

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 395 Collaborative Process
SPONSOR(S): Tobia
TIED BILLS: None IDEN./SIM. BILLS: None

Table with 4 columns: REFERENCE, ACTION, ANALYST, STAFF DIRECTOR. Row 1: Civil Justice & Courts Policy Committee, DeZego, De La Paz.

SUMMARY ANALYSIS

Collaborative law is a structural process which provides an alternative to litigation. The process begins when the parties enter into a collaborative participation agreement.

This bill creates part II of chapter 44, Florida Statutes, and enacts the "Collaborative Process Act." The act provides for collaborative process in all types of law in Florida.

This bill appears to have an indeterminate positive fiscal impact on state and local governments.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Collaborative Law is generally characterized as a type of alternative dispute resolution.¹ Developed in 1990 by a family law attorney in Minnesota, collaborative law provides a structured process where parties and their attorneys resolve issues and disputes in a nonadversarial process. The collaborative process begins when the parties enter into a collaborative participation agreement. The agreement provides that the parties' attorneys may not take the case to court nor threaten to do so. The court is used for common filings of stipulations only. If the parties are unable to settle, then the attorneys must withdraw and the parties may then hire adversarial counsel for trial.

While collaborative law can be used in all types of law, the collaborative process has primarily been used in family law cases, specifically divorce cases. A number of states have enacted statutes of varying length and complexity which recognize and authorize the collaborative law process in family law.² In addition, the National Conference of Commissioners on Uniform State Laws is in the process of creating a uniform collaborate law. An interim draft was published in January 2009.³

Effect of Bill

Current Law

Florida law currently recognizes alternatives to the adversarial court process and ch. 44, F.S., provides for alternative dispute resolution in the form of mediation⁴ and arbitration⁵. In 2001, the Florida Supreme Court found that families need a system that provides nonadversarial alternatives and

¹ Alternative Dispute Resolution (ADR) is a procedure for settling a dispute by means other than litigation, such as arbitration, mediation or mini-trial. Black's Law Dictionary, pg. 32 (2nd Pocket Edition, 2001). The Florida Dispute Resolution Center does not classify collaborative law as ADR, but rather as a legal process.

² See Cal. Fam. Code §2013 (2007); Tex. Fam. Code §§6.603, 153.0072 (2006); N.C. Gen. Stat. §§50-70 to 50-79 (2006).

³ See <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=279>. Last accessed February 10, 2009.

⁴ Mediation is an informal, nonadversarial process where a third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. Section 44.1011(2), F.S.

⁵ Arbitration is a process where a neutral third person or panel called an arbitrator considers the facts and arguments presented by the parties and renders a decision which may be binding or nonbinding. Section 44.1011(1), F.S.

flexibility of alternatives.⁶ In response, three judicial circuits in Florida authorized the collaborative process for family law cases.⁷

Proposed Changes

This bill creates part II of chapter 44, F.S., and enacts the "Collaborative Process Act." The act provides for collaborative process in all types of law in Florida. A collaborative attorney under this act must be licensed to practice law in Florida and must satisfy any other training requirements required by the Supreme Court in order to represent clients in the collaborative process.⁸

Legal Time Periods Tolled

This bill provides that the collaborative process begins once the parties enter a collaborative participation agreement, which must adopt Supreme Court requirements in regard to the collaborative process.⁹ All legal time periods, including statute of limitations,¹⁰ are tolled between the parties as long as the collaborative participation agreement is in effect. Therefore, if the collaborative process is unsuccessful, the participating parties will still be able to seek litigation.

Confidentiality

This bill provides that all collaborative communications are confidential, unless the parties agree otherwise in writing. The parties may agree to sanctions if confidentiality is breached or a party may terminate the collaborative process. This bill provides that a party has a privilege to refuse to testify and to prevent another person from testifying in a proceeding regarding collaborative process communications. However, if a party discloses or makes a representation about a privileged collaborative communication, then the party waives the privilege to the extent necessary for the other party to respond to the disclosure or representation.

This bill provides that unless the parties agree otherwise in writing, there is no confidentiality or privilege attached to a signed written agreement reached during the collaborative process that:

- Is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;
- Requires a mandatory report pursuant to ch. 39 or ch. 415, Florida Statutes, solely for the purpose of making the mandatory report to the entity requiring the report¹¹;
- Is offered to report, prove or disprove professional malpractice or misconduct occurring during the collaborative process, solely for the purpose of professional malpractice, misconduct, or ethics proceeding; or
- Is offered for the limited purpose of establishing or refuting enforceability of an agreement reached during the collaborative process.

Information that would otherwise be admissible or subject to discovery does not become inadmissible or protected from discovery merely by being used in the collaborative process.

Once the collaborative process is finished, a willful and knowing violation of the confidentiality provision by a party may make the party subject to the following:

⁶ In re Report of Family Law Steering Committee, 794 So.2d 518, 523 (Fla. 2001), which adopts the Model Family Court.

⁷ See Eighteenth Judicial Circuit Administrative Order No. 07-20-B, *In re Domestic Relations – Collaborative Dispute Resolution in Dissolution of Marriage Cases* (June 25, 2007); Eleventh Judicial Circuit Administrative Order No. 1-07-08, *In Re: Authorizing the Collaborative Process Dispute Resolution Model in the Eleventh Judicial Circuit of Florida* (October 2007); Ninth Judicial Circuit Administrative Order No. 2008-06, *Order Authorizing Collaborative Process Dispute Resolution Model in the Ninth Judicial Circuit of Florida* (March 28, 2008).

⁸ There are currently no specific requirements for an attorney to participate in the collaborative process.

⁹ *Id.*

¹⁰ A statute of limitations is an absolute bar to the filing of a legal case after a date set by law.

¹¹ Chapter 39, F.S., provides requirements for proceedings related to children and ch. 415, F.S., provides requirements for adult protective services.

- Equitable relief;
- Compensatory damages;
- Attorney's fees and costs incurred during the collaborative process; or
- Reasonable attorney's fees and costs incurred by the application for remedies under this section.

Relief for a violation of confidentiality after the process is finished may not be commenced more than two years after the date the party had a reasonable opportunity to discover the breach of confidentiality and no more than four years after the date of the breach. Furthermore, a party is not subject to a civil action under this section for complying with s. 119.07, F.S., regarding the inspection and copying of public records.

Chapter Title

This bill changes the title of chapter 44, F.S., to "Alternatives to Judicial Action" and Part I of ch. 44, F.S., to "Arbitration."

B. SECTION DIRECTORY:

Section 1 creates Part II of chapter 44, Florida Statutes, relating to the Collaborative Process Act.

Section 2 provides a direction to redesignate chapter 44, Florida statutes, as "Alternatives to Judicial Action."

Section 3 amends s. 44.1011, F.S., relating to definitions of arbitration.

Section 4 amends s. 44.102, F.S., relating to court-ordered mediation.

Section 5 amends s. 44.106, F.S., relating to standards and procedures for mediators and arbitrators.

Section 6 provides an effective date of July 1, 2009.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

To the extent that this bill could reduce the amount of adversarial cases heard in the court system, this bill appears to have an indeterminate positive impact on state and local governments by reducing the burden on the court system.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

A statute of limitations is an absolute bar to the filing of a legal case after a date set by law. The general objective of statute of limitations is to prevent a delay in the enforcement of legal rights and reduce the risk of erroneous decisions.¹² Most claims become more difficult to litigate with the passage of time because there is a greater chance that witnesses will be unavailable, evidence will be lost, and memories will fade. This bill allows for the tolling of legal time periods and statutes of limitations while the collaborative participation agreement is in effect. However, it may be more difficult to litigate later if the statutes of limitations and legal time periods have been tolled for a long period of time.

This bill redesignates ss. 44.1011-44.406, F.S., as Part I of ch. 44 F.S., entitled "Arbitration." Since arbitration is only one type of Alternative Dispute Resolution mentioned in Part I of ch. 44 under this bill, it may be more accurate to entitle Part I by a broader term that encompasses both arbitration and mediation.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

N/A

¹² Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Ass'n, Inc., 581 So. 2d 1301 (Fla. 1991).