

By Senator Campbell

32-982C-04

1 A bill to be entitled
2 An act relating to confidentiality and
3 privilege against disclosure of mediation
4 proceedings; creating s. 44.401, F.S.;
5 providing a short title; creating s. 44.402,
6 F.S.; providing that the act applies to
7 specified mediations; creating s. 44.403, F.S.;
8 providing definitions relating to mediation
9 proceedings; creating s. 44.404, F.S.;
10 providing for durational time limits for
11 mediations; creating s. 44.405, F.S.; providing
12 that all mediation communications are
13 confidential unless otherwise provided in the
14 act; providing that a mediation participant has
15 the privilege to refuse to testify concerning
16 communications made during a mediation;
17 describing the circumstances when mediations
18 begin and end; providing exceptions to
19 confidentiality and privilege provided for
20 mediation communications; creating s. 44.406,
21 F.S.; providing civil remedies for disclosing
22 mediation communications; providing for
23 attorney's fees and costs; amending s. 44.107,
24 F.S.; providing immunity from liability for
25 trainees in the Supreme Court's mentorship
26 program; conferring immunity from liability on
27 persons serving as mediators in specified
28 circumstances; providing an effective date.

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30 Be It Enacted by the Legislature of the State of Florida:
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1 Section 1. Section 44.401, Florida Statutes, is
2 created to read:

3 44.401 Mediation Confidentiality and Privilege
4 Act.--Sections 44.401-44.407 may be cited as the "Mediation
5 Confidentiality and Privilege Act."

6 Section 2. Section 44.402, Florida Statutes, is
7 created to read:

8 44.402 Scope.--

9 (1) Except as otherwise provided, this act applies to
10 any mediation:

11 (a) Required by statute, court rule, agency rule or
12 order, oral or written case-specific court order, or court
13 administrative order;

14 (b) Conducted under this act by express agreement of
15 the mediation parties; or

16 (c) Facilitated by a mediator certified by the Supreme
17 Court, unless the mediation parties expressly agree not to be
18 bound by this act.

19 (2) Notwithstanding any other provision of
20 44.401-44.407, the mediation parties may agree in writing that
21 any or all of s. 44.405(1), s. 44.405(2), s. 44.405(5), or s.
22 44.406 will not apply to all or part of a mediation
23 proceeding.

24 Section 3. Section 44.403, Florida Statutes, is
25 created to read:

26 44.403 Definitions.--As used in ss. 44.401-44.407, the
27 term:

28 (1) "Mediation communication" means an oral or written
29 statement, or nonverbal conduct intended to make an assertion,
30 by or to a mediation participant made during the course of a
31 mediation, or prior to mediation if made in furtherance of a

1 mediation. The commission of a crime during a mediation is not
2 a mediation communication.

3 (2) "Mediator" means a neutral, impartial third person
4 who facilitates the mediation process. The mediator's role is
5 to reduce obstacles to communication, assist in identifying
6 issues, explore alternatives, and otherwise facilitate
7 voluntary agreements to resolve disputes, without prescribing
8 what the resolution must be.

9 (3) "Mediation party" or "party" means a person
10 participating directly, or through a designated
11 representative, in a mediation and who:

12 (a) Is a named party;

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

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

17 (4) "Mediation participant" means a mediation party or
18 a person who attends a mediation in person, by telephone,
19 video conference, or other electronic means.

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

22 Section 4. Section 44.404, Florida Statutes, is
23 created to read:

24 44.404 Mediation; duration.--

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

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

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

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

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

7 1. Agreement of the parties; or

8 2. One party giving written notice to all other
9 parties, in a multiparty mediation, that the party is
10 terminating its participation in the mediation. Under this
11 circumstance, the termination is effective only for the
12 withdrawing party.

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

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

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

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

24 (d) The mediation is terminated by:

25 1. Agreement of the parties; or

26 2. One party giving written notice to all other
27 parties in a multiparty mediation that the one party is
28 terminating its participation in the mediation. Under this
29 circumstance, the termination is effective only for the
30 withdrawing party.

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1 Section 5. Section 44.405, Florida Statutes, is
2 created to read:

3 44.405 Confidentiality; privilege; exceptions.--

4 (1) Except as provided in this section, all mediation
5 communications shall be confidential. A mediation participant
6 may not disclose a mediation communication to a person other
7 than another mediation participant or a participant's counsel.
8 A violation of this section may be remedied as provided by s.
9 44.406. If the mediation is court-ordered, a violation of this
10 section may also subject the mediation participant to
11 sanctions by the court, including, but not limited to, costs,
12 attorney's fees, and mediator fees.

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

16 (3) If, in a mediation involving more than two
17 parties, a party gives written notice to the other parties
18 that the party is terminating its participation in the
19 mediation, that party shall have a privilege to refuse to
20 testify and to prevent any other person from testifying in a
21 subsequent proceeding regarding only those mediation
22 communications that occurred prior to the delivery of the
23 written notice of termination of mediation to the other
24 parties.

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

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

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

4 3. That requires a mandatory report pursuant to
5 chapter 39 or chapter 415 solely for the purpose of making the
6 mandatory report to the entity requiring the report;

7 4. Offered to report, prove, or disprove professional
8 malpractice, solely for the purpose of the proceeding;

9 5. Offered for the limited purpose of establishing or
10 refuting legally recognized grounds for voiding or reforming a
11 settlement agreement reached during a mediation; or

12 6. Offered to report, prove, or disprove professional
13 misconduct, solely for the internal use of the body conducting
14 the investigation of the conduct.

15 (b) A mediation communication disclosed under any
16 provision of subparagraphs (a)3.-6. remains confidential and
17 is not discoverable or admissible for any other purpose,
18 unless otherwise permitted by this section.

19 (5) Information that is otherwise admissible or
20 subject to discovery does not become inadmissible or protected
21 from discovery by reason of its disclosure or use in
22 mediation.

23 (6) A party that discloses or makes a representation
24 about a privileged mediation communication waives that
25 privilege, but only to the extent necessary for the other
26 party to respond to the disclosure or representation.

27 Section 6. Section 44.406, Florida Statutes, is
28 created to read:

29 44.406 Confidentiality; civil remedies.--

30 (1) Any mediation participant who knowingly and
31 willfully discloses a mediation communication in violation of

1 section 44.405 shall, upon application by any party to a court
2 of competent jurisdiction, be subject to remedies, including:

3 (a) Equitable relief;

4 (b) Compensatory damages;

5 (c) Attorney's fees, mediator fees, and costs incurred
6 in the mediation proceeding; and

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

9 (2) An application for relief filed under this section
10 may not be commenced later than 2 years after the date on
11 which the party had a reasonable opportunity to discover the
12 breach of confidentiality, but in no case more than 4 years
13 after the date of the breach.

14 Section 7. Section 44.107, Florida Statutes, is
15 amended to read:

16 44.107 Immunity for arbitrators and mediators.--

17 (1) An arbitrator ~~appointed~~ serving under s. 44.103 or
18 s. 44.104, ~~or~~ a mediator ~~appointed~~ serving under s. 44.102,
19 and a trainee fulfilling the mentorship requirements for
20 certification by the Supreme Court as a mediator shall have
21 judicial immunity in the same manner and to the same extent as
22 a judge.

23 (2) A person serving as a mediator in any
24 noncourt-ordered mediation:

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

26 (b) Conducted under ss. 44.401-44.407 by express
27 agreement of the mediation parties; or

28 (c) Facilitated by a mediator certified by the Supreme
29 Court, unless the mediation parties expressly agree not to be
30 bound by ss. 44.401-44.407,
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1 shall have immunity from liability arising from the
2 performance of that person's duties while acting within the
3 scope of the mediation function. The mediator does not have
4 immunity if he or she acts in bad faith or with malicious
5 purpose or in a manner exhibiting wanton and willful disregard
6 of human rights, safety, or property.

7 (3) A person serving ~~appointed~~ under s. 44.106 to
8 assist the Supreme Court in performing its disciplinary
9 function shall have absolute immunity from liability arising
10 from the performance of that person's duties while acting
11 within the scope of that person's appointed function.

12 Section 8. This act shall take effect July 1, 2004.

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15 SENATE SUMMARY

16 Creates the Mediation Confidentiality and Privilege Act.
17 Provides that the act applies to specified mediations.
18 Declares that all mediation communications are
19 confidential unless otherwise provided in the act.
20 Provides that a mediation participant has the privilege
21 not to testify concerning communications made during a
22 mediation. Describes the circumstances when mediations
23 begin and end. Provides exceptions to confidentiality and
24 privilege of mediation communications. Creates civil
25 remedies for disclosing mediation communications.
26 Provides immunity from liability to trainees in the
27 Supreme Court's mentorship program. Confers immunity on
28 persons serving as mediators in specified circumstances.
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