

Secretary of State  
Certificate and Order for Filing  
**PERMANENT ADMINISTRATIVE RULES**

I certify that the attached copies\* are true, full and correct copies of the PERMANENT Rule(s) adopted on March 22, 1999 by the  
Date prior to or same as filing date.

Water Resources Department - Director's Office  
Agency and Division

690  
Administrative Rules Chapter Number

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to become effective March 23, 1999 Rulemaking Notice was published in the February, 1999 Oregon Bulletin.\*\*  
Date upon filing or later Month and Year

**RULEMAKING ACTION**  
List each rule number separately, 000-000-0000.

**ADOPT:**  
Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

OAR 690-004-0030

**AMEND:**

OAR 690-004-0010

**REPEAL:**

Renumber: Secure approval of rule numbers with the Administrative Rules Unit prior to filing.  
Amend and Renumber: Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

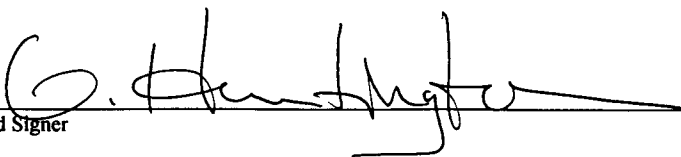
ORS 36.224 and 536.027  
Stat. Auth.: ORS

Other Authority

ORS 36.224, 36.228, 36.230 and 36.232  
Stats. Implemented: ORS

**RULE SUMMARY**

Pursuant to ORS 36.224(4), the Water Resources Department has adopted rules relating to the confidentiality of mediation negotiations. The rules are identical to the "Combined Rule (7/16/98) - Confidentiality and Inadmissibility of Mediation Communications" and the "Simplified Workplace Interpersonal Dispute Rule (7/16/98)" developed by the Department of Justice. The Department of Administrative Services and the Dispute Resolution Commission encourage all state agencies to adopt these rules. The rules allow the Department to participate in confidential mediations for litigation, labor negotiations and workplace disputes in a manner consistent with the state's policy on open government. Without these rules, the Department would have limited ability to conduct candid, confidential settlement negotiations. Mediation has the potential to resolve lawsuits less expensively than litigation and to achieve more satisfactory results.

  
Authorized Signer

March 23, 1999  
Date

\*Copies include a photocopy of this certificate with paper copy of each rule listed in the Rulemaking Action.

\*\*The Oregon Bulletin is published on the 1<sup>st</sup> of each month and updates the rule text found in the Oregon Administrative Rules Compilation. Notice forms must be submitted to the Administrative Rules Unit, Oregon State Archives, 800 Summer Street NE, Salem, Oregon 97310 by 5:00 p.m. on the 1<sup>st</sup> day of the preceding month unless this deadline falls on a Saturday, Sunday or legal holiday when Notice forms are accepted until 5:00 p.m. on the preceding workday.

March 23, 1999

OREGON ADMINISTRATIVE RULES  
WATER RESOURCES DEPARTMENT  
CHAPTER 690  
DIVISION 4  
PROCEDURAL RULES FOR MEDIATION COMMUNICATIONS

**Confidentiality and Inadmissibility of Mediation Communications**

**690-004-0010** (1) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110 and 36.234.

(2) Nothing in this rule affects any confidentiality created by other law. Nothing in this rule relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690. Whether or not they are confidential under this or other rules of the agency, mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.

(3) This rule applies only to mediations in which the agency is a party or is mediating a dispute as to which the agency has regulatory authority. This rule does not apply when the agency is acting as the "mediator" in a matter in which the agency also is a party as defined in ORS 36.234.

(4) To the extent mediation communications would otherwise be compromise negotiations under ORS 40.190 (OEC Rule 408), those mediation communications are not admissible as provided in ORS 40.190 (OEC Rule 408), notwithstanding any provisions to the contrary in section (9) of this rule.

(5) Mediations Excluded. Sections (6)-(10) of this rule do not apply to:

(a) Mediation of workplace interpersonal disputes involving the interpersonal relationships between this agency's employees, officials or employees and officials, unless a formal grievance under a labor contract, a tort claim notice or a lawsuit has been filed; or

(b) Mediation in which the person acting as the mediator will also act as the hearings officer in a contested case involving some or all of the same matters;

(c) Mediation in which the only parties are public bodies;

(d) Mediation involving two or more public bodies and a private party if the laws, rule or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential;

(e) Mediation involving 15 or more parties if the agency has designated that another mediation confidentiality rule adopted by the agency may apply to that mediation.

(6) Disclosures by Mediator. A mediator may not disclose or be compelled to disclose mediation communications in a mediation and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless

(a) all the parties to the mediation and the mediator agree in writing to the disclosure; or

(b) the mediation communication may be disclosed or introduced into evidence in a

*Note: These rules were filed with the Office of the Secretary of State and took effect on March 23, 1999. The rules are subject to non-substantive modifications such as renumbering and correction of typographical errors pursuant to ORS 183.360 (2)(a) when published by the Secretary of State*

subsequent proceeding as provided in subsections (c)-(d), (j)-(l) or (o)-(p) of section (9) of this rule.

(7) Confidentiality and Inadmissibility of Mediation Communications. Except as provided in sections (8)-(9) of this rule, mediation communications are confidential and may not be disclosed to any other person, are not admissible in any subsequent administrative, judicial or arbitration proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of a subsequent proceeding, or introduced as evidence by the parties or the mediator in any subsequent proceeding.

(8) Written Agreement. Section (7) of this rule does not apply to a mediation unless the parties to the mediation agree in writing, as provided in this section, that the mediation communications in the mediation will be confidential and/or nondiscoverable and inadmissible. If the mediator is the employee of and acting on behalf of a state agency, the mediator or an authorized agency representative must also sign the agreement. The parties' agreement to participate in a confidential mediation must be in substantially the following form. This form may be used separately or incorporated into an "agreement to mediate."

(9) Exceptions to confidentiality and inadmissibility.

(a) Any statements, memoranda, work products, documents and other materials, otherwise subject to discovery that were not prepared specifically for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding.

(b) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential or privileged under state or federal law.

(c) A mediation communication is not confidential and may be disclosed by any person receiving the communication to the extent that person reasonably believes that disclosing the communication is necessary to prevent the commission of a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential and may be disclosed in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(d) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule is not confidential and may be disclosed to the extent necessary to make such a report.

(e) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential or that all or part of the mediation communications may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential, privileged or otherwise prohibited from disclosure under state or federal law.

(f) A party to the mediation may disclose confidential mediation communications to a person if the party's communication with that person is privileged under ORS chapter 40 or other provision of law. A party to the mediation may disclose confidential mediation communications to a person for the purpose of obtaining advice concerning the subject matter of the mediation, if all the parties agree.

(g) An employee of the agency may disclose confidential mediation communications to

another agency employee so long as the disclosure is necessary to conduct authorized activities of the agency. An employee receiving a confidential mediation communication under this subsection is bound by the same confidentiality requirements as apply to the parties to the mediation.

(h) A written mediation communication may be disclosed or introduced as evidence in a subsequent proceeding at the discretion of the party who prepared the communication so long as the communication is not otherwise confidential under state or federal law and does not contain confidential information from the mediator or another party who does not agree to the disclosure.

(i) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications and such communications may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.

(j) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications are not confidential and may be disclosed and may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(k) When a mediation is conducted as part of the negotiation of a collective bargaining agreement, the following mediation communications are not confidential and such communications may be introduced into evidence in a subsequent administrative, judicial or arbitration proceeding:

(A) a request for mediation, or

(B) a communication from the Employment Relations Board Conciliation Service establishing the time and place of mediation, or

(C) a final offer submitted by the parties to the mediator pursuant to ORS 243.712, or

(D) a strike notice submitted to the Employment Relations Board.

(l) To the extent a mediation communication contains information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, that portion of the communication may be disclosed as required by statute.

(m) Written mediation communications prepared by or for the agency or its attorney are not confidential and may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding to the extent the communication does not contain confidential information from the mediator or another party, except for those written mediation communications that are:

(A) attorney-client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege, or

(B) attorney work product prepared in anticipation of litigation or for trial, or

(C) prepared exclusively for the mediator or in a caucus session and not given to another party in the mediation other than a state agency, or

(D) prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation, or

(E) settlement concepts or proposals, shared with the mediator or other parties.

(n) A mediation communication made to the agency may be disclosed and may be admitted

into evidence to the extent the Director of the Water Resources Department determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public's health or safety, and the communication is not otherwise confidential or privileged under state or federal law.

(o) The terms of any mediation agreement are not confidential and may be introduced as evidence in a subsequent proceeding, except to the extent the terms of the agreement are exempt from disclosure under ORS 192.410 to 192.505, a court has ordered the terms to be confidential under ORS 30.402 or state or federal law requires the terms to be confidential.

(p) The mediator may report the disposition of a mediation to the agency at the conclusion of the mediation so long as the report does not disclose specific confidential mediation communications. The agency or the mediator may use or disclose confidential mediation communications for research, training or educational purposes, subject to the provisions of ORS 36.232(4).

(10) When a mediation is subject to section (7) of this rule, the agency will provide to all parties to the mediation and the mediator a copy of this rule or a citation to the rule and an explanation of where a copy of the rule may be obtained. Violation of this provision does not waive confidentiality or inadmissibility.

Stat. Auth.: ORS 36.224 and ORS 539.027

Stats. Implemented: ORS 36.224, 36.228, 36.230, 36.232

Hist: WRD -1998, f. & cert. ef. 11-2-98, WRD -1999, f. & cert. ef. 3-23-99

### **Applicability of Rules and Inadmissibility of Certain Mediation Communications in Large, Multi-party Mediation**

**690-004-0020** (1) Except as provided in this rule, or in other rules adopted by this agency pursuant to Oregon Laws 1997, chapter 670, section 3, or by other state or federal law, mediation communications in a mediation session may not be disclosed in any subsequent administrative, judicial or arbitration proceeding or introduced into evidence in any subsequent proceeding so long as:

(a) The mediation is one for which:

(A) The agency is a party as defined in Oregon Laws 1997, chapter 670, section 11, or is mediating a dispute as to which the agency has regulatory authority;

(B) A mediator is assisting and facilitating the parties to reach a mutually acceptable resolution of the issues in controversy;

(C) There are 15 or more parties to the mediation, regardless of whether or not all the parties participate in each mediation session; and

(D) The agency designates in writing that this rule may apply and provides a copy of the designation along with a copy of this rule to the mediator and to those parties to the mediation that are known to the agency. The designation required by this section must contain sufficient information to identify the mediation, including a brief description of the dispute or issues to be resolved, and the names of those parties to the mediation that are known to the agency; and

(b) The specific mediation session is one for which:

(A) The agency or the mediator and at least one party other than the agency are present;

- (B) A party to the mediation or the mediator requests that this rule apply; and
  - (C) If present, the agency agrees to have this rule apply; and
  - (c) The agency or the mediator notifies all persons in attendance at the beginning of the mediation session that the session is being conducted under OAR 690-0004-0020 and that any communications in the session may not be disclosed or introduced as evidence in any subsequent proceeding except as otherwise provided by OAR 690-0004-0020 or by other rules adopted by the agency pursuant to Oregon Laws 1997, chapter 670 or by other state or federal law.
- (2) The agency may declare that certain mediation communications are not subject to the inadmissibility or non-disclosure provided by this rule. This declaration must:
    - (a) Be included in the designation provided in paragraph (1)(a)(D), or in an amendment to the declaration in which case the agency must mail or deliver a copy of the designation to all parties listed in the original designation and any other parties that are known to the agency; and
    - (b) Identify the mediation communications that, pursuant to this section, may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding.
  - (3) To the extent mediation communications would otherwise be compromise negotiations under ORS 40.190 (OEC Rule 408), those mediation communications are not admissible as provided in ORS 40.190 (OEC Rule 408).
  - (4) Nothing in this rule affects any confidentiality created by other law.
  - (5) The words and phrases used in this rule have the same meaning as given to them in Oregon Laws 1997, chapter 670, section 11.
  - (6) Any statements, memoranda, work products, documents and other materials otherwise subject to discovery that were not prepared specifically for use in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.
  - (7) Any mediation communications that are public records as defined in ORS 192.410(4) and were not specifically prepared for use in the mediation may be disclosed in a subsequent proceeding and may be introduced into evidence unless the substance of the communication is confidential under state or federal law.
  - (8) A party may disclose confidential mediation communications that were made in a mediation session covered by this rule in a subsequent proceeding if all the parties to the mediation session agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in a subsequent proceeding.
  - (9) A mediator may disclose confidential mediation communications that were made in a mediation session covered by this rule in any subsequent proceeding if all the parties to the mediation session and the mediator agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in subsequent proceedings.
  - (10) A mediation communication may be disclosed in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.
  - (11) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule may be disclosed to the extent necessary to make such a report. A communication that has been disclosed may be introduced as evidence in a subsequent proceeding.

(12) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation session may disclose mediation communications, and such communications may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.

(13) In an action for damages or other relief between a party to the mediation session and a mediator or mediation program, mediation communications may be disclosed in a subsequent proceeding and may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(14) A written mediation communication may be disclosed in a subsequent proceeding and may be introduced as evidence by the party who prepared the communication so long as it does not contain information from another party to the mediation session or the mediator, or information that is otherwise confidential under state or federal law.

(15) When the only parties to the mediation session are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505.

(16) When the parties to the mediation session include a private party and two or more public bodies, mediation communications may be disclosed and may be introduced as evidence in a subsequent proceeding if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation session are not confidential.

(17) The terms of any mediation agreement may be disclosed and may be introduced as evidence in a subsequent proceeding.

(18) When a person acts as the mediator in the mediation session and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation session may be disclosed and may be introduced as evidence in a subsequent proceeding.

(19) Nothing in this rule relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.224 and ORS 539.005(2)

Stats. Implemented: ORS 36.224(4) and ORS 539.010 through 539.220

Hist: WRD -1998, f. & cert. ef. 11-2-98

### **Confidentiality and Inadmissibility of Workplace Interpersonal Dispute Mediation Communications**

**OAR 690-004-0030** (1) This rule applies to workplace interpersonal disputes, which are disputes involving the interpersonal relationships between this agency's employees, officials or employees and officials. This rule does not apply to disputes involving the negotiation of labor contracts or matters about which a formal grievance under a labor contract, a tort claim notice or a lawsuit has been filed.

(2) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110 and 36.234.

(3) Nothing in this rule affects any confidentiality created by other law.

(4) To the extent mediation communications would otherwise be compromise negotiations under ORS 40.190 (OEC Rule 408), those mediation communications are not admissible as provided in ORS 40.190 (OEC Rule 408), notwithstanding any provisions to the contrary in section (9) of this rule.

(5) Disclosures by Mediator. A mediator may not disclose or be compelled to disclose mediation communications in a mediation and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless

(a) all the parties to the mediation and the mediator agree in writing to the disclosure; or

(b) the mediation communication may be disclosed or introduced into evidence in a subsequent proceeding as provided in subsections (c) or (h)-(j) of section (7) of this rule.

(6) Confidentiality and Inadmissibility of Mediation Communications. Except as provided in section (7) of this rule, mediation communications in mediations involving workplace interpersonal disputes are confidential and may not be disclosed to any other person, are not admissible in any subsequent administrative, judicial or arbitration proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of a subsequent proceeding, or introduced into evidence by the parties or the mediator in any subsequent proceeding so long as:

(a) The parties to the mediation and the agency have agreed in writing to the confidentiality of the mediation, and;

(b) The person agreeing to the confidentiality of the mediation on behalf of the agency:

(A) is neither a party to the dispute nor the mediator, and

(B) is designated by the agency to authorize confidentiality for the mediation, and

(C) is at the same or higher level in the agency than any of the parties to the mediation or who is a person with responsibility for human resources or personnel matters in the agency, unless the agency head or member of the governing board is one of the persons involved in the interpersonal dispute, in which case the Governor or the Governor's designee.

(7) Exceptions to confidentiality and inadmissibility.

(a) Any statements, memoranda, work products, documents and other materials, otherwise subject to discovery that were not prepared specifically for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding.

(b) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential or privileged under state or federal law.

(c) A mediation communication is not confidential and may be disclosed by any person receiving the communication to the extent that person reasonably believes that disclosing the communication is necessary to prevent the commission of a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential and may be disclosed in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(d) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential or that all or part of the mediation communications may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of



the communication is confidential, privileged or otherwise prohibited from disclosure under state or federal law.

(e) A party to the mediation may disclose confidential mediation communications to a person if the party's communication with that person is privileged under ORS chapter 40 or other provision of law. A party to the mediation may disclose confidential mediation communications to a person for the purpose of obtaining advice concerning the subject matter of the mediation, if all the parties agree.

(f) A written mediation communication may be disclosed or introduced as evidence in a subsequent proceeding at the discretion of the party who prepared the communication so long as the communication is not otherwise confidential under state or federal law and does not contain confidential information from the mediator or another party who does not agree to the disclosure.

(g) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications and such communications may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.

(h) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications are not confidential and may be disclosed and may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements

(i) To the extent a mediation communication contains information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, that portion of the communication may be disclosed as required by statute.

(j) The mediator may report the disposition of a mediation to the agency at the conclusion of the mediation so long as the report does not disclose specific confidential mediation communications. The agency or the mediator may use or disclose confidential mediation communications for research, training or educational purposes, subject to the provisions of ORS 36.232(4).

(8) The terms of any agreement arising out of the mediation of a workplace interpersonal dispute are confidential so long as the parties and the agency so agree in writing. Any term of an agreement that requires an expenditure of public funds, other than expenditures of \$1,000 or less for employee training, employee counseling or purchases of equipment that remain the property of the agency, may not be made confidential.

(9) When a mediation is subject to section (6) of this rule, the agency will provide to all parties to the mediation and to the mediator a copy of this rule or an explanation of where a copy of the rule may be obtained. Violation of this provision does not waive confidentiality or inadmissibility.

Stat. Auth.: ORS 36.224 and 536.027

Stats. Implemented: ORS 36.224, 36.228, 36.230 and 36.232

Hist: WRD -1999, 3-23-99

*Agreement to Participate in a Confidential Mediation*

The agency and the parties to the mediation agree to participate in a mediation in which the mediation communications are confidential and/or nondiscoverable and inadmissible to the extent authorized by OAR 690-004-0010(7) and this agreement. This agreement relates to the following mediation:

- a) \_\_\_\_\_  
(Identify the mediation to which this agreement applies)
- b) To the extent authorized by OAR 690-004-0010(7), mediation communications in this mediation are: (check one or more)

\_\_\_ confidential and may not be disclosed to any other person

\_\_\_ not admissible in any subsequent administrative proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of a subsequent administrative proceeding, or introduced as evidence by the parties or the mediator in any subsequent administrative proceeding

\_\_\_ not admissible in any subsequent administrative, judicial or arbitration proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of a subsequent administrative, judicial or arbitration proceeding, or introduced as evidence by the parties or the mediator in any subsequent administrative, judicial or arbitration proceeding

- c) \_\_\_\_\_  
Name of Agency

\_\_\_\_\_  
Signature of Agency's authorized representative (when agency is a party) or Agency employee acting as the mediator (when Agency is mediating the dispute)

\_\_\_\_\_  
Date

- d) \_\_\_\_\_  
Name of party to the mediation

\_\_\_\_\_  
Signature of party's authorized representative

\_\_\_\_\_  
Date

- e) \_\_\_\_\_  
Name of party to the mediation

\_\_\_\_\_  
Signature of party's authorized representative

\_\_\_\_\_  
Date