



# INSIDE ADR'S MINNESOTA RULES RESET

*Understanding the new Rule 114*

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**PART ONE: AN OVERVIEW**

BY KRISTI PAULSON

**T**he process of amending Rule 114—the portion of Minnesota’s General Rules of Practice for the District Courts pertaining to alternative dispute resolution as a means of avoiding litigation—began in July 2017. What followed was years of input from entities such as the ADR Ethics Board, the ADR Workgroup, and a Supreme Court Advisory Board. In July 2022, the Minnesota Supreme Court issued an order that made sweeping changes to Rules 114 and Rule 310 of the General Rules of Practice. On December 30, 2022, the Minnesota Supreme Court issued an administrative order clarifying certain points and correcting a few scrivener errors.

These changes—which took effect on January 1, 2023—dramatically alter the face of ADR by clarifying procedures, identifying responsibilities, creating new ADR rosters and training requirements, codifying an ethical code, and placing responsibility for the enforcement of these rules on the ADR Ethics Board. This article, the first of two, will provide an overview of the new rules and a general discussion of key aspects of those rules. It is not an exhaustive treatment of the changes, however, and it is not a substitute for reading the new Rule 114 in its entirety. Part two will focus on what practitioners need to know about the Code of Ethics and the ADR Ethics Board.

### To whom does the new Rule 114 apply?

Rule 114 now applies to *everyone* who does any kind of court-annexed ADR. Rule 114 previously applied to all civil cases. The changes now extend that rule to govern all civil and family cases, making them subject to its provisions. The rule also applies to all neutrals, regardless of whether they are registered as Rule 114-qualified, making them subject to the authority of the ADR Ethics Board and requiring compliance with the new code of ethics. Rule 114 carves out some limited case-type exceptions (for example, medical malpractice cases or cases in which there is a history of domestic abuse—see Rule 114.01 (a)). The rules also add one new general caveat: The inability to pay may be grounds for a court to except a party from the ADR process. (But note that this determination is made by the court, not the parties.)

### How does the Supreme Court define ADR?

The Supreme Court distinguishes ADR as falling into four categories:

**1) Adjudicative:** A process in which a neutral or panel of neutrals renders an award after consideration of evidence and presentation by parties or counsel. This includes processes such as arbitration, a consensual special magistrate, or a summary jury trial.

**2) Evaluative:** A process in which neutral(s) with subject matter experience review information relative to a case and provide an assessment of its strengths and weaknesses as well as opinions regarding the value or settlement ranges of the case. These processes include early neutral evaluations, non-binding advisory opinions, and neutral fact-finding.

**3) Facilitative:** A process in which a neutral facilitates communication and negotiation between parties to encourage a voluntary resolution of the conflict. An example is mediation.

**4) Hybrid:** A process that combines various ADR techniques or encourages parties to define a settlement process on their

own terms. Examples of a hybrid process include a mini-trial, mediation-arbitration, arbitration-mediation, or the creation of some other process for reaching agreement.

### Is this rule only for mediators or does it apply to attorneys who mediate?

Many of the rule changes apply to ADR neutrals, the training process for neutrals, and the rosters available to them. However, this rule also now imposes specific obligations on attorneys and court administrators with respect to ADR processes.

Parties are to confer about the ADR process and the selection of a neutral very early in a case. Court administration is now required to provide information about ADR processes and a list of neutrals qualified to provide ADR services in that county. The names of neutrals provided by a court *must* be listed on a qualified roster. If a neutral is agreed upon, it then falls upon the attorneys to notify the court of the name and contact information for the selected neutral. Once ADR has been ordered by a court, the neutral is required to proceed in accordance with that court order.

Attorneys are now required in all civil disputes to inform their clients about available ADR processes. Attorneys are responsible for notifying the court if a case has settled through ADR and are required to *promptly* complete settlement documents and finalize closure of the case.

### Who selects the neutral—the attorneys or the court?

The parties are to immediately confer about the selection of an ADR neutral once they have commenced a case through service, petition, or motion. Rules 111.02 and 304.02 continue to require that parties include ADR information in initial court submissions.

If the parties agree to an ADR process, a court will order the agreed-upon process. If the parties cannot agree, the court will select a non-binding process. If the parties are unable to agree to the selection of an ADR neutral, the court will select from the list of qualified neutrals. The court is not to influence or express preferences when parties have agreed on ADR. The court will establish ADR deadlines, seeking the advice of parties.

New Rule 114 specifies a removal process if an attorney is not satisfied with the court-appointed neutral. A party, within seven days, may file a notice to remove a qualified neutral, in which case the court shall select another. After the one presumptive removal, removing a neutral requires an affirmative showing of prejudice brought by motion (see Minn. Rule 114.04(c)).

Parties are to inform the court as to any selected neutral, in which case the court will issue an order of appointment of the neutral. A neutral is to proceed with ADR in accordance with the court’s order of appointment.

### Who has to attend ADR proceedings?

ADR sessions are private and closed to the public, unless all parties agree otherwise. Attorneys who will try the case may be required by the court to attend. In adjudicative proceedings, a court does not have to require the person with settlement authority to attend. For evaluative, hybrid, and facilitative ADR sessions, by contrast, the person with settlement authority can be required to attend. Sanctions are the new teeth in this rule. A court can now award sanctions for violations of the attendance rule.

**Can ADR be used for discovery?**

The ADR process is certainly one in which parties learn a lot of claims, both their own and the other side's. The new rule now states that no evidence from an ADR process can be used in a later proceeding without either consent or an order from the court. Statements made in a non-binding proceeding are not admissible for any purpose at a later trial, including for impeachment. In adjudicative or binding arbitration (and in some non-binding arbitration cases), evidence may be used in later proceedings. The rule now goes further than it used to, stating that sworn testimony in summary jury trials is admissible in later proceedings as evidence.

**What if a case settles during ADR?**

The new rule requires that the attorneys notify the court and immediately begin the process of bringing before the court the documents required to finalize the matter. This is a requirement whether or not a case is filed, keeping in mind that most if not all family actions require approval of the court. Notably, the Advisory Committee comments offer guidance for civil actions, many of which go through presuit mediation, noting that while the new rule requires the prompt preparation of settlement documents, there is no requirement those documents be filed if the case is not filed with the court.



**THE NEW RULE DEEMS ANY PERSON PROVIDING COURT-ANNEXED ADR SERVICES IN MINNESOTA AS HAVING CONSENTED TO THE JURISDICTION OF THE ADR ETHICS BOARD AND HAVING AGREEING TO COMPLY WITH THE ADR CODE OF ETHICS FOR COURT-ANNEXED ADR PROFESSIONALS. THIS IS TRUE WHETHER OR NOT THE PERSON IS LISTED ON A ROSTER OR IS RULE 114-QUALIFIED.**

**What is a qualified neutral?**

The rule now defines a neutral as an individual who provides an ADR process under this rule. A *qualified* neutral is an individual or a community dispute-resolution group listed on the State Court Administrator's Office roster as provided in Rule 114.12 (and therefore having completed the required training).

The new rule requires that qualified individuals complete continuing education requirements to remain on the roster. Generally, for facilitative, evaluative, or hybrid rosters, 18 credits are required every three years; for adjudicative rosters, the requirement is nine credits every three years. Continuing education requirements are submitted to the court administrator's office through a prescribed affidavit form.

Community Dispute Resolution programs are those programs certified by the State Court Administrator's Office per Minn Stat. ch. 494. These

programs are required to maintain records satisfying the provisions of this new rule and making sure compliance with roster requirements is met by each neutral it engages. The individual neutrals on these community programs are subject to the new rule's provisions and the jurisdiction of the ADR Ethics Board.

**I'm not qualified, but I provide ADR services. Does this mean I have to stop?**

The new rule deems any person providing court-annexed ADR services in Minnesota as having consented to the jurisdiction of the ADR Ethics Board and having agreeing to comply with the ADR Code of Ethics for Court-Annexed ADR Professionals. This is true whether or not the person is listed on a roster or is Rule 114-qualified. Parties are allowed to select a neutral of their choice, including one who is not Rule 114-qualified if they so choose. If they are unable to agree, the court may appoint a neutral, but in that case the person must be a qualified neutral.

The rule now provides in clear language, "Any individual providing ADR services under Rule 114 must either be a Qualified Neutral or be selected and agreed to by the parties." (See Minn. Rule 114.04 (b)). Keep in mind that the rule also clearly states, "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" (Minn. Rule. 114.01 (a)).

**What is the status of the neutral's notes?**

Neutrals cannot be called to testify in the proceedings of the parties. The new rules codify that the "notes, records, impressions, opinions and recollections" of the ADR neutral are confidential and shall not be disclosed. The neutral has a duty to maintain confidentiality. The only exceptions occur if there is agreement by all the parties and the neutral, or disclosure is required by law pursuant to Rules 114.10-11. No recording of the proceedings is permitted except by agreement of all parties and the neutral. The rule acknowledges that many courtrooms are subject to continual recording and clarifies that even if there is constant recording, it is not admissible without full agreement of the parties and the neutral.

**What are the new ADR rosters?**

The State Court Administrator's Office maintains the Rule 114 rosters as provided in the Rules of the Minnesota Supreme Court for ADR Rosters and Training. Under the new rules, only individuals on these rosters will now be disclosed by state court administration to filing parties as ADR providers.

The civil ADR rosters comprise two rosters: (1) Civil Facilitative/Hybrid and (2) Civil Adjudicative/Evaluative. While there are no changes to the civil rosters themselves, there are changes to the training requirements and to the continuing education requirements.

The family ADR rosters will undergo substantial changes. All family law matters in the district courts are now subject to ADR under Rules 310 and 114 with limited exceptions (such as domestic abuse actions under Section 518B.01, contempt matters, public agency child support matters, or special master proceedings). In cases where domestic abuse has occurred and in domestic abuse cases in which parties agree to ADR, the court will not require such proceedings to be in person. Courts will also look at specific issues, and if ADR has been attempted unsuccessfully on current, pending issues, the court will not require ADR.

There will continue to be a Family Law Facilitative/Hybrid roster, and the rule further creates a second hybrid category consisting of (1) parenting-time expeditors and (2) parenting consultants. (Rule 310.03, now contained in Rule 114, defines all of these rosters in detail.) The rule also creates a new roster for Family Law Evaluative/Hybrid Processes and identifies new rosters for (1) Social Early Neutral Evaluation, (2) Financial Early Neutral Evaluation, and (3) Moderated Settlement Conferences. There is also a Family Law Adjudicative roster, essentially for family court arbitration processes.

The new rule recognizes the roles that child custody evaluators play in the family law process. A roster is not created for this designation. But clarity is provided along with a prohibition against a neutral later serving as a custody investigator in most instances. (In the limited cases requiring exceptions, the new rule requires: full disclosure by the neutral and agreement in writing signed by the parties; a court finding that there is no one else available to fill the custody investigation role; and written notification to the parties that disclosures will not be confidential.) (See Minn. Rule 310.03 (d).)

### How do I get on the new ADR rosters?

The State Court Administrator's Office maintains the rosters and sets the training requirements for inclusion on the rosters. The training requirements include classroom training, experiential learning, and, in some cases, observations or "ride-alongs" of the process. To become a qualified neutral, one must complete the certified training requirements as set forth in Rule 114 and then must comply with the continuing education requirements to maintain inclusion on the roster.

The state court administrator will certify programs meeting the training requirements and now requires that trainers must also meet specified requirements. On December 30, 2022, the Supreme Court clarified that Rules 114.12 and Rules 114.13 are the new rules governing training and setting forth training requirements. Individuals who are able to demonstrate exceptional competence will still be allowed to seek a waiver. The Supreme Court has charged the ADR Ethics Board with setting up the criteria for waivers.

The ADR Ethics Board will also be setting the allowable time to apply for the roster once training

has been completed. This has not been specified before. The ADR Ethics Board determined at its October 2022 meeting that the window of time to apply to a roster following completion of a training is one year, after which one would need to retake the training.

### What about those of us who arbitrate?

#### Do the new rules apply to us?

Yes. In fact, there is an entire section dedicated to arbitration proceedings, both binding and non-binding. (See Rule 114.09.) Unless there has been a waiver, all parties must be present during the taking of evidence. "Relevance" is now defined as it applies to documents, reports, and affidavits. The process of obtaining and using subpoenas is clarified. The rule sets forth the timing of the arbitrator's issuance of an award and the filing requirements for trial or vacation of an award.

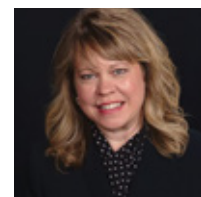
### Wait. I do family law or mediation— isn't that governed by Rule 310?

Rule 114 now governs family law cases; Rule 310, located in Title IV—Rules of Family Court Procedure, is incorporated directly into Rule 114 and provides the specific rules and procedures for ADR in family law cases. Rule 310 sets forth the limited exceptions to family law ADR and continues to not require ADR in cases in which domestic abuse has occurred. One notable change to Rule 310 is that it now defines the early neutral evaluation, moderated settlement conference, and parenting time expediting process as well as the parenting-time consulting process (for which there are new rosters).

### Communication before, during, and after: Who can speak up?

The new rule defines the instances and the process for communicating with the neutral and for the neutral's communication with the court. There is to be no advance communication with a neutral, absent agreement by all, in any adjudicative process. In evaluative, hybrid, or facilitative processes, communication that encourages or facilitates settlement is allowed in advance of the proceedings.

A neutral continues to be limited with respect to the information it can share with a court during the ADR process, generally only confirming that a case has not resolved without comment or recommendation. A neutral can notify the court of non-compliance, request additional time, or indicate, with the written consent of the parties, that procedural action on the part of the court would facilitate resolution. One new facet of the rule is the provision that a neutral (either through consent of the parties or a court order) may disclose to the court information obtained during the ADR process. After an ADR process has been concluded, a neutral may inform the court that the case has been settled and provide a copy of the written agreement; that the case has not settled; that fees have not been paid; or, in the event of parenting-time adjustments, notify the court of those.



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THE ADR ETHICS BOARD IS THE ENTITY CHARGED BY THE MINNESOTA SUPREME COURT, ALONG WITH THE STATE COURT ADMINISTRATOR'S OFFICE, WITH ENFORCING THE CODE OF ETHICS CONTAINED IN RULE 114.

### What about fees?

First, if a party cannot afford to pay for an ADR process (as determined through court processes, not the wishes of the parties), a court can exempt it from the ADR requirements.

Neutrals are to be paid for their services. The agreements are to be based on terms provided to the parties and their attorneys or ordered by the court. Fees for ADR services are to be fair and reasonable. If parties or attorneys fail to pay the neutral, the neutral may file an affidavit with the court and seek an order for just and proper relief.

### What is the ADR Ethics Board?

The ADR Ethics Board is the entity charged by the Minnesota Supreme Court, along with the State Court Administrator's Office, with enforcing the Code of Ethics contained in Rule 114. The Minnesota Supreme Court notes that inclusion on the roster is a conditional privilege and subject to revocation for cause.

The Minnesota Supreme Court has now defined the process for making a complaint and the process the ADR Ethics Board is to use for investigating and addressing complaints. The ADR Ethics Board can impose sanctions, including but not limited to private or public reprimands or removal from the Rule 114 rosters. The process for review, appeal, and reconsideration are now clearly defined. Part two of this article will offer additional details about the workings of the board.

### So what exactly is the ADR Code of Ethics?

The Rule 114 Code of Ethics defines standards of ethical conduct to guide the neutrals conducting ADR under this rule. It is based in the recognition that for a dispute resolution process to be effective, there must be a high level of integrity and fairness in the process to encourage public confidence. Part two of this article, appearing next month, will explore the Code of Ethics and the ADR Ethics Board in more detail, but for now here are a few key points.

Rule 114.13 ("Code of Ethics & Enforcement Procedures") defines the following ethical aspirations and sets forth specific requirements neutrals must demonstrate or follow in several areas:

- impartiality;
- conflicts of interest;
- competence;
- confidentiality;
- quality of process;
- advertising and solicitation;
- fees; and
- self-determination.

All of these are important. Practitioners must also keep in mind that there is presently no such thing as a "certified" neutral. The trainings are certified, but neutrals are *qualified*. The rules require

that when it comes to advertising, a neutral on one of the rosters may use the phrase "qualified neutral under the General Rules of Practice."

The rules have always required fees to be non-contingent and to be fair and reasonable; they now provide more detailed guidance regarding what must be contained in a written fee agreement. It is important to know these requirements and comply with them.

Neutrals are required to provide a written agreement for services that must be signed by participants before or at the start of the ADR process in all civil and family cases employing ADR. The new version of the rule goes into detail regarding provisions that must be included in all such agreements and further requires a neutral to define and explain the process to parties at the start of any ADR process. These provisions represent one of the most significant changes to the rule and there are specific and detailed provisions that *must* be included in mediation agreements.

The Minnesota Supreme Court is clear that, while these are not *legal* duties, violations of any of these provisions may result in the imposition of sanctions by the ADR Ethics Board. We'll discuss how this works in part two next month.

### Conclusion

The new ADR ethics rules contained in Rule 114 are intended to define and clarify the field of ADR, an area that has increased in popularity over the years. As with any new rule, there will be a period of clarification and interpretation as we move forward and it would be a good idea to remain attentive to these discussions as the new rule goes into play. How do you do this? Start by reading the new rule as ordered by the Supreme Court and pay attention to the ADR Ethics Board and the State Court Administrator's Office websites as rule clarifications come forward.

January 1, 2023, marked the official effective date of the new rule and the year ahead will be a transitional phase as the new rule is put in play. (For example: There will be an ADR waiver process for individuals previously qualified on current (family) rosters; it requires that if an individual wishes to apply for a waiver rather than take a required training, that process must be concluded by December 31, 2023.) There are new rules for trainers and new requirements for certified training courses. There is also now a limited one-year period during which one may apply to be on a roster following the completion of a training.

The ADR arena is growing and moving forward. The new ADR rules are meant to offer guidance and order regarding an increasingly popular process. Whether you are an ADR provider or an ADR advocate, the New Rule 114 is now part of your life and needs to be incorporated into your practice. ▲

## WHAT DO JUDGES NEED TO KNOW ABOUT THE NEW ADR RULES?

■ The new rules apply to all civil and family cases (with limited exceptions) that come before the court. (Rule 114.01 (a).) A court may waive the ADR requirement in a few cases:

- Inability to pay. The standard for reaching this determination is the waiver of fees pursuant to Minn. Stat. 563.01 or a court determination on other grounds. (Rule 114.01 (c).)

- A court, in family law matters, shall not ask for ADR in cases alleging domestic abuse; shall not require face-to-face ADR if there are allegations but the parties agree to ADR; and shall not require parties to engage in ADR if a process has already been tried and failed relevant to pending issues. (Rule 310.01 (b) and (c).)

■ The State Court Administrator's Office is required to:

- provide information about ADR and qualified neutrals to all parties. (Rule 114.03(a).)

- provide to the neutral a copy of the neutral's appointment once ordered by the court. (Rule 114.04(d).)

■ The court is required to:

- Order ADR when required under the rules.

- *If the parties agree on an ADR process, the court shall order that process. Parties can agree to a neutral, including a non-qualified one. If the parties agree on a process but cannot agree on a neutral, the court is not to substitute its judgement on the process. (Rule 114.04 (b).)*

- *If the parties cannot agree on an ADR process, the court shall order a non-binding process. (Rule 114.04 (b).)*

- *If the parties cannot agree on a neutral, the court shall order one. Any court-ordered neutral must be a qualified neutral as defined under Rule 114 and must be listed on the Supreme Court ADR roster. (Rule 114.04 (b).)*

- Establish (with the advice of parties) ADR process deadlines. (Rule 114.04(b).)

- Follow the ADR neutral removal process when the court appoints a neutral without consent of the parties. (See Rule 114.04(c).)

- *Parties may file a notice to remove a neutral within seven days of appointment. The court shall select another neutral.*

- *Once a party has exercised the removal by right, any subsequent removal motions require a showing of prejudice and shall come before the chief judge or his or her designee.*

- Require the attorneys to notify the court of settlement and promptly take measures to conclude the issue or matter before the court. (Rule 114.05.)

■ The court may be required to impose sanctions for violations of attendance requirements contained in Rule 114. (Rule 114.06(e).)

The court may be asked to consider evidence from ADR proceedings for use at trial (Rule 114.07); for when the disclosure of confidential ADR notes may be required (Rule 114.08(b)); or asked to enter judgment or vacate arbitration awards (Rule 114.09).

■ Courts are to be mindful of communication requirements with neutrals during and after the ADR process. The communication process is very limited and the acceptable areas of discussion are set forth in Rule 114. (Rule 114.10.)

■ Courts can order the payment of ADR fees whether they are court-ordered fees (Minn. Rule 114.10) or fees agreed to by private agreement of the parties. A neutral need only file an affidavit and shall not disclose any confidential information other than non-payment of fees. The court shall provide notice to the court and the parties and then may issue an order "granting relief as the court deems just and proper." (Minn. Rule 114.11.)

■ Courts need to know the ADR Code of Ethics. Courts are not to order neutrals to do anything that might be in violation of these rules. (Minn. Rule 114.13(A)(7)(b).) Nothing prevents a judge from reporting a violation of the ADR Ethics Code by a neutral to the ADR Ethics Board in accordance with the process outlined in the Code of Ethics.

