

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1970

SPONSOR: Judiciary Committee and Senator Campbell

SUBJECT: Mediation Confidentiality Act

DATE: April 19, 2004 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Lang</u>	<u>JU</u>	<u>Fav/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill creates the Mediation Confidentiality and Privilege Act. This bill provides for standardized proceedings, so that both court-ordered and non court-ordered mediation are entitled to the same confidentiality status.

This bill creates ss. 44.401, 44.402, 44.403, 44.404, 44.405, and 44.406, F.S. This bill substantially amends s. 44.107 of the Florida Statutes¹.

This bill reenacts s. 627.7015 (5), which contains a cross-reference to s. 44.107, F.S.

II. Present Situation:

Statutory Authority

Chapter 44, F.S., provides the statutory framework for mediation alternatives to judicial action. Its primary focus is on court-ordered mediation and arbitration, which occur after litigation has already begun. The Supreme Court currently establishes rules of practice and procedure, and maintains a certification process for mediators and arbitrators.²

Statutory confidentiality provisions encourage the flow of information and disclosure by parties in mediation proceedings and limit their use in subsequent legal proceedings.³ Court referrals to mediation of certain contested family law issues are addressed in chapter 61, F.S, including provisions for the confidentiality of communications made during mediation.

¹ SB 1972, a public records exemption bill, is linked and traveling with this bill.

² Section 44.102 (1) and (2), F.S.

³ Section 44.102, F.S.

Subsection (3) of s. 44.102, F.S., titled, “Court-ordered mediation”, provides:

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.

Current law does not grant confidentiality status to non court-ordered mediations. Therefore, an inconsistency exists as between court-ordered and non court-ordered mediation communications.

Case Law

Where a plaintiff knowingly and willfully violates confidentiality, pursuant to a court-ordered mediation, dismissal with prejudice is appropriate.⁴ Confidentiality attaches to oral mediation proceedings, pursuant to a court-ordered mediation, and precludes compelling a mediator to testify.⁵ Confidentiality is not absolute, however. Where there has been a mutual mistake made in the settlement agreement, mediation communications are admissible to determine intent.⁶ Disclosing confidential information to real parties in interest, though they are not named parties, is not construed to constitute a violation of confidentiality.⁷

III. Effect of Proposed Changes:

This bill creates the Mediation Confidentiality and Privilege Act as a new section of the statutes, s. 44.401 through s. 44.406, F.S.

This bill specifies its application to the following types of mediation:

- Required by statute, court rule, agency rule or order, oral or written case-specific court order, or court administrative order;
- Conducted under this bill by express agreement of the mediation parties;
- Facilitated by a Supreme Court certified mediator, unless the parties expressly except themselves from the provisions or any part of the provisions of this bill.

This bill defines mediation communication, mediator, mediation party, mediation participant, and subsequent proceeding. This bill clarifies when a court ordered or non-court ordered mediation commences and when it ceases.

This bill makes all mediation communications confidential, and provides that a mediation participant may not disclose a mediation communication, and grants participants a privilege to

⁴ See *Paranzino v. Barnett Bank*, 690 So.2d 725 (Fla. 4 DCA 1997); sanction upheld in *Spanish Broadcasting Systems of Florida, Inc., v. Grillone*, 731 So.2d 160 (Fla. 3d DCA 1999)

⁵ See *Royal Caribbean Corporation v. Modesto*, 614 So.2d 517 (Fla. 3d DCA 1993)

⁶ See *DR Lakes v. Brandsmart U.S.A.*, 819 So.2d 971 (Fla. 4 DCA 2002); *Feldman v. Kritch*, 824 So.2d 274 (Fla. 4 DCA 2002)

⁷ See *Yacht Club Southeastern, Inc. v. Sunset Harbour North Condominium Association, Inc.*, 843 So.2d 917 (Fla. 3d DCA 2003)

refuse to testify regarding the communication. Under this bill, exemptions from confidentiality apply for certain signed written agreements.

This bill authorizes remedies for violations of mediation communications, to include equitable relief, compensatory damages, attorney's fees, mediator fees, costs, and reasonable attorney's fees and costs incurred in the remedy process. A statute of limitations is provided, ranging between two and four years. This bill provides that a mediation participant is not subject to a civil action where he or she acts lawfully in compliance with public records law.

Judicial immunity from liability is provided under this bill for certain arbitrators, mediators, and trainees, as well as mediators in non-court mediations required by statute, agency rule or order, conducted under this Act by express agreement, or facilitated by a Supreme Court certified mediator, unless the parties expressly except themselves. This bill clarifies that mediators serving in non court-ordered mediation have liability immunity only where the liability arises from the performance of their duties, while acting within the scope of the mediation function. This bill additionally clarifies that immunity is not provided, however, for acts of bad faith, with malicious purpose, or willful or wanton disregard.

This bill clarifies that all information relating to disputes obtained by any person performing any duties for the Citizen Dispute Settlement Center is exempt from disclosure. This bill also clarifies that all information relating to mediation proceedings in child support cases is exempt from disclosure.

This bill reenacts s. 627.7015 (5), which contains a cross-reference to s. 44.107, F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
