

MILE SEMINAR

MEDIATION IN ADOPTION

ITS TIME HAS COME

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I. Mediation.

A. Rule 114 of the General Rules of Practice for the District Court.

1. See copy of Rule 114; it provides that all civil cases are subject to alternative dispute resolution.
2. Certain specific types of court proceedings are excluded from Rule 114, including family court matters (Rule 301 to 312 the Minnesota Rules of General Practice apply to family court proceedings), juvenile court proceedings and civil commitment proceedings.
3. Query: Are all adoption proceedings governed by Rule 114?
4. Minn. Stat. §259.58 dealing with communication or contact agreements specifically provides that “if there is a dispute under an open adoption agreement, the matter is to be enforced through a petition or motion in family court, which must be accompanied by an affidavit stating that the parties have mediated or attempted to mediate any dispute under the agreement.”
5. New mergers of infant adoption issues and older children issues have led to more need for mediation in its truest form.
6. Conclusion: Alternative Dispute Resolution, and in particular mediation, has arrived in the area of adoption law. Requires less turf wars.

B. Different Types of Alternative Dispute Resolution.

1. Rule 114 sets out various types of ADR processes that are available.
2. The processes are grouped into the following categories.
 - a. Adjudicative processes.
 - (1) *Arbitration.* A form 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 form 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) *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.
- (4) *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. Evaluative Processes.

- (1) *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.
- (2) *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.

c. Facilitative Processes.

- (1) *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.

d. Hybrid Processes.

- (1) *Mini-Trial.* A forum in which each party and their counsel present their opinion, either before a selected representative for each party, 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.

(2) *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.

(3) *Other*. Parties may by agreement create an ADR process.

C. What is a Neutral and What are the Qualifications?

1. A “neutral” is an individual or organization who provides an ADR process.
2. A “qualified neutral” is an individual or organization who has completed the requisite training included on the State Court Administrator’s roster.
3. The State Court Administrator has established one roster for neutrals for civil matters and one roster for family law neutrals. The civil neutral roster includes two separate parts: one for facilitative and hybrid processes and a second for adjudicative and evaluative processes. The family law neutral roster includes three separate parts: one for facilitative and hybrid processes, the second for adjudicative processes, and a third for evaluative processes.
4. Civil Facilitative/Hybrid Neutrals are to receive a minimum of 30 hours of classroom training with an emphasis on experiential learning.
5. Civil Adjudicative/Evaluative Neutrals are to receive a minimum of 6 hours of classroom training.
6. Family Law Facilitative Neutrals are to receive or teach a minimum of 40 hours of family mediation training which is certified by the Minnesota Supreme Court.
7. Family Law Adjudicative Neutrals are to have at least five years of professional experience in the area of family law and be recognized as qualified practitioners in their field.
8. Family Law Evaluative Neutrals also must have at least five years of experience as family law attorneys, as accountants dealing with divorce related matters, as custody and visitation psychologists, or as other

professionals working in the area of family law who are recognized as qualified practitioners in their field and complete or teach a minimum of 2 hours of certified training on management of presentations made during the evaluative processes.

9. All Family Law Neutrals must also complete a minimum of 6 hours of certified training in domestic abuse issues.

D. Mediation in Adoption Matters.

1. When does mediation have the best chances of success:
 - (a) Attorneys and parties are open to settlement and willing to give and take.
 - (b) Both sides have strong incentives to settle but have been unable to reach agreement because of ego problems, emotional responses, or other similar reasons.
 - (c) The attorneys are closer to settlement than the clients.
 - (d) The parties are interested in maintaining ongoing relationships.
 - (e) Confidentiality is a concern.
 - (f) The matter will involve very complex issues and litigation and you have an inexperienced judge.
 - (g) Your mediator has experience in all areas of the law so as to be able to work towards creative solutions.
2. Mediation may not be effective when:
 - (a) You have extremely uncooperative clients.
 - (b) The case involves issues needing resolution either by judicial precedent or the parties need their “day in court”.
3. Types of adoption cases where mediation could be most useful:
 - (a) CHIPS or Termination of Parental Rights cases pending in juvenile court where the court must move towards permanency and the primary dispositional option is adoption.
 - (b) Disputes under an open adoption agreement.

- (c) Cases where the child is an older child who has relationships with relatives and families that will need to be maintained in the context of an adoption.
- (d) Voluntary Termination of Parental Rights initiated by family members who want to continue to be involved with the child.
- (e) Direct Placement Adoptions where a birth father may be supportive, but is not yet on board.

E. Factual Hypotheticals for Discussion.

1. Open adoption.
2. Foster parent adoption.
3. Grandparent or other relative adoption.
4. Direct placement adoption.