STATE OF MINNESOTA

IN SUPREME COURT

C5-87-843

ORDER FOR HEARING TO CONSIDER PROPOSED
ALTERNATIVE DISPUTE RESOLUTION RULES OF ETHICS
FOR THE MINNESOTA GENERAL RULES OF PRACTICE

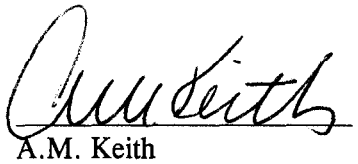
IT IS HEREBY ORDERED that a hearing be had before this Court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on April 24, 1997 at 2:00 p.m., to consider the recommendation of the Alternative Dispute Resolution Review Board that a Code of Ethics for neutrals be added to Rule 114 of the Minnesota General Rules of Practice. A copy of the proposed rules is annexed to this order and is also available at the Court's Internet address (www.courts.state.mn.us).

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 245 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before April 18, 1997 and
2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the aforesaid Clerk together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before April 18, 1997.

Dated: January 29, 1997

BY THE COURT:



A.M. Keith
Chief Justice

RULE 114
CODE OF ETHICS

As proposed 1/7/97 by the
Alternative Dispute Resolution Review Board

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.

March 24, 1997

BRIAN P. SHORT

Leamington Co.
Executive Offices
215 SOUTH 11TH STREET
MINNEAPOLIS, MINNESOTA 55403

(612) 332-4732 FAX (612) 332-4228

Mr. Frederick Grittner
Clerk of the Appellate Courts
245 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

RE: Code of Ethics for Neutrals - Rule 114

Dear Mr. Grittner:

With an Order dated January 29, 1997, the Chief Justice caused to be distributed a copy of the rules proposed by the Alternative Dispute Resolution Review Board. On a part-time basis, I provide mediation services to the State and Federal District Courts in Minnesota and attorneys generally within the Twin Cities area. I would appreciate it if the Court would consider the comments in this letter as it considers the proposed rules.

I am on the Rule 114 Roster. A review of that list suggests that most of the people on it do not earn even a small part of their livelihood providing mediation services. Thus, while mediation is becoming more and more used in civil litigation in this area, there are still not, in my view, very many practitioners who earn a substantial portion of their income providing those services. Most of the practitioners in this area also maintain an active private law practice. I am aware of only three or four individuals in this area who most people would agree are successful full-time mediators.

Thus, I would suggest that the Court be especially careful as it considers Rule II - Conflicts of Interest. I would urge the Court to adopt the following as its statement on conflicts of interest.

> Rule II - CONFLICTS OF INTEREST: At the earliest stage in the proceeding, a neutral shall disclose to all parties and any appointing authority, all actual and potential conflicts of interest reasonably known at that time to the neutral. After disclosure, the neutral shall not participate further in the matter unless all parties waive the disclosed conflict and choose to retain the neutral. Once the conflict is waived, however, no party may reassert it as a reason for declining to participate in the process with that neutral.

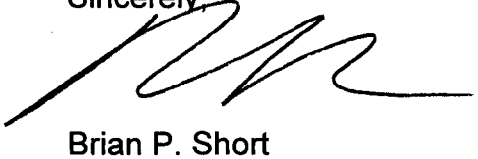
I believe this change reaffirms what I understand to be the central value of the proposed Rule II: early and complete disclosure to all parties. I have added that the disclosure should also be to the appointing authority, generally a judge. In addition, I have specifically deleted any limitation on the future relationship between the mediator and any party. The proposed rule which prevents a mediator "without the consent of all parties" from establishing a "professional relationship" with any of the parties for a "reasonable time" in the future. I am not sure I know what that means. However, if the Rule were to be adopted as proposed, I would be forced to seriously consider removing my name from the Rule 114 Roster.

My principal occupation is as the Chief Executive of a family owned business with operations in banking, transportation and property management. In the last six months, I have served as a mediator in disputes which have involved individuals or entities with whom I have the following professional business relationships:

1. Competitor;
2. Supplier;
3. Tenant;
4. Other customer;
5. Attorney.

In each case, I disclosed the relationship to all parties and the judge who appointed me. In each case, all parties thought it made sense to go forward. However, if the proposed Rule II were in effect, it seems to me that even after the mediation, I could not continue the business relationship without the consent of all parties to the mediation. From a business point of view, I simply could not put any business relationship to that risk.

Sincerely,



Brian P. Short

BPS/smm

HAMLINE
UNIVERSITY
SCHOOL OF LAW

Faculty Office
Peter N. Thompson
(612) 641 2983

April 15, 1997

Frederick K. Grittner
Clerk of the Appellate Courts
245 Judicial Center
25 Constitution Ave
St Paul MN 55155

Re: Proposed ADR Rules of Ethics
C5-87-843

Dear Mr. Grittner:

I enclose the original and 12 copies of my statement in the above entitled matter.

Very truly yours,

Peter N Thompson

Peter N. Thompson
Professor of Law

STATE OF MINNESOTA
IN SUPREME COURT
C5-87-843

In re Hearing to Consider Alternative Dispute Resolution Rules of Ethics for the Minnesota General Rules of Practice

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To The Honorable Chief Justice and Associate Justices of the Minnesota Supreme Court:

I respectfully request that proposed Rule IV [CONFIDENTIALITY] be amended. Proposed Rule IV makes it unethical for a neutral to disclose any information that would be protected from disclosure under Minn.Gen.R.Prac. 114.08. Rule 114.08 is an over inclusive rule that essentially precludes any disclosure of statements, documents or conduct relating to most ADR proceedings when offered for any purpose in an action involving a party or issue in the ADR proceeding. Rule 114.08 provides for an exception in Adjudicative Processes, but in Mediations, perhaps the most commonly used ADR process, no exceptions are provided absent party consent and a court order.

The broad privilege in mediations created by the rule is at odds with Minn.Stat. § 595.02 subd. 1(l) (1996) which creates a privilege in mediations but provides an exception for proceedings to set aside or reform a mediated settlement agreement. Both the rule and Minn.Stat. § 595.02 subd. 1(l) (1996) are at odds with Minn.Stat. § 595.02 subd. (1a) (1996) which precludes ADR neutral testimony but contemplates that neutrals will testify in criminal matters and in professional misconduct proceedings.

Rules codifying ethical responsibilities should clarify and resolve conflicting policy considerations and not create personal conflict for the ADR neutral. The proposed rule requiring absolute confidentiality without exception places the ADR neutral in an untenable position when faced with conflicting legal duties or conflicting ethical or moral obligations.

I request that the Court amend the proposed rule to include the following underlined language:

Rule IV. CONFIDENTIALITY: Except as provided below [t]he 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. It is not unethical for a neutral to disclose to appropriate entities or persons, pertinent statements or conduct in the following circumstances:

1. When ordered to disclose by a judge or hearing officer with appropriate jurisdiction;
2. When all the parties consent to the disclosure;
3. When the statements or conduct during the proceeding constitute criminal activity or involve threats to commit a felony;
4. In actions or administrative proceedings brought by the neutral to collect a fee or brought against the neutral for malpractice, or misconduct of the neutral; or
5. When required to disclose by mandatory reporting statutes, rules or court decisions.

The proposed amendments make it clear that when faced with a valid order from a judge or

hearing officer, the neutral has no ethical duty to refuse to disclose. Journalists and occasionally lawyers and pastors, standing on ethical or moral principles, believe that their duty is to refuse to comply with court orders in order to protect confidences. The ethical rule should state unambiguously that neutrals have no ethical duty and no legal right stemming from the ethical rule to refuse to disclose information when ordered to do so by a judge or hearing officer.

Second, when all parties consent, the neutral should be permitted to disclose within the scope of the consent free from ethical constraints. Rule 114.08 would permit disclosure only if the parties consented and a court ordered the disclosure.

Third, if a neutral observes criminal activity, such as an assault during a mediation, or threats to commit a felony, the ethical rules should not preclude the neutral from disclosing this information to the necessary parties or authorities. *See* Minn.R.Prof.Cond. 1.6(b)(3) (lawyer can reveal confidences involving intention of client to commit crime or if necessary to rectify the consequences of a client's criminal acts that were furthered by the lawyer's services); Minn. Stat. § 148.975 (1996) (public health licensee has a duty to warn of a "specific, serious threat of physical violence against a specific, clearly identifiable potential victim"); *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976) (psychotherapist has a duty to warn of death threats made by patient). See also Minn. Stat. § 595.02 subd. (1a) (1996) (which appears to permit a neutral's testimony on criminal matters).

Fourth, it should not be unethical for a neutral to disclose information necessary to collect a fee.

Minn.Gen.R.Prac. 114.11(c) contemplates that a neutral can move the court for an order to enforce a fee agreement. Implicit in this provision is the assumption that a mediator is not precluded by the express language in Rule 114.08 from offering evidence relating to a mediation in order to collect a fee. *See also* Minn.R.Prof.Cond. 1.6(b)(5) (lawyer can disclose confidences to collect a fee or defend against claims of wrongful conduct). Further, in actions against the neutral, such as for malpractice, for failure to comply with the civil mediation act disclosure requirements, Minn.Stat. § 572.37 (1996) (a mediator who charges a fee for the mediation without first providing a written statement of qualifications is guilty of a petty misdemeanor), or for professional misconduct, the neutral should not be precluded on ethical grounds from offering evidence in defense. *See also* Minn. Stat. § 595.02 subd.1(a) (1996) (ADR neutral can testify in actions involving professional misconduct).

Finally, when a neutral is a professional, subject to mandatory disclosure laws, rules or court-decisions, it should not be unethical for a mediator to report as required by law. The interests of confidentiality in ADR proceedings must give way to the policy of protecting innocent third parties. *See e.g.* Minn. Stat. § 626.556 (1996) (certain professionals have a duty to report maltreatment of minors); Minn. Stat. § 626.557 (duty to report maltreatment of vulnerable adults); Minn.R.Prof.Cond. 8.3(a) (lawyers' duty to report professional misconduct of another lawyer).

I appreciate the source of the concern raised by the proposed ethical rule is caused by the over inclusive language in Rule 114.08, which creates blanket confidentiality in mediations. I ask that

the court reconsider the scope of Rule 114.08. It is possible, and perhaps likely that when faced with concrete cases in litigation, courts will disregard the over inclusive language of Rule 114.08 and create reasonable exceptions in some or all of the circumstances described above. Rules of ethics, however, (and particularly rules of ethics for ADR proceedings) should clarify responsibilities and assist neutrals in determining appropriate conduct, not create conflicts for neutrals that can be resolved only by litigation. The comments to the proposed rule suggest that there may be implicit limitations to the confidentiality required by Rule 114. Unfortunately, the language in the Rule provides no exception and mediators, particularly non-lawyer mediators, will be at a loss to know the extent of those limitations. I ask that the Court not compound the problems for neutrals by creating ethical requirements that conflict with statutes and other strong policy considerations as discussed above. I ask that the Court adopt proposed Rule IV with the proposed amendment.

I thank the Court for the opportunity to comment on the proposed ethical rules.

Respectfully submitted,

Peter N. Thompson

Peter N. Thompson
Attorney at Law
License No. 0109356
1536 Hewitt Ave
St Paul MN 55104
612-641-2983

April 15, 1997

MEMORANDUM

TO: Frederick Grittner, Clerk of the Appellate Courts

FROM: Jan Frankman, Chair
Ethics and Standards Committee
Conflict Management and Dispute Resolution Section
Minnesota State Bar Association

DATE: April 11, 1997

RE Recommendation of ADR Review Board To Add Code of Ethics to Rule 114; Request To Make Oral Presentation

Pursuant to the Minnesota Supreme Court Order dated January 29, 1997, regarding the captioned matter, please accept and grant this request to make an oral presentation to the Court at 2:00 p.m. on April 24, 1997. If permitted, Duane Krohnke, Chair of the Conflict Management and Dispute Resolution Section, and I will each present a portion of our Statement.

Enclosed as directed by the referenced Order are twelve (12) copies of the material to be presented at the hearing including a Written Statement in Support of Oral Presentation together with Appendices A,B and C. The Appendices include a proposed revised rule and proposed new rule (App A), the rationale for the proposals (App B) and our August 15, 1996, Comments to the ADR Review Board (App C).

Please contact me at 349-9882 with any question or comment you may have. Thank you.

WRITTEN STATEMENT IN SUPPORT OF ORAL PRESENTATION TO THE MINNESOTA SUPREME COURT REGARDING THE RECOMMENDATION OF THE ADR REVIEW BOARD TO ADD A CODE OF ETHICS TO RULE 114

Submitted by
Conflict Management and Dispute Resolution Section
Minnesota State Bar Association

April 11, 1997

The Ethics and Standards Committee ("the Ethics Committee") of the Conflict Management and Dispute Resolution Section ("CMDR Section") of the Minnesota State Bar Association ("MSBA") has been meeting since December, 1994, to consider a code of ethics applicable to ADR neutrals. The Committee first reviewed the Model Standards of Ethics promulgated by the American Arbitration Association, the Dispute Resolution and Civil Litigation Sections of the American Bar Association and the Society for Professionals in Dispute Resolution. By Memorandum dated October 27, 1995, it submitted to the ADR Review Board ("the Board") a report regarding the Committee's analysis of the Model Standards. Following the publication by the Board of a Draft Code of Ethics for Comment on June 5, 1996, the Committee and the Section met and on August 15, 1996, submitted lengthy Comments and a Proposed Revised Code of Ethics. The Committee presented its Comments to the Board on September 18, 1996. Two Committee meetings and one Section meeting have been held to consider the Rule 114 Code of Ethics (as proposed 1/7/97 by the Alternative Dispute Resolution Review Board) now before the Minnesota Supreme Court. The result of those meetings are this Statement together with Appendices A and B which include a proposed revised rule regarding conflicts, a proposed new rule regarding arbitration and consensual special magistrate proceedings and the rationale for each proposal. Appendix C is CMDR's August 15, 1996, Comments to the ADR Review Board.

The Section believes the adoption of a Code of Ethics in conjunction with Rule 114 is very important and necessary to set out clear standards in the burgeoning, interdisciplinary field of alternative dispute resolution. The State Court Roster of Neutrals includes individuals from a variety of primary disciplines including, law, business, psychology and social work to name a few. While many disciplines have their own codes of ethics, it is important to have one set of rules to ensure ethical, high quality service when anyone provides service pursuant to Rule 114. A code of ethics should inform the providers of the service and ensure the public that high quality is expected. It should be a document which is understandable and which contains language that may be evenly enforced.

The Committee's August 15, 1996, suggestions were intended to provide clearer, more concise language subject to enforcement, to address its concerns regarding the distinctions among ADR processes and to add new language directed to the professionalism of the individual providing any ADR service. The Committee's Proposed Revised Code was presented in "statutory" form with interlining and underlining to delineate changes in the ADR Review Board's language. Rather than seven rules which applied to all ADR processes and one rule applicable only to mediation, the Committee proposed eleven rules including the eight proposed by the Board and three new rules relating to professionalism, communication with the parties and their attorneys and arbitration and consensual special magistrate proceedings. The ADR Review Board has included some of the language changes suggested by the Committee in its Proposed Code of Ethics now before the Court; it has not adopted the new rules which were suggested or changed the format it originally proposed. The Committee recognizes that recent amendments to Rule 114 address some of its concerns and agrees that because this is a rapidly evolving field, there are not clear, definitive answers to every issue which may be raised. The Committee has been informed by the good counsel of Patrick Burns from the

Lawyers Professional Responsibility Office with regard to the history of the evolution of the Lawyers Rules. In that regard, the Committee has raised the issue with the ADR Review Board relative to how the Lawyers Rules mesh with and may be enforced with the Rule 114 Code of Ethics. The provision of "exit doors" from the Lawyers Rules when an attorney is providing ADR services is one suggestion that has been preliminarily discussed. The Committee will continue to address the issue with the Lawyers Board and the ADR Review Board.

Although the entire text of CMDR's August 15,1996, Comments and Proposed Revised Code of Ethics are included here as Appendix C, the Committee respectfully requests that the Court attend particularly to its proposals for revisions to Rule II relative to Conflicts and to the Section's proposed new rule relative to Arbitration and Consensual Special Magistrate Proceedings. The changes in the Conflicts rule include new language which distinguishes mediation from all other ADR processes, addresses the interdisciplinary nature of this field by recognizing both business and professional relationships which may give rise to conflicts and suggests several new comment paragraphs to better inform the Rule. The new Arbitration and Consensual Special Magistrate Rule is included to address concerns about and to direct the manner in which arbitrators and consensual special magistrates make decisions. Appendices A and B detail the rules and the rationale for them.

Lastly, the Committee has suggested that upon adoption of the Code of Ethics, the Board publish the Code in a booklet which also includes Rule 114 of the Minnesota General Rules of Practice for District Courts, the Minnesota Uniform Arbitration Act, the Minnesota Civil Mediation Act and Minn. Stat.Sections 484.73-484.76(1994).

Thank you for the opportunity to provide this Written Statement and to make an oral presentation to the Court.

Respectfully submitted:

MINNESOTA STATE BAR ASSOCIATION
CONFLICT MANAGEMENT AND DISPUTE RESOLUTION SECTION
ETHICS AND STANDARDS COMMITTEE

Jan Frankman
Sheryl Ramstad Hvass
Duane Krohnke
Robert Langford
Diane Lynch
John Palmer
Rebecca Picard

Consultant to the Committee:
Patrick Burns,
Lawyers Board of Professional Responsibility

APPENDIX A

PROPOSED REVISED RULE II*
RULE 114
CODE OF ETHICS

PROPOSED NEW RULE
RULE 114
CODE OF ETHICS

Submitted by
Conflict Management and Dispute Resolution Section
Minnesota State Bar Association

April 11, 1997

**This document is based upon the Rule 114 Code of Ethics (as proposed by the Alternative Dispute Resolution Board on 1/7/97) published for hearing by Minnesota Supreme Court Order dated January 29, 1997. New suggested language is underlined. Proposed deletions in the language are interlined.*

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.

A mediator practicing another profession shall not, subsequent to a mediation, establish a professional relationship that is adverse to any of the parties to the mediation.

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 subsequently establish a business or professional relationship ~~in that other profession with one of the parties, or any person or entity in a substantially factually related matter~~ in a substantially factually related matter with one of the parties to the ADR proceeding or any other person or entity. This is not intended to prevent a neutral from serving in the same neutral capacity in any subsequent case.

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 or other source of bias or prejudice concerning a person, institution or issue 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. Persons who are requested to serve as a neutral, before accepting should disclose: (1) any direct or indirect financial or personal interest in the outcome of the proceeding; and (ii) any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias.

3. The disclosures by a prospective neutral pertain to relationships between (i) the neutral, members of his or her family, his or her current employer, partners or business associates and (ii) the parties, their representatives, insurers, lawyers and individuals who are expected to be witnesses or to accompany the parties in mediation.

4. Prospective neutrals shall make a reasonable effort to inform themselves of any interests or relationships which require disclosure. Such persons should err on the side of disclosure because it is better that the relationship be disclosed at the outset when the parties are free to reject the prospective neutral or to accept the person with knowledge of the relationship. (See Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 151-52 (1968) (concurring opinion).) On the other hand, the prospective neutral cannot be expected to provide a complete and unexpurgated business biography or to disclose trivial relationships or interests. (Id.)

5. After accepting appointment and while serving as a neutral, a person shall not enter into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias.

6. The obligation to disclose interests or relationships is a continuing duty which requires the neutral immediately to disclose in writing, at any state of the proceeding, any such interests or relationships which may arise or which are recalled or discovered.

~~2.~~7. 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.~~8. In deciding whether to establish a relationship in an unrelated matter, the neutral should exercise caution in circumstances which would raise legitimate questions about the integrity of the process.

~~4.~~9. A neutral should avoid conflicts of interest, as defined in Comment No. 1 to this Rule, in recommending the services of other professionals in connection with the ADR proceeding before the neutral.

~~5.~~10. 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.~~11. There is no intent that the prohibition established in this rule which applies to an individual mediator 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 XI. ARBITRATION AND CONSENSUAL SPECIAL MAGISTRATE PROCEEDINGS: JUST, INDEPENDENT AND DELIBERATE DECISIONS AND OPINIONS. In arbitration and consensual special magistrate proceedings, a neutral, after careful deliberation and exercise of independent judgment, should decide the matter justly based upon the law and the evidence as presented in the proceeding. Such a neutral should not exert pressure on any party to settle. Such a neutral, however, may suggest that the parties discuss settlement, but should not be present or participate in settlement discussions unless requested to do so by all parties.

Comments:

1. A neutral involved in the ADR processes mentioned in this Rule should not permit outside pressure to affect the decision. A neutral should not delegate to any other person the duty to decide.

2. A neutral should decide all issues submitted for determination. No other issues should be decided.

3. When said neutral determines that more information than has been presented by the parties is required to decide the matter, the neutral may ask questions, call witnesses and request documents or other evidence.

M2:20068042.01

APPENDIX B

RATIONALE FOR PROPOSED REVISED RULE II AND NEW RULE RULE 114 CODE OF ETHICS

Submitted by
Conflict Management and Dispute Resolution Section
Minnesota State Bar Association

April 11, 1997

Rule II: Conflicts of Interest:

1. We believe there are several provisions of the Minnesota Arbitration Act (Minn. Stat. §§572.10, 572.19 (1994)) and Comment D to Canon I and Comments A, B and C to Canon II of the AAA's Arbitrators' Code that should be incorporated as comments to Rule II of the Board's Draft Code. They are as follows:

   (a) Persons who are requested to serve as a neutral, before accepting should disclose: (i) any direct or indirect financial or personal interest in the outcome of the proceeding; and (ii) any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias.

   (b) The disclosures by a prospective neutral pertain to relationships between (i) the neutral, members of his or her family, his or her current employer, partners or business associates and (ii) the parties, their representatives, insurers, lawyers and individuals who are expected to be witnesses.

   (c) Prospective neutrals shall make a reasonable effort to inform themselves of any interests or relationships which require disclosure. Such persons should err on the side of disclosure because it is better that the relationship be disclosed at the outset when the parties are free to reject the prospective neutral or to accept the person with knowledge of the relationship. (See, Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 151-52 (1968) (concurring opinion).) On the other hand, the prospective neutral cannot be expected to provide a complete and unexpurgated business biography or to disclose trivial relationship or interests. (Id.)

   (d) After accepting appointment and while serving as a neutral, a person shall not enter into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias.

   (e) The obligation to disclose interests or relationships is a continuing duty which requires the neutral immediately to disclose in writing, at any state of the proceeding, any such

interests or relationships which may arise or which are recalled or discovered.

3. There is a split within the Committee with respect to the portion of our Proposed Rule which states, "A mediator practicing in other professions shall not, subsequent to a mediation, establish a professional relationship that is adverse to any of the parties to the mediation."

A minority of the Committee opposes the inclusion of this provision because it goes beyond the holding of Polysoftware, Int'l, Inc. vs. Su, 800 F. Supp. 1487 (D. Utah 1995). The Court in Polysoftware stated that there were competing interests in establishing a conflicts rules for conduct of the mediator after an ADR proceeding. On the one hand, there was a need for a rule which encouraged disputants to disclose confidences to a mediator without fear that the mediator subsequently would be an opposing attorney in a substantially related matter. On the other hand, there was a need for a rule that did not discourage attorneys from becoming mediators. Therefore, the appropriate rule, held the Court, limited post-mediation conflict in a substantially factually related matter.

The majority of the Committee is concerned that, in mediation, the Polysoftware standard of "substantially related matter" is not broad enough to prohibit some post-mediation conduct we would consider improper. A mediator often inquires broadly about the business and affairs of each party in order to uncover and understand the basic interests of the parties, learning facts and attitudes well beyond the narrow legal issues in the particular dispute being mediated. Where such knowledge is obtained in confidence, it would be unfair to the party providing the knowledge, and harmful to the integrity of the mediation process and profession, to make subsequent use of such knowledge in a matter adverse to such a party.

4. We note that the Board's Draft Code's provision about subsequent relationship in a "substantially factually related matter" is broader than Rule 1.12 of the Rules of Professional Responsibility with respect to a former arbitrator who was not involved in confidential ex parte settlement discussions. Under Rule 1.12, the former attorney/arbitrator is barred from subsequently representing as a lawyer someone in "the matter," i.e., the same matter.

Rule XI: Arbitration and Consensual Special Magistrate Proceedings: Just, Independent and Deliberate Decisions and Opinions:

1. This proposed new Rule is a result of our examination of whether sufficient consideration had been given to all of the ADR processes in light of the fact that the Draft Code is largely styled after the Model Standards, which apply only to mediation.

2. This proposed new Rule is based, in part, upon Canon V and its comments of the AAA's Arbitrators' Code of Ethics.

3. This proposed new Rule uncovered a significant issue of public policy and the law with respect to the substantive basis for a decision by an arbitrator (or consensual special master) under Rule 114, which we believe needs to be addressed and resolved in any code of ethics.

4. As initially drafted by us, this proposed new Rule provided, in part, that an arbitrator or consensual special magistrate should make a decision "based upon the law." At one of the CMDR meetings, someone questioned whether such a provision was contrary to Chapter 572 of the Minnesota Statutes (the Minnesota Arbitration Act). At another CMDR meeting, several persons raised a similar question while noting that some arbitrators were not attorneys and that arbitrators under AAA rules were not so constrained. The consensus of the latter CMDR meeting was to modify this portion of this proposed new Rule to state that an arbitrator or consensual special master should make a decision "based upon the law. . . . as presented at the proceeding." This CMDR consensus language on this point is incorporated in the proposed new Rule XI.

5. We have not found anything in the Minnesota Arbitration Act which expressly authorizes or requires an arbitrator to base a decision on something other than the law. The Act does state that an award may not be vacated on the ground that the relief granted by the award would not be granted by a court of law or equity (Minn. Stat. §572.19, Subd. 1 [1994].) However, the Act also states that an arbitrator may modify or correct an award it if "is based on an error of law" (Id. 1572.16).

6. The Minnesota cases however make it clear that unless the arbitrators are restricted by the arbitration agreement to decide according to principles of law, they may make an award according to their own notion of justice without regard to the law. (E.g., Metropolitan Waste Control Comm'n v. City of Minnetonka, 242 N.W.2d 830, 832 (Minn.

Sup. Ct. 1976); 3 Dunnell, Minnesota Digest "Arbitration and Award" § 2.01(b), at 390 (4th ed. 1989).) Yet, there are other cases, including a recent decision by the federal district court in Minnesota, suggesting that an arbitrator's "manifest disregard of the law" would be a basis for vacating an arbitration award even though such a ground is not mentioned in the Federal Arbitration Act (or the Minnesota Arbitration Act). (E.g., Wilko v. Swan, 346 U.S. 427, 436-37 (1953) (dictum); Card v. Stratton Oakmont, Inc., 1996 WL 395878, at 3-4 (D. Minn. July 8, 1996).)

7. It apparently is the general practice and policy of the AAA that its commercial arbitrators are not obligated to follow and apply the governing substantive law (e.g., Hochman, "A Bar Association-Sponsored Forum for Arbitration is Needed," Nat'l L.J., Oct. 22, 1992, at 1; Hochman, "Do We Need a Lawyers Arbitration Forum for Commercial Arbitration?" [American Bar Ass'n, Section of Dispute Resolution, "What's Wrong with Arbitration and How Can We Fix It?", Aug. 4, 1996]).

8. We, however, did not find anything that expressly states this practice or policy in the AAA's Commercial Arbitration Rules, its Guide to Arbitration or its Guide to Commercial Arbitrators. Nor did we find any express statement to that effect in the AAA's Arbitrators' Code of Ethics; it states in Comment B to Canon V: "An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision."

9. In contrast, Article 29 of the AAA's International Arbitration Rules (November 1, 1993) tracks the language of the UNCITRAL, Arbitration Rules, and provides as follows:

> Applicable Laws
>
> Article 29
>
> 1. The tribunal shall apply the substantive law or laws designated by the parties as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such law or laws as it determines to be appropriate.
>
> 2. In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the

contract and shall take into account usages of the trade applicable to the contract.

3. The tribunal shall not decide an *amiable compositeur* or *ex aequo et bono* unless the parties have expressly authorized it do so.

10. We believe that the code of ethics for neutrals needs to address and resolve this issue so that it is clear to the courts, the parties and the arbitrators (and consensual special magistrates) what the substantive standard should be. Nor can the issue be avoided in the code of ethics on the ground that it is covered in the underlying Minnesota rule for court-annexed ADR. The latter does not expressly address the issue although said rule probably implicitly requires determinations in accordance with the laws by such neutrals, especially for consensual special magistrates. The only mention in said rule of consensual special magistrates is in the definition of same as a "forum in which a dispute is presented to a neutral third party in the same manner as a civil lawsuit is presented to a judge. This process is binding and includes the right of appeal." (Minn. R. Gen. Practice 114.02(a)(2).) The rule's definition of arbitration, on the other hand, states that it is a "forum in which each party and its counsel present its position before a neutral third party, who renders a specific award. It the parties stipulate in advance, the award is binding and is enforceable in the same manner as any contractual obligation. If the parties do not stipulate that the award is binding, the award is not binding and a request for trial de novo may be made." (Id. 114.02(a)(1).) In addition, the Minnesota court-annexed ADR rule provides that an arbitrator has the power "to decide the law and facts of the case and make an award accordingly." (Id. 114.09(b)(7).)

11. CMDR's proposed rule on this subject clearly comes down on the side of requiring arbitrators and consensual special magistrates to decide in accordance with the law. This position seems particularly appropriate for court-annexed proceedings. However, because arbitration at its core is a matter of contract, there should be no problem with permitting the parties to a court-annexed arbitration proceeding to agree to authorize the arbitrator to depart from application of the law in terms of what is regarded as part or equitable under the circumstances. Such deviation should not be permitted for consensual special magistrates, on the other hand, because they are to decide "in the same manner as a civil lawsuit ... presented to the judge" and because there is a full right to appeal from such decisions.

12. Another important issue, somewhat related to the issue of the substantive standard, is what type of decision should the arbitrator or consensual special magistrate make: "short form" ala general verdict or "long form" ala findings of fact and conclusions of law. Here the underlying court-annexed ADR rule does provide guidance. The consensual special magistrate proceedings are to be conducted "in the same manner as a civil lawsuit is presented to a judge" and thus presumably require findings of fact and conclusions of law. (Minn. R. Gen. Prac. 114.02(a)(2).) In court-annexed arbitration, however, "No findings of fact, conclusions of law, or opinions supporting an arbitrator's decision are required." (Id. 114.09(d)(3).)

13. Again, for the same reasons just given, the parties to a court-annexed arbitration proceeding should have the right to agree to require the arbitrator to provide reasons for an award or to render findings of fact, conclusions of law and award as a discipline to protect against compromise decisions by the arbitrator. Such reasons are required of arbitrators under Article 28(2) of the AAA's International Arbitration Rules and Rule 13.2 of CPR's Rules for Non-Administered Arbitration of Business Disputes (unless expressly waived by the parties under both sets of rules). The AAA, however, discourages its commercial arbitrators from providing reasons for an award on the ground that it may increase the risk of a court's vacating an award. (AAA's Guide for Commercial Arbitrators at 24; AAA's Guide to Arbitration at 16.) On the other hand, there should not be a parallel right to abandon such findings and conclusions for consensual special magistrates because of the reasons previously provided.

APPENDIX C

COMMENTS TO THE ADR REVIEW BOARD REGARDING ITS 6/5/96 DRAFT RULE 114 CODE OF ETHICS

Submitted by
Conflict Management and Dispute Resolution Section
Minnesota State Bar Association

April 11, 1997

MEMORANDUM

TO : Alanna Moravetz
Lynae K. E. Olson

FROM : Ethics and Standards Committee
Conflict Management and Dispute Resolution Section
Minnesota State Bar Association

DATE : August 15, 1996

RE : Comments to the ADR Review Board
Proposed Code of Ethics

Enclosed are our Comments, together with Appendices A, B and C which include a Proposed Revised Rule 114 Code of Ethics, Analysis of Some of the Changes in the Proposed Revised Rule 114 Code of Ethics, and a portion of our October 27, 1995 Memo to the ADR Review Board. These documents are presented on behalf of the Conflict Management and Dispute Resolution Section by the Ethics and Standards Committee.

Please contact Jan Frankman at 349-9882 with any questions and, if the ADR Review Board agrees, to arrange a convenient time for Committee representatives to appear and present our comments.

Thank you.

Hand Delivered

COMMENTS TO THE ADR REVIEW BOARD REGARDING ITS 6/5/96 DRAFT RULE 114 CODE OF ETHICS

Submitted by
Conflict Management and Dispute Resolution Section
Minnesota State Bar Association

August 15, 1996

The Ethics/Standards of Practice Committee ("the Ethics Committee") of the Conflict Management and Dispute Resolution Section ("CMDR Section") of the Minnesota State Bar Association ("MSBA") has held eight meetings regarding the ADR Review Board's 6/5/96 Draft Code of Ethics ("the Draft Code") while the CMDR Section has held two such meetings. The result of our meetings and other work is the Revised Proposed Rule 114 Code of Ethics in "revisor of statutes" form noting deletions from, and additions to, the ADR Review Board's 6/5/96 draft of same. A copy of our document is attached hereto as Appendix A. Discussion of some of the changes we are suggesting is found in Analysis of Some of the Changes in the Revised Proposed Rule 114 Code of Ethics, a copy of which is attached hereto as Appendix B. (We regret that we did not have sufficient time to discuss all of the changes we are suggesting.)

In preparing this report to the ADR Review Board, the Ethics Committee and the CMDR Section have studied the Draft Code and Rule 114 of the Minnesota General Rules of Practice and have consulted the Model Standards of Conduct for Mediators ("the Model Standards"), the CMDR Section's October 27, 1995, report to the ADR Review Board ("the Prior Report"), together with applicable State and Federal law (e.g., Minnesota Civil Mediation Act, Uniform Arbitration Act), codes of conduct and studies provided by various dispute resolution organizations and professional associations (e.g., American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes, MAM, Minnesota Rules of Professional Conduct for Attorneys, NIDR) and books and periodicals which address the broad area of ADR and narrow issues which have arisen particularly with respect to mediation practice.

In reviewing the Draft Code, we addressed four principal areas of concern: (1) is the purpose of the Code to provide aspirational statements, standards to use as guides or enforceable rules; (2) has sufficient consideration been given to all of the ADR processes in light of the fact that the Draft Code is largely styled after the Model Standards which apply to mediation; (3) how are the provisions of this Code distinct from the Lawyers Rules and how will each be enforced; and (4) whether sufficient consideration has been given to the professionalism of a neutral.

Finally, the Committee recognized that there are several topics which will need to be addressed another day, including: (1) what agency and what procedures will be used for enforcement of the Code of Ethics; (2) whether and to what extent the Draft Code will be applied exclusively when lawyers provide service as a neutral; (3) where and how "exit doors" from the Lawyers Rules may be designated and approved; (4) whether the Section may suggest amendment to the Judicial Code concerning confidentiality and to Rule 114 with regard to prohibiting a disbarred attorney from inclusion on the Roster; (5) whether and to what extent there should be more stringent education and experience criteria to be included on the Roster; and (6) what are the procedures for removal or withdrawal of a

neutral[1]. Attached as Appendix C to these Comments are pages 2 through 5 of our Prior Report which details (beginning at III, Applicability of Minnesota Rules of Professional Conduct for Attorneys to Attorneys Acting as ADR Neutrals) the exit door issues.

We suggest that, after the ADR Review Board adopts a Code of Ethics, it publish the Code in a booklet which also includes Rule 114 of the Minnesota General Rules of Practice for the District Courts, the Minnesota Uniform Arbitration Act (Minn. Stat. §§572.08 - 572.30 [1994]), the Minnesota Civil Mediation Act (Minn. Stat. §§572.31 - 572.40 [1994]) and Minn. Stat. §§484.73 - 484.76 [1994]).

Thank you for the opportunity to provide our Comments. We request that you allow us to appear and present our proposals to you at your convenience.

Respectfully submitted:

MINNESOTA STATE BAR ASSOCIATION
CONFLICT MANAGEMENT AND DISPUTE RESOLUTION SECTION
ETHICS/STANDARDS COMMITTEE

Jan Frankman
Sheryl Ramstad Hvass
Duane Krohnke
Bob Langford
Diane Lynch
John Palmer
Rebecca Picard

Consultant to the Committee:
Patrick Burns,
Lawyers Board of Professional Responsibility

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[1] We have noticed that neither the Board's Draft Code of Ethics nor Rule 114 itself has any detailed procedures for removal or withdrawal of a neutral, and we have not been able to find such provisions elsewhere. Rule 114.05(c) talks about disqualification of a neutral "by making an affirmative showing of prejudice to the chief judge or his or her designee." The Draft Code's Rule I talks about a neutral's obligation to withdraw if "at any time the neutral is unable to conduct the process in a neutral manner." Comment No. 1 to the Draft Code's Rule III discusses a neutral's obligation to withdraw if "a dispute...is beyond the neutral's competence." There are statutory provisions for removal of a neutral without cause within five days of notice of appointment of a neutral and for removal for cause (i.e., "prejudice"), but by their terms they only apply to "non-binding" ADR processes (Minn. Stat. §484.74, Subd. 2 [1994]). Comment E to Canon II of the AAA's Arbitrator's Code of Ethics, on the other hand, has more detailed discussion of this subject.

APPENDIX A:

PROPOSED REVISED* RULE 114 CODE OF ETHICS

Submitted by
Conflict Management and Dispute Resolution Section
Minnesota State Bar Association

August 15, 1996

** This document is based upon the Draft (6/5/96) Rule 114 Code of Ethics published for comment by the Supreme Court ADR Review Board. New suggested language is underlined. Proposed deletions in the language are interlined.*

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RULE 114 CODE OF ETHICS

INTRODUCTION AND SCOPE

Rule 114 of the Minnesota General Rules of Practice provides that nearly all civil cases filed in district court must consider the use of alternative dispute resolution (ADR). 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. Two State Court Rosters of Neutrals are maintained -- one for mediators and one for arbitrators and other neutrals.

Individuals and organizations included on either Roster consent to the jurisdiction of the ADR Review 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. ~~By virtue of Board approval as qualified neutrals, individuals and organizations consent to the jurisdiction of the ADR Review Board and this Code of Ethics. This code provides standards of ethical behavior that protects consumers of the ADR services, as well as gives guidance to neutrals who conduct 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, to each other as professionals and to the court, but also to the continuing improvement of ADR processes. Accordingly, neutrals must observe high standards of ethical conduct. ~~so that the integrity and fairness of the process will be preserved. Neutrals should recognize their responsibility to the court to the public, to the parties, and to all other participants in the ADR process.~~ 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 impact ~~may affect a party's~~ values and negotiation ~~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. Violation of a provision of this Code shall not give rise to 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.~~

Failure to comply with any provision in this Code of Ethics may be the basis for removal from the Roster of Qualified 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.

Rule I. **IMPARTIALITY:** The concept of ~~neutral~~ impartiality of the neutral is central to ~~the~~ 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. 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 is obligated to withdraw.

Comments:

1. Conflicts of interest addressed in Rule II are a part of the consideration in determining impartiality of a neutral. Impartiality, however, is a broader concept which requires the neutral to conduct careful on-going self-examination.

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.

A mediator practicing another profession shall not, subsequent to a mediation, establish a professional relationship that is adverse to any of the parties to the mediation.

Without the consent of all parties, a neutral ~~who also practices in another profession~~ shall not subsequently establish a business or professional relationship ~~in that other profession with one of the parties, or any person or entity in a substantially factually related matter.~~ in a substantially factually related matter with one of the parties to the ADR proceeding or any other person or entity. This is not intended to prevent a neutral from serving in the same neutral capacity in any subsequent case.

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. ~~A conflict~~

~~of interest is a dealing or relationship that might reasonably create an impression of possible bias.~~ If all parties agree to proceed after being informed of conflicts, the neutral may proceed with the case. ~~If, however, the conflict of interest casts serious doubt on the integrity of the process, the neutral should decline to proceed.~~ If, however, the neutral believes that the conflict of interest would inhibit the neutral's impartiality, the neutral should decline to proceed.

2. Persons who are requested to serve as a neutral, before accepting should disclose: (i) any direct or indirect financial or personal interest in the outcome of the proceeding; and (ii) any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias.

3. The disclosures by a prospective neutral pertain to relationships between (i) the neutral, members of his or her family, his or her current employer, partners or business associates and (ii) the parties, their representatives, insurers, lawyers and individuals who are expected to be witnesses or to accompany the parties in mediation.

4. Prospective neutrals shall make a reasonable effort to inform themselves of any interests or relationships which require disclosure. Such persons should err on the side of disclosure because it is better that the relationship be disclosed at the outset when the parties are free to reject the prospective neutral or to accept the person with knowledge of the relationship. (See Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 151-52 (1968)(concurring opinion).) On the other hand, the prospective neutral cannot be expected to provide a complete and unexpurgated business biography or to disclose trivial relationships or interests. (Id.)

5. After accepting appointment and while serving as a neutral, a person shall not enter into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias.

6. The obligation to disclose interests or relationships is a continuing duty which requires the neutral immediately to disclose in writing, at any stage of the proceeding, any such

interests or relationships which may arise or which are recalled or discovered.

7. 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. (Minn. Stat. §572.19, Subd. 1(1),(2), §572.36 (1994); Uniform Arbitration Act §12(a)(1),(2); 9 U.S.C. §10 (a),(b)(Federal Arbitration Act).)

~~8. This Rule provides: "Without the consent of all parties, a neutral who also practices in another profession shall not subsequently establish as professional relationship in that other profession in a substantially factually related matter with one of the parties to the ADR proceeding or any other person or entity." This is the holding of Polysoftware Int'l, Inc. vs. Su, 800 F. Supp. 1487 (D. Utah 1995), which involved an attorney/mediator who in the prior mediation had acquired confidential information in a caucus. It is also the holding of Cho vs. Superior Court, 45 Cal. Rptr. 2d 863 (Ct. App. 1995), which involved a former judge who had conducted a settlement conference in the same matter.~~

8. In deciding whether to establish a relationship in an unrelated matter, the neutral should exercise caution in circumstances which would raise legitimate questions about the integrity of the process.

9. A neutral should avoid conflicts of interest, as defined in Comment No. 1 to this Rule, in recommending the services of other professionals in connection with the ADR proceeding before the neutral.

10. 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.

11. There is no intent that the prohibition established in the second paragraph of this Rule II which applies to an individual mediator shall be imputed to an organization, panel or firm of which the mediator is a part.

Rule III. **COMPETENCE:** A neutral shall serve as a neutral only when she/he

has the necessary qualifications and sufficient knowledge regarding the appropriate alternative dispute resolution process to satisfy the reasonable expectations of the parties.

Comments:

1. Any person on the Statewide Roster of Approved Neutrals may be selected as a neutral, provided that the parties are satisfied with the neutral's qualifications. A person who offers ~~herself or himself as available to serve as a~~ neutral services gives parties and the public the expectations that she or he ~~has the competency~~ 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 shall ~~have available~~ provide information regarding their relevant training, education and experience for the parties and be ready to provide any requested additional information.

3. Neutrals come to this field from a variety of backgrounds. Neutrals have the responsibility to continually improve their skills through formal education, training programs and practical experience.

4. Neutrals shall not offer advice to the parties to a dispute unless the parties have requested and agreed that the neutral's opinion is desired. In any event, it is not the role of a mediator to give expert advice.

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.~~ Before beginning any ADR process, a neutral shall clearly inform and discuss with the parties the nature of confidential communications.

A neutral shall inform the parties of circumstances under which disclosure of information may be compelled pursuant to law or rule or where any limit on the protection of confidentiality exists.

Information received in confidence by a neutral (in private session, caucus or joint session with the disputants) shall remain confidential. Such information shall not be revealed within the process to any other person or party without the prior permission of the party or person

from whom the information was received. Such information shall not be revealed to persons outside of the process without the prior written agreement of the parties.

A neutral is in a relationship of trust to the parties and shall not, at any time, use confidential information acquired during the proceeding to gain personal advantage for himself or others or to adversely affect the interest of another.

Comments:

~~1. A mediator should discuss issues of confidentiality with the parties before beginning mediation.~~

1. Rules 114.08 (Confidentiality) and 114.10 (Communication With Neutral) help to distinguish the various ADR processes and appropriate conduct of a neutral and the parties in the different processes.

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 has a duty to ensure that the parties are educated about ADR options and that they understand the nature and consequences of the process they have chosen. A neutral has a duty not only to the parties, but also to the integrity of ADR processes and to other persons, including the public who may be affected by ADR agreements.

A neutral shall treat all parties, other professionals and the public with respect and dignity. A neutral shall not knowingly make false statements of fact or law. Throughout and after the process, a neutral should avoid impropriety or the appearance of impropriety.

~~The neutral shall exert every reasonable effort to expedite the process including prompt issuance of orders.~~ A neutral shall make every effort to respond to the timing needs of the parties by the prompt issuance of mediation summaries or arbitration awards or other documentation requested by the parties and agreed to by the neutral.

In the case of mediation, a neutral shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

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 ~~counseling or~~ 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.~~

4~~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, alcohol, or other physical or mental incapacity.

5. Unless the participants have previously entered into a written agreement, the best practice in most situations is for a neutral, at the outset of the process, to enter into a written agreement with all participants that includes a description of the neutral's role, the scope of the neutral's decision-making authority, if any, and the basis of compensation, fees, costs, and time and manner of payment by the participants.

6. A mediator has a responsibility to promote the participants' consideration of the interest of other persons affected by the agreement, including the public.

7. A mediator is obligated to inform parties of their own obligation to participate in good faith. A mediator should inform them of the need to be realistic in protecting themselves.

8. Where a mediator discovers an intentional abuse of the process, such as non-disclosure of vital information or lying, the mediator is obligated to encourage the abusing party to alter the conduct in question. The mediator is not obligated to reveal the conduct to the other party, nor to discontinue the mediation; but the mediator may discontinue, so long as this does not violate the obligation of confidentiality. (Rule XI.D.)

9. A neutral should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other

abuse or disruption of the ADR process.

10. A neutral should be patient and courteous to the parties, their attorneys, witnesses and all other participants in the ADR proceeding and should encourage similar conduct by everyone else.

11. A neutral should accord to all parties the right to appear in person and to be heard after due notice of the time and place of the proceeding.

12. A neutral should not deny any party the opportunity to be represented by counsel.

Rule VI. **PROFESSIONALISM; CHARACTER AND FITNESS:** To instill confidence in ADR processes, persons who serve as neutrals are expected to act with integrity and honesty in all of their professional dealings. They shall treat other professionals with respect, honesty and fair dealing, and shall respect the role of other neutrals.

Comments:

1. A mediator should respect the complementary relationship between mediation and legal, mental health, and other social services and should promote cooperation with other professionals.

2. Neutrals shall treat other neutrals with professional courtesy and shall not engage in activities that are likely to undermine public confidence in ADR processes.

3. In those situations where more than one mediator is participating in a particular case, each mediator has a responsibility to keep the other informed of developments essential to a cooperative effort.

4. When a person qualified to serve as a neutral is acting in another capacity in an ADR process, such as that of a party, advocate or expert, he or she shall respect the role of the neutral serving in that case, and shall not interfere with or attempt to undermine the neutral's authority or effectiveness.

Rule ~~VI~~ VII. **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 (including potential results), the neutral's role and his/her skills or qualifications.

In an advertisement or other communication to the public, a neutral who is on the Supreme Court Roster may only use the phrase "qualified neutral under Rule 114 of the Minnesota General Rules of Practice."

Comments:

1. A neutral shall refrain from promising specific results or making representations favoring one side over another for the purpose of obtaining business.

2. A neutral may discuss the advantages of using a particular alternative dispute resolution process, but shall refrain from making any implied or express assurance that use of any process will guarantee a desired result. It is best practice to clearly state in a written agreement signed by all participants in the ADR process that no assurances have been made as to the success or result of the process.

3. Although inclusion on the roster requires that a neutral take courses which have been certified by the ADR Review Board, it is never appropriate to identify oneself as a certified neutral.

Rule ~~VII~~ VIII. **FEES:** ~~A neutral shall fully disclose and explain~~ At the outset of the relationship, a neutral shall enter into a written agreement with all participants in the ADR process which includes the basis of compensation, fees, ~~and charges~~ costs, and time and manner of payment to all participants in the process. 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~~1. A neutral who withdraws from a case should return any unearned fee to the parties. The best practice is to establish a separate account for unearned fees.

Rule IX. **SELF-DETERMINATION IN MEDIATION:** A mediator shall recognize that mediation is based on the principle of self-determination ~~by the parties~~. ~~It~~ This principle requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement which, so far as possible, accommodates the underlying interests of all parties. The primary responsibility for the resolution of a dispute ~~and the shaping of a settlement agreement~~ rests with the parties. Any party may withdraw from mediation at any time.

Comments:

1. ~~The~~ A mediator may provide information about the process, raise issues, draft proposals and help parties explore options. The primary role of ~~the~~ a mediator is to facilitate a voluntary resolution of a dispute and not to impose his or her preferred solution. Parties should be given the opportunity to consider all proposed options. It is acceptable for ~~the~~ a mediator to suggest options ~~or offer opinions about the case in response to parties' requests for such options or opinions~~, but not to coerce the parties to accept any particular option. A mediator shall be non-judgmental. For example, the mediator shall not seek to determine which party is likely to prevail in litigation and to persuade the parties to accept the mediator's opinion of an appropriate settlement.

2. A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is 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.

3. A mediator should make the parties aware of the requirement of the Minnesota Civil Mediation Act that, in order to reach a binding settlement agreement, the parties must be "advised in writing that (a) the mediator has no duty to protect their interests or provide them with information about their legal rights; (b) signing a mediated settlement agreement may affect their legal rights; and (c) they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights."

Rule ~~IX~~ X. COMMUNICATIONS WITH THE PARTIES AND THEIR ATTORNEYS:

Arbitration and Consensual Special Master Proceedings.

An arbitrator or consensual special master shall not discuss a case with any party or attorney in the absence of the other party or parties to the proceeding, except in the following circumstances: (1) Discussions may be had with a party or an attorney concerning such matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator or consensual special master should promptly inform the other party or parties of the discussion and should not make any final determination concerning the matter discussed before giving the absent party or parties an opportunity to express its views. (2) If a party fails to be present at a hearing after having been given due notice, the arbitrator or consensual special master may discuss the case with any party who is present. (3) If all parties request or consent to it, such discussion may take place.

Whenever an arbitrator or consensual special master communicates in writing with one party, a copy of same should be sent to every other party. Whenever an arbitrator or consensual special master receives any written communication concerning the case from one party which appears not to have been sent to the other parties, the arbitrator or consensual special master should do so.

An arbitrator or consensual special master should not exert pressure on any party to settle. Such a neutral, however, may suggest that the parties discuss settlement, but should not be present or participate in settlement discussions unless requested to do so by all parties.

Other ADR Proceedings. In ADR Proceedings other than arbitration and consensual special master proceedings, a neutral may discuss the case with any party or attorney in the absence of other parties or their attorneys so long as the neutral believes the communication encourages or facilitates settlement.

Comments:

1. This Rule parallels Rule 114.10 of the Minnesota General Rules of Practice for the District Courts, which is directed at whether

and when parties and their counsel may communicate ex parte with a neutral in Rule 114 proceedings. This Rule is directed at whether and when the neutral may engage in such communications.

2. This Rule is also based, in part, on comments B and C to Canon III of the American Arbitration Association's Code of Ethics for Arbitrators in Commercial Disputes.

Rule ~~X~~ XI. **ARBITRATION AND CONSENSUAL SPECIAL MASTER PROCEEDINGS; JUST, INDEPENDENT AND DELIBERATE DECISIONS AND OPINIONS.** In arbitration and consensual special master proceedings, a neutral, after careful deliberation and exercise of independent judgment, should decide the matter justly based upon the law and the evidence as presented in the proceeding. Such a neutral should not exert pressure on any party to settle. Such a neutral, however, may suggest that the parties discuss settlement, but should not be present or participate in settlement discussions unless requested to do so by all parties.

Comments:

1. A neutral involved in the ADR processes mentioned in this Rule should not permit outside pressure to affect the decision. A neutral should not delegate to any other person the duty to decide.

2. A neutral should decide all issues submitted for determination. No other issues should be decided.

3. When said neutral determines that more information than has been presented by the parties is required to decide the matter, the neutral may ask questions, call witnesses and request documents or other evidence.

APPENDIX B:

ANALYSIS OF SOME OF THE CHANGES IN THE PROPOSED REVISED RULE 114 CODE OF ETHICS

Submitted by
Conflict Management and Dispute Resolution Section
Minnesota State Bar Association

August 15, 1996

Rule II: Conflicts of Interest:

1. We suggest an expansion of the definition of "conflict of interest" in Comment #1 to this Rule to track the implicit definition of same in the Minnesota Arbitration Act and in Canon II of the AAA's Arbitrators' Code: "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."

2. We believe there are several provisions of the Minnesota Arbitration Act (Minn. Stat. §§572.10, 572.19 (1994)) and Comment D to Canon I and Comments A, B and C to Canon II of the AAA's Arbitrators' Code that should be incorporated as comments to Rule II of the Board's Draft Code. They are as follows:

   (a) Persons who are requested to serve as a neutral, before accepting should disclose: (i) any direct or indirect financial or personal interest in the outcome of the proceeding; and (ii) any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias.

   (b) The disclosures by a prospective neutral pertain to relationships between (i) the neutral, members of his or her family, his or her current employer, partners or business associates and (ii) the parties, their representatives, insurers, lawyers and individuals who are expected to be witnesses.

   (c) Prospective neutrals shall make a reasonable effort to inform themselves of any interests or relationships which require disclosure. Such persons should err on the side of disclosure because it is better that the relationship be disclosed at the outset when the parties are free to reject the prospective neutral or to accept the person with knowledge of the relationship. (See, Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 151-52 (1968)(concurring opinion).) On the other hand, the prospective neutral cannot be expected to provide a complete and unexpurgated business biography or to disclose trivial relationships or interests. (Id.)

   (d) After accepting appointment and while serving as a neutral, a person shall not enter into any financial, business, professional,

family or social relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias.

(e) The obligation to disclose interests or relationships is a continuing duty which requires the neutral immediately to disclose in writing, at any stage of the proceeding, any such interests or relationships which may arise or which are recalled or discovered.

3. We also suggest the addition of the following comment to this Rule: "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. (Minn. Stat. §572.19, Subd. 1(1),(2), §572.36 (1994); Uniform Arbitration Act §12(a)(1),(2); 9 U.S.C. §10 (a),(b) (Federal Arbitration Act).)"

4. There is a split within the Committee with respect to the portion of our Proposed Rule which states, "A mediator practicing in other professions shall not, subsequent to a mediation, establish a professional relationship that is adverse to any of the parties to the mediation."

A minority of the Committee opposes the inclusion of this provision because it goes beyond the holding of Polysoftware, Int'l., Inc. vs. Su, 800 F. Supp. 1487 (D. Utah 1995). The Court in Polysoftware stated that there were competing interests in establishing a conflicts rule for conduct of the mediator after an ADR proceeding. On the one hand, there was a need for a rule which encouraged disputants to disclose confidences to a mediator without fear that the mediator subsequently would be an opposing attorney in a substantially related matter. On the other hand, there was a need for a rule that did not discourage attorneys from becoming mediators. Therefore, the appropriate rule, held the Court, limited post-mediation conflict in a substantially factually related matter.

The majority of the Committee is concerned that, in mediation, the Polysoftware standard of "substantially related matter" is not broad enough to prohibit some post-mediation conduct we would consider improper. A mediator often inquires broadly about the business and affairs of each party in order to uncover and understand the basic interests of the parties, learning facts and attitudes well beyond the narrow legal issues in the particular dispute being mediated. Where

such knowledge is obtained in confidence, it would be unfair to the party providing the knowledge, and harmful to the integrity of the mediation process and profession, to make subsequent use of such knowledge in a matter adverse to such a party.

5. We note that the Board's Draft Code's provision about subsequent relationship in a "substantially factually related matter" is broader than Rule 1.12 of the Rules of Professional Responsibility with respect to a former arbitrator who was not involved in confidential ex parte settlement discussions. Under Rule 1.12, the former attorney/arbitrator is barred from subsequently representing as a lawyer someone in "the matter," i.e., the same matter.

Rule III: Competence:

We have discussed, but suggested no language, with regard to distinguishing between process and substantive competencies. It may be appropriate to provide a comment which alerts parties to the need to determine what competencies are most important and necessary in a particular case in choosing a neutral.

Rule IV: Confidentiality:

Confidentiality in mediation has been one of the consistent focal points of commentary about the process. The most common view is that candor and success of the process depend on confidentiality of communications made during the process (D. Alan Rudlin and Kelly L. Faglioni of Hunton and Williams in NLJ In Focus ADR issue of June 12, 19950, Nebraska Office of Dispute Resolution Manual of Standards and Ethics Section III.C, Model Standards of Practice for Family and Divorce Mediation IV, A. The National Standards for Court-Connected Mediation Programs devotes a Section (9) and four pages of discussion in advising Courts to have clear, written policies relating to the confidentiality of both written and oral communications in mediation. The Standards comment on the policy consideration of confidentiality: "The one [policy consideration] most frequently cited is that confidentiality is required for the process to be effective. The assurance of confidentiality encourages parties to be candid and to participate fully in the process..."

It seems that the evidentiary treatment of information developed in a court-annexed procedure, or under the new statutory provision is a right or protection given to parties by the rule or law, and has little to do with an ethical standard. However, how the neutral deals with information, and discloses information the neutral receives, is appropriate for guidance and

standard.

Two distinct arenas need discussion. The first is information transfer within the process, most often at issue as the result of caucus, or ex parte communication. The practical need for guidance is likely to be in the area of disclosures to the other party to achieve or attempt to achieve a result. The second is disclosure of information or status to third parties, including the public, the assigning judge, others interested in the subject matter or, for that matter, advertising recipients.

One of the challenges to a pithy statement is that of otherwise required disclosure, despite the expectation of confidence, i.e., reporting child abuse.

Rule V: Quality of the Process:

Every other aspect of the ethical code impacts the quality of the process. It is important for mediators, in particular, to be aware of various kinds of harm that can result from mediation and various abuses of the mediation process. These include exposing participants to intimidation or "unsafe" expressions of emotion or hostility; a participant's acting in reliance upon agreements made in mediation before they are formalized in a court order; fishing for information with no intention of trying to reach agreement; lying or intentionally concealing information critical to a proposed solution; and engaging in mediation solely as a stalling technique. These kinds of abuses, especially if discovered by a mediator, can result in difficult dilemmas for the mediator. While a mediator cannot always prevent such abuses, knowledge of their potential increases the likelihood that the mediator may be able to head them off or become aware of them at an early enough stage to keep harm to a minimum.

A quality mediation process requires that the participants understand the nature of the process and make freely chosen and informed decisions. Mediators should be sensitive to any indicia that a party is acting under fear or coercion or does not understand the decisions he or she may be making.

Rule VII: Advertising and Solicitation, and Rule VIII: Fees:

"Exit Door" issues raised by these two rules include the following:

1. What ethical issues arise where co-mediation teams are used?

2. What problems with Rule 5.4 lawyers from splitting fees with a non-lawyer result when lawyers co-mediate with clinicians, such as a mental health professional?

3. Does a lawyer participating with a mediation or dispute resolution center run into problems with solicitation and use of a trade name?

4. Should solicitation of business by dispute resolution entities be subject to different standards than are applied to individuals?

5. Can an ADR referral source promise "volume discounts" to the companies that meet certain thresholds? Must that be disclosed to the other side?

Rule XI: Arbitration and Consensual Special Master Proceedings: Just, Independent and Deliberate Decisions and Opinions:

1. This proposed new Rule is a result of our examination of whether sufficient consideration had been given to all of the ADR processes in light of the fact that the Draft Code is largely styled after the Model Standards, which apply only to mediation.

2. This proposed new Rule is based, in part, upon Canon V and its comments of the AAA's Arbitrators' Code of Ethics.

3. This proposed new Rule uncovered a significant issue of public policy and the law with respect to the substantive basis for a decision by an arbitrator (or consensual special master) under Rule 114, which we believe the Board needs to address and resolve in any code of ethics.

4. As initially drafted by us, this proposed new Rule provided, in part, that an arbitrator or consensual special master should make a decision "based upon the law." At one of the CMDR meetings, someone questioned whether such a provision was contrary to Chapter 572 of the Minnesota Statutes (the Minnesota Arbitration Act). At another CMDR meeting, several persons raised a similar question while noting that some arbitrators were not attorneys and that arbitrators under AAA rules were not so constrained. The consensus of the latter CMDR meeting was to modify this portion of this proposed new Rule to state that an arbitrator or consensual special master should make a decision "based upon the law...as presented at the proceeding." This CMDR consensus language on this point is incorporated in the Revised Proposed Rule 114 Code of Ethics, which we are submitting to the Board.

5. We have not found anything in the Minnesota Arbitration Act which expressly authorizes or requires an arbitrator to base a decision on something other than the law. The Act does state that an award may

not be vacated on the ground that the relief granted by the award would not be granted by a court of law or equity (Minn. Stat. §572.19, Subd. 1 [1994]). However, the Act also states that an arbitrator may modify or correct an award if it "is based on an error of law" (Id. §572.16).

6. We have not had sufficient time or resources to conduct our own legal research on this issue, but we note that, according to Dunnell's, "Where the arbitrators are not restricted by the submission to decide according to principles of law, they may make an award according to their own notion of justice without regard to the law." [3 Dunnell, Minnesota Digest, "Arbitration and Award," §201(b) at 390 (4th Ed. 1989).]

7. It apparently is the general practice and policy of the AAA that its commercial arbitrators are not obligated to follow or apply the governing substantive law (e.g., Hochman, "A Bar Association-Sponsored Forum for Arbitration is Needed," Nat'l L.J., Oct. 22, 1992, at 1; Hochman, "Do We Need a Lawyers Arbitration Forum for Commercial Arbitration?" [American Bar Ass'n, Section of Dispute Resolution, "What's Wrong with Arbitration and How Can We Fix It?", Aug. 4, 1996]).

8. We, however, did not find anything that expressly states this practice or policy in the AAA's Commercial Arbitration Rules, its Guide to Arbitration or its Guide to Commercial Arbitrators. Nor did we find any express statement to that effect in the AAA's Arbitrators' Code of Ethics; instead, it states in Comment B to Canon V: "An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision."

9. In contrast, Article 29 of the AAA's International Arbitration Rules (November 1, 1993) tracks the language of the UNCITRAL Arbitration Rules, and provides as follows:

> Applicable Laws
>
> Article 29
>
> 1. The tribunal shall apply the substantive law or laws designated by the parties as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such law or laws as it determines to be appropriate.

2. In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract.

3. The tribunal shall not decide as *amiable compositeur* or *ex aequo et bono* unless the parties have expressly authorized it do so.

10. We believe that the ADR Review Board, in any code of ethics for neutrals, needs to address and resolve this issue so that it is clear to the courts, the parties and the arbitrators (and consensual special masters) what the substantive standard should be. Subsidiary issues for the Board are the following: (a) whatever the standard is, should the court and/or the parties have the right to select a different standard; and (b) should the rule on this point be the same for arbitrators and consensual special masters, as we have suggested.

11. Another issue, somewhat related to the issue of the substantive standard, is what type of decision should the arbitrator or consensual special master make: "Short form" ala general verdict, or "long form" ala findings of fact and conclusions of law. Again, subsidiary issues are: (a) whatever the standard is, should the court and/or the parties have the right to select a different standard; and (b) should the rule on this point be the same for arbitrators and consensual special masters. We have not had time to consider any of these issues.

APPENDIX C

Submitted by
Conflict Management and Dispute Resolution Section
Minnesota State Bar Association

August 15, 1996

III. Applicability of Minnesota Rules of Professional Conduct for Attorneys to Attorneys Acting as ADR Neutrals.

In order to try to find some kind of "exit door" from the attorney's rules linked to an "entrance door" to the ADR neutral's rules, the Committee has reviewed the Minnesota Rules of Professional Conduct for Attorneys to determine their impact upon attorneys acting as ADR neutrals.[3] Here are the results of that analysis:

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[2] We have no preconception as to the enforcement mechanism for the ADR neutral's rules. We await any suggestions by the Professional Responsibility Board and the ADR Review Board.

[3] The Committee acknowledges the assistance in this effort rendered by Patrick R. Burns, Senior Assistant Director of the Office of the Director of the Minnesota Lawyers Professional Responsibility Board.

A. Rules Which Appear To Apply to Attorneys Who Are Acting as ADR Neutrals.

1.5 Fees
1.6 Confidentiality
1.7 Conflict of Interest
1.8 Conflict of Interest
1.9 Conflict of Interest
1.10 Imputed Disqualification
1.11 Successive Government & Private Employment
1.12 Former Judge, Arbitrator
1.13 Organization as Client
7.1 Communications Concerning Lawyer's Services
7.2 Advertising
7.3 Contacts with Prospective Clients
7.4 Communication of Fields of Practice
7.5 Firm Names
8.2 Judicial & Legal Officials
8.3 Reporting Professional Misconduct[4]
8.4 Misconduct
8.5 Jurisdiction

B. Rules Which Do Not Apply Because of Non-Existence of Attorney-Client Relationship.

1.1 Competence[5]
1.2 Scope of Representation[6]
1.3 Diligence[7]
1.4 Communication
1.14 Client Under Disability[8]
1.15 Safekeeping Property[9]

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[4] There is an express exemption from Rule 8.3 in a pilot project for mediation of attorney professional misconduct matters.

[5] Rule 1.1 relates to a topic which should be covered in ethical rules for neutrals.

[6] Rule 1.2(c) and (d) cover topics which should be covered in ethical rules for neutrals.

[7] Rule 1.3 relates to a topic which should be covered in ethical rules for neutrals.

[8] Rule 1.14 relates to a topic which should be covered in ethical rules for neutrals.

[9] Rule 1.15 relates to a topic which needs to be addressed in ethical rules for neutrals if they accept responsibility for safekeeping property.

1.16 Declining Representation[10]
2.1 Advisor
2.2 Intermediary[11]
2.3 Evaluation for Use by Third-Parties
4.1 Truthfulness in Statements[12]
4.2 Communication with Person Represented by Counsel
4.3 Dealing with Unrepresented Person[13]
4.4 Respect for Rights of Third Parties

C. Rules Which Do Not Apply Because Attorney/Neutral Is Not an Advocate.

3.1 Meritorious Claims & Contentions
3.2 Expediting Litigation
3.3 Candor Toward Tribunal
3.4 Fairness to Opposing Party and Counsel
3.5 Impartiality and Decorum of Tribunal
3.6 Trial Publicity
3.7 Lawyer as Witness
3.8 Prosecutor
3.9 Advocate in Nonadjudicative Proceedings

D. Rules Which Do Not Apply for Other Reasons.

5.1 Responsibilities of Partner
5.2 Responsibilities of Subordinate Lawyer
5.3 Responsibilities of Nonlawyer Assistants
5.4 Professional Independence[14]
5.5 Unauthorized Practice of Law[15]
5.6 Restrictions on Right To Practice
6.1 Pro Bon Publico

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[10] Rule 1.16 relates to a topic which needs to be addressed in ethical rules for neutrals.

[11] Rule 2.2 needs an express comment that it does not apply to attorneys acting as neutrals.

[12] Rule 4.1 relates to a topic which should be covered in ethical rules for neutrals.

[13] Rule 4.3 relates to a topic which should be covered in ethical rules for neutrals.

[14] Rule 5.4 raises the issue of whether providing mediation or other neutral services constitutes the "practice of law." This should be resolved by the Board.

[15] Rule 5.5 raises the issue of whether providing mediation or other neutral services constitutes the "practice of law." This should be resolved by the Board.

6.2 Accepting Appointments
6.3 Membership in Legal Services Organization
6.4 Law Reform Activities
8.1 Bar Admissions

To try to achieve the Committee's goal of having an "exit" door from the attorney's rules linked to an "entrance" door to the ADR neutral's rules, the Committee believes that any set of ethical rules for ADR neutrals should contain parallel provisions to the attorney's rules which appear to apply to attorneys who are acting as ADR neutrals as well as similar provisions to those attorney's rules which on their face do not so apply but which relate to topics which should be covered in ethical rules for neutrals. Here then is a list of those attorney's rules which should be included in some form in any set of ADR neutral's rules:

1.1 Competence
1.2(c) and (d) Scope of Representation
1.3 Diligence
1.5 Fees
1.6 Confidentiality
1.7 Conflict of Interest
1.8 Conflict of Interest
1.9 Conflict of Interest
1.10 Imputed Disqualification
1.11 Successive Government & Private Employment
1.12 Former Judge, Arbitrator
1.13 Organization as Client
1.14 Client Under Disability
1.15 Safekeeping Property (for neutrals if they accept responsibility for safekeeping property).
1.16 Declining Representation
4.1 Truthfulness in Statements
4.3 Dealing with Unrepresented Person
7.1 Communication Concerning Lawyers' Services
7.2 Advertising
7.3 Contacts with Prospective Clients
7.4 Communication of Field of Practice
7.5 Firm Names
8.2 Judicial & Legal Officials
8.3 Reporting Professional Misconduct
8.4 Misconduct
8.5 Jurisdiction

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MEMORANDUM

To: Frederick Grittner
Clerk of the Appellate Courts

From: Alanna K. Moravetz

Date: April 17, 1997

Re: Oral Presentation at Hearing on Rule 114 Ethics Code

Lynae Olson and Dan Gislason will be presenting on behalf of the ADR Review Board at the hearing scheduled for April 24, 1997. They will present information regarding the process used by the Board to develop the Code as well as address those provisions that may be controversial.

Minnesota Association of Mediators

April 18, 1997

Mr. Frederick Grittner
Clerk of the Appellate Courts
245 Judicial Center
25 Constitution Avenue
St. Paul MN 55155

Re: Request to Make an Oral Presentation on Proposed Code of Ethics

Dear Mr. Grittner:

This is to advise you that the Minnesota Association of Mediators requests the opportunity to make an oral presentation at the April 24, 1997 hearing on the Proposed Code of Ethics for Rule 114 of the Minnesota General Rules of Practice.

I will be making the oral presentation on behalf of the Minnesota Association of Mediators.

I am enclosing 12 copies of this request and 12 copies of the material to be presented.

If there are any questions, please call me at 430-6361.

Sincerely,

William Funari

pc D.M. Boulay, President, Minnesota Association of Mediators

encl 12 copies of this request and 12 copies of the material to be presented

Oral Presentation of the Minnesota Association of Mediators on the Proposed Code of Ethics in Rule 114 to the Minnesota Supreme Court on April 24, 1997.

Mr. Chief Justice, Justices, my name is Bill Funari. I am a non-lawyer mediator specializing in school, family, and work-place mediation. My mediation practice is separate from and in addition to my full time position as the Budget and Special Projects Manager for Washington County Court Administration.

I am here today as a member of the Board of Directors of the Minnesota Association of Mediators to present the Association's views on the proposed Code of Ethics for Neutrals in Rule 114 of the Minnesota General Rules of Practice.

The non-profit Minnesota Association of Mediators, an all volunteer organization, is the largest multi-disciplinary professional association of mediators in the State of Minnesota. Our members come from the fields of law, education, social work, medicine, education, psychology, the clergy and others. As an organization, we are committed to the improvement of mediation, and this is why the proposed code of ethics is so important to us.

Our recommendations pertain to the impact of the proposed code on mediation.

The Minnesota Association of Mediators believes the code, as proposed, is a good beginning to help inform and protect consumers of ADR services and to ensure the integrity of the process as you intend. We believe the rule can be strengthened by putting some of the clarifying comments into the rule itself and by making other changes. We have six recommendations. These pertain to proposed Rules II, III, IV, V of the ADR section and Rule I of the Mediation section. I will present our recommended changes for each rule in sequence beginning with Rule II in the ADR section.

ADR Code of Ethics Rule II - Conflicts of Interest

We recommend deletion of the statement "...in a substantially factually related matter." from the last sentence of the rule. The statement violates all three purposes of the rule. The statement reduces clarity as a guide for the neutrals because it puts

a qualifier on a clear standard. The statement does not protect consumers because the rule becomes unenforceable when a mediator gets to define and interpret what is substantially factually related. The statement compromises the integrity of the processes by opening up the possibility of self-dealing.

We also recommend that Comment #2 in Rule II on Conflicts of Interest be added to the rule itself. The proposed comment suggests sources of guidance on conflicts of interest. We believe ADR consumers should understand, and see in the rule, that mediator compliance with case and statutory authority on conflicts of interest is mandatory, not optional or less important as can be implied by consumers if the statement remains in the comment section.

ADR Code of Ethics Rule III - Competence

We recommend that the qualifications for neutrals in Rule 114 be added as Comment #3 in Rule III or referenced directly in the Ethics Code. For example the rule could state:

> "A neutral shall serve as a neutral only when she/he has the necessary qualifications to satisfy the reasonable expectations of the parties and is a qualified neutral or serves as a neutral for a qualified organization as described in Rule 114 of the Minnesota General Rules of Practice."

Again, this is an ADR consumer issue. The change makes it easier for consumers to learn that there are well-defined qualifications for neutrals and this enhances the public's expectations and confidence in the profession.

ADR Code of Conduct Rule IV - Confidentiality

There are important limits to the scope of confidentiality which are not addressed in the proposed rule or comments. For example: mediators may have obligations to report allegations of child abuse, statements of intent to harm or kill someone, and statements of intent to commit suicide. We believe these limits may not be well understood even in the profession. A list or citations of these or other limits on the scope of confidentiality would be helpful if they were a part of the rule or its comments. Clear, authoritative communication of all the limits on confidentiality will assist both consumers and mediators.

ADR Code of Conduct Rule V - Quality of the Process

We recommend Comment #3 in Rule V on Quality of the Process be added to the rule. The proposed comment on the provision of therapy or legal representation is permissive. We believe this requirement should be made mandatory. No mediator should ever provide therapy or legal representation to any party during a mediation.

Mediation Code of Conduct Rule I - Self Determination

We recommend Comment #1 for Rule I in the Mediation section be revised to state:

> "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....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 or to offer opinions about the strengths or weaknesses of a case."

We believe the rule should prohibit rather than authorize mediators to tell the parties the mediator's opinion about the strengths and weaknesses of a case.

This is a matter of some controversy in the profession and has been the subject of articles and debate. We believe this should not be a matter of controversy in Minnesota at this time for three reasons:

1. The definitive standard on this issue has been established in the Model Standards of Conduct for Mediators developed by the American Bar Association, American Arbitration Association and Society for Professionals in Dispute Resolution. The proposed statement in the Code of Ethics for Rule 114 was borrowed from the Model Standards and that source does not contain permission for mediators to offer opinions about the strengths and weaknesses of a case.

2. The practice of offering opinions on cases may have been a necessary and efficient means of helping the parties reach an agreement when arbitration and mediation were the only forms of ADR available. Rule 114 offers ten (10) ADR processes including *Early Neutral Evaluation* and an *Other*

process. The *Other* process allows parties to create their own ADR process if the parties believe they need a hybrid such as a combination of *Mediation* and *Early Neutral Evaluation.* We believe there is no compelling reason to continue obsolete practices when better means are available.

3. Finally, we believe the offering of opinions on the strengths and weaknesses of cases by a mediator is contrary to the definition of mediation in Rule 114.02 (a)(7) and a violation of Rule I of the Proposed ADR Code of Ethics.

   Rule 114.02 (a)(7) prohibits the mediator from imposing his or her own judgment on the issues for that of the parties. We believe offering opinions on the strengths and weaknesses of a case is such a judgment.

   Rule I of the proposed Code of Ethics states: "A neutral shall conduct the dispute resolution process in an impartial manner...." The mediator's credibility as an impartial neutral is lost when the mediator gives an opinion on strengths and weaknesses of a case. Both parties may interpret any subsequent action by the mediator as biased or prejudiced. At best the mediator would be required to immediately disqualify him/herself after the opinion was offered.

Summary

Rule II, Conflict of Interest

We recommend deletion of the statement "...in a substantially factually related matter." from the last sentence of Rule II and that Comment #2 in Rule II be added to the rule itself.

Rule III, Competence

We recommend that the qualifications for neutrals in Rule 114 be added as Comment #3 in Rule III or referenced directly in the Ethics Code.

Rule IV, Confidentiality

We recommend a list or citations of other limits on the scope of confidentiality.

Rule V, Quality of the Process

We recommend that Comment #3 in Rule V be added to the rule.

Rule I, Mediation

We recommend that Comment #1 for Rule I in the Mediation section be revised to move the statement regarding offering opinions on the strengths and weaknesses of a case from a sentence which authorizes such actions to a sentence which prohibits such actions.

Thank you for your attention and the opportunity to present these recommendations of the Minnesota Association of Mediators on the Proposed ADR Code of Ethics.