

FIRST REGULAR SESSION

HOUSE BILL NO. 953

101ST GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVE RIGGS.

2086H.02I

DANA RADEMAN MILLER, Chief Clerk

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Section A. Section 435.014, RSMo, is repealed and five new sections enacted in lieu thereof, to be known as sections 435.300, 435.303, 435.306, 435.309, and 435.312, to read as follows:

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

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

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

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

The term "alternative dispute resolution communication" shall not include the notifications or reports made under subsection 2 of section 435.303 or subsection 8 of section 435.306 or a written agreement as described under section 435.312;

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

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

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

- 17 (4) **"Conflict of interest", any direct or indirect financial or personal interest in the**
18 **outcome of a dispute or any existing or prior financial, business, professional, family, or**
19 **social relationship with any participant in an alternative dispute resolution process that**
20 **is likely to affect the impartiality of the neutral or that may reasonably create an**
21 **appearance of partiality or bias;**
- 22 (5) **"Early neutral evaluation", a process in which a neutral provides parties to a**
23 **dispute with a nonbinding assessment of their dispute;**
- 24 (6) **"In camera", a proceeding held in a judge's chambers or in a courtroom from**
25 **which the public is excluded;**
- 26 (7) **"Mandated reporter", an individual who is required to report abuse or neglect**
27 **under the provisions of section 192.2405, 192.2475, 198.070, 208.912, 210.115, 352.400,**
28 **630.162, or 630.165;**
- 29 (8) **"Mediation", a process in which a neutral facilitates communications among**
30 **the parties and assists the parties in their efforts to reach a voluntary agreement regarding**
31 **the dispute;**
- 32 (9) **"Mediator", a neutral who conducts mediation;**
- 33 (10) **"Neutral", an individual who, acting independently and not as a**
34 **representative, agent, or advocate of any of the parties, assists the parties in their efforts**
35 **to reach a resolution of their dispute through an alternative dispute resolution process;**
- 36 (11) **"Participant", any person or entity, including any neutral or party, who**
37 **participates in an alternative dispute resolution process;**
- 38 (12) **"Party", an individual or entity named as a party in a pending civil action, or**
39 **in an agreement to use an alternative dispute resolution process as described under sections**
40 **435.309 and 435.312;**
- 41 (13) **"Person", an individual; a public or private corporation, business trust, estate,**
42 **trust, partnership, limited liability company, or insurance company; an association; a joint**
43 **venture; a governmental unit, subdivision, agency, or instrumentality of the state; or any**
44 **other legal or commercial entity;**
- 45 (14) **"Proceeding", a judicial, administrative, arbitral, or other adjudicative process**
46 **subject to sections 435.300 to 435.312, including related prehearing and posthearing**
47 **motions, conferences, hearings, and discovery;**
- 48 (15) **"Writing" or "written", a tangible or electronic record of a communication**
49 **or representation, including handwriting, typewriting, printing, photostating,**
50 **photography, audio or video recording, and electronic communication;**
- 51 (16) **"Written agreement", a writing that:**
52 (a) **Contains the essential terms of an agreement; and**

53 **(b) Is signed, executed, or adopted by the parties by any process described under**
54 **subdivision (15) of this section, including electronic signatures as permitted by section**
55 **432.230, with the intent to sign and be bound by the writing and attached to or logically**
56 **associated with the writing.**

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

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

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

11 **(2) Notify the court that all of the parties have agreed to delay such process until**
12 **a date certain, which date may be subsequently modified by the court, to allow for the**
13 **exchange of specified information, the identification of representatives with authority, or**
14 **another identified action or event related to the ability of the parties to participate**
15 **effectively in that process; or**

16 **(3) File a motion for relief from the referral setting forth the reasons for not**
17 **participating if any party, after conferring with all other parties, concludes that referral**
18 **to a nonbinding alternative dispute resolution process has no reasonable chance of helping**
19 **the parties to better understand or resolve one or more of the procedural or substantive**
20 **issues in the matter or there is a compelling circumstance for not participating in the**
21 **alternative dispute resolution process. Once a motion for relief has been filed, the**
22 **alternative dispute resolution process ordered by the court shall not occur until the court**
23 **has ruled on the motion. If the court grants the motion, the matter shall not thereafter be**
24 **referred by the court to an alternative dispute resolution process without compelling**
25 **circumstances, which shall be set out by the court in any order referring the matter to an**
26 **alternative dispute resolution process.**

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

32 **4. A neutral who is appointed by the court or requested by the parties to serve in**
33 **an alternative dispute resolution process under sections 435.300 to 435.312 shall avoid any**
34 **conflict of interest. If the neutral believes that no disqualifying conflict exists, the neutral**
35 **shall:**

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

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

41 **(3) If, after accepting a designation by the parties or the court, the neutral learns**
42 **of any previously undisclosed information that could reasonably suggest a conflict of**
43 **interest, promptly disclose the information to the parties.**

44 **5. After the neutral's disclosure of a conflict, the alternative dispute resolution**
45 **process may proceed if either:**

46 **(1) All parties agree in writing to service by the neutral; or**

47 **(2) An organization independently administering the alternative dispute resolution**
48 **process under rules of procedure that were adopted by a written agreement of the parties**
49 **determines under such rules that the neutral may continue to serve.**

50 **6. Any party who believes a court-appointed neutral has a conflict of interest may**
51 **request that the neutral recuse himself or herself if a conflict is disclosed or otherwise**
52 **discovered. If the neutral declines, the party may timely file a motion with the court for**
53 **disqualification of the neutral. Failure to file a motion waives that objection. On its own**
54 **motion, the court may also review the choice of a neutral in any alternative dispute**
55 **resolution process involving a party that is not represented by counsel and require a**
56 **change of neutral if necessary to protect the rights of the unrepresented party.**

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

6 **2. Evidence or information that is otherwise admissible or subject to discovery,**
7 **including information that would be available to the public under sections 610.010 to**
8 **610.035, shall not become inadmissible or protected from discovery solely by reason of its**
9 **disclosure or use in an alternative dispute resolution process.**

10 **3. A court may determine to admit an alternative dispute resolution communication**
11 **upon motion of a party, which motion shall not reveal the substance of the communication,**

12 and following a hearing only if the court finds that one or more of the exceptions under this
13 subsection apply and the communication is otherwise relevant and admissible. The party
14 seeking admission shall ensure that timely notice is given to the neutral and parties that
15 participated in the alternative dispute resolution process in which the alternative dispute
16 resolution communication was made. Such hearing shall be conducted in camera if
17 requested by a party or if the court determines on its own motion that an in camera
18 proceeding is necessary to ensure the confidentiality of the communications that are the
19 subject to the hearing. The only exceptions to the general rule of nonadmissibility of
20 alternative dispute resolution communications stated under subsection 1 of this section are
21 as follows:

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

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

28 (3) The alternative dispute resolution communication is intentionally used to plan
29 a crime, attempt to commit an offense, or to conceal an ongoing crime or ongoing criminal
30 activity; or

31 (4) The alternative dispute resolution communication is necessary to establish or
32 defend against a claim of professional misconduct or malpractice that is filed against or on
33 behalf of a participant based on conduct occurring during the alternative dispute
34 resolution process.

35 4. The admission of evidence in a proceeding under any of the exceptions stated
36 under subsection 3 of this section shall not in itself render the evidence or any other
37 alternative dispute resolution communication discoverable or admissible for any other
38 purpose or proceeding.

39 5. Any participant in an alternative dispute resolution process has standing to
40 intervene in any proceeding to object to the admissibility of an alternative dispute
41 resolution communication made by that person during or relating to that alternative
42 dispute resolution process. A neutral who participated in an alternative dispute resolution
43 process also has standing to intervene in any proceeding to object to the admissibility of
44 an alternative dispute resolution communication made by the neutral or an agent or
45 employee of a neutral or of an organization through which the neutral provided the
46 alternative dispute resolution services for such process, but the neutral is under no
47 requirement to do so.

48 **6. Except as provided under subsection 7 of this section, no neutral, agent or**
49 **employee of that neutral, or agent or employee of an organization through which the**
50 **neutral provided alternative dispute resolution services shall be subpoenaed or otherwise**
51 **compelled to disclose any alternative dispute resolution communication, including any**
52 **alternative dispute resolution communication that would otherwise fall within the**
53 **exceptions identified under subsection 3 of this section. No neutral who is a licensed**
54 **attorney, nor an agent or employee of such neutral or of an organization through which**
55 **the neutral provided alternative dispute resolution services under sections 435.300 to**
56 **435.312, shall be required to disclose any alternative dispute resolution communication to**
57 **which a reporting obligation might otherwise apply under the rules regulating the**
58 **professional conduct of attorneys.**

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

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

71 **9. The court may order the party or parties seeking admission of an alternative**
72 **dispute resolution communication to pay the costs and fees of the neutral or other person**
73 **participating in an alternative dispute resolution process who intervenes to contest the**
74 **disclosure and admission of alternative dispute resolution communication or who responds**
75 **to a subpoena prohibited under subsection 6 of this section or a subpoena under subsection**
76 **7 of this section.**

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

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

6 **3. Alternative dispute resolution processes included in consumer contracts for**
7 **goods or services shall be independently administered.**

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

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

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

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

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

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

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

6. If the court has not ordered the parties to an alternative dispute resolution process and if the parties do not elect to use sections 435.300 to 435.312, the process shall be regarded as settlement negotiations and subject to the rules of confidentiality that generally apply to such negotiations. If the parties to the dispute have agreed in writing to submit their dispute to that alternative dispute resolution process but have not invoked the protections of sections 435.300 to 435.312, no person who serves as a neutral in such process, nor any agent or employee of that person or of an organization through which the neutral provided the alternative dispute resolution process, shall be subpoenaed or otherwise compelled to disclose any matter revealed in the process of setting up or conducting such alternative dispute resolution process. All settlement agreements are required to be in writing as described under sections 435.300 to 435.312.

~~[435.014. 1. If all the parties to a dispute agree in writing to submit their dispute to any forum for arbitration, conciliation or mediation, then no person~~

3 ~~who serves as arbitrator, conciliator or mediator, nor any agent or employee of~~
4 ~~that person, shall be subpoenaed or otherwise compelled to disclose any matter~~
5 ~~disclosed in the process of setting up or conducting the arbitration, conciliation~~
6 ~~or mediation.~~

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

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