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MINNESOTA'S NEW RULE 114 – A
GUIDE FOR DEFENSE LAWYERS AS
ADVOCATES IN MEDIATION

DEFENDING DOG BITE CASES

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MINNESOTA'S NEW RULE 114 – A GUIDE FOR DEFENSE LAWYERS AS ADVOCATES IN MEDIATION

BY: KRISTI PAULSON

Trial lawyers love to try cases and jury trials are the bedrock of the justice system. However, time and resources require that not every case can, nor should, be tried. Alternative dispute resolution is a system that ranges from adjudicative to facilitative to evaluative tools and processes designed to assist courts, parties, and lawyers in resolving conflicts and managing caseloads. A common facilitative process in civil cases is mediation, a process that uses a third-party neutral as an intermediary, to facilitate settlement in conflict resolution and contested legal cases.

Alternative Dispute Resolution in Minnesota began initially as an intended means to avoid litigation. Rule 114 was introduced in 1994 as a practice rule for lawyers governing civil mediations and arbitrations. The process of mediation has continued to evolve over the years and is a valuable tool in the settlement of cases. It has become more than just an effective pretrial process. Mediation in today's world is now also used during the trial phase to resolve issues or matters, during post-trial discussions to settle lingering issues or negate appeals, and even targeted mediation is employed to address specific issues, such as damages or liability.

The Minnesota Supreme Court, recognizing the evolution of the alternative dispute resolution process, began the long task of amending Rule 114 of the General Rules of Practice back in 1997. That process has since included 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 amending Rule 114 and Rule 310, making sweeping changes to the dispute resolution process in Minnesota. As amended, this new rule changes the ADR process through

language that clarifies dispute resolution procedures, identifies responsibilities in the process, and creates new rosters and requirements for professional neutrals. The new rule also codifies an ethical code for neutrals, clarifying the enforcement process and placing the ADR Ethics Board at the heart of the enforcement and oversight of these new rules.

The new Rule 114 went into effect on January 1, 2023.

The New Rule 114 – The Defense Lawyer's To-do List as a Mediation Advocate:

At first glance, Rule 114 appears to be a handbook for mediators and arbitrators. A closer look at the language of the rule reveals that Rule 114 applies to everyone who does any kind of court-annexed ADR. This new rule imposes specific obligations on attorneys with respect to ADR processes. As defense lawyers, what does one need to focus on or be aware of under this new Rule 114? Let's look at ten requirements of Rule 114 that defense lawyers and trial lawyers should incorporate into their mediation advocacy practices.

(1) Defense Lawyers Should Confer with Opposing Counsel and Select an ADR Neutral.

This requirement is not new. What changes is that the new Rule 114 moves this requirement much earlier in the case process. Parties are to confer about ADR processes and select an ADR neutral once they have "commenced a case through service, petition, or motion." Minn. R. 114.04(b) (1994). This rule, coupled with Rules 111.02 and 304.02, requires parties to include ADR information in initial court

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submissions. Parties are also to provide the name of a neutral if selected by agreement of the parties to the court. Courts are now required to order that process and that neutral. Courts are not allowed to impose preferences or requirements as to particular processes or neutrals the attorneys may select. Minn. R. 114.04 (b).

(2) Defense Lawyers Should Inform Clients about ADR Processes.

Attorneys are now required in all civil disputes to inform their clients about available ADR processes. Now, at the time of filing, court administrators are required to provide information as to qualified neutrals listed on relevant rosters. Minn. R. 114.03(a). Parties, by mutual agreement, are not required to use rostered, rule-qualified neutrals; however, all neutrals are now subject to the requirements in Rule 114 and the jurisdiction of the ADR Ethics Board whether or not they are listed on a roster. Inclusion on the roster does ensure that the individual neutral has met the training and practice requirements set forth and required by the Minnesota Supreme Court.

(3) Defense Lawyers Should Exercise Rights to Remove Court appointed ADR Neutrals.

If parties cannot agree on an ADR process, Rule 114 requires the court to select and order a non-binding process. Minn. R. 114.04 (b). If the parties are unable to agree to the selection of an ADR neutral, the court will select from the list of Qualified Neutrals. Minn. R. 114.04 (b). If an attorney is not satisfied with the court appointed neutral, the new Rule 114 sets forth a removal process. 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, an affirmative showing of prejudice brought by motion is required. See Minn. R. 114.04(c).

(4) Defense Lawyers Should Notify the Court of a Settlement.

Attorneys are responsible for notifying the court if a case has settled through ADR. They are also required to now promptly complete settlement documents and finalize closure of the case. Minn. R. 114.05. The Advisory Committee comments clarify that there is no requirement under the new rule that settlement documents be filed if the case itself is not filed with the Court.

(5) Defense Lawyers (trying the case) Should Attend the ADR Proceedings.

Rule 114 now requires that attorneys who will try the case may be required by the court to attend. Minn. R. 114.06(e). Attorneys should carefully read the court's order and/or

address this with the court if there is a reason the attorney trying the case cannot attend. Why? Sanctions. Sanctions are the new teeth in this rule. A court can now award sanctions for violations of the attendance rule.

(6) Defense Lawyers Should Ensure Clients Understand ADR Processes.

(1) ADR is not Discovery. The ADR process is certainly one in which parties learn a lot about claims, both their own and the other side's. The long-standing rule continues that 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. Rule 114 offers a caveat saying that court orders or agreement of all parties, including the neutral, may now allow for disclosure. While there is much discussion over what might be a basis for such a court order, there is agreement that a party's desire to obtain discovery is not likely an adequate basis. And, generally, neutrals are reluctant to consent to a voluntary disclosure in civil cases.

(2) ADR Proceedings Cannot Be Recorded. The pandemic introduced the concept of online mediation as a necessity and it is now a recognized medium in the mediation world. Technology makes it easy to record proceedings and that threatens the confidential sanctity of the process. The new Rule 114 clarifies and states that no recording of any ADR proceeding is permitted, absent 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.

(7) Defense Lawyers Should Maximize Communication with the Neutral.

The new rule defines the instances and the process for communicating with the neutral in advance of an ADR proceeding. There is to be no advance communication with a neutral, absent agreement by all, in any adjudicative process. In mediations and other evaluative, hybrid, or facilitative processes, the new rule recognizes that communication that encourages or facilitates settlement may be valuable.

(8) Defense Lawyers Should Pay the Neutral (as should Plaintiff's Lawyers).

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This sounds obvious. Neutrals are to be paid for their services based on terms provided to the parties in the written agreement governing the process, or in some cases as ordered by the court. Yet, this doesn't always happen. The new Rule 114 provides that neutrals may file an affidavit with the court and seek an order for just and proper relief. Courts can order the payment of ADR fees whether they are court-ordered fees (Minn. R. 114.10) or fees agreed to by private agreement of the parties. The court shall provide notice to the parties and then may issue an order "granting relief as the court deems just and proper." Minn. R. 114.11.

(9) Defense Lawyers Should Be Familiar with the ADR Code of Ethics and the ADR Ethics Board.

The Rule 114 Code of Ethics defines standards of ethical conduct intended to guide the neutrals conducting ADR under this rule. 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. These canons are felt to create a high level of integrity and fairness in the process. Attorney advocates are not bound by these particular rules or subject to the jurisdiction of the ADR Ethics Board. Yet many of these ethical rules are similar to the ones found in the Rules of Professional Responsibility. Attorneys are bound by those rules.

(10) Defense Lawyers Should Embrace the Concept of Self-Determination in Mediation.

The new Rule 114 embraces the concept of self-determination and integrates it as the focus of the mediation process. ADR Professionals are 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." Mediation is a process that requires the parties' participation: it is their dispute, their case and their outcome. Both neutrals and mediation advocates should be mindful of this focus.

Concluding Remarks

The modern-day ADR arena is growing and moving forward. 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. These ADR rules are meant to offer guidance and order to an increasingly popular process for all involved. For ADR providers and also for defense attorneys as ADR advocates, the new Rule 114 is now part of one's life as a defense lawyer and needs to be incorporated into one's practice.

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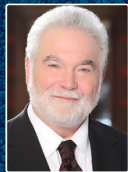
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