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ETHICAL/PROFESSIONAL RESPONSIBILITY CONCERNS FOR RULE 114 LAWYER-MEDIATORS: A VACUUM OF APPLICABLE RULES?

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The February 1995 Volume of Minnesota's Journal of Law and Politics included a "Who's Who in ADR" listing. At least 12 of the 300 people who paid the requisite fee to be included on the list, may have committed a petty misdemeanor by falsely identifying themselves as "certified" mediators. There is no such thing as a "certified" mediator in the State of Minnesota. Any of the dozen who happened to be a lawyer may also have run afoul of Rule 7.1 of the Minnesota Rules of Professional Conduct which, in pertinent part, states that "a lawyer shall not make a false or misleading communication about the lawyer

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3. Under the Civil Mediation Act, MINN. STAT. § 572.39 (1994), it is a petty misdemeanor to act as a mediator 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. Falsely representing one's qualifications presumably violates this requirement.

4. Under MINN. GEN. R. PRAC. 114.12(6)(1994), training programs for neutrals, not the neutrals themselves, can be certified by the State Court administrator's office. Individual mediators who take a certified training program, or who successfully waive the training program pursuant to Rule 114.14, are eligible to be placed on the roster of qualified neutrals.
or the lawyer's services," as well as Rule 7.4 of the Minnesota Rules of Professional Conduct which requires that "a lawyer shall not state or imply that the lawyer is a specialist in a field of law unless the lawyer is currently certified as a specialist in that field by a board or other entity which is approved by the State Board of Legal Certification."

Under current Minnesota law, the ethical/professional responsibilities of mediators may depend, in part, on their professional "hat" (i.e., lawyer-mediators might have different ethical/professional responsibility obligations than therapist-mediators). This article will examine Minnesota General Rule of Practice Rule 114 in the context of existing Minnesota statutes and court rules on mediation, and in relationship to the lawyers' rules of professional conduct. The primary focus will be to identify and discuss ethical/professional responsibility concerns for lawyer-mediators, in light of conflicting responsibilities created by the various statutes, court rules, and lawyer's ethical rules.

In drafting Rule 114, the Implementation Committee expressly declined to adopt specific rules to govern forms of Alternative Dispute Resolution ("ADR") other than arbitration, arguing

[t]here is no consensus among those who conduct or participate in those forms of ADR as to whether any procedures or rules are necessary at all, let alone what those rules or procedures should be.8

5. Under Minn. R. Prof. Conduct 7.1 (1994), a communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other laws; or

(c) compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated.


7. Minn. Gen. R. Prac. 114, which became effective July 1, 1994, subjects most state district court cases to alternative dispute resolution processes, including mediation. The rule requires that parties be advised of ADR options immediately after a case is filed, obligates parties to confer about ADR possibilities (and other scheduling issues) before preparing the Informational Statement required under Rule 111.03 of the General Rules of Practice, and authorizes the Court to consider the possibility of early referral of cases to ADR with or without the parties' agreement.

But the Committee also observed "that it may be necessary, at some time in the future, to revisit the issues of rules, procedures or other limitations applicable to the various forms of court-annexed ADR."  At least with respect to the ethical and practice dilemmas posed for lawyer-mediators practicing under Rule 114, the future may be now; after all, lawyers are potentially subject to discipline for violation of professional rules regardless of the capacity in which they perform work.

What rules of professional responsibility apply?

Many lawyer mediators begin a mediation with a statement during orientation to the effect that "although I'm a lawyer, I'm here today as a mediator."  One state council of mediation organizations has adopted a code of professional conduct which includes the following:

The Law. Mediators are not lawyers. At no time shall a mediator offer legal advice to parties in disputes. Mediators shall refer parties to appropriate attorneys for legal advice. This same code of conduct applies to mediators who are themselves trained in the law. The role of an impartial mediator should not be confused with that of an attorney who is an advocate for a client.

My own standard agreement to mediate includes the following clause:

*Mediator.* The mediator does not represent either party. The medi-

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9. *Id.*

10. For example, the mediation orientation excerpted from one very popular videotape training series used by law schools and mediation training programs around the country contains the following: "And I should add that I am not here as a lawyer. While I may be able to help you identify some legal issues, I am in fact a lawyer, but my job here today is to be a mediator, and so I won't be telling you about what your legal rights are. I won't be telling you about what's likely to happen in court." Leonard Riskin, *Dispute Resolution and Lawyers Videotape Series, Tape III: Mediation, The Red Devil Dog Lease* (West 1992).


12. Modeled on standard agreement used by the Mediation Center, a Minnesota non-profit corporation.
ator has no duty to provide advice or information to a party or to assure that a party has an understanding of the problem and the consequences of his/her actions. The function of the mediator is to promote and facilitate voluntary resolution of the matter and the mediator has no responsibility concerning the fairness or legality of the resolution. Neither party knows of any circumstances which would cause reasonable doubt regarding the impartiality of the mediator.

Under the Minnesota Civil Mediation Act, a written mediated agreement is not binding unless

it contains a provision stating that it is binding and a provision stating substantially that the parties were advised in writing that (a) the mediator has no duty to protect their interests or provide them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect their legal rights; and (c) they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights.\(^{13}\) (Emphasis added)

Such mediator-conducted orientations, agreements to mediate, and the state legislation, effectively direct that lawyer-mediators may leave their legal obligations to the participants at the door of the mediation.

Does simply stating this dropping of the lawyer's hat "make it so"? The Minnesota Board of Professional Responsibility has not issued an opinion, and there is certainly no clear answer in the Minnesota Rules of Professional Conduct. In fact, according to the Preamble of the Rules of Professional Conduct, "whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact."\(^{14}\)

\(^{13}\) Minn. Stat. § 572.35, subd. 1 (1994).

\(^{14}\) Minn. R. Prof. Conduct, Preamble: A Lawyer's Responsibilities (1994).
The rules of professional conduct are written primarily to define a set of obligations and responsibilities with respect to clients. In deciding whether and how to apply the rules, a threshold question is whether the parties in mediation are "clients" of the lawyer-mediator in mediation. Minnesota Rule of Professional Conduct 2.2 describes the role of lawyer intermediary. The rule provides:

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.15

15. MINN. R. PROF. CONDUCT 2.2 (1994)
Perhaps the clearest indication that a lawyer does not have a client relationship with non-client parties in mediation comes from the commentary to Rule 2.2 which in relevant part, provides:

The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association. (Emphasis added)

The commentary suggests that other applicable codes of ethics may govern a lawyer's behavior as a mediator. At present, however, no code of ethics is binding on mediators practicing in Minnesota.

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At least one state, Maine, has chosen to expressly state that the mediating lawyer does not, simply by virtue of his or her role as mediator, enter into a lawyer-client relationship with mediation participants. The role of mediator does not create a lawyer-client relationship with any of the parties and does not constitute representation of any of them. The lawyer shall not attempt to advance the interests of any of the parties at the expense of any other party.

Of course, even with a bright line rule, individual attorney-mediators may perform their "mediating" role ambiguously and either intentionally or unintentionally create an attorney-client relationship with a mediation participant.

17. **maine code prof.resp., rule 3.4(h)(2)(West 1994)**, provides:

(A) A lawyer may act as a mediator for multiple parties in any matter if the lawyer clearly informs the parties of the lawyer's role and they consent to this arrangement.

(B) A lawyer serving as a mediator may draft a settlement agreement but must advise and encourage the parties to seek independent legal advice before executing it.

(C) A lawyer serving as a mediator may not act on behalf of any party in court nor represent one party against the other in any related legal proceeding.

(D) A lawyer shall withdraw as mediator if any of the parties so request, or if any of the conditions stated in DR 5-106(A) are no longer satisfied. Upon withdrawal, the lawyer shall not continue to act on behalf of any of the parties in the matter that was the subject of the mediation.

18. **Or. Code Prof. Resp. DR 5-106 (1986)** provides as follows:
and limit the role of the lawyer-mediator. A number of state and city bar committees have addressed the issue, with dramatically different

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19. For example, Iowa Rules of Court For Lawyer Mediators in Family Disputes Rule 6 allows a family law lawyer-mediator to memorialize a settlement but notes that "[t]he Mediator Has a Continuing Duty to Advise Each of the Participants to Obtain Legal Review Prior to Reaching any Agreement." Specifically,

Any proposed agreement which is prepared in the mediation process should be reviewed separately by independent counsel before it is signed. If the participants, or either of them, choose to proceed without independent counsel, the mediator shall warn them of the risks involved in not being represented, and shall provide them with the following statement in writing:

WARNING

Without review and advice by your own independent legal counsel, you may be giving up legal rights to which you are entitled, or running certain risks of which you are not aware, with respect to the following types of issues:

1. Real and personal property division.
2. Income tax consequences resulting from an agreement regarding division of property, alimony, or child support.
3. Accurate documenting and recording of conveyances and proper title to real estate or personal property.
4. Alimony.
5. Child custody, visitation, and support.
6. Court costs and attorney fees.
7. Subsequent modifications and substantial changes in circumstances.
8. Court disapproval of any submitted agreement which is contrary to the parties', or an affected child's, legal rights.

The above is not a complete list of legal rights and is not meant to be. There may be other considerations unique to the circumstances of your individual case. You should consult a lawyer for advice.

IOWA R. GOVERNING STANDARDS OF PRACTICE FOR LAWYER MEDIATOR IN FAMILY DISPUTES RULE 6(c)(1986).

Florida’s Mediator Rule 10.090. Professional Advice, in relevant part provides:

a. Generally. A mediator shall not provide information the mediator is not qualified by training or experience to provide.

b. Independent Legal Advice. When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the participants to seek independent legal counsel.

... (d) Personal Opinion. While a mediator may point out possible outcomes of the case, under no circumstances may a mediator offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.

FLA. STAT. ANN. § 10.090 (West 1994). Under the Florida mediation rules, only lawyers with 5 years experience or retired trial judges are permitted to mediate circuit court cases. Florida lawyer-mediators are obligated to "explain the risks of proceeding without independent counsel and advise the parties to consult counsel during the course of the mediation and before signing any settlement agreement that he might prepare for them." Florida Bar Committee on Professional Ethics, formal opinion 86-8 at 1239, cited in Fla. Stat. Ann. § 10.090, Comm. Notes (West 1994).
conclusions. Some opinions dramatically restrict the lawyer's participation in mediation reasoning that the lawyer could not adequately safeguard both parties' interests while engaged in multiple representation. The more progressive and increasingly more common conclusion is recognition of a role for the "neutral" lawyer-mediator who is not in a representational relationship with the parties in mediation.

Even if the progressive view prevails in Minnesota and, either by ethics opinion or court rule, lawyers are ultimately held not to be in a lawyer-client relationship or common representation situation while mediating, are lawyers nonetheless practicing law in their provision of ADR services? Some legal malpractice insurers believe the answer is yes. The New Jersey Supreme Court Advisory Committee on Professional Ethics reached the same conclusion in approving provision of ADR services in the same location as and jointly marketed and advertised with an attorney's legal practice:

It is therefore apparent that ADR has become part and parcel of the practice of law and constitutes a tool of equal rank with litigation to achieve, in the proper case, prompt and cost effective dispute resolution. When a lawyer (a) discusses the potential of ADR with a client; (b) participates as an advocate in mediation or arbi-

22. Smiley, supra note 20, at 226-229, citing and discussing Maryland State Bar Association Comm. on Ethics, Ethics Docket 80-55A (Aug. 20, 1980), reprinted in Md. St. B. J., January 1981, at 8 (permitting lawyers to act as mediators but noting that a lawyer mediator who does not have a lawyer-client relationship with the parties may not give legal advice for lack of a duty of loyalty to the non-client); Oregon State Bar Legal Ethics, Op. No. 79-46 (1980)(permitting divorce mediation by attorney where participants consent to non-representation, the lawyer gives legal advice to both parties only in the presence of each other, the lawyer drafts agreements only after advising and encouraging the parties to seek independent legal counsel, and the lawyer refrains from representing either party in subsequent legal proceedings); Connecticut Bar Association, Formal Op. 35 (1982)(lawyer authorized to act as neutral mediator upon full disclosure, including disclosure of possibility that attorney-client privilege would not protect information revealed by or to the mediator); Association of the Bar of the City of New York Comm. on Professional and Judicial Ethics, Op. 80-23 (1981)(lawyer may proceed as neutral mediator "only if [he] is satisfied that the parties understand the risks and understand the significance of the fact that the lawyer represents neither party.").
23. See infra notes 126-128.
tration; or (c) serves as a third party neutral, he or she is acting as a lawyer and is not engaging in a separate business....This is not to say that only lawyers appropriately may provide third party neutral services....Clearly, non-lawyers may provide ADR/CDR services as long as they do not hold themselves out as lawyers and do not engage in any activities, such as the rendering of legal advice, that might constitute the unauthorized practice of law.

However, the fact that non-lawyers may and do serve as third party neutrals does not mean that attorneys engaged in ADR are rendering non-legal services to their clients.\textsuperscript{24}

The Board of Professional Responsibility of the Supreme Court of Tennessee has issued a similar opinion.\textsuperscript{25}

Assuming, as I do, that this analysis is correct and the lawyer-mediator is practicing law (although not in a lawyer-client relationship) when mediating,\textsuperscript{26} there still remains the question of how mediators who happen to be lawyers handle the wide variety of ethical and practical concerns they will encounter. Some rules of professional conduct are linked specifically and unambiguously to the existence of a lawyer-

\textsuperscript{24} N.J. ETH. OP. NO. 676 (1994).

\textsuperscript{25} TENN. ETH. OP. NO 93-P-131 (1993) (holding that an attorney acting as an impartial arbitrator, mediator, or neutral in an alternate dispute resolution proceeding is not engaging in a profession or business distinct from the practice of law, and when practicing as a neutral remains subject to the Code of Professional Responsibility.)

\textsuperscript{26} For a contrary view, see Sandra E. Purnell, The Attorney as Mediator - Inherent Conflict of Interest?, 32 UCLA L. REV. 986 (1985) (arguing that the practice of law involves two key elements: 1) a reasonable belief by the client that the attorney is representing the client; and 2) application by the attorney of legal principles to specific facts confided to the attorney by a client in order to give the client advice. Mediators properly performing their work clearly explain they are not representing either of the parties, and always refrain from applying rule of law to confidential details of the parties' situation in order develop legal advice. Accordingly, argues Purnell, attorney-mediators are not practicing law and their conduct should not be judged by bar ethics rules or malpractice standards applicable to attorney's law practice.)
client relationship. Whether a party in a mediation conducted by a lawyer would be considered a "client" for purposes of interpreting and enforcing such rules is undecided. Other rules of professional conduct would appear to apply to all of a lawyer's activities, whether or not the lawyer is engaged in a lawyer-client relationship.

The remainder of this article will examine five major areas: 1) the lawyer-mediator's role in mediation; 2) the limits of confidentiality in mediation; 3) conflicts of interest; 4) structuring a mediation practice, and 5) immunity/malpractice issues. A final section makes recommendations for adoption of new rules, and summarizes ten critical practice tips for lawyer-mediators.

I. THE LAWYER-MEDIATOR'S ROLE IN MEDIATION

A provocative and ongoing debate among mediator proponents is the degree of responsibility over outcome to be borne by the mediator. For those who see the mediator's primary duty as promoting impartiality and a neutral process maximizing each party's opportunity to make independent decisions, the mediator is obligated to adhere to strict neutrality as to outcome. Others suggest that the mediator must, in addition to promoting a fair impartial process, guarantee a result that uses

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probable litigated outcome as the reference point for substantive fairness.\textsuperscript{30}

Does the calculus of this debate shift in some way if the mediator is a lawyer? The specific problem posed for lawyer-mediator, and not for mediators from other professions, is the lawyer-mediator's ability to predict a justiciable outcome. Familiarity with rules of evidence, basic legal principles, and in certain situations, the peculiarity of particular decision-makers, means the lawyer-mediator may have information that, if shared, could profoundly effect outcome of a facilitated settlement discussion. Should the information be shared? The question poses a high degree of discomfort for the lawyer-mediator, especially when parties are unrepresented.

One solution is to draw distinctions between the provision of legal advice and legal information. For example, pursuant to the American Bar Association's Standards of Practice for Lawyer Mediators in Family Disputes, the lawyer-mediator "may define the legal issues, but shall not direct the decision of the mediation participants based upon the mediator's interpretation of the law as applied to the facts of the situation."\textsuperscript{31} And, while the ABA Family Law Standards go on to emphasize that the mediator, "shall endeavor to assure that the participants have a sufficient understanding of appropriate statutory and case law as well as local judicial tradition, before reaching an agreement,"\textsuperscript{32} the lawyer-mediator is allowed to do so only "by recommending to the participants that they obtain independent legal representation during the process."\textsuperscript{33} Beyond these limitations on giving legal advice, the ABA Family Law Standards suggest that "the mediator has a duty to suspend or terminate mediation whenever continuation of the process would harm one or more of the participants."\textsuperscript{34}

30. Judith L. Maute, Mediator Accountability: Responding to Fairness Concerns, 1990 J. Disp. Res. 347 (1990)(arguing that the probable litigated outcome is the reference point for substantive fairness, and "the mediator should know enough about the law to assess whether an agreement is within the range of legally acceptable outcomes. If it is not, the parties should be told of this assessment and the potential problems when the agreement is publicly reviewed." Id. at 360).
31. ABA Family Law Standards, supra note 16 at Standard IV.C.
32. Id.
33. Id.
34. Id., at Standard V.
The American Bar Association's Standing Committee on Dispute Resolution, Proposed Model Rule on Lawyers Acting as Mediator's for non-clients, similarly states:

If either of the parties do not have independent legal counsel, the lawyer-mediator shall give legal information to a party only in the presence of all parties in the matter. The lawyer-mediator shall advise unrepresented parties or those parties whose independent counsel does not accompany them about the importance of reviewing the lawyer-mediator's legal information with an independent counsel.\textsuperscript{35}

A proposed joint code promulgated by the American Bar Association, American Arbitration Association, and the Society of Professional is Dispute Resolution emphasizes that

The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should therefore refrain from providing legal professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counselling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.\textsuperscript{36}

A very different approach is taken in the model procedural rules for mediation of procedural disputes drafted by the Center for Public Resourc-

\textsuperscript{35} ABA Proposed Rule, \textit{supra} note 16, at Section (c).
\textsuperscript{36} Joint Code, \textit{supra} note 16.
es ("CPR"). The CPR rules state that "[t]he mediator, if a lawyer, may freely express his views to the parties on the legal issues of the dispute, unless a party objects to his so doing." The commentary to those proposed rules goes on to emphasize that since failure of the mediation process will likely lead to litigation, it is productive for the lawyer-mediator to "give the parties his educated, objective appraisal of the strengths and weaknesses of their positions and likely outcome of a trial."

Given the extraordinary wide range of approaches on this delicate question of the lawyer's unique role as mediator, some clarification through court rule, amendment of the code of professional conduct, or adoption of a binding ethical code for mediators is sorely needed.

37. The Center for Public Resources is a nonprofit initiative of 500 general counsel of major corporations, leading law firms and prominent legal academics in support of private alternatives to the high costs of litigation.
39. Id., at Commentary section V.
II. THE LIMITS OF CONFIDENTIALITY IN MEDIATION

Rule 114 purports to provide blanket confidentiality protection for many ADR processes.\(^4\) Rule 114.08 provides that

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

(b) Statements made and documents produced in non-binding ADR processes which are not otherwise discoverable are not subject to discovery or other disclosure and are not admissible into evidence for any purpose at the trial, including impeachment, except as provided in paragraph (d) [governing summary jury trials].

(c) Evidence in consensual special master proceedings, binding arbitration, or in non-binding arbitration after the period for a demand for trial expires, may be used in subsequent proceedings for any purpose for which it is admissible under the rules of evi-

\(^4\) The confidentiality of Minnesota mediations conducted outside the Rule 114 context are governed by distinct statutes and rules. For example, under the Rules of Family Court Procedure, “mediation proceedings . . . are privileged, not subject to discovery, and inadmissible as evidence in family court proceedings without the written consent of both parties. Mediators and lawyers for the parties, to the extent of their participation in the mediation process, cannot be called as witnesses in the family court proceedings.” MINN. GEN. R. PRAC. 310.05 (1994).

Mediations conducted by volunteers working for state funded community based programs, operate under a different confidentiality standard, which provides: “any communication relating to the subject matter of the dispute by any participant during dispute resolution shall not be used as evidence against a participant in a judicial or administrative proceeding. This shall not preclude the use of evidence obtained by other independent investigation.” MINN. STAT. § 494.02 (1994).

In farm-lender mediations conducted pursuant to MINN. STAT. §§ 583.25-583.32, [b] [the] mediator cannot be examined about a communication or document, including worknotes, made or used in the course of or because of mediation under this section and section 583.27. This paragraph does not apply to the parties in the dispute in an application to a court by a party to have a mediated settlement agreement set aside or reformed. A communication or document otherwise not privileged does not become privileged because it is used in the cause of mediation. This paragraph is not intended to limit the privilege accorded to communication during mediation by the common law. MINN. STAT. § 583.26, subd. 7(b) (1994).
(d) Sworn testimony in a summary jury trial may be used in subsequent proceedings for any purpose for which it is admissible under the rules of evidence.

(e) Notes, records, and recollections of the neutral are confidential, which means that they shall not be disclosed to the parties, the public, or anyone other than the neutral.  

The comment to Rule 114 succinctly lays out the policy reason for protection: "If a candid discussion of the issues is to take place, parties need to be able to trust that discussions held and notes taken during an ADR proceeding will be held in confidence." And, the comment goes on to note that "[a]s a general rule, statements in ADR processes that are intended to result in the compromise and settlement of litigation would not be admissible under Minn.R.Evid. 408."  

Actually, Rule 114 casts a far wider net of protection than Rule 408, which provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to

43. Id.
obstruct a criminal investigation or prosecution.\textsuperscript{44}

Rule 114 does not, as does Rule 408, restrict the protection for mediation discussions to compromise of a dispute as to either validity or amount of a claim. More important, Rule 114.08 purports to exclude facts and statements made in mediation even if the evidence is being offered for other purposes, such as bias or prejudice. And, the protection stretches to “a trial de novo or in any subsequent proceeding involving any of the issues or parties to the proceeding.” (emphasis added). Rule 408 is far more limited and does not, for example, limit the collateral use of statements in settlement negotiations in subsequent litigation.

In addition to the Rule protection for mediation, Minnesota has a witness privilege for mediation, enacted simultaneously with the Civil Mediation Act in 1984, and codified with other witness privileges at Chapter 595 of the Minnesota Statutes. The witness privilege provides:

Subdivision 1. Competency of witnesses. Every person of sufficient understanding, including a party, may testify in any action or proceeding, civil or criminal, in court or before any person who has authority to receive evidence, except as provided in this subdivision:

\...
(l) person cannot be examined as to any communication or document, including worknotes, made or used in the course of or because of mediation pursuant to an agreement to mediate. This does not apply to the parties in the dispute in an application to a court by a party to have a mediated settlement agreement set aside or reformed. A communication or document otherwise not privileged does not become privileged because of this paragraph. This paragraph is not intended to limit the privilege accorded to communication during mediation by the common law.\footnote{Minn. Stat. § 595.02, subd. 1(l)(1994). The same statute defines “witness” as “a person whose declaration under oath is received in evidence for any purpose, whether such declaration is made on oral examination, or by deposition or affidavit.” Minn. Stat. § 595.01 (1994).}

The statutory witness privilege is far narrower than either the broad Rule 114 protection, or the narrower Rule 408. First, the witness privilege applies only to mediations “made or used in the course of or because of mediation pursuant to an agreement to mediate.”\footnote{Although there is no specific cross-reference between the statutory witness privilege and the Civil Mediation Act, the term “agreement to mediate” used in the statutory privilege is specifically defined in the Mediation Act as 

\textit{a written agreement which identifies a controversy between the parties to the agreement, states that the parties will seek to resolve the controversy through mediation, provides for termination of mediation upon written notice from either party or the mediator delivered by certified mail or personally to the other people who signed the agreement, is signed by the parties and mediator and is dated. Minn. Stat. § 572.33, subd. 3 (1994)(emphasis added).}

Attorneys representing clients in mediation are well advised to never knowingly waive the statutory witness privilege by failing to have their clients sign agreements to mediate. Most well-trained mediators have participants sign such agreements as part of a standard mediation orientation. But see, Cant v. Gaffney, et. al., No. C2-90-938 1990 WL 157443 (Minn. Ct. App. 1990)(concluding without explanation that failure to execute an agreement to mediate as defined in the Civil Mediation Act did not preclude assertion of the evidentiary privilege).}

And, the privilege does not extend to actions by parties to “have a mediated settlement agreement set aside or reformed.”\footnote{Under the Civil Mediation Act, 

\textit{a court of competent jurisdiction shall set aside or reform a mediated settlement agreement if appropriate under the principles of law applicable to contracts, or if there was evident partiality, corruption, or misconduct by a mediator prejudicing the rights of a party. That the relief could not or would not be granted by a court of law or equity is not ground for setting aside or reforming the mediated settlement agreement unless it violates public policy. Minn. Stat. § 572.36 (1994).}
for mediation offered by Rule 114 is limited by the Civil Mediation Act
and witness privileges which seem to suggest that an exception to the
promise of confidentiality exists in actions to set aside a mediated
agreement under Minnesota Statute § 572.36.

Other potential exceptions to the broad promise of confidentiality
might be found by analogy to Rule 1.6 of the Rules of Professional Con-
duct, which permits lawyers to reveal

(1) confidences or secrets with the consent of the client or clients
affected, but only after consultation with them;

(2) confidences or secrets when permitted under the Rules of Pro-
fessional Conduct or required by law or court order;

(3) the intention of a client to commit a crime and the information
necessary to prevent a crime;

(4) confidences and secrets necessary to rectify the consequences
of a client's criminal or fraudulent act in the furtherance of which
the lawyer's services were used;

(5) confidences or secrets necessary to establish or collect a fee or
to defend the lawyers or employees or associates against an acu-
sation of wrongful conduct;

(6) secrets necessary to inform the Office of Lawyers Professional
Responsibility of knowledge of another lawyer's violation of the
Rules of Professional Conduct that raises a substantial question as
to that lawyer's honesty, trustworthiness or fitness as a lawyer in
other respects.\footnote{Minn. R. Prof. Conduct 1.6(b) (1994). Under the same rule,
"Confidence" refers to information protected by the attorney-client privilege under
applicable law, and "secret" refers to other information gained in the professional
relationship that the client has requested be held inviolate or the disclosure of
which would be embarrassing or would be likely to be detrimental to the client.
Minn. R. Prof. Conduct 1.6(d).}
Which, if any, of these exceptions, should also apply to the lawyer-mediator?
Notwithstanding the apparent blanket promise of confidentiality provided by Rule 114 itself, there are exceptions, some unambiguous and others more uncertain.

A. Attorney Misconduct

The Preamble to the Minnesota Rules of Professional Conduct states that "every lawyer is responsible for observance of the Rules of Professional Conduct... and should also aid in securing their observance by other lawyers."\(^{49}\) The reporting obligations are precisely defined in Rule 8.3, which provides:

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Office of Lawyers Professional Responsibility.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the Board on Judicial Standards.

(c) This Rule does not require disclosure of information that Rule 1.6 requires or allows a lawyer to keep confidential.\(^{50}\)(Emphasis added)

Rule 8.3 creates a delicate balance between the protection of client con-

\(^{49}\) MINN. R. PROF. CONDUCT, Preamble: A Lawyer's Responsibilities (1994).
\(^{50}\) MINN. R. PROF. CONDUCT 8.3 (1994)
fidences and the obligation to file reports. However, no such balance is currently codified for protecting mediation. Accordingly, under a literal reading of current law, lawyer mediators must report lawyer misconduct they learn about or observe in mediation.

The Supreme Court has recently carved out a limited mediation-related exception to this mandatory reporting obligation, for a pilot mediation project for lawyer misconduct. In this special program,

The mediator may not be called to testify in any proceeding about anything that happened or was said in the mediation. Lawyers who serve as mediators under these rules are not bound by the mandatory reporting rules of Minnesota Rules of Professional Conduct 8.3 to report information learned during the course of the mediation. The mediator may not reveal nor can the mediator be compelled to disclose the mediator's notes or other material that the mediator has prepared, or any document or other material presented or shown to the mediator by one party in the absence of the other party during the course of the mediation.

51. The Comment to Rule 1.6, in relevant part states:
This discretion to report a lawyer’s misconduct balances the policy of confidentiality with the legal profession’s obligation to enforce high ethical standards. If the client consents to the lawyer reporting another lawyer’s misconduct, no conflict exists between these two policies. Therefore, the lawyer with knowledge of another lawyer’s misconduct should seek the client’s permission to report the misconduct to the disciplinary authority.
When the client opposes such disclosure, the lawyer then must determine whether knowledge of the misconduct stemmed from a client confidence. If so, the confidentiality rule prevails: disclosure is prohibited. If the knowledge stemmed from a secret, however, the lawyer faces the discretionary decision whether to report the misconduct. Factors pertinent to the discretionary decision include the nature of the lawyer’s misconduct, the likelihood that such misconduct will recur if not reported, the possible emotional harm to the client if required to testify in a disciplinary proceeding and/or the likelihood of recovery of embezzled funds.
Other factors that may merit consideration would be the ability to recover funds, such as through frozen assets or a client security fund, in which case, the client’s preference might be given less weight.

Minn. R. Prof. Conduct 1.6 Cmt. (1994).

52. See, Minn. Lawyers Prof. Resp. 6x (applicable July 1, 1995 through July 1, 1998)(1994). The pilot program authorizes the district chair of a district bar associations ethics committee to refer complaints of a lawyer’s alleged unprofessional misconduct to mediation. Under Rule 6x(b)(3)(1994), “the mediator shall, in all cases, be a trained volunteer mediator who shall be on the Neutral Roster maintained by the State Court Administrator’s Office.” There is no requirement that the mediator be a lawyer.
tion or document otherwise not privileged does not, however, become privileged because of this rule.53(Emphasis added)

At least in this special context, the Supreme Court has concluded that the mandatory reporting obligation is superseded by the higher purpose of facilitating dispute resolution. Given the subject matter of this specialized form of mediation, a failure to provide such protection would make virtually impossible productive mediations with lawyer-mediators. Whether the court will “read into” Rule 8.3 a similar exception for mediators outside this specialty area is unknown.

B. Past, present and future crimes

Rule 1.6 permits a lawyer to reveal the intention of a client to commit a future crime and the information necessary to prevent the crime.54 However, a lawyer is not permitted to disclose “a client's criminal or fraudulent act committed prior to the clients' retention of the lawyer's services.”55

Again, since Rule 1.6 would not appear to limit the lawyer-mediator's handling of confidential information (given the absence of a lawyer-client relationship), how should such sensitive information be handled? Some states have chosen to deal with such problems by express legislation.56 The proposed ethics codes vary in the degree of ab-

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53. MINN. R. PROF. RESP. 6α(d)(5)(1994).
54. MINN. R. PROF. CONDUCT 1.6(b)(3)(1994).
56. IOWA CODE § 679.12 (1994) (protecting confidentiality except where a mediator or center staff member has reason to believe that a party to a dispute has given perjured evidence); KAN. STAT. ANN. § 23-605 (1994) (no privilege for communications relevant to: (1) child abuse; (2) the commission of a crime during the mediation process or (3) an expressed intent to commit a crime in the future; N.J. COMPLEMENTARY DISPUTE RESOLUTION PROGRAM RULE 1:40-4 (b)(1994)(mediator has duty to disclose to a proper authority information obtained at a mediation session on the reasonable belief that such disclosure will prevent a participant from committing a criminal or illegal act likely to result in death or serious bodily harm).
solute protection offered the mediation process. The safest course for lawyer mediators is to inform parties in advance of circumstances where it is believed there is a statutory or ethical obligation to disclose information.

C. Child Abuse and Mistreatment of Vulnerable Adults

Volunteer mediators working for Minnesota state-funded community dispute resolution programs are obligated to report maltreatment of children and vulnerable adults. Are Rule 114 mediators under the same obligation? There is no clear answer.

Minnesota enacted the Reporting of Maltreatment of Minors Act in 1975 in response to the requirements of the Federal Child Abuse Prevention and Treatment Act of 1974. Minnesota's child abuse reporting act includes a declared public policy "to protect children whose

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57. Compare Joint Code, supra note 16, at Sect.V ("The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. A mediator shall not disclose any matter that any party expects to be confidential unless given permission by all parties or unless required by law or other public policy.") with CDR Code supra note 16, ("The following exceptions shall be applied to the confidentiality rule: In the event of child abuse by one or more disputants or in a case in which a mediator discovers that a probable crime will be committed that may result in serious psychological or physical harm to another person, the mediator is obligated to report these actions to the appropriate agencies.")

58. Community-based programs using volunteer mediators are eligible for certification to receive state funds under the Community Dispute Resolution Program, MINN. STAT. § 494 (1994). The program is "an effort to utilize, when appropriate, voluntary dispute resolution processes instead of traditional and formal judicial processes for disputes of the kind that are common in neighborhoods, such as those involving neighbors, relatives, landlords and tenants, consumers and like disputes concerning relations within a community." Community Dispute Resolution Programs Operational Guidelines, Introduction (as amended 6/3/91). See James R. Cohen, Community Based Dispute Resolution," 12 HAMLINE J. PUB. L. & POL'y 3, 28-32 (1991).

59. Community Dispute Resolution Programs Operational Guideline 4.01, in relevant part, provides:

All files relating to a case in a community dispute resolution program are to be classified as private data on individuals, pursuant to Minnesota Statutes, Section 13.02, subd. 2, with the following exceptions:

... (2) Data relating to suspected neglect or sexual abuse of children or vulnerable adults are to be subject to the reporting requirements of Minnesota Statutes, Section 626.556 [child abuse] and 626.557 [vulnerable adults].

60. MINN. STAT. § 626.556 (1994).

health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse\textsuperscript{62} and "to require the reporting of neglect, physical or sexual abuse of children."\textsuperscript{63} The operative portion of the Act requires certain persons, and permits all others, to report suspected neglect,\textsuperscript{64} physical abuse\textsuperscript{65} or sexual abuse\textsuperscript{66} of children.

Persons mandated to report child abuse under the Act include "[a] professional or professional's delegate who is engaged in the practice of the healing arts, social services, hospital administration, psychological or psychiatric treatment, child care, education, or law enforcement."\textsuperscript{67} Whether a mediator would be included among the professionals engaged in the practice of social services is not clear from the statute's definition of social services\textsuperscript{68}, or from the legislative history.

\begin{flushleft}
\textsuperscript{62} \textit{Minn. Stat.} § 626.556, subd. 1(1994)
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{Minn. Stat.} § 626.556 subd. 2(c)(1994). "Neglect" means failure by a person responsible for a child's care to supply a child with necessary food, clothing, shelter or medical care when reasonably able to do so, failure to protect a child from conditions or actions which imminently and seriously endanger the child's physical or mental health when reasonably able to do so, or failure to take steps to ensure that a child is educated in accordance with state law. The act further provides that "neglect includes prenatal exposure to a controlled substance." used by the mother for a nonmedical purpose.
\textsuperscript{65} \textit{Minn. Stat.} § 626.556 subd. 2(d)(1994). "Physical abuse" means any physical or mental injury, or threatened injury, inflicted by a person responsible for the child's care on a child other than by accidental means, or any physical or mental injury that cannot reasonably be explained by the child's history of injuries, or any aversive and deprivation procedures that have not been authorized under section 245.825.
\textsuperscript{66} \textit{Minn. Stat.} § 626.556 subd. 2(a)(1994). "Sexual abuse" means the subjection of a child by a person responsible for the child's care, or by a person in a position of authority, as defined in section 609.341, subdivision 10, to any act which constitutes a violation of section 609.342, 609.343, 609.344, or 609.345. Sexual Abuse also includes any act which involves a minor which constitutes a violation of sections 609.321 to 609.324 or 617.246. Sexual abuse includes threatened sexual abuse.
\textsuperscript{67} \textit{Minn. Stat.} § 626.556 subd. 3 (1994).
\textsuperscript{68} \textit{Minn. Stat.} § 626.556 subd. 2(j)(1994). "Practice of social services," for the purposes of subdivision 3, includes but is not limited to employee assistance counseling and the provision of guardian ad litem services.
\end{flushleft}
Since the child abuse reporting act imposes criminal penalties on mandatory reporters who fail to report known or suspected abuse, the principle that criminal statutes are to be construed narrowly would cut against the conclusion that mediators would be considered social service professionals. On the other hand, the state's compelling interest in identifying and protecting victims of child abuse has been found to outweigh the policies supporting the evidentiary medical privilege, thereby strengthening, by analogy, the argument that mediators might be considered mandatory reporters under the Act.

Until the mandatory reporting clause is more clearly defined, voluntarily reporting child abuse is the safest course, especially in light

69. Minn. Stat. § 626.556 subd. 6 (1994). “Failure to Report. A person mandated by this section to report who knows or has reason to believe that a child is neglected or physically or sexually abused within the preceding three years, and fails to report is guilty of a misdemeanor.” In State v. Grover, 473 N.W.2d 60, 62-63 (Minn. 1989), the Supreme Court of Minnesota, on certiorari, addressed a constitutional challenge to the child abuse reporting act’s criminal penalty for the failure to report. Therein, the Court stated:

Minnesota’s criminal code provides that “know’ requires only that the actor believes that the specified fact exists.” Minn. Stat. § 609.02 subd. 9(2) (1986). Thus, it is apparent that violation of the child abuse reporting statute entails either one of two levels of culpability: A mandated reporter who knows or believes that a child is being or has been abused but fails to report it exhibits the callousness associated with the knowing commission of a criminal act. On the other hand, neither knowing violation nor conscious disregard of substantial risk are requisite to a violation of the reporting act. A mandated reporter who has reason to know or believe that a child is being or has been abused but fails to recognize it also violates the statute though the actor’s culpability is merely negligent rather than purposeful, knowing, or reckless. * * * Negligence at criminal law is not the same as negligence giving rise to a civil cause of action. The statute does not contain any indication that the legislature intended criminal liability for failure to report child abuse to turn on the ordinary negligence in the civil sense. Nevertheless, the legislature undoubtedly concluded that attaching misdemeanor criminal liability to the negligent failure to file a mandated report was necessary to provide a strong enough motive to comply with the mandatory provisions of the statute.

See also, Valtakis v. Putnam, 504 N.W.2d 264, 266 (Minn. Ct. App. 1993) (“There is no mention of a civil cause of action for failure to report nor is a civil action implied by the language of the subdivision * * * [A] civil action cannot lie outside the express or clearly implied language of the statute.”)

70. See United States v. Gideon, 1 Minn. 292, 296 (1856).


72. Assuming that the mediator is a mandatory reporter under the child abuse reporting act, a mediator who “knows or has reason to believe a child is being neglected or physically or sexually abused, * * * or has been neglected or physically or sexually abused within the preceding three years, [must within 24 hours] report the information to the local welfare agency, police department or the county sheriff.” Minn. Stat. § 626.556 subd. 3 (1994).
of the fact that the Act provides all reporters, be they mandatory or vol-
untary, with immunity "from any civil or criminal liability that might
otherwise result from their actions, if they are acting in good faith." Accordingly, mediators may want to reference this potential exception
to confidentiality in their mediation orientation and/or in their written
agreement to mediate.

Persons mandated to report child abuse are similarly required to
report known maltreatment of vulnerable adults. Like the Child
Abuse Reporting Act, persons mandated to report the abuse of vulner-
able adults ambiguously include "a professional or his delegate who is
engaged in . . . social services". Unlike the Child Abuse Reporting Act,
however, the Vulnerable Adult Act imposes absolute liability upon manda-
datory reporters for damages caused by the failure to report abuse of
vulnerable adults. The statute further provides that the intentional
failure to report abuse or neglect of a vulnerable adult constitutes a
misdemeanor offense, providing separate civil liability for intentional
failure to report.

D. Collecting Fees

Notwithstanding the broad pledge of confidentiality, the Supreme
court has specifically authorized the mediator to enlist court assistance

73. "Any person who knowingly or recklessly makes a false report under the provisions of this sec-
tion shall be liable in a civil suit for any actual damages suffered by the person or persons so reported and
for any punitive damages set by the court or jury." MINN. STAT. § 626.556 subd. 5 (1994).
74. MINN. STAT. § 626.556 subd. 4 (1994).
75. MINN. STAT. § 626.557 subd. 2(b)(1994) broadly defines a vulnerable adult as "any person 18
years of age or older who is a resident or inpatient of a facility, who received services at or from a facility
required to be licensed to serve adults ***, a person receiving services from a home health agency or
who, regardless of residence or type of service received, is unable or unlikely to report abuse or neglect
without assistance because of impairment of mental or physical function or emotional status."
76. The Act requires the following persons to report the maltreatment of vulnerable adults: "a pro-
fessional or his delegate who is engaged in the care of vulnerable adults, education, social services, law
enforcement, or any of the regulated occupations referenced [in the statute], or an employee of or person
providing services in a facility who has knowledge that a vulnerable adult has sustained a physical injury
which is not reasonably explained." MINN. STAT. § 626.557 subd. 3 (1994).
77. See, Thelan v. St. Cloud Hosp., 379 N.W.2d 189 (Minn. Ct. App. 1985) (a showing that the
hospital violated the vulnerable adult statute in failing to report an employee's sexual abuse of a patient,
was per se evidence of negligence. The affirmative defenses of contributory negligence and assumption of
risk were not available.)
78. MINN. STAT. § 626.557 subd. 7 (1994).
in collecting fees. Under Rule 114.11(c), "[i]f a party fails to pay for the neutral, the court may, upon motion, issue an order for the payment of such costs and impose appropriate sanctions." By providing the remedy, there is an implicit exception to the blanket coverage of confidentiality offered by Rule 114.08. Preferably, the confidentiality section should be amended to make the exception express as it is in the Rules of Professional Conduct governing confidentiality of information.80

E. Actions to Vacate Mediated Settlement Agreements

The Civil Mediation Act specifically anticipates court action to set aside or reform mediated settlement agreements under certain sets of circumstances.81 Basic contract theories for setting aside a contract include mutual mistake, fraud, lack of capacity, duress, impossibility or impracticability of performance, frustration of purpose, negligent nondisclosure, unconscionability, and undue influence. Reformation of a mediated agreement would be possible upon proof that the memorialized agreement is not what the parties intended.

Under any one or all of these theories, the mediator might have information that could be shared. Rule 114 would seem to preclude compelling the mediator or parties to testify.

However, the evidentiary privilege codified in Chapter 59582 specifically exempts from protection evidence on these grounds. Further, since the Civil Mediation Act specifically anticipates suits to set aside or reform agreement for evident partiality, corruption or misconduct of the mediator, presumably there is an exception to confidentiality in

80. MINN. R. PROF. CONDUCT 1.6(b)(5)(1994) authorizes disclosure of "confidences or secrets necessary to establish or collect a fee or to defend the lawyers or employees or associates against an accusation of wrongful conduct."
81. Under the Civil Mediation Act, a court of competent jurisdiction:
    shall set aside or reform a mediated settlement agreement if appropriate under the principles of law applicable to contracts, or if there was evident partiality, corruption, or misconduct by a mediator prejudicing the rights of a party. That the relief could not or would not be granted by a court of law or equity is not ground for setting aside or reforming the mediated settlement agreement unless it violates public policy.
82. Supra note 45.
such suits.

III. CONFLICTS OF INTEREST

There is already precedent for Minnesota lawyer-mediators to run into trouble with the professional licensing board. Indeed, at least one Minnesota lawyer was suspended from the practice of law for providing legal services as a mediator without regard to the conflicts of interest posed in representing both parties in a dissolution proceeding. 83

Rule 114 is silent on the issue of neutral conflict of interest. Indeed, the rules are premised on the parties' freedom to choose their own neutral. There is, however, a removal escape provision. Under Rule 114.05,

(c) Any party or the party's attorney may file with the court administrator within 10 days of notice of the appointment of the qualified neutral and serve on the opposing party a notice to remove. Upon receipt of the notice to remove the court administrator shall immediately assign another neutral. After a party has once disqualified a neutral as a matter of right, a substitute neutral may be disqualified by the party only by making an affirmative showing of prejudice to the chief judge or his or her designee. 84

Minnesota Rule of Professional Conduct 1.7 states the basic principles of conflict of interest as such:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

83. In re the Petition for Disciplinary Action Against Dean Nyquist, 493 N.W.2d 538 (Minn. 1992).
84. Minn. Gen. R. Prac. 114.05 (1994)
(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.85

This rule, like many others, is, in part, premised on the lawyer-client relationship. Arguably, it is not directly relevant to the unique role of lawyer-mediator. Yet, most proposed mediator codes of ethics track the essential logic of this professional rule.

The ABA Proposed Model Rule on Lawyers Acting as Mediators for Non-Clients, expressly precludes working as a mediator for a client previously or currently represented in connection with the subject matter of the mediation.86 The same model rule offers the following with respect to matters not related to the past or present representation:

A lawyer may act as mediator in a dispute involving a past or present client, who was or is represented in a matter unrelated to the mediation, provided (i) there is full disclosure of the representation, (ii) in light of the disclosure, obtain the parties' informed consent, (iii) there is no breach of confidentiality, and (iv) the mediator is impartial. This does not prohibit intermediation between clients, which is interpreted by Rule 2.2.87

These principles of informed consent are echoed in the Joint Code of

85. Minn. R. Prof. Conduct 1.7 (1994)
86. Section 4(d) of the ABA Proposed Rule, supra note 16, provides: "A lawyer may act as mediator only if the lawyer has not previously nor is currently representing one of the parties in connection with the subject matter of the mediation."
87. ABA Proposed Rule supra note 16, section (e).
the American Arbitration Association, American Bar Association, and the Society of Professionals in Dispute Resolution.88

Rules adopted in Florida circuit courts go further and expressly require disclosure of current, past, or possible future representation or consulting relationships with either party, as well as "any close personal relationship or other circumstance [which] might reasonably raise a

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88. Section III of the Joint Code provides:

Conflicts of Interest: A Mediator Shall Disclose all Actual and Potential Conflicts of Interest Reasonably Known to the Mediator. After Disclosure, the Mediator Shall Decline to Mediate Unless all Parties Choose to Retain the Mediator. The Need to Protect Against Conflicts of Interest Also Governs Conduct that Occurs During and After the Mediation. [bold in original]

A conflict of interest is a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

A mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process.

COMMENTS [bold in original]

*A mediator shall avoid conflicts of interest in recommending the services of other professionals. A mediator may make reference to professional referral services or associations which maintain rosters of qualified professionals.

*Potential conflicts of interest may arise between administrators of mediation programs and mediators and there may be strong pressures on the mediator to settle a particular case or cases. The mediator's commitment must be to the parties and the process. Pressures from outside of the mediation process should never influence the mediator to coerce parties to settle.
question as to the mediator's impartiality.\textsuperscript{89} The 1995 Pocket Part Committee Notes to the Florida statute specifically emphasizes that potential conflicts include participation on boards, current stock or bond ownership and other forms for managerial, financial, or immediate family interest.

Under Iowa court rules governing standards of practice for lawyer mediators in family disputes, a lawyer-mediator is precluded from representing a party in any legal matter for three years after termination

\textsuperscript{89} Florida's Mediator Rule 10.070 provides,
(a) Impartiality. A mediator shall be impartial and advise all parties of any circumstances bearing on possible bias, prejudice, or impartiality. Impartiality means freedom from favoritism or bias in word, action, and appearance. Impartiality implies a commitment to aid all parties, as opposed to an individual party, in moving toward an agreement.

(1) A mediator shall maintain impartiality while raising questions for the parties to consider as to the reality, fairness, equity, and feasibility of proposed options for settlement.

(2) A mediator shall withdraw from mediation if the mediator believes the mediator can no longer be impartial.

(3) A mediator shall not give or accept a gift, request, favor, loan, or any other item of value to or from a party, attorney, or any other person involved in and arising from any mediation process.

(b) Conflicts of Interest and Relationships; Required Disclosures; Prohibitions.
(1) A mediator must disclose any current, past, or possible future representation or consulting relationship with any party or attorney involved in the mediation. Disclosure must also be made of any pertinent pecuniary interest. All such disclosures shall be made as soon as practical after the mediator becomes aware of the interest or the relationship.

(2) A mediator must disclose to the parties or to the court involved any close personal relationship or other circumstance, in addition to those specifically mentioned earlier in this rule, which might reasonably raise a question as to the mediator's impartiality. All such disclosures shall be made as soon as practical after the mediator becomes aware of the interest or the relationship.

(3) The burden of disclosure rests on the mediator. After appropriate disclosure, the mediator may serve if both parties so desire. If the mediator believes or perceives that there is a clear conflict of interest, he or she should withdraw, irrespective of the expressed desires of the parties.

(4) A mediator shall not provide counselling or therapy to either party during the mediation process, nor shall a mediator who is a lawyer represent either party in any matter during the mediation.

(5) A mediator shall not use the mediation process to solicit, encourage, or otherwise incur future professional services with either party. Fla. Stat. Ann. § 10.070 (West 1994).
of the mediation process.\textsuperscript{90} While such a bright line rule clearly delineates appropriate lawyer-mediator behavior, such a rule would make virtually impossible mediation practice by rural lawyers in small out-state Minnesota communities.

\section*{IV. Structuring a Mediation Practice}

\subsection*{A. Fees}

Rule 114 provides “[t]he neutral and the parties will determine the fee.”\textsuperscript{91} The 1993 Implementation Committee Comments go on to state that “[t]he marketplace in the parties' geographic area will determine the rates to be offered by neutrals for their services. The parties can then best determine the appropriate fee, after considering a number of factors, including availability, experience and expertise of the neutral and the financial abilities of the parties.” Whatever fee is chosen, it must be reasonable. The relevant Rule of Professional Conduct, Rule 1.5, dictates that in all cases “[a] lawyer's fee shall be reasonable.”\textsuperscript{92}

Several proposed mediator codes of ethics would preclude contingency fee agreements by mediators.\textsuperscript{93} These same codes suggest that a

\begin{footnotesize}
\begin{enumerate}
\item \textbf{90.} \textit{Iowa Court Rules Governing Standards of Practice for Lawyer Mediators in Family Disputes}, Rule 1(C)(1994) provides:
\begin{quote}
The mediator shall inform the participants that the mediator cannot represent either or both of them in any other legal matter during the mediation process or for a period of three years after termination of the mediation process. The mediator cannot undertake the mediation if either of the participants previously has been a client, or a client of the mediator’s law firm.
\end{quote}
\item \textbf{91.} \textit{Minn. Gen. R. Prac.} 114.11(a)(1994).
\item \textbf{92.} The requirement for a “reasonable” fee is not expressly limited to a lawyer’s services provided to “clients.” \textit{See also}, Lawyers Professional Responsibility Board Opinions, Op. 16 (“Interest and Late Charges on Attorneys Fees”)(1994).
\item \textbf{93.} \textit{See e.g.}, ABA Proposed Rule, supra note 16, at Sect. (h) (“A lawyer mediator shall not charge a fee contingent on the outcome of mediation.”); Joint Code, supra note 16, at Sect.VIII (“A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.”); ABA Family Law Standards, supra note 16, at Standard I.F. (“The mediator shall explain the fees for mediation. It is inappropriate for a mediator to charge a contingency fee or to base the fee on the outcome of the mediation process.”)
\end{enumerate}
\end{footnotesize}
mediator's fees should be reasonable, and, as recommended in the Minnesota Rules of Professional Conduct for Lawyers, that the fee structure should be communicated in writing to all participants.

94. "If a mediator charges fees, the fees shall be reasonable considering, among other things, the mediation service, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary in the community." Joint Code, supra note 16, at Section VIII.

Compare MINN. R. PROF. CONDUCT 1.5(a)(1994) which states that

A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

95. "The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement." Joint Code, supra note 16, at Section VIII: "It is the duty of the neutral to explain to the parties at the outset of the process the bases of compensation, fees, and charges, if any." SPIDR Ethical Standards, supra note 16.

Compare MINN. R. PROF. CONDUCT FOR LAWYERS 1.5(b)(1994) which provides: "When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation."
Florida has adopted much more detailed rules regarding court-appointed mediator compensation.96

Regardless of the fee charged, if a lawyer-mediator chooses to be paid by retainer, Rule 1.15 of the Minnesota Rules of Professional Conduct arguably mandates that such funds be held in an identifiable trust

96. Florida's rules for certified and court-appointed mediators provides as follows with respect to fees:

(a) General Requirements. A mediator occupies a position of trust with respect to the parties and the courts. In charging for services and expenses, the mediator must be governed by the same high standards of honor and integrity that apply to all other phases of the mediator's work. A mediator must endeavor to keep total charges for services and expenses reasonable and consistent with the nature of the case. If fees are charged, a mediator shall give a written explanation of the fees and related costs, including time and manner of payment, to the parties prior to the mediation. The explanation shall include:
(1) the basis for and amount of charges, if any, for:
(A) mediation sessions;
(B) preparation for sessions;
(C) travel time;
(D) postponement or cancellation of mediation sessions by the parties and the circumstances under which such charges will normally be assessed or waived;
(E) preparation of the parties' written mediation agreement; and
(F) all other items billed by the mediator; and
(2) the parties' pro rata share of mediation fees and costs if previously determined by the court or agreed to by the parties.
(b) Records. A mediator shall maintain adequate records to support charges for services and expenses and shall make an accounting to the parties or to the court upon request.
(c) Referrals. No commissions, rebates, or similar remuneration shall be given or received by a mediator for referral of clients for mediation or related services.
(d) Contingent Fees. A mediator shall not charge a contingent fee or base a fee in any manner on the outcome of the process.
(e) Principles. A mediator should be guided by the following general principles:
(1) Time charges for a mediation session should not be in excess of actual time spent or allocated for the session.
(2) Time charges for preparation should not be in excess of actual time spent.
(3) Charges for expenses should be for expenses normally incurred and reimbursable in mediation cases and should not exceed actual expenses.
(4) When time or expenses involve 2 or more sets of parties on the same day or trip, such time and expense charges should be prorated appropriately.
(5) A mediator may specify in advance a minimum charge for a mediation session without violating this rule.
(6) When a mediator is contacted directly by the parties for mediation services, the mediator has a professional responsibility to respond to questions regarding fees by providing a copy of the basis for charges for fees and expenses.

FLA. STAT. ANN. § 10.100 (West 1994).
account. Whether these third party mediation "clients" accounts are subject to IOLTA interest bearing rules is less clear.

B. Advertising

Rule 7.1 of the Rules of Professional Conduct states that a lawyer "shall not make a false or misleading communication about the lawyer

97. Minn. R. Prof. Conduct 1.15 (1994), in relevant part provides:
(a) All funds of clients paid to a lawyer or law firm shall be deposited in one or more identifiable interest bearing trust accounts as set forth in paragraphs (c) through (f).

(b) A lawyer shall:
(1) promptly notify a client of the receipt of the client's funds, securities, or other properties.
(2) identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them.
(4) promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

(c) Each trust account referred to in paragraph (a) shall be an interest bearing account in a bank, savings bank, trust company, savings and loan association, savings association, credit union, or federally regulated investment company selected by a lawyer in the exercise of ordinary prudence.

(d) A lawyer who receives client funds shall maintain a pooled interest bearing trust account for deposit of client funds that are nominal in amount or expected to be held for a short period of time. The interest accruing on this account, net of any transaction costs, shall be paid to the Lawyer Trust Account Board established by the Minnesota Supreme Court.

(e) All client funds shall be deposited in the account specified in paragraph (d) unless they are deposited in:
(1) a separate interest bearing trust account for the particular client or client's matter on which the interest, net of any transaction costs, will be paid to the client; or
(2) a pooled interest bearing trust account with subaccounting which will provide for computation of interest earned by each client's funds and the payment thereof, net of any transaction costs, to the client.

At first glance, this section could be argued as precluding the maintenance of trust accounts for monies of mediation participants, who are arguably non-clients. However, the 1985 comment to the rule states:

A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts.

98. Neither Rule 1.15 nor the comment give guidance. At least one state's bar association has issued an ethical opinion drawing a distinction between the lawyer's duty to maintain trust accounts and the payment of IOLTA. See, Or. Eth. Op. 1993-135 (1993 WL 537321)(funds received by a mediator or arbitrator must be held in trust account but not necessarily placed in IOLTA account, since they are not "client funds.")
or the lawyer’s services.” The 1985 comment to the rule states unambiguously the proscription about false or misleading communications “governs all communications about a lawyer’s services.” (Emphasis added). Thus, while nothing precludes a lawyer from advertising her services as a mediator, such advertising must be truthful and avoid confusion about the distinction between provision of legal representation and mediation or other ADR services.

Above all, Minnesota lawyers should not refer to themselves as specialists or certified in mediation.

C. Record-keeping

The Minnesota Rules of Professional Conduct are silent as to whether a lawyer who functions as a mediator must retain records relating to the mediation for any specific period of time. Rule 114.08(e) anticipates that the mediator will maintain records, but is silent on requirements, noting only that “[n]otes, records, and recollections of the neutral are confidential, which means that they shall not be disclosed to the parties, the public, or anyone other than the neutral.”


100. Minn. R. Prof. Conduct 7.1 cmt. (1994)

101. Examples of problematic advertising include: Mass. Bar Ass’n on Prof. Eth. Op. No. 85-3 (1985)(finding trade name “City Mediation Services” deceptive because it suggested partnership between lawyer and nonlawyer who used the letterhead); Me. Bar Assoc. Prof. Eth., Comm’n, Op. No. 71 (1986)(advertising divorce mediation services as “new and unique” lacked accuracy in light of existing court mediation programs and further noting that the statement “we will work with both spouses, something your divorce lawyer is not allowed to do,” as misleading given that it is permissible for one spouse attorney to work with the attorney of the other spouse, or with the other unrepresented spouse; Bar Assoc. of Nassau Co., [N.Y.] Comm. on Prof. Eth., Op. No. 82-8 (1982)(finding false, deceptive and blatantly misleading the advertisement that “hiring separate lawyers ... is costly ... [and] often only complicates matters.”), cited in Chapter 9, section 9.3 of [insert title and author] pages 163-164.

102. See supra notes 34. Neutrals who have taken certified training as defined in Rule 114 and gotten on the Supreme Court roster of neutrals, can, of course, state they are on the roster of neutrals and that they have completed a certified training program. Advertising oneself as “certified” is misrepresentation.

Lawyers earning income from mediation, are probably wise to maintain financial records for six years in compliance with Rule 1.15.\textsuperscript{104} But what about the notes and details of the mediations themselves? Can a lawyer mediator destroy notes and all files after mediation is concluded or is there a duty to maintain files analogous to client files? There is no binding Minnesota authority on point and this author could find only one reported State ethics opinion addressing the subject.\textsuperscript{105} In that opinion, the State Bar of Michigan Standing Committee on Professional and Judicial Ethics, considered whether a lawyer functioning as a court-appointed arbitrator or mediator must retain records for a particular period of time or notify the parties to such proceedings prior to the time the lawyer disposes of or destroys the records.\textsuperscript{106} The Michigan Committee concluded that the Rules of Professional Conduct were inapplicable because the arbitrator/mediator was not involved in representation.\textsuperscript{107} However, the committee opined that it was advisable to retain records for at least one year, in light of the fact that judicial proceedings to confirm arbitral awards were permitted under State law for one year after an award was rendered.\textsuperscript{108} Disposal, wrote the committee, is advisable only if the year passes and the neutral “first ascertained that no judicial proceeding in relation has yet been instituted.”\textsuperscript{109}

\textit{D. Working with Non-Lawyers}

The Rules of Professional Conduct specifically prohibit lawyers from entering business partnerships with non-lawyers if any part of the

\textsuperscript{104} Whether Rule 1.15 is applicable to the lawyer’s work as mediator is unclear. The rule requires that every lawyer engaged in private practice of law shall maintain or cause to be maintained on a current basis books and records sufficient to demonstrate income derived from, and expenses related to, the lawyer's private practice of law, and to establish compliance with paragraphs (a) through (e). The books and records shall be preserved for at least six years following the end of the taxable year to which they relate or, as to books and records relating to funds or property of clients, for at least six years after completion of the employment to which they relate.


\textsuperscript{106} \textit{Id.}

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{Id.}

\textsuperscript{109} \textit{Id.}
business entities activities constitutes the practice of law. The Oregon Supreme Court has concluded that whether a mediation business jointly operated by a lawyer and non-lawyer constitutes the practice of law might vary depending on the nature of services provided; [i]n essence, the practice of law involves the application of a general body of legal knowledge to the problem of a specific entity or individual. The drafting of settlement agreements for other would, for example, constitute the practice of law. Applying such a standard, the Oregon court concluded that an attorney-psychologist mediation service would be prohibited if the service drafted agreements. As noted earlier, the New Jersey Supreme Court Advisory Committee on Professional Ethics, has ruled that in all cases mediation done by a lawyer is the practice of law. Following this analysis, the safest course for the lawyer-mediator is never to share fees with non-lawyer mediators, and never jointly own a corporation or partnership providing ADR services. Nothing, of course, prohibits the lawyer from hiring the non-lawyer on a salaried basis.

110. MINN. R. PROF. CONDUCT 5.4 (1994) in relevant part provides:
   (a) A lawyer or law firm shall not share legal fees with a nonlawyer
   
   (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
   
   (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
   (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of a lawyer for a reasonable time during administration;
   (2) a nonlawyer is a corporate director or officer thereof; or
   (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

MINN. R. PROF. CONDUCT 5.4 (1994).
112. Id.
113. Supra note 24.
114. Id.
An additional concern for lawyers is the prohibition against assisting non-lawyers in the practice of law.\textsuperscript{115} Doing so subjects the lawyer to bar discipline.\textsuperscript{116}

\textbf{E. Referrals}

Several proposed codes suggest that lawyer-mediators, while obligated to encourage mediation participants to obtain independent legal counsel, should be precluded from recommending particular lawyers.\textsuperscript{117} The conflicts of interest problems posed by any other referral policy are obvious.

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\textsuperscript{115} \textsc{Minn. Stat.} § 481.02, subd. 1 (1994), in relevant part, provides:

It shall be unlawful for any person or association of persons, except members of the bar of Minnesota admitted and licensed to practice as attorneys at law, to appear as attorney or counselor at law in any action or proceeding in any court in this state to maintain, conduct, or defend the same, except personally as a party thereto in other than a representative capacity, or, by word, sign, letter, or advertisement, to hold out as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor at law, or in furnishing to others the services of a lawyer or lawyers, or, for a fee or any consideration, to give legal advice or counsel, perform for or furnish to another legal services, or, for or without a fee or any consideration, to prepare, directly or through another, for another person, firm, or corporation, any will or testamentary disposition or instrument of trust serving purposes similar to those of a will, or, for a fee or any consideration, to prepare for another person, firm, or corporation, any other legal document, except as provided in subdivision 3.

Violation of this prohibition is punishable as a misdemeanor. \textsc{Minn. Stat.} § 481.02, subd. 8.

\textsuperscript{116} Under \textsc{Minn. R. Prof. Conduct} 5.5(b) (1994), a lawyer may not “assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law”.

\textsuperscript{117} \textsc{ABA Family Law Standards}, \textit{supra} note 16, Standard V.A. provides:

At the beginning of the mediation process, the mediator should inform the participants that each should employ independent legal counsel for advice at the beginning of the process and that the independent legal counsel should be utilized throughout the process and before the participants have reached any accord to which they have made an emotional commitment. \textit{In order to promote the integrity of the process, the mediator shall not refer either of the participants to any particular lawyers.} When an attorney referral is requested, the parties should be referred to a Bar Association list if available. In the absence of such a list, the mediator may only provide a list of qualified law attorneys in the community. (Emphasis added).

Section III of the Final Draft of Joint Code, \textit{supra} note 16, would prohibit individual referrals but authorize “reference to professional referral services or associations which maintain rosters of qualified professionals.”
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V. IMMUNITY/MALPRACTICE

To date, there have been relatively few reported cases alleging mediator malpractice or recovery on other theories of mediator liability.\footnote{118} This is likely to change as more parties voluntarily choose, or are mandated, to use mediation.\footnote{119}

Under the Minnesota Farm-Lender mediation act, mediators have statutory immunity from civil liability for actions within the scope of the position as mediator.\footnote{120} Outside this specific type of mediation, there

\footnote{118} There are numerous potential theories of mediator liability, including: 1) false advertising; 2) breach of contract; 3) tortious interference with contract or business relations; 4) fraud; 5) invasion of privacy; 6) defamation; 7) outrageous conduct; 8) breach of fiduciary duty; 9) malpractice or professional negligence. Arthur A. Chaykin, The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation, 2 OHIO ST. J. ON DISP. RESOL. 47 (1987).

\footnote{119} Attorney mediators have been sued for conflict of interest and negligence. Such suits have often been won on quasi-judicial immunity grounds or because of causation defects. See e.g., Wagshal v. Foster, 28 F.3d 1249 (D.C. Cir. 1994) (affirming grant of qualified immunity to court-appointed neutral who allegedly breached obligations of neutrality and confidentiality); Mills v. Killebrew, 765 F.2d 69 (6th Cir. 1985) (affirming grant of quasi-judicial immunity to court appointed mediation panel sued for violation of fourteenth amendment rights to equal protection and due process by party who had been judicially compelled to participate in mediation and who failed to timely reject the mediator's monetary award in their favor); Lange v. Marshall, 622 S.W.2d 237 (Mo. Ct. App. 1981) (reversing $74,000 jury negligence award against attorney mediator upon insufficient proof of damages given that the plaintiff divorce mediation participant had secured a new lawyer who negotiated a better settlement for her).

\footnote{120} Rule 114 does not require neutrals to be lawyers. Under MINN. GEN. R. PRAC. 114.03(b)(1994): a "neutral" is an individual or organization who provides an ADR process. A "qualified neutral" is an individual or organization included on the State Court Administrator's roster as provided in Rule 114.13. An individual neutral must have completed the training and continuing education requirements provided in Rule 114.12. An individual neutral provided by an organization also must meet the training and continuing education requirements of Rule 114.12. Neutral fact-finders selected by the parties for their expertise need not undergo training nor be on the State Court Administrator's roster.

The Committee comments to this section specifically state that "[n]o special educational background or professional standing (e.g., licensed attorney) is required of neutrals." MINN. GEN. R. PRAC. 114 cmt (1994). Non-lawyer mediators risk the additional challenge of unauthorized practice of law. See e.g., Werle v. Rhode Island Bar Association, 755 F.2d 195 (1st Cir. 1985). And, lawyers are subject to bar discipline for assisting non-lawyers in the unauthorized practice of law. MINN. R. PROF. CONDUCT 5.4(b)(1994). See supra notes 110-114.
is no generic legislative grant of immunity for Minnesota mediators.

Indeed, a broad grant of immunity for mediators was specifically rejected by the Minnesota legislature when it adopted the Civil Mediation Act in 1984. The initial version of the House bill contained a broad grant of immunity: "A mediator is a quasi judicial officer and shall have the same immunity from civil liability as an arbitrator acting under chapter 572." Subsequent amendments to the bill, however, whittled away at the initial version's broad grant of immunity to mediators. And, notwithstanding arguments that even with a statutory grant of immunity mediation participants would have recourse to set aside or vacate improper mediation agreements, immunity was eliminated altogether largely on the argument by several family mediation practitioners that the grant of immunity was premature given the absence of qualifications, standards, procedures, ethics and training for mediators.


122. The first of the proposed amendments provided "A mediator is a quasi-judicial officer and shall be immune from civil liability for his or her actions," Subcomm. Report 1/13/84 [Counsel] JB SCS0966A-5, at 3 lines 28-29, thereby deleting that portion of the bill granting mediators equal immunity status to that of arbitrators. A second amendment to the bill removed the quasi-judicial officer status afforded to mediators under the original bill, proposing a grant of immunity which read: "A mediator shall be immune from civil liability for his or her actions." Subcomm. Report Mar. 29, 1984 [Counsel] JB SCS0966A10, at 1 line 12. (deleting p. 3 line 28, "is a quasi-judicial officer and" from the bill.) This second amendment was re-drafted to read "A mediator shall be immune from civil liability for his or her actions within the scope of his or her position as a mediator unless there is proof of fraud by the mediator" Journal of the House, 7214a Comm.on Judiciary Amendment to H.F. 944, Sec.7 [572.37] [Status of Mediator] (Apr. 4, 1984), thus, further limiting the circumstances under which immunity would be granted to the State's mediators.

123. Following several revisions of the bill's immunity clause by members of both the House and Senate, the Senate Judiciary Committee heard from John Wolff, President of Minneapolis' Mediation Center who testified in support of the bill, applauding, inter alia, the bill's grant of civil immunity for mediators. Mr. Wolff testified:

The other thing the bill does is to provide civil immunity for mediators from suits for people who might for some reason decide after they've made a mediated settlement agreement, which they expressed would be a binding agreement and then subsequently decide that they're not pleased with that mediated settlement agreement, it would be unfortunate if mediators were subject to suit in that situation. The parties do have the relief to have the mediated settlement agreement set aside if there's any inappropriate conduct by the part of the mediator or if under the principles of law applicable to contracts generally, the contract could be set aside.

(on file with author)
in Minnesota. 124 A growing number of states have taken a different ap-

124. Emory Barrett, testified on behalf of the Minnesota Council of Family Mediators: ("We feel that the issue of standards and training should be addressed long before we are granting immunity from civil liability and privileged communication . . . If the committee desires to pass this bill, we would strongly recommend that those sections relating to domestic dispute mediation be stricken from the bill. . . I'm addressing the issue of immunity as it relates to divorce mediation and that same principle could apply to anyone else that's doing mediation that is untrained.") The committee also heard opposing testimony from Steven Erickson, a divorce mediator, attorney and member of the Minnesota Counsel of Family Mediators. (expressing his concerns about "giving immunity to mediators before the concept has really had a chance to gel; before we really know what forms and procedures and rules work best; before we know whether it works in domestic abuse situations or not . . . [T]he core of the issue is standards and training which is being addressed on a national basis; my recommendation is that we go very slowly and we take time to really address all the implications of the bill and particularly the immunity part. [W]e're raising questions about the effect of those rules and regulations and forms and procedures that are suggested to be used without...standards, training and credentials which we hope will be addressed [and] we simply wonder whether or not this is putting the cart before the horse.") Finally, the Committee heard from Marilyn McKnight, Director of Family Mediation Services and trainer for the Alternative Community Dispute Resolution Program. ("My concern has to do with the procedures and forms described in this bill in mediation and the same question that this is premature that even in our program, we are looking at what we need, what is needed in the individual communities and really raises a question of why this needs to be in a bill at this point, and isn't it a little soon?"") Following testimony opposing the bill's immunity provision, the Committee Chairman stated, "[I]f indeed the whole notion of the immunity is premature for [family] mediators, it's probably premature for all of them." The immunity provision was subsequently stricken from the bill completely, leaving the final, adopted version of the Civil Mediation Act without any reference to immunity for mediators. (on file with author)
proach and granted differing ranges of immunity. 125

Not all lawyers' professional liability policies provide coverage for

125. States granting immunity to mediators include: Arizona, ARIZ. REV. STAT. ANN. § 12-2238(E) (1993) (limiting mediator liability to acts or omissions involving intentional misconduct or reckless disregard of a substantial risk of a significant injury to the rights of others); Colorado, COLO. REV. STAT. ANN. § 13-22-305(6) (West 1992) & § 13-22-306(2)(West 1991) (limiting mediator liability to willful or wanton misconduct); Delaware, DEL. SUPER. CT. R. CIV. PRO., INTERIM R. 16.2 (f)(eff. 1992, for one year) (limiting mediator liability in court-annexed mediation to acts or omissions "done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another"); Florida, Fla. STAT. ANN. § 44.107 (West 1990) (granting immunity to mediators in court-ordered civil mediations in the same manner and to the same extent as a judge); Maine, ME. REV. STAT. ANN. tit.4, § 18 (2-A) (1990) (granting immunity to mediators under contract with the Justice department for any acts performed within the scope of the mediator's duties); Michigan, Mich. Comp. Laws Ann. § 691.1557(a)(7)(a) (West 1994) (limiting community dispute resolution center mediator liability to acts done "in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of the rights, safety, or property of another"); Mississippi, Miss. CODE ANN. § 69-2-49 (1990) (requiring parties who enter into the State's Voluntary Farm Debt Mediation Program to waive right to take civil action against State mediators, thereby releasing mediators from civil liability for actions occurring within the scope of the mediation); New Mexico, N.M. STAT. 2 Dist. LLR2-601(E) (Michie 1994) (granting quasi-judicial immunity to Second Judicial District Court-annexed ADR program mediators, limited to conduct within the scope of their appointment); New York, N.Y. PUB. HEALTH LAw § 2974 (McKinney 1994) (granting immunity to mediators acting in good faith under Public Health Dispute Mediation System); North Carolina, N.C. GEN. STAT. § 7A-38(j) (1993) (pilot program extending judicial immunity to court-annexed pretrial settlement conference mediators, in the same manner and to the same extent as a judge of the State's General Court of Justice); North Dakota, N.D. CENT. CODE § 6-09.10-04.1 (1989) (granting immunity to mediators who assist financially distressed farmers and small business persons); Oklahoma, OKLA. STAT. ANN. tit.59, § 328.63 (1983) (granting immunity to mediation committee members under Oklahoma Dental Mediation Act for actions taken in good faith); Oregon, OR. REV. STAT. § 36.210 (1989) (limiting mediator liability to acts or omissions made in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another); South Dakota, S.D. CODIFIED LAWS ANN. § 54-13-20 (1989) (granting State Farm Mediation Board mediators immunity for acts done in good faith and within the scope of mediator's official functions and duties); Tennessee, Tenn. CODE ANN. § 16-20-105 (1993) (granting Victim-Offender Mediation Center employees and volunteers immunity for acts performed in their capacity as employees or volunteers, except in cases of willful or wanton misconduct); Virginia, Va. CODE ANN. § 8.01-581.23 (Michie 1988) (granting mediators immunity for actions done in good faith); West Virginia, W. Va. CODE § 23-5-1(e) (1994) (granting immunity to workers' compensation mediators); Wisconsin, Wis. Stat. ANN. § 93.50(2)(c) (West 1991) (limiting liability for Farm mediators) and Wis. Stat. ANN. § 655.465(6)(a) (West 1993) (granting immunity to Health Care mediators); Wyoming, Wyo. STAT. § 1-43-104 (1991) (granting mediators immunity from civil liability for any good faith act or omission within scope of duties).
mediation under standard policy wording.\textsuperscript{126} Some insurers reason that there is no coverage for such activities because there is no lawyer-client relationship.\textsuperscript{127}

Lawyer mediators are well advised to check their coverage; even for those insurers which have determined that mediating is not the practice of law, a mediator rider is generally available at very low cost.\textsuperscript{128}

\textbf{VI. CONCLUSIONS/RECOMMENDATIONS}

Minnesota lawyers accepting appointments as mediators under Rule 114 must recognize the ethical vacuum into which they will choose to practice. Whether all or only parts of the rules of professional

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\textsuperscript{126} Bonnie L. Yakley, \textit{Insurance for Mediators} 35 RES GESTAE 534 (May 1992), Phone calls to local providers of malpractice insurance confirm a split in coverage. For example, the standard attorney professional liability insurance offered by St. Paul Companies covers mediation as a general legal service. Telephone Interview with Kent George, St. Paul Companies (Mar. 27, 1995). The same is true regarding general attorney malpractice insurance offered by Minnesota Lawyers Mutual Insurance Company ("MLM"); however, MLM covers individual attorney mediators only if mediation is incidental to the firm’s practice. So, if all the attorney or firm does is mediation, then the mediator could not get insurance through MLM. Telephone Interviews with Tom Konkel, Minnesota Lawyers Mutual Insurance Co. (Mar. 27, 1995). In contrast, mediator insurance is not part of a standard attorney policy offered by Complete Equity Markets, but can be purchased as an additional rider to the standard policy. Insurance is also available through Complete Equity Markets to non-attorneys. Telephone Interview with Betsy Thomas, Complete Equity Markets (Mar. 27, 1995).

\textsuperscript{127} Id.

\textsuperscript{128} In writing this article I checked my own coverage as a clinician providing legal aid services under a policy issued by Complete Equity Markets, Inc. My contract reads: “Legal Aid Services’ means the rendering of legal services in civil matters to persons unable to employ counsel for lack of means, either in the nature of consultation and advice or in the nature of representation in court or before administrative bodies.” The insurer’s position is that this definition of legal services excludes mediation. Betsy Thomas interview, supra note 126.

The same company offers a general liability policy to all members of SPIIDR. The standard wording of that policy covers “any negligent act, error or omission in the conduct of Arbitration or Dispute Resolution Services.” Section I. “Dispute resolution service” is defined in the policy as “the rendering of professional services by the Assured as a neutral administrator involving the submission, negotiation and settlement of disputes.” Section II(c).

Interestingly, the policy requires that “where the Assured assists in preparing a written settlement agreement in connection with the provision of Dispute Resolution Services, the Assured shall advise each participant in writing to have the settlement agreement independently reviewed by their own counsel before executing the agreement.” Section VIII(d). And, attorneys offering dispute resolution must, as a condition of coverage under the policy, “provide a written statement to all the parties, explaining his or her role as a neutral intermediary and stating that he or she may not act as an advocate for either party.” Section VIII(d).

conduct will be found relevant and enforceable in evaluating a mediating lawyer's actions is an open question. Ideally, the Minnesota Supreme Court should amend the rules of professional conduct to expressely identify and delineate a role for the lawyer offering mediation services to non-clients. A number of model rules are available to consider, including the ABA proposed rule, and rules already adopted in Maine and Oregon.

An alternative approach is to promulgate a specific code of ethics for lawyer-mediators, or develop detailed court rules dictating mediator behavior.

129. See supra notes 16, 35, 86, 87. The full text of the Model Rule is as follows:
   a. A lawyer may act as a mediator but must inform the parties of the difference between the lawyer's role as mediator and the lawyer's role as advocate. The lawyer shall act as mediator only with the parties' consent, unless the parties are attending the session pursuant to a legal mandate.
   b. The lawyer who acts as mediator shall advise and encourage the parties to seek independent legal counsel before a settlement agreement is executed.
   c. If either of the parties do not have independent legal counsel, the lawyer-mediator shall give legal information to a party only in the presence of all parties in the matter. The lawyer-mediator shall advise unrepresented parties or those parties whose independent counsel does not accompany them about the importance of reviewing the lawyer-mediator's legal information with an independent counsel.
   d. A lawyer may act as mediator only if the lawyer has not previously nor is currently representing one of the parties in connection with the subject matter of the mediation.
   
   e. A lawyer may act as mediator in a dispute involving a past or present client, who was or is represented in a matter unrelated to the mediation, provided (i) there is full disclosure of the representation, (ii) in light of the disclosure, obtain the parties' informed consent, (iii) there is no breach of confidentiality, and (iv) the mediator is impartial. This does not prohibit intermediation between clients, which is interpreted by Rule 2.2
   f. A lawyer may not act on behalf of any party to a mediation, nor represent one such party against the other, in any legal proceeding related to the subject of the mediation.
   g. A lawyer shall withdraw as mediator if any of the conditions stated in this rule are no longer satisfied or if any of the parties to the mediation so request except when the parties are attending pursuant to legal mandate. Upon withdrawal, the lawyer shall not represent any of the parties in any present or future matters that were the subject of mediation.
   h. A lawyer mediator shall not charge a fee contingent on the outcome of the mediation.

130. See supra note 17.
131. See supra note 18.
132. This is the approach taken in Florida. See supra at notes 19, 89 and 96.
The Court and or the legislature should also critically examine the conflicting confidentiality provisions relating to mediation. First, mediators should not have to guess whether they are mandated to report maltreatment of children and vulnerable adults. Second, the court should consider amending Rule of Professional Conduct 8.3 to expressly exempt lawyer-mediators from the mandatory obligation to report lawyer misconduct observed in mediation. This amendment would relieve lawyer-mediators of the mandatory obligation to "police" the performance of parties' counsel (and, in some cases, the conduct of parties who happen to be lawyers) and foster the frankest possible settlement dialogue. Third, just as Rule of Professional Conduct 1.6 allows the disclosure of client confidences or secrets to establish or collect a fee or to defend the lawyer against an accusation of wrongful conduct, Rule 114 should be amended to contain a similar express confidentiality exception for lawyer-mediators. Finally, there is need for clarity regarding the nature and extent of confidentiality protection and witness privilege in actions to vacate or set aside mediated agreements.

Given the current uncertainty about applicable rules and the lawyer's role as mediator, the prudent lawyer-mediator should incorporate the following tips into their regular mediation practice:

1) Always have parties review and sign an agreement to mediate before beginning a Rule 114 mediation. Written agreements to mediate are the best way to ensure compliance with the required disclosures of the Civil Mediation Act, and increase the likelihood of a meeting of the minds regarding the lawyer-mediator's role in mediation.

2) In addition to including a provision on confidentiality in your agreement to mediate, make sure your mediation orientation includes a frank discussion of confidentiality concerns. If you believe you are mandated to make certain kinds of reports or disclosures, tell the par-

133. See discussion supra at notes 40-48.
134. See discussion supra at notes 49-53.
135. MINN. R. PROF. CONDUCT 1.6(b)(5)(1994).
136. See discussion supra at notes 79-80 (noting the existing implicit confidentiality exception in MINN. GEN. R. PRAC. 114.11(c) (1994)).
137. See discussion supra at notes 81-82.
138. Supra note 3.
139. See Appendix I for a reproduction of my agreement to mediate.
ties in advance.  

3) Be particularly sensitive to potential conflicts of interest. At a minimum, disclose even remote potential conflicts and seek consent for your continued involvement.

4) Rule 114 specifically authorizes ex parte contacts between you and the parties and their counsel, provided such contact is made with your consent and "so long as the communication encourages or facilitates settlement." Accordingly, do not hesitate to contact the parties' counsel (or the parties themselves if proceeding pro se) prior to beginning mediation to inquire as to the nature of services requested by the parties, including how the parties want to utilize your legal expertise and judgment.

5) Always encourage parties to retain independent legal counsel, if

140. One experienced mediator urges a discussion of confidentiality along these lines:
Mediation is a settlement procedure which should remain confidential and privileged. Nevertheless: Evidence that would be discoverable and useful at trial had the mediation not been held, does not lose its character as discoverable or admissible at trial merely because it is used in a mediation. Of course the settlement agreement we hope to reach by mediation will be enforceable, and to that extent is not secret. In some circumstances the law requires certain disclosures-like a disclosure of drug or child abuse or of a planned future murder-whether or not first disclosed in a mediation. But we will get more open communication, which seems to help the mediation process, if we each

. agree to treat the statements there made as confidential (except for necessary internal company reports to those having need to know, and those reports themselves shall be kept confidential);

. agree that the fact that a statement was made in the mediation shall be privileged against use at any trial relating to this dispute, even in cross-examination;

. agree that notes either you or the mediator takes must be destroyed at the conclusion of the mediation, save only the notes of the final agreement.

. agree that the mediator will not be called as a witness or otherwise involved in any ongoing litigation, should settlement fail.

If that is agreeable, it would be a favor if you would execute copies of this statement of agreement, so each of the parties and the mediator can preserve a copy in their files." Followed by signature lines.

I like the idea of reminding the parties in writing before the mediation that the confidentiality is not total, so they won't be deceived into thinking it is. So I send them this contract form and ask that they bring it to the mediation, executed.

I like the idea of binding the parties to an agreement to honor the confidence rather than relying on legal privilege. I don't trust courts and privilege. There are too many barnacles on the law of privilege scattered around the nation.


141. MINN. GEN. R. PRAC. 114.10(b) (1994).
they are not already represented. However, avoid making referrals to a particular lawyer; rather, use a list, preferably one generated by an independent organization such as the Bar Association.

6) If you give advice on the law, give it only to both parties in joint session, and always emphasize the need to obtain independent legal counsel to review your advice.

7) If you draft agreements, include civil mediation act provisions to ensure enforceability\textsuperscript{142} and emphasize the need for each party to review the agreement with independent counsel before signing.

8) If you advertise your mediation services, scrupulously follow the rule of professional conduct requirement to avoid false or misleading communication about your services.\textsuperscript{143} Never state or imply that you are a certified mediator.\textsuperscript{144}

9) Charge only reasonable fees, communicate your fees in writing, do not charge fees contingent on mediation outcome, keep records, and create trust accounts if you bill by retainer.

10) Check to make sure your malpractice coverage covers your mediation activities; if not, purchase a rider or separate policy.

Finally, given the current ethical unknowns, keep the phone number of the Lawyer's Professional Responsibility Board close at hand.\textsuperscript{145} The Board's staff attorneys are available to render advisory opinions on ethical issues.

\textsuperscript{142} See supra note 13.
\textsuperscript{143} MINN. R. PROF. CONDUCT 7.1 (1994); supra note 5.
\textsuperscript{144} See discussion supra at notes 2-6.
\textsuperscript{145} The current phone number for the Board is (612)296-3952.
APPENDIX I

The following is a reproduction of my agreement to mediate. This agreement is adopted from a form originally prepared by the Mediation Center, a non-profit provider of mediation services.

ACKNOWLEDGEMENT OF MEDIATION GROUND RULES AND AGREEMENT TO MEDIATE

The parties named below acknowledge and agree that they are willing to participate in a mediation process in an effort to reach voluntary agreement to resolve the following:

The parties also acknowledge and agree to be bound by the following ground rules:

1. Duty to meet. The parties will attend scheduled mediation conferences unless they advise the mediator of their inability to attend at least 24 hours before the conference or unless there is an emergency.

2. Termination of mediation. The effort to resolve the matter through mediation may be terminated without cause as follows:

   a. Either party may withdraw from mediation; or

   b. Mediator may issue a “Notice of Termination of Mediation” to the parties.

3. Good Faith. The parties agree to negotiate in good faith. The parties may refuse to divulge information but will not give false information.

4. Mediator. The mediator does not represent either party. The mediator has no duty to provide advice or information to a party or to assure that a party has an understanding of the problem and the
consequences of his/her actions. The function of the mediator is to promote and facilitate voluntary resolution of the matter and the mediator has no responsibility concerning the fairness of legality of the resolution. Neither party knows of any circumstances which would cause reasonable doubt regarding the impartiality of the mediator.

5. Confidentiality. The parties and mediator agree to the following confidentiality provisions:

a. All discussions, representations, and statements made during mediation will be privileged as settlement negotiations. The parties agree that they will not attempt to discover or use as evidence in any legal proceeding anything related to the mediation, including any communications or the thoughts, impressions or notes of the mediator. No document produced in mediation which is not otherwise discoverable will be admissible by any of the parties in any legal proceedings for any purpose, including impeachment.

b. The parties will not subpoena the mediator, or any records or documents of the mediator in any legal proceedings of any kind. If so called or subpoenaed, the mediator may refuse to testify or produce the requested documents. Should any party attempt to compel such testimony or production, such party shall be liable for, and shall indemnify the mediator against any liabilities, costs or expenses, including reasonable attorneys’ fees, which the mediator may incur in resisting such compulsion.

c. The mediator will not discuss the mediation process or disclose any communications made during the mediation process except as authorized by the parties or required by law. Minnesota law may require the mediator to report suspected maltreatment of children and vulnerable adults.

6. Fees. The mediator’s hourly rate is —. The parties will be billed at the end of each month. The parties will share the cost of mediation
as follows:

7. Civil Mediation Act Disclosure. Prior to beginning this mediation, the parties were each provided with a written statement of the mediator's qualifications.

8. Voluntary Acknowledgement. The parties hereby voluntarily sing this Acknowledgement to affirm that they have read the Acknowledgement and agree to be bound by its provisions as they attempt to mediate their problem.

{signed and dated by mediator, parties and counsel}