

A Court-System Training Session

What Court-Connected Mediators Need to Know About Confidentiality

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Disclaimers

- Today's oral presentation and all materials are for educational purposes only and should not be relied upon as legal advice.
- Although Sam Imperati is a licensed member of the Oregon State Bar, this presentation does not create an attorney-client relationship.
- Local court processes may vary. Consult your local court for specific guidance.

Package of Materials

- **Today's training is a three-part package:**
 - The live (or recorded) oral presentation
 - This PowerPoint slide deck
 - A handout titled: [Mediation Confidentiality: A Framework for Oregon Court-Connected Mediators](#)

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](#) under the Court-System Training drop-down (beneath Session 4).

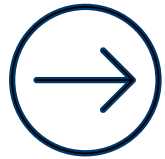
Training Overview

- Introductory level court-system training session or refresher training
- Intended audience: prospective and current Oregon Judicial Department court-connected mediators and mediation programs
- Training content:
 - Oregon-specific
 - Primarily focused on confidentiality when mediating between private (non-public body) parties

Training Limitations

- This training does **not** provide the full picture for:
 - Mediators who work outside the court context (i.e., exclusively in private practice or non-court-connected community resolution centers)
 - Cases involving executive branch state agencies
 - Refer to confidentiality resources from the [Oregon Department of Justice](#) instead.
 - Confidentiality obligations related to professional licenses

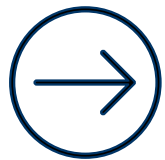
We hope you will leave with a better understanding of....



The purpose and limits of mediation confidentiality, and how to explain them to parties

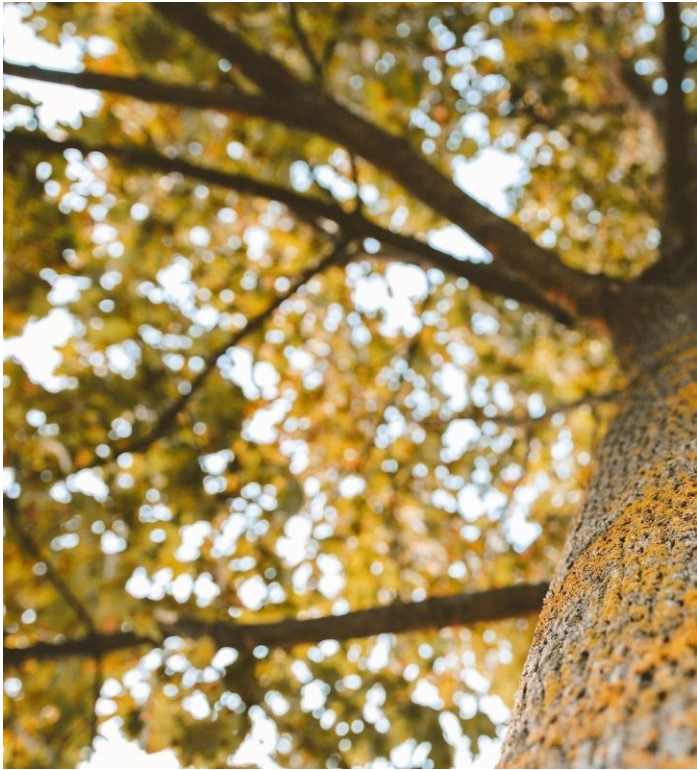


How to determine whether information is confidential—and what can, cannot, or sometimes must be shared



How to apply the confidentiality framework in real situations and make accurate disclosure decisions

Agenda



- Purpose of confidentiality
- Overview of Oregon's framework
- How to decide what's confidential and what isn't
- Making disclosure decisions
 - Basic analytical model
 - Detailed decision tree
- Proactive confidentiality measures
- Practice two steps
- Questions & Scenarios



**OPEN & HONEST
COMMUNICATION**

Confidentiality

What is its purpose?



**Confidentiality
Isn't A Cloak Of
Invisibility.**

Oregon Statutes

- Oregon mediation confidentiality is not organized around one single definition of 'confidentiality.'
- Instead, Oregon statutes explain:
 - What **is** confidential
 - What **is not** confidential
 - When a confidential communication or agreement can be (or sometimes, must be) disclosed

Confidentiality Framework in Oregon Essentials for Court-Connected Mediators

Reference Appendix 1 of the Supplemental Handout

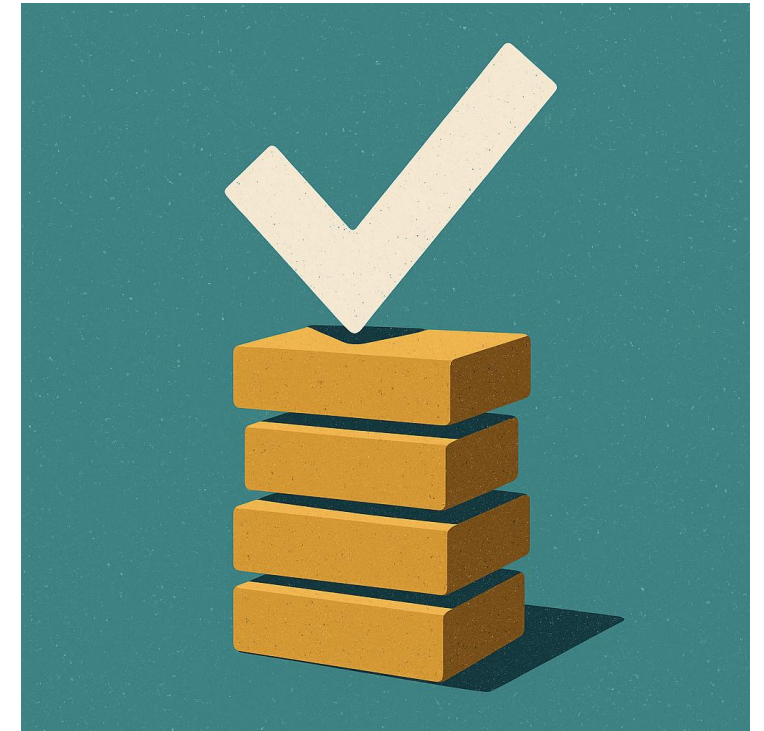
- **Oregon Law**
 - **Oregon Revised Statutes**
 - Chapter 36—Mediation and Arbitration
 - Chapter 107—Domestic Relations
 - **Case Law**
 - Bidwell v. Bidwell (2001 OR Ct. App.)
 - Alfieri v. Solomon, 358 Or. 383 (2015)
- **Rules**
 - Uniform Trial Court Rule—Chapter 12
 - Oregon Rules of Professional Conduct (RPC) section 8.3(d)
- **Ethics standards**

Court- Connected Mediator Obligations

In Oregon, when mediating court-connected cases, court-connected mediators must:

1. Tell parties about the mediator's relevant mediator ethics code
2. Follow confidentiality laws, including ORS 36.220, 36.222, and 107.785 (UTCR 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 (UTCR 12.040(3))

Why should you care about confidentiality?



Key Definitions

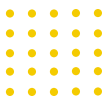
Reference Appendix 2: Definitions of the Supplemental Handout

ORS 36.110

- Mediation
- Mediation Agreement
- Mediation Program
- Mediator
- Public Body
- State Agency

Other Definitions

- Party
- Party to Mediation
- Admissibility
- Discovery
- Evidence
- Rules
- Regulatory Authority
- State Agency Regulatory-Mediator
- Subsequent Adjudicatory Proceeding



Mediation Communications

Plain Language Summary of ORS 36.110(7)

Anything said, written, or communicated during mediation

- Communicated to a mediator, a mediation program or a party to, or any other person present during mediation.

Any materials created exclusively for mediation or created during the mediation

- Anything written or prepared for the mediation by the mediator, the mediation program, the parties, or anyone else who is part of the mediation process.

Examples of “Mediation Communications”

Anything said or written exclusively for, or during, mediation.

- Any verbal, non-verbal, and written communication (including electronic communication) and recollections from the mediator or parties

Materials created exclusively for, or during, mediation.

- Agreements to mediate forms, notes, records, summaries, or recordings
- The mediator’s work products
- Drafts from the mediator or parties, including draft mediated settlement agreements
- Even materials made before mediation count if they were created only for mediation



Key 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.

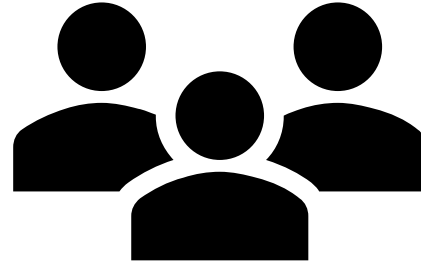
(8) Mediation Program

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.

Other Key Definition



- **Party:** Means a litigant or the litigant's attorney (UTCRC 1.110(10))
 - Note: a litigant could be a person or an entity

CONFIDENTIAL



Confidentiality at a Glance

Putting it all together

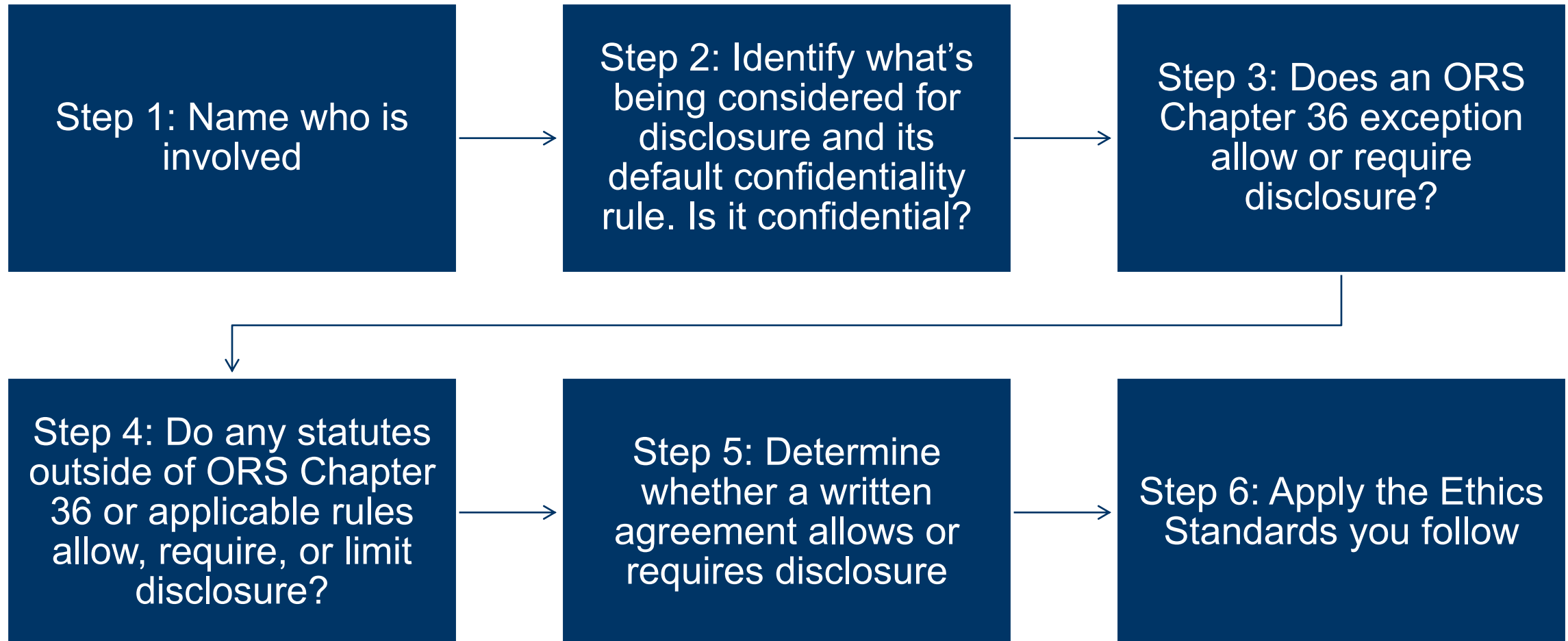
- In Oregon, most (not all!) mediation communications are confidential. That means mediation communications are generally:
 - ✓ Private: Kept hidden from everyone minus a few exceptions
 - ✓ Non-discoverable: Can't be requested or obtained through discovery
 - ✓ Inadmissible: Can't be used as evidence in court
- Define when mediation begins and ends clearly so everyone knows what counts as a mediation communication



Safest Approach: Assume Confidentiality Applies

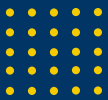
When mediating between private parties: If it was made for mediation or communicated in mediation, treat it as confidential unless the statute, rules, or a written agreement opens the door.

Disclosure Decisions: Basic Analytical Framework





Decision Tree: Confidentiality and Disclosures



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 but they depend heavily on the specific facts of each case.

Step 1: Name who is involved.

Is the mediator an executive branch state agency mediator of a regulatory matter or is an executive branch state agency a party?

Stop here. Do not rely on this Decision Tree. Refer to the Oregon Department of Justice confidentiality resources instead.

No

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

- Pre-existing information or materials subject to discovery
- It was a public record before mediation
- Communications before mediation starts or after it ends
- Final Agreement Terms
- Mediation Communication (ORS 36.110(7))

Did parties agree to keep the term of agreement confidential?

No

Yes

Not confidential. Use ordinary legal, privacy, or evidence rules to decide whether it can be shared.

Confidential unless a statutory exception allows or requires disclosure. Continue to step 3.

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	

Does the possible disclosure meet all four components of the exact statutory exception?

Who can share	Authorized recipient	Allowed purpose	Limitations or conditions
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The disclosure is not allowed by ORS Chapter 36, but may be allowed by Steps 4 or 5. Continue

The disclosure may be allowed but not required. Continue to Step 4.

Unless another statute limits otherwise, disclosure is required. Say only what the law requires (and nothing more) while upholding mediator ethics.

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

Use applicable statute or rule to determine whether disclosure is permitted, required, or restricted. Continue to step 5.

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

Does a written agreement (usually in an agreement to mediate) exist?



Step 6: Apply the Ethics Standards you follow.

Is the disclosure allowed or required?

Disclosure is allowed, but not required

Ethics-informed action: Apply your ethics standards to decide whether to disclose. Consider which choice—disclosing or maintaining confidentiality—best aligns with those standards.

Will you disclose?

No

Maintain confidentiality

Yes

Ethics-informed action: Apply your ethics standards to decide how to disclose, and disclose only what is needed.

Step 1: Name who is involved.

Is the mediator an executive branch state agency mediator of a regulatory matter or is an executive branch state agency a party?

Yes

No

Stop here.
Do not rely on this
Decision Tree. Refer to
the [Oregon Department
of Justice confidentiality
resources](#) instead.

Go to Step 2.

Use The Chat – Step 1



- **Related to Step 1, write in the chat:**
 - Clarifying questions
 - Anything about this step that doesn't make sense
 - Any hypotheticals related to this step

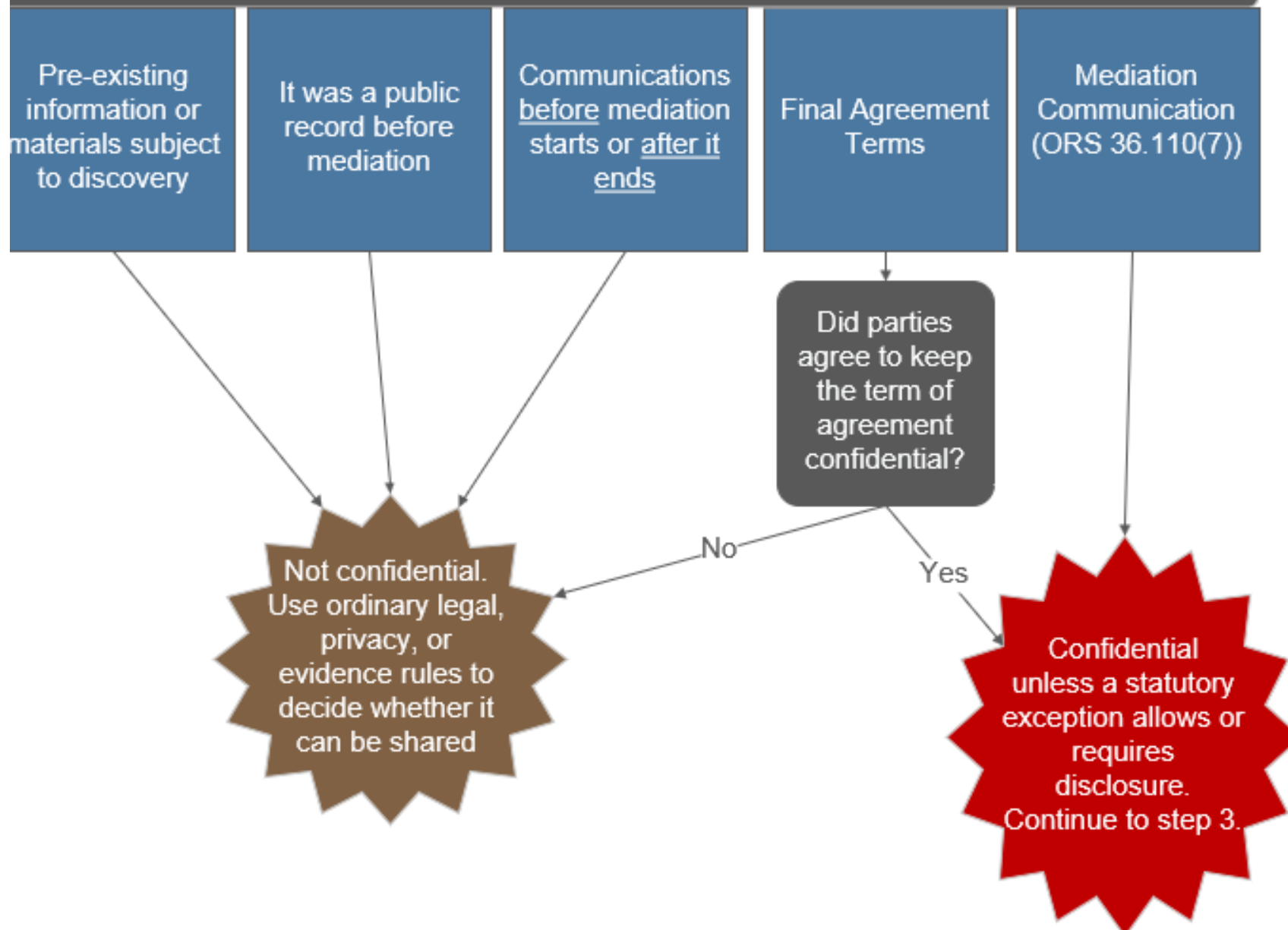
Extra Credit: Confidentiality Cheat Sheet

Confidentiality will vary depending on who the parties and mediator are representing....

	IF THE PARTIES (as defined in ORS 36.234)	AND THE MEDIATOR (as defined in ORS 36.110(10)) IS	THEN CONFIDENTIALITY IS
1	Are all private parties	Private, public body (other than state agency) or state agency that has no regulatory authority over matter in mediation	Assumed
2	Include a public body (other than a state agency) and a private party	Private, public body (other than state agency) or a state agency that has no regulatory authority over matter in mediation.	Assumed
3	Include a public body (other than a state agency) and a private party	A state agency with regulatory authority over matter in mediation.	Only available if agency adopts an approved rule
4	Include a state agency and a private party	Any type	Only available if agency adopts an approved rule
5	Include public bodies (one of which has non-confidentiality policy/law) and a private party	Any type	Not available
6	Are all public bodies	Any type	Not available
7	Include multiple state agencies and a private party and one of the agencies has not adopted a confidentiality rule	Any type	Not available

www.doj.state.or.us/wp-content/uploads/2017/08/state_agency_mediation_confidentiality.pdf

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



Use The Chat – Step 2



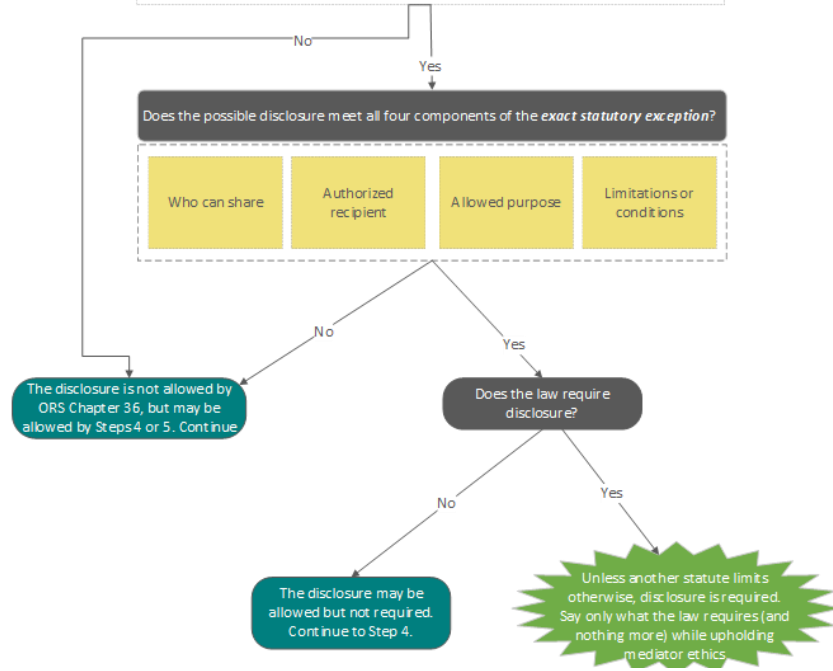
- **Related to Step 2, write in the chat:**
 - Clarifying questions
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 - Any hypotheticals related to this step

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?

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

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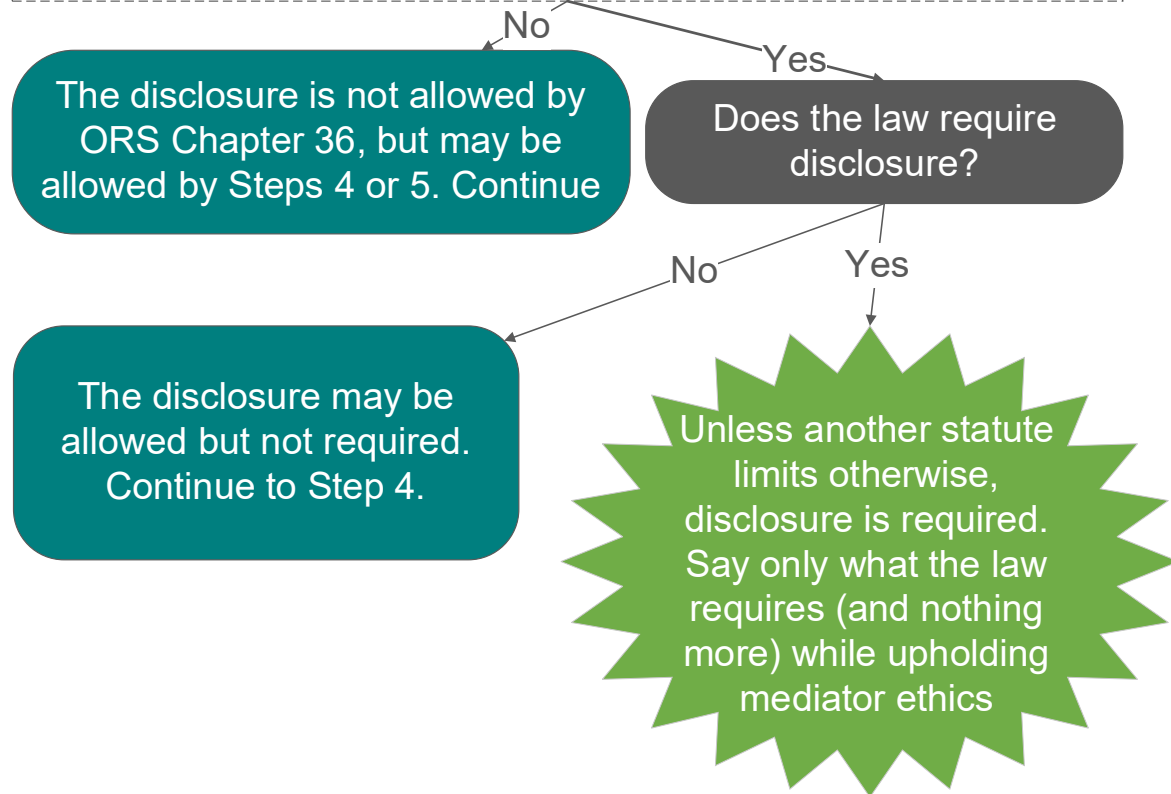
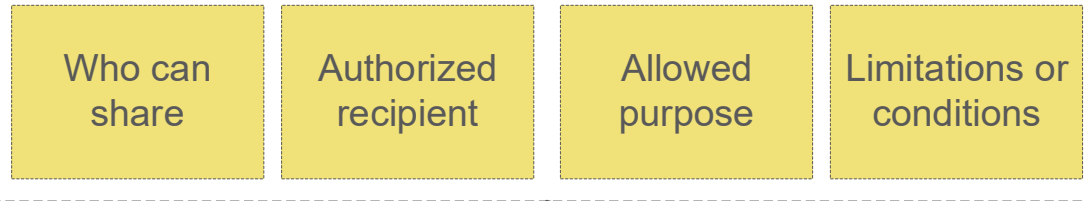
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Use by a mediator for research, training, or education	Court-Connected Mediator Reports	Written agreements to waive specific confidentiality protections	

See general exception categories on previous slide.

Does the possible disclosure meet all four components of the *exact statutory exception*?



Use The Chat – Step 3



- **Related to Step 3, write in the chat:**
 - Clarifying questions
 - Anything about this step that doesn't make sense
 - Any hypotheticals related to this step

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

Yes

No

Use applicable statute or rule to determine whether disclosure is permitted, required, or restricted. Continue to step 5.

Go to Step 5 to determine whether any written agreement changes the default confidentiality rules.

Use The Chat – Step 4

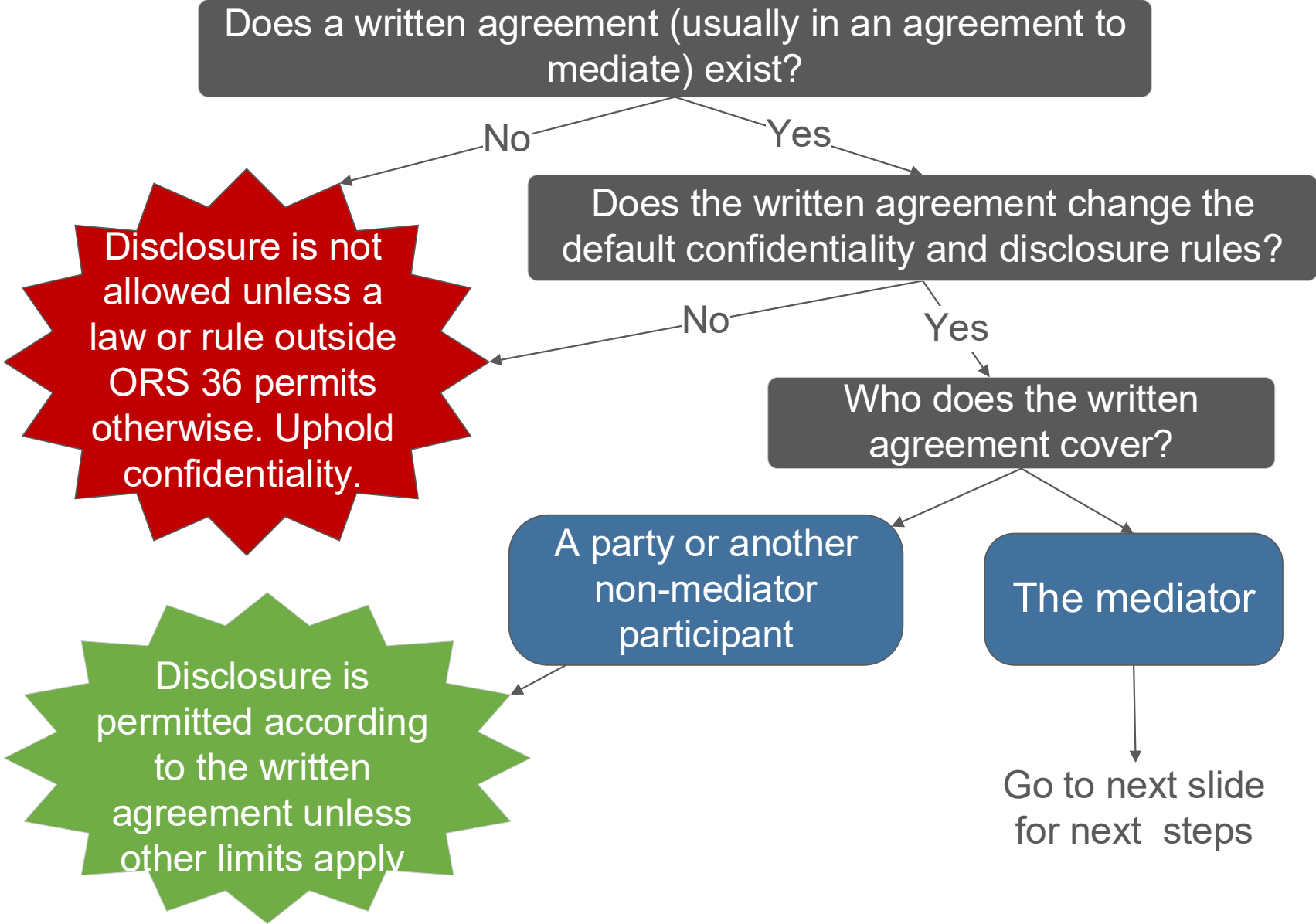


- **Related to Step 4, write in the chat:**
 - Clarifying questions
 - Anything about this step that doesn't make sense
 - Any hypotheticals related to this step



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

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



Step 5 Written Agreement (Part B)

Who does the written agreement cover?

The mediator

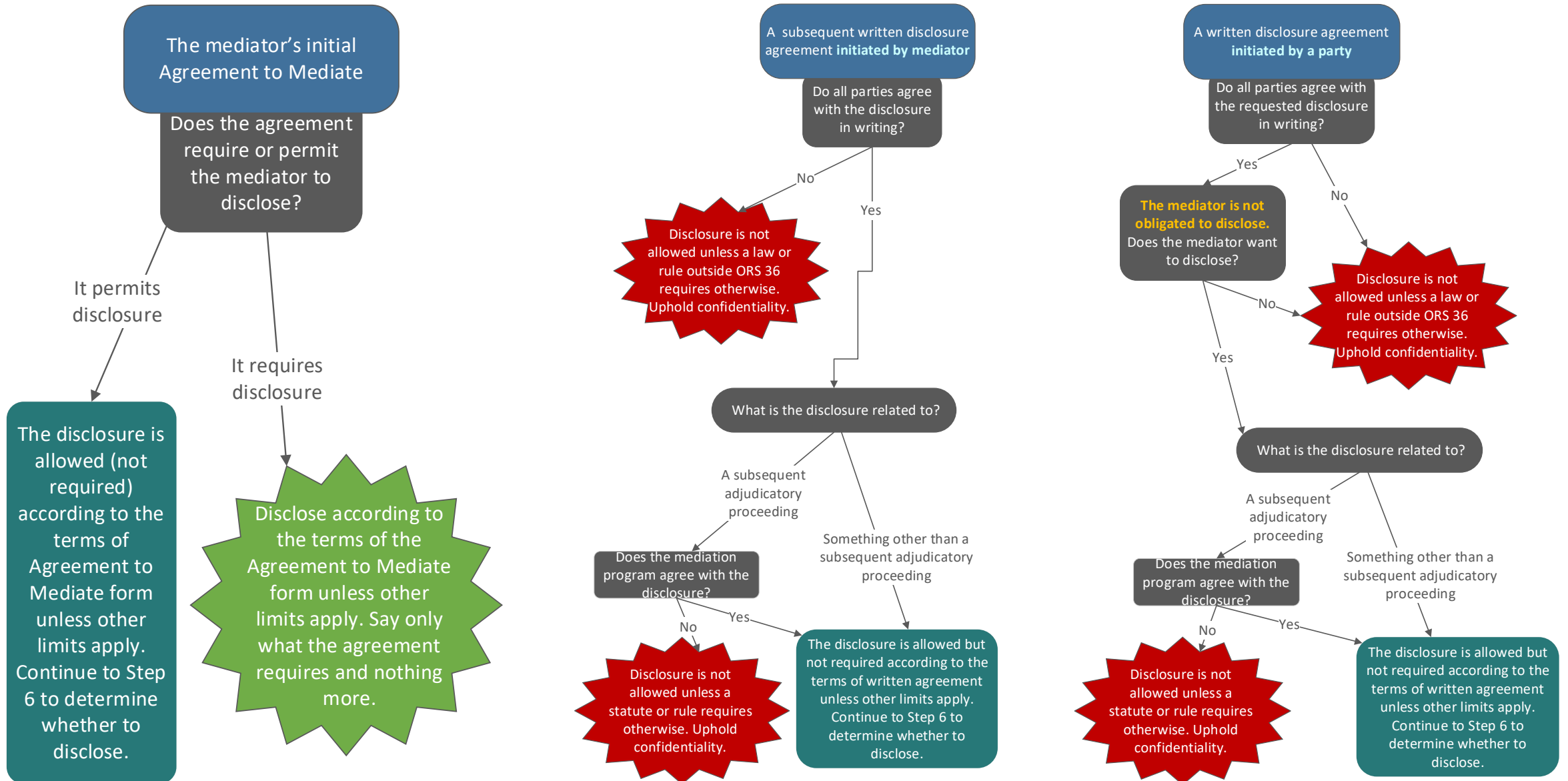
What is the mechanism for the written agreement?

The mediator's initial Agreement to Mediate

A written disclosure agreement **initiated by a party**

A subsequent written disclosure agreement **initiated by mediator**

Step 5 Written Agreement (Part C)



Use The Chat – Step 5

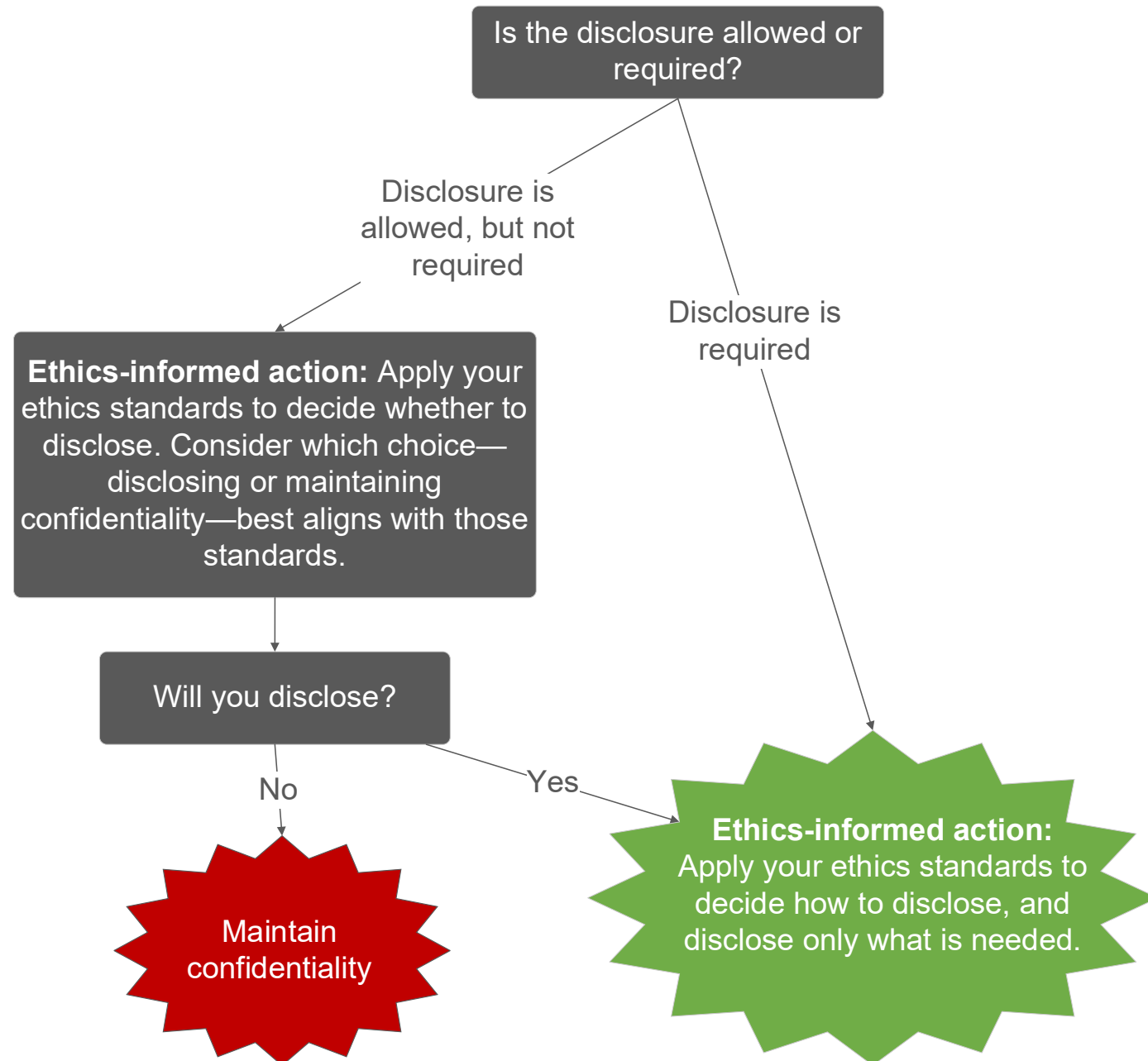


Related to Step 5, write in the chat:

- Clarifying questions
- Anything about this step that doesn't make sense
- Any hypotheticals related to this step

Step 6: Apply the Ethics Standards you follow.

Step 6: Apply the Ethics Standards you follow



Use The Chat – Step 6



Related to Step 6, write in the chat:

- Clarifying questions
- Anything about this step that doesn't make sense
- Any hypotheticals related to this step



**We know this
can feel like a
stretch, so let's
take a
5-minute stretch
break**

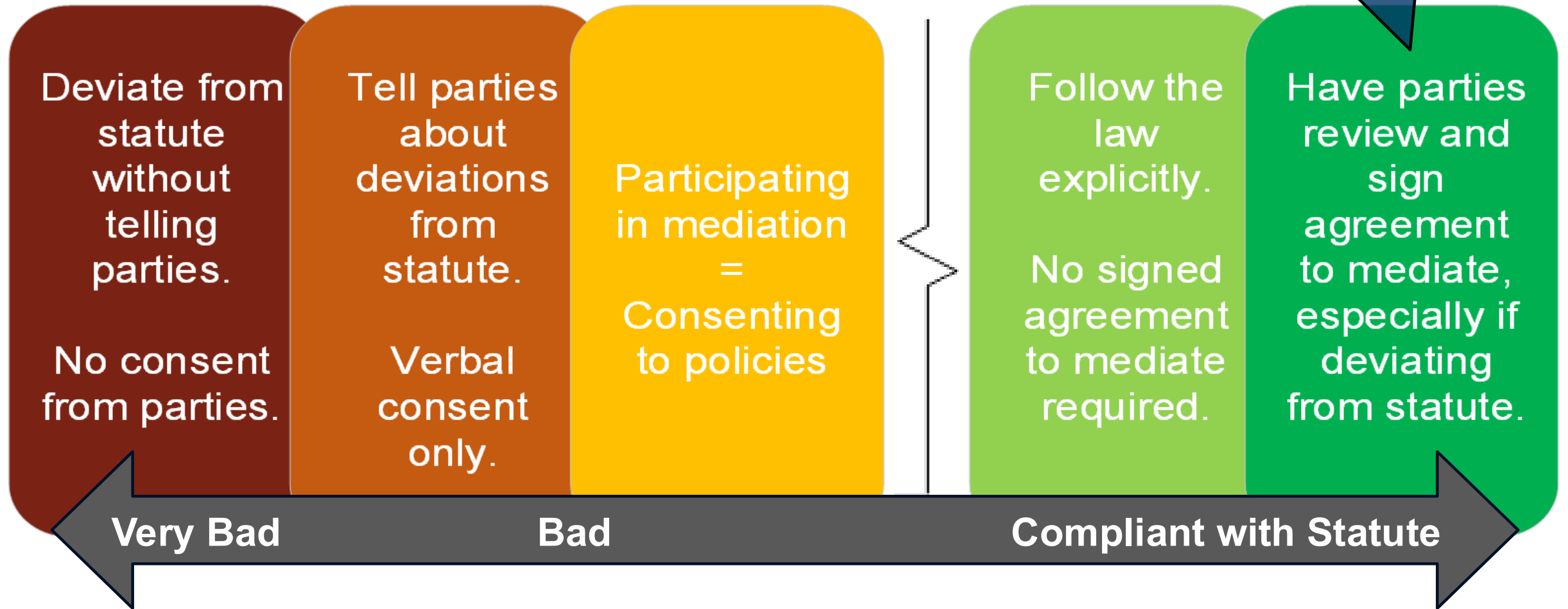
Proactive Measures

- Opening Statements
- Agreement to Mediate
Template Language

Script Template: How to Explain Confidentiality

- Introduce the purpose
- Explain the general rule
- Outline exceptions
- Differentiate joint sessions and caucus
- Seek agreement for any non-statutory exceptions
- Summarize expectations
- Emphasize self-determination and choice
- Invite questions

Recommended Practices for Confidentiality



Best practice (even if not deviating from statute)



**Time to practice
a few Decision
Tree steps**

Let's Practice Step 2: Is it Confidential by Default?

A party's opening statement in mediation

Confidential by default

A final settlement agreement with no confidentiality clause

Not confidential by default

A financial record created two years before mediation

Not confidential by default

A draft settlement term sheet prepared by the mediator

Confidential by default

A public agency report that was a public record before mediation

Not confidential by default

Let's practice Step 3 (Level 1)

Does the disclosure fall within a general statutory exception category?

To gossip

Most likely no; only possible within a privileged relationship.

To prevent someone from committing a crime

Maybe. We need more facts.

To tell a judge or jury what the other party offered in mediation

Almost certainly no unless there's a written agreement.

For a mandatory reporter to report child abuse

Yes; this fits into a statutory exception category.

To correct false claims a party is making about the mediator's actions in session

No; reputation concerns aren't a general exception category.

Let's practice Step 3 (level 2)

Does the
disclosure
meet all four
statutory
elements?

What is It?		
Mediation communication related to reasonable suspicion of child abuse		
Who would report?	To whom or what would they report?	Purpose of disclosure
Mediator who is <u>not</u> a mandatory reporter under ORS 419B.010	To Oregon Department of Human Services Abuse Reporting Line	To report suspected child abuse
Is there a written agreement, rule, waiver, or notice that changes the default?		
No		

What does appendix 3 say?

Child abuse reporting by a mandatory reporter

ORS 36.220(5)

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.

Authorized recipient: To the centralized child abuse reporting system described in ORS 418.190 or to a law enforcement agency within the county where the person making the report is located at the time of the contact.

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.

What does appendix 4 say? Decision Guide

1. Is the person required by law to report child abuse under ORS 419B.010? If no, this statutory exception does not apply.
 - 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?
 - If no, this statutory exception does not apply.
3. 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.

If the mediator is the mandatory reporter: Disclose as required and do so in a way that prioritizes [mediator ethics](#) as much as possible.

Let's practice Step 3 (level 2)

**Does the disclosure meet all four statutory elements?
Answer**

What is It?		
Mediation communication related to reasonable suspicion of child abuse		
Who would report?	To whom or what would they report?	Purpose of disclosure
Mediator who is <u>not</u> a mandatory reporter under ORS 419B.010 <input type="checkbox"/>	To Oregon Department of Human Services Abuse Reporting Line <input checked="" type="checkbox"/>	To report suspected child abuse <input checked="" type="checkbox"/>
Is there a written agreement, rule, waiver, or notice that changes the default?		
No <input type="checkbox"/>		



Discussion from Six Step Questions

Step 1: Name who is involved.

Is the mediator an executive branch state agency mediator of a regulatory matter or is an executive branch state agency a party?

Yes

No

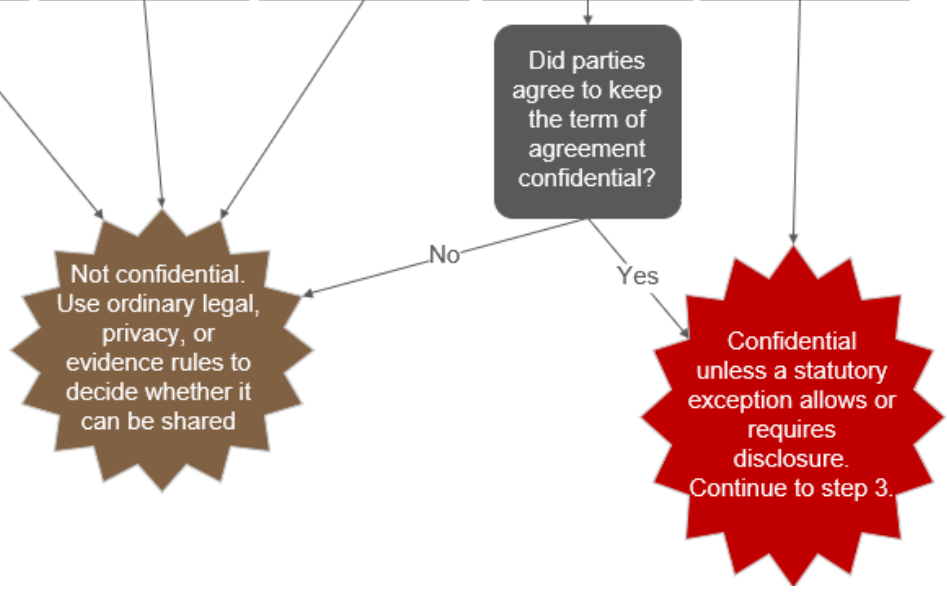
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Go to Step 2.

Step 1 Scenarios

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

Pre-existing information or materials subject to discovery	It was a public record before mediation	Communications <u>before</u> mediation starts or <u>after it ends</u>	Final Agreement Terms	Mediation Communication (ORS 36.110(7))
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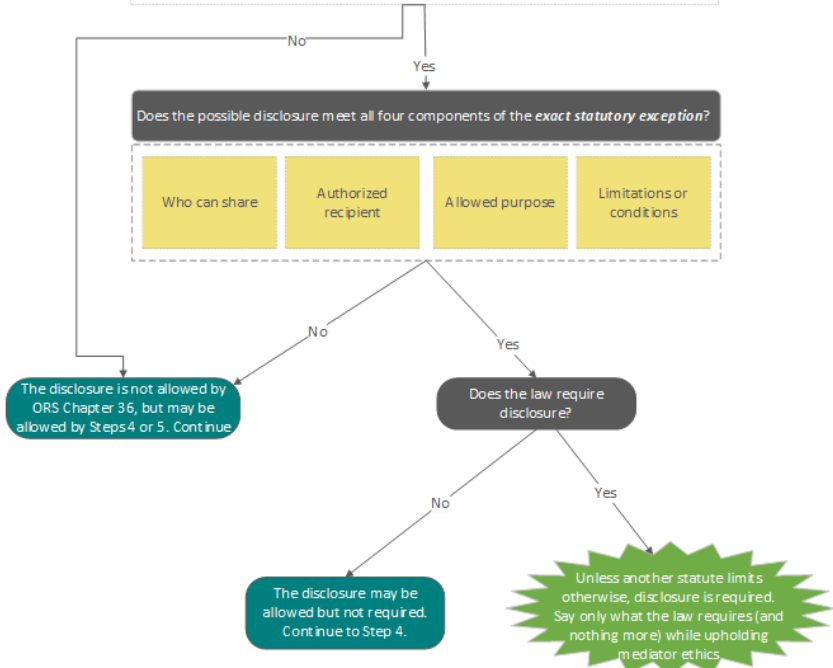
Step 2 Scenarios

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Step 3 Scenarios

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

Yes

Use applicable statute or rule to determine whether disclosure is permitted, required, or restricted. Continue to step 5.

No

Go to Step 5 to determine whether any written agreement changes the default confidentiality rules.

Step 4 Scenarios



Step 5 Scenarios

Step 6: Apply the Ethics Standards you follow.



Step 6 Scenarios

Summary of Practice Safeguards for Disclosures

- When mediating between private parties: If it was made for mediation or communicated in mediation, treat it as confidential unless the statute, rules, or a written agreement opens the door.
 - Pause before disclosing
 - Identify the exact authority
 - Match the exception to the facts
 - Use minimum necessary disclosure
 - “May disclose” is not the same as “should disclose.”
 - Document reasoning for sensitive disclosures
 - Consult your local court program
- See ORS 36.210 – Liability of mediators and programs

Closing Announcements

Any Final Questions?

- **Reminder that today's training is a three-part package:**
 - The live (or recorded) oral presentation
 - This PowerPoint slide deck
 - A handout titled: [Mediation Confidentiality: A Framework for Oregon Court-Connected Mediators](#)

Using all three together will help you navigate the nuances of mediation confidentiality more effectively.

All materials are posted on the Oregon Judicial Department's [Mediator Resources Webpage](#) under the Court System Training Section (see session 4)

- [Post-Session Survey](#)

Thank You!

**For questions related to court-connected mediation,
contact:**

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Office of the State Court Administrator

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To connect with or to learn more from Sam Imperati, visit:

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