

State of Minnesota



HON. ELIZABETH A. HAYDEN
JUDGE OF DISTRICT COURT

STEARNS COUNTY COURTHOUSE
ST. CLOUD, MINNESOTA 56303
TELEPHONE (612) 656-3660

SEVENTH JUDICIAL DISTRICT

DATE: October 5, 2006

TO: All Interested Persons

CC: Minnesota Lawyers' Professional Responsibility Board
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Hon. James E. Dehn, Chair

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Minnesota State Bar Association
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Linda F. Close, Chair, ADR Section
Lucinda E. Jesson, Chair, Committee on Rules of Professional Conduct

Collaborative Law Institute
Linda K. Wray, President

FROM: Minnesota Supreme Court Advisory Committee
On General Rules of Practice
Hon. Elizabeth Anne Hayden, Chair

DATE: October 4, 2006

RE: Proposed Amendments to Establish Collaborative Law as a Court-Annexed ADR Process

Background

The advisory committee has considered a number of proposals relating to “collaborative law.” This process began at least two years ago, and the committee has not yet made any final determination as to what recommendations to make to the Minnesota Supreme Court on this subject. The committee is quite satisfied that collaborative law represents an ADR process that may be of interest and value to litigants, at present primarily in the marriage dissolution process, but also potentially in other types of disputes.

The current proposal, prepared by a self-appointed task force and submitted to the advisory committee in September 2006 is available on the Court’s website at: <http://www.mncourts.gov> (click on News). The committee has also posted the portions of its 2004 and 2005 Final Reports that deal with the collaborative law proposals and the committee’s interim advice to the Court.

The current proposal seeks to have collaborative law recognized as a form of ADR to be used in court-annexed contexts. The advisory committee recognizes that collaborative law is a valid and potentially attractive alternative to litigation in court. Collaborative law, however, is premised on the resolution of disputes outside the court system; the committee has struggled to determine the proper role for this process in court rules that apply only to court cases. In many ways, collaborative law appears to be an ADR process that parties to a dispute might select to resolve the dispute, much as they might agree to use American Arbitration Association or National Arbitration Forum processes, or NASD arbitration, or a host of other ADR processes that do not require resort to the courts except in limited ways, usually defined by statute.

The current proposal includes a number of features that distinguish it from any existing ADR process, and the advisory committee wants to be sure that it fully understands the views of affected boards, committees, and bar groups on the desirability of the proposed rules and alternatives that might be implemented.

The committee would like to receive comments from all interested persons not later than January 15, 2007. Please submit them by mail or email (email preferred) to

Michael Johnson, Senior Legal Counsel
State Court Administration
140-C Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
Saint Paul, MN 55155
michael.johnson@courts.state.mn.us

and David F. Herr, Reporter
Maslon Edelman Borman & Brand, LLP
90 South Seventh Street
3300 Wells Fargo Center
Minneapolis, MN 55402-4140
david.herr@maslon.com

The committee may or may not hold further hearings on this subject before making a recommendation to the court; accordingly, any interested parties should assume that their written submissions may be their final opportunity to be heard before this committee.

Specific questions or concerns about the current proposal that have been voiced either to or by the advisory committee include the following:

1. Given the fact that collaborative law is designed primarily to function without resort to the courts, is it properly or optimally viewed as a court-annexed ADR process at all?

2. Is “collaborative lawyering” a form of ADR service to be “regulated” by the ADR Review Board as it does other types of ADR Neutrals or is it more akin to a specific form of legal specialization that should be treated under the aegis of the Minnesota State Board of Legal Certification?

3. Should the courts impose any training or other requirements on collaborative lawyers beyond what they are performing in a case pending before the court?

4. Is it appropriate for courts to recommend “collaborative lawyers” to litigants, either those who have counsel or those who may not? Should the general rules include a provision requiring this?

5. Is it appropriate for the court rules to require lawyers to advise their clients of an ADR process that might require those clients to retain different counsel?

6. Should the general rules specify the form of engagement agreements between lawyers and clients, as is proposed in Form 114A.01?

7. Should this committee be concerned about having judges monitor the progression of the case and assume responsibility for enforcement of the requirements of collaborative law practice?

8. Is it appropriate for the rules to exempt any class of cases from case scheduling requirements because the parties are exploring settlement through any process? Should the deferral from case management, if allowed in the rules, have any temporal limits?

9. To the affected Boards, the Collaborative Law Institute and the task force: What would be the fiscal impact of adoption of the proposed Rule 114A, and what budgetary support exists to bear these costs? If fees are appropriate for certification of a collaborative law specialty, what would be the appropriate fee?

10. Is collaborative law practice as envisioned by the proposal consistent with the ethical obligations of attorneys under the Rules of professional Responsibility?

11. Are domestic abuse situations handled appropriately in the collaborative law process?

12. Is it appropriate for court rules to provide a waiver from general ADR requirements if a case has already attempted a collaborative law process?

13. What authority if any exists for the judicial branch to impose confidentiality by court rule on a collaborative law process that exists primarily outside of the judicial process?

14. If attorneys in the collaborative law process are not serving as neutrals but as attorneys, is it appropriate to create additional confidentiality rights?

15. If a medical professional, such as a mental health professional, is involved in the collaborative law process, how does that professional's obligation as a mandatory reporter of child maltreatment or abuse square with the proposed confidentiality of the collaborative law process?

16. Should the proposed confidentiality of the collaborative process preclude a party from introducing testimony to establish an oral settlement agreement that one of the parties has relied upon to their detriment?

17. Can collaborative law process be effectively utilized for cases that have already been filed in court? How does the absence of judicial involvement in the collaborative law process square with the court's responsibility to manage its caseload and maintain an appropriate scheduling process?