STATE OF MINNESOTA

IN SUPREME COURT

C5-87-843

ORDER FOR HEARING TO CONSIDER PROPOSED ALTERNATIVE DISPUTE RESOLUTION RULE FOR THE MINNESOTA GENERAL RULES OF PRACTICE

IT IS HEREBY ORDERED that a hearing be had before this Court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on November 17, 1993 at 1:30 p.m., to consider the recommendation of the Alternative Dispute Resolution Implementation Committee that an Alternative Dispute Resolution Rule (Rule 114) be added to the Minnesota General Rules of Practice. A copy of the committee's report and proposed rule are annexed to this order.

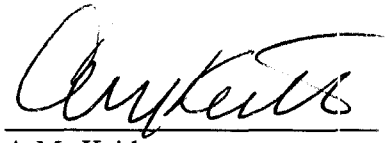
IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 245 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before November 12, 1993 and

2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the aforesaid Clerk together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before November 12, 1993.

Dated: September 17, 1993

BY THE COURT:



A.M. Keith
Chief Justice

August 25, 1993

C5-87-843

FINAL REPORT

ALTERNATIVE DISPUTE RESOLUTION IMPLEMENTATION COMMITTEE

Hon. Charles Flinn, Jr., Saint Paul, Chair

Hon. Lawrence Agerter, Mantorville
Larry Anderson, Minneapolis
Sue K. Dosal, Saint Paul
Jon Hagen, Redwood Falls
Hon. Roberta Levy, Minneapolis
Hon. John Lindstrom, Willmar
Janie S. Mayeron, Esq., Minneapolis
Prof. Barbara McAdoo, Saint Paul
Lynae Olson, Saint Paul
Edward J. Pluimer, Esq., Minneapolis
Gary Weissman, Esq.
Nancy Welsch, Esq., Saint Paul
DePaul Willette, Esq., Mendota Heights

Janet K. Marshall, Saint Paul, Staff
Julie Stenberg, Saint Paul, Staff

I N T R O D U C T I O N

The Minnesota Supreme Court and Minnesota State Bar Association jointly established a Task Force on Alternative Dispute Resolution (ADR) in 1987 to explore alternative methods which may ease the burden of the caseload upon the courts and facilitate resolution of legal problems of the citizens. The task force assessed the promise of ADR programs for resolving disputes more efficiently, at less cost, and with greater satisfaction to the parties while assuring that these processes guarantee fundamental fairness and promote the goals of effective and efficient justice. This task force made a number of recommendations and submitted a report to the Supreme Court, which was approved in June of 1990. In 1991, the following legislation was passed:

> Subd. 1. **General.** The supreme court shall establish a statewide alternative dispute resolution program for the resolution of civil cases filed with the court. The supreme court shall adopt rules governing practice, procedure, and jurisdiction for alternative dispute resolution programs established under this section. The rules must provide an equitable means for the payment of fees and expenses for the use of alternative dispute resolution processes.
>
> Subd. 2. **Scope.** Alternative dispute resolution methods provided for under the rules must include arbitration, private trials, neutral expert fact-finding, mediation, mini-trials, consentual special magistrates including retired judges and qualified attorneys to serve as special magistrates for binding proceedings with a right of appeal, and any other methods developed by the supreme court. The methods provided must be non-binding unless otherwise agreed to in a valid agreement between the parties. Alternative dispute resolution may not be required in guardianship, conservatorship, or civil commitment matters; proceedings in the juvenile court under chapter 260; or in matters arising under section 144.651, 144.652, 518B.01, or 626.557.

Minn. Stat. § 484.76 (1992).

Pursuant to this statute, and to implement the 1990 report of the joint task force, this Alternative Dispute Resolution Implementation Committee ("Implementation Committee") was appointed by the Minnesota Supreme Court.

Over the course of a year, the implementation committee met to discuss the 1990 recommendations. The committee also reviewed training programs offered by existing ADR programs, and considered a number of items that were not addressed in 1990, including applicability of the Rules of Evidence; the need for a brochure which explains ADR in easily understandable terms; and the proper content of training programs for neutrals.

The Committee reconfirmed the conclusions of the initial Task Force that ADR has the potential to ease burdens upon the courts and to dispose of disputes effectively and efficiently. The Committee concluded that many of the potential benefits of ADR are either lost or reduced by the failure to use ADR to settle or narrow disputes earlier in the case.

Fundamental to the approach of the proposed rules is the Committee's conclusion that the parties should be advised of ADR options immediately after the case is filed, that the parties should 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 that the Court should consider the possibility of early referral of cases to ADR with or without the parties' agreement.

The Committee believes ADR will better serve the courts and the parties if all options are known and considered at the earliest stages of litigation, regardless of whether that results in ADR occurring early in the case, later in the case, or not at all.

As a result of the committee's deliberation, rules were drafted, forms were prepared, and other action necessary to implement the Rules was identified.

The Committee Report is divided into three sections. The first section recommends the adoption of a new rule to govern the ADR system. The second section recommends amendments to existing rules to accommodate the ADR process. The third section recommends the creation of a temporary Board to fulfill certain functions described in the new rules in section one. Forms to be used by the Board are included. Finally, a flowchart of the ADR process is set forth on the last page of the report.

Respectfully submitted,

MINNESOTA SUPREME COURT ALTERNATIVE DISPUTE RESOLUTION IMPLEMENTATION COMMITTEE

Hon. Charles Flinn, Jr., Saint Paul, Chair

Hon. Lawrence Agerter, Mantorville
Larry Anderson, Minneapolis
Sue K. Dosal, Saint Paul
Jon Hagen, Redwood Falls
Hon. Roberta Levy, Minneapolis
Hon. John Lindstrom, Willmar
Janie S. Mayeron, Esq., Minneapolis
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Lynae Olson, Saint Paul
Edward J. Pluimer, Esq., Minneapolis
Gary Weissman, Esq.
Nancy Welsch, Esq., Saint Paul
DePaul Willette, Esq., Mendota Heights

Janet K. Marshall, Saint Paul, Staff
Julie Stenberg, Saint Paul, Staff

RECOMMENDATION 1: A NEW RULE GOVERNING ADR SHOULD BE ADOPTED.

The principal means for implementing the committee's recommendations is the adoption of the following Rule 114 of the Minnesota General Rules of Practice.

Rule 114. ALTERNATIVE DISPUTE RESOLUTION

RULE 114.01 Applicability

All civil cases are subject to Alternative Dispute Resolution (ADR) processes, except for those actions enumerated in Minn. Stat. § 484.76 and Rule 111.01 of these rules.

RULE 114.02 Definitions

The following terms shall have the meanings set forth in this rule in construing these rules and applying them to court-affiliated ADR programs.

(a) ADR Processes

(1) Arbitration: A forum in which each party and its counsel present its position before a neutral third party, who renders a specific award. If the parties stipulate in advance, the award is binding and is enforceable in the same manner as any contractual obligation. If the parties do not stipulate that the award is binding, the award is not binding and a request for trial de novo may be made.

(2) Consensual Special Magistrate: A forum in which a dispute is presented to a neutral third party in the same manner as a civil lawsuit is presented to a judge. This process is binding and includes the right of appeal.

(3) Early Neutral Evaluation (ENE): A forum in which attorneys present the core of the dispute to a neutral evaluator in the presence of the parties. This occurs after the case is filed but before discovery is conducted. The neutral then gives a candid assessment of the strengths and weaknesses of the case. If settlement does not result, the neutral helps narrow the dispute and suggests guidelines for managing discovery.

(4) Mediation: A forum in which a neutral third party facilitates communication between parties to promote settlement. A mediator may not impose his or her own judgment on the issues for that of the parties.

(5) Mediation - Arbitration (Med-arb): A hybrid of mediation and arbitration in which the parties initially mediate their disputes; but if they reach impasse, they arbitrate the deadlocked issues.

(6) Mini-Trial: A forum in which each party and their counsel present their position, either before a selected representative for each party, ~~or~~ before a neutral third party, or both to define the issues and develop a basis for realistic settlement negotiations. A neutral

third party may issue an advisory opinion regarding the merits of the case. The advisory opinion is not binding unless the parties agree that it is binding and enter into a written settlement agreement.

(7) Moderated Settlement Conference: A forum in which each party and their counsel present their position before a panel of neutral third parties. The panel may issue a non-binding advisory opinion regarding liability, damages, or both.

(8) Neutral Fact Finding: A forum in which a dispute, frequently one involving complex or technical issues, is investigated and analyzed by an agreed-upon neutral who issues findings and a non-binding report or recommendation.

(9) Summary Jury Trial: A forum in which each party and their counsel present a summary of their position before a panel of jurors. The number of jurors on the panel is six unless the parties agree otherwise. The panel may issue a non-binding advisory opinion regarding liability, damages, or both.

(b) Neutral

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.

Implementation Committee Comments--1993

The definitions of ADR processes that were set forth in the 1990 report of the joint Task Force have been used. No special educational background or professional standing (*e.g.*, licensed attorney) is required of neutrals.

RULE 114.03 Notice of ADR Processes

(a) Upon receipt of the completed Certificate of Representation and Parties required by Rule 104 of these rules, the court administrator shall provide the attorneys of record and any unrepresented parties with information about ADR processes available to the county and the availability of a list of neutrals who provide ADR services to the county.

(b) Attorneys shall provide clients with the ADR information.

Implementation Committee Comments—1993

This rule is designed to provide attorneys and parties to a dispute with information on the efficacy and availability of ADR processes. Court personnel are in the best position to provide this information. A brochure has been developed, which can be used by court administrators to give information about ADR processes to attorneys and parties. The State Court Administrator's Office will maintain a master

list of all qualified neutrals, and will update the list and distribute it annually to court administrators.

RULE 114.04 Selection of ADR Process

(a) After the filing of an action, the parties shall promptly confer regarding case management issues, including the selection and timing of the ADR process. Following this conference ADR information shall be included in the informational statement required by Rule 111.02.

(b) If the parties cannot agree on the appropriate ADR process, the timing of the process, or the selection of neutral, or if the court does not approve the parties' agreement, the court shall schedule a telephone or in-court conference of the attorneys and any unrepresented parties within thirty days after the due date for filing informational statements pursuant to Rule 111.02 to discuss scheduling and case management issues. If no agreement on the ADR process is reached or if the judge disagrees with the process selected, the judge may order the parties to utilize one of the non-binding processes, or may find that ADR is not appropriate.

(c) Within 90 days of the filing of the action, the court's Rule 111.03 Scheduling Order shall designate the ADR process selected, the deadline for completing the procedure, and the name of the neutral selected or the deadline for the selection of the neutral. If ADR is determined to be inappropriate, the Rule 111.03 Scheduling Order shall so indicate.

(d) Upon motion by any party, or on its own initiative, the court may, at any time, issue an order for any ADR process.

Implementation Committee Comments--1993

Early case evaluation and referral to an appropriate ADR process has proven to facilitate speedy resolution of disputes, and should be encouraged whenever possible. Mandatory referral to a non-binding ADR process may result if the judge makes an informed decision despite the preference of one or more parties to avoid ADR. The judge shall not order the parties to use more than one non-binding ADR process. Seriatim use of ADR processes, unless desired by the parties, is inappropriate. The judge's authority to order mandatory ADR processes should be exercised only after careful consideration of the likelihood that mandatory ADR in specific cases will result in voluntary settlement.

RULE 114.05 Selection of Neutral

(a) If the parties are unable to agree on a neutral, or the date upon which the neutral will be selected, the court shall appoint the neutral at the time of the issuance of the scheduling order required by Rule 111.03.

(b) In appropriate circumstances, the court, upon agreement of the parties, may appoint a neutral who does not qualify under Rule 114.12 of these Rules, if the appointment is based on legal or other professional training or experience. This section does not apply when mediation or med-arb is chosen as the dispute resolution process.

(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.

Implementation Committee Comments--1993

Parties should consult the statewide roster for information on the educational background and relevant training and experience of the proposed neutrals. It is important that the neutrals' qualifications be provided to the parties so that the parties may make an informed choice. Unique aspects of a dispute and the preference of the parties may require special qualifications by the neutral.

Parties should have the ability, within reason, to choose a neutral with special expertise or experience in the subject matter of the dispute, even if they do not qualify under Rule 114.12, though it is anticipated that this will occur infrequently. Parties to mediation and med-arb processes must appoint an individual who qualifies under Rule 114.12.

RULE 114.06 Time and Place of Proceedings

(a) The court shall send a copy of its order appointing the neutral to the neutral.

(b) Upon receipt of the court's order, the neutral shall, promptly schedule the ADR process in accordance with the scheduling order and inform the parties of the date. ADR processes shall be held at a time and place set by the neutral, unless otherwise ordered by the court.

(c) If the case is settled through an ADR process, the attorneys shall complete the appropriate court documents to bring the case to a final disposition.

Implementation Committee Comments--1993

The neutral will schedule the ADR process date unless, the parties agree on a date within the timeframe contained in the scheduling order. If the neutral is selected at the time of scheduling order, such order can serve as the court order appointing the neutral. In scheduling the ADR process the neutral will attempt to accommodate the parties' schedules.

Rule 114.07 Attendance at ADR Proceedings

(a) Non-binding ADR processes are not open to the public except with the consent of all parties.

(b) The attorneys who will try the case may be required to attend ADR proceedings.

(c) Processes aimed at settlement of the case, such as mediation, mini-trial, or med-arb, shall be attended by individuals with the authority to settle the case, unless otherwise directed by the court.

(d) Processes aimed at reaching a decision in the case, such as arbitration, need not be attended by individuals with authority to settle the case, as long as such individuals are reasonably accessible, unless otherwise directed by the court.

(e) The court may impose sanctions for failure to attend a scheduled ADR process only if this rule is violated.

Implementation Committee Comments--1993

Effective and efficient use of an ADR process depends upon the participation of appropriate individuals in the process. Attendance by attorneys facilitates discussions with clients about their case. Attendance of individuals with authority to settle the case is essential where a settlement may be reached during the process. In processes where a decision is made by the neutral, individuals with authority to settle need only be readily accessible for review of the decision.

RULE 114.08 Confidentiality

(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, except as provided in paragraph (d).

(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 evidence.

(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.

Implementation Committee Comments--1993

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.

This proposed rule is important to establish the subsequent evidentiary use of statements made and documents produced during ADR proceeidngs. As 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. This rule underscores and clarifies that the fact that ADR proceedings have occurred or what transpired in them. Evidence and sworn testimony offered in summary jury trials and other similar related proceedings is not excluded from admissibility by this rule, but is

explicitly treated as other evidence or as in the other sworn testimony or evidence under the rules of evidence. Former testimony is accepted from the hearsay rule if the witness is unavailable by Minn. R. Evid. 804(b)(1). Prior testimony may also be admissible under Minn. R. Evid. 613 as a prior statement.

RULE 114.09 Arbitration Proceedings

(a) Evidence

(1) Except where a party has waived the right to be present or is absent after due notice of the hearing, the arbitrator and all parties shall be present at the taking of all evidence.

(2) The arbitrator shall receive evidence that the arbitrator deems necessary to understand and determine the dispute. Relevancy shall be liberally construed in favor of admission. The following principles apply:

(i) Documents. The arbitrator may consider written medical and hospital reports, records, and bills; documentary evidence of loss of income, property damage, repair bills or estimates; and police reports concerning an accident which gave rise to the case, if copies have been delivered to all other parties at least 10 days prior to the hearing. Any other party may subpoena as a witness the author of a report, bill, or estimate, and examine that person as if under cross - examination. Any repair estimate offered as an exhibit, as well as copies delivered to other parties, shall be accompanied by a statement indicating whether or not the property was repaired, and if it was, whether the estimated repairs were made in full or in part, and by a copy of the receipted bill showing the items repaired and the amount paid. The arbitrator shall not consider any police report opinion as to ultimate fault.

(ii) Other Reports. The written statement of any other witness, including written reports of expert witnesses not enumerated above and statements of opinion which the witness would be qualified to express if testifying in person, shall be received in evidence if: (1) it is made by affidavit or by declaration under penalty of perjury; (2) copies have been delivered to all other parties at least 10 days prior to the hearing; and (3) no other party has delivered to the proponent of the evidence a written demand at least 5 days before the hearing that the witness be produced in person to testify at the hearing. The arbitrator shall disregard any portion of a statement received pursuant to the rule that would be inadmissible if the witness were testifying in person, but the inclusion of inadmissible matter does not render the entire statement inadmissible.

(iii) Depositions. Subject to objections, the deposition of any witness shall be received in evidence, even if the deponent is not unavailable as a witness and no exceptional circumstance exist, if: (1) the deposition was taken in the manner provided for by law or by stipulation of the parties; and (2) not less than 10 days prior to the hearing, the proponent of the

deposition serves on all other parties notice of the intention to offer the deposition in evidence.

(iv) Affidavits. The arbitrator may receive and consider witness affidavits, but shall give them only such weight as they are entitled to after consideration of any objections. A party offering opinion testimony in the form of an affidavit, statement, or deposition, shall have the right to withdraw such testimony, and attendance of the witness at the hearing shall not then be required.

(3) Subpoenas shall issue for the attendance of witnesses at the arbitration hearing, as provided in Minn. R. Civ. P. 45. The party requesting the subpoena shall modify the form of the subpoena to show that the appearance is before the arbitrator and to give the time and place set for the arbitration hearing. At the discretion of the arbitrator, nonappearance of a properly subpoenaed witness may be grounds for an adjournment or continuance of the hearing. If any witness properly served with a subpoena fails to appear or refuses to be sworn or answer, the court may conduct proceedings to compel compliance.

(b) Powers of Arbitrator

The arbitrator has the following powers:

(1) to administer oaths or affirmations to witnesses;
(2) to take adjournments upon the request of a party or upon the arbitrator's initiative;
(3) to permit testimony to be offered by deposition;
(4) to permit evidence to be introduced as provided in these rules;
(5) to rule upon admissibility and relevance of evidence offered;
(6) to invite the parties, upon reasonable notice, to submit pre-hearing or post-hearing briefs or pre-hearing statements of evidence;
(7) to decide the law and facts of the case and make an award accordingly;
(8) to award costs, within statutory limits;
(9) to view any site or object relevant to the case; and
(10) any other powers agreed upon by the parties.

(c) Record

(1) No record of the proceedings shall be made unless permitted by the arbitrator and agreed to by the parties.

(2) The arbitrator's personal notes are not subject to discovery.

(d) The Award

(1) No later than 10 days from the date of the arbitration hearing or receipt of the final post-hearing memorandum, the arbitrator shall file with the court the decision, together with proof of service by first class mail on all parties.

(2) If no party has filed a request for a trial within 20 days after the award is filed, the court administrator shall enter the decision as a judgment and shall promptly mail notice of entry of judgment to the parties. The judgment shall have the same force and effect as, and is subject to all provisions of law relating to, a judgment in a civil action or proceeding, except that it is not subject to appeal, and except as provided in section (d) may not be attacked or set aside. The judgment may be enforced as if it had been rendered by the court in which it is entered.

(3) No findings of fact, conclusions of law, or opinions supporting an arbitrator's decision are required.

(4) Within 6 months after its entry, a party against whom a judgment is entered pursuant to an arbitration award may move to vacate the judgment on only those grounds set forth in Minnesota Statutes Chapter 572.

(e) Trial after Arbitration

(1) Within 20 days after the arbitrator files the decision with the court, any party may request a trial by filing a request for trial with the court, along with proof of service upon all other parties. This 20-day period shall not be extended.

(2) The court may set the matter for trial on the first available date, or shall restore the case to the civil calendar in the same position as it would have had if there had been no ADR.

(3) Upon request for a trial, the decision of the arbitrator shall be sealed and placed in the court file.

(4) If the party filing a demand for trial does not improve its position, any other party may move the court for payment of costs and disbursements, including payment of attorney and arbitrator's fees.

(5) A trial de novo shall be conducted as if there had been no arbitration.

Implementation Committee Comments--1993

The Committee made a conscious decision not to formulate rules to govern other forms of ADR, such as mediation, early neutral evaluations, and summary jury trials. There 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. The Committee urges parties, judges and neutrals to be open and flexible in their conduct of ADR proceedings (other than arbitration), and to experiment as needed to suit the circumstances presented. The Committee recognized 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.

Hennepin County and Ramsey County both have had substantial experience with arbitrations, and have developed rules of procedure that have worked well. The Committee has considered those rules, and others, in developing its proposed rules.

Subd. (a) of this rule is modeled after rules presently in use by the Second and Fourth Judicial Districts and rules currently in use by the American Arbitration Association.

Subd. (b) of this Rule is modeled after rules presently in use in the Second and Fourth Judicial Districts. In non-binding arbitration, the arbitrator is limited to providing advisory awards, unless the parties do not request a trial.

Subd. (c) of this Rule is modeled after rules presently in use in the Second and Fourth Judicial Districts. Records of the proceeding include records made by a stenographer, court reporter, or recording device.

Subd. (d) of this Rule is modeled after Rule 25 VIII of the Special Rules of Practice for the Second Judicial District.

RULE 114.10 Communication with Neutral

(a) The parties and their counsel shall not communicate ex parte with an arbitrator or a consensual special master.

(b) Parties and their counsel may communicate ex parte with the neutral in other ADR processes with the consent of the neutral, so long as the communication encourages or facilitates settlement.

Implementation Committee Comments--1993

This Rule is modeled after Rule 25 VI of the Special Rules of Practice for the Second Judicial District.

RULE 114.11 Funding

(a) The neutral and the parties will determine the fee.

(b) The parties shall pay for the neutral. It is presumed that the parties shall split the costs of the ADR process on an equal basis. The parties may, however, agree on a different allocation. Where the parties cannot agree, the court retains the authority to determine a final and equitable allocation of the costs of the ADR process.

(c) If 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.

Implementation Committee Comments--1993

The 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.

ADR providers shall be encouraged to provide pro bono and volunteer services to parties unable to pay for ADR processes. Parties with limited financial resources should not be denied access to an ADR process because of an inability to pay for a neutral. Judges and ADR providers should consider the financial abilities of all parties and accommodate those who are not able to share equally in costs of the ADR process. The State Court Administrator shall monitor access to ADR processes by individuals with limited financial resources.

RULE 114.12 Training

(a) All neutrals providing mediation, med-arb, or mini-trial services shall receive a minimum of 30 hours of classroom training, with an emphasis on experiential learning. The training must include the following topics:

(1) Conflict resolution and mediation theory, including causes of conflict and interest-based versus positional bargaining and models of conflict resolution;

(2) Mediation skills and techniques, including information gathering skills, communication skills, problem solving skills, interaction skills, conflict management skills, negotiation techniques, caucusing, cultural and gender issues and power balancing;

(3) Components in the mediation process, including an introduction to the mediation process, fact gathering, interest identification, option building, problem solving, agreement building, decision making, closure, drafting agreements, and evaluation of the mediation process;

(4) Mediator conduct, including conflicts of interest, confidentiality, neutrality, ethics, standards of practice and mediator introduction pursuant to the Civil Mediation Act, Minn. Stat. § 572.31.

(5) Rules, statutes and practices governing mediation in the trial court system, including these rules, Special Rules of Court, and applicable statutes, including the Civil Mediation Act.

(b) The training outlined in subdivision 1 shall include a maximum of 15 hours of lectures and a minimum of 15 hours of role-playing.

(c) All neutrals serving in arbitration, summary jury trial, early neutral evaluation and moderated settlement conference processes or serving as a consensual special magistrate shall receive a minimum of 6 hours of classroom training on the following topics:

(1) Pre-hearing communications between parties and between parties and neutral; and

(2) Components of the hearing process including evidence; presentation of the case; witness, exhibits, and objectives; awards; and dismissals; and

(3) Settlement techniques; and

(4) Rules, statutes, and practices covering arbitration in the trial court system, including Supreme Court ADR rules, special rules of court and applicable state and federal statutes; or

(5) Management of presentations made during early neutral evaluation procedures and moderated settlement conferences.

(d) Neutral fact-finders selected by the parties for their expertise need not undergo training nor be included on the State Court Administrator's roster.

(e) All mediators and neutrals conducting med-arb must attend 6 hours of continuing education about alternative dispute resolution subjects annually. All other neutrals must attend 3 hours of continuing education about alternative dispute resolution subjects annually. These hours may be attained through course work and attendance at state and national ADR conferences. The neutral is responsible for maintaining attendance records and shall disclose the information to program administrators and the parties to any dispute. The neutral shall submit continuing education credit information to the State Court Administrator's office on an annual basis.

(f) The State Court Administrator shall certify training programs which meet the training criteria of this rule.

Implementation Committee Comments--1993

The training requirements are designed to emphasize the value of learning through experience. Training requirements can protect the parties and the integrity of the ADR processes from neutrals with little or no dispute resolution skills who offer services to the public and training to neutrals. These rules shall serve as minimum standards; individual jurisdictions may make requirements more stringent.

RULE 114.13 Credentials

The State Court Administrator shall review applications from those who wish to be listed on the roster of qualified neutrals and shall include those who meet the training requirements established in Rule 114.12. The roster shall be updated and published on an annual basis.

RULE 114.14 Exceptions

(a) Practicing neutrals on the effective date of these rules be placed on the roster of qualified neutrals without meeting the training requirements of these Rules. Any person acting as a neutral as of the effective date of these Rules shall have one year to apply. The Minnesota State Supreme Court ADR Review Board shall develop criteria for granting applications, which shall be based on education, training, and expertise of the applicants.

(b) Any neutral wishing to be placed on the roster of qualified neutrals after the Board has disbanded shall comply with the training requirements. However, application may be made to the Supreme Court for a waiver of the training requirement.

Implementation Committee Comments--1993

Some neutrals may be permitted to continue providing ADR services without completing the training requirements. A Board, made up of dispute resolution professionals, court officials, judges and attorneys, shall determine who qualifies.

Forms 114.01 and .02 attached to these Rules is to be used for application to the neutral and provider organization rosters.

RECOMMENDATION 2: RELATED EXISTING RULES SHOULD BE AMENDED TO ACCOMMODATE ADR PROCESSES.

In order to integrate the ADR provisions of new Rule 114, minor amendments to related case management rules are necessary. These rule amendments are set forth in this section.

1. Amend Rule 111 as follows:

Rule 111. Scheduling of Cases

* * *

Rule 111.02 The Party's Informational Statement

* * *

(j) ~~Whether alternative dispute resolution is recommended~~ Recommended alternative dispute resolution process, the timing of the process, the identity of the neutral selected by the parties or, if the neutral has not yet been selected, the deadline for selection of the neutral. If ADR is believed to be inappropriate, a description of the reasons supporting this conclusion;

* * *

Rule 111.03 Scheduling Order

(b) Contents. The scheduling order shall provide for alternative dispute resolution as required by Rule 114.04(c) and shall establish a date for completion of discovery.

2. Amend Form 111.02 as follows:

FORM 111.02 INFORMATIONAL STATEMENT
(Civil Matters--Non-Family)

* * *

~~9. Alternative dispute resolution (is) (is not) recommended, in the form of _____ (specify e.g. arbitration, mediation).~~

a. Meeting: Counsel for the parties met on _____ to discuss case management issues.
(Date)

b. ADR PROCESS (Check one):

☐ Counsel agree that ADR is appropriate and choose the following:

☐ Mediation
☐ Arbitration (non-binding)
☐ Arbitration (binding)
☐ Med-Arb
☐ Early Neutral Evaluation
☐ Moderated Settlement Conference
☐ Mini-Trial
☐ Summary Jury Trial
☐ Consensual Special Magistrate
☐ Impartial Fact-Finder
☐ Other (describe) _____
_____

☐ Counsel agree that ADR is appropriate but request that the Court select the process.

☐ Counsel agree that ADR is NOT appropriate because:

☐ the case implicates the federal or state constitution.
☐ other (explain with particularity) _____
_____
_____

☐ domestic violence has occurred between the parties.

c. PROVIDER (check one):

☐ The parties have selected the following ADR neutral:

_____

☐ The parties cannot agree on an ADR neutral and request to Court of appoint one

☐ The parties agreed to select an ADR neutral on or before

_____.

RECOMMENDATION 3: A BOARD SHOULD BE ESTABLISHED TO APPROVE ADR PROVIDERS.

The Minnesota Supreme Court should establish a temporary board to review the qualifications and applications of ADR providers and establish criteria for listing providers. The Board's role is defined in proposed Rule 114.14.

The Board should:

1. dissolve after one year;

2. comprise seven (7) members, including representatives of the following groups:
   (1) Judge
   (2) Court ADR Program Director
   (3) ADR Sole Practitioner
   (one from metropolitan area; one from Greater Minnesota)
   (4) Director, For-Profit ADR Organization
   (5) Director, Non-Profit ADR Organization
   (6) Attorney.

3. be named the Minnesota State Supreme Court ADR Review Board, and

4. use Forms 114.01 and 114.02 in substantially the form attached to this report.

Date:_____

MN STATE COURT SYSTEM
NEUTRAL ADR ORGANIZATION ROSTER REGISTRATION FORM

GENERAL INFORMATION

☐ Government
☐ For Profit
☐ Not for Profit

Organization: _____

Director: _____ Years in Business: _____

Address: _____

Phone: _____

Fax: _____

I am requesting placement of this ADR Organization on the following neutral rosters:

☐ Mediation/Med-Arb/Mini-Trial ☐ Arbitration/Other ADR Processes

DISPUTE RESOLUTION ROSTER INFORMATION

Check (√) those processes for which the organization will provide a qualified neutral and the number of individuals available. Also, indicate on the reverse, the counties the organization will serve.

Process Type	√	Number of Neutrals
Mediation		
Arbitration		
Early Neutral Evaluation		
Mediation-Arbitration		
Mini-Trial		
Moderated Settlement Conference		
Neutral Fact Finding		
Consensual Special Magistrate		
Summary Jury Trial		
Other		

Please circle those counties to which you are willing to travel to provide ADR services:

All 87 counties
All 7 metro counties

Aitkin
Anoka
Becker
Beltrami
Benton
Big Stone
Blue Earth
Brown
Carlton
Carver
Cass
Chippewa
Chisago
Clay
Clearwater
Cook
Cottonwood
Crow Wing
Dakota
Dodge
Douglas
Faribault
Fillmore
Freeborn
Goodhue
Grant
Hennepin
Houston
Hubbard
Isanti
Itasca
Jackson
Kanabec
Kandiyohi
Kittson
Koochiching
Lac Quie Parle
Lake
Lake of the Woods
Le Sueur
Lincoln
Lyon
Mahnomen
Marshall
Martin
McLeod
Meeker
Mille Lacs
Morrison
Mower
Murray
Nicollet
Nobles
Norman
Olmsted
Otter Tail
Pennington
Pine
Pipestone
Polk
Pope
Ramsey
Red Lake
Redwood
Renville
Rice
Rock
Roseau
Scott
Sherburne
Sibley
St. Louis
Stearns
Steele
Stevens
Swift
Todd
Traverse
Wabasha
Wadena
Waseca
Washington
Watonwan
Wilkin
Winona
Wright
Yellow Medicine

Does the organization provide neutrals with the following skills:

Non-English Skills (please list) _____

_____

_____

Familiarity with other cultures (please list) _____

_____

_____

Sign Language Skills ☐ Yes ☐ No

List of Neutrals Attached ☐ Yes ☐ No

Will Organization provide resumé of Neutral, if requested? ☐ Yes ☐ No

What ADR Fees & Expenses do you charge?

_____

_____

_____

I do hereby certify that the information provided in this application is true, that only neutrals who qualify under Supreme Court Rules on Alternative Dispute Resolution will participate in this program, and that, upon request, I will provide, documentation of training provided to neutrals.

Name:_____

Date:_____

Date: _____

MN STATE COURT SYSTEM
NEUTRAL ROSTER REGISTRATION FORM

GENERAL INFORMATION

Name: _____

Occupation: _____ Years in Profession: _____

Address: _____

Phone: _____

Fax: _____

I am requesting placement on the following neutral rosters:

☐ Mediation/Med-Arb/Mini-Trial ☐ Arbitration/Other ADR Processes

DISPUTE RESOLUTION TRAINING				
ADR Process	**Date**	**Course Title**	**Sponsoring Organization**	**Hours**

Non-English Language Skills or Access to Interpreters _____

_____

Sign Language Skills ☐ Yes ☐ No

Familiarity with other cultures _____

_____

If attorney, percentage of work for the: Plaintiff _____ Defendant ___

EDUCATION				
Date	**Name of Institution**	**State**	**Areas of Concentration**	**Degrees**

RELEVANT EXPERIENCE

For each roster you wish to be placed on, please describe the last five proceedings you have conducted as an ADR neutral in the past 5 years. (This section is mandatory for individuals seeking "grandparent" privileges.)

Mediation/Med-Arb/Mini-Trial

Arbitration/Other

MEMBERSHIPS

List memberships in relevant professional associations.

DISPUTE RESOLUTION ROSTER INFORMATION

Check (√) those processes you wish to conduct. Please indicate the approximate number of each type of case in which you have served as a neutral. Also, indicate on the reverse, the counties to which you are willing to travel.

Process Type	√	Prior Number of Cases Handled
Mediation		
Arbitration		
Early Neutral Evaluation		
Mediation-Arbitration		
Mini-Trial		
Moderated Settlement Conference		
Neutral Fact Finding		
Consensual Special Magistrate		
Summary Jury Trial		
Other		

Substantive area: % of professional practice devoted to each

Contract _____
Personal Injury _____
Property Damage _____
Employment _____
Medical Malpractice _____
Other _____
_____
_____

% of ADR practice devoted to each

Contract _____
Personal Injury _____
Property Damage _____
Employment _____
Medical Malpractice _____
Other _____
_____
_____

What ADR Fees & Expenses do you charge? _____

_____

_____

_____

Please circle those counties to which you are willing to travel to provide ADR services:

All 87 counties
All 7 metro counties

Aitkin
Anoka
Becker
Beltrami
Benton
Big Stone
Blue Earth
Brown
Carlton
Carver
Cass
Chippewa
Chisago
Clay
Clearwater
Cook
Cottonwood
Crow Wing
Dakota
Dodge
Douglas
Fairbault
Fillmore
Freeborn
Goodhue
Grant
Hennepin
Houston
Hubbard
Isanti
Itasca
Jackson
Kanabec
Kandiyohi
Kittson
Koochiching
Lac Quie Parle
Lake
Lake of the Woods
Le Sueur
Lincoln
Lyon
Mahnomen
Marshall
Martin
McLeod
Meeker
Mille Lacs
Morrison
Mower
Murray
Nicollet
Nobles
Norman
Olmsted
Otter Tail
Pennington
Pine
Pipestone
Polk
Pope
Ramsey
Red Lake
Redwood
Renville
Rice
Rock
Roseau
Scott
Sherburne
Sibley
St. Louis
Stearns
Steele
Stevens
Swift
Todd
Traverse
Wabasha
Wadena
Waseca
Washington
Watonwan
Wilkin
Winona
Wright
Yellow Medicine

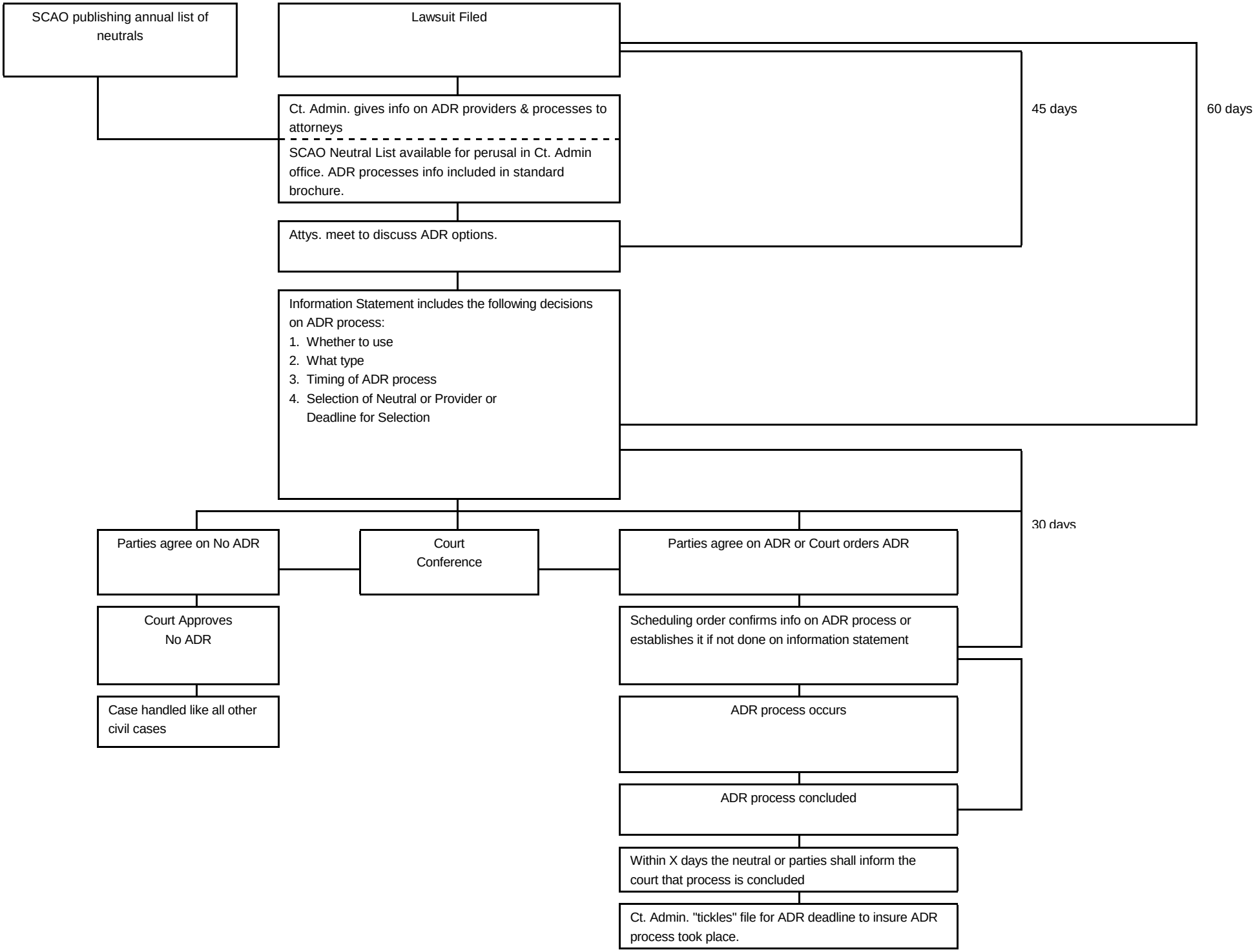
I do hereby certify that the information provided in this application is true.

Name:_____

Date:_____

FLOWCHART OF ADR PROCESS

August 25, 1993



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R

347-9175

November 10, 1993

Mr. Frederick Grittner
Clerk of the Appellate Court
245 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Dear Mr. Grittner:

Pursuant to the Supreme Court's Order of September 17, 1993, regarding Alternative Dispute Resolution Rule for the Minnesota General Rules of Practice, I am enclosing my written statement and twelve copies.

Very truly yours,

David B. Orfield,
President of CDR

DBO:bh:128061
Enclosures

STATE OF MINNESOTA

IN SUPREME COURT

C5-87-843

WRITTEN STATEMENT OF DAVID B. ORFIELD,
PRESIDENT OF CREATIVE DISPUTE RESOLUTION

Creative Dispute Resolution (CDR) is a non-profit ADR organization founded by the Minnesota Trial Lawyers Association and the Minnesota Defense Lawyers Association.

As President of CDR, I call to the attention of the Minnesota Supreme Court two troubling proposals in the Final Report of the Supreme Court Alternative Dispute Resolution Implementation Committee.

1. The final report does not require that the mediators or arbitrators be a licensed attorney. It appears to only require 30 hours of classroom study in mediation. It is my judgment that legal cases cannot be competently handled by a non-lawyer. It would be impossible for non-lawyers to adequately evaluate and handle cases without knowledge of the law of the case.

2. The final report recommends that attorney fees may be awarded if one does not improve its position from an arbitration award. This recommendation would cause an increase in litigation costs and prevent a party from its right to a jury trial.

I respectfully request that the Minnesota Supreme Court consider an order that all cases must be heard by a licensed attorney and that any award by an arbitrator exclude attorneys' fees, costs and disbursements and interest.

Respectfully submitted,

David B. Orfield,
President of CDR

November 9, 1993

Mr. Frederick Grittner
Clerk of Appellate Courts
245 Judicial Center
25 Constitutional Avenue
St. Paul, Minnesota 55155

Re: Proposed Alternative Dispute Resolution Rules for the Minnesota General Rules of Practice

Dear Mr. Grittner:

Please consider this a request by the Minnesota Defense Lawyers Association (MDLA) to make an oral presentation at the hearing to consider the proposed Alternative Dispute Resolution Rule which hearing the court has scheduled for November 17, 1993, at 1:30 p.m., in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center. Mr. Eric J. Magnuson, of the law firm of Rider, Bennett, Egan & Arundel, will appear and speak on behalf of this Association at that hearing.

This letter is also intended to serve as MDLA's statement of its position with regard to the proposed Rules. Specifically, MDLA is very concerned with Rule 114.09 Arbitration Proceedings, (e) Trial After Arbitration, Subd. (4), which reads:

> "If the party filing a demand for trial does not improve its position, any other party may move the court for payment of costs and disbursements, including payment of attorney and arbitrator's fees."

The adoption of this Rule represents a major shift from current procedures and, to the best of our knowledge, is not a part of any current ADR Rules. The adoption of this Rule would, in our opinion, result in a chilling effect on a party's right to trial by jury. The constitutionality of the adoption of such a Rule is an open question. A person should not be punished for exercising a constitutional right. That issue aside, the fairness of depriving a litigant of a jury determination on the merits in favor of the determination by one individual is questionable. Fairness of the system should not be sacrificed under the guise of efficiency. And, a litigant's faith in the system is not expendable in favor

MDLA

205 National City Bank Building
510 Marquette Avenue
Minneapolis, MN 55402

(612) 338-2717

EXECUTIVE DIRECTOR
Janet Blomberg Soule

of speed and reduction of costs. To place a litigant into a position where the right to a jury trial can only be exercised by risking a substantial penalty in attorney's fees and costs if he or she should be unsuccessful is to make jury trials less available to litigants. It will also, we believe, result in a system that will make the outcome in a particular case more dependent upon the personal background and bias of one individual rather than the equalizing effect of the mix provided by a jury of one's peers.

Adoption of this rule would be contrary to established common law. This court has consistently rejected arguments presented to it that attorneys' fees should be awarded to a prevailing party in civil litigation. "For over 100 years, the law in Minnesota has been that, absent a contractual agreement or statute, a party cannot collect attorneys' fees. See Frost v. Jordan, 37 Minn. 544, 546, 36 N.W. 713, 714 (1887) (it is against the analogies of the law to allow expenses of litigation beyond the costs allowed by statute, which, as said before, however inadequate, are the measure of indemnity which the law provides)." Garrick v. Northland Insurance Company, 469 N.W.2d 709, 713 (Minn. 1991). See also Justice Simmonett's concurring opinion in Church of the Nativity v. WatPro, 491 N.W.2d 1 (Minn. 1992).

The policy reasons behind this rule have been examined in a variety of contexts. This proposed provision in the rules for alternative dispute resolution will run directly contrary to that long-established rule of law. If adopted, the provision with regard to attorneys' fees will clearly result in a significant disincentive to submit to even non-binding arbitration, if one result may be a significant increase in a client's exposure. This is a fundamental change in the rule of attorneys' fees, that should be dealt with directly. In effect, there will now be a rule in all civil litigation that the "winner" gets attorneys' fees, with only the definition of what is "winning" being changed.

An additional consideration is that, as a practical matter, in a substantial portion of the cases, the Rule would operate only to restrict defendants who are either solvent or insured from seeking jury trials while having little or no deterrent effect on plaintiffs or uninsured or insolvent parties. It is no secret that the assessment of costs, disbursements and attorney's fees against the majority of plaintiffs pursuing personal injury claims or other parties who are uninsured or insolvent results in an uncollectible judgment. A party who is judgment proof can request a jury trial without any real fear of the financial consequences. On the other hand, parties who are insured or financially solvent will be placed at a disadvantage in requesting jury trials since their insurance or their own assets will be on the line to pay for the costs, disbursements and attorney's fees that are assessed as a result of this Rule. As a practical matter, the application of such a Rule would result in a basic unfairness to the system and a bias against insured or solvent parties.

Apart from common law and fairness considerations, the proposed Rule is very poorly drafted. What is meant by "If the party . . . does not improve its position?" In the framework of the complex litigation

currently taking place in our courts, what is and is not an improvement in position is not clear. Further, what costs, disbursements and attorney's fees are to be awarded? Are these the costs, disbursements and attorney's fees in connection with the arbitration; the costs, disbursements and attorney's fees for the entire litigation; or just those incurred in proceedings after arbitration? Also, must such costs, disbursements and attorney's fees be reasonable and, if so, who decides what is reasonable?

The proposed Rule is fraught with problems relating to long established common law, fairness and definitional deficiencies. MDLA does not think that the Rule is necessary for the successful implementation of alternative dispute resolution principles in Minnesota. The Rule is obviously proposed for the purpose of deterring a litigant from exercising his or her right to request a jury trial. As such, the Rule is contrary to one of the basic precepts of our judicial system, i.e., the court system should be equally available to all.

For the reasons stated above, the Minnesota Defense Lawyers Association recommends that proposed Rule 114.09(e), Subd. (4), not be adopted as part of the Alternative Dispute Resolution Rules for the Minnesota General Rules of Practice. The court's consideration of this Association's recommendation is appreciated.

Very truly yours,

MINNESOTA DEFENSE LAWYERS ASSOCIATION

Dale B. Lindman
President

DBL/sf

cc: Mr. Eric Magnuson
Board of Directors
Executive Committee

MINNESOTA TRIAL LAWYERS ASSOCIATION

MTLA

706 Second Avenue South • 140 Baker Building • Minneapolis, Minnesota 55402 • Telephone (612) 375-1707

Executive Director
Nancy K. Klossner

President
Fred H. Pritzker, Minneapolis

President-elect
Mark R. Kosieradzki, Minneapolis

Vice President
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Ex-Officio
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Ronald H. Schneider, Willmar
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Russell M. Spence, Minneapolis
Stanley E. Karon, St. Paul
Thomas E. Wolf, Rochester
Paul D. Tierney, Minneapolis
Ronald I. Meshbesher, Minneapolis
John V. Norton, Minneapolis
Robert N. Stone, Minneapolis
Harry L. Munger, Duluth
John A. Cochrane, St. Paul
Paul Owen Johnson, Golden Valley

November 11, 1993

Mr. Frederick Grittner
Clerk of Appellate Courts
245 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Dear Mr. Grittner:

The Minnesota Trial Lawyers Association respectfully submits the attached written statement, by President Fred H. Pritzker with respect to the Supreme Court Hearing to consider proposed Alternative Dispute Resolution Rule for the Minnesota General Rules of Practice.

MTLA's spokesperson is Charles T. Hvass, of Hvass, Weisman & King in Minneapolis. He has asked for 5-10 minutes to make an oral presentation on behalf of the Minnesota Trial Lawyers Association on November 17, 1993.

As requested we are enclosing twelve copies of this statement.

Very Truly Yours,

Nancy K Klossner

Nancy K. Klossner
Executive Director

STATE OF MINNESOTA

IN SUPREME COURT

C5-87-843

WRITTEN STATEMENT OF FRED H. PRITZKER, PRESIDENT, MINNESOTA TRIAL LAWYERS ASSOCIATION

Thank you for the opportunity to offer this statement regarding proposed ADR Rules.

The Minnesota Trial Lawyers Association and its members are strong supporters of ADR. Our members frequently serve as mediators and arbitrators and have received extensive formal training in the ADR process. We, along with the MDLA, have formed our own independent ADR company, which is fast becoming one of the best and most frequently used in the state.

It is precisely because of our experience with and belief in arbitration and other forms of ADR that we generally support enactment of these rules with the exception of proposed Rule 114.09(e)(4).

Arbitration works only if it is truly voluntary. If parties feel that sanctions, real or perceived, apply, there will be less likelihood of widespread participation. Judges will realize this too and will be less inclined to order arbitration if the parties object to it. If the parties are ordered to arbitration against their wishes and sanctions apply, there will be institutional pressure to end its use. Inevitably, proposed Rule 114.09(e)(4) will decrease the use of arbitration.

Arbitration's stated benefit has always been that it is less expensive and less time consuming than trial. Again, if sanctions apply, and the award of costs, disbursements and attorneys' fees are clearly sanctions, the parties are going to spend that much more time and expense in arbitrating cases. It is very likely that soon arbitrations will resemble jury trials in every respect except for the jury.

Other practical problems abound. Plaintiff lawyers handling personal injury cases rarely keep track of their time. Defense lawyers almost always do. How are fees to be calculated? Are those fees to be left to the discretion of the judge? What if there is a consistent discrepancy between how and when these sanctions are to be applied? Will the award of fees, for example, bear any resemblance to the actual fees incurred? This lack of certainty in the amount and frequency of the imposition of these sanctions leads very directly to the possibility of abuse.

There is an inherent imbalance in resources among parties to a personal injury lawsuit. The actual and perceived cost of the imposition of sanctions to an insurance company is far different than it is to an individual litigant. This threat goes up in direct proportion to the size of the case.

The talent and experience of arbitrators vary. It has been my experience that arbitrators assigned by the courts in personal injury cases occasionally have no idea about the reasonable value of a case. Obviously, juries don't either, but those same juries are the beneficiaries of more extended evidentiary presentations, jury instructions and the like. In this regard, there is no showing or data to suggest that an arbitrator's findings correlate with actual jury results. If this is true, we are creating an artificial claims resolution system that may or may not mirror the "reality" of a jury trial. This also carries with it the risk of an "elitist" substitute for

substitute for the wisdom of six people who more closely represent a cross section of the general population.

I realize, in response to the above, that people will say "No one is infringing upon anybody's Seventh Amendment right to a jury trial." But that's exactly what is happening. In that regard, it is not unlike poll taxes, literacy requirements, and the like. When the exercise of a constitutional right becomes encumbered with costs or tests or other impediments, that right is inevitably denied.

There is also no empirical data to suggest that the rule would ever accomplish its implied purpose: to discourage frivolous appeals or to lessen the perceived court backlog. In other words, there is no data to suggest there is a problem that needs correcting; it is a solution in search of a problem.

The proposal also breaks new ground. I am not aware of any other rule now in existence in Minnesota that imposes these sanctions on a party appealing from an arbitrator's decision who does not better his or her position at trial.

Our members are also suspicious of the timing for this proposed rule. The so-called English Rule was one of the Willie Horton issues in the last presidential campaign (i.e., no factual validity, portrayed in an emotional manner to advance the agenda of the political Right).

In summary, while we generally support enactment of these proposed rules, we object to the implementation of Rule 114.09(e)(4) because there is no data suggesting it is necessary, it will not work, it impairs constitutional rights, it will not be applied consistently, and will likely cause arbitration to be used less.

FRED H. PRITZKER

Dated: November 8, 1993

SELMER LAW FIRM, P.A.

TRIAL LAWYERS
MINNEAPOLIS CENTRE
920 SECOND AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55402

TELEPHONE
(612) 338-1312
TELECOPIER
(612) 338-7349

SCOTT E. SELMER*
MARC M. BERG
JANEAN S. JUST
LILA M. SCULLY

*ALSO LICENSED IN WISCONSIN

LFPA

November 12, 1993

HAND-DELIVERED

Frederick Grittner
Clerk of Appellate Courts
245 Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Re: Order for Hearing to Consider Proposed Alternative Dispute Resolution Rule for the Minnesota General Rules of Practice
Court File No.: C5-87-843

Dear Mr. Grittner:

Enclosed for filing please find an original and 11 copies of the Statement of Marc M. Berg in connection with the above-referenced hearing. Thank you.

Very truly yours,

SELMER LAW FIRM, P.A.

Marc M. Berg

MMB/amc

Enclosures

STATE OF MINNESOTA
IN SUPREME COURT
C5-87-843

In re: Hearing to Consider Proposed Alternative Dispute Resolution Rule for the Minnesota General Rules of Practice

STATEMENT OF MARC M. BERG

INTRODUCTION

I am an associate attorney in a small law firm in downtown Minneapolis. I have been licensed to practice in the State of Minnesota for three years. Below are my thoughts on the proposed Alternative Dispute Resolution Rule for the Minnesota General Rules of Practice. I would have liked to make an oral presentation on November 17, 1993, but I have a conflict with another matter.

DISCUSSION

I strongly support the use of alternative dispute resolution (ADR) as a means of resolving cases in the district court system, so long as ADR does not impose substantial additional expenses upon litigants who otherwise have the right to seek redress through the judicial process. There are already enough financial barriers to bringing a case to district court, including attorney's fees, filing fees, service of process fees, court reporter fees, expert witness fees, costs of photocopying, postage, trial exhibits, certified records, etc. The addition of costly ADR procedures could be abused by the well-leveraged, institutional litigants who refuse to settle cases on fair terms, thereby defeating the one of

the important purposes of ADR, which is to provide speedy but fair justice to all parties.

For this reason, I would support the proposed ADR rules only if the new rules include language which acknowledges the very real disparity of wealth and bargaining power between individual and institutional litigants, and include appropriate procedural safeguards against any attendant abuses. In personal injury cases, for example, the defendant is usually sponsored by a multimillion (and sometimes multibillion) dollar insurance company, with virtually unlimited willingness to spend the insured's money on defense costs. The plaintiff, on the other hand, is usually a private individual, who often lives a paycheck-to-paycheck (or disability check-to-disability check) existence, and is therefore forced to pay the attorney's fees and expenses at the conclusion of the representation out of any recovery. In such cases, nothing can stop the defense from appearing at an arbitration or mediation and refusing to settle. The defense can do this as a shrewd way of saying that the judicial process exists not for the injured individual plaintiff, but for the powerful institutions that defend injury claims simply as a cost of doing business.

In my experience with ADR, I have been able to resolve some difficult cases, but I have also encountered situations in which insurance companies or other big corporations have appeared at an arbitration, but then failed to negotiate in good faith. I think these litigants have done this to make a point, or to wear us down. When a well-financed, institutional defendant such as an insurance

company knows that the ADR cost poses an obstacle for an individual plaintiff, the defense can use this disparity as a negotiating weapon. Ostensibly, the defense knows that short of execution of an unstayed judgment, no one can force the defense to part with settlement money, regardless of any level of encouragement from an arbitrator or mediator. At this point, each side could have incurred something up to or in excess of $1,000.00 in various fees, which may be mere pocket change to the defense, but could be unbearable to the plaintiff.

While I do believe that we should encourage ADR, I am against any process in which referral to ADR amounts to nothing more than an additional, inflated filing fee. In my opinion, the way to prevent this from happening is to modify proposed Rule 114.11 to read as follows:

(a) The neutral and the parties will determine the fee.

(b) The parties shall pay for the neutral. It is presumed that the parties shall split the costs of the ADR process on an equal basis. The parties may, however, agree on a different allocation. Where the parties cannot agree, the court retains the authority to determine a final and equitable allocation of the costs of the ADR process. In allocating the costs of the ADR process, the court shall take into account the relative financial abilities of the parties to bear such costs, and in no event shall the court allocate the costs of the ADR process in a manner which would effectively deny a party of the opportunity to proceed to district court. Any party who has been granted permission to proceed in forma pauperis shall be excused from paying any of the costs of the ADR process.

(c) Subject to the provisions of subparagraph (b), if 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. If the court finds, upon motion, that a party has used the ADR process as a means to delay, harass, or burden an opponent, or otherwise has failed to participate in the ADR process in a manner consistent with

good faith efforts to resolve the dispute, the court may order that party to pay the entire cost of the ADR process, or the court may impose any other appropriate sanction.

As to subparagraph (b), I have particular difficulty with the presumption that the parties should split the ADR costs on an equal basis, especially in cases when there is so much financial inequality between the parties. If the parties are on an equal footing, they should share the expense equally, but if they are not, the district court judges should be told to take this into account. Accordingly, the rule should specifically mandate that the courts examine the relative financial strengths of the parties when allocating the ADR costs. Also, it should go without saying that a party who is proceeding in forma pauperis is, by definition, unable to bear any of the added costs presented by ADR.

As to subparagraph (c), I think that the court's authority to sanction a party for failing to pay for a neutral or other ADR costs should be expressly subordinate to the district court judge's determination of that party's financial status. The reason is that there are some people who will be unable to pay for ADR without incurring substantial personal hardship. The system exists for these people, too, and the Supreme Court should avoid promulgating any rules which will result in sanctions being enforced only against those parties who are least able to bear them.

More importantly, I think the district court judges should have express authority to review the ADR process to see if any of the parties have abused it, or otherwise have failed to approach it as a serious method for the fair resolution of the case. In

fact, while the proposed rules appear to set up workable procedures for ADR, none of the proposed rules readily reflect the stated policy of "resolving disputes more efficiently, at less cost, and with greater satisfaction to the parties while assuring that the processes guarantee fundamental fairness and promote the goals of effective and efficient justice." I think that this is the place to do so, by saying that there will be penalties if the district court judge finds, upon motion, that someone has misused ADR.

Regardless of the exact language used, the rules need to embody the idea that those litigants who use ADR correctly will be rewarded, while those litigants who abuse the process will be punished. An analogy may be made to the Offer of Judgment procedure in Minn. R. Civ. Proc. 68, which is also designed to encourage settlement. The basic premise of Rule 68 is that if a defendant puts a reasonable settlement offer on the table, the defendant will either (1) see the case settled, or (2) have the burden of paying costs and disbursements shifted onto the plaintiff. On the other hand, if a plaintiff rejects a reasonable Rule 68 settlement offer, the plaintiff will be required to pay the defendant's costs and disbursements. The key, of course, is that the settlement offer must be <u>reasonable</u>. By the same token, there should be a similar system of predictable rewards and punishments to encourage the good faith use of ADR.

I anticipate that any opponents of the language I have proposed will offer two arguments against the basic point I am trying to make. First, many will say that because the plaintiff

decided to bring the suit, the plaintiff tacitly agreed to bear all attendent expenses, and should not be heard to complain if she is serious about pursuing her claim. I frequently hear words to this effect from trial court judges and defense attorneys, to which I often respond that the plaintiff never decided to be injured in the first place. Second, many will say that the plaintiff can simply pay the cost of ADR out of the recovery, so the plaintiff does have the means of paying for ADR. The problems with this argument are that (a) it assumes that settlement will occur either at the ADR or shortly thereafter, and (b) the plaintiff has already committed to paying all of the other costs of the litigation out of the recovery, including the initial filing fee, and should not let the defense use the ADR cost as a bargaining chip in arriving at the ultimate settlement amount.

CONCLUSION

My understanding of the General Rules of Practice are that they are meant to be an extension of the Minnesota Rules of Civil Procedure. For this reason, the same underlying policy should govern the operation of the proposed ADR rules. Recall that Minn. R. Civ. Proc. 1 states that the rules "shall be construed to secure the just, speedy, and <u>inexpensive</u> determination of every action." An added ADR process will result in "inexpensive" determination only if ADR does not result in excessive or duplicative costs. As recent statistics from the ABA show that approximately half of the public cannot afford to pay for the services of a lawyer, it's

likely that a large segment of the public would be burdened by the added expense of ADR.

The goal of getting more cases resolved more quickly and out of the system is a good one, but we should never forget for whom the system exists: not for the lawyers, not for the judges, and for not the court personnel, but for the public, and especially for those members of the public who are faced with the choice of either resorting to the system or giving up their rights. For this reason, I would urge the court to decline to adopt proposed Rule 114.11 in its present form, or, for that matter, any other rule which ultimately creates an uneven ADR playing field.

RESPECTFULLY SUBMITTED,

SELMER LAW FIRM, P.A.

Dated: Nov. 12, 1993

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November 12, 1993

Mr. Frederick Grittner
Clerk of Appellate Courts
245 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

RE: Proposed Rules for ADR

Dear Mr. Grittner:

What follows is one of my concerns about the new rules for ADR. I am putting my concerns in writing and would like to speak to that issue on November 17.

Rule 114.09 (e)(4) is, as I am sure the drafters understand, a substantial change in Minnesota Law. One could cite pages of Minnesota cases which argue against awarding attorney fees in all but the narrowest of circumstances. I do not, however, oppose this rule simply because it is a major expansion of Minnesota Law but rather because it provides no direction and cannot be applied in an evenhanded way.

These two difficulties are perhaps most clearly seen in personal injury cases. On the one hand it is hard to imagine any court ordering a defeated plaintiff to pay attorney fees to the defendant's attorney whose fee the court knows has already been paid. Conversely, courts will find it easy to order defendants to pay because the court knows such payments will not generally come from the named defendant but from her insurer. Rule 114.09 (e)(4) cannot and will not be enforced in an evenhanded manner.

The second problem is that when courts order such payments there are no guidelines or parameters. It is easy to imagine courts just enhancing verdicts by an additional one-third if the plaintiff wins and ignoring the rule when the defendant wins.

It seems to me the goal of this rule is to encourage settlements by providing one more risk to the parties. This rule provides such a risk to just one party and thus is not only unfair but will not produce the desired results.

Sincerely,

Jim Kremer
Regional Counsel

JK/lkk

STATE OF MINNESOTA
FOURTH JUDICIAL DISTRICT COURT

THOMAS H. CAREY
JUDGE
HENNEPIN COUNTY GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487
(612) 348-2908

October 18, 1993

Janet K. Marshall
Research and Planning
State Court Administration
25 Constitution Avenue, Suite 120
St. Paul, MN 55155

Re: ADR Implementation Committee Recommendation:
Proposed Rules, Alternative Dispute Resolution
for Civil Cases

Dear Ms. Marshall:

I understand this matter will come on for hearing on Wednesday, November 17, 1993, at 1:30 p.m. in Courtroom 300, Minnesota Judicial Center, St. Paul. Would you kindly furnish a copy of this letter to the committee members?

I wholeheartedly support the ADR concept, and after review of the proposed rules, I certainly want to commend the committee for their work. However, there is one glaring problem with the present situation and I would like to call it to your attention.

On the one hand, a judge has 7 or 8 years of college, two or more degrees, and 10 to 20 years of experience. In addition, his conduct is held in a public courtroom, subject to review by the press, and the constraints of having to run for office every six years, disciplinary actions before the State Board of Professional Responsibility, State Board of Judicial Standards, and suffer through the various popularity contests commonly known as "bar association polls".

On the other hand, under these rules an arbitrator (who does not have a jury to balance his/her opinion) can have absolutely no formal education, no experience whatsoever, no training, and just six hours spent in a classroom on some Saturday and they are in a position to make multi-million dollar decisions. In addition, there is no State Board of Judicial Standards, Ethics Board, or other organization to act as a reviewer of their conduct. Lastly, their proceedings are far more secretive because they are not held in a courtroom but rather are to be found in private

offices or conference rooms with neither an invitation for public appearance nor facilities that could accommodate the general public's attendance.

Let's not kid ourselves, yesterday ADR did not exist, but today it is a cottage industry, and by tomorrow it will be a multi-million dollar business. They are already hiring marketing people and are out there actively soliciting. (Just last week one of my clerks was written to and subsequently called by telephone by an arbitration solicitor actively trying to solicit her business away from the normal judicial process and into an ADR mode. Although the ADR representative was told that she had an attorney, this did not dissuade her from a follow-up conversation, actively pursuing a nonjudicial resolution procedure.)

I would recommend the following modification to your rules:

1. I think that a committee should immediately draft state ethical standard requirements for fact finders in ADR programs.

2. Until such rules are enacted, I think they should be temporarily held to the standards of the Rules of Professional Responsibility applicable to attorneys and/or the judicial standards applicable to judges.

3. Lastly, grievances against ADR personnel for violation of standards should be heard by the State Board of Judicial Standards in the same manner that the judiciary is held accountable. (Until a board is established.)

Of course, once ADR standards of conduct are independently written, it may prove advisable to have a separate board hearing complaints.

In conclusion, I think it is totally inappropriate to

turn ADR personnel loose on the public after only six hours of class and with absolutely no standards to comply with. If we found it necessary to control judges and lawyers, why is it that rules are being written without the inclusion of professional responsibility on the part of arbitrators/mediators, etc.?

Respectfully submitted,

Thomas H. Carey
Judge of District Court

cc: President of MTLA
President of MDLA
Larry Anderson

THC/df

P.S. Since drafting this letter, I was approached at breakfast by a prominent businessman in our community. A year ago he agreed to avoid the judicial process and enter into binding arbitration. The matter was totally submitted last December 15th! He has yet to get a decision out of the arbitrator. They wrote him in June and they still haven't gotten a response. He asked me what remedy was available for complaining about the arbitrator, and I stated I was not aware of any. (You might be interested in noting the arbitrator is a retired district judge.)

DUANE M. PETERSON
JUDGE OF DISTRICT COURT

HOUSTON COUNTY COURTHOUSE
304 S. MARSHALL STREET
CALEDONIA, MN 55921

DODGE, FILLMORE, FREEBORN, HOUSTON,
MOWER, OLMSTED, RICE, STEELE,
WABASHA, WASECA AND WINONA COUNTIES

TELEPHONE (507) 724-5211

DISTRICT COURT OF MINNESOTA
THIRD JUDICIAL DISTRICT

October 4, 1993 C5-87-843

Ms. Janet K. Marshall
State Court Administration
Minnesota Judicial Center
25 Constitution Avenue, Suite 120
St. Paul, MN 55155

Re: Alternative Dispute Resolution

Dear Ms. Marshall:

The program proposed is misguided. Supposedly, it is an effort to handle the heavy caseload of the trial courts.

What is lost sight of is the question of "what is the true role of the courts?" This proposal seeks to remove the most complicated cases from the courts and turn them over to private enterprise. While I admire the free enterprise system of economics, I do not believe it should be applied to the courts.

If we truly wish to relieve the judges of a heavy workload, we should seek to take the simplest cases out of the courts . . . not the most complex. Simpler matters such as conciliation court, domestic abuse, misdemeanor court trials, and arraignments ought to be referred to some sort of alternative dispute system. When I first began practicing law in the 1950's, those matters were handled by justices of the peace, probate judges, and municipal judges who did not have to be learned in the law.

Now that court reform has dumped those cases on the court, your solution seems to be that the courts should be relegated to handling those simple cases only. Rather than elevating all judges to the level of the former district judges, you are reducing the court system to the level of former justices of the peace.

This is court reform run amok. You will probably do it anyway, and my comments will have been for nought. I would sentence all court reformers to read a hundred years of legal history before being allowed to serve on a committee.

Incidentally, how many judgeships have to be eliminated to pay for this?

Very truly yours,

Duane M. Peterson
Judge of District Court

DMP:ees

cc: The Hon. Harold G. Krieger, Chief Judge, Third Judicial District, Olmsted County Gov't Center, Rochester, MN

Clerk of the Appellate Courts
254 Minnesota Judicial Center
25 Constitution Avenue
120 Minnesota Judicial Center
St. Paul, MN 55155