**Avoiding Ethical Jeopardy:**

**How to Apply the ARIAS-US Code of Conduct in Practice**

**Friday May 11, 2018**

**8:30 a.m. – 9:20 a.m.**

**ROUND #1**

A reinsurance dispute has arisen between Great Coverage Insurance Company, Inc. and Behemoth Reinsurance Company, Inc. (the "Dispute"). The Dispute involves a single reinsurance treaty, and the Arbitration Clause in that treaty provides any dispute must be submitted for decision to an arbitration panel consisting of three arbitrators: one appointed by the cedent, one appointed by the reinsurer, and a neutral umpire to be selected by the parties.

Unable to agree on an umpire, each party proposes six candidates from the ARIAS\*U.S. Certified Arbitrators List, selects three from the other party's list, the parties then rank the six candidates, and the candidate with the total lowest ranking is selected as umpire.

Each party has nominated its six umpire candidates, and jointly forwarded an umpire questionnaire to each candidate. Great Coverage and its counsel review the questionnaires and ultimately select three candidates from Behemoth Re's list. Great Coverage ranks one of Behemoth Re's candidates, Ms. Ombra, higher than the other two remaining Behemoth Re candidates, despite a disclosure made by Ms. Ombra in her questionnaire that she is currently serving as umpire in an arbitration also involving Behemoth Re's arbitrator, Mr. Rivela. Likewise, Behemoth Re selects three candidates from Great Coverage's list. In the end, Ms. Ombra has the lowest total ranking, and is selected as the umpire.

After Ms. Ombra has been selected as the umpire, approximately a week before the Organizational Meeting, Mr. Rivela discloses to the parties, and the Panel, that he is currently serving as a party appointed arbitrator on five arbitration panels, where Ms. Ombra is the umpire.

At Great Coverage's request, the parties issue a joint letter to Ms. Ombra requesting information to assist them to better understand the discrepancy between Mr. Rivela's disclosure and the disclosures made by Ms. Ombra in the umpire questionnaire. Ms. Ombra promptly confirms that she is in fact acting as umpire on five panels where Mr. Rivela is acting as a party appointed arbitrator. Prompted by additional questions, the parties learn:

1. at the time she filled out the umpire questionnaire, she was actually acting as umpire in two, not one, arbitrations in which Mr. Rivela was involved as a party appointed arbitrator;
2. between the date on which Ms. Ombra filled out the questionnaire and the point in time in which the parties ranked and selected the umpire in the present matter, Ms. Ombra accepted two additional umpire assignments in which Mr. Rivela was involved as a party appointed arbitrator; and
3. after Ms. Ombra's selection, but prior to the Organizational Meeting, Ms. Ombra agreed to accept an umpire assignment in which Mr. Rivela was involved as a party appointed arbitrator.

Based upon the foregoing, Great Coverage requests Behemoth Re to issue a joint request to Ms. Ombra that she withdraw from the Panel. Behemoth Re refuses, and Great Coverage makes the request on its own, arguing that had it been aware of the numerous arbitrations in which Ms. Ombra was currently the umpire on a panel in which Mr. Rivela was a party appointed arbitrator, it would have made different decisions in the umpire selection process. What should Ms. Ombra do?

**Questions**:

* Should she have disclosed her prior appointments?
* If so, when?
* Is the length of time that has passed between her filling out the questionnaire, and the day on which the parties ranked and selected the umpire in the present matter relevant?

**ARIAS-U.S. Code of Conduct Canons to Consider**: Canon I Integrity (Comments 1 & 2), Canon III Competence (Comments 1 & 2), Canon IV Disclosure (Comments 3 & 6)

**ROUND #2:**

A dispute has arisen between Old Exposures, a property/casualty ceding insurer, and Mostly Finished Re, its reinsurer, which centers on the issue of whether different asbestos products released into the stream of commerce by Old Exposures policyholder Problematic Enterprises, Inc. can be viewed as one “occurrence.” The relevant treaty language specifies that a reinsurance occurrence is:

…each accident or occurrence or series of accidents or occurrences arising out of one event, whether involving one or several of the Company’s policies**.**

The treaty further provides**:**

All bodily injury or property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence.

Mostly Finished Re has not only terminated this treaty, but all of its assumed business has been in run-off for the past twenty years. To put it bluntly, Mostly Finished Re and Old Exposures cannot agree about anything, much less about what constitutes a reinsurance occurrence.

Not surprisingly, they are also unable to agree on an umpire. Pursuant to the applicable Arbitration Clause, both parties select three umpire candidates. At the specified time, each party strikes two candidates from the other’s list. Old Exposures' appointed arbitrator Henry Lancaster and Mostly Finished Re’s appointed arbitrator Edward York each pick a digit of the next day’s Dow Jones Industrial average to select an umpire randomly from the two remaining candidates.

Collis Hornsby, the remaining Old Exposures’ candidate, is picked as the umpire. This retired gentleman’s sole employment (after five years as an associate with a major law firm) was as the Head Reinsurance Counsel for 32 years of Market Force, a major property/casualty insurance carrier and ceding company with long-lived asbestos products problems.

It is common industry knowledge that several of the reported reinsurance cases relating to number of occurrences in the asbestos products arena were managed by Mr. Hornsby in his past employment capacity. On his ARIAS-US umpire questionnaire, Mr. Hornsby has also disclosed that he has served as a party-appointed arbitrator 112 times and has never served as an umpire. While the questionnaire does not require Mr. Hornsby to state whether the appointing party was a cedent or a reinsurer, Mostly Finished Re’s counsel Ann Neville has performed her due diligence and has determined that Mr. Hornsby has always been appointed by ceding companies. In addition, five years ago, Mr. Hornsby was the author of an ARIAS US article: “Asbestos Products: How Cedents Can Aggregate Losses and Collect from their Reinsurers.” The article has been duly disclosed on the umpire questionnaire.

At the organizational meeting, Ms. Neville questions Umpire Hornsby about whether he has predetermined the outcome of the major issue in controversy. Mr. Hornsby denies that he has any pre-existing bias in favor of the cedent’s position, saying he judges each case on its merits. However, on behalf of Mostly Finished Re, Ms. Neville challenges Mr. Hornsby on the grounds of evident partiality and bias. Mr. Hornsby refuses to step down.

**Questions**:

* Does this reinsurer’s counsel have a viable challenge to Mr. Hornsby as the umpire?
* Should Mr. Hornsby step down?
* Assuming the answer to the above questions is “no”, does reinsurer’s counsel Ms. Neville have any further recourse?

An additional twist as to our vignette leads us to the deliberations phase of the arbitration. Let’s assume that, instead of disclosing his ARIAS US article “Asbestos Products: How Cedents Can Aggregate Losses and Collect from their Reinsurers” on his umpire questionnaire, Mr. Hornsby did not reveal his authorship on the questionnaire. Ms. Neville’s challenge fails, and Mr. Hornsby, Mr. Lancaster and Mr. York proceed to deliberations immediately following a two-week final arbitration hearing at which both testimonial and documentary evidence was submitted. Mr. Hornsby gives Mr. Lancaster and Mr. York a copy of his article, asking that they read and discuss it in the context of the pending deliberations. The article was not mentioned by either counsel at any time during the arbitration proceedings, although, as with all ARIAS US articles, it was accessible on the society’s website. What should happen? Here are some choices:

* Mr. Lancaster and Mr. York should agree to consider the article in the context of the current proceedings. After all, it was publicly available on the ARIAS-US website.
* Mr. Lancaster and Mr. York should protest to Mr. Hornsby and refuse to consider the article, since it was not affirmatively mentioned in the course of the proceedings and since it was not affirmatively disclosed on the umpire questionnaire.
* Mr. Lancaster and Mr. York should urge Mr. Hornsby to disclose the article to Ms. Neville, and Old Exposures' counsel Ms. Hanover and request post-hearing briefs.

**ARIAS-U.S. Code of Conduct Canons to Consider**:

As to the main fact pattern- For the arbitrator Canon I Integrity (Comment 3(b), Canon II Fairness (Comments 1 & 2), Canon IV Disclosure (all); Canon VIII Just Decisions (Comment 2)

As to the “twist”- Canon II Fairness (Comment 2) and Canon IV (all).

**ROUND #3:**

Great Coverage and Behemoth Re are at it again! Great Coverage has issued a second Demand for Arbitration (the "Arbitration") against Behemoth Re in the fourth quarter of 2017. This Arbitration involves different treaties and issues than the one discussed in Round #1.

During the first quarter of 2018, the parties appoint their arbitrators both of whom are ARIAS-certified and agree that the Arbitration shall be governed by the *ARIAS • U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes*. The party appointed arbitrators select a neutral umpire who is also ARIAS-certified, the parties exchange position statements and the newly constituted panel (the “Panel”) holds an organizational meeting. The umpire selection process and organizational meeting are uneventful with discussion at the organizational meeting centered on the substantive dispute and the scheduling of discovery to culminate in a one-week evidentiary hearing in the third quarter of 2018.

Both Great Coverage's and Behemoth Re's party appointed arbitrators are attending the ARIAS 2018 Spring Conference, and have a chance meeting during a Refreshment Break. Great Coverage's party appointed arbitrator states that while he appreciates being appointed as a party appointed arbitrator and looks forward to working with Behemoth Re's party appointed arbitrator, he thinks it’s ridiculous the matter is being arbitrated as it’s clear that Great Coverage properly ceded the claim in question, and should be awarded not only recovery for the claim but the legal fees and costs expended in bringing the Arbitration. He adds that while he appreciates the fees generated by the week-long hearing, the parties are wasting valuable corporate resources on discovery and in conducting an evidentiary hearing as he can’t envision any new information or argument which would persuade him that Great Coverage’s positon is wrong. Behemoth Re's party appointed arbitrator does not respond but rather changes the subject by asking Great Coverage's party appointed arbitrator if he is playing golf or tennis.

**Questions**:

* Is it proper for party appointed arbitrators to be discussing the issues in dispute and the Arbitration outside of the presence of the umpire?
* Are there certain aspects of the issues in dispute or the Arbitration which can be discussed between the party appointed arbitrators without the umpire present?
* Based on his statements, is Great Coverage's PAA in compliance with Canon VIII of the ARIAS Code of Conduct which states “Arbitrators should, after careful review, analysis and deliberation with the other members of the panel, fairly and justly decide all issues submitted for determination.”
* Does Behemoth Re's party appointed arbitrator have an obligation to report the substance of this conversation to the umpire and/or the parties to the Arbitration?

**ARIAS-U.S. Code of Conduct Canons to Consider**: Canon I Integrity, Canon II Fairness, and Canon VIII Just Decisions

**BONUS ROUND!!!:**

Part A

Another reinsurance dispute has arisen between Old Exposures and Mostly Finished Re (the "Dispute"). The Dispute involves a single reinsurance treaty which provides that any dispute must be submitted for decision to an arbitration panel consisting of three arbitrators: one appointed by the cedent, one appointed by the reinsurer, and a neutral umpire selected by the parties.

Old Exposures' party appointed arbitrator and Mostly Finished Re's party appointed arbitrator are ARIAS-certified. Each are twenty-plus-year claim veterans of the reinsurance industry and have had numerous business dealings while employed by several different underwriters and brokers. They agree on the appointment of a neutral umpire, also ARIAS-certified, and the parties accept the arbitration panel (the “Panel”) at the organization meeting and agree the arbitration (the “Arbitration”) will be governed by the *ARIAS • U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes.*

Discovery and a week-long evidentiary hearing proceed and the Panel is now in deliberations. Assume during the course of deliberations, the following takes place between the Panel members:

Mostly Finished Re's party appointed arbitrator states that Mostly Finished Re's company representative heard “through the grapevine” that Old Exposures' party appointed arbitrator served as a reinsurer’s arbitrator in another arbitration involving a substantively identical issue with the exact same wording as that involved in the current Dispute. In that arbitration, Mostly Finished Re's party appointed arbitrator claims Old Exposures' party appointed arbitrator advocated the exact same position Mostly Finished Re is advocating in the current Dispute.

**Questions**:

* Should the umpire ignore the allegation and ask that the parties decide the Dispute based on the record before them?
* What if Old Exposures' party appointed arbitrator insists on the opportunity to explain his alleged previous position?
* Should the umpire affirmatively question Old Exposures' party appointed arbitrator regarding his position in the previous arbitration?
* Should the umpire question whether the previous arbitration was subject to a confidentiality order and, if so, how should the umpire and/or Old Exposure's party appointed arbitrator proceed?

Part B:

During the course of deliberations, Old Exposures' party appointed arbitrator claims that approximately ten years ago he reported to Mostly Finished Re's party appointed arbitrator while both were employed by ABC Insurance Company. Old Exposures' party appointed arbitrator further claims that the wording in the clauses in ABC Insurance Company's reinsurance treaties were very similar, if not exactly the same, as the wording involved in the Dispute. He recalls that several reinsurers refused to honor certain claims ceded under those reinsurance treaties based on substantively similar reasons now being advocated by Mostly Finished Re, and that while at ABC Insurance Company, Mostly Finished Re's party appointed arbitrator was adamant that the claims were correctly ceded and ultimately collected every penny from the objecting reinsurers.

**Questions**:

* Should the umpire ignore the allegation and ask that the parties decide the Dispute based on the record before them?
* Should Mostly Finished Re's party appointed arbitrator be given an opportunity to explain his alleged position while previously working for ABC Insurance Company?
* Is it proper for Old Exposure's party appointed arbitrator to make this claim during deliberations?

**ARIAS-U.S. Code of Conduct Canons to Consider**:

Part A: Canon II Fairness (Comment 1), Canon V (Comment 4), Canon VI (Comments 1-3), and Canon VIII (Comment 2)

Part B: