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## **Act Deux: Confidentiality after the Florida Mediation Confidentiality and Privilege Act**

Fran L. Tetunic

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# ACT DEUX: CONFIDENTIALITY AFTER THE FLORIDA MEDIATION CONFIDENTIALITY AND PRIVILEGE ACT

FRAN L. TETUNIC\*

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## I. INTRODUCTION

Confidentiality is the bedrock of mediation, the firm foundation that supports and sustains the mediation process.<sup>1</sup> “One of the fundamental

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axioms of mediation is the importance of confidentiality. It is deemed necessary to foster the neutrality of the mediator and essential if parties are to participate fully in the process.”<sup>2</sup> “[T]he challenge of communicating with an adversary, the presence of a neutral intermediary, and the potential for information informally reaching a judge all make confidentiality especially important for mediation.”<sup>3</sup> The security and predictability of statutory mediation confidentiality and privilege are critical to the efficacy of the mediation process.

Florida has had a statutory mediation privilege for court-ordered mediation since 1987.<sup>4</sup> In 2004, the Mediation Confidentiality and Privilege Act (the Act) came into effect, broadening the scope of mediation confidentiality, clarifying the privilege, defining covered mediation communications, delineating exceptions, and providing statutory sanctions for breaching the Act.<sup>5</sup> Additionally, the Act serves to codify the significant body of mediation case law, and provides clearly stated law to guide judges, attorneys, mediators, parties, and mediation participants.<sup>6</sup>

This article will summarize the Act and highlight areas in which case law has been established, as well as areas of emerging case law. It will also identify and discuss current confidentiality conundrums. The term confidentiality will generally be used to reference both confidentiality and privilege, unless privilege is specifically addressed. The exceptions delineated in the Act apply to both mediation confidentiality and privilege.<sup>7</sup>

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The author dedicates this article to the Florida Dispute Resolution Center, and thanks its dedicated professionals for their steadfast vision and leadership. The Dispute Resolution Center along with the Alternative Dispute Resolution Policy and Rules Committee, Mediator Ethics Advisory Committee, Mediator Qualifications Board, and Mediation Training Review Board have led Florida’s court-connected alternative dispute resolution programs to a place of well-deserved prominence.

1. Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33, 35 (2001).

2. *Id.*

3. Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 83–84 (2001) [hereinafter Deason, *The Quest for Uniformity in Mediation Confidentiality*].

4. Act effective Jan. 1, 1988, ch. 87–173, § 2, 1987 Fla. Laws 1202, 1202 (codified at FLA. STAT. §§ 44.301–.306 (1988)).

5. See FLA. STAT. §§ 44.401–.406 (2011).

6. See *id.*

7. FLA. STAT. § 44.405(1)–(4)(a). While the distinction between mediation confidentiality and privilege is often blurred, it is significant. All things confidential are not privileged. See *id.* Privilege prevents testimony of mediation communications at subsequent legal proceedings. *Id.* § 44.405(2). Confidentiality is far broader. See *id.* § 44.405(1). “A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant’s counsel.” *Id.*

## II. THE MEDIATION CONFIDENTIALITY AND PRIVILEGE ACT

The statutory definition of mediation remains unchanged since 1990:

“Mediation” means a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and non-adversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision-making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem-solving, and exploring settlement alternatives.<sup>8</sup>

The description of mediation privilege, as amended, makes clear the privilege covers testimony at subsequent proceedings, and 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.”<sup>9</sup>

### A. Scope

Prior to the enactment of the Act in 2004, only court-ordered mediation cases were confidential by statute.<sup>10</sup> Confidentiality coverage has been greatly expanded to include any mediation: 1) conducted by agreement of the parties under the Act;<sup>11</sup> 2) facilitated by a Supreme Court of Florida certified mediator, unless the parties agree otherwise;<sup>12</sup> and 3) “[r]equired by statute, court rule, agency rule or order, oral or written case-specific court order, or

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8. Compare FLA. STAT. § 44.1011(2) (1990), with FLA. STAT. § 44.1011(2) (2011). The definition is not found in the Act. See FLA. STAT. §§ 44.401–406 (2011). It is located in *Florida Statutes*, chapter 44, Mediation Alternatives to Judicial Action. *Id.* § 44.1011(2).

9. *Id.* § 44.405(2). The prior statutory definition read: “Each party involved in a court-ordered mediation proceeding has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing, communications made during such proceeding.” FLA. STAT. § 44.102(3) (2003).

10. *Id.*

11. FLA. STAT. § 44.402(1)(b) (2011).

12. *Id.* § 44.402(1)(c).

court administrative order.”<sup>13</sup> However, the parties may agree in writing that selected provisions of the Act will not apply to their mediation.<sup>14</sup>

### B. *Parameters of Confidentiality*

The Act provides when mediation begins and ends for confidentiality purposes.<sup>15</sup> Court-ordered mediation begins as soon as the court issues a referral to mediation.<sup>16</sup> In all other mediations to which the Act applies, “the mediation begins when the parties agree to mediate or as required by agency rule, agency order, or statute, whichever occurs earlier.”<sup>17</sup> Mediation confidentiality does not necessarily end when the parties and other participants leave the mediation room. If the law requires court approval of the settlement agreement, the mediation—for confidentiality purposes—is considered to end upon the required court approval.<sup>18</sup> Mediation is also properly determined to end when “the mediator declares an impasse,” or “the mediation is terminated.”<sup>19</sup> Nonetheless, the obligation to maintain confidentiality extends beyond the conclusion of the mediation session.<sup>20</sup>

All mediation communications are confidential unless they fit within an exception delineated in the Act.<sup>21</sup> Covered communications must occur during the mediation or before the mediation commences “if made in furtherance of [the] mediation.”<sup>22</sup> “‘Mediation communication’ means an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant . . . .”<sup>23</sup> Significantly, the Act specifically excludes “the commission of a crime during . . . mediation” from the definition of mediation communication.<sup>24</sup>

The mediation parties hold the “privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications.”<sup>25</sup> Mediation participants are prohibited from

13. *Id.* § 44.402(1)(a).

14. *Id.* § 44.402(2). “Notwithstanding any other provision, the mediation parties may agree in writing that any or all of . . . s[ection] 44.405(2), or s[ection] 44.406 will not apply to all or part of a mediation proceeding.” *Id.*

15. FLA. STAT. § 44.404(1).

16. *Id.*

17. *Id.* § 44.404(2).

18. *Id.* § 44.404(1)(a).

19. *Id.* § 44.404(1)(b)–(c), (2)(b)–(c).

20. *See* FLA. STAT. §§ 44.404(1)–(2), 405(4)(b).

21. *Id.* § 44.405(1).

22. *Id.* § 44.403(1).

23. *Id.*

24. *Id.*

25. FLA. STAT. § 44.405(2).

disclosing communications to anyone other than participants' counsel or other participants.<sup>26</sup> In addition to and consistent with the Act, the Florida ethical rules for certified and court-appointed mediators provide, "[a] mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties."<sup>27</sup>

### C. *Exceptions to Confidentiality*

The mediation parties, the only mediation participants who hold the statutory privilege, may waive their privilege.<sup>28</sup> By statute, signed mediated agreements are not confidential, unless the parties otherwise agree.<sup>29</sup> Significantly and specifically excluded from confidentiality is a mediation communication "[t]hat is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence."<sup>30</sup>

As with any person within Florida, all mediation participants are required to make mandatory reports of abuse and neglect of children and vulnerable adults pursuant to chapter 39 or 415 respectively.<sup>31</sup> The mandatory reports are solely for the purpose of providing information to the entity that requires the report.<sup>32</sup> Reporting abuse and neglect of children and vulnerable adults is the Act's only mandatory reporting requirement.<sup>33</sup> All other exceptions to confidentiality are permissive.<sup>34</sup>

If professional malpractice or professional misconduct occurs during the mediation, the communication may be "[o]ffered to report, prove, or disprove" the misconduct or malpractice "solely for the purpose of the . . . malpractice [or grievance] proceeding."<sup>35</sup> Additionally, parties retain access to the court to seek relief in terms of voiding or reforming a mediated agree-

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26. *Id.* § 44.405(1).

27. FLA. R. CERT. & CT.-APPTD. MEDIATORS R. 10.360(a). The Mediator Ethics Advisory Committee advises that when mediators are subpoenaed, they should "file a motion for a protective order or notify the judge" that they are statutorily obligated to "maintain the confidentiality of mediation." Mediator Qualifications Advisory Panel, Advisory Op. 99-012 (2000) (citing Mediator Qualifications Advisory Panel, Advisory Op. 96-005 (1997)).

28. FLA. STAT. § 44.405(4)(a)(1). Unlike the Uniform Mediation Act, mediators do not hold the privilege. *See id.* § 44.405(2); UNIF. MEDIATION ACT § 4(b)(2) (2001) (providing a mediator has a privilege regarding mediation communications made by the mediator).

29. FLA. STAT. § 44.405(4)(a).

30. *Id.* § 44.405(4)(a)(2).

31. *See id.* §§ 39.201(1)(a), 44.405(4)(a)(3), 415.1034(1)(a).

32. *Id.* § 44.405(4)(a)(3).

33. *See id.*

34. FLA. STAT. § 44.405(4)(a)(1)-(2), (4)-(6).

35. *Id.* § 44.405(4)(a)(4), (6).

ment.<sup>36</sup> Communications may be “[o]ffered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation.”<sup>37</sup> Should a party disclose a privileged mediation communication, the party would be deemed to have waived the privilege to allow the other party to respond.<sup>38</sup>

The Act clarifies the interplay of mediation communications with discovery and admissibility.<sup>39</sup> Information disclosed during mediation does not become protected from discovery or inadmissible in court if it is otherwise subject to discovery or admissible.<sup>40</sup>

Additionally, information disclosed pursuant to confidentiality exceptions “remains confidential and is not [otherwise] discoverable or admissible for . . . other purpose[s], unless otherwise permitted by th[e]” Act.<sup>41</sup>

#### D. *Civil Remedies*

A mediation participant may be subject to remedies if the participant “knowingly and willfully discloses a mediation communication in violation of [the Act].”<sup>42</sup> Remedies include compensatory damages, equitable relief, fees for attorneys and mediators, as well as “costs incurred in the mediation proceeding” and in applying for remedies.<sup>43</sup> Application for relief must begin within two years after the date “the party had a reasonable opportunity to discover the [confidentiality breach].”<sup>44</sup> The application may not be commenced “more than four years after the date of the breach” of confidentiality.<sup>45</sup> In addition to statutory sanctions, if the mediation is ordered by the court, participants are subject to court sanctions, including fees for attorneys and mediators and costs.<sup>46</sup>

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36. *Id.* § 44.405(4)(a)(5).

37. *Id.*

38. *Id.* § 44.405(6).

39. FLA. STAT. § 44.405(5).

40. *Id.*

41. *Id.* § 44.405(4)(b).

42. *Id.* § 44.406(1).

43. *Id.* § 44.406(1)(a)–(d).

44. FLA. STAT. § 44.406(2).

45. *Id.*

46. *Id.* § 44.405(1).

### III. MEDIATION CASE LAW

#### A. *Settled Confidentiality Issues*

Despite an umbrella of mediation confidentiality and privilege, parties seek court intervention to enforce, interpret, reform, and overturn mediated agreements. Florida has almost two decades of mediation case law, much of which is clearly established.<sup>47</sup>

##### 1. Agreements Must Be in Writing with Required Signatures

A series of cases display parties' attempts to allege that they have mediated agreements that should be enforced by the courts.<sup>48</sup> By asserting the existence of a mediated agreement, they seek to get information to the court about mediation communications that would otherwise be covered by mediation confidentiality.<sup>49</sup>

The Act provides: "there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise."<sup>50</sup>

Early mediation cases questioned whether courts should admit evidence of the existence of mediated agreements.<sup>51</sup> Dating back to the 1990s, the cases clearly establish that mediated agreements must be in writing.<sup>52</sup> Courts do not recognize oral agreements purporting to be mediated agreements.<sup>53</sup> Nor will the courts hear testimony alleging the existence of oral mediated agreements.<sup>54</sup> "The confidentiality of the [mediation] negotiations should remain inviolate until a written agreement is executed by the parties."<sup>55</sup>

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47. See, e.g., *City of Delray Beach v. Keiser ex rel. Estate of Menachem*, 699 So. 2d 855, 855–56 (Fla. 4th Dist. Ct. App. 1997); *Gordon v. Royal Caribbean Cruises Ltd.*, 641 So. 2d 515, 517 (Fla. 3d Dist. Ct. App. 1994) (per curiam); *Cohen v. Cohen*, 609 So. 2d 785, 786 (Fla. 4th Dist. Ct. App. 1992); *Hudson v. Hudson*, 600 So. 2d 7, 9 (Fla. 4th Dist. Ct. App. 1992) (per curiam).

48. See, e.g., *Keiser ex rel. Estate of Menachem*, 699 So. 2d at 855; *Gordon*, 641 So. 2d at 516; *Cohen*, 609 So. 2d at 786; *Hudson*, 600 So. 2d at 8.

49. See *Keiser ex rel. Estate of Menachem*, 699 So. 2d at 855; *Gordon*, 641 So. 2d at 516; *Cohen*, 609 So. 2d at 786; *Hudson*, 600 So. 2d at 8; see also FLA. STAT. § 44.405(4)(a).

50. FLA. STAT. § 44.405(4)(a).

51. See *Gordon*, 641 So. 2d at 517; *Cohen*, 609 So. 2d at 786; *Hudson*, 600 So. 2d at 9.

52. See *Gordon*, 641 So. 2d at 517; *Cohen*, 609 So. 2d at 786; *Hudson*, 600 So. 2d at 9.

53. See, e.g., *Hudson*, 600 So. 2d at 8–9.

54. See, e.g., *id.*

55. *Cohen*, 609 So. 2d at 786 (quoting *Hudson*, 600 So. 2d at 9).

“[T]he reasons for confidentiality are not as compelling” once parties have signed a mediated agreement.<sup>56</sup>

Mediation agreements must also bear the requisite signatures to be recognized by the courts.<sup>57</sup> Courts consistently have required that parties sign their mediated agreements as directed by the applicable rules of procedure.<sup>58</sup> In *City of Delray Beach v. Keiser ex rel. Estate of Menachem*,<sup>59</sup> the court determined there was no mediated agreement to enforce, as neither party had signed the alleged agreement.<sup>60</sup> The signature of party’s counsel was insufficient to satisfy the signature requirement of Florida Rule of Civil Procedure 1.730.<sup>61</sup> However, in *Jordan v. Adventist Health System/Sunbelt, Inc.*,<sup>62</sup> the court enforced the mediated agreement signed by the parties, but not their counsel, when the parties had operated under the terms of the agreement.<sup>63</sup>

Courts continue to decide cases regarding agreements allegedly reached during mediation that are not memorialized in writing and signed by the parties.<sup>64</sup> In 2008, a defendant in a personal injury lawsuit filed to enforce a settlement agreement allegedly reached during mediation.<sup>65</sup> “[T]he alleged . . . agreement was [never] reduced to writing and signed by the parties . . . .”<sup>66</sup> Accordingly, the court concluded “that the lack of a written agreement signed by both parties was more than a mere technical deficiency, and that the alleged mediation [agreement] is unenforceable.”<sup>67</sup> In 2009, a law firm moved for final judgment against a client, attaching a purported mediated agreement.<sup>68</sup> The trial court erred in granting the attorney’s motion and ordering the client to perform based on the purported agreement that the client never signed.<sup>69</sup> As in *Gordon v. Royal Caribbean Cruises Ltd.*,<sup>70</sup> the “attorney’s signature alone . . . is wholly insufficient” to execute a mediated

56. *DR Lakes, Inc. v. Brandsmart U.S.A. of W. Palm Beach (DR Lakes I)*, 819 So. 2d 971, 974 (Fla. 4th Dist. Ct. App. 2002).

57. *City of Delray Beach v. Keiser ex rel. Estate of Menachem*, 699 So. 2d 855, 856 (Fla. 4th Dist. Ct. App. 1997) (citing *Gordon*, 641 So. 2d at 517).

58. *Id.*

59. 699 So. 2d 855 (Fla. 4th Dist. Ct. App. 1997).

60. *Id.* at 856.

61. *Id.* (citing *Gordon*, 641 So. 2d at 517); *see also* FLA. R. CIV. P. 1.730.

62. 656 So. 2d 200 (Fla. 5th Dist. Ct. App. 1995).

63. *Id.* at 201–02.

64. *See, e.g., Mastec, Inc. v. Cue*, 994 So. 2d 494, 495 (Fla. 3d Dist. Ct. App. 2008).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Dean v. Mulhall*, 16 So. 3d 284, 285 (Fla. 4th Dist. Ct. App. 2009).

69. *Id.* at 286.

70. 641 So. 2d 515 (Fla. 3d Dist. Ct. App. 1994) (per curiam).

agreement.<sup>71</sup> “Florida courts consistently have held that a supposed settlement agreement resulting from mediation cannot be enforced absent the signatures of all parties.”<sup>72</sup>

## 2. Courts Enforce Established Mediated Agreements as Written

True to contract law, once a mediated agreement is established, courts will enforce it as written.<sup>73</sup> Courts are not in the business of rewriting parties’ agreements or relieving them from bad bargains.<sup>74</sup> Further, “[t]he mediation rules create an environment intended to produce a final settlement of the issues with safeguards against the elements of fraud, overreaching, etc., in the settlement process.”<sup>75</sup> “The decision to engage in mediation and to settle at mediation means that remedies and options otherwise available through the judicial system are foregone. The finality of it once the parties have set down their agreement in writing is critical.”<sup>76</sup> To reach such finality, courts routinely enforce the mediated agreements as written by the parties.<sup>77</sup> Nonetheless, the Act provides an exception to confidentiality to establish or refute recognized grounds for reforming or voiding a mediated agreement.<sup>78</sup> The mediated agreement would be neither confidential nor privileged, unless the parties specifically decided otherwise.<sup>79</sup>

An agreement in principle reached at mediation is not binding on the parties when one of the express conditions precedent was never met.<sup>80</sup> “To ignore one term of the agreement, but uphold the others, would be tantamount to the creation of a new contract.”<sup>81</sup> Similarly, a conditional mediated

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71. *Dean*, 16 So. 3d at 286 (quoting *Gordon*, 641 So. 2d at 517).

72. *Id.* Rules of Procedure govern who must attend mediation. See FLA. R. JUV. P. 8.290(1)(2); FLA. R. APP. P. 9.720(a); FLA. R. CIV. P. 1.720(b); FLA. R. CIV. P. 1.750(e); FLA. R. CIV. P. 7.090(f); FLA. FAM. L. R. P. 12.740(d). For small claims actions, an attorney who has full authority to settle without consultation may appear on behalf of a party. FLA. R. CIV. P. 1.750(e). A nonlawyer representative, who has the party’s signed authority to appear and has full settlement authority without consultation, may also appear on behalf of a party. *Id.* When an authorized representative appears, the party is not required to appear in person. *Id.*

73. *Andersen Windows, Inc. v. Hochberg*, 997 So. 2d 1212, 1213–14 (Fla. 3d Dist. Ct. App. 2008).

74. *Id.* at 1214.

75. *Trowbridge v. Trowbridge*, 674 So. 2d 928, 931 (Fla. 4th Dist. Ct. App. 1996).

76. *Sponga v. Warro*, 698 So. 2d 621, 625 (Fla. 5th Dist. Ct. App. 1997).

77. See, e.g., *id.*

78. FLA. STAT. § 44.405(4)(a)(5) (2011).

79. *Id.* § 44.405(4)(a).

80. *Racing Props., L.P. v. Baldwin*, 885 So. 2d 881, 883 (Fla. 3d Dist. Ct. App. 2004).

81. *Id.*

agreement will not be enforced if the condition on which it is based fails to occur.<sup>82</sup> In a 2011 dissolution of marriage case, the trial court erred in entering a final judgment when it was based on a “void” mediated agreement.<sup>83</sup> At mediation, the parties entered into a comprehensive settlement conditioned upon the husband paying the wife \$130,000 from a refinancing described in the agreement.<sup>84</sup> The agreement further provided that should the husband not pay the wife as described, ““this agreement shall be a nullity and have no force and effect whatsoever.””<sup>85</sup> Therefore, the appellate court, other than affirming the dissolution of marriage, reversed all other settlement provisions.<sup>86</sup>

Courts continue to enforce clear and unambiguous provisions in mediated agreements.<sup>87</sup> In *O’Neill v. Scher*,<sup>88</sup> the court held that the mediated agreement’s language was unambiguous.<sup>89</sup> Therefore, the trial court did not err when it refused to consider parol evidence.<sup>90</sup> Similarly, in *Gowni v. Makar*,<sup>91</sup> the court concluded that because the contract, as a whole, was not ambiguous, an evidentiary hearing at which parol evidence<sup>92</sup> was considered would be inappropriate.<sup>93</sup> However, the appellate court reversed the specific portion of the trial court’s order that instructed the appellant to execute a “general release” as it did not reflect the claims or interests released in the agreement, and was overly broad.<sup>94</sup> Consistently, in *Johnson v. Bezner*,<sup>95</sup> the appellate court affirmed the enforcement of the mediated agreement, but reversed the portion of the court’s order that exceeded the court’s authority and the scope of the mediated agreement entered into by the parties.<sup>96</sup> The trial court had erred in requiring the appellant to hire counsel experienced in

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82. *Schlifstein v. Schlifstein*, 52 So. 3d 841, 842 (Fla. 2d Dist. Ct. App. 2011).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *See, e.g., O’Neill v. Scher ex rel. Estate of Scher*, 997 So. 2d 1205, 1207 (Fla. 3d Dist. Ct. App. 2008).

88. 997 So. 2d 1205 (Fla. 3d Dist. Ct. App. 2008).

89. *Id.* at 1207.

90. *Id.*

91. 940 So. 2d 1226 (Fla. 5th Dist. Ct. App. 2006).

92. The parol evidence rule is “[t]he common law principal that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing.” BLACK’S LAW DICTIONARY 1227 (9th ed. 2009).

93. *Gowni*, 940 So. 2d at 1230.

94. *See id.* at 1228–30.

95. 910 So. 2d 398 (Fla. 4th Dist. Ct. App. 2005).

96. *Id.* at 399, 401.

county zoning law and awarding attorney's fees, when the agreement neither required appellants to hire an attorney, nor provided for the reimbursement of the awarded fees.<sup>97</sup> "An order enforcing a settlement agreement must conform with the terms of the agreement and may not impose terms that were not included in the agreement."<sup>98</sup> The court's authority to enforce the terms of the parties' "agreement is circumscribed by the express terms of that agreement."<sup>99</sup>

### 3. Courts Overturn or Reform Agreements for Recognized Bases

Recognized legal bases to overturn or reform mediated agreements predate the 2004 Act.<sup>100</sup> As with other settlement agreements, parties have access to the courts to seek rescission or reformation.<sup>101</sup> "After all, the 'right to go to court to resolve our disputes is one of our fundamental rights.'"<sup>102</sup>

Early cases brought to overturn or reform mediated agreements dealt primarily with party wrongdoing.<sup>103</sup> These cases would now likely fit within the current statutory exception allowing parties to establish or refute recognized bases to void or reform their mediated agreement.<sup>104</sup> Some cases would also fit within the exclusion for any mediation communication "willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence."<sup>105</sup> For example, in *Cooper v. Austin*,<sup>106</sup> the court addressed allegations of extortion.<sup>107</sup> The wife in a dissolution of marriage mediation sent a note to her husband reading: "If you can't agree to this, the kids will take what information they have to whomever to have you arrested, etc. Although I would get no money if you were in jail—you wouldn't also be living freely as if you did nothing wrong."<sup>108</sup>

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97. *Id.* at 401.

98. *Id.*

99. *Garcia v. Rambo Sec. Patrol, Inc.*, No. 08-22303-Civ., 2010 WL 750296, at \*2 (S.D. Fla. Mar. 3, 2010) (citing *Paulucci v. Gen. Dynamics Corp.*, 842 So. 2d 797, 803 (Fla. 2003)).

100. *See DR Lakes, Inc. v. Brandsmart U.S.A. of W. Palm Beach (DR Lakes I)*, 819 So. 2d 971, 974 (Fla. 4th Dist. Ct. App. 2002).

101. *See id.*

102. *Id.* (quoting *Psychiatric Assocs. v. Siegel*, 610 So. 2d 419, 424 (Fla. 1992) (construing FLA. CONST. art. I, § 21)).

103. *See, e.g., Cooper v. Austin*, 750 So. 2d 711, 711 (Fla. 5th Dist. Ct. App. 2000).

104. FLA. STAT. § 44.405(4)(a)(5) (2011).

105. *Id.* § 44.405(4)(a)(2).

106. 750 So. 2d 711 (Fla. 5th Dist. Ct. App. 2000).

107. *Id.* at 711.

108. *Id.*

Shortly after the husband received this note, the parties settled with the wife receiving \$128,000 in marital assets to the husband's \$10,000.<sup>109</sup> The trial court had adopted the mediated agreement in its final judgment and denied the husband relief from final judgment.<sup>110</sup> The appellate court held that the note was "extortionate and [the] presentation of the extorted agreement to the court [constituted] a fraud on the court."<sup>111</sup> Therefore, it could not allow the wife to benefit from her actions and held that the husband was entitled to relief from the agreement.<sup>112</sup>

Courts have also set aside agreements based on false statements made with knowledge that the representation was false and with the intention to induce reliance on the representation and the party who relied on the false information was injured by the reliance.<sup>113</sup> Similarly, when a party properly pleads specific allegations of fraud constituting a "colorable entitlement to relief," the party is entitled to an evidentiary hearing.<sup>114</sup> An exculpatory clause in a mediated agreement does not bar the court from considering "whether the [a]greement was procured by fraud, duress, or coercion."<sup>115</sup>

Notably, courts will not enforce mediated agreements that violate the law.<sup>116</sup> A key benefit to mediation is the self-determination of the parties who have the opportunity to create resolutions that will specifically address and meet their needs.<sup>117</sup> Nonetheless, parties do not have free rein in their decision-making.<sup>118</sup> Courts deciding family law matters may set aside agreements, consistent with statutory law, if they are "not in the best interest of the children" and will admit evidence relevant to the best interest standard.<sup>119</sup> In these cases, the settlement provisions "must be reviewed and approved by the trial court as being in the best interest of the children."<sup>120</sup> Ad-

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109. *Id.* at 711–12.

110. *Id.* at 711.

111. *Cooper*, 750 So. 2d at 713.

112. *Id.*

113. *See, e.g.*, *Still v. Still*, 835 So. 2d 376, 376 (Fla. 3d Dist. Ct. App. 2003) (citing *Lopez-Infante v. Union Cent. Life Ins. Co.*, 809 So. 2d 13, 15 (Fla. 3d Dist. Ct. App. 2002)).

114. *Hinson v. Hinson*, 985 So. 2d 1120, 1121 (Fla. 3d Dist. Ct. App. 2008) (quoting *Schindler v. Schiavo (In re Guardianship of Schiavo)*, 800 So. 2d 640, 645 (Fla. 2d Dist. Ct. App. 2001)); *see also Gostyla v. Gostyla*, 708 So. 2d 674, 675 (Fla. 2d Dist. Ct. App. 1998).

115. *Marjon v. Lane*, 995 So. 2d 1086, 1087 (Fla. 2d Dist. Ct. App. 2008).

116. *Cooper*, 750 So. 2d at 713.

117. *See* FLA. STAT. § 44.1011(2) (2011).

118. *See* FLA. STAT. § 61.13(2)(c); *Feliciano v. Feliciano*, 674 So. 2d 937, 937 (Fla. 4th Dist. Ct. App. 1996) (per curiam); *see also* FLA. FAM. L. R. P. 12.540; FLA. R. CIV. P. 1.540(b)(3).

119. *Feliciano*, 674 So. 2d at 937; FLA. STAT. § 61.13(2)(c).

120. *Griffith v. Griffith*, 860 So. 2d 1069, 1071 (Fla. 1st Dist. Ct. App. 2003) (citing *Feliciano*, 674 So. 2d at 937); *see also* FLA. STAT. § 61.13(2)(c).

ditionally, parties may neither decide bankruptcy matters based on state contract law,<sup>121</sup> nor decide all the federal income tax exemptions in their marital settlement agreement.<sup>122</sup>

#### 4. Judicial Sanctions for Breach of Confidentiality

In 1997, seven years before the Act, a trial judge struck a party's pleadings and dismissed her case with prejudice because the party violated mediation confidentiality when she disclosed a settlement offer to a newspaper.<sup>123</sup> In the case of *Paranzino v. Barnett Bank of South Florida*,<sup>124</sup> the trial judge found that the disclosure was a willful and deliberate breach of the confidentiality provision in the Mediation Report and Agreement.<sup>125</sup> The appellate court affirmed.<sup>126</sup> The *Paranzino* decision was based on language in the Mediation Report and Agreement, executed by parties and their counsel, which provided in relevant part:

*[T]his report and agreement is the result of a confidential proceeding and all signers agree to be bound by such confidentiality and shall not disclose any discussions unless agreed to in writing by all signators or unless ordered by the court; that this mediation is governed by the provisions of Chapter 44, Florida Statutes and Rule 1.700 et. seq. which shall be binding.*<sup>127</sup>

Eleven years after *Paranzino*, and four years after the Act took effect, the issue of willful and deliberate breach by a mediation party had a different result.<sup>128</sup> In *Hill v. Greyhound Lines, Inc.*,<sup>129</sup> a worker's compensation claimant violated confidentiality by questioning his doctor about information defense counsel attributed to the claimant's doctor during mediation.<sup>130</sup> The Judge of Compensation Claims dismissed the case with prejudice, finding

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121. See *In re Ellertson*, 252 B.R. 831, 833 (Bankr. S.D. Fla. 2000); see also *Dehart v. Miller (In re Miller)*, 424 B.R. 171, 174 (Bankr. M.D. Pa. 2010).

122. See *Hoelzle v. Shapiro*, 736 So. 2d 1207, 1209 (Fla. 1st Dist. Ct. App. 1999).

123. *Paranzino v. Barnett Bank of S. Fla., N.A.*, 690 So. 2d 725, 726, 729 (Fla. 4th Dist. Ct. App. 1997).

124. 690 So. 2d 725 (Fla. 4th Dist. Ct. App. 1997).

125. *Id.* at 729.

126. *Id.* at 730.

127. *Id.* at 726.

128. *Hill v. Greyhound Lines, Inc.*, 988 So. 2d 1250, 1252 (Fla. 1st Dist. Ct. App. 2008) (per curiam).

129. 988 So. 2d 1250 (Fla. 1st Dist. Ct. App. 2008) (per curiam).

130. *Id.* at 1251.

that claimant's violation was willful and deliberate.<sup>131</sup> The case was reversed and remanded with a finding that the severe sanction was unwarranted.<sup>132</sup> This case underscores the importance of attorneys advising their clients about confidentiality and specifically addressing what clients can and cannot communicate to whom.<sup>133</sup> Here, the claimant sought information from his treating doctor and clarification as to what was in the doctor's report.<sup>134</sup> However, by repeating to his physician the statement made by the attorney during mediation, the claimant had breached mediation confidentiality.<sup>135</sup>

With the specter of harsh sanctions, by virtue of the Act's provisions<sup>136</sup> or court order,<sup>137</sup> all mediation participants need to keep the boundaries of mediation confidentiality in mind. While mediators have an ethical obligation to include information about confidentiality in their opening statements, they are not obligated to include information about sanctions.<sup>138</sup> Lawyers seem best suited to discuss in detail the confidentiality requirements and sanctions with their clients to prevent unfortunate results.

## B. *Developing Confidentiality Case Law*

### 1. Mediator Misconduct

In a significant departure from general contract law, the Fourth District Court of Appeal held in 2001 that mediator misconduct in a court-ordered mediation may be the basis for setting aside the parties' mediated agreement.<sup>139</sup> The trial judge rightly denied the wife's motion to set aside the mediated agreement for, at that time, there was no legal basis to do so premised on duress or coercion exerted by a third party, such as the mediator.<sup>140</sup>

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131. *Id.* at 1250.

132. *Id.* at 1252.

133. *See id.* at 1251.

134. *Hill*, 988 So. 2d at 1251.

135. *Id.*

136. FLA. STAT. § 44.406(1) (2011). All mediation participants who willingly and knowingly disclose a mediation communication in violation of the Act are subject to sanctions, including attorney's fees, mediator's fees, compensatory damages, and equitable relief. *Id.*

137. FLA. STAT. § 44.405(1). For court-ordered mediation, a participant may be sanctioned by the court, to include attorney's fees, mediator's fees and costs. *Id.*

138. Fla. R. Cert. & Ct.-Apptd. Mediators R. 10.420(a)(3) (2011). The mediator shall advise the mediation participants that "communications made during the process are confidential, except where disclosure is required or permitted by law." *Id.*

139. *Vitakis-Valchine v. Valchine (Vitakis-Valchine I)*, 793 So. 2d 1094, 1099 (Fla. 4th Dist. Ct. App. 2001).

140. *Id.* at 1095.

In *Vitakis-Valchine v. Valchine (Vitakis-Valchine I)*,<sup>141</sup> the wife testified that the mediator told her: 1) the couple's frozen embryos were not "lives in being," and the judge would not grant her child support, if after the divorce, she was impregnated with the embryos; 2) the judge would order the embryos destroyed and not give her custody of them; 3) "that's it, I give up" and would tell the judge that she caused the settlement to fail if no agreement was reached at mediation; 4) she was not entitled to the husband's federal pension, and that it was not worth litigating; and 5) she could protest provisions of the agreement she did not like at the final hearing after she signed the mediated agreement.<sup>142</sup> The wife also testified that "time pressure" caused her to sign the agreement, and that the mediator warned her that they only had five minutes to hurry up and get out because his family was more important.<sup>143</sup>

The mediation began at 10:45 a.m. and continued for eight hours.<sup>144</sup> The wife attended with her brother and attorney, and her husband attended with his attorney.<sup>145</sup> The parties' mediation resulted in a comprehensive twenty-three page agreement.<sup>146</sup> Nonetheless, the wife filed a motion to set aside the mediated agreement, in part, based on coercion and duress by the mediator.<sup>147</sup> The appellate court addressed whether the wife's claim of mediator misconduct was an exception to the rule that third party duress and coercion will not invalidate an agreement between two contracting parties.<sup>148</sup> The court believed "it would be unconscionable for a court to enforce a settlement agreement reached through coercion or any other improper tactics utilized by a court-appointed mediator."<sup>149</sup> It held "the court may invoke its inherent power to maintain the integrity of the judicial system and its processes by invalidating a court-ordered mediation settlement agreement obtained through violation and abuse of the judicially-prescribed mediation procedures."<sup>150</sup>

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141. 793 So. 2d 1094 (Fla. 4th Dist. Ct. App. 2001).

142. *Id.* at 1097.

143. *Id.*

144. *Id.* at 1096.

145. *Id.* See information provided by wife's testimony. *Vitakis-Valchine I*, 793 So. 2d at 1096.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1099.

150. *Vitakis-Valchine I*, 793 So. 2d at 1099. The court noted that pursuant to Florida Rules for Certified and Court-Appointed Mediators, Rule 10.500, mediators remain "accountable to the referring court[s] with ultimate authority over the case[s]." *Id.* at 1099 n.3 (quoting FLA. R. CERT. & CT.-APPTD. MEDIATORS R. 10.500).

Accordingly, the appellate court remanded to the trial court to determine “whether the mediator substantially violated the Rules for Mediators, and whether that misconduct led to the settlement agreement in this case.”<sup>151</sup> On remand, the trial judge did not find mediator misconduct, duress, or coercion on the part of the mediator, and therefore, upheld the mediated agreement.<sup>152</sup> The appellate court affirmed that ruling.<sup>153</sup>

Mediator misconduct was also alleged as a basis for setting aside mediated agreements in two more recent cases.<sup>154</sup> In neither case was the agreement overturned.<sup>155</sup> In a probate case questioning whether the mediated agreement determined the property distribution when one party died before the final judgment of dissolution of marriage was entered, the opinion did not state that the conduct of the mediator constituted misconduct.<sup>156</sup>

In *Clark v. School Board of Bradford County, Florida*,<sup>157</sup> the plaintiff filed a Motion to Set Aside the Mediated Agreement claiming that she was “pressured, threaten[ed], and coerce[d] into signing the agreement” at mediation.<sup>158</sup> She specifically alleged that the mediator told her she could file a motion with the court, and that this remained her only recourse, as she had already signed the agreement.<sup>159</sup> Interestingly, the plaintiff violated the confidentiality provision in the parties’ agreement when she attached their settlement agreement to her Motion to Set Aside Mediation Agreement.<sup>160</sup> This however, was not an issue before the court, and consequently, breach of confidentiality was not addressed in the opinion.<sup>161</sup>

The plaintiff did not dispute the terms of the agreement or the existence of an executed valid agreement.<sup>162</sup> The mediator testified that he would never give a party legal advice during mediation, and if a party were showing

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151. *Id.* at 1100. The appellate court did not make any findings regarding whether the mediator had committed misconduct. *Id.*

152. *Vitakis v. Valchine (Vitakis-Valchine III)*, 987 So. 2d 171, 171 (Fla. 4th Dist. Ct. App. 2008) (interpreting *Valchine v. Valchine (Vitakis v. Valchine II)*, 923 So. 2d 511, 511 (Fla. 4th. Dist. Ct. App. 2006) (unpublished table decision)).

153. *Vitakis-Valchine III*, 987 So. 2d at 171 (interpreting *Vitakis v. Valchine II*, 923 So. 2d at 511).

154. *Clark v. Sch. Bd. of Bradford Cnty., Fla.*, No. 3:09-cv-901-J-34TEM, 2010 WL 4696063, at \*4 (M.D. Fla. Oct. 13, 2010); *Marlowe ex. rel. Estate of Brown v. Brown*, 944 So. 2d 1036, 1038 (Fla. 4th Dist. Ct. App. 2006).

155. *Clark*, 2010 WL 4696063, at \*6; *see Brown*, 944 So. 2d at 1038.

156. *See Brown*, 944 So. 2d at 1037–38, 1040.

157. No. 3:09-cv-901-J-34TEM, 2010 WL 4696063 (M.D. Fla. Oct. 13, 2010).

158. *Id.* at \*1.

159. *Id.*

160. *Id.* at \*2.

161. *See id.* at \*3–6.

162. *Clark*, 2010 WL 4696063, at \*3.

signs of duress, he would never have the party sign the mediated agreement.<sup>163</sup> The court did not find any evidence that the mediator coerced or exerted undue pressure on the plaintiff or somehow forced her to sign the mediated agreement.<sup>164</sup> Accordingly, the court dismissed the case with prejudice and ordered the removal of the mediated agreement that the plaintiff had attached to her motion.<sup>165</sup>

Not yet a decade old, the law of mediator misconduct is still in its infancy. Case law does not provide the answer to what constitutes mediator misconduct rising to the level required to set aside or reform a mediated agreement. Proving mediator misconduct would likely be challenging. While one party looks to overturn or reform the mediated agreement, the other party seeks to enforce it. The mediator would likely deny violating ethical rules and testify as to facts consistent with the party looking to enforce the mediated agreement. Additionally, counsel who accompanied the parties to mediation will also likely testify that they did not stand idly by as the mediator coerced, threatened, or otherwise violated ethical rules. Yet, alleging mediator misconduct may be attractive as a means to reform or set aside a mediated agreement. Given the limited number of options, it remains a viable cause of action to consider.

## 2. Mutual Mistake

In 2002, the Fourth District Court of Appeal addressed whether the mediation privilege applies where a mutual mistake was made by the parties in their mediated agreement.<sup>166</sup> The appellant, seller, sought relief from a \$600,000 clerical error he claimed was made in the mediated agreement.<sup>167</sup> The trial court determined that the seller was left without the means to prove the alleged error because the mediation privilege precluded admission of evidence of what transpired at mediation.<sup>168</sup> In this case of first impression, the appellate court held that the statutory mediation privilege did not apply: "Although it may be difficult for [the] seller to prove that [the] mistake was mutual, given the position of the buyer, seller should still have the opportunity to put on all of its evidence. We therefore reverse."<sup>169</sup>

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163. *Id.* at \*5.

164. *Id.*

165. *Id.* at \*6.

166. *DR Lakes I*, 819 So. 2d 971, 973 (Fla. 4th Dist. Ct. App. 2002).

167. *Id.* at 972.

168. *Id.*

169. *Id.* at 973–75.

The court reasoned that “the reasons for confidentiality are not as compelling” once the parties have signed a mediated agreement.<sup>170</sup> It did not believe that the Florida Legislature meant to deny a party who reached an agreement at mediation the same access to the courts to correct a mutual mistake, as a party who reached agreement through means other than mediation.<sup>171</sup>

On remand, at a non-jury trial, the parties “presented conflicting evidence [as to] what occurred [at] mediation.”<sup>172</sup> The trial judge ruled in favor of DR Lakes, the seller, finding that the seller had shown “by clear and convincing evidence that the parties agreed” the seller would receive a \$600,000 credit for its contribution to the construction.<sup>173</sup> The credit “was implicit in the incorporation of [a section] of the Purchase Agreement into the Stipulation” which dealt with the credit and was read in connection with the changed provision “that DR Lakes [either] construct or pay for [the road] construction.”<sup>174</sup>

Following remand, Brandsmart appealed, challenging the trial court’s finding of fact as unsupported by competent substantial evidence.<sup>175</sup> The appellate court affirmed, determining that the seller’s witnesses’ testimony regarding the mediated agreement supported the trial court’s ruling.<sup>176</sup> “The parties’ conflicting stories at trial do not preclude a finding that a mutual mistake was established by clear and convincing evidence.”<sup>177</sup> “A mistake is mutual when the parties agree to one thing and then, due to either a scrivener’s error or inadvertence, express something different in the written instrument.”<sup>178</sup> It results in litigation when the parties do not agree.<sup>179</sup>

Mutual mistake was also alleged in a 2011 dissolution of marriage case.<sup>180</sup> In *Moree v. Moree*,<sup>181</sup> the husband requested reformation of the me-

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170. *Id.* at 974.

171. *DR Lakes I*, 819 So. 2d at 974. “It is well-established in Florida that statutes, even where clear, should not be interpreted to produce absurd results.” *Id.* (citing *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)).

172. *Brandsmart U.S.A. of W. Palm Beach, Inc. v. DR Lakes, Inc. (DR Lakes II)*, 901 So. 2d 1004, 1005 (Fla. 4th Dist. Ct. App. 2005).

173. *Id.*

174. *Id.*

175. *Id.* at 1006.

176. *Id.*

177. *DR Lakes II*, 901 So. 2d at 1006.

178. *Id.* at 1005–06 (quoting *Circle Mortg. Corp. v. Kline*, 645 So. 2d 75, 78 (Fla. 4th Dist. Ct. App. 1994) (per curiam)).

179. *Id.* at 1006.

180. *Moree v. Moree*, 59 So. 3d 205, 206 (Fla. 2d Dist. Ct. App. 2011).

181. 59 So. 3d 205 (Fla. 2d Dist. Ct. App. 2011).

diated agreement so it would accurately reflect the parties' intentions.<sup>182</sup> He claimed that the mediated settlement agreement contained errors and did not reflect the value of accounts held by the parties due to tax factors.<sup>183</sup> The trial court denied the husband's motion to reform or set aside the agreement, determining that the husband did not "allege fraud, misrepresentation in discovery, coercion, or allegations sufficient under Florida Family Law Rule of Procedure 12.540."<sup>184</sup> The appellate court reversed and remanded for an evidentiary hearing on the husband's motion, concluding that the trial court erred in determining the husband's motion based on mutual mistake to be facially insufficient.<sup>185</sup>

Curiously, in another dissolution of marriage case, the parties agreed there had been a mutual mistake, yet the trial judge did not rescind the parties' mediated agreement.<sup>186</sup> Prior to the entry of an order of dissolution of marriage, the husband filed a "Motion for Reformation of Agreement and Motion for Reconsideration."<sup>187</sup> Although the wife joined in the motion, the trial court denied their joint motion.<sup>188</sup> The appellate court found the "agreement was entered into based [on] mutual mistake . . . [and] the trial court [had] erred in not rescinding the [mediated agreement]."<sup>189</sup>

Courts have distinguished mutual mistake from unilateral mistake.<sup>190</sup> In *Feldman v. Kritch*,<sup>191</sup> State Farm filed a motion to set aside the mediated agreement, alleging there was a misunderstanding as to whether the \$40,000 it had already paid should be deleted from the \$75,000 referenced in the agreement.<sup>192</sup> "[F]inding that there was no meeting of the minds," the trial court set aside the mediated agreement.<sup>193</sup> Distinguishing *Brandsmart U.S.A of West Palm Beach, Inc. v. DR Lakes, Inc. (DR Lakes II)*,<sup>194</sup> the appellate court did not find any evidence that an offset of \$40,000 was ever mentioned during the parties' mediation.<sup>195</sup> "Thus, any mistake was a unilateral mistake on the part of State Farm."<sup>196</sup>

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182. *Id.* at 206.

183. *Id.*

184. *Id.* at 207.

185. *Id.* at 207–08.

186. *Barber v. Barber*, 878 So. 2d 449, 451 (Fla. 3d Dist. Ct. App. 2004) (per curiam).

187. *Id.* at 450–51.

188. *Id.* at 451.

189. *Id.*

190. *Feldman v. Kritch*, 824 So. 2d 274, 277 (Fla. 4th Dist. Ct. App. 2002).

191. 824 So. 2d 274 (Fla. 4th Dist. Ct. App. 2002).

193. *Id.* at 276.

193. *Id.*

194. 901 So. 2d 1004 (Fla. 4th Dist. Ct. App. 2005).

195. *Feldman*, 824 So. 2d at 277.

196. *Id.*

In this case predating the Act, the court cites to *DR Lakes II*'s recognition of mutual mistake as a basis for considering evidence without violating confidentiality.<sup>197</sup> "Because State Farm claimed that there was a mutual mistake, the statutory privilege protecting the confidentiality of all oral and written communications, other than the executed settlement agreement, should not apply."<sup>198</sup>

The doctrine of mutual mistake will not apply when parties seek relief from agreements they entered into improvidently.<sup>199</sup> For a party to prevail on the basis of mutual mistake:

[T]he party must . . . show he did not bear the risk of a mistake. A party to an agreement bears the risk of a mistake when "he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient."<sup>200</sup>

A plaintiff who reaches agreement at mediation despite not knowing the applicable policy limits may not avoid his or her agreement by claiming mutual mistake.<sup>201</sup> Similarly, a plaintiff's failure to determine the severity of his or her condition before settling at mediation will not have the agreement set aside based on "mistake."<sup>202</sup> "[C]ases settled in mediation are especially unsuited for the liberal application of a rule allowing rescission of a settlement agreement based on unilateral mistake."<sup>203</sup> "[M]ore stringent principles of law apply in setting aside a contract than in setting aside a judgment."<sup>204</sup> Mutual mistake is easy to allege, but difficult to prove.<sup>205</sup> The burden of proof is clear and convincing evidence.<sup>206</sup> Conflicting testimony will be the norm as one party looks to overturn or reform, while the other seeks to en-

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197. *Id.*

198. *Id.* at 276. "[T]he court agreed to hear testimony, including that of the mediator himself, regarding the settlement negotiations." *Id.*

199. *Leff v. Ecker*, 972 So. 2d 965, 966 (Fla. 3d Dist. Ct. App. 2007) (per curiam).

200. *Id.* (citation omitted) (quoting *Rawson v. UMLIC VP, L.L.C.*, 933 So. 2d 1206, 1210 (Fla. 1st Dist. Ct. App. 2006)).

201. *See id.*

202. *Sponga v. Warro*, 698 So. 2d 621, 624–25 (Fla. 5th Dist. Ct. App. 1997).

203. *Id.* at 625.

204. *Tilden Groves Holding Corp. v. Orlando/Orange Cnty. Expressway*, 816 So. 2d 658, 660 (Fla. 5th Dist. Ct. App. 2002) (citing *Smiles v. Young ex rel. Estate of McCutcheon*, 271 So. 2d 798, 801 (Fla. 3d Dist. Ct. App. 1973)).

205. *See DR Lakes II*, 901 So. 2d 1004, 1005–06 (Fla. 4th Dist. Ct. App. 2005).

206. *Id.* at 1006.

force.<sup>207</sup> Even if the parties were to agree on a mistake,<sup>208</sup> chances are good they do not agree on the resolution or they would not be seeking court determination. In *DR Lakes II*, there was a document other than the mediated agreement, which added credibility to DR Lakes's position.<sup>209</sup> Proving the case by clear and convincing evidence will likely prove difficult if the only evidence is the mediation participants' conflicting testimony.<sup>210</sup>

Mutual mistake was first considered in the context of mediation less than a decade ago.<sup>211</sup> Although case law does provide guidance distinguishing mutual mistake from unilateral mistake, these cases remain problematic. Mere allegation of mutual mistake allows the party to introduce evidence to attempt to prove the allegation.<sup>212</sup> The utterance of the allegation serves to open the door to admitting evidence of mediation communications that were expected to be confidential and would otherwise be confidential.<sup>213</sup> It destroys the mediation privilege and confidentiality for purposes of proving the mistake.<sup>214</sup> As courts balance preserving mediation confidentiality with providing parties access to the courts, perhaps there is a way of making a threshold determination of the existence of mutual mistake before holding a full-blown trial. That would serve to preserve mediation confidentiality until there is a determination that a party made a credible allegation.<sup>215</sup>

#### IV. CONFIDENTIALITY CONUNDRUMS AFTER THE ACT

##### A. *Identifying Mediation Communications*

The statutory definition is broad and the exceptions are often hazy.<sup>216</sup> Courts are determining what is and what is not a confidential mediation communication.<sup>217</sup> They are determining what is discoverable and what is

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207. See *id.* (citing *Steffens v. Steffens*, 422 So. 2d 963, 964, n.1 (Fla. 4th Dist. Ct. App. 1982)).

208. See *Barber v. Barber*, 878 So. 2d 449, 451 (Fla. 3d Dist. Ct. App. 2004) (per curiam).

209. *DR Lakes II*, 901 So. 2d at 1005.

210. See *id.* at 1006.

211. *DR Lakes I*, 819 So. 2d 971, 973 (Fla. 4th Dist. Ct. App. 2002).

212. See *id.* at 974–75.

213. See *id.* at 972, 974.

214. See *id.* at 974–75.

215. See Deason, *The Quest for Uniformity in Mediation Confidentiality*, *supra* note 3, at 95. Some “states provide a mechanism, such as an in camera hearing, to ensure that confidentiality is maintained while courts decide whether an exception to confidentiality provisions is appropriate.” *Id.*

216. See, e.g., FLA. STAT. §§ 44.403(1), .405 (2011).

217. See, e.g., *Polanco v. McNeil*, No. 09-60448-Civ-COHN, 2010 WL 3027798, at \*2 (S.D. Fla. Apr. 19, 2010).

admissible.<sup>218</sup> Written statements are included within the definition of mediation communication.<sup>219</sup> In *Chabad House-Lubavitch of Palm Beach County, Inc. v. Banks*,<sup>220</sup> mediation confidentiality and privilege extended to physical evidence that “was a direct product of [the] mediation.”<sup>221</sup> Similarly, an apology written during mediation, which was not part of the mediated agreement, would be a mediation communication.<sup>222</sup> Mediation communications may also be in the form of nonverbal assertions made by or to a mediation participant.<sup>223</sup>

In *Polanco v. McNeil*,<sup>224</sup> the United States District Court for the Southern District of Florida distinguished between mediation communications and observations made during mediation.<sup>225</sup> Petitioner, charged with first degree murder, sought to prevent testimony from her divorce mediation at her murder trial.<sup>226</sup> The court permitted testimony of observations made at her divorce mediation, which took place one day before the murder.<sup>227</sup> Both the petitioner’s mediator and attorney testified about the observations they made during the mediation.<sup>228</sup> For instance, the mediator testified that the petitioner was appropriately dressed and spoke properly.<sup>229</sup> The mediation communications, however, were considered confidential and not admitted into evidence.<sup>230</sup> Attorney-client privilege did not prevent the attorney from testifying about observations he made.<sup>231</sup>

An Indiana civil case sheds additional light on the communication-observation distinction.<sup>232</sup> In *Bridges v. Metromedia Steakhouse Co.*,<sup>233</sup> the trial judge allowed an insurance adjuster who attended appellant’s mediation

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218. See, e.g., *Althem v. Geico Gen. Ins. Co.*, No. 8:10-cv-156-T-24TBM, 2010 WL 5092721, at \*1–2 (M.D. Fla. Dec. 8, 2010); *Fluor Intercontinental, Inc. v. IAP Worldwide Servs., Inc.*, No. 5:09CV331/RS-EMT, 2010 WL 2366482, at \*1–2 (N.D. Fla. June 14, 2010).

219. FLA. STAT. § 44.403(1).

220. 602 So. 2d 670 (Fla. 4th Dist. Ct. App. 1992).

221. *Id.* at 672.

222. FLA. STAT. § 44.403(1); Mediator Ethics Advisory Comm., Advisory Op. 2004-010 (2005).

223. FLA. STAT. § 44.403(1).

224. No. 09-60448-Civ-COHN, 2010 WL 3027798 (S.D. Fla. Apr. 19, 2010).

225. *Id.* at \*26.

226. *Id.* at \*2.

227. *Id.* at \*26.

228. *Id.*

229. *Polanco*, 2010 WL 3027798, at \*5.

230. *Id.* at \*2, \*26.

231. *Id.* at \*26 (citing *Clanton v. United States*, 488 F.2d 1069, 1071 (5th Cir. 1974)).

232. See *Bridges v. Metromedia Steakhouse Co.*, 807 N.E.2d 162, 166–67 (Ind. Ct. App. 2004).

233. 807 N.E.2d 162 (Ind. Ct. App. 2004).

to testify about observations she made during the mediation.<sup>234</sup> The adjuster testified during trial that she did not see scarring, redness, or blisters on Bridges' injured hand.<sup>235</sup> On appeal, "Bridges state[d] that she 'display[ed]' her hand . . . and 'point[ed] to the scars.'"<sup>236</sup> She maintained that the adjuster's testimony was based on "Bridges' 'nonverbal conduct' during mediation," which was privileged, confidential, and inadmissible.<sup>237</sup>

Considering this issue of first impression for the Indiana courts, the court of appeals checked the record to see if the adjuster was asked to view Bridges' hand or simply observed her hand.<sup>238</sup> The analysis is critical in determining whether the testimony was based on protected mediation statements or conduct, or simply on observation occurring during the mediation.<sup>239</sup> The court found nothing in the record to support Bridges' assertion that she displayed her hand.<sup>240</sup> Therefore, the testimony was deemed to be based on personal observation, and the trial court did not abuse its discretion.<sup>241</sup> Florida, like Indiana, distinguishes between confidential and privileged mediation communications, and discoverable and admissible observations that take place during mediation.<sup>242</sup> The Florida courts' determination would also turn on whether there was "nonverbal conduct [by the party] intended to make an assertion, by or to a mediation participant."<sup>243</sup>

A federal judge who had ordered a Florida case to mediation determined that communications during the alleged mediation were not confidential because the "'mediation' was a sham."<sup>244</sup> In his Order on Motion to Disqualify or Recuse himself from the case, the judge noted his reasons for deciding that mediation had not occurred, and therefore mediation confidentiality did not apply.<sup>245</sup> The case at bar was a suit against Joseph R. Francis and *Girls Gone Wild*, in which the plaintiff alleged that the defendant and the defendant's employee coerced her to expose her breasts for their film.<sup>246</sup>

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234. *Id.* at 164.

235. *Id.* at 164, 166.

236. *Id.* at 166.

237. *Id.* at 165.

238. *Bridges*, 807 N.E.2d at 165–66.

239. *See id.*

240. *Id.*

241. *Id.* at 166–67.

242. *See id.* at 166; *Fisk Electric Co. v. Solo Constr. Corp.*, 417 F. App'x 898, 902 (11th Cir. 2011) (*per curiam*).

243. FLA. STAT. § 44.403(1) (2011).

244. *Pitts v. Francis*, No. 5:07CV169-RS-EMT, 2007 WL 4482168, at \*13 (N.D. Fla. Dec. 19, 2007).

245. *See id.* at \*11–13.

246. *Id.* at \*1.

Sixteen years of age at the time, the plaintiff contended she had not consented to be filmed.<sup>247</sup>

According to evidence and testimony from an evidentiary hearing, Francis was four hours late for the mediation.<sup>248</sup> He proceeded to place his bare and dirty feet on top of the conference table facing plaintiff's counsel and interrupted him when the plaintiff's counsel had only said four words.<sup>249</sup> He repeatedly yelled, "Don't expect to get a fucking dime—not one fucking dime!" and shouted, "I hold the purse strings. I will not settle this case at all. I am only here because the court is making me be here!"<sup>250</sup> As plaintiff's counsel was leaving, Francis added, "We will bury you and your clients! I'm going to ruin you, your clients, and all of your ambulance-chasing partners!"<sup>251</sup> Francis then charged at plaintiff's counsel, appearing poised to physically assault him.<sup>252</sup> His parting words to plaintiff's counsel were "Suck my dick."<sup>253</sup> Based on this behavior, the judge determined that Francis was not engaged in mediation, and that his behavior was violent.<sup>254</sup> Further, the judge found that Francis used the court's mediation order as "a conduit through which he could threaten and assault the other party and its attorneys under the cloak of confidentiality."<sup>255</sup>

In response to the plaintiff's motion for sanctions against Joe Francis, the judge found Francis in civil contempt for failing to mediate in good faith, and ordered his incarceration.<sup>256</sup> The court's order provided that once the mediator certified Francis had mediated in good faith and complied with the court's order, Francis would be released.<sup>257</sup> This placed the mediator in the awkward position of reconciling his obligation to obey the court's order with his obligation to abide by the Florida Rules for Certified and Court-Appointed Mediators.<sup>258</sup> The Mediator Ethics Advisory Committee (MEAC) has advised mediators that they are "not able to comply with both the Florida

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247. *Id.*

248. *Id.* at \*11.

249. *Pitts*, 2007 WL 4482168, at \*11.

250. *Id.*

251. *Id.*

252. *Id.* "Francis' own attorney had to position himself between Francis and plaintiff's counsel to prevent a brawl." *Id.* at \*12.

253. *Pitts*, 2007 WL 4482168 at \*12.

254. *Id.* at \*11–13.

255. *Id.* at \*12. See *Meet Joe Francis*, MEETJOEFrancis.COM, <http://www.meetjoeFrancis.com/> (last visited Nov. 13, 2011) for Francis' position on this and related matters.

256. *Pitts*, 2007 WL 4482168, at \*13–16. Plaintiff's motion alleged that Francis' behavior at mediation was threatening and abusive toward the plaintiffs and their attorneys. *Id.* at \*10.

257. *Id.* at \*15. The judge stayed the order to allow Francis the opportunity to mediate in good faith. *Id.* at \*15–16.

258. See Mediator Ethics Advisory Comm., Advisory Op. 2004-006 (2005).

Rules for Certified and Court-Appointed Mediators and a court order to report a party who fails to mediate in good faith.”<sup>259</sup> “[M]ediators . . . may not report to a court that a party has failed to negotiate in good faith for the principal reasons that the mediator’s report would: 1) constitute a breach of confidentiality; 2) impair parties’ right to self-determination; and 3) destroy mediator impartiality, in appearance and in reality.”<sup>260</sup> Whether the mediator is reporting that the party failed to mediate in good faith or mediated in good faith, the ethical analysis remains the same: the mediator is required to maintain confidentiality except where disclosure is required or permitted by law.<sup>261</sup> MEAC clarifies the mediator’s obligation by interpreting it in light of the Mediation Confidentiality and Privilege Act, which provides that mediation communications are confidential unless the Act provides otherwise.<sup>262</sup> Mediation communications include nonverbal conduct intended to make an assertion by or to a mediation participant, as well as written and oral statements.<sup>263</sup> The Act does not contain an exception for reporting whether a party mediated in good faith.<sup>264</sup>

Local court rules for the United States District Court for the Northern District of Florida provide that mediators are governed by the ethical rules adopted by the Supreme Court of Florida for circuit civil mediators.<sup>265</sup> They also provide that unless the parties settle or agree otherwise, the mediator may only report to the judge that the case settled, was adjourned, continued, or terminated.<sup>266</sup> Given the mediator’s ethical obligation to comply with local rules, court rules, administrative orders, and statutes governing mediation, the mediator’s allowable communication to the court regarding mediation is limited.<sup>267</sup>

Notably, if the parties do not engage in mediation, there would be no mediation communications to be confidential and privileged. Determining whether mediation took place becomes a conundrum—a catch twenty-two.

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259. *Id.*

260. *Id.*

261. FLA. R. CERT. & CT.-APPTD. MEDIATORS R. 10.360(a).

262. FLA. STAT. § 44.405(1), (4)(a) (2011).

263. *Id.* § 44.403(1).

264. MEAC Advisory Op. 2004-006, *supra* note 258. MEAC advises that parties are not required to negotiate in good faith. *Id.* (citing *Avril v. Civilmar*, 605 So. 2d 988, 989–90 (Fla. 4th Dist. Ct. App 1992) (quashing order imposing sanctions for failure to negotiate in good faith at mediation as departure from essential requirements of law and stating that “[l]here is no requirement that a party . . . make an offer at mediation, let alone offer what the opposition wants to settle”).

265. N.D. FLA. LOC. R. 16.3(D). The referenced rules are the Florida Rules for Certified and Court-Appointed Mediators. *See id.* 16.3.

266. *Id.* 16.3(A).

267. FLA. R. CERT. & CT.-APPTD. MEDIATORS R. 10.520.

To determine whether mediation occurred, information about what did or did not happen would be necessary. As mediation communications are confidential and privileged, mediators are not permitted to report them to the court, absent a statutory exception or agreement of all parties.<sup>268</sup> Consequently, protected mediation communications could not be utilized to determine if mediation took place unless and until there had been a determination that they were not mediation communications because mediation never occurred.

In significant contrast, mediators are permitted to report to the court whether parties and attorneys physically appear for mediation, and other matters based on observation are, likewise, not mediation communications.<sup>269</sup> Additionally, the commission of a crime during mediation would not constitute a mediation communication,<sup>270</sup> and there is no confidentiality or privilege for a mediation communication “willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence.”<sup>271</sup> Therefore, if Joe Francis’s behavior constituted an exclusion from the definition for mediation communication or a delineated exception within the Act, the behavior would be neither confidential nor privileged.<sup>272</sup>

### B. *Discovery and Admissibility*

Federal courts in Florida have addressed whether communications arising from mediation are admissible or discoverable.<sup>273</sup> In so doing, they have applied the Act, Federal Rules of Evidence, and local court rules.<sup>274</sup> A recent Eleventh Circuit Court of Appeals case reviewed the district court’s application of the Act in its decision to admit testimony of mediation proceedings.<sup>275</sup> The district court stated that the appellant, by arguing that it had not been paid and by raising an affirmative defense, opened the door to admission of evidence showing the mediation resulted in payment to the appellant.<sup>276</sup> The Act specifically provides that a party who “makes a representa-

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268. *Id.* 10.360(a).

269. *See* FLA. STAT. § 44.403(1) (2011); *see also* Mediator Ethics Advisory Comm., Advisory Op. 2006-008 (2007); Mediator Ethics Advisory Comm., Advisory Op. 2007-001 (2007).

270. FLA. STAT. § 44.403(1).

271. *Id.* § 44.405(4)(a)(2).

272. *See* *Pitts v. Francis*, No. 5:07cv169-RS-EMT, 2007 WL 4482168, at \*12 (N.D. Fla. Dec. 19, 2007). This analysis is premised on the applicability of the Mediation Confidentiality and Privilege Act. *See* FLA. STAT. § 44.403.

273. *See, e.g.,* *Fisk Electric Co. v. Solo Constr. Corp.*, 417 F. App’x 898, 902 (11th Cir. 2011) (*per curiam*).

274. *See, e.g., id.* at 902 n.7.

275. *Id.* at 902 n.7.

276. *Id.* at 902.

tion about a privileged mediation communication waives the privilege . . . to the extent [needed] for the other party to respond” properly.<sup>277</sup> The appellate court affirmed.<sup>278</sup> It did not find error in the district court’s application of the Act.<sup>279</sup>

In *Altheim v. GEICO General Insurance Co.*,<sup>280</sup> the United States District Court for the Middle District of Florida applied the Act to find that the requested discovery was not precluded by the Act.<sup>281</sup> The plaintiff sought an order compelling GEICO to produce all of the documents on its privilege log for a given period of time.<sup>282</sup> The defendant maintained that the mediation privilege applied.<sup>283</sup> The court found it did not.<sup>284</sup> “By definition, the privilege contemplates protecting disclosure of communications that were made during mediation to others outside the mediation process.”<sup>285</sup> Therefore, since the plaintiff and the defendant were both mediation participants who were not disclosing the communications to persons not mediation participants, the privilege did not apply.<sup>286</sup> Further, the privilege could not be invoked for communications occurring outside the mediation process.<sup>287</sup>

Parties seek to quash protective orders and compel responses to discovery requests regarding otherwise confidential and privileged mediation communications.<sup>288</sup> In *In re Denture Cream Products Liability Litigation*,<sup>289</sup> the appellant sought production of mediation materials and the mediation agreement from a case with the same defendant, but different plaintiff, to show that the defendant was on notice of claims against its product.<sup>290</sup> The plaintiff and plaintiff’s counsel for the other case did not object to the dis-

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277. FLA. STAT. § 44.405(6) (2011).

278. *Fisk Electric Co.*, 417 F. App’x at 902.

279. *Id.* at 902 n.7. The court noted that it “generally appl[ies] federal evidentiary rules in diversity cases.” *Id.* (citing *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005)). “But state substantive law may provide additional protection for evidence beyond what the federal evidentiary rules provide.” *Id.* (citing *Ungerleider v. Gordon*, 214 F.3d 1279, 1282 (11th Cir. 2000)).

280. No. 8:10-cv-156-T-24TBM, 2010 WL 5092721 (M.D. Fla. Dec. 8, 2010).

281. *Id.* at \*1.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Altheim*, 2010 WL 5092721, at \*1. “[A] mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant’s counsel.” *Id.* at \*1 (quoting FLA. STAT. § 44.405(1) (2011)).

286. *Id.*

287. *Id.*

288. *In re Denture Cream Prods. Liab. Litig.* No. 09-2051-MD, 2011 WL 1979666, at \*1 (S.D. Fla. May 20, 2011).

289. No. 09-2051-MD, 2011 WL 1979666 (S.D. Fla. May 20, 2011).

290. *Id.* at \*2.

covery.<sup>291</sup> The court ruled that Federal Rule of Evidence 408 did not bar discovery, and the Confidentiality Agreement in the other case did not preclude discovery of its agreement.<sup>292</sup> Accordingly, the appellees/defendants were ordered to produce the non-privileged mediation materials in question with the settlement amounts redacted.<sup>293</sup>

In contrast, in *Fluor Intercontinental, Inc. v. IAP Worldwide Services, Inc.*,<sup>294</sup> another federal case applying Federal Rule of Evidence 408, statements were not found to be discoverable or admissible.<sup>295</sup> The statements were communicated at the mediation of a different case that “was part of [the] settlement of a common claim,” which was also at issue in the case at bar.<sup>296</sup> During the mediation, Fluor’s attorney gave a PowerPoint presentation.<sup>297</sup> RMS, a subsidiary of IAP, sought to compel discovery responses regarding Fluor’s presentation made at the mediation of the other case.<sup>298</sup> The district court determined that “any statements made by Fluor during the [other] mediation, including the PowerPoint presentation, [were] not admissible” based on Rule 408.<sup>299</sup> “The focus on a lawyer’s statements made while he was in the role of an advocate in mediation is not appropriate or admissible under the Federal Rules of Evidence.”<sup>300</sup>

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291. *Id.* at \*3.

292. *Id.* at \*5. Federal Rule of Evidence 408, Compromise and Offers to Compromise, provides:

(a) Prohibited Uses.—Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: (1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and [when] the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

FED. R. EVID. 408. Please note the Supreme Court of the United States approved amendments to Rule 408, effective December 1, 2011, by order dated April 26, 2011. Order Amending Federal Rules of Evidence, Rules 101–1103 (effective Dec. 1, 2011).

293. *In re Denture Cream Prods. Liab. Litig.*, 2011 WL 1979666 at \*5. The opinion does not address the Mediation Confidentiality and Privilege Act. *In re Denture Cream Prods. Liab. Litig.*, 2011 WL 1979666.

294. No. 5:09CV331/RS-EMT, 2010 WL 2366482 (N.D. Fla. June 14, 2010).

295. *Id.* at \*1.

296. *Id.* at \*2.

297. *Id.* at \*1.

298. *Id.*

299. *Fluor Intercontinental, Inc.*, 2010 WL 2366482, at \*2. The court noted it would reach the same result applying Federal Rule of Evidence 403. *Id.*

300. *Id.*

In another recent case, *Facebook, Inc. v. Pacific Northwest Software, Inc.*,<sup>301</sup> the United States Court of Appeals for the Ninth Circuit agreed that the district court was correct in excluding proffered evidence.<sup>302</sup> The appellate court based its decision on the parties' signed Confidentiality Agreement that provided:

All statements made during the course of the mediation or in mediator follow-up thereafter at any time prior to complete settlement of this matter are privileged settlement discussions . . . and are non-discoverable and inadmissible for any purpose including in any legal proceeding . . . . *No aspect of the mediation shall be relied upon or introduced as evidence in any arbitral, judicial, or other proceeding.*<sup>303</sup>

The court noted that “[a] local rule, like any court order, can impose a duty of confidentiality” regarding mediation.<sup>304</sup> However, the parties had used a private ADR procedure, which was not subject to the court’s ADR Local Rules.<sup>305</sup> Nonetheless, the parties’ clearly worded Confidentiality Agreement precluded the appellants from introducing evidence of “what Facebook said, or did not say, during the mediation.”<sup>306</sup> Without this evidence, the appellants’ securities claims failed.<sup>307</sup>

In addition to rules of evidence and statutory law, courts’ local rules and parties’ confidentiality agreements weigh heavily in the courts’ determination of mediation confidentiality and privilege.<sup>308</sup> Carefully drafting confidentiality agreements and keeping track of local rules are essential to protecting both confidentiality and access to the courts. The District Court for the

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301. 640 F.3d 1034 (9th Cir. 2011).

302. *Id.* at 1041.

303. *Id.*

304. *Id.* at 1040. On the contrary, “privileges are created by federal common law.” *Id.* at 1041 (referencing FED. R. EVID. 501).

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in . . . light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

305. *Facebook, Inc.*, 640 F.3d at 1041. The district court had reached its decision based on a Local ADR Rule, which the appellate court determined did not apply to this case. *Id.*

306. *Id.*

307. *Id.*

308. *See id.*

Southern District of Florida has a strong local rule restricting the use of information derived during mediation, specifically referencing the Act:

All proceedings of the mediation shall be confidential and are privileged in all respects as provided under federal law and Florida Statutes § 44.405. The proceedings may not be reported, recorded, placed into evidence, made known to the Court or jury, or construed for any purpose as an admission against interest. A party is not bound by anything said or done at the [mediation] conference, unless a written settlement is reached, in which case only the terms of the settlement are binding.<sup>309</sup>

The United States Court of Appeals for the Ninth Circuit, applying Oregon law, also excluded evidence that a party needed to prove his case.<sup>310</sup> In *Fehr v. Kennedy*,<sup>311</sup> the plaintiffs filed a diversity action against Kennedy for legal malpractice alleging they rejected an offer made at mediation because they relied on Kennedy's advice.<sup>312</sup> Subsequently, they received a less favorable outcome at trial and filed suit in federal court.<sup>313</sup> The district court granted Kennedy's summary judgment motion.<sup>314</sup> Prohibited from disclosing confidential mediation communications, the Fehrs were not able to prove their case.<sup>315</sup> Although the Oregon Legislature had provided exceptions to the nondisclosure requirement for mediation, it had not provided an exception covering actions between a party to a mediation and the party's attorney.<sup>316</sup> This case highlights the importance of statutory exceptions specifically drafted to cover intended exceptions to mediation confidentiality and privilege.<sup>317</sup> The federal court applied Oregon state law, which did not provide an exception for legal malpractice actions.<sup>318</sup> In contrast, Florida law specifically provides an exception for malpractice and professional misconduct.<sup>319</sup> In *Nova Casualty Co. v. Santa Lucia*,<sup>320</sup> the plaintiff alleged that his attorney negligently negotiated a High-Low Agreement during mediation,<sup>321</sup>

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309. S.D. FLA. LOC. R. 16.2(g)(2).

310. *Fehr v. Kennedy*, 387 F. App'x 789, 791 (9th Cir. 2010).

311. 387 F. App'x 789 (9th Cir. 2010).

312. *Id.* at 790.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Fehr*, 387 F. App'x at 791.

317. *See id.*

318. *See id.* at 790-91.

319. FLA. STAT. § 44.405(4)(a)(4), (6) (2011).

320. No. 8:09-cv-1351-T-30AEP, 2010 WL 2367208 (M.D. Fla. June 14, 2010).

321. *Id.* at \*1.

and in *Shepard v. Florida Power Corp.*,<sup>322</sup> the plaintiff alleged he was coerced into settling at mediation by his attorney.<sup>323</sup> The statutory exception applies in both cases because the alleged wrongdoing took place during the mediation.<sup>324</sup>

### C. *Appearance with Authority to Settle*

The Act and Florida Rules of Procedure for Juvenile,<sup>325</sup> Appellate,<sup>326</sup> Civil,<sup>327</sup> and Family<sup>328</sup> matters that govern required appearance at mediation, have inconsistent and incompatible provisions. The Florida Rules of Procedure and Mediation Referral Orders identify who is required to appear at mediation.<sup>329</sup> Generally, the requirement is to attend the mediation and have full authority to settle.<sup>330</sup> There is no requirement that parties mediate in good faith, for parties have self-determination and may decide not to make an offer and not to settle.<sup>331</sup> Nonetheless, party representatives are required to appear with full settlement authority:

[A] party [to a circuit civil mediation] is deemed to appear . . . if the following . . . are physically present:

- (1) The party or its representative having full authority to settle without further consultation.
- (2) The party's counsel of record, if any.
- (3) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authori-

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322. No. 8:09-cv-2398-T-27TGW, 2011 WL 1465995 (M.D. Fla. Apr. 18, 2011).

323. *Id.* at \*2.

324. FLA. STAT. § 44.405(4)(a)(4), (6).

325. FLA. R. JUV. P. 8.290(l)(5).

326. FLA. R. APP. P. 9.720(b).

327. FLA. R. CIV. P. 1.720(b).

328. FLA. FAM. L. R. P. 12.741(b)(2).

329. *See* FLA. R. JUV. P. 8.290(l)(2); FLA. R. APP. P. 9.720(a); FLA. R. CIV. P. 1.720(b); FLA. R. CIV. P. 1.750(e); FLA. R. CIV. P. 7.090(f); FLA. FAM. L. R. P. 12.740(d).

330. *See* FLA. R. JUV. P. 8.290(l)(2); FLA. R. APP. P. 9.720(a); FLA. R. CIV. P. 1.720(b); FLA. R. CIV. P. 1.750(e); FLA. R. CIV. P. 7.090(f); FLA. FAM. L. R. P. 12.740(d).

331. *See* *Avril v. Civilmar*, 605 So. 2d 988, 989–90 (Fla. 4th Dist. Ct. App. 1992); Carol L. Izumi & Homer C. La Rue, *Prohibiting “Good Faith” Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent*, J. DISP. RESOL. 67, 74–75 (2003).

ty to settle up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.<sup>332</sup>

The Act does not provide an exception to confidentiality for reporting lack of authority to settle.<sup>333</sup> Therefore, if lack of settlement authority is learned during mediation, it is a confidential mediation communication.<sup>334</sup> Consequently, mediation participants are prohibited from communicating it to the judge, unless the parties waive their privilege.<sup>335</sup>

Following passage of the Act, the MEAC, a standing committee of the Supreme Court of Florida, advised that if mediators learned of parties' lack of full settlement authority during the mediation proceeding, they were not ethically permitted to report the lack of authority to the judge.<sup>336</sup> Prior to the Act, MEAC had opined that appearance with full authority was required by Rule 1.720(b), and mediators could report failure to appear.<sup>337</sup> However, as the information conveyed during the mediation falls within the statutory definition of mediation communication, mediators are now prohibited from communicating this nonappearance.<sup>338</sup> Mediators may continue to report failure to appear when individuals fail to physically appear.<sup>339</sup> The mediator would be reporting a permitted observation, not a prohibited mediation communication.<sup>340</sup>

Rules of procedure provide for sanctions should parties fail to appear with the requisite settlement authority.<sup>341</sup> Yet, lack of authority to settle will not reach the judge if the information is learned in mediation.<sup>342</sup> This creates

332. FLA. R. CIV. P. 1.720(b).

333. *See* FLA. STAT. § 44.405 (2011).

334. *See id.*

335. *See id.* § 44.405(1), (4)(a)(1).

336. Mediator Ethics Advisory Comm., Advisory Op. 2006-003 (2006).

337. Mediator Qualifications Advisory Panel, Advisory Op. 99-002 (1999); Mediator Ethics Advisory Comm., Advisory Op. 2001-010 (2002).

338. *See* FLA. STAT. § 44.405(1).

339. MEAC Advisory Op. 2006-008, *supra* note 269; MEAC Advisory Op. 2007-001, *supra* note 269.

340. MEAC Advisory Op. 2006-008, *supra* note 269; MEAC Advisory Op. 2007-001, *supra* note 269.

341. *See* FLA. R. CIV. P. 1.720(b) (providing mandatory sanctions); FLA. R. APP. P. 9.720(b) (providing permissive sanctions).

342. *See* FLA. STAT. § 44.405. Previously, information was reported to judges, and they would sanction parties for failing to appear without full settlement authority. *See, e.g.,* Physicians Protective Trust Fund v. Overman, 636 So. 2d 827, 829 (Fla. 5th Dist. Ct. App. 1994); Western Waste Indus. v. Achord, 632 So. 2d 680, 681-82 (Fla. 5th Dist. Ct. App. 1994).

a conundrum.<sup>343</sup> Parties, parties' counsel, and mediators are prohibited from apprising judges of the information needed to sanction.<sup>344</sup> The rule of procedure and statutory provision are undisputedly inconsistent.<sup>345</sup>

The inconsistency may not have much impact on the vast majority of mediations held throughout the state. Parties may, of course, choose not to settle. Parties' representatives may not state that they do not have full settlement authority. They may also make a phone call to get increased authority based on the mediation discussion.<sup>346</sup> Regardless, at this time the rule stands, and information is not coming to the court's attention.<sup>347</sup> Judges are unable to sanction and deter failure to appear because the Act prohibits the information from reaching them.<sup>348</sup>

To address this conundrum, the Supreme Court Committee on Alternative Dispute Resolution Rules and Policy (ADR R&P Committee) petitioned the Supreme Court of Florida to revise the appearance segment of Florida Rule of Civil Procedure 1.720(b).<sup>349</sup>

Prior to doing so, the ADR R&P Committee studied the problem and devised three possible options to address the inconsistency between the Act and the rule.<sup>350</sup> Option one was to amend the Act to extend the scope of the exceptions to mediation confidentiality and privilege.<sup>351</sup> The ADR R&P Committee rejected this possibility, reasoning "that having mediators assume responsibility for reporting non-compliance would place mediators in a position that could compromise the mediator's impartiality, violate the Act, and inhibit party communication during mediation."<sup>352</sup> Option two had parties filing a pre-mediation form with the court identifying the party representatives who would attend the mediation, and confirming that the representa-

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343. See, e.g., *In re* Amendments to the Florida Rules of Civil Procedure, Case No. SC10-2329 1, 2 (Fla. filed Dec. 6, 2010) available at [http://www.floridasupremecourt.org/decisions/probin/sc10-2329\\_Petition.pdf](http://www.floridasupremecourt.org/decisions/probin/sc10-2329_Petition.pdf).

344. FLA. STAT. § 44.405(1).

345. Compare FLA. R. CIV. P. 1.720, with FLA. STAT. § 44.405(1).

346. E.g., *Achord*, 632 So. 2d at 681.

347. FLA. STAT. § 44.405.

348. *Id.*

349. *In re* Amendments to the Florida Rules of Civil Procedure, Case No. SC10-2329 1, 1 (Fla. filed Dec. 6, 2010) available at [http://www.floridasupremecourt.org/decisions/probin/sc10-2329\\_Petition.pdf](http://www.floridasupremecourt.org/decisions/probin/sc10-2329_Petition.pdf).

350. *Id.* at 2-3.

351. *Id.* at 3.

352. *Id.* at 3; see Samara Zimmerman, Note, *Judges Gone Wild: Why Breaking the Mediation Confidentiality Privilege for Acting in "Bad Faith" Should be Reevaluated in Court-Ordered Mandatory Mediation*, 11 CARDOZO J. CONFLICT RESOL. 353, 368-71 (2009) (discussing the importance of mediator impartiality and the destruction to the mediation process should the mediator's facilitative role become a "quasi-policing" role).

tives had the required settlement authority.<sup>353</sup> Option three would require party representatives to file a post-mediation notice with the court if the mediation resulted in impasse.<sup>354</sup> The notice would confirm that the party representatives had full settlement authority while participating in the mediation.<sup>355</sup>

The committee sought and received public comment on the options.<sup>356</sup> The majority of those responding to the survey and proposal drafts preferred the pre-mediation confirmation of settlement authority.<sup>357</sup> Pre-mediation filing of confirmation of settlement authority places a document in the court file “unrelated to confidential ‘mediation communications.’”<sup>358</sup> This may afford a court the opportunity to later consider the imposition of sanctions based on matters of record, rather than mediation communications.<sup>359</sup> Additionally, the advance notice may cause parties and attorneys to more seriously consider mediation in terms of benefits and responsibility.<sup>360</sup> The petition before the Supreme Court of Florida represents “a good balance in strengthening the potential of resolution in circuit court civil mediations, without compromising confidentiality or self-determination.”<sup>361</sup>

## V. CONCLUSION

Florida has earned its position as a respected leader in the field of mediation. After the Act, attorneys, mediators, parties, and other participants are better able to plan for and participate in meaningful mediation. Additionally, the courts are in a better position to make consistent rulings on questions of mediation confidentiality. The Act provides needed clarity as to the breadth

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353. *In re Amendments to the Florida Rules of Civil Procedure*, Case No. SC10-2329, at 3. The Supreme Court of Florida adopted this option after this article was drafted and at the end of the article’s editing process. *In re: Amendments to the Florida Rule of Civil Procedure* 1.720, Case No. SC10-2329 1, 2 (Fla. filed Nov. 3, 2011) (per curiam), available at [www.floridasupremecourt.org/decisions/2011/sc10-2329.pdf](http://www.floridasupremecourt.org/decisions/2011/sc10-2329.pdf). The Court adopted “the amendments to rule 1.720 as proposed by the Committee, with the minor modification to new subdivision (e) (Certification of Authority).” *Id.* The amendment provides that the parties serve written notice of the Certification of Authority on all parties attending the mediation. *Id.*

354. *In re Amendments to the Florida Rules of Civil Procedure*, Case No. SC10-2329, at 3.

355. *Id.*

356. *Id.*

357. *Id.* at 4.

358. *Id.*

359. *In re Amendments to the Florida Rules of Civil Procedure*, Case No. SC10-2329, at 4.

360. *Id.* at 4–5.

361. *Id.* at 8.

of mediation confidentiality, as well as the exceptions.<sup>362</sup> The progeny of *Vitakis-Valchine I* and *DR Lakes, Inc. v. Brandsmart U.S.A. of West Palm Beach (DR Lakes I)*<sup>363</sup> will serve to clarify the law of mediator misconduct and mutual mistake. Court determination of what constitutes mediation communication will prove key to future discovery requests and determinations as to the admissibility of evidence. The incompatibility of statutory confidentiality and procedural rules requiring parties to “appear” for mediation will, no doubt, be addressed. The state’s honored tradition of serving parties by respectfully giving them an opportunity to structure agreements that meet their needs, and serving the courts by recognizing their heavy caseloads and providing a means to have parties resolve matters without trial, continues. The Florida courts and conflict resolvers should be proud of how far mediation has come, and should look forward to continuing leadership to determine where it has yet to go.

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362. See generally FLA. STAT. §§ 44.401–.406 (2011).

363. 819 So. 2d 971, 973 (Fla. 4th Dist. Ct. App. 2002).

