

CORE ETHICAL CONCEPTS FOR MINNESOTA MEDIATORS

Leslie Sinner McEvoy, Esq.

McEvoy Conflict Management & Legal Education Consulting

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Leslie Sinner McEvoy, Esq.



- Mediator, Arbitrator, Teacher, Trainer and Consultant
- Teaching, Studying, Writing about Rule 114 since 2008
- Website: www.lesliemcevoy.com
- Email:
 - ▣ leslie@lesliemcevoy.com
 - ▣ mcevoyleslie@gmail.com

READ THE RULES!



AGENDA

- Sources of Ethical & Legal Duties for Rule 114 Mediators
- **Scenarios** – Selected Ethical Dilemmas – Chronological approach
 - ▣ Round Table Discussion
 - ▣ Applicable Rules & Concepts
 - ▣ Practice Tips



Sources of Ethical & Legal Standards

- **Rule 114.13 (A) Code of Ethics for Court-Annexed ADR Neutrals (2024)**
- **Rule 114 of the Minnesota General Rules of Practice (2024)**
- AAA/ABA/ACR Model Standards of Conduct for Mediators (2005) [“MSCM”]
- Minnesota Civil Mediation Act
- Minn. Stat. 595.02 Testimony of Witnesses
- Minnesota Rules of Professional Conduct [MRPC]
- Other programs and contexts



Rule 114.01 Applicability: “Court-Annexed” ADR

- **114.01(b) Applicability of Ethics Rules to All Neutrals** “All Neutrals serving in court-annexed ADR Processes under this rule are subject to the authority of the ADR Ethics Board and the Code of Ethics for Court Annexed ADR Neutrals, without regard to whether they are Qualified Neutrals as defined in Rule 114.02.”
- **114.13. (A) Code of Ethics for Court-Annexed ADR Neutrals** – Introduction
 - ▣ “This Code of Ethics governs Neutrals appointed or serving by agreement of the parties in any court-annexed ADR proceedings.”



Rule 114: *Not applicable* in “non-court contexts”

- “Rule 114 governs ADR as a tool of managing pending litigation. The procedures employed may mirror those available to resolve disputes wholly outside the court-based litigation process, but Rule 114 does not govern ADR in those non-court contexts.”
 - ▣ **Rule 114.01 Applicability**, Advisory Committee Comments – 2022 Amendments

Rule 114 - Overview



- *Procedure* – 114.01 to 114.11
- *Neutrals* – 114.12 & 114.13
 - ▣ *Rosters & Training* – 114.12
 - ▣ *Ethics* – 114.13
 - 114.13 (A) Code of Ethics for Court-Annexed ADR Neutrals
 - 114.13 (B) Rules of the Minnesota ADR Ethics Board

Rule 114.13 (A) Code of Ethics for Court-Annexed ADR Neutrals



- Subd. 1. Impartiality**
- Subd. 2. Conflicts of Interest**
- Subd. 3. Competence**
- Subd. 4. Confidentiality**
- Subd. 5. Quality of the Process**
- Subd. 6. Advertising and Solicitation**
- Subd. 7. Fees; Requirement of Written Agreement for ADR Services; Prohibited Actions**
- Subd. 8. Self-Determination in Mediation**

MN ADR Ethics Board Stats

Ethics complaints for each Rule 114 Code of Ethics Rule

(2001 - 2015):

- **Impartiality** ?
- **Conflicts of Interest** ?
- **Competence** ?
- **Confidentiality** ?
- **Quality of Process** ?
- **Advertising** ?
- **Fees** ?
- **Self-Determination** ?
- **TOTAL** ?



□ Source: Minnesota Supreme Court ADR Ethics Board

MN ADR Ethics Board Stats

Ethics complaints for each Rule 114 Code of Ethics Rule

(2001 - 2015):

▪ Impartiality	138
▪ Conflicts of Interest	71
▪ Competence	70
▪ Confidentiality	75
▪ Quality of Process	156
▪ Advertising	19
▪ Fees	69
▪ Self-Determination	36
▪ TOTAL	204



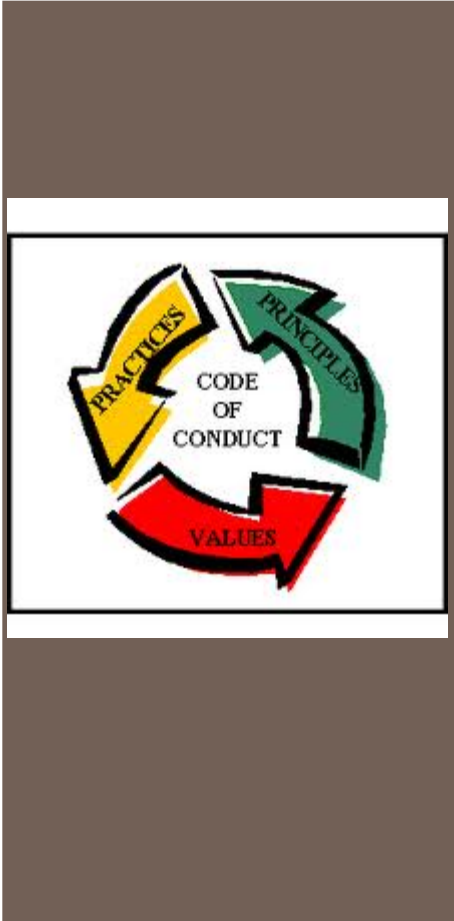
□ Source: Minnesota Supreme Court ADR Ethics Board

Rule 114: Procedural Confidentiality

- Rule 114.07 Use of ADR Evidence in Court
- Rule 114.08 Neutral's Duty of Confidentiality
- Rule 114.10 Communication with Parties and Court in ADR Process



Model Standards of Conduct for Mediators



Standard I. Self Determination

Standard II. Impartiality

Standard III. Conflicts of Interest

Standard IV. Competence

Standard V. Confidentiality

Standard VI. Quality of Process

Standard VII. Advertising and Solicitation

Standard IX. Advancement of Mediation Practice

Minnesota Civil Mediation Act

- Minn. Stat. Sec. 572.33, subd. 4
Mediated settlement agreement.
- Minn. Stat. Sec. 572.35, subd. 1
Effect of Mediated Settlement Agreement.
- Minn. Stat. Sec. 572.36
Setting Aside or Reforming a Mediated Agreement. (“evident partiality”)
- Minn. Stat. Sec. 572.37
Presentation of Mediator to Public.



Minn. Stat. 595.02 Testimony of Witnesses

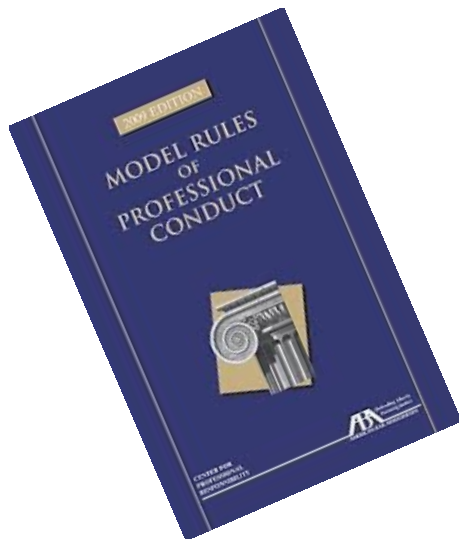


- “Competency” Standard
- Minn. Stat. 595.02, Subd. 1
Competency of Witnesses (m)
[Mediation]
- Minn. Stat. 595.02, Subd. 1(a)
*Alternative dispute resolution
privilege*

Minnesota Rules of Professional Conduct

Rule 1.12 Former Judge, Arbitrator, Mediator, or other Third-Party Neutral

Rule 2.4 Lawyer Serving as Third-Party Neutral



Scenarios - Assumptions

- Minnesota State Court Civil Matter – “court-annexed”
- Rule 114 applies, unless there are specific facts to the contrary
- “Rule” references are to Rule 114 and Rule 114 Code of Ethics, unless otherwise specified
- “MSCM” refers to the Model Standards of Conduct for Mediators
- Minnesota Rules of Professional Conduct [MRPC] may also apply in some cases
- “*Best Answers*”

Advertising & Solicitation



1. Selecting a Rule 114 Mediator

When researching rostered Rule 114 mediators, the attorneys and parties review a number of brochures and websites.

Several of the prospective mediators refer to themselves as “**certified**”.



1. This practice is:

- a. a good, ethical marketing strategy.
- b. “not appropriate” under Rule 114.13 (A) Subd. 6
- c. an ethical violation under Rule 114.13 (A) Subd. 6 unless the mediator is “certified” in another state.
- d. b) and c).

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“Qualified Neutral”



- **Rule 114.13 (A) Subd. 6. Advertising and Solicitation**

- “It is not appropriate to identify oneself as a ‘**certified**’ neutral.”

- ***Correct PHRASE:*** “**qualified neutral** under Rule 114 of the General Rules of Practice.” [NOTE: This is a change from what was in the *original new rule* promulgated in July 2022.]

- ***Tip:*** Conform your business cards, website, stationary, signature block, etc.

Why? Consumer Protection



- Much ado about nothing?
- “Certified” might be misleading
 - ▣ Neutrals who complete “certified” training and are on a roster are NOT “certified” in terms of having achieved a measurable level of competence; rather they have completed the training, possess the required background, and have paid the roster fee.
 - ▣ “Qualified” better encompasses the completion of these requirements
- “Certified” in another state?
 - ▣ Neutrals are permitted to advertise this, as long as it is very clear that this certification is from another state, program or entity - NOT the State of MN

2. Advertising: What about success rates?

- Can a mediator ethically advertise that they have a 95% success rate?
 - a. Yes, if this statement is accurate and truthful
 - b. No, because this statement is a promise of a specific result
 - c. Maybe not, if this statement is perceived as a promise of a specific result



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No Promises of Specific Results

- **Rule 114.13 (A) Subd. 6. Advertising and Solicitation** **Neutrals** “shall refrain from promising specific results” - settlement as the outcome of the mediation. Also, Model Standards VII.A.1 and 3. (former rule to same effect)
- **Rule 114.13 (A) Subd. 8. Self-Determination in Mediation** - It also may put **pressure on the parties to settle**, undermining the first principle of mediation. See also Model Standard I.
- **Practice Tip**: *Refrain from advertising settlement rates.*


Results

Conflicts of Interest & Disclosure



3. Mediators' Affiliations

In a personal injury case, one of the mediators the parties are inclined to hire is a lawyer who – unbeknownst to the parties - has done a lot of work for an insurance company involved in the matter.



3. If the mediator is unaware of the parties' insurers, the mediator:

- a. has no duty to inquire about what the parties have not disclosed.
- b. has a duty to ask the parties if they are aware of any conflicts of interest involving the mediator.
- c. under the circumstances, should make a reasonable effort to determine what insurance companies may be affiliated with the parties.

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- b. has a duty to ask the parties if they are aware of any conflicts of interest involving the mediator.
- c. under the circumstances, should make a reasonable effort to determine what insurance companies may be affiliated with the parties.

WHAT to Disclose



Conflicts of Interest Reasonably Creating an Appearance of Bias

“A conflict of interest is a direct or indirect financial or personal *interest in the outcome* of the proceeding **or** any existing or past financial, business, professional, family or social *relationship* which is likely to affect impartiality or which might *reasonably create* an *appearance of partiality or bias*.” (emphasis supplied) (**Rule 114.13 (A) Subd. 2 Conflicts of Interest**). *See also* MSCM STD III. A. Conflicts of Interest



Conflicts “Reasonably Known”



- Disclose actual and potential conflicts of interest “reasonably known” to the neutral. **Rule 114.13 (A) Subd. 2 Conflicts of Interest**
- Make a “reasonable inquiry” to determine if such conflicts exist. MSCM STD. III. B.

Reasonable Inquiry?

- What constitutes a “reasonable inquiry”?
 - ▣ Inquiring of parties
 - Subject matter
 - All parties
 - All counsel
 - All known witnesses
 - ▣ Previous contacts by parties and counsel with neutral and neutral’s firm
 - ▣ Internal conflicts check where applicable
 - ▣ Other? **DEPENDS**



In Sum – WHAT to Disclose



- Disclose **ALL** Conflicts of Interest – all facts that might “reasonably create” an appearance of partiality or bias – that are “reasonably known” after “reasonable inquiry”

PRACTICE TIP FOR NEUTRALS

Disclosures

When in doubt, make a disclosure, even if the interest or relationship seems remote, as in, “You should know that my oldest daughter babysits for the next door neighbor of plaintiff’s lawyer’s brother and sister-in-law.”

When to Disclose



When: Mediators/Other Neutrals: Before Serving

- Rule 114 (A) Subd. 2. (a) “When” is not directly addressed for mediators and other non-arbitrators. However, neutrals “may serve, with consent of the parties “[a]fter disclosure”, evidencing the intent that conflicts “reasonably known” should be disclosed **before serving.**
- MSCM STD III.C. A mediator shall disclose, **as soon as practicable,**
...



4. Mid-Stream Conflict

- What if the mediation has already begun before the mediator realizes that one of the parties is insured by one of the mediator's clients?



4. The mediator:

- a. Should disclose potential conflict of interest, but can continue to serve if the parties desire
- b. Should disclose potential conflict of interest and decline to continue to serve
- c. Has discretion about what to do depending on how far along the mediation has progressed
- d. Should not disclose potential conflict of interest because it would negatively affect the quality of the process

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When: Continuing Obligation

- Mediators - before serving or continuing to serve
 - **Rule 114 (A) Subd. 2. (a)**
 - *See MSCM STD III. D, requiring disclosure of conflicts arising after accepting appointment, “**as quickly as practicable.**”*

CONTINUE ►

How to Disclose



HOW?

How: Details in Writing – Best Practice

Rule 114.13 (A) Subd. 2. (b)

- “Neutrals acting as arbitrators shall disclose to the parties in writing....”
 - ▣ **Other neutrals: writing not required, but best practice**
 - ▣ **TIP: DETAILS**
 - General nature of the conflict(s)
 - Frequency
 - Timing
 - Significance of relationships or circumstances
 - Assertion that facts disclosed will not affect impartiality – if believe can proceed
 - “Reasonable Inquiry”
 - Parties informed consent to proceed where obtained
- **CAVEAT: Do Not Disclose Confidential Information** from another proceeding or attorney-client relationship.

DETAILS

How: Format

- **Disclosure of Potential Conflict**
 - ▣ Retention Agreement
 - ▣ Administrator's Form
 - ▣ Agreement to Mediate
 - ▣ Letter to All

- **Acknowledgement & Consent to Proceed**
 - ▣ May be incorporated in above documents
 - ▣ May be in a separate writing



After Disclosure



After Disclosure: Serve or Decline/Withdraw?

- To serve or not to serve?
 - ▣ Rule 114.13 (A) Subd. 2.(a); “*may serve*, with the consent of the parties.”
 - ▣ MSCM STD III. D. “if all parties agree, the mediator may proceed...”



After Disclosure: *Integrity of the Process*

CAVEAT

- If all parties choose to retain, the neutral may proceed, **unless the mediator believes** that the conflict of interest would inhibit the mediator's impartiality. **Rule 114.13 (A) Subd. 2. (a)**



After Disclosure: “Exercise Caution”

- “Even with the consent of the parties, the Neutral must exercise caution in circumstances that would raise legitimate questions about the integrity of the ADR process. If a conflict of interest impairs a Neutral’s impartiality, *the Neutral shall withdraw regardless of the consent of the parties.*” Rule 114.13 (A) Subd. 2. (a)

Withdraw

In Sum: Conflicts Disclosure Process

- Make a “**Reasonable Inquiry**” to Discover Conflicts
- Disclose Conflicts
- Consider Impact of Conflicts
 - ▣ Continue
 - If all parties agree **AND**
 - If neutral assesses that Conflict will not interfere with ethical duties
 - ▣ Withdraw
 - If any party so desires **OR**
 - If neutral assesses that Conflict MAY interfere with ethical duties
- Continuing obligation to disclose and assess impact of potential conflicts



Mediator Experience



5. Mediator Experience

One of the prospective mediators in a matter has no experience in the substantive area of law at issue.



3. The mediator should:

- a. decline assignment because mediator has no substantive experience in the area.
- b. disclose lack of substantive experience and serve if parties desire.
- c. disclose lack of substantive experience, analyze whether he/she has the qualifications and ability to fulfill the role, and if so, serve if parties desire.

3. The mediator should:

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New Competency Standard : “Qualifications and Ability to Fulfill the Role”

- **Subject matter expertise is not required.**
- **STANDARD: Rule 114.13 (A) Subd. 3**
Competence requires that the neutral may only serve when “they possess the **qualifications and ability to fulfill the role** that the Neutral has been requested or assigned to serve...”
- **Rule 114.13 (A) Subd. 3 Competence** – neutral “**must decline appointment, request assistance, or withdraw** when a dispute is beyond the neutral’s competence.”



Practice Tip: Disclose, Consider, Consent

- ❑ Disclose relevant training, education, and experience
- ❑ Analyze whether he/she has the “qualifications and ability” to fulfill requested role).
- ❑ Serve if the parties still want to hire after disclosure and assessment
- ❑ Get assent/waiver in writing



Retaining the Mediator



6. Mediator Fees

The parties in a “court-annexed” matter are considering retaining a mediator who orally offers the following fee structure: nothing unless an agreement is reached, \$400 per hour if an agreement is reached. In this conversation the mediator also explains their background and all agree to go forward.



6. Is this ethical?

- a. No, Rule 114 prohibits contingency fees.
- b. No, Rule 114 requires fee agreements to be in writing.
- c. Yes, Rule 114 permits this type of agreement to mediate.
- d. Yes, Rule 114 permits this, if the parties understand the fees and background of the neutral.
- e. It's unclear; Rule 114 does not explicitly address fee agreements.
- f. a. and b.

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No Contingency Fees or Referral Fees

- **No Contingency Fees - Rule 114.13 (A) Subd. 7. (a) Fees.** - **prohibits fees contingent** upon the outcome of the mediation. *See also* MSCM VIII. B. 1.
- **NOTE: No Referral Fees** - Can't offer reduced mediation fee in exchange for referrals either. **Rule 114.13 (A) Subd. 7. (a)** prohibits a neutral from giving or receiving “any commission, rebate, or similar remuneration” for referrals. Model Standards of Conduct is silent on this issue.



Fees Fully Explained *in Advance & in Writing*

- **Rule 114.13 (A) Subd. 7. (a) Fees** provides that “[a] neutral shall fully disclose and explain the basis of compensation, fees and charges to the parties. The parties shall be provided with **sufficient information about fees at the outset** to determine if they wish to retain the services of the neutral.”
- **Rule 114.13 (A) Subd. 7. (a) Fees** requires that “[t]he fee agreement shall be included in the *written agreement* and shall be included in the written agreement and shall be consistent with a court order appointing the neutral.”



Neutral's Burden to Correct Errant Court Order [NEW]

- Signed written agreement must be consistent with court order appointing neutral

BUT ...

- If the court requires the Neutral to do something that would violate Rule 114 or other applicable court rules or statutes ...
 - ▣ Then the ***Neutral must decline or defer appointment*** until amendment of the order is obtained
 - ***Burden is on the neutral*** to educate court about neutral's duties under the rules
- **Rule 114.13 (A) Subd. 7(b)**



114.13 (A) Subd. 7(a) Fees: **Neutral Duties**

- “The fee agreement shall be included in the written agreement...”
- “A Neutral shall establish a protocol for regularly advising parties on the status of their account and requesting payment of fees.”
- Neutral may withdraw, proceed or postpone if one party does not pay the fee and no other party covers the fee.
- “...the Neutral shall not refuse participation by any party based on payment status.”
- Neutral shall return any unearned fees.
- **NEW**



Agreements for ADR Services/Fees Must Be *in Writing*

Rule 114.13 (A)

Subd. 7. (b):

Written agreements for ADR services are required in “court-annexed” matters – including:

(1) A description of the role of the Neutral.

(2) If the Neutral’s role includes decision making, whether the Neutral’s decision is binding or non-binding.

(3) An explanation of confidentiality and admissibility of evidence.

(4) If the Neutral is to be paid, the amount of compensation, how the compensation will be paid, and include a notice that the Neutral could seek remedies from the court for non-payment pursuant to Rule 114.11(b) of the General Rules of Practice for the District Courts.

(5) If adjudicative, the rules of the process.

(6) That the Neutral must follow the Code of Ethics for Court-Annexed ADR Neutrals and is subject to the jurisdiction of the ADR Ethics Board.

(7) Neutrals for facilitative and evaluative processes shall include the following language in the agreement signed at the commencement of the process:

(A) the Neutral has no duty to protect the interests of the parties or provide them with information about their legal rights;

(B) no agreement reached in this process is binding unless it is put in writing, states that it is binding, and is signed by the parties (and their legal counsel, if they are represented) or put on the record and acknowledged under oath by the parties;

(C) signing a settlement agreement may adversely affect the parties’ legal rights;

(D) the parties should consult an attorney before signing a settlement agreement if they are uncertain of their rights; and

(E) in a family court matter, the agreement is subject to the approval of the court.

Mediator Tip: Conform Your Agreements

- Remember: Requirements only apply in Minnesota State Court matters
- Consider what provisions might work in both court-annexed and other matters
- Many of the requirements reflect your Rule 114 ethical obligations
- Rule 114.13 A. Subd. 7(b)(7) (A) through (D) incorporates what is already considered “best practice” to include in Agreements to Mediate to ensure enforceability. See Minnesota Civil Mediation Act



Written Statement of Qualifications *in Advance*

Rule 114.13 (A) Subd. 3. Competence “No individual may act as a Neutral for compensation without providing the individuals to the conflict with a written statement of qualifications prior to beginning services.”



Qualifications

MN Civil Mediation Act: **Statement of Qualifications**

- “No individual may act as a mediator pursuant to the Minnesota Civil Mediation Act for compensation without providing the individuals to the conflict with a written statement of qualifications prior to beginning mediation. The statement shall describe the educational background and relevant training and experience in the field.”
- Minn. Stat. 572.37 Presentation of Mediator to Public.



Qualifications

Practice Tip: Not “Court-Annexed”?

- Fees – no requirements from Rule 114
- Written Agreements – no requirements from Rule 114
- Statement of Qualifications – no requirements from Rule 114

- **CONSIDER**
 - ▣ MN Civil Mediation Act requirements – “written agreement” to mediate; “written statement of qualifications”
 - ▣ Model Standards of Conduct for Mediators – “fee arrangement should be in writing” e.g., MSCM STD VIII. A. 2.
 - ▣ Best Practices
 - ▣ Consistency across your own ADR practice
 - ▣ Possibility that the matter may become court-annexed in the near future

Unrepresented Parties



7. Mediator's Introduction

At the beginning of a court-annexed mediation, the mediator introduces herself to the parties - one of whom is unrepresented - by saying that she is a lawyer with over 20 years of practice in housing law, handling many matters both large and small and, accordingly, has a lot of experience pertinent to the dispute.



7. Does this introduction raise any ethical issues?

- a. No, it is all true and assures the parties of her competence.
- b. No, it provides parties with information about her relevant experience in the field, as required by Rule 114 and Minn. Stat. 572.37.
- c. Yes, it sounds too much like promising results.
- d. Maybe, if the unrepresented party does not understand the mediator's role.

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Unrepresented Parties & Lawyer-Mediator: Inform & Explain



- If the parties are unrepresented, **MRPC 2.4** requires a **lawyer-neutral** to inform unrepresented parties that the neutral is not representing them.
- If there is reason to believe an unrepresented party does not understand the difference, **MRPC 2.4** requires the mediator to explain the difference between a lawyer's role in representing a client and the lawyer-neutral's role as a neutral in the ADR process.
- **Practice tip**: Include a **statement of role** in Agreement for ADR services.
- **Rule 114 (A) Subd. 7(b)(1)**: Description of role *required*.

The Neutral's Role



PRACTICE TIP FOR LAWYER-NEUTRALS (CONT'D)

Sample clause for agreement to mediate:

The Mediator's Role. The mediator sometimes works as an attorney in the private practice of law and sometimes as a mediator. In this matter the mediator is a neutral third party, whose role is to facilitate communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute. The mediator does not represent any party in this mediation. The parties understand that the mediator will not provide legal advice and does not act as an advocate or counsel for any party. There is no attorney-client relationship between the mediator and any party. If you have questions about the difference between the mediator's role and the role of the lawyer-advocate, please ask the mediator for clarification.

See Chalmers, *supra* at 28.

Other processes: Lawyer-neutrals in other processes should also consider including a clause clarifying the neutral's role in writing, whether in a letter, agreement, or other disclosure document.

Unrepresented Parties: *Proceed with Caution*

- Working with pro se parties involves special ethical and practical challenges
- Requires careful disclosures and careful balancing of sometimes conflicting ethical obligations
- Most difficult dilemmas for the *neutral* involve balancing:
 - ▣ **Impartiality** – avoiding the appearance of partiality
 - ▣ **Quality of the process** – uphold fairness and integrity of process

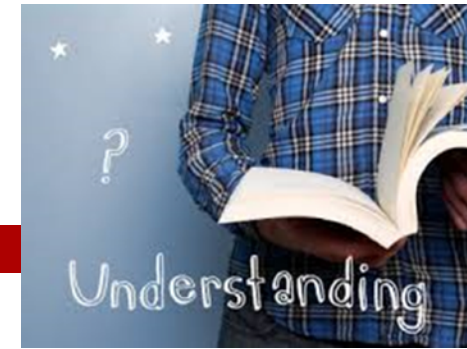


Impact on Impartiality



- **Rule 114.13. A. Subd. 1. Impartiality** . “....Impartiality means freedom from favoritism or bias either by word or action, and a **commitment to serve all parties** as opposed to a single party. If at any time the neutral is unable to conduct the process in an impartial manner, the neutral shall withdraw.”

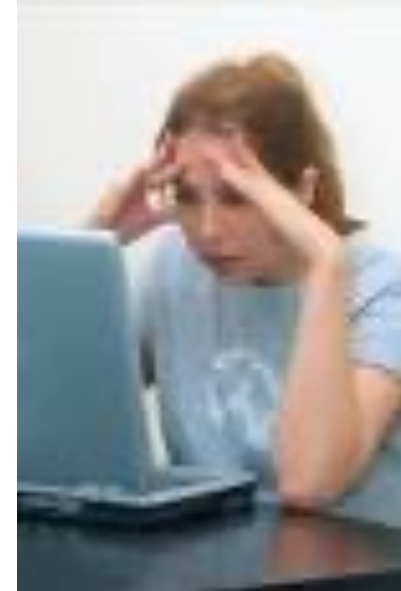
Quality of the Process



- **Rule 114.13 (A) Subd. 5. Quality of the Process.** “A neutral shall withdraw from an ADR process or postpone a session.....if a party is unable to participate due to drug or alcohol abuse, or other physical or mental incapacity.”

8. Party Competence

- Suppose this is a housing court mediation and as the mediation progresses, the unrepresented party seems distracted and seems to be having trouble following the discussion, asking the mediator frequently, “What should I do?”



8. Can the Mediator continue?

- a. Yes, mediator can continue, answering the party's questions
- b. Yes, mediator can continue, but remind all parties of his/her role
- c. No, mediator should pause, inquire, and assess the party's capacity to participate
- d. No, the mediator should withdraw

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Party Competency Issues

- ▣ Prohibited Actions
- ▣ Quality of the Process
- ▣ Self-Determination
- ▣ Impartiality
- ▣ Lawyer Serving as Third-Party Neutral



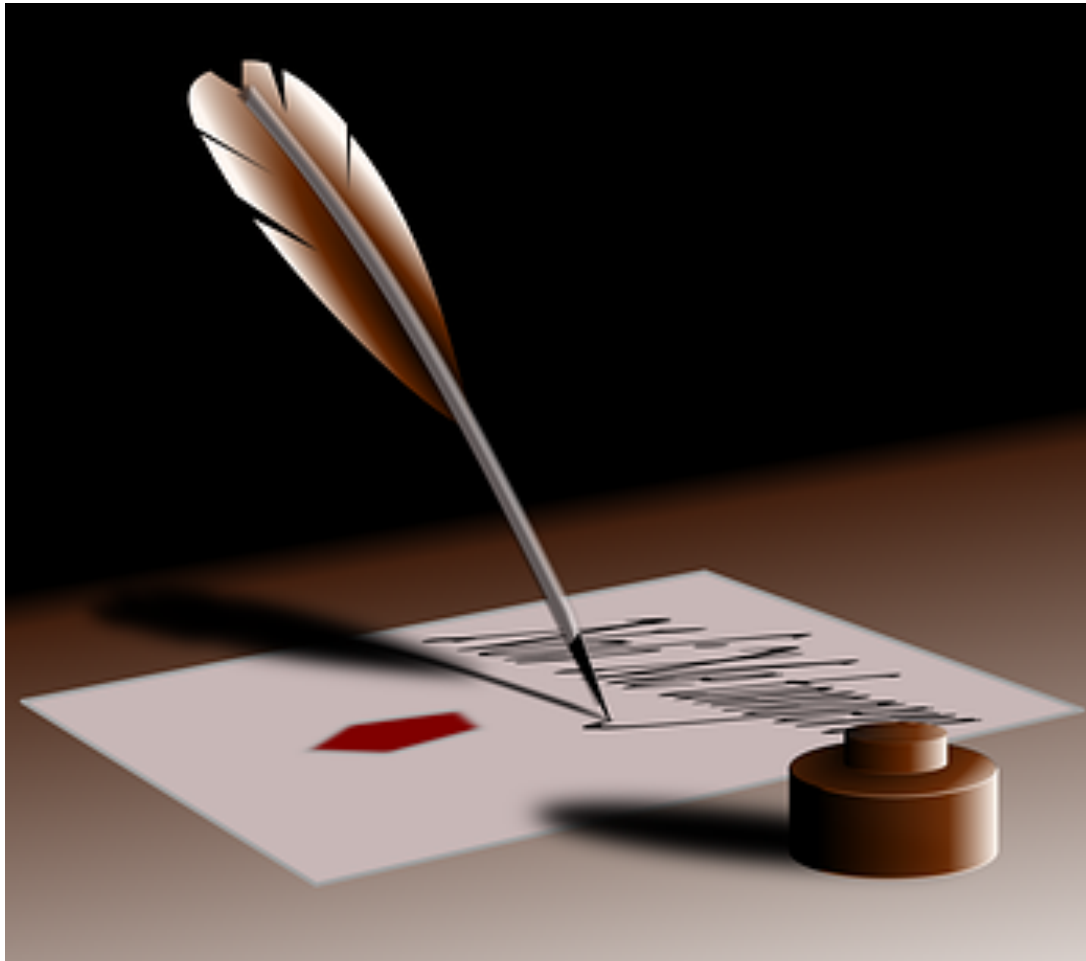
Rule 114.13 (A) Subd. 7(c) “Prohibited Actions”

□ Facilitative & Evaluative Neutrals

- Drafting
- Therapy
- Legal Representation
- Legal Advice



Rule 114.13 (A) Subd. 7(c)(1): **Drafting**



- “A Neutral in a facilitative or evaluative process *shall not:*
 - ▣ (1) Draft legal documents that are intended to be submitted to the court as an order to be signed by a judge or judicial officer...” (emphasis supplied)

Rule 114.13 (A) Subd. 7(c)(2): **Therapy**

- “A Neutral in a facilitative or evaluative process **shall not:**
 - ▣ (2) ...provide therapy to either party ... during an ADR process ... (emphasis supplied)

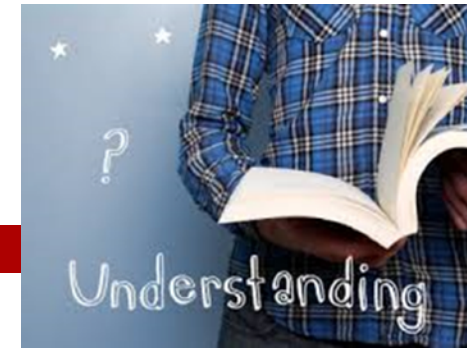


Rule 114.13 (A) Subd. 7(c)(2): **Legal Advice**



- “A Neutral in a facilitative or evaluative process *shall not*:
 - ▣ (2) ...provide legal representation or advice to any party or engage in the unauthorized practice of law in any matter during an ADR process... (emphasis supplied)

Quality of the Process



- **Rule 114.13 (A) Subd. 5** “A Neutral shall withdraw from an ADR process or postpone a session.....if a party is unable to participate due to drug or alcohol abuse, or other physical or mental incapacity.”
- **Model Standard VI.A.10**. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party’s capacity to comprehend, participate and exercise self-determination.

Impact on Impartiality

- **Rule 114.13 (A) Subd. 1. Impartiality**
 - “...If at any time the Neutral is unable to conduct the process in an impartial manner, the Neutral shall withdraw.”
 - “...Impartiality means freedom from favoritism or bias either by word or action, and **a commitment to serve all parties** as opposed to a single party.”



Assessing & Addressing Competency

- Assessing Competency:
 - ▣ Does the participant understand the process?
 - ▣ Do they have enough info to make informed decisions?
 - ▣ Are they capable of negotiating in own best interests?
 - ▣ Are they acting of their own free will?
 - ▣ Are they capable of understanding the known potential consequences of their decisions?

Assessing & Addressing Competency

- Addressing Competency
 - ▣ Remind the all parties of the neutral's role
 - ▣ Make party aware of importance of consulting other professionals to help make informed decisions
 - ▣ Inquire about problems and potential accommodations, such as a support person
 - ▣ Suggest a recess to think and consider options
 - ▣ Check-in periodically
 - ▣ Allow time for attorney review of settlement agreement
 - ▣ Postpone to allow party to obtain assistance
 - ▣ Withdraw

Intervene and Assist with Caution

“The critical inquiry is how to intervene on behalf of an unrepresented party to support self-determination and a quality process, without undermining the neutral’s impartiality – or appearance of impartiality - and the integrity and fairness of the process for *all* parties.”

MN ADR Handbook, p. 284-5



Final Word: Serve All Parties

Lawyer-neutrals should:

- disclose and clarify your neutral role – clearly, completely, early, and often;
- put the disclosures in writing;
- focus on commitment to serve all parties, rather than a single party;
- advise unrepresented parties to obtain counsel or consult other professionals – do not give legal advice; and
- withdraw or postpone if the breakdown in the process is sufficient to undermine the integrity of the process or the result.

HERETOSERVE

Impartiality



9. Mediator Antipathy

In the course of a mediation, you as the mediator conclude inwardly that one of the parties is an insufferable, arrogant, irresponsible cad.



9. You should:

- a. continue to serve, but self-monitor to assure you do not demonstrate partiality/antipathy.
- b. continue to serve, UNLESS you conclude the antipathy affects your ability to remain impartial, then withdraw.
- c. tell the parties you can no longer serve and withdraw.

9. You should:

- a. continue to serve, but self-monitor to assure you do not demonstrate partiality/antipathy.
- b. continue to serve, UNLESS you conclude the antipathy affects your ability to remain impartial, then withdraw.
- c. tell the parties you can no longer serve and withdraw.

The Balance of Impartiality



- **Rule 114.13 (A) Subd. 1. Impartiality** requires a neutral to conduct an impartial process and to **withdraw** if cannot remain impartial.
- **Minn. Stat. 572.36 Setting Aside or Reforming a Mediated Settlement Agreement** – court shall set aside mediated settlement agreement for “evident partiality” of the mediator.
- **Model Standard II.B.1 and II.C - Impartiality** states that a mediator should not act with partiality based on any participants “personal characteristics” and to withdraw in such circumstances.

Self-Determination



10. Break please?

The mediation begins at 10:00 a.m. At 1:00 p.m., the parties say they would like to take a lunch break. The mediator says “No, you are making good progress, and I am only available until 4:00 this afternoon, so let’s keep going and see if we can settle this.”



10. This conduct is:

- a. Ethical because the mediator is trying to “expedite the process” as required for a quality process.
- b. Unethical because the mediator did not honor the parties’ request, violating self-determination.
- c. Unethical because the mediator’s action is “prohibited” under Rule 114.13 (A)
- d. b. and c.

10. This conduct is:

- a. Ethical because the mediator is trying to “expedite the process” as required for a quality process.
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- c. Unethical because the mediator’s action is “prohibited” under Rule 114.13 (A)
- d. b. and c.

Mediators/Evaluators: Requiring Parties to Stay is a “Prohibited Action”



- **Rule 114.13 (A) Subd. 5 Quality of Process**, “A neutral shall ensure that the reasonable expectations of the parties concerning the timing of the process are satisfied ... and shall exert every reasonable effort to expedite the process.”
- **Rule 114.13 (A) Subd. 7(c)(3) Prohibited Actions** – “A Neutral in a *facilitative or evaluative* process *shall not*: ... (3) **Require a party to stay** in the ADR process or attempt to coerce an agreement between the parties.” (emphasis supplied)
- **Rule 114.13 (A) Subd. 8 Self-Determination in Mediation**, “A mediator shall act in a manner that recognizes that mediation is based on the principle of self-determination by the parties.”
- MSCM I - Self Determination requires that parties make “free and informed choices as to process and outcome.”

Communication



11. Caucus Confidentiality

At one point in the mediation, the mediator is caucusing with Defendant who says, “You know, if I get stuck paying more than \$40,000 in this case, I’m going to declare bankruptcy. Don’t tell Plaintiff, though.”



11. What should the mediator do?

- a. Must keep the secret unless authorized by party to reveal.
- b. Reveal this information if it will help facilitate settlement.
- c. Wait to see if Defendant ends up getting stuck with paying more than \$40,000 and only then reveal the confidential information.
- d. None of the above.

11. What should the mediator do?

- a. Must keep the secret unless authorized by party to reveal.
- b. Reveal this information if it will help facilitate settlement.
- c. Wait to see if Defendant ends up getting stuck with paying more than \$40,000 and only then reveal the confidential information.
- d. None of the above.

Caucus Confidentiality



- **Rule 114.10(b) Communication with Parties and Court in ADR Processes**
 - ▣ In evaluative, facilitative and hybrid processes, [p]arties and their counsel may communicate **ex parte** with the Neutral ... with the consent of the Neutral, so long as the communication *encourages or facilitates settlement.*”
- Some Mediators → All is “public” unless identify specific confidential information
- MSCM STD V.B. → All is confidential unless permission to share

Discuss Expectations for Caucus Confidentiality at the Outset

- **Rule 114.13 (A) Subd. 4. Confidentiality** requires the neutral to “maintain confidentiality as required by Rules 114.08, 114.10, and 114.11... and any additional agreements made with or between the parties.”
- **Rule 114.13 (A) Subd. 4. Confidentiality** “The Neutral shall discuss issues of confidentiality with the parties **before beginning an ADR process** including limitations on the scope of confidentiality and the extent of confidentiality provided in any private sessions....”



Practice Tips: Caucus Confidentiality

- **Practice Tip:** Mediator and parties should come to a clear understanding, before the first caucus, of the precise extent of confidentiality of communications during caucuses.
- **Practice Tip:** **Verify** at the close of every caucus what may be disclosed.



Withdraw?

- **Rule 114.13 (A) Subd. 5. Quality of the Process** – would require the mediator to withdraw “if the process is being used to further illegal conduct”
- **Rule 114.13 (A) Subd. 1. Impartiality**– “Neutral shall withdraw...” if “unable to conduct the process in an impartial manner”.



WHEN TO
WITHDRAW?

- **Practice Tip:** The mediator may explore with Defendant the implications of telling or not telling

12. Communication with the Court

Plaintiff has filed and served a motion to compel discovery against Defendant. Defendant files an affidavit stating he responded to the discovery during mediation. The judge phones the mediator and asks for the mediator's input regarding what information was exchanged during the mediation.



12. How should the mediator respond?

- a. Verify or contradict the information in Defendant's affidavit, depending on what the mediator remembers
- b. Refuse to answer and advise the court that Rule 114 prohibits the mediator from communicating with the court about what happened at the mediation, absent consent of the parties or a court order
- c. Refuse to verify or contradict the information, but tell the Court that a ruling on the motion would facilitate the mediation process
- d. Refuse to speak with the court

12. How should the mediator respond?

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- b. Refuse to answer and advise the court that Rule 114 prohibits the mediator from communicating with the court about what happened at the mediation, absent consent of the parties or a court order
- c. Refuse to verify or contradict the information, but tell the Court that a ruling on the motion would facilitate the mediation process
- d. Refuse to speak with the court

Rule 114.10 Communications with Parties and Court

- **Rule 114.10(c)** Communications to Court *during* an ADR Process: Neutral *may* inform the court:
 - Whether case has undergone ADR and whether settled
 - Failure to attend or pay court ordered fees
 - Request by parties for additional time
 - With parties' written consent, procedural action by court that would facilitate
 - Neutral's assessment that case is inappropriate for that ADR process
 - Information obtained during ADR process, with parties' consent or court order
- **Rule 114.10(d)** Communications to Court *after* an ADR Process: Neutral *may* inform the court:
 - Whether case has settled and copy of agreement
 - Case has not settled and with written consent, court actions that would facilitate
 - Failure to pay some or all of the fees
 - Notice of parenting time adjustments



13. Suit to Enforce Settlement Agreement

Through mediation, the parties agreed to settle an employment matter and signed a memo of understanding. The settlement falls apart in the drafting and one party sues to **enforce** the settlement terms agreed to at the mediation. That party calls the mediator to testify as to his/her recollections as to what was **discussed** at mediation about the settlement terms.



13. Pursuant to MN ADR statutes and rules, can mediator testify about his/her recollection?

- a. Yes, if both parties consent.
- b. Yes, this is permitted testimony, regardless of consent.
- c. No, mediator is not “competent” to testify.
- d. No, unless there is no other way to get this information.

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- b. Yes, this is permitted testimony, regardless of consent.
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- d. No, unless there is no other way to get this information.

Mediators: “**Not Competent**” to Testify

Minn. Stat. 595.02, Subd. 1a. ADR Privilege

Mediators shall not “be competent to testify, in any subsequent civil proceeding as to any statement ... occurring at or in conjunction with the prior” mediation...,
“except as to any statement or conduct that could:

- (1) constitute a crime;
- (2) give rise to disqualification proceedings under the Rules of Professional Conduct for attorneys; or
- (3) constitute professional misconduct.”



Mediation Statements Inadmissible

- **Rule 114.07** Use of ADR Evidence in Court
 - “(b) Inadmissibility. Subject to Minnesota Statutes, section 595.02, ... no statements made ...in non-binding ADR processes that are not otherwise discoverable shall be subject to discovery or other disclosure. Such evidence is **inadmissible for any purpose** at a later trial, including for impeachment.” (emphasis supplied)



Conflicts of Interest: Subsequent Representation



14. New Business?

Plaintiff was so impressed with the mediator's substantive knowledge that, three months after the mediation, Plaintiff asked the mediator if the mediator would represent her in another lawsuit.



14. The mediator:

- a. may take the new case; it raises no ethical issues.
- b. may take the case with the oral consent of the parties and if 3 months is a “reasonable time”.
- c. may take the case IF the new lawsuit does not involve a substantially factually-related matter.
- d. may NOT take the case.

14. The mediator:

- a. may take the new case; it raises no ethical issues.
- b. may take the case with the oral consent of the parties and if 3 months is a “reasonable time”.
- c. may take the case IF the new lawsuit does not involve a substantially factually-related matter.
- d. may NOT take the case.

Conflicts of Interest: Subsequent Representation

- Minnesota Rules of Professional Conduct 1.12 Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral
- Rule 114.13 (A) Subd. 2 Conflicts of Interest
- MSCM STD III. F.



Theme: *Integrity of the Process*

- Impartiality
- Actual or Perceived Conflict of Interest
- Related Matter/Unrelated Matter
- Consent
- Time Elapsed
- Integrity of the Process



“Participated Personally and Substantially”



- **Minn. R. Prof. Conduct 1.12(a)**
– Former Neutral, prohibits lawyer-neutrals from later representing anyone in connection with a matter in which the lawyer “**participated personally and substantially**” as a neutral, unless all parties “give informed consent, confirmed **in writing**”.

“Substantially Factually Related Matter”

- **Rule 114.13 (A) Subd. 2. (a) Conflicts of Interest.**
 - “Without the consent of all parties, and for a reasonable time under the particular circumstances, a Neutral who also practices in another profession shall not establish a professional relationship in that other profession with one of the parties, or any person or entity, in a *substantially factually related matter*.”



MSCM STD III. F. Conflicts of Interest

- “Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants *in any matter* that would raise questions about the integrity of the mediation. ... the mediator should consider factors such as time elapsed..., the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.”



In Sum: The “Smell Test”

- **Related Matter**
 - “Participated personally and substantially” - MRPC 1.12
 - “Substantially factually related matter” - Rule 114
- **Reasonable Time** - Rule 114
- **Consent** – MRPC 1.12 & Rule 114

- **Related or Unrelated Matter**
 - Integrity of the Process
 - Appearance of Impartiality
 - ***“Smell Test”***



READ THE RULES!



I thank
you!



Resources



- **Rule 114 of the Minnesota General Rules of Practice for District Courts**
 - https://www.revisor.mn.gov/court_rules/gp/id/114/
- **ORDER PROMULGATING AMENDMENTS TO THE GENERAL RULES OF PRACTICE FOR THE DISTRICT COURTS - July 13, 2022, ADM09-8009**
 - <https://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/RecentRulesOrders/ORADM098009-071322.pdf>
- **ADR-Rule 114 Neutral Roster Individual Application Form**
 - https://www.mncourts.gov/mncourtsgov/media/scao_library/ADR/Individual_Application.pdf
- **Model Standards of Conduct for Mediators (ABA/AAA/ACR)(2005)**
 - https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf

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- Significant further additions, deletions, revisions and updates were made by me for subsequent presentations and for this presentation today about Core Ethics for Minnesota Mediators.
- Questions? Feel free to contact me at leslie@lesliemcevoy.com

Leslie Sinner McEvoy, Esq.



- Mediator, Arbitrator, Teacher, Trainer and Consultant
- Teaching, Studying, Writing about Rule 114 since 2008
- Website: www.lesliemcevoy.com
- Email:
 - ▣ leslie@lesliemcevoy.com
 - ▣ mcevoyleslie@gmail.com