

Mediation Confidentiality – Do Loose Lips Really Sink Ships?

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In my standard introduction statement, I tell mediation participants of my “Top Four Reasons Why Mediation Works” list, the second of which is the confidentiality that applies to the communications that are made. If the fact finder could learn of what went on during the mediation conference, parties would be far less willing to speak the truth and earnestly explore compromise. Without confidentiality, mediation conferences would resemble poker tournaments, where bluffs and lack of candor are expected.

Florida Statute Section 44.405(1) declares that, except in rare exceptions, “all mediation communication shall be confidential” and shall only be disclosed to another mediation participant or a participant’s counsel. “Mediation communication” is defined in Section 44.403(1) to encompass oral, written and nonverbal assertions made during or in furtherance of a mediation. Section 44.405(4)(a) delineates the rare exceptions, stating that there is no confidentiality to mediation communications:

- (1) For which confidentiality has been waived by all parties;
- (2) That is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;
- (3) That requires mandatory reporting as to abuse of children or vulnerable adults;
- (4) Offered to report, prove or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;
- (5) Offered for the limited purpose of establishing or refuting grounds for voiding or reforming the mediated settlement agreement; or
- (6) Offered to report, prove or disprove professional malpractice occurring during the mediation, solely for the internal use of the investigating body.

All other mediation communication “shall be confidential”. A party who “knowingly and willfully” breaches this confidentiality may be subjected to equitable relief, compensatory damages, attorney’s and mediator’s fees incurred in the underlying mediation, attorney’s fees and cost incurred in pursuit of this relief, and, if the mediation was court-ordered, additional sanctions by the court. (Fla. Stat. 44.405(1) and 44.406(1).)

A recent case, from our own backyard, explored the breadth of the potential consequence for confidentiality violations. In Hill v. Greyhound Lines, Inc., 988 So. 2d 1250 (Fla. 1st DCA 2008), the workers compensation claimant was discovered to have disclosed to his treating doctor communications that the employer/carrier made during the mediation. As a result of this confidentiality breach alone, the E/C successfully moved for the claimant’s petition to be dismissed with prejudice. On appeal, the Claimant’s counsel conceded the breach, but argued that such was not “willful”, nor did it cause any prejudice to the E/C. Relying on a lack of findings, and on specific statutory provisions in the workers’ compensation act, the First District Court reversed the dismissal, finding that the “most severe of sanctions” was inappropriate.

I write this article and cite this case not to draw attention to local colleagues, nor to instigate such sanction pursuits, but to demonstrate the high regard that the legislature, the courts, and participants have for mediation confidentiality. There is no known case where severe sanctions were imposed for mediation confidentiality breaches, but Hill demonstrates the potential for such a precedent in the future.

The statute is quite clear in spelling out the fees and cost consequences for breaching mediation confidentiality. Less clear is what “court sanctions” and “equitable relief” are available to mediation participant whose opponent had discloses mediation communications.

As part of your mediation preparation efforts, you’d be wise in stressing with your client the significance of mediation confidentiality and the potentially dire consequences for breaching same, so that your client is not the creator of this missing precedent. While it hasn’t happened yet, loose lips may indeed sink the mediation participant’s ship.

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