

STATE OF MINNESOTA

IN SUPREME COURT

CX-89-1863

**ORDER ESTABLISHING DEADLINE FOR SUBMITTING COMMENTS ON
PROPOSED AMENDMENTS TO MINNESOTA GENERAL RULES OF
PRACTICE RULE 114.12**

The Alternative Dispute Resolution Review Board has proposed amendments to Rule 114.12 of the Minnesota General Rules of Practice dealing with Code of Ethics Enforcement Procedures for Neutrals; and

This court will consider the proposed changes without a hearing after soliciting and reviewing comments on the proposed changes;

IT IS HEREBY ORDERED that any individual wishing to provide statements in support or opposition to the proposed amendments shall submit twelve copies in writing addressed to Frederick K. Grittner, Clerk of the Appellate Courts, 25 Constitution Avenue, St. Paul, Minnesota 55155, no later than Thursday, June 15, 2000. A copy of the Board's proposed amendments is annexed to this order.

Dated: April 17, 2000

BY THE COURT:


Kathleen A. Blatz
Chief Justice

OFFICE OF
APPELLATE COURTS

APR 17 2000

FILED

Code of Ethics Enforcement Procedure

ADR Review Board Final Draft 03/17/00

INTRODUCTION

Inclusion on the list of qualified neutrals pursuant to Minnesota General Rules of Practice 114.12 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 114.12 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

- 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, 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, to be represented by an attorney, and to examine and cross-examine witnesses. The Board shall make an electronic recording of the proceedings. The Board at its own initiative, or by request of the neutral, may issue subpoenas for the attendance of witnesses and the production of documents and other evidentiary matter.

- 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.

HAMLIN
UNIVERSITY
SCHOOL OF LAW

Faculty Office
Peter N. Thompson
(651) 523 2983

June 9, 2000

Frederick K. Grittner
Clerk of Appellate Courts
25 Constitution Ave
St Paul MN 55155

Re: Proposed Amendments to Minn. Gen. R. Prac. 114.12 CX 89 1863

Dear Mr. Grittner:

I enclose the original and 12 copies of my comments to the proposed amendments.

Very truly yours,

Peter N. Thompson

Peter N. Thompson
Professor of Law

State of Minnesota

In Supreme Court

CX 89 1863

OFFICE OF
APPELLATE COURTS

JUN 14 2000

FILED

Comments in Opposition to Proposed Amendments to
Minnesota General Rules of Practice Rule 114.12

TO: Mr. Frederick K. Grittner, Clerk of the Appellate Court

I am an attorney licensed to practice by the Minnesota Supreme Court and a qualified neutral under Rule 114 of the Minnesota General Rules of Practice. I respectfully request that the court not approve the proposed amendments to Rule 114.12 of the Minnesota General Rules of Practice dealing with Code of Ethics Enforcement Procedures for Neutrals.

I oppose adopting the proposed rules for two reasons. First, the rules do not set forth sufficient procedures to assure a fair process, leaving the development of the enforcement procedures to unguided, *ad hoc* determinations of the Board. Second, the proposed rules and procedures conflict with existing rules and statutes addressing the confidentiality of ADR processes.

I. THE PROPOSED RULES DO NOT SET FORTH ADEQUATE PROCEDURES

The proposed rules are sparse leaving for subsequent development the actual rules that will be followed in prosecuting a claim. No guidance or policy is provided to guide the Board in

developing a sound and consistent approach to resolving claims of ethical violations. I agree that the continued success of ADR processes rests in maintaining flexibility and trust in the good judgment and good faith of participants and not in minute regulation. When it comes to vesting public agencies such as this Board with the authority to adjudicate and make findings that will affect a person's professional standing, however, the rules should clearly set forth the scope and limits of the agency's authority, and the processes to be followed.

A. The Rules and Commentary Do Not Provide General Policy to Guide the Board in Filling in the Gaps in the Text of the Rules

The rules do not set out a general policy for enforcement proceedings that will guide the Board in interpreting the rules and filling in the numerous gaps in the published text. For example there is no indication whether the rules should be construed broadly to encourage complaints or narrowly to protect neutrals from harassing complainants.

The actual language in the rules appears to be aimed at discouraging complaints. Parties can obtain a complaint form by E-mail, but it does not appear they can file a complaint by E-mail. To draft a valid complaint the party must include "facts" if true that would constitute a violation. Perhaps the Board will give a liberal interpretation to what "facts" must be pled. On the other hand, maybe the Board will be stringent in assessing the adequacy of complaints. Years ago in the litigation process, courts abandoned "fact pleading" in favor of the present notice pleading requirements found in Rule 8, of the Minnesota Rules of Civil Procedure. Parties in court are

now required to plead only a short and plain statement of a claim showing that they are entitled to relief. Fact pleading was rejected because it was too technical and cumbersome. Courts had to distinguish between pleading ultimate facts and mediate facts and to distinguish between legal conclusions and factual conclusions. The proposed rules appear to be a return to the discarded, formalistic fact pleading requirement.

For example, if someone fills out a complaint form stating “the neutral had a conflict of interest,” that allegation is a conclusion and does not recite the facts that give rise to the conclusion. This conclusion would be inadequate in a fact pleading system.

In the interest of consumer protection I urge the Court adopt an open process rejecting technical rules serving as barriers to addressing these issues. Whatever the standard, liberal encouraging complaints, or narrow restricting access, the Rules and Commentary should provide guidance to the Board and Minnesota citizens about the expectations of the process.

B. The Rules Do Not Set Forth the Scope of the Board’s Authority

The scope of the Board’s enforcement authority is not clear. While the Board is given authority over all Rule 114 neutrals, it is not clear if the Board has the authority to investigate qualified neutrals’ conduct in proceedings not governed by Rule 114, such as private mediations or ADR processes in the work place?

In context, the Board's authority appears to be limited to investigating violations of the Code of Ethics associated with Rule 114 proceedings. Nothing in the Code of Ethics indicates that the ethical requirements were drafted to reach conduct outside of Rule 114 proceedings. Nonetheless it has been argued that the Code, and thus the Board's investigative power, includes all conduct of qualified neutrals.

I urge that the Board's enforcement authority be limited to ethical claims in Rule 114 proceedings because the context of ADR proceedings in a litigation process is markedly different from the context in other ADR experiences. The Code of Ethics was drafted in the context of court annexed processes.

In any event, the decision about the scope of the rules should not be left to *ad hoc* Board decisions, but should be made directly by the Court in adopting a clear statement of the scope of the rules. If the rules are intended to govern neutrals' conduct in processes not involving Rule 114 cases, qualified neutrals should be informed about this obligation.

C. The Rules Do Not Provide For Adequate Hearing Procedures

Initially, it is not clear from the rules whether the complainant is expected to prosecute the claim or if the matter will be prosecuted by a Board or staff member. If the Board prosecutes the case, can the claimant be present? Can the claimant present evidence? Will the claimant be notified of any disposition?

The rules do not provide the standard of proof that must be established to sanction a neutral. Since the findings and sanctions can affect the professional standing of citizens I urge that the violation must be established by clear and convincing evidence and not by a simple preponderance of the evidence. Further, the rules should have a time limit for appeal to the full board, a statement of the standard of review, (de novo, substantial evidence,) quorum requirements, a description of applicable evidence rules and a statement whether the Board decision must be unanimous, majority, two thirds or whatever. Participants should know in advance what procedures will be used to resolve their issues. These procedures should not be made up by a Board on a case-by-case basis.

II. THE RULES DO NOT ADEQUATELY ADDRESS THE SCOPE OF CONFIDENTIALITY AND MAY CREATE CONFLICTS WITH OTHER STATUTES OR RULES ADDRESSING CONFIDENTIALITY OR MANDATORY REPORTING.

The rules addressing confidentiality need attention. Rule IV allows the neutral to obtain the file maintained by the Board, "excluding the Board's work product." Numerous issues are raised. I assume most of the file other than the complaint would be prepared in anticipation of the hearing, and thus be work product. What is protected and what should be disclosed? Will witness statements, compilation of files and records be disclosed? Subdivision C protects mental processes or communications. Do the rules protect from disclosure all correspondence from the Board? Once the neutral gets whatever he or she is entitled to, can the neutral use and disclose these materials in the hearing or mediation?

Rule II D exempts the neutral from the confidentiality requirements of Rule 114.08(e) of the General Rules of Practice or Rule IV of the Code of Ethics. If the neutral chooses to defend but does not want to disclose personal notes or records can the neutral be compelled to disclose?

The rules do not address other statutes and rules governing confidentiality. For example, if the neutral was a mediator in a Rule 114 mediation can the claimant or for that matter the neutral disclose what happened at the prior mediation without violating Minn. Gen. R. Pract. 114.08(a) or Minn. Stat. § 595.02, subd. 2(1). A neutral who discloses information about the prior ADR process violates these confidentiality rules and statutes, which in turn might constitute new ethical violations.

The rules do not set forth the scope of confidentiality at the mediation. If the Board and parties agree to have the matter mediated, is the mediation governed by Rule 114 and the mediator governed by the Rules of Ethics? Can the mediator disclose to the Board the results of the mediation? What if anything can be disclosed without violating the mediator's ethical and statutory duties to maintain confidentiality?

If the mediator is a mandated reporter and becomes aware of matters that fall within mandatory reporting requirements (breach of ethical duties of a lawyer, Minn. R. Prof. Cond. 8.3 or abuse of a child or vulnerable adult) may or must the mediator breach the confidentiality of the mediation and comply with the mandatory reporting requirements? *See, e.g.,* Rule 6X

Lawyers Professional Responsibility, (lawyers mediating complaints against lawyers are specifically exempted from the requirement to report ethical violations).

While no set of rules can anticipate and resolve in advance every possible issue, confidentiality requirements should not be left to private *ad hoc* Board determinations. Participants should know in advance the general principles of confidentiality that will be applicable to their disclosures to protect legitimate interests of parties and neutrals. In particular the rules should set forth the extent to which participating in this procedure exempts parties and neutrals from complying with other confidentiality rules and statutes requiring confidentiality or mandatory reporting.

III. Conclusion

To vest a Board with the authority to investigate professional conduct and make a public proclamation that a citizen has acted unethically is a serious matter. If the court is to approve rules that create this authority, the rules should clearly explain the scope of the Board's authority and the procedures to be used, and not create conflicts with other rules or statutes. The proposed rules do not set forth adequate procedures and create potential conflict with other statutes and rules governing confidentiality. I ask that the Court not approve the proposed rules.

Respectfully submitted.

Peter N. Thompson

Peter N. Thompson
Attorney License No. 109356
M.S. D2046
1536 Hewitt Ave
St Paul MN 55104-1237
651 523 2983