

# SENATE BILL NO. 1096

102ND GENERAL ASSEMBLY

INTRODUCED BY SENATOR ROBERTS.

2909S.01I

KRISTINA MARTIN, 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Section A. Section 435.014, RSMo, is repealed and five  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 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 procedure in which a neutral or  
22 panel of neutrals hears and decides a dispute between two or  
23 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 familial, 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, including related  
65 prehearing and posthearing motions, conferences, hearings,  
66 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 the 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 has been filed, the alternative dispute resolution process

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

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

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

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

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

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

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

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

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

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

75 6. Any party who believes a court-appointed neutral  
76 has a conflict of interest may request that the neutral  
77 recuse himself or herself if a conflict is disclosed or  
78 otherwise discovered. If the neutral declines, the party  
79 may timely file a motion with the court for disqualification  
80 of the neutral. Failure to file a motion waives that  
81 objection. On its own motion, the court may also review the  
82 choice of a neutral in any alternative dispute resolution  
83 process involving a party that is not represented by counsel  
84 and require a change of neutral if necessary to protect the  
85 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 admit an alternative dispute resolution  
16 communication upon motion of a party, which motion shall not  
17 reveal the substance of the communication, and following a  
18 hearing, only if the court finds that one or more of the  
19 exceptions in this subsection applies and that the  
20 communication is otherwise relevant and admissible. The  
21 party seeking admission shall ensure that timely notice is  
22 given to the neutral and parties that participated in the  
23 alternative dispute resolution process in which the  
24 alternative dispute resolution communication was made. The  
25 hearing shall be conducted in camera if requested by a party  
26 or if the court determines on its own motion that an in  
27 camera proceeding is necessary to ensure the confidentiality  
28 of the communications that are the subject to the hearing.  
29 The only exceptions to the general rule of nonadmissibility  
30 of alternative dispute resolution communications stated in  
31 subsection 1 of this section are as follows:

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

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

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

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

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

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

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

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

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

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

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

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

106 who intervenes to contest the disclosure and admission of  
107 alternative dispute resolution communication or who responds  
108 to a subpoena prohibited by subsection 6 of this section or  
109 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 referred  
4 by rule or court order, or when the parties enter into a  
5 written agreement to resolve their dispute through an  
6 alternative dispute resolution process expressly providing  
7 that sections 435.300 to 435.312 shall apply to such  
8 alternative dispute resolution process.

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

18 that refers a class of cases to any alternative dispute  
19 resolution process.

20 3. Nothing in sections 435.300 to 435.312 shall  
21 preclude any court from referring any individual matter to a  
22 nonbinding alternative dispute resolution process so as to  
23 effectuate the timely, fair, and efficient administration of  
24 justice, subject only to the provisions of subsection 2 of  
25 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 referred the case to an  
39 alternative dispute resolution process pursuant to section  
40 435.303 or if the parties do not elect to use sections  
41 435.300 to 435.312, the process shall be regarded as  
42 settlement negotiations and subject to the rules of  
43 confidentiality that generally apply to such negotiations.  
44 If the parties to the dispute have agreed in writing to  
45 submit their dispute to such alternative dispute resolution  
46 process but have not invoked the protections of sections  
47 435.300 to 435.312, no person who serves as a neutral in  
48 such process, nor any agent or employee of that person or of  
49 an organization through which the neutral provided the

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