

Voluntary Mediations – Confidentiality Now Comes Standard

By Blane G. McCarthy

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Last year, I wrote an article alerting you to some key distinctions with voluntary Mediation. The article highlighted that the sanctions, enforcement, and confidentiality provisions of Florida Statute Chapter 44 apply only to court-ordered Mediations. Recent caselaw confirmed that parties could invoke the statute into voluntary Mediations, so that all of the same protections and benefits would apply. Absent such an invocation, voluntary Mediations have the “same number of enforcement ‘teeth’ as does my five-month-old son, Jonah.”

Well, my son is now 20-months-old and has a mouthful of teeth. So, too, does Florida Statute Chapter 44. Effective July 1, 2004, new section 44.401 applies confidentiality automatically to all Mediations conducted by a Supreme Court certified mediator. Sanctions for violating this confidentiality include attorney’s fees, mediator’s fees, and mediation costs.

Many attorneys fail to see the importance of confidentiality, presuming that section 90.408 serves the same purpose. While this statute bars evidence of offers to compromise, it has no application outside of the courtroom. Without confidentiality, a party’s mediation concessions can become public knowledge. The ability to share an opponent’s communications with others would greatly deter candor at Mediation and turn the conference into a more sophisticated form of high-stakes poker.

Any chink in confidentiality armor can prove to be the downfall of Mediation. Thankfully, the armor is now better fortified.

It is still advisable to invoke all of Chapter 44 when pursuing voluntary Mediation, to better effect appearance and better enforce agreements. Your Mediator can easily accomplish this within the Notice document. If not, take the initiative yourself to craft a stipulation that Florida Statute Chapter 44 will control the Mediation. Just don’t worry so much about invoking statutory confidentiality, as it now comes standard.

This article is one in a series of periodic articles concerning mediation topics such as use, legal developments, and negotiation tactics. Blane G. McCarthy is a Jacksonville civil trial lawyer and certified circuit civil mediator. For questions, comments, or suggestions on future articles, please call (904) 391-0091 or email at bgmccarthy@sprintmail.com.