

SUPREME COURT COMMISSION
ON
ALTERNATIVE DISPUTE RESOLUTION

FIRST ANNUAL REPORT

JULY 1, 2010

COMMISSION MEMBERS

The Honorable Jay A. Daugherty, Chair
Judge, 16th Judicial Circuit
Courthouse 415 East 12th Street
Kansas City, MO 64106
816/881-3613
E-mail: jay.daugherty@courts.mo.gov

Professor Robert G. Bailey
University of Missouri School of Law
217 Hulston Hall
Columbia, MO 65211
573/882-6891
E-mail: BaileyR@missouri.edu

Mr. James B. Condry
1548 E. Primrose Street
Springfield, MO 65804-7928
417/447-2222
E-mail: jim@condrymediates.com

Mr. Michael S. Geigerman
United States Arbitration & Mediation
Midwest, Inc.
Suite 2300, 720 Olive Street
St. Louis, MO 63101
314/231-4642
E-mail: mgeigerman@usam-midwest.com

Mr. Maurice B. Graham
Suite 800, 701 Market Street
St. Louis, MO 63101
314/241-5620
E-mail: mgraham@grgpc.com

Mr. Keith Cutler
21 North Gregory
Kansas City, MO 64114-1105
816-471-8575
kcutler@tippinlawfirm.com

Ms. Nancy E. Kenner
Suite 840, 4717 Grand Avenue
Kansas City, MO 64112
816/931-1400
E-mail: nancy@kcmedmal.com

Mr. John R. Phillips
4801 Main Street, Suite 1000
Kansas City, MO 64112-2551
816/983-8000
E-mail: john.phillips@huschblackwell.com

Ms. Sarah J. Read
1905 Cherry Hill Drive
Columbia, MO 65203
Phone: 573-447-2349
E-mail: sjr@readadr.com

Mr. Richard P. Sher
Sher Corwin LLC
190 Carondelet Plaza, #1100
St. Louis, MO 63105
Phone: (314) 721-5200
E-mail: rsher@shercorwin.com

Professor Karen Tokarz
Washington University School of Law
One Brookings Drive
Seigle Hall, Room 117
St. Louis, MO 63130
314/ 935-6414
E-mail: tokarz@wulaw.wustl.edu



SUPREME COURT OF MISSOURI

en banc

March 31, 2009

In re: Commission on Alternative Dispute Resolution

ORDER

There is hereby established the "Commission on Alternative Dispute Resolution."

The committee shall review the provisions of Rule 17, Rule 88, and the final report of the Commission on Alternative Dispute Resolution Services in Domestic Relations Cases and report to the Court any recommendations for improving the use of alternative dispute resolution services.

In connection with its work, the committee shall:

- Review the national trend toward the adoption of the Uniform Mediation Act and the status and desirability of adoption of the act in Missouri.
- Consider the issues of confidentiality, privilege, the giving of legal advice and other ethical issues in connection with alternative dispute resolution services.
- Assess the dramatically increased use and acceptance of alternative dispute resolution services since the adoption of Rule 17.
- Assess the impact of the proliferation of arbitration clauses in many new areas of business.

In addition, the committee shall examine the use of alternative dispute

resolution services with respect to foreclosure and other proceedings resulting from economic distress and recommend methods for facilitating the use of such services and for the participation of the bar in resolving such disputes.

The committee shall be composed of the following:

Robert G. Bailey, University of Missouri School of Law, Columbia, Missouri

James B. Condry, Springfield, Missouri

Judge Jay Daugherty, Judge, 16th Judicial Circuit

Michael S. Geigerman, St. Louis, Missouri

Maurice Graham, St. Louis, Missouri

Sylvester James, Jr., Kansas City, Missouri (Replaced by Keith Cutler)

Nancy Kenner, Kansas City, Missouri

John R. Phillips, Kansas City, Missouri

Sarah J. Read, Columbia, Missouri

Richard P. Sher, St. Louis, Missouri

Karen Tokarz, Washington University School of Law, St. Louis, Missouri

Judge Jay Daugherty is appointed chair of the committee.

The committee shall meet at such times and places as determined by the chair and members will be reimbursed actual expenses as authorized for state employees.

To the extent the committee believes changes in the rules of court are desirable, it should make recommendations to this Court's civil rules committee. The committee also shall submit any recommended forms to this Court's state judicial records committee prior to submitting such materials to this Court for approval.

The committee shall submit an initial report to this Court on or before September

1, 2009, an annual report on or before July 1, 2010, and a final report on or before July 1, 2011.

Day – to – Day

LAURA DENVIR STITH
Chief Justice

First Annual Report of the Supreme Court ADR Commission

Introduction

Missouri courts, like many other courts around the nation, have long recognized the value of offering an alternative method for resolving legal disputes outside the traditional, adversarial court process. Missouri statutes, Supreme Court Rules, and local court rules provide for alternative dispute resolution (ADR) mechanisms for the resolution of civil disputes, including arbitration, early neutral evaluation, mediation, mini-trial, and summary jury trial, as well as the establishment of other local court ADR programs.

History

In the last fifteen years two Supreme Court Commissions have dealt with ADR issues. In the mid-1990's, the Supreme Court Commission on ADR, chaired by the Honorable Jay A. Daugherty, substantially revised Supreme Court Rule 17, which principally applies to civil cases (revised rule effective July 1, 1997). Later, the Supreme Court Commission on ADR in Domestic Relations, chaired by the Honorable Ron Holliger, was created and subsequently proposed significant changes in ADR for domestic relations cases with some of its proposed changes being adopted.

The Supreme Court ADR Commission

This Commission was created by order of the Supreme Court on March 31, 2009. The Supreme Court ADR Commission was created in an effort to follow up on the work of the mid-1990's Commission and to examine the status and utilization of ADR in Missouri after nearly twenty years of rapid growth in this field of law.

Meetings of the Commission

The work of the Commission in its first full year of existence has dealt largely with narrowing the issues in this burgeoning field, educating the Commission's membership on the depth and breadth of the issues before it, surveying the members of the Missouri Bar on their knowledge of and satisfaction with current ADR practices, and drafting a revised Rule 17. The Commission preliminarily met on five (5) occasions prior to the issuance of its first Interim Report dated September 1, 2009 (May 12; June 9; June 23; July 7; and July 28).

Since the Interim Report, The Commission has met in person on September 29, and December 3, 2009; February 19, 2010; and April 29, 2010. The Commission has also met either as a whole or by subcommittee on several additional occasions utilizing WebEx or conference call. The Commission has strategically divided its members into two subcommittees. The ADR Trends and Resources Subcommittee, chaired by Sarah Read and the UMA/Confidentiality/Ethics Subcommittee, chaired by Michael Geigerman. Through these subcommittees, the Commission has discussed many ADR issues with the most significant discussions centering on the issues presented in the charge to the Commission.

Commission Objectives

The Commission established three broad objectives in its efforts to comply with the charge presented by the Supreme Court:

Objective One: Review, analyze and make recommendations regarding Rule 17 and the Uniform Mediation Act with the related topics of confidentiality and privilege.*

Objective Two: Conduct comprehensive surveys of the bar, the judiciary and the public to measure, among many things, the use of ADR, and the proliferation of arbitration clauses, as well as other topics.

Objective Three: Plan and conduct seminars and CLE to educate, inform and survey the ADR community regarding the progress of the Commission and the state of ADR in Missouri.

*As further noted below, the Commission has prepared a discussion draft that outlines potential revisions to Rule 17 which is attached to this report. We would like to release this report and draft rule for informal comment by the members of the bar and other interested parties so that this input is received before the commission makes its final recommendations to the Court. We plan to gather further comment through surveys and CLE through the fall.

Report of the UMA/Confidentiality/Ethics Subcommittee

The UMA/Confidentiality/ Ethics Subcommittee was formed to help the Commission evaluate the UMA and to consider specific revisions to the present Rule 17. In considering revisions to the Rule, the Subcommittee and, in turn, the Commission considered all arguments pro and con including: (1) a historical analysis of both the UMA and Missouri law; (2) ease of understanding for both counsel and the public; (3) expectations of the participants; (4) symmetry with other states; (5) specific Missouri statutes pertaining to mediation that would be impacted or that would impact the rule; (6) The impact on the courts (urban as well as rural); (7) impact on the bar; and (8) the need for public input. The attached proposed draft is a product of this effort (see appendix).

Consideration of the Uniform Mediation Act (UMA). The UMA was adopted by the National Conference of Commissioners on Uniform State Laws in 2001 and the American Bar Association in 2002. Since then eleven states have adopted the UMA although few have adopted the UMA in whole. The UMA's primary focus is on the issue of confidentiality (admissibility) of mediation communications and is a privilege based statute. The UMA also addresses issues concerning the right to an attorney and conflict of interest by the mediator. The Subcommittee invited Professor Richard Reuben from the University Of Missouri School Of Law to address the subcommittee on two occasions and was also an invited guest at two subsequent meetings of the Commission. Professor Reuben was the Reporter for the UMA and is considered a leading authority on the UMA. The Commission appreciates the advice and insight provided by Professor Reuben. The Commission also considered the privilege based statutes of Florida as well as the admissibility statutes of California and Texas in addition to our own statute, Section 435.014 RSMO.

After thoroughly comparing and contrasting the various options available to the Commission and following considerable discussion between the choices of a privilege based or a non-admissibility based statute, the Commission decided on recommending a rule of non-admissibility. It should be noted that the Commission adopted many of the definitions found in the UMA draft as well as a majority of the exceptions found in the UMA.

Highlights of the proposed draft include:

- a. A comprehensive set of definitions;
- b. A universal mediation expectation for civil cases where demand is in excess of \$25,000 with clearly identified relief language provided;
- c. Attendance requirements were updated to reflect practice and practical problems in the current mediation environment;
- d. Continuing education and training requirements were expanded to reflect national trends and the need to have an educated mediator community.
- e. Consistent with Section 435.014 a clear mandate of non-admissibility has been identified along with clearly defined exceptions
- f. Ethical issues were addressed in the new Rule after seeking input from the Mr. Alan Pratzel, Chief Disciplinary Counsel. Mr. Pratzel addressed both the subcommittee and the Commission on issues surrounding confidentiality and the obligation of attorney/mediators to report professional misconduct. The tension in this area has been noted in the comments to the rules and remains an area where continuing dialogue is needed and welcomed.
- g. Changes in the Rule are and were constrained by the language contained in Section 435.014. The subcommittee and the Commission are appreciative of the suggestions provided by Mr. Bill Thompson, Counsel to the Missouri Supreme Court.

Report of the ADR Trends and Resources Subcommittee

The Commission has made substantial progress in its examination of recent trends in Alternative Dispute Resolution since the adoption of the revised Rule 17 in 1997. It has examined the academic landscape of ADR in the United States and Missouri; reviewed prior ADR surveys conducted in Missouri; completed a new initial survey of the members of the MoBar and judiciary and circulated that for response through the Missouri Bar and through various legal publications; and considered the practice and use of ADR both in Missouri and other states.

Preliminarily, the Commission has found that the use of ADR has increased substantially in the state of Missouri since the adoption of Rule 17 and that most academics, practitioners and judges believe its use will continue to increase in the future. This is particularly true for mediation which our preliminary survey data showed 90% of the respondents had used. Newer forms of ADR like early neutral evaluation, collaborative law, and neutral fact-finding are also beginning to be used. Mediation is used in a wide range of cases, from commercial to personal injury to divorce and custody cases. Respondents mentioned using mediation in such diverse areas as intellectual property, juvenile dispositions, eminent domain, class action, probate and environmental law.

Because of the diverse and rapidly changing nature of the ADR field, this

subcommittee also is focusing on identifying, documenting and summarizing the broad trends that may affect the practice of law over the next few years. It has prepared draft reports in the areas of arbitration, ombudmen, collaborative law, and foreclosure mediation, and anticipates preparing summary reports in the areas of restorative justice and the use of state “conflict resolution offices”. Each report summarizes the applicable trends and contains links for further information and research. We hope that these summaries will help both court personnel and members of the Bar understand and evaluate developments in the field.

Foreclosure and other proceedings resulting from economic distress

How Missouri Might Benefit from Mortgage Foreclosure Mediation: As foreclosure rates have surged over the past three years and the federal response to the growing mortgage foreclosure crisis has proven inadequate, state and local governments and courts across the country have begun developing their own responses to the crisis. One such response is mortgage foreclosure mediation, which requires the lender or mortgage servicer to confer with the homeowner before a foreclosure proceeds to a sale. Evidence from foreclosure mediation programs around the country suggests that when borrowers and lenders come together in the context of a mediation program, they are far more likely to find a mutually beneficial alternative to foreclosure than in the absence of such a program.

Missouri’s 9,080 home foreclosures in the first quarter of 2010 represent a 9.5% increase from the fourth quarter of 2009 and a 24.5% hike from the first quarter of 2009. Nationwide, home foreclosures increased 7.2% during the first quarter and 16% from the first quarter of 2009. Missouri, a non-judicial foreclosure state, has one of the fastest foreclosure processes in the country. The speed of the process prohibits some homeowners from working with their mortgage servicers to achieve meaningful work-outs – from forbearance agreements to loan modifications. A foreclosure mediation program in Missouri has the potential to slow down the process and reduce the number of foreclosures.

The ADR Commission intends to explore the costs and benefits of a foreclosure mediation program for Missouri in the coming year. [Some advocate that Missouri should move from non-judicial foreclosure to judicial foreclosure to provide the safeguards that come with judicial scrutiny, e.g., verifying that the foreclosing party actually owns the mortgage and that the homeowners have been provided access to the federal government Home Affordable Modification Program (HAMP) modification program before the foreclosure. It is not clear whether this issue is beyond the scope of the commission.]

How do mortgage foreclosure mediation programs work? Foreclosure mediation programs bring together lenders and homeowners to explore alternatives to foreclosure. The programs do not require any specific outcomes. The programs only produce an alternative to foreclosure when both homeowners and lenders agree that the alternative is preferable. Otherwise, the foreclosure process moves forward in the same way and on the same schedule as the jurisdiction currently requires. Mediation programs frequently produce one of three alternatives to foreclosure that are better for homeowners, lenders, communities, and courts: (1) new repayment terms that allow the owner to remain in the home and save the lender all the costs and uncertainty associated

with foreclosure; (2) “deeds in lieu of foreclosure,” when the owner simply transfers title to the lender without a court proceeding and the owner receives cash for leaving the property; or (3) a lender-authorized “short sale,” where the lender allows the property to be sold for less than the value of the outstanding mortgage. In many programs, homeowners, with assistance from housing counselors or attorneys (often pro bono), first work with lenders to find alternatives and engage mediators (often pro bono) in the small number of cases where they can’t reach agreement.

What are the benefits of a foreclosure mediation program? Foreclosure mediation programs help homeowners. They provide a powerful boost to efforts to provide at-risk homeowners with housing counseling designed to help them stay in their homes. Many counselors and homeowners experience difficulty identifying, contacting, and meeting with someone authorized to modify a loan. Mediation programs ensure that borrowers meet with such a person. Foreclosure mediation programs help lenders. Mediation often produces outcomes that save lenders time and money, reduce uncertainty, and better preserve the condition of the property at issue. As of September 2009, investors’ losses from foreclosures of first mortgages had risen on average to 65% of the value of the loans. Foreclosure mediation programs help communities and the state. The economic benefits of reducing foreclosures are indisputable. Foreclosure mediation programs help courts. They make efficient use of judicial resources by allowing judges to consider cases with genuine legal issues and have cases that turn on non-legal, financial considerations addressed in context of mediation.

In fact, many foreclosure cases settle before the mediation begins. It appears that the very requirement that parties must confer results in far greater instances of conciliation. When legislatures and courts make a decision to establish a mediation program, they typically bring together a wide range of interested parties and experts to help design the program. These groups include members of the foreclosure plaintiff’s bar, legal aid attorneys, housing counselors, policy experts, community organizations, mediators, and others with a direct stake in the program.

What are other states doing? According to a National Consumer Law Center January 2010 report, “State and Local Foreclosure Mediation Programs: Updates and New Developments,” there are over thirty foreclosure mediation programs in sixteen states (CA, CT, DE, FL, IN, KY, ME, MI, NV, NJ, NM, NY, OH, OR, PA, RI), including non-judicial foreclosure states like Missouri. In Nevada, a non-judicial foreclosure state, the Nevada Supreme Court promulgated a rule that refers foreclosures to court-supervised mediation, mandates notice to homeowners of the right to mediation, and requires that the servicer must, “under confidential cover, provide to the mediator the evaluative methodology used in determining the eligibility or non-eligibility of the [homeowner] for a loan modification.” (Nevada Supreme Court Rule 7(3), effective July 1, 2009.) Significant efforts are underway to establish foreclosure mediation programs through the courts in Illinois, e.g., the Cook County Circuit Court received a \$3.5 million appropriation from the Cook County Board, to develop a foreclosure mediation program that began this spring. Madison County Circuit Court just endorsed a similar program in conjunction with Land of Lincoln Legal Services Assistance Foundation. A number of other circuit courts around the state are considering similar programs.

What are the key components of a successful foreclosure mediation program? 1) **Notice:** Homeowners must be provided notice of the opportunity or right

to engage in mediation prior to foreclosure. If the homeowner responds affirmatively and in a timely manner, the foreclosure process is suspended during the period of mediation.

2) Outreach: Evidence from programs across the country shows that door-to-door outreach increases homeowner participation in foreclosure mediation programs.

3) Housing Counseling and Legal Services: The process is greatly enhanced if housing counseling and legal aid services are provided early in the process to offer the necessary support and advice to homeowners as they work their way through the foreclosure mediation process.

4) Lender Requirements: Lenders are required to provide notice of the opportunity to engage in the mediation process, provide relevant information to the homeowner, and make available a representative with the authority to settle are essential to a successful program.

5) Enforcement: Strict enforcement of program obligations is needed to insure that parties will actually perform them. Ultimately, judges must be able to assure that both parties participate in the program in good faith.

What resources are available to help fund these programs? Successful foreclosure mediation programs require resources, but many of the resources are already being provided. For example, federal, state, and local governments already provide funding for housing counseling and legal services providers already have some funding to assist homeowners. Additional resources typically are needed for administrative costs, mediators (unless operated on a pro bono basis), and community-based outreach. In several states, legislatures have adopted a \$1000 fee on all foreclosure sales. The revenue generated from this fee funds a number of foreclosure prevention activities, including comprehensive foreclosure mediation programs. In Illinois, it was estimated that such a fee would generate more than \$40 million statewide for these efforts.

The Commission and Domestic Relations ADR

The Commission has agreed that ADR in domestic relations cases is beyond the scope and expertise of the Commission; however, it will survey, to a limited extent, in this area to remain open to suggestions from the domestic relations community. The Chair of the ADR Commission, Jay Daugherty, did discuss the work of the past Supreme Court Commission on ADR in Domestic Relations cases with its former chair, Ron Holliger. As the work of that Commission was concluded only a few years ago, the chairs and the members of the ADR Commission agreed the focus of this new commission should center on civil ADR.

The proliferation of arbitration clauses in many new areas of business

The sense of the commission is that arbitration as well as mediation clauses are being used in many different types of businesses, and used far more frequently than when Rule 17 was first adopted. Clauses that begin with informal negotiation, and escalate to mediation and then arbitration are not uncommon between large companies. We have asked questions relating to this issue in the survey and will also address this issue further in the Trends Report which is discussed above.

Appendix

Draft of Rule 17

Introduction: On March 31, 2009, the Supreme Court created the Commission on Alternative Dispute Resolution. In general terms, the charge to the Commission is to review Rule 17, which was last revised in 1995, and report to the Court any recommendations for improving the use of alternative dispute resolution services in the state of Missouri. More specifically, the Commission, chaired by the Honorable Jay A. Daugherty, a Circuit Judge in Jackson County, is charged with reviewing the national trend toward the adoption of the Uniform Mediation Act (UMA); considering confidentiality (in terms of admissibility), and other issues such as disclosure of mediation communications by mediators and the giving of legal advice by neutrals; assessing the increased use and acceptance of ADR in Missouri; and assessing the impact of arbitration clauses in many areas of business.

Since its formation, the Commission has met frequently, reviewed the UMA as well as laws and rules in other states, consulted additional resources, and issued a survey to members of the Bar and to neutrals. The Commission has considered the impact of various changes on the public, the courts and counsel. For reasons described below, the Commission has preliminarily decided to update Rule 17 rather than recommending adoption of the UMA which to date has been adopted in fewer than a dozen states. In updating and modernizing this rule, the Commission has sought to identify and incorporate current "best practices." The Commission is releasing this interim discussion draft to obtain further feedback before issuing a recommended rule. We invite your questions and comments.

You are also invited to contact the Chair or other members of the Commission if you have any other comments or questions regarding the activities of the Commission. The Commission can be reached at moadrcommn@gmail.com.

17.01 DEFINITIONS - PURPOSE

(a) As used in this Rule 17, the following terms mean:

(1) "ADR process" or "alternative dispute resolution process,"

mediation, arbitration, or early neutral evaluation used in conjunction with a civil dispute under this Rule 17. In addition it means any other alternative to litigation to the extent such other alternative is included in a local court rule adopted pursuant to this Rule 17;

(2) "ADR communication," a statement, whether communicated

orally or in writing or by verbal or non-verbal conduct, that either is related to the

subject matter of the dispute made either during an ADR process, or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening an ADR process. The term “ADR communication” does not include a written agreement that meets the requirements of Rule 17.04 or Rule 17.05;

(3) "Arbitration," a procedure in which a neutral, typically one person or a panel of three persons, hears all sides and decides the matter. The parties, by agreement, select the method of determining the arbitrator or arbitrators and determine the rules under which the arbitration will be conducted;

(4) “Conflict of interest,” any direct or indirect financial or personal interest in the outcome of a dispute or any existing or prior financial, business, professional, family, or social relationship with any participant in an ADR process that is likely to affect the neutral’s impartiality or that may reasonably create an appearance of partiality or bias;

(5) "Early neutral evaluation," a process bringing together parties to litigation and their counsel in the early pretrial period to present case summaries before, and receive a non-binding assessment from, an experienced neutral evaluator. The objective is to promote early and meaningful communication concerning disputes, enabling parties to plan their cases effectively and assess realistically the relative strengths and weaknesses of their positions. While this confidential environment provides an opportunity to negotiate a resolution, immediate settlement is not the primary purpose of this process;

(6) “In camera,” a proceeding held in a judge’s chambers or in a courtroom with the public excluded;

(7) "Mediation," a process in which a neutral third party facilitates ADR communication among the parties to promote settlement and assist them in reaching a voluntary agreement regarding their dispute. A mediator may not impose his or her own judgment on the issues for that of the parties;

(8) "Mediator," an individual who conducts mediation;

(9) "Neutral," a person who conducts an ADR process including, without limitation, an arbitrator, mediator, or an early neutral evaluator;

(10) "Participant," a person, including the neutral, that participates in an ADR process;

(11) "Person," an individual; public or private corporation, business trust, estate, trust, partnership, limited liability company, or insurance company; association; joint venture; governmental unit, subdivision, agency, or instrumentality; or any other legal or commercial entity;

(12) "Proceeding," a judicial, administrative, arbitral, or other adjudicative process subject to this Rule 17, including related pre-hearing and post-hearing motions, conferences, and discovery, subject to this Rule 17;

(13) "Written Agreement," an agreement, whether full or partial, that both indicates a clear and present intent of the parties to be bound by that agreement and is signed by the parties. "Written" and "signed" for the purposes of this definition shall have the same meaning as provided in Rule 4-1.0(n).

(b) The purpose of this Rule 17 is to improve the quality of justice and promote timely resolution of claims through settlement satisfactory to the parties. This will help the parties and the courts achieve savings in both time and expense

without sacrificing the quality of justice to be rendered or the right of litigants to jury trial in the event that a settlement satisfactory to the parties is not achieved.

Explanation: The definitions in this section are provided for clarity and to promote consistency in interpretation of the rule. They were informed by the Commission's review of the UMA and other state and federal statutes and rules.

17.02 REFERRAL TO MEDIATION

Subject to the provisions of Rule 17.03, all civil cases shall be referred to mediation if the prayer for relief is in excess of \$25,000. Each circuit is encouraged to provide options for alternative dispute resolution processes in civil cases where the prayer for relief does not exceed \$25,000. Each circuit shall adopt such necessary local rules as will effectuate the purpose and intent of this Rule 17. This Rule 17 shall not apply to those matters that are subject to Rules 88.02 to 88.09.

Explanation: Mediation has proven to be a cost-effective and efficient process for resolving many cases. Providing for referral of all cases, subject to the options in Rule 17.03, will streamline procedures and provide for faster, more economical resolution in many cases. Preliminary survey data available to the Commission at the time it was working on this discussion draft indicated that 93.7% of the respondents were using mediation, more than 75% noted that mediation was either effective or very effective at resolving disputes efficiently and cost effectively, and more than 80% rated mediation as being effective at resolving disputes fairly. Slightly more than 50% of respondents indicated a preference for a court to order mediation in every case and an additional 12.8% indicated that courts should order mediation in certain types of cases as specified in a court rule.

The Commission recognizes that these changes may affect rural county practice more than that in urban circuits, and invites comments on how to make the rule most effective for the greatest number of circuits and cases. The Commission anticipates that its final report will include a proposed model local rule to help the various circuits in carrying out the requirements of the rule. Note also that the notice requirements currently in existing Rule 17.02 are not contained in this draft. The Commission anticipates that issues relating to notice would be addressed in the local rules. An attorney's duty to advise clients regarding ADR options is already addressed by Rules 4-1.4 and 4-2.1 comment 5.

17.03 RELIEF FROM REFERRAL TO MEDIATION, NOTIFICATION, APPOINTMENT, AND ATTENDANCE

(a) If counsel for any party, after conferring with the client, all other attorneys, and self-represented parties, if any, concludes that referral to an ADR process has no reasonable chance of being productive, counsel may:

(1) Notify the court that the parties have chosen to pursue an ADR process different from that ordered by the court;

(2) Request a delay until after specified information is exchanged or an identified event occurs; or

(3) File a request for relief from the referral to an ADR process, setting forth compelling circumstances for not participating in an ADR process.

The parties shall provide such notification or file their written request for delay or relief within ninety (90) days after the filing of the last responsive pleading.

If the court grants the request for relief, the matter shall not thereafter be referred by the court to an ADR process absent either:

(1) A stipulation of the parties; or

(2) Compelling circumstances, which circumstances shall be set out by the court in any order referring the matter to an ADR process.

If the parties subsequently stipulate to a referral to an ADR process, the action shall be referred.

(b) If the parties agree to or are ordered to participate in an ADR process but cannot agree upon the neutral, then the court shall select a neutral from individuals or organizations qualified under Rule 17.06.

(c) Nothing contained in this Rule 17 shall preclude the parties from

agreeing:

(1) To participate in an ADR process other than that ordered by the court as provided in Rule 17.02;

(2) On a different neutral than the one selected by the court either before or after the entry of an order entered pursuant to this Rule 17; or

(3) On a neutral not otherwise identified on any court maintained list.

(d) Except as provided in Rule 17.03(d)(4), attendance in person at an ADR process shall be required as follows:

(1) All named parties and their counsel are required to attend the ADR process in person and possess the knowledge and authority needed for settlement unless excused under Rule 17.03(d)(4);

(A) A party not a natural person (e.g. a corporation or association) satisfies this attendance requirement if represented by a person, other than outside counsel, who has authority to settle and who is knowledgeable about the case;

(B) A unit or agency of government satisfies this attendance requirement if represented by a person who has authority to settle and who is knowledgeable about the facts of the case, the position of the governmental unit or agency, and the procedures and policies under which the governmental unit or agency decides whether to accept proposed settlements. If the action is brought by the government on behalf of one or more individuals, at least one such individual shall attend.

(2) Each party shall be accompanied at the ADR process by either:

(A) The lawyer who will be primarily responsible for handling the trial of the matter; or

(B) In the case of limited representation, the lawyer who is representing the party in the ADR process pursuant to Rule 4-1.2(c).

(3) If the case involves an insured and the insurer's agreement would be necessary to achieve a settlement, insurer representatives who possess the knowledge and authority needed for settlement are required to attend.

(4) A person who is required to attend an ADR process may be excused from attending in person only by agreement of the parties or after a showing to the court that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. If there is no agreement on excusing personal attendance, then a person seeking to be excused must submit a motion to the Court not fewer than 30 days before the date set for the ADR process. The motion shall be served on all counsel and the neutral. The motion shall:

(A) Set forth all considerations that support the request;

(B) Identify an appropriate substitute; and

(C) Indicate whether the other party or parties join in or object to the request.

Explanation: Sections (a) – (c) are intended to promote the self-determination of the parties within the context of referral to an ADR process.

A continuing theme reflected in the comments of many attorneys is concern about the failure of the decision makers to attend mediations. This is addressed in subsection (d). The Commission understands that in many civil actions where there is insurance there will not be a need for the defendant to attend. Likewise it may be impractical to require in some cases the attendance of an insurer. Common sense should prevail as the parties prepare for the mediation. The parties should give themselves plenty of time to seek relief from the court in the event that compromise is not possible. By simply exchanging letters or calling the other party most problems in this area could be resolved.

17.04 ADR PROCESSES NON-BINDING WITHOUT WRITTEN AGREEMENT OF THE PARTIES

At any time during the pendency of a civil action, the parties may enter into a written agreement to attempt to resolve their dispute through an ADR process. All ADR processes, whether or not such a written agreement is entered into, shall be nonbinding unless the parties:

(a) Have entered into a written agreement providing for the entry into a binding ADR process and entry into such an agreement is not prohibited by law; or

(b) Have entered into a written agreement setting forth a settlement of the parties' dispute reached through an ADR process. Such a written agreement shall be binding to the extent not prohibited by law.

Explanation: This section includes the concepts currently in existing Rule 17.01(d).

17.05 PRE-SUIT AND POST-SUIT ELECTION

Prior to the filing of an action or subsequent to the conclusion of an action, the parties to a dispute may enter into a written agreement to attempt to resolve their dispute through an ADR process and may agree that the provisions of Rule 17.07 shall apply to such ADR process.

Explanation: The current Rule 17 is more specific than Section 435.014 RSMo. The differences are most prominent in the areas of confidentiality and the need for written settlement agreements. Many attorneys already draft mediation agreements that incorporate the provisions of Rule 17 in order to enhance the integrity of pre and post litigation mediation, and this provision acknowledges that practice.

17.06 QUALIFICATION OF NEUTRALS: TRAINING AND CONTINUING EDUCATION

(a) To qualify as a Rule 17 mediator, an individual must:

(1) Be an attorney or otherwise qualified through a relevant professional degree or substantial experience.

(2) Have completed at least thirty (30) hours of approved training, as described in Rule 17.06(b);

(3) Complete two (2) hours of continuing legal education related to ADR process in the annual Missouri continuing legal education reporting cycle, if an attorney. Other qualified professionals also must complete at least two hours of continuing education related to ADR process annually. Those individuals who have previously received Rule 17 approval shall not be required to complete the initial training referred to in Rule 17.06(a)(2) However, all Rule 17 mediators are required to attend the continuing education hours referred to in Rule 17.06(a)(3) in order to maintain Rule 17 status.

(b) To qualify for the approved initial training requirement in Rule 17.06(a)(2), a mediation training program must include the following:

(1) Conflict resolution and mediation theory, including causes and dynamics of conflict, interest-based versus positional bargaining, negotiation theory, and models of conflict resolution;

(2) Mediation and co-mediation skills and techniques, including information gathering skills, conflict management skills, listening skills, negotiation techniques, power issues, caucusing, cultural and gender issues, and mediating with self-represented as well as represented individuals;

(3) Mediator conduct, including conflicts of interest, confidentiality, impartiality, ethics, and standards of practice; and

(4) Mediation simulations or role-plays that are critiqued by experienced mediator trainers.

Explanation: The modern trend is to require more hours of initial training for mediators than are required under the existing rules. Most states require significantly more initial training than Missouri does, many up to forty hours. Consistent with the principle of self-determination in choice of neutral and process, the proposed revisions would not require parties to use a Rule 17 mediator. The Commission believes though that if the court is going to provide the designation of "Rule 17 mediator," it should be conferred on those more qualified by training or experience. In this discussion draft the requirements for qualifications are stated broadly in order to invite more definition through comments on the criteria to be applied. The Commission will continue to review this issue.

Preliminary survey data indicated that most mediators continue to update their skills through regular training. This makes sense because mediator skills can be lost if not kept current. Many administering organizations require mediators to obtain ongoing training in order to remain on their panel. For these reasons, the Commission concluded that a minimum of two hours of continuing training per year should be required of all mediators who wish to be on the Rule 17 list.

In addition, the Commission invites comments and suggestions for how to update and maintain a list of mediators meeting the qualifications stated above.

17.07 NON-ADMISSIBILITY OF ADR COMMUNICATIONS

(a) Within ten days after the termination of an ADR process, the parties shall advise the court only whether the parties were successful or unsuccessful in resolving their dispute. Otherwise, as provided in 435.014 RSMo, ADR communications shall not be admissible as evidence in any proceeding, or subject to discovery, except as otherwise provided in Rules 17.07 (c) and (g).

(b) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in an ADR process.

(c) A court may determine to admit an ADR communication upon motion of a participant and following a hearing only if it finds and determines that one or more of the following exceptions applies and the communication is otherwise admissible. This hearing shall be conducted *in camera* if requested by a party or if the court determines on its own motion that an *in camera* proceeding is necessary to ensure the confidentiality of the communications that are subject to the hearing. The only exceptions to this general rule of non-admissibility of ADR communications are as follows:

(1) The ADR communication pertains to child abuse as described in section 210.115, RSMo, and was made in the presence of a required reporter;

(2) The ADR communication is information that would be available to the public under section 610.021, RSMo;

(3) The ADR communication was a substantial threat or statement of a plan to inflict bodily injury capable of causing death or substantial bodily harm reasonably certain to occur; or

(4) The ADR communication is intentionally used to plan a crime, attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity.

(d) Admission of evidence in a proceeding under any of the exceptions stated in Rule 17.07(c) does not render the evidence, or any other ADR communication, discoverable or admissible for any other purpose or proceeding, civil or criminal.

(e) The neutral or any party participating in an ADR process has standing to intervene in any proceeding to object to the admissibility of an ADR

communication.

(f) No individual or organization providing alternative dispute resolution services pursuant to this Rule 17, nor any agent or employee of the individual or organization, shall be subpoenaed or otherwise compelled to disclose any ADR communication. This prohibition includes ADR communications that would otherwise fall within the exceptions identified in Rule 17.07(c).

(g) An individual or organization providing alternative dispute resolution services pursuant to this Rule 17 or any agent or employee of the individual or organization may be called in an action to enforce a written agreement as described in Rule 17.04 only for the limited purpose of testifying that the written agreement was signed by the parties.

(h) This Rule 17.07 shall apply whether its application to the ADR process is by written agreement of the parties as provided in Rule 17.04 or Rule 17.05 or pursuant to court order.

Explanation: After much discussion the Commission decided to revise the current Rule 17 which addresses confidentiality through the non-admissibility of communications, rather than changing to the privilege based structure set out in the Uniform Mediation Act (UMA). The Rules of admissibility/non admissibility are straightforward, are already used by Missouri lawyers, and take into consideration the many competing interests in mediation. However, the Commission carefully studied both the detail and the context of various exceptions to confidentiality set forth in the UMA. The limited exceptions set forth here track certain of the UMA exceptions.

The revisions proposed here are interpretative of Section 435.014 RSMo which provides in part that “Any communication relating to the subject matter of such disputes made during the resolution process by any participant, mediator, conciliator, arbitrator or any other person present at the dispute resolution shall be a confidential communication. No admission, representation, statement or other confidential communication made in setting up or conducting such proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.” The revisions provide guidance on the interpretation of this provision.

Counsel should be mindful that Rule 17 deals with non-admissibility and does not address confidentiality in the context of communications with third parties. The

Commission, the UMA, and most states leave such confidentiality issues to the non-neutral participants.

The Commission further notes the tension among the provisions of Section 435.014 which is quoted above, the ethical standards applicable to mediators (including the standard of confidentiality), and the professional rules of conduct, particularly Rule 4-8.3 governing the reporting of professional misconduct. This tension is recognized although not resolved in the rules of professional conduct (see Rule 4-2.4 comment 2, and Rule 4-1.12, comment 3). The Commission has begun a dialogue with the Office of Disciplinary Counsel on this issue and that dialogue will continue over the next few months. We invite comments on the potential addition of an exception for ADR communications that are sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice that is filed against a participant based on conduct occurring during the ADR process.

17.08 DISCOVERY

In an action referred to an ADR process, discovery may proceed as in any other action, and all motions regarding discovery disputes shall be ruled upon by the court as in any other action. Discovery may take place both before and after an ADR process is held pursuant to this Rule 17.

Explanation: This section is virtually identical to current 17.07.

17.09 CONFLICT OF INTEREST

(a) A neutral shall avoid a conflict of interest or the appearance of a conflict of interest during and after an ADR process. A neutral shall 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.

(b) A neutral shall disclose to participants, as soon as practicable, facts and information relevant to any actual and potential conflicts of interest that are reasonably known to the neutral. If a neutral learns of any previously undisclosed information that could reasonably suggest a conflict of interest after accepting a

designation by the parties, the neutral must promptly disclose the information to the participants. After the neutral's disclosure, the ADR process may proceed if all parties agree to service by the neutral or if an organization that is administering the ADR process pursuant to a written agreement of the parties determines under its rules of procedure that the neutral may continue to serve.

(c) Notwithstanding the agreement of the parties to waive a conflict of interest, a neutral shall withdraw from or decline a designation in a case if the neutral determines that an actual or potential conflict of interest may undermine the integrity of the ADR process.

(d) Any party who believes that a neutral who has been appointed by the court has a conflict of interest may request the neutral to recuse. If the neutral declines, the party may file a motion for disqualification of the neutral with the court. Failure to file a motion waives the objection.

Explanation: The Commission anticipates that all neutrals would comply in any event with existing ethical guidelines, including those relating to impartiality and conflicts.

17.10 REPORTING

Explanation: This subject will be addressed in subsequent versions of this Rule. Comments and suggestions are welcomed.

Foreclosure Citations and Resources:

State and Local Foreclosure Mediation Programs: Updates and New Developments, National Consumer Law Center (January 2010).

Daniel Klaff, Skadden Fellow, Land of Lincoln Legal Assistance Foundation, Establishing a Foreclosure Mediation program in Your Circuit Court: An Overview (2010).

Geoff Walsh, Foreclosure Mediations: Can They Make a Difference? Clearinghouse REVIEW J. Pov. & L & Pol. 355 (Nov/Dec 2009).

www.mortgagemediation.org
www.courtadr.org/specialtopics.php?sec=6