



Alerts

Oregon Supreme Court Limits Mediation Confidentiality

December 16, 2015

Lawyers for the Profession® Alert

Alfieri v. Solomon, ___ P.3d ___, 2015 WL 8539065 (Or. 2015)

Brief Summary

In a case of first impression, the Oregon Supreme Court held that confidential mediation communications did not include private communications between a mediating party and his or her attorney outside of the mediation proceedings, even if integrally related to the mediation.

Complete Summary

Plaintiff retained defendant to pursue employment related claims against plaintiff's former employer, and defendant filed a civil action against the former employer. After limited discovery, plaintiff, represented by defendant, and plaintiff's former employer entered into mediation under the terms and conditions set forth in ORS 36.185 to 36.210. Before meeting with the mediator and plaintiff's former employer, defendant advised plaintiff about the potential value of his claims and the amount for which he might settle. Plaintiff and his former employer, along with their respective lawyers and the mediator, attended a joint mediation session and attempted to resolve the dispute. No resolution was reached. After the session ended, the mediator proposed a settlement package to the parties, and defendant provided advice to plaintiff about the proposed settlement. At defendant's urging, plaintiff accepted the proposed terms and signed a confidential settlement agreement. After the parties signed the agreement, defendant continued to counsel plaintiff and provide legal advice regarding the settlement.

Months after the mediation ended, plaintiff concluded that defendant's legal representation had been deficient and negatively affected the outcome of his case. Plaintiff sued defendant for legal malpractice, alleging that defendant had been negligent and had breached his fiduciary duty to plaintiff through his work both on the underlying civil action and the mediation. Plaintiff asserted he was entitled to substantially more monetary relief than he obtained by settlement. To assert those claims, plaintiff pleaded facts that disclosed certain terms of the confidential settlement agreement and that pertained to communications made by various persons involved in the mediation process.

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Specifically, plaintiff's allegations disclosed facts about the mediator's settlement proposal to the parties, defendant's conduct during the mediation, and private attorney-client discussions between plaintiff and defendant regarding the mediation. Those private attorney-client discussions — which occurred outside the mediation session and without the involvement of either the mediator or plaintiff's former employer — concerned the valuation and strength of plaintiff's claims, whether plaintiff was obligated to accept the mediator's proposal and sign the settlement agreement, and whether the agreement was enforceable. Although some of those discussions took place before or while the mediation was still in progress, others occurred when plaintiff signed the settlement agreement or thereafter.

Defendant filed a motion to strike many of plaintiff's allegations, arguing that they contained material that was confidential and inadmissible under two provisions of Oregon's mediation statute, ORS 36.220 and ORS 36.222. The trial court granted the motion and then dismissed plaintiff's complaint. The appellate court affirmed in part and reversed in part. The appellate court concluded that the trial court did not err in striking the allegations that disclosed the terms of the settlement agreement and the allegation that described the mediator's settlement proposal to the parties. With respect to other allegations that referred to mediation-related communications, the appellate court distinguished between those communications that took place while the mediation process was still underway and those that occurred after the settlement agreement was signed.

The Oregon Supreme Court affirmed in part, reversed in part and remanded the case for further proceedings. After carefully reviewing the terms and definitions of the mediation confidentiality statutes, the court ultimately concluded 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. The court held that confidential mediation communications did not include private communications between a mediating party and his or her attorney outside of mediation proceedings, even if those communications were integrally related to the mediation.

Significance of Opinion

The case is significant because the Oregon Supreme Court significantly limited the scope of mediation confidentiality, and communications outside the mediation process are not considered confidential in Oregon. For an excellent article on mediation confidentiality, see "[Viewpoint: The Clock is Ticking on Mediation Confidentiality](#)," *The Recorder*, December 8, 2015 (subscription required).

For more information, please contact Terrence P. McAvoy.