

By the Committee on Judiciary; and Senator Campbell

308-2645-04

1 A bill to be entitled
2 An act relating to mediation alternatives to
3 judicial action; amending s. 44.102, F.S.;
4 deleting language regarding the disclosure of
5 specified information made during court-ordered
6 mediation; amending s. 44.107, F.S.; providing
7 immunity from liability for trainees in the
8 Supreme Court's mentorship program; providing
9 immunity from liability for persons serving as
10 mediators in specified circumstances; amending
11 s. 44.201, F.S.; deleting language regarding
12 disclosure of specified information held by
13 Citizen Dispute Resolution Centers; creating
14 ss. 44.401-44.406, F.S.; providing a popular
15 name; providing for the creation of the
16 Mediation Confidentiality and Privilege Act;
17 providing for application; providing
18 definitions; specifying when a mediation begins
19 and ends; providing for confidentiality of
20 mediation communications; providing for a
21 privilege; providing exceptions; providing for
22 civil remedies; providing a statute of
23 limitation; providing an exception; amending s.
24 61.183, F.S.; deleting language regarding
25 disclosure of specified information made during
26 cases; reenacting s. 627.7015(5), F.S.,
27 relating to statements and documents produced
28 at mediation conferences, to incorporate the
29 amendment to s. 44.107, F.S., in references
30 thereto; providing an effective date.
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1 Be It Enacted by the Legislature of the State of Florida:

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3 Section 1. Subsections (3) and (4) of section 44.102,
4 Florida Statutes, are amended, and present subsections (5) and
5 (6) of that section are renumbered as subsections (4) and (5),
6 respectively, to read:

7 44.102 Court-ordered mediation.--

8 (3) ~~Each party involved in a court ordered mediation~~
9 ~~proceeding has a privilege to refuse to disclose, and to~~
10 ~~prevent any person present at the proceeding from disclosing,~~
11 ~~communications made during such proceeding. All oral or~~
12 written communications in a mediation proceeding, other than
13 an executed settlement agreement, shall be exempt from the
14 requirements of chapter 119 ~~and shall be confidential and~~
15 ~~inadmissible as evidence in any subsequent legal proceeding,~~
16 ~~unless all parties agree otherwise.~~

17 (4) ~~There shall be no privilege and no restriction on~~
18 ~~any disclosure of communications made confidential in~~
19 ~~subsection (3) in relation to disciplinary proceedings filed~~
20 ~~against mediators pursuant to s. 44.106 and court rules, to~~
21 ~~the extent the communication is used for the purposes of such~~
22 ~~proceedings. In such cases, the disclosure of an otherwise~~
23 ~~privileged communication shall be used only for the internal~~
24 ~~use of the body conducting the investigation. Prior to the~~
25 ~~release of any disciplinary files to the public, all~~
26 ~~references to otherwise privileged communications shall be~~
27 ~~deleted from the record. When an otherwise confidential~~
28 ~~communication is used in a mediator disciplinary proceeding,~~
29 ~~such communication shall be inadmissible as evidence in any~~
30 ~~subsequent legal proceeding. "Subsequent legal proceeding"~~

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1 ~~means any legal proceeding between the parties to the~~
2 ~~mediation which follows the court ordered mediation.~~

3 Section 2. Section 44.107, Florida Statutes, is
4 amended to read:

5 44.107 Immunity for arbitrators, ~~and~~ mediators, and
6 mediator trainees.--

7 (1) Arbitrators serving ~~An Arbitrator appointed~~ under
8 s. 44.103 or s. 44.104, mediators serving ~~or a mediator~~
9 ~~appointed~~ under s. 44.102, and trainees fulfilling the
10 mentorship requirements for certification by the Supreme Court
11 as a mediator shall have judicial immunity in the same manner
12 and to the same extent as a judge.

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

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

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

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

24
25 The mediator does not have immunity if he or she acts in bad
26 faith, with malicious purpose, or in a manner exhibiting
27 wanton and willful disregard of human rights, safety, or
28 property.

29 (3) A person servicing ~~appointed~~ under s. 44.106 to

30 assist the Supreme Court in performing its disciplinary

31 function shall have absolute immunity from liability arising

1 from the performance of that person's duties while acting
2 within the scope of that person's appointed function.

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

5 44.201 Citizen Dispute Settlement Centers;
6 establishment; operation; confidentiality.--

7 (5) Any information relating to a dispute obtained by
8 any person while performing any duties for the center from the
9 files, reports, case summaries, mediator's notes, or other
10 communications or materials, ~~oral or written, is confidential~~
11 ~~and exempt from the provisions of s. 119.07(1) and shall not~~
12 ~~be publicly disclosed without the written consent of all~~
13 ~~parties to the dispute. Any research or evaluation effort~~
14 ~~directed at assessing program activities or performance shall~~
15 ~~protect the confidentiality of such information. Each party to~~
16 ~~a Citizen Dispute Settlement Center proceeding has a privilege~~
17 ~~during and after those proceedings to refuse to disclose and~~
18 ~~to prevent another from disclosing communications made during~~
19 ~~such proceedings, whether or not the dispute was successfully~~
20 ~~resolved. This subsection shall not be construed to prevent or~~
21 ~~inhibit the discovery or admissibility of any information~~
22 ~~which is otherwise subject to discovery or which is admissible~~
23 ~~under applicable law or rules of court, except that any~~
24 ~~conduct or statements made during such mediation sessions or~~
25 ~~in negotiations concerning such sessions shall be inadmissible~~
26 ~~in any judicial proceeding.~~

27 Section 4. Sections 44.401, 44.402, 44.403, 44.404,
28 44.405, and 44.406, Florida Statutes, are created to read:

29 44.401 Mediation Confidentiality and Privilege
30 Act.--Sections 44.401-44.406 may be known by the popular name
31 the "Mediation Confidentiality and Privilege Act."

1 44.402 Scope.--

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

4 (a) Required by statute, court rule, agency rule or
5 order, oral or written case-specific court order, or court
6 administrative order;

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

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

12 (2) Notwithstanding any other provision, the mediation
13 parties may agree in writing that any or all of s. 44.405(1),
14 s. 44.405(2), or s. 44.406 will not apply to all or part of a
15 mediation proceeding.

16 44.403 Definitions.--As used in ss. 44.401-44.406, the
17 term:

18 (1) "Mediation communication" means an oral or written
19 statement, or nonverbal conduct intended to make an assertion,
20 by or to a mediation participant made during the course of a
21 mediation, or prior to mediation if made in furtherance of a
22 mediation. The commission of a crime during a mediation is not
23 a mediation communication.

24 (2) "Mediation participant" means a mediation party or
25 a person who attends a mediation in person or by telephone,
26 video conference, or other electronic means.

27 (3) "Mediation party" or "party" means a person
28 participating directly, or through a designated
29 representative, in a mediation and a person who:

30 (a) Is a named party;

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

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

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

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

12 44.404 Mediation; duration.--

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

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

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

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

23 (d) The mediation is terminated, after party
24 compliance with the court order to appear at mediation, 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 (2) In all other mediations, the mediation begins when
2 the parties agree to mediate or as required by agency rule,
3 agency order, or statute, whichever occurs earlier, and ends
4 when:

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

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

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

12 (d) The mediation is terminated by:

13 1. Agreement of the parties; or

14 2. One party giving notice to all other parties in a
15 multiparty mediation that the one party is terminating its
16 participation in the mediation. Under this circumstance, the
17 termination is effective only for the withdrawing party.

18 44.405 Confidentiality; privilege; exceptions.--

19 (1) Except as provided in this section, all mediation
20 communications shall be confidential. A mediation participant
21 shall not disclose a mediation communication to a person other
22 than another mediation participant or a participant's counsel.
23 A violation of this section may be remedied as provided by s.
24 44.406. If the mediation is court ordered, a violation of this
25 section may also subject the mediation participant to
26 sanctions by the court, including, but not limited to, costs,
27 attorney's fees, and mediator's fees.

28 (2) A mediation party has a privilege to refuse to
29 testify and to prevent any other person from testifying in a
30 subsequent proceeding regarding mediation communications.
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1 (3) If, in a mediation involving more than two
2 parties, a party gives written notice to the other parties
3 that the party is terminating its participation in the
4 mediation, the party giving notice shall have a privilege to
5 refuse to testify and to prevent any other person from
6 testifying in a subsequent proceeding regarding only those
7 mediation communications that occurred prior to the delivery
8 of the written notice of termination of mediation to the other
9 parties.

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

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

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

19 3. That requires a mandatory report pursuant to
20 chapter 39 or chapter 415 solely for the purpose of making the
21 mandatory report to the entity requiring the report;

22 4. Offered to report, prove, or disprove professional
23 malpractice occurring during the mediation, solely for the
24 purpose of the professional malpractice proceeding;

25 5. Offered for the limited purpose of establishing or
26 refuting legally recognized grounds for voiding or reforming a
27 settlement agreement reached during a mediation; or

28 6. Offered to report, prove, or disprove professional
29 misconduct occurring during the mediation, solely for the
30 internal use of the body conducting the investigation of the
31 conduct.

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

6 (5) Information that is otherwise admissible or
7 subject to discovery does not become inadmissible or protected
8 from discovery by reason of its disclosure or use in
9 mediation.

10 (6) A party that discloses or makes a representation
11 about a privileged mediation communication waives that
12 privilege, but only to the extent necessary for the other
13 party to respond to the disclosure or representation.

14 44.406 Confidentiality; civil remedies.--

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

19 (a) Equitable relief.

20 (b) Compensatory damages.

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

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

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

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

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

6 61.183 Mediation of certain contested issues.--

7 (3) Any information from the files, reports, case
8 summaries, mediator's notes, or other communications or
9 materials, ~~oral or written,~~ relating to a mediation proceeding
10 pursuant to this section obtained by any person performing
11 mediation duties is ~~confidential and~~ exempt from the
12 provisions of s. 119.07(1) ~~and may not be disclosed without~~
13 ~~the written consent of all parties to the proceeding. Any~~
14 ~~research or evaluation effort directed at assessing program~~
15 ~~activities or performance must protect the confidentiality of~~
16 ~~such information. Each party to a mediation proceeding has a~~
17 ~~privilege during and after the proceeding to refuse to~~
18 ~~disclose and to prevent another from disclosing communications~~
19 ~~made during the proceeding, whether or not the contested~~
20 ~~issues are successfully resolved. This subsection shall not be~~
21 ~~construed to prevent or inhibit the discovery or admissibility~~
22 ~~of any information that is otherwise subject to discovery or~~
23 ~~that is admissible under applicable law or rules of court,~~
24 ~~except that any conduct or statements made during a mediation~~
25 ~~proceeding or in negotiations concerning the proceeding are~~
26 ~~inadmissible in any judicial proceeding.~~

27 Section 6. For the purposes of incorporating the
28 amendment made by this act to section 44.107, Florida
29 Statutes, in a reference thereto, subsection (5) of section
30 627.7015, Florida Statutes, is reenacted to read:
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1 627.7015 Alternative procedure for resolution of
2 disputed property insurance claims.--

3 (5) All statements made and documents produced at a
4 mediation conference shall be deemed to be settlement
5 negotiations in anticipation of litigation within the scope of
6 s. 90.408. All parties to the mediation must negotiate in good
7 faith and must have the authority to immediately settle the
8 claim. Mediators are deemed to be agents of the department and
9 shall have the immunity from suit provided in s. 44.107.

10 Section 7. This act shall take effect July 1, 2004.

11
12 STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN
13 COMMITTEE SUBSTITUTE FOR
14 Senate Bill 1970

15 This CS creates the Mediation Confidentiality and Privilege
16 Act, which provides as follows:

- 17 - Clarifies that no confidentiality or privilege exists
18 regarding signed written agreements reached during
19 mediation and offered to report, prove, or disprove
20 professional malpractice or misconduct that occurs during
21 the mediation.
22 - Clarifies that the period of limitation to bring an
23 action for a violation under this Act applies
24 notwithstanding any other law, and that a mediation
25 participant is not subject to civil action where the
26 participant acts lawfully in compliance with public
27 records law.

28 This CS additionally makes the following changes:

- 29 - Revises existing law relating to Citizen Dispute
30 Settlement Centers, to clarify that information relating
31 to a dispute obtained by any person performing duties for
the Center is exempt from disclosure.
- Revises existing law relating to child support
mediations, to clarify that all information relating to
mediation proceedings in child support cases is exempt
from disclosure.
- Reenacts a cross-reference.