BRIGGS
BRIGGS AND MORGAN

2200 IDS Center
80 South 8th Street
Minneapolis MN 55402-2157
tel 612.977.8400
fax 612.977.8650

February 23, 2010

ADM-09-8011

Sam Hanson
612.977.8525
shanson@briggs.com

Frederick Grittner
Clerk of Appellate Court
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-6102

Re: Minnesota No-Fault Arbitration Rules

Dear Mr. Grittner:

The Standing Committee on No-Fault Arbitration met to review the public comments received on its petition to amend the Minnesota No-Fault Arbitration Rules. The Committee agreed with two suggested changes to the proposed amendments to Rule 10.b:

1. The Committee agreed to modify the fifth sentence as shown below:

> It is a financial conflict of interest if, within the last year, the appointed arbitrator or the arbitrator's firm has ~~represented~~ been hired by the respondent to represent the respondent or respondent's insureds in a dispute for which respondent provides insurance coverage.

The Committee believes this revision is appropriate for clarification.

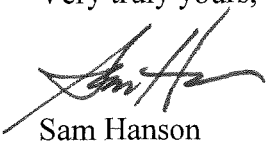
2. The Committee agreed to delete the seventh sentence, which read:

> It is a conflict of interest if a provider whose bills are in dispute has provided expert testimony on behalf of a client of the arbitrator within the past year or if the arbitrator anticipates calling the provider as an expert witness in any pending matter.

On reflection, the Committee agreed that this sentence was overbroad, may eliminate major portions of the plaintiffs and defense bar from arbitration, and would present significant administrative difficulties.

Attached are the original and 11 copies of the Committee's Supplemental Petition for Amendments to the Minnesota No-Fault Arbitration Rules, reflecting these changes.

Very truly yours,



Sam Hanson

SLH/bm
Enclosures
cc: Hon. Christopher Dietzen
Katherine Stifter

STATE OF MINNESOTA
IN SUPREME COURT

SUPPLEMENTAL PETITION FOR AMENDMENTS TO THE MINNESOTA NO-FAULT ARBITRATION RULES

TO: THE SUPREME COURT OF THE STATE OF MINNESOTA

The Standing Committee on No-Fault Arbitration hereby Petitions the Court to amend the No-Fault Arbitration Rules as follows (proposed deletions are shown by striking the words, additions are underlined):

Rule 10. Qualification of Arbitrator and Disclosure Procedure

a. **Every member of the panel shall be a licensed attorney at law of this state or a retired attorney or judge in good standing. Effective January 1, 2004, requirements for qualification as an arbitrator shall be: (1) at least 5 years in practice in this state; (2) at least one-third of the attorney's practice is with auto insurance claims or, for an attorney not actively representing clients, at least one-third of an ADR practice is with motor vehicle claims or not-fault matters; (3) completion of an arbitrator training program approved by the No-Fault Standing Committee prior to appointment to the panel; (4) at least three CLE hours on no-fault issues within their reporting period; and (5) arbitrators will be required to re-certify each year, confirming at the time of recertification that they continue to meet the above requirements.**

b. **No person shall serve as an arbitrator in any arbitration in which he or she has a financial or personal conflict of interest~~, whether actual or potential~~. Under procedures established by the Standing Committee and immediately following**

appointment to ~~the panel, each member~~ a case, every arbitrator shall be required to disclose any circumstances likely to create a presumption or possibility of bias or conflict that may disqualify the person as a potential arbitrator. ~~Each member~~ Every arbitrator shall supplement the disclosures as circumstances require. ~~The following facts, in and of themselves, do not create a presumption of bias; that an attorney or the attorney's firm represents auto accident claimants against insurance companies including the insurance company which is the respondent in the pending matter; that an attorney or an attorney's firm represents or has represented insurance companies.~~ The fact that an arbitrator or the arbitrator's firm represents automobile accident claimants against insurance companies or self-insureds, including the respondent, does not create a presumption of bias. It is a financial conflict of interest if, within the last year, the appointed arbitrator or the arbitrator's firm has been hired by the respondent to represent the respondent or respondent's insureds in a dispute for which respondent provides insurance coverage. It is a financial conflict of interest if the appointed arbitrator is aware of having received referrals within the last year from officers, employees or agents of any entity whose bills are in dispute in the arbitration or the arbitrator's firm has received such referrals and the arbitrator is aware of them.

c. If ~~a panel~~ an arbitrator has been certified and has met the requirements of subdivision (a) for the past five years but ~~he or she~~ becomes ineligible for certification under Rule 10(a) ~~because he or she has retired or there has been a change in his or her practice~~ due to retirement or change in practice, the arbitrator may continue to seek annual certification for up to five years from the date of retirement or practice change ~~if he or she satisfies the following requirements:~~ if the following requirements are satisfied:

~~1.~~ **The arbitrator completes and files an annual No-Fault Arbitrator Recertification form~~; and 2. In that form, the arbitrator~~ which certifies that ~~he~~**

1. **He or she is an attorney licensed to practice law in Minnesota and is in good standing; ~~and~~**

2. **He or she has retained current knowledge of the Minnesota No-Fault Act (Minn. Stat. §§ 65B.41-65B.71), Minnesota appellate court decisions interpreting the Act, the Minnesota No-Fault Arbitration Rules and the Arbitrators' Standards of Conduct; and**

3. ~~**The arbitrator certifies that he**~~ **He or she has attended CLE course(s) in the last year containing at least three credits relating to no-fault matters.**

~~c.~~ **The rules regarding bias and conflict of interest as set forth in subdivision ~~(a)~~ (b) remain applicable to arbitrators who are recertified under this subdivision ~~(b)~~ (c).**

Committee Comment to Rule 10 Amendment

In recent years, there have been inconsistencies in district court rulings and in determinations by the Standing Committee as to what constitutes a conflict of interest for no-fault arbitrators. In response, the Standing Committee wishes to clarify what constitutes a conflict of interest for both respondents' and claimants' attorneys. The Committee recognizes that the Amendment will limit the number of arbitrators, especially in certain out state areas. But the Amendment is necessary to clarify the law and stem the tide of parties seeking removal of arbitrators in the district court. The Amendment also establishes, for the first time, that a conflict exists if an arbitrator who is to rule on a disputed bill for a medical provider is aware that the provider has made referrals to the arbitrator within the last year.

The grounds for this Petition are as follows:

1. Attached as Exhibit A are the No-fault Arbitration Rules currently adopted by the Minnesota Supreme Court. These Rules are published on the AAA website at www@adr.org, under "Government & Labor" as "MN No-Fault".

2. Effective January 1, 2004, Rule 10(a) of the Minnesota No-fault Arbitration Rules limited the qualifications for no-fault arbitrators to attorneys who specialize in auto insurance claims (as one-third of an active law practice or one-third of an ADR practice). As a result, in many areas of the state, the pool of eligible arbitrators is small and consists largely of practitioners who are otherwise representing claimants or respondents in no-fault arbitration proceedings.

3. The current Rule 10(a) provides for the disqualification as arbitrators of persons that have "a financial or personal conflict of interest, whether actual or potential."

4. In recent years, the Standing Committee has seen increasing numbers of requests to disqualify members of an arbitration panel or the selected arbitrator on grounds that the person or her law firm, in other cases, has represented claimants with claims against the respondent insurer or self-insured entity, or have represented the respondent insurer or self-insured entity.

5. In three cases, the requests to disqualify a no-fault arbitrator have been taken to district court in the form of motions to remove the arbitrator. In each of those cases, the district court ordered removal after the Standing Committee had affirmed the appointment.

6. In *Kinder v. State Farm Mutual Automobile Insurance Company*, Hennepin County District Court File No. CT-97-3037, Memorandum and Order of March 18, 1999 (attached as Exhibit B), the district court granted a motion to remove as potential no-fault arbitrators two attorneys who had represented other auto accident claimants against the respondent insurance company. The court reasoned, in part, that removal of these claimants' attorneys was necessary in fairness because an attorney whose firm represented the respondent insurance company in the subject arbitration had been disqualified. Thereafter, Rule 10(a) was amended to modify the decision in *Kinder* by providing that:

The following facts, in and of themselves, do not create a prescription of bias or conflict of interest: that an attorney or the attorney's firm represents auto accident claimants against insurance companies, including the insurance company which is the respondent in the pending matter; that an attorney or an attorney's firm represents or has represented insurance companies.

7. In *Mahavong v. Allstate Property and Casualty Insurance Company*, Stearns County District Court File No. 73-CIV-08-5655, Order and Memorandum of June 9, 2008 (attached as Exhibit C), the district court granted the motion to remove as arbitrator an attorney whose firm represented the respondent insurance company in other matters, though not in the subject arbitration case. The court reasoned that, as a partner in the firm, the attorney had a financial interest in representation of the insurance company.

8. In *Cochran v. Metropolitan Council*, Hennepin County District Court File No. 27-CV-08-31801, Order of February 9, 2009 (attached as Exhibit D), the district court granted a motion to remove as arbitrator an attorney whose firm had other cases pending against the Council, a self-insured governmental agency. The court reasoned in part that the provisions of Rule 10 (that an attorney is not disqualified by representing other claimants against the respondent insurance company) did not apply to a self-insured respondent.

9. In March 2008, the Standing Committee appointed a subcommittee to review Rule 10 in light of *Mahavong*. The work of that subcommittee was later expanded to consider *Cochran*. The subcommittee's proposed amendments to the Rule were discussed at meetings of the full Standing Committee in August and October 2009. The Standing Committee unanimously approved the amendments proposed in this petition to:

(a) Reformat Rule 10 to divide current subdivision (a) into two parts: subdivision (a) to deal with qualifications of arbitrators and subdivision (b) to deal with conflicts of interest.

(b) Expand the conflict of interest subdivision (b) to include reference to respondents who are "self-insureds", addressing the issues raised in *Cochran*, and to include conflicts that arise from relationships with medical providers.

(c) Change current subdivision (b) to subdivision (c) and to clarify the language concerning the continued eligibility of attorneys who are retired or whose practice has changed.

10. It is the conclusion of the Standing Committee that the proposed amendments will clarify the conflict of interest rules and are necessary to reduce the disqualification of arbitrators in some circumstances.

Dated: February 23, 2010

The Standing Committee on No-fault Arbitration

By _____
Sam Hanson, Chair

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