

Committee Substitute for Senate Bill No. 1970

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

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

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

44.102 Court-ordered mediation.—

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

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

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

44.107 Immunity for arbitrators, and mediators, and mediator trainees.—

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

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

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

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

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

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

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

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

44.201 Citizen Dispute Settlement Centers; establishment; operation; confidentiality.—

(5) Any information relating to a dispute obtained by any person while performing any duties for the center from the files, reports, case summaries, mediator's notes, or other communications or materials, oral or written, is confidential and exempt from the provisions of s. 119.07(1) and shall not be publicly disclosed without the written consent of all parties to the dispute. Any research or evaluation effort directed at assessing program activities or performance shall protect the confidentiality of such information. Each party to a Citizen Dispute Settlement Center proceeding has a privilege during and after those proceedings to refuse to disclose and to prevent another from disclosing communications made during such proceedings, whether or not the dispute was successfully resolved. This subsection shall not be construed to prevent or inhibit the discovery or admissibility of any information which is otherwise subject to discovery or which is admissible under applicable law or rules of court, except that any conduct or statements

~~made during such mediation sessions or in negotiations concerning such sessions shall be inadmissible in any judicial proceeding.~~

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

44.401 Mediation Confidentiality and Privilege Act.—Sections 44.401-44.406 may be known by the popular name the “Mediation Confidentiality and Privilege Act.”

44.402 Scope.—

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

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

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

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

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

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

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

(2) “Mediation participant” means a mediation party or a person who attends a mediation in person or by telephone, video conference, or other electronic means.

(3) “Mediation party” or “party” means a person participating directly, or through a designated representative, in a mediation and a person who:

(a) Is a named party;

(b) Is a real party in interest; or

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

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

(5) “Subsequent proceeding” means an adjudicative process that follows a mediation, including related discovery.

44.404 Mediation; duration.—

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

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

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

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

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

1. Agreement of the parties; or

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

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

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

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

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

(d) The mediation is terminated by:

1. Agreement of the parties; or

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

44.405 Confidentiality; privilege; exceptions.—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

44.406 Confidentiality; civil remedies.—

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

(a) Equitable relief.

(b) Compensatory damages.

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

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

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

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

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

61.183 Mediation of certain contested issues.—

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

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

Approved by the Governor June 10, 2004.

Filed in Office Secretary of State June 10, 2004.