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SENT VIA E-MAIL AND USPS

Minnesota Supreme Court Advisory Committee on General Rules of Practice

c/o 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

c/o 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

RE: Proposed Rule 114A

Dear Committee Members:

Thank you for the opportunity to respond to your October 5, 2006, memorandum about proposed Rule 114A. The Alternative Dispute Resolution Section (ADR Section) of the Minnesota State Bar Association has actively discussed collaborative law since a rule was first proposed in 2003. Our members have differing views about collaborative law and how it should be regulated. The following represents the consensus of our current membership about proposed Rule 114A.

At the outset, it is important for the Committee to know that we support the practice of collaborative law. It brings civility and fairness to law practice in an area that produces high emotion in the parties. Moreover, we look forward to the growth of this style of practice as it influences civil dispute practice.

Equally important for the Committee to know is that, while we recognize collaborative law as an alternative dispute resolution method in the broad sense of that phrase, the majority of ADR Section members do not regard the practice of collaborative law as a Rule 114 form of alternative dispute resolution (ADR). In seeking to respond to your Memorandum, we have begun by asking whether ADR in Minnesota requires a "neutral." While the words "alternative dispute resolution" generally mean alternative to our court system's processes, our state's history with ADR is that a "neutral" is required in all forms of ADR. We believe that the impartiality of that neutral is critical to ADR work in Minnesota. This view is supported by the mandates present in sources such as the Rule 114 Appendix Code of Ethics, where impartiality is the paramount rule; the Model Standards of Conduct for Mediators, which were jointly developed by the American Arbitration Association (AAA), the American Bar Association (ABA) Section of Dispute Resolution, and the Society of Professionals in Dispute Resolution; and the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes. These national organizations also see the impartiality of a neutral as critical to ADR.

Collaborative lawyers, by definition, are lawyers who are not neutrals. They are engaged by clients to protect and represent their clients' interests. When collaborative lawyers and their clients sign an agreement limiting their relationship to non-adversarial venues, they anticipate that the collaborative lawyer has duties to his/her client which include protecting and representing the client's interests. Those relationships keep collaborative law outside of ADR as it has been practiced in Minnesota.

The public's perception of ADR reinforces our notion that collaborative law is not a form of ADR as practiced in Minnesota. Since ADR was initially adopted in Minnesota, the public's understanding has been promoted through public education efforts of the court administrators and various public and private agencies (both for profit and not for profit). This education has focused on the concept of a "neutral" who will listen to all sides of a conflict and who is free of obligation to any party. To now change the concept and include collaborative law or collaborative practices under the umbrella of ADR may undo the progress that has been made and is likely to confuse the public.

The practice of collaborative law, while it is a very big step away from the more traditional practice of law in which advocacy for one's client is the impetus driving an attorney's work, it is not the only step in that direction. Mediation and other forms of ADR that utilize a neutral comprise another step that expands the options of conflict resolution for the public. They are not, however, the same step. Nor are they the last steps. It is important to leave room for the growth of these and other methodologies within our systems of conflict resolution as well as within the practice of law, mediation and associated professions. We recognize that collaborative law is part of the ADR scheme in at least four states, which may signal a trend for the future. The ADR Section is committed to working with collaborative lawyers as their practice develops as a method of alternative dispute resolution in the broad sense of that phrase.

The ADR Section, for these reasons, opposes language in any rule that refers to collaborative law as a form of alternative dispute resolution within Rule 114. We also oppose regulation of the practice of collaborative law by the ADR Review Board, as proposed by proponents of Rule 114A. Instead, we believe the Supreme Court should regulate this practice under the Rules of Professional Responsibility. Indeed, the Advisory Comment to the Rule 114 Appendix Code of Ethics states that "Attorneys functioning as collaborative attorneys are subject to the Minnesota Rules on Lawyers Professional Responsibility. Complaints against collaborative attorneys should be directed to the Lawyers Professional Responsibility Board." Similarly, to the extent the collaborative law team incorporates mental health or financial experts, the regulatory boards of those professions are well equipped to determine whether ethical standards have been breached.

We see the need for regulation of collaborative law for the protection of the public and for those highly committed and trained individuals who practice collaborative law. It appears desirable for there to be rules that define collaborative law, set training standards for those who wish to practice it, forbid its practice by those not so trained, encourage public education about it, and provide for ethical standards, including elements of fee agreements between collaborative lawyers and their clients.

We wish to suggest the following areas of regulation in particular.

1) The State Board of Legal Certification should accredit agencies for the certification of collaborative law practitioners. Proposed Rule 114A provides an excellent foundation for the Board's development of minimum requirements for accrediting agencies.

2) A new Rule 131 should be promulgated to define collaborative law practice. The new rule should be appended with ethical standards for collaborative law practitioners. The rule should require all collaborative law practitioners to be trained through an accredited agency.

3) Rule 114.04 may be amended to add a sentence to paragraph (c) as follows: "In determining whether ADR is appropriate, the court may consider whether the case has already undergone a collaborative law process."

4) We understand the need for a special rule of confidentiality regarding communications in a collaborative law setting. However, we believe this issue should be addressed statutorily through Chapter 595 and new Rule 131.

In addition, we wish to note that a one-year deferral to inactive status is already available, through stipulation, in family law court cases. Collaborative Lawyers may avail themselves of that opportunity to ensure that the collaborative process is given a chance to work.

We urge the Committee to encourage collaborative law practitioners to revise their proposed rule in keeping with the above for possible insertion as Rule 131. We are willing to offer comments at that juncture if the Committee requests it.

Thank you for providing us with this opportunity for input.

Sincerely,

Linda L. Schneider
Chair, Ad Hoc Committee on Proposed Rule 114A
MSBA, ADR Section