

OREGON LAW UPDATE

Confidential Agreement Stays Confidential in Later Legal Malpractice Suit

From the desk of Jeff Eberhard: To what extent are confidential agreements and communications made during the course of mediation admissible in a later legal malpractice lawsuit?

Claims Pointer: 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. However, this general rule will not be enforced 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.

case in point...

Alfieri v. Solomon, A152391, 2014 WL 2608866 (Or. Ct. App. June 11, 2014)

Phillip Alfieri retained Glenn Solomon, an employment law attorney, to pursue claims against Alfieri's former employer by filing complaints with the Bureau of Labor and Industries (BOLI), and, later, by filing a civil complaint on Alfieri's behalf. Solomon later filed a motion to amend the complaint to add additional claims, which was granted, but never actually amended the complaint. Solomon performed only limited discovery in the underlying lawsuit and then proposed mediation.

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, Solomon continued to advise Alfieri regarding the proposed settlement package. During that time, Solomon again advised Alfieri regarding the potential value of settling the underlying lawsuit, but significantly reduced the dollar value of his recommendation. Alfieri 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, Alfieri continued to seek advice from Solomon regarding the enforceability of the agreement; during that period, Solomon failed to advise Alfieri that the former employer had not complied with some of the agreement's terms, calling into question the enforceability of the agreement.

Alfieri sued Solomon for legal malpractice, alleging that Solomon had been negligent and had breached his fiduciary duty to Alfieri. The complaint contained information on communications by the mediator, the content of communications between

Alfieri and Solomon during the 16-day period after the mediation conference (the post-mediation conference period), the settlement amount and contents of the final settlement agreement, and the content of communications between Alfieri and Solomon after Alfieri had signed the settlement agreement (the post-signing period).

Pursuant to ORCP 21 E, Solomon moved to strike the portions of Alfieri'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. After a hearing on the matter, the trial court granted defendant's motion to strike. The court then dismissed the complaint with prejudice for failing to state a claim.

On appeal, Alfieri argued that the trial court erred in striking three categories of communications, because they are nonconfidential: (1) all communications between Alfieri and Solomon relating to the substance of the settlement agreement; (2) communications occurring during the post-mediation conference period; and (3) communications between Alfieri and Solomon during the post-signing period.

The court noted that Alfieri agreed to keep the terms of the settlement agreement and settlement amount confidential. 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. That also covers the communications between Alfieri and Solomon relating to the substance of the settlement agreement as well as communications during the post-mediation period because they were communications made "in the course of or in connection with" mediation.



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However, the court noted that the communications in the post-signing period did not occur in the course of or in connection with the mediation process and thus is not confidential mediation communications. 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 Solomon and Alfieri 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. Thus, the trial court erred in striking those portions of Alfieri's complaint.



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