

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; 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 present subsections (5) and

1 (6) of that section are renumbered as subsections (4) and (5),
2 respectively, to read:

3 44.102 Court-ordered mediation.--

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

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

29 Section 2. Section 44.107, Florida Statutes, is
30 amended to read:
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1 44.107 Immunity for arbitrators, ~~and~~ mediators, and
2 mediator trainees.--

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

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

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

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

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

20
21 The mediator does not have immunity if he or she acts in bad
22 faith, with malicious purpose, or in a manner exhibiting
23 wanton and willful disregard of human rights, safety, or
24 property.

25 (3) A person servng appointed under s. 44.106 to
26 assist the Supreme Court in performing its disciplinary
27 function shall have absolute immunity from liability arising
28 from the performance of that person's duties while acting
29 within the scope of that person's appointed function.

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

1 44.201 Citizen Dispute Settlement Centers;

2 establishment; operation; confidentiality.--

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

23 Section 4. Sections 44.401, 44.402, 44.403, 44.404,
24 44.405, and 44.406, Florida Statutes, are created to read:

25 44.401 Mediation Confidentiality and Privilege
26 Act.--Sections 44.401-44.406 may be known by the popular name
27 the "Mediation Confidentiality and Privilege Act."

28 44.402 Scope.--

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

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1 (a) Required by statute, court rule, agency rule or
2 order, oral or written case-specific court order, or court
3 administrative order;

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

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

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

13 44.403 Definitions.--As used in ss. 44.401-44.406, the
14 term:

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

21 (2) "Mediation participant" means a mediation party or
22 a person who attends a mediation in person or by telephone,
23 video conference, or other electronic means.

24 (3) "Mediation party" or "party" means a person
25 participating directly, or through a designated
26 representative, in a mediation and a person who:

27 (a) Is a named party;

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

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

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

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

9 44.404 Mediation; duration.--

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

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

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

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

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

22 1. Agreement of the parties; or

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

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

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

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

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

8 (d) The mediation is terminated by:

9 1. Agreement of the parties; or

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

14 44.405 Confidentiality; privilege; exceptions.--

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

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

27 (3) If, in a mediation involving more than two
28 parties, a party gives written notice to the other parties
29 that the party is terminating its participation in the
30 mediation, the party giving notice shall have a privilege to
31 refuse to testify and to prevent any other person from

1 testifying in a subsequent proceeding regarding only those
2 mediation communications that occurred prior to the delivery
3 of the written notice of termination of mediation to the other
4 parties.

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

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

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

14 3. That requires a mandatory report pursuant to
15 chapter 39 or chapter 415 solely for the purpose of making the
16 mandatory report to the entity requiring the report;

17 4. Offered to report, prove, or disprove professional
18 malpractice occurring during the mediation, solely for the
19 purpose of the professional malpractice proceeding;

20 5. Offered for the limited purpose of establishing or
21 refuting legally recognized grounds for voiding or reforming a
22 settlement agreement reached during a mediation; or

23 6. Offered to report, prove, or disprove professional
24 misconduct occurring during the mediation, solely for the
25 internal use of the body conducting the investigation of the
26 conduct.

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

1 (5) Information that is otherwise admissible or
2 subject to discovery does not become inadmissible or protected
3 from discovery by reason of its disclosure or use in
4 mediation.

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

9 44.406 Confidentiality; civil remedies.--

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

14 (a) Equitable relief.

15 (b) Compensatory damages.

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

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

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

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

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

31 61.183 Mediation of certain contested issues.--

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

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