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# The Times They Are a Changin'— Or Are They? An Update on Rule 114

By Barbara McAdoo and Nancy Welsh

When Rule 114 of the General Rules of Civil Practice arrived on the Minnesota legal scene in July 1994, it took many attorneys by complete surprise. Even in Hennepin County, which has had a non-binding arbitration program since 1984, some attorneys asked, "ADR? Is that short for 'Another Darn Requirement'?" Nearly two years later, now that most attorneys know that ADR is the acronym for "Alternative Dispute Resolution," it is time to take stock of Rule 114, to evaluate its influence on the practice of law and its impact on the courts.<sup>1</sup>

This review is timely for another, very important reason. We are beginning to see the progeny of Rule 114.<sup>2</sup> As we write this, the Supreme Court Advisory Committee on General Rules of Practice has proposed amendments to the rule. These amendments will make Rule 114 applicable to family cases. Family attorneys now will be required to consider and discuss ADR with their clients and advise the court regarding the appropriateness of ADR for all or parts of their cases. Judges also will be given the authority to order family cases into nonbinding ADR. If, at this point, we have learned any lessons from the implementation of Rule 114, they should inform the application of Rule 114 to the family area.

**A Brief History of Rule 114.** How did we get Rule 114 in the first place? In 1984, the Minnesota Legislature autho-

rized a majority of judges in a district to establish a mandatory, nonbinding arbitration program to dispose of civil cases.<sup>3</sup> Hennepin County District Court established a program to provide nonbinding arbitration for civil cases involving claims of less than \$50,000. Then, in 1987, legislators raised concerns about the amount of judicial time and energy consumed by larger, civil matters. They feared that "regular citizens" were losing meaningful and timely access to the courts. To deal with these concerns, the Legislature passed legislation enabling Hennepin County District Court to order parties into nonbinding ADR for cases involving claims of more than \$50,000.<sup>4</sup>

Hennepin County District Court decided to focus on mediation of these claims. Why mediation? Most importantly, Hennepin County District Court was impressed with Florida courts' successful use of mediation in civil cases.<sup>5</sup> Simply put, mediation disposed of many cases. In addition, mediation proponents quickly—and repeatedly—argued that mediation held special promise as a process that directly involved the disputing parties in resolving cases. Mediation had the potential to increase parties' satisfaction with both the dispute resolution process itself and with the resulting settlement. Mediation even could "transform" the parties' perceptions of each other—from despised opponents to people with legitimate inter-

ests and a shared problem. Finally, mediation allowed—and even encouraged—solutions which were tailored to the needs of the parties and more creative than what courts could order.

In addition, in 1987, the Minnesota Supreme Court and the Minnesota State Bar Association jointly established an ADR Task Force to "explore alternative methods by which the burden of the caseload upon the courts might be eased and the resolution of the legal problems for citizens facilitated." After two years of deliberations, the ADR Task Force issued its final report finding that ADR held "substantial promise" for earlier, less costly, and more satisfactory disposition of many civil cases. As a result, the task force recommended enactment of statewide legislation to authorize and encourage early use of ADR in civil cases filed with the trial courts.

Legislators took the recommendations of the task force seriously. In 1991, the Legislature required the Minnesota Supreme Court to establish a statewide ADR program for the resolution of most civil cases filed with the courts and required the Supreme Court to adopt rules governing practice, procedures, and jurisdiction for ADR programs adopted under the state.<sup>6</sup> In response, the Supreme Court established the ADR Implementation Committee to advise the Court regarding rules to implement the

recommendations of the ADR Task Force. In 1993, the ADR Implementation Committee submitted its recommendations to the Minnesota Supreme Court, and, late in the year, the Minnesota Supreme Court promulgated Rule 114.

#### **Mandatory Consideration of ADR.**

One particularly striking feature of Rule 114 is its approach to encouraging the use of ADR. During its deliberations from 1987 to 1989, the ADR Task Force struggled mightily with the question of whether or not to make ADR mandatory in all civil cases. The experience of other jurisdictions was instructive. In those jurisdictions where ADR was totally voluntary, parties used ADR rarely or not at all. In jurisdictions that made ADR mandatory for certain classes of cases, there was not always a good "match" between a case and the ADR process used to attempt resolution of the case. Therefore, the ADR Task Force recommended a rule which would require attorneys to *consider* ADR in every civil case, *discuss* ADR with their client(s) and the opposing counsel in a case, and *advise* the court regarding their conclusions about ADR, including the selection of a process and neutral, as well as the timing of an ADR process. The ADR Task Force recommended that attorneys and clients have great discretion and creative freedom in selecting an ADR process. And, in order to ensure that attorneys and clients considered ADR seriously, the ADR Task Force also recommended that judges be given the ultimate discretion to order parties into nonbinding ADR against their will. These recommendations of the ADR Task Force ultimately became part of Rule 114.

The ADR Task Force (and the subsequent ADR Implementation Committee) also recognized that Minnesota required an infrastructure to support the creative and appropriate application of Rule 114—a statewide pool of qualified ADR neutrals who understood and could provide the ADR processes listed in the rule; an informed bar which had access to the pool of ADR neutrals; and an informed and proactive judiciary. Thus, Rule 114 ultimately established specific training and continuing education requirements for ADR neutrals providing services under Rule 114; a written "Roster of Qualified Neutrals," to be distributed to all courts and available to all attorneys; and a "grandparenting" provision for ADR neutrals who already had substantial experience with ADR. The rule also established the seven-person ADR Review Board, which was given the responsibility to develop the exact format of the written roster and determine the criteria to be used in deciding whether an individual could be "grandparented" onto the roster, without meeting the training require-

ments specified in the rule.

The ADR Review Board spent most of 1994 reviewing applications from neutrals and developing the roster. By the end of 1994, 1,576 organizations and individuals had been approved.<sup>7</sup> The board's work in the first year also included the development of an appeals process for individuals not approved for the roster and direction to the Supreme Court Office of Continuing Education for the certification of training and continuing education courses.

The board was set up to dissolve on Jan. 1, 1995. It became clear, however, that many issues under Rule 114 required additional attention. Therefore, in December 1994, the Supreme Court extended the life of the Review Board for an additional two years and expanded its authority to address (1) evaluation issues (i.e., Is ADR being used? Is it saving costs and/or time? Are parties satisfied?); (2) ethical issues (i.e., What ethical considerations regarding neutrals should be addressed? What standards will ensure high quality?); (3) whether the program should be expanded to the family-law area; and (4) whether educational efforts were needed for judges, lawyers, and court administrators. Four members were added to the board to help with this expanded agenda.

**Ethics.** Minnesota, like the rest of the national dispute resolution ADR community, has been increasingly concerned about the need for a code of ethics for ADR neutrals. Both the Minnesota State Bar Association's Section on Conflict Management and Dispute Resolution and the ADR Review Board have been deliberating about this issue for over a year, with some collaboration. The ADR Review Board collected and studied all the current ethics/standards of practice codes now being used around the country (approximately 12 of them) and has drafted an all-encompassing Code of Ethics for Neutrals. This code will apply only to neutrals providing services under Rule 114. An influential guide in this effort has been the Joint Code of Ethics for Mediators developed and approved by three national organizations: the Society of Professionals in Dispute Resolution, the American Arbitration Association, and the American Bar Association. The board wrestled with a number of difficult issues the past year including (1) the difficulty of developing a code which applies to all kinds of neutrals who are performing different ADR services; (2) whether confidentiality provisions do (and/or should) preclude conversations with judges about mediation sessions which do not result in settlement; (3) how the neutrals' code, which applies to nonlawyers as well as lawyers, intersects with the Lawyers' Code of Professional Responsibility; and



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(4) what enforcement mechanisms need to be developed for the neutrals' code. The board's draft of the code has been shared with the legal and dispute resolution communities for input prior to submission to the Supreme Court.

**Evaluation.** The "evaluation" assignment from the Supreme Court is a daunting one. A consultant was engaged to help develop a work plan that would enable the ADR Review Board to meet the requirements of an evaluation of Rule 114. As a result, a research plan has been approved by the board, with the following broad goals:

- To learn how Rule 114 is being implemented in various parts of the state;
- To assess the impact of Rule 114 on courts and on the pace and character of case resolution;
- To identify possible changes in Rule 114 or its implementation that will make it more effective in achieving the goals of speedy, cost-effective, and fair resolution of civil cases.

Nine possible studies are articulated in the plan; two of them are underway. First, a telephone survey of court administrators has been done to learn about ADR data now being collected in each district and the specific involvement of judges and/or administrators in making ADR decisions for parties. A second study involves in-depth interviews with civil litigators to collect data about how lawyers use ADR in relation to discovery, negotiation, and trial; how lawyers decide which ADR process to use for a given case, and what kinds and numbers of settlements

*continued on page 10*

are occurring in ADR processes. This data is being used to develop a questionnaire to gather quantitative data about ADR in Minnesota. The projects are designed to give the Supreme Court a "scorecard" regarding what is happening in Minnesota with respect to ADR. This will enable thoughtful changes in Rule 114, if they are needed.<sup>8</sup> The ADR Review Board also is working to ensure the statewide collection of basic data about the ADR processes that are ordered and held, as well as settlement rates for each process.

**Influence of Rule 114 on the Way Law Is Practiced in Hennepin County.** Hennepin County has had some court-ordered mandatory mediation in place since 1987. Thus, it is especially difficult to assess whether changes have been caused directly by Rule 114. Very preliminary data from 12 in-depth lawyer interviews do suggest, however, that ADR has changed the way lawyers practice law—if only because now every civil case has to be considered a candidate for ADR. What follows are some preliminary conclusions from the lawyer interviews, with editorial comments from the authors.

1. Hennepin County lawyers view Rule 114 as a *mandatory* ADR rule. If the process and/or neutral is not picked by the parties, they assume it will be ordered.<sup>9</sup> The process being chosen most often is mediation.

*Comment:* It was not intended under Rule 114 that every case would or should go to ADR. Although most attorneys report that they like mediation, judges still should be reviewing each case to determine whether mediation, or any other ADR process, is truly appropriate.

2. Discovery is generally conducted about the same way as before (thus not saving money for clients). ADR settlements which happen well before the proverbial courthouse steps, however, do result in savings when intensive trial preparation is not needed.

*Comment:* It was assumed that costs for litigation could be substantially lowered through the use of ADR, and sometimes this occurs. It seems, however, that many lawyers may be missing the potential to think strategically about the interplay between the ADR event and crucial discovery. To paraphrase one lawyer's opinion: "Eighty percent of the information needed for trial comes from 20 percent of the discovery. If mediation can settle the case after this 20 percent is completed, there is tremendous savings for the client."<sup>10</sup>

3. Lawyers report that overall settlement rates are about the same as pre-ADR, and the terms of settlement (mostly money) also are about the same. Very few more "creative" resolutions have been mentioned.

*Comment:* Although many cases really are "only about money," sometimes lawyers and ADR neutrals need to get off the "lawyer's standard philosophical map"<sup>11</sup> to recognize that clients value other things in settlement as well. Interestingly, even if ADR does not foster more creative settlements, or even greatly lower costs, this does not make ADR a negative for most lawyers. They like to tell clients that our system of justice encourages settlement, as evidenced by Rule 114; and, therefore, settlement is not weak. Lawyers also like the fact that Rule 114 usually causes an earlier settlement "event" than that of the courthouse steps.<sup>12</sup>

4. There may be less lawyer-to-lawyer negotiation going on now, with a preference to wait for a "mandatory" mediator's assistance with settlement.

*Comment:* In Hennepin County, the sheer number of lawyers practicing makes informal, more civil negotiations difficult. Lawyers like the fact

that with mediation under Rule 114, an outside neutral is brought to the case who can assist the lawyers to tone down their posturing, to be realistic about their cases, and to allow clients to be more actively involved in the ultimate resolution. In addition, mediation provides a specific day when all parties come to the table, with the task at hand being to *settle*.

**Influence of Rule 114 on the Way ADR/Mediation Is Practiced.**

Arguments about the "right" way to practice ADR usually center on mediation and is mostly a topic reserved for academics and mediators who espouse the philosophy of "empowerment." Professors Robert Baruch Bush and Joseph Folger write about "transformative mediation"<sup>13</sup>—a process in which the primary concern in mediation is not *whether* the dispute is resolved, but *how* the parties act and interact in handling the conflict. In their view, mediation supports party self-determination and the capacity to consider the concerns and perspectives of others in the conflict.

Professor Leonard Riskin writes about the continuum of mediation practices. First, he writes about the very "facilitative" process which incorporates elements of the Bush/Folger model and focuses on a broad definition of the dispute, with the mediator facilitating communication between the parties. At the other end of the continuum is the very "evaluative" mediation process in which a mediator focuses almost exclusively on the legal claims, assesses the strengths and weaknesses of those claims, predicts the impact of not settling, and pushes the parties toward his or her evaluation of the appropriate settlement.<sup>14</sup> Professors Kimberlee Kovach and Lela Love argue that "evaluative" mediation is an "oxymoron" which jeopardizes the mediator's neutrality in the whole process.<sup>15</sup>

Most practicing lawyers in Hennepin County find this debate irrelevant to their deliberations under Rule 114. The preliminary data from the lawyer interviews describes the purpose of mediation as settlement of cases, and mediators are chosen who fit the following more "evaluative" profile.

1. Lawyers want lawyers as mediators.
2. Lawyers want lawyers who are litigators as mediators, so they understand the entire context of the case.
3. Lawyers want lawyers who have substantive expertise in the matter being mediated, so they can assess the strengths and weaknesses of the case with the lawyers and their clients.
4. Most lawyers want mediators to give their view of settlement ranges at some point, although usually not unless or until impasse has occurred.

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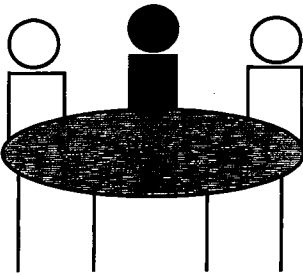
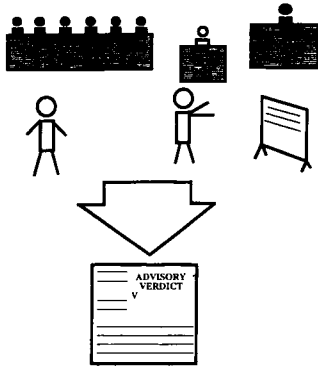
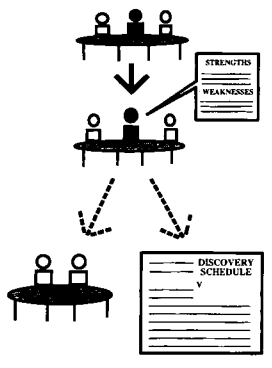
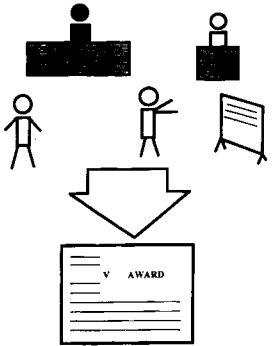
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	<p><b>Early Neutral Evaluation</b></p>	<p>Evaluation and aggressive case management. Assessment of strengths and weaknesses of positions; if case not settled, schedule for discovery and certain motions established.</p>
	<p><b>Arbitration</b></p>	<p>Final resolution after hearing. Binding award, if stipulated; if not stipulated, non-binding award (unless trial de novo is not requested). Variations include high-low and baseball arbitration.</p>

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## The Times - Continued

Mediators who do this too early are often ineffective. But not to use this tool at impasse is viewed as ridiculous—"that's why we hired him/her—to get the case settled."

- 5. There is some serious thinking in the legal community that the mediation model which requires opening statements in joint session may promote adversarial posturing which is harmful to a settlement process. Contrary to this, several lawyers report the benefits of the joint sessions, when they wish to send a message of their intent to engage in good-faith negotiations and/or when it is helpful to have clients talk directly to each other in the safety of the mediation process.

*Comment:* The training required of mediators under Rule 114 presumes a more "facilitative" process than is probably occurring in Hennepin County. This does not necessarily reflect poorly on Hennepin County practices. Indeed, lawyers are reporting tremendous satisfaction with mediation. It does, however, raise the question whether the "takeover" of the mediation field by lawyers obfuscates the hoped-for promise that "better" resolutions might result from a process in which the parties themselves are more directly active in the negotiations. It also may raise issues about future training and continuing education requirements under Rule 114, as well as the code of ethics now being developed.<sup>16</sup>

**Influence of Rule 114 on the Way Judges Judge.** The Hamline Dispute Resolution Institute and the Mediation Center recently completed a series of workshops for Minnesota's district court judges on Rule 114, the different ADR processes, and tools to analyze cases for their ADR potential. Prior to the workshops, a questionnaire was sent to all judges and court administrators to gather information about the use of ADR and judicial attitudes about the effectiveness of Rule 114. Data received from Hennepin County judges revealed a number of factors influencing judges in their use of ADR. Again, we will give the judges' comments, followed by our editorial comment.

- 1. Rising juvenile and criminal caseloads make ADR essential in Hennepin County. Rule 114 allows for an "earlier settlement interaction" which is good for the "system." It also allows some separation of settlement and judging functions and presumably places the settlement function in the hands of a trained settlement neutral.

*Comment:* Although we agree with the foregoing comments, they are not

problem-free. Judges are rewarded today when/if they spend less time on their cases. This provides a strong incentive to shuffle civil cases to ADR as fast as possible, especially since there is a strong possibility that the ADR process will settle the case. ADR is not, however, a panacea for all judicial problems. The system needs the resources to enable judges to pay attention to cases when judicial intervention is required or requested. Lawyers report dissatisfaction and frustration when cases are ordered to an ADR process without even a telephone conference call between the judge and involved counsel. Judges need the time, and sufficient knowledge about the processes, to assist counsel with appropriate choices. This is true both when counsel disagree with each other, and when counsel do not pick ADR, but the judge orders it anyway.

2. Many judges report that unless both parties request ADR, it is not ordered. They also report that with a little "judicial encouragement" almost everyone does want to go to ADR.

*Comment:* Very few cases have ever gone to trial. The cost of justice could rise if ADR is just a "hop" on the way to a settlement that would have occurred anyway, at approximately the same time and involving the same terms. "Judicial encouragement" is good when it is used wisely, by a judge who listens to the parties before pressuring them to go to ADR. Otherwise, we have *de facto* mandatory ADR, at least in Hennepin County.

3. Judges order parties to the "free" Hennepin County nonbinding arbitration program when small amounts of money are at stake, when parties are poor, and/or when lawyers cannot agree on an ADR process.

*Comment:* When parties are ordered to an adjudicative process, if they take it seriously and prepare appropriately, it can be costly. If they don't take it seriously, it can be a tremendous waste of time and money. The Hennepin County nonbinding arbitration program reports settling 64 percent of all cases referred in 1995. As noted earlier, many of these settlements occur prior to hearing. Of the referrals that did go to hearing, one party requested a trial *de novo* 68 percent of the time. Lawyers report that they would prefer either (1) assistance from the court to ensure agreement on the best ADR process for the case (which will sometimes be nonbinding arbitration);<sup>17</sup> or (2) no ADR order, on the assumption that small-dollar-amount cases will settle without it, at less cost to the

client than would be required to prepare for arbitration.

**Conclusion.** The ADR Task Force found that ADR held substantial promise for earlier, less costly, and more satisfactory disposition of many civil cases. Would we say, then, that Rule 114 has lived up to this promise? As good lawyers, we must answer with a resounding "It depends."

Based on the feedback from Hennepin County lawyers, there is only cost savings for clients if the ADR event eliminates the need for some discovery and intensive trial preparation and gets the case settled earlier than the courthouse steps. But many lawyers do not see the possibilities for curtailing any of the discovery in a given case. As a result, more timely resolution of cases, especially in the aggregate, is unlikely. There may be some savings of judicial time with the extensive use of ADR, but Hennepin County lawyers report dissatisfaction that their cases are being "diverted"—rather coercively—to ADR. ADR studies nationally, and in Hennepin County, consistently report high party-satisfaction levels, especially with mediation, but the Hennepin County data predates Rule 114.<sup>18</sup>

Rule 114 has made a difference, but its impact has been incremental, not revolutionary. Indeed, it may be that the legal system has incorporated ADR to such an extent that it looks very much like what had gone on before. For example, mediators hold mediations which too often look like the settlement conferences which used to be held by judges. Admittedly, there are some differences: clients are included in mediation discussions; most mediators hold back on their case evaluations until impasse; and mediators typically can spend more time on a given case. Still, negotiations continue to be held late-in-the-game between the attorneys, although at the mediation session rather than on the telephone. And settlements still consist almost entirely of an exchange of money.

So, has anything been lost as ADR, especially mediation, has tried to find its place within the litigation structure? Perhaps the broader view of disputes? The potential for empowerment of the parties? The push for creativity? The "can do" "let's get on with it" desire for early, quick resolution?

We believe that the practice of law is enriched by the incorporation of these ideals.<sup>19</sup> Our challenge as lawyers and ADR advocates is to find a way to help Rule 114 and the Minnesota judicial system realize this potential.

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## ENDNOTES

<sup>1</sup>Although the authors are both members of the ADR Review Board, the views expressed in this article are solely their own and are not positions of the ADR Review Board.

<sup>2</sup>Maine has adopted the philosophy and specific provisions of Rule 114 for its statewide court-annexed ADR program.

<sup>3</sup>Minn. Stat. Sec. 484.73, subd. 1 (1990).

<sup>4</sup>Minn. Stat. Sec. 484.74, subd. 1 (1990).

<sup>5</sup>In 1987, the Florida Legislature passed legislation which granted circuit and county judges the authority to refer any contested civil matter to mediation or nonbinding arbitration, subject to limited exceptions established by the Florida Supreme Court. Judges began referring cases to mediation and nonbinding arbitration in 1988. Many cases have been mediated as part of this program. In 1992, for example, at least 13,275 circuit court cases went to mediation. Of those, approximately 61 percent resulted in agreements. A much smaller number of cases—less than 100—went to nonbinding arbitration in 1992.

<sup>6</sup>Minn. Stat. Sec. 484.76, subd. 1 (1996).

<sup>7</sup>As of April 1, 1996, the roster has 1,154 individuals approved for arbitration, 991 individuals approved for mediation, and 127 organizations approved for both.

<sup>8</sup>The ADR Review Board welcomes suggestions from Hennepin County lawyers and others on needed changes to the rule.

<sup>9</sup>We believe this assumption is not shared in most other Minnesota counties.

<sup>10</sup>Corporate users of ADR have estimated savings of 11 to 50 percent of anticipated litigation costs. Deloitte Touche Tohnatso International, "Deloitte & Touche Litigation Services 1993 Survey of General and Outside Counsels: Alternative Dispute Resolution (ADR)."

<sup>11</sup>Leonard L. Riskin, *Mediation and Lawyers*, 43 Ohio St. L. J. 29, 43 (1982).

<sup>12</sup>For example, in the Hennepin County nonbinding arbitration referrals for 1995, 25 percent of the cases settled even before the arbitration appearance or "event."

<sup>13</sup>Robert Baruch Bush & Joseph Folger, *The Promise of Mediation* (Jossey-Bass, 1994).

<sup>14</sup>Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques, Alternatives*, Sept. 1994, at 111.

<sup>15</sup>Kimberlee Kovach & Lela Love, *Evaluative Mediation Is an Oxymoron*, *Alternatives*, March 1996, at 31.

<sup>16</sup>See, e.g., Carrie Menkel-Meadow, *Is Mediation the Practice of Law?* NIDR News, March/April 1996, at 1.

<sup>17</sup>Other possibilities might be community mediation programs which often mediate smaller disputes or individual mediators who will provide their services at no or minimal cost.

<sup>18</sup>Wayne Kobbervig, "Mediation of Civil Cases in Hennepin County: An Evaluation," Office of the State Court Administrator, February 1991.

<sup>19</sup>This belief is informed by our work as mediation trainers. Often attorneys report to us that although they may or may not serve as mediators in the future, our mediation training has changed the way they will interact with, and advocate for, their clients. ■