

# **MN Rules of Practice for the District Courts Rule 114 Ethics Code**

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# Rule 114 Focus

- ▶ Rule 114 & Rule 114 Ethics Code
- ▶ Purpose of Ethics Code
  - Framework for ADR professionals' conduct
  - Inform and protect consumers
  - Ensure the integrity of ADR processes
- ▶ “Before” and “After” 2023 Revisions



# Links to New and Old Rules 114

- ▶ Current Rule 114
  - [Office of the Revisor of Statutes \(Rule 114\)](#)
- ▶ Rule 114 Effective 1/1/2023
  - [Order Promulgating Amendments to the General Rules of Practice for the District Courts \(Rule 114\)](#)

# MN ADR Ethics / Guidelines

- ▶ General
  - MN General Rules of Practice for the District Courts – Rule 114 and Rule 114 Code of Ethics
- ▶ Professional Organizations
  - Quasi-regulatory policies can be used to establish a legal standard of care
  - Model Standards of Practice for Mediation (AFCC, ACR and Mediate.com & ABA, AAA) ([See American Bar Association Section of Dispute Resolution Policy and Standards](#))

# MN ADR Ethics / Guidelines

- ▶ Specific Forms of Neutrals
  - Community Dispute Resolution Program – Minn. Stat. §494
  - Parenting Time Dispute Resolution – Minn. Stat. §518.1751
- ▶ Confidentiality/Exceptions/Testimony
  - Testimony of Witnesses – Minn. Stat. §595.02 Subd.1a. Alternative dispute resolution privilege
  - Reporting of Maltreatment of Minors – Minn. Stat. §626.556
  - Reporting of Maltreatment of Vulnerable Adults – Minn. Stat. §626.557

# MN ADR Ethics / Guidelines

## ▶ Civil Immunity

- Alternative Dispute Resolution Immunity – Minn. Stat. §604A.32

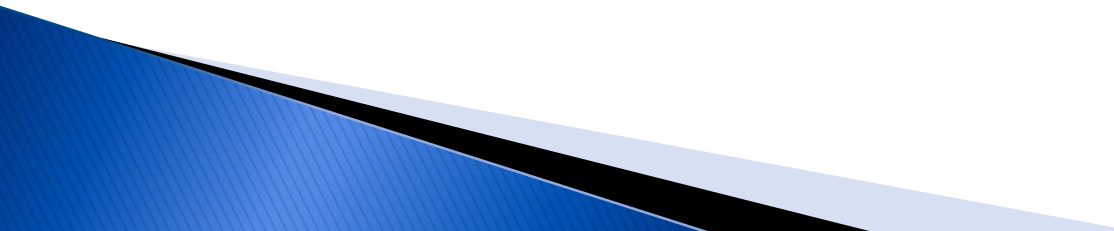
## ▶ Other

- MN Civil Mediation Act Presentation of Mediator to the Public – Minn. Stat. §572
- MN Rule of Professional Responsibility (lawyers) Rule 1.12 conflicts of interest
- MN Rule of Professional Responsibility (lawyers) Rule 2.4 lawyer serving as neutral with unrepresented parties
- ABA Section of Dispute Resolution guidance on the unauthorized practice of law

# MN ADR System 1978 – 2022



# Reasons for Proposed Revisions to Rule 114

- ▶ Reflect changes in ADR practice
  - ▶ Clarify neutrals' roles
  - ▶ Provide more robust agreements for ADR services
  - ▶ Clarify neutral may not follow court orders that violate Rule 114
  - ▶ Make Rule 114 applicable to any neutral practicing in civil or family court case not otherwise excluded
- 



# 2023 ADR System



# 2023 – Who do the rules cover?

- ▶ Rule 114 Code of Ethics applies to any neutral who is on any Rule 114 roster (or working for a community dispute resolution program which is on the roster).
  - Rule 114.04(a) Neutrals serving under this rule shall be deemed to consent to the jurisdiction of the ADR Ethics Board and shall comply with the ADR Code of Ethics for Court-Annexed ADR Neutrals.
- ▶ Rule 114 Code of Ethics applies to anyone acting as a neutral in a court-annexed process.
  - Rule 114.01(b) All neutrals in court-annexed ADR processes are subject to Rule 114 Code of Ethics without regard to whether they are Qualified Neutrals (on the roster).
- ▶ Other programs may require neutrals to be on the roster to ensure compliance with Rule 114 Code of Ethics (e.g., MN Dept of Ed Special Education ADR Panel, MN Court of Appeals Family Mediation Program)

# 2023 – What is (Rule 114) mediation?

The MN Supreme Court defines “mediation” as a facilitative process.

## **(c) Facilitative Processes**

~~(71) *Mediation:* A process forum in which a Neutral third party facilitates communication and negotiation to promote voluntary decision making by the parties to the dispute. between parties to promote settlement. A mediator may not impose his or her own judgment on the issues for that of the parties.~~

## **(d) Hybrid Processes**

# 2023 – What is a qualified mediator?

(f) Qualified Neutral. A “Qualified Neutral” is an individual or Community Dispute Resolution Program (CDRP) listed on the State Court Administrator’s roster as provided in the Rules of the Minnesota Supreme Court for ADR Rosters and Training.

- ▶ A mediator is NOT a lawyer, therapist or judge:
  - Ethics Subd. 7(c) **Prohibited Actions** by Facilitative and Evaluative Neutrals. 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; (2) **Regardless of a Neutral’s qualifications or licenses, provide therapy to either party nor provide legal representation or advice** to any party or engage in the unauthorized practice of law in any matter during an ADR process; or (3) **Require a party to stay in the ADR process or attempt to coerce an agreement between the parties.**



# Disclaimer

- ▶ The actors are highly qualified ADR professionals. All errors are *great acting* and do not reflect their ADR skills.

# Agreement for Mediation Services

## – Current

- ▶ Minnesota Statute 572 Civil Mediation Act
  - *Minn. Stat. 572.33 Subd. 3. Agreement to mediate. "Agreement to mediate" means a written agreement which identifies a controversy between the parties to the agreement, states that the parties will seek to resolve the controversy through mediation, provides for termination of mediation upon written notice from either party or the mediator delivered by certified mail or personally to the other people who signed the agreement, is signed by the parties and mediator and is dated.*

# Agreement for ADR Services

Agreement to Mediate



# 2023 – Minimum Requirement of Written Agreement

Code of Ethics Subd. 7. (b)

The written agreement shall include, at a minimum, the following:

- ▶ (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.

# Confidentiality in Mediation – Confidentiality – Current

- ▶ Rule 114.08 Confidentiality
  - *(a) Evidence. Without the consent of all parties and an order of the court, or except as provided in Rule 114.09(e)(4), no evidence that there has been an ADR proceeding or any fact concerning the proceeding may be admitted in a trial de novo or in any subsequent proceeding involving any of the issues or parties to the proceeding.*
- ▶ Rule 114.10 Communication with Neutral

# Confidentiality in Mediation

Confidentiality in Mediation

# 2023 – Admissibility of Evidence from ADR

## Rule 114.078 Confidentiality Use of ADR Evidence in Court

**(a) Evidence.** Without the consent of all parties and an order of the court, ~~or~~ except as provided in paragraph (c) Rule 114.09(e)(4), no evidence from an ADR process ~~that there has been an ADR proceeding or any fact concerning the ADR process proceeding~~ may be admitted in a trial ~~de novo or in any subsequent~~ later proceeding involving any of the issues or parties ~~to the proceeding~~.

**(b) Inadmissibility.** Subject to Minnesota Statutes, section 595.02 and except as provided in paragraphs (a) and (d), no statements made nor documents produced in non-binding ADR processes that which are not otherwise discoverable shall be subject to discovery or other disclosure. Such evidence is inadmissible for any purpose at a later ~~the~~ trial, including for impeachment.

# 2023 – Confidentiality

## Rule 114.08 Neutral's Duty of Confidentiality

(a) Records of Neutral. Notes, records, impressions, opinions and recollections of the Neutral are confidential, and the Neutral shall not disclose them to the parties, the public, or any third person, unless (1) all parties and the Neutral agree to such disclosure, or (2) disclosure is required by law or other applicable professional codes or permitted by these rules. No record or recording of an ADR session may be made or disclosed without the agreement of all parties and the Neutral. If an ADR session is conducted in a court facility where proceedings are automatically recorded, the recording made shall not be used for any purpose in the case without the agreement of all parties and the Neutral.

# 2023 – Communication to Court

## Rule 114.10(c)

**(c) Communications to Court during ADR Process.** During an ADR process the Neutral may inform the court ~~may be informed only~~ of only the following:

(1) Without comment or recommendations, whether the case has undergone an ADR process and whether it has or has not been resolved;

(2) Whether ~~The failure of a party or an attorney~~ has failed to comply with the order to attend the process or pay the court-ordered fees;

(3) Any request by the parties for additional time to complete the ADR process;

(4) With the written consent of the parties, any procedural action by the court that would facilitate the ADR process; ~~and~~

(5) The ~~N~~neutral's assessment that the case is inappropriate for that ADR process; ~~and~~

(6) A Neutral may, with the consent of the parties or by court order, disclose to the court information obtained during the ADR process.

# 2023 – Communication to Court

**(d) Communications to Court after ADR Process.** When the ADR process has been concluded, the Neutral may inform the court ~~may only be informed of~~ only the following:

(1) ~~If the parties do not reach an agreement on any matter, the neutral shall report the lack of an agreement to the court without comment or recommendations~~ That the case has been settled and may also include a copy of the written agreement;

(2) ~~Without further comment, that the case has not been settled and, with 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 or their counsel, that resolution of , 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 resolution of the dispute; the possibility of a settlement.~~

(3) That some or all of the fees have not been paid; or

(4) Notice of the court of parenting time adjustments required by Rule 310.03(c)(3).

# Court Order for ADR – Current

- ▶ Rule 114.04 (b) Court Involvement
  - *... Except as otherwise provided in Minnesota Statutes, section 604.11 or Rule 310.01, the court at its discretion may order the parties to utilize one of the non-binding processes; provided that no ADR process shall be approved if the court finds that ADR is not appropriate or if it amounts to a sanction on a non-moving party. ...*



# Court Order for ADR

A Parenting Time Expeditor  
Receives the Court Order

# 2023 – Selection and Appointment

## Rule 114.04 (b)

(b) Selection and Appointment. The parties, after service of the complaint, petition, or motion, shall promptly confer regarding selection and timing of the ADR process and selection of a Neutral. The parties shall include information regarding the ADR process in the submissions required by Rules 111.02 and 304.02.

If the parties agree on a process, the court should order the parties to participate in that process. If the parties cannot agree on an ADR process, the court shall order the parties to use a non-binding ADR process. In the event that the parties are unable to agree on a Neutral, the court shall make the selection of a Qualified Neutral. If the parties decide on a process and cannot decide on a Neutral, the court should not substitute its judgment on process. The court shall, with the advice of the parties, establish a deadline for completion of the ADR process.

Any individual providing ADR services under Rule 114 must either be a Qualified Neutral or be selected and agreed to by the parties.

# Finalizing Agreements – Current (Mediation)

- ▶ **CIVIL MEDIATION ACT 572.35 EFFECT OF MEDIATED SETTLEMENT AGREEMENT.**
  - §Subdivision 1.General. The effect of a mediated settlement agreement shall be determined under principles of law applicable to contract. A mediated settlement agreement is not binding unless:
    - (1) it contains a provision stating that it is binding and a provision stating substantially that the parties were advised in writing that (a) the mediator has no duty to protect their interests or provide them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect their legal rights; and (c) they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights; or
    - (2) the parties were otherwise advised of the conditions in clause (1).

# Finalizing Agreements – Current

- ▶ Rule 114.06 Time and Place of Proceedings
  - *(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.*

# Finalizing Agreements from Mediation



# 2023 – Finalizing Agreements

## Rule 114.05 Notice to Court Upon Settlement

If the case a filed action is settled through an ADR process, the attorneys shall promptly notify the court and, whether filed or not, complete the appropriate court documents to bring the case to a final disposition.

A Code of Ethics Subd. 7(b) 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

# Fees – Current

- ▶ Rule VII. Fees A neutral shall fully disclose and explain the basis of compensation, fees and charges to the parties. The parties shall be provided sufficient information about fees at the outset to determine if they wish to retain the services of a neutral. ...

# Ethics: Fees





# 2023 Fees, Agreement for ADR Services

## Subd. 7. Fees; Requirement of Written Agreement for ADR Services; Prohibited Actions.

(a) Fees. A #Neutral shall fully disclose and explain the basis of compensation, fees and charges to the parties. The parties shall be provided sufficient information about fees at the outset to determine if they wish to retain the services of a #Neutral. A #Neutral shall not enter into a fee agreement that ~~which~~ is contingent upon the outcome of the alternative dispute resolution process. The fee agreement shall be included in the written agreement and shall be consistent with a court order appointing the Neutral. A Neutral shall establish a protocol for regularly advising parties on the status of their account and requesting payment of fees. If one party does not pay the fee, and another party declines to cover the fee, the Neutral may withdraw, proceed, or suspend services for both parties until payment is made. If proceeding with services, the Neutral shall not refuse participation by any party based on payment status. A Neutral who withdraws from a case shall return any unearned fee to the parties. A #Neutral shall not give or receive any commission, rebate, or similar remuneration for referring a person for alternative dispute resolution services.

# Current – Ethics Rule 3, Competence

- ▶ Neutral shall serve only when she/he has the necessary qualifications to satisfy the reasonable expectations of the parties.

# Competence

The Dating Game

# 2023 – Competence

**Subd. 3. Competence.** ~~A neutral shall serve as a neutral only when she/he has the necessary qualifications to satisfy the reasonable expectations of the parties. No person shall serve as a Neutral unless they possess the qualifications and ability to fulfill the role that the Neutral has been requested or assigned to serve and must decline appointment, request assistance, or withdraw when a dispute is beyond the Neutral's competence. No individual may act as a Neutral for compensation without providing the parties with a written statement of qualifications prior to beginning services. The statement shall describe the Neutral's educational background and relevant training and experience in the field.~~

# Ethics Questions

»» Rule 114 Code of Ethics

# Rule I. Impartiality

Rule 1 Impartiality Question – You are an hour into the mediation and it's clear to you that the plaintiff's lawyer is a jerk. They have a smugness or sense of superiority which is entirely out of place -- in your opinion their handling of the case borders on professional incompetence. You find yourself struggling to ask impartial questions because you would love to really put them in their place. Do you have a problem?



# Rule I. Impartiality

- Common complaint, less common finding
- Documentation of process important
- Maintain awareness of perceptions
  - e.g., informal discussion with one side



# Rule II. Conflicts of Interest

Rule 2 Conflicts of Interest Question -- You're a lawyer and a mediator with a specialty in employment law. You've had your first successful mediation -- a sexual harassment case which settled, much to the relief of the defendant company. Yesterday you received a call from that company's general counsel asking if you would consult with them on another sexual harassment case. Can you accept their consulting offer?





# Rule II. Conflicts of Interest

- When in doubt, disclose in writing
- Disclose group leadership (not membership) roles
- Neutral must consider ability to remain impartial and must withdraw if impartiality is impaired (2023 Amendments)



# Rule V. Quality of the Process

Rule 5 Quality of the Process Question -- You have a very busy therapy practice and you're active in the local professional association and serve on several committees -- and you love to mediate. It's hard to keep all the balls in the air. During mediation sessions you often use breaks or periods when the parties are in private meetings to return phone calls, etc. Once or twice, you realize you've gotten tied up on a phone call and left both parties alone for longer than was necessary. But you rationalized it by saying they could use the time to think. Do you have a problem?



# Rule V. Quality of the Process

**Subd. 5. Quality of the Process.** A ñNeutral shall work to ensure a quality process. A quality process requires a commitment by the ñNeutral to diligence and procedural fairness. A Neutral shall ensure that the reasonable expectations of the parties concerning the timing of the ADR process are satisfied and shall exert every reasonable effort to expedite the process, including prompt issuance of written reports, awards, or agreements. A Neutral shall withdraw from an ADR process or postpone a session if the process is being used to further illegal conduct, or if a party is unable to participate due to drug or alcohol abuse, or other physical or mental incapacity. A ñNeutral shall not knowingly make false statements of fact or law. ~~The neutral shall exert every reasonable effort to expedite the process including prompt issuance of written reports, awards, or agreements.~~



# Mediation Rule I. Self-Determination

Mediation Rule 1 (2023 Rule 8) Question -- You are mediating a case involving a woman who has filed a claim for racial discrimination. In your opinion her case is weak and is unlikely to stand up in court. Her lawyer seems to agree with you and much of the time in caucus has been spent trying to convince her to settle for a nominal amount of money. You've suggested that the defendants might be willing to apologize. She's very reluctant to settle for this but after four hours in mediation she's starting to feel like she has no other option. You know you're being realistic, but you're increasingly uncomfortable with your role. Should you be?



# Mediation Rule I. Self-Determination

## **MEDIATION**

**Subd. 4 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. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. The primary responsibility for the resolution of a dispute and the shaping of a settlement agreement rests with the parties. A mediator shall not require a party to stay in the mediation against the party's will.





# MN Rules of Practice for the District Courts Rule 114 Ethics Code

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**Thank you for your  
participation!**