

REVIEW & PREVIEW: RULE 114 ETHICS

Leslie Sinner McEvoy, Conflict Resolution Minnesota
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The MN ADR Handbook

**A Guide to Mediation,
Arbitration, and
Other Processes
for
Advocates and Neutrals**

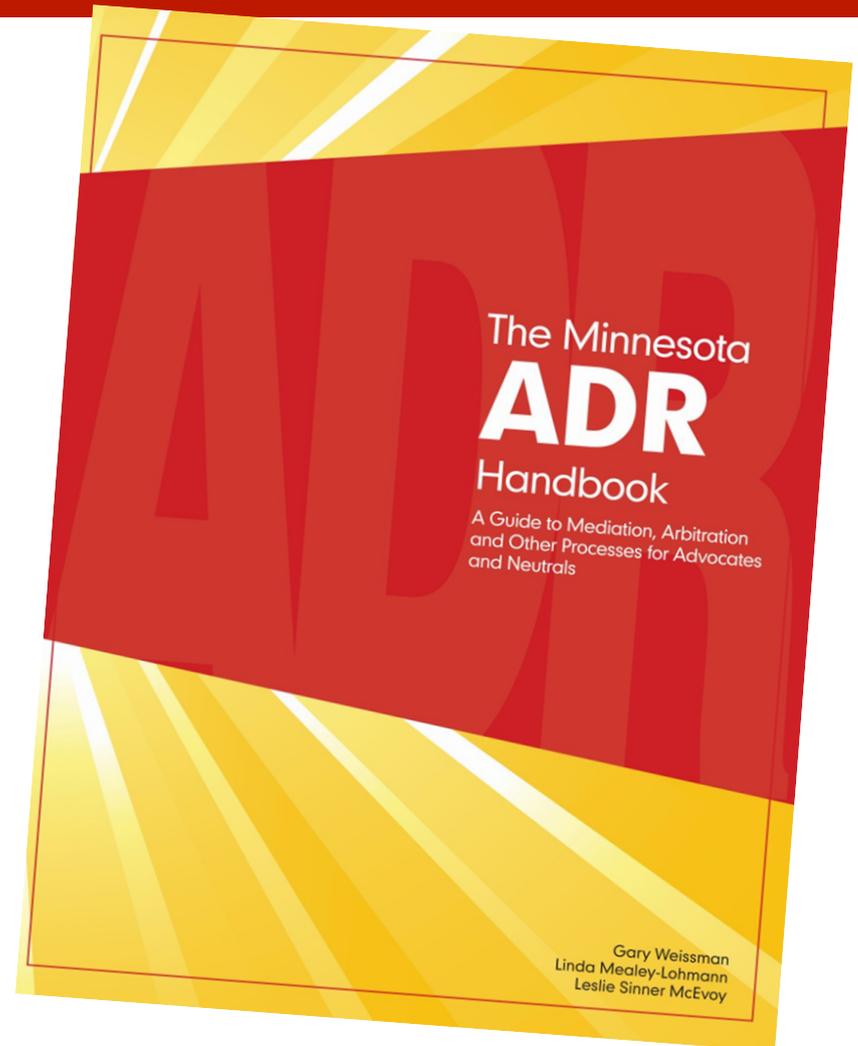
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Available from MN CLE (2011)



Who are you?



INTRODUCTION



AGENDA

- Sources of Ethical & Legal Duties for Neutrals
- Scenarios – Selected Ethical Dilemmas
 - Small Groups
 - Review of Standards & Concepts
 - Applicable Rules – Current & **Proposed**
 - Practice Tips
 - ADR Handbook



CAVEAT: Rule 114 Revisions

- The ADR Ethics Board is currently undertaking major revisions to Rule 114 and the Rule 114 Code of Ethics
- The process is not yet complete
- The current rules are still in place
- The concepts will remain the same, but some of the details may change



Rule 114 Code of Ethics: Jurisdiction



Rule 114 Code of Ethics: Jurisdiction

- **Current Rule 114 Code of Ethics Introduction:**
“Individuals...approved by the ADR Review Board [sic] consent to the jurisdiction of the Board and to compliance with this Code of Ethics.”
- **Proposed Rule 114.15. ADR Code of Ethics**
(a) Introduction. (2) *Consent to Jurisdiction.*
“Individuals,...when providing ADR services in any civil or family court case... consent to the jurisdiction of the ADR Ethics Board and to compliance with this Code of Ethics.”

Sources of Ethical & Legal Duties

- Rule 114
- Rule 114 Code of Ethics
- Model Standards of Conduct for Mediators
- Minnesota Civil Mediation Act
- Federal Arbitration Act
- Minnesota Revised Uniform Arbitration Act
- Code of Ethics for Arbitrators in Commercial Disputes
- Minnesota Rules of Professional Conduct

See *MN ADR Handbook*, p.233-268



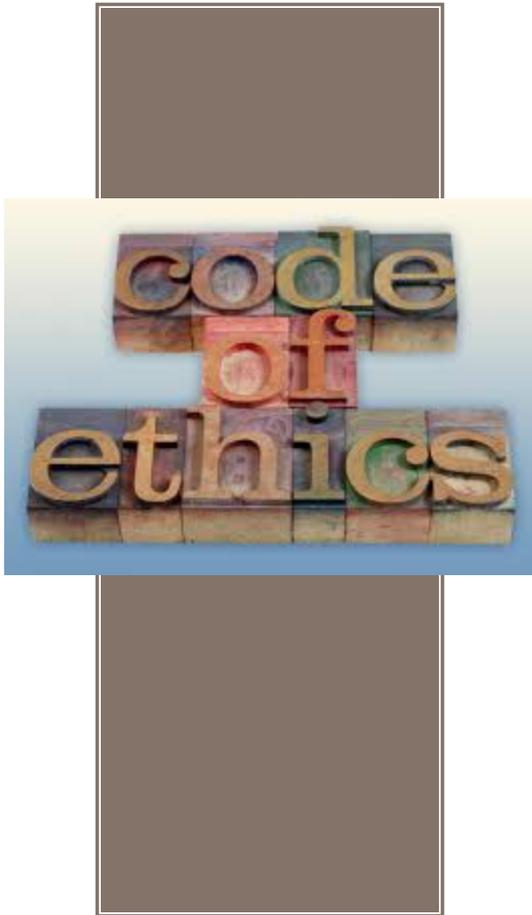
Rule 114

- Rule 114.08 Confidentiality
 - ▣ *See Proposed Rules 114.07 & 114.08*
- Rule 114.09 Arbitration Proceedings
 - ▣ *Omitted* in Proposed Rule 114
- Rule 114.10 Communication with Neutral
 - ▣ *See Proposed Rule 114.10*

MN ADR Handbook, B-9 to B-15



Rule 114 Code of Ethics



Rule I. Impartiality

Rule II. Conflicts of Interest

Rule III. Competence

Rule IV. Confidentiality

Rule V. Quality of Process

Rule VI. Advertising and Solicitation

Rule VII. Fees

Mediation Rule I. Self-Determination

MN ADR Handbook, p. B-22
See Proposed Rule 114.15

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



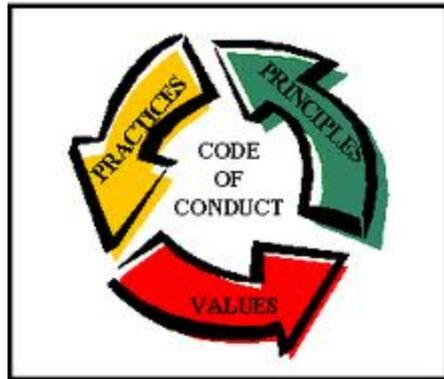
□ Source: Minnesota Supreme Court ADR Ethics Board

NOTE: Proposed Rule 114



- Many are the same/similar in impact
- Some are re-ordered or re-numbered
- Rule 114.09 Arbitration Proceedings is omitted.
- Comments from old ethics rules are largely incorporated into text of proposed rules, as the committee felt the comments were “**best practices**” that should be elevated to “**requirements.**”
- *See* Comment to **Proposed Rule 114.15**

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 Settlement Agreement. (“evident partiality”)

- Minn. Stat. Sec. 572.37

Presentation of Mediator to Public.

Federal Arbitration Act

□ Grounds to Vacate an Arbitration Award:

□ *Evident Partiality*

- “[W]here there was *evident partiality* or corruption in the arbitrators, or either of them”

- 9 U.S.C. Section 10 (a)

□ *Disclosure not mentioned specifically*



Minnesota Revised Uniform Arbitration Act

- Failure to disclose known interest in outcome of arbitration or substantial relationship with a party - Presumption of *Evident Partiality* – 572B.12(e)
- Vacating Award – if there was *Evident Partiality* by an arbitrator appointed as a neutral – 572B.23(a)



AAA/ABA Code of Ethics for Arbitrators

- I. Uphold Integrity & Fairness
- II. Disclose Interests Affecting Impartiality
- III. Avoid Impropriety in Communication
- IV. Conduct Proceedings Fairly & Diligently
- V. Make Decisions in Just Manner
- VI. Be Faithful to Trust & Confidentiality
- VII. Integrity & Fairness in Compensation
- VIII. Advertising Must Be Truthful
- IX. Party Arbitrators Disclose & Comply with Code
- X. Exemptions for Party Arbitrators

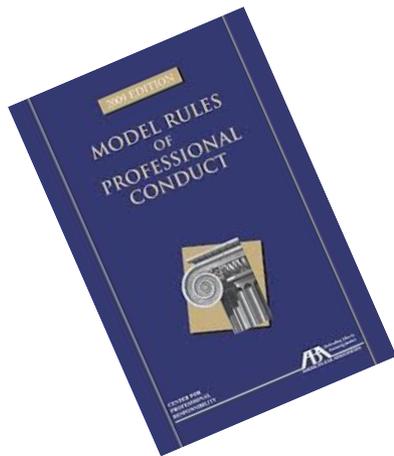
See *MN ADR Handbook, C-31 – C-44*



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



MN ADR Handbook, p. C-1

Scenarios - Assumptions

- Minnesota State Court
- Civil matter
- Rule 114 applies
- “Rule” references are to Rule 114 and Rule 114 Code of Ethics, unless otherwise specified
- “**Proposed Rule**” refers to Proposed Rule 114
- Minnesota Rules of Professional Conduct may also apply in some cases
- “Best Answers”

Certified v. Qualified



1. Selecting a Minnesota Neutral

In selecting a Minnesota neutral, the attorneys and parties review a number of brochures and websites of neutrals.

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



1. This practice is:

- a. a good, ethical marketing strategy.
- b. “not appropriate” under Rule VI of the Code of Ethics for Rule 114.
- c. an ethical violation under Rule VI unless the mediator is “certified” in another state.
- d. b) and c).

1. This practice is:

- a. a good, ethical marketing strategy.
- b. **“not appropriate” under Rule VI of the Code of Ethics for Rule 114.**
- c. an ethical violation under Rule VI unless the mediator is “certified” in another state.
- d. b) and c).

“Qualified Neutral under Rule 114”



- **Rule 114 Code of Ethics**
 - **Rule VI. Advertising and Solicitation**

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

- “...a neutral who is on the Roster may use the phrase ‘**qualified neutral** under Rule 114 of the Minnesota Rules of General Practice’.”

See MN ADR Handbook, p. 292-293

See Proposed Rule 114.15(g) (to same effect)

Celebrating Success?



2. Can a mediator ethically advertise that she/he has 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.

2. Can a mediator ethically advertise that she/he has 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.**



No Promises of Specific Results

- **Rule VI. Advertising and Solicitation** Neutrals must refrain from **promising specific results** - settlement as the outcome of the mediation. Also Model Standards VII.A.1 and 3. *See Proposed Rule 114.15(g)* (to same effect)
- **Mediation Rule I. Self-Determination** - It also may put **pressure on the parties to settle**, undermining the first principle of mediation. Also Model Standard I. *See Proposed Rule 114.15(j)* (to same effect).
- **Practice Tip**: Refrain from advertising settlement rates.


Results

See MN ADR Handbook, p. 293

Impartiality & Disclosure



3. Neutral Affiliations

In a personal injury case, one of the neutrals the parties are inclined to hire is a lawyer who did a lot of work as outside counsel for one of the insurance companies involved in the matter.



3. If the neutral 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 are involved.

3. If the neutral 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 are involved.**

WHAT to Disclose



What: Facts Creating Appearance of Bias

- Facts Creating an Appearance of Bias
 - Any financial or personal interest in the outcome of the arbitration or any existing or past relationship with any of the parties, counsel, witnesses or arbitrators that a reasonable person would consider likely to affect the impartiality of the arbitrator. Minn. Stat. 572B. 12(a)
 - All doubts should be resolved in favor of disclosure.

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.”

Rule 114 Ethics Rule I. Impartiality

“A neutral shall conduct the dispute resolution process in an impartial manner and shall serve only in those matters in which she or he can remain impartial and evenhanded. If at any time the neutral is unable to conduct the process in an impartial manner, the neutral shall withdraw.”

WHEN TO
WITHDRAW?

What: Conflicts of Interest

- “A conflict of interest is any 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.” Rule 114 Ethics Rule II. Conflicts of Interest, Advisory Task Force Comment 1. (Proposed **Rule 114.15 (c)** incorporates comment). See also, Minn. Stat. 572B. 12(a); AAA/ABA Code of Ethics for Arbitrators, Canon II.



AAA/ABA Code of Ethics

- Canon I. An Arbitrator Should Uphold the Integrity and Fairness of the Arbitration Process
 - ▣ *Shall serve impartially*

- Canon II. An Arbitrator Should Disclose Any Interest or Relationship Likely to Affect Impartiality or Which Might Create An Appearance of Impartiality
 - ▣ *Disclosure of conflicts of interest*

Conflicts of Interest: “in the *eyes of the parties*”

- AAA/ABA Code of Ethics for Arbitrators, Canon II.
 - “A. Persons who are requested to serve as arbitrators should, before accepting, disclose:
 - (1) any known or indirect financial or personal interest in the outcome of the arbitration:
 - (2) any known or existing past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the *eyes of any of the parties.*”



What: Conflicts “*Reasonably Known*”

- Rule 114: Disclose actual and potential conflicts of interest “*reasonably known*” to the neutral. Rule 114 Ethics, Rule II. Proposed Rule 114.15(c) (to same effect)
- Model Standard III. B & C: requires a mediator to make a “*reasonable inquiry*”
- MN RUAA: Make a “*reasonable inquiry*” to determine if such conflicts exist. Minn. Stat. Sec. 572B.12(a)
- Make a “*reasonable effort*” to discover conflicts. AAA/ ABA Code of Ethics for Arbitrators, Canon II.B.



MN ADR Handbook, 297-308

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



Conflicts “Reasonably Known”

- **Practice Tip**: Make sufficient inquiry and disclose all actual and potential conflicts. Consider documenting the inquiry made into the facts, the information disclosed regarding potential conflicts, and the parties’ subsequent consent to retaining the mediator. In administered arbitrations this will be managed by the administrator.

See MN ADR Handbook, p. 297-308

In Sum – WHAT to Disclose

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



4. Neutral Affiliations

What if the ADR process has already begun before the neutral realizes that one of the parties is insured by one of the neutral's clients?



4. The neutral:

- a. should disclose potential conflict of interest, but can continue to serve if 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.

4. The neutral:

- a. **should disclose potential conflict of interest, but can continue to serve if 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.

When to Disclose



When: As Soon as Practicable

- **Before accepting appointment**
 - AAA/ABA Code of Ethics, Canon II. A.
 - Minn. Stat. 572B.12(a)
 - Proposed Rule 114.15(2) (at time of selection)
- **“As soon as practicable”**
 - Model Standard III. D.
 - AAA/ABA Code of Ethics Canon II. C.
- **“when it becomes known”** Proposed Rule 114.15(c)(2)
- **BEST PRACTICE** – “[D]isclose, as soon as practicable, any information that has the potential to affect the integrity of the process and the parties’ perception of the ability of the neutral to proceed in a fair and impartial manner.”

The image shows the word "ASAP" in a bold, white, sans-serif font against a black rectangular background. The letters are slightly shadowed, giving it a 3D appearance.

When: Continuing Obligation

- Neutral’s obligation to disclose is ongoing throughout the process
- In addition to disclosures at the outset, as soon as practicable arbitrator must disclose any new facts discovered DURING the process or any newly discovered “old” facts.
- Rule 114 Code of Ethics Rule II; **Proposed Rule 114.15(c)(2)**; Minn. Stat. 572B.12(b); AAA/ABA Code of Ethics for Arbitrators Canon II.C.

CONTINUE ▶

Continuing Obligation to Disclose

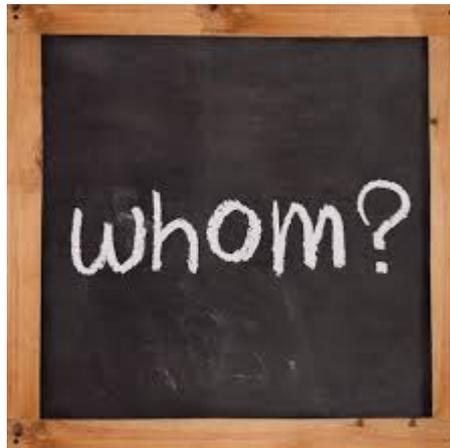
Consider, Obtain Consent

- **Rule II. Conflicts of Interest** - Arbitrator should **disclose and continue to serve *only* if all parties consent, *and* if the neutral reasonably believes that the conflict will not inhibit the neutral's impartiality.** ATF Comment 1. *See Proposed Rule 114.15 (c)*
- See also, Code of Ethics for Arbitrators, Canon II.C., Model Standard III. D, which require disclosure of conflicts arising after accepting appointment, as “**soon as practicable.**”



See MN ADR Handbook, p. 300-304

To Whom to Disclose



To Whom: All



- All Parties
 - ▣ Rule 114 Code of Ethics, Rule II.
 - ▣ Minn. Stat. 572B.12 (a)
 - ▣ AAA/ABA Code of Ethics for Arbitrators, Canon II.E.
- Other Arbitrators
 - ▣ Minn. Stat. 572B.12(a) & (b)
 - ▣ AAA/ABA Code of Ethics for Arbitrators, Canon II.E.

How to Disclose



HOW?

How: In Writing

- Facts
- Reasonable Inquiry
- Timing of Disclosure
- Consent to Proceed

Put it in writing



How: Details

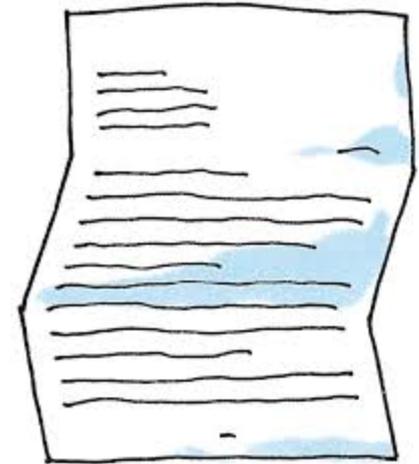
- General nature of the conflict(s)
- Frequency
- Timing
- Significance of relationships or circumstances
- Assertion that facts disclosed will not affect impartiality – if believe can proceed
- “Reasonable Inquiry”
- **CAVEAT: Do Not Disclose Confidential Information** from another proceeding or attorney-client relationship.

DETAILS

How: Format

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

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



5. After Disclosure

- You were selected to arbitrate/mediate an employment non-compete matter. As required, before serving, you disclosed that 15 years earlier you had worked at a firm with some lawyers who now work with defense counsel. All parties consented to your continued service.



5. Can you continue to serve?

- Yes, all parties consented to your service
- Yes, all parties consented to your service and it would be inefficient to withdraw
- Yes, if you have made an independent assessment that you can proceed impartially

5. Can you continue to serve?

- Yes, all parties consented to your service
- Yes, all parties consented to your service and it would be inefficient to withdraw
- **Yes, if you have made an independent assessment that you can proceed impartially**

After Disclosure



After Disclosure: Serve or Withdraw?

- To serve or not to serve?
 - **Rule 114 Code of Ethics, Rule II**: “*Decline* to participate unless the parties choose to retain the neutral”
 - **Proposed Rule 114.15(c)(1)**; “*may* serve if the parties agree”
 - **AAA/ABA Code of Ethics for Arbitrators**
 - Serve if all agree – Canon II.F.
 - Withdraw if all request – Canon II.G.
 - If fewer than all request withdrawal, withdraw *unless* –
 - There are procedures in place to challenge - follow - OR
 - Arbitrator determines challenge is not substantial and can be fair and impartial – Canon II.G.
 - **QUERY**: Is it a good idea to continue?



After Disclosure: Independent Assessment

WHEN TO WITHDRAW?

- A neutral must decline to serve or withdraw if unable to remain impartial
- Even if the parties agree to retain or continue, a neutral “must make an *independent assessment* of whether he or she can proceed in an *impartial* manner. If [he or she] believes that the conflict of interest would inhibit his or her impartiality, [he or she] should *decline the appointment or withdraw* from the process.” See Rule 114 Code of Ethics. Rule I. & II. Advisory Task Force Comment 1.

After Disclosure: Proposed Rule 114.15(c)

- Proposed Rule 114.15(c)(1)
- “Even with consent of all parties, the Neutral must exercise caution in circumstances which would raise legitimate questions about the integrity of the ADR process. If a conflict of interest clearly impairs a Neutral’s impartiality, *the Neutral shall withdraw regardless of the express agreement of the parties.*”

Withdraw

Rule 114 Ethics Rule II. Conflicts of Interest

- Disclose all actual and potential conflicts of interest “*reasonably known*”
- After disclosure, “*decline to participate*” unless all parties choose to retain
 - **CAVEAT**: if all parties choose to retain, neutral may proceed, **unless the neutral believes** that the conflict of interest would impair the neutral’s impartiality (incorporated in **Proposed Rule 114.15(c)**).
 - **ALERT**: **Proposed Rule 114.15(c)** *reverses* the presumption (“After disclosure,... Neutral *may serve* if ... parties agree”)
- Governs conduct during and after the process

Consequences : Failure to Disclose or Withdraw



Consequences: Failure to Disclose or Withdraw

□ Parties

- Setting aside or reforming a mediated settlement agreement – MN Civil Mediation Act
- Vacation of Award – FAA & MN RUAA
- Increased expense & inefficiency
- Decline in confidence in the p

□ Arbitrator

- Personal –
 - Reputation for good process
 - Professional integrity
- Ethical - Discipline



Caveat: Party Arbitrators



- ***Neutral Arbitrator*** – appointed by the court, other arbitrators or all the parties
 - ***Party Arbitrator*** – appointed by fewer than all the parties
 - ***Sole Arbitrator*** – always “neutral”
 - ***Panel Arbitrator*** – may be all neutral or a combination of neutral and party arbitrators
- See ***MN ADR Handbook***, 298, 321-322

Caveat: Party Arbitrators



- Partisan – a party arbitrator is presumed to be partisan and NOT neutral
- Rules of disclosure differ for “party” arbitrators
RUAA & AAA (FAA and Rule 114 do not address)
- “*Evident partiality*” is *not* cause to withdraw for party arbitrators
- See Minn. Stat. 572B.12 & AAA/ABA Code of Ethics for Arbitrators, Canon IX. & X.
 - See *MN ADR Handbook*, 298, 321-322

Neutral Disclosure Checklist



Neutral Disclosures - Checklist

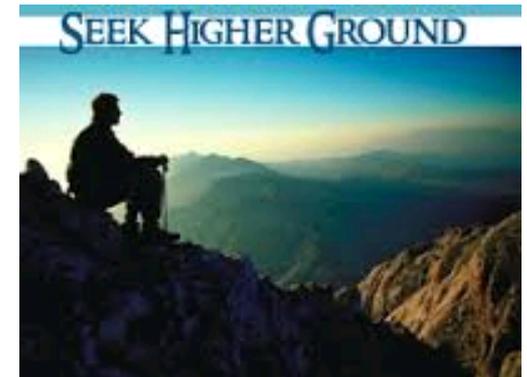
<p style="text-align: center;">TABLE 18. NEUTRALS CONFLICTS OF INTEREST DISCLOSURE SUMMARY</p>	
What to disclose	Conflicts of interest "reasonably known" after "reasonable inquiry"
	Conflicts of interest – all facts that might create an appearance of partiality or bias
When to disclose	As soon as practicable, before appointment where possible
	Continuing obligation to disclose newly discovered facts throughout the process
Whom to disclose to	All parties and, in arbitration, other arbitrators
How to disclose	<p>In writing, where possible, including:</p> <ul style="list-style-type: none"> • the general nature of the conflict • the frequency, timing and significance of the conflict • the "reasonable inquiry" to discover conflicts

Neutral Disclosures – Checklist

What to do after disclosure	Serve if all parties agree <i>and</i> neutral can remain impartial
	Decline to serve if any party requests withdrawal
	CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon II.G:
	<ul style="list-style-type: none"> • If all parties agree, serve • If all parties request withdrawal, withdraw • If fewer than all parties request withdrawal, withdraw unless: <ul style="list-style-type: none"> ▪ challenge procedures apply; or ▪ the objection is insubstantial and arbitrator can remain impartial
	Independently assess whether facts will affect impartiality or the appearance of impartiality
What may happen after failure to disclose	Discipline
	Vacation of award or setting aside or reformation of mediated settlement agreement

Practice Tip – Higher Ground

- Make a reasonable inquiry in all cases
- Document the inquiry
- As soon as practicable, disclose all facts - that may create an impression of bias - to all
- Document the disclosure
- Proceed only if all agree
- Make an independent assessment
- Durability of settlements/awards is at stake
- Professional integrity is at stake



Conflicts Disclosure : Process

- Disclose Conflict
- Consider Impact of Conflict
 - ▣ Continue
 - If all parties agree AND
 - If arbitrator assesses that Conflict will not interfere with ethical duties
 - ▣ Withdraw
 - If any party so desires OR
 - If arbitrator assesses that Conflict MAY interfere with ethical duties



When in Doubt.....

- Disclose, Disclose, Disclose
- Withdraw, Withdraw, Withdraw



KEEP
CALM
AND
DISCLOSE
EVERYTHING!

Neutral Experience



6. Neutral Experience

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



6. The neutral 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 can meet the reasonable expectations of the parties, and if so, serve if parties desire.

6. The neutral 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 can meet the reasonable expectations of the parties, and if so, serve if parties desire.**

“Reasonable Expectations of the Parties”

- **Subject matter expertise is not required.** (But it is often expected in arbitration and some other adjudicative evaluative processes).
- **Rule III. Competence** requires that the neutral may only serve when he/she has the “**necessary qualifications**” to satisfy the “**reasonable expectations of the parties.**” *But see Proposed Rule 114.15(d)*

Also Model Standard IV A. - Competence.

- **Rule III Competence**, ATF Cmt. 1 - neutral should **decline the work, request assistance or withdraw** from a dispute “beyond the neutral’s competence.”

See Proposed Rule 114.15(d) (to same effect as Cmt. 1).



Proposed Rule 114.15(d): *New Standard*

Qualifications and Ability to Fulfill Requested Role

Rule III.(d) Competence. ~~A neutral shall serve as a neutral only when she/he has the necessary qualifications to satisfy the reasonable expectations of the parties. A person shall not serve as a Neutral unless she or he possesses the qualifications and the ability to fulfill the role the parties have asked the Neutral 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 individuals to the conflict with a written statement of qualifications prior to beginning services. The statement shall describe educational background and relevant training and experience in the field.~~

Practice Tip: Disclose, Consider, Consent

- ❑ Disclose relevant training, education, and experience
- ❑ Analyze whether he/she can meet the “**reasonable expectations of the parties**” (current standard) or proposed “**qualifications and the ability**” to fulfill requested role (proposed standard).
- ❑ Serve if the parties still want to hire after disclosure and assessment
- ❑ Get assent/waiver in writing

See MN ADR Handbook, p. 296-297

7. Neutral Fees

The parties are considering retaining a mediator who offers the following fee structure: nothing unless an agreement is reached, \$400 per hour if an agreement is reached.



7. Is this ethical?

- a. **No, the Rule 114 Code of Ethics prohibits contingency fees.**
- b. Yes, the Rule 114 Code of Ethics permits this.
- c. Yes, the Rule 114 Code of Ethics permits this, if the parties agree in writing in advance.
- d. It's unclear; the Rule 114 Code of Ethics does not explicitly address this.

No Contingency Fees

- **Rule VII. Fees** - **prohibits fees contingent** upon the outcome of the ADR process. Also **Model Standard VIII. B. 1.** *See Proposed Rule 114.15(h)* (to same effect)
- **NOTE: No Referral Fees** - Can't offer reduced mediation fee in exchange for referrals either. **Rule VII. Fees** - prohibits a neutral from giving or receiving any commission, rebate, or compensation for referrals. *See Proposed Rule 114.15(h)* (to same effect). **Model Standards of Conduct** is silent on this issue.



See MN ADR Handbook, p. 294

Impartiality & Fees

Proposed New Comment

- *While a Neutral may accept **unequal fee payments** from the parties, a Neutral should not allow such a fee arrangement to adversely impact the Neutral's ability to conduct the ADR process in an impartial manner. (Rule VII Fees Comment – 2017 Proposed Amendment)*

8. Hiring the Neutral

After considering several candidates, the parties finally agree to hire a particular mediator. Through word-of-mouth, the parties have learned that the mediator's style, training and experience appear to be a good fit. During a teleconference, the neutral generally explains her background and fees. The mediation is scheduled for the following week.



8. Can the mediator legally and ethically go forward with the mediation?

- a. Yes, the parties have an oral, binding agreement about fees and a good understanding of the mediator's training and experience.
- b. No, Rule 114 requires all fee arrangements to be in writing.
- c. No, the mediator has not complied with Rule 114 requirements regarding fees or disclosures about education, training and experience.

8. Can the mediator legally and ethically go forward with the mediation?

- a. Yes, the parties have an oral, binding agreement about fees and a good understanding of the mediator's training and experience.
- b. No, Rule 114 requires all fee arrangements to be in writing.
- c. **No, the mediator has not complied with Rule 114 requirements regarding fees or disclosures about education, training and experience.**

Fees Fully Explained in Advance

- **Rule VII. 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.” See **Proposed Rule 114.15(h)**(to same effect)
- **ATF Comment 1.** “The better practice in reaching an understanding about fees is to set down the arrangements in a **written agreement.**”
- **Proposed New Rule: “signed written agreement”** required. See **Proposed Rules 114.05(d) and 114.15(h)**



See **MN ADR Handbook**, p. 292-294

Written Statement of Qualifications **in Advance**

- **Minn. Stat. Sec. 572.37 Presentation of Mediator to Public** : “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 educational background and relevant training and experience in the field.”
- **Misdemeanor**: a mediator is guilty of a petty misdemeanor if she/he does not provide the specified info in writing.

Written Statement of Qualifications **in Advance**

- **Rule III. Competence**, ATF Comment 2 (“Neutrals must provide information regarding their relevant training, education and experience to the parties (Minnesota Civil Mediation Act.)”)
- **Proposed Rule 114.15(d) 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.”

Sample Clause for Agreement to Mediate



SAMPLE CLAUSE FOR AGREEMENT TO MEDIATE

Disclosures and Consent. The mediator has provided parties and counsel with a written summary of pertinent education and experience. The mediator has inquired of counsel and the parties about: (1) the subject matter of the dispute, (2) the identity of the interested persons, (3) previous party or counsel contacts with the mediator and the mediator's law firm, and (4) other facts that could present a potential conflict of interest. The mediator has disclosed [potential conflicts of interest]. The parties acknowledge

the mediator's disclosures and consent to his/her service as mediator in this matter until such time as either party or the mediator terminates participation in the mediation.

Chalmers, *supra* at 28.

Unrepresented Parties



9. Neutral's Introduction

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



9. 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 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.

9. 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 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.**

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 neutral to **explain the difference** between a **lawyer's role** in representing a client and the lawyer-neutral's **role as a neutral**.
- **Practice tip**: Include a **statement of role** in writing.



See MN ADR Handbook, p. 282-3

The Neutral's Role



PRACTICE TIP FOR LAWYER-NEUTRALS

Clarifying the Neutral's Role

Introductory statement: Include a statement at the beginning of any ADR process, disclosing that the neutral does not represent any party and describing how the neutral's role differs from the role of an attorney. This can be done at the beginning of the mediation or hearing, and/or even earlier at a pre-mediation or pre-hearing conference.

Agreement to mediate: As a routine matter, lawyer-mediators should include a clause in the agreement to mediate clarifying the mediator's role (disclosing that the neutral does not represent any party and describing how the neutral's role differs from the role of an attorney). This is in addition to some iteration of the "magic language" prescribed by the Minnesota Civil Mediation Act for agreements to mediate and mediated settlement agreements. *See supra* chapter 2, section 2.2(E)(7).

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.

10. Party Competence

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



10. 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

10. 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

Party Competence Issues

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

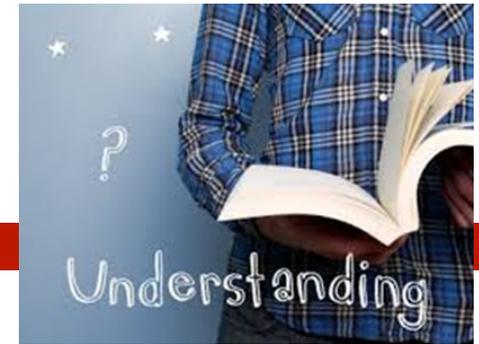


Unrepresented Parties: *Proceed with Caution*

- 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



Quality of the Process



- **Rule V. ATF Comment 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.” See **Proposed Rule 114.15 (f)** (to same effect).
- **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.

Self-Determination: Mediator Intervention*

The mediator:	
Shall not	<ul style="list-style-type: none">• Require a party to stay in mediation against the party's will
May	<ul style="list-style-type: none">• Provide information about the process• Raise issues• Offer opinions about the strengths and weaknesses of a case• Draft proposals• Help parties explore options• Suggest options in response to parties' requests
Should	<ul style="list-style-type: none">• Give parties the opportunity to consider all proposed options• Make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions (although the mediator cannot personally ensure that each party has made a fully informed choice)
May not	<ul style="list-style-type: none">• Coerce the parties to accept any particular option

But see Proposed Rule 114.15(j)*

MN ADR Handbook, p. 245

Impact on Impartiality



- **Rule I. Impartiality**

“....If at any time the neutral is unable to conduct the process in an impartial manner, the neutral shall withdraw.”

- **ATF Comment 1.**

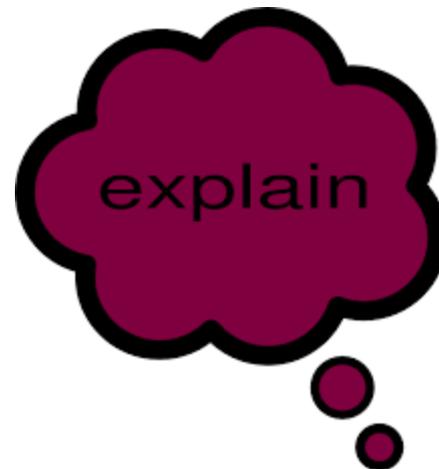
“....Impartiality means freedom from favoritism or bias either by word or action, and **a commitment to serve all parties** as opposed to a single party.” See **Proposed Rule 114.15(b)** (to same effect).

- **Code of Ethics for Arbitrators, Canons I.D.** “Arbitrators are to avoid conduct that gives the “appearance of partiality toward or against any party.”

Lawyer-Neutral

□ **MRPC 2.4**

- ▣ Inform unrepresented parties that lawyer-neutral does not represent them
- ▣ Explain the difference between the lawyer's role as a neutral and the lawyer's role as one who represents a client where it appears the unrepresented party does not understand



Practice Tip: Clarifying the Arbitrator's Role

PRACTICE TIP FOR LAWYER-NEUTRALS

Clarifying the Neutral's Role

Introductory statement: Include a statement at the beginning of any ADR process, disclosing that the neutral does not represent any party and describing how the neutral's role differs from the role of an attorney. This can be done at the beginning of the mediation or hearing, and/or even earlier at a pre-mediation or pre-hearing conference.

Mediators routinely include a clause in the agreement to mediate clarifying the neutral's role when working with unrepresented parties.

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.

Put it in writing



MN ADR Handbook, 282-283

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 party 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
 - ▣ 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

MN ADR Handbook, p. 284-6
p. 312-4

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

Assess and Address Capacity

- Assessing and Addressing Party Capacity
 - ▣ Can the party understand and manage the arbitration advocacy tasks without inappropriate interventions by the arbitrator that could give the appearance of partiality
 - ▣ If the arbitrator determines that the party does not have the capacity to proceed, the arbitrator should withdraw or postpone so that the party can obtain assistance.
- Intervene and Assist with Caution
 - ▣ In a manner that upholds a quality process while not undermining impartiality and *fairness for all*.

General Tips for Interventions

TABLE 16.

TIPS FOR NEUTRAL INTERVENTIONS WITH UNREPRESENTED PARTIES

All neutrals

- Remind the unrepresented party of the neutral's role
- Remind the unrepresented party of the possibility of seeking counsel
- Suggest a recess to think and/or seek counsel or other assistance
- Enlist the aid of counsel for the represented party
- Educate all parties about effective negotiation, arbitration, or other process techniques
- Explain the neutral's obligation to withdraw, if necessary
- Withdraw or postpone if the unrepresented party is unable to participate effectively

Tips for Interventions - Arbitrators

Arbitrators	<ul style="list-style-type: none">• Provide generalized direction and assistance to all parties jointly• Explain the prohibition of ex parte communication with the arbitrator early in the process• Avoid use of confusing legal jargon that can lead to requests for “advice”• Avoid particularized assistance as much as possible• Review the goal of the arbitration, the legal standards and burdens of proof jointly for both parties• Ask questions, make open-ended suggestions or outline options• If necessary, seek additional evidence from both parties, as permitted (CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon IV.E)
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A Heightened Challenge

CAUTION

Unrepresented and Struggling

The participation of a party who is both unrepresented and lacking capacity in some other way heightens the challenge for the neutral. Without counsel to act as a buffer for the neutral and an advisor for the participant, the neutral has the sole responsibility to assess capacity and address it. The neutral should guard against the temptation to exceed his or her role by offering inappropriate assistance. Ultimately, if the lack of capacity significantly affects the quality of the process or undermines party self-determination, the neutral will need to withdraw.



MN ADR Handbook, p. 313

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: Personality Clash



11. Mediator Antipathy

In the course of performing your duties as a neutral in an ADR process, you as the neutral conclude inwardly that one of the parties is an insufferable, arrogant, irresponsible cad.



11. 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.

11. 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 I. Impartiality** requires a neutral to conduct an impartial process and to **withdraw** if cannot remain impartial. See **Proposed Rule 114.15(b)** (to same effect).
- **Rule V. Quality of the Process** requires a neutral to ensure a “quality process.” ATF Comment 4 states “A neutral should **withdraw** from an ADR process when incapable of serving or when unable to remain neutral.”
- **Minn. Stat. 572.36 Setting Aside or Reforming a Mediated Settlement Agreement** – on grounds of “evident partiality”
- **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.
- **Minn. Stat. 572B.23(a)(2)(A) Vacating Award** – on grounds of “evident partiality”
- **Code of Ethics for Arbitrators, Canon I. D.** “Arbitrators should conduct themselves in a way that is fair to all parties”

See ***MN ADR Handbook***, p. 240-243

Breaks in the Process



12. This conduct is:

- a. ethical because the mediator is trying to “expedite the process” as required under Ethics Rule V.
- b. unethical because the mediator did not honor the parties’ request, violating self-determination.

12. This conduct is:

- a. ethical because the mediator is trying to “expedite the process” as required under Ethics Rule V.
- b. **unethical because the mediator did not honor the parties’ request, violating self-determination.**

Coercion \neq Self Determination

- **Mediation Rule I. Self-Determination** specifically prohibits a mediator from requiring a party to stay in mediation against the party's will. *But see Proposed Rule 114.15(j)* (language omitted)
- **Rule V. Quality of Process**, ATF Comment 1, “A neutral should be prepared to commit the attention essential to the ADR process,” and Comment 2, “A neutral should satisfy the reasonable expectations of the parties concerning the timing of the process.” *See Proposed Rule 114.15(f)* (similar language now in rule)
- Model Standard I - Self Determination requires that parties make “free and informed choices as to process and outcome.”



See MN ADR Handbook, p. 242-245; p. 308-312

Quality Process: “Switching Hats”



13. “Switching Hats”

- During the course of an arbitration hearing, the parties tell you that they would like you to mediate part of the dispute, and arbitrate the remaining issues. Can you do this?



13. Can the arbitrator “switch” to being a mediator?

- a. Yes, because the parties both requested the switch
- b. No, because confidential information may be shared in arbitration.
- c. Yes, if all parties give informed consent.
- d. Yes, if all parties give informed consent and the arbitrator has the competence to be a mediator.

13. Can the arbitrator “switch” to being a mediator?

- a. Yes, because the parties both requested the switch
- b. No, because confidential information may be shared in arbitration.
- c. Yes, if all parties give informed consent.
- d. **Yes, if all parties give informed consent and the arbitrator has the competence to be a mediator.**

Switching Hats “By Design”



- **When dual role in place at outset**
 - Informed Consent
 - Competence
 - Confidential Information

- **Put it in Writing**

Minnesota ADR Handbook, p. 317-18

Switching Hats “Mid-Stream”



- **When dual role is a “surprise”**
 - Pause
 - Competence
 - Informed Consent
 - Confidential Information

- **Put it in Writing**

***Minnesota ADR Handbook*, p. 317-18**

Final Note: Impartiality

Final Note: Impartiality

If at any time during the process the neutral believes that he or she can no longer remain impartial as a result of the dual role, he or she must withdraw. Although the use of a second neutral is not always practical or expedient, that may be the ethical choice in some matters.



Communication



14. 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.



14. 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 discovery
- 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

14. 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 discovery**
- 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

Permitted Neutral Communication with the Court

TABLE 21. PERMITTED NEUTRAL COMMUNICATION WITH THE COURT	
MINN. GEN. R. PRAC. 114.10(c): During the Process	MINN. GEN. R. PRAC. 114.10(d): After the Process
Failure of a party or attorney to attend	Any lack of agreement, without any comment or recommendation
Requests for additional time to complete the process	If agreement is reached, its terms may be reported consistent with district practice
Procedural actions by the court that might facilitate the process, <i>but only with written consent of the parties</i>	Pending motions, outstanding issues, discovery or other action that might facilitate settlement, <i>but only with written consent of the parties</i>
The neutral's assessment that the matter is not appropriate for the particular ADR process attempted	

See *MN ADR Handbook*, p. 326

Changes: Proposed Rule 114.10

- **Proposed Rule 114.10(c):** Adds as permissible -
 - ▣ Whether case has undergone ADR and whether settled
 - ▣ Failure to pay court ordered fees
 - ▣ In a moderated settlement conference, pursuant to waiver or court order
- **Proposed Rule 114.10(d):** Adds as permissible -
 - ▣ With written consent whether case has settled
 - ▣ Failure to pay some or all of the fees

CH-CH-CH-CHANGES!

15. 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.”



15. 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.

15. 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)

Ex parte communications permitted

- Some Mediators → All is “public” unless identify specific confidential information
- Model Standards V.B. → All is confidential unless permission to share
- *See Proposed Rule 114.10(b)* (to same effect)

Discuss Expectations for Caucus Confidentiality at the Outset

- **Rule IV. Confidentiality** requires the neutral to maintain confidentiality to the extent of the parties' agreement.
- **Rule IV. Confidentiality** ATF Comment 1. “a neutral should 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....”
- *See Proposed Rule 114.15(e)* (comment elevated to rule)



*See **MN ADR Handbook**, p. 322-323*

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 V. Quality of the Process** – would require the mediator to withdraw if unable to remain neutral or if the process is being used to further illegal conduct
- *See Proposed Rule 114.15(f)* (to same effect)

WHEN TO
WITHDRAW?

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

16. Ex Parte Communication

- You are arbitrating a matter as a sole arbitrator. At lunch, you and the parties adjourn and agree to resume in 1 hour. You leave the conference room ahead of the others and enter the elevator to go to grab some lunch. Before the door closes, one of the parties enters and asks you how you think the hearing is going.



16. What should the arbitrator do?

- a. Respond very generally.
- b. Ask what she would like to know.
- c. Hit the open door button and excuse yourself.
- d. Nothing, but after lunch withdraw as arbitrator.

16. What should the arbitrator do?

- a. Respond very generally.
- b. Ask what she would like to know.
- c. **Hit the open door button and excuse yourself.**
- d. Nothing, but after lunch withdraw as arbitrator.

No Ex Parte Communication

- No Ex Parte Communication with the Arbitrator – Minn. R. Gen Prac. 114.10(a); **Proposed Rule 114.10(a)**(to same effect). Code of Ethics for Arbitrators, Canon III. B.
 - ▣ *But see* Canons III, IX, and X re **Party Arbitrators**



Withdraw?

- **Rule V. Quality of the Process** – would require the arbitrator to withdraw if unable to remain neutral.



WHEN TO
WITHDRAW?

- **Practice Tip:** The arbitrator should explain the rules against ex parte communication at the beginning of the hearing to guard against inappropriate communication.

Arbitration Proceedings Confidential

- Notes and records of arbitrator are confidential and shall not be disclosed except with agreement of all parties and neutral OR court order – Rule 114.08(e)
See Proposed Rule 114.08(a) (to same effect).
- Arbitrators are generally prohibited from disclosing any information about an arbitration – AAA/ABA Code of Ethics for Arbitrators, Canon VI. B.



17. 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 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.

17. 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.

17. 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.

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 114.08(b) Inadmissibility** prohibits the admission of any evidence of “statements made” in mediation, subject to Minn. Stat. 595.02.
- *See Proposed Rule 114.07(b)*(to same effect)



See MN ADR Handbook, p. 252-254

Conflicts of Interest: Subsequent Representation



Dual Practices & Subsequent Representation

- Many attorneys represent clients AND also act as arbitrators and mediators in their practice
- There are no prohibitions on doing this
- What problems can arise in a dual practice?



18. New Business?

Plaintiff was so impressed with the mediator's substantive knowledge that, three months after the mediated settlement in her case was approved by the court, Plaintiff asked the mediator if the mediator would represent her in another lawsuit.



18. 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.

18. 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
- Minnesota General Rules of Practice 114
Appendix, Code of Ethics Rule II. Conflicts of Interest
- Model Standards III. F.
- Code of Ethics for Arbitrators, Canon I. C.



Lawyer-Mediators – MRPC Standard

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

See MN ADR Handbook, p. 279-281

Subsequent Matter – Unrelated or Consent

- **Rule II. Conflicts of Interest** permits the neutral to represent an ADR participant in another lawsuit if (1) the new lawsuit does not “involve a **substantially factually related matter**”, OR (2) the mediator gets the consent of all parties to the original matter **and** a reasonable time has elapsed. **Proposed Rule 114.15(c)**(to same effect).
- **BUT: Rule II. Conflicts of Interest**, ATF Comment 3. “In deciding whether to establish a relationship with one of the parties in an *unrelated* matter, the neutral should exercise caution in circumstances which would raise legitimate questions about the integrity of the ADR process.” **Proposed Rule 114.15(c)**(to same effect).
- **Proposed Rule 114.15(c)** (to same effect)(adds “Neutral shall withdraw regardless of the express agreement of the parties” if conflict of interest impairs Neutral’s impartiality).



Conflicts of Interest: Representation of Participants

	MINN. R. PROF'L CONDUCT 1.12	MINN. GEN. R. PRAC. 114 APPENDIX, CODE OF ETHICS RULE II
Who	Lawyer-neutrals	Neutrals in another profession
Prohibition	"[S]hall not represent anyone in connection with a matter in which the lawyer participated personally and substantially" as a neutral (MINN. R. PROF'L CONDUCT 1.12(a))	Shall not, "for a reasonable time under the particular circumstances ... establish a professional relationship in that other profession with one of the parties, or any person ... in a substantially factually related matter"
Consent	May proceed with representation if all parties give informed consent, confirmed in writing (<i>Id.</i>)	May proceed with representation if parties consent
Disqualification of firm	Firm is also disqualified unless lawyer-neutral is timely screened and proper notices given, due to neutral confidentiality obligations (MINN. R. PROF'L CONDUCT 1.12(c) & cmt. 3)	Firm is not automatically disqualified, but neutral must be mindful of confidentiality requirements of Rule 114 Code of Ethics Rule IV (MINN. GEN. R. PRAC. 114 APPENDIX, CODE OF ETHICS RULE II, advisory task force comment 6 (1997))
Party arbitrators	Rule does not apply to party arbitrators (MINN. R. PROF'L CONDUCT 1.12(d))	(No parallel exception)

CAUTION: Unrelated Matters



Unrelated Matters – Appearances are Everything

Neutrals in large firms face a delicate balancing act when:

1. a party in a potential ADR matter was a former client of the firm in an *unrelated matter*; or
2. a party in a past ADR process (over which a firm member presided) seeks representation by the firm in an *unrelated matter*.

While proceeding in these matters may not technically rise to the level of rules violations, ultimately it is the “smell test” that prevails. If going forward in either case (even with disclosures and informed consent) would create the appearance of impropriety, the firm should decline representation.

AAA/ABA Code of Ethics



□ Canon I.C.

After accepting appointment, while serving, or after the arbitration, an arbitrator “**should avoid**” entering into personal or professional relationships with parties that might affect impartiality of the arbitrator or “**might reasonably create the appearance of partiality.**”

- This does NOT apply to **Party Arbitrators**

Subsequent Representation Checklist

- Does NOT involve a “substantially factually related matter” [Rule II.]
- Is NOT in connection with a matter in which a lawyer “participated personally and substantially” as a mediator [MRPC Rule 1.12]
- If a related matter, with consent of all parties and a reasonable time has elapsed [Rule II.] [informed consent, confirmed in writing, MRPC Rule 1.12]
- “...in an *unrelated* matter, the neutral should exercise caution in circumstances which would raise legitimate questions about the integrity of the ADR process.” [Rule II., ATF Comment 3.]



In Sum

- **Related Matter**
 - ▣ “Participated personally and substantially” - MRPC 1.12
 - ▣ “Substantially factually related matter” - Rule 114
- **Reasonable Time** - Rule 114
- **Consent** - Both
- **Firm Disqualification** – MRPC 1.12
- **Party Arbitrators** -NA – MRPC 1.12
- **Unrelated Matter**
 - ▣ Integrity of the Process
 - ▣ Appearance of Impropriety

Bottom Line: The Smell Test

**Model Standard of Conduct
for Mediators, Standard III.
F. Conflicts of Interest.**

“Subsequent to the mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise a question about the **integrity of the mediation.**”



Thank You!



- The set of ethical dilemmas upon which this presentation is based was originally developed by Rebecca Picard in March 2000 for a presentation for Minnesota CLE.
- Those problems were updated and adapted by me, Linda Mealey-Lohmann and Rebecca Picard for use in our ADR classes in 2009 and subsequent terms.
- Significant further revisions and updates were made by me for subsequent presentations and for this presentation today.
- Questions? Feel free to contact me at lsinnermcevoy@minncle.org

The MN ADR Handbook

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