

STATE OF MINNESOTA

IN SUPREME COURT

C5-87-843

PROMULGATION OF AMENDMENTS
TO THE MINNESOTA GENERAL RULES
OF PRACTICE

ORDER

WHEREAS, the Alternative Dispute Resolution Review Board recommended that a Code of Ethics for neutrals be added to Rule 114 of the Minnesota General Rules of Practice, and

WHEREAS, the Supreme Court held a hearing on the proposed code on April 24, 1997, and

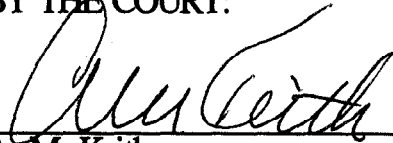
WHEREAS, the Supreme Court has reviewed the recommendations and is fully advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. The attached Code of Ethics for neutrals under Rule 114 of the Minnesota General Rules of Practice be, and the same hereby is, prescribed and promulgated for the regulation of practice and procedure in the courts of the State of Minnesota.
2. The Code of Ethics shall be effective upon filing of this order.
3. The inclusion of Advisory Task Force Comments is made for convenience and does not reflect court approval of the comments made therein.

DATED: August 27, 1997

BY THE COURT:


A. M. Keith
Chief Justice

OFFICE OF
APPELLATE COURTS

AUG 27 1997

FILED

RULE 114

CODE OF ETHICS

INTRODUCTION

Rule 114 of the Minnesota General Rules of Practice provides that alternative dispute resolution (ADR) must be considered for nearly all civil cases filed in district court. The ADR Review Board, appointed by the Supreme Court, approves individuals and organizations who are qualified under Rule 114 to act as neutrals in court-referred cases.

Individuals and organizations approved by the ADR Review Board consent to the jurisdiction of the Board and to compliance with this Code of Ethics. The purpose of this code is to provide standards of ethical conduct to guide neutrals who provide ADR services, to inform and protect consumers of ADR services, and to ensure the integrity of the various ADR processes.

In order for ADR to be effective, there must be broad public confidence in the integrity and fairness of the process. Neutrals have a responsibility not only to the parties and to the court, but also to the continuing improvement of ADR processes. Neutrals must observe high standards of ethical conduct. The provisions of this Code should be construed to advance these objectives.

Neutrals should orient the parties to the process before beginning a proceeding. Neutrals should not practice, condone, facilitate, or promote any form of discrimination on the basis of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age. Neutrals should be aware that cultural differences may affect a party's values and negotiating style.

This introduction provides general orientation to the Code of Ethics. Comments accompanying any rule explain and illustrate the meaning and purpose of the rule. The Comments are intended as guides to interpretation but the text of each rule is authoritative. Failure to comply with any provision in this Code of Ethics may be the basis for removal from the roster of neutrals maintained by the Office of the State Court Administrator and/or for such other action as may be taken by the Minnesota Supreme Court.

Violation of a provision of this Code shall not create a cause of action nor shall it create any presumption that a legal duty has been breached. Nothing in this Code should be deemed to establish or augment any substantive legal duty on the part of neutrals.

Rule I. IMPARTIALITY: A neutral shall conduct the dispute resolution process in an impartial manner and shall serve only in those matters in which she or he can remain impartial and evenhanded. If at any time the neutral is unable to conduct the process in an impartial manner, the neutral shall withdraw.

Comment:

1. The concept of impartiality of the neutral is central to all alternative dispute resolution processes. Impartiality means freedom from favoritism or bias either by word or action, and a commitment to serve all parties as opposed to a single party.

Rule II. CONFLICTS OF INTEREST: A neutral shall disclose all actual and potential conflicts of interest reasonably known to the neutral. After disclosure, the neutral shall decline to participate unless all parties choose to retain the neutral. The need to protect against conflicts of interest shall govern conduct that occurs during and after the dispute resolution process. Without the consent of all parties, and for a reasonable time under the particular circumstances, a neutral who also practices in another profession shall not establish a professional relationship in that other profession with one of the parties, or any person or entity, in a substantially factually related matter.

Comments:

1. A conflict of interest is any direct or indirect financial or personal interest in the outcome of the proceeding or any existing or past financial, business, professional, family or social relationship which is likely to affect impartiality or which might reasonably create an appearance of partiality or bias. If all parties agree to proceed after being informed of conflicts, the neutral may proceed with the case. If, however, the neutral believes that the conflict of interest would inhibit the neutral's impartiality, the neutral should decline to proceed.
2. Guidance on these conflict of interests issues may be found in the cases under statutes regarding challenges to arbitration awards or mediated settlement agreements on the grounds of fraud for nondisclosure of a conflict of interest or material relationship or for partiality of an arbitrator or mediator. (Minnesota Civil Mediation Act, Uniform Arbitration Act, Federal Arbitration Act.)
3. In deciding whether to establish a relationship with one of the parties in an unrelated matter, the neutral should exercise caution in circumstances which would raise legitimate questions about the integrity of the ADR process.
4. A neutral should avoid conflicts of interest in recommending the services of other

professionals.

5. The neutral's commitment must be to the parties and the process. Pressures from outside of the process should never influence the neutral's conduct.
6. There is no intent that the prohibition established in this rule which applies to an individual neutral shall be imputed to an organization, panel or firm of which the neutral is a part. However, the individual neutral should be mindful of the confidentiality requirements in Rule IV of this Code and the organization, panel, or firm should exercise caution.

Rule III. COMPETENCE: A neutral shall serve as a neutral only when she/he has the necessary qualifications to satisfy the reasonable expectations of the parties.

Comments:

1. Any person on the Minnesota Statewide ADR-Rule 114 Neutral Roster may be selected as a neutral, provided that the parties are satisfied with the neutral's qualifications. A person who offers neutral services gives parties and the public the expectations that she or he is competent to serve effectively as a neutral. A neutral should decline appointment, request technical assistance, or withdraw from a dispute which is beyond the neutral's competence.
2. Neutrals must provide information regarding their relevant training, education and experience to the parties (Minnesota Civil Mediation Act.)

Rule IV. CONFIDENTIALITY: The neutral shall maintain confidentiality to the extent provided by Rule 114.08 and 114.10 and any additional agreements made with or between the parties.

Comment:

1. A neutral should discuss issues of confidentiality with the parties before beginning an ADR process including limitations on the scope of confidentiality and the extent of confidentiality provided in any private sessions that a neutral holds with a party.
2. Rule 114.08 reads: Confidentiality
 - (a) Evidence. Without the consent of all parties and an order of the court, or except as provided in Rule 114.09(e)(4), no evidence that there has been an ADR proceeding or any fact concerning the proceeding may be admitted in a trial de novo or in any subsequent proceeding involving any

of the issues or parties to the proceeding.

- (b) **Inadmissibility.** Statements made and documents produced in non-binding ADR processes which are not otherwise discoverable are not subject to discovery or other disclosure and are not admissible into evidence for any purpose at the trial, including impeachment, except as provided in paragraph (d).
- (c) **Adjudicative Evidence.** Evidence in consensual special master proceedings, binding arbitration, or in non-binding arbitration after the period for a demand for trial expires, may be used in subsequent proceedings for any purpose for which it is admissible under the rules of evidence.
- (d) **Sworn Testimony.** Sworn testimony in a summary jury trial may be used in subsequent proceedings for any purpose for which it is admissible under the rules of evidence.
- (e) **Records of Neutral.** Notes, records, and recollections of the neutral are confidential, which means that they shall not be disclosed to the parties, the public, or anyone other than the neutral, unless (1) all parties and the neutral agree to such disclosure or (2) required by law or other applicable professional codes. No record shall be made without the agreement of both parties, except for a memorandum of issues that are resolved.

3. Rule 114.10 reads: Communication with Neutral

- (a) **Adjudicative Processes.** The parties and their counsel shall not communicate ex parte with an arbitrator or a consensual special master or other adjudicative neutral.
- (b) **Non-Adjudicative Processes.** Parties and their counsel may communicate ex parte with the neutral in non-adjudicative ADR processes with the consent of the neutral, so long as the communication encourages or facilitates settlement.
- (c) **Communications to Court During ADR Process.** During an ADR process the court may be informed only of the following:
 - (1) The failure of a party or an attorney to comply with the order to attend the process;
 - (2) Any request by the parties for additional time to complete the ADR

process;

- (3) With the written consent of the parties, any procedural action by the court that would facilitate the ADR process; and
 - (4) The neutral's assessment that the case is inappropriate for that ADR process.
- (d) **Communications to Court After ADR Process.** When the ADR process has been concluded, the court may only be informed of the following:
- (1) If the parties do not reach an agreement on any matter, the neutral should report the lack of an agreement to the court without comment or recommendations;
 - (2) If agreement is reached, any requirement that its terms be reported to the court should be consistent with the jurisdiction's policies governing settlements in general; and
 - (3) With the written consent of the parties, the neutral's report also may identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.

Rule V. QUALITY OF THE PROCESS: A neutral shall work to ensure a quality process. A quality process requires a commitment by the neutral to diligence and procedural fairness. A neutral shall not knowingly make false statements of fact or law. The neutral shall exert every reasonable effort to expedite the process including prompt issuance of written reports, awards, or agreements.

Comments:

1. A neutral should be prepared to commit the attention essential to the ADR process.
2. A neutral should satisfy the reasonable expectations of the parties concerning the timing of the process.
3. A neutral should not provide therapy to either party, nor should a neutral who is a lawyer represent either party in any matter during an ADR process.
4. A neutral should withdraw from an ADR process when incapable of serving or when unable to remain neutral.

5. A neutral should withdraw from an ADR process or postpone a session if the process is being used to further illegal conduct, or if a party is unable to participate due to drug or alcohol abuse, or other physical or mental incapacity.

Rule VI. ADVERTISING AND SOLICITATION: A neutral shall be truthful in advertising and solicitation for alternative dispute resolution. A neutral shall make only accurate and truthful statements about any alternative dispute resolution process, its costs and benefits, the neutral's role and her or his skills or qualifications. A neutral shall refrain from promising specific results.

In an advertisement or other communication to the public, a neutral who is on the Roster may use the phrase "qualified neutral under Rule 114 of the Minnesota General Rules of Practice." It is not appropriate to identify oneself as a "certified" neutral.

Rule VII. FEES: A neutral shall fully disclose and explain the basis of compensation, fees and charges to the parties. The parties shall be provided sufficient information about fees at the outset to determine if they wish to retain the services of a neutral. A neutral shall not enter into a fee agreement which is contingent upon the outcome of the alternative dispute resolution process. A neutral shall not give or receive any commission, rebate, or similar remuneration for referring a person for alternative dispute resolution services.

Comments:

1. The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement.
2. A neutral who withdraws from a case should return any unearned fee to the parties.

MEDIATION:

Rule I. SELF-DETERMINATION: A mediator shall recognize that mediation is based on the principle of self-determination by the parties. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. The primary responsibility for the resolution of a dispute and the shaping of a settlement agreement rests with the parties. A mediator shall not require a party to stay in the mediation against the party's will.

Comments:

1. The mediator may provide information about the process, raise issues, offer opinions about the strengths and weaknesses of a case, draft proposals, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties should be given the opportunity to consider all proposed options. It is acceptable for the mediator to suggest options in response to parties' requests, but not to coerce the parties to accept any particular option.
2. A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.