

SECOND REGULAR SESSION

# HOUSE BILL NO. 1456

102ND GENERAL ASSEMBLY

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INTRODUCED BY REPRESENTATIVE VEIT.

3005H.011

DANA RADEMAN MILLER, Chief Clerk

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## AN ACT

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

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Section A. Section 435.014, RSMo, is repealed and five new sections enacted in lieu thereof, to be known as sections 435.300, 435.303, 435.306, 435.309, and 435.312, to read as follows: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

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.

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

18           (4) "Conflict of interest", any direct or indirect financial or personal interest in  
19 the outcome of a dispute or any existing or prior financial, business, professional, family,  
20 or social relationship with any participant in an alternative dispute resolution process  
21 that is likely to affect the impartiality of the neutral or that may reasonably create an  
22 appearance of partiality or bias;

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

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

27           (7) "Mandated reporter", an individual who is required to report abuse or  
28 neglect under the provisions of section 192.2405, 192.2475, 198.070, 208.912, 210.115,  
29 352.400, 630.162, or 630.165;

30           (8) "Mediation", a process in which a neutral facilitates communications among  
31 the parties and assists the parties in their efforts to reach a voluntary agreement  
32 regarding the dispute;

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

34           (10) "Neutral", an individual who, acting independently and not as a  
35 representative, agent, or advocate of any of the parties, assists the parties in their  
36 efforts to reach a resolution of their dispute through an alternative dispute resolution  
37 process;

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

40           (12) "Party", an individual or entity named as a party in a pending civil action,  
41 or in an agreement to use an alternative dispute resolution process as described under  
42 sections 435.309 and 435.312;

43           (13) "Person", an individual; a public or private corporation, business trust,  
44 estate, trust, partnership, limited liability company, or insurance company; an  
45 association; a joint venture; a governmental unit, subdivision, agency, or  
46 instrumentality of the state; or any other legal or commercial entity;

47           (14) "Proceeding", a judicial, administrative, arbitral, or other adjudicative  
48 process, including related prehearing and posthearing motions, conferences, hearings,  
49 and discovery;

50           (15) "Writing" or "written", a tangible or electronic record of a communication  
51 or representation, including handwriting, typewriting, printing, photostating,  
52 photography, audio or video recording, and electronic communication;

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

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

55 (b) Is signed, executed, or adopted by the parties by any process described under  
56 subdivision (15) of this section, including electronic signatures as permitted by section  
57 432.230, with the intent to sign and be bound by the writing and attached to or logically  
58 associated with the writing.

435.303. 1. A court may refer any individual civil case or category of civil cases  
2 to mediation or another nonbinding alternative dispute resolution process either by rule  
3 or 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  
6 by 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  
10 the 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,  
14 or 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  
19 helping the parties to better understand or resolve one or more of the procedural or  
20 substantive issues in the matter or there is a compelling circumstance for not  
21 participating in the alternative dispute resolution process. Once a motion for relief has  
22 been filed, the alternative dispute resolution process ordered by the court shall not occur  
23 until the court has ruled on the motion. If the court grants the motion, the matter shall  
24 not thereafter be referred by the court to an alternative dispute resolution process  
25 without compelling circumstances, which shall be set out by the court in any order  
26 referring the matter to an alternative dispute resolution process.

27 3. In an action referred to a nonbinding alternative dispute resolution process,  
28 discovery may proceed as in any other action before, during, and after the nonbinding  
29 alternative dispute resolution process is held. The court may stay discovery in whole or  
30 in part during the pendency of an alternative dispute resolution process in order to  
31 promote savings in time and expense 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 **a nonbinding alternative dispute resolution process under sections 435.300 to 435.312**  
34 **shall avoid any conflict of interest. If the neutral believes that no disqualifying conflict**  
35 **exists, the neutral shall:**

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

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

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

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

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

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

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

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

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

22           **(1) The alternative dispute resolution communication was made in the presence**  
23 **of a mandated reporter and pertains to abuse or neglect that such person is required by**  
24 **state 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**  
29 **plan a crime, attempt to commit an offense, or to conceal an ongoing crime or ongoing**  
30 **criminal 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**  
33 **on 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**  
43 **resolution process also has standing to intervene in any proceeding to object to the**  
44 **admissibility of an alternative dispute resolution communication made by the neutral or**  
45 **an agent or employee of a neutral or of an organization through which the neutral**

46 provided the alternative dispute resolution services for such process, but the neutral is  
47 under no 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  
51 otherwise compelled to disclose any alternative dispute resolution communication,  
52 including any alternative dispute resolution communication that would otherwise fall  
53 within the exceptions identified under subsection 3 of this section. No neutral who is a  
54 licensed attorney, or an agent or employee of such neutral or of an organization through  
55 which the neutral provided alternative dispute resolution services under sections  
56 435.300 to 435.312, shall be required to disclose any alternative dispute resolution  
57 communication to which a reporting obligation might otherwise apply under the rules  
58 regulating the 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  
61 services may be subpoenaed in an action to enforce a written agreement as described  
62 under subsection 2 of section 435.309, but only for the limited purpose of testifying that  
63 the 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  
66 actions; provided that, such reports shall be limited to a statement that the matter has  
67 been resolved in its entirety, partially resolved, or not resolved and whether future dates  
68 for an alternative dispute resolution process are scheduled. A neutral may also report to  
69 the court that a payment has not been received from one or more parties. A court shall  
70 not require the disclosure of alternative dispute resolution communication in any such  
71 report.

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

       435.309. 1. Unless the parties have entered into a written agreement providing  
2 for entry into a binding alternative dispute resolution process, all alternative dispute  
3 resolution 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**  
2 **435.300 to 435.312 shall apply only when the court has referred an individual civil case**  
3 **or category of cases to a nonbinding alternative dispute resolution process, either by**  
4 **rule or court order, or when the parties enter into a written agreement to resolve their**  
5 **dispute through a nonbinding alternative dispute resolution process expressly providing**  
6 **that sections 435.300 to 435.312 shall apply to such alternative dispute resolution**  
7 **process.**

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

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

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

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

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

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

27           **6. If the court has not referred a case to a nonbinding dispute resolution process**  
28 **pursuant to section 435.303 and if the parties do not elect to use sections 435.300 to**  
29 **435.312, the process shall be regarded as settlement negotiations and subject to the rules**  
30 **of confidentiality that generally apply to such negotiations. If the parties to the dispute**  
31 **have agreed in writing to submit their dispute to that alternative dispute resolution**  
32 **process but have not invoked the protections of sections 435.300 to 435.312, no person**  
33 **who serves as a neutral in such process, nor any agent or employee of that person or of**  
34 **an organization through which the neutral provided the alternative dispute resolution**  
35 **process, shall be subpoenaed or otherwise compelled to disclose any matter revealed in**

36 **the process of setting up or conducting such alternative dispute resolution process. All**  
37 **settlement agreements are required to be in writing as described under sections 435.300**  
38 **to 435.312.**

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

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

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