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

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

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

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

[2] ORS 36.110 provides in part:
"(5) 'Mediation' means a process in which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy and includes all contacts between a mediator and any party or agent of a party, until such time as a resolution is agreed to by the parties or the mediation process is terminated."
"(7) 'Mediation communications' means:
(a) All communications that are made, in the course of or in connection with a mediation, to a mediator, a mediation program or a party to, or any other person present at, the mediation proceedings; and
(b) All memoranda, work products, documents and other materials, including any draft mediation agreement, that are prepared for or submitted in the course of or in connection with a mediation or by a mediator, a mediation program or a party to, or any other person present at, mediation proceedings."

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

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

confidentiality statutes. If a communication between a lawyer and client constitutes a mediation communication, it is generally inadmissible, even if relevant to the claims or defenses in a legal malpractice case. *See* ORS 36.222 (1).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Court of Appeals' Opinion

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

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

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

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

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

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

The Supreme Court Opinion

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

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

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

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

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

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

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

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

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

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

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

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

The First Interpretation

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

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

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

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

The Second Interpretation

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

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

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

Alfieri, 358 Or at 395 (emphasis added).

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

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

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

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

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

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