STATE OF MINNESOTA

IN SUPREME COURT

CX-89-1863

ORDER FOR HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE MINNESOTA GENERAL RULES OF PRACTICE FOR THE DISTRICT COURTS

IT IS HEREBY ORDERED that a hearing be had before this Court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on July 10, 1996 at 1:30 p.m., to consider the recommendations of the Minnesota Supreme Court Advisory Committee on General Rules of Practice to amend the General Rules of Practice. A copy of the report containing the proposed amendments is annexed to this order and may also be found at the Court's World Wide Web site: (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, 305 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before July 5, 1996, 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 July 5, 1996.

DATED: May 16, 1996

BY THE COURT:

A.M. Keith
Chief Justice

ADVISORY COMMITTEE ON GENERAL RULES OF PRACTICE

Summary of Committee Recommendations

This Court's Advisory Committee on General Rules of Practice met to discuss a report from an ad hoc committee of judges and lawyers known as the Committee on Dispute Resolution Alternatives in Family Law, chaired by attorney Daniel Ventres, Jr. ("Ad Hoc Committee"). The advisory committee has reviewed this report, conducted a public hearing on the proposed rule, and revised the proposed rule in accordance with the drafting considerations used in the initial adoption and subsequent amendments to the Minnesota General Rules of Practice.

The amendments now recommended to the court comprise two significant changes. First, the proposed rule is a single rule contained within the other rules governing family court practice. The new Rule 310.01 governs ADR proceedings in all family law matters and creates the specific exceptions for cases where ADR is either not likely to be helpful or where it may actually be counterproductive or may prejudice the rights of parties. The balance of existing Rule 310, being limited to mediation in family law matters, is deleted as unnecessary. The most significant substantive changes are made in the existing rule governing ADR in other civil matters. That rule, Rule 114, is amended to provide for family law ADR as part of the existing mechanisms for ADR, with changes to accommodate the special needs of family law matters. The committee believes the interests of sound administration of justice will be advanced by incorporating the majority of the ADR provisions in a single rule.

History of ADR in Family Law Matters

When the General Rules were adopted in 1991, on the recommendation of the Committee on Uniform Local Rules, a new rule governing ADR was not included in the rules for the reason that a joint committee was in the process of evaluating and proposing ADR. (The new rules retained the rule on mediation from the former family court rules as Minn. Gen. R. Prac. 310, however.) The process on ADR that was underway in 1991 included establishing the need for legislative action to facilitate adoption of ADR processes in civil litigation. In 1993, this Court adopted Rule 114 to implement ADR in all civil matters, other than various specific types of cases.

It is the view of the advisory committee that ADR under Rule 114 has functioned well in civil cases. Although it is used to varying extent from district to district, the system functions well

from the standpoints of courts, counsel, litigants, and neutrals. As judges and lawyers become more familiar with ADR and what it both can and cannot accomplish, the advisory committee believes ADR is constantly being used more advantageously in civil cases.

Ad Hoc Committee Report

The Ad Hoc Committee studied the use of ADR in family law matters, and recommended a comprehensive rule, to be codified as Minn. Gen. R. Prac. 313. The report included numerous provisions derived from Rule 114, the existing rule governing ADR in civil cases, but also included modifications to the Rule 114 procedures. As set forth in greater detail below, the report also included certain provisions that either conflicted with the provisions of the existing rule or seem to be inappropriate provisions for inclusion in any rule.

Advisory Committee Process

The advisory committee met to review the Ad Hoc Committee report in early 1996, and scheduled a public hearing which was held on March 8, 1996. Notice of that hearing was published, appearing in ***Finance & Commerce*** and ***Bench & Bar of Minnesota***. The advisory committee heard at that time from members of the Ad Hoc Committee, both in support of and opposition to the report, as well as lawyers on behalf of the Battered Women's Legal Advocacy Project, Minnesota Office of Child Support Enforcement Office, Alternative Dispute Resolution Review Board, and Hennepin County Family Court Services. Additionally, written comments were received from private attorneys practicing in the family law area, the Minnesota Family Support and Recovery Council, Minnesota County Attorneys Association, and Minnesota State Bar Association Family Law Section. This Court's ADR Review Board was also present for this hearing, represented by its staff, as well as a member. The advisory committee met twice again to consider various issues and review drafts of this report.

The public comments, both spoken and written, were generally supportive of adopting an ADR program in family law matters, but included considerable discussion of potential problems with specific provisions of the proposed rule. Significant concern has been expressed to the advisory committee about the increased cost ADR can impose on the dissolution process. Although ADR processes that are carefully selected and initiated by the parties are generally useful for the litigants, ADR that is imposed on the parties or selected without concern for the timing of the dissolution process can be a waste of time and resources for the parties. The

committee believes these concerns are best met by creating a system that gives the parties and their lawyers the primary right to initiate ADR, select the ADR process and determine other ground rules, and to pick a neutral. These actions by the parties and their lawyers can best be made in a system where market information on availability, skills, experience, and costs of ADR providers can determine their selection.

Summary of Advisory Committee Recommendations.

The advisory committee recommends adoption of rules establishing ADR for use in family law matters. The specific form of this recommendation is a new Rule 310 to provide for ADR in family law matters and creating the specific exceptions for those where mandatory ADR is not advised. This rule would supersede, and encompass within its scope, the existing Rule 310, which deals solely with mediation. The new Rule 310 incorporates the existing ADR mechanisms of Rule 114 of the General Rules of Practice.

Rule 114 is substantially amended to add provisions that apply exclusively to family law ADR and modifying existing provisions to allow them to apply both to general civil and to family law matters. The committee believes it is advantageous to have the ADR rules uniform for civil and family law matters. As a matter of drafting style, subdivision headings are added to make the rule easier to use. These headings are not intended to affect the interpretation of the rules.

The Ad Hoc Committee proposal included provisions requiring use of court-annexed ADR in various support collection actions brought either by or with the involvement of governmental agencies. The proposed rule expressly exempts these actions from court-mandated ADR (*see* Rule 310.01). These actions are called "Title IV Actions" because they exist as a part of federal law arising under Title IV-D of the Social Security Act, 42 U.S.C. §§651-669 (1981 & Supp. 1995). Although no separate substantive action exists under Minnesota law, a state-wide administrative process for handling child support proceedings involving public entities was established effective July 1, 1995. See Minn. Stat. § 518.5511 (1995). This administrative process is itself an "alternative" dispute resolution process, and provides a streamlined mechanism for resolution of these matters. There accordingly appears to be no good reason to require these "actions" to be subject to court-annexed ADR. Moreover, there appear to be significant questions relating to the feasibility of using court-annexed ADR in these matters given the fact they are not pending in district court and there is no mechanism for funding hiring of neutrals for these matters. The advisory committee was advised that the Family Law Section of the

Minnesota State Bar Association also recommended that these actions not be included at this time.

Other Issues.

The committee also considered all other communications it has received to date from the public, bench, and bar regarding the rules, and recommends two additional new rules. Both rules arise from standing orders entered by the bench in the second judicial district. One of these rules deals with applications for attorneys' fees and the other with the filing of original wills as required by a new statute, Minn. Stat. § 524.2–515. The committee met with representatives of the Ramsey County bench, and recommends that these standing orders be modified and adopted for state-wide application as new Rules 119 and 418.

Non-Rule Concerns

The advisory committee has concerns about certain matters that are not reflected in recommended rule amendments. Chief among these is the concern that ADR not become a mechanism that exacerbates in any way the problems facing victims of domestic violence.

Domestic Violence. The committee heard clear and graphic descriptions of situations where the judicial system may compound the burdens on victims of domestic violence. However, the committee does not believe this problem is solved by a blanket exemption from ADR of all actions involving a party claiming to be such a victim. Mediation or other facilitative ADR processes can be inappropriate in cases involving victims of domestic violence, and the rules expressly prohibit ordering mediation where domestic abuse is asserted to be present. However, empirical evidence supports the use of forms of ADR other than facilitative forms even where domestic violence is an issue. *See generally,* Douglas D. Knowlton & Tara Lea Muhlhauser, *Mediation in the Presence of Domestic Violence: Is It the Light at the End of the Tunnel or Is a Train on the Track?,* 70 No. Dak. L. Rev. 233 (1994); Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse,* 23 Fla. St. U.L. Rev. 43 (1995). The gender fairness report to this court identified a persistent and troubling problem: "[S]ome judges continue to order custody mediation in situations where there has been domestic abuse in spite of state law prohibiting mandatory mediation in these cases." Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Report Summary at S10 (1989). The court of appeals has affirmed the inappropriateness of mandated ADR in these circumstances. *See Mechtel v. Mechtel*, 529

N.W.2d 916 (Minn. App. 1995). The committee recommends that this court continue—or expand—its efforts at training court personnel, including judges, on domestic violence and its impact on all aspects of how the courts handle family law matters.

Immunity. The Ad Hoc Committee recommended that the family law ADR rule include a provision purporting to establish immunity for ADR neutrals. The advisory committee considered this proposal, and concluded such a rule is not sufficient to create immunity and may be counterproductive. Although ADR neutrals should generally be entitled to immunity, immunity should be established either by caselaw or statute. The advisory committee is also aware of decisions establishing immunity in Minnesota. *See, e.g., L & H Airco, Inc. v. Rapistan Corp.,* 446 N.W.2d 372 (Minn. 1989) (arbitrators immune to civil liability). The committee is especially fearful that an ill-advised rule would serve to limit immunity of neutrals rather than ensure it.

Dissolution Education. The Ad Hoc Committee report proposed a rule expressly providing for so-called "divorce education." Because this program is provided for by statute, Minn. Stat. § 518.157 (1995), *codifying* Minn. Laws 1995 ch. 127, § 1, the advisory committee does not believe a rule of procedure that merely restates the statute is either necessary or desirable. This exclusion from the proposed rule does not suggest anything but support for the legislative program; there simply is no reason for a court rule that does nothing but recite the applicability of the statute.

Visitation Expediters. This report does not consider or deal with the use of visitation expediters in family law matters. As this court is aware, the use of visitation expediters is now expressly encouraged by statute, Minn. Laws 1996 ch. 391, and will be considered by this court's Minnesota Supreme Court Advisory Committee on Visitation and Child Support Enforcement. See Order, No. C1-95-2120 (Minn., Nov. 1, 1995). Issues regarding use of visitation expediters can best be considered, at least initially, by that advisory committee.

Effective Date

The Ad Hoc Committee impliedly recommended an immediate effective date. The advisory committee has proceeded expeditiously to consider this report and make its recommendations to the Court, and it is possible that the matter could be considered for adoption for a July 1, 1996, effective date. Because of the significant changes these rules may have on practice in family law matters, however, the committee recommends that the court consider these rules for adoption as soon as they can be heard and evaluated, with an effective date of January

1, 1997. The committee believes that delayed effective date will permit the following necessary steps before the rules can operate smoothly:

- The ADR Review Board needs to implement procedures for approval of training courses and providers and for certification of neutrals and creation of rosters
- Judges and litigants can familiarize themselves with the rule and the resources available to obtain ADR services in family law matters
- Neutrals can receive necessary training and complete the application and approval process.

This court used a similar approach when Minn. Gen. R. Prac. 114, governing ADR in civil matters, was adopted. The order of adoption was dated December 2, 1993, and the effective date was over six months later, on July 1, 1994.

The proposed Rules 119 and 418 could be implemented effective either July 1, 1996 or January 1, 1997, as they do not require a significant period for implementation.

Continuation of ADR Review Board

The ADR Review Board is currently scheduled to disband on December 31, 1996. The Board should be invited to remain in operation for another year to implement the various recommendations made in this report. The committee believes the experience gained by the ADR Review Board under the existing rules will be valuable in minimizing any problems that might otherwise be encountered in the implementation of the recommendations contained in this report.

Respectfully submitted,

MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON GENERAL RULES OF PRACTICE

Recommendation 1: Establish Rules and Forms Governing ADR in Family Matters

This recommendation comprises a number of specific rule and form amendments. These should be considered a single package of amendments, and should be adopted as a group. Specific rules affected are as follows:

Rule 310.	Replace all subdivisions .
Rule 114.	Amend to incorporate new provisions.
Form 9A.	Amend.
Form 9B.	Amend.
Rule 303.03	Amend.
Rule 304.02	Amend.
Rule 204.03	Amend.

RULE 310. MEDIATION ALTERNATIVE DISPUTE RESOLUTION

Rule 310.01 ~~Order for Mediation~~ Applicability

~~**(a) When Issued.** The court may issue an order for mediation upon a motion by a party, by stipulation of the parties, or upon the court's own initiative. The court shall not require mediation when it finds probable cause that domestic or child abuse has occurred. Where the parties have made an unsuccessful effort to mediate with a qualified mediator, additional mediation need not be required.~~

~~**(b) Condition Precedent to Final Hearing.** When ordered by the court, participation in mediation shall be a condition precedent to the scheduling of a final hearing in a dissolution proceeding.~~

All family law matters in district court are subject to Alternative Dispute Resolution (ADR) processes as established in Rule 114, except for:

1. actions enumerated in Minn. Stat. ch. 518B (Domestic Abuse Act),
2. contempt actions, and
3. maintenance, support, and parentage actions when the public agency responsible for child support enforcement is a party or is providing services to a party with respect to the action.

The court shall not require parties to participate in any facilitative process where one of the parties claims to be the victim of domestic abuse by the other party or where the court determines there is probable cause that one of the parties or a child of the parties has been physically abused or threatened with physical abuse by the other party. In circumstances where the court is satisfied that the parties have been advised by counsel and have agreed to an ADR process that will not involve face-to-face meeting of the parties the court may direct that the ADR process be used.

The court shall not require parties to attempt ADR if they have made an unsuccessful effort to settle all issues with a qualified neutral before the filing of Informational Statement.

[DELETE ALL EXISTING TASK FORCE COMMENTS AND FAMILY COURT RULES ADVISORY COMMITTEE COMMENTS OR ALL PARTS OF RULE 310 SINCE THE EXISTING RULE IS SUPERSEDED IN ITS ENTIRETY.]

Advisory Committee Comment—1996 Amendment

This rule is changed from a limited rule dealing only with mediation to the main family law rule governing use of ADR. All of the provisions of the existing rule are deleted because their subject matter is now governed by either the amended rule or Minn. Gen. R. Prac. 114.

The committee believes that there are significant and compelling reasons to have all court-annexed ADR governed by a single rule. This will streamline the process and make it more cost-effective for litigants, and will also make the process easier to understand for ADR providers and neutrals, many of whom are not lawyers.

The rule is not intended to discourage settlement efforts in any action. In cases where any party has been, or claims to have been, a victim of domestic violence, however, courts need to be especially cautious. Facilitative processes, particularly mediation, are especially prone to abuse since they place the parties in direct contact and may encourage them to compromise their rights in situations where their independent decision-making capacity is limited. The rule accordingly prohibits their use where those concerns are present.

Rule 310.02 ~~Mediators~~ Post-Decree Matters

~~**(a) Appointment.**. The court shall appoint a mediator from its approved list, unless the parties stipulate to a mediator not on the list.~~

~~Each party shall be entitled to file a request for substitution within seven (7) days after receipt of notice of the appointed mediator. The court shall then appoint a different mediator with notice given to the parties.~~

~~**(b) Qualification and Training.** The court shall establish an approved list of mediators who qualify for appointment by statute.~~

The court may order ADR under Rule 114 in matters involving post-decree relief. The parties shall discuss the use of ADR as part of the conference required by Rule 303.03(c).

Advisory Committee Comment—1996 Amendment

This rule expressly provides for use of ADR in post-decree matters. This is appropriate because such matters constitute a significant portion of the litigation in family law and because these matters are often quite susceptible to successful resolution in ADR.

The committee believes the existing mechanism requiring the parties to confer before filing any motion other than a motion for temporary relief provides a suitable mechanism for considering ADR and Rule 303.03(c) is amended to remind the parties of this obligation.

~~Rule 310.03 Mediation Attendance~~

~~**(a) Mandatory Orientation.** Parties ordered by the court to participate in mediation shall attend the orientation session.~~

~~**(b) Mediation Sessions.** Mediation sessions shall be informal and conducted at a suitable location designated by the mediator. Both parties shall appear at the time scheduled by the mediator, and attendance is limited to the parties, unless all parties and the mediator agree to the presence of other persons.~~

~~To assist in resolving contested issues, the parties may involve resource persons including lawyers, appraisers, accountants, and mental health professionals.~~

Rule 310.04 Scope of Mediation

Mediation may address all issues of controversy between the parties, unless limited by court order.

Rule 310.05 Confidentiality

Mediation proceedings under these rules are privileged, not subject to discovery, and inadmissible as evidence in family court proceedings without the written consent of both parties.

Mediators and lawyers for the parties, to the extent of their participation in the mediation process, cannot be called as witnesses in the family court proceedings.

No record shall be made without the agreement of both parties, except for a memorandum of issues that are resolved.

Rule 310.06 Termination of Mediation

Mediation shall be terminated upon the earliest of the following circumstances to occur:

(a) a complete agreement of the parties;

(b) the partial agreement of the parties and a determination by the mediator that further mediation will not resolve the remaining issues; or

(c) the determination by the mediator or either party that the parties are unable to reach agreement through mediation or that the proceeding is inappropriate for mediation.

Rule 310.07 Mediator's Memorandum

(a) Submissions. Upon termination of mediation, the mediator shall submit a memorandum to the parties and the court setting out (1) the complete or partial agreement of the parties and enumerating the issues upon which they cannot agree, or (2) that no agreement has been reached, without any explanation.

(b) Copy to Lawyer. Where a party is represented by a lawyer, the mediator shall send a copy of the memorandum to that party's lawyer as well as the party.

(c) Agreement. The parties' agreement shall be reduced to writing by counsel for the petitioner, or counsel for the respondent with the consent of the petitioner, in the form of a marital termination agreement, stipulation, or similar instrument. The written agreement shall be signed by both parties and their counsel and submitted to the court for approval.

Rule 310.08 Child Custody Investigation

When the parties are unable to each agreement on custody through mediation, the mediator may not conduct a custody investigation, unless the parties agree in writing executed after the termination of mediation, that the mediator shall conduct the investigation or unless there is no other person reasonably available to conduct the investigation or evaluation. Where the mediator is also the sole investigator for a county agency charged with making recommendations to the court regarding child custody and visitation, the court administrator shall make all reasonable attempts to obtain reciprocal services from an adjacent county. Where such reciprocity is possible, another person or agency is "reasonably available."

Rule 310.09 Fees

Each court shall establish fees for mediation services. The court may allocate payment of the fees among the parties and the county.

RULE 114. ALTERNATIVE DISPUTE RESOLUTION

Rule 114.01 Applicability

All civil cases are subject to Alternative Dispute Resolution (ADR) processes, except for those actions enumerated in Minn. Stat. § 484.76 and Rules 111.01 and 310.01 of these rules.

Advisory Committee Comment—1996 Amendment

This change incorporates the limitations on use of ADR in family law matters contained in Minn. Gen. R. Prac. 313.01 as amended by these amendments. The committee believes it is desirable to have the limitations on use of ADR included within the series of rules dealing with family law, and it is necessary that it be included here as well.

Rule 114.02 Definitions

The following terms shall have the meanings set forth in this rule in construing these rules and applying them to court-affiliated ADR programs.

(a) ADR Processes.

Adjudicative Processes

(1) *Arbitration.* A forum in which each party and its counsel present its position before a neutral third party, who renders a specific award. If 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.

(2) *Consensual Special Magistrate.* 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.

(~~7~~3) *Moderated Settlement Conference.* A forum in which each party and their counsel present their position before a panel of neutral third parties. The panel may issue a non-binding advisory opinion regarding liability, damages, or both.

(~~9~~4) *Summary Jury Trial.* A forum in which each party and their counsel present a summary of their position before a panel of jurors. The number of jurors on the panel is six unless the parties agree otherwise. The panel may issue a non-binding advisory opinion regarding liability, damages, or both.

Evaluative Processes

(~~3~~5) *Early Neutral Evaluation (ENE).* A forum in which attorneys present the core of the dispute to a neutral evaluator in the presence of the parties. This occurs after the case is filed but before discovery is conducted. The neutral then gives a candid assessment of the strengths and weaknesses of the case. If settlement does not result, the neutral helps narrow the dispute and suggests guidelines for managing discovery.

(~~8~~6) *Neutral Fact Finding.* A forum in which a dispute, frequently one involving

complex or technical issues, is investigated and analyzed by an agreed-upon neutral who issues findings and a non-binding report or recommendation.

Facilitative Processes

(~~4~~7) *Mediation.* A forum in which a neutral third party facilitates communication between parties to promote settlement. A mediator may not impose his or her own judgment on the issues for that of the parties.

Hybrid Processes

(~~6~~8) *Mini-Trial.* A forum in which each party and their counsel present their opinion, either before a selected representative for each party, before a neutral third party, or both to define the issues and develop a basis for realistic settlement negotiations. A neutral third party may issue an advisory opinion regarding the merits of the case. The advisory opinion is not binding unless the parties agree that it is binding and enter into a written settlement agreement.

(~~5~~9) *Mediation-Arbitration (Med-arb).* A hybrid of mediation and arbitration in which the parties initially mediate their disputes; but if they reach impasse, they arbitrate the deadlocked issues.

(10) *Other.* Parties may by agreement create an ADR process. They shall explain their process in the Informational Statement.

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

Advisory Committee Comment—1996 Amendment

The amendments to this rule are limited, but important. In subdivision (a) (10) is new, and makes it explicit that parties may create an ADR process other than those enumerated in the rule. This can be either a "standard" process not defined in the rule, or a truly novel process not otherwise defined or used. This rule specifically is necessary where the parties may agree to a binding process that the courts could not otherwise impose on the parties. For example, the parties can agree to "baseball arbitration" where each party makes a best offer which is submitted to an arbitrator who has authority to select one of the offers as fairest, but can make no other decision.

The individual ADR processes are grouped in the new definitions as "adjudicative," evaluative," facilitative," and "hybrid." These collective terms are important in the rule, as they are used in other parts of the rule. The group definitions are useful because many of the references elsewhere in the rules are intended to cover broad groups of ADR processes rather than a single process, and because the broader grouping avoids issues of precise definition. The distinction is particularly significant because of the different training requirements under Rule 114.13.

Rule 114.03 Notice of ADR Processes

(a) Notice. Upon receipt of the completed Certificate of Representation and Parties required by Rule 104 of these rules, the court administrator shall provide the attorneys of record and any unrepresented parties with information about ADR processes available to the county and the availability of a list of neutrals who provide ADR services ~~to the~~ in that county.

(b) Duty to Advise Clients of ADR Processes. Attorneys shall provide clients with the ADR information.

Advisory Committee Comment—1996 Amendment

This change is made only to remove an ambiguity in the phrasing of the rule and to add titles to the subdivisions. Neither change is intended to affect the meaning or interpretation of the rule.

Rule 114.04 Selection of ADR Process

(a) Conference. After the filing of an action, the parties shall promptly confer regarding case management issues, including the selection and timing of the ADR process. Following this conference ADR information shall be included in the informational statement required by Rule 111.02 and 304.02.

In family law matters, the parties need not meet and confer where one of the parties claims to be the victim of domestic abuse by the other party or where the court determines there is probable cause that one of the parties or a child of the parties has been physically abused or threatened with physical abuse by the other party. In such cases, both parties shall complete and submit form 9A or 9B, specifying the form(s) of ADR the parties individually prefer, not what is agreed upon.

(b) Court Involvement. If the parties cannot agree on the appropriate ADR process, the timing of the process, or the selection of neutral, or if the court does not approve the parties' agreement, the court shall schedule a telephone or in-court conference of the attorneys and any unrepresented parties within thirty days after the due date for filing informational statements pursuant to Rule 111.02 or 304.02 to discuss ADR and other scheduling and case management issues. Except as otherwise provided in Minn. Stat. § 604.11, or Rule 310.01, if no agreement on the ADR process is reached or if the court disagrees with the process selected, the court may order the parties to utilize one of the non-binding processes, or may find that ADR is not appropriate; provided that any ADR process shall not be approved where it amounts to a sanction on a non-moving party.

(c) Scheduling Order. ~~Within 90 days of the filing of the action, t~~The court's ~~Rule 111.03~~ Scheduling Order pursuant to Rule 111.03 or 304.03 shall designate the ADR process selected, the deadline for completing the procedure, and the name of the neutral selected or the deadline for the selection of the neutral. If ADR is determined to be inappropriate, the ~~Rule 111.03~~ Scheduling Order pursuant to Rule 111.03 or 304.03 shall so indicate.

(d) Post-Decree Family Law Matters. Post-decree matters in family law are

subject to ADR under this rule. ADR may be ordered following the conference required by Rule 303.03(c).

(~~d~~e) Other Court Order for ADR. Except as otherwise provided in Rule 310.01 or Minn. Stat. § 604.11, upon motion by any party, or on its own initiative, the court may, at any time, issue an order for any non-binding ADR process.

Advisory Committee Comment—1996 Amendment

The changes to this rule are made to incorporate Rule 114's expanded applicability to family law matters. The rule adopts the procedures heretofore followed for ADR in other civil cases. The beginning point of the process is the informational statement, used under either Rule 111.02 or 304.02. The rule encourages the parties to approach ADR in all matters by conferring and agreeing on an ADR method that best suits the need of the case. This procedure recognizes that ADR works best when the parties agree to its use and as many details about its use as possible.

Subdivision (a) requires a conference regarding ADR in civil actions and after commencement of family law proceedings. In family cases seeking post-decree relief, ADR must be considered in the meeting required by Rule 303.03(c). Cases involving domestic abuse are expressly exempted from the ADR meet-and-confer requirement and courts should accommodate implementing ADR in these cases without requiring a meeting nor compromising a party's right to choose an ADR process and neutral .

The rule is not intended to discourage settlement efforts in any action. In cases where any party has been, or claims to have been, a victim of domestic violence, however, courts need to be especially cautious. Facilitative processes, particularly mediation, are especially prone to abuse since they place the parties in direct contact and may encourage them to compromise their rights in situations where their independent decision-making capacity is limited. The rule accordingly prohibits their use where those concerns are present.

Rule 114.05 Selection of Neutral

(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 114.12 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.

(c) Removal. Any party or the party's attorney may file with the court administrator within 10 days of notice of the appointment of the qualified neutral and serve on the opposing party a notice to remove. Upon receipt of the notice to remove the court administrator shall immediately assign another neutral. After a party has once disqualified a neutral as a matter of right, a substitute neutral may be disqualified by the party only by making an affirmative showing of prejudice to the chief judge or his or her designee.

(d) Availability of Child Custody Investigator. A neutral serving in a family law matter shall not conduct a custody investigation, unless the parties agree in writing executed

after the termination of mediation, that the neutral shall conduct the investigation or unless there is no other person reasonably available to conduct the investigation or evaluation. Where the neutral is also the sole investigator for a county agency charged with making recommendations to the court regarding child custody and visitation, the court administrator shall make all reasonable attempts to obtain reciprocal services from an adjacent county. Where such reciprocity is possible, another person or agency is "reasonably available."

Advisory Committee Comment—1996 Amendment

This rule is amended only to provide for the expanded applicability of Rule 114 to family law matters. The rule also now explicitly permits the court to establish a deadline for completion of a court-annexed ADR process. This changes is intended only to make explicit a power courts have had and have frequently exercised without an explicit rule

Rule 114.05(d) is derived from existing Rule 310.08. Although it is clearly not generally desirable to have a neutral subsequently serve as child custody investigator, in some instances it is necessary. The circumstances where this occurs are, and should be, limited, and are defined in the rule. Where other alternatives exist in a county and for an individual case, a neutral should not serve as child custody investigator.

Rule 114.06 Time and Place of Proceedings

(a) Notice. The court shall send a copy of its order appointing the neutral to the neutral.

(b) Scheduling. Upon receipt of the court's order, the neutral shall~~,~~ promptly schedule the ADR process in accordance with the scheduling order and inform the parties of the date. ADR processes shall be held at a time and place set by the neutral, unless otherwise ordered by the court.

(c) Final Disposition. If the case is settled through an ADR process, the attorneys shall complete the appropriate court documents to bring the case to a final disposition.

Advisory Committee Comment—1996 Amendment

The only changes to this rule are the inclusion of titles to the subparagraphs. This amendment is not intended to affect the meaning or interpretation of the rule, but is included to make the rule easier to use.

Rule 114.07 Attendance at ADR Proceedings

(a) Privacy. Non-binding ADR processes are not open to the public except with the consent of all parties.

(b) Attendance. The attorneys who will try the case may be required to attend ADR proceedings.

(c) Attendance at Facilitative Sessions. Facilitative ~~P~~processes aimed at settlement of the case, such as mediation, mini-trial, or med-arb, shall be attended by individuals with the authority to settle the case, unless otherwise directed by the court.

(d) Attendance at Adjudicative Sessions. Adjudicative ~~P~~processes aimed at reaching a decision in the case, such as arbitration, need not be attended by individuals with authority to settle the case, as long as such individuals are reasonably accessible, unless otherwise directed by the court.

(e) Sanctions. The court may impose sanctions for failure to attend a scheduled ADR process only if this rule is violated.

Advisory Committee Comment—1996 Amendment

This rule is amended only to incorporate the collective definitions now incorporated in Rule 114.02. This change is not intended to create any significant difference in the requirements for attendance at ADR sessions.

Rule 114.08 Confidentiality

(a) Evidence. Without the consent of all parties and an order of the ~~C~~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) Inadmissability. 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.

Advisory Committee Comment—1996 Amendment

The amendment of this rule in 1996 is intended to underscore the general need for confidentiality of ADR proceedings. It is important to the functioning of the ADR process that the participants know that the ADR proceedings will not be part of subsequent (or underlying) litigation. Rule 114.08(a) carries forward the basic rule that evidence in ADR proceedings is not to be used in other actions or proceedings. Mediators and lawyers for the parties, to the extent of their participation in the mediation process, cannot be called as witnesses in other proceedings. Minn. Laws 1996 ch. 388, § 1, *to be codified as* Minn. Stat. § 595.02, subd. 1a. This confidentiality should be extended to any subsequent

proceedings.

The last sentence of 114.08(e) is derived from existing Rule 310.05.

Rule 114.09 Arbitration Proceedings

(a) Evidence.

(1) Except where a party has waived the right to be present or is absent after dues notice of the hearing, the arbitrator and all parties shall be present at the taking of all evidence.

(2) The arbitrator shall receive evidence that the arbitrator deems necessary to understand and determine the dispute. Relevancy shall be liberally construed in favor of admission. The following principles apply:

(I) *Documents*. The arbitrator may consider written medical and hospital reports, records, and bills; documentary evidence of loss of income, property damage, repair bills or estimates; and police reports concerning an accident which gave rise to the case, if copies have been delivered to all other parties at least 10 days prior to the hearing. Any other party may subpoena as a witness the author of a report, bill, or estimate, and examine that person as if under cross-examination. Any repair estimate offered as an exhibit, as well as copies delivered to other parties, shall be accompanied by a statement indicating whether or not the property was repaired, and if it was, whether the estimated repairs were made in full or in part, and by a copy of the receipted bill showing the items repaired and the amount paid. The arbitrator shall not consider any police report opinion as to ultimate fault. In family law matters, the arbitrator may consider property valuations, business valuations, custody reports and similar documents.

* * *

Advisory Committee Comment—1996 Amendment

The changes to this rule in 1996 incorporate the collective labels for ADR processes now recognized in Rule 114.02. These changes should clarify the operation of the rule, but should not otherwise affect its interpretation.

Rule 114.10 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 ~~other~~ 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.

Advisory Committee Comment—1996 Amendment

The changes to this rule in 1996 incorporate the collective labels for ADR processes now recognized in Rule 114.02. These changes should clarify the operation of the rule, but should not otherwise affect its interpretation.

Rule 114.11 Funding

(a) Setting of Fee. The neutral and the parties will determine the fee. All fees of neutral(s) for ADR services shall be fair and reasonable.

(b) Responsibility for Payment. The parties shall pay for the neutral. It is presumed that the parties shall split the costs of the ADR process on an equal basis. The parties may, however, agree on a different allocation. Where the parties cannot agree, the court retains the authority to determine a final and equitable allocation of the costs of the ADR process.

(c) Sanctions for Non-Payment. If a party fails to pay for the neutral, the court may, upon motion, issue an order for the payment of such costs and impose appropriate sanctions.

(d) Inability to Pay. If a party in family law proceedings qualifies for waiver of filing fees under Minn. Stat. § 563.01 or the court determines on other grounds that the party is unable to pay for ADR services, and free or low-cost ADR services are not available, the court shall not order that party to participate in ADR and shall proceed with the judicial handling of the case.

Advisory Committee Comment—1996 Amendment

The payment of fees for neutrals is particularly troublesome in family law matters, where the expense may be particularly onerous. Subdivision (d) of this rule is intended to obviate some difficulties relating to inability to pay ADR fees. The advisory committee rejected any suggestion that these rules should create a separate duty on the part of neutrals to provide free neutral services. The committee hopes such services are available, and would encourage qualified neutrals who are attorneys to provide free services as a neutral as part of their obligation to provide pro bono services. See Minn. R. Prof. Cond. 6.1. If free or affordable ADR services are not available, however, the party should not be forced to participate in an ADR process and should suffer no ill-consequence of not being able to do so.

Rule 114.12 ~~Training~~ Rosters of Neutrals.

(a) Rosters. The State Court Administrator shall establish one roster of neutrals for civil matters and one roster for family law neutrals. Each roster shall be updated and published on an annual basis. The State Court Administrator shall not place on, and shall delete from, the rosters the name of any applicant or neutral whose professional license has been revoked. A qualified neutral may not provide services during a period of suspension of a professional license. The State Court Administrator shall review applications from those who wish to be listed on either roster of qualified neutrals and shall include those who meet the training requirements established in Rule 114.1~~2~~3.

(b) Civil Neutral Roster. The civil neutral roster shall include two separate parts: one for facilitative and hybrid processes (mediators and providers of med-arb and mini-trial services); a second for adjudicative and evaluative processes (arbitrators and providers of consensual special magistrate, moderated settlement conference, summary jury trial, and early neutral evaluation services).

(c) Family Law Neutral Roster. The family law neutral roster shall include three separate parts: one for facilitative and hybrid processes (mediators and providers of med-arb and mini-trial services); a second for adjudicative processes (arbitrators and providers of consensual special magistrate, moderated settlement conference and summary jury trial services); and a third for evaluative processes (neutral evaluators).

(~~c~~d) Fees. The State Court Administrator may establish reasonable fees for qualified individuals and entities to be placed on ~~the~~ either roster.

[THIS RULE IS DERIVED FROM SEVERAL EXISTING RULES. THE INTERLINING DOES NOT SHOW THE ORIGIN OF ALL PROVISIONS. NEW TEXT IS SHOWN AS UNDERLINED.]

Advisory Committee Comment—1996 Amendment

This rule is primarily new, though it incorporates the procedure now in place administratively under Rule 114.12(b) for placement of neutrals on the roster and the establishment of fees.

This rule expands the State Court Administrator's neutral roster to create a new, separate roster for family law neutrals. It is intended that the new roster will function the same way

the current roster for civil ADR under existing Rule 114 does. Subparagraph (b) is new, and provides greater detail of the specific sub-rosters for civil neutrals. It describes the roster as it is now created, and this new rule is not intended to change the existing practice for civil neutrals in any way. Subparagraph (c) creates a parallel definition for the new family law neutral roster, and it is intended that the new roster appear in form essentially the same as the existing roster for civil action neutrals.

Rule 114.1~~2~~3 Training, Standards and Qualifications for Neutral Rosters

(a) Civil Facilitative/Hybrid Neutral Roster. All neutrals providing ~~mediation, med-arb, or mini-trial~~ facilitative or hybrid services in civil, non-family matters, shall receive a minimum of 30 hours of classroom training, with an emphasis on ~~experimental~~ experiential learning. The training must include the following topics:

(1) Conflict resolution and mediation theory, including causes of conflict and interest-based versus positional bargaining and models of conflict resolution;

(2) Mediation skills and techniques, including information gathering skills, communication skills, problem solving skills, interaction skills, conflict management skills, negotiation techniques, caucusing, cultural and gender issues and power balancing;

(3) Components in the mediation process, including an introduction to the mediation process, fact gathering, interest identification, option building, problem solving, agreement building, decision making, closure, drafting agreements, and evaluation of the mediation process;

(4) Mediator conduct, including conflicts of interest, confidentiality, neutrality, ethics, standards of practice and mediator introduction pursuant to the Civil Mediation Act, Minn. Stat. § 572.31.

(5) Rules, statutes and practices governing mediation in the trial court system, including these rules, Special Rules of Court, and applicable statutes, including the Civil Mediation Act.

~~**(b)**~~ The training outlined in this subdivision ~~1~~ shall include a maximum of 15 hours of lectures and a minimum of 15 hours of role-playing.

(~~c~~b) Civil Adjudicative/Evaluative Neutral Roster. All neutrals serving in ~~arbitration, summary jury trial, early neutral evaluation and moderated settlement conference~~ adjudicative or evaluative processes or serving as a consensual special magistrate shall receive a minimum of 6 hours of classroom training on the following topics:

(1) Pre-hearing communications between parties and between parties and neutral; and

(2) Components of the hearing process including evidence; presentation of the case; witness, exhibits and objectives; awards; and dismissals; and

(3) Settlement techniques; and

(4) Rules, statutes, and practices covering arbitration in the trial court system, including Supreme Court ADR rules, special rules of court and applicable state

and federal statutes; and

(5) Management of presentations made during early neutral evaluation procedures and moderated settlement conferences.

(c) Family Law Facilitative Neutral Roster

To qualify for the family law facilitative roster neutrals shall:

(1) Complete or teach a minimum of 40 hours of family mediation training which is certified by the Minnesota Supreme Court. The certified training shall include at least:

(a) four hours of conflict resolution theory;

(b) four hours of psychological issues relative to separation and divorce, and family dynamics;

(c) four hours of the issues and needs of children in divorce;

(d) six hours of family law including custody and visitation, support, asset distribution and evaluation, and taxation as it relates to divorce;

(e) five hours of family economics; and,

(f) two hours of ethics, including: (I) the role of mediators and parties' attorneys in the facilitative process; (ii) the prohibition against mediators dispensing legal advice; and, (iii) a party's right of termination.

Certified training for mediation of custody issues only need not include five hours of family economics. The certified training shall consist of at least forty percent roleplay and simulations.

(2) Complete or teach a minimum of 6 hours of certified training in domestic abuse issues, which may be a part of the 40-hour training above, to include at least:

(a) 2 hours about domestic abuse in general, including definition of battery and types of power imbalance;

(b) 3 hours of domestic abuse screening, including simulation or roleplay; and,

(c) 1 hour of legal issues relative to domestic abuse cases; and

(3) Certify on the roster application that they have not had a professional license revoked, been refused membership or practice rights in a profession, or been involuntarily banned, dropped or expelled from any profession.

(d) Family Law Adjudicative Neutral Roster.

To qualify for the family law adjudicative roster neutrals shall have at least five years of professional experience in the area of family law and be recognized as qualified practitioners in their field. Recognition may be demonstrated by submitting proof of professional licensure, professional certification, faculty membership of approved continuing education courses for family law, service as court-appointed adjudicative neutral, including consensual special magistrates, service as referees or guardians ad litem, or acceptance by peers as experts in their field. All neutrals applying to the adjudicative neutral roster shall also complete or teach a minimum of 6 hours of certified training on the following topics:

(1) Pre-hearing communications among parties and between the parties and neutral(s);

(2) Components of the family court hearing process including evidence, presentation of the case, witnesses, exhibits, awards, dismissals, and vacation of awards;

(3) Settlement techniques; and,

(4) Rules, statutes, and practices pertaining to arbitration in the trial court system, including Minnesota Supreme Court ADR rules, special rules of court and applicable state and federal statutes.

In addition to the 6-hour training required above, all neutrals applying to the adjudicative neutral roster shall complete or teach a minimum of 6 hours of certified training in domestic abuse issues, to include at least:

(1) 2 hours about domestic abuse in general, including definition of battery and types of power imbalance;

(2) 3 hours of domestic abuse screening, including simulation or roleplay; and,

(3) 1 hour of legal issues relative to domestic abuse cases.

(e) Family Law Evaluative Neutrals. All neutrals offering early neutral evaluations or non-binding advisory opinions shall have at least five years of experience as family law attorneys, as accountants dealing with divorce-related matters, as custody and visitation psychologists, or as other professionals working in the area of family law who are recognized as qualified practitioners in their field, and shall complete or teach a minimum of 2 hours of certified training on management of presentations made during evaluative processes. Evaluative neutrals shall have knowledge on all issues in which they render opinions.

In addition to the 2-hour training required above, all neutrals applying to the family law evaluative neutral roster shall complete or teach a minimum of 6 hours of certified training in domestic abuse issues, to include at least:

(1) 2 hours about domestic abuse in general, including definition of battery and types of power imbalance;

(2) 3 hours of domestic abuse screening, including simulation or roleplay; and,

(3) 1 hour of legal issues relative to domestic abuse cases.

(~~d~~f) Exceptions to Roster Requirements. Neutral fact-finders selected by the parties for their expertise need not undergo training nor be included on the State Court Administrator's roster.

(~~e~~g) Continuing Training. All mediators and neutrals conducting med-arb must attend 6 hours of continuing education about alternative dispute resolution subjects annually. All other neutrals must attend 3 hours of continuing education about alternative dispute resolution subjects annually. These hours may be attained through course work and attendance at state and national ADR conferences. The neutral is responsible for maintaining attendance records and shall disclose the information to program administrators and the parties to any dispute. The neutral shall submit continuing education credit information to the State Court Administrator's office on an annual basis.

(f~~h~~) **Certification of Training Programs.** The State Court Administrator shall certify training programs which meet the training criteria of this rule.

Advisory Committee Comment—1996 Amendment

The provisions for training and certification of training are expanded in these amendments to provide for the specialized training necessary for ADR neutrals. The committee recommends that six hours of domestic abuse training be required for all family law neutrals, other than those selected solely for technical expertise. The committee believes this is a reasonable requirement and one that should significantly facilitate the fair and appropriate consideration of the concerns of all parties in family law proceedings.

Rules 114.14 Exceptions

(a) **Existing Neutrals.** Practicing family law neutrals on the effective date of the 1996 amendments to these rules may be placed on the roster of qualified family law neutrals without meeting the training requirements of these rules except the requirement for training in domestic abuse issues. Any person acting as a family law neutral as of the effective date of the 1996 amendments to these Rules shall have one year to apply. The Minnesota State Supreme Court ADR Review Board shall develop criteria for granting applications, which shall be based on education, training, and expertise of the applicants.

(b) **Waiver of Training Requirement.** Any neutral wishing to be placed on either of the roster of qualified neutrals after the Board has disbanded shall comply with the training requirements. However, application may be made to the Supreme Court for a waiver of the training requirement.

Advisory Committee Comment—1996 Amendment

This rule is amended to allow"grandparenting" of family law neutrals. The rule is derived in form from the grandparenting provision included in initial adoption of this rule for civil neutrals.

Form 9A should be amended as follows:

FORM 9A. **INFORMATIONAL STATEMENT** (Family Court Matters) See Minn. Gen. R. Prac. 304.02

*** * ***

8. ~~Alternative dispute resolution (is) (is not) recommended, in the form of: _____ (specify, *e.g.*, arbitration, mediation, or other means).~~

~~_____ Date for completion of mediation/alternative dispute resolution. Mediation/alternative dispute resolution expected to extend over a period of _____ days/weeks.~~

*** * ***

a. MEETING: Counsel for the parties met on _____ (date) to discuss case management issues.

b. ADR PROCESS: (check one):

☐ Counsel agree that ADR is appropriate and choose the following:

- ☐ Mediation
- ☐ Arbitration (non-binding)
- ☐ Arbitration (binding)
- ☐ Med-Arb
- ☐ Early Neutral Evaluation
- ☐ Moderated Settlement Conference
- ☐ Mini-Trial
- ☐ Summary Jury Trial
- ☐ Consensual Special Magistrate
- ☐ Impartial Fact-Finder
- ☐ Other (describe) _____

☐ Counsel agree that ADR is appropriate but request that the ~~C~~court select the process

☐ Counsel agree that ADR is NOT appropriate because:

- ☐ the case implicates the federal or state constitution
- ☐ other (explain with particularity) _____

☐ domestic violence has occurred between the parties

c. PROVIDER (check one):

☐ the parties have selected the following ADR neutral: _____.

☐ The parties cannot agree on an ADR neutral and request the ~~C~~court to appoint one.

☐ The parties agreed to select an ADR neutral on or before: _____.

d. DEADLINE: The parties recommend that the ADR process be completed by _____.
(date)

Form 9B should be amended as follows:

FORM 9B. ALTERNATIVE INFORMATIONAL STATEMENT (Family Court Matters)
See Minn. Gen. R. Prac. 304.02

* * *

1. This form is being filled out:
   a. Jointly (both parties together) ___.
   b. Separately ___.

   Check or complete the following if they apply.
   1. ___ An Order for Protection petition has been filed at some time during the marriage.
   2. ___ An Order for Protection is in effect.
   3. _____ is the ~~C~~court file number for the Order for Protection.
   4. ____ Domestic abuse (physical or emotional) has occurred between the parties. NOTE: Law and court rule prohibit court-ordered mediation when either party is claims to have been the victim of domestic abuse by the other party. If you check this item 4, you will be inelgible for court-ordered mediation an you do not have to complete item 5, below.

* *** ***

5. ~~MEDIATION~~ ALTERNATIVE DISPUTE RESOLUTION
(NOTE: YOU MAY SKIP THIS QUESTION AND PROCEED TO TO QUESTION 6 IF YOUR ATTORNEY IS COMPLETING QUESTIONS 7 THROUGH 10.)

~~Do you feel it would be helpful for~~ Have the parties ~~to~~ talked with a third person to decide ~~some~~ any of the problems listed in this form?
Yes ___ No ___

If yes, please check one or all of the following:
___ Property/Financial problems
___ Custody problems
___ Visitation problems
___ Third person is on the Supreme Court's roster of qualified neutrals

a. MEETING: The parties (or their attorneys) met on _____ (date) to discuss case management issues.

b. ADR PROCESS: (check one) (descriptions can be obtained from the court administrator):

You	Both Parties	
☐	☐	Agree that ADR is appropriate and choose the following:
		☐ Mediation
		☐ Arbitration (non-binding)
		☐ Arbitration (binding)
		☐ Med-Arb
		☐ Early Neutral Evaluation
		☐ Moderated Settlement Conference
		☐ Mini-Trial
		☐ Summary Jury Trial
		☐ Consensual Special Magistrate
		☐ Impartial Fact-Finder
		☐ Other (describe)

You	Both Parties	
☐	☐	Agree that ADR is appropriate but request that the court select the process

You	Both Parties	
☐	☐	Agree that ADR is NOT appropriate because:
		☐ the case implicates the federal or state constitution
		☐ other (explain with particularity) _____ _____ _____
		☐ domestic violence has occurred between the parties

c. PROVIDER (check one):

You	Both Parties	
☐	☐	have selected the following ADR neutral: _____ _____
☐	☐	cannot agree on an ADR neutral and request the court to appoint one
☐	☐	agreed to select an ADR neutral on or before: ___. [date]

d. DEADLINE (check one)

You Both Parties

☐ ☐ recommend that the ADR process be completed by _____.
[date]

* * *

THE NEXT TWO PAGES ARE TO BE COMPLETED BY ATTORNEYS ONLY.

* * *

9. a. MEETING: Counsel for the parties met on _____ to discuss case management issues.
(date)

b. ADR PROCESS: (check one):

☐ Counsel agree that ADR is appropriate and choose the following:

☐ Mediation

☐ Arbitration (non-binding)

☐ Arbitration (binding)

☐ Med-Arb

☐ Early Neutral Evaluation

☐ Moderated Settlement Conference

☐ Mini-Trial

☐ Summary Jury Trial

☐ Consensual Special Magistrate

☐ Impartial Fact-Finder

☐ Other (describe) _____

_____

_____

☐ Counsel agree that ADR is appropriate but request that the court select the process

☐ Counsel agree that ADR is NOT appropriate because:

☐ the case implicates the federal or state constitution

☐ other (explain with particularity) _____

_____

_____

☐ domestic violence has occurred between the parties

c. PROVIDER (check one):

☐ the parties have selected the following ADR neutral: _____

_____.

☐ The parties cannot agree on an ADR neutral and request the court to appoint one.

☐ The parties agreed to select an ADR neutral on or before: _____.

d. DEADLINE: The parties recommend that the ADR process be completed by _____.
(date)

~~9~~10. Please list additional information . . ..

RULE 303. MOTIONS; EX PARTE RELIEF; ORDERS TO SHOW CAUSE; ORDERS AND DECREES

Rule 303.03 Motion Practice

* * *

(c) Settlement Efforts. No motion, except a motion for temporary relief, will be heard unless the parties have conferred either in person, or by telephone, or in writing in an attempt to resolve their differences prior to the hearing. The moving party shall initiate such conference. In matters involving post-decree motions, if the parties are unable to resolve their differences in this conference they shall consider the use of an appropriate ADR process under Rule 114 to attempt to accomplish resolution. The moving party shall certify to the court, before the time of the hearing, compliance with this rule or any reasons for not complying, including lack of availablity or cooperation of opposing counsel. Whenever any pending motion is settled, the moving party shall promptly advise the court.

* * *

Advisory Committee Comment—1994~~6~~ Amendment

Subdivisions (a)-(d) of this rule are new. They are derived from parallel provisions in new Minn.Gen.R.Prac. 115, and are intended to make motion practice in family court matters as similar to that in other civil actions as is possible and practical given the particular needs in family court matters.

Subdivision (d) of this rule is derived from Rule 2.04 of Rules of Family Court Procedure and from Second Judicial District Rules 2.041 and 2.042.

The requirement in subsection (c) of an attempt to resolve motion disputes requires that the efforts to resolve the matter be made before the hearing, not before bringing the motion. It is permissible under the rule to bring a motion and then attempt to resolve the motion. If the motion is resolved, subsection (c) requires the parties to advise the court immediately.

Rule 303.03(a)(5) is added by amendment to be effective January 1, 1994, in order to make it clear that the stringent timing requirements of the rule need not be followed on post-trial motions. This change is made to continue the uniformity in motion practice between family court matters and general civil cases, and is patterned on the change to Minn. Gen. R. Prac. 115.01(c) made effective January 1, 1993.

Subdivision (c) of this rule is amended in 1996 to require consideration of ADR in post-decree matters. The rule specifies how ADR proceedings are commenced in post-decree

matters; the procedures for court-annexed ADR in these matters is generally the same under Rule 114 as for other cases.

Rule 304 SCHEDULING OF CASES

*** * ***

Rule 304.02 The Party's Informational Statement

*** * ***

(b) Content. The information provided shall include:

* * *

(6) Recommended alternative dispute resolution process, the timing of the process, the identity of the neutral selected by the parties or, if the neutral has not yet been selected, the deadline for selection of the neutral. If ADR is believed to be inappropriate, a description of the reasons supporting this conclusion;

(~~6~~7) A proposal for establishing any of the deadlines or dates to be included in a scheduling order pursuant to this rule.

*** * ***

Rule 304.03 Scheduling Order

*** * ***

(b) Contents of Order. The scheduling order shall provide for alternative dispute resolution as required by Rule 114.04(c) and may establish any of the following:

* * *

Advisory Committee Comment—199~~2~~6 Amendment

This rule is new. It is patterned after the similar new Minn. Gen. R. Prac. 111. The Task Force believes that the scheduling information and procedures in family court and other civil matters should be made as uniform as possible, consistent with the special needs in family court matters. It is amended in 1996 to include information needed for using alternative dispute resolution in family law matters as required by Minn. Gen. R. Prac. 301.01, also as amended in 1996. These amendments follow the form of similar provisions in Minn. Gen. R. Prac. 111, and should be interpreted in the same manner.

Matters not scheduled under the procedures of this rule are scheduled by motion practice under Minn. Gen. R. Prac. 303.

Rule 304.02 now provides a definite time by which informational statements are required, even if a temporary hearing is contemplated and postponed. Under the prior version of the rule, informational statements might never be due because a temporary hearing might be repeatedly postponed. If the parties seek to have a case excluded from the court scheduling process, they may do so by stipulation to have the case placed on "Inactive Status." This stipulation can be revoked by either party, but removes the case from active court calendar management for up to one year. *See* Minnesota Conference of Chief Judges (See Exhibit A), Resolution Relating to the Adoption of Uniform Local Rules, Jan. 25, 1991.

This rule~~, as amended,~~ provides for a separate Form 9B for use by unrepresented parties. This form contains additional information useful to the court in managing cases where one

or both parties are not represented by a party. This form is updated in 1996 to request information about any history or claims of domestic abuse and the views of the parties on the use (or potential use) of alternative dispute resolution in the same manner as Form 9A for represented parties.

PROPOSAL 2: Establish a Uniform Rule of Submissions in Support of Attorneys' Fees

Introduction

It came to the attention of the Advisory Committee that the judges in the Second Judicial District have adopted a Standing Order for Approval of Attorneys' Fees. It appears to the Committee that this standing order is no different than a local rule, and as such it should either be approved as a local rule for Ramsey County by the Supreme Court, or it should be made a rule of the General Rules for statewide application or rescinded. Although the Committee believes that the Ramsey County rule contains some unduly onerous provisions, it also believes that a rule dealing with the requirements for attorneys' fee applications would be helpful to the bench and bar and should be adopted. The Committee accordingly drafted a rule derived in significant part from the Ramsey County rule.

Specific Recommendation.

Recommendation 1. Adopt a new Minn. Gen. R. Prac. 119 as follows:

Rule 119 Applications for Attorneys' Fees

In any action or proceeding in which an attorney seeks the award, or approval, of attorneys' fees in the amount of $1,000.00 for the action, or more, application for award or approval of fees shall be made by motion. The motion shall be accompanied by an affidavit of any attorney of record which establishes the following:

1. A description of each item of work performed, the date upon which it was performed, the amount of time spent on each item of work, the identity of the lawyer or legal assistant performing the work, and the hourly rate sought for the work performed.;
2. The normal hourly rate for each person for whom compensation is sought, with an explanation of the basis for any difference between the amount sought and the normal hourly billing rate, if any;
3. A detailed itemization of all amounts sought for disbursements or expenses, including the rate for which any disbursements are charged and the verification that the amounts sought represent the actual cost to the lawyer or firm for the disbursements sought; and
4. That the affiant has reviewed the work in progress or original time records, the work was actually performed for the benefit of the client and was

necessary for the proper representation of the client, and that charges for any unnecessary or duplicative work has been eliminated from the application or motion.

The court may require production of copies of additional records, including any fee agreement relevant to the fee application, bills actually rendered to the client, work in progress reports, time sheets, invoices or statements for disbursements, or other relevant records. These documents may be ordered produced for review by all parties or for *in camera* review by the court.

The motion should be accompanied by a memorandum of law that discusses the basis for recovery of attorney's fees and explains the calculation of the award of fees sought and the appropriateness of that calculation under applicable law.

Advisory Committee Comment—1996 Amendment

This rule is intended to establish a standard procedure for supporting requests for attorneys' fees. The committee is aware that motions for attorneys' fees are either not supported by any factual information or are supported with conclusionary, non-specific information that is not sufficient to permit the court to make an appropriate determination of the appropriate amount of fees.

Where fees are to be determined under the "lodestar" method widely used in the federal courts and adopted in Minnesota in *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 542-43 (Minn. 1986), trial courts need to have information to support the reasonableness of the hours claimed to be expended as well as the reasonable hourly rate under the circumstances. This rule is intended to provide a standard set of documentation that allows the majority of fee applications to be considered by the court without requiring further information. The rule specifically acknowledges that cases involving complex issues or serious factual dispute over these issues may require additional documentation. The rule allows the court to require additional materials in any case where appropriate. This rule is not intended to limit the court's discretion, but is intended to encourage streamlined handling of fee applications and to facilitate filing of appropriate support to permit consideration of the issues.

This rule also authorizes the court to review the documentation required by the rule *in camera*. This is often necessary given the sensitive nature of the required fee information and the need to protect the party entitled to attorneys' fees from having to compromise its attorney's thoughts, mental impressions, or other work product in order to support its fee application. As an alternative to permitting in camera review by the trial judge, the court can permit submission of redacted copies, with privileged material removed from all copies.

PROPOSAL 3: Adopt new rule relating to filing of wills with court.

Introduction

The legislature amended Minn. Stat. § 542.2–515 in 1995, effective January 1, 1996. The amended statute provides for safekeeping of wills by courts under rules established by the courts. Ramsey County has adopted a standing order governing this subject, and the committee believes a rule of statewide application is desirable given the statewide applicability of the statute.

Specific Recommendation.

Recommendation 1. Adopt a new Minn. Gen. R. Prac. 418 as follows:

Rule 418 Deposit of Wills

(a) Deposit by Testator. Any testator may deposit his or her will with the court administrator in any county subject to the following rules. Wills shall be placed in a sealed envelope with the name, address, and birth date of the testator placed on the outside. The administrator shall give a receipt to the person depositing the will.

(b) Withdrawal by Testator or Agent. Any will may be withdrawn by the testator in person upon presentation of identification and signing an appropriate receipt. A testator's attorney or other agent may withdraw the will by presenting a written authorization signed by the testator and two witnesses with the testator's signature notarized.

(c) Examination by Guardian or Conservator. A guardian or conservator of the testator may reveiew the will upon presentation of identification bearing the photograph of the person seeking review and a copy of valid letters of guardianship or conservatorship. If the guardianship or conservatorship proceedings are venued in a county other than that where the will is filed, the required copy of the letters shall be certified by the issuing court within 30 days of the request to review the will. The will may only be examined by the guardian or conservator in the presence of the court administrator or deputy administrator, who shall reseal it after the review is completed and shall endorse on the resealed envelope the date it was opened, by whom it was opened and that the original was placed back in the envelope.

(d) Copies. No copies of the original will shall be made during the testator's lifetime.

Advisory Committee Comment—1996 Amendment

This rule is new and is intended to provide a standard mechanism for handling wills deposited with the court for safekeeping. Minn. Stat. § 542.2–515, subd. 1a, was adopted in 1996 to permit deposit of any will by the testator. This rule is intended to provide uniform and orderly rules for deposit and withdrawal of wills that are deposited pursuant to this statute.

COURT ADMINISTRATION

Wright County Government Center
10 Northwest Second Street
Buffalo, Minnesota 55313-1193

Buffalo direct dialed:
Civil Division 682-7546 ( )
Conciliation Court 682-7548 ( )
Criminal Division 682-7541 ( )
Family Division 682-7536 ( )
Juvenile Division 682-7545 ( )
Probate Division 682-7544 ( )
Traffic/Misdemeanor 682-7538 ( )
Other: 682-7535 (X)
Metro: (612) 339-6881
WATS: (800) 362-3667

LaVonn Nordeen
Court Administrator

July 2, 1996

CX-89-1863

OFFICE OF
APPELLATE COURTS
JUL -5 1996
FILED

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

Re: Proposed Amendments to the General Rules of Practice

Dear Mr. Grittner:

On behalf of a majority of the Court Administrators in the Tenth Judicial District, I submit this written statement regarding the proposed rules. We do not wish to make an oral presentation.

The recommendation for Minn. Gen. R. Prac. 418 (d) provides that "no copies of the original will shall be made." Even though the statute that required the will be opened publicly and notice be given to the named executor and that a copy be retained when we transmit the will to another court has been amended, it is common to provide a copy to the named personal representative or another interested party or to an attorney for purposes of commencing the probate of the estate because we do not release the original will. It also provides a safeguard to retain a copy when transmitting the original to another court even though we are no longer "directed" to do so.

We would suggest the following alternative language:

> No copies of the original will on deposit with the court shall be made during the testator's lifetime.

Thank you for your consideration.

Sincerely,

LaVonn Nordeen

LaVonn Nordeen
Vice Chairperson, Tenth District Court Administrators

c: Mike Johnson

STATE OF MINNESOTA
DISTRICT COURT, SECOND DISTRICT
SAINT PAUL 55102

MARY LOUISE KLAS
JUDGE

July 2, 1996

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

Dear Mr. ~~Grittner~~ Fred:

Enclosed herewith please find 12 copies of my statement regarding the recommendations of the Minnesota Supreme Court Advisory Committee on General Rules of Practice.

Sincerely yours,

Mary Lou

MLK/mcm

Enclosures (12)

STATE OF MINNESOTA
DISTRICT COURT, SECOND DISTRICT
SAINT PAUL 55102

MARY LOUISE KLAS
JUDGE

July 2, 1996

CX-89-1863

Members, MN Supreme Court
Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Re: Recommendations of the Minnesota Supreme Court Advisory Committee on General Rules of Practice

Dear Members of the Court:

Since 1986, I have served as a district court judge in the Second Judicial District. I graduated from William Mitchell in 1960 and, for the six or eight years prior to my appointment as a judge, limited my practice to family law. I am a member and past chair of the Minnesota State Bar Association Family Law Section and member and past-president of the Minnesota Chapter of the American Academy of Matrimonial Lawyers. I am an adjunct professor of family law at William Mitchell College of Law. I was a late and casual addition to the Ad Hoc Committee chaired by Daniel Ventres, Jr. I recall that the genesis of the Ad Hoc Committee occurred at an AAML lunch during which Dan Ventres suggested putting together some people who could assist Mary Davidson with her Divorce With Dignity Program.

Since January of 1989, I have served as a member of the Minnesota Supreme Court Gender Fairness Implementation Committee and, once the committee began directing its attention toward implementing the recommendations, have been charged with the education of judicial officers in the areas of family law and domestic violence. I believe that relevant to the issues before you at this time are the following findings and recommendations of the Minnesota Supreme Court Task Force for Gender Fairness in the Courts which made its report in September of 1989:

FINDINGS:

1. Domestic violence is one of the most serious problems faced by our society.

2. Minnesota has strong and progressive statutes which are not adequately implemented or enforced.

3. Judges, lawyers, court personnel, and law enforcement

officers are not sufficiently sensitive to the problems of victims of domestic abuse.

RECOMMENDATIONS:

1. Judges, attorneys, court personnel and law enforcement officers should be sensitized to the problems of individuals who have been victims of domestic abuse.

2. The topic of domestic abuse and Orders for Protection--including information about the abuse dynamic and the dangers of victim blaming--should be addressed in judicial education programs.

I note that your Advisory Committee understands this need quite well. On page 5 of the Summary of Committee Recommendations, the Committee:

> recommends that this court continue--or expand--its efforts at training court personnel, including judges, on domestic violence and its impact on all aspects of how the courts handle family law matters.

As Justice Tomljanovich and, before her, Justice Wahl recognizes, sometimes I see a glass as half empty where others could see it as half full. However, after six and a half years of attempting to "train ... judges on domestic violence and its impact on all aspects of how the courts handle family law matters" I'm not sanguine about how far we've come toward achieving the Gender Fairness Task Force goals. I'm therefore concerned that nothing in the amendments to the General Rules of Practice give license to any court to "end play" the case law and statutes in Minnesota with regard to mediation in family law cases where domestic abuse is an issue.

Having said that, I do commend the Advisory Committee for taking the recommendations of the Ad Hoc Committee, viewing them in the general context of the practice of law in Minnesota and meeting some issues head on:

1. On page 17, I appreciate the addition of subp. (d) which provides that if a party cannot pay, the court shall not order that party to participate in ADR and directs that the court proceed with judicial handling of the case. This is an issue which the Ad Hoc Committee danced around. Some of us urged the committee to deal with it realistically, but we were not successful.

2. I appreciate the completeness of the requirements for qualification as a family law facilitative neutral which are set out in subp. (c) on page 20. I especially appreciate the requirement that the six hours of training

in domestic abuse cover both the general dynamics as well as how to screen for domestic violence and the legal issues involved.

On an editorial note, I would respectfully suggest that on page 13 the advisory comment repeat the third paragraph of the advisory comment on page 8 which refers to Rule 310.01. Lawyers, being human, may well go directly to Rule 114 and never bother to refer to or read Rule 310.01 or its comments. Adding it again under Rule 114.04 won't kill too many trees.

I have specific concerns about three portions of the Advisory Committee amendments:

1. Page 7, last sentence: unfortunately, the court could be satisfied that the parties "have been advised by counsel" and still not be satisfied that there is no abuse or that the playing field is level. Unfortunately, not all attorneys who handle family law matters are **competent** to do so. Unfortunately, not all lawyers who handle family law cases are **sensitive** to the issues of domestic violence and know how to find out if it exists in a particular family.

   In addition, what little I know about the dynamic of domestic abuse leads me to conclude that even if there is no "face-to-face meeting of the parties," the history of abuse will have an impact on the victim's ability to make decisions during negotiations. That impaired decision making, one might argue, is present even if negotiations are carried on only by counsel. That's true, but an ADR process involving "shuttle diplomacy" which many of the family law mediators now use, puts far more pressure on the victim to agree to the "right things." The victim knows, from experience, that if s/he doesn't agree to the "right things," there will be consequences in his/her life--if not immediately in the parking lot or the next morning, then ultimately at some point along the way.

   I would respectfully suggest that the last sentence beginning with the words "In circumstances" be stricken completely. As some members of the Ad Hoc Committee continued to point out, at the present time if parties wish to utilize ADR prior to or at any point throughout the course of their dissolution, they are free to do so. The victim of domestic violence is as free as any other person to do so. My concern is with the **court directing** that an ADR process be used.

2. On page 22, I'm afraid I do not understand the sentence:

   The Minnesota State Supreme Court

> ADR Review Board shall develop criteria for **granting applications,** which shall be based on education, training and expertise of the applicants.

I am assuming that that is a typographical error and what the committee wishes the board to do is to develop criteria for **placement on the roster.** The typo is easy enough to take care of.

What is not so easy, however, is whether those family law neutrals who are grandmothered/grandfathered in have the requisite education, training and expertise to deal with the cases in the same way as those newly qualifying. I respecfully suggest that the sentence should read:

> The Minnesota State Supreme Court ADR Review Board shall develop criteria for placement on the roster. The criteria shall include a determination as to whether or not the existing neutral's training, education and expertise are substantially equivalent to the requirements of 114.1, especially subp. (c).

3. In form 9B on page 25, I'm very concerned about the material after the word "Note:" That material reads:

> Law and court rule prohibit court-ordered mediation when either party is (sic) claims to have been the victim of domestic abuse by the other party. If you check this item 4, you will be inelgible (sic) for court-ordered medition an (sic) you do not have to complete item 5, below.

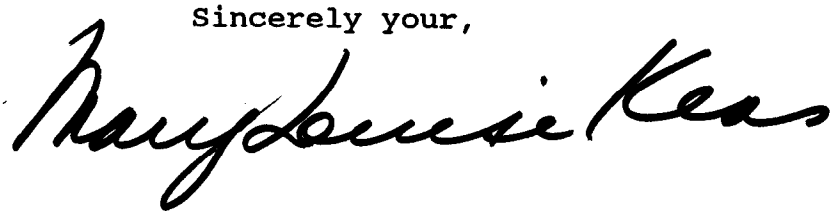
Given the dynamics of many divorcing families in which domestic violence is present, this is an open invitation to lie! Often the domestic violence victim is very anxious to get out of the marriage and will do or say anything to facilitate that happening. Unfortunately, Minnesota's court system material developed to educate parties as to what the dissolution process is all about displays a parade of horrors if one goes through the judicial process and insists upon one's substantive or procedural rights. It presents ADR as a cheap and quick alternative which a domestic abuse victim would have a

hard time rejecting. This sentence is not needed here and is only going to cause trouble.

I have an additional concern with the procedure for evaluation of ADR neutrals and their removal from the roster for mis- or malfeasance. I am certainly not an expert on governmental immunity, but I understand that the ADR review board will dispand on December 31, 1996. Even if the court accepts the Advisory Committee recommendation that it remain in operation for another year, I do not see that Board operating to monitor the behavior of neutrals. Does that mean the Supreme Court would ultimately be liable?

Thank you for listening. Good luck.

Sincerely your,



MLK/mcm

THE SUPREME COURT OF MINNESOTA
CONTINUING EDUCATION
FOR STATE COURT PERSONNEL

140 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155-1500

General: (612) 297-7590
Fax: (612) 297-5636
ADR: (612) 296-4788

July 2, 1996

Mr. Frederick Grittner
Clerk of the Appellate Court
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

CX-89-1863

Dear Mr. Grittner:

The Alternative Dispute Resolution Review Board requests approximately 10-15 minutes to make an oral presentation at the Hearing to Consider Proposed Amendments to the Minnesota General Rules of Practice on July 10, 1996, at 1:30 p.m. in Courtroom 300 of the Supreme Court. Daniel A. Gislason, Esq., will make the presentation on behalf of the Board.

In addition, I would like to call your attention to a typographical error in 114.13(a) of the proposed rule. The work "experimental" should be "experiential." Thank you.

Sincerely,

Alanna K. Moravetz

Alanna K. Moravetz
Staff to the Board

THE SUPREME COURT OF MINNESOTA
CONTINUING EDUCATION
FOR STATE COURT PERSONNEL

140 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155-1500

General: (612) 297-7590
Fax: (612) 297-5636
ADR: (612) 296-4788

July 22, 1996

CX-89-1863

Members, Minnesota Supreme Court
Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Re: Amendments to Rule 114 of the Minnesota General Rules of Practice

Dear Members of the Court:

I am writing to request changing the first sentence in proposed Rule 114.13(g) to read:

> **(g) Continuing Training.** All neutrals providing facilitative or hybrid services must attend 6 hours of continuing education about alternative dispute resolution subjects annually.

By replacing "All mediators and neutrals conducting med-arb" with "All neutrals providing facilitative or hybrid services," neutrals providing mini-trial services will be required to complete 6 hours of continuing education. That is the requirement as the rule now stands.

The suggested change will facilitate administrative processing of this requirement as well as bring the continuing education requirement into conformity with the language used in proposed Rule 114.13(a).

Thank you for your consideration.

Sincerely,

Alanna K. Moravetz

Alanna K. Moravetz
Director

cc: Michael Johnson, Esq.

GARY A. WEISSMAN LAW OFFICES
SUITE 500
701 FOURTH AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55415-1810
FAX (612) 338-1771

GARY A. WEISSMAN
ATTORNEY AT LAW
(612) 337-9519

NANCY M. GRIFFITH
LEGAL ASSISTANT
(612) 337-9521

July 10, 1996

Supreme Court of Minnesota
300 Minnesota Judicial Center
St. Paul, MN 55101

CX-89-1863

re: **ACGRP RECOMMENDATIONS CONCERNING THE EXTENSION OF RULE 114 TO FAMILY LAW**

Dear Honorable Justices:

The Advisory Committee on General Rules of Practice ("ACGRP") has done an excellent job of reformatting the Ventres Committee Recommendations, so that ADR in family law will fall, appropriately, within the ambit of Rule 114.

In the compressed time that it had to review the Ventres Committee work product, however, the ACGRP inadvertently made one error and for policy reasons made two omissions. I ask that the Supreme Court direct its Advisory Committee to modify these three oversights:

- **Moderated Settlement Conferences;**
- **Divorce with Dignity**
- **Collaborative Law**

A. MISPLACEMENT: Moderated settlement conferences. The ACGRP appropriately adopted the Ventres Committee typology (grouping the various ADR processes into facilitative, adjudicative, evaluative, and hybrid categories). But it misplaced moderated settlement conferences into the adjudicative category. It should be moved to the evaluative category in Rule provisions:

- 114.02
- 114.12(c)
- 114.13(c)

B. OMISSIONS:

1. Divorce with Dignity (a/k/a/ Judicial Case Management).
2. **Collaborative law**.

The Ventres Committee had recommended that the smorgasbord of ADR options for family law include Divorce with Dignity and Collaborative Law. The ACGRP omitted them both (apparently on the premises that DWD is a "one-county model" and that collaborative law is "an 'opt-out' process that is not really court-annexed").

Both should be part of the smorgasbord of ADR options available to parties, even if each judicial district will not have marshalled the resources to make divorce with dignity practicable by January 1. 1997. The Supreme Court can signal its approval of these less adversarial processes by including them within Rule 114.[1]

Respectfully,

Gary A. Weissman

[1] It would require their inclusion in Rule 114.02 and an enumeration of the Collaborative Law groundrules fashioned by the Ventres Committee.

♦Pastoor Law Office, Ltd.♦
Maria K. Pastoor

First National Bank Building
Suite E-1434
332 Minnesota Street
St. Paul, MN 55101
(612) 290-9004

MEMORANDUM

TO: Minnesota Supreme Court
FROM: Maria K. Pastoor
RE: Proposed Amendments to the Minnesota General Rules of Practice
File No. CX-89-1863
Date: July 5, 1996

PERSONAL BACKGROUND

I have practiced family law since 1986. I have worked with battered women since 1983. Recently I served as staff attorney with the Battered Women's Legal Advocacy Project. Currently I am in solo practice, practicing exclusively in the areas of order for protection, harassment restraining orders, and family law appeals.

As a member of the "*Ad Hoc* Committee" that reported to this Court's Advisory Committee on the General Rules of Practice, I am familiar with the rationales and debates surrounding the rules. I testified and made written comments to the Advisory Committee.

I make the following comments in the spirit of improving justice for parents and children in family court. These comments address four topics: Mediation and Battered Women; Need for New Rules; Licensure; and Immunity.

MEDIATION AND BATTERED WOMEN

ADR for most litigants means mediation. Mediation is the form of ADR most frequently used in family courts. I doubt that consensual special magistrates are available as a practical matter in Rock County. Thus, proposals that increase the use of ADR mean more mediation.

A significant portion of women in family court have been battered. Between 35 and 65% of women have been battered by an intimate partner at some point in their lives.

Seven years ago the Minnesota Supreme Court learned that mediation harmed children of battered women[1]:

> Though state law expressly prohibits judges from requiring custody mediation in cases where there is probable cause to believe that domestic abuse has occurred[2], Minnesota judges regularly order abused women into mediation. Loretta Frederick of the Minnesota Coalition for Battered Women testified to the Task Force:
>
> > Battered Women go into mediation scared to death to assert themselves, frightened to say what they really think should happen with their children, sometimes getting literally beaten up in the parking lot afterwards for having opened their mouths, and ending up with custody and visitation [agreements] that are not in the best interests of the children.

Minnesota Supreme Court Task Force for Gender Fairness in the Courts: Report Summary at S9 (1989). The Task Force found that "[s]ome judges continue to order custody mediation in situations where there has been domestic abuse in spite of state law prohibiting mandatory mediation in these cases." Id. at S10.

Judges continue ordering battered women into mediation. The Battered Women's Legal Advocacy Project brought a case raising this issue in to the court of appeals. Mechtel v. Mechtel, 529 N.W.2d 916 (Minn. Ct. App. 1995) said that it really is true that a court cannot order a battered woman into mediation. Today we have a reported case, a rule, and a statute severely restricting mediation involving violent parents. Yet the practice noted by the Gender Fairness Task Force continues: Many judges order battered women into mediation contrary to well-established law.

---

[1] This letter refers to "battered women" and "battered mothers" because 95% of violence between intimate couples is perpetrated by men against women.

[2] Currently Minn. Stat. § 518.619 (1994) and Gen. R. Prac. 310.01(a).

Given this history, skepticism arises when proposals which result in expanded mediation arrive, especially when protection for survivors of domestic abuse is less than ironclad.

The courts should not involve themselves in approving such mediation due to the dangers it can pose. I appreciate the concern the Advisory Committee demonstrates for battered women's issues. However, a number of provisions are problematic and dangerous to battered women.

1. **Insufficient screening for domestic abuse is provided.** Given the significant proportion of women who have been battered, screening for domestic abuse must be done prior to agreements to mediate or orders to mediate. Screening must be done by the court, any attorneys for the parties, and by mediators prior to mediation. How else can the plague of dangerous mediation referrals end?

2. **"Mediation-Arbitration" is permitted for battered women.** Proposed Rule 310.01 limits the use of a "facilitative process" where one party claims to be a victim of domestic abuse. However, the definitions of facilitative processes in Rule 114.02(a) include only mediation. Mediation-arbitration is not defined as a facilitative process. Therefore a judge could legally order a battered woman to participate in mediation as long as unsuccessful mediation was followed by arbitration. The result appears to be unintended.

3. **Avoiding face-to-face processes does not eliminate all dangers posed by mediation.** The following sentence of Rule 310.01 should be removed:

   > In circumstances where the court is satisfied that the parties have been advised by counsel and have agreed to an ADR process that will not involve face-to-face meeting of the parties the court may direct that the ADR process be used.

   Advice by counsel often does not protect battered women. Many attorneys do not inquire about domestic abuse. Many attorneys don't know what questions to ask. Few litigants volunteer.

   The rules should prohibit courts from referring to any process in which parties meet and confer with a neutral third party for the purpose of reaching agreement on legal disputes whenever a party claims domestic abuse has existed. If a fully

informed battered women chooses to mediate, nothing prevents her from doing so privately. The court simply should not place its imprimatur on the process.

Some believe that mediation is safe for battered women if special techniques are used. For instance, the parties sit in different rooms and do not meet face to face. However, a woman who has lived for the past eight years trying her best to placate her abuser does not automatically cease that behavior when the abuser leaves the room. She placates her abuser by agreeing that he can have custody. The children end up suffering because they end up in the custody of a parent who teaches that violence and intimidation work to get what you want in this world. Furthermore, it is not fair to force a woman to sit in the same building with a man who has spent the last ten years torturing and terrifying her--kicking her, burning her, making plain that he would take her life in the blink of an eye. Should the court system remove her choices for obtaining a divorce and resolving issues? Shouldn't she have the choice of saying, "I want a judge to do her job and decide who should have custody. I will not waste time negotiating with someone who does not negotiate in good faith?"

For further information I urge you to read the attached article, "Mediation Can Make Bad Worse" from the National Law Journal.

Avoiding face-to-face meetings between parties does not avoid many of the dangers mediation poses to battered women. "Shuttle" mediation, where the parties sit in different rooms, does not eliminate all inappropriate pressure on battered women. Such a process always puts more pressure on battered women to make inappropriate settlements than judicial decision-making and arbitration.

4. **Rule 114.04(b) must reference the exceptions to ADR in family law matters in Rule 310, just like Rule 114.04(e) does.** Given the history of inappropriate and illegal mediation, the exceptions protecting battered women must be cross-referenced or they will be ignored.

5. **Existing neutrals must not be grandparented in unless they take the domestic abuse training required for new neutrals.** (Rule 114.14(a).) If court personnel, including judges, need expanded training on domestic violence as the Advisory Committee recommends, then all neutrals should receive that training, not just new ones. My understanding is that six hours of domestic violence training is not a routine part of current mediator training. This Court should adopt the *Ad Hoc*

Committee's proposal to give grandparented neutrals six months from the effective date of the rules to obtain the domestic violence training.

6. **Form 9B (page 25) creates unintended problems for battered women.** Paragraph 1.a.4. contains a warning that reads like an invitation to lie about domestic abuse. It should be eliminated. If it is retained, another warning should be added about the consequence of not checking the box if domestic abuse has occurred. For instance, a woman could be prohibited from ever getting an order for protection based upon acts occurring up to the time she signed Form 9B. Assault charges be dismissed if the woman's testimony is the primary evidence of abuse. A battered woman would not have the benefit of the presumption against joint custody in Minn. Stat. § 518.17 subd. 2.

   No other portions of the form advise the parties about consequences of checking various boxes. It would be far better to simply leave the box as is, without a demand to check yes or no, and eliminate the comment.

7. **Increased use of mediation risks increasing punishment of battered mothers who refuse to mediate.** More ADR means more mediation and greater emphasis on cooperative parenting. The family court system is increasingly punishing mothers who decline to cooperate and be "friendly" with abusive fathers. The punishment often takes the form of unsafe visitation arrangements or custody granted to abusive fathers. More ADR risks more children reared by abusive fathers.[1]

---

[1] In the years since the Gender Fairness Task Force, mediation has expanded throughout Minnesota. Organizations which operate statewide (Minnesota Coalition for Battered Women and Battered Women's Legal Advocacy Project) learned that battered mothers were criticized for not being friendly and cooperative enough with those who had abused them. It has become increasingly difficult to convince decision makers that "the good of the children" requires consistent limits on violent parents, rather than capitulation to their demands in the name of cooperation. Children end up in the custody of violent parents because decision makers value cooperation over protection. The emerging challenge to the family courts is whether being a "friendly parent" will continue to be valued over modeling violent methods of dealing with women and mothers. Expanded mediation increases this challenge.

A number of items in the rules improve things for battered women and should be retained if the court promulgates the rules:

1. The inclusion of six hours of domestic violence training for new neutrals in Rule 114.23(c) is greatly needed.

2. The wording of the exception for domestic violence in Rule 310.01 such that claiming to be a victim of domestic abuse will often exempt a person from mediation is helpful. It avoids having to litigate whether or not there was domestic abuse just to get parties into the most appropriate form of ADR.

3. Rule 114.04(a) avoids victims of domestic abuse having to meet with their abusers.

Remember the Gender Fairness Task Force findings. Think about the dangers mediated agreements pose to children of battered women. If the proposed rules are not improved, they should be discarded altogether.

NEED FOR NEW RULES

The tea leaves indicate that some form of Rule 114 is coming to family law. For the record, I must state that the need for rules governing ADR is not obvious. Many counties throughout the state have developed mediation programs. The types of programs vary, but all attempt to reduce the pain that sometimes accompanies the adversary process. ADR is happening in family court, and will continue happening, with or without these rules.

The *Ad Hoc* Committee was repeatedly asked about the need for the rules. Those questions were ignored every time they were raised. The Advisory Committee "believes" that "Rule 114 has functioned well in civil cases." Nothing indicates upon what this belief rests.

This Committee should not consider promulgating more rules before answering the following questions:

Who is being prevented from using all the ADR methods currently in existence? If it's low income people, the proposed rules do very little to improve access to ADR. In fact, poverty and unavailability of free or low-cost ADR automatically exempt one from ADR. Rule 114.11(d).

Current rules permit the rich to purchase whatever ADR they agree to.

What would truly improve access and fairness to all? Wouldn't it be making the courts more friendly to the 50% of family law litigants I am told are *pro se*? Doesn't everyone deserve access to a judge who controls litigation and makes decisions when necessary?

How is ADR doing in civil cases? Who knows? Who's asking? Who's evaluating? What do litigants (not attorneys) think about civil ADR?

Is mandating ADR for every family law case overkill? Don't adequate tools exist now for any creative judge to manage the few "cases from hell?"

What do the diverse populations served by the courts think about the proposed rules? Contrary to prior claims from members of the *Ad Hoc* Committee, the participants in that committee were not representative of the diversity of Minnesota. To my knowledge, no people of color participate on the *Ad Hoc* Committee or the Advisory Committee. The *Ad Hoc* Committee's active participants were primarily ADR providers.

LICENSURE

Use of the roster scheme appears inevitable. However, for the record, I urge this court to reconsider the advisability of expanding this approach.

The roster system is essentially one of licensure. If neutrals take trainings, have not lost any professional license they happen to have, and apply to the Supreme Court, they get to be listed on a roster that judges have to use when appointing ADR neutrals. Usually professional licensure walks hand in hand with accountability. However, a neutral is removed form the roster under the proposed rules only if she has misbehaved badly enough to have a professional license revoked. **The rules have no mechanism for accountability if a neutral misbehaves in her capacity as a neutral.**
If ADR is so important to the functioning of the court system, then the funds must be found to do it right and create a true accountability mechanism.

If funds cannot be found to create a genuine accountability mechanism, better that this Court do nothing. The counties can continue to develop the ADR that meets their needs. And the Supreme Court does not involve itself in giving away licenses with no mechanism to take them back.

IMMUNITY

The Ad Hoc Committee's proposal bestowed quasi-judicial immunity on all neutrals. The Advisory Committee's proposal appropriately declines to do so, at least via rule-making. Given the near impossibility of a neutral losing one's "license" on the roster, lawsuits for negligence or gross negligence may be the only accountability mechanism remaining. Immunity should not be granted in the Rules of General Practice.

CONCLUSION

The need for detailed ADR rules has not been established. Licensure of ADR neutrals without accountability leaves consumers with little recourse. Immunity for neutrals leaves consumers with no recourse.

Battered women and their children risk a high price for the increased mediation that will result from the proposed rules. Tightening the rules as I've suggested will help limit that risk.

Respectfully Submitted,

Maria K. Pastoor

Maria K. Pastoor

MKP:km

Enclosure

Mediation Can Make Bad Worse

By Dianne Post
Special to The National Law Journal

IN THE PAST few years, there has been a major move in the legal community toward mandatory mediation as a way to reduce the number of cases in court and, allegedly, as a more "humane" way to deal with litigants. What has been absent from these discussions is a recognition that mediation, like any other panacea, is not the right move in every situation. One inappropriate situation is domestic violence.

Many recent studies on mediation and violence show not only that mediation is an inadvisable judicial route for battered women to take, but that it also rarely provides sufficient benefit to encourage anyone in a potentially violent domestic situation to risk choosing this alternative.

Mediation does not produce results for women as favorable as those from either negotiation or litigation. The money saved by choosing mediators as opposed to lawyers is minimal, and the number of divorces or eventual court cases has not been reduced and may, in fact, have risen. Where the violence has been chronic or has occurred after separation (two-thirds of those in one study done in 1985 reported marital violence) the results were worse for women. The Minneapolis Study of 1982 and subsequent studies in Los Angeles and Kansas City, Mo., showed that swift and certain arrest for domestic violence is the best method to reduce recidivism.

Battered women feel coerced by mediators, and more than 40 percent of the men studied resumed their abusive behavior within four-and-a-half months of completing mediation.

Studies found more abuse after mediation efforts than after a formal trial. Furthermore, mediation more often resulted in joint custody, lower child support and lower spousal maintenance. It is not surprising that most of

Continued on page 16

Ms. Post is a sole practitioner in Phoenix, specializing in domestic violence cases.

Domestic Violence Is a Crime

Continued from page 15

the increased satisfaction produced by mediation was experienced by fathers.

Nor did mediation produce better results regarding positive post-decree adjustment for children. Protracted failed mediation is terrible for the children, and fathers were not seen to be more willing to be financially generous or, for example, to contribute more readily to their children's college education. Even if there was more contact with the children as a result of the mediation, this did not automatically translate into a higher level of child support.

It is a given, in the process of mediation, that the mediator cannot take sides. Consequently, the results may depend on the communication skills of the husband and wife. An article by Judy Cornelia Pearson in the 1991 study Gender and Communication, speaks persuasively of the tendency of men to dominate conversations, which means that the woman frequently starts at a disadvantage. This makes it difficult to maintain the legal standard for decisions regarding children, i.e. the best interest the child.

To be successful, mediation must be confidential. This is usually a state requirement, but is also fundamental to the process. But for battered women, that is exactly the opposite of what is needed. Violence against women and children can not be controlled as long as it lurks behind closed doors. It must be brought out into the open so that the perpetrators can be held accountable. Consequently, by decriminalizing the behavior of the batterer, mediation moves in direct opposition to the advocacy for battered women in the last 20 years. The general implication is "no-fault" — that both parties must change. The process deals with the relationship rather than with the crime.

While focusing on the relationship may be beneficial to those who are at odds now but want to maintain the relationship, for a battered woman to maintain the relationship means courting the real possibility of physical injury or even death. Seventy-five percent of all reported domestic violence and most murders take place after the woman has left the relationship.

Impossible Prerequisites

The basis of mediation is trust, respect, understanding and good will. In the case of a battered woman and her partner, none are present. The prerequisites are cooperation and the view that the process will be therapeutic. The mediator must be unbiased, the mediation voluntary and the parties willing to compromise. "Mandatory" mediation thus becomes a contradiction in terms.

Other requirements — equal power, comparable knowledge and equivalent verbal and planning skills are equally unlikely to be present. Since most batterers are extremely controlling, the wife rarely has equal knowledge of the family finances or perhaps even of the world outside the family. She may have equivalent or superior verbal and planning skills but has long since learned not to exercise them in front of the batterer.

A battered woman who maintains the relationship risks the possibility of physical injury or death.

Mediation forces her to focus on the wrong issues. Having been beaten and having escaped, the woman is finally able to express her anger. That is perfectly normal and a necessary healing stage. But for the purposes of mediation, it is not appropriate. Separation is necessary for the woman to heal and learn to avoid manipulation. Mediation does not allow that. Battered women need to learn to speak out for their own needs, having till now subordinated them totally to those of their husband and children. But if they do this in mediation, it risks being perceived as lack of maternal caring.

Mediation is based on a therapeutic theory, not justice. Battered women are not sick. They are sick and tired of injustice.