

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

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MEMORANDUM

OFFICE OF
APPELLATE COURTS

APR 5 2000

TO: Minnesota Supreme Court
FROM: Kent J. Wagner, Associate Director
DATE: April 4, 2000
SUBJECT: Code of Ethics Enforcement Procedures for Rule 114

CX-89-1863 **FILED**

Attached please find the Code of Ethics Enforcement Procedures for the Rule 114 Ethics Code for Neutrals and research memorandum outlining the Board's findings regarding the granting of subpoena power and privileges and immunities. The Review Board submits these procedures for consideration and adoption by the Supreme Court.

The Enforcement Procedures were drafted by the Review Board with input and comments from many parties including the Alternative Dispute Resolution Section of the Minnesota State Bar Association. The Board approved the Enforcement Procedures on March 17, 2000 as amended. Section II F was redrafted to clarify that the Board has the capability to issue subpoenas on behalf of the neutral or on it's own initiative.

Two different copies of the final draft of the Enforcement Procedures have been included. One contains *drafting notes*, highlighting issues the Board feels the Court will need to address in considering the procedures. The second version does not include *drafting comments* but does have *advisory comments* which the Board feels should be published as part of the Rule.

Code of Ethics Enforcement Procedure

Final Draft 03/17/00

INTRODUCTION

Inclusion on the list of qualified neutrals pursuant to Minnesota General Rules of Practice 114.12 is a conditional privilege, revocable for cause.

I. SCOPE

This procedure applies to complaints against any individual or organization (neutral) placed on the roster of qualified neutrals pursuant to Rule 114.12 or serving as a court appointed neutral pursuant to 114.05(b) of the Minnesota General Rules of Practice.

Advisory Comment

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

II. PROCEDURE

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

Advisory Comment

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

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

Advisory Comment

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

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

Advisory Comment

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

[Drafting Note]

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

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

III. SANCTIONS

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

IV. CONFIDENTIALITY

- A. Unless and until sanctions are imposed, all files, records, and proceedings of the Board that relate to or arise out of any complaint shall be confidential, except:
 - (1) As between Board members and staff;
 - (2) Upon request of the neutral, the file maintained by the Board, excluding its work

product, shall be provided to the neutral;

(3) As otherwise required or permitted by rule or statute; and

(4) To the extent that the neutral waives confidentiality.

- B. If sanctions are imposed against any neutral pursuant to Section III A (2) – (5), the sanction shall be of public record, and the Board file shall remain confidential.
- C. Nothing in this rule shall be construed to require the disclosure of the mental processes or communications of the Board or staff.

V. PRIVILEGE; IMMUNITY

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

[Drafting Note]

It is crucial the Board and staff conduct investigations and hearings pursuant to these enforcement procedures with immunity.

Code of Ethics Enforcement Procedure

ADR Review Board Final Draft 03/17/00

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

- F. After review and investigation, the Board shall advise the complainant and neutral in writing of the Board's proposed action on the complaint. Upon request, the neutral shall be entitled to a hearing before a three-member panel of the Board to contest proposed sanctions or findings. The neutral shall have the right to defend against all charges, to be represented by an attorney, and to examine and cross-examine witnesses. The Board shall make an electronic recording of the proceedings. The Board at its own initiative, or by request of the neutral, may issue subpoenas for the attendance of witnesses and the production of documents and other evidentiary matter.
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 - 4. Publish the neutral's name, a summary of the violation, and any sanctions imposed.
 - 5. Remove the neutral from the roster of qualified neutrals, and set conditions for reinstatement.
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- B. If sanctions are imposed against any neutral pursuant to Section III A (2) – (5), the sanction shall be of public record, and the Board file shall remain confidential.
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MEMORANDUM

To: Minnesota Supreme Court

From: ADR Review Board

Date: March 20, 2000

Re: Rules of General Practice for District Court Rule 114 Ethics Code Enforcement Procedures

The ADR Review Board submitted to the Supreme Court a draft of the proposed Enforcement Procedures for the Rule 114 Code of Ethics on November 18, 1999. The Court returned the draft procedures asking the Board to respond to two questions. This memo addresses those questions and the Boards conclusions. With this memorandum the Board respectfully submits the attached Rule 114 Code of Ethics Enforcement Procedure, as approved by the ADR Review Board on March 17, 2000, for consideration and approval.

First Questions Presented: Does the Supreme Court have authority to give the ADR Review Board, as part of ethics code enforcement proceedings, the right to compel the attendance of witnesses and the production of documents and other evidentiary matter through Board subpoena power?

Short Answer: Yes. The Supreme Court has broad power under Minn. Stat. § 480.05 to "prescribe, and from time to time...amend and modify, rules of practice." Moreover, the legislature gave express authorization to the Court to "adopt rules governing practice, procedure, and jurisdiction for alternative dispute resolution programs." Minn. Stat. § 484.76. The Court has previously promulgated rules giving witness examination authority to the Board of Judicial Standards and the Lawyers Professional Responsibility Board. In both cases, said power was granted without express legislative authority for the right to examine witnesses or compel production of evidence. While neither the Board of Judicial Standards nor the Lawyers Professional Responsibility Board issues subpoenas (instead relying on the Ramsey County District Court to do so at the Boards' request), there is no legal impediment to vesting initial

subpoena-issuing power in the ADR Review Board.

ANALYSIS

Section II F of the proposed enforcement code provides as follows:

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

(Emphasis added). The due process elements of this proposed provision were modeled on the Florida Rules for Certified and Court-Appointed Mediators, which provide:

Right of the Mediator to Defend. A mediator shall have the right to defend against all charges and shall have the right to be represented by an attorney, to examine and cross-examine witnesses, to compel the attendance of witnesses to testify, and to compel the production of documents and other evidentiary matter through the subpoena power of the panel.

F.S.A. Mediator Rule 10.230(e).¹ Under the Florida rules, subpoena power of the panel is provided as follows:

Issuance. Subpoenas for the attendance of witnesses and the production of documentary evidence for discovery and for the appearance of any person before a complaint committee, a panel, or any member thereof, may be issued by the chair of the complaint committee or panel or, if the chair of the panel is absent, by the vice chair. Such subpoenas may be served in any manner provided by law for the service of witness subpoenas in a civil action.

F.S.A. Mediator Rule 10.250(a).²

¹ To be renumbered as F.S.A. Mediator Rule 10.820, effective April 1, 2000.

² To be renumbered as F.S.A. Mediator Rule 10.840, effective April 1, 2000.

Broad Powers of the Minnesota Supreme Court

Minn. Stat. § 480.05 gives the Supreme Court broad power to create and modify its operational rules:

The Supreme Court shall have all the authority necessary for carrying into execution its judgments and determinations, and for the exercise of its jurisdiction as the supreme judicial tribunal of the state, agreeable to the usages and principles of law. Such court shall prescribe, and from time to time may amend and modify, rules of practice therein and also rules governing the examination and admission to practice of attorneys at law and rules governing their conduct in the practice of their profession, and rules concerning the presentation, hearing, and determination of accusations against attorneys at law not inconsistent with law, and may provide for the publication thereof at the cost of the state.

Moreover, the power of the court to regulate court-annexed ADR programs was expressly defined by the Legislature in 1991, when it promulgated enabling legislation for what has become Rule 114:

Alternative dispute resolution program.

Subdivision 1. General. The supreme court shall establish a statewide alternative dispute resolution program for the resolution of civil cases filed with the courts. The supreme court shall adopt rules governing practice, procedure, and jurisdiction for alternative dispute resolution programs established under this section.

Minn. Stat. § 484.76. The proposed availability of subpoenas as part of the Minnesota Rule 114 enforcement/disciplinary effort is consistent with similar powers given to two other Minnesota Supreme Court boards -- the Board of Judicial Standards and the Lawyer Professional Responsibility Board.

The Board of Judicial Standards

The Legislature created the Board of Judicial Standards, but did not legislate rules for the Board or the scope of its investigative powers. Minn. Stat. § 490.15.³ Instead, pursuant to Minn. Stat.

³ Minn. Stat. § 490.15, subd. 1 provides:

The board on judicial standards is established and consists of one judge of the court of appeals, three trial court judges, two lawyers who have practiced law in the state for ten years and four citizens who are not judges, retired judges, or lawyers. The executive secretary is appointed by the governor. Commencing July 1, 1980, the board shall appoint the executive secretary. All members shall be appointed by the governor with the advice and consent of the senate except that senate confirmation shall not be required for the judicial members. No member

490.16, subd. 5,⁴ the Supreme Court was authorized to make rules implementing the Board's mandate. The Supreme Court first promulgated rules for the Board in 1978. Currently, the Rules provide for both investigative and hearing subpoenas. Rule 2 (Jurisdiction and Powers of the Board) provides, in relevant part,

(2) Subpoenas for Investigation. During the evaluation and investigative stage of a proceeding, prior to a finding of sufficient cause to proceed pursuant to Rule 6(d), and subject to the limitations of Rule 2(d)(1):

(i) Upon resolution of the board, the executive secretary may make application for the issuance of a subpoena compelling any person, including a judge, to attend and give testimony, and to produce documents, books, accounts and other records. Such subpoena shall issue upon a showing that the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(ii) Failure or refusal of a judge who is the subject of information to cooperate or the intentional misrepresentation of a material fact by the judge shall constitute conduct prejudicial to the administration of justice and may be sufficient cause for the board to proceed under Rule 2(d)(3).

(3) Subpoenas for Hearing. At all other stages of the proceeding following a finding of sufficient cause to proceed pursuant to Rule 6(d), and subject to the limitations of Rule 2(d)(1), both the board and the judge being investigated shall be entitled to compel, by subpoena, attendance and testimony of witnesses, including the judge as a witness, and the inspection of documents, books, accounts and other records.

Board on Judicial Standards Rule 2(d). The investigative subpoena power created by this rule was specifically affirmed in Matter of Agerter, 353 N.W.2d 908 (Minn. 1984)("[s]ince the Board has jurisdiction to investigate...allegations, it follows that it has the authority to issue subpoenas to make the investigation effective"). According to Agerter,

Generally, an investigative subpoena will be enforced if (1) the investigation is within the jurisdiction and authority of the board or agency, (2) the subpoena is sufficiently specific, (3) the investigation is for a proper purpose and the

shall serve more than two full four-year terms or their equivalent. Membership terminates if a member ceases to hold the position that qualified the member for appointment.

⁴ Minn. Stat. § 490.16, subd. 5 simply states that "[t]he supreme court shall make rules to implement this section.

information sought is relevant to that purpose, and (4) the use of the subpoena power is reasonable and does not violate constitutional rights.

Matter of Agerter, 353 N.W.2d at 911.

The Board of Judicial Standards does not, itself, physically issue subpoenas. Instead, the investigative authority of the Board is supported by the general subpoena power of the District Court venued in Ramsey County. Board of Judicial Standards Rule 2d provides.

(4) Issuing Subpoenas. The District Court of Ramsey County shall issue subpoenas.

(5) Motions. Prior to the appointment of a fact-finding panel pursuant to Rule 10(a), the District Court of Ramsey County shall have jurisdiction over motions arising from Rule 2(d) requests.

This vesting of subpoena-issuing authority in the District Court is consistent with Minnesota Civil Procedure Rule 45.05, which gives authority to the court administrator of the district court to issue subpoenas for witnesses in all civil cases pending "before any...board...authorized to examine witnesses."⁵

Lawyers Professional Responsibility Board

The Lawyer Professional Responsibility Board was created by the Supreme Court to implement the Court's statutorily derived authority to "prescribe rules governing the examination and admission to practice of attorneys at law and rules governing their conduct in the practice of their profession, and rules concerning the presentation, hearing, and determination of accusations against attorneys at law not inconsistent with law." Minn. Stat. § 480.05.

Like the Rules promulgated for the Board of Judicial Conduct, the Lawyers Professional Responsibility Rules also provide for investigative,⁶ as well as deposition and hearing

⁵ Rule 45.05 provides:

At the request of any party, the court administrator of the district court shall issue subpoena for witnesses in all civil cases pending before the court, **or before any** magistrate, arbitrator, **board**, committee, or other person **authorized to examine witnesses**. A subpoena requiring attendance of a witness at a hearing or trial may be served at any place within the state. (Emphasis added).

⁶ Lawyers Professional Responsibility Rule 8(c) provides:

Investigatory subpoena. With the Board Chair or Vice-Chair's approval upon the Director's application showing that it is necessary to do this before issuance of charges under Rule 9(a), the Director may subpoena and take the testimony of any

subpoenas.⁸ And, like the Board of Judicial Conduct, the Lawyers Professional Responsibility Board does not, itself, issue subpoenas. Instead, the investigative authority of the Board is supported by the general subpoena power of the District Court, specifically with venue in Ramsey County.

The rationale for this allocation of subpoena-issuing authority is not made clear in the rules. There is to my knowledge, no constitutional, statutory, or common law principle that would preclude a judicially-created Board from issuing its own subpoenas. Indeed, it is not uncommon for licensing boards to have independent subpoena issuing authority. However, even those Boards with independent subpoena-issuing authority must rely on the District Courts for enforcement of subpoenas and processing of procedural motions relating to subpoenas.

Boards with Independent Subpoena Power

A host of examining and licensing boards created by statute and run by administrative agencies issue their own subpoenas: for example, the Commissioner of Health is authorized to issue subpoenas in disciplinary action against Alcohol and Drug Counselors (Minn. Stat. § 148C.091, subd. 2); the State Board of Chiropractic Examiners is authorized to administer oaths and summon witnesses (Minn. Stat. § 148.04); the Commissioner of Commerce “or any person designated by the Commissioner” may issue subpoenas to Enforce fair Debt Collection Practices

person believed to possess information concerning possible unprofessional conduct of a lawyer. The examination shall be recorded by such means as the Director designates. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas and over motions arising from the examination.

⁷ Lawyers Professional Responsibility Rule 9(d) provides:

Deposition. Either party may take a deposition as provided by the Rules of Civil Procedure for the District Courts. A deposition under this Rule may be taken before the pre-hearing meeting or within ten days thereafter. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas and over motions arising from the deposition. The lawyer shall be denominated by number or randomly selected initials in any District Court proceedings.

⁸ Lawyers Professional Responsibility Rule 9(h)(3) provides:

If testimony is authorized, it shall be subject to cross-examination and the Rules of Evidence and a party may compel attendance of a witness or production of documentary or tangible evidence as provided in the Rules of Civil Procedure for the District Courts. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas, motions respecting subpoenas, motions to compel witnesses to testify or give evidence, and determinations of claims of privilege. The lawyer shall be denominated by number or randomly selected initials in any district court proceedings.

Act (Minn. Stat. § 332.40, subd. 3) and also has subpoena power regarding licensing of real estate brokers and salespersons (Minn. Stat. § 82.27, subd. 2). This executive agency subpoena power can be traced to an express grant of legislative authority for subpoenas in the enacting legislation for the specific examining or licensing board (same cites as above), or to a broader grant of subpoena power granted generally to examining and licensing boards pursuant to Minn. Stat. 214.10, subd. 3.⁹

The ADR Review Board as an entity of the Supreme Court is not subject to the requirements of Chapter 214, which provides general authority for executive agencies to regulate occupations when regulation is found by the legislature to be "required for the safety and well being of the citizens of the state." Given the ADR Review Board's narrow mandate, it scarcely can be argued that the Board (as a representative of the Court) is in any way regulating an occupation. Even at its most extreme extension of power, the ADR Review Board is simply controlling who is eligible to get on and stay on a court-maintained roster of neutrals. In light of this extraordinarily narrow regulatory function, and its placement in the judicial branch of government, there is no express statutory authority under Chapter 214 for our Board to rely on in assuming subpoena-issuing authority. However, no express statutory authority is necessary given the broad powers of the Court to adopt its own rules.

Conclusion and Practical Concerns

The can be no dispute that the Supreme Court can create a Board and promulgate rules giving the

⁹ Minn. Stat. § 214.10, subd. 3 provides:

Discovery; subpoenas. In all matters pending before it relating to its lawful regulation activities, a board may issue subpoenas and compel the attendance of witnesses and the production of all necessary papers, books, records, documents, and other evidentiary material. Any person failing or refusing to appear or testify regarding any matter about which the person may be lawfully questioned or produce any papers, books, records, documents, or other evidentiary materials in the matter to be heard, after having been required by order of the board or by a subpoena of the board to do so may, upon application to the district court in any district, be ordered to comply therewith; provided that in matters to which the peace officers standards and training board is a party, application shall be made to the district court having jurisdiction where the event giving rise to the matter occurred. The chair of the board acting on behalf of the board may issue subpoenas and any board member may administer oaths to witnesses, or take their affirmation. Depositions may be taken within or without the state in the manner provided by law for the taking of depositions in civil actions. A subpoena or other process or paper may be served upon any person named therein, anywhere within the state by any officer authorized to serve subpoenas or other process or paper in civil actions, with the same fees and mileage and in the same manner as prescribed by law for service of process issued out of the district court of this state. Fees and mileage and other costs shall be paid as the board directs.

Board investigatory powers. Once a Board has investigatory powers, it is well established under Minnesota law (Matter of Agerter) that subpoenas should issue to make investigation effective. Whether, as a purely technical matter, the subpoenas issued to support that investigatory power come directly from the Board or from the District Courts at the Board's request is not particularly significant. The Board favors having its own subpoena power primarily to keep the complaint process as simple as possible – both for the Board and for the neutral affected. While the Board of Judicial Standards and the Lawyers Professional Responsibility Board vest subpoena issuing authority in the Ramsey County District Court, there is not strong policy argument compelling the ADR Review Board to do the same, especially given the dramatically different interests at stake in the respective complaint processes.

Second Question Presented. Can the Supreme Court establish by order the privilege and immunity provisions proposed in Section V of the Rule 114 Ethics Code Enforcement Procedures?

Again the short answer is yes. The Minnesota Legislature granted the Supreme Court the power to adopt rules governing practice, procedures and jurisdiction, for alternative dispute resolution programs established under Minn. Stat. § 484.76. The court also has the power to prescribe, and from time to time amend and modify rules of practice for carrying into execution its judgments and determinations (Minn. Stat. § 480.05, *paraphrased*). The scope of the proposed Code of Ethics Enforcement Procedures are limited to complaints of unethical conduct by “qualified neutrals”¹⁰ as defined by Rule 114 of the General Rules of Practice for District Court. In two previous circumstances the Court has promulgated rules granting privileges and immunities to Supreme Court Boards and staff charged with similar responsibilities for investigating and hearing complaints of misconduct based on Court rules. For both, the Board of Judicial Standards and the Lawyers Board of Professional Responsibilities, the grant of immunity came without expressed legislative authority.

Analysis

Section V of the proposed Rule 114 Code of Ethics Enforcement Procedures provides as follows:

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

This language is similar to language the court adopted for the Lawyers Board¹¹ and the Board on

¹⁰ Minn. Gen. R. 114.02 (b) A “qualified neutral” is an individual or organization included on the State Court Administrator’s roster as provided in Rule 114.12. (1998)

¹¹ Rules on Lawyers Professional Responsibility, Rule 21. Privilege: Immunity (1999)

Judicial Standards¹² covering privilege and immunity in disciplinary proceedings before these boards. It is crucial ADR Review Board members and staff who conduct investigations and hearings pursuant to these enforcement procedures do so with some level of immunity from civil action.

As it did with the Board on Judicial Standards¹³ and the Lawyers Board¹⁴ the legislature required the Court to adopt rules, governing practice, procedures, and jurisdiction for alternative dispute resolution programs established under Minn. Stat. § 484.76. The scope of the proposed enforcement procedure is limited to investigations of complaints of the unethical conduct of Neutrals on the State Courts Roster, as prescribed in Rule 114.12 of the Rules of General Procedures for District Court. If there is a finding by the Board of an ethical violation the Board, under the proposed sanctions, may remove a neutral from the Roster of Neutrals and establish conditions for reinstatement.¹⁵ This does not prohibit a neutral from serving in matters outside of the scope of Rule 114, but rather limits the neutral only in those matters outlined in Rule 114.05 of the General Rules.¹⁶

Conclusions

- a) **Privilege.** A complaint or charge, or statement relating to a complaint or charge, of a lawyer's alleged unprofessional conduct, to the extent that it is made in proceedings under these Rules, or to the Director or a person employed thereby or to a District Committee, the Board or this Court, or any member thereof, is absolutely privileged and may not serve as a basis for liability in any civil lawsuit brought against the person who made the complaint, charge or statement.
- b) **Immunity.** Board members, other Panel members, District Committee members, the Director, and the Director's staff, and those entering into agreements with the Director's Office to supervise probations, shall be immune from suit for any conduct in the course of their official duties.

¹² Rules of Board on Judicial Standards, Rule 3. Immunity; Privilege (1996)

Information submitted to the board or its staff and testimony given in the proceedings under these rules shall be absolutely privileged, and not civil action predicated thereon may be instituted against the complainant or witness, or their counsel. Members of the board, referees, board counsel and staff shall be absolutely immune from suit for all conduct in the course of their official duties.

¹³ Minn. Stat. § 490.16, subd. 5. The Supreme Court shall make rules to implement this section

¹⁴ Minn. Stat. § 480.05. The Supreme Court shall have all the authority necessary for carrying into execution its judgments and determinations, and for the exercise of its jurisdiction as the supreme judicial tribunal of the state, agreeable to the usages and principles of law. Such court shall prescribe, and from time to time may amend and modify, rules of practice therein and also rules governing the examination and admission to practice of attorneys at law and rules governing their conduct in the practice of their profession, and rules concerning the presentation, hearing, and determination of accusations against attorneys at law not inconsistent with law, and may provide for the publication thereof at the cost of the state.

¹⁵ Section III. **Sanctions.** Proposed Code of Ethics Enforcement Procedures.

¹⁶ Minn. Gen. R. 114.05 (a) **Court Appointment.** If the parties are unable to agree on a neutral, or the date upon which the neutral will be selected, the court shall appoint the neutral at the time of the issuance of the scheduling order required by Rule 111.03 or 304.03. The order may establish a deadline for the completion of the ADR process

(b) **Exception from Qualification.** In appropriate circumstances, the court upon agreement of the parties, may appoint a neutral who does not qualify under Rule 114.13 of these rules, if the appointment is based on legal or other professional training or experience. This selection does not apply when mediation or med-arb is chosen as the dispute resolution process.

The grant of privilege and immunity sought in these enforcement procedures is also limited to proceeding with in the scope of the Courts rules for the alternative dispute resolution program created by Rule 114. Given the limited scope of these enforcement procedures and the Courts ability to grant privilege and immunity for two other Supreme Court Boards it is within its authority of this Court to grant the privilege and immunities as outlined in Section V of the Proposed Code of Ethics Enforcement Procedures.