

Memorandum

TO: ADR Section RUAA Sub-committee **DATE:** September 5, 2005

FROM: Jan Frankman, Acting Sub-committee Chair

RE Authority of the Arbitrator; Ethics and Standards

In recommending support of adoption of the RUAA in Minnesota, provisions addressing arbitrator authority and jurisdiction together with those that address ethics and standards are significant. Concerns relative to quality of arbitral service and accountability as well as efficiency and cost-effectiveness of the process have been raised in reported cases and in informal discussion where there is an apparent desire to limit the use of arbitration as an alternative to litigation. Several existing statutory provisions, rules of procedure, codes of ethics and professional rules as well as rules adopted by professional organizations which provide ADR services address these areas. Adoption of RUAA in Minnesota would supplant some, and complement or conflict with others. A brief summary of each follows anticipating closer review and comparison as a Section position is developed. An exhaustive review of the myriad statutory provisions which make reference to arbitration has not been conducted; the statutes and rules addressed here are most prominent.

Proposed MN RUAA; S.F.665 (2001-02 biennium)

Sections 6, 8, 10, 12, 14, 15, 17, 19, 19, and 21 address the arbitrator's role in the process, provide authority and set forth standards. In contrast to Chapter 572 of the Minnesota Statutes captioned "Arbitration and Award" which is Minnesota's 1957 adoption of the UAA, the proposed RUAA provides process detail, defines arbitrator authority and expands ethical standards. Minn. Stat. §§ 572.10, subd. 2 and 572.14 address disclosure by a neutral arbitrator and permit issuance of subpoenas and the taking of depositions. The RUAA provides for both and is broader, and it includes several new provisions. It codifies case law and reflects arbitration practice as it has evolved by addressing issues often raised during the several stages of the arbitration process. It includes many provisions already existing by statute or rule in Minnesota. A brief summary of each of the cited RUAA sections follows:

Sec. 6. Validity of Agreement to Arbitrate

Limits arbitrator authority to determination of procedural arbitrability except in the collective bargaining context. Only a court may determine whether an agreement to arbitrate exists or whether a case in controversy is subject to the agreement.

Sec. 8. Provisional Remedies

Authorizes an arbitrator to issue orders for provisional remedies and interim awards the same as if the controversy were in the court system with a provision for a party to petition the court in urgent situations where the arbitrator cannot address the issue in a timely or complete manner.

Sec. 10. Consolidation of Separate Arbitration Proceedings.

Limits an arbitrator to deciding whether grievances under a CBA may be consolidated.

Sec. 12. Disclosure by Arbitrator

Provides for disclosure of known facts which would impact impartiality before appointment as an arbitrator and continuing disclosure through the process. Details required areas of disclosure and presumptions where there is failure to disclose. Provides for possible sanctions including award vacatur where an arbitrator fails to follow objections or fails to disclose. Recognizes procedures of arbitration organizations.

Sec. 14. Immunity of Arbitrator; Competency to Testify; Attorney's Fees and Costs

Provides for immunity the same as for judges and supplemental to any other applicable immunity. Provides that an arbitrator is incompetent to testify with two exceptions. Provides for an award of attorney's fees and costs where immunity or incompetency to testify is determined.

Sec. 15. Arbitration Process

Addresses conduct of the hearing to "aid in the fair and expeditious disposition of the proceeding" including admission of evidence, making summary disposition decisions, setting the date and time for hearing and adjournments, provision for panel decision-making and timely replacement of an arbitrator.

Sec. 17. Witnesses; Subpoenas; Depositions

Provides for issuance and enforcement of subpoenas. Provides for permitting depositions and other discovery under arbitrator determined conditions to promote a fair, expeditious and cost effective proceeding. Provides for sanctions where there is non-compliance and for issuance of protective orders.

Sec. 19. Award

Sec. 20. Change of Award by Arbitrator

Requires a record of an award within times set by the parties or a court.
Provides the bases for modifying or correcting an award.

Sec. 21. Remedies; Fees and Expenses of Arbitration Proceeding

Permits an arbitrator to award punitive damages, attorney's fees and costs where authorized by law and by agreement of the parties and other remedies which the arbitrator determines to be just and appropriate even where the remedy could not be provided in a court of law. Provides for payment of arbitrator fees and costs.

Minn. Stat. § 595.02, subd. 1a. Alternative Dispute Resolution Privilege

This subdivision of the statute which applies to testimony of witnesses was written and became law as a result of ADR Section action. It provides that an arbitrator (and any person presiding in any ADR process) shall be incompetent to testify in subsequent specified proceedings with three exceptions. Close comparison of this subdivision with Section 14 of RUAA is required and may result in a conclusion that either repeal of this subdivision or amendment of RUAA is necessary.

General Rules of Practice for the District Courts Rule 114 and Code of Ethics

The Rule and Code of Ethics applies to all arbitrators listed on the Roster of Neutrals provided for in the Rule. Arbitration is the only ADR process for which procedures are provided in Rule 114. The Rule was revised most recently effective December 31, 2004, and must be considered along with the proposed RUAA to determine whether any conflict exists where arbitration arises in the court setting.

Rule 114.09 provides options for binding or non-binding arbitration and permits parties to construct or choose a set of rules in their agreement to arbitrate. There is cross reference to the UMA where an agreement is silent and the parties elect binding arbitration. The arbitrator is directed with regard to receipt of evidence and is provided with nine express powers. The Rule prohibits the making of a record except by agreement of the arbitrator and the parties and prohibits discovery of arbitrator's notes. It also addresses the timing and nature of awards.

Rule 114.10 addresses communication with an arbitrator and limits what may be communicated to a court where a case is pending during and following arbitration.

Rule 114 Code of Ethics addresses impartiality, conflicts of interest, competence of the arbitrator, confidentiality including quotation of Rule 114.08

within the comments, the quality of the process, advertising and solicitation and fees. The Code of Ethics must be closely compared with Sec. 12 of RUAA. It may also be cited in support of RUAA to demonstrate the existence of ethics and standards applicable to all arbitrators who conduct hearings arising from filed litigation. The Supreme Court promulgated an Enforcement Procedure for implementation by the ADR Review Board.

New Lawyer's Rules of Conduct Effective October 1, 2005

Rule 1.12: Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

Applies only to attorneys licensed in Minnesota and addresses representation in a matter where one served as a neutral (not partisan) arbitrator without informed consent in writing. It disqualifies a disqualified lawyer's law firm as well unless certain conditions including screening, fee apportionment and notice affected parties is provided.

Rule 2.4: Lawyer Serving as Third-Party Neutral

Requires a lawyer serving as an arbitrator to inform unrepresented parties that she is not representing them and, where necessary to explain the difference in advocacy and decision-making roles.

Summary

For emphasis, there are many statutory provisions which incorporate arbitration as an alternative way to resolve disputes. This Memo does not represent an exhaustive search of them. Also, organizations which provide arbitration services customarily have their own set of rules, and there is opportunity for parties to agree to be bound by them.

From my perspective as an employment and labor arbitrator, I believe that RUAA is an important and helpful piece of legislation that should be adopted in Minnesota with all appropriate changes to eliminate conflicts either by revision or repealer of existing provisions or by amendment of RUAA to preserve existing laws. Our work as arbitrators often takes us to other jurisdictions therefore uniformity of laws will be very helpful. Procedural questions that often arise within the pre-hearing and hearing settings are addressed adding to efficiency of the process. Parties and arbitrators will have a clear set of rules and parameters which do not currently exist and potential litigation raising the many issues addressed by RUAA will be limited. Provision of arbitrator immunity will reduce post-arbitration litigation where meritless challenges to arbitrator conduct and awards are made.

JKF

