack of funds or can be more efficiently handled outside the courts;

(4) Provide a method to evaluate the effect of dispute resolution programs on communities, local governments, the justice system and state agencies;

(5) Encourage the development and use of mediation panels for resolution of civil litigation disputes;

(6) Foster the development or expansion of integrated, flexible and diverse state agency programs that involve state and local agencies and the public and that provide for use of alternative means of dispute resolution pursuant to ORS 183.502; and

(7) Foster efforts to integrate community, judicial and state agency dispute resolution programs. [1989 c.718 §2; 1997 c.706 §3; 2003 c.791 §10]

### 36.110 Definitions for ORS 36.100 to 36.238.
As used in ORS 36.100 to 36.238:

(1) “Arbitration” means any arbitration whether or not administered by a permanent arbitral institution.

(2) “Dean” means the Dean of the University of Oregon School of Law.

(3) “Dispute resolution program” means an entity that receives a grant under ORS 36.155 to provide dispute resolution services.

(4) “Dispute resolution services” includes but is not limited to mediation, conciliation and arbitration.

(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.

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

(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.

(8) “Mediation program” means a program through which mediation is made available and includes the director, agents and employees of the program.

(9) “Mediator” means a third party who performs mediation. “Mediator” includes agents and employees of the mediator or mediation program and any judge conducting a case settlement conference.

(10) “Public body” has the meaning given that term in ORS 174.109.
(11) “State agency” means any state officer, board, commission, bureau, department, or division thereof, in the executive branch of state government. [1989 c.718 §3; 1997 c.670 §11; 2003 c.791 §§11,11a; 2005 c.817 §3]

** * * * **

(Liability of Mediators and Programs)

36.210 Liability of mediators and programs. (1) Mediators, mediation programs and dispute resolution programs are not civilly liable for any act or omission done or made while engaged in efforts to assist or facilitate a mediation or in providing other dispute resolution services, unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another.

(2) Mediators, mediation programs and dispute resolution programs are not civilly liable for the disclosure of a confidential mediation communication unless the disclosure was made in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another.

(3) The limitations on liability provided by this section apply to the officers, directors, employees and agents of mediation programs and dispute resolution programs. [1989 c.718 §24; 1995 c.678 §2; 1997 c.670 §12; 2001 c.72 §1; 2003 c.791 §§22,22a]

(Confidentiality of Mediation Communications and Agreements)

36.220 Confidentiality of mediation communications and agreements; exceptions. (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.

(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) 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.

(5) Any mediation communication relating to child abuse that is made to a person who is required to report child abuse under the provisions of ORS 419B.010 is not confidential to the extent that the person is required to report the communication under the provisions of ORS 419B.010. Any mediation communication relating to elder abuse that is made to a person who is required to report elder abuse under the provisions of ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under the provisions of ORS 124.050 to 124.095.

(6) A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from
Chapter 1—In the Wake of Alfieri and Crimson Trace (Oregon Supreme Court)

committing a crime that is likely to result in death or substantial bodily injury to a specific person.

(7) 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. A party may disclose confidential mediation communications to any other person for the purpose of obtaining advice concerning the subject matter of the mediation, if all parties to the mediation so agree.

(8) The confidentiality of mediation communications and agreements in a mediation in which a public body is a party, or in which a state agency is mediating a dispute as to which the state agency has regulatory authority, is subject to ORS 36.224, 36.226 and 36.230. [1997 c.670 §1]

36.222 Admissibility and disclosure of mediation communications and agreements in subsequent adjudicatory proceedings. (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.

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

(5) In an action for damages or other relief between a party to a mediation and a mediator or mediation program, confidential mediation communications or confidential mediation agreements may be disclosed to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(6) A mediator may disclose confidential mediation communications directly related to child abuse or elder abuse if the mediator is a person who has a duty to report child abuse under ORS 419B.010 or elder abuse under ORS 124.050 to 124.095.

(7) The limitations on admissibility and disclosure in subsequent adjudicatory proceedings imposed by this section apply to any subsequent judicial proceeding, administrative proceeding or arbitration proceeding. The limitations on disclosure imposed by this section include disclosure during any discovery conducted as part of a subsequent adjudicatory proceeding, and no person who is prohibited from disclosing information under the provisions of this section may be compelled to reveal confidential communications or agreements in any discovery proceeding conducted as part of a subsequent adjudicatory proceeding. Any confidential mediation communication or agreement that may be disclosed in a subsequent adjudicatory proceeding under the provisions of this section may be introduced into evidence in the subsequent adjudicatory proceeding. [1997 c.670 §2]
36.224 State agencies; confidentiality of mediation communications; rules. (1) Except as provided in this section, mediation communications in mediations in which a state agency is a party, or in which a state agency is mediating a dispute as to which the state agency has regulatory authority, are not confidential and may be disclosed or admitted as evidence in subsequent adjudicatory proceedings, as described in ORS 36.222 (7).

(2) The Attorney General shall develop model rules that provide for the confidentiality of mediation communications in mediations described in subsection (1) of this section. The rules shall also provide for limitations on admissibility and disclosure in subsequent adjudicatory proceedings, as described in ORS 36.222 (7). The rules shall contain provisions governing mediations of workplace interpersonal disputes. The rules may be amended by the Attorney General after notice and opportunity for hearing as required by rulemaking procedures under ORS chapter 183.

(3) Model rules developed by the Attorney General under this section must include a provision for notice to the parties to a mediation regarding the extent to which the mediation communications are confidential or subject to disclosure or introduction as evidence in subsequent adjudicatory proceedings.

(4) A state agency may adopt the model rules developed by the Attorney General under this section in their entirety without complying with the rulemaking procedures under ORS 183.335. The agency shall file notice of adoption of rules under this subsection with the Secretary of State in the manner provided by ORS 183.355 for the filing of rules.

(5) Except as provided in ORS 36.222, mediation communications in any mediation regarding a claim for workers’ compensation benefits conducted pursuant to rules adopted by the Workers’ Compensation Board are confidential, are not subject to disclosure under ORS 192.410 to 192.505 and may not be disclosed or admitted as evidence in subsequent adjudicatory proceedings, as described in ORS 36.222 (7), without regard to whether a state agency or other public body is a party to the mediation or is the mediator in the mediation.

(6) Mediation communications made confidential by a rule adopted by a state agency are not subject to disclosure under ORS 192.410 to 192.505. [1997 c.670 §3; 2003 c.791 §23; 2005 c.333 §1; 2015 c.114 §1]

36.226 Public bodies other than state agencies; confidentiality of mediation communications. (1) Except as provided in subsection (2) of this section, mediation communications in mediations in which a public body other than a state agency is a party are confidential and may not be disclosed or admitted as evidence in subsequent adjudicatory proceedings, as described in ORS 36.222 (7).

(2) A public body other than a state agency may adopt a policy that provides that all or part of mediation communications in mediations in which the public body is a party will not be confidential. If a public body adopts a policy under this subsection, notice of the policy must be provided to all other parties in mediations that are subject to the policy. [1997 c.670 §4]

36.228 Mediations in which two or more public bodies are parties. (1) Notwithstanding any other provision of ORS 36.220 to 36.238, if the only parties to a mediation are public bodies, mediation communications and mediation agreements in the mediation are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505. Mediation of workplace interpersonal disputes between employees of a public body is not subject to this subsection.
(2) Notwithstanding any other provision of ORS 36.220 to 36.238, if two or more public bodies are parties to a mediation in which a private person is also a party, mediation communications in the mediation are not confidential if the laws, rules or policies governing confidentiality of mediation communications for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(3) Notwithstanding any other provision of ORS 36.220 to 36.238, if two or more public bodies are parties to a mediation in which a private person is also a party, mediation agreements in the mediation are not confidential if the laws, rules or policies governing confidentiality of mediation agreements for at least one of the public bodies provide that mediation agreements in the mediation are not confidential. [1997 c.670 §4a; 2007 c.12 §1]

36.230 Public bodies; confidentiality of mediation agreements.
(1) Except as provided in this section, mediation agreements are not confidential if a public body is a party to the mediation or if the mediation is one in which a state agency is mediating a dispute as to which the state agency has regulatory authority.

(2) If a public body is a party to a mediation agreement, any provisions of the agreement that are exempt from disclosure as a public record under ORS 192.410 to 192.505 are confidential.

(3) If a public body is a party to a mediation agreement, and the agreement is subject to the provisions of ORS 17.095, the terms of the agreement are confidential to the extent that those terms are confidential under ORS 17.095 (2).

(4) If a public body is a party to a mediation agreement arising out of a workplace interpersonal dispute:
   (a) The agreement is confidential if the public body is not a state agency, unless the public body adopts a policy that provides otherwise;
   (b) The agreement is confidential if the public body is a state agency only to the extent that the state agency has adopted a rule under ORS 36.224 that so provides; and
   (c) Any term of an agreement that requires an expenditure of public funds, other than expenditures of $1,000 or less for employee training, employee counseling or purchases of equipment that remain the property of the public body, may not be made confidential by a rule or policy of a public body. [1997 c.670 §5; 2005 c.352 §2]

36.232 Disclosures allowed for reporting, research, training and educational purposes.
(1) If a public body conducts or makes available a mediation, ORS 36.220 to 36.238 do not limit the ability of the mediator to report the disposition of the mediation to that public body at the conclusion of the mediation proceeding. The report made by a mediator to a public body under this subsection may not disclose specific confidential mediation communications made in the mediation.

(2) If a public body conducts or makes available a mediation, ORS 36.220 to 36.238 do not limit the ability of the public body to compile and disclose general statistical information concerning matters that have gone to mediation if the information does not identify specific cases.

(3) In any mediation in a case that has been filed in court, ORS 36.220 to 36.238 do not limit the ability of the court to:
   (a) Require the parties or the mediator to report to the court the disposition of the mediation at the conclusion of the mediation proceeding;
   (b) Disclose records reflecting which matters have been referred for mediation; or
(c) Disclose the disposition of the matter as reported to the court.

(4) ORS 36.220 to 36.238 do not limit the ability of a mediator or mediation program to use or disclose confidential mediation communications, the disposition of matters referred for mediation and the terms of mediation agreements to another person for use in research, training or educational purposes, subject to the following:
   (a) A mediator or mediation program may only use or disclose confidential mediation communications if the communications are used or disclosed in a manner that does not identify individual mediations or parties.
   (b) A mediator or mediation program may use or disclose confidential mediation communications that identify individual mediations or parties only if and to the extent allowed by a written agreement with, or written waiver of confidentiality by, the parties. [1997 c.670 §6]

36.234 Parties to mediation. For the purposes of ORS 36.220 to 36.238, a person, state agency or other public body is a party to a mediation if the person or public body participates in a mediation and has a direct interest in the controversy that is the subject of the mediation. A person or public body is not a party to a mediation solely because the person or public body is conducting the mediation, is making the mediation available or is serving as an information resource at the mediation. [1997 c.670 §7]

36.236 Effect on other laws. (1) Nothing in ORS 36.220 to 36.238 affects any confidentiality created by other law, including but not limited to confidentiality created by ORS 107.755 to 107.795.
   (2) Nothing in ORS 36.220 to 36.238 relieves a public body from complying with ORS 192.610 to 192.690. [1997 c.670 §9]

36.238 Application of ORS 36.210 and 36.220 to 36.238. The provisions of ORS 36.210 and 36.220 to 36.238 apply to all mediations, whether conducted by a publicly funded program or by a private mediation provider. [1997 c.670 §8]

* * *
# Oregon Rules of Professional Conduct

(As amended effective February 19, 2015)

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RULE 1.0 TERMINOLOGY

(a) "Belief" or "believes" denotes that the person involved actually supposes the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Electronic communication" includes but is not limited to messages sent to newsgroups, listservs and bulletin boards; messages sent via electronic mail; and real time interactive communications such as conversations in internet chat groups and conference areas and video conferencing.

(d) "Firm" or "law firm" denotes a lawyer or lawyers, including "Of Counsel" lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

(e) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(f) "Information relating to the representation of a client" denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(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.

(h) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question, except that for purposes of determining a lawyer's knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person's knowledge may be inferred from circumstances.

(i) "Matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and any other matter covered by the conflict of interest rules of a government agency.

(j) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(k) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(l) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(m) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(n) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(o) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(p) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.
(q) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostatting, photography, audio or videorecording and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Adopted 01/01/05
Amended 01/01/14: “Electronic communications” substituted for “email.”

Comparison to Oregon Code
This rule replaces DR 10-101 and is significantly more expansive. Some DR 10-101 definitions were retained, but others were not incorporated into this rule.

The definition of “firm member” was eliminated as not necessary, but a reference to “of counsel” was retained in the definition of “firm.” The definition of “firm” also distinguishes office sharers and lawyers working in a firm on a limited basis.

The concept of “full disclosure” is replaced by “informed consent,” which, in some cases, must be “confirmed in writing.”

The definition of “professional legal corporation” was deleted, as the term does not appear in any of the rules and does not require explanation.

The definitions of “person” and “state” were also eliminated as being unnecessary.

Comparison to ABA Model Rule
The Model Rules do not define “information relating to the representation of a client;” it was added here to make it clear that ORPC 1.6 continues to protection of the same information protected by DR 4-101 and the term is defined with the DR definitions of confidences and secrets. The MR definition of “firm” was revised to include a reference to “of counsel” lawyers. The MR definition of “knowingly, known or knows” was revised to include language from DR 5-105(B) regarding knowledge of the existence of a conflict of interest. The definition of “matter” was moved to this rule from MR 1.11 on the belief that it has a broader application than to only former government lawyer conflicts. The MR definition of “writing” has been expanded to include “facsimile” communications.

CLIENT-LAWYER RELATIONSHIP

RULE 1.1 COMPETENCE
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Adopted 01/01/05

Defined Terms (see Rule 1.0):
“Reasonably”

Comparison to Oregon Code
This rule is identical to DR 6-101(A).

Comparison to ABA Model Rule
This is the ABA Model Rule.

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.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(d) Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon’s marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.

Adopted 01/01/05
Amended 02/19/15: Paragraph (d) added
Chapter 1—In the Wake of Alfieri and Crimson Trace (Oregon Supreme Court)

Defined Terms (see Rule 1.0):

“Fraudulent”
“Informed consent”
“Knows”
“Matter”
“Reasonable”

Comparison to Oregon Code
This rule has no real counterpart in the Oregon Code. Subsection (a) is similar to DR 7-101(A) and (B), but expresses more clearly that lawyers must defer to the client’s decisions about the objectives of the representation and whether to settle a matter. Subsection (b) is a clarification of the lawyer’s right to limit the scope of a representation. Subsection (c) is similar to DR 7-102(A)(7), but recognizes that counseling a client about the meaning of a law or the consequences of proposed illegal or fraudulent conduct is not the same as assisting the client in such conduct. Paragraph (d) had no counterpart in the Oregon Code.

Comparison to ABA Model Rule
ABA Model Rule 1.2(b) states that a lawyer’s representation of a client “does not constitute an endorsement of the client’s political, economic, social or moral views or activities.” It was omitted because it is not a rule of discipline, but rather a statement intended to encourage lawyers to represent unpopular clients. Also, MR 1.2(c) refers to “criminal” rather than “illegal” conduct.

RULE 1.3 DILIGENCE
A lawyer shall not neglect a legal matter entrusted to the lawyer.

Adopted 01/01/05

Defined Terms (see Rule 1.0)

“Matter”

Comparison to Oregon Code
This rule is identical to DR 6-101(B).

Comparison to ABA Model Rule
The ABA Mode Rule requires a lawyer to “act with reasonable diligence and promptness in representing a client.”

RULE 1.4 COMMUNICATION
(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.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

“Knows”
“Reasonable”
“Reasonably”

Comparison to Oregon Code
This rule has no counterpart in the Oregon Code, although the duty to communicate with a client may be inferred from other rules and from the law of agency.

Comparison to ABA Model Rule
This is the former ABA Model Rule. ABA MR 1.4 as amended in 2002 incorporates provisions previously found in MR 1.2; it also specifically identifies five aspects of the duty to communicate.

RULE 1.5 FEES
(a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.

(b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(c) A lawyer shall not enter into an arrangement for, charge or collect:
(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of spousal or child support or a property settlement;

(2) a contingent fee for representing a defendant in a criminal case; or

(3) a fee denominated as "earned on receipt," "nonrefundable" or in similar terms unless it is pursuant to a written agreement signed by the client which explains that:

(i) the funds will not be deposited into the lawyer trust account, and

(ii) the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed.

(d) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client gives informed consent to the fact that there will be a division of fees, and

(2) the total fee of the lawyers for all legal services they rendered the client is not clearly excessive.

(e) Paragraph (d) does not prohibit payments to a former firm member pursuant to a separation or retirement agreement, or payments to a selling lawyer for the sale of a law practice pursuant to Rule 1.17.

Adopted 01/01/05

Amended 12/01/10: Paragraph(c)(3) added.

Defined Terms (see Rule 1.0):

"Firm"
"Informed Consent"
"Matter"
"Reasonable"

Comparison to Oregon Code

Paragraphs (a), (b) and (c)(1) and (2) are taken directly from DR 2-106, except that paragraph (a) is amended to include the Model Rule prohibition against charging a "clearly excessive amount for expenses." Paragraph (c)(3) had no counterpart in the Code. Paragraph (d) retains the substantive obligations of DR 2-107(A) but is rewritten to accommodate the new concepts of "informed consent" and "clearly excessive." Paragraph (e) is essentially identical to DR 2-107(B).

Comparison to ABA Model Rule

ABA Model Rule 1.5(b) requires that the scope of the representation and the basis or rate of the fees or expenses for which the client will be responsible be communicated to the client before or within a reasonable time after the representation commences, “preferably in writing.” Model Rule 1.5(c) sets forth specific requirements for a contingent fee agreement, including an explanation of how the fee will be determined and the expenses for which the client will be responsible. It also requires a written statement showing distribution of all funds recovered. Paragraph (c)(3) has no counterpart in the Model Rule. Model Rule 1.5(e) permits a division of fees between lawyers only if it is proportional to the services performed by each lawyer or if the lawyers assume joint responsibility for the representation.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer’s compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client’s identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall
have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer’s clients, except to the extent reasonably necessary to carry out the monitoring lawyer’s responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Adopted 01/01/05

Amended 12/01/06: Paragraph (b)(6) amended to substitute “information relating to the representation of a client” for “confidences and secrets.”

Amended 01/20/09: Paragraph (b)(7) added.

Amended 01/01/14: Paragraph (6) modified to allow certain disclosures to avoid conflicts arising from a change of employment or ownership of a firm. Paragraph (c) added.

Defined Terms (see Rule 1.0):

“Believes”
“Firm”
“Information relating to the representation of a client”
“Informed Consent”
“Reasonable”
“Reasonably”
“Substantial”

Comparison to Oregon Code

This rule replaces DR 4-101(A) through (C). The most significant difference is the substitution of “information relating to the representation of a client” for “confidences and secrets.” Paragraph (a) includes the exceptions for client consent found in DR 4-101(C)(1) and allows disclosures “impliedly authorized” to carry out the representation, which is similar to the exception in DR 4-101(C)(2).

The exceptions to the duty of confidentiality set forth in paragraph (b) incorporate those found in DR 4-101(C)(2) through (C)(5). There are also two new exceptions not found in the Oregon Code: disclosures to prevent “reasonably certain death or substantial bodily harm” whether or not the action is a crime, and disclosures to obtain legal advice about compliance with the Rules of Professional Conduct.

Paragraph (b)(6) in the Oregon Code pertained only to the sale of a law practice.

Paragraph (b)(7) had no counterpart in the Oregon Code.

Comparison to ABA Model Rule

ABA Model Rule 1.6(b) allows disclosure “to prevent reasonably certain death or substantial bodily harm” regardless of whether a crime is involved. It also allows disclosure to prevent the client from committing a crime or fraud that will result in significant financial injury or to rectify such conduct in which the lawyer’s services have been used. There is no counterpart in the Model Rule for information to monitoring responsibilities.

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.
Chapter 1—In the Wake of Alfieri and Crimson Trace (Oregon Supreme Court)

Adopted 01/01/05

Defined Terms (see Rule 1.0):

“Believes”
“Confirmed in writing”
“Informed consent”
“Knows”
“Matter”
“Reasonably believes”

Comparison to Oregon Code

The current conflicts of interest prohibited in paragraph (a) are the self-interest conflicts currently prohibited by DR 5-101(A) and current client conflicts prohibited by DR 5-105(E). Paragraph (a)(2) refers only to a “personal interest” of a lawyer, rather than the specific “financial, business, property or personal interests” enumerated in DR 5-101(A)(1). Paragraph (a)(3) incorporates the “family conflicts” from DR 5-101(A)(2).

Paragraph (b) parallels DR 5-101(A) and DR 5-105(F) in permitting a representation otherwise prohibited if the affected clients give informed consent, which must be confirmed in writing. Paragraph (b)(3) incorporates the “actual conflict” definition of DR 5-105(A)(1) to make it clear that a lawyer cannot provide competent and diligent representation to clients in that situation.

Paragraph (b) also allows consent to simultaneous representation “not prohibited by law,” which has no counterpart in the Oregon Code. According to the official Comment to MR 1.7 this would apply, for instance, in jurisdictions that prohibit a lawyer from representing more than one defendant in a capital case, to certain representations by former government lawyers, or when local law prohibits a government client from consenting to a conflict of interest.

Comparison to ABA Model Rule

This is essentially identical to the ABA Model Rule, except for the addition of paragraphs (a)(3) and (b)(3) discussed above; also, the Model Rule uses the term “concurrent” rather than “current.” The Model Rule allows the clients to consent to a concurrent conflict if “the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.”

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS:

SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, confirmed in writing, except as permitted or required under these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information related to the representation of a client is protected as required by Rule 1.6.
(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

1. make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement;
2. settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith;
3. enter into any agreement with a client regarding arbitration of malpractice claims without informed consent, in a writing signed by the client; or
4. enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or to pursue any complaint before the Oregon State Bar.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

1. acquire a lien authorized by law to secure the lawyer’s fee or expenses; and
2. contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them before the client-lawyer relationship commenced; or have sexual relations with a representative of a current client of the lawyer if the sexual relations would, or would likely, damage or prejudice the client in the representation. For purposes of this rule:

1. "sexual relations" means sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party; and

(2) "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (j) that applies to any one of them shall apply to all of them.

Adopted 01/01/05
Amended 01/01/13: Paragraph (e) amended to mirror ABA Model Rule 1.8(e).

Defined Terms (see Rule 1.0):
- "Confirmed in writing"
- "Information relating to the representation of a client"
- "Informed consent"
- "Firm"
- "Knowingly"
- "Matter"
- "Reasonable"
- "Reasonably"
- "Substantial"
- "Writing"

Comparison to Oregon Code

This rule has no exact counterpart in the Oregon Code, although it incorporates prohibitions found in several separate disciplinary rules.

Paragraph (a) replaces DR 5-104(A) and incorporates the Model Rule prohibition against business transactions with clients even with consent except where the transaction is "fair and reasonable" to the client. It also includes an express requirement to disclose the lawyer’s role and whether the lawyer is representing the client in the transaction.

Paragraph (b) is virtually identical to DR 4-101(B).

Paragraph (c) is similar to DR 5-101(B), but broader because it prohibits soliciting a gift as well as preparing the instrument. It also has a more inclusive list of "related persons."

Paragraph (d) is identical to DR 5-104(B).

Paragraph (e) is identical to DR 5-104(B).

Paragraph (f) replaces DR 5-108(A) and (B) and is essentially the same as it relates to accepting payment from someone other than the client. This rule is somewhat narrower than DR 5-108(B), which prohibits allowing influence from someone who “recommends, employs or pays” the lawyer.

Paragraph (g) is virtually identical to DR 5-107(A).
Paragraph (h)(1) and (2) are similar to DR 6-102(A), but do not include the “unless permitted by law” language. Paragraph (h)(3) retains DR 6-102(B), but substitutes "informed consent, in a writing signed by the client" for “full disclosure.” Paragraph (h)(4) is new and was taken from Illinois Rule of Professional Conduct 1.8(h).

Paragraph (i) is essentially the same as DR 5-103(A).

Paragraph (j) retains DR 5-110, reformatted to conform to the structure of the rule.

Paragraph (k) applies the same vicarious disqualification to these personal conflicts as provided in DR 5-105(G).

Comparison to ABA Model Rule

This rule is identical to ABA Model Rule 1.8 with the following exceptions. MR 1.8 (b) does not require that the client’s informed consent be confirmed in writing as required in DR 4-101(B). MR 1.8 (h) does not prohibit agreements to arbitrate malpractice claims. MR 1.8 (j) does not address sexual relations with representatives of corporate clients and does not contain definitions of terms.

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless each affected client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(d) For purposes of this rule, matters are “substantially related” if (1) the lawyer’s representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or (2) there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client’s position in the subsequent matter.

Adopted 01/01/05

Amended 12/01/06: Paragraph (d) added.

Defined Terms (see Rule 1.0):

“Confirmed in writing”
“Informed consent”
“Firm”
“Knowingly”
“Known”
“Matter”
“Reasonable”
“Substantial”

Comparison to Oregon Code

This rule replaces DR 5-105(C), (D) and (H). Like Rule 1.7, this rule is a significant departure from the language and structure of the Oregon Code provisions on conflicts. Paragraph (a) replaces the sometimes confusing reference to “actual or likely conflict” between current and former client with the simpler “interests [that are] materially adverse.” The prohibition applies to matters that are the same or “substantially related,” which is virtually identical to the Oregon Code standard of “significantly related.”

Paragraph (b) replaces the limitation of DR 5-105(H), but is an arguably clearer expression of the prohibition. The new language makes it clear that a lawyer who moves to a new firm is prohibited from being adverse to a client of the lawyer’s former firm only if the lawyer has acquired confidential information material to the matter while at the former firm.

Paragraph (c) makes clear that the duty not to use confidential information to the client’s disadvantage continues after the conclusion of the representation, except where the information “has become generally known.”

Paragraph (d) defines “substantially related.” The definition is taken in part from former DR 5-105(D) and in part from Comment [3] to ABA Model Rule 1.9.

Comparison to ABA Model Rule

ABA Model Rule 1.9(a) and (b) require consent only of the former client. The Model Rule also has no definition.
In this legal malpractice action arising out of the mediation of an underlying civil lawsuit, plaintiff appeals from a general judgment dismissing his claims against his former attorney, asserting that the trial court erred in granting defendant’s ORCP 21 E motion to strike and in granting defendant’s motion to dismiss with prejudice under ORCP 21 A(8) for failure to state a claim. Plaintiff contends that the trial court erred in striking the allegations that, during and just after the mediation, defendant’s representation of plaintiff was negligent and that defendant breached his fiduciary duty to plaintiff. Plaintiff also asserts that the trial court erred in dismissing his complaint with prejudice under ORCP 21 A(8). We affirm in part and reverse in part the motion to strike, and we reverse and remand the judgment of dismissal with prejudice.

In reviewing a trial court’s grant of a motion to strike under ORCP 21 E and grant of a motion to dismiss for failure to state a claim under ORCP 21 A, we employ the same standard: “We * * * accept as true all well-pleaded allegations and any facts that might be adduced as proof of those allegations.” In re Marriage of Ross, 240 Or.App. 435, 439, 246 P.3d 1179 (2011). In light of that standard, we summarize the facts taken from plaintiff’s complaint.

Plaintiff retained defendant, an employment law attorney, to pursue claims against plaintiff’s former employer by filing complaints with the Bureau of Labor and Industries (BOLI), and, later, by filing a civil complaint on plaintiff’s behalf. In that complaint, defendant initially alleged a common-law wrongful discharge claim against plaintiff’s former employer, but subsequently filed a motion to amend the complaint to add additional claims. The trial court
granted that motion. However, defendant did not amend the complaint. Defendant performed only limited discovery in the underlying lawsuit and then proposed mediation.

Before the mediation conference, defendant advised plaintiff regarding the potential value of settling the underlying lawsuit. No resolution was reached at the mediation conference. The day after the mediation conference, the mediator suggested a settlement package to the parties. Over the next 16 days, defendant continued to advise plaintiff regarding the proposed settlement package. During that time, defendant again advised plaintiff regarding the potential value of settling the underlying lawsuit, but significantly reduced the dollar value of his recommendation. Plaintiff ultimately signed a settlement agreement that incorporated the settlement amount proposed by the mediator. The parties agreed that the terms of the agreement and the settlement amount would remain confidential. After signing the agreement, plaintiff continued to seek advice from defendant regarding the enforceability of the agreement; during that period, defendant failed to advise plaintiff that the former employer had not complied with some of the agreement’s terms, calling into question the enforceability of the agreement.

Plaintiff sued defendant for legal malpractice, alleging that defendant had been negligent and had breached his fiduciary duty to plaintiff. The allegations included communications by the mediator, the content of communications between plaintiff and defendant during the 16–day period after the mediation conference (the post-mediati on conference period), the settlement amount and contents of the final settlement agreement, and the content of communications between plaintiff and defendant after plaintiff had signed the settlement agreement (the post-signing period).

Pursuant to ORCP 21 E, defendant moved to strike the portions of plaintiff’s complaint relating to the mediation and settlement agreement, contending that those challenged portions of the complaint were “mediation communications” that were both confidential and inadmissible under ORS 36.222(1). Defendant also filed an ORCP 21 A(8) motion to dismiss plaintiff’s complaint for failure to state ultimate facts sufficient to constitute a claim, arguing that dismissal was required because plaintiff could not allege or prove his damages without the challenged portions of the complaint. After a hearing on the matter, the trial court granted defendant’s motion to strike. The court then dismissed the complaint with prejudice. This appeal followed.

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1 We distinguish between the “mediation conference” referring to the face-to-face meeting between parties and the mediator to work toward a resolution of the dispute—and the “mediation process”—viz., the series of ongoing contacts between the parties to mediation and the mediator, although those contacts may occur outside of the mediation conference setting. SeeORS 36.110(5) (defining mediation as a “process” that “includes all contacts * * * until such time as a resolution is agreed to by the parties or the mediation process is terminated”).

2 Plaintiff alleged that his former employer failed to pay the settlement amount within 10 days of plaintiff’s acceptance as required by the terms of the agreement. The record reveals that plaintiff ultimately received the settlement amount from the employer. However, plaintiff continued to allege that the agreement was unenforceable because the employer “had not accepted it on time.” The trial court struck the bulk of those allegations from the complaint, leaving only that the former employer failed to comply with the terms of the agreement, and that defendant was negligent because he advised plaintiff that he was bound to the terms of the agreement.
Because they inform the parties’ arguments, we begin by setting forth the pertinent legal standards. Generally, “[m]ediation communications are confidential and may not be disclosed to any other person” unless the parties otherwise agree, in writing. ORS 36.220(1)(a), (b). “Mediation communications” are defined in ORS 36.110(7) as follows:

“(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.”

That definition distinguishes between direct communications and materials. “[D]irect communications” are “communications between persons who are privy to a mediation proceeding.” Bidwell and Bidwell, 173 Or.App. 288, 294, 21 P.3d 161 (2001) (emphasis omitted). Direct communications, which fall under ORS 36.110(7)(a), are confidential under ORS 36.220(1)(a), regardless of whether they were specifically prepared for use in mediation. Id. On the other hand, “materials” that are also mediation communications must be “prepared for, or submitted in connection with, mediation,” and typically 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.” Id. at 294, 21 P.3d 161 (emphasis omitted).

The definition of “mediation communications” in ORS 36.110(7) also requires us to determine if a communication under either subparagraph (a) or (b) occurred “in the course of or in connection with a mediation.” “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 36.100(5) (emphasis added). Under that definition of mediation, a communication made outside the mediation conference setting may still be a confidential “mediation communication” as long as the communication occurs in the course of or in connection with the ongoing mediation process.

Thus, to determine if a communication is a “mediation communication,” we first must determine whether the communication is either a direct communication made to a party privy to the mediation proceedings, ORS 36.110(7)(a), or material prepared for use in the mediation proceedings, ORS 36.110(7)(b). After determining whether one of those subsections is applicable,
we next must determine if the communication at issue occurred “in the course of or in connection with” the mediation process.\(^3\)

As noted, generally, “[m]ediation communications are confidential and may not be disclosed to any other person” unless the parties otherwise agree, in writing. ORS 36.220(1)(a), (b). Conversely, unless the parties otherwise agree in writing, “[t]he terms of any mediation agreement are not confidential.” ORS 36.220(2)(a), (b) (emphasis added). Generally, confidential mediation communications and confidential mediation agreements “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.” ORS 36.222(1). However, the statute carves out specific exceptions, allowing disclosure in the following situations: if all parties agree in writing to disclosure of the mediation communications; if the proceeding is to enforce, modify, or set aside the mediation agreement; if the action is between a party and the mediator or mediation program; or in circumstances involving child or elder abuse. ORS 36.222(2), (4)-(6).

With that background in mind, we turn to the allegations that the trial court struck from plaintiff’s complaint to determine whether they were confidential mediation communications or a confidential mediation agreement that plaintiff could not disclose. On appeal, plaintiff generally contends that the trial court erred in striking three categories of communications, because they are nonconfidential: (1) all communications between plaintiff and defendant relating to the substance of the settlement agreement; (2) communications occurring during the post-mediation conference period; and (3) communications between plaintiff and defendant during the post-signing period. We examine each in turn, beginning with the settlement agreement itself.

As noted, plaintiff agreed to keep the terms of the settlement agreement and settlement amount confidential. ORS 36.220(2)(b). As such, the terms of the agreement and the settlement amount are inadmissible as evidence and not subject to disclosure in any subsequent adjudicatory proceeding. ORS 36.222(1). That also covers the communications between plaintiff and defendant relating to the substance of the settlement agreement.

Plaintiff asserts, in part, that the settlement agreement was unenforceable, and, based on that fact, it does not matter that the parties had agreed to keep the agreement’s terms and the settlement amount confidential. We disagree. Plaintiff brought this action against defendant for negligence and breach of fiduciary duty; he did not bring an action to enforce, modify, or set aside the agreement, ORS 36.222(4). Nor does plaintiff argue that he is allowed to disclose the terms of the agreement and settlement amount under any other valid exception to the confidentiality rules. Accordingly, we reject plaintiff’s argument and conclude that the trial court did not err in striking

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\(^3\) Our “paramount goal” when construing a statute is to discern the legislature’s intent. To do so, we look to the text, context, including related statutes, and pertinent legislative history of the statute. *State v. Gaines*, 346 Or. 160, 171, 206 P.3d 1042 (2009). When we consider the text of a statute we give words of common usage their plain and ordinary meaning. *Id.*
the allegations that disclosed the terms of the settlement agreement, including the settlement amount.

Turning to the communications that occurred during the post-mediation conference period, we must determine whether those communications were “mediation communications.” Plaintiff focuses on plaintiff’s and defendant’s direct post-mediation conference communications, including the content of defendant’s legal advice to plaintiff and the mediator’s communications (in which the mediator proffered a settlement proposal). Accordingly, we analyze whether those communications fall within the definition of ORS 36.110(7)(a). That requires us to determine, first, if the communications were made to a person covered by the statute, and, second, whether those communications occurred “in the course of or in connection with” the mediation. ORS 36.110(7)(a).

The communications between the mediator and the parties were communications made either to “a party” or “a mediator,” respectively, and thus, are all communications that meet the first step of our inquiry. ORS 36.110(7)(a). The remaining issue to be addressed is whether the communications made between defendant and plaintiff fall within the definition of ORS 36.110(7)(a).

Plaintiff was, by definition, “a party * * * to the mediation proceedings.” ORS 36.110(7)(a); ORS 36.234 (“[A] person * * * is a party to a mediation if the person * * * participates in a mediation and has a direct interest in the controversy that is the subject of the mediation.”). The parties, however, each advance several arguments relating to defendant’s status—i.e., that he is (or is not) “a party,” “any other person present,” or that defendant was “a party” because he acted as plaintiff’s agent during the mediation process. Because ORS 36.110(7)(a) specifies only to whom the communication is made, and omits any reference to the person making the communication, defendant’s status as “a party” or “any other person present” has no import as to whether his communications—i.e., the alleged negligent legal advice—fell within the scope of ORS 36.110(7)(a). Those communications are undisputably communications made to “a party.” To the extent plaintiff’s allegations implicate plaintiff’s communications back to defendant, that question has been answered by Bidwell. In that case, letters exchanged between the parties’ attorneys were mediation communications because they were “made to one of the disputants’ representatives.” Bidwell, 173 Or.App. at 294, 21 P.3d 161 (emphasis in original). Defendant was plaintiff’s representative for purposes of mediation, and he also was privy to the mediation proceedings. If defendant’s communications to plaintiff are “mediation communications,” then plaintiff’s communications to defendant within the same general exchange also must be “mediation communications.” Any other conclusion would lead to the absurd result of plaintiff being permitted to disclose one side of an otherwise confidential communication exchange.

Next, we must determine whether the communications between the mediator and the parties and plaintiff and defendant during the post-mediation conference period occurred “in the
course of or in connection with” the mediation. As set out previously, mediation is defined as “a process” that continues “until such time as a resolution is agreed to by the parties or the mediation process is terminated.” ORS 36.100(5). However, the phrase “in the course of or in connection with” the mediation is not otherwise defined in ORS chapter 36. Thus we employ the ordinary meaning of those terms. The ordinary meaning of “course” is “progress or progression through a series (as of acts or events) or through a development or a period,” Webster’s Third New Int’l Dictionary 522 (unabridged ed 2002), and in Bidwell, we noted that a “connection” is a “relationship, an association, or a link,” 173 Or.App. at 295 n. 5, 21 P.3d 161.

In keeping with those ordinary meanings, in Bidwell, we concluded that letters sent between the parties’ attorneys while the litigation was held in abeyance pending mediation fell within the definition of mediation communications in ORS 36.110(7)(a). We reached that conclusion, as pertinent here, because the letters were sent while mediation was pending, occurred close in time “after a mediation conference had taken place,” each letter “reflected a different phase of negotiations,” and the letters had been sent before one party withdrew the settlement and the case was referred out of mediation and back to the Court of Appeals. Bidwell, 173 Or.App. at 291, 294–95, 21 P.3d 161 (emphasis added).

In sum, communications are made “in the course of or in connection with” mediation if they are related to, associated with, or linked to the mediation process. In other words, “mediation communications” include the series of actions or occurrences relating to the mediation that continues until the parties agree to a resolution or the mediation ends, because, for example, one party has withdrawn from the mediation or because the mediation has been formally terminated. Id. at 293, 295, 21 P.3d 161; ORS 36.110(5).

Here, it is undisputed that defendant continued to advise plaintiff relating to the mediation process—and its potential outcomes—during the 16–day post-mediation conference period. The parties participated in a mediation conference but did not reach a mutually agreed-upon resolution. Defendant advised plaintiff during that conference. The day after the mediation conference, the mediator proferred a settlement proposal. Defendant continued to advise plaintiff over the next two weeks, during which time he advised plaintiff that plaintiff could expect to receive a lower settlement value than his initial estimate. Plaintiff then signed a settlement agreement resolving his claims with his former employer.

Thus, during the post-mediation conference period, plaintiff 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 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. ORS 36.222(1)(a). Therefore, the trial court did not err in striking the portions of plaintiff’s complaint that related to the communications between plaintiff and defendant, and between the mediator and the parties, during the post-mediation conference period.

Plaintiff next contends that, because the mediation process ended when he signed the settlement agreement, his communications with defendant during the post-signing period were nonconfidential and subject to disclosure. We agree.

The trial court struck plaintiff’s allegations that defendant had failed to properly advise him that his former employer had not complied with the settlement agreement’s terms. Like the communications between plaintiff and defendant during the post-mediation conference period, the communications between plaintiff and defendant during the post-signing period are communications made to a person privy to the mediation proceedings under ORS 36.110(7)(a).

However, those communications did not occur in the course of or in connection with the mediation process and thus are not confidential mediation communications. As noted above, the mediation process ended when plaintiff and his employer signed the settlement agreement and resolved the disputes at issue in the mediation. Although the communications between defendant and plaintiff during the post-signing period have some connection to the mediation because they concerned the settlement agreement, those communications occurred outside the mediation process and thus are not subject to the blanket nondisclosure rule in ORS 36.220(1). See ORS 36.110(5) (the mediation process continues only “until such time as a resolution is agreed to by the parties”). To the extent the communications revealed the terms of the settlement agreement itself, those terms cannot be disclosed, as discussed elsewhere in this opinion. See 263 Or.App. at 498, 329 P.3d at 30. Other communications that occurred during the post-signing period, however, could be disclosed by plaintiff because they are not “mediation communications” as defined by ORS 36.110(7)(a). Thus, the trial court erred in striking those portions of plaintiff’s complaint.

Finally, we turn to whether dismissal of the complaint with prejudice under ORCP 21 A(8) was error. To state a claim for legal malpractice, plaintiff must allege “(1) a duty that runs from the defendant to the plaintiff; (2) a breach of that duty; (3) a resulting harm to the plaintiff measurable in damages; and (4) causation, i.e., a causal link between the breach of duty and the harm.” Stevens v. Bispham, 316 Or. 221, 227, 851 P.2d 556 (1993) (emphasis omitted).

“To establish causation, the plaintiff must show that, but for the defendant’s negligence, the plaintiff would not have suffered the claimed harm *** by showing that he or she would have obtained a more favorable result had the defendant not been negligent. The jury in the malpractice case is called upon *** to decide what the outcome for plaintiff would have been in the earlier case if it had been properly tried, a process that has been described as a ‘suit within a suit.’ If the

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4 In essence, plaintiff alleged that defendant’s failure to communicate about his former employer’s performance (or nonperformance) under the mediation agreement was negligent.
jury determines that the defendant was negligent but concludes that the outcome of the underlying case would have been the same in all events, the defendant’s negligence is deemed not to have caused the plaintiff’s harm.”


Defendant argues that plaintiff was barred from disclosing the settlement amount, and thus he could not allege “a resulting harm * * * measurable in damages.” *Stevens*, 316 Or. at 227, 851 P.2d 556.

With those principles in mind, we reiterate the procedural posture in this case. Plaintiff filed the complaint for legal malpractice. Defendant then filed a motion to strike and motion to dismiss. ORCP 21 A(8), E. After the hearing on the motion, the trial court dismissed plaintiff’s complaint with prejudice. This appeal followed. Under ORCP 23 A,5 “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.” *O’Neil v. Martin*, 258 Or.App. 819, 838, 312 P.3d 538 (2013), rev. den., 355 Or. 381, 328 P.3d 697 (2014). Thus, the trial court erred when it dismissed plaintiff’s complaint with prejudice. *See O’Neil*, 258 Or.App. at 837, 312 P.3d 538 (concluding that, because the DOG defendants had not filed a responsive pleading-and had instead filed ORCP 21 A motions to dismiss “the trial court lacked discretion to dismiss the complaint with prejudice”); *Lamka v. KeyBank*, 250 Or.App. 486, 491, 281 P.3d 639 (2012) (concluding that, under the plain language of ORCP 23 A, the plaintiff could amend the complaint once as a matter of law even if the court had previously dismissed the complaint, because the defendant had not yet filed a responsive pleading).

As noted, we accept as true all well-pleaded allegations in plaintiff’s complaint. The trial court struck portions of plaintiff’s complaint with respect to the damages allegation, but left portions of the complaint intact. Upon review of the complaint, we discern that plaintiff alleged the amount that he had expected to receive after the jury trial in the underlying suit ($4,000,000), i.e., the resulting harm to plaintiff measurable in damages.

We understand the concern of the trial court in the context of plaintiff’s malpractice action, which requires plaintiff to prove that he would have obtained a more favorable result if defendant had not been negligent. Here, however, the negligence allegations that are not confidential (and not stricken) are that defendant gave negligent advice to plaintiff post-signing, that is, after plaintiff had already obtained the settlement amount. Thus, conceivably the posture presented for plaintiff to show that he would have achieved a more favorable result had the defendant not been negligent is whether plaintiff would have been able to recover additional funds. That posture does not necessarily require plaintiff to plead and prove the settlement amount to the jury because the jury would not need to compare a potential jury award to the settlement amount to determine which

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5 ORCP 23 A provides, in relevant part, “A pleading may be amended by a party once as a matter of course at any time before a responsive pleading is served * * *.”
was more favorable; rather the jury would compare zero (nothing in addition to the settlement amount) with the additional amount plaintiff proves he could have achieved if the settlement agreement had been challenged.

Should a jury ultimately find for plaintiff, the parties and the trial court can determine the best method to reduce any award in plaintiff’s favor by the settlement amount that does not reveal that amount to the jury, if such a reduction is necessary to avoid a double recovery. See, e.g., OEC 201 (judicial notice). Whatever means are ultimately used to address that potential discrete issue, it was error for the trial court to dismiss plaintiff’s complaint with prejudice, when, at this early stage, it was conceivable that plaintiff could allege and prove a total damage award without disclosing the settlement amount in an amended complaint.

Motion to strike affirmed in part and reversed in part; judgment of dismissal with prejudice reversed.
Chapter 1—In the Wake of Alfieri and Crimson Trace (Oregon Supreme Court)

358 Or. 383
365 P.3d 99

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.

On review from the Court of Appeals

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.

Opinion

BALMER, C.J.

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

* Appeal from Multnomah County Circuit Court, Jerry B. Hodson, Judge. 263 Or.App. 492, 329 P.3d 26 (2014).
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 set forth in 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 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, 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 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.”

\(^1\) 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).

\(^2\) 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.
• 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 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 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 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.

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 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). However, where a court’s exercise of discretion turns on a legal question, such as the meaning of a statute, we

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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.
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 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).

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.”

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 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, 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. 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 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 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.

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 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 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

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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.
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 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 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 of Donna Silverberg, Acting Director of Oregon Dispute Resolution Commission,7 and official representative of workgroup 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

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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).

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.
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, 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 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

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
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 the statute and another person not among those listed.

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, 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

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.
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 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 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 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 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 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 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 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 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

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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 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).
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)).

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.

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 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).

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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.
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 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 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.\textsuperscript{13} See Council on Court Procedures, \textit{(1982 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. The amendment would also make it clear that judgment may be entered if leave to amend is not granted.”).\textsuperscript{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,\textsuperscript{15} see Council on Court Procedures, Proposed Rules of Civil Procedure, Rule 23 (comment), in \textit{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 analogous federal rule existed. \textit{See id.} (describing statutory source of that part of rule).\textsuperscript{16} The provision from which ORCP 25 A was drawn, \textit{former} ORS 16.380, provided that if a demurrer\textsuperscript{17} was sustained, “the court may in its discretion allow the party to amend the pleading demurred to, upon such terms as may be proper.” \textit{Former} ORS 16.380 (1977), \textit{repealed by Or.\textsuperscript{18}}

\textsuperscript{13} Initially, the wording of that provision differed slightly. \textit{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. \textit{See} Council on Court Procedures, (2000 promulgation), Rule 21, comment (describing effect of changes), \textit{available at http://counciloncourtprocedures.org/Content/Legislative_History_of_Rules/ORCP_21_promulgations_all_years.pdf} (accessed Dec. 2, 2015).

\textsuperscript{14} \textit{Available at} http://counciloncourtprocedures.org/Content/Legislative_History_of_Rules/ORCP_21_promulgations _all_years.pdf (accessed Dec. 2, 2015).

\textsuperscript{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.


\textsuperscript{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. \textit{See} Council on Court Procedures, Commentary to Oregon Rules of Civil Procedure Pleading, 9–10, in \textit{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. \textit{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”).
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).

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 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

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.
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 1—In the Wake of *Alfieri* and *Crimson Trace* (Oregon Supreme Court)

355 Or. 476
326 P.3d 1181

CRIMSON TRACE CORPORATION, an Oregon corporation, Plaintiff–Adverse Party,
v.

DAVIS WRIGHT TREMAINE LLP, a Washington limited liability partnership; Frederick Ross Boundy, an individual; and William Birdwell, an individual, Defendants–Relators.

(CC110810810; SC S061086).

Supreme Court of Oregon, En Banc.

Argued and Submitted Nov. 4, 2013.

Original proceeding in mandamus.*

Kevin Stuart Rosen, Gibson, Dunn & Crutcher, LLP, Los Angeles, argued the cause and filed the brief for defendants-relators. With him on the brief was Daniel L. Keppler.

Bonnie Richardson, Folawn Alterman & Richardson, LLP, Portland, argued the case and filed the brief for plaintiff-adverse party. With her on the brief was John Folawn.

Robyn Rider Aoyagi, Tonkon Torp LLP, Portland, filed a brief on behalf of amici curiae Interested Oregon Law Firms.

Bridget Donegan, Larkins Vacura LLP, Portland, and Kristian S. Roggendorf, of Roggendorf Law LLC, Lake Oswego, filed a brief on behalf of amicus curiae Oregon Trial Lawyers Association.

Amar D. Sarwal and Evan P. Schultz, Association of Corporate Counsel, and Kelly Jaske, Jaske Law LLC, Portland, filed a brief on behalf of amicus curiae Association of Corporate Counsel.

LANDAU, J.

In this original proceeding in mandamus, relator Davis Wright Tremaine LLP ("DWT") challenges a trial court order compelling production of certain materials that, in DWT’s view, are protected under the attorney-client privilege codified at OEC 503. The trial court issued the order in the context of a legal malpractice action against DWT by a former client. The materials that are the subject of the order are communications between DWT’s designated in-house counsel and the lawyers in the firm who had represented the former client, and concern how actual and potential conflicts between the lawyers and the former client should be handled.

The trial court concluded that all but three of the communications with the firm’s in-house counsel ordinarily would be covered by the attorney-client privilege under OEC 503. The court,

* On petition for alternative writ of mandamus from an order of Multnomah County Circuit Court, Stephen K. Bushong, Judge.
however, recognized a “fiduciary exception” to the attorney-client privilege, which arose out of the fact that the firm was attempting to shield its internal communications from a former client.

We conclude that the trial court correctly determined that the attorney-client privilege as defined in OEC 503 applies to communications between lawyers in a firm and in-house counsel. We further conclude, however, that the trial court erred in recognizing an exception to OEC 503 that the legislature did not adopt in the terms of that rule. Accordingly, we issue a peremptory writ of mandamus ordering the trial court to vacate its order compelling production of materials related to those communications that it determined were otherwise subject to the attorney-client privilege.

I. BACKGROUND

Crimson Trace Corp. manufactures and sells laser grips for firearms. The company retained Birdwell, a lawyer with DWT, to prosecute certain patents for those products before the Patent and Trademark Office. Crimson later retained DWT to represent it in a dispute with a competitor, LaserMax, Inc., over possible patent infringements. Birdwell was joined by Boundy, who acted as lead trial counsel in the litigation in the federal district court.

The action did not go smoothly for Crimson. LaserMax asserted counterclaims that challenged the validity of the patents at issue. In particular, LaserMax argued that one of the patents—the “235 patent”—was invalid because Crimson had deceptively omitted material information when it submitted the patent to the Patent and Trademark Office. In its counterclaim, LaserMax named Birdwell as the lawyer who had prosecuted the patent.

Birdwell and Boundy became concerned that the “235 patent” counterclaim could create a conflict of interest between Crimson and the two DWT lawyers. Because LaserMax had named Birdwell as the attorney who had prosecuted that patent before the Patent and Trade Office, the firm could have been put in the position of defending Birdwell at the same time that it was defending Crimson. Birdwell and Boundy consulted with the firm’s Quality Assurance Committee (QAC), a small group of DWT lawyers that had been designated by the firm as in-house counsel. Specifically, they consulted with Johnson, a member of the QAC, after which Boundy disclosed the potential conflict in an email to Crimson’s CEO:

“[Birdwell] is also alleged to be part of the deceptive activity. * * * Under the circumstances, I should advise you that someone could argue I have a conflict of interest in that I may be defending my partner at the same time as I am representing Crimson * * *. I frankly don’t see this as an issue, but I do want you to know that you certainly have the right to consult with independent counsel to fully consider this.”

Crimson offered to dismiss its claims relating to the “235 patent.” LaserMax, however, refused to drop its counterclaims relating to that patent. Moreover, it sought to recover its attorney fees for defending against the claim. In asserting its claim for attorney fees, LaserMax argued that Crimson had both procured the “235 patent” and litigated the claim of infringement over it in bad faith. The district court granted LaserMax discovery for the purpose of determining whether Crimson in fact had acted in bad faith, and LaserMax subsequently subpoenaed Birdwell’s files.
relating to the “235 patent.” Birdwell and Boundy again consulted with the firm’s QAC in determining how to respond.

Eventually, Crimson and LaserMax negotiated a settlement, which the parties agreed should remain confidential. When Boundy, acting for Crimson, moved to file the settlement under seal, however, he did so in a way that publicly disclosed certain details of the agreement and gave the impression that LaserMax had conceded liability, which it had not.

LaserMax complained about the disclosure. The district court concluded that Boundy’s disclosures were intentional and damaging to LaserMax. As a result, the court disclosed the entire agreement and imposed a monetary sanction on Crimson for having acted in bad faith.

Meanwhile, Crimson had stopped paying DWT. Crimson’s CEO told Boundy that the company had intentionally stopped paying because “we did not like the status of the case and what we were getting for our money.” Boundy and Birdwell consulted extensively with Johnson and another member of the QAC, Waggoner, about how to proceed in the light of those revelations.

By that time, the litigation had begun to wind down: Crimson and LaserMax had entered into their confidential settlement agreement and the issue of Boundy’s public and misleading references to the settlement terms was before the court. The two lawyers continued to communicate with the QAC about the sanction issue and the fee dispute as they went on with their representation of Crimson. Eventually, Crimson’s CEO informed Boundy that Crimson’s board of directors had become “hostile” to DWT, leading the lawyers and the firm to believe that Crimson was contemplating a malpractice action against them. The firm nevertheless continued to bill Crimson for small amounts of work performed in the LaserMax litigation until Crimson, in fact, did file an action for legal malpractice and breach of contract.

In its complaint, Crimson alleged that the defendants committed legal malpractice in various ways, including by (1) failing to advise Crimson about problems with its “235 patent” and that Birdwell would likely be a witness in any dispute about those problems; (2) failing to advise against suing LaserMax for infringing that patent; and (3) failing to advise Crimson when conflicts arose in connection with LaserMax’s request for attorney fees. Crimson also alleged that defendants had breached their legal services contract with Crimson by charging Crimson for work that was unnecessary, was of no value, and was performed in DWT’s own interest at a time when DWT had a conflict of interest with Crimson.

In the course of the ensuing litigation, Crimson requested production of any communications between or among DWT’s attorneys about possible conflicts of interest in DWT’s representation of Crimson that occurred during the period when DWT still was representing Crimson. The discovery request specifically mentioned internal communications “regarding defendant Boundy’s handling of the confidential settlement agreement with LaserMax,” “regarding the failure to disclose * * * to the Patent and Trademark Office during prosecution of the ‘235’ patent,” and “regarding professional duties owed by [DWT] to [Crimson], possible or actual breach of those duties, and/or prevention of loss related to duties owed to [Crimson].”
DWT resisted production, arguing that the communications Crimson sought were protected by the attorney-client privilege under OEC 503 because they involved the rendition of legal services by the firm’s in-house counsel to the firm and its members. DWT also argued that some of the documents, which were prepared after DWT began to suspect that Crimson would sue them, were protected by the work-product doctrine.

Crimson responded by moving to compel DWT to respond to its discovery requests. DWT opposed the motion, again contending that the material requested was subject to the attorney-client privilege. In support, DWT offered, among other things, an affidavit of one of the members of the QAC, Thurber, which explained that “[m]embers of the [QAC] act as in-house counsel for the firm and its lawyers on matters relating to the work of the firm” and that, “[a]s a matter of firm policy and procedure, any documents generated from the work of the [QAC] do not become part of the client file for any firm client.” The firm also introduced affidavits of Birdwell and Boundy, both of whom stated that their communications with the firm’s QAC “were intended to be confidential” and “were made for the purpose of facilitating the rendition of professional legal services” and “obtaining legal advice regarding the fulfillment of [their] professional responsibilities and other matters relating to the LaserMax case.”

The trial court granted Crimson’s motion in part, ordering DWT to supply its former client with a privilege log of every document responsive to Crimson’s request for production and to produce the documents themselves to the court for in camera review. DWT complied with the order. After reviewing the documents that DWT had produced and considering additional arguments and other evidence in the matter, the trial court concluded that the first three of the documents in the privilege log were not privileged. The balance of documents, though, the court determined were subject to the attorney-client privilege. The court found:

“The remaining documents on the privilege log, and by December 2010, at the interests of [DWT], they had a separate interest, and the lawyers who were representing Crimson *** were intending to communicate to members of the [QAC] regarding [DWT’s] separate interest. They were intending that those communications would be confidential attorney-client privileged communications.”

The court nevertheless concluded that the privilege did not apply. The court explained that “what I’m left with is a series of communications by lawyers within the same firm that were intended to be confidential, and I think the—there is a conflict of interest that did arise under the circumstances of this case.” Because of that conflict, the court concluded, the firm was not permitted to assert the attorney-client privilege. The court accordingly granted Crimson’s motion to compel in its entirety, ordering DWT to produce to Crimson all of the documents identified in the privilege log.

DWT then filed a petition with this court for a peremptory or alternative writ of mandamus directing the trial court to vacate its order granting Crimson’s motion to compel and to issue a new order denying that motion. This court granted an alternative writ, ordering the trial court to vacate its order or show cause for not doing so.
The trial court declined to vacate its order and issued an opinion explaining that decision. In the opinion, the trial court announced the following factual findings:

“The internal law firm communications at issue were made during the time defendant [DWT] represented plaintiff Crimson *** in a patent infringement action pending in federal court (the LaserMax litigation). The communication consisted primarily of emails between the DWT lawyers representing Crimson *** in the LaserMax litigation, and the DWT lawyers on the firm’s [QAC]. The communications addressed Crimson[’s] decision to stop paying its legal bills and its dissatisfaction (and potential claim against DWT) based on the firm’s handling of the LaserMax litigation.

“The DWT lawyers intended that those communications would be confidential and not disclosed to Crimson ***. The DWT lawyers on the [QAC] were not directly involved in the firm’s ongoing representation of Crimson *** in the LaserMax litigation. The lawyers representing Crimson *** in the litigation communicated with the lawyers on the [QAC] about the LaserMax litigation. Some of those communications concerned court filings in the Lasermax litigation. DWT did not disclose a potential conflict to Crimson *** or seek its consent to DWT’s continued representation of Crimson *** in the LaserMax litigation, nor did DWT seek to withdraw from its representation of Crimson *** in that litigation.”

Based on those findings, the trial court concluded that the DWT lawyers representing Crimson “could have an attorney-client relationship with the DWT lawyers on the firm’s [QAC], so that communications among the DWT lawyers ordinarily would be covered by the attorney-client privilege.” The court also concluded, however, that a “fiduciary exception” to the attorney-client privilege applied. The court explained that because of DWT’s duties of candor, disclosure, and loyalty to Crimson as its client, the firm was precluded from asserting the attorney-client privilege as to its internal communications. The court noted that the issue was one of first impression in Oregon, but that it was persuaded by arguments that the “better rule” required DWT’s claim of privilege to give way to its “paramount duties to Crimson *** under the circumstances presented here.”

II. ANALYSIS

In its mandamus petition, DWT argues that the trial court erred in recognizing a “fiduciary exception” to the attorney-client privilege. According to DWT, OEC 503 is the sole source of law that is relevant to this, and any other, controversy about the attorney-client privilege as it applies in this state, and that the so-called fiduciary exception is not among the exceptions to the privilege that are enumerated in that rule. DWT contends that, insofar as the communications at issue here fall squarely within the general privilege as defined in OEC 503 and do not fall into any of the enumerated exceptions, the trial court was precluded from concluding that the attorney-client privilege is inapplicable and that the communications are subject to discovery.

In its response, Crimson first contends that we do not need to decide whether to recognize a “fiduciary exception” to the attorney-client privilege, because the communications at issue do
not fall within the privilege in the first place. Relying on case law concerning the Oregon Rules of Professional Conduct, Crimson argues that the privilege depends on the existence of an attorney-client relationship, and that whether an attorney-client relationship exists depends in turn on the client’s “reasonable expectation” that he or she is entitled to look to the lawyer for advice. In this case, Crimson argues, Birdwell and Boundy had no such reasonable expectation with respect to the QAC, because they knew that their interests were adverse to Crimson’s, a then-current client.

In the alternative, Crimson argues that, even assuming that an attorney-client relationship exists and the communications fall within the general privilege, the “fiduciary exception” applies. In Crimson’s view, the fact that OEC 503 itself does not include that exception does not preclude this court from recognizing additional exceptions to the attorney-client privilege as set out in that rule.

A. Availability of mandamus

Mandamus is a statutory remedy aimed at correcting errors of law for which there is no other “plain, speedy and adequate remedy in the ordinary course of the law.” ORS 34.110. A trial court decision ordering the disclosure of privileged information is subject to review in mandamus precisely because ordinary appeal provides an inadequate remedy. As the court explained in State ex rel. OHSU v. Haas, 325 Or. 492, 497, 942 P.2d 261 (1997), “[o]nce a privileged communication has been disclosed, the harm cannot be undone.” As a result, “[m]andamus is an appropriate remedy when a discovery order erroneously requires disclosure of a privileged communication.” Id.

B. Whether the attorney-client privilege applies

We turn, then, to the merits of the parties’ dispute, beginning with the question whether the attorney-client privilege described in OEC 503 applies at all. At the outset, we emphasize that, in this case, the issue is governed by statute: OEC 503, codified at ORS 40.225. Although the rules of evidence are commonly denominated “rules,” they were—unlike other rules, such as some of the Oregon Rules of Civil Procedure—adopted by the legislature. Accordingly, in construing OEC 503, our task is to determine what the legislature intended, using our traditional analytical framework, which focuses on the statute’s text, context, and any helpful legislative history. See State v. Serrano, 346 Or. 311, 318–25, 210 P.3d 892 (2009) (applying interpretive framework described in State v. Gaines, 346 Or. 160, 206 P.3d 1042 (2009), to OEC 505); State ex rel. OHSU, 325 Or. at 501, 942 P.2d 261 (citing and applying PGE v. Bureau of Labor and Industries, 317 Or. 606, 859 P.2d 1143 (1993), in interpreting OEC 503).

OEC 503 defines relevant terms and sets out the attorney-client privilege as follows:

“(1) As used in this section, unless the context requires otherwise:

“(a) ‘Client’ means a person, public officer, corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer * * * with a view to obtaining professional legal services.
“(b) ‘Confidential communication’ means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

“(c) ‘Lawyer’ means a person authorized or reasonably believed by the client to be authorized, to practice law in any state or nation.

***

“(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

“(a) Between the client or the client’s representative and the client’s lawyer or a representative of the lawyer.”

In State v. Jancsek, 302 Or. 270, 275, 730 P.2d 14 (1986), this court concluded that, under OEC 503, a claim of privilege generally may be asserted with respect to a communication if three requirements are satisfied. First, the communication must have been between a “client” and the client’s “lawyer,” as those terms are defined in OEC 503(1)(a) and (c). Second, the communication must have been a “confidential communication,” as that term is defined in OEC 503(1)(b). Finally, the communication must be “made for the purpose facilitating the rendition of professional legal services to the client.” OEC 503(2).

Crimson insists that a fourth requirement must be satisfied for the attorney-client privilege under OEC 503 to apply. In Crimson’s view, OEC 503 implicitly assumes the existence of an attorney-client “relationship,” which Crimson contends depends on the “reasonable expectations” of the parties. In this instance, Crimson argues, Birdwell and Boundy could not reasonably have believed that their conversations with their firm’s QAC created an attorney-client relationship, because no lawyer could reasonably expect another member of his or her firm to represent the lawyer in his or her conflict with a current client. That is so, Crimson argues, because the Oregon Rules of Professional Conduct prohibit the lawyer from representing a client when that representation might be adverse to another client.

In support of that argument, Crimson relies on statements in this court’s prior cases concerning the Oregon Rules of Professional Conduct to the effect that the existence of an attorney-client relationship is determined by the reasonable expectations of the client. See In re Weidner, 310 Or. 757, 770, 801 P.2d 828 (1990) (“[T]o establish that the lawyer-client relationship exists based on reasonable expectation, a putative client’s subjective * * * intention or expectation must be accompanied by evidence of objective facts on which a reasonable person would rely as supporting existence of that intent.”); Kidney Association of Oregon v. Ferguson, 315 Or. 135, 145, 843 P.2d 442 (1992) (“The existence of a lawyer-client relationship primarily is determined by the reasonable expectation of the client that the lawyer will perform legal work in the client’s behalf.”); In re Spencer, 335 Or. 71, 84, 58 P.3d 228 (2002) (“The modern trend in Oregon and
elsewhere is to find the existence of an attorney-client relationship whenever the would-be client reasonably believes under the circumstances that the client is entitled to look to the lawyer for advice.”” (quoting the Ethical Oregon Lawyer, 6.3 (Oregon CLE 1991)).

Crimson’s reasoning is unpersuasive for at least two reasons. First, and most important, it finds no support in the wording of OEC 503. Nothing in the rule mentions a requirement that the existence of an attorney-client relationship sufficient to trigger the privilege depends on the reasonableness of the parties’ expectations. To be sure, the rule does mention reasonableness in defining who is a “lawyer.” But it uses the term in reference to the client’s believe that a person is “authorized to practice law in any state or nation.” OEC 503(1)(c). There is a difference between the reasonableness of a client’s belief that an individual is authorized to practice law at all and the reasonableness of the client’s belief that the individual is authorized to be that client’s lawyer. The terms of the rule refer only to the former, not the latter.

In arguing to the contrary, Crimson relies on this court’s lawyer-discipline cases. Those cases, however, have no necessary relevance to the question of OEC 503’s applicability. While it may be true that the attorney-client privilege set out in OEC 503 requires the existence of an “attorney-client relationship” in some sense—after all, the rule defines “client” and “lawyer” and provides that the privilege applies to communications between them—there is no reason to believe that the existence of such a relationship for purposes of OEC 503 would be determined by the same analysis that applies in the disciplinary context. Rather, OEC 503 itself describes what is required.

Second, Crimson misconstrues the attorney discipline cases on which it relies. Those decisions support the idea that an attorney-client relationship may be found to exist based on the would-be client’s reasonable expectation of representation. However, none of them stand for the entirely different proposition that Crimson advances—that an attorney-client relationship can exist only if the putative client reasonably believes that he or she can look to the lawyer for advice and representation. In fact, Weidner and Spencer both suggest that the existence of an attorney-client relationship is usually a matter of the parties’ expressed intentions, and that the reasonableness of the client’s expectation of representation becomes an issue only when the lawyer denies that the relationship existed at the relevant time. See Spencer, 335 Or. at 84–85, 58 P.3d 228 (although lawyer ultimately decided not to represent person who sought his advice, the person nevertheless became the lawyer’s client for the limited purpose of safeguarding the documents that she had turned over to lawyer, because it was reasonable for the person to believe that lawyer would return them upon her request); see also Weidner, 310 Or. at 770, 801 P.2d 828 (where there was no evidence of any express lawyer-client relationship, relationship still could be established based on client’s reasonable expectation based on objective facts). It appears, then, that the reasonableness of the putative client’s expectation of representation is irrelevant when, as in this case, the client and lawyer mutually agree that an attorney-client relationship has been formed.

We turn, then, to whether the communications at issue in this case satisfy the three requirements set out in OEC 503(2). It is important to note, in approaching that issue, that the trial court concluded that the communications fell within the privilege as defined by OEC 503(2): It
stated that the communications “ordinarily would be covered by the attorney-client privilege,” but were excepted under the “fiduciary exception.” In reviewing that conclusion, we are bound by the court’s factual findings as long as the record contains evidence that supports those findings. To the extent that the trial court did not explicitly state its factual findings, we assume that it found facts consistent with its conclusion (assuming, again, that the evidence in the record would support such findings). State ex rel. OHSU, 325 Or. at 498, 942 P.2d 261.

1. **Was the communication between a “client” and the client’s “lawyer”?**

   No one contests that Birdwell and Boundy could have consulted with lawyers outside of their firm and that such consultations would be subject to the attorney-client privilege. The issue in this case is whether Birdwell and Boundy’s consultations with the members of the QAC of their own firm constituted communications between a “client” and the client’s “lawyer” as those terms are defined in OEC 503(1). That the members of the QAC are “lawyers” within the meaning of OEC 503(1)(c)—that is, that they are “authorized * * * to practice law”—is not in dispute. That leaves the question whether Birdwell and Boundy were the QAC’s “clients” within the meaning of OEC 503(1)(a).

   At the outset, we note that nothing in the wording of OEC 503 or the case law construing it suggests that a law firm, or one or more of its individual lawyers, cannot be the “client” of the firm’s in-house counsel. To the contrary, this court has recognized that an organization can be the “client” of its own in-house counsel within the meaning of OEC 503(1)(a). See State ex rel. OHSU, 325 Or. at 500, 942 P.2d 261 (OHSU was the client of its own in-house counsel).

   In this case, although the trial court made no explicit factual findings that are relevant to this issue, it did state the legal conclusion that, but for the “fiduciary exception,” Birdwell and Boundy could have had an attorney-client relationship with the firm’s QAC and that, as a result, those communications “ordinarily would be covered by the attorney-client privilege.” That determination suggests an implicit factual finding that Birdwell and Boundy “consult [ed] a lawyer with a view to obtaining professional legal services.” OEC 503(1)(a). And that implicit finding is supported by evidence in the record: QAC member Thurber’s affidavit explained that the members of the QAC “act as in-house counsel for the firm and its lawyers.” And Birdwell and Boundy both submitted declarations to the trial court stating that they had consulted with the QAC “for the purposes of obtaining legal advice regarding [their] professional responsibilities and other matters relating to the LaserMax case.”

   Amicus, the Oregon Trial Lawyers Association (OTLA), contends that DWT and its individual lawyers should not be deemed the QAC’s “clients” within the meaning of OEC 503(1)(a), because doing so would essentially condone DWT’s violation of its duty of loyalty to its current client and undermine a client’s sense of security in frankly communicating with his or her own lawyers.

   We are not persuaded. OTLA’s argument is essentially one of policy. Our task is one of statutory interpretation. As this court has cautioned in previous cases, “[t]his court’s statutory
construction methodology, not policy considerations,” guides our determination of the meaning of statutes. *Johnson v. Swaim*, 343 Or. 423, 430, 172 P.3d 645 (2007); *Rodriguez v. The Holland, Inc.*, 328 Or. 440, 446, 980 P.2d 672 (1999). In the absence of an explanation as to how the wording of OEC 503(1)(a) supports the result that OTLA seeks, we reject its contention that that definition does not apply to Birdwell and Boundy.

We conclude that the communications at issue were “between the client * * * and the client’s lawyer,” OEC 503(2)(a), and that, as such, the first requirement for placing a communication within the attorney client privilege is satisfied.

2. *Were the communications “confidential communications”?*

To qualify for the attorney-client privilege as defined at OEC 503(2), a communication must be a “confidential communication,” that is, a communication “not intended to be disclosed to third persons.” OEC 503(1)(b). In this case, the trial court expressly found that “[t]he DWT lawyers intended that those communications would be confidential and not disclosed to Crimson * * *.” That finding is supported by the affidavits of Birdwell and Boundy, both of whom stated that their meetings with members of the firm’s QAC “were intended to be confidential.” Because the trial court’s finding is supported by evidence in the record, we are bound by it. *Serrano*, 346 Or. at 326, 210 P.3d 892.

Crimson suggests that, regardless of the trial court’s finding, the requirement that the communication be a “confidential communication” was not satisfied. Crimson’s reasoning is as follows: Most of the communications being sought in discovery were communications between Boundy and his primary contact at the QAC, Johnson. Boundy and Johnson are both Washington lawyers, and the communications in question occurred in Washington state. The Washington courts have concluded that internal communications between a law firm and its in-house lawyers about a conflict with a current client may not be protected by the attorney-client privilege in a malpractice action brought by the client. *VersusLaw, Inc. v. Stoel Rives, LLP*, 127 Wash.App. 309, 111 P.3d 866 (2005), *rev. den.*, 156 Wash.2d 1008, 132 P.3d 147 (2006). Given that state of the law in the jurisdiction where the communications occurred and where Boundy and Johnson were licensed to practice law, those two lawyers could not have “reasonably” intended to keep their communications secret.

Crimson’s reasoning is unpersuasive. Washington law has no bearing on the meaning of OEC 503(1)(b). Whether or not the communications at issue occurred in Washington, the litigation concerning those statements is taking place in Oregon. It is well established in this state that Oregon applies its own rules prescribing how litigation shall be conducted, including its own evidentiary rules. *Equitable Life Assurance v. McKay*, 306 Or. 493, 497–98, 760 P.2d 871 (1988).

We therefore accept the trial court’s finding that the various DWT lawyers who were involved in the communications at issue intended to keep the communications confidential. The second requirement for assertion of the attorney-client privilege is satisfied.
3. **Were the communications “made for the purpose of facilitating the rendition of professional legal services to the client”?**

   As we have noted, the court expressly found that, but for the “fiduciary exception,” the attorney-client privilege would apply. Moreover, in addressing the question whether particular materials listed in the privilege log were subject to the attorney-client privilege, the court found that, with the exception of three documents, the balance of the materials that Crimson requested reflected the fact that the firm and its lawyers “had a separate interest, and the lawyers who were representing Crimson * * * were intending to communicate to members of the [QAC] regarding [DWT’s] separate interest.” That would appear to be a finding that those communications were made for the purpose of facilitating the rendition of professional legal services to the QAC’s client, DWT.

   That finding is supported by evidence in the record, including the uncontradicted affidavits of Birdwell and Boundy that their communications with the firm’s QAC “were made for the purpose of facilitating the rendition of professional legal services” and “obtaining legal advice regarding the fulfillment of [their] professional responsibilities and other matters relating to the LaserMax case.” Accordingly, we conclude that, except for the first three communications listed on the privilege log, the third requirement is satisfied.

   We have determined that, except for the three communications just mentioned, the communications at issue satisfied the three requirements set out in OEC 503(2) for application of the attorney-client privilege, and we therefore accept the trial court’s conclusion that those communications “ordinarily” would fall within the privilege. We turn, then, to the question whether those communications were nevertheless subject to a “fiduciary exception” to the attorney client privilege stated in OEC 503.

   **C. Do the communications fall within a recognized exception to the attorney-client privilege?**

   OEC 503(4) provides that “[t]here is no [lawyer-client] privilege” in five circumstances:

   “There is no privilege under this section:

   “(a) If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

   “(b) As to a communication relevant to an issue between parties who claim through the same deceased client * * *;

   “(c) As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

   “(d) As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness or
“(e) As to a communication relevant to a matter of common interest between two or more
clients if the communication was made by any of them to a lawyer retained or consulted in
common, when offered in an action between any of the clients.”

In this case, there is no contention that any of the foregoing five exceptions to the attorney-client
privilege applies to DWT’s communications with its QAC. The trial court, however, recognized
an additional exception—denominated a “fiduciary exception”—and concluded that that exception
applied to the circumstances of this case.

The trial court explained that a number of courts that have addressed the issue have concluded that, because of the fiduciary obligations that a law firm owes its clients, a firm may not invoke the attorney-client privilege to protect communications between its lawyers and its in-house counsel from the firm’s clients. The court stated that the exception to the usual rule that privileges attorney-client communications that such courts have recognized represents the “better rule,” which it suggested this court should adopt. Crimson defends the trial court’s assessment, contending that the “vast majority of courts” have adopted the exception.

What is commonly referred to as the “fiduciary exception” to the attorney-client privilege
is a judicially created rule that originated in English trust cases in the mid-to late-nineteenth
rule was that a trustee who obtained legal advice concerning the administration of the trust was
required to disclose that advice to beneficiaries of that trust. The attorney-client privilege was held
not to apply between the trustee and the attorney because of the attorney’s fiduciary relationship
with the beneficiaries, for whose benefit the advice presumably was obtained. Id.

The rule found some acceptance among American courts in the 1970s. See, e.g., Garner v.
Wolfinbarger, 430 F.2d 1093, 1101–04 (5th Cir.1970) (discussing whether privilege attaches to
communications between corporate management and corporate counsel in lawsuit brought by
(discussing whether attorney-client privilege bars disclosure by trustee to trust beneficiary of legal
memoranda prepared by lawyer at trustee’s request). The reasoning has been extended to
circumstances other than trusts in subsequent cases—in particular, to cases in which a lawyer
claims a privilege as to communications with in-house counsel. A number of courts have adopted
the rule that a law firm cannot assert the attorney-client privilege against a current client when
self-representation would create a conflict of interest with that client. See, e.g., Sonicblue Inc. v.
Portside Growth & Opportunity Fund, 2008 Bankr.LEXIS 181 (where conflicting duties to firm’s
lawyers and current outside client of firm exist, “the law firm’s right to claim privilege must give
way to the interest in protecting current clients who may be harmed by the conflict.”); Thelen, Reid
firm’s fiduciary obligations to client did not allow it to protect internal communications about
client); Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.,
with current client because firm’s fiduciary duty to outside client was “paramount to its own
interest”); In re Sunrise Securities Litigation, 130 F.R.D. 560 (E.D.Pa.1989) (consultation with in-house counsel created conflict of interest for firm that vitiated attorney-client privilege that otherwise would attach to intra-firm communications).

Other courts, however, have declined to adopt the fiduciary exception to the attorney-client privilege. Some have done so on the ground that they are not persuaded by the reasoning offered in support of the exception. See, e.g., St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, PC, 293 Ga. 419, 425, 746 S.E.2d 98, 105–06 (2013) (“[T]he potential existence of an imputed conflict of interest between in-house counsel and the firm client is not a persuasive basis for abrogating the attorney[-] client privilege between in-house counsel and the firm’s attorneys.”); RFF Family Partnership, LP v. Burns & Levinson, LLP, 465 Mass. 702, 716, 991 N.E.2d 1066, 1076 (2013) (“[A] client is not entitled to revelation of the law firm’s privileged communications with in-house or outside counsel * * * if those communications were conducted for the law firm’s own defense against the client’s adverse claims.”); Garvy v. Seyfarth Shaw LLP, 359 Ill.Dec. 202, 966 N.E.2d 523, 536 (Ill.App.2012) (“Illinois has not adopted the fiduciary-duty exception to the attorney-client privilege. The cases relied on * * * do not persuade us to create new law in Illinois by adopting it here.”).

Others have rejected it on the ground that, because the attorney-client privilege is stated in a legislatively adopted evidence code, courts lack authority to create such ad hoc exceptions to it. See, e.g., Wells Fargo Bank v. Superior Court, 22 Cal.4th 201, 206, 91 Cal.Rptr.2d 716, 990 P.2d 591, 594 (2000) (rejecting fiduciary exception because “[t]he privileges set out in the Evidence Code are legislative creations; the courts of this state have no power to expand them or to recognize implied exceptions”); Estate of Barbano v. White, 800 N.Y.S.2d 345, 6 Misc.3d 1029, 2004 N.Y.Misc. LEXIS 3016 (N.Y.Sup.2004) (noting that fiduciary exception had been largely eliminated by legislative amendments to evidence code).

In that regard, it bears emphasis that, among the courts that have adopted the fiduciary exception, most are not governed by a legislatively adopted privilege; most of the cases adopting the exception are federal. See Wells Fargo Bank, 22 Cal.4th at 208, 91 Cal.Rptr.2d 716, 990 P.2d at 595 (so noting). Under federal law, the attorney-client privilege is recognized as judge-made and, as a result, is subject to judge-made exceptions. See generally Christopher B. Mueller and Laird C. Kirkpatrick, Federal Evidence § 5:1, 405 (3d ed 2007) (“Congress decided to leave privilege law where it was, and yet without freezing the evolution of the common law relating to privileges.”); see also Trammel v. U.S., 445 U.S. 40, 47, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980) (federal rules allow courts to develop privilege law “on a case-by-case basis”). Indeed, among federal courts addressing the issue as a matter of state law, the result has not been as uniform as Crimson suggests. See, e.g., TattleTale Alarm Systems, Inc. v. Calfee, Halter & Griswold, 2011 WL 382627 (S.D. Ohio 2011) (applying Ohio law, declining to adopt fiduciary exception); Murphy v. Gorman, 271 F.R.D. 296, 318–19 (D.N.M.2010) (applying New Mexico law, declining to adopt fiduciary exception because of lack of authority to recognize exceptions not listed in state evidence code).
With the foregoing in mind, we turn to the question whether to recognize a fiduciary exception to the attorney-client privilege set out in OEC 503. We begin by recalling that OEC 503 is a statute, enacted into law by the legislature. Accordingly, the scope of the privilege—as well as any exceptions to it—is a matter of legislative intent. *See, e.g.*, *Serrano*, 346 Or. at 318, 210 P.3d 892 (scope of evidentiary privilege and its exceptions governed by ordinary principles of statutory construction).

In some cases, discerning the legislature’s intentions with respect to the scope of exceptions is straightforward. When, for example, statutory lists of conditions or exceptions are preceded by the phrase “including, but not limited to,” courts readily acknowledge that such legislation is not exhaustive. *See State v. Kurtz*, 350 Or. 65, 75, 249 P.3d 1271 (2011) (“statutory terms such as * * * ‘including but not limited to’ * * * convey an intent that an accompanying list of examples be read in a nonexclusive sense”).

In other cases, legislation may set out a rule, but say nothing one way or the other about exceptions. The historical context of the enactment nevertheless may make clear that the legislature did not intend to foreclose the courts from adopting them. *See Hatley v. Stafford*, 284 Or. 523, 526 n. 1, 588 P.2d 603 (1978) (holding that the legislature, in adopting the parol evidence rule without mention of any exceptions, intended to codify the existing common-rule, but not to preclude judicial recognition of exceptions to it).

In this case, OEC 503(4) enumerates five circumstances in which “[t]here is no privilege under this section.” The rule says nothing about the authority of the courts to add to those five exceptions. To the contrary, by taking the trouble to enumerate five different circumstances in which there is no privilege, the legislature fairly may be understood to have intended to imply that no others are to be recognized. That much follows from the application of the familiar interpretive principle of *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of others). *See, e.g.*, *Waddill v. Anchor Hocking, Inc.*, 330 Or. 376, 381–82, 8 P.3d 200 (2000) (applying canon to text of rule of civil procedure); *Fisher Broadcasting, Inc. v. Dept. of Rev.*, 321 Or. 341, 353, 898 P.2d 1333 (1995) (applying canon to text of statute).

Of course, care must be taken in applying that principle. The mere expression of one thing does not *necessarily* imply the exclusion of all others. A sign outside a restaurant stating “No dogs allowed” cannot be taken to mean that any and all other creatures are allowed—including, for example, elephants, tigers, and poisonous reptiles. The *expressio unius* principle is simply one of inference. And the strength of the inference will depend on the circumstances. For example, the longer the list of enumerated items and the greater the specificity with which they are stated, the stronger the inference that the legislature intended the list to be exhaustive. *See generally* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 108 (2012) (“The more specific the enumeration, the greater the force of the canon.”). Also relevant is whether something is stated in one portion of the statute, but excluded in another; the fact that the legislature took the trouble to include a provision in one part of the statute strongly supports the inference that any exclusion elsewhere in the statute is intentional. Norman Singer and J.D. Shambie Singer, 2A
Sutherland Statutes and Statutory Construction § 47:23, 417 (7th ed 2007) ("The force of the maxim is strengthened where a thing is provided in one part of the statute and omitted in another.").

In this case, the negative inference is especially strong for three reasons. First, the enumerated list is not short or general. OEC 503(4) sets out a list of five different circumstances in which the privilege does not apply and spells them out in some detail.

Second, the Oregon Evidence Code includes other evidentiary privileges that use the same basic drafting convention of stating the privilege and then listing exceptions to the privilege. In two cases, however, the list of exceptions is preceded by a statement that the list is not exclusive. Thus, for example, OEC 504(2) sets forth the psychotherapist-patient privilege. OEC 504(4) then lists four exceptions to that privilege, preceded by the statement that “[t]he following is a nonexclusive list of limits on the privilege granted by this section.” (Emphasis added.) Similarly, OEC 504–1(2) recognizes a physician-patient privilege. It is followed by OEC 504–1(4), which lists three exceptions to the privilege, preceded by the statement that “[t]he following is a nonexclusive list of limits on the privilege granted by this section.” (Emphasis added.) In the context of those rules, the fact that OEC 503(4) enumerates a list of exceptions without the statement that the list is nonexclusive appears to confirm the negative inference that the list was intended to be exhaustive.

Third, this court has read a similarly worded list of exceptions to another privilege recognized by the Oregon Evidence Code as precluding the recognition of exceptions not included in the code. OEC 505(2) and (3) recognize a husband-wife evidentiary privilege. The statement of the privilege is followed by OEC 505(4), which lists three exceptions under which “[t]here is no privilege under this section.” Those three exceptions are: (1) in all criminal actions in which one spouse is charged with committing or attempting to commit any of several listed offenses against the other spouse; (2) as to matters occurring before the marriage; and (3) in any civil action in which the spouses are adverse parties. Id. In Serrano, a murder case, the state offered the inculpatory testimony of the defendant’s wife concerning things that the defendant had said in the course of conversations about the dissolution of their marriage. The defendant objected on the basis of the husband-wife privilege. The state argued that the privilege did not apply. The state reasoned that, because the historical purpose of the privilege was to preserve marriages, communications regarding the dissolution of a marriage should not be privileged. 346 Or. at 319–21, 210 P.3d 892. This court rejected the state’s argument, noting that “the legislature set out three specific exceptions to the marital privileges, but did not provide for any ‘marital health’ exception.” Id. at 320, 210 P.3d 892. In the court’s view, “the omission of a ‘marital health’ exception in OEC 505(4) is decisive.” Id. at 321, 210 P.3d 892.

Crimson insists that there is evidence that the legislature did not intend OEC 503(4) as a complete listing of exceptions to the privilege. In support, Crimson relies on legislature commentary to OEC 503(4), which, after describing the five enumerated exceptions to the attorney-client privilege, adds:
“Oregon law recognizes two other exceptions to the lawyer-client privilege—an exception for assets left with the attorney, State ex rel. Hardy v. Gleason, 19 Or. 159, 23 P. 817 (1890), and an exception for the fact of employment and name and address of the client, Cole v. Johnson, 103 Or. 319, 205 P. 282 (1922); In re Illidge, 162 Or. 393, 91 P.2d 1100 (1939). By the adoption of Rule 503, the Legislative Assembly does not intend to affect these latter exceptions.” OEC 503 Commentary (1981). Crimson asserts that, because the commentary adverts to two specific “exceptions” that are not enumerated in the rule, the rule must contemplate the recognition of other exceptions.

We are not persuaded. First, the commentary recognizes two specific, unenumerated exceptions, and no others. It does not necessarily follow from the stated intention not to eliminate the two exceptions that the legislature also intended to recognize other exceptions. In fact, it is at least equally plausible that the commentary was intended to recognize only the two exceptions that it explicitly mentions. Second, and in any event, the two “exceptions” that are identified in the commentary are not really exceptions at all, but circumstances that this court has found are not within the scope of the attorney-client privilege in the first place. See In re Illidge, 162 Or. 393, 405, 91 P.2d 1100 (1939) (“The privilege itself was to extend only to communications between a client and an attorney who had been retained. The name or identity of the client was not the confidence which the privilege was designed to protect.”); State ex rel. Hardy v. Gleason, 19 Or. 159, 162, 23 P. 817 (1890) (the client already having admitted that he possessed certain assets, answers to questions about the disposition of those assets left with an attorney “were not privileged”).

Crimson argues that failing to recognize an exception for these circumstances would be “absurd” because it would allow a lawyer to breach his or her duty of loyalty to the client and then “compound the conflicts of interest by communicating with other lawyers in his firm that not only indirectly through imputation represent the client, but actually and directly represent the client on the very same matter, and then shield those internal communications from disclosure to the client.” But, once again, Crimson conflates ethical considerations with the separate issue of the scope of the privilege set out in OEC 503.

This court’s opinion in State v. Miller, 300 Or. 203, 709 P.2d 225 (1985), is instructive on the distinction between rules of professional conduct and rules of evidence. In that case, the defendant killed another person and, shortly after, telephoned a psychiatrist, to whom he confessed. The psychiatrist later disclosed to police that the defendant had told her that he had murdered someone. The defendant moved to suppress the evidence, asserting the psychotherapist-patient privilege recognized in OEC 504. The trial court recognized the privilege, but rejected the application in the circumstances, based, apparently, on a recognition that psychotherapists have an ethical obligation to divulge a patient’s confidences when necessary to aid the victim of a patient’s violence. Id. at 215, 709 P.2d 225.
This court rejected the trial court’s reasoning. The court held that the conversations between the defendant and the psychiatrist were plainly subject to the evidentiary privilege. *Id.* It then noted that OEC 504 specifically included exceptions to that privilege, but that there was no such exception based on the therapist’s ethical obligation to divulge patient confidence under the circumstances of that case. *Id.* at 216, 709 P.2d 225. “It is important to distinguish,” the court explained,

“between the evidentiary privilege which is claimed by a patient, or a psychotherapist [o]n behalf of a patient, to prevent disclosure of confidential information at trial, and the discretionary authority of a public health care provider or any ethical obligation that a licensed psychotherapist may have to notify the police or other proper authority in order to aid a victim or warn of future dangerousness.”

*Id.* at 215–16, 709 P.2d 225 (emphasis in original).

The same reasoning applies in this case. As in *Miller*, rules of professional conduct may require or prohibit certain conduct, and the breach of those rules may lead to disciplinary proceedings. But that has no bearing on the interpretation or application of a rule of evidence that clearly applies.

We conclude that OEC 503(4) was intended as a complete enumeration of the exceptions to the attorney-client privilege. Insofar as that list does not include a “fiduciary exception,” that exception does not exist in Oregon, and the trial court erred in relying on that exception to compel production of communications that otherwise fell within the general scope of the privilege. It follows that the trial court’s order must be vacated to the extent that it orders production of communications that were otherwise within the privilege. The trial court remains free, however, to order production of the three communications that it found were not within the general scope of the privilege because, in essence, those communications were not made for the purpose of facilitating the rendition of professional legal services to DWT.

Peremptory writ to issue.
Karen GRUBAUGH, a single woman, Petitioner,

v.

The Honorable James T. BLOMO, Judge of the Superior Court of the State of Arizona, in and for the COUNTY OF MARICOPA, Respondent Judge, Andrea C. Lawrence and John Doe Lawrence, wife and husband; Hallier & Lawrence, P.L.C. d/b/a Hallier Law Firm, a public limited company; ABC Corporations I–X; Black and White Partnerships and/or Sole Proprietorships I–X; John Does I–X and Jane Does I–X, Real Parties in Interest.

No. 1 CA–SA 15–0012.

Court of Appeals of Arizona, Division 1.


Sternberg & Singer Ltd., Phoenix By Melvin Sternberg and Law Office of Paul M. Briggs PLLC, Phoenix By Paul M. Briggs, Co–Counsel for Petitioner.


Presiding Judge JOHN C. GEMMILL delivered the opinion of the Court, in which Judge DONN KESSLER and Judge KENTON JONES joined.

OPINION

GEMMILL, Judge:

Plaintiff/petitioner Karen Grubaugh brought this legal malpractice action against her former attorneys, defendants/real parties in interest Andrea Lawrence and the Hallier Law Firm (collectively “Lawrence”), seeking damages for allegedly substandard legal advice given to Grubaugh during a family court mediation. Grubaugh challenges the superior court’s ruling that the Arizona mediation process privilege created by Arizona Revised Statutes (“A.R.S.”) section 12–2238(B) has been waived or is otherwise inapplicable. We accept special action jurisdiction and grant relief as described herein. Any communications between or among Grubaugh, her attorney, or the mediator, as a part of the mediation process, are privileged under § 12–2238(B). Based on the statute and the record before us, that privilege has not been waived. Because these communications are neither discoverable nor admissible, the superior court is directed to dismiss any claims in the complaint dependent upon such communications.

Grubaugh alleges that Lawrence’s representation of Grubaugh in marital dissolution proceedings fell below the applicable standard of care. Grubaugh’s malpractice claim is premised, in part, on the distribution of certain business assets. Agreement regarding the method of
distribution, and the handling of the tax liability resulting therefrom, was reached during a family court mediation involving Grubaugh, her ex-husband, their attorneys, and the neutral mediator. Before formal discovery began in this matter, Lawrence asked the superior court to order that the A.R.S. § 12–2238(B) mediation privilege was waived as a result of Grubaugh’s allegations of malpractice. Lawrence seeks to utilize as evidence communications between herself and Grubaugh, occurring during and after mediation, which led to Grubaugh’s ultimate acceptance of the dissolution agreement. In the alternative, Lawrence moved to strike Grubaugh’s allegations relating to the mediation if the court held the pertinent communications are protected as confidential.

The superior court granted Lawrence’s motion in part, concluding the mediation privilege was waived as to all communications, including demonstrative evidence, between the mediator and the parties and between Lawrence and Grubaugh. The court reasoned in part that the privilege was not applicable in this instance because the statute did not contemplate the precise issue presented. The court then ruled that Lawrence’s alternative motion to strike was moot.

Grubaugh filed this special action challenging the court’s order. Because this is a matter involving privilege and imminent disclosure of potentially privileged information, remedy by appeal is inadequate and we therefore accept special action jurisdiction. See Roman Catholic Diocese of Phoenix v. Superior Court ex rel. Cnty. of Maricopa, 204 Ariz. 225, 227, ¶ 2, 62 P.3d 970, 972 (App.2003); Ariz. Bd. of Med. Exam’rs v. Superior Court, 186 Ariz. 360, 361, 922 P.2d 924, 925 (App.1996).

ARIZONA’S STATUTORY MEDIATION PROCESS PRIVILEGE

Arizona’s mediation process privilege is created by A.R.S. section 12–2238(B):

The mediation process is confidential. Communications made, materials created for or used and acts occurring during a mediation are confidential and may not be discovered or admitted into evidence unless one of the following exceptions is met:

1. All of the parties to the mediation agree to the disclosure.
2. The communication, material or act is relevant to a claim or defense made by a party to the mediation against the mediator or the mediation program arising out of a breach of a legal obligation owed by the mediator to the party.
3. The disclosure is required by statute.
4. The disclosure is necessary to enforce an agreement to mediate.

Subsection (C) of § 12–2238 provides further protection for a mediator against being forced to testify or produce evidence in response to service of process or subpoena:

Except pursuant to subsection B, paragraph 2, 3 or 4, a mediator is not subject to service of process or a subpoena to produce evidence or to testify regarding any evidence or occurrence
relating to the mediation proceedings. Evidence that exists independently of the mediation even if the evidence is used in connection with the mediation is subject to service of process or subpoena.

When interpreting a statute, we look to the plain meaning of the language as the most reliable indicator of legislative intent and meaning. New Sun Bus. Park, LLC v. Yuma Cnty., 221 Ariz. 43, 46, ¶ 12, 209 P.3d 179, 182 (App.2009); see also Maycock v. Asilomar Dev. Inc., 207 Ariz. 495, 500, ¶ 24, 88 P.3d 565, 570 (App.2004). When the statute’s language is “clear and unequivocal, it is determinative of the statute’s construction.” Janson v. Christensen, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991). This court will apply the clear language of a statute unless such an application will lead to absurd or impossible results. City of Phoenix v. Harnish, 214 Ariz. 158, 161, ¶ 11, 150 P.3d 245, 248 (App.2006).

The mediation process privilege was not waived when Grubaugh filed a malpractice action against her attorney because none of the four specific statutory exceptions in A.R.S. § 12–2238(B) is applicable. The statute’s language is plain, clear, and unequivocal: The privileged communications “are confidential and may not be discovered or admitted into evidence unless one of the following exceptions is met.” A.R.S. § 12–2238(B) (emphasis added). It provides for a broad screen of protection that renders confidential all communications, including those between an attorney and her client, made as part of the mediation process. Further, of the four exceptions listed in the statute, none excludes attorney-client communications from mediation confidentiality. The legislature could have exempted attorney-client communications from the mediation process privilege, but it did not do so. Cf. Fla. Stat. § 44.405(4)(a)(4) (West 2004) (specifically exempting from the mediation privilege those communications “[o]ffered to report, prove, or disprove professional malpractice occurring during the mediation”).

Our construction of this wide-reaching statute is confirmed by complementary rules of court referencing it. Arizona’s Rules of Family Law Procedure emphasize that “all communications” in the context of the mediation are confidential and § 12–2238 is applicable: “Mediation conferences shall be held in private, and all communications, verbal or written, shall be confidential.... Unless specifically stated otherwise in these rules, the provisions of A.R.S. § 12–2238 shall apply to any mediation conference held in conformance with this rule.” Ariz. R. Fam. L.P. 67(A) (emphasis added). Similarly, the Maricopa County Local Rules further express that the only exceptions to mediation confidentiality are found in § 12–2238(B): “Mediation proceedings shall be held in private, and all communications, verbal or written, shall be confidential except as provided in A.R.S. § 12–2238(B).” Ariz. Local R. Prac. Super. Ct. (Maricopa) 6.5(b)(1) (emphasis added).

The history of the mediation process privilege further supports its application in this case. From 1991 to 1993, mediation confidentiality was codified in A.R.S. § 12–134. The current statute was created by an amendment in 1993. The 1991 statute differed significantly from the current version by expressly limiting confidentiality to “communications made during a mediation.” A.R.S. § 12–134 (West 1993) (Emphasis added.) In contrast, the current statute states that the “mediation process” is confidential. When the legislature alters the language of an existing statute,
we generally presume it intended to change the existing law. *State v. Bridgeforth*, 156 Ariz. 60, 63, 750 P.2d 3, 6 (1988). Therefore, by casting a wider net of protection over mediation-related communications, acts, and materials, the legislature altered the statute by increasing its reach.

In holding that the mediation process privilege had been waived, the superior court reasoned that the situation at hand was analogous to one in which a party impliedly waives the attorney-client privilege. The mediation process privilege, however, differs from the attorney-client privilege, which may be impliedly waived. See *Church of Jesus Christ of Latter–Day Saints v. Superior Court in & for Maricopa Cnty.*, 159 Ariz. 24, 29, 764 P.2d 759, 764 (App.1988); see also *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 56–57, ¶¶ 10–11, 13 P.3d 1169, 1173–74 (2000). The attorney-client privilege originated at common law and was subsequently codified by the Arizona legislature. At common law, the privilege was impliedly waived when a litigant’s “course of conduct [was] inconsistent with the observance of the privilege.” *Bain v. Superior Court in & for Maricopa Cnty.*, 148 Ariz. 331, 334, 714 P.2d 824, 827 (1986).

Consistent with the common law, the codified attorney-client privilege includes a broad waiver provision: “A person who offers himself as a witness and voluntarily testifies with reference to the communications ... thereby consents to the examination of such attorney, physician or surgeon.” A.R.S. § 12–2236. Moreover, there is no indication that the legislature, when codifying the attorney-client privilege, intended to abrogate the common law implied waiver of the privilege. See *Church of Jesus Christ of Latter–Day Saints*, 159 Ariz. at 29, 764 P.2d at 764 (holding that A.R.S. § 12–2236 does not abrogate common law forms of waiver); *Carrow Co. v. Lusby*, 167 Ariz. 18, 21, 804 P.2d 747, 750 (1990) (“[A]bsent a manifestation of legislative intent to repeal a common law rule, we will construe statutes as consistent with the common law”); see also *Wyatt v. Wehmueller*, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991) (explaining that if the common law is to be “changed, supplemented, or abrogated by statute,” such a change must be express or a necessary implication of the statutory language).

In contrast to the attorney-client privilege, Arizona’s mediation process privilege has no common law origin. It was created entirely by the legislature. Therefore, this court must rely upon the language of the statute to determine its meaning. Unlike waiver of the attorney-client privilege under the statute and common law, the statutory waiver provisions of the mediation process privilege are specific and exclusive:

The mediation process is confidential. Communications made, materials created for or used and acts occurring during a mediation are confidential and may not be discovered or admitted into evidence unless one of the following exceptions is met. A.R.S. § 12–2238(B). By expressly shielding the entire mediation process, other than when an exception provided by the statute applies, § 12–2238(B) “occup[ies] the entire field” of methods by which the mediation process privilege might be waived. The statute therefore leaves no room for an implied waiver under these circumstances. Cf. *Church of Jesus Christ of Latter–Day Saints*,
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159 Ariz. at 29, 764 P.2d at 764 (explaining that attorney-client privilege statute allows room for implied waiver under the common law).

The parties do not contend that the communications at issue here come within any of the four exceptions specifically delineated within A.R.S. § 12–2238(B). In finding an implied waiver, the superior court reasoned in part that the statute “did not contemplate the exact issue” presented by this case. But we cannot reach the same conclusion in light of the language of the statute, which does not allow us to infer the existence of an implied waiver. See Morgan v. Carillon Inv., Inc., 207 Ariz. 547, 552, ¶ 24, 88 P.3d 1159, 1164 (App.2004) (explaining that even though the legislature did not include a specific provision that would have been beneficial, the court will not “interpret” the statutes “to add such a provision”), aff’d, 210 Ariz. 187, 109 P.3d 82 (2005). The privilege is therefore applicable.

Additionally, a plain-language application of the statute in this case does not produce an absurd result, but is supported by sound policy. See State v. Williams, 209 Ariz. 228, 237, ¶ 38, 99 P.3d 43, 52 (App.2004) (examining a rule’s policy implications in deciding whether its application would lead to absurd results) See also State v. Estrada, 201 Ariz. 247, 251, ¶ 17, 34 P.3d 356, 360 (2001) (explaining that a result is “absurd” when “it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons with ordinary intelligence and discretion” (internal quotation omitted)). By protecting all materials created, acts occurring, and communications made as a part of the mediation process, A.R.S. § 12–2238 establishes a robust policy of confidentiality of the mediation process that is consistent with Arizona’s “strong public policy” of encouraging settlement rather than litigation. See Miller v. Kelly, 212 Ariz. 283, 287, ¶ 12, 130 P.3d 982, 986 (App.2006). The statute encourages candor with the mediator throughout the mediation proceedings by alleviating parties’ fears that what they disclose in mediation may be used against them in the future. Id. The statute similarly encourages candor between attorney and client in the mediation process.

Another reason confidentiality should be enforced here is that Grubaugh is not the only holder of the privilege. The privilege is also held by Grubaugh’s former husband, the other party to the mediation. See A.R.S. § 12–2238(B)(1). The former husband is not a party to this malpractice action and the parties before us do not claim he has waived the mediation process privilege. It is incumbent upon courts to consider and generally protect a privilege held by a non-party privilege-holder. See Tucson Medical Center Inc. v. Rowles, 21 Ariz.App. 424, 429, 520 P.2d 518, 523 (App.1974). The former husband has co-equal rights under the statute to the confidentiality of the mediation process. Although the superior court did rule that the privilege was not waived as to communications between the mediator and the former husband, waiving the privilege as to one party to the mediation may have the practical effect of waiving the privilege as to all. In order to protect the rights of the absent party, the privilege must be enforced.

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1 The mediator may also be a holder of the privilege, but we need not reach that issue in this opinion.
Accordingly, we hold that the mediation process privilege applies in this case and renders confidential all materials created, acts occurring, and communications made as a part of the mediation process, in accordance with A.R.S. § 12–2238(B).

In her reply, Grubaugh identifies several classifications of the communications at issue, asserting that some are covered by the mediation process privilege while others are not. [Reply at 2] Rather than this court undertaking to identify precisely the application of the mediation process privilege to specific communications, it is more appropriate to allow the superior court to determine, in the first instance, which of the communications, materials, or acts are privileged under A.R.S. § 12–2238(B) as part of the mediation process and which are not confidential under the statute.

**DISPOSITION OF MEDIATION–PRIVILEGED CLAIMS**

In light of our determination that the mediation process privilege has not been waived, it is necessary to address Lawrence’s alternative argument. Lawrence cites *Cassel v. Superior Court*, 51 Cal.4th 113, 119 Cal.Rptr.3d 437, 244 P.3d 1080 (2011), for the proposition that claims involving confidential mediation-related communications should be stricken from the complaint. In *Cassel*, a client brought a malpractice action against his former attorneys, claiming they coerced him into accepting an improvident settlement agreement during the course of a pretrial mediation. 119 Cal.Rptr.3d 437, 244 P.3d at 1085. The client alleged the attorneys misrepresented pertinent facts about the terms of the settlement, harassed him during the mediation, and made false claims that they would negotiate an additional “side deal” to compensate for deficits in the mediated settlement. *Id.* The court explained that absent an absurd result or implication of due process rights, California’s mediation privilege statute “preclud[ed] judicially crafted exceptions” to allow an implied waiver of their express technical requirements.² *Id.* at 1088. It held that all communications, including attorney-client communications, were confidential and undiscoverable if made “for the purpose of, in the course of, or pursuant to, [the] mediation.” *Id.* at 1097. Accordingly, it granted the attorneys’ motion in limine to exclude all evidence related to these communications.

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² In pertinent part, the California statute provides:

(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, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing ... prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

*Cal. Evid.Code § 1119 (West 1997).*
communications, *id.*, even if that meant the former client would be unable to prevail in his malpractice action, *id.* at 1094 (refusing to create an exception to statute even when the “equities appeared to favor” it); see also *Alfieri v. Solomon*, 263 Or.App. 492, 329 P.3d 26, 31 (2014), *review granted*, 356 Or. 516, 340 P.3d 47 (explaining that a trial court “did not err in striking the allegations that disclosed the terms of [a mediated] settlement agreement” because there was no “valid exception to the confidentiality rules” governing the agreement).

We agree with the reasoning of the California Supreme Court. Application of the mediation process privilege in this case requires that Grubaugh’s allegations dependent upon privileged information be stricken from the complaint. To hold otherwise would allow a plaintiff to proceed with a claim, largely upon the strength of confidential communications, while denying the defendant the ability to fully discover and present evidence crucial to the defense of that claim. *Cassel*, 119 Cal.Rptr.3d 437, 244 P.3d at 1096. A privilege should not be invoked in a way that unfairly prevents one party from defending against a claim of another. *See Elia v. Pifer*, 194 Ariz. 74, 82, ¶ 40, 977 P.2d 796, 804 (App.1998). As already noted, the legislature could have, but did not, create an exception to this privilege for attorney-client communications and legal malpractice claims. Striking from the complaint any claim founded upon confidential communications during the mediation process is the logical and necessary consequence of applying the plain language of this statutory privilege.

**CONCLUSION**

Arizona’s mediation process privilege promotes a strong policy of confidentiality for the mediation process. The Arizona Legislature specified the exceptions to the application of the privilege and left no room for implied common-law waiver. The privilege applies under the facts of this dispute. We therefore vacate the order of the superior court that declared the privilege inapplicable. We also direct the superior court to determine which communications are privileged and confidential under A.R.S. § 12–2238 and to strike from the complaint and ensuing litigation any allegation or evidence dependent upon such privileged communications.
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DIANA WILLIS et al.,

Plaintiffs,

vs.                                    Civ. No. 13-280 KG/KK

GEICO GENERAL INSURANCE COMPANY
et al.,

Defendants.

SECOND ORDER REGARDING DISCOVERY MOTIONS

THIS MATTER comes before the Court on the following motions: (1) Defendant GEICO General Insurance Company’s (“GEICO”) Motion to Compel Depositions (Doc. 157), filed December 21, 2015; (2) Plaintiffs’ Motion for Protective Order Concerning Disclosures by Mediator (Doc. 188), filed March 4, 2016; (3) Defendant GEICO’s Motion to Allow Mediator to Testify Regarding Final Settlement Offer Numbers Only (Doc. 189), filed March 4, 2016; and, (4) Plaintiffs’ Motion to Supplement Response to GEICO’s Motions for Protective Order Documents Nos. 147 & 148 (Doc. 193), filed March 15, 2016. The Court, having reviewed the parties’ submissions and the relevant law, and being otherwise fully advised, FINDS that:

(1) Defendant GEICO’s Motion to Compel Depositions (Doc. 157) should be GRANTED IN PART and DENIED IN PART;

(2) Plaintiffs’ Motion for Protective Order Concerning Disclosures by Mediator (Doc. 188) should be DENIED;

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1 Former Defendant Government Employees Insurance Company (“Government Employees”) joined in this motion when it was filed. (Doc. 157 at 1.) However, the Court has since dismissed Government Employees from this action, and will therefore consider the motion to be Defendant GEICO’s alone. (Doc. 175.)
(3) Defendant GEICO’s Motion to Allow Mediator to Testify Regarding Final Settlement Offer Numbers Only (Doc. 189) should be GRANTED; and,

(4) Plaintiffs’ Motion to Supplement Response to GEICO’s Motions for Protective Order Documents Nos. 147 & 148 (Doc. 193) should be DENIED AS MOOT.

I. Background

Plaintiffs filed this lawsuit on February 6, 2013 in the Thirteenth Judicial District Court for the State of New Mexico, and Defendants removed it to this Court on March 22, 2013. (Docs. 1, 1-1.) In their complaint, Plaintiffs allege the following. On May 15, 2010, Joshua Kiscadon, while intoxicated, fleeing a crime scene, speeding, and driving on a suspended license, lost control of his vehicle and struck Plaintiff Diana Willis’ vehicle, causing her serious bodily injury and property damage. (Doc. 1-1 ¶¶ 15-20.) Plaintiffs subsequently demanded policy limits from Mr. Kiscadon’s insurer, Defendant GEICO, which Defendant GEICO paid. (Id. ¶¶ 32, 33.) Plaintiffs further demanded that Defendant GEICO, as their own uninsured/underinsured motorist (“UM/UIM”) insurer, compensate them for their damages in excess of Mr. Kiscadon’s policy limits. (Id. ¶¶ 35, 42, 53, 58.) Several months of communications between Plaintiffs’ counsel and Defendant GEICO, including at a private mediation, failed to result in a mutually satisfactory resolution of Plaintiffs’ UM/UIM claim. (Id. ¶¶ 59-120, 138-40.) Plaintiffs therefore filed this lawsuit, seeking to require Defendant GEICO to pay their UM/UIM claim in full. (Id.) Plaintiffs also seek extracontractual damages from Defendant GEICO based on allegations that it mishandled their UM/UIM claim as part of its
regular business practice. (Id. ¶¶ 59-137, 141-59.) At this time only Plaintiffs’ extracontractual claims remain pending.\(^2\)

Plaintiffs assert several different extracontractual claims against Defendants, \textit{i.e.}, claims under the New Mexico Unfair Practices Act (“UPA”), N.M. Stat. Ann. § 57-12-1 \textit{et seq.} and the New Mexico Trade Practices and Frauds Act, also called the Unfair Insurance Practices Act (“UIPA”), N.M. Stat. Ann. § 59A-16-1 \textit{et seq.}, as well as tort claims for “insurance bad faith.” (Doc. 1-1 at 22, 24, 26.) The claims share a common factual basis, however. As described in considerable detail in their complaint, Plaintiffs’ grievances include Defendant GEICO’s alleged misrepresentation and miscalculation of Plaintiffs’ UM/UIM coverage limits for several months, and its alleged undervaluation of and delay in paying their 2010 UM/UIM claim for several years. (Id. at 6-7, 10-22.) Discovery in this case began in March 2015 (Doc. 69), and has generated a considerable number of disputes that the parties have been unable to resolve without the Court’s assistance. Presently before the Court for resolution are the four (4) pending discovery motions listed above. (Docs. 157, 188-89, 193.)

\textbf{II. Analysis}

\textbf{A. Defendant GEICO’s Motion to Compel Depositions (Doc. 157)}

In this motion, Defendant GEICO seeks to compel the depositions of attorneys John Howard and Geoffrey Romero, who represented Plaintiffs with respect to their 2010 UM/UIM claim before the filing of this lawsuit. (Doc. 157 at 9-10); see Fed. R. Civ. P. 37(a)(3)(B)(i) (party may move to compel witness to answer deposition questions). Mr. Howard no longer represents Plaintiffs, but Mr. Romero remains co-counsel of record for them in this action. (Doc. 157 at 10.) Defendant GEICO seeks to depose Mr. Howard and Mr. Romero regarding their

\(^2\) The parties settled Plaintiffs’ UM/UIM claim in September 2015. (Doc. 130 at 1.)
recollection of Defendant’s “investigation and evaluation, the settlement negotiation, . . . the coverage issues raised by Plaintiffs’ extracontractual allegations[, and] the handling of Plaintiffs’ UM/UIM claim.” (Id. at 12.) Defendant GEICO also wishes to explore Plaintiffs’ counsel’s “understanding, . . . impressions, and belief[s]” regarding these topics. (Doc. 170 at 7.) Plaintiffs oppose Defendant GEICO’s motion, arguing that depositions of counsel are discouraged, that the depositions Defendant GEICO proposes to take are unnecessary because Defendant GEICO’s employees already know what happened, and that to allow Defendant GEICO to ask Plaintiffs’ counsel about their understanding, impressions, and beliefs will invade counsel’s protected mental impressions.3 (Doc. 161 at 4-11.)

The Eighth Circuit addressed the circumstances in which a party may depose an opposing party’s trial counsel in Shelton v. American Motors Corp., 805 F.2d 1323, 1327-28 (8th Cir. 1986). The Shelton court noted that “[t]he practice of forcing trial counsel to testify as a witness . . . has long been discouraged,” because it “causes the standards of the profession to suffer and . . . disrupt[s] the adversarial nature of our judicial system.” Id. at 1327 (internal citations and quotation marks omitted). Thus, the court held that, although opposing trial counsel is not “absolutely immune from being deposed,” such depositions should be limited to where the party seeking to take the deposition has shown that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.

Id. (internal citation omitted). “The party seeking to take the deposition of opposing counsel bears the burden of establishing that the three factors are satisfied.” Archuleta v. City of Santa

3 Plaintiffs also argue that, in seeking to depose their counsel, Defendant GEICO is improperly trying to “mak[e] mediation transactions part of the evidentiary record.” (Doc. 161 at 11-12.) The Court discusses the discoverability of information about the parties’ pre-litigation mediation in Section II.B., infra.
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Fe, 2005 WL 2313706, at *6 (D.N.M. Aug. 10, 2005) (citing Boughton v. Cotter Corp., 65 F.3d 823, 831 n.10 (10th Cir. 1995)).

The Tenth Circuit addressed Shelton in Boughton, stating that it approve[d] of the criteria set forth in Shelton . . . but at this time . . . need only make the more limited holding that ordinarily the trial court at least has the discretion under Rule 26(c) to issue a protective order against the deposition of opposing counsel when any one or more of the three Shelton criteria for deposition . . . are not met.

65 F.3d at 830 (emphasis in original); see In re Subpoena Issued to Dennis Friedman, 350 F.3d 65, 71 n.3 (2d Cir. 2003) (Sotomayor, J.) (Boughton “upheld [a] lower court ruling[] premised on Shelton . . . on the grounds that the ruling[ was] within the lower court’s discretion to manage discovery under Rule 26.”). However, the Tenth Circuit has since stated that “Shelton was adopted by this court in Boughton.” Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1111 n. 15 (10th Cir. 2001); see also S.E.C. v. Goldstone, 301 F.R.D. 593, 649 (D.N.M. 2014) (“In Boughton . . . the Tenth Circuit adopted Shelton[’s] three-part test to determine whether a party can depose opposing counsel.”); Malcolm D. Smithson & Christine B. Smithson Trusts v. Amerada Hess Corp., 2007 WL 5685112, at *9 (D.N.M. Dec. 19, 2007) (“[T]he Court interprets Boughton . . . as adopting the Shelton . . . criteria.”).

Defendant GEICO cites to an unpublished New Mexico Court of Appeals decision to support its position that this Court should compel Plaintiffs to make Mr. Howard and Mr. Romero available to be deposed. In Coleman v. Hartford Insurance Cos., the court first noted that, like the Tenth Circuit, it “disfavor[s] depositions of a party’s attorney and will allow them only in limited circumstances.” 2014 WL 1314929, at *3 (N.M. App. Feb. 25, 2014). However, the Coleman court determined that the case before it “present[ed] such a circumstance.” Id. Coleman “initiated this bad faith case against Hartford regarding the way Hartford handled her
claim.” *Id.* at *2. “Coleman’s complaint alleged that she provided medical records to Hartford,” and that Hartford had no justification for its failure to pay her claim. *Id.* Hartford, conversely, contended that it had never received certain medical records from Coleman and “therefore could not complete [its] evaluation of the claim.” *Id.* Coleman testified at deposition “that she had no personal knowledge as to the claims handling process with Hartford”; rather “the only people [who were] involved in the adjustment process,” and had knowledge of the medical records Coleman claimed to have provided to Hartford, were Coleman’s attorney and his two employees. *Id.* at *3.

On these facts, the district court properly found that [Coleman’s attorney and his two employees] became essential witnesses in the case and that testimony regarding their communications with Hartford and other parties regarding the handling of Coleman’s UM/UIM claim would be necessary to Hartford’s defenses. *Id.*

Also informative is a recent decision in which the United States District Court for the District of Kansas, in another insurance bad faith case, prohibited the insurer from deposing the plaintiff’s counsel about counsel’s participation in the claims handling process. *Nelson v. Hardacre*, 312 F.R.D. 609, 612, 617-20 (D. Kan. 2016). The *Nelson* court applied the *Shelton* factors to reach this decision. *Id.* at 617-20. First, the court found that the insurer had “not met its burden to show no other means exists by which to obtain the information it seeks,” because written communications between the plaintiff’s counsel and the insurer’s agents had already been produced, and “pointed discovery could have done much to fill in any blanks which [the insurer] found missing.” *Id.* at 617. Second, the court found that the actions about which the insurer sought to depose counsel had “very little, if any, relevance,” and that “the work product doctrine prevents inquiry into his legal theories and mental impressions.” *Id.* at 618-19. Finally, the court
concluded that the insurer failed to explain why the information it sought was crucial to its case. *Id.* at 619.

After careful consideration of all of the foregoing, the Court will grant Defendant GEICO’s motion in part. This case is more analogous to *Coleman*, which the Court finds persuasive, than to *Nelson*; and, Defendant GEICO has satisfied the *Shelton* test as to some of the information it seeks from Mr. Howard and Mr. Romero. First, Plaintiffs’ counsel have information that Defendant GEICO cannot obtain by other means. *Shelton*, 805 F.2d at 1327. Virtually all of Defendant GEICO’s handling of Plaintiffs’ UM/UIM claim, as described in Plaintiffs’ complaint, consists of what Plaintiffs’ counsel told Defendant GEICO’s employees, and what Defendant GEICO’s employees told Plaintiffs’ counsel. (Doc. 1-1 at 10-20.) This is consistent with the deposition testimony of Plaintiffs George and Diana Willis, that they personally had only minimal interactions with Defendant GEICO’s employees regarding their claim. (Docs. 157-1, 157-2.) While Defendant GEICO does, presumably, know what its employees remember about their interactions with Plaintiffs’ counsel, it does not know what Plaintiffs’ counsel remember. Thus, to the extent that there is any disagreement between Plaintiffs’ counsel and Defendant GEICO’s employees about what happened—and the parties’ pleadings suggest that there is considerable disagreement—Defendant GEICO cannot know what Plaintiffs’ counsel may say in attempting to prove that *their* allegations are correct, without deposing them.5

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5 If Plaintiffs’ counsel and Defendant GEICO’s employees had had substantially fewer interactions, it would likely be preferable for Defendant to seek information about these interactions by way of written discovery requests. See *Nelson*, 312 F.R.D. at 617. However, in the present matter, the very large number of relevant interactions renders this discovery method impracticable.
Also, there are at least three problems with relying on Plaintiffs’ counsel’s letters to Defendant GEICO’s employees to supply this information. Cf. Nelson, 312 F.R.D. at 617. First, the letters do not constitute every relevant communication Plaintiffs’ counsel and Defendant GEICO’s employees exchanged; rather, Plaintiffs’ counsel and Defendant’s employees had a number of oral conversations as well. (Doc. 170 at 5-6.) Second, at his deposition, Defendant GEICO’s adjuster was uncertain whether Plaintiffs’ counsel’s letters included all of the medical records allegedly attached to them. (Doc. 170-1 at 6-7.) Thus, as in Coleman, only Plaintiffs’ counsel can testify to which records they actually attached to the letters. Finally, Defendant GEICO is entitled to discover whether and to what extent Plaintiffs’ counsel can recall, authenticate, and attest to the contents of these letters at trial, which appear to both constitute and contain hearsay statements if offered against Defendant GEICO to prove the truth of the matters asserted.6 Fed. R. Evid. 801(c) (out-of-court statement offered to prove truth of matter asserted is hearsay); (see, e.g., Doc. 157-4 at 2-10, 13-14, 17-20.)

Plaintiffs argue that Defendant GEICO’s employees can provide it with all of this information. (Doc. 161 at 5-8.) And indeed, if Defendant GEICO’s employees could fully recall and testify to all of their oral conversations with Plaintiffs’ counsel, and these employees could recall, authenticate, and verify all of Plaintiffs’ counsel’s letters, all of the events described therein, and all of the documents allegedly attached thereto, and Plaintiffs agreed not to dispute Defendant’s employees’ testimony in any way, then Plaintiffs’ argument would be correct. There would be no need to depose Plaintiffs’ counsel about their version of events, because

6 Plaintiffs’ current contention that they do not intend to offer their counsel’s testimony to prove their claims does not end the inquiry. (Doc. 161 at 10.) Inter alia, Plaintiffs do not appear to have considered that their counsel’s testimony may prove essential to get counsel’s letters admitted into evidence, particularly if they are offered to prove the truth of matters asserted in them. Further, either Plaintiffs’ counsel’s testimony or their letters appear necessary to Plaintiffs’ ability to prove at least some of their claims at trial.
Defendant GEICO’s version of events would be both complete and undisputed. However, that hypothetical situation is very different from the actual circumstances of this case, in which Defendant GEICO’s employees’ recollection of relevant events is in fact incomplete and disputed. In short, in light of the unique circumstances of this case, the Court finds that Defendant GEICO cannot obtain Plaintiffs’ counsel’s recollection, authentication, and verification of the very numerous interactions between them and Defendant GEICO’s employees regarding Plaintiffs’ 2010 UM/UIM claim without deposing them.

Turning to the second and third Shelton factors, the Court finds that Plaintiffs’ counsel’s factual recollection of how Defendant GEICO handled Plaintiffs’ UM/UIM claim is centrally relevant to Plaintiffs’ extracontractual claims, not privileged, and crucial to the preparation of Defendant GEICO’s defense. Shelton, 805 F.2d at 1327. However, the Court further finds that Plaintiffs’ counsel’s “understanding,” “impressions,” and “belief[s]” about these events, and particularly about which of Defendant GEICO’s actions they believed to be unlawful, are protected work product and are also not crucial to Defendant GEICO’s preparation of its defense. (Doc. 170 at 7.) As the Nelson court noted, “the work product doctrine prevents inquiry into [counsel’s] legal theories and mental impressions.” Nelson, 312 F.R.D. at 619; Fed. R. Civ. P. 26(b)(3)(B). Moreover, Defendant GEICO does not need to ask Plaintiffs’ counsel which of its actions they believed to be unlawful. Plaintiffs have already provided Defendant GEICO with a

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7 For example, Defendant Bob Smith, the GEICO adjuster who first handled Plaintiffs’ 2010 UM/UIM claim, in many instances did not recall receiving Plaintiffs’ counsel’s letters or the attachments to them, or the substance of the oral conversations they purport to memorialize. (Doc. 170-1 at 2-3, 5-7, 11, 15-16.) See also Note 4, supra.

8 Defendant GEICO argues that the Court should require Plaintiffs to prove with greater specificity that their counsel’s mental impressions are protected. (Doc. 170 at 9.) This argument is nonsensical in the context of depositions that have not yet begun. Plaintiffs obviously cannot show that their counsel’s answers to specific deposition questions will include protected mental impressions without knowing what the questions will be.
reasonably detailed and comprehensive list of what they contend are its wrongful actions, (Doc. 157-3 at 2-4); and, they have also “retained expert witnesses to identify which of GEICO’s actions and conduct” form the basis of their extracontractual claims. (Doc. 161 at 7.)

For all of the above reasons, the Court will grant Defendant GEICO’s motion to compel the depositions of Mr. Howard and Mr. Romero in part. The Court will compel Plaintiffs to make Mr. Howard and Mr. Romero available for Defendant GEICO to depose regarding their personal recollection of the facts alleged in Plaintiffs’ complaint, including Plaintiffs’ counsel’s letters and the matters described therein. However, the Court will not compel Mr. Howard or Mr. Romero to answer questions regarding their understanding, impressions, and beliefs about the legality and propriety of Defendant GEICO’s conduct, which the work product doctrine protects.

B. Plaintiffs’ and Defendant GEICO’s Cross-Motions regarding Disclosures by Mediator (Docs. 188, 190)

In these motions, the parties dispute whether mediator Mark Mowery should be allowed to disclose certain information about the parties’ unsuccessful October 19, 2012 private mediation.9 Plaintiffs contend that the Court should issue a protective order prohibiting Mr. Mowery from disclosing anything at all about the mediation, other than that the parties did not settle.10 (Doc. 188 at 1-2.) Defendant GEICO, in contrast, proposes that Mr. Mowery should be

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9 Plaintiffs argue that Defendant GEICO seeks to compel Mr. Mowery to disclose certain information about the mediation. (Doc. 203 at 3.) In fact, however, Defendant GEICO’s motion requests only that Mr. Mowery be allowed to make the disclosures in question. (Doc. 189 at 1; Doc. 190 at 1-2, 10.) The Court declines to read into Defendant GEICO’s motion a request for relief that simply is not there.

10 Plaintiffs also ask the Court to compel Mr. Mowery to disclose whether Defendant GEICO has already contacted him to request information about the mediation and what, if anything, he has already told Defendant GEICO. (Doc. 188 at 2-3.) However, Plaintiffs have indicated neither that Mr. Mowery has refused to provide this information to them, nor that they have subpoenaed it from him. As such, the Court will deny Plaintiffs’ request as premature.
allowed to disclose only the amounts of the final settlement offers each side made at the mediation.¹¹ (Doc. 190 at 2-3.) For the following reasons, the Court will deny Plaintiffs’ motion and grant Defendant GEICO’s.

According to Federal Rule of Civil Procedure 26(c), the Court may issue a protective order “for good cause . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P. 26(c)(1). A protective order may forbid or limit particular discovery, or otherwise control the terms on which it may be had. Id. Moreover, “[i]f a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.” Fed. R. Civ. P. 26(c)(2). The party seeking a protective order bears the burden of showing good cause for the order to issue. Pearson v. Miller, 211 F.3d 57, 72 (3d Cir. 2000); In re Cooper Tire & Rubber Co., 568 F.3d 1180, 1190 (10th Cir. 2009). The decision whether to grant a motion for a protective order is within the trial court’s discretion. In re Cooper Tire & Rubber Co., 568 F.3d at 1195; Nelson, 312 F.R.D. at 613; see Morales v. E.D. Etnyre & Co., 229 F.R.D. 661, 662 (D.N.M. 2005) (“Federal district courts have broad discretion over discovery.”) (citing cases). The Court will consider the parties’ cross-motions in light of these general principles.

Plaintiffs contend that the New Mexico Mediation Procedures Act (“NMMPA”) governs the discoverability of information about the parties’ mediation, while Defendant GEICO argues that it is unclear whether state or federal law applies. (Doc. 188 at 1-2; Doc. 190 at 3-4; Doc. 203 at 8-10.) Defendant GEICO agrees that, if state law applies, the NMMPA governs. (Doc. 190 at 4-6.) If federal law applies, however, Defendant GEICO contends that the Alternative

¹¹ According to Defendant GEICO, the parties dispute the amount of its final offer. (Doc. 190 at 6.)
Dispute Resolution Act ("ADRA"), 28 U.S.C. § 652, and this Court’s Local Civil Rule 16.2(e) govern, and that there is no federal common law “mediation privilege.” (Id. at 7-9.)

The Court need not determine whether state or federal law applies to this issue, because both permit the disclosure of the very limited information Defendant GEICO seeks. Under state law, the NMMPA provides that, “[e]xcept as otherwise provided in the [NMMPA] or by applicable judicial court rules, all mediation communications are confidential, and not subject to disclosure and shall not be used as evidence in any proceeding.” N.M. Stat. Ann. § 44-7B-4. The statute then lists several exceptions to this general rule. N.M. Stat. Ann. § 44-7B-5. *Intercalia,*

[m]ediation communications are not confidential pursuant to the [NMMPA] if they . . . are sought or offered to disprove a claim or complaint of professional misconduct or malpractice based on conduct during a mediation and filed against a mediation party or nonparty participant.


In their complaint, Plaintiffs allege that

[d]uring the course of the mediation, GEICO ultimately made a final offer of settlement commensurate with its own lowball evaluation of the claim. . . . At the mediation GEICO refused to consider payment of any amount beyond its original unreasonably low evaluation evaluation [sic], excluding property damages from its assessment of the measure of punitive damages.

(Doc. 1-1 ¶¶ 109, 110.) Plaintiffs contend that Defendant GEICO thereby committed the tort of insurance bad faith and also violated the UPA and UIPA. (Id. ¶ 137.) The Court finds that these allegations constitute claims of professional misconduct filed against Defendant GEICO, a mediation party, based on conduct during the mediation, *i.e.*, the making of an unreasonably low final settlement offer, and that Defendant GEICO seeks information about the parties’ final settlement offers to disprove these claims, within the meaning of Section 44-7B-5(A)(8).
Plaintiffs argue that Section 44-7B-5(A)(8) applies only to legal malpractice actions. (Doc. 203 at 6.) The Court disagrees. First, by its plain language, the exception is not limited to legal malpractice actions, but rather applies more broadly to any claim of “professional misconduct or malpractice” committed during a mediation filed against any “mediation party or nonparty participant.” N.M. Stat. Ann. § 44-7B-5(A)(8); Warner v. Calvert, 2011-NMCA-028, ¶ 12, 258 P.3d 1125, 1130 (N.M. App. 2011) (courts must “first examine the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different meaning was intended”) (internal quotation marks omitted). The NMMPA defines a “mediation party” as “a person who participates in a mediation and whose agreement is necessary to resolve the dispute,” and a “person” as “an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government or governmental subdivision, agency or instrumentality, public corporation or any other legal or commercial entity.” N.M. Stat. Ann. § 44-7B-2(C), (G). It is therefore beyond cavil that Defendant GEICO is a “mediation party” within the meaning of Section 44-7B-5(A)(8). Then, because the NMMPA does not define the term “professional misconduct,” the Court must give it its ordinary meaning, Warner, 2011-NMCA-028, ¶ 12, 258 P.3d at 1130, i.e., misconduct “relating to a job that requires special education, training, or skill.” http://www.merriam-webster.com/dictionary/professional. The Court finds that an insurer’s bad faith participation in a mediation, such as Plaintiffs allege here, falls within the term’s ordinary meaning.12

12 The adjuster(s) who presumably acted for Defendant GEICO at the mediation were certainly performing a job that requires special education, training, or skill. By law, licensed insurance adjusters in New Mexico must possess specified minimum qualifications, including a “good business reputation,” and “experience,” “special education,” or “training” in handling insurance claims. N.M. Stat. Ann. § 59A-13-4(A); see also 2016 N.M. Laws Ch. 89 § 54 (licensed insurance adjusters must pass an examination and attend continuing education).
Further, the reference in Section 44-7B-5(A)(8) to “claim[s] or complaint[s] of professional misconduct or malpractice” tracks Section 6(a)(6) of the Uniform Mediation Act (“UMA”); and, the UMA’s drafters’ comments indicate that this exception applies to “lawyers and fiduciaries.” Unif. Mediation Act § 6(a)(6) at 30 (2003) (emphasis added), at http://uniformlaws.org/Act.aspx?title=Mediation%20Act. In New Mexico, an insurer is considered a “fiduciary” when dealing with its insured in matters regarding the performance of the insurance contract. Allsup’s Convenience Stores, Inc. v. North River Ins. Co., 1999-NMSC-006, ¶ 37, 976 P.2d 1, 15 (N.M. 1999). Thus, in the present matter, Defendant GEICO was acting as a fiduciary to whom Section 6(a)(6) of the UMA, and thus Section 44-7B-5(A)(8), should apply.

The decisions Plaintiffs cite to the contrary are inapposite, because they either apply statutes that lack an exception like Section 44-7B-5(A)(8), or do not involve claims or complaints of professional misconduct or malpractice based on conduct during the mediation. See, e.g., Cassel v. Super. Ct. of Los Angeles Cnty., 244 P.3d 1080, 1094 (Cal. 2011) (noting that the mediation confidentiality statutes at issue included no exception for legal malpractice claims); Princeton Ins. Co. v. Vergano, 883 A.2d 44, 64-65 (Del. Ch. 2005) (noting that defendants relied on plaintiff’s alleged fraudulent misrepresentations at mediation in seeking admission of mediator’s testimony). Moreover, Plaintiffs have taken fundamentally inconsistent positions by arguing that the amount of Defendant GEICO’s final settlement offer at mediation is confidential, while also describing that amount in their complaint.13 If Plaintiffs were correct

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13 Although Plaintiffs did not name the actual dollar amount of Defendant GEICO’s final offer at mediation in their complaint, they might as well have done so. Both the complaint and subsequent discovery precisely quantify the alleged “lowball evaluation of the claim” with which Plaintiffs allege Defendant GEICO’s final offer was “commensurate.” (Doc. 1-1 ¶¶ 109-10; see id. ¶¶ 75, 79, 81; Doc. 170-1 at 8, 10, 20.) Plaintiffs’ phrasing is coy but their meaning is clear.
that the amount of Defendant GEICO’s final settlement offer at mediation is confidential, then
their description of this amount in a publicly filed document would clearly violate the NMMPA
and would have to be stricken. See Alfieri v. Solomon, 365 P.3d 99, 105, 112 (Or. 2015)
(allegations in plaintiff’s complaint that disclosed confidential mediation communications were
properly stricken). For all of the above reasons, the Court finds that information about the
amount of Defendant GEICO’s final settlement offer at mediation is not confidential under the
NMMPA, because it is sought to disprove Plaintiffs’ claims of professional misconduct against
Defendant GEICO based on its conduct at the mediation.

The discoverability of this information is at least as clear under federal law. First, as
Defendant GEICO observes, the Tenth Circuit has not recognized a federal common law
(D. Colo. Jul. 15, 2015); Bird v. Regents of N.M. St. Univ., 2010 WL 8973917, at *4 (D.N.M.
Jun. 15, 2010); but see Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d
1164, 1180 (C.D. Cal. 1998) (adopting federal common law mediation privilege). Plaintiffs have
made no attempt to address the complex factors a court must consider before adopting a new
federal common law privilege, see Folb, 16 F. Supp. 2d at 1171; as such, and “absent direction
from the Tenth Circuit, this [C]ourt will not imply the existence” of one. Gebremedhin, 2015
WL 4272716, at *8 n.5.

Then, it is true that the ADRA directs federal district courts to “provide for the
confidentiality of . . . alternative dispute resolution processes and to prohibit disclosure of
confidential dispute resolution communications” by local rule. 28 U.S.C. § 652(d). However,
this provision appears to apply only to “alternative dispute resolution processes under [the
ADRA],” i.e., to alternative dispute resolution processes that the federal district courts provide to
litigants appearing before them. 28 U.S.C. § 652(a), (d). Thus, this Court’s Local Rule regarding the confidentiality of settlement conferences, which was adopted in compliance with Section 652(d) of the ADRA, applies only to settlement conferences held by a “judge.” D.N.M. LR-Civ. 16.2(a), (e); see also Clark v. Stapleton Corp., 957 F.2d 745, 746 (10th Cir. 1992) (statement made at court-sponsored appellate settlement conference was confidential pursuant to Tenth Circuit Rule 33.1).

The mediation at issue here was not provided by this or any other federal court, and was not conducted by a judge. Rather, it was undertaken independently and conducted by a private attorney well before this lawsuit was filed. (Doc. 190 at 2.) As such, the confidentiality provisions of the ADRA and Local Rule 16.2 simply do not apply to it. 28 U.S.C. § 652(a), (d); D.N.M. LR-Civ. 16.2(a), (e). Nor have Plaintiffs identified any other federal case, statute, or rule that prohibits Mr. Mowery from disclosing the parties’ final offers at the mediation, as Defendant GEICO proposes.14 For the foregoing reasons, because Plaintiffs have directly and deliberately put at issue the nature and reasonableness of the parties’ final positions at mediation, and because the parties dispute the amount of Defendant GEICO’s final offer, the Court will grant Defendant GEICO’s motion to allow Mr. Mowery to disclose only the amount of both parties’ final settlement offers at the mediation, and will deny Plaintiffs’ motion for a protective order prohibiting him from doing so.15

14 Plaintiffs do cite to Federal Rule of Evidence 408 for this proposition. (Doc. 188 at 2.) However, Rule 408 addresses only the admissibility, and not the discoverability, of evidence, and so does not support Plaintiffs’ position. Fed. R. Civ. P. 408; see Fed. R. Civ. P. 26(b)(1) (“Information . . . need not be admissible in evidence to be discoverable.”).

15 Plaintiffs’ motion for a protective order prohibiting Mr. Mowery from disclosing any other information about the mediation is moot, because Defendant GEICO has conceded that such information should not be disclosed. (Doc. 190 at 2-3; Doc. 194 at 4.)
C. Plaintiffs’ Motion to Supplement Response to GEICO’s Motions for Protective Order Documents Nos. 147 & 148 (Doc. 193)

In this motion, Plaintiffs seek leave to supplement their response in opposition to Defendant GEICO’s Motion for Protective Order Limiting the Deposition Testimony of Karlyn Nelson (Doc. 147) and Motion for Protective Order Limiting the Deposition Testimony of Ruben Garay, Ann Pelczar, and Mark Euziere (Doc. 148), to address the supplemental disclosures Defendant GEICO provided to them on March 10, 2016. (Doc. 193 at 1-2; Doc. 193-1 at 4.) However, the Court has already denied the motions for protective order in question. (Doc. 202 at 32.) As such, Plaintiffs’ motion to supplement their response in opposition to these motions is moot.

D. Award of Expenses under Federal Rule of Civil Procedure 37

The Court will not award expenses to either party as a result of the parties’ pending discovery motions. Pursuant to Federal Rule of Civil Procedure 37, if a party’s motion to compel or for protective order is granted, the Court must generally require the opposing party and/or its counsel to pay the movant’s reasonable expenses incurred in making the motion. Fed. R. Civ. P. 37(a)(5)(A); Fed. R. Civ. P. 26(c)(3). However, the Court must not require payment of such expenses if, inter alia, “the opposing party’s nondisclosure, response, or objection was substantially justified,” or “other circumstances make an award of expenses unjust.” Fed. R. Civ. P. 37(a)(5)(A)(ii), (iii). Similarly, Rule 37(a)(5)(B) provides that if a motion to compel is denied, the Court must generally award expenses to the party opposing the motion, but again, not if “the motion was substantially justified or other circumstances make an award of expenses unjust.” Fed. R. Civ. P. 37(a)(5)(B). Finally, Rule 37(a)(5)(C) provides that “[i]f the motion is
granted in part and denied in part, the court . . . may . . . apportion the reasonable expenses for

Here, some of each party’s arguments have been successful and some have not. Each
party has taken some positions that are substantially justified, and some that are without merit.
Portions of the motions presented relatively complex and/or significant legal issues, which were
appropriately submitted to the Court for resolution. In these circumstances, an award of
expenses to either party would be unjust and inappropriate under Rule 37(a)(5)(A) and (B), and
the Court declines to exercise its discretion under Rule 37(a)(5)(C) to apportion expenses
between the parties.

III. Conclusion

IT IS THEREFORE ORDERED AS FOLLOWS:

(1) Defendant GEICO’s Motion to Compel Depositions (Doc. 157) is GRANTED IN PART
and DENIED IN PART. Plaintiffs are to make John Howard and Geoffrey Romero
available for Defendant GEICO to depose regarding their personal knowledge of the facts
alleged in Plaintiffs’ complaint, including Plaintiffs’ counsel’s letters and the matters
described therein. However, Mr. Howard’s and Mr. Romero’s understanding,
impressions, and beliefs about the legality and propriety of Defendant GEICO’s conduct
are protected work product, about which they are not required to answer questions;

(2) Plaintiffs’ Motion for Protective Order Concerning Disclosures by Mediator (Doc. 188) is
DENIED;

(3) Defendant GEICO’s Motion to Allow Mediator to Testify Regarding Final Settlement
Offer Numbers Only (Doc. 189) is GRANTED; and,
(4) Plaintiffs’ Motion to Supplement Response to GEICO’s Motions for Protective Order Documents Nos. 147 & 148 (Doc. 193) is DENIED AS MOOT.

IT IS SO ORDERED.

KIRTAN KHALSA
UNITED STATES MAGISTRATE JUDGE
Chapter 1—In the Wake of Alfieri and Crimson Trace (Oregon Supreme Court)

YOSHIDA’S INC., an Oregon corporation, Plaintiff–Appellant,

v.

DUNN CARNEY ALLEN HIGGINS & TONGUE LLP, an Oregon limited liability partnership; and Brian Cable, an individual, Defendants–Respondents.

110505126; A152507.

Court of Appeals of Oregon.

Argued and Submitted July 2, 2014.

Decided July 22, 2015.

Corey Tolliver, Portland, argued the cause for appellant. With him on the briefs were Shannon Flowers, Bonnie Richardson, and Folawn Alterman & Richardson LLP.

Thomas W. McPherson, Portland, argued the cause for respondents. With him on the brief were Dunn Carney Allen Higgins & Tongue, LLP and Brian Cable.

Before DUNCAN, Presiding Judge, and LAGESEN, Judge, and WOLLHEIM, Senior Judge.

LAGESEN, J.

This is an action for negligence (legal malpractice) and breach of contract against a law firm, defendant Dunn, Carney, Allen, Higgins & Tongue, LLP, and one of the law firm’s partners, Cable (collectively, defendants). The trial court directed a verdict for defendants on plaintiffs breach of contract claim, and the jury returned a defense verdict on the professional negligence claim. The issues on appeal are whether the trial court erroneously admitted evidence of confidential mediation communications, in violation of ORS 36.222,1 and whether it erred in directing a verdict for defendants on the breach of contract claim. We conclude that the trial court erred in both respects and, accordingly, reverse and remand for further proceedings consistent with this opinion.

I. FACTS

After it was purchased by another entity, defendants’ former client, OIA Global Logistics–SCM, Inc. (OIA), assigned to plaintiff, Yoshida’s, Inc., its legal malpractice claim against

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1 ORS 36.222 provides, in pertinent 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.”
defendants. The claim arose from defendants’ alleged mishandling of the termination of an equipment and software lease between OIA and Winthrop Resources Corporation (Winthrop), a corporation located in Minnesota.

OIA produces packaging for a footwear company. In 2006, as part of a sale-leaseback arrangement, OIA sold warehouse equipment and software to Winthrop, and then leased back the equipment and software. The original lease term was three years, ending no later than November 30, 2009; there was some uncertainty as to when the lease term began and when the lease term ended. The lease provided that it would automatically renew for an additional fourth year unless OIA notified Winthrop no later than 120 days before the lease’s termination date that OIA intended to terminate the lease. The lease also provided that it would automatically renew for an additional year if, having terminated the lease, OIA did not return the leased equipment and software to Winthrop within 10 days of the termination date.

In July 2009, OIA determined that it wanted to terminate the lease at the expiration of the three-year term, although OIA recognized that it was not certain of the lease’s end date. On July 29, 2009, OIA, through its chief financial officer (CFO), Sether, contacted Miller—an associate at defendant law firm who assisted defendant Cable in the firm’s work for OIA—by phone and then by follow-up e-mail. Sether requested defendant law firm’s assistance in terminating the lease before its end date, which Sether described as being “anytime between Today and 11/1/2009.” In the e-mail following up on the phone conversation, Sether informed Miller that “the big things are getting out of the lease ASAP,” and that “[a]t the very least it appears the termination notice is in order ASAP.” Sether identified “[r]each[ing] a near $1 dollar or less buyout” of the software and equipment as another priority, noting that OIA would not be able to return some portion of the equipment and wanted to continue using the software. The next day, Miller responded:

“Thank you for the information. I will review and follow up with you shortly. I did discuss the matter briefly with Brian Cable as he was involved in the issue during the NGL due diligence period. He has sent me his correspondence with Winthrop and provided me with some additional background.”

In response to Miller’s e-mail, Sether reiterated that, “as stated [,] probably the intent to terminate notice is the first step and then we work on the other facets * * * and the residual.”

Approximately one month later, on August 26, 2009, Miller provided OIA with a notice-of-termination letter for OIA to send to Winthrop. OIA immediately forwarded the letter to Winthrop. Upon receiving the letter, Winthrop notified OIA that the notice of termination was not timely under the terms of the lease and that, in its view, the lease extended for an additional year as a result. After discussing Winthrop’s response to OIA’s attempt to terminate the lease, defendant law firm concluded that it could no longer represent OIA in connection with the lease dispute because OIA might have “potential claims” against it.

OIA thereafter retained counsel in Minnesota to assist it with the resolution of the lease dispute. Ultimately, on February 10, 2010, OIA and Winthrop mediated their dispute and resolved
it through mediation. They executed a “Mediated Settlement Agreement” on February 10, 2010. Two days later, OIA’s CFO, Sether, notified OIA’s Minnesota lawyers that there were “two minor changes that [OIA] would like to see modified in the Winthrop final documents.” Sether requested, among other changes, that the bill of sale indicate that the “residual value” of the equipment was $25,000. The parties then executed a final “Settlement Agreement and Release.” Under its terms, Winthrop agreed to transfer title of the equipment and software to OIA, and OIA agreed to pay $325,000 to Winthrop. The agreement required Winthrop to execute a bill of sale to OIA in connection with the transfer of the equipment, upon delivery of the settlement payment. It further specified that the “[p]rice for transferring Winthrop’s title to the equipment” to OIA was $25,000 and that the remaining $300,000 was in “[s]ettlement of remaining monthly lease charges due under the Lease.” Thereafter, OIA assigned its claims against defendants to plaintiff, and plaintiff filed this action.2

The case was tried to a jury. Before trial, plaintiff moved in limine under ORS 36.222 to exclude “all mediation communications” made in the course of or in connection with the mediation between OIA and Winthrop. In support of the motion, plaintiff provided the court with a packet of the e-mail communications that, in its view, had to be excluded under ORS 36.222. Plaintiff argued that the statute barred the introduction into evidence of those communications, because the parties to the mediation had not consented in writing to their disclosure, and because no other statutory exception authorizing the evidentiary use of such communications applied. Defendants opposed the motion, asserting that Minnesota, not Oregon, law governed the admissibility of mediation communications related to the mediation between OIA and Winthrop, and that ORS 36.222 thus did not preclude the admission of communications related to the OIA and Winthrop mediation. Defendants argued further that the communications were admissible to undercut plaintiffs claim that OIA was damaged by defendants’ alleged negligence, and to show that OIA’s settlement with Winthrop was not a reasonable one and that OIA could have mitigated its damages. Defendants also argued that plaintiff effectively waived the protections of ORS 36.222 by filing the malpractice action, thereby putting at issue how much plaintiff was damaged by defendants’ alleged malpractice. In response, plaintiff contended that Minnesota and Oregon law both required the exclusion of the mediation communications.

The trial court denied the motion. The court did not “debat[e]” that the communications were, in fact, mediation communications under ORS 36.110(7). It nonetheless concluded that “mediation confidentiality” did not apply and “that the issue of what happened at the mediation comes into play, so I think it is admissible, and so the communications that happened around that are going to be admissible.” The court reasoned that the mediation communications that defendant sought to introduce were from a mediation in a different case—the dispute between OIA and

2 The original complaint alleged only a claim for legal malpractice. Plaintiff amended the complaint to add the claim for breach of contract. Defendants objected to the amendment on the ground that OIA’s assignment of claims to plaintiff did not encompass the breach of contract claim, but the trial court rejected that argument. On appeal, defendants do not argue that the breach of contract claim was not within the scope of OIA’s assignment to plaintiff.
Winthrop—and that the statute therefore did not preclude the introduction of the communications in the malpractice case, because the communications were relevant to the issue of whether plaintiff had been harmed by defendants’ alleged malpractice.

Based on the court’s ruling, three e-mails connected to the resolution of the lease dispute between OIA and Winthrop were introduced into evidence at trial, and Sether was examined about them. The first e-mail, dated January 5, 2010, was from Sether to OIA’s Minnesota attorneys for the lease dispute. In it, as “a starting point for conversation related to the equipment values,” Sether estimates that the market value of the equipment was “$250–$275K.” The second e-mail, dated February 5, 2010, was from Sether to OIA’s president. In it, Sether states that he had requested an OIA employee, Wogan, to evaluate the assets under the lease with Winthrop. Sether notes that Wogan came up with a value “in the $200K range,” which provides some “good context” for negotiation in the upcoming mediation. The attached analysis by Wogan identifies three different methods for valuing the equipment; depending on the valuation method employed, Wogan’s analysis attributes a value to the property ranging from $0–$239,000. The third e-mail, dated two days after the mediation between OIA and Winthrop, is from Sether to OIA’s attorney in the lease dispute. In the e-mail, Sether requests that OIA’s attorney arrange for changes in the final settlement paperwork:

“They would like the bill of sale to show—’residual value—equipment $25,000’ obviously the settlement agreement is fine as we paid a total of $325,000[,] but for the equipment that’s not the sales amount, that includes residual value termination contract value.”

(Emphasis omitted.)

At the close of plaintiff’s case, defendants moved for a directed verdict on both claims. With respect to the breach of contract claim, defendants argued that, in the case of an attorney-client relationship, a client cannot sue an attorney for breach of contract and negligence unless the contract is “an express specific promise to achieve a certain result.” Defendants then asserted that there was no evidence that would permit a finding that OIA had an express contract with defendants, requiring the grant of a directed verdict. The trial court agreed and granted the motion as to the breach of contract claim, explaining that “it does take an express agreement,” and that “I don’t think an express agreement, even in the light applied to a directed verdict standard, has been met here. And I am granting directed verdict on the contract claim.”

The trial court subsequently submitted the negligence claim to the jury. In closing argument, defendants urged the jury to find that defendants were not negligent. Alternatively, defendants argued that any negligence by defendants did not damage plaintiff. Defendants pointed out that plaintiff had sold some of the equipment covered by the lease and urged the jury to conclude that the lease would have automatically renewed anyway, even if defendants had not been negligent, because plaintiff would not have been able to return the equipment to Winthrop within 10 days of the date the lease terminated, as required by the lease. Defendants also argued that plaintiff was not harmed by any negligence of defendants because the settlement was, in effect,
the purchase of the equipment at a reasonable price—something that plaintiff had wanted to accomplish all along. In making that argument, defendants relied heavily on plaintiff’s mediation communications estimating the value of the equipment to OIA. The jury returned a verdict for defendants. The jury found that defendants were negligent, but that defendants’ negligence did not cause damages to plaintiff. The trial court entered a general judgment in favor of defendants, and plaintiff timely appealed.

On appeal, plaintiff assigns error to the trial court’s denial of plaintiff’s pre-trial motion in limine to exclude evidence of confidential mediation communications under ORS 36.222. Plaintiff also assigns error to the trial court’s grant of defendants’ motion for a directed verdict on the breach of contract claim.

II. STANDARDS OF REVIEW

The trial court denied plaintiff’s motion in limine regarding mediation communications, based on its interpretation of the scope of ORS 36.222. Where the trial court admits or excludes evidence based on the court’s interpretation of a statute, we review the court’s ruling for legal error. See State v. Edwards, 231 Or.App. 531, 533, 219 P.3d 602 (2009) (so doing). On review of the trial court’s grant of defendants’ motion for a directed verdict, we view the evidence, and all reasonable inferences therefrom, in the light most favorable to the nonmoving party (in this case, plaintiff), and review to determine whether any reasonable fact-finder could find in favor of the nonmoving party. Trees v. Ordonez, 354 Or. 197, 205–06, 311 P.3d 848 (2013). A directed verdict is appropriate only if the moving party is entitled to judgment as a matter of law. Id.

III. ANALYSIS

A. Mediation communications

We first address plaintiff’s contention that the trial court erred by denying its motion to exclude communications related to the mediation of the lease dispute between OIA and Winthrop. In particular, plaintiff contends that the trial court erred by admitting three documents that plaintiff asserts are not admissible under ORS 36.222: (1) the January 5, 2010, e-mail from Sether to OIA’s president and Minnesota counsel regarding the valuation of the equipment at issue in the lease; (2) the February 5, 2010, e-mail from Sether to OIA’s president further discussing the equipment values and “wondering if [they] should share [the valuation information] with [Minnesota counsel] before next week’s mediation”; and (3) the February 12, 2012, e-mail from Sether to Minnesota counsel asking for adjustments to the final settlement documents, including the equipment bill of sale to reflect a “residual value” of $25,000.3 As noted, the trial court denied plaintiff’s motion based on its conclusion that ORS 36.222 did not require the exclusion of those communications.

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3 In its opening brief, plaintiff suggests that the Mediated Settlement Agreement executed by OIA and Winthrop on February 10, 2010, also is a protected mediation communication. However, in its reply brief, plaintiff focuses on the e-mail communications. For that reason, we treat the e-mail communications as the communications at issue for purposes of our analysis.
and material because the mediation took place in a different case, not in the instant malpractice case.

That conclusion is erroneous. ORS 36.222 generally makes any communication that qualifies as a confidential “mediation communication” under ORS 36.110(7)⁴ inadmissible in any “adjudicatory proceeding” occurring after the communication. ORS 36.222 states, in pertinent 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.”

The statute means what it says. Contrary to the trial court’s conclusion, mediation communications generally are not admissible evidence in any later adjudicatory proceeding, even if that proceeding is not the same proceeding in which the mediation occurred. For example, in Alfieri v. Solomon, 263 Or.App. 492, 494–503, 329 P.3d 26, rev. allowed, 356 Or. 516, 340 P.3d 47 (2014), we concluded that ORS 36.222(1) barred the plaintiff in a legal malpractice case from using confidential mediation communications to prove the plaintiff’s claim that the defendant lawyer had negligently mediated an employment dispute on the plaintiff’s behalf. 263 Or.App. at 494–95, 501–02, 329 P.3d 26. We explained that, “[g]enerally, confidential mediation communications and confidential mediation agreements ‘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.’” Id. at 497–98, 329 P.3d 26 (quoting ORS 36.222(1)) (emphases added). Although ORS 36.222 contains a number of exceptions to the limitations on the disclosure and admissibility of mediation communications, those exceptions, on their face, do not appear to apply here, and defendants do not suggest otherwise. See ORS 36.222(2–6) (establishing exceptions to the mediation-communication privilege).

Defendants assert that the trial court’s decision to admit the evidence, even if based on an erroneous understanding of ORS 36.222, can be sustained on other grounds. First, defendants

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⁴ ORS 36.110(7) provides, 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; 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.”
argue, as they did below, that Minnesota, not Oregon, law controls the issue of whether the communications related to the OIA–Winthrop mediation of the lease dispute are admissible in a subsequent adjudicatory proceeding and that, under Minnesota law, the communications were admissible. Second, defendants argue, for the first time on appeal, that, if Oregon law governs, the communications at issue do not meet the definition of “mediation communications” under ORS 36.110(7) and, for that reason, were properly admitted into evidence by the trial court. Third, defendants contend that plaintiff waived the privilege afforded to mediation communications, both by filing this action and by disclosing the communications in discovery, making those communications admissible. For the reasons that follow, none of those arguments provides a basis for this court to sustain the trial court’s decision to admit the communications at issue.

First, to the extent that defendants assert that plaintiff waived the statutory privilege afforded to mediation communications by filing this case or by disclosing the communications in discovery, the terms of ORS 36.222 foreclose that conclusion. The statute states plainly that, “[e]xcept 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.” ORS 36.222(1) (emphasis added). Again, we understand that provision to mean what it says: Unless one of the statutory exceptions applies, mediation communications are not admissible into evidence. We are not, through the act of judicial interpretation, permitted to expand that limited list of statutory exceptions crafted by the legislature to include new exceptions, such as unilateral waiver through a party’s conduct. Crimson Trace Corp. v. Davis Wright Tremaine LLP, 355 Or. 476, 496–97, 326 P.3d 1181 (2014) (when the statute establishing evidentiary privilege also expressly contains a list of specific exceptions, “the legislature fairly may be understood to have intended to imply that no others are to be recognized”). That is so especially in light of the legislature’s explicit decision to require that “all parties to the mediation agree in writing to the disclosure” of mediation communications in a subsequent adjudicatory proceeding, and its omission of any statutory mechanism allowing for one party to unilaterally waive that confidentiality. ORS 36.222(2) (emphasis added). As noted, defendants do not contend that the mediation communications at issue in this case are admissible under any of the express exceptions to the mediation-communication privilege crafted by the legislature, and, in any event, none of the exceptions appears to apply to the communications at issue here.

Second, to the extent that defendants assert that the communications at issue are not, in fact, “mediation communications” as defined by ORS 36.110(7), that argument does not present grounds for affirmance because defendants did not raise that argument below and, had they done so, the record may have developed differently. 5 Outdoor Media Dimensions Inc. v. State of

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5 At the hearing on plaintiff’s motion in limine to exclude mediation communications, plaintiff presented to the court (and to defendants’ lawyers) a packet of e-mails that plaintiff contended were covered by the mediation-communication privilege. Although we have not been able to locate that packet in the trial court file, the discussions of the contents of that packet indicate that it contained the communications on which plaintiff predicates its arguments.
Oregon, 331 Or. 634, 659–60, 20 P.3d 180 (2001) (for appellate court to affirm trial court’s ruling on an alternative basis requires, among other things, “that the record materially be the same one that would have been developed had the prevailing party raised the alternative basis for affirmance below”). Specifically, if defendants had contested below whether the e-mails at issue were, in fact, mediation communications, plaintiff would have been entitled to introduce additional foundational evidence under OEC 104(1) to establish that the communications did, in fact, occur “in connection with a mediation” among parties covered by the privilege so as to render the mediation privilege applicable. See ORS 36.110(7); ORS 36.222(1). Because defendants opted not to dispute that the communications at issue were mediation communications, plaintiff did not have that opportunity. Accordingly, for purposes of our review, we as did the trial court) treat the communications at issue as mediation communications under ORS 36.222(7).6

Third, and finally, defendants’ choice-of-law arguments do not provide a basis for affirming the trial court’s ruling. We assume without deciding that the Oregon courts would be obligated to apply Minnesota law regarding the privilege afforded to mediation communications if either party established that Minnesota law should govern this dispute.7 Nevertheless, we decline to resolve the parties’ dispute over the scope of the privilege for mediation communications under Minnesota law, because defendants have not made the threshold showing required to invoke another state’s laws in the courts of this state. As the proponents of the application of Minnesota law, it is “incumbent on” defendants to demonstrate “whether there is a material difference between Oregon substantive law and the law of the other forum. If there is no material difference—if there is a ‘false conflict’—Oregon law applies.” Angelini v. Delaney, 156 Or.App. 293, 300, 966 P.2d 223 (1998) (citations omitted). A false conflict exists when “no substantial conflict is found on appeal. Specifically, in describing the communications put at issue by the motion in limine, the parties discussed both the communications regarding valuation leading up to mediation, noting that “there is a transactional history that leads up to that mediation where the parties are communicating their thought process for assigning values to their respective positions that then formed the settlement that is now an item of damage in our case,” and the post-mediation communications leading to formalization of the mediation settlement, including the e-mail requesting that the final settlement documents reflect that the equipment’s residual value was $25,000.

6 In the absence of any contention by defendants that the communications were not, in fact, mediation communications, it was not unreasonable for the trial court to find that the communications were mediation communications. The communications occurred relatively close in time to the mediation and discuss what appears to be OIA’s mediation strategy. Although some of the e-mails, on their face, do not compel a finding that they are, in fact, mediation communications, nothing on their face would preclude such a finding, either. And, at least one of the e-mails—the one dated February 5, 2010—states that its purpose is to provide “some good context for negotiation” in advance of the mediation the following week, which suggests that communication was made “in connection” with the pending mediation.

7 Plaintiff argues that the scope of the privilege afforded to mediation communications is a procedural issue, such that the laws of the forum state always apply. As noted, we do not address that issue in the light of our conclusion that defendants have not demonstrated a material difference between Oregon and Minnesota law regarding the scope of the evidentiary privilege afforded to mediation communications. It is not readily apparent to us that the scope of the privilege afforded to mediation communications is properly characterized as procedural for choice-of-law purposes. As Oregon’s own statutes reflect, in creating a privilege for mediation communications, the legislature made a substantive policy choice regarding such communications in order to encourage parties “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 exist between the states’ policies or interests” or “where the laws of two states are the same or would produce the same results.” Erwin v. Thomas, 264 Or. 454, 457–58, 506 P.2d 494 (1973).

Here, defendants have not demonstrated a material difference between the laws of Oregon and the laws of Minnesota. The only difference that defendants have identified is a difference in wording between the applicable Minnesota statutes and the applicable Oregon statutes. But defendants have not shown that that difference in wording amounts to a material difference between Minnesota law and Oregon law. To the contrary, the applicable Minnesota statute and rule of practice appear on their face to render mediation communications inadmissible to the same extent that Oregon law does. Minn Stat § 595.02(1)(m) states:

“A person cannot be examined as to any communication or document, including work notes, made or used in the course of or because of mediation pursuant to an agreement to mediate or a collaborative law process pursuant to an agreement to participate in collaborative law. This does not apply to the parties in the dispute in an application to a court by a party to have a mediated settlement agreement or a stipulated agreement resulting from the collaborative law process set aside or reformed. A communication or document otherwise not privileged does not become privileged because of this paragraph. This paragraph is not intended to limit the privilege accorded to communication during mediation or collaborative law by the common law.”

By precluding the examination of any person regarding mediation communications or documents, the statute effectively precludes the use of such communications as evidence. If no witness can be examined about such communications, it is difficult to see how such communications or documents could be introduced into evidence; without examination, there would be no way for a litigant to lay a foundation for the admission of that evidence.

The terms of Minnesota General Rule of Practice 114.08 further indicate that mediation communications are privileged under Minnesota law in much the same way that they are under Oregon law, specifying that statements made and documents produced in an alternative dispute resolution proceeding generally are not admissible in subsequent proceedings involving any of the issues or parties to the alternative dispute resolution proceeding. It states, in relevant part:

“(a) Evidence. Without the consent of all parties and an order of the court, or except as provided in Rule 114.09(e)(4), no evidence that there has been an ADR proceeding or any fact concerning the proceeding may be admitted in a trial de novo or in any subsequent proceeding involving any of the issues or parties to the proceeding.

“(b) Inadmissibility. Subject to Minn.Stat. § 595.02 and except as provided in paragraphs (a) and (d), no statements made nor documents produced in non-binding ADR processes which are not otherwise discoverable shall be subject to discovery or other disclosure. Such evidence is inadmissible for any purpose at the trial, including impeachment.”

Minn. Gen. R. Prac. 114.08.
Thus, on its face, Minnesota law appears to afford the same evidentiary privilege to mediation communication that Oregon law affords them. Defendants have not identified any decisions from the Minnesota courts suggesting that the Minnesota mediation privilege is narrower in scope than the words of Minn. Stat. § 595.02 indicate, and “it is not our obligation to cast around the law of [Minnesota] in quest of possible material differences.” Angelini, 156 Or.App. at 300, 966 P.2d 223. Accordingly, defendants’ arguments regarding Minnesota law, and the scope of the privilege afforded to mediation communications under it, do not provide an alternative basis for sustaining the trial court’s judgment.

Having concluded that the trial court erred in denying plaintiff’s motion to exclude the mediation communications at issue, we assess whether the error requires reversal. We conclude that it does. An evidentiary error is reversible only if it substantially affects a party’s rights. OEC 103(1); ORS 19.415(2). Evidentiary errors substantially affect a party’s rights and, therefore, require reversal “when the error has some likelihood of affecting the jury’s verdict.” Dew v. Bay Area Health District, 248 Or.App. 244, 258, 278 P.3d 20 (2012) (citations omitted); see also Purdy v. Deere and Company, 355 Or. 204, 226, 324 P.3d 455 (2014) (same).

Here, our review of the record persuades us that there is “some likelihood” that the erroneously admitted evidence affected the jury’s determination that defendants’ conduct (which the jury found to be negligent) did not cause OIA to suffer any damages. One of defendants’ central attacks on plaintiff’s case for causation relied heavily on the erroneously admitted mediation communications. Defendants asserted that their negligence—if any—did not cause damages to OIA because, regardless of defendants’ negligence, OIA had intended to purchase the equipment and would have had to negotiate with Winthrop to do so. Defendants argued further that the settlement amount simply represented a reasonable purchase price for the equipment and that the $25,000 value assigned to the equipment by the settling parties did not accurately represent the equipment’s value. In closing argument, defendants pointed to the erroneously admitted communications as proof that the equipment value was not $25,000 but, instead, was much closer to the $325,000 settlement amount. From that evidence, defendants were able to argue that plaintiff was not damaged by any negligence by defendants because the deal reached by plaintiff was, in effect, a negotiated equipment purchase that plaintiff would have made for a similar price even absent a breach:

“Now, let’s assume further that the [lease] negotiations were to take place [before any breach]. What was [plaintiff] willing to pay for that equipment? We have some evidence on that, and we know how [plaintiff] was valuing that equipment.

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“Let’s look at Exhibit 127. Here we are in January 2010, and now the matter’s in the hands of the Minnesota lawyers. Now [plaintiff’s CFO] is saying to [plaintiff’s President], ‘I would recommend at or around [$]250[ ] to 275,000.’ Reflecting the value of that equipment. And, obviously, that’s what they were willing to pay then.
“[Exhibit] 135. This is the best one of all three of these in terms of the actual thinking going on [with plaintiff] about this equipment. This is later in 2010. This time [plaintiff’s CFO] has asked one of the internal guys [who works for plaintiff], a fellow named * * * Wogan, Tut together an analysis of the value of that equipment.’

“Let’s look at the second page. This is Mr. Wogan’s analysis, January 29, 2010. Look at number 2. [Plaintiffs] value, close to $200,000. ‘We are still using the assets. And this number reflects what I believe is a fair value to [plaintiff].’

“Ladies and gentleman, as we sit here today [plaintiff] has some of those assets. They are still using that software. They weren’t about to give it up. They could not give it up.

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“As far as the $25,000 equipment residual value at settlement, it is absolutely preposterous to think that that is, to [plaintiff], the true value of that equipment. Remember the evidence?

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“But to suggest that the $25,000 is the actual value to [plaintiff] of that equipment, that doesn’t work. Not with the kind of evidence we just showed with regard to that.”

Apart from the erroneously admitted communications, the record contains little other evidence that counters plaintiffs $25,000 valuation of the equipment or suggests that the settlement payment represented a purchase of the equipment for a reasonable price. The only other properly admitted evidence that the equipment value approached the $325,000 settlement amount was an e-mail from Sether to defendants, sent in October 2009 while defendants still represented OIA. In that e-mail, Sether describes the “market value” of the equipment as “around $285–$325K.” However, Sether minimized the accuracy of that early computation in his trial testimony, testifying that it was based on “a schedule” provided by Winthrop and that his own view was that the equipment did not have any value. The erroneously admitted e-mails—particularly the February 5, 2010, e-mail containing an OIA employee’s valuation of the equipment under different methodologies—allowed defendants to undercut Sether’s testimony downplaying the October 2009 valuation. In particular, defendants employed the February 5 e-mail to demonstrate, contrary to Sether’s testimony, that OIA ascribed substantial market value to the assets even when OIA performed its own independent valuation of the equipment. As noted, defendants emphasized that point in closing argument, arguing that the February 5, 2010, e-mail “is the best one of all three of these in terms of the actual thinking going on in OIA about this equipment.”

For those reasons, we conclude that there is “some likelihood” that the erroneously admitted e-mails affected the jury’s verdict. Although we acknowledge that defendants attacked

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8 Neither party introduced any expert valuation of the equipment, relying instead on evidence of OIA’s various valuations of the equipment—both internal and external—during the course of the negotiations and mediation with Winthrop.
plaintiffs case on causation in one other way, given defendants’ emphasis on OIA’s valuation of the equipment as negating any inference that OIA was damaged by defendants’ failure to terminate the lease, there is some likelihood that the jury relied on the erroneously admitted communications—particularly the February 5, 2010, e-mail—to find that the amount paid in settlement by OIA was simply a reasonable purchase price for the equipment, and that defendants’ negligence did not, therefore, cause damage to OIA, which had planned to purchase the equipment all along. We therefore reverse and remand for a new trial.

B. Directed verdict on breach of contract claim

We next consider the trial court’s grant of defendants’ motion for a directed verdict on the breach of contract claim. In that claim, plaintiff alleged that OIA and defendants entered into a contract under which defendants “specifically agreed to prepare and provide notice of termination of the lease in a timely manner” and that defendants breached that contract “by failing to prepare and provide notice of termination of the lease in a timely manner.” Defendants defend the trial court’s ruling, arguing that, “to make out a claim for breach of contract in the attorney-client context, the plaintiff must plead and prove that a promise to accomplish a defined objective was made by the attorney. If the plaintiff fails to offer evidence that such a promise was made, the breach of contract claim must be dismissed.” Defendants argue further that the record demonstrates a “failure of proof” that defendants promised to prepare the notice of lease termination “by any particular date,” and that, as a result, the trial court correctly directed a verdict on the breach of contract claim.

We disagree. In general, Oregon law does not require that a client suing a lawyer for breach of contract to provide professional legal services prove that the contract between the lawyer and the client took a particular form. Rather, Oregon law long has provided that a client may sue an attorney under both contract and negligence theories. In Currey v. Butcher, 37 Or. 380, 384–85, 61 P. 631 (1900), the Supreme Court observed that the attorney-client relationship arises out of the existence of a contract, “either express or implied.” From that contract, “the law imposes a duty to exercise reasonable care and skill.” Id. If the attorney fails to perform that duty in a manner that results in injury to the client, the court noted that the client “could sue, either in [contract], for a breach of the implied promise, or in [tort], for the neglect of duty.” Id. at 385, 61 P. 631 (trial court had appropriately overruled the attorney defendants’ motion for an order requiring the client

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9 As noted, defendants also argued that their failure to give timely notice of termination did not damage OIA because OIA had sold some of the equipment covered by the lease, making it likely that the lease would renew even if OIA had given timely notice of termination, in light of the lease provision specifying that OIA’s failure to return the equipment within 10 days of the date that the lease ended would trigger an automatic renewal. However, plaintiff countered that line of defense by pointing to expert testimony opining that, had the lease been timely terminated, the lease would not have renewed and OIA wouldn’t have had to pay to the additional liability for the year and you would have negotiated some amounts for the equipment.” Those arguments and evidence increase the likelihood that the jury’s assessment of the value of the equipment played a central role in its causation determination, because they increase the likelihood that the jury assessed causation by trying to determine what OIA would have paid for the equipment if the lease had been terminated in a timely manner.
plaintiff to choose a remedy under either tort or contract) (emphases added). In the absence of any statute-of-limitation issues—and none is raised here—no special rules govern the pleading and proof of a client’s claim against a lawyer for breach of contract; a client may seek to enforce an attorney’s express or implied promise to perform in accordance with the general standard of care under either a negligence theory, a contract theory, or both. Metropolitan Property & Casualty v. Harper, 168 Or.App. 358, 368–69, 7 P.3d 541 (2000) (explaining how statutes of limitation bear on issue of whether client can sue attorney under breach of contract theory).11

In urging us to reach a different conclusion, defendants rely on two lines of cases. Neither line of cases assists defendants. Securities–Intermountain v. Sunset Fuel, 289 Or. 243, 611 P.2d 1158 (1980), exemplifies the first line of cases. It stands for the proposition that a claim for breach of a contract to provide professional services is barred by the two-year statute of limitation applicable to negligence claims unless the plaintiff pleads and proves that the defendant agreed “to perform specific contractual duties irrespective of the general standard of care” and then breached that agreement. Allen v. Lawrence, 137 Or.App. 181, 184, 903 P.2d 919 (1995) (explaining rule of law established by Securities–Intermountain); Metropolitan Property & Casualty, 168 Or.App. at 368–69, 7 P.3d 541 (same). This case does not present any statute-of-limitation issues. Accordingly, the standards of pleading and proof for a claim for breach of a professional services contract filed outside the two-year negligence limitation period are not applicable here. In other words, those cases provide no basis for concluding that plaintiff’s proof of the existence of a contract was insufficient to withstand defendants’ motion for a directed verdict.

Hale v. Groce, 304 Or. 281, 744 P.2d 1289 (1987), and Caba v. Barker, 341 Or. 534, 145 P.3d 174 (2006), exemplify the second line of cases invoked by defendants. But those cases also do not stand for the proposition that plaintiff was required to plead and prove that it had an “express” contract with defendants. Instead, as we have explained, those cases “stand for the proposition that an essential element of a breach of contract or negligence claim by a nonclient

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10 By contrast, a client seeking to pursue a breach of contract claim against an attorney outside of the two-year limitation period applicable to negligence claims, but within the six-year statute of limitation applicable to contract claims, must plead and prove that the attorney contracted with the client “to perform specific contractual duties irrespective of the general standard of care.” Allen v. Lawrence, 137 Or.App. 181, 184, 903 P.2d 919 (1995). Otherwise, “[i]f the alleged contract merely incorporates by reference or by implication a general standard of skill and care to which the defendant would be bound independent of the contract, and the alleged breach would also be a breach of this noncontractual duty,” then the tort statute of limitation applies. Id. (quoting Securities–Intermountain v. Sunset Fuel Co., 289 Or. 243, 259, 611 P.2d 1158 (1980) (quoting Georgetown Realty v. The Home Ins. Co., 313 Or. 97, 106, 831 P.2d 7 (1992))).

11 Oregon’s approach is consistent with the Restatement approach. It provides that “[a] lawyer is subject to liability to a client for injury caused by breach of contract in the circumstances and to the extent provided by contract law.” Restatement (Third) of Law Governing Lawyers § 55(1) (2000). Comment c to section 55 further provides that

“[a] client’s claims for legal malpractice * * * can be considered either as tort claims for negligence or breach of fiduciary duty or as contract claims for breach of implied terms in a client-lawyer agreement. Ordinarily, a plaintiff may cast a legal-malpractice claim as a tort claim, a contract claim, or both and often also as a claim for breach of fiduciary duty. * * * The choice of theory may, however, affect what statute of limitations applies[.]”
plaintiff against an attorney who prepared a testamentary instrument is the existence of a promise by the attorney—either express or implied—to include specific provisions to satisfy certain objectives of the client for the benefit of the plaintiff.” *Deberry v. Summers*, 255 Or.App. 152, 161, 296 P.3d 610 (2013) (citing *Frakes v. Nay*, 254 Or.App. 236, 267, 295 P.3d 94 (2012)) (emphases added). Those cases have no applicability under the circumstances present here.

Accordingly, the trial court erred when it concluded that plaintiff was required to demonstrate that defendants made an “express” contract with OIA to deliver the notice by the particular date. In the light of how plaintiff alleged the breach of contract claim in the complaint, the trial court was required to deny defendants’ motion for a directed verdict and submit the breach of contract claim to the jury if there was any evidence in the record from which a reasonable factfinder could find that defendants had an express or implied contract with OIA “in which defendants specifically agreed to prepare and provide notice of termination of the lease in a timely manner, as requested by OIA,” as well as evidence that defendants “breached the contract by failing to prepare and provide notice of termination of the lease in a timely manner.” Viewed in the light most favorable to plaintiff, the record would permit a reasonable factfinder to find that

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12 Plaintiff alleged, in relevant part:

“OIA and defendants entered into a contract in which defendants specifically agreed to prepare and provide notice of termination of the lease in a timely manner, as requested by OIA. The parties exchanged mutual promises in consideration of the contract.

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“Under the contract, OIA has performed all conditions precedent on its part to be performed, or performance is excused.

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“Defendants breached the contract by failing to prepare and provide notice of termination of the lease in a timely manner.

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“As a result of defendants’ breach, OIA (and [plaintiff] as OIA’s assignee) has been damaged in the amount of $402,552, which it would not have paid to [Winthrop] had defendants performed their obligation under the contract, and in the amount of $34,965.42, which OIA reasonably and necessarily paid to Minnesota counsel for attorney fees and costs to settle the dispute caused by defendants’ breach.”

Although, as we explained earlier, this case does not involve any statute-of-limitation issues that required plaintiff to satisfy the Securities–Intermountain standards for pursuing a breach of contract claim, we note that plaintiff did allege that defendants contracted with plaintiff to perform a specific task—the timely filing of the notice of lease termination—that is “irrespective of the general standard of care.”

13 We note that plaintiff alleged the breach of contract claim against both defendant attorney and defendant law firm. Before this court, the parties have not argued that we should analyze the directed verdict on the breach of contract claim differently for each defendant; accordingly, for purposes of this appeal, we treat both defendants as if they are in an identical position with respect to the breach of contract claim. In so doing, we do not intend to foreclose any arguments on remand as to whether both defendants are truly proper defendants on the breach of contract claim; it is not readily apparent that plaintiff had a contract with both the individual defendant and with the law firm.
OIA and defendants had an implied (if not an express) contract under which defendants agreed to timely provide notice of termination of the lease. In an implied-in-fact contract, “the parties’ agreement is inferred, in whole or in part, from their conduct.” Staley v. Taylor, 165 Or.App. 256, 262, 994 P.2d 1220 (2000) (citing Restatement (Second) of Contracts § 4 comment a (1979)). “The conduct that is relevant to the inference of assent is not limited to the parties’ actions at the commencement of the alleged relationship.” Montez v. Roloff Farms, Inc., 175 Or.App. 532, 536–37, 28 P.3d 1255 (2001). An implied-in-fact agreement arises “only where the natural and just interpretation of the acts of the parties warrants such conclusion.” Owen v. Bradley, 231 Or. 94, 103, 371 P.2d 966 (1962). “Frequently, implied-in-fact contracts arise because an accepted course of conduct would permit a reasonable juror to find that the parties understood that their acts were sufficient to manifest an agreement.” Staley, 165 Or.App. at 262 n. 6, 994 P.2d 1220 (citations omitted).

Here, plaintiff presented evidence of the following conduct: OIA, through its CFO, Sether, notified defendants that it wanted defendants to “[p]rovide official notice of intent to Terminate the Lease.” As to that goal, OIA also told defendants that the notice should occur “ASAP.” OIA provided defendants with a billing code, which indicated an intention to pay defendants for their services. Defendants immediately began working on the project, with knowledge that their task was to help OIA get out of the lease “ASAP,” and a promise to “follow up * * * shortly.” Ultimately, defendants did, in fact, prepare the termination notice, and then billed plaintiff for that service.

From that evidence of the course of conduct between OIA and defendants, a reasonable factfinder could find that OIA and defendants had an implied contract under which defendants agreed to send a timely notice of termination of contract and that defendants breached that agreement when they did not promptly send the notice of termination. The trial court therefore erred in granting defendants’ motion for a directed verdict on the breach of contract claim.

We conclude further that the error requires reversal of the dismissal of the breach of contract claim. The court’s ruling “substantially affect[ed]” plaintiff’s rights because it resulted in the dismissal of a claim that should have been considered by the jury. We recognize that the erroneous grant of a directed verdict on a claim does not categorically require reversal; if the verdict on claims that were submitted to the jury demonstrates that the jury necessarily would have rejected one or more elements of the claim that was taken away from it, then we will not deem the erroneous grant of a directed verdict to have “substantially affect[ed]” the plaintiff’s rights under ORS 19.415(2). Piazza v. Dept. of Human Services, 261 Or.App. 425, 437–39, 323 P.3d 444, rev.

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14 An express contract is no different in legal effect from an implied-in-fact contract. Staley v. Taylor, 165 Or.App. 256, 262, 994 P.2d 1220 (2000) (citing Restatement (Second) of Contracts § 4 comment a (1979)). “The only difference between them is the means by which the parties manifest their agreement.” Staley, 165 Or.App. at 262, 994 P.2d 1220. “In an express contract, the parties manifest their agreement by their words, whether written or spoken.” Id. Accordingly, based on the e-mail correspondence alone between plaintiff and defendants, a reasonable factfinder potentially also could have found the existence of an express contract.
_den._, 355 Or. 879, 333 P.3d 333 (2014); _A.G. v. Guitron_, 238 Or.App. 223, 234, 241 P.3d 1188 (2010), _aff’d_, 351 Or. 465, 268 P.3d 589 (2011). Here, however, we have concluded that the trial court’s erroneous admission of mediation communications requires reversal of the jury’s verdict on the one claim that was submitted to it. Under those circumstances, we are unable to conclude that the jury’s verdict renders the erroneous grant of a directed verdict harmless.

Reversed and remanded.