

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1765 (PCB JU 04-08) Mediation Confidentiality and Privilege Act
SPONSOR(S): Judiciary Committee
TIED BILLS: **IDEN./SIM. BILLS:** SB 1970

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|--------------------------------|-----------------------|-------------------|-----------------|
| 1) <u>Judiciary</u> | <u>12 Y, 0 N w/CS</u> | <u>Birtman</u> | <u>Havlicak</u> |
| 2) <u>State Administration</u> | <u></u> | <u>Williamson</u> | <u>Everhart</u> |
| 3) <u></u> | <u></u> | <u></u> | <u></u> |
| 4) <u></u> | <u></u> | <u></u> | <u></u> |
| 5) <u></u> | <u></u> | <u></u> | <u></u> |

SUMMARY ANALYSIS

Current law provides confidentiality of two types of mediation: court-ordered mediation, and those conducted by a Citizen Dispute Settlement Center mediator.

This bill creates the Mediation Confidentiality and Privilege Act, which provides uniformity and predictability in the following ways:

- The scope of the confidentiality law is expanded to provide confidentiality to any mediation required by statute, court rule, administrative agency rule or order, case specific court orders, by express agreement of the parties; and any mediation facilitated by a Florida Supreme Court certified mediator unless the parties expressly agree not to be bound by the Act.
- Contains an opt-out provision for individual cases, in order to ensure the greatest amount of freedom for mediation parties to structure the mediation process;
- Specifies when a mediation begins and ends;
- Clarifies exceptions to confidentiality provisions to resolve perceived ambiguity;
- Creates a civil remedy for violations of the Act;
- Provides judicial immunity for specified mediator trainees and limited immunity for mediators serving in any non court-ordered mediation.

There does not appear to be a fiscal impact associated with this bill.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

This bill creates civil remedies for any mediation participant who knowingly and willfully discloses a confidential mediation communication.

B. EFFECT OF PROPOSED CHANGES:

Mediation is a process whereby a neutral third party acts to encourage and facilitate the resolution of a dispute between two or more parties. In mediation, decision making authority rests with the parties.¹ Parties may mediate a dispute pursuant to court order,² statute,³ court rule,⁴ agency rule or order,⁵ case-specific court order, or court administrative order.⁶ However, current law only provides confidentiality to mediations conducted pursuant to court order⁷ or in accordance with a Citizen Dispute Settlement Center.⁸ In fact, in a Seventh Judicial Circuit case regarding the confidentiality of communications made during a mediation that was not court ordered, Judge Briese opined:

While this Court believes confidentiality during mediation fosters the process and is sound public policy, it is not its function to disregard the constitution and case authority and extend confidentiality to non-court-ordered mediation. In fact, just the opposite is true. Based on the above it is currently up to the parties during non-court-ordered mediation to provide by agreement confidentiality of the mediation... This Court would respectfully suggest that the Legislature review the wisdom of extending confidentiality to non-court-ordered mediation conducted by

¹ See s. 44.1011(2), F.S.

² See s. 44.102, F.S.

³ Examples of mediation provided by statute include s. 61.183, F.S., (court may refer parties to mediation in any proceeding in which the issues of parental responsibility, primary residence, visitation, or support of a child are contested); s. 627.745, F.S., (personal injury or property claims against an insurer for less than \$10,000); s. 723.038, F.S., (disputes over mobile home park lot tenancies); s. 16.60, F.S., (public records mediation program through the Attorney General's office); s. 39.4075, F.S., (dependency cases); and s. 97.028, F.S., (Title III of the Help America Vote Act).

⁴ Examples of mediation provided by court rule include referral to dependency mediation (Fla. R. Juv. P. Rule 8.290); the Florida Bar Grievance Mediation Program (Fla. Bar Rule 3-8.1); referral to family mediation (Fla. Fam. L.R.P. Rule 12.740); and mandatory mediation under workers' compensation rules (Fla.R.Work.Comp. P. Rule 4.310).

⁵ See s. 120.573, F.S., which provides that announcements of agency action that affects substantial interests shall advise whether medication of the administrative dispute for the type of agency action announced is available.

⁶ Examples of mediation provided by court administrative order include referral of contested juvenile dependency cases to mediation in the Ninth Judicial Circuit (Ninth Judicial Circuit Administrative Order 07-97-48); and referral of contested cases to mediation in the Thirteenth Judicial Circuit (Thirteenth Judicial Circuit Administrative Order S-03-10-28-95-59).

⁷ See ss. 44.102(3) and (4), F.S., which provide that parties in court-ordered mediation proceedings have a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing, communications made during the proceeding. All communications in a mediation proceeding, other than an executed settlement agreement, are confidential and inadmissible in evidence in any subsequent legal proceeding unless all parties agree otherwise. Confidential communications may be disclosed in relation to disciplinary proceedings against mediators.

⁸ See s. 44.201(5), F.S. Citizen Dispute Settlement Centers may be established in judicial circuits by the chief judge in consultation with the board of county commissioners, and are administered by a council as provided by statute.

certified mediators who are subject to the Florida Rules for Certified and Court-Appointed Mediators.^{9, 10}

The Florida Supreme Court Committee on Alternative Dispute Resolution Rules and Policy submitted the language of this bill after a two-year revision process. The purpose of the bill is to provide uniformity and predictability as to which mediation communications will be confidential.

Specifically, this bill creates the Mediation Confidentiality and Privilege Act. The Act applies to any mediation required by statute, court rule, agency rule or order, oral or written case-specific court order, or court administrative order; conducted by express agreement of the mediation parties; or facilitated by a mediator certified by the Florida Supreme Court,¹¹ unless the parties expressly agree not to be bound by this Act. The Act allows parties to agree in writing not to be bound by confidentiality provisions, privilege provisions, and the application of civil remedies.

The Act defines “mediation communication” as any 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. A “mediation party” is a person participating directly, or through a designated representative in a mediation, and who is a named party, a real party in interest, or would be a named party of real party in interest if an action relating to the subject matter of the mediation were brought in a court of law. A “participant” is a mediation party or person who attends a mediation in person, by telephone, video conference, or other electronic means.

In order to clarify exactly which communications are mediation communications, the Act specifies when a mediation begins and ends. This bill provides that mediation begins when an order is issued or when all parties agree to mediate, and ends when:

- A partial or complete settlement agreement, intended to resolve the dispute and end the mediation, is signed by the parties;
- The mediator declares an impasse;
- The mediation is terminated by court order, court rule, or applicable law; or
- The mediation is terminated by agreement of the parties, or by one party giving notice to all other parties that the one party is terminating its participation in the mediation.¹²

This Act provides that mediation communications are confidential, with the following exceptions:

- There is no confidentiality or privilege attached to a signed written agreement, unless the parties agree otherwise.
- There is no confidentiality or privilege for any mediation communication for which the confidentiality or privilege against disclosure has been waived by all parties.
- There is no confidentiality or privilege for any mediation communication for the following:
 - Information that is willfully used to plan, commit, or attempt a crime, conceal ongoing criminal activity, or threaten violence;
 - Information that requires a mandatory child abuse or vulnerable adult abuse report. The confidentiality and privilege are waived solely for the purpose of making the mandatory report;

⁹ See *State of Florida v. Trull et al.*, 9 Fla. L. Weekly Supp. 289a (Circuit Court, 7th Judicial Circuit in and for Volusia County, Shawn L. Briese, Judge, March 5, 2002).

¹⁰ Mediator qualifications, standards of professional conduct, and discipline are addressed by the Florida Rules for Certified and Court-Appointed Mediators. Rule 10.360 provides that a mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required by law. Rule 10.850 provides the proceedings regarding the discipline of mediators shall remain confidential until sanctions are imposed.

¹¹ Rule 10.100, Fla. Mediator Rules, provides for the general qualifications of mediators.

¹² Under this circumstance, the termination is effective only for the withdrawing party.

- Information offered to report, prove, or disprove professional malpractice. The confidentiality and privilege are waived solely for the purpose of the professional malpractice proceeding;
- Information offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation; or
- Information offered to report, prove, or disprove professional misconduct, solely for the internal use of the body conducting the investigation of the conduct.

This bill provides that 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. If a party gives written notice to the other parties that the party is terminating its participation in the mediation, then that party shall have a privilege regarding only those communications that occurred prior to the delivery of the written notice of termination. Pursuant to the Act, information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by virtue of its disclosure or use in mediation. A party that discloses a privileged mediation communication waives that privilege, but only to the extent necessary for the other party to respond.

The Act provides for civil remedies for participants who knowingly and willfully disclose a mediation communication. Knowing and willful violators are subject to remedies including equitable relief; compensatory damages; attorney's fees, mediator fees, and costs incurred in the underlying proceeding; and reasonable attorney's fees¹³, mediator fees, and costs incurred in the application for remedies. The bill requires an application for relief to be commenced no 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. Mediation participants are not subject to civil actions pursuant to this section for lawful compliance with the provisions of s. 119.07, F.S.¹⁴

Mediators conducting court-ordered mediations; arbitrators conducting court-ordered, nonbinding arbitration; and arbitrators conducting voluntary binding arbitration and voluntary trial resolution are statutorily provided judicial immunity in the same manner and to the same extent as a judge.¹⁵ This bill extends that immunity to trainees fulfilling the mentorship requirements for certification by the Supreme Court as a mediator. The bill also provides limited immunity to persons serving as mediators in non court-ordered mediations required by statute, agency rule, or order; conducted under this Act by express agreement of the parties; or facilitated by a certified mediator unless the parties expressly agree otherwise. This limited immunity provides protection from liability arising from the performance of that person's duties while acting within the scope of the mediation function, and does not apply if the mediator acts in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Lastly, the bill conforms existing statutory language regarding privileged and confidential communications to the provisions of this Act. Specifically, the bill deletes inconsistent provisions regarding the disclosure of privileged information. It also deletes the protection of oral communications

¹³ Where the legislature is silent on the factors it thinks should be considered in determining the reasonableness of attorneys' fees, the court should look to criteria enumerated in Florida Bar Rule 4-1.5. *Seminole County v. Coral Gables Federal Savings and Loan*, 691 So.2d 614 (Fla. 5th DCA 1997). Florida Bar Rule 4-1.5 provides 8 factors to be considered in determining a reasonable fee. Generally, those 8 factors are: 1) the time and labor required; 2) the likelihood that the acceptance of the particular employment will preclude other employment; 3) the fee customarily charged in the locality; 4) the significance, the responsibility, and the results of the representation; 5) the time limitations; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, diligence, and ability of the lawyer; 8) whether the fee is fixed or contingent.

¹⁴ Section 119.07, F.S., requires custodians of public records to permit such records to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian or the custodian's designee. There are numerous exemptions to this law, including exemptions for documents offered in court-ordered mediation proceedings.

¹⁵ Judges are cloaked with absolute immunity from liability for official acts committed within their jurisdiction. See *Johnson v. Harris*, 645 So.2d 96 (Fla. 5th DCA 1994).

from public records requests, as oral communications are not considered public records.¹⁶ Records that are not made confidential, but are simply exempt from the mandatory disclosure requirements in s. 119.07(1), F.S., are allowed to be disclosed by agencies in the manner provided in the Act.

C. SECTION DIRECTORY:

Section 1 amends s. 44.102, F.S., to conform to the confidentiality provisions of the Act.

Section 2 amends s. 44.107, F.S., regarding immunity for arbitrators, mediators, and mediator trainees.

Section 3 amends s. 44.201, F.S., to conform to the confidentiality provisions of the Act.

Section 4 creates ss. 44.401, 44.402, 44.403, 44.404, 44.405, and 44.406, F.S., to create the Mediation Confidentiality and Privilege Act, provide for the scope of the Act, provide for definitions, specify when a mediation begins and ends, provide that all mediation communications are confidential except as specifically provided, and provide specified civil remedies for the knowing and willful disclosure of a mediation communication.

Section 5 amends s. 61.183, F.S., to conform to the confidentiality provisions of the Act.

Section 6 provides an effective date of July 1, 2004.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent that the provisions of this Act result in the need to litigate fewer issues regarding confidentiality, parties to mediation may experience a savings.

D. FISCAL COMMENTS:

None.

¹⁶ See s. 119.011(1), F.S., which defines "public records" as documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material..... made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not affect municipal or county government.

2. Other:

Public Records

Article I, section 24 of the State Constitution provides that every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section. Article 1, section 24(d) continues to recognize certain public records exemptions that were in existence when the amendment took effect in 1993. The constitution does not permit the creation of new exemptions unless the Legislature complies with three constitutional requirements: a statement of public necessity, narrow tailoring, and the single subject limitation. Passage is by 2/3 vote of each house. This bill amends pre-1992 exemption language, and does not appear to create new exemptions nor expand current exemptions. Thus it does not appear that a separate public records bill is required.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 3, 2004, the Judiciary Committee adopted two amendments to the PCB:

1. Providing judicial immunity to mediator trainees and limited immunity to mediators conducting non-court-ordered mediations under certain circumstances.
2. Providing that mediation participants who lawfully comply with public records requirements shall not be subject to civil action under the act.

This analysis is drafted to the bill as amended.