

# Mediation Confidentiality — Draft

## A Framework for Oregon Court-Connected Mediators

### Disclaimer

This resource is provided for information purposes only. The laws are complex to apply because they depend heavily on the specific facts of each case. **These materials and the related presentation are not a substitute for legal advice.**

### Trainers' Notes:

#### 1. Three-piece training package

This resource accompanies the June 12, 2026, Court System Training: *What Court-Connected Mediators Need to Know About Confidentiality*. It is one part of a three-piece training package:

- a. The live (or recorded) oral presentation
- b. The PowerPoint slide deck
- c. This supplemental handout.

Using all three together will help you navigate the nuances of mediation confidentiality more effectively. All materials will be posted on the Oregon Judicial Department's [Mediator Resources Webpage](#) in the Court-System Training section (under Session 4).

#### 2. How to use this document

This document is detailed, but it's organized so you can easily find what you need. It includes:

- a. Background on mediation confidentiality
- b. A script for explaining confidentiality to parties
- c. A framework for making disclosure decisions
- d. Guidance on key confidentiality issues

Use the Table of Contents on the next page to jump directly to the section(s) most relevant to your inquiry.

#### 3. Draft v. Final Handout

This document is being piloted on June 12, 2026. The final version will be posted later this summer. If you are accessing this material at a later date, please go to the Oregon Judicial Department's [Resources for Mediators](#) webpage to ensure you have the most recent version.

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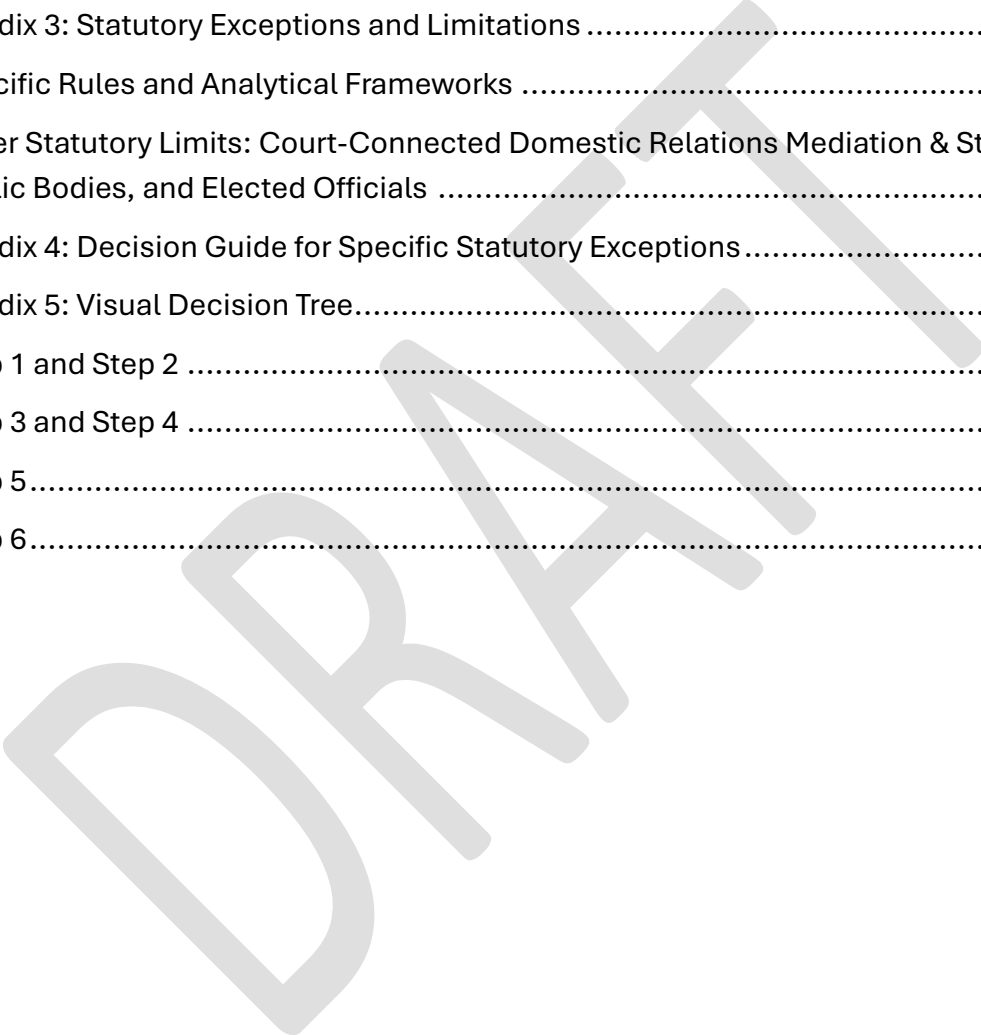
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## Purpose of Confidentiality

Confidentiality is meant to:

- Help people have open, honest conversations in mediation. It gives parties the freedom to explore options without worrying that what they share will later be used as evidence.
- Parties may feel more comfortable to:
  - Acknowledge responsibility
  - Offer apologies
  - Share personal or private business information and offer settlement ideas that they wouldn't otherwise want exposed in court or shared publicly.

Mediation confidentiality isn't a cloak of invisibility. It's a privacy screen, not a hiding place. Without the right safeguards, blanket confidentiality risks misuse in ways never intended.

Confidentiality is not meant to serve as a way for parties to:

- Avoid public-records laws
- Hide elder or child abuse
- Cover up plans to commit physical violence against someone
- Bury preexisting facts

Lawmakers tried to balance the need for honest, open mediation conversations with other important values, such as public accountability, government transparency, safety, and mandatory reporting of abuse. The statutory exceptions show how they tried to strike that balance.

To understand how these goals are supported in practice, it helps to look at how Oregon structures its mediation confidentiality laws.

## Overview of Oregon's Framework

### Oregon Statutes

Oregon mediation confidentiality is not organized around one single definition of 'confidentiality.' Instead, Oregon statutes explain:

- What is confidential
- What is not
- When confidential communications or agreements can be—or sometimes, must be—disclosed

See [Appendix 1](#) for a more in-depth overview of the legal framework. See [Appendix 2](#) for key definitions used in the legal framework. The statute shapes mediators' responsibilities, especially those working in court-connected programs.

## Court-Connected Mediator Obligations

Within Oregon's statutory framework, court-connected mediators have specific responsibilities. Under Chapter 12 of the [Uniform Trial Court Rules](#) (UTCRC), when mediating court-connected cases, mediators are required to:

1. **Disclose ethics standards** to the court and parties, including any applicable professional codes or rules (UTCRC 12.040(1))
2. **Follow confidentiality laws**, including ORS 36.220, 36.222, and 107.785 (UTCRC 12.040(2)).
3. **Explain key process issues** at or before mediation begins, such as the scope of confidentiality and how caucus information is handled (UTCRC 12.040(3)).

These responsibilities aren't just procedural; they directly affect mediators' credibility and exposure to risk.

## Why Mediators Should Care About Confidentiality

- Mediators should be able to clearly explain confidentiality, and any exceptions, so parties know what to expect. A solid grasp of confidentiality enables parties to exercise key mediator ethics principles, including informed decision-making and self-determination.
- At the very least, breaching confidentiality undermines trust in both mediation and the courts.
- Failing to maintain confidentiality can potentially expose a mediator to professional risk, including reputational damage, malpractice exposure, and possible civil liability if done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another. (ORS 36.210)

With those risks in mind, it's useful to understand the general rules that determine what is and isn't confidential in Oregon mediation.

## Confidentiality at a Glance

In Oregon, mediation communications are usually confidential, while final mediation (settlement) agreements usually are not. Certain factors can influence when, and to what extent, confidential communications can, or must, be disclosed. These factors include:

- State agency rules
- Public records laws
- Statutory exceptions
- Agreements between the parties, or in some situations, everyone involved (e.g., the parties, mediator, and mediation program)

Parties cannot restrict disclosures required by law. For example, they cannot make a public record confidential or stop a mandatory reporter from reporting something they are legally required to report.

## Explaining Confidentiality to Parties

Mediators should explain confidentiality, including how caucus information is handled, before mediation begins or at the start of mediation. The explanation should be in plain, understandable language that helps parties make informed choices about how they want to participate and what they choose to share or keep private during mediation. Mediators should also clearly outline any exceptions to confidentiality, so parties understand the limits.

In line with these goals, here is a script template for court-connected mediators. This template should not be used for cases involving non-executive branch state agency parties or state-agency regulatory mediators.

### Script Template

#### Introduce the Purpose of Confidentiality.

“I want to start by explaining how confidentiality works, so you know what to expect and can make informed choices throughout the process.”

#### Explain the General Rule.

“Mediation in Oregon is confidential. That means three things generally:

1. What you say in mediation stays private,
2. It can't be requested or obtained through discovery, which is the legal process for collecting information in a court case, and
3. It can't be used as evidence in court.

If you reach an agreement in mediation today, the final settlement agreement itself is not confidential unless you both agree to keep it confidential.

#### Outline the Exceptions.

“There are some exceptions to that general rule:

1. I am required to tell the court the outcome of mediation. For example, whether or not you reach an agreement.
2. You may share mediation communications with people you have a legally privileged relationship with, such as a spouse, attorney, therapist, or religious leader. If you want to share information with anyone else, you may be able to, but only if everyone involved agrees. If you're thinking about sharing something, let me know so we can determine whether you can share.
3. Oregon law still requires mandatory reporters (including any of you if this applies) to report suspected child or elder abuse. Confidentiality does not apply to those disclosures. Are either of you mandatory reporters? [Mediator should state their own reporting status.]
4. There are a few other limited legal exceptions—such as sharing something to try to prevent serious physical harm, mediator malpractice, enforcing the settlement, or when mediators use

## Mediation Confidentiality: A Framework for Oregon Court-Connected Mediation

de-identified case examples for training. If something comes up that might require sharing information outside the mediation, I will tell you beforehand whenever possible.”

### Differentiate Joint Sessions and Caucus.

“If I meet privately with either of you, I will keep what you say private unless you give me permission to share it.” [If your approach differs, refer to your written agreement to mediate.]

### Seek agreement for any non-statutory exceptions.

[Explain any applicable non-statutory exceptions (if any, those must be outlined in the written agreement form) and seek consent to those exceptions.]

### Summarize Expectations.

“To uphold confidentiality, participating in mediation means you agree:

1. Not to audio or video-record mediation, and not to take pictures of anyone or anything (including whiteboards, screenshare, or chat messages).
2. Not to share mediation communications outside of a privileged relationship or unless everyone agrees that you can share it. This includes not posting about mediation on social media.
3. Not to ask me or the mediation program to share confidential communications.
4. (For remote sessions only): To stay in a private location where no one else can overhear or see the session. If your space stops being private, please let me know right away.”

[Note: These are common examples. Only include those that apply in your court, and consult your local court program to determine whether any additional expectations should be added.]

### Emphasize Self-Determination and Choice.

“You choose what information you want to share during mediation. Confidentiality gives you an opportunity to talk openly and consider options without those conversations being used outside the mediation.”

### Invite Questions.

“Do you have any questions about confidentiality?”

## Basic Analytical Model for Confidentiality Disclosure Decisions

If something was created specifically for mediation or shared exclusively during mediation, treat it as confidential unless the law, court rules, agency rules, or an agreement (sometimes written) says otherwise.

Don't share confidential mediation communications or confidential mediation agreements unless legally allowed or required to do so. Use these steps to figure out whether something can, or must, be shared:

**1. Name who is involved.**

- a. Private parties? Court-connected mediator? Domestic relations case? Public body?
- b. Executive branch state agency party? Executive branch state agency mediator of a regulatory matter? If yes, stop here. Refer to confidentiality resources from the [Oregon Department of Justice](#) instead.

**2. Identify what's being considered for disclosure and its default confidentiality rule. Is it confidential?**

- a. Mediation communication, final agreement term, draft settlement agreement, pre-existing document, public record, or something from outside mediation?
- b. Confidential, not confidential, inadmissible, closed record, public record, ordinary discovery rule, or court-report requirement?

**3. Does an ORS Chapter 36 exception allow or require disclosure?**

Check Oregon Revised Statutes (ORS) Chapter 36

**4. Do any statutes outside of ORS Chapter 36 statute or applicable rules allow, require, or limit disclosure?**

Check ORS Chapter 107 (Domestic Relations Mediators), the Oregon Rules of Civil Procedure, evidentiary rules, the Uniform Trial Court Rules (UTCrs), Supplement Local Court Rules (SLRs), and professional licensing rules (if applicable)

**5. Does a written agreement permit the otherwise confidential communications to be shared?**

Who agreed to what? What exactly does the agreement to mediate or other written agreement cover? Does it permit or require disclosure of something otherwise confidential?

**6. Apply the ethics standards you follow.**

Even if you can disclose, it doesn't mean you should.

The decision tree below builds on this model and provides a structured approach to working through these questions.

## The Decision Tree

Those basic questions get you started, but most situations need more careful thinking. This decision tree walks you through how to decide whether something is confidential and, if so, when someone can or must share confidential mediation communications. [Appendix Five](#) provides a visual guide for these steps.

### Step 1: Name who is involved.

Review [Step 1](#) of the Visual Decision Tree.

Read about limitations related to State Agencies, Public Bodies, and Elected Officials at the end of [Appendix 3](#).

Using this framework begins with identifying the people involved, because the rules differ depending on who is participating.

1. Is the mediator an executive branch state agency mediator of a regulatory matter, or is an executive branch state agency a party? ([ORS 36.220\(8\)](#))
  - a. If yes to either, stop here. Do not rely on this decision tree. Refer to the [Oregon Department of Justice confidentiality resources](#) instead.
  - b. If no to both (for example, all private parties and non-state agency entities), [go to step 2](#).

**Step 2: Identify what’s being considered for disclosure and its default confidentiality rule. Is it confidential?**

Review [Step 2](#) of the Visual Decision Tree.

What is it?	Confidential?	Disclosable?	Reference
Pre-existing info or subject to discovery	Not confidential	Use ordinary legal, privacy, or evidence rules to decide whether it can be shared.	<a href="#">ORS 36.220(3)</a>
Already a public record	Not confidential	Use ordinary legal, privacy, or evidence rules to decide whether it can be shared.	<a href="#">ORS 36.220(4)</a>
Communication that took place before mediation began or after it ended	Not confidential	Use ordinary legal, privacy, or evidence rules to decide whether it can be shared.	<a href="#">ORS 36.110</a> <a href="#">ORS 36.220(1)</a> <a href="#">Case law</a>
Final Agreement Terms	Not confidential unless parties agree to make a term confidential.	Yes, unless the parties agreed to make the term confidential.	<a href="#">ORS 36.220(2)</a>
Mediation Communication ( <a href="#">Defined in ORS 36.110(7)</a> )	Confidential unless a statutory exception allows or requires disclosure.	Only if an exception allows or requires disclosure. <a href="#">Go to step 3</a> to determine if it can be disclosed.	<a href="#">ORS 36.220(1)</a>

1. If it is not confidential, use ordinary legal, privacy, or evidence rules to decide whether it can be shared.
2. If it is confidential, [go to step 3](#).

### Step 3: Check whether an ORS Chapter 36 exception allows or requires disclosure.

The statutory exceptions are complex to apply because they depend heavily on the specific facts of each case. Step 3 walks you through how to determine whether a statutory exception applies.

#### Supplemental Resources for Step 3

Two appendices are provided to help a court-connected mediator decide what the statutory exceptions are and whether an exception applies. Use them in Step 3 of the Decision Tree.

- [Appendix 3](#): Description of the above-listed statutory exceptions. It states the rule, who may disclose, the proper recipient, and the key limits.
- [Appendix 4](#): Decision guide for determining whether a statutory exception applies.

#### Instructions for Step 3

1. To determine whether a statutory exception applies, continue through Step Six of the Decision Tree only when the outcome could be either:
  - a. Disclosure is required, or
  - b. Disclosure is permitted but not required.
2. If the legal framework does not allow disclosure, stop the analysis and uphold confidentiality. You do not need to complete the remaining steps of the Decision Tree once you determine that the information cannot be disclosed.

#### Broad ORS 36 Statutory Exception Categories for Step 3

Here are the **main categories** of ORS Chapter 36 statutory exceptions by disclosure purpose.

**Each exception is narrower than its category title, so do not treat these as blanket rules.**

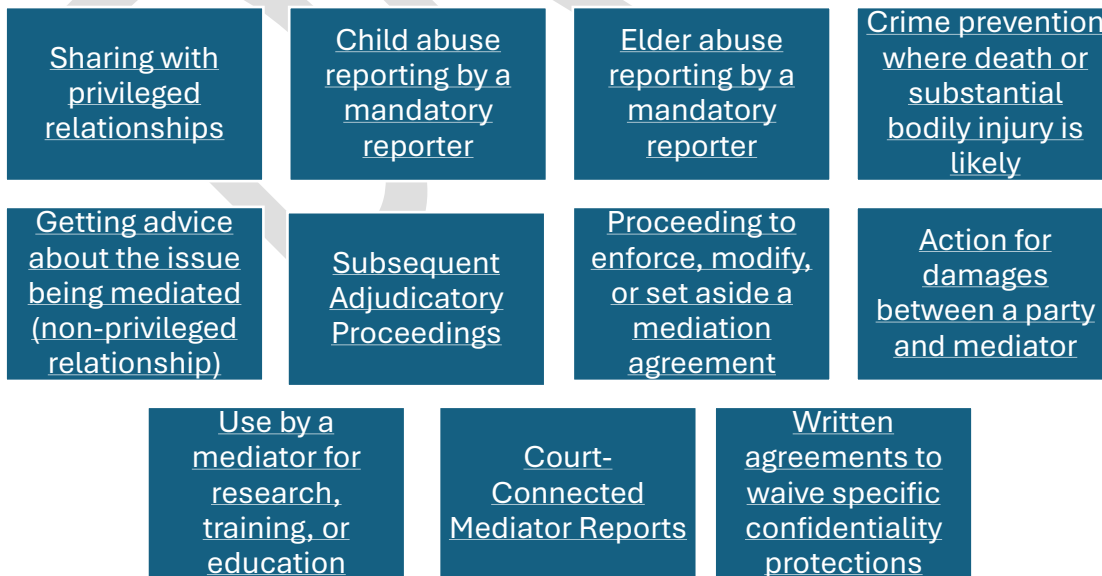


Figure 1. Categories of Oregon's statutory exceptions (individual exceptions are narrower than titles; do not treat them as blanket rules)

### Decision Process for Step 3

Review [Step 3](#) of the Visual Decision Tree.

1. Triage: Does the possible disclosure seem to fall within any of the above general statutory exception categories?
  - a. If not, the disclosure is not allowed by ORS Chapter 36 but may be allowed by Steps 4 or 5. The next step is to consider whether other statutes or court rules affect the ability to disclose. [Go to step 4.](#)
  - b. If yes, continue.
2. Does the possible disclosure meet all four components of the **exact statutory exception**?
  - a. [Use the Statutory Exceptions section in Appendix 4 to help make that determination.](#) It follows the following format.
    - i. Who is allowed to share
    - ii. Authorized recipient
    - iii. Allowed purpose
    - iv. Limitations or conditions
  - b. If the possible disclosure does not meet the exact statutory exception, the disclosure is not allowed by ORS Chapter 36 but may be allowed by Steps 4 or 5. The next step is to consider whether other statutes or court rules affect the ability to disclose. [Go to step 4.](#)
  - c. If it meets the exact statutory exception, does the law require disclosure?
    - i. If yes, unless another statute limits otherwise, disclosure is required. If the mediator is the required sharer, say only what the law requires, and nothing more. Disclose in a way that upholds [mediator ethics](#) (see step 6) to the greatest extent possible.
    - ii. If not, the disclosure may be allowed but not required: the next step is to consider whether other statutes or court rules affect the ability to disclose. [Go to step 4.](#)

### Step 4: Check whether any statutes outside of ORS Chapter 36 or applicable rules allow, require, or limit disclosure.

Review [Step 4](#) of the Visual Decision Tree

1. Do any statutes outside of ORS Chapter 36 allow, require, or limit the disclosure?
2. Do any rules allow, require, or limit disclosures (for example, the Oregon Rules of Civil Procedure, evidentiary rules, [Uniform Trial Court Rules](#), Oregon State Bar's [Oregon Rules of Professional Conduct](#), and the court's [Supplemental Local Rules](#))?
3. If any statute or rule applies, use it to decide if disclosure is allowed, required, or restricted.
4. After completing this step, regardless of whether another statute or rule applies, go to [Step 5](#) to determine whether any written agreement changes the default confidentiality rules.

## Step 5: Determine whether a written agreement allows or requires disclosure

### [ORS 36.220\(1\)\(b\)](#)

Review [Step 5](#) of the Visual Decision Tree.

1. Does a written agreement (usually in an agreement to mediate) exist?
  - a. If no, disclosure is not allowed unless a law or rule outside ORS 36 permits otherwise. Uphold confidentiality.
  - b. If yes, continue.
2. Does the written agreement change the default confidentiality and disclosure rules?
  - a. If no, disclosure is not allowed unless a law or rule outside ORS 36 permits otherwise. Uphold confidentiality.
  - b. If yes, continue.
3. If a written agreement (usually in an agreement to mediate) exists, identify who it covers:
  - a. If it covers a party or another non-mediator participant: the disclosure is permitted according to the written agreement unless other limits apply.
  - b. If it covers the mediator:
    - i. What is the mechanism for the written agreement?
      - A. The mediator's initial written agreement to mediate form.
        1. Does the agreement require the mediator to disclose:
          - a. If yes, disclose according to the terms of the Agreement to Mediate form unless other limits apply. Say only what the agreement requires and nothing more
          - b. If no, the disclosure is allowed (not required) according to the terms of the Agreement to Mediate form unless other limits apply. Continue to [Step 6 \(Mediator Ethics\)](#) to determine whether to disclose.
        - B. A subsequent written disclosure agreement was initiated by a party to authorize the mediator to share specific confidential information.
          1. Do all parties agree with the disclosure in writing?
            - a. If no: Disclosure is not allowed unless a law or rule outside ORS 36 requires otherwise. Uphold confidentiality.
            - b. If yes, continue.
          2. What is the disclosure related to?
            - a. A subsequent proceeding: The mediator is not obligated to disclose and may not be permitted to disclose. Go to the [subsequent proceeding](#)

exception section in Appendix 3 to determine if the disclosure is permitted.

- b. Something other than a subsequent proceeding: disclosure is allowed but not required according to the terms of the written agreement unless other limits apply. Continue to Step 6 ([mediator ethics](#)) to determine whether to disclose.
- C. A subsequent written disclosure agreement initiated by the mediator
1. Do all parties agree with the disclosure in writing?
    - a. If no: Disclosure is not allowed unless a law or rule outside ORS 36 requires otherwise. Uphold confidentiality.
    - b. If yes, continue.
  2. What is the disclosure related to?
    - a. Something other than a subsequent proceeding: disclosure is allowed according to the terms of the written agreement unless other limits apply. Continue to Step 6 ([mediator ethics](#)) to determine whether to disclose.
    - b. A subsequent proceeding: Does the mediation program agree with the disclosure?
      - i. If no: Disclosure is not allowed unless a law or rule outside ORS 36 requires otherwise. Uphold confidentiality.
      - ii. If yes, the disclosure is allowed according to the terms of the written agreement unless other limits apply. Continue to Step 6 ([mediator ethics](#)) to determine whether to disclose.

## Step 6: Apply Mediator Ethics

Once you know whether disclosure is allowed or required, consider mediator ethics before deciding whether and how to move forward. Under [UTCRC 12.040](#), mediators handling court-connected cases must inform both the court and the parties of the applicable ethics codes, professional standards, and relevant rules.

1. The first step for Step 6 is to determine: Is the disclosure allowed or required?
  - a. If required, apply the [ethics standards](#) (Appendix 1) you follow to guide how you disclose, and disclose only what is needed.
  - b. If allowed, apply the [ethics standards](#) (Appendix 1) you follow to decide whether to disclose. Consider which choice—disclosing or maintaining confidentiality—best aligns with those standards
    - A. Will you disclose?
      - i. If yes: apply your ethics standards to decide how to disclose and disclose only what is needed.
      - ii. If no: maintain confidentiality.
2. Key ethics considerations include:
  - a. Self-determination
  - b. Informed decision making
  - c. Impartiality (including conflicts of interest)
  - d. Competence (also known as quality of the process)
  - e. Advertising
  - f. Fees
  - g. Advancement of mediation
  - h. Dual roles or hybrid processes
  - i. Any other applicable ethics principle to which the mediator subscribes.

Additional mediator ethics resources are available from the recording, *What Courts Should Know About Mediator Ethics*:

- [Video replay \(YouTube\)](#)
- [PowerPoint Slides](#)
- [Session Handout](#)

## Proactive Measures

While the decision tree helps mediators analyze disclosure questions as they arise, many confidentiality issues can be managed through strong up-front practices. Mediators should:

- Understand and comply with confidentiality laws (and exceptions)
- Explain confidentiality (and any exceptions) to parties as soon as reasonably possible.
- Provide the parties with an agreement-to-mediate form to review and sign, especially if disclosure practices differ from the statute (see Figure 2).

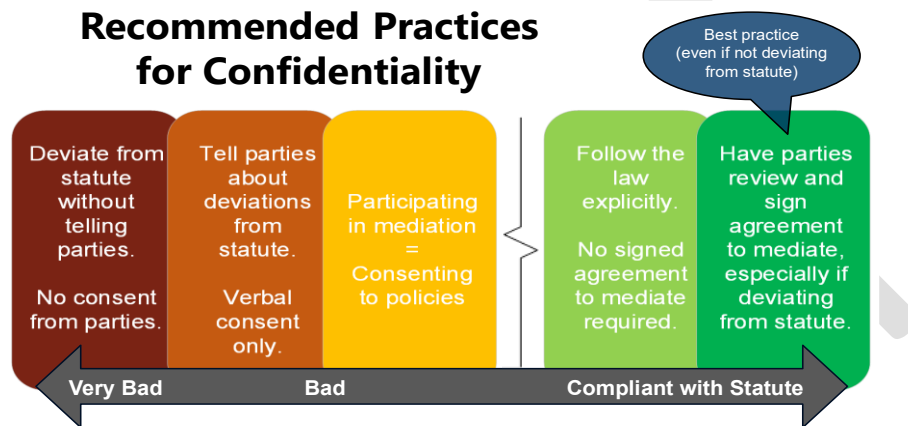


Figure 2

## Practice Safeguards for Disclosures

In addition to taking proactive measures at the start of mediation, use these safeguards whenever a disclosure question arises:

**Pause before disclosing.** Confidentiality errors are usually made in haste, not malice.

**Identify the exact authority.** Do not say 'there is an exception' until you can name it and confirm it applies.

**Match the exception to the facts.** Who may disclose, to whom, for what purpose, and with what limits?

**Use minimum necessary disclosure.** Say only what the law, rule, or agreement requires or allows.

**Separate mediator ethics from legal permission.** "May disclose" is not the same as "should disclose."

**Capture the Rationale.** Document your reasoning for sensitive disclosures (e.g., abuse reporting, threats of future violence, public body matters, or subpoenas).

**Consult your local court program.** Consult your local court program to account for local processes not covered in this resource and reach out to the court's mediation contact when further direction is needed.

# Appendix 1: Legal Framework

## Appendix 1: Legal Framework

For a plain language comparison of the key confidentiality-related statutes, review these [PowerPoint Slides](#), which have been posted to OJD's [Resources for Mediators](#) webpage.

### Oregon Revised Statutes, Chapter 36—Mediation and Arbitration

- [ORS 36.110](#): Definitions for ORS 36.100 to 36.238
  - Key confidentiality-related definitions are also listed in [Appendix 2](#).
- [ORS 36.195](#): Presence of attorney; authority and duties of mediator; notice to court at completion of mediation
- [ORS 36.210](#): Liability of mediators and programs
- [ORS 36.220](#): Confidentiality of mediation communications and agreements; exceptions
- [ORS 36.222](#): Admissibility and disclosure of mediation communications and agreements in subsequent adjudicatory proceedings
- [ORS 36.224](#): State agencies; confidentiality of mediation communications; rules
- [ORS 36.226](#): Public bodies other than state agencies; confidentiality of mediation communications
- [ORS 36.228](#): Mediations in which two or more public bodies are parties
- [ORS 36.230](#): Public bodies; confidentiality of mediation agreements
- [ORS 36.232](#): Disclosures allowed for reporting, research, training and educational purposes
- [ORS 36.234](#): Parties to mediation
- [ORS 36.236](#): Effect on other laws

### Oregon Revised Statutes, Chapter 107—Domestic Relations

- [ORS 107.755](#): Court-ordered mediation
- [ORS 107.765](#): When referral to mediation permitted (Report to Court of Outcome of Mediation)
- [ORS 107.785](#): Privacy of proceedings (Confidentiality of Communications; Records)

## Case Law

- [Bidwell v. Bidwell](#) (2001 OR Ct. App.)
- [Alfieri v. Solomon](#), 358 Or. 383 (2015)

## Rules

- **For court-connected mediators:**
  - [Uniform Trial Court Rules](#)—Chapter 12
  - [Supplemental Local Rules](#) are different in each court. Some courts include confidentiality rules and others do not. The details of such rules vary.
- **For mediators who are licensed members of the Oregon State Bar:**
  - [Oregon Rules of Professional Conduct](#)

## Ethics standards for mediators

- **General**
  - [Model Standards of Conduct for Mediators](#): Adopted by the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution
  - [Core Standards of Mediation Practice](#): Adopted by the Oregon Mediation Association
- **Family Mediation**
  - [Model Standards for Family and Divorce Mediation](#) (AFCC)
  - [Standards of Practice for Professional Family Mediators](#) (APFM)

## Other Resources

- **Oregon Public Meetings Law**
  - [Oregon public meeting laws \(ORS 192.610 to ORS 192.705\)](#)
  - [Other public meeting law resources](#)
- [Oregon Department of Justice confidentiality resources](#)

## Appendix 2: Definitions

### Appendix 2: Definitions

#### ORS 36.110

- (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. (A government or public entity covered by Oregon public body rules.)
- (11) State Agency** means any state officer, board, commission, bureau, department, or division thereof, in the executive branch of state government.

#### Other Statutory Definitions

- 1. Party** means a litigant or the litigant’s attorney (UTCRC 1.110(10)). Mediators should be aware:
- a. A litigant could be a person or an entity (for example, a corporation, non-profit, limited liability company, business trust, or another legally recognized organization).
  - b. For practical purposes, when a litigant is an entity, the person who comes to mediation is there as the entity’s authorized representative. If needed, the representative may consult with others at the organization while still preserving mediation confidentiality.

## Appendix 2: Definitions

2. **Party to Mediation**([ORS 36.234](#)) For the purposes of confidentiality provisions in ORS 36.220 through ORS 36.238, a person, state agency, or other public body is considered a party to a mediation if that person or entity:
- a. participates in the mediation, and
  - b. has a direct interest in the controversy being mediated.

Merely conducting the mediation, making it available, or serving as an informational resource does not qualify one as a “party” to the mediation.

### Other Plain Language Definitions

**Admissibility:** Whether something is allowed to be used as evidence in court.

**Discovery:** A legal process where parties must share information and specific evidence before trial.

**Evidence:** Information a court can use to decide what happened and what the outcome of the case should be.

**Rules:** In this document, *rules* refer to legally enforceable requirements, such as court rules and procedures, professional regulations, and binding ethical standards. It does not include organizational policies or ethical standards that are not legally binding.

**Regulatory authority** means a state agency that sets rules, issues licenses, or enforces compliance over certain matters.

**State Agency Regulatory-Mediator:** In Oregon, this means that an executive branch state agency both has regulatory authority over a particular subject matter and acts as a mediator in disputes related to that subject matter.

**Subsequent adjudicatory proceeding:** A later court case, administrative proceeding, arbitration, or related discovery process.

# Appendix 3

## Appendix 3: Statutory Exceptions and Limitations

### Specific Rules and Analytical Frameworks

Appendix 3 states the rule, who may disclose, the proper recipient, and the key limits. It is designed to help a court-connected mediator decide whether a specific statutory exception allows or requires disclosure of confidential mediation communications or agreements.

Appendix 3 should be used alongside the broader Decision Tree in [Step 3](#) and [Appendix 5](#). If disclosure is not allowed under an exception category, unless a different exception category applies, go to [Step 4](#) of the Decision Tree. If you still aren't sure whether a statutory exception applies, [Appendix 4](#) provides a Decision Guide for determining whether a statutory exception applies.

As a reminder, this appendix does not address every confidentiality scenario. It does not cover mediations involving an executive branch state agency party or an executive branch state agency regulatory mediator. For those matters, go to the [Other Statutory Limits for State Agencies, Public Bodies, and Elected Officials](#) for general information and use the [Oregon Department of Justice](#) confidentiality resources or agency-specific guidance.

### Sharing with privileged relationships ([ORS 36.220\(7\)](#))

- 1. Who can share:** A party to mediation (not the mediator)
- 2. Authorized recipient:** To a person if the party's communication with that person is privileged under ORS 40.010 to 40.585 (for example, but not limited to: a party's lawyer, legal spouse, psychotherapist, physician, member of clergy, victim advocate) or another provision of law
- 3. Limitations:** Privileges can be set aside for things like waiver, consent, crime or fraud, future harm, disputes with the professional, etc.

*If you want help deciding if this exception applies, [go to the related Decision Guide section in Appendix 4](#). If you do not need further help with this exception, return to [Step 3](#) of the decision tree to determine whether any other ORS Chapter 36 exceptions apply. If none apply, go to [Step 4](#) of the Decision Tree.*

### Child abuse reporting by a mandatory reporter ([ORS 36.220\(5\)](#))

- 1. Who can share:** Anyone required under ORS 419B.010 to report suspected child abuse who has reasonable cause to believe that a child with whom they came into contact suffered abuse or any person with whom they came into contact abused a child
- 2. Authorized recipient:** To the centralized child abuse reporting system described in [ORS 418.190 \(Centralized child abuse reporting system\)](#) or to a law enforcement agency within the county where the person making the report is located at the time of the contact.

## Appendix 3: Statutory Exceptions and Limitations

- 3. Limitation: This exception is narrow;** If you are not obligated by ORS 419B.010 to report child abuse, then you are not permitted to report such communications unless there is a [written agreement](#) to do so.

*If you want help deciding if this exception applies, [go to the related Decision Guide section in Appendix 4](#). If you do not need further help with this exception, return to [Step 3](#) of the decision tree to determine whether any other ORS Chapter 36 exceptions apply. If none apply, go to [Step 4](#) of the Decision Tree.*

### Elder abuse reporting by a mandatory reporter ([ORS 36.220\(5\)](#))

- 1. Who can share:** Anyone required under ORS 124.050 to 124.095 to report elder abuse who has reasonable cause based on a mediation communication to believe that a person 65 years of age or older with whom they came into contact has suffered abuse, or that any person with whom they came into contact has abused a person 65 years of age or older.
- 2. Authorized recipient:** By telephone or otherwise to the local office of the Department of Human Services or to a law enforcement agency within the county where the person making the report is at the time of contact.
- 3. Limitation: This exception is narrow;** If you are not obligated by ORS 124.050 to 124.095, then you are not permitted to report such communications unless there is a [written agreement to do so](#).

*If you want help deciding if this exception applies, [go to the related Decision Guide section in Appendix 4](#). If you do not need further help with this exception, return to [Step 3](#) of the decision tree to determine whether any other ORS Chapter 36 exceptions apply. If none apply, go to [Step 4](#) of the Decision Tree.*

### Crime prevention where death or substantial bodily injury is likely. ([ORS 36.220\(6\)](#))

- 1. Who can share:** A party or the mediator may disclose confidential communications if they *reasonably believe* the disclosure is necessary to prevent a party from committing a crime that is likely to result in death or substantial bodily injury to a *specific person*.
- 2. Authorized recipient:**
  - a. The statute does not name a specific person or entity. The disclosing party or mediator must *reasonably believe* that disclosing to that person or agency is necessary to prevent such crime.
  - b. Recommended practice: Consider whether the person or agency you are sharing with can realistically help prevent the crime (for example, law enforcement, the intended target or their representative, or someone connected to the party, such as a lawyer, advocate, guardian, spouse, or roommate).

## Appendix 3: Statutory Exceptions and Limitations

- c. The range of possible recipients is broad, but disclosure must still meet the “necessary to prevent the crime” standard.

### 3. Limitations:

- a. To apply this exception, both of the following must be true:
  - i. The party or mediator reasonably believes that a party is about to commit a crime likely to cause death or substantial bodily injury to a specific person.
  - ii. Disclosing the information to a specific person or agency is necessary to prevent that crime.
- b. Additional limits:
  - i. The exception applies only to preventing a future crime. It does not allow disclosure of past crimes.
  - ii. The exception is narrow.
    - A. It does not allow disclosure to prevent crimes that would cause only financial, emotional, reputational, or other non-bodily-injury harms.
    - B. It does not allow disclosure of plans to attempt to die by suicide unless the plan involves committing a crime (for example, using a firearm in a manner that violates the law).

*If you want help deciding if this exception applies, [go to the related Decision Guide section in Appendix 4](#). If you do not need further help with this exception, return to [Step 3](#) of the decision tree to determine whether any other ORS Chapter 36 exceptions apply. If none apply, go to [Step 4](#) of the Decision Tree.*

### Getting advice about the issue being mediated (non-privileged relationship) (ORS 36.220(7))

- 1. Who can share:** A party (as a reminder, this includes the party’s attorney, and if the party is a business or organizational entity, the entity itself)
- 2. Authorized recipient:** Any *other person* or entity (in other words, not AI or technological systems) if the following limitation has been met.
- 3. Limitation:** Disclosing to any person outside a privileged relationship is only allowed if all parties in the mediation agree in writing.

*If you want help deciding if this exception applies, [go to the related Decision Guide section in Appendix 4](#). If you do not need further help with this exception, return to [Step 3](#) of the decision tree to determine whether any other ORS Chapter 36 exceptions apply. If none apply, go to [Step 4](#) of the Decision Tree.*

## Appendix 3: Statutory Exceptions and Limitations

### Subsequent adjudicatory proceedings ([ORS 36.222](#))

1. Who can share	Party ( <a href="#">ORS 36.222(2)</a> )	Mediator ( <a href="#">ORS 36.222(3)</a> )
2. With whom or what	In a subsequent adjudicatory proceeding	In a subsequent adjudicatory proceeding (The mediator has an independent right not to do so.)
3. Condition for this exception	Only if all parties to the mediation agree in writing to the disclosure.	Only if all parties to the mediation, the mediator, <i>and the mediation program</i> agree in writing to the disclosure.

If you want help deciding if this exception applies, [go to the related Decision Guide section in Appendix 4](#). If you do not need further help with this exception, return to [Step 3](#) of the decision tree to determine whether any other ORS Chapter 36 exceptions apply. If none apply, go to [Step 4](#) of the Decision Tree.

### Proceeding to enforce, modify, or set aside a mediation (settlement) agreement ([ORS 36.222\(4\)](#))

- 1. Who can share:** Not specified in statute.
- 2. Authorized recipient:** In a proceeding to enforce, modify, or set aside a mediation agreement.
- 3. Limitations or conditions for this exception:**
  - Confidential mediation communications and confidential mediation (settlement) agreements may be disclosed *to the extent necessary to prosecute or defend the matter*.
  - If a party asks, the court can seal parts of the record, so the information is not revealed to anyone other than the parties to the agreement.

If you want help deciding if this exception applies, [go to the related Decision Guide section in Appendix 4](#). If you do not need further help with this exception, return to [Step 3](#) of the decision tree to determine whether any other ORS Chapter 36 exceptions apply. If none apply, go to [Step 4](#) of the Decision Tree.

### Action for damages between a party and a mediator ([ORS 36.222\(5\)](#))

- 1. Who can share:** Not specified in statute.
- 2. Authorized recipient:** In an action for damages or other relief between a party to a mediation and a mediator or mediation program
- 3. Limitations or conditions for this exception:**
  - Confidential mediation communications and confidential mediation agreements may be disclosed *to the extent necessary to prosecute or defend the matter*.

## Appendix 3: Statutory Exceptions and Limitations

- b. If a party asks, the court may seal any part of the record of the proceedings to prevent further disclosure of the mediation communications or agreements.

*If you want help deciding if this exception applies, [go to the related Decision Guide section in Appendix 4](#). If you do not need further help with this exception, return to [Step 3](#) of the decision tree to determine whether any other ORS Chapter 36 exceptions apply. If none apply, go to [Step 4](#) of the Decision Tree.*

### Use by a mediator for research, training, or education ([ORS 36.232\(4\)](#))

- 1. Who can share:** A mediator or mediation program
- 2. Authorized recipient:** With others for research, training, or educational purposes under the following limitations.
- 3. Limitations for this exception:**
  - a. Non-identifying disclosures: no party consent needed.
  - b. Identifying disclosures: must be explicitly agreed to in writing by the parties.

*If you want help deciding if this exception applies, [go to the related Decision Guide section in Appendix 4](#). If you do not need further help with this exception, return to [Step 3](#) of the decision tree to determine whether any other ORS Chapter 36 exceptions apply. If none apply, go to [Step 4](#) of the Decision Tree.*

### Court-connected mediator reports to the court.

- 1. Civil Court-Connected Mediator Reports ([ORS 36.232](#))**
  - a. Who can share:** Civil Court-Connected Mediator under [ORS 36.200\(1\)](#)
  - b. Authorized recipient:** Notice to the court at completion of mediation ([ORS 36.195\(5\)](#))
  - c. Conditions:** Within 10 judicial days of the completion of the mediation (or within the timeframe expected by the local court if less than 10 judicial days), the mediator shall notify the court whether an agreement was reached by the parties (or not).
  - d. Limitations:**
    - i. The mediator may only report the outcome of mediation (Agreement, No Agreement, Mediation Did Not Occur, or Failure to Appear).
    - ii. If the parties do not reach an agreement, the mediator shall report that fact only to the court, but shall not make a recommendation as to the resolution of the dispute without the written consent of all parties or their legal counsel. The action shall then proceed in the normal fashion on either an expedited or regular pretrial list.

*If you want help deciding if this exception applies, [go to the related Decision Guide section in Appendix 4](#). If you do not need further help with this exception, return to [Step 3](#) of the decision*

## Appendix 3: Statutory Exceptions and Limitations

*tree to determine whether any other ORS Chapter 36 exceptions apply. If none apply, go to [Step 4](#) of the Decision Tree.*

### **2. Domestic Relations Court-Connected Mediator Reports ([ORS 107.765\(2\)](#))**

**a. Who can share:** Domestic Relations Court-Connected Mediator under [ORS 107.775\(2\)](#)

**b. Authorized recipient:** Notice to the court and parties' attorneys at completion of mediation and a written summary of the agreement.

#### **c. Conditions and Limitations:**

- i. Once mediation concludes, the mediator shall notify the court and the parties' lawyers whether the parties reached an agreement during mediation (or not).
  - A. The mediator may only report basic outcomes of mediation information, such as:
    1. Type of mediation services provided
    2. The respective outcome of those services (Agreement, No Agreement, Mediation Did Not Occur, Objection to Mediation, or Failure to Appear).
  - B. To fulfill this requirement, the mediator must complete and submit OJD's official Domestic Relations Mediator Report to the Court Form once mediation concludes
    1. Additional training materials are posted to [OJD's Resources for Mediators webpage](#) under the "Domestic relations mediator report to the court" accordion header
  - C. Notes:
    1. This statutory requirement does not create an exception to allow the mediator to use the mediator report form to disclose confidential mediation.
    2. This exception does not allow a mediator to submit a report if mediation is not yet concluded (so don't submit a report if mediation hasn't concluded).
- ii. If the parties reach an agreement, the mediator shall send a written summary of that agreement to the court and the lawyers so it can be put into a proposed order or judgment provision prepared for the court.
- iii. If the parties did not reach an agreement, the mediator shall report only that fact to the court and to counsel for the parties, but shall not make a recommendation to the court without the written consent of the parties or their counsel.

*If you want help deciding if this exception applies, [go to the related Decision Guide section in Appendix 4](#). If you do not need further help with this exception, return to [Step 3](#) of the decision tree to determine whether any other ORS Chapter 36 exceptions apply. If none apply, go to [Step 4](#) of the Decision Tree.*

## Appendix 3: Statutory Exceptions and Limitations

Written agreements to waive specific confidentiality provisions ([ORS 36.220\(1\)\(b\)](#))

1. **Who can share:** Any party, person, mediator, or mediation program covered by the written agreement
2. **Authorized recipient:** With the recipient identified in the written agreement
3. **Limitations or conditions for this exception:**
  - a. The agreement must be in writing
  - b. Only communications specified in the written agreement may be disclosed according to the terms of the written agreement
  - c. [See additional information in Step 5 of the Decision Tree.](#)

If you want help deciding if this exception applies, [go to the related Decision Guide section in Appendix 4](#). If you do not need further help with this exception, return to [Step 3](#) of the decision tree to determine whether any other ORS Chapter 36 exceptions apply. If none apply, go to [Step 4](#) of the Decision Tree.

### Other Statutory Limits: Court-Connected Domestic Relations Mediation & State Agencies, Public Bodies, and Elected Officials

Limits related to mediation communications from domestic relations mediation cases under 107.755 to 107.795

Overlay ORS 107.765 and ORS 107.785. These rules address private proceedings, confidential communications, closed records, and mediator reports.

#### State Agencies, Public Bodies, and Elected Officials

When a public body or state agency is involved in mediation, the usual private-party confidentiality rules don't always apply. State agencies often need to follow special confidentiality rules, and public bodies may still have to meet public records or public meetings requirements. Because of these added obligations, mediators should be aware that confidentiality may be more limited than in a typical private mediation.

Refer to confidentiality resources from the [Oregon Department of Justice](#) for further guidance.

Public-sector question	Why it matters
Is an executive-branch state agency a party?	Agency-specific confidentiality rules may be required.
Is the agency acting as a mediator of a regulatory matter?	Use <a href="#">ORS 36.224</a> and Oregon Department of Justice/state-agency guidance.

Appendix 3: Statutory Exceptions and Limitations

Public-sector question	Why it matters
Is a city, county, board, district, commission, council, committee, or other public body involved?	Public body provisions and public records law may affect confidentiality. Mediators should clarify in advance who can settle, whether officials must follow public meetings and public records laws, and how decisions are made.
Will elected officials or a quorum attend?	Public meetings law may be implicated if a governing body deliberates toward a decision. Mediators should clarify in advance who can settle, whether officials must follow public meetings and public records laws, and how decisions are made.
Will a mediated settlement (draft or final) agreement be submitted, approved, voted on, filed, or incorporated into a public action?	Governmental decision-making and related public record issues require separate analysis beyond the scope of this resource.

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# Appendix 4

## Appendix 4: Decision Guide for Specific Statutory Exceptions

Use this appendix for Step 3 of the Decision Tree. It provides a series of questions for each general statutory exception category to help you evaluate whether a specific statutory exception allows or requires disclosure of confidential mediation communications or confidential mediation agreements. The tool should be used alongside the broader [Decision Tree](#).

Refer to [Appendix 3](#) for a description of the statutory exceptions. It states the rule, who may disclose, the proper recipient, and the key limits. If disclosure is not allowed under an exception category, unless a different exception category applies, go to [Step 4](#) of the Decision Tree.

The appendices do not address every confidentiality scenario, and do not cover mediations involving an executive branch state agency party or an executive branch state agency regulatory mediator. For those matters, use the [Oregon Department of Justice](#) confidentiality resources or agency-specific guidance.

As a reminder, this appendix does not address every confidentiality scenario. It does not cover mediations involving an executive branch state agency party or an executive branch state agency regulatory mediator. For those matters, use the Oregon Department of Justice confidentiality resources or agency-specific guidance.

### **Decision Guide:** [Sharing with privileged relationships](#)

#### [ORS 36.220\(7\)](#)

1. Is the person who would disclose the communication considered “[a party to mediation?](#)”
  - a. If no: If no, this statutory exception does not apply.
  - b. If yes: continue.
2. Does the party share a privileged relationship with the person with whom the disclosure would be shared?
  - a. If no: If no, this statutory exception does not apply.
  - b. If yes: The statutory exception applies unless a later [Decision Tree](#) step specifies otherwise.

*If you do not need further help with this exception, return to [Step 3](#) of the Decision Tree to determine whether any other ORS Chapter 36 exceptions apply. If none, go to [Step 4](#) of the Decision Tree.*

### **Decision Guide:** [Child abuse reporting by a mandatory reporter](#)

#### [ORS 36.220\(5\)](#)

1. Is the person required by law to report child abuse under ORS 419B.010?

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- a. If no, this statutory exception does not apply.
  - b. If yes: continue.
2. Does the person who is legally required to report child abuse have a reasonable belief—based on something shared in the mediation—that a child they encountered was abused or that someone they encountered abused a child?
    - a. If no, this statutory exception does not apply.
    - b. If yes, this exception applies unless another statute says otherwise. The confidential mediation communication or confidential agreement must be disclosed to either the centralized child abuse reporting system described in [ORS 418.190 \(Centralized child abuse reporting system\)](#) or to a law enforcement agency within the county where the person making the report is located at the time of the contact.
      - i. If the mediator is the mandatory reporter: Disclose as required and do so in a way that prioritizes [mediator ethics](#) as much as possible.

*If you do not need further help with this exception, return to [Step 3](#) of the Decision Tree to determine whether any other ORS Chapter 36 exceptions apply. If none, go to [Step 4](#) of the Decision Tree.*

### Decision Guide: [Elder abuse reporting by a mandatory reporter](#) [ORS 36.220\(5\)](#)

1. Is the person required by law to report elder abuse under ORS 124.050 to 124.095?
  - a. If no, this statutory exception does not apply.
  - b. If yes: continue.
2. Does the person who is legally required to report elder abuse under ORS 124.050 to 124.095 have reasonable cause—based on a mediation communication—to believe that a person 65 years of age or older with whom they came into contact has suffered abuse, or that any person with whom they came into contact has abused a person 65 years of age or older?
  - a. If no, this statutory exception does not apply.
  - b. If yes, this exception applies unless another statute says otherwise. The confidential mediation communication or confidential agreement must be disclosed by telephone or otherwise to the local office of the Department of Human Services or to a law enforcement agency within the county where the person making the report is at the time of contact.
    - i. If the mediator is the mandatory reporter: Disclose as required and do so in a way that prioritizes [mediator ethics](#) as much as possible.

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*If you do not need further help with this exception, return to [Step 3](#) of the Decision Tree to determine whether any other ORS Chapter 36 exceptions apply. If none, go to [Step 4](#) of the Decision Tree.*

### Decision Guide: [Crime prevention where death or substantial bodily injury is likely ORS 36.220\(6\)](#)

1. Is the person who would disclose a party or mediator:
  - a. If not, this exception does not apply.
  - b. If yes, continue.
2. Does the person who would disclose reasonably believe the disclosure is necessary to prevent a party from committing a crime?
  - a. If not, this exception does not apply.
  - b. If yes, continue.
3. Is the prospective crime likely to result in death or substantial bodily injury **to a specific person**?
  - a. If not, this exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
  - b. If yes, continue.
4. Can the person or agency who would receive the disclosure realistically help prevent the crime?
  - a. If not, this exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
  - b. If yes, continue.
5. Who is considering making the disclosure?
  - a. A party: this exception applies, and disclosure is allowed unless a later [Decision Tree](#) step specifies otherwise.
  - b. A mediator: this exception applies, and disclosure is allowed (but not required) unless a later [Decision Tree](#) step specifies otherwise.

*If you do not need further help with this exception, return to [Step 3](#) of the Decision Tree to determine whether any other ORS Chapter 36 exceptions apply. If none, go to [Step 4](#) of the Decision Tree.*

### Decision Guide: [Getting advice about the issue being mediated \(non-privileged relationship\) ORS 36.220\(7\)](#)

## Appendix 4: Decision Guide for Specific Statutory Exceptions

1. Is the disclosing person a party, mediator, or someone else?
  - a. Someone other than a party or mediator: this exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise. ▼
  - b. Mediator: this exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
  - c. [Party](#) (See definition in [Appendix 2](#)): continue.
2. Is the party disclosing to another person or entity (not AI) for advice about the mediation subject?
  - a. If not, this exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
  - b. If yes, continue.
3. Do all parties agree that the party may disclose to that person for advice?
  - a. If not, this exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
  - b. If yes, disclosure is allowed according to the parties' agreement unless a later [Decision Tree](#) step specifies otherwise.

*If you do not need further help with this exception, return to [Step 3](#) of the Decision Tree to determine whether any other ORS Chapter 36 exceptions apply. If none, go to [Step 4](#) of the Decision Tree.*

### Decision Guide: [Subsequent adjudicatory proceedings](#) [ORS 36.222\(2\)](#) and [ORS 36.222\(3\)](#)

1. Is the disclosure related to sharing confidential mediation communications or confidential mediation agreements in a subsequent adjudicative proceeding?
  - a. If not, this exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
  - b. If yes, continue.
2. Is the disclosure related to a proceeding to enforce, modify, or set aside a mediation agreement or to a proceeding related to a claim between a party and the mediator?
  - a. If related to a proceeding to enforce, modify, or set aside a mediation agreement, go to [the proceeding to enforce, modify, or set aside section](#) instead.
  - b. If related to a claim between a party and a mediator, go to action for damages between a party and a mediator.
  - c. If not, continue.

## Appendix 4: Decision Guide for Specific Statutory Exceptions

3. Is the disclosing person a party, mediator, or someone else?
  - a. Someone other than a party or mediator: This exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
  - b. A party: Have all parties agreed in writing to the disclosure?
    - i. If not, this exception does not apply. Confidentiality should be maintained unless another exception applies. If yes, the disclosure is permitted unless a later [Decision Tree](#) step specifies otherwise.
  - c. Mediator:
    - i. Have all parties to the mediation agreed **in writing** to the disclosure?
      - A. If yes, continue.
      - B. If not, this exception does not apply. Confidentiality should be maintained unless another exception applies or otherwise.
    - ii. Have the mediator and the mediation program agreed to the disclosure?
      - A. Not yet. The mediator is not obligated to disclose. Use [mediator ethics](#) (Step 6) to determine whether to disclose. Then return here.
      - B. If the mediator and mediation program do not agree to the disclosure: This exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
      - C. If the mediator and mediation program agree to the disclosure, have they both agreed to the disclosure **in writing**?
        1. If not, this exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
        2. If yes, the disclosure is permitted unless a later [Decision Tree](#) step specifies otherwise:
          - a. Only share what is needed, and
          - b. Disclose in a way that upholds [mediator ethics](#) (Step 6) as much as possible.

*If you do not need further help with this exception, return to [Step 3](#) of the Decision Tree to determine whether any other ORS Chapter 36 exceptions apply. If none, go to [Step 4](#) of the Decision Tree.*

Decision Guide: [Proceeding to enforce, modify, or set aside a mediation \(settlement\) agreement](#)

[ORS 36.222\(4\)](#)

## Appendix 4: Decision Guide for Specific Statutory Exceptions

1. Is the disclosure related to a proceeding to enforce, modify, or set aside a mediation agreement?
  - a. If not, this exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
  - b. If yes, continue.
2. Is the disclosure necessary to prosecute or defend the matter?
  - a. If not, this exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
  - b. If yes, disclosure is permitted to the extent necessary to prosecute or defend the matter unless a later [Decision Tree](#) step specifies otherwise.
    - i. If the mediator is considering disclosing:
      - A. Only share what is needed
      - B. Disclose in a way that upholds [mediator ethics](#) (Step 6) as much as possible.

*If you do not need further help with this exception, return to [Step 3](#) of the Decision Tree to determine whether any other ORS Chapter 36 exceptions apply. If none, go to [Step 4](#) of the Decision Tree.*

### Decision Guide: [Action for damages between a party and a mediator](#) [ORS 36.222\(5\)](#)

1. Is the disclosure related to an action for damages or other relief between a party to a mediation and a mediator or mediation program?
  - a. If not, this exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
  - b. If yes, continue.
2. Is the disclosure of confidential mediation communications necessary to prosecute or defend the matter?
  - a. If not, this exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
  - b. If yes, disclosure is permitted to the extent necessary to prosecute or defend the matter unless a later [Decision Tree](#) step specifies otherwise.
    - ii. If the mediator is considering disclosing:
      - A. Only share what is needed
      - B. Disclose in a way that upholds [mediator ethics](#) (Step 6) as much as possible.

## Appendix 4: Decision Guide for Specific Statutory Exceptions

*If you do not need further help with this exception, return to [Step 3](#) of the Decision Tree to determine whether any other ORS Chapter 36 exceptions apply. If none, go to [Step 4](#) of the Decision Tree.*

### Decision Guide: [Use by a mediator for research, training, or education](#) [ORS 36.232\(4\)](#)

1. Is the disclosure for research, training, or educational purposes by a mediator or mediation program?
  - a. If not, this exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
  - b. If yes, continue.
2. Can the parties be identified from the disclosure?
  - a. If not, disclosure is allowed unless a later [Decision Tree](#) step specifies otherwise.
  - b. If yes, have the parties agreed in writing to the disclosure?
    - iii. If yes, disclosure is allowed unless a later [Decision Tree](#) step specifies otherwise.
    - i. If not, this exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.

*If you do not need further help with this exception, return to [Step 3](#) of the Decision Tree to determine whether any other ORS Chapter 36 exceptions apply. If none, go to [Step 4](#) of the Decision Tree.*

### Decision Guide: [Court-connected mediator reports to the court](#) Civil: [ORS 36.195\(5\)](#)

Domestic Relations: [ORS 107.765\(2\)](#)

1. Is the disclosing person a party, mediator, or someone else?
  - a. Someone else: this exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
  - b. A party: this exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
  - c. A mediator: continue.
2. Is the mediator handling a court-connected mediation case?
  - a. If no, this statutory exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
  - b. If yes, continue.

## Appendix 4: Decision Guide for Specific Statutory Exceptions

3. Has mediation concluded?
  - a. If no, this statutory exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
  - b. If yes, continue.
4. What is the mediator going to disclose
  - a. Anything beyond basic outcomes (for example, details of discussions, reasons for positions, or specific statements made during mediation): this exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
  - b. Basic mediation outcomes such as the type of mediation services offered and any applicable outcomes of those services—Agreement, No Agreement, Mediation Did Not Occur, Objection to Mediation, or Failure to Appear): continue.
5. What type of court-connected case was mediated?
  - a. A non-domestic relations mediation case:
    - i. Who will the mediator disclose it to?
      - A. Anyone other than the court: this exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
      - B. The court: The mediator is required to tell the court whether the parties reached an agreement once mediation concludes. Disclosure is required unless another statute says otherwise.
    - b. A domestic relations mediation case:
      - i. Who will the mediator disclose it to?
        - A. Anyone other than the court and the parties' attorneys: this exception does not apply. Confidentiality should be maintained unless another exception or a later [Decision Tree](#) step specifies otherwise.
        - B. The court: The mediator is required to notify the court and the parties' lawyers whether the parties reached an agreement (or not) during mediation. Continue.
      - ii. Does the local court require mediators to use a local mediator reporting form?
        - A. If yes, use the local reporting form provided by the local court.
        - B. If no, report the outcome of mediation using OJD's statewide [Domestic Relations Mediator Report to the Court Form](#) (or your local court's template if applicable).

*If you do not need further help with this exception, return to [Step 3](#) of the [Decision Tree](#) to determine whether any other ORS Chapter 36 exceptions apply. If none, go to [Step 4](#) of the [Decision Tree](#).*

## Appendix 4: Decision Guide for Specific Statutory Exceptions

Decision Guide: [Written agreements to waive specific confidentiality provisions ORS 36.220\(1\)\(b\)](#)

Refer to [Step 5 of the Decision Tree](#).

*If you do not need further help with this exception, return to [Step 3](#) of the Decision Tree to determine whether any other ORS Chapter 36 exceptions apply. If none, go to [Step 4](#) of the Decision Tree.*

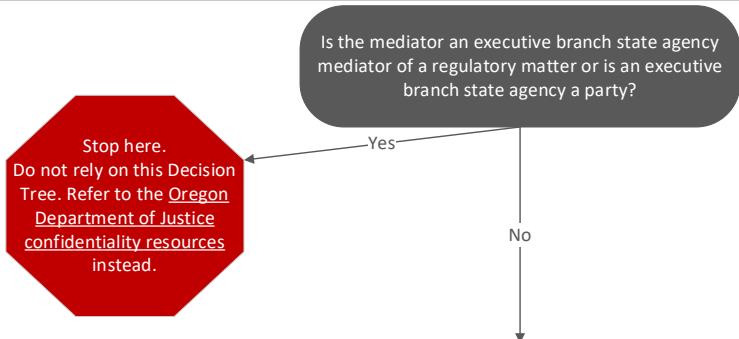
DRAFT

# Appendix 5: Visual Decision Tree

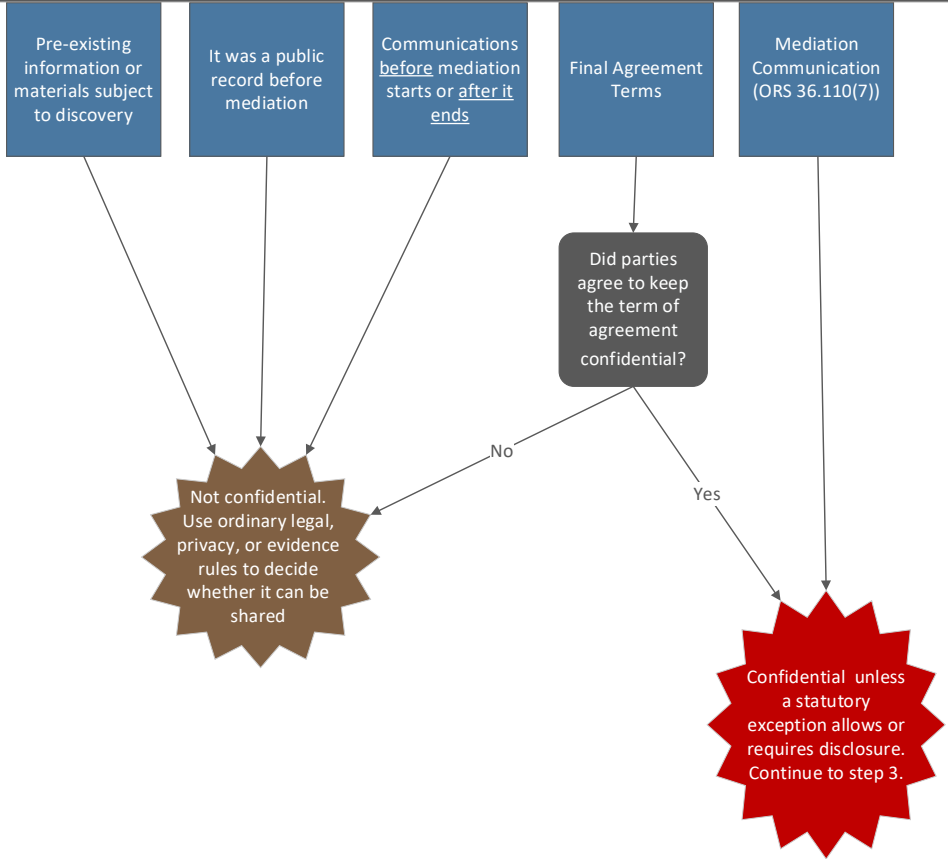
## Mediation Confidentiality: Can “it” be disclosed? A Framework for Oregon Court-Connected Mediation

This resource is provided for information purposes only. The laws are complex to apply because they depend heavily on the specific facts of each case.

### Step 1: Name who is involved.



### Step 2: Identify what’s being considered for disclosure and its default confidentiality rule. Is it confidential?



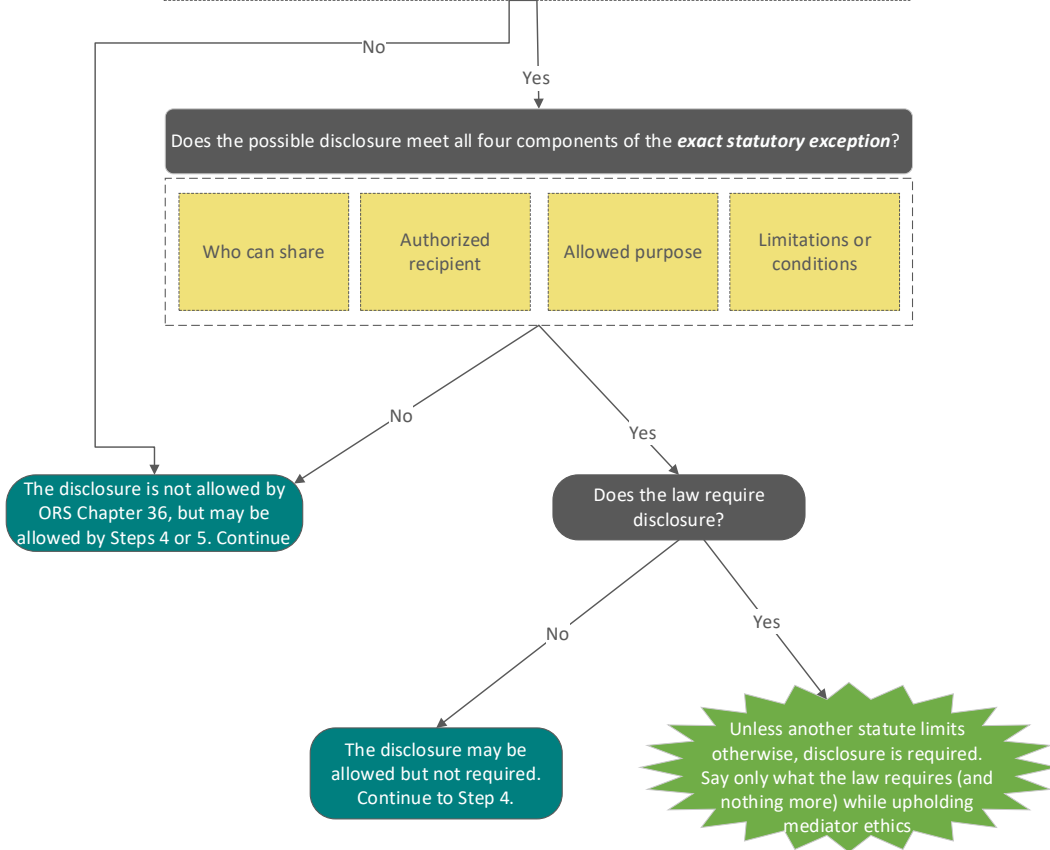
## Appendix 5: Visual Decision Tree

### Step 3: Does an ORS Chapter 36 exception allow or require disclosure?

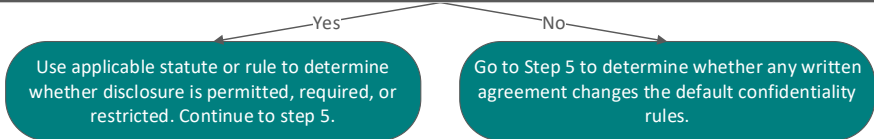
Triage: Does the possible disclosure seem to fall within any of the below general statutory exception categories?

\*\*\*Individual exceptions are narrower than titles; do not treat general category as a blanket rule\*\*\*

Sharing with privileged relationships	Child abuse reporting by a mandatory reporter	Elder abuse reporting by a mandatory reporter	Crime prevention where death or substantial bodily injury is likely
Getting advice about the issue being mediated (non-privileged relationship)	Subsequent Adjudicatory Proceedings	Proceeding to enforce, modify, or set aside a mediation agreement	Action for damages between a party and mediator
Use by a mediator for research, training, or education	Court-Connected Mediator Reports	Written agreements to waive specific confidentiality protections	

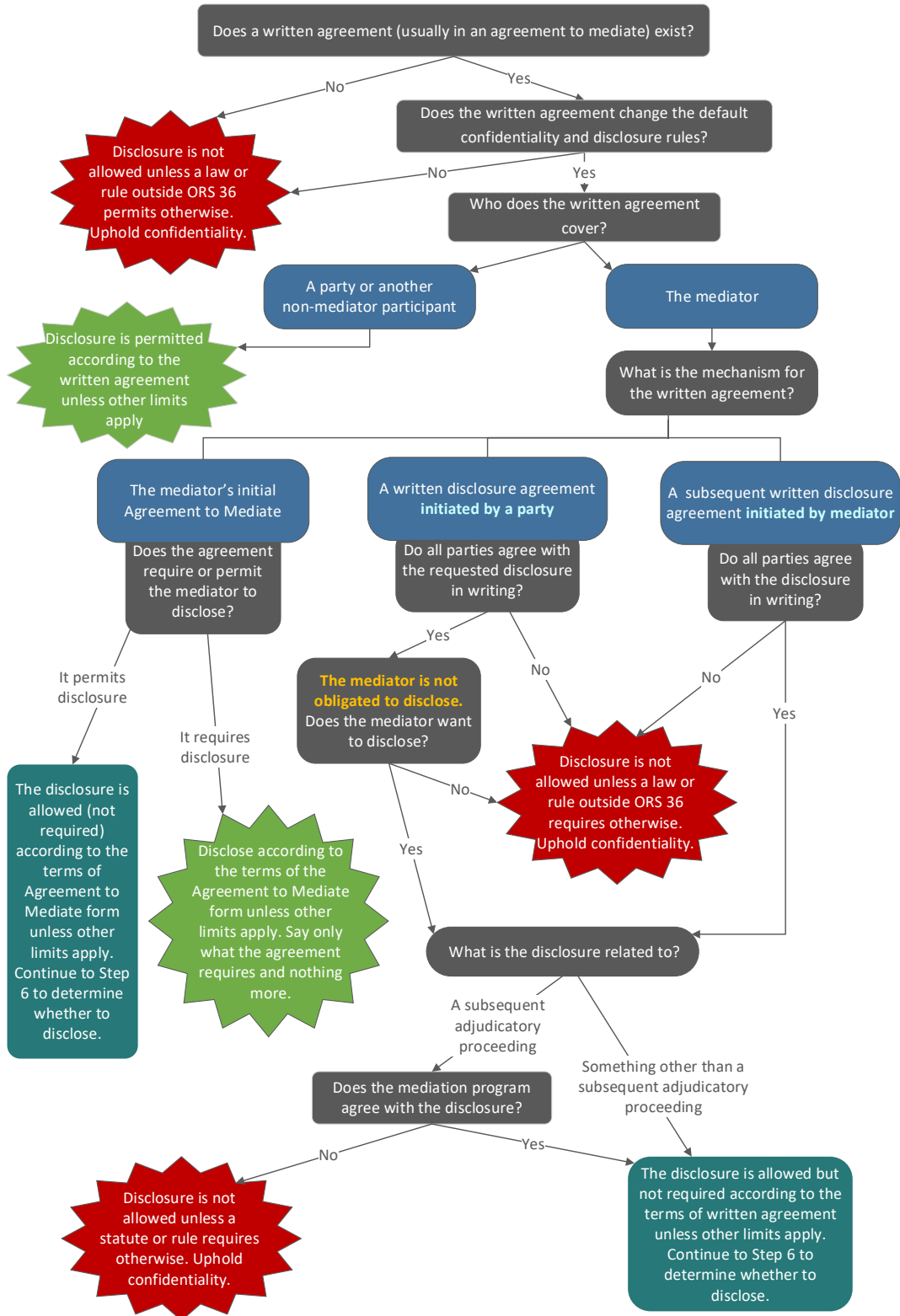


### Step 4: Do any statutes outside of ORS Chapter 36 or applicable rules allow, require, or limit disclosure?



## Appendix 5: Visual Decision Tree

### Step 5: Determine whether a written agreement allows or requires disclosure



## Appendix 5: Visual Decision Tree

### Step 6: Apply the Ethics Standards you follow.

