

THE SUPREME COURT OF MINNESOTA  
CONTINUING EDUCATION  
FOR STATE COURT PERSONNEL  
ADR PROGRAM

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CX-89-1863

CS-87-843

MEMORANDUM

TO: Minnesota Supreme Court

FROM: Kent J. Wagner, Associate Director 

DATE: November 18, 1999

SUBJECT: Code of Ethics Enforcement Procedures for Rule 114

OFFICE OF  
APPELLATE COURTS

NOV 19 1999

**FILED**

The attached Code of Ethics Enforcement Procedures for the Rule 114 Ethics Code for Neutrals is submitted by the Alternative Dispute Resolution Review Board for consideration by the Court for adoption. The Enforcement Procedures were drafted by the Review Board with input and comments from many parties including the Alternative Dispute Resolution Section of the Minnesota State Bar Association.

I have included two copies of the ADR Review Boards final draft of the Enforcement Procedures. One includes *drafting not*, highlighting issues the Board feels the Court will need to address in considering the procedures. The second version does not include *drafting comments* but does have *advisory comments* which the Board feels should be published as part of the Rule.

# Code of Ethics Enforcement Procedure

Final ADR Review Board Draft 10/01/99

NOV 19 1999

**FILED**

## INTRODUCTION

Inclusion on the list of qualified neutrals pursuant to Minnesota General Rules of Practice 114.13 is a conditional privilege, revocable for cause.

### I. SCOPE

This procedure applies to complaints against any individual or organization (neutral) placed on the roster of qualified neutrals pursuant to Rule 114.13 or serving as a court appointed neutral pursuant to 114.05(b) of the Minnesota General Rules of Practice.

#### *Advisory Comment*

*Minn. R. Gen. Prac. 114.02(b): "Neutral. A 'neutral' is an individual or organization that provides an ADR process. A 'qualified neutral' is an individual or organization included on the State Court Administrator's roster as provided in Rule 114.12. An individual neutral must have completed the training and continuing education requirements provided in Rule 114.13. An individual neutral provided by an organization also must meet the training and continuing education requirements of Rule 114.13. Neutral fact-finders selected by the parties for their expertise need not undergo training nor be on the State Court Administrator's roster."*

### II. PROCEDURE

- A. A complaint must be in writing, signed by the complainant, and mailed or delivered to the ADR Review Board at 25 Constitution Avenue, Suite 140, St. Paul, MN 55155. The complaint shall identify the neutral and must specify facts that form the basis of the complaint.

#### *Advisory Comment*

*A complaint form is available from the Supreme Court Office of Continuing Education ADR Program by calling 651-297-7590 or emailing [adr@courts.state.mn.us](mailto:adr@courts.state.mn.us)*

- B. The Board shall review the complaint to determine whether the allegation(s), if true, constitute a violation of the Code of Ethics.

#### *Advisory Comment*

*There may be situations when a qualified neutral is providing ADR services outside the scope of Minn. Gen. R. Prac. 114.05(b). The Board will consider the full context of the alleged misconduct, including whether the neutral was subject to other applicable codes of ethics, or representing a "qualified organization" at the time of the alleged misconduct.*

- C. If the allegation(s) of the complaint do not constitute a violation of the Code of Ethics, the complaint shall be dismissed and the complainant and the neutral shall be notified in writing.
- D. If the Board concludes that the allegations of the complaint, if true, may constitute a violation of the Code of Ethics, the Board will undertake such review, investigation, and action it deems appropriate. In all such cases, the Board shall send to the neutral, by certified mail, a copy of the complaint, a list identifying the ethical rules which may have been violated, and a request for a written response to the allegations and to any specific questions posed by the Board. It shall not be considered a violation of Rule 114.08(e) of the Minnesota General Rules of Practice or Rule IV of the Code of Ethics, Rule 114 Appendix, for the neutral to disclose notes, records, or recollections of the ADR process complained of as part of the complaint procedure. Except for good cause shown, if the neutral fails to respond to the complaint in writing within thirty (30) days, the allegation(s) shall be deemed admitted.
- E. The Board, at its discretion, may refer the complainant and neutral to mediation conducted by a volunteer, qualified neutral to resolve the issues raised by the complainant. Mediation shall proceed only if both the complainant and neutral consent. If the complaint is resolved through mediation, the Board shall dismiss the complaint, unless the resolution includes sanctions to be imposed by the Board. If no agreement is reached in mediation, the Board shall determine whether to proceed further.

*Advisory Comment*

*The Board, at its discretion, may establish a complaint review panel comprised of members of the Board. Staff under the Board's direction and control may also conduct investigations.*

- F. After review and investigation, the Board shall advise the complainant and neutral in writing of the Board's proposed action on the complaint. Upon request, the neutral shall be entitled to a hearing before a three-member panel of the Board to contest proposed sanctions or findings. The neutral shall have the right to defend against all charges and shall have the right to be represented by an attorney, to examine and cross-examine witnesses, to compel the attendance of witnesses to testify, and to compel the production of documents and other evidentiary matter through the subpoena power of the panel. The Board shall make an electronic recording of the proceedings.
- G. The neutral may appeal the panel's decision to the full Board. The appeal shall be on the existing record. If the neutral appeals, the record will be transcribed at the neutral's expense.

### **III. SANCTIONS**

- A. The Board may impose sanctions, including but not limited to:
  - 1. Issue a private reprimand.
  - 2. Designate the corrective action necessary for the neutral to remain on the roster.
  - 3. Notify the appointing court and any professional licensing authority with which the neutral is affiliated of the complaint and its disposition.
  - 4. Publish the neutral's name, a summary of the violation, and any sanctions imposed.
  - 5. Remove the neutral from the roster of qualified neutrals, and set conditions for reinstatement.
- B. Sanctions against an organization may be imposed for its ethical violation and its member's violation if the member is acting within the rules and directives of the organization.

### **IV. CONFIDENTIALITY**

- A. Unless and until sanctions are imposed, all files, records, and proceedings of the Board that relate to or arise out of any complaint shall be confidential, except:
  - (1) As between Board members and staff;
  - (2) Upon request of the neutral, the file maintained by the Board, excluding its work product, shall be provided to the neutral;
  - (3) As otherwise required or permitted by rule or statute; and
  - (4) To the extent that the neutral waives confidentiality.
- B. If sanctions are imposed against any neutral pursuant to Section III A (2) – (5), the sanction shall be of public record, and the Board file shall remain confidential.
- C. Nothing in this rule shall be construed to require the disclosure of the mental processes or communications of the Board or staff.

V. **PRIVILEGE; IMMUNITY**

- A. **Privilege.** A statement made in these proceedings is absolutely privileged and may not serve as a basis for liability in any civil lawsuit brought against the person who made the statement.
- B. **Immunity.** Board members and staff shall be immune from suit for any conduct in the course of their official duties.

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*There may be situations when a qualified neutral is providing ADR services outside the scope of Minn. Gen. R. Prac. 114.05(b). The Board will consider the full context of the alleged misconduct, including whether the neutral was subject to other applicable codes of ethics, or representing a "qualified organization" at the time of the alleged misconduct.*

- C. If the allegation(s) of the complaint do not constitute a violation of the Code of Ethics, the complaint shall be dismissed and the complainant and the neutral shall be notified in writing.
- D. If the Board concludes that the allegations of the complaint, if true, constitute a violation of the Code of Ethics, the Board will undertake such review, investigation, and action it deems appropriate. In all such cases, the Board shall send to the neutral, by certified mail, a copy of the complaint, a list identifying the ethical rules which may have been violated, and a request for a written response to the allegations and to any specific questions posed by the Board. It shall not be considered a violation of Rule 114.08(e) of the Minnesota General Rules of Practice or Rule IV of the Code of Ethics, Rule 114 Appendix, for the neutral to disclose notes, records, or recollections of the ADR process complained of as part of the complaint procedure. Except for good cause shown, if the neutral fails to respond to the complaint in writing within thirty (30) days, the allegation(s) shall be deemed admitted.
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*Advisory Comment*

*The Board, at its discretion, may establish a complaint review panel comprised of members of the Board. Staff under the Board's direction and control may also conduct investigations.*

*[Drafting Note]*

*The Board recommends that the Supreme Court amend Rule 114.08(e) of the Minnesota General Rules of Practice or Rule IV of the Code of Ethics to make the rule governing confidentiality of a neutral's notes, records and recollections consistent with this proposed enforcement code procedure. In addition, new legislation may be necessary to fully implement the complaint procedure. While Minn. Stat. section 595.02, subd. 1(a) authorizes neutrals to testify about statements or conduct that constitute alleged professional misconduct, there is no parallel exception for parties in mediation to breach confidentiality. Under Minn. Stat. section 595.02, subd. 1(1), "a party cannot be examined as to any communication or document, including worknotes, made or used in the course of or because of mediation pursuant to an agreement to mediate." The only exception to this broad promise of confidentiality is regarding "an application to a court by a party to have a mediated settlement agreement set aside or reformed."*

- E. After review and investigation, the Board shall advise the complainant and neutral in writing of the Board's proposed action on the complaint. Upon request, the neutral shall be entitled to a hearing before a three-member panel of the Board to contest proposed sanctions or findings. The neutral shall have the right to defend against all charges and shall have the right to be represented by an attorney, to examine and cross-examine witnesses, to compel the attendance of witnesses to testify, and to compel the production of documents and other evidentiary matter through the subpoena power of the panel. The Board shall make an electronic recording of the proceedings.

*[Drafting Note]*

*The Board will research where the authority for the subpoena power will be derived.*

- F. The neutral may appeal the panel's decision to the full Board. The appeal shall be on the existing record. If the neutral appeals, the record will be transcribed at the neutral's expense.

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- B. **Immunity.** Board members and staff shall be immune from suit for any conduct in the course of their official duties.

*[Drafting Note]*

*It is crucial the Board and staff conduct investigations and hearings pursuant to these enforcement procedures with immunity. The Court will need to consider whether or not legislative action is required for such a grant of privilege and immunity.*