

2024 Spring Conference

May 1-3, 2024

Puerto Rico



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Ethics Enforcement: Has the time Come?

General Session 7

What are our Members Telling us and How Can we Best Use that Information

- Presentation of Results

Neal Moglin *Foley & Lardner LLP*

- Roundtable Discussion

Alysa Wakin *Odyssey Group* (Moderator)

Suman Chakraborty *Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.*

Lawrence Greengrass *Arbitrator*

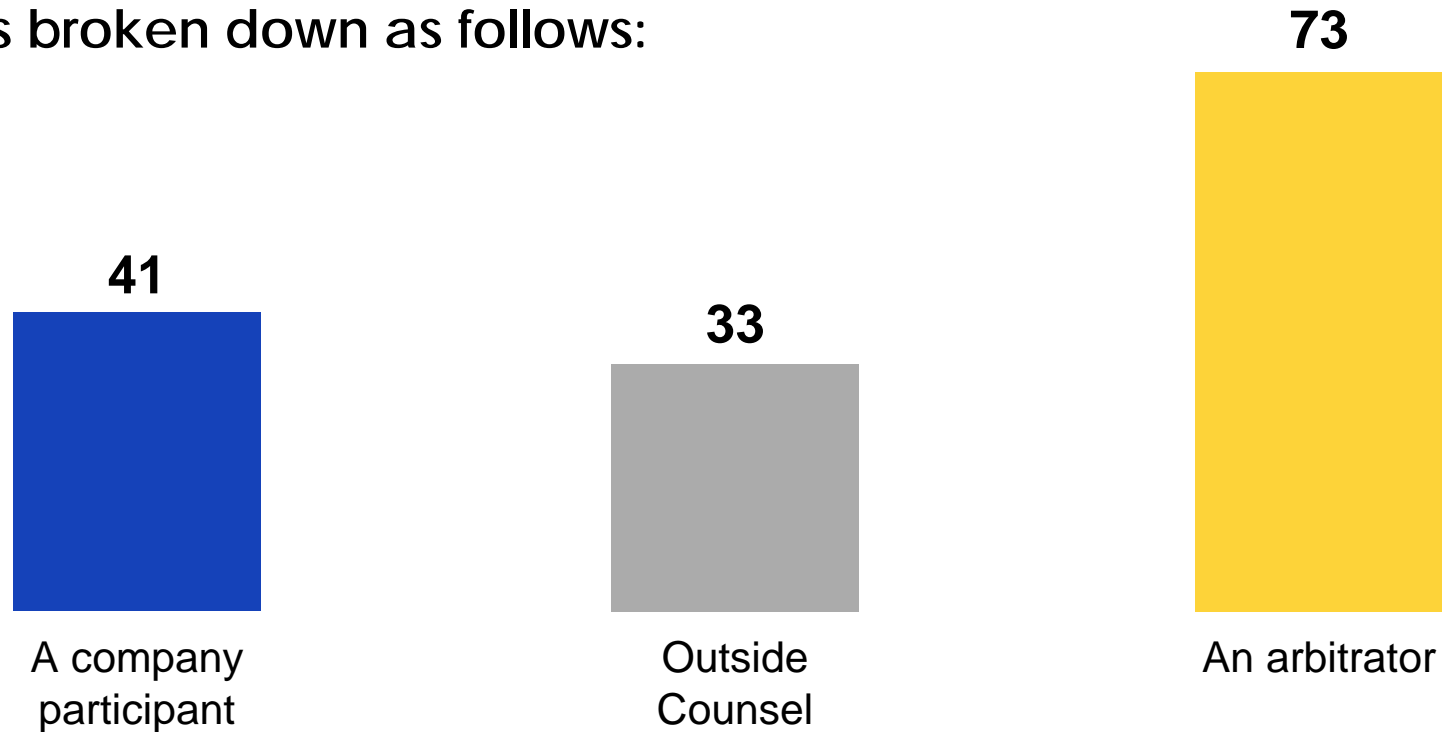
Susan Mack *Arbitrator*

Neal Moglin *Foley & Lardner LLP*

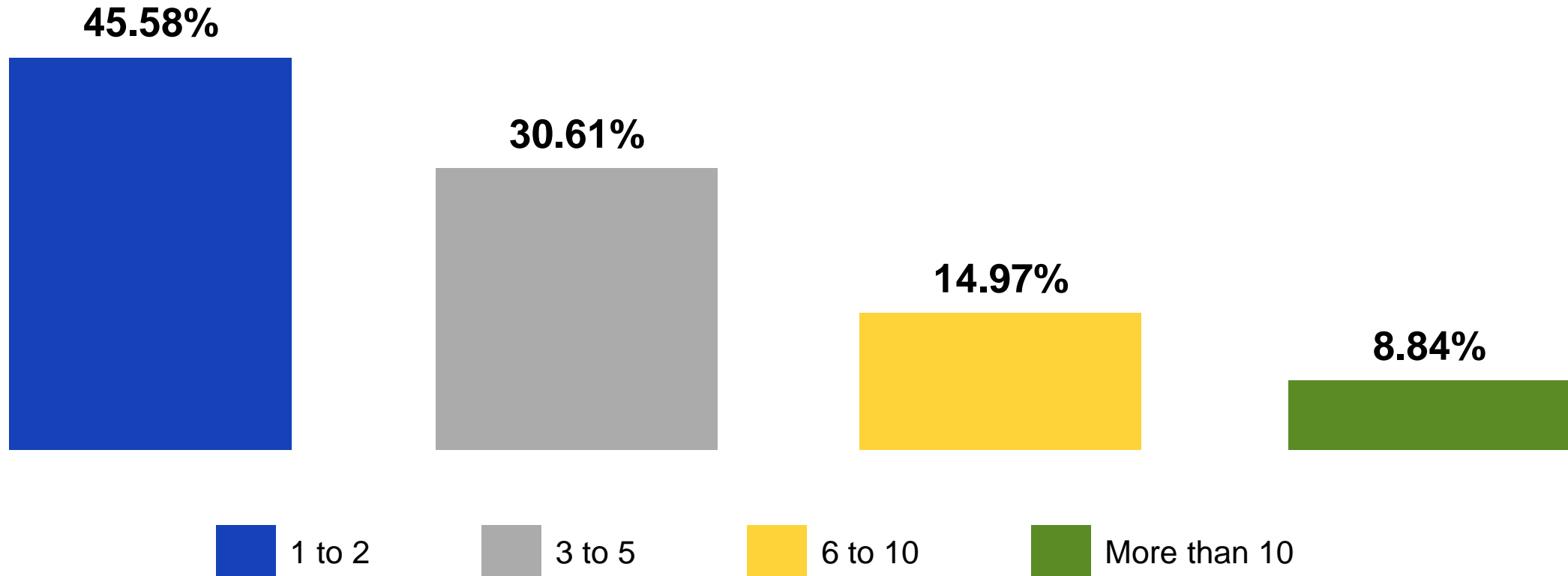


Q1: What is your primary role with respect to arbitrations?

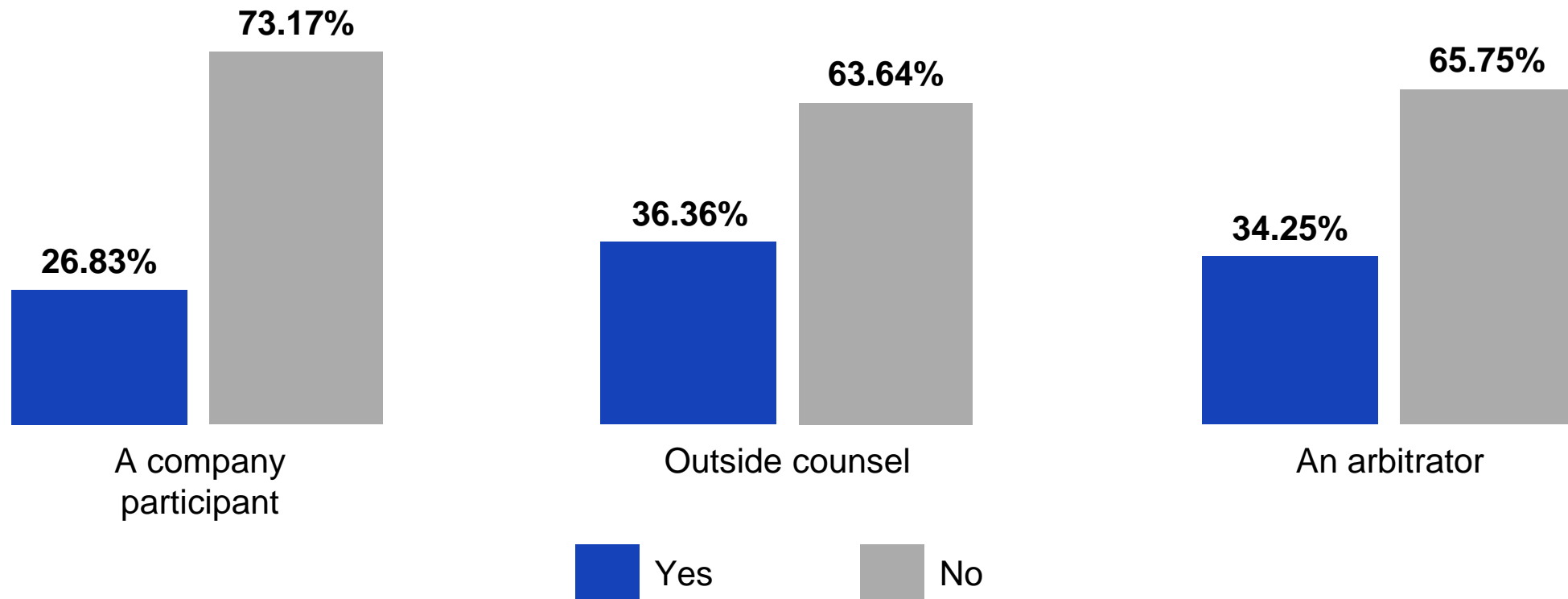
147 Respondents broken down as follows:



Q2: How many arbitrations are you involved in on average in a year?



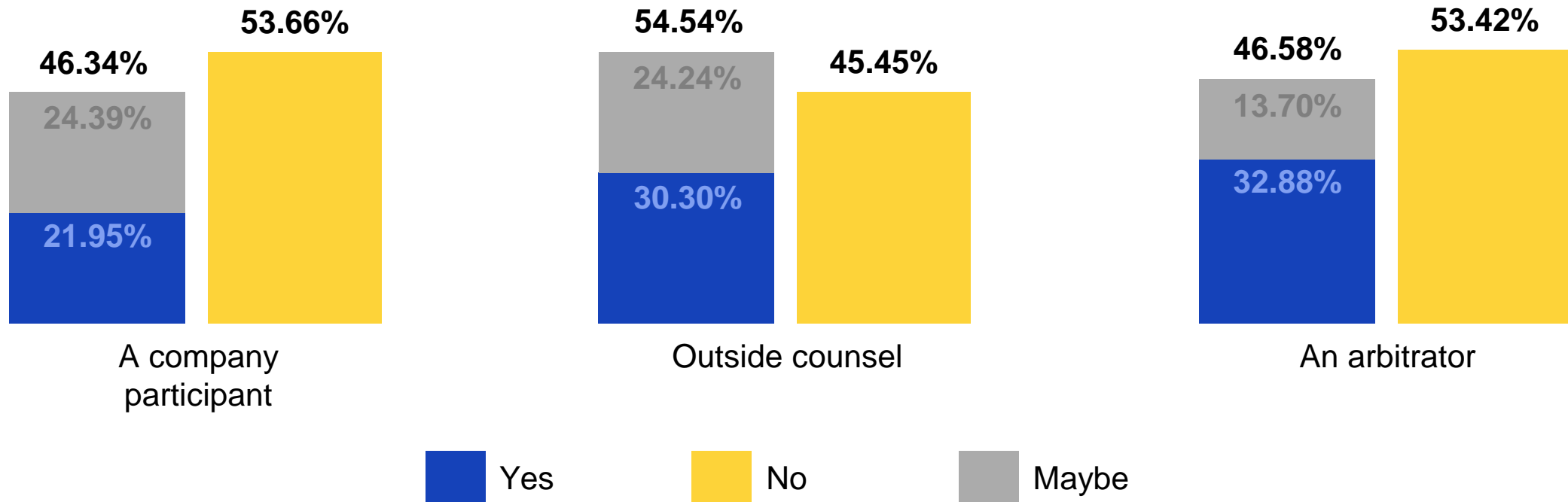
Q4: Have you been involved in any situations where you have sought, or wished to seek, guidance on the Code of Conduct?



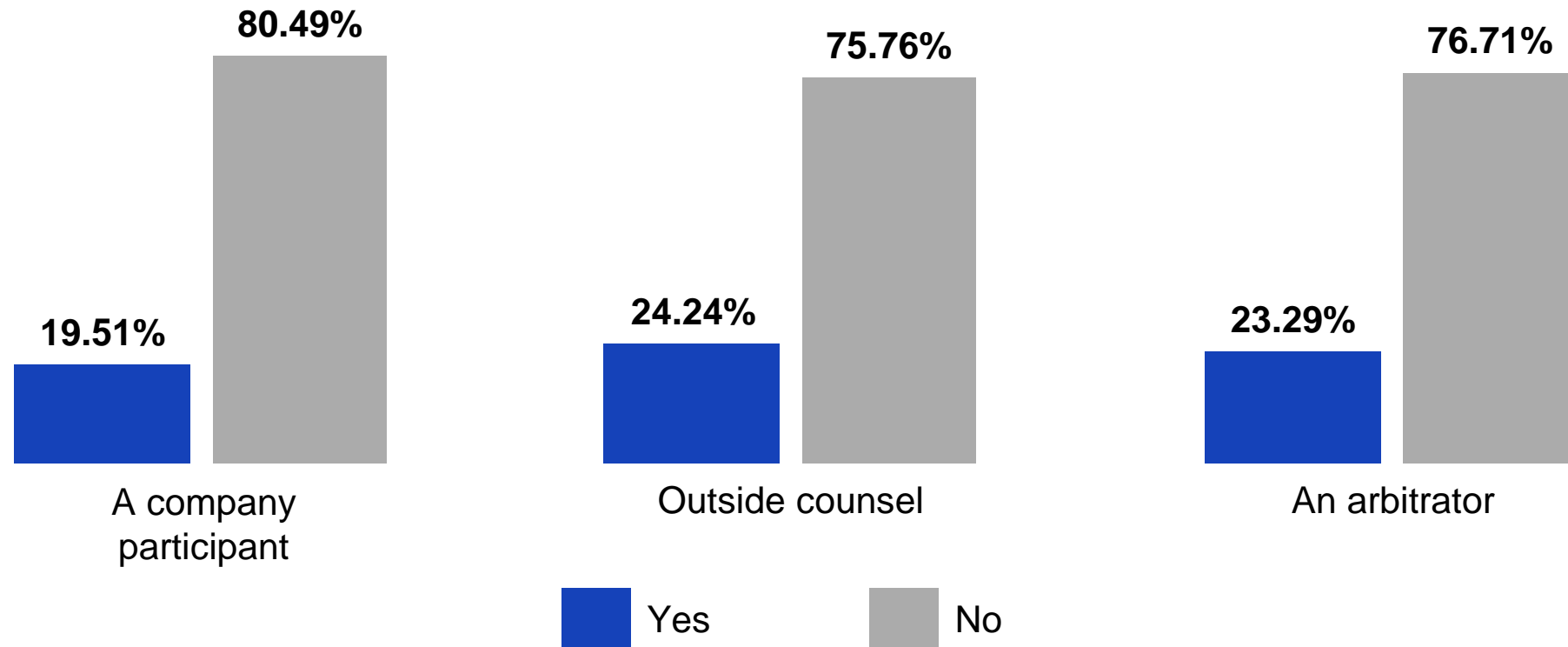
Respondents report consulting (or wanting to consult) the Code to resolve questions about:

- Panel qualifications/conflicts
- Exclusion of party arbitrator from deliberations/communications
- Breaches of *ex parte* communication ban
- Breaches of panel confidentiality
- Breaches of confidentiality regarding related or similar matters
- Breaches of decorum/name calling

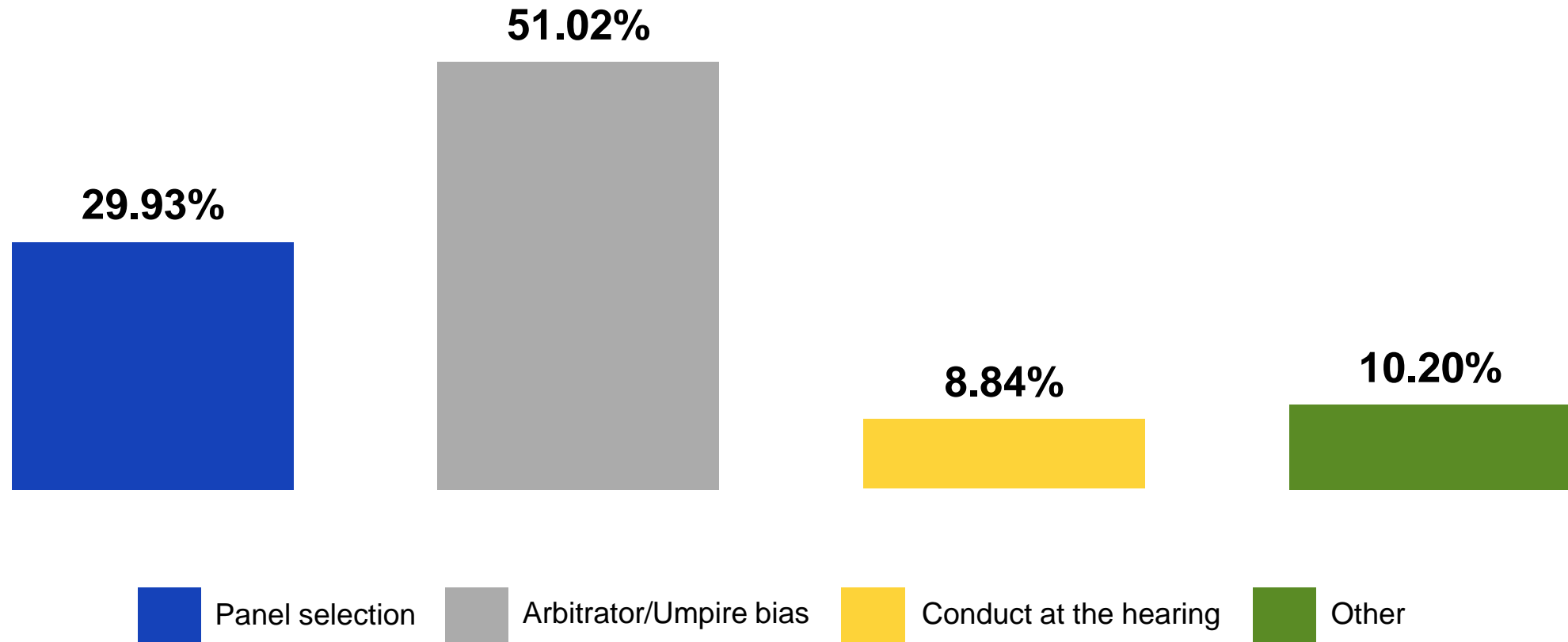
Q6: Have you been involved in any situations where you believe an arbitrator has violated the Code of Conduct?



Q8: Have you been involved in any situations where you believe a party, or its counsel, has placed an arbitrator in a position where the arbitrator is unable to sit or is otherwise at risk of contravening the Code of Conduct?



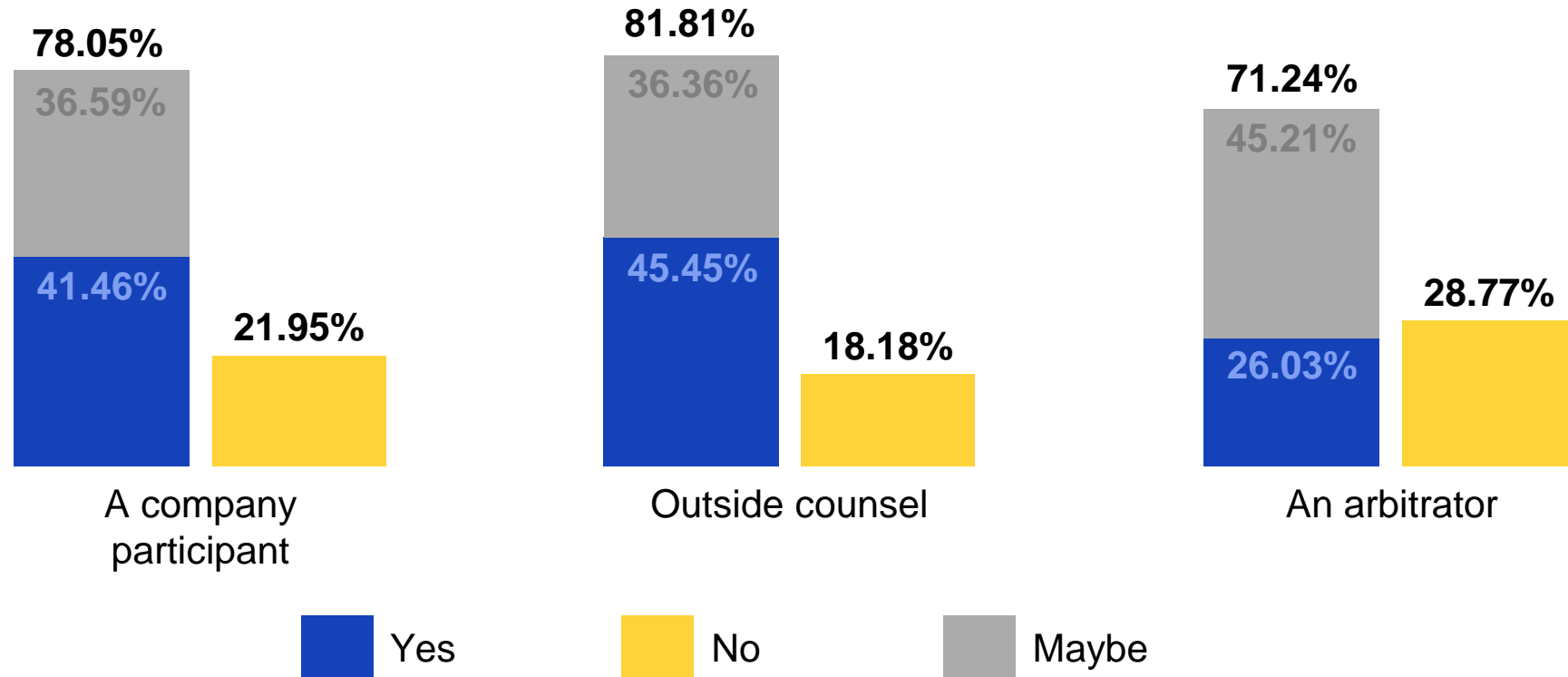
Q11: What are the biggest ethical dilemmas facing ARIAS·U.S.?



Reported examples of ethical breaches

- Gamesmanship relating to Panel selection/composition including
 - Improper contact of potential umpire candidates
 - Baselessly pressuring Panel members to recuse themselves/resign from Panel
 - Encouraging or forcing one's own party arbitrator to resign during arbitration
- Failure to disclose potentially disqualifying relationships
- Prohibited *ex parte* communications
- Exclusion of party arbitrator from deliberations
- Inclusion by Panel member of evidence/facts not placed in the record by the parties—sometimes from other confidential proceedings
- Bullying/intimidation/threats made to arbitrators by counsel, parties, and co-panelists
- Disclosure of confidential Panel communications

Q10: Should ARIAS·U.S. establish a formal ethical grievance and sanctioning body and procedure?



Responses Favoring Consideration of Enforcement Mechanism

Outside Counsel

“There are perceptions among clients that some arbitrators may be biased or are acting in their own best interests...ARIAS would be wise to be proactive on this front.”

Company Representative

“I find it weird that we don’t already have a method in place for dealing with grievances.”

“There needs to be teeth behind the rules. At a minimum, arbitrators who fail to follow the rules should be suspended and ultimately, depending on their conduct, removed from the ARIAS Panel of Certified Arbitrators. Other sanctions could also be appropriate.”

“If it could be confidential and/or anonymous that would be helpful.”

Responses Favoring Consideration of Enforcement Mechanism

Arbitrator/Umpire

“Most organizations have an ethics committee... why else adopt a code of conduct?”

“Bringing some of the shenanigans into the light will help deter companies from wanting to be associated with the less than reputable arbitrators who are out there.”

“Familiarity” within the community “may encourage unethical behavior, especially without any formal oversight or enforcement.”

“Many arbitrators want to function in the manner in which ARIAS US expects/requires but not all can withstand” the “pressured expectations” placed on them by counsel and the appointing parties.

Responses Opposing Consideration of Enforcement Mechanism

Outside Counsel

“I am not sure this is an area ARIAS should be wading into.”

“It would be nice to have a process of getting advisory opinions, but I worry that a formal governing board would be potentially weaponized by counsel.”

Company Representative

“I am not in favor of establishing an ARIAS sanctions board because there is a potential of serious misuse of it by parties and the practical difficulties of creating a process that is perceived...to be reasonably fair and effective are too great.”

“I am concerned” about tactical weaponization. “I am also concerned that ethics board members would hesitate to sanction more powerful players in the industry while making examples out of easier targets.”

Responses Opposing Consideration of Enforcement Mechanism

Arbitrator/Umpire

“An enforcement procedure is likely to make arbitration even more expensive, time consuming and bitter.”

“While creating a formal grievance and sanction process is a commendable effort, it is quite difficult to develop and enforce.”

“Difficult topic. Tread carefully.”

“A guidance body rather than a sanctioning one seems preferable, with sanctioning only following judicial determination of malfeasance.”



PANEL DISCUSSION

Arbitrator Responses- *Ex Parte* Violations

Arbitrators have engaged in prohibited *ex parte* communications with the counsel/parties who appointed them (including during a hearing).

Please note that this issue was also raised by counsel, who discerned a prohibited ex parte exchange between an arbitrator and umpire by reviewing the umpire's bill.

Arbitrator Responses-Umpire Deficiencies

Umpires have voted in “lock step” with the arbitrators/parties who they believed were responsible for their appointment.

Umpires have failed to allow all panel members to address objections fairly.

Arbitrator Responses-Confidentiality and Evidentiary Violations

Arbitrators have disclosed confidential panel deliberations to the counsel/parties who appointed them.

Arbitrators have disclosed confidential panel deliberations in the context of filing dissents.

Panel members have imported evidence/results of factual investigations outside the record into panel deliberations (including materials from other confidential arbitrations).

The Role of Counsel – Comment 1

A respondent reported that in one case, a party appointed a former employee to serve as an arbitrator under a clause prohibiting that behavior. The party refused to appoint a replacement and ***the arbitrator refused to step down, deferring to appointing counsel's aggressive argument that the arbitrator had not been an employee*** during the specific time frame at issue in dispute. (emphasis added).

The Role of Counsel – Comment 2

One respondent reported that a party arbitrator's written panel communications changed after the close of the *ex parte* communication window. Specifically, the communications became "upgraded" both stylistically and substantively, prompting questions as to whether opposing counsel had begun ghost writing those communications.

**SUMMARY OF RESPONSES
TO ARIAS ETHICS SURVEY QUESTIONS 5, 7 AND 9**

Broken Down by Category of Respondent

QUESTION 5:

Under what situations have you sought (or did you wish to seek) guidance under the ARIAS Code of Conduct?

OUTSIDE COUNSEL RESPONSES

How to deal with umpire excluding my client's party arbitrator from deliberations?

Whether an umpire/arbitrator was required to reject appointment/recuse him/herself?

Whether it would be appropriate to nominate a particular individual for umpire based on specific facts?

Discussions with original drafters regarding why certain rules operate as they do.

How to deal with aggressive ex parte communications from opposing party's arbitrator to umpire—revealed by reviewing umpire bill?

How to deal with opposing counsel violating/ignoring panel orders for the express purpose of placing previously excluded evidence in front of panel (i.e., what do you do when the sanctions a Panel can impose are insufficient to undue the harm)?

ARBITRATOR/UMPIRE RESPONSES

Whether to withdraw from service?

How to deal with misconduct by a co-arbitrator including breaches of decorum/name calling and behavior demonstrating a clear lack of objectivity?

How to deal with an arbitrator's breach of confidentiality regarding panel communications (including via a dissent filed by that arbitrator)?

How to deal with a co-arbitrator advising opposing counsel of arguments/strategies that had been successful in a prior confidential arbitration involving the same contract but involving different counsel?

How to deal with outside counsel/parties steering new assignments to a sitting umpire?

How to deal with requests to resign based upon prior exposure to a witness in another case?

COMPANY REPRESENTATIVE RESPONSES

How to deal with an arbitrator's representation of a party in several arbitrations, all arising out of the same occurrence/contracts/facts and specifically the potential that the arbitrator will be exposed to different facts/evidence in one case that will not be available to his party's opponent in other cases or to his party's counsel to the extent counsel is different in some of the cases?

How to deal with arbitrator misconduct during deliberations including yelling, foul language and other forms of intimidation

How to deal with the fact that some umpire candidates with clear conflicts submit questionnaires (as opposed to simply declining to do so) as this forces a party to effectively waste a strike?

QUESTION 7

Generally describe situations in which you believe arbitrators or umpires violated the ARIAS Code of Conduct.

OUTSIDE COUNSEL RESPONSES

A respondent reported that in one case, a party appointed a former employee to serve as an arbitrator under a clause prohibiting that behavior. The party refused to appoint a replacement and the arbitrator refused to step down, deferring to appointing counsel's aggressive argument that the arbitrator had not been an employee during the specific time frame at issue in dispute.

Ethical lapses reported by more than one respondent include the following:

Panel members failed to adequately disclose prior involvements in cases where issues in dispute were "similar."

Arbitrators engaged in *ex parte* merits discussions with umpires without involving their counterparty arbitrators.

Arbitrators disclosed panel deliberations to counsel/parties who appointed them.

Arbitrators engaged in substantive, prohibited *ex parte* discussions with the counsel/parties who appointed them.

Arbitrators de facto agreed to serve as pocket votes by accepting multiple engagements involving the same parties/counsel/issues.

ARBITRATOR/UMPIRE RESPONSES

An arbitrator allowed counsel to write dissents for that arbitrator and also violated prohibitions on *ex parte* communications.

NOTE: In this matter of public record, the counsel involved was removed from the case and referred to the relevant state's bar association conduct committee for further action.

One respondent reported that a party arbitrator's written panel communications changed after the close of the *ex parte* communication window. Specifically, the communications became "upgraded" both stylistically and substantively, prompting questions as to whether opposing counsel had begun ghost writing those communications.

One respondent reported that a party arbitrator "feigned fatigue" during deliberations as a means of pressuring the umpire to reach a quick resolution to matter.

One respondent reported an instance where his/her counterparty arbitrator and the umpire "colluded" on an outcome without that respondent having an opportunity to participate in the deliberations.

One respondent reported that a party arbitrator made pointed remarks about the female gender to his opposing party arbitrator (the sole woman on the panel) during deliberations.

Ethical lapses reported by more than one respondent include the following:

Counsel have engaged in a practice akin to "swatting" whereby they have used frivolous/false claims of conflict or bias to pressure umpires to decline appointments or recuse themselves.

Arbitrators have disclosed confidential panel deliberations to the counsel/parties who appointed them.

Arbitrators have disclosed confidential panel deliberations in the context of filing dissents.

Arbitrators have engaged in prohibited *ex parte* communications with the counsel/parties who appointed them (including during a hearing).

Panel members have imported evidence/results of factual investigations from outside the record into panel deliberations (including material from other confidential arbitrations).

Arbitrators have assumed the role of advocate (beyond acting as the appointing parties' representatives to the panel).

Umpires have voted “in lock step” with the arbitrators/parties who they believed were responsible for their appointment.

Arbitrators have accepted more assignments from particular parties/counsel in a short period of time “than ethically permissible.”

Umpires have failed to allow all panel members to address objections fairly.

COMPANY REPRESENTATIVE RESPONSES

One respondent reported that an arbitrator engaged in *ex parte* communications with the counsel/party who appointed him/her during a hearing.

One respondent reported that an arbitrator attempted to engage in prohibited *ex parte* communications with the counsel/party who appointed him/her during an industry event.

Ethical lapses reported by more than one respondent include the following:

Arbitrators and umpires have refused to decline engagements where the ARIAS rules prohibited service (including instances where there was an active dispute between the umpire and one of the parties).

Arbitrators and umpires have downplayed or failed to disclose the extent of their contacts/ relationships with other panel members/counsel/parties.

Counsel and/or parties have contacted potential umpire candidates in advance of their nomination for service—either to “signal” that they would be nominated or to create grounds for “disqualifying” those persons from serving.

Arbitrators have offered testimony/evidence for the party who appointed him/her during hearing (including instances where the information in question was derived from other confidential proceedings).

QUESTION 9

Generally describe situations in which you believe a party or its counsel placed an arbitrator in a position where the arbitrator was unable to sit or was otherwise at risk of contravening the Code?

OUTSIDE COUNSEL RESPONSES

Opposing counsel/appointing party asked their party arbitrator to resign well into an arbitration.

Opposing counsel contacted umpire candidates in advance of the nomination process, ostensibly to check their availability.

After Mr. X joined a unanimous ruling against the party who appointed him in an arbitration involving similar treaties, the same book of business and the same party as a second arbitration, the appointing party refused to pay Mr. X's fees in the first matter and took other unspecified actions to cause Mr. X to resign as arbitrator in the second arbitration.

ARBITRATOR/UMPIRE RESPONSES

Opposing counsel asserted the existence of a conflict allegedly disqualifying a party arbitrator from serving. Opposing counsel's subsequent behavior regarding that petition and generally was so hostile that the party arbitrator ultimately determined he/she could not be objective anymore and withdrew for that reason.

Counsel asked a party arbitrator to review/comment on draft briefs.

After a party appointed replacement counsel in an arbitration, that counsel asked/demanded that the party's appointed arbitrator resign so replacement counsel could appoint someone with whom he/she had more of a relationship.

An arbitrator engaged in prohibited *ex parte* communications with counsel.

The counsel/party who appointed an arbitrator “personally threatened” that arbitrator if he/she did not agree to dissent to any adverse rulings.

COMPANY REPRESENTATIVE RESPONSE

One respondent reported that an arbitrator who had been appointed by one party to a concluded arbitration wherein that arbitrator was exposed to confidential information subsequently accepted an appointment in a second case involving related facts/parties from the company that had been on the other side of the concluded case. The arbitrator clearly had a conflict but refused to decline the appointment.

Multiple respondents reported instances where counsel/parties appointed arbitrators they know were conflicted (including in one instance, appointing arbitrators with connections to the companies or contracts involved in the disputes) or otherwise not qualified and then refused to withdraw the appointment.

Multiple respondents also reported instances of improper *ex parte* contact including one who stated “*ex parte* conduct occurs often during arbitration – mostly mild and irrelevant, but not always.”

QUESTION 12

Please provide any other comments with respect to ethical issues you have faced or ethical dilemmas with which you have been involved.

OUTSIDE COUNSEL COMMENTS

“It would be nice to have a process of getting advisory opinions but I worry that a formal governing board would be potentially weaponized by counsel.”

“There are perceptions among clients that some arbitrators may be biased or are acting in their own best interests. I do not generally share these concerns, but I do hear them from clients and therefore believe ARIAS would be wise to be proactive on this front.

“I am not sure this is an area ARIAS should be wading into.”

“We should consider what we can do as an organization to discourage meritless court applications to disqualify arbitrators. This adds expense and uncertainty to our dispute resolution process.”

“In my view, arbitration was never intended to provide a primary source of income to retired executives. The need to ‘earn’ repeat engagements has, in my view, destroyed the efficacy of the tripartite process.”

“Tying disinterested to financial interest in the outcome leaves room for situations where an arbitrator has no direct financial interest (and thus can serve) but is objectively invested in some other way or might have personal knowledge of relevant facts that may unfairly influence the outcome.”

“Supplemental disclosures throughout an arbitration proceeding can sometimes present thorny issues.”

ARBITRATOR/UMPIRE COMMENTS

“Most organizations have an ethics committee and procedure to help clarify non-ethical behavior consistent with the code, why else adopt a code of conduct?”

“Bringing some of the shenanigans out into the light will help deter companies from wanting to be associated with the less than reputable arbitrators who are out there.”

“Over time, the arbitrator community and counsel who participate in this community have become very familiar with one another. This familiarity may encourage unethical behavior, especially without any formal oversight or enforcement.”

“We addressed this issue many years ago in connection with the code of conduct and were unable to incorporate rules that could even be applied let alone be enforced against counsel and the parties [who are] the primary sources of pressured expectations on the arbitrators. Many arbitrators want to function in the manner in which ARIAS US expects/requires but not all can withstand these pressures.”

“While creating a formal grievance and sanction process is a commendable effort, it is quite difficult to develop and enforce.”

“Difficult topic. Tread carefully.”

“A guidance body rather than a sanctioning one seems preferable, with sanctioning only following judicial determination of malfeasance.”

“While ethics are an important issue, an enforcement procedure is likely to make arbitration even more expensive, time consuming and bitter.”

“Attorneys do things in the course of an arbitration which would be sanctioned in court. They act unethically and seem to believe there are no consequences.”

“Umpire selection remains problematic. I don’t know what the solution is frankly.”

“The UK only permits neutral panels. [Were] this the case in the US, it would reduce the gamesmanship prevalent in US reinsurance arbitrations.”

“I think there is a lot of talk about ethics, but the truth is most protagonists and counsel care more about winning than having an ethical proceeding. I do not know how to change this, but it is a problem. The only way to avoid it is to have ARIAS appoint the entire panel.”

“Limiting arbitrators’ assignments with a particular company (or law firm) would not seriously or broadly affect many arbitrators but might greatly improve the overall integrity and impartiality of the process.”

“Generally, in my experience, there has been fairly consistent adherence to the code of conduct.”

COMPANY REPRESENTATIVE COMMENTS

“I find it weird that we don’t already have a method in place for dealing with grievances.”

“There needs to be teeth behind the rules. At a minimum, arbitrators who fail to follow the rules should be suspended and ultimately, depending on their conduct, removed from the ARIAS panel of certified arbitrators. Other sanctions could also be appropriate.

“It is very risky to lodge a complaint as that arbitrator will be in future matters. If it could be confidential and/or anonymous, that would be helpful.”

“No process which relies on the choice of an umpire, or coin flip results, whose bias is usually clear can be seen to be fair and ethical.”

“Rather than vague ethical standards that are difficult to specifically enforce, it would be better to develop specific rules designed to fight against at least the appearance of bias or unethical behavior. For example, a rule that an arbitrator may only sit on one or two active arbitrations for a party at a given time. Or preventing an umpire from having more than two on going arbitrations that involve the same party appointed.”

“I am not in favor of establishing an ARIAS sanctions board because there is a potential of serious misuse of it by parties and the practical difficulties of creating a process that is perceived by parties and arbitrators to be reasonably fair and effective are too great.”

“I am concerned that a formal grievance and sanctioning board will be used as a tactical weapon by counsel and parties. I am also concerned that ethics board members would hesitate to sanction more powerful players in the industry while making an example out of easier targets. If an arbitration is fundamentally unfair due to an ethical breach, the aggrieved party should go to court and publicize it that way. Having an ARIAS process is a terrible idea.”



January 1, 2019

ARIAS•U.S. Code of Conduct

This version of the Code of Conduct was revised and became effective as of January 1, 2019, for conduct taking place after that date. It is an integration, with significant updates and amendments, of the original Guidelines and the Additional Ethics Guidelines adopted by ARIAS•U.S. in 2010. The date on the PDF version of the Code reflects subsequent amendments to the Code as approved by the Board.

Revisers note to Canon I, Comment 5

Comment 5 is intended to cover situations where the mandatory prohibitions of Comment 3 almost apply. Typically, this occurs where the candidate has a relationship described in Comment 3 with an entity that is related to a party to the current arbitration, but where the Code's definition of affiliate or party is not met. Comment 5 establishes a rebuttable presumption that a candidate will decline to serve in such situations unless the relationship is remote.

Following are three examples covered by Comment 5:

Example 1. Assume there is an entity that is related to a party to the current arbitration, although not "affiliated" as the Code of Conduct defines affiliated because the related entity owns only 49 percent (not 50.1 percent) of the party to the arbitration. Assume the same individuals manage both entities' reinsurance disputes (those of the related entity and the party to the current arbitration).

A candidate is solicited to serve as the party-appointed arbitrator in the current arbitration by the party that is 49 percent owned by the related entity, while already serving as the umpire in an arbitration involving the related entity. Under the Code of Conduct, the definition of affiliate isn't met, and Comment 3's mandatory prohibitions (here Comment 3(f)) are not triggered. Under Comment 5, the candidate must not serve in this circumstance because the relationship is not remote (49 percent ownership and the same people managing the two disputes).

Example 2. Similarly, assume a candidate currently serves as the lawyer for an entity that owns 49 percent of the party to the current arbitration. Assume the same individuals manage both entities' reinsurance disputes (those of the entity that owns 49 percent of the party to the current arbitration and the party). The candidate is solicited to serve as the party appointed arbitrator for the party that is 49 percent owned by the entity for which the candidate serves as a lawyer. Under the Code, the definition of party is not met, and Comment 3(c)'s mandatory prohibitions are not triggered. Under Comment 5, the candidate must not serve in this circumstance because the relationships are not remote.

Example 3. In a third example, assume there are two entities that are separately owned, but whose losses are entirely reinsured by the same entity. Assume also that the two separate entities' reinsurance disputes are managed by the same individuals who are employed by the



common reinsurer. A candidate is solicited by one of the two reinsured entities to serve as its party-appointed arbitrator in the current arbitration while already serving as the umpire in an arbitration involving the second of the two reinsured entities.

Under the Code, the definition of affiliate isn't met (the two reinsured entities are separately owned, even if reinsured by the same entity) and Comment 3(f)'s mandatory prohibitions are not triggered. Under Comment 5, the candidate must not serve, because the relationship is not remote (there is a common reinsurer at risk for all losses, and the same individuals are managing both disputes).

These examples are not meant to be exhaustive, but illustrative. Admittedly, Comment 5 requires candidates to exercise judgment rather than follow a black-and-white rule. Nevertheless, Comment 5 serves an important purpose: it is intended to advance the general principle that in upholding the integrity of the arbitration process, a candidate should not get too close to the edge on issues of ethics.

INTRODUCTION

ARIAS·U.S. is a not-for-profit corporation organized principally as an educational society dedicated to promoting the integrity of the arbitration process in insurance and reinsurance disputes. Through seminars and publications, ARIAS·U.S. trains knowledgeable and reputable professionals for service as panel members in industry arbitrations. The ARIAS·U.S. Board of Directors certifies as arbitrators, individual members who are qualified in accordance with criteria and procedures established by the Board.

The continued viability of arbitration to resolve industry disputes largely depends on the quality of the arbitrators, their understanding of complex issues, their experience, their good judgment and their personal and professional integrity. In order to properly serve the parties and the process, arbitrators must observe high standards of ethical conduct and must render decisions fairly. The provisions of the Code of Conduct should be construed to advance these objectives.

PURPOSE

*The purpose of the Code of Conduct is to provide guidance to arbitrators in the conduct of insurance and reinsurance arbitrations in the United States, whether conducted by a single arbitrator or a panel of arbitrators, whether or not certified by ARIAS·U.S. and regardless of how appointed. Comments accompanying the Canons explain and illustrate the meaning and purpose of each Canon. These Canons are, however, not intended to override the agreement between the parties in respect to arbitration and do not displace applicable laws or arbitration procedures. Though these Canons set forth considerations and behavioral standards only for arbitrators, **the parties and their counsel are expected to conform their own behavior to the Canons and avoid placing arbitrators in positions where they are unable to sit or are otherwise at risk of contravening the Canons.** Parties and counsel should provide prospective arbitrators and umpires with sufficient information concerning the dispute and all of its potential participants so that they may fairly consider whether to serve.*



DEFINITIONS

1. **Affiliate:** an entity whose ultimate parent owns a majority of both the entity and the party to the arbitration and whose insurance and/or reinsurance disputes, as applicable, are managed by the same individuals that manage the party's insurance and/or reinsurance disputes;
2. **Arbitrator:** a person responsible to adjudicate a dispute by way of arbitration, including the umpire on a three (or more) person panel of arbitrators;
3. **Party:** the individual or entity that is named as the petitioner or respondent in an arbitration, as well as the affiliates of the named party;
4. **Umpire:** a person chosen by the party-appointed arbitrators, by an agreed-upon procedure, or by an independent institution to serve in a neutral capacity as chair of the panel.

CANON I

INTEGRITY: Arbitrators should uphold the integrity of the arbitration process and conduct the proceedings diligently.

COMMENTS:

1. The foundation for broad industry support of arbitration is confidence in the fairness and competence of the arbitrators.
2. Arbitrators owe a duty to the parties, to the industry, and to themselves to be honest; to act in good faith; to be fair, diligent, and objective in dealing with the parties and counsel and in rendering their decisions, including procedural and interim decisions; and not to seek to advance their own interests at the expense of the parties. Arbitrators should act without being influenced by outside pressure, fear of criticism or self-interest.
3. The parties' confidence in the arbitrator's ability to render a just decision is influenced by many factors, which arbitrators must consider prior to their service. There are certain circumstances where a candidate for appointment as an arbitrator must refuse to serve:
 - a) where the candidate has a material financial interest in a party that could be substantially affected by the outcome of the proceedings;
 - b) where the candidate does not believe that he or she can render a decision based on the evidence and legal arguments presented to all members of the panel;
 - c) where the candidate currently serves as a lawyer for one of the parties (where the candidate's law firm, but not the candidate, serves as lawyer for one of the parties the



candidate may not serve as an arbitrator unless the candidate derives no income from the firm's representation of the party and there is an ethical wall established between the candidate and the firm's work for the party);

d) where the candidate is nominated for the role of umpire and is currently a consultant or expert for one of the parties;

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; or

f) where the candidate sits as an umpire in one matter and the candidate is solicited to serve as a party-appointed arbitrator or expert in a new matter by a party to the matter where the candidate sits as an umpire.

4. 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:

a) whether the candidate has a financial interest in a party;

b) whether the candidate currently serves in a non-neutral role on a panel involving a party and is now being proposed for an umpire role in an arbitration involving that party;

c) whether the candidate has previously served as a consultant (which term includes service on a mock or shadow panel) or expert for or against one of the parties;

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;

e) whether the candidate has previously served as a lawyer for either party;

f) whether the candidate has previously had any significant professional, familial or personal relationships with any of the lawyers, fact witnesses or expert witnesses involved such that it would prompt a reasonable person to doubt whether the candidate could render a just decision;

g) whether a significant percentage of the candidate's appointments as an arbitrator in the past five years have come from a party involved in the proposed matter;

h) whether a significant percentage of the candidate's appointments as an arbitrator in the past five years have come from a law firm or third-party administrator or manager involved in the proposed matter;

i) whether a significant percentage of the candidate's total revenue earned as an arbitrator, consultant or expert witness in the past five years has come from a party



involved in the proposed matter;

j) whether a significant percentage of the candidate's total revenue earned as an arbitrator, consultant or expert witness in the past five years has come from a law firm or third-party administrator or manager involved in the proposed matter; and

5. Relationship between Comments 3 and 4. If a candidate has a relationship described in Comment 3 with an entity that does not fall strictly within the scope of Comment 3, but the relationship is sufficiently significant that the principles set out in Comment 3 are clearly implicated, then in these circumstances the candidate should refuse to serve in the current arbitration, in line with the general principle that in upholding the integrity of the arbitration process arbitrators will avoid the perception of bias. If, however, the relationship described above is remote and pursuant to Comment 4, would not affect the candidate's judgment, then the candidate may choose to serve.



6. The parties to a proceeding in which an individual is sitting as an umpire or is being proposed as umpire may, by agreement reached without the involvement, knowledge, or participation of the umpire or candidate, waive any of the provisions of paragraphs 3 (c), (d), (e), or (f) above and 5. The umpire or candidate shall be informed of such agreement.

7. Consistent with the arbitrator's obligation to render a just decision, an arbitrator should consider whether accepting an appointment as a consultant or expert in a new matter by a party to the arbitration where the person sits as an arbitrator would likely affect his or her judgment in the matter where he or she sits as an arbitrator.

CANON II

FAIRNESS: Arbitrators shall conduct the dispute resolution process in a fair manner and shall serve only in those matters in which they can render a just decision. If at any time the arbitrator is unable to conduct the process fairly or render a just decision, the arbitrator should withdraw.

COMMENTS:

1. Before accepting an appointment, a person contacted to serve as an arbitrator should consider whether the identity of the parties and their counsel, or factual issues anticipated to be implicated in the matter (as well as related issues that might be relevant such as the identity of affiliates of the parties, third-party managers, intermediaries, witnesses, etc.), would impact the arbitrator's ability to render a just decision in a fair manner.

2. Arbitrators should refrain from offering any assurances, or predictions, as to how they will decide the dispute and should refrain from stating a definitive position on any particular issue. Although party-appointed arbitrators may be initially predisposed toward the position of the party who appointed them (unless prohibited by the contract), they should avoid reaching a judgment on any issues, whether procedural or substantive, until after both parties have had a full and fair opportunity to present their respective positions and the panel has fully deliberated on the issues. Arbitrators should advise the appointing party, when accepting an appointment, that they will ultimately decide issues presented in the arbitration objectively. Party-appointed arbitrators are obligated to act in good faith and with integrity and fairness, should not allow their appointment to influence their decision on any matter before them, and should make all decisions justly.

3. Party-appointed arbitrators should not offer a commitment to dissent, or to work for a compromise in the event of a disagreement with the majority's proposed award. Party-appointed arbitrators may advise the party appointing them whether they are willing to render a reasoned decision if requested.

4. After accepting an appointment, arbitrators should avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, that would likely affect their ability to render a just decision.



CANON III

COMPETENCE: Candidates for appointment as arbitrators should accurately represent their qualifications to serve.

COMMENTS:

1. Candidates should provide up-to-date information regarding their relevant training, education and experience to the appointing party (or parties if nominated or selected to serve as the umpire) to ensure that their qualifications satisfy the reasonable expectations of the party or parties.
2. Individuals who serve on arbitration panels have a responsibility to be familiar with the practices and procedures customarily used in arbitration that promote confidence in the fairness and efficiency of the process as an accessible forum to resolve industry disputes.

CANON IV

DISCLOSURE: Candidates for appointment as arbitrators should disclose any interest or relationship likely to affect their judgment. Any doubt should be resolved in favor of disclosure.

COMMENTS:

1. Before accepting an arbitration appointment, candidates for appointment as arbitrators should make a diligent effort to identify and disclose any direct or indirect financial or personal interest in the outcome of the proceeding or any existing or past financial, business, professional, family or social relationship that others could reasonably believe would be likely to affect their judgment, including any relationship with persons they are told will be arbitrators or potential witnesses. Such disclosures should include, where appropriate and known by a candidate, information related to the candidate's current employer's direct or indirect financial interest in the outcome of the proceedings or the current employer's existing or past financial or business relationship with the parties that others could reasonably believe would be likely to affect the candidate's judgment.
2. A candidate for appointment as arbitrator shall also disclose:
 - a) relevant positions taken in published works or in expert testimony;
 - b) the extent of previous appointments as an arbitrator by either party, either party's counsel or either party's third party administrator or manager; while it may be true in some circumstances that only the party technically appoints the arbitrator, the purpose of this rule is to require disclosure of the relationships between the candidate and the parties as well as the candidate and either parties' counsel or third party administrator or manager; such relationships that must be disclosed include appointments as an arbitrator where the party's counsel and/or the party's third party administrator or manager acted as counsel or third party administrator or manager for a party making the appointment; and



c) any past or present involvement with the contracts or claims at issue.

3. No later than when arbitrators first meet or communicate with both parties, arbitrators should disclose the information in paragraphs 1 and 2 above to the entire panel and all parties. When confronted with a conflict between the duty to disclose and the obligation to preserve confidentiality, an arbitrator should attempt to reconcile the two objectives by providing the substance of the information requested without identifying details, if that can be done in a manner that does not breach confidentiality and is not misleading. An arbitrator who decides that it is necessary and appropriate to withhold certain information should notify the parties of the fact and the reason that information has been withheld.

4. It is conceivable that the conflict between the duty to disclose and some other obligation, such as a commitment to keep certain information confidential, may be irreconcilable. When an arbitrator is unable to meet the ethical obligations of disclosure because of other conflicting obligations, the arbitrator should withdraw from participating in the arbitration, or, alternatively, obtain the informed consent of both parties before accepting the assignment.

5. 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 and should not withdraw at his or her own instigation absent good reason, such as serious personal or family health issues. In the event that an arbitrator is requested by all parties to withdraw, the arbitrator must do so. 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.

a) when procedures agreed upon by the parties for resolving challenges to arbitrators have been followed and require withdrawal;

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; or

c) if required by the contract or law.



6. The duty to disclose all interests and relationships is a continuing obligation throughout the proceeding. If any previously undisclosed interests or relationships described in -paragraphs 1 and 2 above are recalled or arise during the course of the arbitration, they should be disclosed immediately to all parties and the other arbitrators together with an explanation of why such disclosure was not made earlier.

CANON V

COMMUNICATION WITH THE PARTIES: Arbitrators, in communicating with the parties, should avoid impropriety or the appearance of impropriety.

COMMENTS:

1. If an agreement between the parties or applicable arbitration rules establish the manner or content of communications among arbitrators and the parties, those procedures should be followed.
2. Party-appointed arbitrators may communicate with the party who is considering appointing them about their fees and, excepting those who by contract are required to be “neutral” or the equivalent, may also communicate about the merits of the case prior to acceptance of the appointment until the date determined for the cessation of ex parte communications.
3. A party-appointed arbitrator should not review any documents that the party appointing him or her is not willing to produce to the opposition. A party-appointed arbitrator should, once all members of the Panel are selected, disclose to the other members of the Panel and the parties all documents that they have examined relating to the proceeding. Party-appointed arbitrators may consult in confidence with the party who appointed them concerning the acceptability of persons under consideration for appointment as the umpire.
4. Except as provided above, party-appointed arbitrators may only communicate with a party concerning the dispute provided all parties agree to such communications or the Panel approves such communications, and then only to the extent and for the time period that is specifically agreed upon or ordered.
5. When party-appointed arbitrators communicate in writing with a party concerning any matter as to which communication is permitted, they are not required to send copies of any such written communication to any other party or arbitrator.
6. Where communications are permitted, a party-appointed arbitrator may (a) make suggestions to the party that appointed him or her with respect to the usefulness of expert evidence or issues he or she feels are not being clearly presented; (b) make suggestions about what arguments or aspects of argument in the case to emphasize or abandon; and



(c) provide his or her impressions as to how an issue might be viewed by the Panel, but may not disclose the content or substance of communications or deliberations among the Panel members. An arbitrator should not edit briefs, interview or prepare witnesses, or preview demonstrative evidence to be used at the hearing.

7. Whenever the umpire communicates in writing with one party on subjects relating to the conduct of the arbitration or orders, the umpire should at the same time send a copy of the communication to each other arbitrator and party. Whenever the umpire receives any written communication concerning the case from one party on subjects relating to the conduct of the arbitration that has not already been sent to every other party, the umpire should promptly forward the written communication to the other arbitrators and party.

8. Except as provided above or unless otherwise provided in applicable arbitration rules or in an agreement of the parties, the umpire should not discuss a case with a single arbitrator, party or counsel in the absence of the other arbitrator, party or counsel, except in one of the following circumstances:

- a) Discussions may be had with a single arbitrator, party or counsel concerning ministerial matters such as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the umpire should promptly inform the other arbitrator, party or counsel of the discussion and should not make any final determination concerning the matter discussed before giving each arbitrator, party or counsel an opportunity to express its views.
- b) If all parties request or consent to it, such discussion may take place.
- c) If a party fails to be present at a hearing after having been given due notice, the panel may discuss the case with any party or its counsel who is present and the arbitration may proceed.

CANON VI

CONFIDENTIALITY: Arbitrators should be faithful to the relationship of trust and confidentiality inherent in their position.

COMMENTS:

1. Arbitrators are in a relationship of trust with the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain a personal advantage or advantage for others, or to affect adversely the interest of another.
2. Unless otherwise agreed by the parties, or required or allowed by applicable rules or law, arbitrators should keep confidential all matters relating to the arbitration proceedings and decision.



3. Arbitrators shall not inform anyone of an arbitration decision, whether interim or final, in advance of the time it is given to all parties, or assist a party in post-arbitral proceedings, except as is required by law. An arbitrator shall not disclose contents of the deliberations of the arbitrators or other communications among or between the arbitrators. Notwithstanding the previous sentence, an arbitrator may put such deliberations or communications on the record in the proceedings (whether as a dissent or in a communication to all parties and panel members) to the extent (but only to the extent) reasonably necessary to expose serious wrongdoing on the part of one or more panel members, including actions that are contemplated by Section 10(a) of the Federal Arbitration Act.

4. Unless otherwise agreed by the parties or by applicable rules, arbitrators are not obligated to return or retain notes taken during the arbitration. Notes, records and recollections of arbitrators are confidential and shall not be disclosed to the parties, the public, or anyone else, unless (1) all parties and the panel agree to such disclosure, or (2) a disclosure is required by law.

CANON VII

ADVANCING THE ARBITRAL PROCESS: Arbitrators shall exert every reasonable effort to expedite the process and to promptly issue procedural communications, interim rulings, and written awards.

COMMENTS:

1. When the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrators to comply with such procedures or rules unless the parties agree otherwise.

2. Individuals should only accept arbitration appointments if they are prepared to commit the time necessary to conduct the arbitration process promptly.

3. Arbitrators should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

4. Arbitrators should be patient and courteous to the parties, to their lawyers and to the witnesses, and should encourage (and, if necessary, order) similar conduct of all participants in the proceedings.

5. Arbitrators may question fact witnesses or experts during the hearing for explanation and clarification to help them understand and assess the testimony; however, arbitrators should refrain from assuming an advocacy role and should avoid interrupting counsel's examination unless clarification is essential at the time.

CANON VIII



JUST DECISIONS: Arbitrators should make decisions justly, exercise independent judgment and not permit outside pressure to affect decisions.

COMMENTS:

1. When an arbitrator’s authority is derived from an agreement between the parties, arbitrators should neither exceed that authority nor do less than is required to exercise that authority completely.
2. Arbitrators should, after careful review, analysis and deliberation with the other members of the panel, fairly and justly decide all issues submitted for determination. Arbitrators should decide no other issues.
3. Arbitrators should not delegate the duty to decide to any other person. Arbitrators may, however, use a clerk or assistant to perform legal research or to assist in reviewing the record.
4. In the event that all parties agree upon a settlement of issues in dispute and request arbitrators to embody that agreement in an award, they may do so, but are not required to do so, unless satisfied with the propriety of the terms of settlement. Whenever arbitrators embody a settlement by the parties in an award, they should state in the award that it is based on an agreement of the parties.

CANON IX

ADVERTISING: Arbitrators shall be truthful in advertising their services and availability to accept arbitration appointments.

COMMENTS:

1. It is inconsistent with the integrity of the arbitration process for persons to solicit a particular appointment for themselves. However, a person may indicate a general willingness to serve as an arbitrator.
2. Arbitrators shall make only accurate and truthful statements about their skills or qualifications. A prospective arbitrator shall not promise results.
3. In an advertisement or other communication to the public, an individual who is an ARIAS·U.S. certified arbitrator or umpire may use the phrase “ARIAS·U.S. Certified Arbitrator (or Umpire as the case may be)” or “certified by ARIAS·U.S. as an arbitrator (or umpire as the case may be)” or similar phraseology.

CANON X



FEES: Prospective arbitrators shall fully disclose and explain the basis of compensation, fees and charges to the appointing party or to both parties if chosen to serve as the umpire.

COMMENTS:

1. Information about fees should be addressed when an appointment is being considered. The better practice is to confirm the fee arrangement in writing at the time an arbitration appointment is accepted.
2. Arbitrators shall not enter into a fee agreement that is contingent upon the outcome of the arbitration process. Arbitrators shall not give or receive any commission, rebate or similar remuneration for referring a person for alternative dispute resolution services.

ARIAS Spring 2024 Conference

Ethics Presentation- Ground Rules

Larry Greengrass



These Ground Rules for arbitrations would be incorporated into a set of arbitration procedures in one of three ways:

1. Mandatory application to all prospective arbitrators in an arbitration.
2. Mandatory application solely to prospective umpire candidates.
3. As an option for parties to agree to if they are so inclined, as to 1 or 2 above.

After review of the candidates disclosures, the parties agree that under the following circumstances, the candidate may not serve in this arbitration. (Note that references to the "party" include affiliates.)

1. A candidate is currently serving as either an expert witness or party-appointed arbitrator for either party or for either counsel.
2. A candidate currently represents or has represented either party as counsel within the last five (5) years.
3. A candidate is or has been an officer or employee of either party or affiliated with either counsel within the last 5 years.
4. A candidate has been a party-appointed arbitrator or expert witness (or combination thereof) for or on behalf of either party [or counsel?] on three (3) or more prior occasions within the past five (5) years. Arbitrations which did not proceed after the Organizational Meeting shall not be counted.
5. A candidate states that he/she is unwilling to abide by the ARIAS-U.S. Code of Conduct.

In the event of any conflict between these Ground Rules and any other section of the ARIAS Code, these Ground Rules shall apply.

