

**CX-89-1863**

**STATE OF MINNESOTA**

**IN SUPREME COURT**

**In re:**

**Supreme Court Advisory Committee  
on General Rules of Practice**

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**Recommendations of Minnesota Supreme Court  
Advisory Committee on General Rules of Practice**

**Final Report  
March 29, 2007**

**Hon. Elizabeth Ann Hayden, St. Cloud  
Chair**

**Hon. G. Barry Anderson  
Liaison Justice**

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Hon. Robert D. Walker, Fairmount**

**Michael B. Johnson, Saint Paul  
Staff Attorney**

**David F. Herr, Minneapolis  
Reporter**

# **ADVISORY COMMITTEE ON GENERAL RULES OF PRACTICE**

## **Introduction**

The Court's Advisory Committee on General Rules of Practice recommends that the Court adopt a single set of amendments comprising amendments to four separate rules and to the ADR Review Board's Code of Ethics Enforcement Procedure. This set of amendments would provide explicitly for the use of collaborative law processes by litigants or potential litigants.

The advisory committee has studied and conducted hearings on numerous issues relating to proposals to amend the rules to provide for collaborative law processes. These issues have been before the advisory committee for several years and the committee has previously reported to the Court on these issues.

## **Summary of Committee Recommendations**

The committee's specific recommendations are briefly summarized as follows:

1. Rule 111 should be amended to add a new Rule 111.05.
2. Rule 114.04 should be amended as follows to provide for deferral of cases on court calendars and a new Form 111.03 should be adopted to facilitate this deferral request process.
3. Rule 114 Appendix (Code of Ethics Enforcement Procedure) should be amended to make it clear that collaborative lawyers are acting as lawyers, not neutrals.
4. Rule 304 should be amended to adopt a new Rule 304.05.

## **History**

The advisory committee has considered proposals relating to collaborative law for several years, and has previously reported to the Court on its consideration

of these issues. *See* Recommendations of the Minnesota Supreme Court Advisory Committee on General Rules of Practice, No. CX-89-1863 at 2, 62-66 (Report dated Oct. 28, 2004); Minnesota Supreme Court Advisory Committee on General Rules of Practice, No. CX-89-1863 at 3 (Final Report dated Sept. 26, 2005). The committee has considered proposals on collaborative law from a number of sources, with the primary proponent being the Collaborative Law Institute. This Court's ADR Review Board included a recommendation for adoption of some provision for collaborative law processes in its August 18, 2004, report.

The advisory committee has held public hearings on at least two occasions, most recently on September 19, 2006. The committee had previously given notice to interested parties of an August 19, 2005, public hearing by posting on the Minnesota state courts' website, and by notice sent directly to the ADR Review Board, the ADR section of the MSBA. The ADR Section had opposed an earlier ADR Review Board proposal relating to collaborative law. Following the 2006 hearing, the committee determined to seek formal written input on collaborative law issues from potentially interested parties or organizations, and notified the following parties of the pendency of this issue and the committee's questions about the best means to provide for collaborative law in the court rules:

Minnesota Lawyers' Professional Responsibility Board  
Kent A. Gernander, Chair

Minnesota Board of Judicial Standards  
Hon. James E. Dehn, Chair

Minnesota State Board of Legal Certification  
Brett W. Olander, Chair

Minnesota State Board of Continuing Legal Education  
Thomas J. Radio, Chair

Minnesota Supreme Court Alternative Dispute Resolution Review Board  
Eduardo Wolle, Chair

Minnesota District Judges Association

Hon. Daniel H. Mabley, Chair, Law and Legislation Committee  
 Hon. Robert Birnbaum  
 Hon. Mary E. Steenson DuFresne  
 Hon. Sharon L. Hall  
 Hon. George I. Harrelson  
 Hon. Leslie M. Metzen  
 Hon. Donald J. Venne

Minnesota State Bar Association  
 Patrick J. Kelly, President  
 Ellen A. Abbott, Chair, Family Law Section  
 Linda F. Close, Chair, ADR Section  
 Lucinda E. Jesson, Chair, Committee on Rules of Professional Conduct

Collaborative Law Institute  
 Linda K. Wray, President

The committee received responses to its inquiries from most of these organizations and discussed and evaluated them. The committee recommends, although not unanimously, that the Court should now adopt amendments to Rules 111, 114, 304, and the ADR Code of Ethics Enforcement Procedure as set forth in detail below.

The committee unanimously views collaborative law as a useful alternative to litigation. Its distinguishing features include an agreement to proceed in a collaborative way to resolve disputes, and the agreement of the collaborative lawyers to withdraw from representing the parties if the collaborative process does not result in a complete settlement. This model has been used primarily to date in marriage dissolution matters.

The Collaborative Law Institute’s most recent proposal called for adoption of a new Rule 114A, with the following salient features:

DESCRIPTION	CLI PROPOSED RULE
CL would be approved for all civil actions	114A.01
CL defined to include lawyers and other “Core Professionals”	114A.01(a)

Rule would specify form of “Collaborative Law Practice Participation Agreement”	114.01(a), (c) and Form 114A.01
Court would give notice about CL process and list of Collaborative Professionals	114A.02(a)
Lawyers would be required to provide information on CL process to all clients	114A.02(b)
Rule would create confidentiality of all CL proceedings	114A.03
Agreements reached in CL process would be enforceable by court	114A.04
In event of termination of CL process without complete settlement, lawyers would withdraw and 30-day waiting period would ensue before either side could schedule a court hearing	114A.05
State Court Administrator would maintain roster of qualified Collaborative Professionals	114A.06
Rule establishes training and other qualifications for CL professionals	114A.07
Any training offered by Collaborative Law Institute of Minnesota or International Academy of Collaborative Professionals would be approved by operation of rule	114A.07(a)(3)
Court in individual case could accept Collaborative Case upon agreement of lawyers even without their having the necessary training	114A.08
Cases filed with court would be eligible for deferral	114A.09
Court would adopt Code of Ethics for CL Professionals	Appendix— Code of Ethics

Although it is hardly an easy issue, the committee believes that several of these features make it inappropriate to view collaborative law as a court-annexed ADR mechanism for inclusion in Rule 114. The essence of collaborative law is the resolution of disputes outside the litigation process. Although certain matters resolved collaboratively may require submission to the court for review and entry of a decree of dissolution, the court would otherwise have no involvement in the matters. Indeed, for civil matters where no decree were required to be entered, the courts might not be involved at all.

The committee's fundamental conclusion is that although collaborative law is a good thing, and even a good form of ADR process, it is not one that can be viewed as another court-annexed ADR process. The court cannot direct parties who have not hired collaborative lawyers to fire those lawyers so they can undergo a collaborative law process. Even when or if parties voluntarily seek out a collaborative law approach and it is successful in resolving all issues, it essentially takes place without any role for the court other than, possibly, entry of an agreed decree or settlement agreement. Because collaborative lawyering is just that—a form of lawyering—it falls squarely within the current mechanisms for regulating for lawyers. To the extent collaborative lawyering can be viewed as a new specialty area of practice, it might be certifiable as an area of specialization; again the current regulatory environment would work to meet this need.

After extensive consideration, a majority of the committee concludes that there are essentially three ways, however, where the court system should be more encouraging of the use of collaborative law. First, and particularly in the marriage dissolution area, parties should be given the opportunity to attempt to resolve their issues using a collaborative law process, and should be granted relief from court scheduling mandates to do so. This is consistent with the case-processing standards for family law matters, which now allow family law cases to be transferred to an “inactive” calendar for up to one year. The committee recommends amendments to Rules 111 and 304 to accommodate this concern.

Second, collaborative lawyers are entitled to clarity as to whether they are subject to the ADR Review Board's Code of Ethics when they function as collaborative lawyers. Because the committee believes a collaborative lawyer is a lawyer with no diminution of his or her duties to the client, the committee recommends amendment of the ADR Review Board's Code of Ethics Enforcement Procedure to clarify this status.

Finally, collaborative lawyers are concerned about having to go through court-ordered ADR shortly after the parties invest in a collaborative law process

that fails to result in a complete resolution of the issues. The committee recommends that Rule 114 and 304 be amended to state a presumptive rule that a second ADR process would not be routinely ordered, although it leaves discretion with the court to do so when viewed as appropriate.

The advisory committee believes these provisions are an appropriate way for the courts to support the use of collaborative law without undue entanglement with litigant's rights to access to the courts and freedom to contract with lawyers of their choice. The proposals give appropriate discretion to judges to make case management decisions appropriate to individual cases.

### **Other Matters**

The committee is scheduled to meet again in September 2007 and will report on any other appropriate amendments to the general rules after that meeting.

### **Effective Date**

The committee believes these amendments can be adopted, after public hearing if the Court determines a hearing is appropriate, in time to take effect on July 1, 2007.

### **Style of Report**

The specific recommendations are reprinted in traditional legislative format, with new wording underscored and deleted words ~~struck through~~.

Respectfully submitted,

MINNESOTA SUPREME COURT  
ADVISORY COMMITTEE ON GENERAL  
RULES OF PROCEDURE

**Recommendation:**                **The Court should make five related rule amendments to recognize and permit the use of collaborative law as an ADR mechanism, particularly in family law matters.**

- 1.     **Rule 111 should be amended to add a new Rule 111.05:****

1                                **RULE 111. SCHEDULING OF CASES.**

2                                \* \* \*

3                                **Rule 111.05. Collaborative Law.**

4                                (a) Collaborative Law Defined. Collaborative law is a process in which  
5                                parties and their respective trained collaborative lawyers and other professionals  
6                                contract in writing to resolve disputes without seeking court action other than  
7                                approval of a stipulated settlement. The process may include the use of neutrals as  
8                                defined in Rule 114.02(b), depending on the circumstances of the particular case.  
9                                If the collaborative process ends without a stipulated agreement, the collaborative  
10                               lawyers must withdraw from further representation.

11                               (b) Deferral from Scheduling. Where the parties to an action request  
12                               deferral in a form substantially similar to Form 111.03 and the court has agreed to  
13                               attempt to resolve the action using a collaborative law process, the court shall  
14                               defer setting any deadlines for the period specified in the order approving deferral.

15                               (c) Additional ADR following Collaborative Law. When a case has been  
16                               deferred pursuant to subdivision (b) of this rule and is reinstated on the calendar  
17                               with new counsel or a collaborative law process has resulted in withdrawal of  
18                               counsel prior to the filing of the case, the court should not ordinarily order the  
19                               parties to engage in further ADR proceedings without the agreement of the parties.

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**Advisory Committee Comment—2007 Amendment**

Rule 111.05 is a new rule to provide for the use of collaborative law processes in matters that would otherwise be in the court system. Collaborative law is a process that attempts to resolve disputes outside the court system. Where court approval or entry of a court document is necessary, such as for minor settlements or entry of a decree of marriage dissolution, the court's role may be limited to that essential task. Collaborative law is defined in Rule 111.05(a). The primary distinguishing characteristic of this process is the retention of lawyers for the parties, with the lawyers' and the parties' written agreement that if the collaborative law process is not successful and litigation ensues, each lawyer will withdraw from representing the client in the litigation.

Despite not being court-based, the committee believes the good faith use of collaborative law processes by the parties should be accommodated by the court in two ways. First, as provided in new Rule 111.05(b), the parties should be able to request deferral from scheduling for a duration to be determined appropriate by the parties. This can be accomplished through use of new Form 111.03 or similar submission providing substantially the same information. Second, if the parties have obtained deferral from scheduling for a collaborative law process that proves unsuccessful, the action should not normally or automatically ordered into another ADR process. The rule intentionally does not bar a second ADR process, as there may be cases where the court fairly views that such an effort may be worthwhile. These provisions for deferral and presumed exemption from a second ADR process are also made expressly applicable to family law matters by a new Rule 304.05.

**2. Rule 114.04 should be amended as follows:**

**RULE 114. ALTERNATIVE DISPUTE RESOLUTION.**

\* \* \*

**Rule 114.04. Selection of ADR Process**

\* \* \*

**(b) Court Involvement.** If the parties cannot agree on the appropriate ADR process, the timing of the process, or the selection of neutral, or if the court does not approve the parties' agreement, the court shall, in cases subject to Rule 111, schedule a telephone or in-court conference of the attorneys and any unrepresented parties within thirty days after the due date for filing informational statements pursuant to Rule 111.02 or 304.02 to discuss ADR and other scheduling and case management issues.

\* \* \*

57 (2) *Other Court Order for ADR*. In all other civil case types subject  
58 to this rule, including conciliation court appeals, any party may move or the  
59 court at its discretion may order the parties to utilize one of the non-binding  
60 processes; provided that any no ADR process shall be approved if the court  
61 finds that ADR is not appropriate or if it amounts to a sanction on a non-  
62 moving party. Where the parties have proceeded in good faith to attempt to  
63 resolve the matter using collaborative law, the court should not ordinarily  
64 order the parties to use further ADR processes.

65  
66 Advisory Committee Comment—2007 Amendment

67 Rule 114.04(b)(2) is amended to provide a presumptive exemption from  
68 court-ordered ADR under Rule 114 where the parties have previously obtained  
69 a deferral on the court calendar of an action to permit use of a collaborative law  
70 process as defined in Rule 111.05(a).

3. **Rule 114 Appendix (Code of Ethics Enforcement Procedure) should be amended as follows:**

71 **RULE 114 APPENDIX. CODE OF ETHICS ENFORCEMENT**  
72 **PROCEDURE**

73  
74 **Rule I. SCOPE**

75 This procedure applies to complaints against any individual or organization  
76 (neutral) placed on the roster of qualified neutrals pursuant to Rule 114.12 or  
77 serving as a court appointed neutral pursuant to 114.05(b) of the Minnesota  
78 General Rules of Practice. Collaborative attorneys or other professionals as  
79 defined in Rule 111.05(a) are not subject to the Rule 114 Code of Ethics and  
80 Enforcement Procedure while acting in a collaborative process under that rule.

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82 Advisory Committee Comment—2007 Amendment

83 The committee believes it is worth reminding participants in  
84 collaborative law processes that the process is essentially adversary in nature,  
85 and collaborative attorneys owe the duty of loyalty to their clients. The Code  
86 of Ethics procedures apply to create standards of care for ADR neutrals, as

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defined in the rules; because collaborative lawyers, while acting in that capacity, are not neutrals, these enforcement procedures do not apply.

**4. A new Form 111.03 should be adopted as follows:**

(This form is entirely new, but no underscoring is included in order to enhance legibility.)

89 **FORM 111.03 REQUEST FOR DEFERRAL OF SCHEDULING DEADLINES**

90  
91  
92  
93 STATE OF MINNESOTA  
94 \_\_\_\_\_ COUNTY

DISTRICT COURT  
JUDICIAL DISTRICT

95  
96 CASE NO. :  
97 Case Type: \_\_\_\_\_

98  
99 \_\_\_\_\_  
100 Plaintiff

101  
102 and

REQUEST FOR DEFERRAL

103  
104 \_\_\_\_\_  
105 Defendant

106  
107  
108 The undersigned parties request, pursuant to Minn. Gen. R. Prac. 111.05,  
109 that this action be deferred and excused from normal scheduling deadlines until  
110 \_\_\_\_\_, \_\_\_\_\_, to permit the parties to engage in a formal collaborative law  
111 process. In support of this request, the parties represent to the Court as true:

- 112 1. All parties have contractually agreed to enter into a collaborative law  
113 process in an attempt to resolve their differences.  
114 2. The undersigned attorneys are each trained as collaborative lawyers.  
115 3. The undersigned attorneys each agree that if the collaborative law  
116 process is not concluded by the complete settlement of all issues between the  
117 parties, each attorney and his or her law firm will withdraw from further  
118 representation and will consent to the substitution of new counsel for the party.

119 4. The undersigned attorneys will diligently and in good faith pursue  
120 resolution of this action through the collaborative law process, and will promptly  
121 report to the Court when a settlement is reached or as soon as they determine that  
122 further collaborative law efforts will not be fruitful.

123

124 Signed: \_\_\_\_\_ Signed: \_\_\_\_\_  
125 Collaborative Lawyer for (Plaintiff) Collaborative Lawyer for (Plaintiff)  
126 (Defendant) (Defendant)

127

128 Attorney Reg. #: \_\_\_\_\_ Attorney Reg. #: \_\_\_\_\_

129 Firm: \_\_\_\_\_ Firm: \_\_\_\_\_

130 Address: \_\_\_\_\_ Address: \_\_\_\_\_

131 Telephone: \_\_\_\_\_ Telephone: \_\_\_\_\_

132 Date: \_\_\_\_\_ Date: \_\_\_\_\_

133

134 **ORDER FOR DEFERRAL**

135 The foregoing request is granted, and this action is deferred and placed on  
136 the inactive calendar until \_\_\_\_\_, 20\_\_, or until further order of this  
137 Court.

138 Dated: \_\_\_\_\_, 20\_\_.

139

140 \_\_\_\_\_  
141 Judge of District Court

142

143 **Advisory Committee Comment—2007 Amendment**  
144 Form 111.03 is a new form, designed to facilitate the making of a  
145 request for deferral of a case from scheduling as permitted by Rule 111.05  
146 when that case is going to be the subject to a collaborative law process as  
defined in that rule

5. A new Rule 304.05 should be adopted as follows:

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**RULE 304. SCHEDULING OF CASES**

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\* \* \*

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**Rule 304.05. Collaborative Law.**

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A scheduling order under this rule may include provision for deferral on the

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calendar pursuant to Rule 111.05(b) of these rules and for exemption from

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additional ADR requirements pursuant to Rule 111.05(c).

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**Advisory Committee Comment—2007 Amendment**

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Rule 304.05 is a new provision, intended primarily to make it clear that the special scheduling procedures relating to collaborative law in Minn. Gen. R. Pract. 111.05 apply to scheduling of family law matters subject to Rule 304.

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The rule permits a scheduling order to include provision for collaborative law, but does not require it.