the process will be final and binding by the way they resolve the dispute and write the opinion.

The parties do not demand much of an arbitrator. At the 1982 meeting of the National Academy of Arbitrators, union representative Sam Camens concisely explained what a union seeks from the arbitrator, and his words apply equally well to the desires of management:

> What we are looking for is a decision that is factually and contractually sound, supported by an opinion that is understandable, that supports the decision, and that hopefully improves—but definitely does not worsen—the existing company-union, employer-employee relationships.[44]

Every arbitrator owes that much to the parties.

Craftsmanship is a fundamental aspect of the arbitrator's job. Poor decision making and sloppy opinion writing ill serve the parties. By following these simple guidelines—adhere to the contract, answer all questions posed by the parties and only those questions, address the parties' arguments, reason to a result, and draft an organized and clear opinion—the arbitrator can resolve the case the way the parties expected. Then and only then will the arbitrator's opinion be truly final and binding.

Comment—

ALEX ELSON*

I respond to this excellent paper in two ways. First, I make a few suggestions on how to reduce the length of opinions. Second, and more important, I want to deal with the general problem of arbitrator incompetence. Here are a few practical suggestions on how to cut the length of the opinion:

First, in most cases no purpose is served in copying the parties' contract at length. The parties are better acquainted with it than are arbitrators and have copies in their possession. Usually the dispute centers on one or two provisions of the agreement, and these provisions can be set out separately or in the dicussion

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[44]Camens, *The Art of Opinion Writing*, in Arbitration 1982: Conduct of the Hearing, Proceedings of the 35th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1983), at 81.

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portion of the opinion. Of course, all provisions relied on by the parties should be included.

Second, I know it is customary to have a separate section setting forth the position of the parties. But I see little purpose; the result is redundancy. Inevitably we have to deal with the positions of the parties in the discussion. It should be sufficient to consider the contentions of the losing party in the discussion portion of the opinion. I have found in some cases that the post-hearing briefs omit some points made in the opening statements or during the course of the hearing. Obviously, these points need not be discussed; they have been abandoned. I question the admonition that apparently frivolous and make-weight arguments should be addressed. Generally, it should be sufficient to refer to these arguments and simply state that they are without merit.

Finally, I make a minor suggestion on style. Opinions are more likely to be simple if the arbitrator uses the first person pronoun. Identifying the arbitrator throughout the opinion as "the arbitrator" is, I believe, somewhat stiff and pompous. If a Justice of the Supreme Court uses the first person pronoun, we arbitrators should not shun this practice.

I turn to the second part of my comments. The arbitrator's primary function and responsibility—to write a final and binding award limited to the issues submitted by the parties that is clear, concise, and understandable—has been the subject of numerous papers and discussions over the years within the Academy. This concern for competence was set forth in last year's Report of the Academy's Special Committee on Professionalism:

> as we read arbitration awards from day to day, we find ourselves becoming increasingly concerned over their current level of quality. Opinions are often much too long and poorly written. Arbitrators too often base their rulings on principles taken, not from the parties' agreements, problems or needs, but from some treatise on arbitration or from published awards dealing with other parties, other agreements and other problems. Theoretical principles are too often imposed on the parties, without regard to considerations of practicability or justice. Collective bargaining realities become obscured and play an insufficient role in the reasoning process. Self-restraint is often ignored and awards attempt to decide far more than need be decided. Of course, these shortcomings have always been with us. But the Committee sees evidence that the prevalence of this kind of opinion-writing and decision-making has increased in recent years.[1]

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[1]Seward, *Report of the Special Committee on Professionalism*, in Arbitration 1987: The Academy at Forty, Proceedings of the 40th Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1988), at 223.

At this point a caveat is in order. The Special Committee stated that its conclusions were impressionistic. There are, according to the first definitive study of the arbitration profession, 3,669 arbitrators in North America.[2] There has been no empirical study of competence of professional arbitrators. We should be slow in reaching conclusions on this subject due to the limitations of secondary sources, particularly published decisions which form only a small fraction of the product of arbitrators.

Until I have been presented with evidence to the contrary, I believe the vast majority of arbitrators are competent. The crux of my comments today is that whatever the size of the problem of incompetence, we must as a profession do what we can to eliminate it. An important ethical problem is involved.

The Committee on Professionalism considered various methods of dealing with the issue of incompetence, but its sole recommendation was more and better training and education. No doubt this is desirable. At this late date, after decades of arbitration experience and development, do we have to tell arbitrators, for example, that they must follow the contract?

More is required than better training and education. When we arbitrators undertake to hear a case, there is an implicit representation that we have the requisite skill and ability to carry it through. This representation stems from holding ourselves out as members of the arbitration profession. A prime characteristic of a profession is that its members are presumed to have the necessary education and training to perform competently.[3] The arbitrator's undertaking gives rise to an ethical obligation to perform competently.

The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes includes "general competence in labor relations matters" as one of the essential personal qualifications for an arbitrator (1.A.1., par 11). The Code states that an arbitrator must demonstrate the ability to exercise all essential personal qualifications "faithfully and with good judgment." (1.A.1., par. 12).

The Code equates acceptability with all requisite qualifications including competence. Thus it states:

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[2]Bognanno and Smith, *The Demographic and Professional Characteristics of Arbitrators in North America,* in Chapter 10 of this volume, Table 1.

[3]Greenwood, *The Elements of Professionalization,* in Professionalization, eds. Volmer and Millsed (1966), 12; Moore, The Professions: Roles and Rules (New York: Russell Sage, 1970), 13. *See also* Seward, *supra* note 1, at 222–224.

> Selection by mutual agreement of the parties or direct designation by an administrative agency are the effective methods of appraisal of this combination of an individual's potential and performance, rather than the fact of placement on a roster of an administrative agency or membership in a professional association of arbitrators. (1.A.1.a.)

The Code requires arbitrators to recognize their own limitations and provides that "an arbitrator must decline appointment, withdraw, or request technical assistance when he or she decides that a case is beyond his or her competence." (1.B.1.) Illustrations include some types of incentives, work standards, job evaluation, welfare programs, pensions or insurance cases, and arbitration of contract terms.

Other Code provisions which bear on competence are Sections 2.J. (relating to avoidance of delay) and 2.E.1., which provides that "an arbitrator must observe faithfully both the limitations and inclusions of the jurisdiction conferred by an agreement or other submission under which he or she serves." Clearly understanding and abiding by the scope of jurisdiction is fundamental to competent performance.

Finally, Section 6.C. of the Code deals with the writing of opinions and awards. It provides: "The award should be definite, certain, and as concise as possible." The factors arbitrators must consider are set forth as follows:

> desirability of brevity, consistent with the nature of the case and any expressed desires of the parties; need to use a style and form that is understandable to responsible representatives of the parties, to the grievant and supervisors, and to others in the collective bargaining relationship; necessity of meeting the significant issues; forthrightness to an extent not harmful to the relationship of the parties; and avoidance of gratuitous advice or discourse not essential to disposition of the issues.

All of these factors bear on competence. Despite the foregoing provisions, the Code does not specifically define competence or identify incompetent performance or absence of competence as unprofessional behavior.

Professions have generally been slow in dealing with the issue of competence, in large part because of the absence of any generally accepted standards of professional competence. The manner in which the legal profession has dealt with competency is of interest.

Competence, as a professional responsibility, was not expressly recognized in Codes of Ethics for lawyers in the United

States until the adoption of the Code of Professional Responsibility by the American Bar Association in 1969.[4] The 1969 Code did not define competence. The Code contained three admonitions: (1) not to handle a legal matter beyond the competence of the lawyer, unless associated with a lawyer competent to handle it, (2) not to handle a legal matter without adequate preparation, and (3) not to neglect legal matters entrusted to the lawyer.

There was little or no implementation of the standard of competence under the Code. This failure may have been due in large measure to the absence of any generally recognized standards of competence. Lacking generally accepted guidelines, there was hesitance to label one lawyer as "competent" and another as "incompetent." Instead, most discipline was limited to more clearly understood standards of conduct, such as gross neglect or other behavior bordering on clearly tortious or criminal conduct.

The Code of Professional Responsibility was replaced in 1982 by the Model Rules of Professional Conduct. Model Rule 1.1., adopted in more than 20 states, unequivocally treats incompetent performance as unethical conduct. That rule reads:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Each of the criteria, "legal knowledge and skill, thoroughness and preparation" is discussed in detail in the comment to the Rule. Since the adoption of the Model Rules, the number of complaints charging incompetence have increased.

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[4]ABA Code of Professional Responsibility (DR 6-101) provides: "(a) A lawyer shall not: (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it. (2) Handle a legal matter without preparation adequate in the circumstances. (3) Neglect a legal matter entrusted to him."

As late as 1963, the West Virginia State Bar Committee on Legal Ethics went so far as to hold that competence or ability of attorneys was not within its purview. *See* Maru, Digest of Bar Association Ethics Opinions (1970), 516. Until recently the Formal Opinions of the ABA Committee on Ethics and Professional Responsibility and similar committees were generally silent on the subject. Disciplinary committees until recently have dealt inadequately with complaints of neglect, many of which reflect shoddy performance. *See* Gaudineer, *Ethics and Malpractice*, 26 Drake L. Rev. 88, 96 (1977) and Marks and Cathcart, *Discipline Within the Legal Profession: Is It Self Regulation?*, 1974 U. Ill. L. F. 193, 216; Steele and Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 A.B.F. Res. J. 919. The disciplinary system as of 1974 was described as "a randomized and partial replication of the criminal justice system. It lends itself nicely to the issues of moral fitness and deviance. But it does not easily or usually apply to issues of professional performance." Marks and Cathcart, *supra*, at 235.

Our Special Committee on Professionalism expressed serious reservations as to whether acceptability was tantamount to competency. Both the Code and the admission procedures of the Academy are based on the assumption that acceptability certifies competency. The Special Committee concluded:

> [Acceptability as a] criterion for admission is more quantitative than qualitative [and the] Membership Committee defers in effect to the parties' judgment . . . . What this means is that the parties, not the Academy, set the standards for the profession.
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> . . . the parties' main concern is results. They frequently pay little attention to such matters as art, method and theory. Because of these realities, competence as a criterion for admission is secondary to acceptability. Or, to put the proposition more politely, everyone assumes competence on the basis of acceptability. We question that assumption and we find that the Academy has done relatively little to reverse the equation, to make competence the prime consideration.[5]

After considering various options, the Special Committee, as I have already stated, made only one recommendation—more education and training. I do not disparage this conclusion, with which no reasonable person can disagree, but I do not think we should stop there. I have little confidence that providing more educational opportunities is going to meet fully the ethical problem. There is little likelihood that the incompetent arbitrator who goes on year after year receiving appointments will be motivated to change.

There is strength to the position taken by many that market considerations should prevail—that the parties should be free to appoint anyone, including incompetent arbitrators. But it does not follow that we should tolerate incompetent arbitrators going about their business with the Academy's seal of approval. We can do more. I do not propose to blueprint a plan of action. This deserves more extended consideration by a representative group of the Academy. The following suggestions, I believe, deserve consideration:

1. Amend the Code of Professional Responsibility to include a definition of competency which is clear, specific, and unambiguous, which unequivocally declares that incompetent performance is unprofessional and unethical.

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[5]Seward, *supra* note 1, at 225.

2. Invite the parties to submit complaints concerning competence to the Committee on Professional Responsibility and Grievances.

3. Routinely review published court decisions which have set aside or refused to enforce awards. The Committee on Law and Legislation routinely reviews the published decisions. In some cases it may be apparent that the arbitrator was incompetent. Such cases should be referred to the Committee on Professional Responsibility and Grievances.

If the Academy is to live up to one of its constitutionally stated purposes—"To establish and foster the highest standards of . . . competence . . . among those engaged in the arbitration of labor-management disputes on a professional basis . . .,"[6] we should make this extra effort to raise competency standards.

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[6]*Constitution and By-Laws*, in Arbitration 1987: The Academy at Forty, *supra*, note 1, at 205.