

SENATE BILL NO. 1039

103RD GENERAL ASSEMBLY

INTRODUCED BY SENATOR ROBERTS.

5070S.011

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Section A. Section 435.014, RSMo, is repealed and five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

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

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

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

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

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

(3) If, after accepting a designation by the parties or the court, the neutral learns of any previously 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 apply 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

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

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

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

9. The court may order the party or parties seeking admission of an alternative dispute resolution communication to pay the costs and fees of the neutral or other person 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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