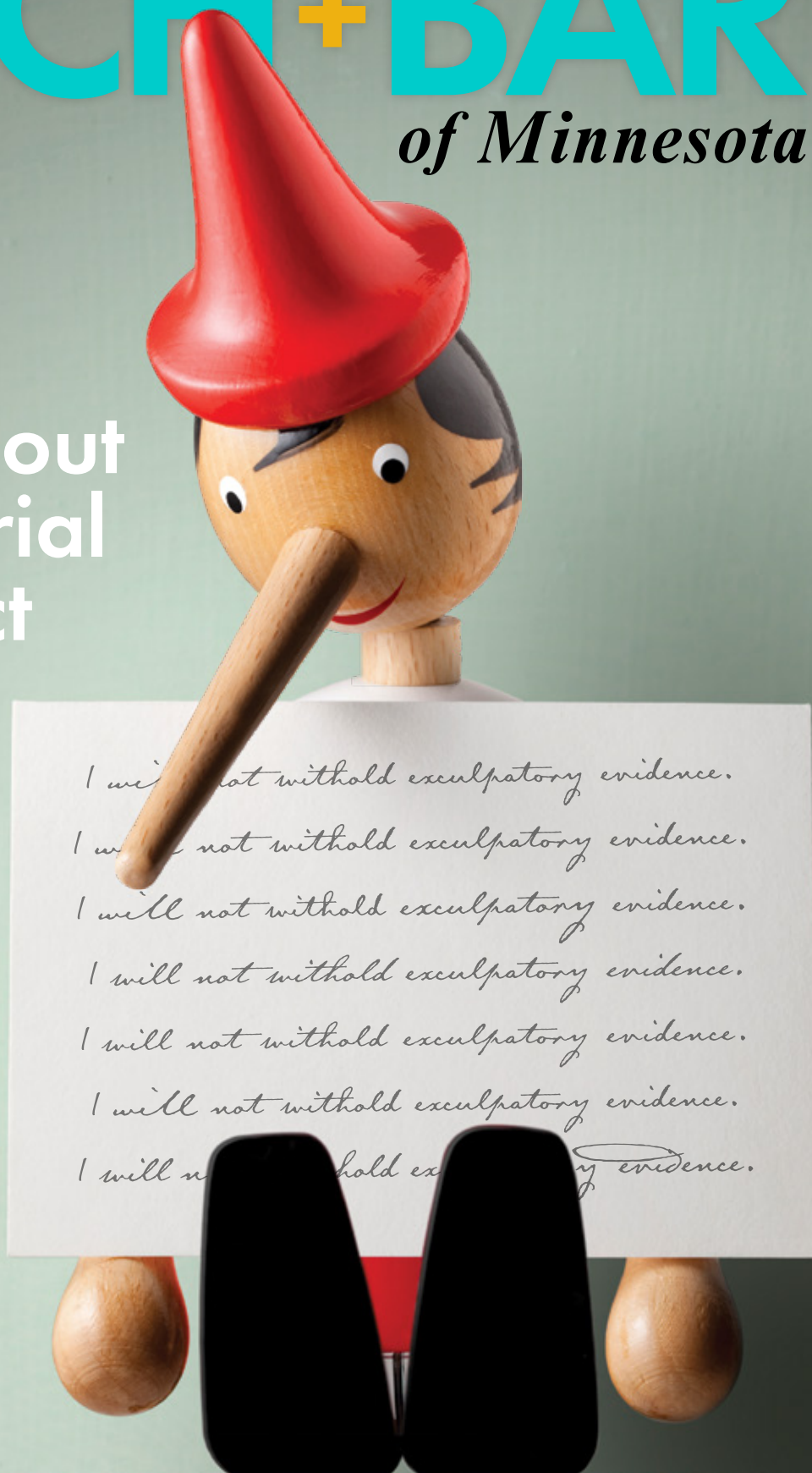


BENCH+BAR

of Minnesota

Getting serious about prosecutorial misconduct

What can—and should—be done



BENCH + BAR *of Minnesota*

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ONLY AT BENCH & BAR ONLINE Felons Can't Vote: Civil Death in the US

The United States is the only democracy in the world in which most convicted offenders who have served their prison sentences are denied the right to vote for many years, and in some cases for the rest of their lives. We examine this phenomenon globally, in the US, and in Minnesota, where the 2023 Legislature was poised to act as this issue went to press.

By Ellen J. Kennedy and Judge Tara Kalar

www.mnbar.org/bench-bar

ADR: UNDERSTANDING THE NEW CODE OF ETHICS FOR COURT-ANNEXED NEUTRALS

INSIDE ADR'S MINNESOTA RULES RESET, PART TWO

BY KRISTI PAULSON

The new Rule 114 of the Minnesota General Rules of Practice stipulates that alternative dispute resolution (ADR) is required in almost all civil and family-court-annexed matters. The importance of establishing trust and rapport while at the same time protecting confidentiality has long been an attribute of successful ADR. The new rule attempts to create statewide uniformity in the rules and procedures that govern ADR.

In formulating the new rule, the Court recognized that public confidence in the integrity and the fairness of the ADR process is essential. Neutrals have an obligation to the process, but also to the parties that engage in the processes. A high standard of ethical conduct is essential to advancing the goals set forth in the ADR Code of Ethics for Court-Annexed Neutrals.

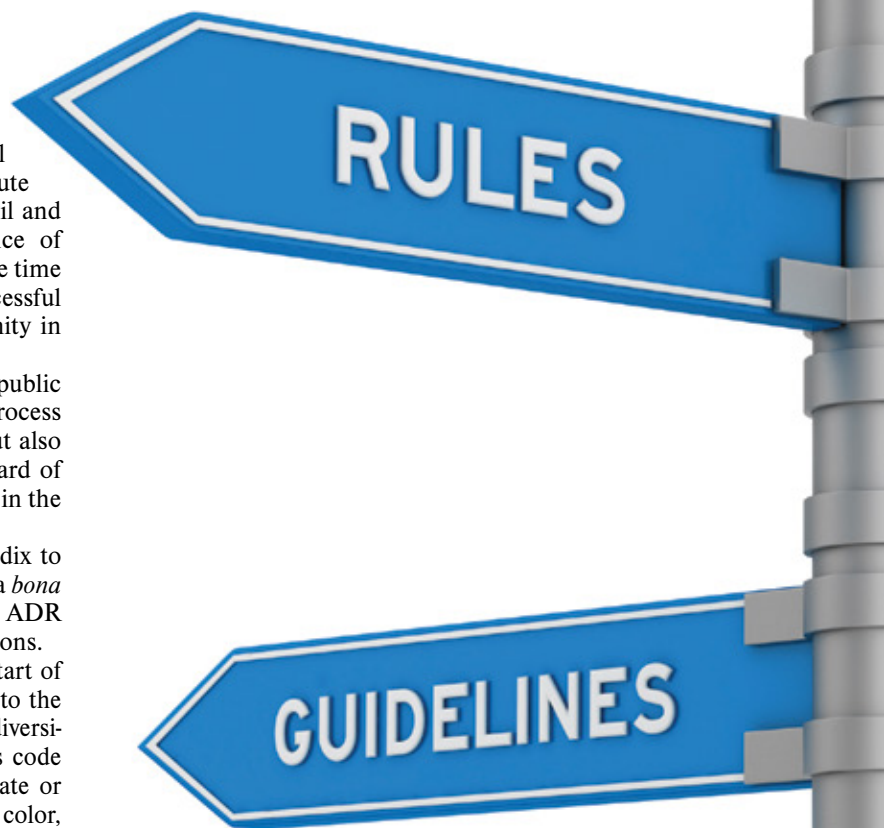
In the past a code of ethics was attached as an Appendix to Rule 114 to offer a suggested list of best practices. It is now a *bona fide* code of conduct. Violations are now enforceable by the ADR Ethics Board and violators are subject to a variety of sanctions.

The new rules impose requirements on neutrals at the start of any ADR process, and they include explaining the process to the parties at the outset of a proceeding. The importance of diversity, equity, and inclusion is also formally recognized in this code of conduct. Neutrals are not to “practice, condone, facilitate or promote” any form of discrimination on “the basis of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age.” The importance of cultural competency is also emphasized and imposes a requirement that neutrals be aware of cultural differences that might affect how a party engages in a resolution process, how they negotiate, or the emphasis they may place on particular values.

Rule 114.13 (Code of Ethics & Enforcement Procedures) defines and sets forth eight ethical requirements an ADR neutral must comply with at all times during the ADR process: (1) impartiality, (2) conflicts of interest, (3) competence, (4) confidentiality, (5) quality of process, (6) advertising and solicitation, (7) fees, and (8) self-determination.

Impartiality

Neutrals shall be fair and impartial in any alternative dispute resolution process they engage in and shall only serve in those matters in which they can be impartial. Impartiality is defined as the “freedom from favoritism or bias either by word or action” and is further noted to be a “commitment to serve all parties as opposed to a single party.” It is important that a neutral be neutral.



This is a continuing obligation throughout the process. If at any time an ADR professional loses impartiality and is unable to conduct the process in an impartial matter, the new rule is very clear: The neutral must withdraw.

Conflicts of interest

Neutrals are required to disclose any and all actual or potential conflicts of interest that may be reasonably known to the neutral. The neutral is to conduct the ADR process in a manner that does not allow outside pressures or influence to affect the neutral's conduct of the process or the outcome. The new rule defines a conflict of interest as a “direct or indirect financial or personal interest in the outcome of any proceeding” or “an existing or past financial, business, professional, family or social relationship” that is likely to affect impartiality *or* may create an appearance of lacking impartiality. Arbitrators are required to disclose *in writing* at the time of selection or upon learning of such conflict any actual or potential conflicts known to the arbitrator.



COMPLIANCE

REGULATIONS

The new rule does allow that following disclosure, a neutral may serve with the consent of the parties. Despite this, however, neutrals are to strive not to allow any conflicts to influence the process. If, at any time, a neutral's impartiality is impaired or the conflict creates undue influence, the neutral is required to withdraw. Individuals serving as neutrals are not allowed to create other professional relationships with parties to the ADR proceedings without either the consent of the parties or the passage of a reasonable amount of time.

(Practice pointer: It is important that a neutral make certain that the attorneys in a matter have informed their respective clients of any conflict-of-interest disclosures. Best practice tip: Have the attorneys confirm in writing or the parties confirm in the ADR agreement or a separate writing.)

Competence

Neutrals must have the ability to understand the ADR process and in some cases may be required to be familiar with the subject matter at hand. The new rule requires that “no person shall serve as a Neutral unless they possess the qualifications and ability to fulfill the role.”

ADR providers are required under the new rules to offer a written statement of qualifications prior to beginning any ADR services. The rules further require that this written statement “shall describe the Neutral’s educational background and relevant training and experience in the field.” In practice, this is often known as an “ADR resume.”

(Practice pointer: The advance of technology makes it easy to include the ADR resume on a website or to provide it by email. It is a good idea to be as inclusive as possible to identify any potential conflicts. There is nothing wrong with passing along the ADR resume several times in the process—for example, when contacted about the process and again when providing the ADR agreement.)

Confidentiality

Neutrals need to know how to keep secrets. Trust and rapport are essential to the dispute resolution process; parties need to know that information they are disclosing is going to be kept confidential. The new rule now imposes a requirement on the neutral to discuss confidentiality before an ADR process, and that discussion must include “limitations on the scope of confidentiality and the extent of confidentiality provided in private sessions that a Neutral holds with a party.” The requirement of confidentiality is so important it is discussed multiple times in the new Rule 114 (See Rule 114.08, 114.10 and 114.11). The requirement of confidentiality is also controlled by any agreements made with or between the parties to the ADR process.

(Practice pointer: ADR professionals in facilitative processes will often identify confidentiality assumptions they make, such as “you need to tell me I can share the information” or “I am going to assume you are allowing me to share unless you tell me *not* to share.” Make sure that the approach you are using is clear to the parties. It’s always a best practice to secure consent to that approach in writing.)

Quality of process

A quality ADR process is required. Toward that end, the new rule explains, the neutral must be committed to (1) diligence and (2) procedural fairness. A neutral is to ensure that the reasonable expectations of parties are met concerning the timing of the process and shall take steps to reasonably expedite the process. Neutrals are to promptly issue any required written reports, awards, or agreements.

The new rule defines instances in which a neutral shall postpone (or may have to withdraw) and those are instances in which (1) the process is used to further illegal conduct or (2) a party is unable to participate due to drug or alcohol use or to other physical or mental incapacity.

Neutrals are to be honest and accurate in any statements of fact or law they make. The new rule dictates that a neutral shall not “knowingly make false statement of fact or law.”

Advertising and solicitation

Neutrals are to be accurate and truthful in any advertising or solicitation for work in a desired ADR field. They must accurately describe any given specific ADR process, its costs and benefits, and the role and qualifications of the neutral. Neutrals are not to promise specific results or make guarantees.

(Practice pointer: As we noted last month in part 1 of this feature, courses that allow one to become a qualified neutral are *certified* by the State Court Administrator’s Office. But there is no such thing as a “certified” neutral in the state of Minnesota: Neutrals are *qualified*. It is never appropriate to refer to oneself as a certified neutral. The actual phrase one should use in identifying themselves is “qualified neutral under Rule 114 of the General Rules of Practice.”)

Fees, requirements of written agreement for ADR services

There are significant changes to the requirements under this section. Although it's located near the end of the new rules, it should be the starting point for many neutrals in identifying the changes necessary to the conduct of ADR processes going forward. The section identifies specific written requirements for fees, for the written agreement for ADR services, and prohibited actions by facilitative and evaluative neutrals.

The new rule requires that a neutral “fully disclose and explain the basis for compensation, fees, and charges to parties.” Prior to being hired, a prospective neutral must provide enough information about fees to ensure that a party can decide whether to hire them. The neutral, in his or her written agreement, shall set forth the agreement for fees—which must be consistent with the court order. Neutrals need to have consistent practices for advising parties about the status of their accounts and for requesting payments. (This is especially important with respect to

some of the new rosters in which continuing relationships and provision of services are intended.)

Neutrals have the right to be paid for ADR services and have the right to withdraw, proceed, or suspend services until paid. The new rule notes, however, that if an ADR provider chooses to proceed, participation by a party cannot be precluded based on nonpayment of fees. Retainers for services are permitted, but any unearned fees must be returned the parties.

The new rule identifies two prohibitions for ADR professionals relative to fees: First, no contingent fees are permitted in any ADR proceeding. Second, no referral fees are permitted (including gifts, commissions, rebates, or any kind of remuneration).

The new rules also require that ADR neutrals must have detailed written agreements with any of the parties entering into an ADR process with them. This applies to any civil or family court matter. The written agreement is to be consistent with any court orders and is to be signed before or promptly at the start of any ADR process.

NOT THE SAME OLD ADR ETHICS BOARD

The ADR Ethics Board—made up of judges, ADR professionals, and court administration staff members—has been in existence for years, charged with promoting the ethical use of ADR in the system. The new rules elevate and clarify the roles of the ADR Ethics Board. The ADR Ethics Board, along with the State Court Administrator's Office, is the entity now charged by the Minnesota Supreme Court with enforcing the Code of Ethics contained in Rule 114.

The Minnesota Supreme Court notes in the new Rule 114 that inclusion on the qualified neutral rosters constitutes a privilege, not a right. The new rules are meant to protect the public, provide guidance for ADR professionals, and improve the quality of court-annexed ADR processes. Violations of the rules do not create claims for legal relief. But sanctions are set forth, as is the process to be followed. To the extent possible, the remedies prescribed are intended to be rehabilitative in nature.

The ADR Ethics Board has jurisdiction over any individual or community dispute resolution group subject to Rules 114 and 310 of the Minnesota Rules of General Practice, the Code of Ethics for Court-Annexed ADR Neutrals, or the Rules of the Minnesota Supreme Court for ADR Rosters and Training. The Court exempts (1) collaborative attorneys or other professionals as defined in Rule 111.05(a) while they are acting in a collaborative process, (2) court-appointed special

masters under Rule 53 of the Rules of Civil Procedure, and (3) court-appointed experts appointed under Rule 706 of the Rules of Evidence.

The procedure for making a complaint against an individual or a community dispute resolution program is outlined below.

■ **Filing a complaint.** A complaint must be in writing, signed by the complainant, and submitted electronically or by mail to the ADR Ethics Board. It must identify the neutral and state the basis for the complaint. If there is no basis for finding a violation of the Code of Ethics for Court-Annexed Neutrals, the complaint—even if factually accurate—will be dismissed and the neutral notified in writing. The decision of the ADR Ethics Board is final in this case.

■ **Investigation.** If a complaint is not dismissed, the ADR Ethics Board will “review, investigate and act” as the board deems appropriate. The rules specify the requirements for notifying the neutral and the time frames for responses to requests.

■ **Response and decision.** A member of the ADR Ethics board will lead the investigation and issue a report and recommendation following its completion. The clear-and-convincing standard will be used to determine violations and whether there should be remedies or sanctions. The board's power to impose sanctions includes but is not limited to private reprimands, corrective actions, notification of licensing authorities, public reprimands,

and removal from the roster of qualified neutrals.

There is a process for requesting reconsideration in cases where the ADR Ethics Board finds a violation. There is also a detailed process to request a review hearing in appropriate cases before an appointed referee. Referees may impose a wider range of sanctions, including private reprimands, public discipline, and removal from the roster—as well as fees and sanctions when there is a finding of bad faith.

ADR Ethics Board files, records, and proceedings are confidential until such time as final sanctions are imposed. The rule specifies exceptions to this general rule, identifying what is accessible to the public and what is within the discretion of the board to release. Disclosure of the deliberations, as well as of thought processes and communications between board and staff, is not permitted.

Statements made in proceedings are privileged as an absolute right. The new rules specifically prohibit such statements from being made the basis for civil liability claims. Board members and staff are granted immunity for their official duties under the rule.

Detailed information about the ADR Ethics Board, identification of current members, and information regarding the process is available on the official Minnesota Judicial Branch website (www.mncourts.gov).

WHAT ADR AGREEMENTS MUST ADDRESS

The new rules provide a detailed description of what is to be provided in the written ADR agreement (Minn. Rule 114.13 (A)(7)(b)). Those requirements are summarized here:

1. A description of the role of the neutral.
2. If the neutral is a decisionmaker, the agreement must indicate whether a decision is binding or non-binding.
3. An explanation of the role of confidentiality and the admissibility of evidence.
4. Terms of the fee agreement and detailed arrangements if a neutral is to be paid (including the rate of compensation, how the neutral is to be paid, and stating that a neutral has the right to seek remedies from the court for non-payment under Rule 114.11(b)).
5. If the proceeding is adjudicative, the agreement must explain the rules of process.
6. Indication that the neutral is required to follow, and shall follow, the Code of Ethics for Court-Annexed Professionals. The agreement must also indicate that the neutral is subject to the jurisdiction of the ADR Ethics Board.
7. Neutrals in facilitative and evaluative settings *must* include the following language:

(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.

(See Minn. Rule 114.13 (A)(7)(b)(7).)

WHAT NEUTRALS ARE PROHIBITED FROM DOING

The new rule sets forth some prohibitions regarding any neutral engaging in a facilitative or evaluative process.

1. Neutrals are not to draft legal documents to be submitted to a court as an order for a judge or judicial officer to sign.
2. Regardless of other licenses or qualifications, neutrals are not to: (1) provide therapy; (2) provide legal representation; or (3) advise any party to engage in the unauthorized practice of law in any matter during the ADR process.
3. Neutrals are not to require a party to stay in an ADR process or attempt to coerce an agreement between the parties. See Minn. Rule 114.13 (A)(7)(c).

Self-determination

An ADR professional is required under the new rules to “act in a manner that recognizes that mediation is based on the principle of self-determination by the parties.” Mediators are always to keep in mind that the mediation in which they are participating is the parties' process. They are the neutral who was asked to participate; they are not a party, this is not their case, and the outcome does not directly affect the neutral. ▲

THE NEW ROSTER WAIVER PROCESS

The ADR Ethics Board was charged by the Minnesota Supreme Court with (1) establishing waiver requirements and deadlines relative to the new rosters and (2) establishing a deadline for individuals to submit applications to be listed on the Rule 114 rosters.

The ADR Ethics Board recognizes that some current, active qualified neutrals may have already complied with training requirements set forth in the new Rule 114, qualifying them for inclusion on the new ADR Rosters: Parenting Time Expeditor, Parenting Consultant, Social Early Neutral Evaluation, Financial Early Neutral Evaluation, and Moderated Settlement Conference.

But the waiver process is time-limited: In effect until December 31, 2023, it permits individuals to bypass the standard application process and application fee if they demonstrate meeting the training and exceptional competence requirements.

The ADR Ethics Board may grant waivers when “an individual's training and experience clearly demonstrate exceptional competence to serve as a Neutral.” (Rule 114.12 (4)(m).) Individuals should carefully review the requirements of the rule to make sure they have met the general requirements, have completed the same or similar trainings or their equivalent, and have experience that meets or exceeds the requirements set forth in Rule 114.

In cases where a waiver is denied, the individual can still complete the necessary trainings or ride-alongs and apply for roster placement in the future. Where no waiver is being sought, neutrals can complete the required trainings and ride-alongs and complete the standard application process at any time. (But note that the ADR Ethics Board has established a deadline of one year following the completion of a Rule 114 training to submit an application to be listed on the roster of qualified neutrals. Failing to meet that deadline will mean having to re-take the training.)

Practitioners should bear in mind that the waiver process is not a pro forma sign-up that will automatically place you on one of the new rosters. Review the basic requirements before applying for a waiver to make sure your qualifications meet the Rule 114 requirements. Be detailed and specific in providing information about your trainings and experience. Include information regarding any roster-specific trainings you have done—and attach certificates of completion or verification when possible. Detail experience and demonstrate why your experience uniquely and exceptionally qualifies you. The ADR Ethics Board won't know what you do not tell them.



KRISTI PAULSON is a professional mediator and an accomplished trial lawyer. She serves on both the Lawyers Professional Responsibility Board and the ADR Ethics Board. Kristi owns PowerHouse Legal, a national training and education center focusing on mediation and trial advocacy skills trainings and CLE programs with a focus on #How2Skills.