STATE OF MINNESOTA
IN SUPREME COURT

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 represented 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 has 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. 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.

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 is to rule on a disputed bill for a medical provider who has or may be providing expert testimony for a client of the arbitrator.

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: 11/23/09

The Standing Committee on No-fault Arbitration

By _____
Sam Hanson, Chair

~~2427612v1~~

American Arbitration Association
Dispute Resolution Services Worldwide

Minnesota No-Fault, Comprehensive or Collisions Damage Automobile Insurance Arbitration Rules
Amended and Effective July 1, 2008

Rule 1. Purpose and Administration

a. The purpose of the Minnesota no-fault arbitration system is to promote the orderly and efficient administration of justice in this State. To this end, the Court, pursuant to Minn. Stat. 65B.525 and in the exercise of its rule making responsibilities, does hereby adopt these rules. These rules are intended to implement the Minnesota No-Fault Act.
b. The Arbitration under Minn. Stat. 65B.525 shall be administered by a Standing Committee of 12 members to be appointed by the Minnesota Supreme Court. Initially, the 12 members shall be appointed for terms to commence January 1, 1975, and the Supreme Court shall designate three such members for a one-year term, three for a two-year term, three for a three-year term, and three for a four-year term commencing on January 1 of each succeeding year. After July 1, 1988, no member shall serve more than two full terms and any partial term.
c. The day-to-day administration of arbitration under Minn. Stat. 65B.525 shall be by an arbitration organization designated by the Standing Committee with the concurrence of the Supreme Court. The administration shall be subject to the continuing supervision of the Standing Committee.

Rule 2. Appointment of Arbitrator

The Standing Committee may conditionally approve and submit to the arbitration organization nominees to the panel of arbitrators quarterly in March, June, September and December of each year, commencing March 1988. These nominees then may be included in the panel of arbitrators that the Standing Committee shall nominate annually for approval by the Supreme Court. The panel appointed by the Supreme Court shall be certified by the Standing Committee to the arbitration organization.

Rule 3. Name of Tribunal

Any tribunal constituted by the parties for the settlement of their dispute under these rules shall be called the Minnesota No-Fault Arbitration Tribunal.

Rule 4. Administrator

When parties agree to arbitrate under these rules, or when they provide for arbitration by the arbitration organization and an arbitration is initiated thereunder, they thereby constitute the arbitration organization the administrator of the arbitration.

Rule 5. Initiation of Arbitration

a. Mandatory Arbitration (for claims of $10,000 or less at the commencement of arbitration). At such time as the respondent denies a claim, the respondent shall advise the claimant of claimant's right to demand arbitration.
b. Nonmandatory Arbitration (for claims over $10,000). At such time as the respondent denies a claim, the respondent shall advise the claimant whether or not it is willing to submit the claim to arbitration.
c. All Cases. In all cases the respondent shall also advise the claimant that information on arbitration procedures may be obtained from the arbitration organization, giving the arbitration organization's current address. On request, the arbitration organization will provide a claimant with a petition form for initiating arbitration together with a copy of these rules. Arbitration is commenced by the filing of the signed, executed form, together with the required filing fee, with the arbitration organization. If the claimant asserts a claim against more than one insurer, claimant shall so designate upon the arbitration petition. In the event that a respondent claims or asserts that another insurer bears some or all of the responsibility for the claim, respondent shall file a petition identifying the insurer and setting forth the amount of the claim that it claims is the responsibility of another insurer. Regardless of the number of respondents identified on the claim petition, the claim is subject to the jurisdictional limits set forth in Rule 6.
d. Denial of Claim. If a respondent fails to respond in writing within 30 days after reasonable proof of the fact and the amount of loss is duly presented to the respondent, the claim shall be deemed denied for the purpose of activating these rules.
e. Itemization of Claim. At the time of filing the arbitration form, or within 30 days after, the claimant shall file an itemization of benefits claimed and supporting documentation. Medical and replacement services claims must detail the names of providers, dates of services claimed, and total amounts owing. Income-loss claims must detail employers, rates of pay, dates of loss, method of calculation, and total amounts owing.
f. Insurer's Response. Within 30 days after receipt of the itemization of benefits claimed and supporting documentation from claimant, respondent shall serve a response to the petition setting forth all grounds upon which the claim is denied and accompanied by all documents supporting denial of the benefits claimed.

Rule 6. Jurisdiction in Mandatory Cases

By statute, mandatory arbitration applies to all claims for no-fault benefits or comprehensive or collision damage coverage where the total amount of the claim, at the commencement of arbitration, is in an amount of $10,000 or less. In cases where the amount of the claim continues to accrue after the petition is filed, the arbitrator shall have jurisdiction to determine all amounts claimed including those in excess of $10,000. If the claimant waives a portion of the claim in order to come within the $10,000 jurisdictional limit, the claimant must specify within thirty (30) days of filing the claims in excess of the $10,000 being waived.

Rule 7. Notice

Upon the filing of the petition form by either party, the arbitration organization shall send a copy of the petition to the other party together with a request for payment of the filing fee. The responding party will then have 20 days to notify the arbitration organization of the name of counsel, if any.

Rule 8. Selection of Arbitrator and Challenge Procedure

The arbitration organization shall send simultaneously to each party to the dispute an identical list of four names of persons chosen from the panel. Each party to the dispute shall have seven business days from the mailing date in which to cross out a maximum of one name objected to, number the remaining names in order of preference and return the list to the arbitration organization. In the event of multiparty arbitration, the arbitration organization may increase the number of potential arbitrators and divide the strikes so as to afford an equal number of strikes to each adverse interest. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable.
One of the persons who has been approved on both lists shall be invited by the arbitration organization to serve in accordance with the designated order of the mutual preference. Any objection to an arbitrator based on the arbitrator's post-appointment disclosure must be made within seven business days from the mailing date of the arbitrator disclosure form. Failure to object to the appointed arbitrator based upon the post-appointment disclosure within seven business days constitutes waiver of any objections based on the post-appointment disclosure. An objection to a potential arbitrator shall be determined initially by the arbitration organization, subject to appeal to the Standing Committee. If an acceptable arbitrator is unable to act, or for any other reason the appointment cannot be made from the submitted list, the arbitration organization shall have the power to make the appointment from among other members of the panel without the submission of additional lists. If any arbitrator should resign, be disqualified or unable to perform the duties of the office, the arbitration organization shall appoint another arbitrator from the no-fault panel to the case.

Rule 9. Notice to Arbitrator of Appointment

Notice of the appointment of the neutral arbitrator, whether appointed mutually by the parties or by the arbitration organization, shall be mailed to the arbitrator by the arbitration organization, together with a copy of these rules, and the signed acceptance of the arbitrator shall be filed with the arbitration organization prior to the opening of the first hearing.

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. 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 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 shall supplement the disclosures as circumstances require. The following facts, in and of themselves, do not create a presumption 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.
b. If a panel arbitrator has been certified and 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, 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:
    1. The arbitrator completes and files an annual No-Fault Arbitrator Recertification form; and
    2. In that form, the arbitrator certifies that he or she is an attorney licensed to practice law in Minnesota and is in good standing; and
    3. The arbitrator certifies that 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
    4. The arbitrator certifies that 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) remain applicable to arbitrators who are recertified under subdivision (b).

Rule 11. Vacancies

If for any reason an arbitrator should be unable to perform the duties of the office, the arbitration organization may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filed in accordance with the applicable provisions of these rules.

Rule 12. Discovery

The voluntary exchange of information is encouraged. Formal discovery is discouraged except that a party is entitled to:

1. exchange of medical reports;

2. medical authorizations directed to all medical providers consulted by the claimant in the seven years prior to the accident;

3. employment records and authorizations for two years prior to the accident, when wage loss is in dispute;

4. supporting documentation required under No-Fault Arbitration Rule 5; and

5. other exhibits to be offered at the hearing.

However, upon application and good cause shown by any party, the arbitrator may permit any discovery allowable under the Minnesota Rules of Civil Procedure for the District Courts. Any medical examination for which the respondent can establish good cause shall be completed within 90 days following the commencement of the case unless extended by the arbitrator for good cause.

Rule 13. Withdrawal

A claimant may withdraw a petition up until ten (10) days prior to the hearing. The claimant will be responsible for the arbitrator's fee, if any, upon withdrawal. If the petition is withdrawn after a panel of arbitrators is submitted and if the claimant shall file another petition arising from the same accident against the same insurer, the same panel of arbitrators shall be resubmitted to the claimant and the respondent. If the petition is withdrawn after the arbitrator is selected and if the claimant shall file another petition arising from the same accident against the same insurer, the same arbitrator who was earlier assigned shall be reassigned. The claimant who withdraws a petition shall be responsible for all parties' filing fees incurred upon the refiling of the petition.

Rule 14. Time and Place of Arbitration

An informal arbitration hearing will be held in the arbitrator's office or some other appropriate place in the general locale within a 50-mile radius of the claimant's residence, or other place agreed upon by the parties. If the claimant resides outside of the state of Minnesota, arbitration organization shall designate the appropriate place for the hearing. The arbitrator shall fix the time and place for the hearing. At least 14 days prior to the hearing, the arbitration organization shall mail notice thereof to each party or to a party's designated representative. Notice of hearing may be waived by any party. When an arbitration hearing has been scheduled for a day certain, the courts of the state shall recognize the date as the equivalent of a day certain court trial date in the scheduling of their calendars.

Rule 15. Postponements

The arbitrator, for good cause shown, may postpone any hearing upon the request of a party or upon the arbitrator's own initiative, and shall also grant such postponement when all of the parties agree thereto. The party requesting a postponement will be billed for the cost of the rescheduling; if, however, the arbitrator determines that a postponement was necessitated by a party's failure to cooperate in providing information required under Rule 5 or Rule 12, the arbitrator may assess the rescheduling fee to that party.

Rule 16. Representation

Any party may be represented by counsel or other representative named by that party. A party intending to be so represented shall notify the other party and the arbitration organization of the name and address of the representative at least three days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

Rule 17. Stenographic Record

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other party of these arrangements at least 24 hours in advance of the hearing. The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties to be, or determined by the arbitrator to be, the official record of the proceeding, it must be made available to the arbitrator and to the other parties for inspection, at a date, time and place determined by the arbitrator.

Rule 18. Interpreters

Any party desiring an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service. The arbitrator may assess the cost of an interpreter pursuant to Rule 42.

Rule 19. Attendance at Hearing

The arbitrator shall maintain the privacy of the hearings. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness.

Rule 20. Oaths

Arbitrators, upon accepting appointment to the panel, shall take an oath or affirmation of office. The arbitrator may require witnesses to testify under oath or affirmation.

Rule 21. Order of Proceedings and Communication with Arbitrator

The hearing shall be opened by the recording of the date, time and place of the hearing, and the presence of the arbitrator, the parties, and their representatives, if any. Either party may make an opening statement regarding the claim. The claimant shall then present evidence to support the claim. The respondent shall then present evidence supporting the defense. Witnesses for each party shall submit to questions or other examination. The arbitrator has the discretion to vary this procedure, but shall afford a full and equal opportunity to all parties for the presentation of any material and relevant evidence. Exhibits, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and description of the exhibits in the order received shall be made part of the record. There shall be no direct communication between the arbitrator and the parties other than at the hearing, unless the parties and the arbitrator agree otherwise. However, pre-hearing exhibits can be sent directly to the arbitrator, delivered in the same manner and at the same time to the opposing party. Parties are encouraged to submit any pre-hearing exhibits at least 24 hours in advance of the scheduled hearing. If the exhibits are not provided to opposing counsel and the arbitrator at least 24 hours before the hearing or if the exhibits contain new information and opposing counsel has not had a reasonable amount of time to review and respond to the information, the arbitrator may hold the record open until the parties have had time to review and respond to the material or reconvene the arbitration at a later date. Any other oral or written communication from the parties to the arbitrator shall be directed to the arbitration organization for transmittal to the arbitrator.

Rule 22. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

Rule 23. Witnesses, Subpoenas and Depositions

a. Through the arbitration organization, the arbitrator may, on the arbitrator's initiative or at the request of any party, issue subpoenas for the

attendance of witnesses at the arbitration hearing or at such deposition as ordered under Rule 12, and the production of books, records, documents and other evidence. The subpoenas so issued shall be served, and upon application to the district court by either party or the arbitrator, enforced in the manner provided by law for the service and enforcement of subpoenas for a civil action.

b. All provisions of law compelling a person under subpoena to testify are applicable.
c. Fees for attendance as a witness shall be the same as for a witness in the district courts.

Rule 24. Evidence

The parties may offer such evidence as they desire and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the issues. The arbitrator shall be the judge of the relevancy and materiality of any evidence offered, and conformity to legal rules of evidence shall not be necessary. The parties shall be encouraged to offer, and the arbitrator shall be encouraged to receive and consider, evidence by affidavit or other document, including medical reports, statements of witnesses, officers, accident reports, medical texts and other similar written documents that would not ordinarily be admissible as evidence in the courts of this state. In receiving this evidence, the arbitrator shall consider any objections to its admission in determining the weight to which he or she deems it is entitled.

Rule 25. Close of Hearing

The arbitrator shall specifically inquire of all parties as to whether they have any further evidence. If they do not, the arbitrator shall declare the hearing closed. If briefs or documents are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of said briefs or documents. The time limit within which the arbitrator is required to make his award shall commence to run upon the close of the hearing.

Rule 26. Re-opening the Hearing

At any time before the award is made, a hearing may be reopened by the arbitrator on the arbitrator's own motion, or upon application of a party for good cause shown.

Rule 27. Waiver of Oral Hearing

The parties may provide, by written agreement, for the waiver of oral hearings in any case. If the parties are unable to agree as to the procedure, the arbitration organization shall specify a fair and equitable procedure.

Rule 28. Extensions of Time

The parties may modify any period of time by mutual agreement. The arbitration organization or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The arbitration organization shall notify the parties of any extension.

Rule 29. Serving of Notice

Each party waives the requirements of Minn. Stat. 572.23 and shall be deemed to have agreed that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection herewith including application for the confirmation, vacation, modification or correction of an award issued hereunder as provided in Rule 38; or for the entry of judgment on any award made under these rules may be served on a party by mail or facsimile addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.
The arbitration organization and the parties may also use facsimile transmission, telex, telegram or other written forms of electronic communication to give the notices required by these rules and to serve process for an application for the confirmation, vacation, modification or correction of an award issued hereunder.

Rule 30. Time of Award

The award shall be made promptly by the arbitrator, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing the hearing, or if oral hearings have been waived, from the date of

the arbitration organization's transmittal of the final statements and proofs to the arbitrator.

Rule 31. Form of Award

The award shall be in writing and shall be signed by the arbitrator. It shall be executed in the manner required by law.

Rule 32. Scope of Award

The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable consistent with the Minnesota No-Fault Act. The arbitrator may, in the award, include arbitration fees, expenses, rescheduling fees and compensation as provided in sections 39, 40, 41 and 42 in favor of any party and, in the event that any administrative fees or expenses are due the arbitration organization, in favor of the arbitration organization, except that the arbitrator must award interest when required by Minn. Stat. 65B.54. The arbitrator may not, in the award, include attorneys fees for either party.
Given the informal nature of no-fault arbitration proceedings, the no-fault award shall not be the basis for a claim of estoppel or waiver in any other proceeding.

Rule 33. Delivery of Award to Parties

Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail, addressed to a party or its representative at the last known address, personal service of the award, or the filing of the award in any other manner that is permitted by law.

Rule 34. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection thereto in writing shall be deemed to have waived the right to object.

Rule 35. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. All other rules shall be interpreted by the arbitration organization.

Rule 36. Release of Documents for Judicial Proceedings

The arbitration organization shall, upon the written request of a party, furnish to the party, at its expense, certified copies of any papers in the arbitration organization's possession that may be required in judicial proceedings relating to the arbitration.

Rule 37. Applications to Court and Exclusion of Liability

a. No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.
b. Neither the arbitration organization nor any arbitrator in a proceeding under these rules can be made a witness or is a necessary party in judicial proceedings relating to the arbitration.
c. Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.
d. Neither the arbitration organization nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules.

Rule 38. Confirmation, Vacation, Modification or Correction of Award

The provisions of Minn. Stat. 572.10 through 572.26 shall apply to the confirmation, vacation, modification or correction of award issued hereunder, except that service of process pursuant to Minn. Stat. 572.23 shall be made as provided in Rule 29 of these rules.

Rule 39. Administrative Fees

The initial fee is due and payable at the time of filing and shall be paid as follows: by the claimant, $45.00; by the respondent, $155.00. In the event that there is more than one respondent in an action, each respondent shall pay the $155.00 fee.
The arbitration organization may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fee.

Rule 40. Arbitrator's Fees

a. An arbitrator shall be compensated for services and for any use of office facilities in the amount of $300 per case.
b. If the arbitration organization is notified of a settlement or a withdrawal of a claim at any time up to 24 hours prior to the scheduled hearing, but after the appointment of the arbitrator, the arbitrator's fee shall be $50. If the arbitration organization is notified of a postponement, settlement or a withdrawal of a claim 24 hours or less prior to the scheduled hearing, the arbitrator's fee shall be $300. Unless the parties agree otherwise, the fee in a settlement shall be assessed equally to the parties, the fee in a withdrawal shall be borne by claimant, and the fee in a postponement shall be borne by the requesting party. Regardless of the resolution of the case, the arbitrator's fee shall not exceed $300 and is subject to the provisions of Rule 15.
c. Once a hearing is commenced, the arbitrator shall direct assessment of the fee.

Rule 41. Postponement Fees

A postponement fee of $100.00, $150.00, and $200.00 shall be charged against each party requesting a rescheduling for their first, second and additional postponements respectively.

Rule 42. Expenses

Generally each side should pay its own expenses. An arbitrator does, however, have the discretion to direct a party or parties to pay expenses as part of an award.

Rule 43. Amendment or Modification

The Standing Committee may propose amendments to these rules as circumstances may require. All changes in these rules and all other determinations of the Standing Committee shall be subject to review and approval by the Minnesota Supreme Court.

MEYER ASSOCIATES, P.A.

helping injured people

HELEN M MEYER

PAUL K DOWNES

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Of Counsel

Attorneys at Law

April 7, 1999

Kate Stifter
American Arbitration Association
200 South Sixth Street
Suite 700
Minneapolis, MN 55402

Re: Michelle Bach Kinder and State Farm Insurance
Case No. 56 600 02437 96

Dear Ms. Stifter:

Attached please find a copy of Judge Gomez's recent order striking the arbitration panel in the Kinder case. I am in the process of discussing the decision with my client along with her available options. However, I would appreciate it if you would let me know what, if any, action AAA intends to take on this issue. When the issue was last addressed, there was some discussion about making a formal rule change and I believe a sub-committee was appointed to address the issue. I have heard nothing further since then.

Please let me know.

Very truly yours,

Paul K. Downes

PKD:jbr
enclos.

cc: Honorable John E. Simonett

Park Place East • Suite 610 • 5775 Wayzata Boulevard • St. Louis Park, MN 55416 • Tel 612 544 8985 • Fax 612 544 8272 • Email meyerlaw@winternet.com

Helen M. Meyer is a Civil Trial Specialist, certified by the Minnesota State Bar Association and the National Board of Trial Advocacy

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Michelle Bach Kinder,

Claimant,

MEMORANDUM AND ORDER

v.

File No.: CT 97-3037

State Farm Mutual Automobile Insurance Company,

Respondent.

To: Claimant through her attorney Paul K. Downes, MEYER & ASSOCIATES, P.A., Park Place East, Suite 610, 5775 Wayzata Blvd., St. Louis Park, MN 55416 and Respondent through its attorney, William M. Hart, MEAGHER & GEER, P.L.L.P., 4200 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402-3788.

On November 23, 1998, Judge Isabel Gomez, of this District Court heard respondent's motion to stay arbitration and strike the arbitration panel. Claimant was represented by Paul K. Downes. Respondent was represented by William M. Hart. Final submissions were received in chambers on December 21, 1998.

Based upon its own file, and upon the written and oral submissions of counsel, it is hereby

ORDERED

1. That respondent's motion to strike the arbitration panel is granted.

2. That this Court's July 8, 1997 Memorandum and Order is incorporated by reference.

3. That the attached Memorandum be made part of this

Order.

4. That the matter be submitted to arbitration pursuant to Minn. Stat. § 65B.525

BY THE COURT

Isabel Gomez

Hon. Isabel Gomez,
Judge of District Court

Dated this 18 day
of March, 1999.

MEMORANDUM

Background:

Pursuant to this Court's July 8, 1997, Order, plaintiff Michelle Kinder submitted to an IME; and on November 26, 1997, the parties refiled for arbitration. Kinder was represented by Paul K. Downes of Meyer and Associates, P.A. and State Farm was represented by Michael R. Moline of Meagher and Geer, P.L.L.P..

The American Arbitration Association produced a panel listing four potential arbitrators. The parties were asked to strike one member of the panel, and then the arbitrator would be selected by the AAA from the remaining two names on the list. Of the four potential arbitrators on the list, three of them were: Robert M. Frazee, an attorney at Meagher & Geer; James G. Weinmeyer, an attorney at Schwebel, Goetz & Sieben and George E. Antrim, III, an attorney at Krause & Rollins.

In a letter dated January 21, 1998, State Farm petitioned AAA for the removal of Weinmeyer and Antrim because of their evident partiality. Both lawyers at the time had active cases against State Farm and its insureds.

On January 29, 1998, Kinder's attorney submitted a letter to AAA, opposing State Farm's request to remove Weinmeyer and Antrim, and requesting that Frazee be removed as a potential arbitrator, because his firm, Meagher & Geer, represents State Farm in this lawsuit. In a letter dated February 2, 1998, AAA declared, without explanation, that "upon review of the file and the contentions of the parties, the Association has removed

Robert M. Frazee from the list and have [sic] reaffirmed George E. Antrim III and James G. Weinmeyer." See, February 2, 1998 letter attached as Exhibit I to Affidavit of Paul K. Downes.

State Farm then appealed AAA's decision to the No-fault Standing Committee, again requesting the removal of Weinmeyer and Antrim. On March 4, 1998, Anne M. Rabatin, Case Administrator for the AAA, sent the parties a letter which, without more, stated that "[t]he No-Fault Standing Committee has reviewed the parties' contentions and has voted to Reaffirm the Arbitrator's [sic]." See, March 4, 1998 letter to the parties, attached as Exhibit J to Affidavit of Paul K. Downes. Rabatin's letter also instructed the parties to submit their arbitrator lists on or before March 13, 1998. State Farm refused to do so and indicated that it would be bringing the current motion before the court.

Kinder indicates that, "[s]ince this Court's original decision, AAA has been deluged with requests on behalf of defense attorneys to remove plaintiff's lawyers as no-fault arbitrators based on this court's original decision." Plaintiff's Memorandum of Law in Opposition to Defendant's Request to Strike the Arbitration Panel and Stay the Arbitration, ("Plaintiff's Memorandum"), at 4. At an October 17, 1997, Meeting of the No-Fault Standing Committee, the members voted to allow the inclusion of the following language in letter responses to any party citing this Court's July 8, 1997, Order as the basis for objection to an arbitrator:

> The mere fact that an arbitrator has handled claims against a party to the arbitration in the past, or

currently, it [sic] is not in and of itself evidence of partiality or the appearance thereof." (Emphasis added).

See Minutes of the October 17, 1997 Quarterly Meeting of the No-Fault Standing Committee, attached as Exhibit N, to Affidavit of Paul K. Downes.

Notwithstanding the Committee's position, it appears that AAA removed Frazee because of "the mere fact" that Frazee's firm was "handl[ing] claims against a party to the arbitration . . . currently." Ibid.. Arbitrators, unlike courts, have no duty to set forth the reasons for their decisions; but no other cause for Frazee's removal has been articulated.

Analysis

"'Evident partiality' is not the same as actual bias." See, Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 147-48, 89 S.Ct. 337, 338-39, 21 L.Ed.2d 301 (1968), as cited in Pirsig v. Pleasant Mound Mut. Fire Ins. Co., 512 N.W.2d 342, 344 (Minn. App. 1994). Whether there is evident partiality is a legal question, Pirsig, at 344, whereas whether there is actual bias is a fact question. Toyota of Berkley v. Automobile Salesmen's Union, Local 1095, 834 F.2d 751, 756 (9th Cir. 1987), cert. denied, 480 U.S. 945, 107 S.Ct. 1602, 94 L.Ed.2d 789 (1987). The issue before this Court is whether Mr. Antrim and Mr. Weinmeyer should be stricken from the arbitration panel in this case, based upon their evident partiality.

I. Kinder's timeliness argument.

In Minnesota, "contacts between an arbitrator and a

party . . . that might create an impression of possible bias, require that the arbitration award be vacated." Northwest Mechanical Inc. v. Public Utils. Comm'n, City of Virginia, 283 N.W.2d 522, 524 (Minn. 1979), citing, Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 150 (1968).

Kinder argues that "[d]etermining whether an arbitrator is qualified to hear a matter before the arbitrator has even been selected is premature and results in a waste of the court's resources." Plaintiff's Memorandum, at 4-5. She further asserts that "[u]ntil an arbitrator has actually been selected to hear a case, a well reasoned and thorough analysis of any potential arbitrator bias cannot be conducted." Id.

Given Kinder's success at having Mr. Frazee removed as a potential arbitrator prior to his selection, she is arguing that what's good for the goose is not good for the gander. Frazee was removed as a potential arbitrator, apparently because he works at Meagher and Geer, and attorneys from that firm represent State Farm here. State Farm opposes Antrim and Weinmeyer's presence on the panel, because they, themselves, are actively engaged in litigation against it.

While acknowledging that Frazee was properly removed from the panel as a potential arbitrator, Kinder nevertheless contends that evidence showing that Weinmeyer has 27 active cases against State Farm, and that Antrim has 4 active lawsuits against State Farm, "falls well short of an adequate basis to remove two potential arbitrators when nothing is known about the cases Mr.

Antrim and Mr. Weinmeyer have involving State Farm." Plaintiff's Memorandum, at 5. The undersigned is at a loss to understand why one party to an arbitration must accept evident partiality, while another gains relief from it.

As this Court found previously, arbitration in these circumstances is, as a matter of law, tainted by the appearance of impropriety. Pirsig v. Pleasant Mount Mut. Fire Ins., 512 N.W.2d 342, (Minn. App. 1994). It would be futile to order the parties to arbitrate this matter before either Antrim or Weinmeyer, only to have the matter come before this Court, yet again, on a motion to vacate the award.

II. Authority under Minn. Stat. §572.09.

Minn. Stat. §572.09 sets forth the standard to compel or stay arbitration. Although the statute indicates that "a stay should be granted only when there is a showing that there has been no agreement to arbitrate the matter," Plaintiff's Memorandum, at 6, Minn. Stat. §572.08 provides for relief "upon such grounds as exist at law or in equity . . . ."

The question of whether an arbitrator appears to be partial is certainly an equitable issue. Defendants are before this Court for a second time in essentially the same posture as before. Although there is no authority expressly permitting this Court to strike a panel before a decision has been rendered by an arbitrator, principles of equity allow this Court to do so when having the arbitration would be an exercise in futility and a waste of resources.

III. Kinder's neutral arbitrator argument.

Minn. Stat. §572.19 provides for vacating an arbitration award where "[t]here was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party." Minn. Stat. §572.10, subd. 2, provides a definition of a neutral arbitrator, and reads as follows:

> Subd. 2. Disclosure by a neutral arbitrator. (a) a "neutral arbitrator" is 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. Id. (emphasis added).

Kinder argues that, because a no-fault arbitrator is not selected or agreed upon by both parties, s/he is not a neutral arbitrator, and, therefore, is "not required to avoid all appearances of evident partiality." Plaintiff's Memorandum, at 7. In support of her argument, she relies on Franke v. Farm Bureau Mutual Insurance Company, 421 N.W.2d 406 (Minn. App. 1988) and Safeco Insurance Co. of America v. Stariha, 346 N.W.2d 663 (Minn. App. 1984). However, both Franke and Safeco are distinguishable from this case.

The cases cited by Kinder dealt with a three-person arbitration panel, in which each party selected its own arbitrator, and a third, neutral, arbitrator was appointed. The third arbitrator was under a duty to avoid the appearance of evident partiality.

In no-fault arbitrations, there is only one arbitrator appointed to decide the matter. To accept Kinder's position that

no-fault arbitrators are not "neutral," would be to concede that they are necessarily biased. Acquiescing to the fact that no-fault arbitrators are necessarily biased, and accepting this fact as unremarkable, flies in the face of basic principles of fairness which all officers of the court are under a duty to observe. How can parties to arbitration maintain any faith in the process if they are forced to accept arbitrators who may not merely appear partial, but, in fact, not be partial?

IV. Kinder's argument concerning the limited number of available no-fault arbitrators.

Kinder argues that:

> "[b]ecause the number of available no-fault arbitrators is a limited number of attorneys regularly practicing in the personal injury area and because practicing in that area on behalf of the plaintiff involves pursuing claims against the same insurance companies on a regular basis, then the fact that an arbitrator may be pursuing claims against State Farm as part of his regular practice cannot be grounds for impartiality as an arbitrator in a case involving State Farm."

Plaintiff's Memorandum, at 11. As it has repeatedly noted in writing and orally on the record, this Court supports the arbitration of no-fault claims. However, if it is to survive as an alternative to litigation, the arbitration process must maintain its integrity. State Farm, like any other party to an action, is entitled to arbitration hearings that are free from the appearance of impropriety, notwithstanding any difficulty involved in finding a suitable arbitrator.

Kinder further asserts that "[n]o-fault arbitrators are unique and unlike any other type of arbitrator," and that "[t]he tragic result [of this Court's ruling] is that the majority of

plaintiff and defense lawyers are disqualified from serving as no-fault arbitrators resulting in no-fault arbitrations being decided by attorneys who do not practice in the area and are not familiar with the no-fault law." Id. at 12.

Assuming, arguendo, that no-fault arbitrators are unique, it does not follow that independent attorneys could not learn enough no-fault law to reach fair decisions in such cases. The arbitrators in this area are statutorily confined to making only factual determinations, and the legal principles underlying such determinations are not particularly arcane or intellectually demanding. While losing their role as arbitrators in their area of expertise is certainly a detriment to no-fault lawyers, this detriment is surely not so "tragic" as to outweigh the fundamental principles of fairness which support the whole arbitration machine.

V. Kinder's statistical argument.

In support of her contention that "[d]efendant's claim that they are not receiving a fair opportunity at no-fault arbitrations is not supported by actual statistics," Plaintiff's Memorandum, at 17, Kinder has provided this Court with a no-fault arbitration annual report prepared by the American Arbitration Association.

However, the statistical analysis presented to this Court does nothing to strengthen Kinder's position. Questions about whether a particular arbitrator is evidently partial, or whether no-fault arbitration in general must be free of evident

BRADSHAW & BRYANT, PLLC

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NO-FAULT PARALEGAL
STACY M. KIMMONS

June 13, 2008

Ms. Jennifer L. Carter
American Arbitration Association
U.S. Bank Plaza, Suite 700
200 South Sixth Street
Minneapolis, MN 55402-1092

Re: Latsamy Mahavong and Allstate Insurance Company
Claim File No. 4501375689-02

Dear Ms. Carter:

I have enclosed and served upon you the order of Judge Knapp dated June 9, 2008 removing the arbitrator in this matter.

In compliance with the order, please order a new arbitrator pursuant to AAA rules.

By copy of this letter, I am requesting Ms. Stifter to provide a copy of this order to the Standing Committee and to the Subcommittee on the issue for consideration. It certainly seems that the Association and the Standing Committee should disqualify arbitrators who have conflicts such as the one that Mr. Rajkowski had in this case.

Thank you for your assistance.

Sincerely,

T. Joseph Crumley

TJC/smk
cc: Richard Kruger, Esq.
Kathryn Stifter

RECEIVED
JUN 16 2008
AMERICAN ARBITRATION

1505 DIVISION STREET · WAITE PARK, MN 56387
(320) 259-5414 · 1-800-770-7008 · FAX: (320) 259-5438

State of Minnesota
Stearns County

District Court
Seventh Judicial District

Court File Number:	73-CV-08-5655
Case Type:	Civil Other/Misc.

Notice of Filing of Order

TERRANCE JOSEPH KANE CRUMLEY
1505 DIVISION ST
WAITE PARK MN 56387

Latsamy Mahavong vs ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY

You are notified that an order Granting Plaintiff's Motion to Remove the Arbitrator is Granted and was signed on 6/9/2008.

Dated: June 12, 2008

Rhonda L, deputy
Court Administrator
Stearns County District Court
725 Courthouse Square Room 134
St. Cloud MN 56303
320-656-3620

cc: RICHARD J KRUGER

A true and correct copy of this notice has been served by mail upon the parties herein at the last known address of each, pursuant to Minnesota Rules of Civil Procedure, Rule 77.04.

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF STEARNS | SEVENTH JUDICIAL DISTRICT

Latsamy Mahavong,

Plaintiff,

v.

Allstate Property and Casualty Insurance Company,

Defendant.

ORDER

Court File #73-CV-08-5655

The above-entitled matter came on for hearing before the Honorable Thomas P. Knapp, Judge of District Court on June 6, 2008.

Attorney T. Joseph Crumley appeared on behalf of Plaintiff; Attorney Richard J. Kruger appeared on behalf of Defendant.

NOW, having duly considered the arguments of counsel, the documents and the proceedings herein, together with the applicable law, the Court makes the following:

ORDER

1. Plaintiff Latsamy Mahavong's Motion to Remove the Arbitrator is **GRANTED** and AAA is ordered to appoint a new arbitrator under its rules.

2. The attached memorandum is incorporated and hereby made a part of this Order.

Dated: June 9, 2008

BY THE COURT:

Thomas P. Knapp
Judge of District Court

MEMORANDUM

Plaintiff Latsamy Mahavong brings this motion to remove the arbitrator appointed to hear a no-fault arbitration between Plaintiff and the defendant Allstate Property and Casualty Company (hereinafter "Allstate") upon two bases: (1) evident partiality; and (2) the existence of a potential financial interest.

On August 30, 2007, Plaintiff was injured in an automobile accident in St. Cloud, Minnesota. At the time of the accident, Plaintiff was covered by a policy of insurance with Allstate, which coverage included personal injury protection ("no-fault") benefits. Pursuant to Minn. Stat. §65B.525, Plaintiff filed a petition for mandatory no-fault arbitration with the American Arbitration Association (hereinafter "AAA"). On December 17, 2007, a panel of four potential arbitrators was sent to each party's counsel. The panel included as one of the potential arbitrators attorney Frank Rajkowski. In a letter dated January 8, 2008, AAA notified the parties that Frank Rajkowski had accepted appointment to hear this matter. Attached to that letter was a written disclosure by Mr. Rajkowski, indicating that his office does work for Allstate, but that he presently did not have any open matters with Allstate.

On January 9, 2008, counsel for Plaintiff sent a letter to AAA objecting to Mr. Rajkowski's serving as an arbitrator on the grounds that as a partner in his law firm, he likely benefits financially from the attorney-client relationship between Allstate and his law firm. By letter dated January 16, 2008, AAA notified the parties that it reaffirmed the appointment of Mr. Rajkowski. Plaintiff's counsel responded to this reaffirmation by a letter dated February 1, 2008, in which he sought review by the No-Fault Standing Committee. By letter dated February 22, 2008, AAA notified the parties that the

Committee voted to reaffirm the Association's decision and that Mr. Rajkowski would remain on the case.

On April 29, 2008, Plaintiff filed a Memorandum with the Stearns County Court requesting TRO relief under Rule 65.01. On April 30, 2008 the Honorable Paul Widick, Judge of District Court, heard the matter and granted Plaintiff's Motion for Immediate Stay of Arbitration and a hearing on this matter.

POTENTIAL FINANCIAL INTEREST IN THE OUTCOME OF ARBITRATION

Pursuant to Minnesota No-Fault Rule 10, "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."

In the instant case, Allstate is a client of the Rajkowski Hansmeier law firm, Mr. Rajkowski's law firm. As a partner in his law firm, Mr. Rajkowski likely has a financial interest in all the firm's files / clients. As such, a potential for a conflict exists. Furthermore, a reasonable person in Plaintiff's situation would have great difficulty believing that she could get a fair and neutral hearing when the arbitrator and / or his law firm in which he has a financial interest "works" for Allstate. As such, and in order to promote and further ensure the success of the ADR program, Mr. Rajkowski should be removed from his appointment as arbitrator in this matter.

APPEARANCE OF IMPROPRIETY

Evident partiality refers to the right of a party to an arbitration to have an arbitration that is free from the appearance of impropriety. Pirsig v. Pleasant Mound Mut. Fire Ins. Co., 512 N.W.2d 342, 343 (Minn.Ct.App. 1994) "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." Id. at 344.

In the instant case, a longstanding business relationship is present between the appointed arbitrator and one of the parties. Mr. Rajkowski and / or his law firm has represented Allstate and / or its insureds on multiple occasions. While Mr. Rajkowski, himself, may not have an open file with Allstate "at this time," it is highly likely that he or another attorney in his firm will in the future. As a partner in his law firm, he has a financial interest in any representation of Allstate by his firm. In additional, public policy favors removal of Mr. Rajkowski as the arbitrator in the instant case because in order for the arbitration process to be effective, the public must be confident that the process is fair and honest and the public must trust the ADR process in order for it to succeed.

Consequently, given both the potential financial interest Mr. Rajkowski has in the outcome of the arbitration as well as the appearance of impropriety, it is appropriate to have Mr. Rajkowski removed as the arbitrator for this case.

6/9/2008

T.P.K.

FILED 6-9-08
Stearns County
District Court
By Rhonda L.
Deputy

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
CASE TYPE: Civil Other/Misc.

Maxine Cochran,

Claimant,

vs.

Metropolitan Council,

Respondent.

Court File No. 27CV083180l

ORDER

The above-entitled matter came on for hearing before the Honorable John J. Sommerville on February 3, 2009, on the Metropolitan Council's Motion to Stay No-Fault Arbitration.

Attorney Jacob R. Jagdfeld appeared on behalf of Claimant; Attorney Tammy M. Reno appeared on behalf of Respondent.

NOW, having duly considered the arguments of counsel, the documents and proceedings herein, together with the applicable law, the Court makes the following:

FINDINGS OF FACT

1. Maxine Cochran filed a Petition for No-Fault Arbitration seeking no-fault benefits from the Metropolitan Council.

2. After the parties submitted strike lists, Cory P. Whalen was selected as the arbitrator. Mr. Whalen disclosed he previously handled cases against the Metropolitan Council but that he did not currently have any cases pending against it.

3. Mr. Whalen's law firm currently has cases pending against the Metropolitan Council.

4. The Metropolitan Council objected to Mr. Whalen's appointment, because it felt it could not get a fair and impartial hearing if Mr. Whalen served as the arbitrator. Mr. Whalen's appointment was reaffirmed by the American Arbitration Association.

5. The Metropolitan Council appealed Mr. Whalen's reaffirmation to the Standing Committee; and the Standing Committee reaffirmed his appointment.

6. The Metropolitan Council appealed the Standing Committee's decision to this Court.

7. The Metropolitan Council is a self-insured, governmental agency.

CONCLUSIONS OF LAW

1. Pursuant to Rule 10 of the Minnesota Rules of Arbitration, "[n]o 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." (See Minnesota No-Fault, Comprehensive or Collisions Damage Automobile Insurance Arbitration Rules, Rule 10.) The Rule further requires appointed the arbitrator "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 shall supplement the disclosures as circumstances require." Id.

2. According to Rule 10, "[t]he following facts, in and of themselves, do not create a presumption 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 . . .."

3. Actual bias is not the same as "evident partiality." Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 147-48, 89 S.Ct. 337, 338-39, 21 L.Ed.2d 301 (1968); Pirsig v. Pleasant Mound Mut. Fire Ins. Co., 512 N.W.2d 342, 344 (Minn. Ct. App. 1994)). "A party to an arbitration is entitled to a fair arbitration. It is not enough that the arbitrators be unbiased; they must not appear to be biased." Pirsig, 512 N.W.2d at 344.

4. Rule 10 does not address situations where an attorney or the attorney's firm represents auto accident claimants against self-insured entities, like the respondent in this case. It only applies to insurance companies.

5. Because Mr. Whalen's firm currently represents auto accident claimants against the Metropolitan Council, a conflict and/or evident partiality exists. The Metropolitan Council ~~cannot~~ does not feel it ~~is getting~~ will get a fair and impartial hearing if Mr. Whalen serves as the arbitrator in this matter. In order to ensure the Metropolitan Council believes it is getting a fair and impartial hearing and for the arbitration system to work, Mr. Whalen must be removed as the arbitrator and a new arbitrator appointed.

ORDER

1. Respondent Metropolitan Council's Motion to Remove Arbitrator is **GRANTED** and AAA is ordered to appoint a new arbitrator under its rules.

Dated: 2/9/09

By: _____
John C. Sommerville
Judge of District Court

STATE OF MINNESOTA

IN COURT OF APPEALS

Maxine Cochran, claimant,

Appellant,

vs.

Metropolitan Council,

Respondent.

ORDER

A09-656

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND BECAUSE THERE IS A QUESTION WHETHER THIS COURT HAS JURISDICTION:

1. This appeal was filed by mail on April 9, 2009.

2. Appellant seeks review of an order filed on February 9, 2009, that grants a motion by respondent Metropolitan Council to remove the arbitrator and directs the American Arbitration Association to appoint a new arbitrator under its rules.

3. Appealable orders in arbitration proceedings are set out in Minn. Stat. § 572.26, subd. 1. *Miyoi v. Gold Bond Stamp Co. Employees Retirement Trust*, 293 Minn. 376, 378, 196 N.W.2d 309, 310 (1972).

4. It does not appear that the February 9 order granting the motion to remove the arbitrator is appealable as of right under Minn. Stat. § 572.26, subd. 1 (2008).

5. Appellant's statement of the case indicates that the February 9 order is appealable under Minn. R. Civ. App. P. 103.03(e) and (g).

6. An order which, in effect, determines the action and prevents a judgment from which an appeal might be taken is appealable. Minn. R. Civ. App. P. 103.03(e).

7. The February 9 order directs the appointment of a new arbitrator, and it appears that the arbitration proceeding will continue. It is unclear how the February 9 order determines the arbitration action and prevents the eventual entry of a judgment on the arbitration award. *See* Minn. Stat. § 572.21 (2008) (stating that a judgment shall be entered in conformity with an order confirming, modifying, or correcting an award).

8. An appeal may be taken from a final order, decision, or judgment affecting a substantial right made in a special proceeding. Minn. R. Civ. App. P. 103.03(g).

9. Arbitration proceedings under Minn. Stat. ch. 572 are not "special proceedings" within the meaning of Minn. R. Civ. App. P. 103.03(g). *Pulju v. Metro. Prop. & Cas.*, 535 N.W.2d 608, 609 (Minn. 1995).

IT IS HEREBY ORDERED:

1. On or before April 27, 2009, the parties shall serve and file informal memoranda (an original and four copies) with the clerk of the appellate courts, 25 Rev. Dr. Martin Luther King Jr. Blvd., St. Paul, MN 55155, which shall address the following:

(a) Is the February 9 interlocutory order appealable under either Minn. Stat. § 572.26, subd. 1, or Minn. R. Civ. App. P. 103.03?

(b) If the answer to (a) is no, should the appeal be dismissed? *See Kowler Assocs. v. Ross*, 544 N.W.2d 800, 802 (Minn. App. 1996) (dismissing appeal from an order that vacated an arbitration award and directed a rehearing on the ground that the order was not final and appealable under the arbitration statute).

2. Memoranda filed after April 27, or memoranda filed without *four copies* and *proof of service*, may not be considered by the court.

3. Failure to comply may result in such sanctions as the court deems appropriate, including dismissal.

4. If, after completion of research, appellant concludes this court lacks jurisdiction over the appeal, appellant shall immediately file a notice of voluntary dismissal.

5. This order does not stay or extend briefing deadlines or other procedural requirements under the rules.

Dated: April 16, 2009

BY THE COURT

Edward Cornish

Chief Judge

NO. A09656

STATE OF MINNESOTA
COURT OF APPEALS

Maxine Cochran,

Appellant,

vs.

Metropolitan Council,

Respondent.

MEMORANDUM

INTRODUCTION

Respondent submits this informal Memorandum in response to the Court's Order dated April 16, 2009. The Court has requested that the parties address whether the February 9, 2009, Order granting Respondent's motion to remove the arbitrator and directing that a new arbitrator be appointed is an interlocutory order appealable under either Minn. Stat. § 572.26, subd. 1, or Minn. R. Civ. P. 103.03. If it is not, the Court has asked the parties to address whether the appeal should be dismissed. Based on Respondent's legal research, the February 9th Order is not appealable under either § 572.26, subd. 1, or Minn. R. Civ. P. 103.03, and this appeal should be dismissed.

ANALYSIS

The Order that is the subject of this appeal ordered the removal of an arbitrator appointed to preside over Appellant's no-fault arbitration. The Order further directed the American Arbitration Association to appoint a new arbitrator who would then decide the

case. That hearing is set for May 11, 2009. Appellant filed her Notice of Appeal seeking review of the February 9th Order. Appellant's Statement of the Case asserts the February 9th Order is appealable under Minn. R. Civ. App. P. 103.03(e) and (g).

Minnesota Rule of Civil Appellate Procedure 103.03 encompasses all appealable judgments and orders, with Rule 103(j) allowing for additional rights of appeal to be created by statute or under the decisions of our state's appellate courts. *In re Estate of Janacek*, 610 N.W.2nd 638, 641 (Minn. 2000). According to the Minnesota Rules of Civil Appellate Procedure, an appeal may be taken to the Court of Appeals "from an order which, in effect, determines the action and prevents a judgment from which an appeal might be taken." Minn. R. Civ. App. P. 103.03(e). An appeal may also be taken "from a final order, decision or judgment affecting a substantial right made in an administrative or other special proceeding." Minn. R. Civ. App. P. 103.03(g). The rule also permits a party to appeal any other "orders or decisions as may be appealable by statute or under the decisions of the Minnesota appellate courts." Minn. R. Civ. App. P. 103.03(j).

Because arbitration proceedings are not "special proceedings" within the meaning of Minn. R. Civ. P. 103.03, Rule 103.03(g) clearly does not apply. *See Pulju v. Metro. Prop. & Cas.*, 535 N.W.2d 608, 609 (Minn. 1995). The analysis then turns to Rule 103.03(g). The February 9th Order is not a final order, does not determine the "action" in this case, and does not prevent a judgment from which an appeal might be taken. A final order has been defined as one that ends the proceeding as far as the court is concerned or

that which "finally determines some positive legal right of the appellant relating to the action." *Weinzierl v. Lien*, 296 Minn. 539, 540, 209 N.W.2d 424, 424 (1973). Here, the "action" is Appellant's claim for no-fault benefits from Respondent. The "action" is not the arbitration selection process. The actual hearing in this case has not been heard, and will proceed on May 11th with a different arbitrator. Appellant will have her case heard on the merits by an arbitrator selected by both parties through the American Arbitration Association. An award will be issued. The February 9th Order did not "end the proceeding." The "proceeding" has not even happened yet.

The Supreme Court has held that orders staying a plaintiff's proceeding to recover money under a retirement plan *until an arbitration was completed*, permitting plaintiff to name an independent arbiter, and vacating the temporary restraining order were not appealable orders. *Miyoi v. Gold Bond Stamp Co. Employees Retirement Trust*, 293 Minn. 376, 378, 196 N.W.2d 309, 310 (1972)(emphasis added). Those orders did not determine a positive legal right of that party. *See Weinzierl*, 296 Minn. at 540, 290 N.W.2d at 424). Respondent has found no case law in Minnesota holding that a party may appeal an order removing an arbitrator. There is also no case law holding that a party has a substantial right to have the arbitrator initially appointed or the substantial right to have the arbitrator of his or her choice. Minnesota case law does make clear, however, that each party has a right to fair and impartial arbitration hearing. *Pirsig v. Pleasant Mound Mut. Fire Ins. Co.*, 512 N.W.2d 342, 344 (Minn. Ct. App. 1994)(*but see e.g., In re Estate of Janek*, 610 N.W.2d 638, 642 (Minn. 2000)(holding that a party has a

substantial a right to be represented by its attorney of choice and determining the court's order disqualifying an attorney finally determined the party's right to be represented by his counsel of choice). As will be discussed below, there are procedures in place that Appellant could have followed if she believes she cannot get a fair and impartial hearing if the newly appointed arbitrator presides over her case. However, until she has a hearing, an arbitration award has been issued, and there has been a final determination on the merits, her appeal is premature.

There are several orders that are routinely issued that are not appealable, even though they may impact a party's likelihood of success. An example that comes to mind is an order denying a motion to compel discovery. Such an order is not appealable under any statute or under the Minnesota Rules of Civil Appellate Procedure. *See* Minn. R. Civ. App. P. 103.03. Under the same analysis, an order denying a motion to compel discovery is not an order which determines the action and prevents a judgment from which an appeal may be taken. An order denying such a motion could prevent a party from later introducing evidence that could be beneficial to that party's case. The simple fact that the potentially valuable discovery is not permitted to be completed does not make the order denying the motion to compel appealable once analyzed under Minn. R. Civ. App. P. 103.03. The order must finally determine some positive legal right of the appellant. *Weinzierl*, 296 Minn. at 540, 209 N.W.2d at 424. Appellant is not entitled to appeal a non-appealable order simply because Appellant preferred the arbitrator who was removed, rather than another arbitrator who was agreeable to both parties.

Further, the February 9th Order does not prevent a judgment from which an appeal may be taken. Quite the contrary is true. Once the arbitration hearing takes place and an award has been issued, if Appellant is unhappy with the award and believes there is a basis to have the award vacated by the district court, she may do so pursuant to Minn. Stat. § 572.19. Following the issuance of an arbitration award, when a matter proceeds to arbitration over a disputed claim, upon application of a party, "the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections 572.19 and 572.20." Minn. Stat. § 572.18. Generally, the confirmation process involves a formal request to the court for entry of a judgment based on an arbitrator's award. "It is well settled that arbitration is meant to be a final judgment of both law and facts." *Johnson v. Consolidated Freightways, Inc.*, 420 N.W.2d 608, 613 (Minn. 1988). An arbitration award is not the equivalent of a tort judgment and cannot be entered as a judgment unless confirmed by the Court. *See* Minn. Stat. § 572.18; 572.21. Therefore, a party can either move to confirm the award to reduce it to an enforceable tort judgment or move to vacate the award. After either of those events, the "action" has been determined and is clearly appealable. However, there must be a hearing and an award. Neither of those has taken place yet.

Therefore, the February 9th Order is not appealable under Minn. R. Civ. App. P. 103.03(e). The February 9th Order is not an order which, in effect, determines the action and prevents a judgment from which an appeal might be taken.

The next step is to analyze Minn. R. Civ. App. P. 103.03(j). That subdivision permits the appeal of certain orders or decision made appealable by statute or case law. Certain orders in arbitration proceedings are appealable as of right under Minn. Stat. § 572.26, subd. 1. Under this statute, an appeal may be taken from:

> (1) an order denying an application to compel arbitration made under section 572.09;
>
> (2) an order granting an application to stay arbitration made under section 572.09(b);
>
> (3) an order confirming or denying confirmation of an award;
>
> (4) an order modifying or correcting an award;
>
> (5) an order vacating an award without directing a rehearing; or
>
> (6) a judgment or decree entered pursuant to the provisions of this chapter.

Minn. Stat. § 572.26, subd. 1 (2008). Under subd. 1(2), a party may seek appeal of an order granting an application to stay an arbitration on the grounds that there was no agreement to arbitrate. *See* Minn. Stat. § 572.09(b) (2008).

A review of Minn. Stat. § 572.26, subd. 1, makes it clear that the February 9th Order does not fit under any of the subdivisions permitting an appeal as of right of the order in this arbitration proceeding. Again, this is an order removing an arbitrator and directing the appointment of a different arbitrator. This does not involve an agreement to arbitrate, as is required under the first two subdivisions of the statute. The next three subdivisions (subds. 1(3)-(5)), pertain to orders issued following an award, which is not

the case here since this case has not yet been arbitrated. Subdivision 1(6) applies to appeals from a judgment, which is also not the case here. No judgment has been entered. Therefore, the February 9th Order is also not appealable under Minn. Stat. § 572.26, subd. 1.

It is expected that Appellant is going to argue there is no procedure in place to challenge the district court's removal of the arbitrator who was appointed. She is incorrect. Given this appeal, it is apparent Appellant believes this arbitrator should not have been removed, yet she has expressed no dissatisfaction with the newly appointed arbitrator. If she was dissatisfied with the newly appointed arbitrator, she could have challenged this arbitrator. Rule 8 of the Minnesota No-Fault, Comprehensive or Collisions Damage Automobile Insurance Arbitration Rules permits a party to object to an arbitrator who has been appointed. Appellant has not objected to the new arbitrator, and she cannot now abrogate the No-Fault Rules by attempting to appeal the February 9th Order, just because she preferred another arbitrator that was not agreeable to Respondent.

CONCLUSION

The February 9th Order is not appealable under either Minn. R. Civ. App. P. 103.03 or Minn. Stat. § 572.26, subd. 1. Therefore, this appeal should be dismissed.

Respectfully submitted,

PROVO-PETERSEN • O'NEILL, P.A.

Dated: April 27, 2009

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April 27, 2009

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Re: Maxine Cochran v. Metropolitan Council
CA File Number: A09-656

Dear Clerk:

This letter will serve as appellant's informal response as directed by the Court's Order of April 17, 2009. This matter should be considered appealable under Minn. R. Civ. App. P. 103.03 (e) as - - while the matter may continue before a new arbitrator - - there never can or will be an appeal resolving the propriety of the arbitrator's removal.

The district court's order creates a disposition that prevents an appeal on the sole issue of justice raised: how arbitrators should be selected. This sole issue is ripe for appeal since an appeal is not dependent on the completion of the arbitration process, unlike the appeal, *Kowler Assocs. v. Ross*, 544 N.W.2d 800, 802 (Minn. App. 1996), referenced in this Court's Order of April 17, 2009.

Additionally, the sole issue of justice raised presents a compelling reason for immediate appeal. Minn. R. Civ. App. P. 105.01 (In the interests of justice the Court of Appeals may allow an appeal from an order not otherwise appealable pursuant to Rule 103.03), See also Emme v. C.O.M.B., Inc., 418 N.W.2d 176, 179 (Minn. 1988). For the foregoing reasons, appellant respectfully requests that this appeal be allowed to proceed.

Respectfully submitted,

GOLDENBERG & JOHNSON, PLLC

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Enclosures

cc: Tammy Reno, Esq.
Judge John Sommerville
Clerk of District Court, Hennepin County
Maxine Cochran

STATE OF MINNESOTA

IN COURT OF APPEALS

Maxine Cochran, claimant,

Appellant,

vs.

Metropolitan Council,

Respondent.

ORDER

A09-656

Considered and decided by Toussaint, Chief Judge; Peterson, Judge; and Bjorkman, Judge.

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND FOR THE FOLLOWING REASONS:

This appeal was filed by mail on April 9, 2009. Appellant seeks review of an order filed on February 9, 2009, that grants a motion by respondent Metropolitan Council to remove the arbitrator and directs the American Arbitration Association (AAA) to appoint a new arbitrator. This court questioned whether the February 9 order is appealable. The parties submitted jurisdiction memoranda.

An appeal may be taken from such orders or decisions as may be appealable by statute. Minn. R. Civ. App. P. 103.03(j). Appealable orders in arbitration proceedings are set out in Minn. Stat. § 572.26, subd. 1. *Miyoi v. Gold Bond Stamp Co. Employees*

Retirement Trust, 293 Minn. 376, 378, 196 N.W.2d 309, 310 (1972). An order granting a motion to remove an arbitrator is not an appealable order under Minn. Stat. § 572.26, subd. 1 (2008).

An order which, in effect, determines the action and prevents a judgment from which an appeal might be taken is appealable. Minn. R. Civ. App. P. 103.03(e). Appellant argues that the February 9 order is appealable under rule 103.03(e) because although the matter may continue before a new arbitrator, there can never be an appeal resolving the propriety of the original arbitrator's removal.

Rule 103.03(e) applies to orders that preclude the possibility of entry of judgment. *Minn. Mining & Mfg. Co. v. H & W Motor Express Co.*, 507 N.W.2d 622, 624 (Minn. App. 1993), *review denied* (Minn. Dec. 22, 1993). Respondent states that appellant has not objected to the new arbitrator appointed by the AAA. If necessary, after completion of arbitration, appellant may move to vacate the arbitration award under Minn. Stat. § 572.19 (2008). An appeal may be taken from an order confirming the award or from a judgment entered pursuant to the award. Minn. Stat. § 572.26, subd. 1(3), (6). Rule 103.03(e) does not authorize the appeal because the February 9 order does not determine the action and prevent the eventual entry of a judgment from which an appeal might be taken.

Appellant also requests that this court extend discretionary review to the February 9 order. Upon the petition of a party, in the interests of justice, the court of appeals may allow an appeal from an order not otherwise appealable pursuant to rule 103.03 except an

BY THE COURT

Edward Toussaint

Chief Judge

order made during trial. Minn. R. Civ. App. P. 105.01. A petition shall be served on the adverse party and filed within 30 days of the filing of the order. *Id.* Appellant did not file a timely petition for discretionary review of the February 9 interlocutory order.

IT IS HEREBY ORDERED:

1. This appeal is dismissed as taken from a nonappealable order.

2. The clerk of the appellate courts shall provide copies of this order to the Honorable John J. Sommerville, counsel of record, and the district court administrator.

Dated: May 5, 2009

BY THE COURT

Edward Toussaint

Chief Judge