

1 A bill to be entitled

2 An act relating to mediation alternatives to judicial  
3 action; amending s. 44.102, F.S.; deleting language  
4 regarding the disclosure of specified information made  
5 during court-ordered mediation; amending s. 44.107, F.S.;  
6 providing immunity from liability for trainees in the  
7 Supreme Court's mentorship program; providing immunity  
8 from liability for persons serving as mediators in  
9 specified circumstances; amending s. 44.201, F.S.;  
10 deleting language regarding disclosure of specified  
11 information held by Citizen Dispute Resolution Centers;  
12 creating ss. 44.401-44.406, F.S.; providing a popular  
13 name; providing for the creation of the Mediation  
14 Confidentiality and Privilege Act; providing for  
15 application; providing definitions; specifying when a  
16 mediation begins and ends; providing for confidentiality  
17 of mediation communications; providing for a privilege;  
18 providing exceptions; providing for civil remedies;  
19 providing a statute of limitation; providing an exception;  
20 amending s. 61.183, F.S.; deleting language regarding  
21 disclosure of specified information made during cases;  
22 providing an effective date.

23  
24 Be It Enacted by the Legislature of the State of Florida:

25  
26 Section 1. Subsections (3) and (4) of section 44.102,  
27 Florida Statutes, are amended, and subsections (5) and (6) of

28 | said section are renumbered as subsections (4) and (5),  
 29 | respectively, to read:

30 |       44.102 Court-ordered mediation.--

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

40 |       (4) ~~There shall be no privilege and no restriction on any~~  
 41 | ~~disclosure of communications made confidential in subsection (3)~~  
 42 | ~~in relation to disciplinary proceedings filed against mediators~~  
 43 | ~~pursuant to s. 44.106 and court rules, to the extent the~~  
 44 | ~~communication is used for the purposes of such proceedings. In~~  
 45 | ~~such cases, the disclosure of an otherwise privileged~~  
 46 | ~~communication shall be used only for the internal use of the~~  
 47 | ~~body conducting the investigation. Prior to the release of any~~  
 48 | ~~disciplinary files to the public, all references to otherwise~~  
 49 | ~~privileged communications shall be deleted from the record. When~~  
 50 | ~~an otherwise confidential communication is used in a mediator~~  
 51 | ~~disciplinary proceeding, such communication shall be~~  
 52 | ~~inadmissible as evidence in any subsequent legal proceeding.~~  
 53 | ~~"Subsequent legal proceeding" means any legal proceeding between~~  
 54 | ~~the parties to the mediation which follows the court-ordered~~  
 55 | ~~mediation.~~

56 Section 2. Section 44.107, Florida Statutes, is amended to  
 57 read:

58 44.107 Immunity for arbitrators, ~~and~~ mediators, and  
 59 mediator trainees.--

60 (1) Arbitrators serving An Arbitrator appointed under s.  
 61 44.103 or s. 44.104, mediators serving or a mediator appointed  
 62 under s. 44.102, and trainees fulfilling the mentorship  
 63 requirements for certification by the Supreme Court as a  
 64 mediator shall have judicial immunity in the same manner and to  
 65 the same extent as a judge.

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

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

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

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

76  
 77 The mediator does not have immunity if he or she acts in bad  
 78 faith, with malicious purpose, or in a manner exhibiting wanton  
 79 and willful disregard of human rights, safety, or property.

80 (3) A person serving appointed under s. 44.106 to assist  
 81 the Supreme Court in performing its disciplinary function shall  
 82 have absolute immunity from liability arising from the

83 performance of that person's duties while acting within the  
 84 scope of that person's appointed function.

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

87 44.201 Citizen Dispute Settlement Centers; establishment;  
 88 operation; confidentiality.--

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

109 Section 4. Sections 44.401, 44.402, 44.403, 44.404,  
 110 44.405, and 44.406, Florida Statutes, are created to read:

111        44.401 Mediation Confidentiality and Privilege  
 112        Act.--Sections 44.401-44.406 may be known by the popular name  
 113        the "Mediation Confidentiality and Privilege Act."

114        44.402 Scope.--

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

117        (a) Required by statute, court rule, agency rule or order,  
 118        oral or written case-specific court order, or court  
 119        administrative order;

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

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

125        (2) Notwithstanding any other provision, the mediation  
 126        parties may agree in writing that any or all of s. 44.405(1), s.  
 127        44.405(2), or s. 44.406 will not apply to all or part of a  
 128        mediation proceeding.

129        44.403 Definitions.--As used in ss. 44.401-44.406, the  
 130        term:

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

137        (2) "Mediation participant" means a mediation party or a  
 138 person who attends a mediation in person or by telephone, video  
 139 conference, or other electronic means.

140        (3) "Mediation party" or "party" means a person  
 141 participating directly, or through a designated representative,  
 142 in a mediation and a person who:

143            (a) Is a named party;

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

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

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

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

156        44.404 Mediation; duration.--

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

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

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

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

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

168            1. Agreement of the parties; or

169            2. One party giving written notice to all other parties in  
 170 a multiparty mediation that the one party is terminating its  
 171 participation in the mediation. Under this circumstance, the  
 172 termination is effective only for the withdrawing party.

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

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

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

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

182            (d) The mediation is terminated by:

183            1. Agreement of the parties; or

184            2. One party giving notice to all other parties in a  
 185 multiparty mediation that the one party is terminating its  
 186 participation in the mediation. Under this circumstance, the  
 187 termination is effective only for the withdrawing party.

188        44.405 Confidentiality; privilege; exceptions.--

189            (1) Except as provided in this section, all mediation  
 190 communications shall be confidential. A mediation participant  
 191 shall not disclose a mediation communication to a person other

192 than another mediation participant or a participant's counsel. A  
193 violation of this section may be remedied as provided by s.  
194 44.406. If the mediation is court ordered, a violation of this  
195 section may also subject the mediation participant to sanctions  
196 by the court, including, but not limited to, costs, attorney's  
197 fees, and mediator's fees.

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

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

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

213 1. For which the confidentiality or privilege against  
214 disclosure has been waived by all parties;

215 2. That is willfully used to plan a crime, commit or  
216 attempt to commit a crime, conceal ongoing criminal activity, or  
217 threaten violence;



218 3. That requires a mandatory report pursuant to chapter 39  
 219 or chapter 415 solely for the purpose of making the mandatory  
 220 report to the entity requiring the report;

221 4. Offered to report, prove, or disprove professional  
 222 malpractice occurring during the mediation, solely for the  
 223 purpose of the professional malpractice proceeding;

224 5. Offered for the limited purpose of establishing or  
 225 refuting legally recognized grounds for voiding or reforming a  
 226 settlement agreement reached during a mediation; or

227 6. Offered to report, prove, or disprove professional  
 228 misconduct occurring during the mediation, solely for the  
 229 internal use of the body conducting the investigation of the  
 230 conduct.

231 (b) A mediation communication disclosed under any  
 232 provision of subparagraphs (4)(a)3., (4)(a)4., (4)(a)5., or  
 233 (4)(a)6. remains confidential and is not discoverable or  
 234 admissible for any other purpose, unless otherwise permitted by  
 235 this section.

236 (5) Information that is otherwise admissible or subject to  
 237 discovery does not become inadmissible or protected from  
 238 discovery by reason of its disclosure or use in mediation.

239 (6) A party that discloses or makes a representation about  
 240 a privileged mediation communication waives that privilege, but  
 241 only to the extent necessary for the other party to respond to  
 242 the disclosure or representation.

243 44.406 Confidentiality; civil remedies.--

244 (1) Any mediation participant who knowingly and willfully  
 245 discloses a mediation communication in violation of s. 44.405

246 shall, upon application by any party to a court of competent  
 247 jurisdiction, be subject to remedies, including:

248 (a) Equitable relief.

249 (b) Compensatory damages.

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

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

254 (2) Notwithstanding any other law, an application for  
 255 relief filed under this section may not be commenced later than  
 256 2 years after the date on which the party had a reasonable  
 257 opportunity to discover the breach of confidentiality, but in no  
 258 case more than 4 years after the date of the breach.

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

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

264 61.183 Mediation of certain contested issues.--

265 (3) Any information from the files, reports, case  
 266 summaries, mediator's notes, or other communications or  
 267 materials, ~~oral or written,~~ relating to a mediation proceeding  
 268 pursuant to this section obtained by any person performing  
 269 mediation duties is ~~confidential and~~ exempt from the provisions  
 270 of s. 119.07(1) ~~and may not be disclosed without the written~~  
 271 ~~consent of all parties to the proceeding. Any research or~~  
 272 ~~evaluation effort directed at assessing program activities or~~  
 273 ~~performance must protect the confidentiality of such~~

274 ~~information. Each party to a mediation proceeding has a~~  
275 ~~privilege during and after the proceeding to refuse to disclose~~  
276 ~~and to prevent another from disclosing communications made~~  
277 ~~during the proceeding, whether or not the contested issues are~~  
278 ~~successfully resolved. This subsection shall not be construed to~~  
279 ~~prevent or inhibit the discovery or admissibility of any~~  
280 ~~information that is otherwise subject to discovery or that is~~  
281 ~~admissible under applicable law or rules of court, except that~~  
282 ~~any conduct or statements made during a mediation proceeding or~~  
283 ~~in negotiations concerning the proceeding are inadmissible in~~  
284 ~~any judicial proceeding.~~

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