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ARIAS·U.S. members may submit questions for consideration by using this request form [insert hyperlink]. By using this form, the submitting member preserves anonymity and the ARIAS·U.S. Ethics Committee will not be able to identify the submitting member.

EXAMPLE #1

INFORMATION SUMITTED IN THE FORM

I am a certified arbitrator/umpire. I estimate that roughly two thirds of my assignments are as party appointed arbitrator and one third are as a neutral arbitrator.

A few months ago, I received a call from an outside lawyer who has been on the other side of the parties who have appointed me in 8 cases over the past 6 years. The lawyer identified himself and said that he was reaching out to see whether I would be interested in serving as party arbitrator in new cases and asked if I had any experience with Company A.

I then received a questionnaire to serve as umpire in a case involving the counsel who called me, the entity he identified, and a counsel on the other side who I know well from ARIAS but have never worked with. I now suspect the purpose of the call was to create a "contact" that would disqualify me from consideration as an umpire.

Can the lawyer who made the call use the fact of that call to pre-emptively disqualify me from service under the facts laid out above?

Your guidance would be appreciated.

REFORMULATION BY ETHICS COMMITTEE

Facts Presented:
An arbitrator received a call from Lawyer X who has regularly been on the other side of the parties who have appointed the arbitrator. Lawyer X stated that he was generally reaching out to see whether the arbitrator would be interested in serving as party arbitrator in new cases and asked generally about conflicts with Company A but Lawyer X did not identify a specific arbitration or the facts of any case.

Several months later the arbitrator received a questionnaire to serve as umpire in a case involving Lawyer X and Company A.

Does the arbitrator need to disqualify themself from service under the facts laid out above?

RESPONSE FROM THE ETHICS COMMITTEE

Advisory Opinion No. 1

Topic Areas: Disqualification, Canon I, Canon IV

Opinion**:**

1. Based on these facts, the arbitrator does not have to disqualify themself as an umpire candidate.

2. The Comments to Canon I of the ARIAS·U.S. Code of Conduct ("Code") set forth certain circumstances where a candidate for appointment "must" refuse to serve (Comment 3) and other circumstances where the candidate "should" decline the appointment (Comment 4). As Canon I itself states, arbitrators should uphold the integrity of the arbitration process. The fundamental question for an arbitrator to assess is whether they believe they could serve as an Umpire in a fair, diligent, and objective manner.

3. Comment 3 to Canon I states that an arbitrator "must refuse to serve":

   > *e) where the candidate is nominated for the role of umpire and the candidate was contacted prior to nomination by a party, its counsel or the party's appointed arbitrator* ***with respect to the matter*** *for which the candidate is nominated as umpire . . .*

   Accordingly, the arbitrator should consider the nature and substance of the contact in deciding whether potentially accepting the appointment would be contrary to Comment 3.

4. Lawyer X made an unsolicited phone call and did not discuss any particular matter. Rather, the Lawyer made a general inquiry as to whether the arbitrator had any conflicts with Company A. This discussion between counsel and the arbitrator was not "with respect to the matter" and is therefore not a reason for an umpire candidate to withdraw from consideration.

5. The answer could be different depending on the level or nature of information disclosed in the call. We note that this is not in any way intended to condone attorney behavior designed to preemptively disqualify an umpire candidate, which should never take place. Regardless, an arbitrator must remember their fundamental duty under Canon I to uphold the integrity of the arbitration process and promote fairness and should confirm their ability to do, considering the contents of the call.

EXAMPLE #2

INFORMATION SUBMITTED IN THE FORM

I was an underwriter for a large reinsurer during my active career in the insurance industry but have now retired for a number of years.

I have been appointed as a party arbitrator by a reinsurer who is defending an arbitration brought by a ceding company to collect balances owed under an excess of loss contract that was in force over 20 years ago. There are multiple discrete issues in dispute, among them one issue that involves aggregation of multiple asbestos bodily injury claims. And there is no aggregate extension clause in the contract. Hence the issue in the arbitration

is whether the multiple bodily injury claims against several direct insureds can be aggregated as one occurrence to meet the contracts attachment point.

After the Panel was constituted and accepted by the parties document discovery began which included production of the broker's files. Upon review of the broker's files cedent's counsel advised the Panel and reinsurer's counsel that my company had been one of the other reinsurers on the contract and that I had been the underwriter for that other reinsurer. The broker's files further revealed that while the contract was in force (over 20 years ago) Riddell defective football helmets resulted in multiple bodily injury claims and the cedent asked reinsurers on the contract (including my employer) to agree to aggregation of these claims as one occurrence despite the lack of an aggregate extension clause. The broker's files revealed that I had personally written to the broker that we would not agree to aggregation of the Riddell claims as one occurrence under the contract.

Given the passage of time, I had not recalled my direct involvement in the contract or the aggregation of football helmet claims as one occurrence or my rejection of cedent's request related these claims.

Cedant requested my resignation from the Panel due to the facts discovered regarding my direct personal involvement on behalf of another reinsurer and cedent's perception that I have a bias and predisposition on the issue of aggregation of product liability claims. I do not feel I am biased or predisposed on this issue and that I can be fair and impartial in the arbitration.

Should I resign?

REFORMULATION BY ETHICS COMMITTEE

<u>Facts Presented:</u>
A reinsurer appointed a retired underwriter to serve as its party arbitrator in an arbitration brought by a ceding company to collect balances under a contract that was in force over 20 years ago. Aggregation of claims was one of the issues in dispute.

After acceptance of the Panel, cedent's counsel asked the arbitrator to resign from the Panel because the arbitrator's former employer was another reinsurer on the same contract and the arbitrator was the underwriter. Documents produced during discovery, and supplied to the Panel by cedent's counsel, revealed that, while the contract was in force, the arbitrator was personally involved in responding in writing to an aggregation issue similar to the issue in dispute in the arbitration.

The arbitrator responded that, given the passage of time, the arbitrator (a) had not recalled their direct involvement in the contract or the aggregation-related issue, and (b) felt they could be fair and impartial in the arbitration. In these circumstances, does the ARIAS·U.S. Code of Conduct require the arbitrator to resign from serving as party-arbitrator?

RESPONSE FROM THE ETHICS COMMITTEE

Advisory Opinion No. 2

Topic Areas: Integrity/Fairness/Disqualification, Canon I, Canon II, Canon IV

Opinion**:**

1. Based on these facts, the arbitrator should resign as a party arbitrator.

2. Canon I of the ARIAS·U.S. Code of Conduct ("Code"), titled "Integrity," specifies that "Arbitrators should uphold the integrity of the arbitration process and conduct the proceedings diligently." Comment 4 to Canon I provides:

> Consistent with the arbitrator's obligation to render a just decision, before accepting an appointment as an arbitrator the candidate should consider whether any of the following factors would likely affect their judgment and, if so, should decline the appointment:
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> * * *
>
> d) whether the candidate has involvement in the contracts or claims at issue such that the candidate could reasonably be called as a fact witness

   Comment 5 to Canon I refers to an important general principle inherent in Canon I, namely, "in upholding the integrity of the arbitration process arbitrators will avoid the perception of bias."

3. Due to the timing of the request that the arbitrator resign, the arbitrator should also consider their obligations under Canon IV ("Disclosure"). Comment 5 to Canon IV provides:

> After the Panel has been accepted by the parties, an arbitrator should recognize the consequences to the parties and the process of a decision to withdraw . . . In the event that an arbitrator is requested to withdraw by less than all of the parties, the arbitrator should withdraw only when one or more of the following circumstances exist.
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> * * *
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> b) if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is substantial and would inhibit the arbitrator's ability to act and decide the case fairly.

4. Under Comment 4 to Canon I, it is the arbitrator themself who must weigh their prior involvement with the contract and assess whether it will likely affect their judgment. Under Comment 5 to Canon IV, the arbitrator must also consider whether the reason for the challenge is substantial and impedes their ability to decide the case fairly.

Although the arbitrator did not recall their involvement with the contract when appointed (and therefore did not disclose it), they should consider the possibility that further documents and testimony may refresh their recollection. See Comment 6 to Canon IV (stating that the duty to disclose is continuing and, if a previously undisclosed interest or relationship is recalled during the course of the arbitration, it must be disclosed). If the arbitrator's ability to render a just decision in a fair manner would be impeded by their prior involvement with the contract, the arbitrator must withdraw. See Canon II ("Fairness") and Comment 1 to Canon II.

5. Even if the arbitrator believes that the parties would not call the arbitrator as a fact witness, the arbitrator would (a) effectively be serving as a fact witness in light of the arbitrator's prior writings regarding aggregation under the very contract at issue in the arbitration and (b) not be subject to cross-examination by the parties.

6. The arbitrator has an obligation under Canon I to avoid the perception of bias. This requires that the arbitrator consider how a reasonable person would view the arbitrator's ability to render a just decision in light of the arbitrator's prior personal involvement with the contract on an issue analogous to the one in dispute. The arbitrator's subjective belief that they can be fair and the fact that only one side has asked the arbitrator to withdraw do not override the arbitrator's ethical obligation to step down from the panel due to the reasonable perception of bias under these facts.