

SENATE BILL NO. 1148

101ST GENERAL ASSEMBLY

INTRODUCED BY SENATOR ROBERTS.

5420S.01I

ADRIANE D. CROUSE, Secretary

AN ACT

To repeal section 435.014, RSMo, and to enact in lieu thereof five new sections relating to alternative dispute resolution.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Section 435.014, RSMo, is repealed and five
2 new sections enacted in lieu thereof, to be known as sections
3 435.300, 435.303, 435.306, 435.309, and 435.312, to read as
4 follows:

**435.300. As used in sections 435.300 to 435.312, the
2 following terms mean:**

3 (1) "Alternative dispute resolution communication", a
4 statement, whether communicated orally, in writing, or by
5 verbal or nonverbal conduct, that is either:

6 (a) Related to the subject matter of the dispute and
7 made during an alternative dispute resolution process; or

8 (b) Made as part of considering, conducting,
9 participating in, initiating, continuing, or reconvening an
10 alternative dispute resolution process.

11 The term "alternative dispute resolution communication"
12 shall not include the notifications or reports made pursuant
13 to subsection 2 of section 435.303 or subsection 8 of
14 section 435.306 or a written agreement as described in
15 section 435.312;

EXPLANATION-Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

16 (2) "Alternative dispute resolution process",
17 mediation, arbitration, or early neutral evaluation used in
18 conjunction with a pending civil action, and any other
19 alternative to trial that has been included in a local court
20 rule applicable to a civil dispute;

21 (3) "Arbitration", a binding procedure in which a
22 neutral or panel of neutrals hears and decides a dispute
23 between two or more parties;

24 (4) "Conflict of interest", any direct or indirect
25 financial or personal interest in the outcome of a dispute
26 or any existing or prior financial, business, professional,
27 family, or social relationship with any participant in an
28 alternative dispute resolution process that is likely to
29 affect the impartiality of the neutral or that may
30 reasonably create an appearance of partiality or bias;

31 (5) "Early neutral evaluation", a process in which a
32 neutral provides parties to a dispute with a nonbinding
33 assessment of their dispute;

34 (6) "In camera", a proceeding held in a judge's
35 chambers or in a courtroom from which the public is excluded;

36 (7) "Mandated reporter", an individual who is required
37 to report abuse or neglect pursuant to the provisions of
38 section 192.2405, 192.2475, 198.070, 208.912, 210.115,
39 352.400, 630.162, or 630.165;

40 (8) "Mediation", a process in which a neutral
41 facilitates communications among the parties and assists the
42 parties in their efforts to reach a voluntary agreement
43 regarding the dispute;

44 (9) "Mediator", a neutral who conducts mediation;

45 (10) "Neutral", an individual who, acting
46 independently and not as a representative, agent, or
47 advocate of any of the parties, assists the parties in their

48 efforts to reach a resolution of their dispute through an
49 alternative dispute resolution process;

50 (11) "Participant", any person or entity, including
51 any neutral or party, who participates in an alternative
52 dispute resolution process;

53 (12) "Party", an individual or entity named as a party
54 in a pending civil action, or in an agreement to use an
55 alternative dispute resolution process as described in
56 sections 435.309 and 435.312;

57 (13) "Person", an individual; a public or private
58 corporation, business trust, estate, trust, partnership,
59 limited liability company, or insurance company; an
60 association; a joint venture; a governmental unit,
61 subdivision, agency, or instrumentality of the state; or any
62 other legal or commercial entity;

63 (14) "Proceeding", a judicial, administrative,
64 arbitral, or other adjudicative process subject to sections
65 435.300 to 435.312, including related prehearing and
66 posthearing motions, conferences, hearings, and discovery;

67 (15) "Writing" or "written", a tangible or electronic
68 record of a communication or representation, including
69 handwriting, typewriting, printing, photostating,
70 photography, audio or video recording, and electronic
71 communication;

72 (16) "Written agreement", a writing that:

73 (a) Contains the essential terms of an agreement; and

74 (b) Is signed, executed, or adopted by the parties, by
75 any process described in subdivision (15) of this section,
76 including electronic signatures as permitted by section
77 432.230, with the intent to sign and be bound by the
78 writing, and attached to or logically associated with the
79 writing.

435.303. 1. A court may refer any individual civil case or category of civil cases to mediation or any other nonbinding alternative dispute resolution process, either by rule or court order.

2. Within thirty days of referral by a court to a nonbinding alternative dispute resolution process pursuant to subsection 1 of this section, or such longer time as may be set by the court, or with leave of the court, the parties may:

(1) Notify the court that all of the parties have chosen to pursue an alternative dispute resolution process different from the nonbinding alternative dispute resolution process ordered by the court if such choice is evidenced in a written agreement between the parties;

(2) Notify the court that all of the parties have agreed to delay such alternative dispute resolution process until a date certain, which date may be subsequently modified by the court, to allow for the exchange of specified information, the identification of representatives with authority, or any other identified action or event related to the ability of the parties to participate effectively in that alternative dispute resolution process; or

(3) If any party, after conferring with all other parties, concludes that referral to a nonbinding alternative dispute resolution process has no reasonable chance of helping the parties to better understand or resolve one or more of the procedural or substantive issues in the matter or there is a compelling circumstance for not participating in the alternative dispute resolution process, the party may file a motion for relief from the referral, setting forth the reasons for not participating. Once a motion for relief

33 has been filed, the alternative dispute resolution process
34 ordered by the court shall not occur until the court has
35 ruled on the motion. If the court grants the motion, the
36 matter shall not thereafter be referred by the court to an
37 alternative dispute resolution process without compelling
38 circumstances, which shall be set out by the court in any
39 order referring the matter to an alternative dispute
40 resolution process.

41 3. In an action referred to an alternative dispute
42 resolution process, discovery may proceed as in any other
43 action before, during, and after the alternative dispute
44 resolution process is held. The court may stay discovery in
45 whole or in part during the pendency of an alternative
46 dispute resolution process in order to promote savings in
47 time and expense without sacrificing the quality of justice.

48 4. A neutral who is appointed by the court or
49 requested by the parties to serve in an alternative dispute
50 resolution process pursuant to sections 435.300 to 435.312
51 shall avoid any conflict of interest. Even if the neutral
52 believes that no disqualifying conflict exists, the neutral
53 shall:

54 (1) Make a reasonable inquiry to determine whether
55 there are any facts that would cause a reasonable person to
56 believe that the neutral has an actual or potential conflict
57 of interest before agreeing to serve in a matter;

58 (2) Disclose to the parties, as soon as practicable,
59 facts and information relevant to any actual or potential
60 conflicts of interest that are reasonably known to the
61 neutral; and

62 (3) If, after accepting a designation by the parties
63 or the court, the neutral learns of any previously
64 undisclosed information that could reasonably suggest a

65 conflict of interest, promptly disclose the information to
66 the parties.

67 5. After the neutral's disclosure of a conflict, the
68 alternative dispute resolution process may proceed if:

69 (1) All parties agree in writing to service by the
70 neutral; or

71 (2) An organization independently administering the
72 alternative dispute resolution process pursuant to the rules
73 of procedure that were adopted by a written agreement of the
74 parties determines under such rules that the neutral may
75 continue to serve.

76 6. Any party who believes a court-appointed neutral
77 has a conflict of interest may request that the neutral
78 recuse himself or herself if a conflict is disclosed or
79 otherwise discovered. If the neutral declines, the party
80 may timely file a motion with the court for disqualification
81 of the neutral. Failure to file a motion waives that
82 objection. On its own motion, the court may also review the
83 choice of a neutral in any alternative dispute resolution
84 process involving a party that is not represented by counsel
85 and require a change of neutral if necessary to protect the
86 rights of the unrepresented party.

435.306. 1. Alternative dispute resolution
2 communications shall not be admissible as evidence in any
3 proceeding or subject to discovery, except as otherwise
4 provided in subsections 2, 3, and 7 of this section.
5 Exceptions shall be narrowly construed and only the portion
6 of the communication necessary for the application of the
7 exception to the general rule of nonadmissibility shall be
8 admitted.

9 2. Evidence or information that is otherwise
10 admissible or subject to discovery, including information

11 that would be available to the public pursuant to sections
12 610.010 to 610.035, shall not become inadmissible or
13 protected from discovery solely by reason of its disclosure
14 or use in an alternative dispute resolution process.

15 3. A court may determine to admit an alternative
16 dispute resolution communication upon motion of a party,
17 which motion shall not reveal the substance of the
18 communication, and following a hearing, only if the court
19 finds that one or more of the exceptions in this subsection
20 applies and that the communication is otherwise relevant and
21 admissible. The party seeking admission shall ensure that
22 timely notice is given to the neutral and parties that
23 participated in the alternative dispute resolution process
24 in which the alternative dispute resolution communication
25 was made. The hearing shall be conducted in camera if
26 requested by a party or if the court determines on its own
27 motion that an in camera proceeding is necessary to ensure
28 the confidentiality of the communications that are the
29 subject to the hearing. The only exceptions to the general
30 rule of nonadmissibility of alternative dispute resolution
31 communications stated in subsection 1 of this section are as
32 follows:

33 (1) The alternative dispute resolution communication
34 was made in the presence of a mandated reporter and pertains
35 to abuse or neglect that such mandated reporter is required
36 by state law or regulation to report;

37 (2) The alternative dispute resolution communication
38 is a substantial threat or statement of a plan to inflict
39 bodily injury capable of causing death or substantial bodily
40 harm that is reasonably certain to occur;

41 (3) The alternative dispute resolution communication
42 is intentionally used to plan a crime, attempt to commit a

43 crime, or to conceal an ongoing crime or ongoing criminal
44 activity; or

45 (4) The alternative dispute resolution communication
46 is necessary to establish or defend against a claim of
47 professional misconduct or malpractice that is filed against
48 or on behalf of a participant based on conduct occurring
49 during the alternative dispute resolution process.

50 4. The admission of evidence in a proceeding under any
51 of the exceptions stated in subsection 3 of this section
52 shall not in itself render the evidence or any other
53 alternative dispute resolution communication discoverable or
54 admissible for any other purpose or proceeding.

55 5. Any participant in an alternative dispute
56 resolution process has standing to intervene in any
57 proceeding to object to the admissibility of an alternative
58 dispute resolution communication made by that participant
59 during or relating to that alternative dispute resolution
60 process. A neutral who participated in an alternative
61 dispute resolution process also has standing to intervene in
62 any proceeding to object to the admissibility of an
63 alternative dispute resolution communication made by the
64 neutral or an agent or employee of a neutral or of an
65 organization through which the neutral provided the
66 alternative dispute resolution services for such process,
67 but the neutral is under no requirement to do so.

68 6. Except as provided in subsection 7 of this section,
69 no neutral, agent or employee of that neutral, or agent or
70 employee of an organization through which the neutral
71 provided alternative dispute resolution services shall be
72 subpoenaed or otherwise compelled to disclose any
73 alternative dispute resolution communication, including any
74 alternative dispute resolution communication that would

75 otherwise fall within the exceptions identified in
76 subsection 3 of this section. No neutral who is a licensed
77 attorney, nor an agent or employee of such neutral or of an
78 organization through which the neutral provided alternative
79 dispute resolution services pursuant to sections 435.300 to
80 435.312, shall be required to disclose any alternative
81 dispute resolution communication to which a reporting
82 obligation might otherwise apply under the rules regulating
83 the professional conduct of attorneys.

84 7. A neutral, an agent or employee of that neutral, or
85 an agent or employee of an organization through which the
86 neutral provided the alternative dispute resolution services
87 may be subpoenaed in an action to enforce a written
88 agreement as described in subsection 2 of section 435.309,
89 but only for the limited purpose of testifying that the
90 written agreement was signed by the parties in the presence
91 of the neutral.

92 8. The court may request that the neutral or the
93 parties provide the court with progress reports on
94 alternative dispute resolution processes related to pending
95 civil actions, except such reports shall be limited to a
96 statement that the matter has been resolved in its entirety,
97 partially resolved, or not resolved and whether future dates
98 for an alternative dispute resolution process are
99 scheduled. A neutral may also report to the court that a
100 payment has not been received from one or more parties. A
101 court shall not require the disclosure of alternative
102 dispute resolution communication in any such report.

103 9. The court may order the party or parties seeking
104 admission of an alternative dispute resolution communication
105 to pay the costs and fees of the neutral or other person
106 participating in an alternative dispute resolution process

107 who intervenes to contest the disclosure and admission of
108 alternative dispute resolution communication or who responds
109 to a subpoena prohibited by subsection 6 of this section or
110 a subpoena pursuant to subsection 7 of this section.

435.309. 1. Unless the parties have entered into a
2 written agreement providing for entry into a binding
3 alternative dispute resolution process, all alternative
4 dispute resolution processes pursuant to sections 435.300 to
5 435.312 shall be nonbinding.

6 2. In order to be binding on the parties, a settlement
7 agreement that is reached in an alternative dispute
8 resolution process shall be in a written agreement.

9 3. Alternative dispute resolution processes included
10 in consumer contracts for goods or services shall be
11 independently administered.

435.312. 1. Except as provided in subsection 6 of
2 this section, sections 435.300 to 435.312 shall apply only
3 to those alternative dispute resolution processes made by
4 court order or referral to an alternative dispute resolution
5 process or when the parties enter into a written agreement
6 to resolve their dispute through an alternative dispute
7 resolution process expressly providing that sections 435.300
8 to 435.312 shall apply to such alternative dispute
9 resolution process.

10 2. The parties to a dispute may enter into a written
11 agreement to attempt to resolve their differences through an
12 alternative dispute resolution process and may agree that
13 sections 435.300 to 435.312 will apply to such alternative
14 dispute resolution process before the filing of an action or
15 after the entry of a judgment, as well as during the
16 pendency of an action. If the matter resolves and the
17 parties file a case to present the settlement for approval

18 by the court, the case shall be exempted from any local rule
19 that refers a class of cases to any alternative dispute
20 resolution process.

21 3. Nothing in sections 435.300 to 435.312 shall
22 preclude any court from referring any individual matter to a
23 nonbinding alternative dispute resolution process so as to
24 effectuate the timely, fair, and efficient administration of
25 justice, subject only to subsection 2 of section 435.303.

26 4. Nothing in sections 435.300 to 435.312 is intended
27 to undermine the right of litigants to a jury trial in the
28 event that a resolution satisfactory to the parties is not
29 achieved through a nonbinding alternative dispute resolution
30 process.

31 5. Nothing in sections 435.300 to 435.312 shall be
32 deemed to require:

33 (1) Any party or party representative who appears at
34 an alternative dispute resolution process in compliance with
35 a court order to settle all or part of any claim; or

36 (2) Any party to attend a mediation with counsel if
37 such party is self-represented.

38 6. If the court has not ordered the parties to an
39 alternative dispute resolution process and if the parties do
40 not elect to use sections 435.300 to 435.312, the process
41 shall be regarded as settlement negotiations and subject to
42 the rules of confidentiality that generally apply to such
43 negotiations. If the parties to the dispute have agreed in
44 writing to submit their dispute to such alternative dispute
45 resolution process but have not invoked the protections of
46 sections 435.300 to 435.312, no person who serves as a
47 neutral in such process, nor any agent or employee of that
48 person or of an organization through which the neutral
49 provided the alternative dispute resolution process, shall

50 be subpoenaed or otherwise compelled to disclose any matter
51 revealed in the process of setting up or conducting such
52 alternative dispute resolution process. All settlement
53 agreements shall be in writing as described in sections
54 435.300 to 435.312.

2 [435.014. 1. If all the parties to a
3 dispute agree in writing to submit their dispute
4 to any forum for arbitration, conciliation or
5 mediation, then no person who serves as
6 arbitrator, conciliator or mediator, nor any
7 agent or employee of that person, shall be
8 subpoenaed or otherwise compelled to disclose
9 any matter disclosed in the process of setting
10 up or conducting the arbitration, conciliation
11 or mediation.]

12 2. Arbitration, conciliation and mediation
13 proceedings shall be regarded as settlement
14 negotiations. Any communication relating to the
15 subject matter of such disputes made during the
16 resolution process by any participant, mediator,
17 conciliator, arbitrator or any other person
18 present at the dispute resolution shall be a
19 confidential communication. No admission,
20 representation, statement or other confidential
21 communication made in setting up or conducting
22 such proceedings not otherwise discoverable or
23 obtainable shall be admissible as evidence or
subject to discovery.]

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