

MISSOURI – EASTERN

September, 2011

VI. ALTERNATIVE DISPUTE RESOLUTION.

Rule 16 - 6.01 Mediation and Early Neutral Evaluation.

The Court may refer appropriate civil cases to Alternative Dispute Resolution (ADR): mediation or early neutral evaluation. The Court may also refer cases to any ADR process that the parties may agree upon.

(A) Mediation.

Mediation is an informal non-binding dispute resolution process in which an impartial neutral facilitates negotiations among the parties to help them reach settlement. A mediator may not impose the mediator's own judgment on the issues for that of the parties. The following cases shall not be referred for mediation:

- (1) appeals from rulings of administrative agencies;
- (2) habeas corpus and extraordinary writs;
- (3) bankruptcy appeals; and
- (4) Social Security cases.

(B) Early Neutral Evaluation.

Early neutral evaluation brings together parties and counsel in the early pretrial period to present case summaries before and receive a non-binding assessment from an experienced neutral evaluator. Immediate settlement is not a primary purpose of this process, though it may lead to settlement negotiations. Any civil case may be appropriate for early neutral evaluation, if the judge believes the parties are likely to benefit mutually from such referral.

(Amended October 1, 2001; effective November 1, 2001.)

(Amended August 11, 2011; effective September 19, 2011.)

Rule 16 - 6.02 Referral to Alternative Dispute Resolution and Duties of Participants; Appointment of Counsel.

(A) Order Referring Case to Alternative Dispute Resolution.

(1) The Court, on its own motion or on the motion of any party, may enter an Order Referring Case to Alternative Dispute Resolution. The Order shall state whether the case is referred to mediation or early neutral evaluation or other mutually agreed ADR process, shall designate a lead counsel who is responsible for coordinating ADR, and shall inform counsel and the parties of their additional obligations regarding ADR.

(2) The Order shall specify a date on which the ADR referral will terminate. Upon motion of a party for good cause shown, the Court may extend the referral termination deadline. In addition, the neutral may elect to extend the deadline for a period not to exceed fourteen additional days

by filing an Alternative Dispute Resolution Compliance Report indicating the neutral's election and the length of the extension. Unless otherwise ordered, referral to ADR does not abate or suspend the action, and no scheduled dates shall be delayed or deferred, including the date of trial.

(3) If the parties agree that the referral to ADR has no reasonable chance of being productive, the parties may jointly move the Court for an order vacating the ADR referral prior to the selection of the neutral.

(B) Duties of Participants.

(1) Attendance by Parties. All named parties and their counsel are required to attend the ADR conference, participate in good faith, and possess the requisite settlement authority unless excused under paragraph (4), below. The attendance requirement is satisfied by appearing in person or by video conference, provided all parties and the neutral agree to video conferencing as an alternative to personal appearance.

(i) **Corporation or Other Entity.** A party other than 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 facts of the case.

(ii) **Government Entity.** 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 government unit's position, and the procedures and policies under which the governmental unit 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 also shall attend.

(2) Counsel. Each party shall be accompanied at the ADR conference by the lawyer who will be primarily responsible for handling the trial of the matter.

(3) Insurers. Insurer representatives are required to attend in person unless excused under paragraph (4), below, if their agreement would be necessary to achieve a settlement.

(4) Request to be Excused. A person who is required to attend an ADR conference may be excused from attending in person only after a showing that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. A person seeking to be excused must submit, no fewer than 14 days before the date set for the conference, a motion to the Judge, simultaneously copying all counsel and the neutral. The motion shall: (I) set forth all considerations that support the request; (ii) identify an appropriate substitute; and (iii) indicate whether the other party or parties join in or object to the request.

(C) Appointment of Counsel.

(1) Upon request of an unrepresented party, the Court may appoint counsel for the limited purpose of providing legal advice and representation in preparation for and during the course of mediation or early neutral evaluation ordered under this rule.

(2) Counsel appointed under this paragraph shall be a member in good standing of the bar of this Court, shall agree to serve without compensation from the party and shall file a Limited Representation Appearance on a form provided by the Clerk of Court confirming counsel's consent to serve pro bono and for the limited purpose of assisting the otherwise unrepresented party in the alternative dispute resolution process ordered for the case in which the appearance is filed. The client shall be required to sign the entry of appearance as an indication of the client's consent to and understanding of the nature of the limited scope representation.

(3) The court-appointed representation shall terminate, and appointed counsel shall have no further obligation to advise or otherwise appear on behalf of the party, when the ADR process is concluded and any resulting settlement agreement is executed. Nothing in this rule prohibits the party and counsel from continuing the legal representation on terms they may negotiate, subject to approval of the court. Appointed counsel may not condition the undertaking of the party's representation on the making of such agreement.

Rule 16 - 6.03. Neutrals.

(A) Certification of Neutrals.

(1) The Court may certify those persons who are eligible to serve as neutrals (mediators or evaluators) in such numbers as the Court deems appropriate. The Court shall have the authority to establish qualifications for and monitor the performance of neutrals, and to withdraw the certification of any neutral. Lists of certified neutrals shall be maintained by the Clerk, and shall be made available to counsel, litigants, and the public for inspection upon request.

(2) To be eligible for certification under this rule a person must:

(a) be admitted to practice law in the highest court of any state or the District of Columbia for at least five years;

(b) be a member in good standing in each jurisdiction where admitted to practice law at the time of application for certification;

(c) complete at least sixteen (16) hours of approved professional training in alternative dispute resolution and mediation skills;

(d) file an application for certification on a form provided by the Clerk; and

(e) agree to serve for reduced or no compensation from a party who has qualified pursuant to paragraph (C)(2) of this rule for appointment of a pro bono neutral.

(3) An attorney certified under this rule who is not admitted to practice law in this Court is bound by the Rules of Professional Conduct as approved and amended from time to time by the Supreme Court of Missouri and this Court's Rules of Disciplinary Enforcement, in accordance

with Local Rule 12.02, to the same extent and under the same conditions as a member of the bar authorized to practice before this Court.

(4) Any member of the bar of this Court who is certified as a neutral shall not for that reason be disqualified from appearing as counsel in any other case pending before the Court.

(5) In January of each even-numbered year, the Clerk shall examine the list of certified neutrals to determine which neutrals did not receive appointments during the previous two years. The Clerk shall notify those neutrals that the Court's record does not show any appointments for those years, and shall solicit their interest in continuing to be carried on the Court's list of certified neutrals. If the neutral desires to remain on the list, the neutral shall submit by March 1 information demonstrating ADR experience and/or training during the previous two years. If such information is not provided the neutral shall be removed from the list.

(B) Appointment of Neutrals.

(1) Within the time prescribed by the Order Referring Case to Alternative Dispute Resolution, the parties must notify the Clerk in writing of the parties' choice of a neutral. If the parties fail timely to select a neutral, the Clerk shall select a neutral from the list and notify the parties.

(2) Notwithstanding subsection (B) (1), the Court, in consultation with the parties, may appoint a neutral who has special subject matter expertise germane to a particular case, whether or not such individual is on the list of certified neutrals.

(3) The Clerk shall send a Notice of Appointment of Neutral to the parties and to the individual designated by the parties, after lead counsel has confirmed that individual's availability. Upon receipt of the Notice of Appointment, lead counsel shall send to the neutral a copy of the Order referring the case to Alternative Dispute Resolution. The appointment shall be effective until the neutral notifies the Court in writing that the referral has been concluded.

(C) Compensation of Neutral.

(1) Unless otherwise agreed by all parties or ordered by the Court, one-half the cost of the neutral's services shall be borne by the plaintiff(s) and one-half by the defendant(s) at the rate contained in the neutral's fee schedule filed with the Court. In a case with third-party defendants, cost shall be divided into three equal shares. A neutral shall not charge or accept in connection with a particular case a fee or thing of value from any source other than the parties. The Court may review the reasonableness of the fee and enter any order modifying the fee. Compensation shall be paid directly to the neutral upon the conclusion of the ADR process. Failure to pay the neutral shall be brought to the Court's attention.

(2) A party who demonstrates a financial inability to pay all or part of that party's pro rata share of the neutral's fee may file a motion asking the Court to appoint a neutral who shall serve pro bono. The Court may waive all or part of that party's share of the fee. A neutral appointed to serve pro bono may apply to the Court for payment of that share of the neutral's fee waived for an indigent party, consistent with regulations approved by the Court. When so ordered by the

Court, payment to the neutral shall be made by the Clerk from the Attorney Admission Fee Non-Appropriated Fund. Other parties to the case who are able to pay the fee shall bear their pro rata portions of the fee.

(D) Disqualification of Neutral.

(1) The term “conflict of interest” as used in this rule means any direct or indirect financial or personal interest in the outcome of a dispute, or any existing or prior business, professional, family or social relationship with any participant in an ADR process which is likely to affect the neutral’s impartiality or which may reasonably create an appearance of partiality or bias.

(2) A neutral shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation or early neutral evaluation. A neutral shall make a reasonable inquiry to determine whether there are any facts that would cause a reasonable person to believe that an actual or potential conflict of interest exists for the neutral in connection with service in a particular case referred to ADR by the Court.

(3) A neutral shall disclose to participants, as soon as practicable, all facts and information relevant to any actual and potential conflicts of interest that are reasonably known to the neutral. If, after accepting a designation by the parties, a neutral learns any previously undisclosed information that could reasonably suggest a conflict of interest, the neutral must promptly disclose the information to the participants. After the neutral’s disclosure, the ADR may proceed if all parties agree to service by the neutral.

(4) 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 mediation or early neutral evaluation.

(5) Any party who believes that an assigned neutral 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. Failure to file a motion will waive the objection.

(E) Unavailability of Neutral. A neutral who cannot serve within the period of referral shall notify lead counsel who will arrange for selection of a different neutral by agreement of the parties or by the Clerk.

Rule 16 - 6.04. Communications Concerning Alternative Dispute Resolution.

(A) Confidentiality.

Alternative dispute resolution proceedings are private and confidential. A neutral may exclude all persons other than the named parties and their counsel from ADR conferences. Other

individuals may participate with the consent of the neutral, provided they agree to the rules pertaining to confidentiality. All written and oral communications made or disclosed to the neutral are confidential and may not be disclosed by the neutral, any party, or other participant, unless the parties otherwise agree in writing. Documents created by the parties for use by the neutral shall not be filed with the Court. The neutral shall not testify regarding matters disclosed during ADR proceedings. This rule does not prohibit or limit the enforcement of agreements or the collection of non-identifying information for Court-approved research and evaluation purposes, or the filing of the ADR compliance report.

(B) Pre-Mediation Ex Parte Communication.

The neutral designated in a case may communicate privately and ex parte with counsel and unrepresented parties prior to the commencement of the formal dispute resolution process.

*(Amended October 1, 2001; effective November 1, 2001)
(Paragraph B amended August 19, 2005; effective September 20, 2005)*

Rule 16 - 6.05. Reporting Requirements.

(A) Failure to Participate in ADR Process in Good Faith.

The neutral shall report to the judge any willful or negligent failure to attend any ADR conference, to substantially comply with the Order Referring Case to Alternative Dispute Resolution, or otherwise participate in the ADR process in good faith. The judge may impose any sanctions deemed appropriate.

(B) Compliance Certification.

Within 14 days after the ADR referral is concluded, the neutral shall file with the Court an Alternative Dispute Resolution Compliance Report on a form provided by the Clerk.

(C) Report of Settlement.

If the parties settle any claim during the ADR referral, a written settlement agreement, a stipulation for dismissal, a motion for leave to voluntarily dismiss, or a proposed consent judgment, signed by all parties and counsel, shall be filed with the Court no later than fourteen (14) days after the last ADR conference.

(D) Proposed Litigation Plan.

If an ADR referral results in decisions or agreements regarding scheduling or other case management matters, the parties shall file a proposed litigation plan or motion to amend an existing Case Management Order with the Court no later than fourteen (14) days after the last ADR conference.