A first look at the new discussion draft for Rule 17

by Michael Geigerman

On September 2, 2010, the Report Of The Supreme Court Commission On Alternative Dispute Resolution was released. The appendix to the Report contains a discussion draft of possible revisions to Rule 17. The Report and draft are the product of over a year and half of meetings, discussions, and vigorous debate among Commission members. The Report and draft can be found at http://moadrcommn.wordpress.com/.

Before summarizing the significant portions of the discussion draft, a brief overview is in order. First, the draft represents the identification and recommendation of several best practice concepts.

Second, the draft, while substantially complete is still a work in progress and comments from the Bench and Bar are welcomed before the Commission recommends the adoption of a final version. The comment period will end November 15, 2010. Comments can be sent to moadrcommn@gmail.com or any Commission member. Their names and email addresses are contained in the Report.

Third, the Commission is also encouraging all interested parties to participate in a survey. The URL for the survey is https://www.surveymonkey.com/s/eval_rule17.

Fourth, the Report of the Commission provides a summary of the discussion and basis for the decisions reached.

Finally, explanatory notes accompany each section to inform the reader of the issues behind the suggested revisions.

17.01(a): Section 17.02(a) provides an extensive listing of applicable definitions beginning with the definition of "ADR process" and concluding with the definition of "written agreement". The Commission selected the most comprehensive definitions available after reviewing the Uniform Mediation Act as well as other state and federal rules and statutes.

17.02: Section 17.02 contains one of the three significant changes from the current Rule by providing that "all civil cases shall be referred to mediation if the prayer for relief is in excess of $25,000.00." The various circuits courts are "encouraged to provide options for alternative dispute resolution processes for civil cases where the prayer" is less than $25,000.00. Further, the courts are directed to adopt local rules to implement the new rule. As the explanatory notes indicate, the Commission was mindful that the threshold for inclusion might not play well in smaller circuits. The Commission looks forward to suggestions to make the new rule practical for those circuits. One of the goals of the Commission over the next year will be to develop a model set of local rules.

17.03(a): As in the current Rule 17, relief from the order compelling mediation is provided. However, delay/relief is time sensitive and Section 17.03(a) contains many details which will require the advocate to carefully study this section.

17.03(d): This section addresses the issue of attendance and adopts in large part the United States District Court E.D. Mo. Rule 6-6.02(B). Insurance representatives are required to attend where appropriate 17.03(d)(3). Still, the parties are given the chance to agree on who needs to attend. Failing that, the parties would need to seek relief from the court 17.03(d)(4).

17.04: Section 17.04 states that a written agreement is required for there to be an effective settlement agreement. Williams v. Kan. City Title Loan Co. Inc., WD70941, WD70969 (Mo. App., July, 2010) provides an excellent analysis of the current Rule 17 and the requirement of a written settlement agreement. Section 435.014 RSMo does not require a written settlement agreement. The Commission was fully cognizant of the difference between Section 435 and the draft document. It would seem prudent for counsel and mediator in a non Rule 17 case to provide in the agreement to mediate that a written settlement agreement be executed for the process to have a binding effect.

17.05: Recognizing the more precise language of the discussion draft, Section 17.05 permits parties who would not otherwise be subject to Rule 17, to agree in writing to be bound by the confidentiality provisions of Section 17.07.

17.06: The second significant change concerns the amount of training and continuing education expected of Rule 17 mediators. Initial training of 30 hours will now be required pursuant to 17.06(a). In order to remain qualified as a Rule 17 mediator, the neutral will need to complete two hours of continuing education annually per section 17.06(b). Current Rule 17 mediators are grandfathered into the initial training requirement at section 17.06(a)(3).

Raising the training requirements and expecting designated neutrals to continue their education is consistent with national trends and should not become a bar to entry into the field. Section 17.03(c) provides that the parties are free to choose a mediator who is not on a court maintained list.

17.07: Much of the work of the Commission centered on a discussion of

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Resolution 111 may have been the issue taken up by the House that received the most press. The resolution itself simply provides "[u]rges state, territorial and tribal governments to eliminate all of their legal barriers to civil marriage between two persons of the same sex who are otherwise eligible to marry". The resolution was co-sponsored by a laundry list of bar associations, commissions, ABA sections and divisions. No substantive opposition was voiced. However, there was some concern raised by one member of the House regarding the impact on membership should the ABA pass the resolution. Objections based on membership concerns or germaneness of issues to the ABA and the practice of law have been raised from the well of the House in the past, some with notable success. Such concerns are never off the radar of most House members I have spoken with. The counter argument was perhaps best expressed by ABA past president Robert J. Grey, Jr. Past president Grey made these two points: the resolution does not ask governments to undertake any affirmative act other than to remove barriers; and the concept of "marriage" as a legal status touches nearly every area of law. Regarding the latter point, he cited specifically the impact of "marriage" on custody, probate, tax, adoption, real property, insurance, asset protection and health care. Ultimately, the resolution passed with very little dissent. In the end, for me the issue came down to equal protection under the law in combination with the problems presented by a constantly moving target in trying to advise clients in same-sex relationships as to their legal rights and responsibilities.

There is a tremendous amount of important first-rate work being done by the American Bar Association. Even if some might disagree with a few decisions coming out of the ABA, there can be no question that the interest of justice under the law, and the integrity of the profession and the American legal system are of primary focus.

In an environment where all bar associations are suffering (including BAMSL and the ABA), it is my hope that you can glean from this some evidence of the importance of the organized bar to our profession. ■

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the admissibility/non-admissibility of mediation communications. The current Rule 17 and Section 435.014 both deal with confidentiality in terms of non-admissibility of mediation communication. They stand in stark contrast to the Uniform Mediation Act's multi-level privilege structure. After considerable debate, the Commission determined to continue the non-admissibility structure and the draft provides a stronger, clearer version of what is of not admissible. The draft also provides interpretation to Section 435.014. Of significant import is that the draft creates four important exceptions "...to this general Rule of non-admissibility of ADR communications...." Neither the current Rule or the current draft nor Section 435.014, or for that matter, the Uniform Mediation Act and most other states, address the issue of confidentiality with respect to third parties.

The mediator may only testify that a "written agreement was signed by the parties."[(17.07(g)]

17.09: A new conflict of interest section was added. Section 17.09 tracks in substantial part the United States District Court E. D. Mo. Rule 16-6.03(D).

In conclusion, this writer believes that the suggested changes to Rule 17 are a significant, positive improvement over the current Rule. Furthermore, these revisions represent a common sense, practical approach to mediation issues in the 21st century and will make Missouri a leader in Alternative Dispute Resolution. ■

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