MEDIATION CONFIDENTIALITY: HIDDEN DANGERS AND COMMON SENSE

By: Reese J. Henderson, Jr.,
Florida Supreme Court Certified Circuit Civil Mediator

Many are familiar from news reports of the case where the former headmaster of a private school lost $80,000 of his wrongful termination settlement with the school because his teenage daughter posted about the settlement to FaceBook (i.e., the infamous "SUCK IT" quote). *See Gulliver Schools, Inc. v. Snay*, 137 So.3d 1045 (Fla. 3d DCA 2014). While this story undoubtedly gained traction in the media because of the tabloid quality of the communication in the relatively new medium of social media, it nevertheless underscores the significant risks posed to litigants from failure to understand or take proper precautions to observe the mediation privilege. This presentation will address the scope of the mediation privilege, the sanctions provided by law for violating the privilege, and discuss some real-world examples where violating the privilege proved costly. Judicially created exceptions to mediation confidentiality will also be addressed, along with some practice pointers to help minimize the risk with clients.

Mediation Confidentiality Defined

Florida's Mediation Confidentiality and Privilege Act, Fla. Stat. §§ 44.401–44.406 (2015) (the "Act") provides that all mediation communications to which the Act applies are confidential. The term "mediation communication" is defined as follows:

> "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.

Fla. Stat. § 44.403(1) (2015). A "mediation participant" is defined as "a mediation party or a person who attends a mediation in person or by telephone, videoconference, or other electronic means." *Id.* § 44.403(2). Note that the terms "mediation communication" and "mediation participant" are defined very broadly, presumably to maximize the scope of the privilege.

The Act does not automatically apply in every mediation context. For example, a voluntary mediation with a non-certified mediator is not covered, unless the parties so agree. The Act will apply to mediation communications under any of the following circumstances:

1) The mediation is conducted pursuant to a court order (including an administrative order), statute, court rule, agency rule or order;
2) The mediation is conducted under the Act by the express agreement of the mediation parties; or
3) The mediation is facilitated by a Supreme Court certified mediator, unless the mediation parties expressly agree **not** to be bound by the Act.

See Fla. Stat. § 44.402(1).

Even in mediations to which the Act applies, there are exceptions to the protection afforded to "mediation communications". For example, protection does not apply:

1) to a communication as to which confidentiality is waived by all parties;
2) to a communication willfully used to plan, commit or attempt to commit a crime, to conceal ongoing criminal activity or to threaten violence;
3) where a mandatory report is required by Fla. Stat Chapter 39 (to report child abuse) or chapter 415 (to report abuse of the elderly or disabled adults);
4) to a communication offered to report, prove or disprove professional malpractice during the mediation;

5) to a communication offered to establish or refute legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation; and

6) to a communication offered to report, prove or disprove professional misconduct occurring during the mediation, solely for the use of the governing body investigating the misconduct (e.g., The Florida Bar).

See Fla. Stat. § 44.405(4)(a). There is also no confidentiality or privilege that attaches to a signed written agreement reached during a mediation, unless the parties agree otherwise. *Id*.

Prohibition on Disclosure and Privilege

Where the Act applies, it provides both a prohibition and a privilege, which apply in different contexts. The prohibition on disclosure reads as follows:

> 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.

See Fla. Stat. § 44.405(1) (emphasis added). The privilege granted reads:

> 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.

See Fla. Stat. § 44.405(2). It is important to note this is a *testimonial* privilege, which is important for reasons discussed further below.

The prohibition on disclosure applies more broadly than the privilege, which is limited to situations involving testimony, whether in open court, in a deposition or an administrative proceeding. For example, the prohibition on disclosure raises questions of not just admissibility of mediation communications, but also of the discoverability of such communications. The consequences flowing from divulging a mediation communication can vary depending upon whether it is the prohibition on disclosure or the testimonial privilege that is violated. Generally

speaking, any mediation participant who "knowingly and willfully" discloses a mediation communication in violation of the Act is subject to a civil action for remedies, including equitable relief, compensatory damages, attorney's fees and mediator fees and costs incurred in the mediation proceeding and reasonable attorney's fees and costs incurred in making the application to the court for such remedies in a civil action. *See* Fla. Stat. § 44.406(1). Trial courts may also impose sanctions, including costs, attorneys' fees and "other appropriate remedies". *See* Rule 1.730(c), Florida Rules of Civil Procedure. If the testimonial privilege is violated, the result may be a new trial, as discussed further below.

Cases Applying Sanctions for Violating Mediation Confidentiality

One particularly noteworthy case shows the extent of the Court's power to sanction violations of mediation confidentiality. In *Paranzino v. Barnett Bank of South Florida, N.A.*, 690 So.2d 725 (Fla. 4th DCA 1997), the Plaintiff sued a banking institution over her claim for monies allegedly deposited with the bank. After the court-ordered mediation, at which the parties signed a confidentiality agreement, the Plaintiff and her attorney contacted the *Miami Herald* and disclosed the contents of the bank's settlement offer. The *Herald* subsequently ran an article which included statements from the Plaintiff's counsel discussing the amount the bank allegedly offered at mediation to settle. The trial court granted the bank's motion to strike the Plaintiff's pleadings and dismiss the action with prejudice as a sanction for "willfully and deliberately" violating mediation confidentiality, and this sanction was upheld on appeal. *See id.* at 729.

Equally noteworthy is the *Snay* decision cited in the introduction, which involved the application of the terms of a mediated settlement agreement to an apparent breach of the confidentiality terms of the agreement. The mediated settlement agreement provided that the Plaintiff "shall not either directly or indirectly, disclose, discuss or communicate to ***any entity or***

person, except his attorneys or other professional advisors or spouse any information whatsoever regarding ***the existence*** or terms of this Agreement . . . ." *See Snay*, 137 So.3d at 1046 (emphasis added). (Absent such a provision, the default rule under the Act is that the terms of the mediated settlement agreement itself are ***not*** confidential.) The settlement further specified that any breach of confidentiality would result in the Plaintiff's forfeiture of his payments under the settlement agreement (as distinguished from the payment to be made to his attorney for attorney's fees). *See id.* After learning that the case was settled and that her parents were "happy with the result", the Plaintiff's college age daughter posted a message on Facebook disclosing both the existence and, indirectly, the terms of the settlement agreement. Her exact words were: "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT." *Id.* at 1046.

After learning of this disclosure (which, according to the opinion, went out to approximately 1200 of the daughter's Facebook friends), the Defendant informed the Plaintiff he was in breach of the confidentiality provision and refused to tender the Plaintiff's portion of the settlement. On appeal, the Third District reversed the trial court's order finding of no breach of the confidentiality provision and took the Plaintiff to task for violating the settlement's confidentiality provision:

> Because Snay's deposition testimony that "[m]y conversation with my daughter was that it was settled and we were happy with the results," establishes a breach of this provision, the court below should have denied his motion for enforcement of the agreement. The fact that Snay testified that he knew he needed to tell his daughter something did not excuse this breach. There is no evidence that he made this need known to the school or to his or its attorneys so that the parties might hammer out a mutually acceptable course of action in the agreement. Rather, before the ink was dry on the agreement, and notwithstanding the clear language of section 13 mandating confidentiality, Snay violated the agreement by doing exactly what he had promised not to do. His

> daughter then did precisely what the confidentiality agreement was designed to prevent, advertising to the Gulliver community that Snay had been successful in his age discrimination and retaliation case against the school.

See id. at 1048 (footnotes omitted). Although the *Snay* decision reads as a straightforward contract interpretation decision, and makes no reference to the Act or the public policy reasons behind mediation confidentiality, it is fair to read the decision as reinforcing the integrity of the mediation process which is obviously built on the confidentiality attached to its proceedings, including the terms of any resulting settlement which the parties agree to keep confidential.

Cases Denying Sanctions for Alleged Violations of Confidentiality

At the other end of the spectrum from the *Paranzino* decision is the case of *Procaps S.A. v. Patheon, Inc.*, 2014 WL 5410300 (S.D. Fla. 2014), wherein the court found "not convincing" the plaintiff's argument in favor of striking the defendant's pleadings based on alleged violations of mediation confidentiality contained in an opposition memorandum filed in federal court. The defendant was opposing the plaintiff's motion to order a return of the parties to mediation, and in its response described a "monumental gap" in the parties' positions at mediation brought on by the plaintiff's "over-the-top" initial settlement demand and an alleged lack of effort to confer in good faith about mediation and settlement. The defendant even went so far as to disclose some details regarding the plaintiff's position at mediation, including the substance of the plaintiff's expert's opinion and allegations that the plaintiff refused to disclose its theory of the case at mediation. On the one hand, the U.S. Magistrate Judge found that the defendant's use of "generalized terms to describe the breadth of the gap between the parties' positions" and of its impression of the plaintiff's willingness to bridge that gap was sufficiently generic so as to not constitute a violation of the confidentiality rule. *See id.* at *1. Nevertheless, the court found the

defendant's response "did in fact go a tad too far" in describing the plaintiff's positions in detail, but not enough to warrant the severe remedy of striking the defendant's pleadings:

> To be sure, Patheon could have easily made its point by simply stating there was a "monumental gap" that the opposing party refused to close and leaving it there, rather than adding in Procaps' exact demand. [ECF No. 587, p. 4 ("Procaps' over-the-top settlement demand is based on its expert's flawed opinion that the Collaboration would have generated $1 billion in revenues ...")]. The inclusion of this specific information in the response to the mediation motion is inappropriate because of the additional detail (modest as it may have been) that it includes. Further, Patheon's statement that "Procaps has no rule of reason theory, as evidenced by its refusal to disclose one to Patheon," is also an unnecessary and inappropriate disclosure of mediation communications. [*Id.*].
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> Nevertheless, despite Patheon's technical violations, Procaps' suggested remedies are disproportionate.

See id. at *2; *see also Hill v. Greyhound Lines, Inc.*, 988 So.2d 1250, 1252 (Fla. 1st DCA 2008) (reversing order of Judge of Compensation Claims dismissing petition for alleged violation of mediation confidentiality where respondent failed to make showing petitioner "willfully and deliberately" violated court order or that respondent was "meaningfully prejudiced" by the disclosure); *and see also* Law360 Article (included among materials) re TransUnion Case Where Motion for Mediation Sanctions was filed which disclosed confidential discussions at mediation.

Cases Applying (or Not Applying) Mediation Privilege

There is surprisingly little authority applying the testimonial privilege contained in the Act to bar introduction of evidence or testimony. Courts have held that the mere mention of the fact during a trial that a mediation had taken place does not waive the mediation privilege so as to allow the introduction of testimony regarding confidential mediation communications. *See Sun Harbor Homeowners' Ass'n, Inc. v. Bonura*, 95 So.3d 262, 270 (Fla. 4th DCA 2012). On the other hand, judges are not automatically required to recuse themselves merely because they

become aware of confidential mediation communications through testimony at trial. Instead, a motion for recusal must be made and must adhere to the pleading requirements of Fla.R.Jud.Admin. 2.160. *See Enterprise Leasing Co. v. Jones*, 789 So.2d 964, 967-68 (Fla. 2001). *Jones* disapproved two earlier decisions – *Fabber v. Wessel*, 604 So.2d 533 (Fla. 4th DCA 1992) and *Hudson v. Hudson*, 600 So.2d 7 (Fla. 4th DCA 1992) – which had held that disclosure of confidential mediation communications to a trial judge automatically required the trial judge's recusal.

Indeed, the mediation privilege is mentioned in reported cases more for its inapplicability than for its applicability. For example, U.S. District Judge Richard Smoak has held on more than one occasion that a confidential settlement demand – apparently including demands made at mediation – may be introduced to establish the amount in controversy for purposes of seeking removal of a state court action to federal court under the court's diversity jurisdiction. *See, e.g., Floyd v. Wal-Mart Stores East, LP*, 2012 WL 3155784, at *2 (N.D. Fla. August 3, 2012). Federal courts in Florida have also ruled that the privilege does not apply to bar discovery requests by one mediation participant directed to another mediation participant, where there is "no effort to disclose the communications to persons other than mediation participants." *Altheim v. GEICO General Insurance Co.*, 2010 WL 5092721, at *1 (M.D. Fla. December 8, 2010) (McCoun, U.S. Magistrate Judge); *see also Bowdler v. State Farm Mut. Automobile Ins. Co.*, 2014 WL 2003114, at *3 (M.D. Fla. May 14, 2014) (Mirando, U.S. Magistrate Judge) (finding insurance company's log entries summarizing communications at mediation were discoverable notwithstanding its assertion of mediation privilege because "the privilege would not apply to these communications because Plaintiff and Plaintiff's counsel were participants in the underlying mediation."), *aff'd*, 2014 WL 2700672 (M.D. Fla. June 13, 2014) (Chappell, J.).

At least one court, moreover, has found that mediation confidentiality was waived through the filing of a lawsuit against an insurance company seeking to enforce its judgment against the original defendants' insurance company. In *Bradfield v. Mid-Continent Cas. Co.*, 15 F.Supp.3d 1253 (M.D. Fla. 2014), the plaintiffs had reached a *Coblentz* agreement with the defendants in the underlying action at mediation, resulting in the entry of a consent judgment in the plaintiff's favor and an assignment to the plaintiff by the defendants of their rights against Mid-Continent under their policies of insurance. The plaintiff then filed suit against Mid-Continent, but sought a protective order requiring the return of various documents – allegedly inadvertently produced in response to discovery – including unexecuted drafts of the mediated settlement agreement in the underlying lawsuit and related communications, arguing they were protected under the mediation confidentiality privilege. The district court disagreed, finding that any mediation privilege was waived under the "sword and shield" doctrine. By bringing suit against the insurance company, the plaintiffs had necessarily placed at issue the reasonableness of the settlement they had reached with the defendants in the underlying lawsuit, and could therefore note hide behind the privilege to prevent the insurance company's discovery of facts necessary to defendant against the plaintiff's claims. *See id.* at 1257.

Similarly, Senior District Judge William Hoeveler found denied a motion to strike an affidavit filed in opposition to a motion for summary judgment containing testimony about statements allegedly made by a surety at mediation in a case in which the reasonableness of the surety's actions at mediation in settling the case with the opposing party were directly at issue. *See Carles Constr., Inc. v. Travelers Cas. & Surety Co. of America*, 56 F.Supp.3d 1259, 1274 (S.D. Fla. 2014). Judge Hoeveler cited the "at-issue" doctrine articulated in *Savino v. Luciano*, 92 So.2d 817 (Fla. 1957), and held:

> In conclusion, the Court does not find that Defendant has presented a sufficient basis for eliminating from consideration the evidence contained in Carles's Affidavit from consideration. Defendant's objections simply are inconsistent with the purposes of the prohibition on disclosure of mediation communications. None of the statements being disclosed reveal confidential communications as to *opposing* parties at the mediation. Moreover, Travelers has raised defenses to Plaintiffs' claims of breach of agreement and civil conspiracy which require an examination of Travelers's conduct in settling the underlying disputes. Having done so, Travelers cannot now seek to preclude the finder of fact from examining such conduct.

Id. (footnote omitted).

The privilege has been held applicable to preclude proof of an alleged oral agreement at mediation which was not reduced to writing. *See Cohen & Cohen*, 609 So.2d 785 (Fla. 4th DCA 1992); *see also Gordon v. Royal Caribbean Cruises, Ltd.*, 641 So.2d 515, (Fla. 3d DCA 1994) (holding that settlement agreement reached at mediation but not signed by one of the parties was not binding, and therefore all communications made during the mediation remained privileged). However, the privilege has been found not applicable in proceedings to modify or enforce a written and signed mediated settlement agreement where it is alleged the agreement is the product of a mutual mistake. *See Feldman v. Kritch*, 824 So.2d 274, 276-77 (Fla. 4th DCA 2002); *DR Lakes Inc. v. Brandsmart U.S.A. of West Palm Beach*, 819 So.2d 971 (Fla. 4th DCA 2002). For example, in *DR Lakes Inc.*, a dispute over a purchase and sale agreement was referred to mediation and resulted in a mediated settlement agreement revising the terms of the purchase agreement. Post-mediation, the seller alleged the agreement contained a clerical error and sought to have the agreement reformed based on mutual mistake and enforced as reformed. In support of its motion, the seller attempted to introduce testimony as to what transpired at mediation to support its argument that there was a clerical error in reducing the parties' agreement to writing. The buyer objected to this testimony and the trial court precluded the

testimony based on the mediation privilege. On appeal, the Fourth DCA reversed, finding that to read the mediation statute to preclude the offered testimony would produce an absurd result:

> We cannot imagine that the legislature intended that a party to a contract reached after mediation should not have the same access to the courts to correct a $600,000 mutual mistake, as a party entering into the same contract outside of mediation. We therefore hold that the privilege does not bar evidence as to what occurred at mediation under the facts in this case.

Id. at 974. Similarly, it has been held that duress or coercion at mediation – including by the mediator herself – may be grounds for invalidating a mediated settlement agreement reached at a court-ordered mediation. *Vitakis-Valchine v. Valchine*, 793 So.2d 1094, 1099 (Fla. 4th DCA 2001). In a marital dissolution case where the former wife asserted duress as grounds to void a mediated settlement agreement, she was held to have waived her privilege to prevent the testimony of the mediator as to what transpired at the mediation in response to her claims. *See McKinlay v. McKinlay*, 648 So.2d 806, 810 (Fla. 1st DCA 1995). As the court explained:

> Third, and most significant, is the fact that as the party who objected to the settlement based on allegations of duress and intimidation, Wife availed herself of the opportunities to file a written letter to the trial judge and to testify at the unreported February 15, 1990, hearing. However, with only her side of the story presented, she invoked a statutory privilege to preclude testimony or a proffer from other witnesses such as the mediator. These particular facts lead us to conclude that Wife waived her statutory privilege of confidentiality and that, as a result of the waiver, it was error and a breach of fair play to deny Husband the opportunity to present rebuttal testimony and evidence.

Id. The above decisions were effectively codified in 2004, when Chapter 44 was amended to add Section 44.405, which provides an exception to the mediation confidentiality and privilege for communications "[o]ffered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation". Fla. Stat. § 44.405(4)(a)5.

Analysis and Practice Tips

From the reported cases, it is apparent that the result in *Paranzino* – that of striking of a party's pleadings for violating mediation confidentiality – is an outlier. *Paranzino* involved a case where, after no settlement was reached at mediation, one of the participants intentionally and very publicly disclosed confidential mediation communications in an obvious effort to gain a tactical advantage in the litigation. Given the rather brazen way in which the plaintiff violated mediation confidentiality – affirmatively arranging an interview with the news media – it is not surprising that the court upheld imposition of the ultimate sanction of dismissal of the plaintiff's action. Most other instances of alleged violation of mediation confidentiality are much closer calls. So the lesson is not so much to avoid brazenly and openly violating mediation confidentiality, but to be sensitive to the risk in less obvious circumstances, such as the opposition memorandum filed in *Procaps* where defense counsel played with fire by aggressively disclosing details of the parties' discussions at mediation. Although Magistrate Judge Goodman was quite forgiving of the defendant's "technical violations" in *Procaps*, not every court will be so forgiving and the sanctions provided by statute and rule are sufficiently high – inclusive of equitable remedies, damages, mediator's fees and attorney's fees, not to mention potential striking of pleadings – that greater circumspection when discussing events at mediation is warranted.

The reported cases also reveal exceptions to the confidentiality rule, virtually all of which are judicially created exceptions to the statutory privilege: (1) introducing offers to establish the "amount in controversy" for diversity jurisdiction purposes (*Floyd, supra*); (2) discovery of mediation communications among participants in the mediation (*Altheim* and *Bowdler, supra*); (3) waiver of the privilege under the "at issue" doctrine (*Bradfield , supra*); (4) inapplicability of

the privilege to proceedings to reform a mediated settlement agreement based on mutual mistake (*DR Lakes Inc., supra*); and (5) waiver of the privilege where it is alleged the mediated settlement agreement is the product of duress or coercion (*McKinlay, supra*). These all represent "common sense" exceptions to the general rule of confidentiality to serve well-established policy goals of the judicial system.

The *Snay* decision cited in the introduction provides its own cautionary tale. It is an example of a case where a settlement *was* reached, but was then ruined (for the plaintiff anyway) by what was arguably a case of poor lawyering if not outright malpractice. With the detailed treatment given to confidentiality in the parties' mediated settlement agreement – to include a specially negotiated sanction for any violation – it is nothing short of astonishing that plaintiff's counsel did not address with the plaintiff the seriousness of any potential breach of confidentiality. Although the opinion singles out the plaintiff himself for not consulting his attorney about what to say to his teenage daughter about the settlement, a future court might just as easily castigate the attorney for not volunteering this advice without being asked. Best practices, in light of this decision, would be to proactively counsel clients on the importance of maintaining mediation confidentiality and to actively seek to uncover any potential risk of future violation by the client (such as having a curious teenage daughter with an interest in the case).