

CHAMBER ACTION

1 The Committee on State Administration recommends the following:

2  
3 **Committee Substitute**

4 Remove the entire bill and insert:

5 A bill to be entitled

6 An act relating to mediation alternatives to judicial  
7 action; amending s. 44.102, F.S.; deleting language  
8 regarding the disclosure of specified information made  
9 during court-ordered mediation; amending s. 44.107, F.S.;  
10 providing immunity from liability for trainees in the  
11 Supreme Court's mentorship program; providing immunity  
12 from liability for persons serving as mediators in  
13 specified circumstances; amending s. 44.201, F.S.;  
14 deleting language regarding disclosure of specified  
15 information held by Citizen Dispute Resolution Centers;  
16 creating ss. 44.401-44.406, F.S.; providing a popular  
17 name; providing for the creation of the Mediation  
18 Confidentiality and Privilege Act; providing for  
19 application; providing definitions; specifying when a  
20 mediation begins and ends; providing for confidentiality  
21 of mediation communications; providing for a privilege;  
22 providing exceptions; providing for civil remedies;  
23 providing a statute of limitation; providing an exception;

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24 | amending s. 61.183, F.S.; deleting language regarding  
25 | disclosure of specified information made during cases;  
26 | providing an effective date.

27 |  
28 | Be It Enacted by the Legislature of the State of Florida:

29 |  
30 | Section 1. Subsections (3) and (4) of section 44.102,  
31 | Florida Statutes, are amended, and subsections (5) and (6) of  
32 | said section are renumbered as subsections (4) and (5),  
33 | respectively, to read:

34 | 44.102 Court-ordered mediation.--

35 | ~~(3) Each party involved in a court-ordered mediation~~  
36 | ~~proceeding has a privilege to refuse to disclose, and to prevent~~  
37 | ~~any person present at the proceeding from disclosing,~~  
38 | ~~communications made during such proceeding. All oral or written~~  
39 | ~~communications in a mediation proceeding, other than an executed~~  
40 | ~~settlement agreement, shall be exempt from the requirements of~~  
41 | ~~chapter 119 and shall be confidential and inadmissible as~~  
42 | ~~evidence in any subsequent legal proceeding, unless all parties~~  
43 | ~~agree otherwise.~~

44 | ~~(4) There shall be no privilege and no restriction on any~~  
45 | ~~disclosure of communications made confidential in subsection (3)~~  
46 | ~~in relation to disciplinary proceedings filed against mediators~~  
47 | ~~pursuant to s. 44.106 and court rules, to the extent the~~  
48 | ~~communication is used for the purposes of such proceedings. In~~  
49 | ~~such cases, the disclosure of an otherwise privileged~~  
50 | ~~communication shall be used only for the internal use of the~~  
51 | ~~body conducting the investigation. Prior to the release of any~~

52 ~~disciplinary files to the public, all references to otherwise~~  
 53 ~~privileged communications shall be deleted from the record. When~~  
 54 ~~an otherwise confidential communication is used in a mediator~~  
 55 ~~disciplinary proceeding, such communication shall be~~  
 56 ~~inadmissible as evidence in any subsequent legal proceeding.~~  
 57 ~~"Subsequent legal proceeding" means any legal proceeding between~~  
 58 ~~the parties to the mediation which follows the court-ordered~~  
 59 ~~mediation.~~

60 Section 2. Section 44.107, Florida Statutes, is amended to  
 61 read:

62 44.107 Immunity for arbitrators, ~~and~~ mediators, and  
 63 mediator trainees.--

64 (1) Arbitrators serving ~~An Arbitrator appointed~~ under s.  
 65 44.103 or s. 44.104, mediators serving or a mediator appointed  
 66 under s. 44.102, and trainees fulfilling the mentorship  
 67 requirements for certification by the Supreme Court as a  
 68 mediator shall have judicial immunity in the same manner and to  
 69 the same extent as a judge.

70 (2) A person serving as a mediator in any noncourt-ordered  
 71 mediation shall have immunity from liability arising from the  
 72 performance of that person's duties while acting within the  
 73 scope of the mediation function if such mediation is:

74 (a) Required by statute or agency rule or order;

75 (b) Conducted under ss. 44.401-44.406 by express agreement  
 76 of the mediation parties; or

77 (c) Facilitated by a mediator certified by the Supreme  
 78 Court, unless the mediation parties expressly agree not to be  
 79 bound by ss. 44.401-44.406.

80  
81 The mediator does not have immunity if he or she acts in bad  
82 faith, with malicious purpose, or in a manner exhibiting wanton  
83 and willful disregard of human rights, safety, or property.

84 (3) A person serving ~~appointed~~ under s. 44.106 to assist  
85 the Supreme Court in performing its disciplinary function shall  
86 have absolute immunity from liability arising from the  
87 performance of that person's duties while acting within the  
88 scope of that person's appointed function.

89 Section 3. Subsection (5) of section 44.201, Florida  
90 Statutes, is amended to read:

91 44.201 Citizen Dispute Settlement Centers; establishment;  
92 operation; confidentiality.--

93 (5) Any information relating to a dispute obtained by any  
94 person while performing any duties for the center from the  
95 files, reports, case summaries, mediator's notes, or other  
96 communications or materials, ~~oral or written, is confidential~~  
97 ~~and exempt from the provisions of s. 119.07(1) and shall not be~~  
98 ~~publicly disclosed without the written consent of all parties to~~  
99 ~~the dispute. Any research or evaluation effort directed at~~  
100 ~~assessing program activities or performance shall protect the~~  
101 ~~confidentiality of such information. Each party to a Citizen~~  
102 ~~Dispute Settlement Center proceeding has a privilege during and~~  
103 ~~after those proceedings to refuse to disclose and to prevent~~  
104 ~~another from disclosing communications made during such~~  
105 ~~proceedings, whether or not the dispute was successfully~~  
106 ~~resolved. This subsection shall not be construed to prevent or~~  
107 ~~inhibit the discovery or admissibility of any information which~~

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108 ~~is otherwise subject to discovery or which is admissible under~~  
 109 ~~applicable law or rules of court, except that any conduct or~~  
 110 ~~statements made during such mediation sessions or in~~  
 111 ~~negotiations concerning such sessions shall be inadmissible in~~  
 112 ~~any judicial proceeding.~~

113 Section 4. Sections 44.401, 44.402, 44.403, 44.404,  
 114 44.405, and 44.406, Florida Statutes, are created to read:

115 44.401 Mediation Confidentiality and Privilege  
 116 Act.--Sections 44.401-44.406 may be known by the popular name  
 117 the "Mediation Confidentiality and Privilege Act."

118 44.402 Scope.--

119 (1) Except as otherwise provided, ss. 44.401-44.406 apply  
 120 to any mediation:

121 (a) Required by statute, court rule, agency rule or order,  
 122 oral or written case-specific court order, or court  
 123 administrative order;

124 (b) Conducted under ss. 44.401-44.406 by express agreement  
 125 of the mediation parties; or

126 (c) Facilitated by a mediator certified by the Supreme  
 127 Court, unless the mediation parties expressly agree not to be  
 128 bound by ss. 44.401-44.406.

129 (2) Notwithstanding any other provision, the mediation  
 130 parties may agree in writing that any or all of s. 44.405(1), s.  
 131 44.405(2), or s. 44.406 will not apply to all or part of a  
 132 mediation proceeding.

133 44.403 Definitions.--As used in ss. 44.401-44.406, the  
 134 term:

135       (1) "Mediation communication" means an oral or written  
 136 statement, or nonverbal conduct intended to make an assertion,  
 137 by or to a mediation participant made during the course of a  
 138 mediation, or prior to mediation if made in furtherance of a  
 139 mediation. The commission of a crime during a mediation is not a  
 140 mediation communication.

141       (2) "Mediation participant" means a mediation party or a  
 142 person who attends a mediation in person or by telephone, video  
 143 conference, or other electronic means.

144       (3) "Mediation party" or "party" means a person  
 145 participating directly, or through a designated representative,  
 146 in a mediation and a person who:

147           (a) Is a named party;

148           (b) Is a real party in interest; or

149           (c) Would be a named party or real party in interest if an  
 150 action relating to the subject matter of the mediation were  
 151 brought in a court of law.

152       (4) "Mediator" means a neutral, impartial third person who  
 153 facilitates the mediation process. The mediator's role is to  
 154 reduce obstacles to communication, assist in identifying issues,  
 155 explore alternatives, and otherwise facilitate voluntary  
 156 agreements to resolve disputes, without prescribing what the  
 157 resolution must be.

158       (5) "Subsequent proceeding" means an adjudicative process  
 159 that follows a mediation, including related discovery.

160       44.404 Mediation; duration.--

161       (1) A court-ordered mediation begins when an order is  
 162 issued by the court and ends when:

163        (a) A partial or complete settlement agreement, intended  
 164 to resolve the dispute and end the mediation, is signed by the  
 165 parties and, if required by law, approved by the court;

166        (b) The mediator declares an impasse by reporting to the  
 167 court or the parties the lack of an agreement;

168        (c) The mediation is terminated by court order, court  
 169 rule, or applicable law; or

170        (d) The mediation is terminated, after party compliance  
 171 with the court order to appear at mediation, by:

172            1. Agreement of the parties; or

173            2. One party giving written notice to all other parties in  
 174 a multiparty mediation that the one party is terminating its  
 175 participation in the mediation. Under this circumstance, the  
 176 termination is effective only for the withdrawing party.

177        (2) In all other mediations, the mediation begins when the  
 178 parties agree to mediate or as required by agency rule, agency  
 179 order, or statute, whichever occurs earlier, and ends when:

180        (a) A partial or complete settlement agreement, intended  
 181 to resolve the dispute and end the mediation, is signed by the  
 182 parties and, if required by law, approved by the court;

183        (b) The mediator declares an impasse to the parties;

184        (c) The mediation is terminated by court order, court  
 185 rule, or applicable law; or

186        (d) The mediation is terminated by:

187            1. Agreement of the parties; or

188            2. One party giving notice to all other parties in a  
 189 multiparty mediation that the one party is terminating its

190 participation in the mediation. Under this circumstance, the  
 191 termination is effective only for the withdrawing party.

192 44.405 Confidentiality; privilege; exceptions.--

193 (1) Except as provided in this section, all mediation  
 194 communications shall be confidential. A mediation participant  
 195 shall not disclose a mediation communication to a person other  
 196 than another mediation participant or a participant's counsel. A  
 197 violation of this section may be remedied as provided by s.  
 198 44.406. If the mediation is court ordered, a violation of this  
 199 section may also subject the mediation participant to sanctions  
 200 by the court, including, but not limited to, costs, attorney's  
 201 fees, and mediator's fees.

202 (2) A mediation party has a privilege to refuse to testify  
 203 and to prevent any other person from testifying in a subsequent  
 204 proceeding regarding mediation communications.

205 (3) If, in a mediation involving more than two parties, a  
 206 party gives written notice to the other parties that the party  
 207 is terminating its participation in the mediation, the party  
 208 giving notice shall have a privilege to refuse to testify and to  
 209 prevent any other person from testifying in a subsequent  
 210 proceeding regarding only those mediation communications that  
 211 occurred prior to the delivery of the written notice of  
 212 termination of mediation to the other parties.

213 (4)(a) Notwithstanding subsections (1) and (2), there is  
 214 no confidentiality or privilege attached to a signed written  
 215 agreement reached during a mediation, unless the parties agree  
 216 otherwise, or for any mediation communication:



- 217        1. For which the confidentiality or privilege against  
 218 disclosure has been waived by all parties;
- 219        2. That is willfully used to plan a crime, commit or  
 220 attempt to commit a crime, conceal ongoing criminal activity, or  
 221 threaten violence;
- 222        3. That requires a mandatory report pursuant to chapter 39  
 223 or chapter 415 solely for the purpose of making the mandatory  
 224 report to the entity requiring the report;
- 225        4. Offered to report, prove, or disprove professional  
 226 malpractice occurring during the mediation, solely for the  
 227 purpose of the professional malpractice proceeding;
- 228        5. Offered for the limited purpose of establishing or  
 229 refuting legally recognized grounds for voiding or reforming a  
 230 settlement agreement reached during a mediation; or
- 231        6. Offered to report, prove, or disprove professional  
 232 misconduct occurring during the mediation, solely for the  
 233 internal use of the body conducting the investigation of the  
 234 conduct.
- 235        (b) A mediation communication disclosed under any  
 236 provision of subparagraphs (4)(a)3., (4)(a)4., (4)(a)5., or  
 237 (4)(a)6. remains confidential and is not discoverable or  
 238 admissible for any other purpose, unless otherwise permitted by  
 239 this section.
- 240        (5) Information that is otherwise admissible or subject to  
 241 discovery does not become inadmissible or protected from  
 242 discovery by reason of its disclosure or use in mediation.
- 243        (6) A party that discloses or makes a representation about  
 244 a privileged mediation communication waives that privilege, but

245 only to the extent necessary for the other party to respond to  
 246 the disclosure or representation.

247 44.406 Confidentiality; civil remedies.--

248 (1) Any mediation participant who knowingly and willfully  
 249 discloses a mediation communication in violation of s. 44.405  
 250 shall, upon application by any party to a court of competent  
 251 jurisdiction, be subject to remedies, including:

252 (a) Equitable relief.

253 (b) Compensatory damages.

254 (c) Attorney's fees, mediator's fees, and costs incurred  
 255 in the mediation proceeding.

256 (d) Reasonable attorney's fees and costs incurred in the  
 257 application for remedies under this section.

258 (2) Notwithstanding any other law, an application for  
 259 relief filed under this section may not be commenced later than  
 260 2 years after the date on which the party had a reasonable  
 261 opportunity to discover the breach of confidentiality, but in no  
 262 case more than 4 years after the date of the breach.

263 (3) A mediation participant shall not be subject to a  
 264 civil action under this section for lawful compliance with the  
 265 provisions of s. 119.07.

266 Section 5. Subsection (3) of section 61.183, Florida  
 267 Statutes, is amended to read:

268 61.183 Mediation of certain contested issues.--

269 (3) Any information from the files, reports, case  
 270 summaries, mediator's notes, or other communications or  
 271 materials, ~~oral or written,~~ relating to a mediation proceeding  
 272 pursuant to this section obtained by any person performing

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273 mediation duties is ~~confidential~~ and exempt from the provisions  
274 of s. 119.07(1) and may not be disclosed without the written  
275 consent of all parties to the proceeding. Any research or  
276 evaluation effort directed at assessing program activities or  
277 performance must protect the confidentiality of such  
278 information. Each party to a mediation proceeding has a  
279 privilege during and after the proceeding to refuse to disclose  
280 and to prevent another from disclosing communications made  
281 during the proceeding, whether or not the contested issues are  
282 successfully resolved. This subsection shall not be construed to  
283 prevent or inhibit the discovery or admissibility of any  
284 information that is otherwise subject to discovery or that is  
285 admissible under applicable law or rules of court, except that  
286 any conduct or statements made during a mediation proceeding or  
287 in negotiations concerning the proceeding are inadmissible in  
288 any judicial proceeding.

289 Section 6. This act shall take effect July 1, 2004.