Basic Mediation Agreements, and a Few Bells and Whistles

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The Mediation Confidentiality and Privilege Act[1] applies in Florida to any mediation facilitated by a certified mediator and to all mediation required by statute, rule, or order -- even when required by oral court order.[2] The Act applies unless the parties agree that it or certain provisions of it will not apply.[3] The Act provides ground rules for the duration, initiation and termination of the mediation, confidentiality and privilege and exceptions thereto, and civil remedies for disclosure of confidential communications.[4]

If the statutory procedure under the Act satisfies your client's needs, you might not need a mediation agreement. A basic, one-page mediation agreement, however, can reinforce and supplement the Act by providing:

1. A written agreement that not only does the Act apply, but also that the entire process is a compromise negotiation and that all communications are confidential, privileged and inadmissible for any purpose under Rule 408 of the Federal Rules of Evidence and Section 90.408, F.S., and under the Act.

2. An express understanding that "all oral or written statements, 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 mediation" shall be confidential.[5]

3. The parties affirmation that the mediator will have "judicial immunity in the same manner and to the same extent as a judge."[6]

It also may be beneficial to add a few bells and whistles to a mediation agreement to prepare the parties for the process and attempt to make the process more meaningful. The goals of the mediation can be included, such as agreeing to participate in good faith in the entire process to attempt to arrive at a mutually acceptable resolution in a cooperative and informal manner. The agreement can provide that each party will have the opportunity and responsibility candidly to disclose to the mediator the facts, theories, and opinions on which it relies.

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[1] Section 44.401 et seq., Fl. Stat. (effective July 1, 2004) (the "Act") .
[2] § 44.402(1)(a), (1)(c), F.S.
[3] § 44.402(1)(c), (2), F.S.
[4] §§ 44.404 - 44.406, F.S.
[5] §§ 44.405(1), 44.403(1), F.S.
[6] § 44.107, F.S.

A mediation agreement also can educate clients on the process, setting forth that: all parties will identify their claims and the basis of them; each party will work with the mediator to evaluate solutions that would satisfy its own interests and those of the other parties; and the mediator will review written information and have private, confidential conversations with the participants.

A mediation agreement also should address who will pay the mediator's fees and expenses, particularly in multi-party cases where derivative liability might exist and some parties might have little liability.

In complex cases, mediation agreements can provide for a preliminary session to: identify key legal and factual issues and educate the mediator and parties on them; discuss the need for mediation statements, ex parte or otherwise; identify additional participants needed to resolve the case; identify discovery needs and provide for informal, expedited exchange of information; and allow the mediator and counsel to agree on preliminary issues.

The Mediation Confidentiality and Privilege Act is a great starting point to provide the basic ground rules for mediation in Florida, but you can serve your client well by using a basic mediation agreement for straight-forward cases and by adding a few bells and whistles for complex cases.

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