As we are all aware, in Florida, mediation is a primary dispute resolution tool. Its ubiquity is not limited just to the state or federal court systems where, with a vanishingly small number of exceptions, litigants are referred to mediation before trial in every case.[1] Instead, mediation has become very common in administrative proceedings and as part of pre-suit negotiations. The success of Florida's mediation process rests in large part on the fundamental concept of mediation confidentiality. While most attorneys were generally familiar with this concept from having participated in mediations, there were, until recently, lingering questions about the extent of such confidentiality, especially in mediations that were not court-referred. Now, with the Mediation Confidentiality and Privilege Act, mediation confidentiality can truly be said to have come into its own.

The Act, codified at Fla. Stat. §§ 44.401-.406,[2] extends confidentiality to any mediation conducted under the following circumstances: when court- or agency-referred[3] or otherwise required by statute, rule, or court order; when the parties agree the Act will apply (regardless of whether the mediator is certified); or when a certified mediator conducts a "private" mediation outside the court or administrative framework – unless the parties agree not to be bound by the Act. Fla. Stat. § 44.402. All mediation participants (e.g., actual parties or real parties-in-interest,[4] their representatives, their counsel, the mediator, and any other person attending the mediation in person or by electronic means) are required to keep confidential *essentially* everything that is communicated, whether orally, in writing, or nonverbally, during (or in preparation for) the mediation. *Id.* § 44.405(1).[5]

I say *essentially* every mediation communication is confidential because the Act recognizes five types of exceptions:

- if confidentiality is waived by the parties;
- if the communication is "willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence";
- statutorily-mandated reporting of either child abuse/neglect or abuse, neglect, or exploitation of elder/vulnerable persons – and then only to disclose the information to the appropriate agency;
- if one of the parties seeks rescission of a mediated settlement agreement, under ordinary contract law[6]; and

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[1] Indeed, in some circuits, parties are not even allowed to get a trial date, much less actually try the case, without first trying to mediate the dispute.

[2] With conforming revisions to Fla. Stat. §§ 44.102, 44.201, 61.183, and 627.7015. See Ch. 2004-291, Laws of Florida.

[3] Previously, only court-appointed mediators enjoyed judicial immunity. While preserving that concept, the Act expanded judicial immunity to trainees seeking certification and to any person, even if not a certified mediator, mediating either a court- or agency-referred mediation or a mediations to which the parties have expressly agreed the Act applies. Judicial immunity is also extended to *certified* mediators conducting mediations that were not agency- or court-referred, unless the parties expressly agree *not* to be bound by the Act. Fla. Stat. § 44.107 (2004).

[4] Or, if the matter is not yet in court or administrative litigation, the person or entity that would be the party or real party-in-interest, if such court or administrative litigation were commenced. Fla. Stat. § 44.403(3).

[5] The Act also defines when a mediation begins (i.e., when confidentiality attaches). Fla. Stat. § 44.404.

[6] E.g., fraud, misrepresentation, mistake, disability/incapacity, unconscionability/illegality, or duress.

- to prove professional misconduct or malpractice alleged to have occurred during mediation. *Id.* § 44.405(4)(a).[7]

Further, the Act creates a privilege against disclosure of mediation communications by any mediation participant to anyone other than to another participant or participant's counsel, creating a civil remedy for relief from improper disclosures and reaffirming referring courts' authority to impose sanctions, including attorney's fees and costs, against the inappropriately disclosing participant. *Id.*. §§ 44.404(1), 44.406. Each mediation participant can assert the privilege to refuse to disclose, and can prevent other participants from disclosing mediation communications. *Id.* § 44.405(2).[8] Even if the Act otherwise applies, the parties can agree to waive confidentiality, the privilege, and the civil remedy, if they choose. *Id.* § 44.402(2).

The Act clarifies and strengthens mediation confidentiality. Since confidentiality has been key to the success of mediation, the Act should only help further facilitate disputes statewide.

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[7] Communications disclosed for these latter three reasons (not by waiver or related to crime), remains confidential otherwise.

[8] In a multiparty mediation, a party withdrawing from mediation can also assert, and must maintain, confidentiality as to communications made through the time of the party's withdrawal. Fla. Stat. § 44.405(3).