

April 18, 2005

### **The Question**

As a certified circuit mediator who mediates, among other things, claims against the state, its agencies, or subdivisions, I would like to elicit the opinion of the Mediator Ethics Advisory Committee concerning the following:

Florida Statute 69.081(8)(a) provides, in relevant part, that “[a]ny portion of an agreement or contract which has the purpose or effect of concealing information relating to the settlement or resolution of any claim or action against the state, its agencies, or subdivisions or against any municipality or constitutionally created body or commission is void, contrary to public policy, and may not be enforced.”

Florida Statute 44.405(1) (2004) provides, in relevant part, that “all mediation communication shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant’s counsel.” The statute goes on to address sanctions that may be imposed for violations of this section.

During the course of negotiations, it is not uncommon for a plaintiff to request a written apology from the public agency defendant that is the subject of the provisions of Florida Statutes 69.081 and 119.07. Suppose the public agency prepares and provides the plaintiff with a written apology during the course of mediation. Included at the bottom of the written apology is language identifying the document as a confidential mediation communication pursuant to Florida Statute 44.405(1) (2004). The parties then sign a written agreement reached during mediation containing the monetary and waiver terms, but the written agreement omits any reference to the written apology.

If a public agency provides a plaintiff with a written apology during the course of a mediation under the circumstances described above, does the written apology fall within the definition of a “mediation communication” as defined in Florida Statute 44.403(1) (2004) so that the written apology is confidential and only subject to public disclosure under the limited circumstances set forth in Florida Statutes 44.405(4)(a) (2004)?

Submitted by a Certified County and Circuit Civil Mediator  
Central Division

### **Authority Referenced**

Rule 10.360(a), Florida Rules for Certified and Court-Appointed Mediators  
The “Mediation Confidentiality and Privilege Act,” sections 44.401 – 44.106, Florida Statutes  
Section 69.081(8) and Chapter 688, Florida Statutes

### **Summary**

The written apology you reference falls within the definition of a “mediation communication” and, therefore, it is confidential, since it is not included in the written agreement, has not been waived by the parties, and does not fall within any of the enumerated exceptions under section 44.405(4)(a), Florida Statutes.

### **Opinion**

A mediator is required to maintain confidentiality of “all information revealed during mediation except where disclosure is required by law<sup>1</sup>.” Rule 10.360(a). The “Mediation Confidentiality and Privilege Act,” sections 44.401 – 44.406, Florida Statutes, defines a “mediation communication” as an “oral or written statement . . . by or to a mediation participant made during the course of a mediation . . .” Section 44.403(1). The Committee believes that the written apology you reference clearly falls within the definition of a “mediation communication.” Therefore, it is confidential, since it is not included in the written agreement, has not been waived by the parties, and does not fall within any of the enumerated exceptions under section 44.405(4)(a).

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Date

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Fran Tetunic, Committee Chair

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<sup>1</sup> While it is beyond the Committee’s jurisdiction to interpret specific statutory provisions unrelated to mediation, the Committee notes that section 69.081(8) contains the following language: “This subsection does not apply to trade secrets protected pursuant to chapter 688, proprietary confidential business information, or other information that is confidential under state or federal law.”