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Note

Demystifying ADR Neutral Regulation in Minnesota:
The Need for Uniformity and Public Trust in the
Twenty-First Century ADR System

Adam Furlan Gislason*

In order for ADR to be effective, there must be broad public confidence
in the integrity and fairness of the process.

—Minnesota General Rule of Practice 114

The "Alternative Dispute Resolution movement" is being
championed as one of the most important legal progressions the

* J.D. Candidate 2000, University of Minnesota Law School.

1. MINN. GEN. R. PRAC. 114 app., Code of Ethics, pmbl., para. 3. The General Rules of Practice for the District Courts "apply in all trial courts of the state." Id. at 1.01.

2. Alternative Dispute Resolution (ADR) is broadly defined as "procedures for settling disputes by means other than litigation," BLACK'S LAW DICTIONARY 78 (6th ed. 1990), and generally encompasses several distinct processes for resolving disputes. For example, Minnesota Rule of General Practice 114 divides the ADR processes into four distinct categories: adjudicative processes (including arbitration, consensual special magistrate, moderated settlement conference, and summary jury trial); evaluative processes (including early neutral evaluation (ENE) and neutral factfinding); facilitative processes (mediation); and hybrid processes (including mini-trials, mediation-arbitration (med-arb) and other processes as contracted by the parties). See MINN. GEN. R. PRAC. 114.02(a) (defining each ADR process).

This Note recognizes that each ADR process invokes dissimilar ethical expectations and concerns. For example, "[b]ecause arbitrators, unlike mediators, have the power to render a binding decision, concerns about impartiality or conflicts of interest may be of greater concern in arbitration proceedings than in mediations." NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 373 (1996); see also Glen Sato, Comment, The Mediator-Lawyer: Implications for the Practice of Law and One Argument for Professional Responsibility Guidance—A Proposal for Some Ethical Considerations, 34 UCLA L. REV. 507, 511 (1986) (discussing the problematic role of lawyers in mediation). Consequently, it should be understood that for the purposes of this Note, "uniform" rules or standards of ADR professional conduct do not equate to "identical" rules for mediators and arbitrators that should necessarily be applied nationwide, but are rules that apply to all neutrals practicing within a specific ADR process. Because arbitration and mediation are the most common forms of ADR, see Harold Brown, Alter-
American justice system has encountered and embraced this century. Inarguably, ADR has transformed the modern legal landscape by offering a more efficient and amicable means of resolving civil disputes—an attractive alternative to the traditional adversarial method of public justice. The use of ADR is skyrocketing as we approach the next millennium; more and more companies and individual consumers are choosing to resolve their simple and complex disputes through ADR rather than litigation.

State and federal legislatures are fueling the

native Dispute Resolution: Realities and Remedies, 30 Suffolk U. L. Rev. 743, 745 (1997), this Note focuses on the regulation of those two processes, but contemplates the regulation of ADR neutrals generally.


5. There is a strong consensus amongst practitioners, judges, and scholars that ADR is more efficient and less expensive than litigation. See, e.g., Tom Arnold, Why ADR, in Pat. Litig. 1996, at 245, 247-66 (agreeing with former Chief Justice Warren E. Burger, who professed, “Our litigation system is too costly, too painful, too destructive, too inefficient for a civilized people,” and arguing as a practicing lawyer and ADR neutral that ADR “save[s] millions of dollars” and “tons of time”); Lieberman & Henry, supra note 3, at 427 (stating that the litigation process is too “formal, tricky, divisive, time-consuming, and distorting”). The former Chief Justice of the Minnesota Supreme Court, A.M. “Sandy” Keith, recently stated that “[t]he promise of alternative dispute resolution techniques is immense. If civil matters can be resolved earlier and more cheaply through ADR, we will not only improve the delivery of legal services for those cases, we will also accelerate the calendar for those cases that must be resolved using the adversarial process.” A.M. Keith, Commentary, 12 Hamline J. Pub. L. & Pol'y 1, 3 (1991). Some proponents go so far as to “argue that more efficient justice is better justice.” Carrie Menkel-Meadow, For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference, 33 UCLA L. Rev. 485, 489 (1985). For similar sentiments and arguments, see Derek C. Bok, A Flawed System of Law Practice and Training, 33 J. Legal Educ. 570, 571 (1983). The view that ADR is more efficient and less expensive than litigation has also been empirically verified. See Rosenberg & Folberg, supra note 4, at 1488-89 (finding that ENE increases party satisfaction by reducing costs and time to solve disputes); Bobbi McAdoo, A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota (Dec. 1997) (unpublished manuscript) (on file with author).

6. See Lieberman & Henry, supra note 3, at 424 (asserting that “[i]n less than a decade . . . [ADR] has grown from a bravely-voiced hope to a congeries
“movement” by considering and enacting legal reforms specifically designed to decrease litigation and increase the use of ADR. The ADR “movement” has become a permanent feature of the American public justice system.

Notwithstanding its prevalence and prominence, ADR has its disadvantages. Traditionally, critics have been skeptical and cautious of ADR because it circumvents the procedural and substantive safeguards of the adversarial public justice system. One of the most important issues and criticisms of practices animated by the desire to resolve legal battles outside the courtroom). The General Accounting Office in 1995 surveyed 2,000 businesses that employed over 100 employees and found that more than 90% had established “some sort of grievance procedure using one or more ADR approaches.” Stuart H. Bompey et al., The Attack on Arbitration and Mediation of Employment Disputes, 13 LAB. LAW. 21, 23 (1997) (citing Richard D. Wilkins, Arbitrate or Out!, CENT. N.Y. BUS. J., Feb. 5, 1996, at 1). Recently, Attorney General Janet Reno announced that more than 170,000 civil cases would be assigned to private arbitrators by the Justice Department. See id. at 23.

7. See, e.g., MINN. STAT. § 484.76 subd. 1 (1998) (delegating the authority to establish a statewide ADR program to the Minnesota Supreme Court); id. § 494.01 subd. 2 (delegating authority to the state court administrator to administer the Community Dispute Resolution Program); MINN. GEN. R. PRAC. 114 (instituting rules governing ADR in district courts). See generally LUCILLE M. PONTE & THOMAS D. CAVENAGH, ALTERNATIVE DISPUTE RESOLUTION IN BUSINESS 22 (1999) (noting that some legal reforms are explicitly designed to increase ADR and decrease litigation).

8. See PONTE & CAVENAGH, supra note 7, at 323.


ADR is the lack of consistent, reliable, and enforceable standards of ADR neutral professional conduct. Members of the bench and bar, ADR practitioners, and scholars have taken notice nationwide that the responsibility and accountability of ADR neutrals is wanting, especially considering the rapid development and use of ADR. Yet despite this persuasive consensus, it is far from settled as to what the standards of professional ADR neutral conduct should be and, more importantly, who has the responsibility and authority to promulgate and enforce these standards.

11. An ADR neutral is defined as “an individual or organization who provides an ADR process.” MINN. GEN. R. PRAC. 114.02(b). Rule 114 distinguishes “qualified neutrals” from other neutrals, defining a qualified neutral as “an individual or organization included on the State Court Administrator’s roster.” Id.

12. One critic noted that “[a]n ethics code for ADR neutrals is at the top of the agenda in Minnesota” and in many other jurisdictions around the country. Duane W. Krohnke, Do No Evil—ADR Ethics, in MINNESOTA ADR DESKBOOK § 4.2 (Gary A. Weissman ed., 1998); see also STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 490 (1985) (stating that ADR has been criticized because the process is “inherently imprecise and subject to manipulation”); Carrie Menkel-Meadow, Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities, 38 S. TEX. L. REV. 407, 408-09 (1997) (stating that “[t]he romantic days of ADR appear to be over,” as ADR presents new ethical dilemmas for attorney and non-attorney-neutrals which cannot be solved by the existing rules governing lawyer conduct); Symposium, Standards of Professional Conduct in Alternative Dispute Resolution, 1995 J. DISP. RESOL. 95, 98 (1995) (noting that standards of professional conduct for ADR neutrals “is a hot topic in the world of ADR today”). For a general but extensive discussion by several ADR experts regarding the regulation of ADR neutrals and standards of ADR professional conduct, see id.


The uniform regulation of ADR neutrals presents several dilemmas. Foremost, ADR is uniquely interdisciplinary and interprofessional—lawyers, psychologists, architects, accountants, and many other professionals (and non-professionals) practice as ADR neutrals in a variety of ADR forums.\(^\text{15}\) Thus some ADR neutrals remain subject to dissimilar standards of conduct established by their professions.\(^\text{16}\) Additionally, neutrals perform distinctive roles as neutrals, raising unique and distinct issues of professional conduct.\(^\text{17}\) Consequently, ADR pundits question and doubt whether ADR neutrals are adequately regulated by the various state boards and private organizations that govern the individual occupations, and whether neutrals should be treated as members of a distinct profession with its own professional standards of conduct.\(^\text{18}\)

(acknowledging that the issue of who should regulate ADR neutrals is presently confronting many state governments and proposing that a good faith requirement in ADR should be enacted by legislation, a code of ethics, or court rule); Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. Rev. 1871, 1911-22 (1997) (discussing what the ethical standards in ADR should be and how it should be regulated). Several state courts have recently addressed the question of who should regulate ADR neutrals in an attempt to bring some semblance of uniformity into the jurisdiction. *See*, *e.g.*, FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS Rule 10 (1998) (establishing the rules for certified and court-appointed mediators); UTAH R. OF COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION Rules 101-04, Canons I-VIII (1998) (defining the standards of ethical conduct for court-appointed arbitrators and mediators).


16. *See* discussion infran Part I.D.

17. ADR neutrals have special ethical demands because they must honor and abide by policies such as impartiality, confidentiality, and respect for party autonomy, qualities which most professional codes do not contemplate or enforce. *See* Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. Rev. 1159, 1161 (1995) (noting that transsubstantive ethics are presently ineffective in today's complex litigation and therefore the system requires more precise standards); Symposium, *supra* note 12, at 95-96. *See generally* Menkel-Meadow, *supra* note 12.

18. *See* Symposium, *supra* note 12, at 95-96 (noting the consensus that the ethics codes of individual professions do not contemplate ADR ethics, and that because ADR neutrals “view themselves as a part of a distinct profession,” an interdisciplinary code of conduct should be promulgated to apply to all neutrals); *see also* JOHN S. MURRAY ET AL., *MEDIATION AND OTHER NON-BINDING ADR PROCESSES* 203-04 (1996); Kovach & Love, *supra* note 13, at 87 (stating that “disparate state regulation has caused confusion about the
These issues pose significant challenges to state governments, which have labored for years with the difficulty of developing and maintaining ethical standards for professionals and public officials.\(^\text{19}\)

Recently, the Minnesota Supreme Court took the first major step toward broader regulation of ADR neutrals in Minnesota\(^\text{20}\) by promulgating the Code of Ethics,\(^\text{21}\) which prescribes standards of ADR neutral conduct to all neutrals practicing court-annexed ADR,\(^\text{22}\) regardless of their professional backgrounds.\(^\text{23}\) Notwithstanding its value, the rapid growth of ADR

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meaning of "mediation" and dilutes the advantages of mediation in general); Moore, supra note 15, at 680 (acknowledging that because mediators "do not share a common ethical background, there have been problems developing a comprehensive set of standards which apply to all mediators").


19. See Brown, supra note 2, at 784 (suggesting that the state legislatures should consider licensing ADR neutrals as a profession, and also suggesting that ADR neutrals should be personally liable for violations of ethical standards); Samuel D. Zurier, Rhode Island's Ethical Laws: Constitutional and Policy Issues, R.I. B.J., June-July 1996, at 9 (noting that state governments have had difficulty in "maintaining high ethical standards for public officials"); cf. John Q. Barrett, A Post-Conference Reflection on Separate Ethical Aspirations for ADR's Not-So-Separate Practitioners, 38 S. TEX. L. REV. 705, 710-11 (1997) (arguing that uniform standards of ethics for ADR neutrals would be futile because they are not necessary and would "chill the development of creative new ADR approaches or drive practitioners who are interested in those approaches out of the legal profession").


21. See MINN. GEN. R. PRAC. 114 app.

22. "Court-annexed ADR" generally refers to court-supervised ADR processes where the judiciary has established rules and standards governing the processes. See, e.g., id. For a general discussion regarding court-annexed arbitration, see PONTE & CANVENAGH, supra note 7, at 188.

23. See MINN. GEN. R. PRAC. 114 app., Code of Ethics, pmbl., para. 2 (stating that "[i]ndividuals and organizations approved by the ADR Review Board consent to the jurisdiction of the Board and to compliance with this
coupled with the problem of copious and disordered legislative, judicial, and private rules and standards of conduct governing neutrals ultimately proves the Code of Ethics inadequate, thereby reinforcing the need for uniform and universal ADR neutral regulation and accountability. This need, however, presents several political, statutory, and philosophical obstacles, including unique issues revolving around the separation of powers doctrine. Hence, the Minnesota Supreme Court is seeking guidance as it ponders the future of the Code of Ethics and the regulation of ADR neutrals in general. Several questions are being raised, including to whom and in what particular circumstances does the Code of Ethics apply. Are ADR neutrals bound to other professional ethical codes of conduct beyond the Code of Ethics in Rule 114? What agency and what procedures will be used for enforcement of any ADR Code of Ethics? And if the Code of Ethics is ultimately inadequate, what actions should be taken, and who should take them, to protect the public from ADR neutral misconduct?

This Note attempts to answer these questions and argues that it is in the best interest of the consuming public and the rapidly evolving ADR system that the Minnesota Legislature, the Executive Branch, and the Minnesota Supreme Court work cooperatively towards establishing an exclusive Board of Alternative Dispute Resolution to undertake the responsibility of regulating all ADR neutrals under universal and uniform rules of ADR professional conduct. Part I of this Note recounts and analyzes the existing disciplinary standards and regulatory mechanisms under statutory law, common law, and the disordered professional standards of conduct governing ADR neutrals. Part II critically analyzes the newly promulgated Code of Ethics under Rule 114 that serves as an aspirational guide for ADR neutrals participating in court-annexed ADR. Part III argues that universal and uniform rules of ADR professional

24. See Kovach & Love, supra note 13, at 87-88 (regarding the disadvantages of "disparate state regulation"); see also discussion infra Parts I-II.
25. See discussion infra Parts III.A-C.
conduct are desirable because they will engender public trust in the ADR system, which is necessary for ADR to be both fair and successful. Until uniform and universal standards of ADR professional conduct are promulgated, the jurisdictional ambiguity and inadequacies of the varying professional standards and enforcement mechanisms of ADR professional conduct will continue to confuse the public, the neutrals, and the state government.

I. OUT OF CONTROL—WHO IS PROTECTING THE PUBLIC FROM ADR NEUTRAL MISCONDUCT?

The settlement process is not some marginal, peripheral aspect of legal disputing in America; it is the central core.

—Marc Galanter

Solving civil disputes outside the confines of the courtroom and beyond the bondage of barristers is by no means a modern phenomenon. For centuries, private and public parties have voluntarily agreed either before or after their dispute to resolve their grievances through some form of arbitration or mediation that did not involve the courts. But the judiciary traditionally suppressed the development of private and public ADR by steadfastly refusing to enforce ADR agreements. Today, however, the efficacy of ADR is reflected by the support it has received from Congress through the enactment of the Federal Arbitration Act (FAA). Further support is evident from the


28. Although the phrase “alternative dispute resolution” is relatively new to the legal system, settling disputes through third-party neutrals is not. In fact, “[t]he Magna Carta itself was a truce mediated at Runnymede, in 1215, between King John and the English barons, by Stephen Langton, the Archbishop of Canterbury.” MINNESOTA ADR DESKBOOK, supra note 20, § 1.1(A) (citing L. Wright, Magna Carta and the Tradition of Liberty 32-35 (1976)).

29. See Cooley & Lubet, supra note 9, at 15 (commenting generally on the history of arbitration in the United States); Kovach & Love, supra note 13, at 88 (commenting on the history of ADR and citing Christopher W. Moore, The Mediation Process 19-24 (1996), which traces the history of mediation and arbitration from Biblical references to the modern era).


31. 9 U.S.C. § 2 (1994) (proclaiming that arbitration agreements are valid contracts between parties lawfully exercising their contractual rights). Congress has also encouraged the use of ADR in Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), and the Ameri-
Supreme Court of the United States and the fifty states that have enacted ADR statutes empowering the courts to establish ADR procedures and establishing ADR grievance procedures in government agencies and programs. Many critics insist however, that we should be somewhat disturbed when private agreements begin to replace traditional, democratic adjudication with all of its procedural and substantive safeguards.


32. A trio of cases referred to as the Steelworkers Trilogy reflected the dramatic change in the Supreme Court's attitude towards arbitration—from utter hostility to uncompromising support. See United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960). This judicial support continues today. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (upholding the mandatory arbitration of a claim under the ADEA and asserting that pursuant to the will of Congress, as embodied in the FAA, the judiciary should no longer be skeptical and hostile towards private arbitration agreements). For an exhaustive discussion regarding the Supreme Court's decisions supporting ADR, see Thomas E. Carbonneau, Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform, 5 OHIO ST. J. DISP. RESOL. 231 (1990).

33. See infra notes 47, 49 and accompanying text.


35. See COOLEY & LUBET, supra note 9, at 6-7; Reuben, supra note 10, at 583-84 (noting that ADR has essentially replaced public litigation in the securities industry as the primary means of resolving disputes and that ADR is encroaching rapidly in the construction, domestic relations, and medical malpractice settings). For excellent arguments supporting the replacement of the adversary system with alternative dispute resolution, see generally Carrie Menkel-Meadow, The Trouble with the Adversary System in a Postmodern,
guards, because "public fairness values require safeguards." In light of that concern, the regulation of ADR systems and neutrals is a significant issue, and although many critics believe that uniform standards are desirable, the more important issue is whether a uniform code can be achieved.

Multicultural World, 38 WM. & MARY L. REV. 5 (1996) (arguing that epistemologically, structurally, remedially, and behaviorally, the adversary system is an inadequate method of achieving the essential goals of a dispute resolution system, and that the experimentation with ADR and other methods of solving disputes reflects society's disappointment with the adversary model).

36. See U.S. CONST. amend. V (stating that no person shall be "deprived of life, liberty, or property, without due process of law"); id. amend. XIV, § 1 (no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"); id. amend. VII (providing the right to a jury trial).

37. See Judith L. Maute, Public Values and Private Justice: A Case for Mediator Accountability, 4 GEO. J. LEGAL ETHICS 503, 520 (1991) (arguing that the standards of professional conduct should be higher for mediators than they currently are today because the mediator distributes or facilitates private justice).

38. See Paul F. Devine, Mediator Qualifications: Are Ethical Standards Enough To Protect the Client?, 12 ST. LOUIS U. PUB. L. REV. 187, 197-207 (1993); Menkel-Meadow, supra note 12, at 421. This Note anticipates the primary criticism that neutrals should not be formally regulated with licensure and standards of ADR professional conduct because there is no present need, as demonstrated by the fact that the public is not filing complaints with any professional board against ADR neutrals—i.e., that the market seems to adequately regulate ADR neutral misconduct. See Telephone Interview with Kent J. Wagner, Associate of Minnesota Supreme Court Office of Continuing Education, Minnesota Supreme Court (Oct. 6, 1998) (noting the scarcity of complaints received against "qualified neutrals"); Telephone Interview with Chad Wagner, Investigator of Minnesota Board of Psychology (Feb. 24, 1999) (stating that to the best of his knowledge, the Minnesota Board of Psychology has not received any complaints regarding a licensed psychologist's misconduct as an ADR neutral). Admittedly, the regulation of ADR neutrals and ADR processes may be disadvantageous because "[i]t might limit the field, stifle innovation and debate, and short-circuit useful experimentation and pluralism." Kovach & Love, supra note 13, at 87-88 (discussing the dangers of uniform regulation of ADR neutrals). Moreover, uniform regulation might stifle and control the ADR processes to the point, for example, that it is "re-pugnant to the fundamental goal of mediation—voluntary self-determination by parties." Id. at 88. See generally FLORENCE HEFFRON & NEIL MCFEELEY, THE ADMINISTRATIVE REGULATORY PROCESS 347-71 (1983) (discussing the economic, political and social consequences of governmental regulation in general). Nevertheless, while a comprehensive defense against these arguments is beyond the scope of this Note, the public's silence on the matter should not be surprising considering the "relative infancy of . . . [ADR] and the lack of a set of standards" regulating ADR neutral conduct. Devine, supra, at 197. Moreover, no board or body has been established to receive and investigate public complaints against ADR neutrals. In fact, the Minnesota Supreme Court has yet to establish a body to whom complaints under the Code of Ethics may be brought and with whom disciplinary actions may be taken. See
Presently, numerous sources provide the "safeguards" against ADR neutral misconduct, including federal and state statutes, common law, court-promulgated standards of ethics, occupational standards of conduct, and standards established by private ADR organizations. However, a close examination of these dissimilar and discombobulated standards reveals that these "safeguards" are merely illusory—necessitating universal and uniform regulation of ADR neutrals.

A. STATUTORY CONTROL: FEDERAL ARBITRATION ACT, MINNESOTA UNIFORM ARBITRATION ACT, AND THE MINNESOTA CIVIL MEDIATION ACT

The enactment of the Federal Arbitration Act in 1925 shook not only the pillars of the Supreme Court of the United States, but also the very foundation of our adversarial system of justice. Historically, the courts criticized and chastised arbitration for its unconventional processes. The enactment of the FAA, however, forced the courts to reexamine their stance by making arbitration agreements in maritime transactions and in contracts involving interstate commerce "valid, irrevocable, and enforceable, save upon grounds as exist at law or equity for the revocation of any contract." Moreover, the FAA further authorized the courts to compel a party to arbitration if one of the parties to an arbitration agreement subsequently refuses and to stay court proceedings where there is a valid arbitration agreement, a mandate that initially received harsh criticism and disavowal from the courts. Although the FAA

ADR Review Board Report, supra note 26, at 16; Telephone Interview with Kent J. Wagner, supra (noting the lack of an enforcement mechanism under the Code of Ethics).

39. See discussion infra Parts I-II.

40. For an extended narration of the Court's historical abhorrence of arbitration and mediation, see Reuben, supra note 10, at 598-601.

41. See supra note 30 and accompanying text.

42. 9 U.S.C. § 2 (1994); see also Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273-74, 281 (1994) (holding that the definition of "involving" commerce is the "functional equivalent of 'affecting' commerce, and that an arbitration agreement is within the FAA if it involves commerce even if the parties never intended an interstate commerce connection). Federal law determines the validity of arbitration because the FAA preempts conflicting state law if the arbitration agreement involves interstate commerce agreements. See Collins Radio Co. v. Ex-Cell-O Corp., 467 F.2d 995, 997 (8th Cir. 1972); Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 409 (2d Cir. 1991).

does not compel parties to arbitrate unless they have expressly and voluntarily agreed to do so, the provisions of the FAA manifest a liberal federal policy in favor of arbitration agreements. The FAA requires the federal courts to enforce arbitration agreements according to their terms as if they were traditional contracts, thus overruling the judiciary's perpetual refusal to do so under the common law. The FAA also preempts any conflicting state laws that require a judicial forum and deny the enforcement of arbitration agreements.

Today, all fifty states and the District of Columbia have enacted arbitration statutes generally modeled after the Uniform Arbitration Act (UAA). These statutes govern arbitration agreements and proceedings outside the scope of the FAA. In Minnesota, arbitration agreements are governed by the Minnesota Uniform Arbitration Act (MUAA). Under this

44. See id.; Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 474-78 (1989) (noting that although the "FAA does not confer a right to compel arbitration of any dispute at any time," the Act "was designed to overrule the Judiciary's longstanding refusal to enforce agreements to arbitrate" and "to encourage the expeditious resolution of disputes"); see also PONTE & CAVENAGH, supra note 7, at 158 (noting that the FAA "promoted the use of arbitration to resolve conflicts in commercial transactions" by providing "parties with the opportunity to resolve their disputes through arbitration rather than the courts").

45. See Scherck v. Alberto-Culver Co, 417 U.S. 506, 510 (1974) (stating that the purpose of the FAA was to "revers[e] centuries of judicial hostility to arbitration agreements . . . to allow parties to avoid 'the costliness and delays of litigation,' and to place arbitration agreements 'upon the same footing as other contracts'") (citing H.R. REP. NO. 89-96, at 1-2 (1924)).

46. See Johnson v. Piper Jaffray, Inc., 530 N.W.2d 790, 803 (Minn. 1995) (holding that the FAA supersedes any conflicting state law to the extent that the state law denies the enforceability of arbitration agreements and requires a judicial forum).

47. See Reuben, supra note 10, at 596 n.60 (listing all of the state statutes adopting the UAA); MURRAY ET AL., supra note 30, at 54-55 (discussing the states' adoption of the UAA).

48. See Thayer v. American Fin. Advisers, Inc., 322 N.W.2d 599, 603 (Minn. 1982) (finding that there is no evidence of Congress's intent "to preempt state regulation of arbitration agreements that are part of contracts involving interstate commerce").

49. See MINN. STAT. §§ 572.08-.30 (1998). Minnesota was the first state to adopt the Uniform Arbitration Act, which was sponsored by the Minnesota Bar Association. See Maynard E. Firsig, The Minnesota Uniform Arbitration Act and the Lincoln Mills Case, 42 MINN. L. REV. 333 (1958). One of the fundamental objectives of the MUAA is to encourage and facilitate settlement disputes by providing a speedy, informal, and relatively inexpensive procedure for resolving controversies arising out of commercial transactions. See Eric A. Carlstrom Const. Co. v. Independent Sch. Dist. No. 77, 256 N.W.2d 479, 483 (Minn. 1977). Although resort to the court system is authorized, the
Act agreements to arbitrate are generally enforceable, and more importantly, irrevocable. The MUAA was enacted by the Minnesota legislature in 1957 to effectuate the general public policy favoring arbitration. The statutory scheme of the MUAA is similar to the FAA; each contains specific provisions regarding the validity and enforceability of arbitration agreements; the court procedures to compel or stay arbitration; procedures governing the arbitration hearing; provisions for witnesses, subpoenas, and depositions; standards and guidelines for arbitration awards; and procedures for obtaining judicial relief from invalid arbitration awards.

The FAA and MUAA only apply to arbitration proceedings and agreements; they do not apply to other ADR processes, specifically mediation proceedings. In Minnesota, mediation proceedings are governed by the Minnesota Civil Mediation Act (MCMA). Similarly, mediation agreements are “determined under principles of law applicable to contract.” As such, the basic intent of the MUAA is “to discourage litigation and to foster voluntary resolution of disputes in a forum created and controlled by the written agreement of the contracting parties.”

50. See MINN. STAT. § 572.08 (stating that arbitration agreements are “valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract”).

51. Minnesota demonstrated “its leadership in progressive legislation” by being the first state to adopt the UAA. Pirsig, supra note 49, at 333. Nearly all fifty states today have enacted arbitration statutes identical or similar to the UAA. See PONTE & CAVENAGH, supra note 7, at 158-59. For a general discussion regarding the historical enactment and applicability of the MUAA and the UAA, see Pirsig, supra note 49.


56. See MINN. STAT. § 572.12.


59. MINN. STAT. §§ 572.31-.40.

60. Id. § 572.35. Under the MUAA, the mediation agreement is not binding on either of the parties and can not be enforced by the courts unless the written agreement contains provisions “stating that it is binding” and stating that (a) the mediator has no duty to protect their interests or provide them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect their legal rights; and (c) they should consult an attorney before signing a mediated settlement.
agreements to mediate\textsuperscript{61} and mediated settlement agreements\textsuperscript{62} must be in writing.\textsuperscript{63}

Notwithstanding the detailed provisions of both the MUAA and MCMA, these acts fail to define and prescribe with any detail the standards of professional conduct and ethical responsibility expected and required by neutrals conducting an ADR process governed by these acts. Although the MUAA and MCMA obligate the neutral to follow certain procedures in order to qualify the process and bring about a legally enforceable outcome, the references to ethical responsibilities of the neutral are sparse and ill-defined. For example, under the MUAA, a "neutral arbitrator"\textsuperscript{64} must "disclose any relationships the person has with any of the parties, their counsel, insurers, or representatives and any conflict of interest, or potential conflict of interest, the person may have."\textsuperscript{65} Similarly, an arbitration award may be vacated if the neutral arbitrator fails to disclose agreement if they are uncertain of their rights.

\textit{Id.}  
\textsuperscript{61} Under the MCMA, an "agreement to mediate" is a written agreement which identifies a controversy between the parties to the agreement, states that the parties will seek to resolve the controversy through mediation, provides for termination of mediation upon written notice from either party or the mediator delivered by certified mail or personally to the other people who signed the agreement, is signed by the parties and mediator and is dated. \textit{Id.} § 572.33 subd. 3.

\textsuperscript{62} Under the MCMA, a "mediated settlement agreement" is "a written agreement setting out the terms of a partial or complete settlement of a controversy identified in an agreement to mediate, signed by the parties, and dated." \textit{Id.} § 572.33 subd. 4.

\textsuperscript{63} See \textit{id}. In a controversial and somewhat landmark case for Minnesota ADR law, the Minnesota Supreme Court refused to honor and enforce a handwritten mediated settlement agreement on the grounds that it did not contain a provision stating that the agreement was binding, effectively holding that the courts will not enforce a mediated settlement agreement unless it complies strictly with the express provisions of the MCMA. See Haghighi v. Russian-Am. Broad. Co., 577 N.W.2d 927, 930 (Minn. 1998) (en banc).

\textsuperscript{64} A neutral arbitrator is defined as "the only arbitrator in a case or is one appointed by the court, by the other arbitrators, or by all parties together in agreement. A neutral arbitrator does not include one selected by fewer than all parties even though no other party objects." \textit{MINN. STAT.} § 572.10 subd. 2.

\textsuperscript{65} \textit{Id.} § 572.10 subd. 2(b). The MUAA further states that "after a neutral arbitrator has been selected, any relationship, conflict of interest, or potential conflict of interest that arises must be immediately disclosed by the arbitrator in writing to all parties, and a party may move the district court or the arbitration tribunal for removal of the neutral arbitrator." \textit{Id.} § 572.10(c)(1).
any conflict of interest;\textsuperscript{66} "the award was procured by corruption, fraud, or other undue means;"\textsuperscript{67} the arbitrator was evidently partial;\textsuperscript{68} or the arbitrator exceeded her power.\textsuperscript{69} Comparatively, under the MCMA, a compensated mediator must only provide the parties a written statement prior to the mediation in which the neutral \textit{shall} describe [the neutral's] educational background and relevant training and expertise in the

\textsuperscript{66} The MUAA provides that the arbitration award may be vacated for fraud "if the neutral arbitrator fails to disclose a conflict of interest or material relationship." \textit{Id.} § 572.10(3). In applying this provision, the Minnesota Court of Appeals has held that the court will not vacate an arbitration award unless the injured party establishes "evident partiality" under the UAA. \textit{See} Ronning \textit{v.} Citizens Sec. Mut. Ins. Co., 557 N.W.2d 363, 366-67 (Minn. Ct. App. 1996) (refusing to adopt a per se rule entitling a party to have an arbitrator's award vacated if the arbitrator fails to disclose a prior relationship with a party regardless of any showing of prejudice). That being said, "evident partiality" is not equivalent to "actual bias." \textit{See} Pirsig \textit{v. Pleasant Mound Mut. Fire Ins. Co.}, 512 N.W.2d 342, 342-44 (Minn. Ct. App. 1994) (holding that evident partiality is a question of law which the courts shall review de novo).

\textsuperscript{67} \textit{Id.} § 572.19 subd. 1(1).

\textsuperscript{68} \textit{Id.} § 572.19 subd. 2. Central to any ADR process is the impartiality of the ADR neutral. Essentially, any code of conduct at the very least must caution the neutrals and give the parties some assurance that an ADR neutral shall remain "neutral" and should not show any favoritism or bias. In this sense, the neutral acts in a capacity completely dissimilar from that of an advocate as contemplated in the varying lawyers' professional standards. Recently, a circuit court has entertained the argument that arbitration awards should be vacated on the grounds of "evident partiality" of the arbitrator when the arbitrator fails to disclose that his former law firm represented one of the disputants in a previous related matter. \textit{See} Al-Harbi \textit{v.} Citibank, N.A., 85 F.3d 680 (D.C. Cir. 1996). However, the court stated that "the burden on the claimant for vacation of an arbitration award due to 'evident partiality' is heavy, and the claimant must establish specific facts that indicate improper motives on the part of an arbitrator." \textit{Id.} at 683 (quoting Peoples Sec. Life Ins. Co. \textit{v.} Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993)). Furthermore, the court decreed that an award will not be vacated if the arbitrator does not adequately investigate and subsequently disclose any facts marginally discloseable under \textit{Commonwealth Coatings Corp. v. Continental Casualty Co.}, 393 U.S. 145 (1968); moreover, the court announced that the arbitrator does not have an affirmative duty to conduct such an investigation. \textit{See id.} at 683. The Minnesota Supreme Court has also stated that arbitration awards may be vacated under the MUAA where ex parte contacts between the neutral and a party to the ADR process at issue create an impression of possible bias, for example where an arbitrator and a party, or an arbitrator and members of the arbitration panel, engage in ex parte contact. \textit{See} Northwest Mechanical, Inc. \textit{v.} Public Util. Comm'n, 283 N.W.2d 522 (Minn. 1979); Pirsig, 512 N.W.2d at 344 ("A party to an arbitration is entitled to a fair arbitration. It is not enough that the arbitrators be unbiased; they must not even appear to be biased.").

\textsuperscript{69} \textit{See} MINN. STAT. § 572.19 subd. 1(3).
field.”70 If the mediator fails to do so, the mediator is guilty of a petty misdemeanor.71 Additionally, the courts will only set aside a mediated settlement agreement “if there was evident partiality, corruption, or misconduct by a mediator prejudicing the rights of a party.”72 But other than setting aside or vacating mediated agreements or arbitration awards, the courts are powerless under the statutes to discipline neutrals who violate these provisions (save a small fine if the mediator fails to provide the parties with a statement of qualifications).73

Complicating this matter further, courts generally hesitate to vacate arbitration and mediation agreements, rendering the neutral relatively autonomous and unaccountable.74 This is especially troubling considering the statutory or common law civil immunity that the neutrals enjoy.75 Generally, courts have been steadfastly obstinate in holding that neutrals (historically arbitrators but more recently mediators) are immune from civil liability, sometimes as prescribed under the existing statutes76 or under the proposition of quasi-judicial common law immunity.77 Although the courts have stated that arbitra-

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70. Id. § 572.37 (emphasis added). Interestingly, the MCMA provides that “nothing in this section shall limit the pursuits of professionals consistent with their training and code of ethics,” id., raising the question whether professionals will be held to a higher standard under their codes of ethics or whether this provision simply specifies that any professional is permitted to mediate so long as it is not forbidden by their applicable codes of ethics or training. This Note demonstrates, however, that the professional codes of conduct for all occupations do not apply to a professional practicing as a neutral, or at the very least, are inadequate if applied to a neutral. See discussion infra Part II.D.

71. See MINN. STAT. § 572.37.
72. Id. § 572.36.
73. See id. § 572.37.
74. “The conventional wisdom is that successful challenges to arbitration awards are rare.” MURRAY ET AL., supra note 30, at 125; Stephen J. Ware, Default Rules from Mandatory Rules: Privatizing Law Through Arbitration, 83 MINN. L. REV. 703, 722 (1999); see also City of Minneapolis v. Police Officers' Fed'n, 566 N.W.2d 83, 86 (Minn. Ct. App. 1997) (citing Ehler v. Western Nat'l Mut. Ins. Co., 207 N.W.2d 334, 336 (Minn. 1973)) (arguing that arbitration agreements are favored at law and will be enforced).

75. See supra notes 71-73 and accompanying text.
76. See, e.g., MINN. STAT. § 583.26 subd. 7 (granting mediators immunity “from civil liability for actions within the scope of the position as mediator”); see also supra note 72 and accompanying text.
77. The immunity of arbitrators “rests upon considerations of public policy . . . . Arbitrators must be protected from the harassment of personal suits brought against them by dissatisfied parties so that, like judges, they are able to act upon their convictions free from the apprehensions of possible conse-
tors enjoy immunity from civil suits for failing to disclose conflicts of interests, arbitrators are not insulated from criminal liability for fraud, corruption, or other sanctions established by the arbitrator's governing body.\textsuperscript{78} The Minnesota courts, however, have yet to hold a neutral liable under these standards.\textsuperscript{79}

sequences.” L&H Airco, Inc. v. Rapistan Corp., 446 N.W.2d 372, 376 (Minn. 1989) (quoting Gammel v. Ernst & Ernst, 72 N.W.2d 364, 368 (Minn. 1955) (noting the policy of protecting the independence of the arbitration process by failing to hold an arbitrator liable for failing to disclose prior business or social contacts)); see also Tindell v. Rogosheske, 428 N.W.2d 386, 387 (Minn. 1988) (extending quasi-judicial immunity to guardians ad litem); Stewart v. Case, 54 N.W. 938, 939 (Minn. 1889) (extending quasi-judicial immunity to assessors). The specific facts and holding in \textit{L & H Airco} are worth mentioning. In that case, the aggrieved party made several claims against both the arbitrator and the attorney for the adversary for failing to disclose their prior business and social contacts. See \textit{L&H Airco}, 446 N.W.2d at 375. The court eventually dismissed the claims of negligent misrepresentation based on arbitrator immunity and, in the case of the adversarial attorney, based on the fact that he did not owe a duty to his client's adversary. See \textit{id}. at 376-78.

The common law immunity enjoyed by arbitrators and other ADR neutrals has recently been codified by the Minnesota Legislature:

A person presiding at an alternative dispute resolution proceeding is not subject to civil liability for the person's conduct in presiding over the proceeding, except for injury caused by malice, bad faith, or reckless conduct. This section does not restrict or affect immunity from liability that may be available under other law. MINN. STAT. § 604A.32. To date, this statute has yet to be applied or interpreted by the Minnesota Supreme Court; therefore, it is difficult to predict exactly what types of ADR neutral misconduct violate the ADR immunity statute. See Kari v. City of Maplewood, 582 N.W.2d 921, 924 (Minn. 1998) (defining “malice” in the official immunity context as “the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right”) (quoting Rico v. State, 472 N.W.2d 100, 107 (Minn. 1991)); Sterling Capital Advisors, Inc. v. Herzog, 575 N.W.2d 121, 125 (Minn. Ct. App. 1998) (defining “bad faith” as “a party's refusal to fulfill some duty or contractual obligation based on an ulterior motive, not an honest mistake regarding one's rights or duties”). The Minnesota Supreme Court has set forth the following definition of “recklessness:”

A person acts “recklessly” when he consciously disregards a substantial and unjustifiable risk that the element of an offense exists or will result from his conduct; the risk must be of such a nature and degree that its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.


78. See L&H Airco, 446 N.W.2d at 377-78 (citing Earle v. Johnson, 84 N.W. 332, 333 (1900)).

79. A Westlaw search of Minnesota caselaw and other regional reporters located one case in which an ADR neutral was sued for malpractice on the theory of professional negligence, not for breach of any professional standard of conduct. See Lange v. Marshall, 622 S.W.2d 237, 238 (Mo. Ct. App. 1981)
Thus, other than vacating the arbitration award or mediation agreements, the statutes and the cases applying them provide little if any protection for the ADR participants and set forth no disciplinary procedures or sanctions to deter or punish neutral misconduct.

B. STATUTORY SUPPORT OF ADR IN MINNESOTA

"Although its destination is not yet marked, ADR's path keeps widening" and it is increasingly apparent that Minnesota is one of the states blazing the modern ADR trail. For example, the State of Minnesota has established the Bureau of Mediation Services to provide dispute resolution services, including arbitration and mediation, to governmental agencies in public policy disputes and has institutionalized ADR processes in disputes arising under several statutes, including the Minnesota Labor Relations Act (MLRA) and the Farmer-Lender Mediation Act (FLMA). Despite these achievements, however, the ethical controls over ADR neutrals practicing un-
der these statutes are minimal to nonexistent.\textsuperscript{86} A quick examination of the disciplinary authority of the BMS, and of that provided for in both the MLRA and FLMA, demonstrates the lack of control over ADR neutrals practicing pursuant to these statutes.\textsuperscript{87}

Favoring the movement towards peacefully solving labor disputes, the Minnesota Legislature enacted the MLRA.\textsuperscript{88} The MLRA contains a relatively complex set of qualification requirements, ethical responsibility provisions, and removal procedures for the neutrals that practice labor ADR.\textsuperscript{89} Under the MLRA, the Public Employment Relations Board maintains a roster of arbitrators and mediators impaneled by the BMS.\textsuperscript{90} A neutral must meet the qualification requirements\textsuperscript{91} set forth by the BMS to maintain her position on the roster.\textsuperscript{92} Further-

\begin{itemize}
\item \textsuperscript{86} See discussion supra notes 81-85 and accompanying text; see also infra notes 89-99 and accompanying text.
\item \textsuperscript{87} It is important to note that ADR is practiced pursuant to several Minnesota statutes, each containing its own rules or no rules at all governing ADR neutrals that practice under them. Compare MINN. STAT \S 583.26 subd. 6 (prescribing the eligibility standards and duties of a mediator practicing under the mortgage moratorium statute), and \textit{id.} \S 583.26 subd. 7 (granting the mediator liability and immunity “within the scope of the position as mediator”), with \textit{id.} \S 494.015 (setting forth training and other requirements of neutrals practicing publicly-supported community dispute resolution programs).
\item \textsuperscript{88} The preamble to the MLRA states:
It is the policy of the state of Minnesota to promote orderly and constructive relationships between labor and management and to avoid unresolved disputes that can be injurious to the public as well as the parties. The use of collective bargaining procedures and binding arbitration to resolve grievances and certain interest disputes between labor and management are specifically encouraged.
MINN. R. 7320.0020 (1997). Currently, arbitration and mediation are the leading methods of solving labor disputes. See COOLEY \& LUBET, supra note 9, at 21; PONTE \& CAVENAGH, supra note 7, at 288 (stating that “[a]rbitration has become an essential tool for the peaceful resolution of labor and employment disputes”); MURRAY \textit{et al.}, supra note 18, at 75 (noting that “labor disputes were the first significant area in which mediation was routinely used” in the United States).
\item \textsuperscript{89} See MINN. R. 5530.1300.
\item \textsuperscript{90} The roster is “a listing of persons determined by the commissioner to be qualified and available for referral as an arbitrator of labor disputes.” \textit{Id.} at 5530.0300(3).
\item \textsuperscript{91} To be a qualified arbitrator, one must “have a substantial knowledge of collective bargaining and labor relations in the public and private sectors, be well versed in applicable state and federal law, and be experienced and knowledgeable in the field of labor arbitration.” \textit{Id.} at 5530.0600(1). Additionally, the arbitrator must “conduct hearings in a fair and impartial manner.” \textit{Id.} at 5530.0600(2).
\item \textsuperscript{92} See \textit{id.} at 5530.0600.
\end{itemize}
more, the BMS maintains a professional and ethical responsibility provision, which all persons on the roster must honor. The statute also provides procedures and grounds for which the neutral may be removed from the arbitration case, and/or removed or suspended from the roster, provided that they are given notice. Grounds for suspension or removal include a violation of the rules or the applicable code of ethics, and non-acceptance by the parties.

Comparatively, the FLMA provides little protection to the parties from neutral misconduct before, during, and after mediation. Under the FLMA, creditors and farmers are required to mediate in good faith (or face sanctions) prior to foreclosures or other adverse credit proceedings. The FLMA provides voluntary and mandatory mediation services for farmers and creditors. The director of the Agricultural Extension Service is responsible for appointing mediators to mediate the dispute, unless otherwise requested by the court. Additionally, the director of the Agricultural Extension Service, through a farm mediation administrator and the Local County Extension Agents, administers the mediation programs. Under the FLMA, the director must provide mediators with skills training, including “mediation process, skills, and farm finance issues in mediation.” While the FLMA declares a mediator ineligible “if the person has a conflict of interest that does not allow the person to be impartial,” a conflict of interest is only

93. See id. at 5530.0800. The neutrals practicing for the BMS are also governed by the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, which is approved and published by the National Academy of Arbitrators. See id. at 5530.0800(2). The BMS requires each arbitrator to disclose “any personal or professional relationships, including direct or indirect past employment, consultative relationships, or affiliation with one of the parties, which may give an appearance of partiality. The burden of disclosure is on the arbitrator.” Id. at 5530.0800(3); see also id. at 5530.0600(3) (stating that “no applicant or roster member may currently, or within the preceding 12 months, have functioned as an advocate for any public or private sector employer, employee, or employee organization in any phase of labor management relations”).

94. See id. at 5530.1300.

95. See id.

96. See MINN. STAT. § 583.27 (1998).

97. See id. § 583.25-.26.

98. See MINN. R. 1502.0025.


100. MINN. R. 1502.0004(A).

101. MINN. STAT § 583.26 subd. 6.
defined as "being a current or past board member or officer of the initiating creditor." 102 Additionally, unlike MLRA, the FLMA lacks a code of ethics and the authority to remove or discipline any mediator serving under the FLMA; moreover, the FLMA provides the mediator with qualified civil immunity. 103

C. PRIVATE ORGANIZATIONS' STANDARDS OF ADR NEUTRAL CONDUCT

The success and support of ADR has generated an incredible growth in the private ADR industry. 104 Presently, hundreds of private dispute resolution organizations, both for-profit and nonprofit, are providing relatively inexpensive and efficient means of resolving simple and complex legal disputes. 105 These organizations have had a dramatic impact on

102. See id. Although FLMA does not provide disciplinary measures for mediator misconduct, it does state that a mediator may not be approved by the director to mediate a dispute in a mandatory mediation proceeding unless the professional mediator prepares and signs an affidavit:

(1) disclosing any biases, relationships, or previous associations with the debtor or creditors subject to the mediation proceeding;
(2) stating certifications, training, or qualifications as a professional mediator;
(3) disclosing fees to be charged or a rate schedule of fees for the mediation proceeding; and
(4) affirming to uphold the Farmer-Lender Mediation Act and faithfully discharge the duties of a mediator.

Id. § 583.26 subd. 4(e)(1)-(4).

103. See id. § 583.26 subd. 7.


105. See MURRAY ET AL., supra note 30, at 28-30 (citing for example that in 1994, more than 59,000 cases were filed with the AAA, which has more than 25,000 neutrals on its roster); see also Karelis, supra note 10, at 627-28 (noting the incredible statistical and economic growth of ADR organizations in the early nineties). The Minnesota Supreme Court has posted on the World Wide Web a complete list of the hundreds of "qualified" neutrals and organizations practicing in Minnesota. See generally Supreme Court Continuing Education, Minnesota Statewide ADR: Rule 114 Neutrals Roster (visited Mar. 13, 1999) <http://www.courts.state.mn.us/adr/adrciv/html>. 
our civil justice system by reducing court dockets nationwide.\textsuperscript{106} The private ADR system has become a vital resource and an indispensable forum to the public justice system.\textsuperscript{107}

In an effort to increase the quality control of ADR neutrals, some of the major professional ADR organizations, such as the AAA and SPIDR, have privately established their own ethical standards and enforcement procedures, which are internally policed and distributed to clients.\textsuperscript{108} In fact, some of these private organizations pioneered the establishment of ADR neutral professional responsibility standards.\textsuperscript{109} Nonetheless, it remains unclear whether these privately-promulgated ethical standards and codes will have any force in litigation involving the quality control of a private ADR neutral given that the courts do not sanction most of these standards.\textsuperscript{110} Furthermore, these private ADR organizations lack disciplinary authority over ADR neutrals and must “rely upon individual professions to undertake enforcement sanctions against one of their members.”\textsuperscript{111} For the most part, private parties resorting to private ADR to resolve their disputes rely primarily on traditional contract law to remedy neutral misconduct that has proven to be mostly inadequate.\textsuperscript{112}

The efforts of the private organizations, however, should be acclaimed for what they represent rather than what they cannot ultimately achieve—a uniform set of standards of conduct for ADR neutrals. For example, recognizing the rapid

\textsuperscript{106} See Karelis, \textit{supra} note 10, at 621 (noting that “[a]lthough private civil dispute resolution organizations are by no means a recent development, the rapid rise of large, for profit, private dispute centers has had a profound effect on the resolution of disputes nationwide”); Elizabeth Roth, \textit{Private ADR: Escaping the Courthouse}, 2 DISP. RESOL. MAG. 6, 6 (1995) (discussing the effect private ADR organizations have had on court dockets in Los Angeles County); \textit{Golberg Et Al., supra} note 12, at 225 (stating that “as courts have struggled to deal with sharply increasing case loads, a number of jurisdictions have adopted a dispute resolution process that merges public and private forms of adjudication”).

\textsuperscript{107} See Karelis, \textit{supra} note 10, at 624.

\textsuperscript{108} See Menkel-Meadow, \textit{supra} note 14, at 1921; see also Hix et al., \textit{supra} note 104, at 260. The ABA is an excellent source of potential mediators. There is a plethora of mediation resources within the ABA organized by sections, divisions, or forums such as Business Law, Construction Industry, General Practice, Intellectual Property Law, Labor and Employment Law, Litigation, Torts and Insurance Practice.

\textsuperscript{109} See Moore, \textit{supra} note 15, at 680-81.

\textsuperscript{110} See Menkel-Meadow, \textit{supra} note 12, at 431.

\textsuperscript{111} Symposium, \textit{supra} note 12, at 96.

\textsuperscript{112} See Feerick, \textit{supra} note 13, at 315.
growth of mediation and the subsequent lack of adequate regulatory control and guidance, the AAA, ABA and SPIDR established a joint committee in 1992 to advance a workable code of conduct for all mediators. Earlier, the AAA and ABA had developed an intricate ethical model for neutral arbitrators that resulted in the proposed Model Standards of Conduct for Mediators. The purposes of the Standards include "the promotion of integrity and impartiality in mediation, the handling of conflicts and the appearance of conflict of interest, and the treatment of fees in mediation, among others." Most importantly for the purposes of this Note, "the goal of the Standards is to encourage mediation of a high quality without drawing a distinction between the lawyer-mediator and other professional mediators." Furthermore, "the Standards are intended to be a starting point in the development of national ethical guidelines for the practice of mediation." Nevertheless, the Standards were not established to prescribe "legal standards" for mediators; that is, the Standards "do not deal with whether a violation of a particular standard should subject a mediator to liability." Thus, although privately-established standards of conduct for ADR neutrals are commendable, they provide the public with only negligible protection from ADR neutral misconduct.

D. STATE RULES OF PROFESSIONAL CONDUCT AND OCCUPATIONAL CODES OF ETHICS

While specific statutory measures prescribe vague and arguably insufficient ethical guidelines and disciplinary measures governing ADR neutrals, another source of ADR regula-

113. See Feerick, supra note 34, at 458.
114. Id. at 459. In developing the Standards, the joint committee drew on a number of existing codes of ethics for neutrals, particularly codes developed in states such as Florida, Hawaii, Texas, Colorado, and Oregon. Additionally, ethical codes for mediators and arbitrators developed by various organizations were reviewed in drafting the Standards, namely from the following: AAA/ABA; AAA and National Academy of Arbitrators and Federal Mediation and Conciliation Service; American Bar Association for Professional Responsibility; American Bar Association; SPIDR; Academy for Family Mediators; Association of Family and Conciliation Courts; and Center for Dispute Settlement at the Institute of Judicial Administration. See id. at 314-16.
115. Id. at 459.
116. Id. at 476.
117. Id. at 467. Generally, proving mediator liability is particularly difficult. See cases cited infra note 154.
118. See generally discussion supra Parts I.A-C.
tion is the array of professional codes of conduct and disciplinary standards promulgated by the numerous state boards charged with the responsibility of regulating numerous occupations.119 Because one of the most important characteristics of ADR is the parties' freedom to select, or not select, a neutral who is professionally familiar with the substantive background of the dispute to render and facilitate a decision during the ADR process, ADR neutrals necessarily come from varying professional backgrounds.120 This transdisciplinary element of neutral regulation presents an equally perplexing problem in that ADR neutrals (both nonlawyers and lawyers) are governed by varying ethical standards (or no ethical standards at all in cases in which the neutral is not a licensed or certified professional). The following section investigates the inadequacy of professional ethical codes as applied to neutrals that are both lawyers and nonlawyers.121

1. Professional Responsibility of Nonlawyer ADR Neutrals

Pursuant to its police powers under the Minnesota Constitution,122 the legislature has established examining and licens-

119. See Symposium, supra note 12, at 95 (stating that ADR neutrals remain subject to their professional codes while practicing as ADR neutrals); see also MINN STAT. § 326.01 (1998) (regarding employment licensed by the state); id. § 148.01 (licensing public health occupations); id. § 148.90 (establishing the board of psychology); id. § 148B.19 (establishing the board of social work); id. § 326.04 (establishing the board of architecture, engineering, land surveying, landscape architecture, geoscience and interior design [hereinafter board of architecture]); id. § 326.165 (establishing the board of acccountancy).

120. See, e.g., Edwards, supra note 10, at 683-84 (noting that the "best neutrals are those who understand the field in which they work" and recognize "the need for substantive expertise" if "nonlegal values are to resolve disputes"); Symposium, supra note 12, at 95 (noting that many neutrals are members of other professions—such as lawyers, psychologists, therapists, and social workers).

121. An investigation of all forms of disciplinary action and codes of conduct applicable to all licensed professionals in Minnesota who may serve as ADR neutrals is beyond the scope of this Note. However, for the purposes of this Note, an examination of the regulations governing licensed accountants, architects, and psychologists (a satisfactory sample of nonlawyer professionals likely to serve as ADR neutrals) substantially demonstrates that existing codes of conduct governing licensed occupations insufficiently regulate ADR neutrals.

122. See MINN. CONST. art. I, § 1 (declaring that "[g]overnment is instituted for the security, benefit and protection of the people, in whom all political power is inherent, together with the right to alter, modify or reform government whenever required by the public good").
ing boards\textsuperscript{123} to regulate specific health-related\textsuperscript{124} and non-health-related professions.\textsuperscript{125} Even though "occupational licensure has an ancient lineage,"\textsuperscript{126} the propagation and pressured expansion of licensed occupations caused the 1976 Minnesota Legislature to impose "limitations to stem the impetus toward greater licensing"\textsuperscript{127} by promulgating the Occupational Licensing Act (OLA).\textsuperscript{128} The OLA was enacted because the legislature found "that the interests of the people of the state are served by the regulation of certain occupations;"\textsuperscript{129} therefore, it will only regulate an occupation if it is "\textit{required} for the safety and well-being of the citizens of the state."\textsuperscript{130}

\textsuperscript{123} These various occupational boards are considered administrative agencies vested in the executive branch, which generally have "(i) the power to perform administrative acts, which may include the expenditure of state money, (ii) the power to issue and revoke licenses or certifications, (iii) the power to make rules, or (iv) the power to adjudicate contested cases or appeals." MINN. STAT. § 15.012 (a)(i)-(iv).

\textsuperscript{124} \textit{See generally} The Occupational Licensing Act, MINN. STAT. § 214.01 subd. 2 (listing the various health-related licensing boards, such as the board of medical practice, the board of psychology, the board of social work, and the board of dentistry).

\textsuperscript{125} \textit{See generally id.} § 214.01 subd. 3 (listing the various non-health-related licensing boards, including the board of barber examiners, the board of architecture, and the board of accountancy).


\textsuperscript{127} Id.

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} \textit{See supra} note 124.

\textsuperscript{129} MINN. STAT. § 214.001 subd. 1. The legislature found further: (1) that it is desirable for boards composed primarily of members of the occupations so regulated to be charged with formulating the policies and standards governing the occupation; (2) that economical and efficient administration of the regulation activities can be achieved through the provision of administrative services by departments of state government; and (3) that procedural fairness in the disciplining of persons regulated by the boards requires a separation of the investigative and prosecutorial functions from the board's judicial responsibility.

\textsuperscript{130} Id. § 214.001 subds. 1-3.

In determining "whether an occupation shall be regulated," the legislature will consider four factors:

(a) Whether the unregulated practice of an occupation may harm or endanger the health, safety and welfare of citizens of the state and whether the potential for harm is recognizable and not remote;

(b) Whether the practice of an occupation requires specialized skill or training and whether the public needs and will benefit by assurances of initial and continuing occupational ability;

(c) Whether the citizens of this state are or may be effectively protected by other means;
On the whole, ADR neutrals practice in an unlicensed "free-market." Because there is no single occupational board that regulates all ADR neutrals, some critics have suggested that nonlawyer ADR neutrals continue to be regulated by their own professional standards of conduct when practicing as an ADR neutral and not as a licensee. While this contention seems legally rational, the application of these varying professional codes of conduct proves to be irrational and inadvisable for several reasons.

First and foremost, the existing health and non-health licensing boards are delegated the explicit responsibilities of establishing rules regulating each specific occupation that the boards are empowered to enforce. Pursuant to these powers the boards have established codes of professional and ethical conduct; however, the codes only pertain to a licensee when she acts within the scope of her practice, not when she acts as an ADR neutral charged with the unique duties of administering justice and resolving disputes. Furthermore, the individual

(d) Whether the overall cost effectiveness and economic impact would be positive for citizens of the state.

Id. § 214.001 subd. 2(a)-(d).

131. Devine, supra note 38, at 193 n.37 (citing AMERICAN ARBITRATION ASSOCIATION, DISPUTE RESOLUTION TODAY—THE STATE OF THE ART 135 (1988)). The ADR Review Board had previously adopted the "free market" policy, endorsed by SPIDR, "giving attorneys and parties wide discretion on the choice of the process as well as the neutral" in their committee report on Standards and Qualifications. ADR Review Board Report, supra note 26, at 3.

132. See Symposium, supra note 12, at 95.

133. See MINN. STAT. § 214.001 subd. 1 (establishing the various examining and licensing boards and stating that "the interests of the people of the state are served by the regulation of certain occupations"); id. § 214.01 subds. 2-3 (defining health-related licensing board and non-health-related licensing board); id. § 326.04 (establishing the board of architecture); id. § 326.165 (establishing the board of accountancy); id. § 148.90 (establishing the board of psychology).

134. For example, Minnesota Statutes section 148.905 states that "[t]he board [of psychology] shall: (1) adopt and enforce rules for licensing psychologists and psychological practitioners and for regulating their professional conduct; (2) adopt and enforce rules of conduct governing the practice of psychology." See also id. § 326.18 subd. 3 (empowering the board of accountancy to "make rules to govern administration of the board, examinations, issuance of certificates, licensing, professional conduct and discipline, continuing education, fees, and practice monitoring"); id. § 326.06 (empowering the board of architecture to promulgate rules of professional conduct).

135. A comprehensive analysis of each occupational board's powers to discipline its licensees is beyond the scope of this Note; however, a cursory examination of these powers bears mentioning. Generally, occupational boards are authorized to take disciplinary action against applicants, licensees, and
certificate holders under the governing statutes or rules of conduct promulgated by the boards themselves. See, e.g., id. § 148.941 subd. 2(a) (regarding the board of psychology's authority to discipline licensees); id. § 326.111 subd. 4(a) (pertaining to the board of architecture's authority to take action against applicants and licensees); id. § 326.229 subd. 4(a) (regarding the board of accountancy's power to deny, revoke, or suspend the license or application of persons practicing public accounting); see also id. § 148.98 (authorizing the board of psychology to "adopt rules of conduct to govern an applicant's or licensee's practices or behavior"). The statutory grounds upon which each board may take action against licensees and applicants vary greatly and are, in most instances, germane to the respective occupation and irrelevant as applied to others. Compare id. § 326.111 subd. 4(a)(1)-(10) (describing the statutory grounds upon which the board of architecture may discipline a licensee), with id. § 148.941 subd. 2(a)(1)-(10) (describing the grounds upon which the board of psychology may discipline a licensee). Even the most open-ended statutory purposes for discipline are restricted to the specific regulated profession. For example, the board of psychology may discipline a licensee or applicant if she "has engaged in fraudulent, deceptive, or dishonest conduct, whether or not the conduct relates to the practice of psychology, that adversely affects the person's ability or fitness to practice psychology." Id. § 148.941 subd. 2(a)(2) (emphasis added). The "practice of psychology" does not include practicing as an ADR neutral. See id. § 148.89 subd. 5 (defining the practice of psychology as "the observation, description, evaluation, interpretation, and modification of human behavior by the application of psychological principles, methods, and procedures, to prevent or eliminate symptomatic, maladaptive, or undesired behavior and to enhance interpersonal relationships, work and life adjustment, personal and organizational effectiveness, behavioral health, and mental health" and listing other services that fall within the practice of psychology).

Pursuant to their statutory authority, the boards have also established rules of conduct which additionally prescribe standards governing licensees beyond the rules enumerated in the statutes. See, e.g., MINN. R. 1100.4000-6200 (1997) (setting forth the code of professional conduct for public accountants); id. at 1805.0100-0900 (regarding the rules of professional conduct as established by the board of architecture); id. at 7200.4500-5700 (defining the rules of professional conduct for licensed psychologists). At first blush, some of the rules of professional conduct promulgated by the boards could be serviceably applied in a disciplinary action against a licensee who may have acted unethically as an ADR neutral. For example, psychologists must protect the privacy of their clients much like an ADR neutral must respect the confidentiality of the parties during the ADR process. Compare, e.g., id. at 7200.4700(1) (requiring that "private information is disclosed to others only with the informed written consent of the client"); MINN. GEN. R. PRAC. 114 app., Code of Ethics, Rule IV; id. at 114.08 (prescribing the confidentiality requirements for an ADR neutral on the court roster); and MINN. R. 1100.4500(A)-(E) (requiring public accountants to maintain objectivity and remain free of conflicts of interest), with MINN. GEN. R. PRAC. 114 app., Code of Ethics, Rules I-II (requiring ADR neutrals on the court roster to remain impartial while also disclosing "all actual and potential conflicts of interest reasonably known to the neutral"). Nevertheless, while one may strongly argue that these rules and codes of conduct sufficiently and clearly apply to licensees practicing as an ADR neutral, the rules of conduct and professional codes apply only within the scope of the specific practice, which does not include practicing as an ADR
board members are generally not in the position and do not have the desired qualifications to hear a complaint against and subsequently discipline a licensee who acted unethically as an ADR neutral. There is also no procedural or substantive

neutral. See, e.g., MINN. R. 1805.0100 (stating that the rule of professional conduct governing architects "is adopted for the purpose of implementing the laws and rules governing the practice of architecture, engineering, land surveying, landscape architecture, and geoscience") (emphasis added); id. at 7200.4500(1) (declaring that the rules of conduct regulating psychologists "apply to the conduct of all licensees and applicants, including conduct during the period of education, training, and employment which is required for licensure") (emphasis added); id. at 1100.4200(1) (specifying that the code of professional conduct governing public accountants "applies to all services performed in the practice of public accounting including tax and management advisory services"). Others may also argue that other, less exacting rules may envelop licensee misconduct as an ADR neutral. See, e.g., id. at 7200.5700 (describing unprofessional conduct as any conduct violating the enumerated rules of conduct and "those standards of professional behavior that have become established by consensus of the expert opinion of psychologists as reasonably necessary for the protection of the public interest"); id. at 1100.4300(1) (stating that a licensed public accountant "shall not commit an act discreditable to the profession"). These attenuated arguments, however, probably will not be effective.

136. Occupational board members are hardly experts in determining whether an ADR neutral should be disciplined for unethical conduct. For example, the board of psychology consists of eleven members: three licensed psychologists with doctoral degrees in psychology; two licensed psychologists with master's degrees in psychology; two not necessarily licensed psychologists, one of whom has a doctoral degree in psychology and who represents a doctoral training program in psychology, and another who holds a master's degree in a training program in psychology; one person licensed or qualified to be a psychological practitioner; and three members of the general public. See MINN. STAT. § 148.90 subd. 1(a); see also id. § 326.04 (defining the qualifications of the twenty-one members of the board of architecture, all but five with specific training within the licensed occupation); id. § 326.17 (defining the seven- to nine-member board of accountancy in which two of the members will not have licenses in accounting). Naturally, the legislature has an interest in structuring the membership of boards such that experts in the field promulgate standards and policies to regulate each occupation. See generally id. § 214.001 subd. 1 (noting that it is the policy of the legislature "that it is desirable for boards composed primarily of members of the occupations so regulated to be charged with formulating the policies and standards governing the occupation"). It is commonplace for the board or regulatory agency to be comprised of experts within the specific field or occupation because they are in the best position to collect information and they possess expertise about occupational matters beyond the three traditional branches of government. See DANIEL J. GIFFORD, ADMINISTRATIVE LAW: CASES AND MATERIALS 6-9 (1992). For a general discussion of the policies justifying the establishment and rule-making authority of administrative agencies and boards, see ARTHUR EARL BONFIELD, STATE ADMINISTRATIVE RULE MAKING 3-11 (1986). Therefore, after looking at who serves on the occupational boards, one could strongly argue that each board, while consisting of experts in their respective fields, hardly
reason to believe that the respective boards would investigate or act upon such a complaint. In fact, an examination of Minnesota caselaw and selected board decisions failed to locate one instance in which an occupational board received or filed a complaint against a licensee for acting unethically as an ADR neutral. Finally, even if the boards could take disciplinary action against the licensee, they could only revoke, suspend, or deny her occupational license but could not prevent her from further practicing as an ADR neutral. Therefore, unless it can be successfully argued that a licensee who acts unethically as an ADR neutral discredits her respective occupational practice (an argument not supported by the rules regulating the professionals), the occupational licensing boards probably do not have the statutory authority to discipline licensees for ADR professional misconduct. The need for universal and uniform standards of ADR professional conduct will only be greatly amplified in the event that the occupational boards begin to investigate and discipline professional ADR misconduct.

2. Professional Responsibility of Lawyers Acting As ADR Neutrals

Professional responsibility issues have traditionally posed some of the most troublesome dilemmas lawyers encounter in practice. For the most part, ethical problems and conflicts arise because of the "tensions or conflicts between three ideas that are central to the lawyer’s role: the lawyer as fiduciary, the lawyer as an officer of the court functioning in an adver-

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137. For example, The Occupational Licensing Act limits the boards to investigating complaints that allege a violation of a statute or rule that the board is empowered to enforce. See id. § 214.10 subds. 1-2 (defining the precise procedure each board must follow upon receiving a complaint and the grounds upon which each is authorized to act); id. § 214.103 subd. 2 (defining the procedure for receiving complaints and conducting investigations for health-related licensing boards).

138. See Telephone Interview with Kent Wagner, supra note 38.

139. See, e.g., MINN. STAT. § 148.941 subds. 2(b), 3 (identifying the actions the board of psychology may take against a licensee who violates a statute or rule that the board is empowered to enforce); see also id. § 326.111 subd. 4(a) (listing actions the board of accountancy may take against a licensee in violation of a statute or rule that the board of architecture is empowered to enforce); id. § 326.229 subds. 4(a), 4a (listing the actions the board of accountancy may take).

140. See CRYSTAL, supra note 2, at 1-9.
sarial system, and the lawyer as an individual with personal values and interests." To combat these tensions and to devise appropriate behavior for the professional discipline of lawyers, an expansive body of law and rules of professional discipline composed of numerous statutes, judicial decisions, and court rules has developed and evolved over the years "to protect the public, to guard the administration of justice, and to deter future misconduct." Notwithstanding the impressive amplitude and scope of these standards and disciplinary measures, it has become increasingly apparent that these standards inadequately apply to and insufficiently guide lawyers practicing as ADR neutrals.

141. Id. at 1; see also MINN. RULES OF PROFESSIONAL CONDUCT pmbl., para. 8 (1998) (stating that "[v]irtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living"). See generally RONALD E. MALLEN & JEFFEREY M. SMITH, LEGAL MALPRACTICE (3d. 1989) (providing a comprehensive guide to all published judicial authority and an analysis of settled principles of legal malpractice litigation); RICHARD H. UNDERWOOD & WILLIAM H. FORTUNE, TRIAL ETHICS (1988) (focusing on the ethical problems associated with the specific stages of litigation).

142. In re Disciplinary Action Against Weems, 540 N.W.2d 305, 308 (1995) (per curiam); see also, e.g., MINN. STAT. § 481.15 (defining the statutory causes for the removal and suspension of attorneys); MINN. RULES OF PROFESSIONAL CONDUCT scope, para. 1. The formal examination of aspiring lawyers assures the public that lawyers are adequately trained regardless of their academic backgrounds. See GEOFFREY C. HAZARD & DEBORAH L. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 466 (2d. ed. 1988). Once a bar applicant is "licensed" to practice law in Minnesota, thus becoming an attorney, her conduct is governed by the Minnesota Rules of Professional Conduct, which are strictly enforced by the Lawyers Board of Professional Responsibility and the Minnesota Supreme Court. See In re Smith, 19 N.W.2d 324, 325 (Minn. 1945) (stating that "t[he] right to practice law is a matter of license and high privilege and is in no sense an absolute right. It is in the nature of a franchise, to the enjoyment of which one is admitted only upon proof of fitness and qualification, which must be maintained if the privilege is to continue in enjoyment"). Under the Minnesota Rules of Professional Conduct, a lawyer is deemed "a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." MINN. RULES OF PROFESSIONAL CONDUCT pmbl., para. 1. In determining what disciplinary action the court shall take, the court "weigh[s] the nature of the misconduct, the cumulative weight of the disciplinary rule violations, and the potential harm to the public, to the legal profession, and to the administration of justice." In re Disciplinary Action Against Jensen, 542 N.W.2d 627, 632 (Minn. 1996) (per curiam) (quoting In re Shoemaker, 518 N.W.2d 552, 555 (Minn. 1994)). For a general description of the procedure of lawyer accountability, see Maute, supra note 37, at 508.
For the most part, the judicial branch possesses the authority to regulate lawyers. The separation of powers doctrine embodied in the Minnesota Constitution essentially prohibits the legislative and executive branches from regulating lawyers like other occupations such as accountants and psychologists. Unlike other state constitutions, however, the Minnesota Constitution does not expressly confer the authority to regulate lawyers and the practice of law to the judicial branch.

143. The separation of powers doctrine, while famously developed at the federal level, also defines the axiomatic parameters that circumscribe the three branches' powers in state government. Compare U.S. CONST. arts. I-III with MINN. CONST. art. III; see also INS v. Chadha, 462 U.S. 919, 957 (1983) (insisting that "the hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted"). More than two-hundred years ago, James Madison explained the purpose of the separation of powers doctrine by stating that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47, at 301 (James Madison) (Willmoore Kendall & George W. Carey eds., 1966).

144. The Minnesota Constitution is one of thirty-four state constitutions that expressly provides that the powers shall be separate and distinct, stating: "the powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution." MINN. CONST. art. III, § 1; see also Michael B. Browde & M.E. Occhialino, Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints, 15 N.M. L. REV. 407, 474-77 (1985) (listing various states' constitutional provisions regarding the separation of powers doctrine).

145. See infra notes 148-50 and accompanying text (discussing the judiciary's inherent power to regulate the practice of law). Compare MINN. STAT. § 214.001 (1998) (vesting in the executive branch the authority to regulate health and non-health-related occupations), with id. § 481.01 (establishing the Board of Law Examiners and vesting the authority to regulate admission to the practice of law with the Minnesota Supreme Court).

146. A 1956 amendment to the Judiciary Article of the Minnesota Constitution placed the authority of promulgating and enforcing court procedural rules exclusively with the judicial branch. Prior to this amendment, the procedural rulemaking power was vested completely in the legislative branch, and the court exerted its inherent power only when the legislature had not acted in that area. See State v. Johnson, 514 N.W.2d 551, 554 n.4 (Minn. 1994). For a complete history of the separation of powers issues involving court procedure in Minnesota, see Maynard E. Pirsig & Randall M. Thietjen, Court Procedure and the Separation of Powers in Minnesota, 15 WM. MITCHELL L. REV. 141 (1989).
Nevertheless, the Minnesota Constitution states that the judicial power of the state is vested in the Supreme Court, and like the federal courts, the Minnesota Supreme Court has carefully interpreted the state constitution to hold that the judicial branch has the inherent power to govern its existence and functions as a court. Accordingly, the Minnesota Supreme Court has held that it possesses the exclusive authority to regulate the practice of law and that any attempt by the legislature to limit or modify that power is constitutionally impermissible. Thus, the statutes regarding the regulation of

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147. "The judicial power of the state is hereby vested in a supreme court, a district court, and such other courts, judicial officers and commissioners with jurisdiction inferior to the district court as the legislature may establish." MINN. CONST. art. VI, § 1. The supreme court's authority is defined by the legislature:

The Supreme court shall have all the authority necessary for carrying into execution its judgments and determinations, and for the exercise of its jurisdiction as the supreme judicial tribunal of the state, agreeable to the usages and principles of law. Such court shall prescribe, and from time to time may amend and modify, rules of practice therein and also rules governing the examination and admission to practice of attorneys at law and rules governing their conduct in the practice of their profession, and rules concerning the presentation, hearing, and determination of accusations against attorneys at law not inconsistent with law, and may provide for the publication thereof at the cost of the state.

MINN. STAT. § 480.05.

148. The Minnesota Supreme Court explained that the judicial power of this court has its origin in the Constitution, but when the court came into existence, it came with inherent powers. Such power is the right to protect itself, to enable it to administer justice whether any previous form of remedy has been granted or not. This same power authorizes the making of rules of practice.

In re Disbarment of Greathouse, 248 N.W. 735, 737 (1933) (per curiam) (holding that courts have the inherent power to discipline attorneys for unethical practices, and, therefore, that the Minnesota Supreme Court could disbar an attorney for employing others to solicit business for him, even though such conduct was not prohibited by statute). Similarly, in dicta, the Minnesota Supreme Court accounted for the nature and scope of the court's inherent powers, stating:

Inherent judicial power governs that which is essential to the existence, dignity, and function of a court because it is a court. Its source is the constitutional doctrine of separation of powers as expressed and implied in our constitution. Its scope is the practical necessity of ensuring the free and full exercise of the court's vital function—the disposition of individual cases to deliver remedies for wrongs and "justice freely and without purchase; completely and without denial; promptly and without delay, conformable to the laws."

In re Clerk of Court's Comp. for Lyon County v. Lyon County Comm'r's, 241 N.W.2d 781, 784 (Minn. 1976) (quoting MINN. CONST. art. I, § 8).

149. See In re Tracy, 266 N.W. 88 (Minn. 1936) (per curiam) (invalidating a
attorneys only broadly define attorney misconduct and the causes that justify the removal or suspension of an attorney.\textsuperscript{150}

The statute of limitations governing disbarment procedures on the grounds that the statute unconstitutionally placed restrictions on the court's inherent power to regulate the practice of law. However, in\textit{In re Tracy}, the Minnesota Supreme Court stated that not all legislation regulating the practice of law would necessarily be unconstitutional. \textit{Id.} at 93. The court stated that it would comply with the legislation provided that the court could do so “without ceasing to function as independent judges” and if the legislation was “found to be reasonable and just in application” and did not violate public policy. \textit{Id.}

Furthermore, the Minnesota Supreme Court has held that it will allow the legislature to pass a statute regulating the practice of law so long as the statute does not address an area already governed by court rule and the statute leaves the final decision with the court. \textit{See Johnson}, 514 N.W.2d at 553-54; \textit{see also} Sharood v. Hatfield, 210 N.W.2d 275, 279 (Minn. 1973) (explaining that “[i]t is true that this court has acquiesced in legislative acts prescribing administrative procedures for admission and discipline of attorneys as long as such acts did not usurp the right of the court to make the final decision”); Cowern v. Nelson, 290 N.W. 795 (Minn. 1940) (accepting a statute allowing real estate brokers to draft legal documents but refusing an exemption that would allow them to charge a fee).

In a related and controversial matter, many ADR experts are vehemently debating whether or not ADR, especially mediation, constitutes the practice of law. \textit{Compare} Carrie Menkel-Meadow,\textit{Is Mediation the Practice of Law?}, NAT. INST. DISP. RESOL., Mar.-Apr. 1996, at 1, 5 (contending that mediation is the practice of law because mediators often assess the legal claims and positions of the disputants and usually predict the outcome of the dispute based upon the law), \textit{with} Bruce Meyerson,\textit{Lawyers Who Mediate Are Not Practicing Law}, 14 ALTERNATIVES TO HIGH COST LITIG. 74, 74 (1996) (responding to Menkel-Meadow, arguing that mediation is not the practice of law because no attorney-client relationship exists and because mediation practice is not characterized by advocacy on behalf of clients); Bruce E. Meyerson,\textit{Mediation and the Practice of Law}, 3 DISP. RESOL. MAG. 11, 11-12 (1996) (discussing the regulation of ADR without defining it as the practice of law). Notwithstanding the debate, the consequences of concluding that mediation is the equivalent to practicing law would be monumental with respect to the regulation of attorneys and to the ADR industry. To begin with, persons without a law degree and who are not licensed to practice law would be prohibited from practicing as a mediator. \textit{See MINN. STAT.} \textsection{481.02 (1998) (prohibiting the unlicensed practice of law). Moreover, lawyers would be subject to their duties and obligations under the Model Rules of Professional Responsibility, which are incompatible with the ADR practice. \textit{See infra} notes 156-62 and accompanying text (regarding the inapplicability of the Model Rules of Professional Responsibility to ADR practice). Finally, the courts would have exclusive jurisdiction to regulate ADR. \textit{See, e.g., In re Tracy}, 266 N.W. at 88 (stating that the court has the inherent power to regulate the disbarment and admission of attorneys).

\textsection{150.} \textit{See generally MINN. STAT.} \textsection{481.06 (defining the general duties of attorneys); id. \textsection{481.071 (defining attorney misconduct); id. \textsection{481.15 (defining the causes for removal or suspension from the bar).}

The Minnesota Supreme Court essentially possesses the authority to regulate the practice of law. \textit{See id.} \textsection{481.01 (establishing the board of law examiners, whose members are appointed by the supreme court and “which
and on the whole, the statutes do not state whether an attorney may be disciplined for professional misconduct while practicing as an ADR neutral.

Even though the most common application of the judiciary's inherent powers is the regulation and discipline of its officers,\textsuperscript{151} it is difficult to locate common law precedent or court rules apropos to the discipline of attorney-ADR neutrals engaging in professional misconduct.\textsuperscript{152} As previously discussed, the Minnesota Supreme Court has vacated arbitration awards in cases in which the attorney-neutral engaged in some form of professional misconduct.\textsuperscript{153} The Court, however, has never enforced a provision of any rule of professional conduct to suspend, disbar, or penalize an attorney for engaging in unethical conduct while practicing as an ADR neutral.\textsuperscript{154}

shall be charged with the administration of such rules and regulations and with the examination of all applicants for admission to practice law"). The Minnesota Supreme Court also has the authority to:

prescribe, and from time to time may amend and modify, rules of practice therein and also rules governing the examination and admission to practice of attorneys at law and rules governing their conduct in the practice of their profession, and rules concerning the presentation, hearing, and determination of accusations against attorneys at law not inconsistent with law, and may provide for the publication thereof at the cost of the state.

\textit{Id.} \textsection 480.05; see also \textit{In re Disciplinary Action Against Perry, 494 N.W.2d 290, 293} (Minn. 1992) (per curiam) (holding that "[t]he supreme court is vested with the final responsibility for determining the appropriate sanctions in attorney discipline cases").

\textsection 480.05.

\textsection 480.13-.15 (creating and defining the powers of the State Court Administrator who is appointed by the Minnesota Supreme Court); \textit{id.} \textsection 480.07-.11 (establishing and defining various judicial employees who are appointed and supervised by the Minnesota Supreme Court); \textit{id.} \textsection 480.01 (establishing the Board of Law Examiners, appointed by the Court, to oversee applications and admission to the practice of law). Lawyers are "officer[s] of the legal system." \textit{Minn. Rules of Professional Conduct} pmbl., para. 1 (1998).

\textsection 152. \textit{See infra} note 154.

\textsection 153. \textit{See supra} notes 66, 68.

\textsection 154. A Westlaw search of Minnesota cases failed to reveal any instance in which the Minnesota Supreme Court has disciplined an attorney-neutral for professional misconduct under any code of professional ethics. The Minnesota Court of Appeals, however, adopted the Code of Ethics for Arbitrators in Commercial Disputes in 1984 and announced that they would apply them prospectively. \textit{See Safeco Ins. Co. v. Stariha, 346 N.W.2d 663, 667} (Minn. Ct. App. 1984). However, from the facts of the case, it appears that the court will apply these ethical rules only to determine if an arbitration award should be vacated because of neutral misconduct. In \textit{Safeco} the court did not vacate an arbitration award for failure to disclose the existence of a conflict of interest. \textit{Id.} at 663. Furthermore, the Lawyers Professional Responsibility Board
Despite the arguments to the contrary, the Minnesota Rules of Professional Responsibility (MRPR) do not sufficiently regulate attorney-neutrals. Essentially, the MRPR (LPRB) has not yet released an official opinion concerning the ethical standards or expectations of lawyers practicing as ADR neutrals. See Lawyers Board of Professional Responsibility, Opinions 1-19 (visited Feb. 28, 1999) <http://www.courts.state.mn.us/lbpr/opinions.html> (listing and defining the official opinions of the LBPR).

Recently, however, other courts have addressed "the issue of whether after the conclusion of an ADR proceeding an attorney-neutral and his or her law firm or organization may be disqualified from representing a party in the same or subsequent case." Krohnke & Frankman, supra note 34, at 4-7; see, e.g., Poly Software Int'l, Inc. v. Su, 880 F. Supp. 1487 (D. Utah 1995) (disqualifying plaintiff's attorney and his attorney's law firm); Cho v. Superior Court, 45 Cal. Rptr. 2d 863 (Cal. App. 2d 1995) (disqualifying law firm); McKenzie Constr. v. St. Croix Storage Corp., 961 F. Supp. 857 (D. V.I. 1997) (disqualifying law firm).

155. See generally MINN. RULES OF PROFESSIONAL CONDUCT.

156. See Menkel-Meadow, supra note 12, at 426-54 (arguing that because of the changing roles of mediators, the Model Rules cannot apply). Model Rule 5.7 pertaining to ancillary services of attorneys has not been adopted by the Minnesota courts. See Dennis J. Block et al., Model Rule of Professional Conduct 5.7: Its Origin and Interpretation, 5 GEO. J. LEGAL ETHICS 739, 806 (1992) (arguing that Rule 5.7 can be applied to attorney ADR neutrals under ancillary practice theory); see also infra notes 157-63 and accompanying text. Others may attempt to solve this ethical dilemma by arguing that attorney ADR neutrals, at least those acting as arbitrators, should be held accountable under the Model Code of Judicial Conduct. The Code of Judicial Conduct would apply by virtue of the fact that arbitrators are empowered with the authority to issue binding judgments (like judges). In fact, the Code of Judicial Conduct provides that unless expressly provided by law, judges shall not act as arbitrators or mediators. See MINN. CODE OF JUDICIAL CONDUCT Canon 4(f). However, a retired judge may participate as an arbitrator or mediator provided that:

(1) the judge does not participate during the period of any judicial assignment,

(2) the judge is disqualified from mediation and arbitration in matters in which the judge served as judge, and is disqualified as judge from matters in which the judge participated as mediator or arbitrator, unless all parties to the proceeding consent after consultation, and

(3) the participation does not reflect adversely on the judge's impartiality.

Id.

While this seems partly logical, this application is entirely outside the intended scope of the Code of Judicial Conduct, which only "establishes standards for the ethical conduct of judges to reflect the responsibilities of the judicial office as a public trust and to promote confidence in our legal system." Id. at pmbl. The Code of Judicial Conduct defines a "judge" as "anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including an officer such as a referee, special master, or magistrate." Id. at cmnts.-application.
only contemplate and accommodate the role of an attorney acting within the traditional client-lawyer relationship,\textsuperscript{157} practicing as a zealous advocate\textsuperscript{158} or a counselor.\textsuperscript{159} A close examination of two Minnesota Rules of Professional Responsibility arguably applicable to an attorney practicing as an ADR neutral—rule 2.2 (pertaining to attorneys practicing as "intermediaries")\textsuperscript{160} and rule 8.4 (regarding attorney "professional misconduct" in general)\textsuperscript{161}—confirms that they do not adequately provide ethical standards for the attorney acting as an ADR neutral because the neutral possesses qualities and responsibilities necessarily in direct conflict with those of an attorney.\textsuperscript{162} Furthermore, despite the Court's history of unsympa-

\textsuperscript{157} See generally MINN. RULES OF PROFESSIONAL CONDUCT Rules 1.1-1.17 (prescribing professional standards such as competence, diligence, communication and confidentiality).

\textsuperscript{158} See generally id. Rules 3.1-3.9 (prescribing professional standards of advocacy such as expediting litigation, candor toward the tribunal and advocacy in non-tribunal proceedings).

\textsuperscript{159} See generally id. Rules 2.1-2.3 (prescribing the professional standards of a lawyer acting as an advisor or intermediary).

\textsuperscript{160} See id. Rule 2.2. At first blush Rule 2.2 (regarding attorneys acting as intermediaries) appears to also apply to attorneys practicing as ADR neutrals. The rule, however, expressly "does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties." Id. Rule 2.2 cmt., para. 2. The comment does state that if a lawyer performs in these capacities, the lawyer "may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes."

\textsuperscript{161} See id. Rule 8.4. Rule 8.4 states that "a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to the practice of law." Id. Rule 8.4 cmt., para. 1. The rule provides a definition for characteristics relevant to the practice of law, stating among other things that "[i]t is professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] ... conduct that is prejudicial to the administration of justice." To a large extent, this general proscription overlaps with other rules that prohibit dishonesty or misrepresentation. See, e.g., id. Rule 1.4 (stating that a lawyer is obliged to keep clients reasonably informed about the status of a matter); Rule 3.3 (stating that a lawyer must not make false statements of law or fact to a tribunal); Rule 3.4 (demanding that a lawyer must not obstruct, falsify or conceal evidence); Rule 4.1 (stating that a lawyer must not make false statements of law or fact to a third party). Arguably, however, ADR neutral misconduct may fall into one of the categories of "dishonesty, fraud, deceit or misrepresentation." Id. Rule 8.4(c). For example, it can be argued that a neutral's failure to disclose a conflict of interest to a party to the ADR process is professional misconduct under Rule 8.4 because it is dishonest, or at the very least "conduct that is prejudicial to the administration of justice." Nonetheless, such a proposition is not yet supported by adequate caselaw. See supra notes 77, 154 and accompanying text.

\textsuperscript{162} See generally Moore, supra note 15, at 720 (concluding that while
thetically\textsuperscript{163} disciplining attorneys for professional misconduct arising outside the practice of law,\textsuperscript{164} it is not necessarily a foregone conclusion that the courts will discipline attorney-neutrals under the rules of professional responsibility which are primarily promulgated to deal with issues arising under the traditional attorney-client relationship.\textsuperscript{165} Thus, notwithstanding the remarkable lineage and breadth of the numerous rules and court decisions governing attorney conduct both within and outside the scope of the practice of law, it is likely that the courts will continue to do no more than vacate arbitration and mediation awards when the attorney-neutral engages in misconduct, or at the most disqualify the neutral if the misconduct occurs before the award is ordered.\textsuperscript{166} Notably, these disciplinary measures (if they may be called that) have no effect on the attorney-neutral's ability to continue practicing as a neutral.\textsuperscript{167}

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\textsuperscript{163} Some Model Rules peripherally comprehend the regulation of attorneys acting as mediators, the Model Rules are inadequate to guide and govern attorneys acting as mediators); Menkel-Meadow, \textit{supra} note 12, at 445-48. This notion has obviously been embraced by many jurisdictions, including Minnesota, the evidence being Rule 114 itself.

\textsuperscript{164} “[B]ecause the court’s primary duty is protection of the public . . . “[t]he enlistment of a natural human sympathy . . . cannot be permitted to deter us from performance of this duty.” \textit{In re} Hansen, 318 N.W.2d 856, 858 (Minn. 1982) (per curiam) (citing \textit{In re} Hanson, 103 N.W.2d 863, 864 (Minn. 1960) (per curiam)).

\textsuperscript{165} Unlike other occupational boards, the Minnesota Supreme Court has the authority to discipline an attorney for almost any reason because “[b]oth clients and nonclients have a right to assume that lawyers will treat them fairly and honestly in all of their dealings, whether professional or otherwise.” \textit{In re} Larson, 324 N.W.2d 656, 659 (Minn. 1982) (per curiam) (quoting \textit{In re} Raskin, 239 N.W.2d 459, 461 (Minn. 1976)).

\textsuperscript{166} To determine the appropriate sanctions to be levied against the attorney, the Minnesota Supreme Court is “guided by prior discipline cases.” \textit{In re} Hoffman, 379 N.W.2d 514, 519 (Minn. 1986) (per curiam). One ADR critic has proposed that Model Rule of Professional Conduct 2.4 should apply to attorneys practicing as mediators. \textit{See} Maute, \textit{supra} note 37, at 514.

\textsuperscript{167} \textit{See}, \textit{e.g.}, Poly Software Int'l v. Su, 880 F. Supp. 1487 (D. Utah 1995) (disqualifying plaintiff's attorney because of previous role as mediator in the same suit).

\textsuperscript{167} Although a disbarred attorney will be removed from the roster of qualified neutrals, the disbarred attorney cannot be prohibited from practicing as an ADR neutral by any governmental board or private organization. \textit{See} MINN. GEN. R. PRAC. 114.12 (“The State Court Administrator shall not place on, and shall delete from, the rosters the name of any applicant or neutral whose professional license has been revoked.”).
II. A STEP FORWARD, BUT STILL LOOKING IN THE REAR-VIEW MIRROR—THE SHORTCOMINGS OF RULE 114'S CODE OF ETHICS

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, and expenses, and waste of time.

—Abraham Lincoln

Issues concerning the ethical conduct of ADR neutrals in Minnesota did not receive considerable attention until the early 1990s, when all Minnesota courts were directed to establish or annex ADR processes for civil proceedings. In 1993, pursuant to the statutory directives of the Minnesota Legislature authorizing "a majority of judges in a district to establish a mandatory, non-binding arbitration program to dispose of civil cases," the Minnesota Supreme Court promulgated Rule 114 of the General Rules of Practice to encourage the use of ADR. Rule 114 requires attorneys to consider ADR in every civil case and grants to judges the discretion to order parties


169. See MINN. STAT. § 484.73 subd. 1 (1998) (giving the majority of the judges of any judicial district the authority to establish "a system of mandatory, nonbinding arbitration within the district"); id. § 484.74 subd. 1 (authorizing the courts to order parties into non-binding ADR if the litigation involved a claim or claims over $7,500); id. § 484.76 subd. 1 (directing the Supreme Court in 1991 to "establish a statewide [ADR] program for the resolution of civil cases filed with the courts"). In 1987, while concerned that "regular citizens' were losing meaningful and timely access to the courts," Barbara McAdoo & Nancy Welsh, Does ADR Really Have a Place on the Lawyer's Philosophical Map?, 18 HAMLINE J. PUB. L. & POL'Y 376, 379 (1997), the Minnesota Supreme Court and the Minnesota State Bar Association jointly established an ADR Task Force to pursue and investigate the possibility of forming a formal ADR program to respond to the adverse public perception that litigation is "expensive, time consuming, slow, and intimidating." ADR Review Board Report, supra note 26, at 2. Four years later, responding to the findings and recommendations of the ADR Task Force, the Minnesota Legislature directed the Minnesota Supreme Court to establish a statewide ADR program. Id.; see also MINN. STAT. § 484.76 subd. 1. In 1993, pursuant to the advice and recommendations of an Implementation Committee, the Minnesota Supreme Court promulgated Rule 114. See ADR Review Board Report, supra note 26.

170. McAdoo & Welsh, supra note 169, at 378.

171. See MINN. GEN. R. PRAC. 114.

172. Rule 114 states that "[a]ll civil cases are subject to Alternative Dispute Resolution." After considerable debate over the issue, the ADR Task Force recommended that the rule require mandatory consideration after examining jurisdictions that imposed a voluntary standard. See McAdoo &
into non-binding ADR even if the one of the parties opposes any form of ADR. To assist the courts, attorneys, and the public in locating "qualified neutrals," the Minnesota Supreme Court also promulgated a Roster of Neutrals which comprises two separate rosters: the Civil Neutral Roster and the Family Law Neutral Roster. Accordingly, Rule 114 prescribes the training, standards, qualifications, and continuing education expectations required by each roster; these standards, however, are purposefully liberal in order to accommodate all professionals who wish to practice as an ADR neutral.

Because ADR processes had become an increasingly popular and prevalent substitute for traditional litigation in recent years, "it [had also become] increasingly apparent to members of both the bench and bar that a 'Code of Ethics' concerning the conduct of neutrals conducting ADR processes was necessary." In pursuit of implementing standards of professional conduct for ADR neutrals, the Minnesota Supreme Court first established the Alternative Dispute Resolution Review Board, which, after many months of protracted research

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Welsh, supra note 169, at 380. The Task Force noted that ADR was rarely if ever used in voluntary ADR consideration jurisdictions. See id.; Minnesota Supreme Court Minnesota State Bar Association Task Force on Alternative Dispute Resolution, Final Report (1990).

173. See MINN. GEN. R. PRAC. 114.

174. See id. Rule 114.12. Importantly, a neutral need not be a "qualified neutral" to practice Rule 114 ADR and the parties to a Rule 114 ADR process are free to select the presiding neutral. See id. Rule 114.05(a) ("If the parties are unable to agree on a neutral . . . the court shall appoint the neutral."). Additionally, the courts have the discretion, with the parties' consent, to appoint non-rostered neutrals "if the appointment is based on legal or other professional training or experience" unless the ADR process is mediation or med-arb. See id. Rule 114.05(b).

175. See id. Rule 114.12(b).

176. See id. Rule 114.12(c).

177. See id. Rule 114.13.

178. Rule 114 has been reportedly successful in reducing costs of litigation and empaneling "qualified" ADR neutrals. See McAdoo, supra note 5, at 59-60 (reporting in a comprehensive statistical analysis supported by an ADR questionnaire that ADR, and specifically mediation, is viewed by attorneys as "a successful settlement tool" which saves clients time and reduces litigation expenses). However, McAdoo also reports that these results are only accurate to the extent that they are based on lawyers' opinions; it remains to be seen whether the clients share the same views.

179. Gislason & Cross, supra note 26, at 1; see also Krohnke, supra note 12, § 4-1.

180. The Alternative Dispute Resolution Review Board was originally es-
and review, submitted a set of ethical standards to the Minnesota Supreme Court for its approval. Without reproach, the Court subsequently adopted the proposal in total, the final product being the Code of Ethics under Rule 114.

Members of the Minnesota ADR community have acclaimed the Code of Ethics as the first significant step towards the statewide regulation of all ADR neutrals, a goal that has yet to be established, much less achieved, in many jurisdictions. The Code of Ethics sets forth a laudable rationale in its introduction:

In order for ADR to be effective, there must be broad public confidence in the integrity and fairness of the process. Neutrals have a responsibility not only to the parties and to the court, but also to the continuing improvement of ADR processes. Neutrals must observe high standards of ethical conduct... [and the] provisions of this Code should be construed to advance these objectives.

established to “develop criteria for inclusion on the Court’s roster of qualified ADR neutrals.” Gislason & Cross, supra note 26, at 1. In 1994, however, the Court expanded the ADR Review Board’s authority to consider the inclusion of family law dispute resolution in Rule 114. The Board was also granted power to consider which, if any, ethical standards should be adopted for ADR neutrals and any continuing education requirements for qualified neutrals. See id. The current makeup of the ADR Review Board is determined by the Minnesota Supreme Court under Rule 114 and consists of thirteen persons representing the following areas: a judge; a court ADR Program Director; an ADR Sole Practitioner (one from the Twin Cities metropolitan area and one from Greater Minnesota); a Director of a for-profit ADR organization; a Director of a non-profit ADR organization; an attorney; and six additional family law practitioners, including a family law judge. See ADR Review Board Report, supra note 26, at 4.

181. See ADR Review Board Report, supra note 26, at 10. The Code of Ethics has earned national attention and praise from other jurisdictions, practitioners, and academics. See Kovach & Love, supra note 13 (discussing and comparing the leading states’ regulatory codes regarding mediation).

182. “Rule 114 is the product of many years of local and national experience with ADR as well as many hours of research and debate by members of the bar, judiciary, court administration, and professionals within the field of ADR.” ADR Review Board Report, supra note 26, at 2.

183. MINN. GEN. R. PRAC. 144 app., Code of Ethics. The ADR Review Board modeled the Code of Ethics after the “Joint Code” advanced by the AAA, ABA, and SPIER, and consulted several other codes promulgated by other states and associations. See ADR Review Board Report, supra note 26, at 10.

184. See, e.g., Krohnke, supra note 12, § 4-2 (noting that the Conflict Management and Dispute Resolution Section of the Minnesota Bar Association supported and applauded the efforts of the ADR Review Board).

185. MINN. GEN. R. PRAC. 114 app., Code of Ethics, pmbl., para. 3. The introduction further states that “[t]he purpose of this code is to provide standards of ethical conduct to guide neutrals who provide ADR services, to in-
Additionally, and unlike other professional codes of ethics, the Code of Ethics applies to all neutrals, regardless of their profession. The Code of Ethics also provides substantial guidance to the ADR neutrals, the parties to the ADR process, and the courts as to precisely what constitutes ADR misconduct. This “breakthrough” framework of regulation is significant considering the important role ADR neutrals play in today’s system of justice and the lack of standards of professional conduct controlling them.

Notwithstanding its documented successes, the Code of Ethics ultimately falls short of protecting ADR consumers primarily because the Code of Ethics is both under-inclusive and toothless. Although the Code of Ethics is transdisciplinary in application, the Code is under-inclusive because it only applies to an ADR neutral if he or she is on one of the court rosters; the Code of Ethics does not apply to all ADR neutrals practicing ADR in Minnesota. Most importantly, qualified ADR neutrals are probably not subject to the Code of Ethics or to Supreme Court disciplinary jurisdiction until a civil action is commenced.

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form and protect consumers of ADR services, and to ensure the integrity of the various ADR processes.” Id. at para. 2.

186. All ADR neutrals or ADR organizations that wish to be on one of the court rosters are subject to the provisions and standards set forth in the Code of Ethics.

187. The Code contains seven rules that apply to all ADR processes: Rule I, Impartiality; Rule II, Conflicts of Interest; Rule III, Competence; Rule IV, Confidentiality; Rule V, Quality of Process; Rule VI, Advertising and Solicitation; and Rule VII, Fees. See MINN. GEN. R. PRAc. 114 app., Code of Ethics. The Code also contains one rule that applies only to mediation: Rule I, Self-Determination. See id.

188. See generally McAdoo, supra note 5.

189. See infra notes 192-99 and accompanying text; see also Letter from Duane Krohnke, Chair, MSBA Conflict Management & Dispute Resolution Section & Rebecca M. Picard, Ethics Committee Chair, MSBA Conflict Management & Dispute Resolution Section, to ADR Review Board 1-2 (May 13, 1998) (on file with author) [hereinafter MSBA Letter].

190. See supra note 186. Not all ADR neutrals practicing in Minnesota are on one of the court rosters; therefore, many ADR neutrals remain essentially unregulated.

191. See MINN. GEN. R. PRAc. 114.01 (“All civil cases are subject to Alternative Dispute Resolution (ADR) processes, except for those actions enumerated in Minn. Stat. § 484.76 and Rules 111.01 and 310.01 of these rules.”). Importantly, in Minnesota, it is sufficient to commence a civil action by serving the defendant with a summons—the plaintiff need not file the summons with the court. See MINN. R. CIV P. 3.01(a)-(c). Consequently, parties may practice Rule 114 ADR without the court ever being aware of the civil action.
The Code of Ethics is also toothless because it fails to define exactly what action the Minnesota Supreme Court may take to discipline an ADR neutral for professional misconduct. The text of the Code of Ethics ambiguously states that "[f]ailure to comply with any provision . . . may be the basis for removal from the roster of neutrals maintained by the Office of the State Court Administrator and/or for such other action as may be taken by the Minnesota Supreme Court." Accordingly, ADR neutrals (and the Minnesota Supreme Court) have little, if any, idea what professional sanctions they may face if they violate one of the Code's Rules (especially considering that ADR neutrals continue to enjoy qualified civil immunity for any violation of the Code of Ethics). Similarly, the Code of Ethics lacks the procedural and due process guidelines and an enforcement mechanism necessary to take any action against one of the "qualified" neutrals. One attorney and ADR practitioner has noted that the Code fails to provide explicit "exit" rules for attorney ADR neutrals from the Rules and "entrance" rules to the ethical standards of Rule 114 that address the kind of ethical issues that are unique to ADR processes. Thus, the Code fails to indicate whether attorneys and non-attorneys will be disciplined under the Code of Ethics in addition to other professional codes of conduct (such as the MRPC). Finally, the Code of Ethics does not address other substantial issues such as whether the complaints, complainants, and results of the investigative process should be confidential or public. Therefore, considering these criticisms, it is apparent that the Code of Ethics, like the other professional standards of conduct, not only fails to provide adequate guid-

192. See MINN. GEN. R. PRAC. 114 app., Code of Ethics, pmbl., para. 6 (defining ambiguously the disciplinary measures the Court may take against a "qualified neutral").
193. Id. (emphasis added).
194. See supra note 187 (listing the specific Rules under the Code of Ethics).
195. The Code of Ethics specifically states that "[v]iolation of a provision of this Code shall not create a cause of action nor shall it create any presumption that a legal duty has been breached. Nothing in this Code should be deemed to establish or augment any substantive legal duty on the part of neutrals." MINN. GEN. R. PRAC. 114 app., Code of Ethics, pmbl., para. 6; cf. supra notes 76-77 and accompanying text (regarding common law and statutory ADR neutral civil immunity).
196. See MSBA Letter, supra note 189, at 1-2.
197. See Krohnke, supra note 12, § 4-2.
198. See MSBA Letter, supra note 189.
ance to ADR neutrals, but inadequately protects the ADR consumer from neutral misconduct.199

III. MANAGING THE ADR MOMENTUM IN THE NEXT MILLENNIUM: THE DEVELOPMENT OF TRUST IN THE ADR ETHICAL SYSTEM

I find the most important thing in the world is not so much where we stand as in what direction we are moving.

—Justice Oliver Wendell Holmes200

A. A SIMPLE MATTER OF TRUST: WHY ADR ETHICS ARE DESIRABLE

The purpose of this Note is to demonstrate that ADR neutrals (whether they are rostered neutrals, licensed professionals, members of private ADR organizations, or laypersons) practice in an unregulated market—free from universal, uniform, and enforceable standards of conduct.201 This Note presupposes that ADR ethics is both a professional and philosophical goal worth pursuing.202 Nevertheless, to buttress the persuasive weight of this Note, a succinct justification for uni-

199. The ADR Review Board is not oblivious to most of these defects. In fact, the Board has recommended that the Supreme Court establish an enforcement mechanism for the Code of Ethics and has asked for the court’s guidance on several other issues including due process, confidentiality, and procedural issues surrounding the discipline of ADR neutrals under Rule 114. See ADR Review Board, Procedure Governing Complaints Against Neutrals and the Code of Ethics Governing Neutrals (unpublished manuscript) (on file with author). But the recommendations have come under considerable criticism from the Minnesota State Bar Association and other organizations and as of the date of this Note have yet to be adopted by the Supreme Court. But even if the proposed procedure is adopted, it would still substantively fail in universally regulating all ADR neutrals and protecting ADR consumers. See supra notes 188-98 (noting the “under-inclusiveness” of the Code of Ethics).


201. Of course, one could make the argument that the market simply would not support unethical ADR practices. The analysis and criticism of a market theory is beyond the scope of this Note.

202. Arguably, if the goal were not worth pursuing then the Code of Ethics and countless other ADR codes of professional conduct established by courts as well as those produced by organizations—such as the AAA and SPIDR—would never have been promulgated, and professional and academic discourse on the subject would not be as substantial as it is today.
universal and uniform rules of ADR professional conduct bears brief mention.

The Minnesota Supreme Court has acknowledged that the effectiveness and success of any ADR process depends on whether the public is confident that the process is both honest and fair. When broken down, this core concept becomes a simple matter of trust—the public must trust the ADR process for it to succeed. Accordingly, the public must trust the ADR neutral because of the pivotal position the neutral plays in the outcome of the process. As one critic has noted, however, "to trust and entrust is to become vulnerable and dependent on the good will and motivations of those we trust," and indeed, the public is vulnerable to ADR misconduct. The relationship between a neutral and the parties to the dispute resolution process is a special and sensitive one, like that between a doctor and her patient or a lawyer and his client; it entails a level of trust and a unique ethical dimension not present in ordinary relationships. In accordance with this understanding, we must be concerned with how to develop this trust.

Generally speaking, trust in any relationship is earned and developed through acts of goodwill over time. This is not always true, though, in the case of relationships between professionals and their clients or customers. In these cases, trust may be founded either in the system as a whole or, ideally, in a combination of both the system and the character of the individual professional. Where professional relationships can be

203. See MINN. GEN. R. PRAC. 114 app., Code of Ethics, pmbl.

204. See Menkel-Meadow, supra note 12, at 408-09 (noting that neutrals, or "solution maximizers," play significant roles in ADR and have created new ethical problems because of their unique roles as neutrals).


207. See Pellegrino, supra note 205, at 72-73. Pellegrino compares the kind of trust we place in absolute strangers, the "reliance" or "system trust" that we place in airline pilots, police, and fireman, and the kind of trust placed in other professionals, such as doctors and attorneys, which tends to be of a more personal nature because of the freedom involved in choosing the relationship with these professionals. Id.

208. Id. at 73. For example, we trust airline pilots not for who they are but for the job they do, because presumably their motives and self-interest coincide with our own wishes—namely, to takeoff, fly, and land the aircraft safely.
formed through consultation, research, and advice (unlike the paradigmatic pilot-passenger relationship), the system is able to establish or reinforce trust. Essentially, this Note has shown that while there are a few “systems” that work to establish trust in ADR (such as the Code of Ethics or private ADR professional standards), these “systems” do very little to reinforce the trust because they are under-inclusive, unenforceable, and/or toothless. Therefore, the development of an effective “system” becomes a simple matter of readjusting the currently maladjusted ADR system by establishing the Rules of ADR Neutral Professional Conduct.

B. DEFINING THE PARAMETERS OF ADR ETHICS WITHIN THE CURRENT “SYSTEM”: ESTABLISHING THE BOARD OF ALTERNATIVE DISPUTE RESOLUTION TO ENFORCE THE RULES OF ADR NEUTRAL PROFESSIONAL CONDUCT

Any attempt to define the parameters of an ADR ethical system should not be done “in space” or on a tabula rasa. It would simply be counterproductive to redefine the professional responsibilities of ADR neutrals and repeal the statutory and common law rules regarding ADR neutral liability and accountability. Correspondingly, this Note does not criticize nor suggest modifications to the ethical rules or Code of Ethics, which already provide a competent and comprehensible framework regarding the duties and responsibilities of ADR neutrals. Moreover, both the legislature and the courts have made it quite clear that neutrals shall enjoy qualified civil immunity, and they have justified this legal determination with valid rationale and sound public policy. Accordingly, this

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209. See id.
210. See discussion supra Parts I-II.
211. See discussion supra Parts I-II.
212. This Note contemplates generally a comprehensive set of universal standards of ADR professional conduct, the “Rules of Neutral ADR Professional Conduct,” which will be uniformly applied to all ADR neutrals practicing ADR in Minnesota, regardless of professional background. While this Note does not discuss or define the substance of these uniform rules, it adopts the substance of Rule 114’s Code of Ethics and contemplates its universal and uniform application.
213. See supra notes 77-79.
214. See generally MINN. GEN. R. PRAC. 114 app., Code of Ethics, Rules I-VII.
215. See supra notes 77-79 and accompanying text.
Note will not debate the theoretical but improbable option of changing the law and holding ADR neutrals civilly liable for professional misconduct. Rather, the system should be constructed based on the solid foundation already provided by the courts and legislature. Therefore, if the current system of ADR ethics must be predicated upon qualified civil immunity, public trust will best be developed by promulgating universal and uniform rules of ADR professional conduct and establishing an exclusive board entrusted with the authority to enforce them with appropriate disciplinary measures.

Regulating work performance through disciplinary controls customarily entails some form of a professional licensing scheme. The primary component of any licensing scheme is

216. As ADR neutral misconduct becomes more prevalent, the aggrieved parties will pursue other theories of recovery, including express and implied warranties based on any agreement the parties may sign with the neutral prior to the ADR process, such as an “Agreement to Mediate,” which defines the process and outlines each party’s obligations during the process. See Minn. Stat. §§ 336.2-.314, 336.2-.315 (regarding implied warranties). However, recovery under these theories is improbable because the Minnesota courts have declined to “extend the implied warranty/strict liability doctrine to cover vendors of professional services.” City of Mounds View v. Walijarvi, 263 N.W.2d 420, 425 (Minn. 1978); accord LeSueur Creamery, Inc. v. Haskon, Inc. 660 F.2d 342, 346 n.6 (8th Cir. 1981) (holding that “[t]he implied warranty provisions of [the Minnesota statutes] ... apply only to the sale of goods, not the sale of services”); Wells v. 10-X Mfg. Co., 609 F.2d 248, 254 (8th Cir. 1979).

217. Theoretically, politically, and philosophically, before choosing to regulate an occupation through legal codes of professional conduct, the legislature or other body must first consider whether “we really want professional conduct to be legally regulated beyond the statutes already in place for negligence, fraud, breaches of contract, and similar misdeeds of citizens in general.” John Kultgen, Ethics and Professionalism 249 (1988). This question clearly need not be asked, much less answered, because ADR neutrals are not regulated by law or statute—at least that is the position this Note takes. See generally supra notes 76-77 (regarding statutory and common law civil immunity).

218. Unlike traditional remedies such as malpractice and breach of fiduciary duties, discipline is a remedy for professional incompetence and failure. See Stephen Gillers & Norman Dorsen, Regulation of Lawyers: Problems of Law and Ethics 287 (2d ed. 1989). Civil actions are brought by a person or an entity who makes the decision whether they should settle the conflict or pursue it in court. See id. Criminal actions are brought by the state. See id. Discipline, on the other hand, vindicates the public interest in preventing unethical behavior—its purpose is not to provide a remedy to the particular individual injured by the misconduct, although it may have this effect. See id.

219. See Herbert M. Kritzer, Rethinking Barriers to Legal Practice, 81 Judicature 100, 102 (1997).
a mechanism to identify, investigate and prosecute possible professional misconduct "and impos[e] disciplinary sanctions upon proof that problems are real."220 Additionally, the procedural and disciplinary measures must be based upon specific standards to guide both the disciplinary body and the ADR neutrals.221 As previously noted, the legislature has used its discretion to establish numerous agencies or boards that oversee the regulation of several occupations.222 But whereas most licensed professions and occupations are regulated and disciplined by executive agencies established by the legislature, it is equally the case in some states, including Minnesota, that the state Supreme Court is vested with the authority to "license" and regulate "officers of the court," including lawyers, and now some ADR neutrals.223 This interdisciplinary confusion and overlapping authority of the branches of government (potentially, the executive branch via an administrative agency with legislatively-delegated powers and the judicial branch regulating court-annexed ADR) foreshadows two inseparable and foreseeable issues—whether the legislature will utilize its constitutional authority to license ADR neutrals, and whether the judiciary will take jurisdictional exception to the legislative action under the separation of powers doctrine.224

At the threshold level, proponents of an exclusive Board of Alternative Dispute Resolution should have little difficulty arguing that the "unregulated practice of [ADR] may harm or endanger the health, safety, and welfare of citizens of the state" and that "the potential for harm is recognizable and not remote."225 As the public justice system evolves into the twenty-first century, we must take a look around and recognize "that

220. Id.
221. See, e.g., supra notes 134-35 (noting the occupation boards' power to enact and enforce rules governing the respective licensees and generally discussing some of these rules).
222. See supra note 119.
223. See Kritzer, supra note 219, at 102-03.
224. Scholars and the ADR Review Board have alluded to the potential power struggle between the judiciary and legislature concerning which branch will be and should be vested with the authority to regulate and discipline ADR practitioners. See Menkel-Meadow, supra note 12, at 412 (asserting that the regulation of ADR presents jurisdictional questions on two levels). The initial level is "[f]irst, what professional body will oversee ethical regulation—is ADR ethics regulation the sole province of lawyers (implicating the controversial question of whether ADR is the practice of law) or should we hope to share transdisciplinary regulation with other professions."
[ADR] as a substitute for court-based litigation is growing in appeal\(^\text{226}\) and that ADR "recapitulates many of the issues of American jurisprudence."\(^\text{227}\) For these and several other reasons, many critics have cautiously attempted to apply the brakes to the ADR movement in order to at least gauge how ADR is transforming the practice of law.\(^\text{228}\) This transformation or movement necessarily affects the welfare of the citizens of any state because the "principal function of our legal system is to provide fair and just results to the individual disputants and to society;"\(^\text{229}\) and whereas myriad rules of law and codes of ethics have been promulgated to protect society by defining the appropriate behavior within the legal system,\(^\text{230}\) this is not the case within the ADR system.\(^\text{231}\) Therefore, because ADR circumvents the safeguards of the legal system, including the rules that protect the public from unethical practices,\(^\text{232}\) the regulation of ADR neutrals is of utmost concern not only to the integrity and fairness of the ADR system, but also to society in general.

It is also evident from the various agency and court rules that "the practice of ADR requires specialized skill or training" and that the "public will benefit by assurances of initial and continuing occupational ability."\(^\text{233}\) Several statutes require the neutrals practicing under them to be trained and/or qualified before they may be placed on a roster,\(^\text{234}\) and many ADR experts are beginning to define the special skills and qualifications it takes to practice as an ADR neutral.\(^\text{235}\) Similarly, although the ADR Review Board has taken the position that ADR neutral qualifications should be modest, the fact remains that the ADR Review Board will not consider a neutral to be "qualified" unless the minimum standards are met.\(^\text{236}\) Moreo-

\(^{226}\) Feerick, supra note 34, at 456.

\(^{227}\) Menkel-Meadow, supra note 12, at 415.

\(^{228}\) See Nolan-Haley, supra note 10, at 1373.

\(^{229}\) Menkel-Meadow, supra note 5, at 489.

\(^{230}\) See, e.g., supra notes 35-36 and accompanying text.

\(^{231}\) See discussion supra Parts I-II.

\(^{232}\) See supra note 10 (discussing the constitutional concerns posed by ADR).

\(^{233}\) Minn. Stat. § 214.001 subd. 2(b) (1998).

\(^{234}\) See, e.g., Minn. R. 5530.0600-0800 (1997) (defining the arbitrator qualifications, roster appointments, and arbitrator conduct and standards).

\(^{235}\) See, e.g., Devine, supra note 38, at 189-92 (discussing the relevant skills and training requirements of a mediator).

\(^{236}\) See Minn. Gen. R. Prac. 114.13(a)-(e) (defining training, standards,
ver, other state courts have established more stringent certification and qualifications for ADR neutrals practicing in their jurisdictions and the ADR Review Board has advised the Minnesota Supreme Court to adopt continuing education requirements for "qualified neutrals." This trend is probative of the fact that ADR experts believe that it is beneficial for neutrals to continue to hone their skills and awareness of their ethical obligations as professional ADR neutrals, regardless of their professional background.

A definitive answer to the final two prongs of the four-part test under the OLA, specifically "[w]hether the citizens of this state are or may be effectively protected by other means" and "[w]hether the overall cost effectiveness and economic impact would be positive for citizens of the state," is somewhat beyond the scope of this Note. Nevertheless, as to the third prong, this Note has demonstrated and contended that the current "system" of ADR ethics does not sufficiently protect the public. And indeed, one need not be an economist to discern that both money and time will necessarily be saved if all of the separate boards currently "regulating" ADR neutrals are consolidated into one body vested with the exclusive authority to regulate all ADR practices and neutrals. Thus, considering the criteria set forth in the OLA, despite the lack of empirical evidence establishing the economic need and benefits of ADR regulation, it can be soundly argued that the legislature would be justified in determining that the public will benefit from the uniform licensure and regulation of ADR neutrals.

C. THE COLLISION COURSE: JURISDICTIONAL CONFLICT AND COMPROMISE—WHICH BRANCH WILL REGULATE ADR NEUTRALS?

The challenge of establishing the exclusive Board of ADR does not end with the conclusion that it can be achieved under the OLA. On the contrary, the state government must first make the jurisdictional determination of which political branch will ultimately regulate ADR neutrals in Minnesota—the leg-

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and qualifications for "qualified" ADR neutrals).

237. See id. Rule 114.13(g).

238. MINN. STAT. § 214.001 subd. 2(c); see supra notes 127-30 and accompanying text (providing background and excerpting the text of the Occupational Licensing Act).

239. Id. § 214.001 subd. 2(d).

240. See discussion supra Parts I-II.
islature, the executive (as an administrative agency), the judi-
ciary, or some cooperative effort of all branches? And if the
branches promulgate conflicting rules regulating ADR neu-
trals, which rules should control?

As previously mentioned, the Minnesota Constitution does
not explicitly bestow upon the judiciary the authority to regu-
late its courts and judicial officers.241 The Minnesota Constitu-
tion, however, expressly separates the powers of government
into three distinct branches, vesting the judicial power exclu-
sively with the Supreme Court.242 Taken in conjunction, these
constitutional provisions are the source of the Minnesota Su-
preme Court's inherent powers,243 which will undoubtedly play
a significant part in the establishment of the Board of ADR.

The Minnesota Supreme Court may threaten the success
of the legislative act establishing an exclusive Board of ADR by
declaring the act unconstitutional, but only if the court chooses
to contest the act as a clear usurpation of the Court's inherent
powers.244 Although the Minnesota Supreme Court rarely ex-
ercises these inherent powers in this way, it has intermittently
done so to preserve its control over the bar, court procedure,
and the practice of law.245 Accordingly, the Court will likely be
very protective of its current regulatory role with respect to
ADR neutrals and standards of ADR conduct, and might in-
volve its inherent powers to protect that role.

Due to the unique nature of ADR neutrals246 and the lack
of governing caselaw,247 it is difficult to play out and predict the
outcome of this imminent jurisdictional conflict. Nonetheless,
the legislature must not overlook the Minnesota Supreme
Court's inherent powers in this area. An initial concern is
whether the Court possesses the exclusive jurisdiction to
regulate all attorney-neutrals qua attorneys248 and all "quali-
fied" ADR neutrals if they violate one of the provisions of the
Code of Ethics during a court-annexed ADR proceeding be-

241. See supra note 144.
242. See supra notes 147-50 and accompanying text.
243. See id.
244. See supra notes 143-44.
245. See supra note 150 (discussing the Minnesota Supreme Court's
authority to regulate the practice of law).
246. See supra notes 17-18 and accompanying text.
247. See cases cited supra notes 147-50.
248. See cases cited supra notes 147-50.
cause the neutral is practicing with the Court's permission and within its jurisdiction.\textsuperscript{249}

Furthermore, the judiciary may be able to establish that it has the authority to regulate all ADR proceedings and neutrals by finding that ADR is equivalent to the practice of law,\textsuperscript{250} an area over which the Court has exclusive regulatory jurisdiction.\textsuperscript{251} Finally, assuming that the judiciary will defend its current dominion over court-annexed ADR\textsuperscript{252} and other dispute resolution programs,\textsuperscript{253} the Court could attempt to defeat any usurpation of that power on the basis that the Court has already promulgated rules governing ADR neutrals,\textsuperscript{254} and any modification or elimination of those rules would violate the separation of powers doctrine.\textsuperscript{255}

Therefore, in light of this possible jurisdictional conflict and the uncertainty of its outcome, it is in the best interests of the government, ADR neutrals, and the public for the three branches to work cooperatively towards establishing an exclusive Board of Alternative Dispute Resolution that will universally enforce uniform rules of ADR conduct.\textsuperscript{256} This endeavor can be accomplished by establishing the Board of ADR as part of the judiciary with the Governor appointing the members of the Board with the advice and consent of the Senate;\textsuperscript{257} alter-

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\textsuperscript{249} See supra notes 169, 172-77 and accompanying text (discussing the Court's authority over ADR processes).

\textsuperscript{250} See supra note 149 (discussing whether ADR is the practice of law).

\textsuperscript{251} See supra notes 147-49 and accompanying text.

\textsuperscript{252} See supra note 172 and accompanying text.

\textsuperscript{253} See, e.g., MINN. STAT. § 494.01 subds. 1-2 (establishing the statewide community dispute resolution program, which is administered by the State Court Administrator). The State Court Administrator serves at the pleasure of the Minnesota Supreme Court. See supra note 151.

\textsuperscript{254} See, e.g., supra note 149 (discussing the legislature's ability to pass a statute regulating the practice of law so long as it does not infringe upon an area already governed by court rule).

\textsuperscript{255} See supra note 149.

\textsuperscript{256} See supra notes 123-24, 129 (describing the legislature's establishment of administrative boards and rules).

\textsuperscript{257} The idea of vesting the Board of ADR in the judiciary is based upon the Board on Judicial Standards, "an independent state agency that investigates allegations of ethical misconduct by Minnesota judges and referees." DEPARTMENT OF ADMINISTRATION, MINNESOTA GUIDEBOOK TO STATE AGENCY SERVICES 1996-1999, at 368 (Robin PanLener ed., 8th ed. 1996); see MINN. STAT. § 490.15 subd. 1 (1998) (establishing the Board on Judicial Standards and defining the membership as appointed by the Governor to include "one judge of the court of appeals, three trial court judges, two lawyers who have practiced law in the state for ten years and four citizens who are not judges,"
natively, the legislature could establish the Board of ADR like any other administrative agency, but with a membership that includes judicial officers such as judges and attorneys. Regardless of which branch the Board of ADR ultimately rests in, the Board should look forward to being advised by both ADR experts and members of the public through an advisory task force created to investigate and ultimately advise the Board on the immediate and primary objectives making the regulation of ADR neutrals as simple and uniform as possible.

all of whom are appointed by the Governor with the consent of the Senate except for the non-judicial members); In re Gillard, 271 N.W.2d 785, 807 (Minn. 1978) (upholding statute establishing the Board on Judicial Standards as a constitutional delegation of power to the judiciary). See, e.g., supra notes 119, 123-24 (discussing administrative agencies).

The constitutionality of this arrangement remains to be seen; however, it probably can be structured to avoid state constitutional conflicts. See generally Mistretta v. United States, 488 U.S. 361, 393 (1989) (stating that the legislative delegation of the power to create sentencing guidelines to a judicial agency "pose[d] no threat of undermining the integrity of the Judicial Branch or of expanding the powers of the Judiciary beyond constitutional bounds by uniting within the Branch the political or quasi-legislative power of the Commission with the judicial power of the courts"); Cahill v. Beltrami County, 29 N.W.2d 444, 446 (Minn. 1947) (upholding under the separation of powers doctrine the legislative delegation of authority to the district courts to conduct de novo review of determination by county board of sheriff's salary because the sheriff is a quasi-judicial officer); Koochiching County Taxes State v. Koochiching Realty Co., 177 N.W. 940 (Minn. 1920).

Pursuant to the legislature's policy "to encourage state agencies to solicit and receive advice from members of the public," advisory task forces are created to render advice to state agencies or boards regarding appropriate subjects. MINN. STAT. § 15.014 subds. 1-2. An advisory task force is defined as "[a] committee or council scheduled upon its creation to expire two years after the effective date of the act creating it or the date of appointment of its members, whichever is later, unless a shorter term is specified in statute." Id. § 15.012(f). The joint advisory task force contemplated by this Note is a "council" composed of ADR experts including lawyers, judges, professionals, and laypersons, much like the membership of the current ADR Review Board, and will be referred to as the Joint ADR Review Council (JADRRC), which is conveniently pronounced "Jade Rock." Compare id. § 15.012(c) (defining a council as a "committee of which at least one-half of the members are required to be certain officers or representatives of specified businesses, occupations, industries, political subdivisions, organizations, or other groupings of persons other than geographical regions"), with ADR Review Board Report, supra note 26, at 4 (defining the membership of the ADR Review Board). See generally MINN. STAT. § 15.059 (outlining the terms, compensation, and removal of members of advisory councils and committees, including advisory task forces).

See KULTGEN, supra note 217, at 212 (stating that standards of professional conduct are most effective when they are "simple and plausible to a wide audience").
The membership of the Joint ADR Review Council (JADRRC) and the Board of ADR will be crucial to the quality and open-mindedness of the discussion, recommendations, and rules governing ADR conduct.\textsuperscript{262} Much like the current ADR Review Board and other occupational licensing boards, the members of JADRRC should include experienced ADR practitioners from varying professional backgrounds, including lawyers, judges, and professionals in other disciplines commonly involved in ADR processes.\textsuperscript{263} Appointments should also take into account geographical representation so that the public is ensured statewide representation.\textsuperscript{264}

It will also be very important for JADRRC to consider, and the Board of ADR to establish, training and eligibility standards, rules of professional conduct, investigative and disciplinary procedures, and sanctions that provide both due process to the neutral and ultimate protection to the public.\textsuperscript{265} Similar to the "market approach" employed by the current ADR Review Board,\textsuperscript{266} the eligibility standards for ADR neutrals can be relatively modest so that the public and the neutrals have broad discretion in selecting the ADR process as well as the neutral. On the other hand, the ethical rules must be explicit and rigorously enforced. The Code of Ethics provides a valuable framework for JADRRC, to study and for the Board of ADR to emulate and improve.\textsuperscript{267}

After JADRRC has had an appropriate amount of time to investigate and make its recommendations,\textsuperscript{268} the permanent and exclusive Board of ADR shall establish procedures to hear complaints and implement and enforce substantive rules with disciplinary sanctions, which will uniformly apply to all neu-

\begin{itemize}
  \item \textsuperscript{262} See \textit{supra} notes 123, 136 and accompanying text (discussing the membership of boards and the authority to prescribe rules).
  \item \textsuperscript{263} See \textit{supra} note 180 (describing the membership of the ADR Review Board).
  \item \textsuperscript{264} See \textit{supra} note 169 (discussing the ADR Task Force's recommendation for statewide representation).
  \item \textsuperscript{265} See \textit{supra} note 123 (noting that occupational boards have the authority to revoke licenses and make rules governing their respective professions); \textit{supra} note 130 (noting the need to consider the skills and training standards of an occupation).
  \item \textsuperscript{266} See ADR Task Force Report, \textit{supra} note 172.
  \item \textsuperscript{267} See \textit{supra} note 187 (providing the seven rules under the Code of Ethics that apply to all ADR processes).
  \item \textsuperscript{268} See \textit{supra} note 260 (noting the two-year existence of advisory task forces).
\end{itemize}
trals practicing in Minnesota—the Rules of ADR Neutral Professional Conduct. Consequently, the Board of Alternative Dispute Resolution and the Rules of ADR Neutral Professional Conduct will develop the public trust necessary for ADR to succeed in the next millennium and beyond.

CONCLUSION

Just as quickly as we approach the twenty-first century, the ADR movement is expeditiously gaining momentum from increasing government and consumer support. Alarmingly, ADR neutrals from diverse professional backgrounds and areas of expertise generally practice with guaranteed civil immunity and little, if any, public accountability. Although there is a strong consensus that ADR requires distinct professional standards of conduct, a consensus has not been reached as to how these standards should be regulated and who will enforce them. By establishing an exclusive Board of Alternative Dispute Resolution to enforce a relaxed licensing scheme including the Rules of ADR Neutral Professional Conduct, Minnesota will provide valuable guidance not only to the ADR neutrals practicing statewide, but to other jurisdictions who will look to Minnesota as the prime mover in the twenty-first century ADR ethical system. Most importantly, in addition to protecting the public with consistent enforcement of uniform standards of ADR conduct, the Board of Alternative Dispute Resolution will develop the public trust the ADR movement depends on for its integrity and ultimate success.