Appendix B

REPORT OF THE COMMITTEE TO CONSIDER THE ACADEMY'S ROLE, IF ANY, WITH REGARD TO ALTERNATIVE LABOR DISPUTE RESOLUTION PROCEDURES

I. The Committee's Charge

The Committee was jointly appointed in May 1990 by then President Elect Howard S. Block and President-Elect Nominee Anthony V. Sinicropi. In the letter confirming the appointment of the Committee members, then President-Elect Block set forth the Committee's charge as follows:

> In recent years, an increasing number of Academy members have been asked to serve in cases involving: (1) arbitration of grievances in unorganized plants; (2) mediation of grievance and interest disputes; and (3) wrongful termination. It is time, I believe, to determine whether the Academy can play a constructive role in one or more of these areas. In particular, I have in mind consideration of the practical and ethical questions confronted by our members as well as the additional training and education that might be indicated in order to broaden a labor arbitrator's basic skills in these areas.

The Committee, consisting of 12 members, was given a two-year life and, thus, it was anticipated that the Committee would report to the Board of Governors at the Atlanta meeting in May 1992. The Committee presented its report to the Board in Atlanta. Written comment on the report was received from the membership and others. The report was also discussed at the members-only meeting in Chicago in October 1992. The Committee met once more in March 1993, at which time it reviewed the comments of the members and others. This final Report, which reflects a consensus of the Committee, recommends a significantly broader role for the NAA, particularly with respect to the arbitration of employment disputes outside the context of a collective bargaining agreement.

II. Information Gathering and Deliberations

The Committee prepared a survey which was sent to all Academy members. The Committee also had available other data based on prior surveys of the NAA membership, including data provided by Mario F. Bognanno, former Chair of the Research Committee, with respect to the survey performed by that Committee for the year 1986.

Additionally, each of the Committee Members prepared a discussion paper with respect to a particular assigned subject for use by the entire Committee in its deliberations. Committee Members engaged in discussions with various Academy members, and correspondence was received from others. The Committee held six formal sessions lasting approximately 32 hours in total at which there was free and full discussion.

III. The Survey

At the Committee's organizational meeting in San Diego in May 1990, it was determined that a broad-based survey of the membership should be taken with respect to alternate dispute resolution (ADR) beyond the arbitration of labor-management disputes. The purpose was to ascertain the extent to which Academy members were, in fact, serving in cases other than the arbitration of labor-management disputes. Although the focus of the survey related to ADR work in the labor and employment field, it also inquired about the caseload of members with respect to ADR work outside the field of labor and employment. Thirteen separate categories of ADR work were identified and the survey inquired about the period January 1, 1989, through June 30, 1990. Two hundred one (201) Academy members responded. The highlights of the results of the Committee survey, compared with the more elaborate 1986 Research Committee's survey where relevant, are presented below.

A. Arbitration. With respect to employer promulgated arbitration, it is important to distinguish between arbitrations involving nonunionized employees who work at jobs subject to union organization and arbitration involving supervisory, management, or other employees not subject to union organization. The Committee's survey revealed that 28 percent of the NAA members who responded performed at least one arbitration involving nonunion employees subject to organization during the survey period, while 17 percent of the respondents performed one or more

arbitrations involving supervisory or other employees not subject to organization.

The Research Committee survey revealed that 24.5 percent of the respondents heard one or more arbitrations which "did not involve representation through a union or employee association." The 24.5 percent figure is very close to the 28 percent of NAA members who responded to the Committee's survey indicating that they had performed one or more employer promulgated arbitrations involving nonunion employees subject to organization. In his report to the Committee, Mario Bognanno referred to the category of arbitrations under consideration as "employer sponsored arbitration." However, it does not appear that the Research Committee in 1986 attempted to distinguish between arbitration cases involving employees subject to union organization and arbitration cases involving supervisory or other employees not subject to union organization.

Although the Committee's survey indicates that approximately 17 percent of the respondents engaged in arbitration of cases involving supervisory or management employees not subject to organization, these results did not establish the extent to which there may be overlap. That is, the same NAA member may have reported performing both employer promulgated arbitrations involving nonunion employees subject to organization and arbitrations involving supervisory or management employees not subject to organization. Additionally, the Committee reviewed a survey taken by NAA member Gordon Knight of the Michigan region members for 1989 which revealed that of 17 Michigan region arbitrators who returned their survey, 8 reported performing one or more discharge and discipline arbitrations involving "nonunion employees."

The Committee's survey also revealed that 19 percent of the respondents reported engaging in the arbitration of disputes involving wrongful termination or other issues arising under an implied or explicit individual employment contract during the period January 1, 1989, through June 30, 1990. Again, these figures do not establish the extent to which there is overlap. That is, an NAA member may have reported performing a wrongful termination arbitration under an individual employment contract and also have reported performing one or both of the two types of employer promulgated arbitrations described above.

Furthermore, with respect to the arbitration of agency shop representational fee fair share disputes, approximately 16 percent

of the respondents to the Committee's survey reported performing such work. Again, these figures do not account for overlap as described above.

Based on the foregoing, the Committee believes it is appropriate to conclude that perhaps as many as one in three of those NAA members who responded to our survey or that of the Research Committee have engaged in the arbitration of an employment dispute other than a traditional labor-management dispute pursuant to a collective bargaining agreement between a union and an employer. We recognize that the respondents may not be representative of the Academy membership as a whole, but nonetheless are persuaded that a substantial number of Academy members have engaged in some nontraditional labor arbitration.

B. Mediation. Approximately 28 percent of the respondents reported performing mediation of grievances between an organized bargaining unit and management, and approximately 6 percent reported mediation of grievances between nonorganized employees and management. The 1986 Research Committee survey did not specifically inquire about grievance mediation. However, in the context of labor-management mediation, that survey did ask, "In 1986, how many cases did you mediate?" The percentage of members responding affirmatively regarding one or more cases was 28.3. The Committee's survey did not inquire about the mediation of labor-management or employment disputes beyond grievances mediation.

C. ADR Outside the Labor and Employment Field. As indicated above, the Committee in its survey did inquire about the performance of arbitration and mediation of nonemployment related disputes, such as, for example, environmental or community disputes. Approximately 26 percent of the respondents reported that they had arbitrated one or more such disputes, and approximately 11 percent reported that they had mediated one or more such disputes within the one-and-one-half-year period covered by the survey.

IV. Scope of NAA Activities

A. ALDR vs. ADR. The Committee did not name itself. Instead, the name was given to the Committee by then President-Elect Block in his May 1990 letter establishing the Committee. The Committee's name refers to alternative labor dispute resolution (ALDR) and the Committee's charge refers only to labor, or more

broadly put, employment matters. Thus, the Committee began its deliberations with the assumption that its consideration of the role of the Academy, if any, beyond the arbitration of labor-management disputes would be limited to a consideration of dispute resolution within the labor and employment field.

The Committee did determine in taking its survey to inquire of member activities beyond the field of labor and employment for the purposes of gathering information regarding the overall dispute resolution activities of NAA members. The Committee recognizes that a significant number of NAA members have performed as a neutral with respect to matters outside of the labor and employment field. However, the Committee does not deem it appropriate to recommend that the Academy take any institutional role regarding such matters at this time.

B. Labor-Management Disputes. As reported above, the Committee recommends a significantly broader institutional role for the Academy with respect to employment disputes as distinguished from labor-management disputes. A basic question faced by the Committee when considering any expansion of the Academy's institutional concerns was the Academy's present authority for doing so. Article II, Section 1 of the NAA Constitution sets forth the purposes of the Academy as follows:

> To establish and foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of labor-management disputes on a professional basis. . . .

The phrase "labor-management disputes" appears in all Academy governing documents. Thus, in addition to the appearance of this phrase in Article II of the Constitution and in the title of the Code, we note the following with respect to membership. In this regard, Article III provides:

> Section 1: The Academy is a non-profit professional and honorary organization of arbitrators . . . its membership shall be composed of those who . . . agree to further the objects and purposes here set forth in accordance with this Constitution and the By-Laws of the Academy and such other persons as may from time to time be elected to membership as hereinafter provided.

Furthermore, the Statement of Policy Relative to Membership contained in the Membership Directory provides that an applicant for membership should "have substantial and current experience as an impartial arbitrator of labor-management disputes. . . ."

Finally, the phrase "labor-management disputes" appears in the policy statement adopted by the Board of Governors in connection with our Legal Representation Program and Fund. Thus, Section 1 provides:

> The program shall provide . . . for payment of costs of legal advice, assistance and retention of counsel when a member becomes involved in legal problems as a result of arbitration activity in labor-management disputes.

The Committee has concluded that the phrase "labor-management disputes" was clearly intended by the founders of the Academy to refer to disputes between management on the one hand and employees represented by a union on the other. Therefore, the term "labor" refers not to individual employees but to collective action by organized labor. Thus, we acknowledge that originally the NAA purpose was based solely on a concern with labor-management disputes. However, today, the evolving nature of the field to include employment relations and the increasing activity of our members in that arena have convinced the Committee that a broadening of our role is warranted.

Therefore, the Committee recommends a broadening of the statement of purpose contained in Article II of the NAA Constitution.

In considering various language changes, the Committee determined to recommend that Article II, Section 1 be changed by the addition of the phrase "and employment" immediately following the phrase "labor-management" in the three places where the phrase "labor-management" appears in Article II. The phrase "Labor-Management" appears a fourth time in Article II as part of the title of the Code. It is not the recommendation of the Committee that the title of the Code be changed and, therefore, where labor-management appears as part of the title of the Code of Professional Responsibility it is not recommended that the phrase "and employment" be included. In this regard, the Committee notes that the Code is a document jointly sponsored by the AAA and FMCS as well as the NAA. We do recommend, however, that if the Academy's role is to be expanded into the area of employment arbitration, then the Code should be revised to include coverage of our members performing these arbitrations.

As discussed in greater detail later in this Report, the Committee recognizes the sensitivity of both our members and the labor movement to any expansion of the Academy's role beyond the traditional one it has played in connection with collective bargain-

ing. Recognizing this sensitivity, the Committee has determined to make clear that there is no intent to abandon our basic role. By leaving in place the phrase "labor-management," our focus as an organization shall remain on collective bargaining. We merely recommend that the Academy's purposes be expanded to include employment disputes beyond the collective bargaining context. In this regard, it should be noted that the labor law section of the American Bar Association several years ago changed its name to the Labor and Employment Law Section, thereby recognizing the changing nature of labor relations. Unions continue to support their attorneys in active participation of the activities of the Labor and Employment Law Section of the American Bar Association.

C. Mediation vs. Arbitration. Just as the governing documents of the Academy presently refer to labor-management disputes as opposed to employment disputes, those documents also refer only to arbitration and do not mention mediation. While the Committee recommends greater involvement of the Academy with respect to mediation when performed by NAA members, the Committee does not recommend that the purpose statement of the Academy be expanded to include mediation. In this regard, it was the conclusion of the Committee that the Academy should remain an association of arbitrators.

V. Arbitration of Labor-Management and Employment Disputes

A. Preliminary Statement. The Committee identified several categories of arbitration beyond the traditional arbitration of labor-management disputes pursuant to a collective bargaining agreement. By far, the most common and probably the most controversial are employer promulgated arbitrations involving nonunionized employees who work at a job subject to union organization. Although there are also employer plans which provide for an arbitration system with respect to supervisory or management employees, such systems must be distinguished from those involving employees subject to organization, since only with respect to the latter is there a question of "union avoidance."

A related type of employment arbitration involves arbitration of disputes involving wrongful termination, or perhaps other issues, arising under an implied or explicit individual employment contract. These arbitrations usually involve middle to higher level management employees. Another kind of employment arbitration relates to individual employment claims arising pursuant to stat-

ute. In this regard, the Canada Labour Code was amended in 1977–1978 to include arbitration of wrongful discharge claims. Additionally, since then Montana has passed the first wrongful discharge statute in the United States providing for the arbitration of such claims. Further, in August 1991, the National Conference of Commissioners on Uniform State Laws adopted a Model Employment Termination Act which provides that an employer may not terminate the employment of an employee without good cause and provides for arbitration of wrongful termination claims.

Another category of employment arbitration relates to the use of arbitration as a tool in the settlement of employment litigation. Here, an employment dispute is already in litigation and the arbitrator is either assigned by the court or the parties on their own have agreed that the arbitrator will resolve the lawsuit. These lawsuits can, of course, involve a wide array of employment legislation such as, Title VII, ADEA, ERISA, OSHA, whistle-blower laws, drug testing and privacy laws, and numerous others.

Finally, there is the category of internal employer and internal union disputes, such as a dispute among employers in a multiemployer association or a dispute between an international union and one or more of its locals. These disputes have been with us for a considerable period of time, and the opportunity for arbitrators to become involved is so infrequent that special consideration is unnecessary at this time. However, there is one form of internal union dispute, the arbitration of agency shop representational fee fair share disputes, which are growing in number and do perhaps present certain special problems due to the nature of the parties involved. These will be discussed to some extent later in this Report.

B. Recommendations Regarding the Arbitration of Employment Disputes. At the beginning, the Committee deems it important to make clear how it views the interrelationship between the Committee's activities and the jurisdiction of various standing committees of the Academy, such as the Committee on Professional Responsibility and Grievances, the Membership Committee, and the Legal Representation Committee. The Committee views its mission as one which requires it to make an overall examination of alternative labor dispute resolution procedures beyond the traditional focus of the NAA, namely, the arbitration of labor-management disputes in the context of collective bargaining. To the extent the Committee recommends a broader role for the Academy and to the extent such recommendations affect either the Code, membership stan-

dards, or the Legal Representation Fund, the Board should seek the advice of the appropriate committee before any changes to these documents are undertaken.

1. Employer Promulgated Arbitrations. As discussed above, the evidence indicates that over the last several years, a significant number of NAA members have arbitrated disputes pursuant to an employer promulgated arbitration plan. Furthermore, the number of traditional arbitrations of labor-management disputes has been decreasing along with the declining percentage of the workforce which is organized.

Many NAA members, including some who have handled employer promulgated arbitrations, are concerned with the "union avoidance" aspect of these plans. The Committee does not dispute the conclusion of many of our members as well as commentators in the field that these plans are proliferating as union avoidance techniques. However, the National Labor Relations Act (NLRA) does not require employees to be represented by a union; rather, the purpose of that legislation is to provide employees with the right to make a decision in this regard free from coercion. It also must be recognized that an additional impetus for employer promulgated arbitration plans is the growth of wrongful discharge litigation and the resulting crumbling of the termination at will doctrine. Thus, employers establish these plans in an attempt to avoid litigation and the possible resulting damage award which may be significantly greater than would be available to a claimant pursuant to an employer promulgated arbitration plan. Further, an employer may well decide in good faith, as a part of its overall personnel policies, that it would be appropriate to provide an arbitration system for resolution of employee grievances where no such system would otherwise be available since the place of business is unorganized.

In any event, the Committee determined that, with one exception, a focus on the elusive question of employer motivation is not a promising approach to resolving the issue of what role, if any, the NAA should play as members decide whether to participate in employer sponsored arbitrations. That exception is when the employer plan violates the law.

A determination of whether these plans can be said to violate the NLRA requires a finding that the plan constitutes a labor organization as defined in section 2(5) of the Act and, if so, whether the employer dominated or interfered with such labor organization in violation of section 8(a)(2). A labor organization is defined in

broad terms in the Act, and it includes "dealing with" employers concerning grievances.

The Division of Advice of the General Counsel's Office, after reviewing various National Labor Relations Board (NLRB) and court decisions, recently determined that a charge should be dismissed because a committee consisting of employees and management personnel functioned "solely to adjudicate individual employee grievances" and, therefore, was not a labor organization within the meaning of section 2(5) because it did not "deal with" the employer (Advice Memo dated February 8, 1991, Case No. 28-CA-10505). The fact that settlement negotiations regarding the grievance were possible pursuant to the plan in this case was not considered to require a contrary result. An action has been filed in federal district court in Phoenix, Arizona, asking the court to require the NLRB General Counsel to issue a complaint in this case, but a decision on that request is still pending.

Clearly, the Academy would not wish to have any role regarding employer promulgated plans that might be considered in violation of section 8(a)(2) of the Act. Therefore, it will be necessary to monitor any developing law in this regard. However, barring a finding by the NLRB that these plans constitute a violation of the Act, it is the Committee's conclusion that the concerns that have been expressed about these employer promulgated plans are not in and of themselves sufficient reason for the Academy either to prohibit or to recommend against its members participating in any such plans.

To the contrary, we counsel the Academy to adhere to its current position of neutrality with respect to member participation in employer promulgated plans. The Academy should neither encourage nor discourage those of its members who wish to engage in such arbitration. Rather, the Academy should leave it to the individual member to make his or her own determination as to the strengths and weaknesses of a particular employer promulgated plan under which the member is invited to arbitrate, and to decide whether, under all of the circumstances, participation is appropriate.

We do recommend, however, as detailed later in this Report, that the Continuing Education Committee schedule educational seminars as an aid to our members considering such participation. We also recommend that the Code be revised so that members who decide to participate in such plans are bound by the Code's professional responsibilities standards when doing so.

The Committee also considered whether it would be appropriate to provide coverage under the Legal Representation Program for NAA members participating in employer promulgated arbitrations.

The Board of Governors, in May 1992, accepted the recommendation of the Legal Representation Committee that "NAA members should be covered by the Legal Representation Program whenever they function as a 'neutral' in a labor-management dispute, i.e., activity including rights arbitration, interest arbitration, grievance mediation, med-arb, fact finding and advisory arbitration." The Legal Representation Committee made no recommendation regarding coverage for members who participate in individual employment disputes such as employer promulgated arbitration.

Subject to one caveat, we recommend that the Legal Representation Fund coverage be extended to employer promulgated arbitration. The caveat is that we are concerned that absent the institutional restraint placed on suits against arbitrators by the presence of a union, such suits will arise out of employer promulgated arbitration (or mediation, fact finding, etc.) considerably more often than is the case in the labor-management context. If that concern is warranted, extending legal representation program coverage to employer promulgated methods of dispute resolution could strain the resources of the Fund.

This concern leads us to recommend that if the Board, after receiving the advice of the Committee on Legal Representation, does authorize extension of the Legal Representation Program to employer promulgated dispute resolution, that extension should be conditioned upon periodic review of its cost. In that way, those of our members who engage in employer promulgated arbitration will be assured of coverage as long as such coverage does not compromise the fiscal integrity of the Legal Representation Fund.

None of the foregoing with regard to the Code or the Fund is intended as an endorsement of employer promulgated arbitration, nor should it be construed as such. As previously stated, the Academy should neither encourage nor discourage those members who wish to engage in such arbitrations. Nevertheless, those who choose to participate should be bound by the Code. If they are so bound, they should also be covered by the Legal Representation Fund to the extent indicated above.

2. *Arbitration of Employment Disputes Other Than Employer Promulgated Arbitrations.* The various other types of employment

arbitrations considered by the Committee were identified and discussed in Section V.A. "Preliminary Statement," above. For the convenience of the reader, they are also listed below:

1. Wrongful termination and other issues arising under an implied or explicit individual employment contract;
2. Individual employment claims arising pursuant to statute;
3. Arbitration as a tool in the settlement of employment litigation;
4. Agency shop representational fee fair share disputes.

Fair share arbitrations raise problems distinct from the first three categories listed above and, therefore, the Committee has determined to treat fair share arbitrations separately. With respect to the first three categories, the Committee believes that it is also appropriate for them to come within the coverage of the Code and of the Legal Representation Fund, subject to the same caveat noted with regard to employer promulgated arbitration.

With respect to arbitrations of individual employment claims arising pursuant to statute, there may well be protection for the arbitrator as an agent of the state or other governmental entity involved. Thus, coverage by the Fund might well be limited to a situation where governmental protection is lacking.

With respect to fair share arbitrations, we note there is a similarity to employer promulgated arbitrations in that the arbitration system is designed by one of the parties, with the other party being an individual, in this case an employee/bargaining unit member. The AAA has developed what it titles "Rules for Impartial Determination of Union Fees," pursuant to which the AAA will appoint an arbitrator "experienced in employment relations who is willing to hear and decide such issues in accordance with applicable law and the union's internal procedures. . . ."

In *Chicago Classroom Teachers Union, Local No. 1, AFT-AFL-CIO v. Hudson,* 475 U.S. 292, 121 LRRM 2793 (1986), the Supreme Court at footnote 21 stated that ". . . an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator's selection did not represent the union's unrestricted choice." Thus, it would appear that an appointment of the arbitrator by the AAA would satisfy the Supreme Court.

The Committee recommends that the Code be amended to cover fair share arbitrations. We also recommend that NAA members performing fair share arbitrations be covered by the Legal Representation Fund and that this matter be turned over to the Legal Representation Committee for study. Moreover, the Con-

tinuing Education Committee, as detailed below, should address the unilateral aspects of fair share arbitration procedures.

VI. Mediation

The Committee identified and considered several types of mediation relating to the labor and employment field. We wish to make clear that when the Committee refers to mediation, we are referring to a separate assignment as a mediator as distinguished from a situation where a person retained as an arbitrator engages in mediation in an attempt to resolve the dispute prior to arbitration. The types of mediation we identified are: (1) mediation of grievances, (2) mediation of individual employment claims arising pursuant to statute, (3) mediation as a tool in the settlement of employment litigation, and (4) interest mediation.

As discussed previously in this Report, the Committee does not recommend any change in the Academy's statement of purpose to include mediation. However, we recognize that NAA members are increasingly engaged in labor-management mediation, particularly grievance mediation, as well as employment mediation, and that mediation is an important and related dispute resolution procedure. Therefore, we believe that the NAA should play a role in mediation, albeit one that is secondary to our focus on arbitration.

We have already noted above that the Board of Governors adopted the Legal Representation Committee's recommendation extending the coverage of the Legal Representation Fund to include grievance mediation but apparently did not accept its recommendation to include interest mediation. (See minutes of the May 25, 1992, Board of Governors meeting at page 16.) In the Committee's view, it would be appropriate to provide legal representation coverage for NAA members who engage in the various types of labor-management and employment mediation. We express the concern that such coverage, particularly as it relates to employment mediation, could be costly, and thus we recommend study by the Legal Representation Committee before this recommendation is implemented.

With respect to the Code, paragraph 6 provides that the Code is "not designed to apply to mediation or conciliation, as distinguished from arbitration. . . ." However, we note that SPIDR has promulgated ethical standards which cover mediation. The Committee is of the view that NAA members who perform mediation should have available a set of ethical standards to guide them in their work. Perhaps the ethical standards promulgated by SPIDR

are adequate. The Committee recommends that the Board request that the CPRG, or perhaps a special committee, look into this matter to make a determination of whether SPIDR standards are adequate or whether a separate code drafted by the NAA should be considered.

There may be occasions where an arbitrator is asked to engage in grievance mediation between an unorganized employee and an employer. If the unorganized employee holds a job subject to union organization, then the union avoidance issue discussed in connection with employer promulgated arbitrations becomes relevant. There is also the situation in which an employer will call upon a neutral to assist the employer and its unorganized employees in resolving terms and conditions of employment. As a cautionary measure, we point out that service either in this situation or as a grievance mediator involving unorganized employees raises separate concerns pursuant to section 8(a)(2) of the NLRA, since a mediation, unlike an arbitration, is not an adjudication and, therefore, an employer sponsored mediation with an unorganized group of employees might be considered to be unlawful interference with a labor organization where an arbitration in the same situation might not.

VII. Education

Whatever action the Board determines is appropriate with respect to all of the foregoing in this Report, the Committee believes it highly important that the Board take the lead in ensuring that future educational programs devote a significant amount of time to topics beyond those connected solely to the arbitration of labor-management disputes, such as wrongful termination and court deferral to an employment arbitration decision. The NAA has made a good beginning in this regard, and we enthusiastically endorse continuation and expansion of such programs.

It is of particular importance that the Continuing Education Committee address concerns regarding unilaterally promulgated arbitrations, whether they be union-promulgated fair share arbitrations or employer-promulgated discipline and discharge plans. These plans present unique procedural concerns involving questions of basic fairness as well as ethical concerns involving broader questions of professional responsibility generally associated with the Code.

As noted, the AAA has developed, for fair share arbitrations, "Rules for Impartial Determination of Union Fees." It has also developed, for the nonunion setting, "Model Employment Arbitration Procedures," pursuant to which it will appoint an arbitrator from its panel of arbitrators "with expertise in the employment field."

Also, the FMCS presently requires a yes answer to each of the following questions before providing a panel of arbitrators to an employer in a nonunion setting.

1. Is the grievance and arbitration procedure spelled out in a personnel manual or an employee handbook?
2. Do employees have access to the grievance and arbitration procedure as a matter of right?
3. Does an employee have a voice in the arbitrator selection?
4. Does an employee have a right to representation of his or her choice in the grievance and arbitration process?
5. Is the arbitrator's award binding and enforceable?

Questions such as these address due process considerations and issues of fundamental fairness. Similar questions are applicable to union internal fair share procedures, i.e., questions of arbitrator selection, notice to protesters, access to documents and witnesses, right to counsel, etc.

Continuing education seminars might explore comparable lines of inquiry: whether, for example, an arbitrator should ascertain in advance a plan's limitations on arbitral authority; whether a grievant is in a work group subject to organization; whether any rules or policies at issue are in writing and given to employees; and what standard, such as just or reasonable cause, a plan purports to apply in disciplinary proceedings.

By exploring such issues, the Academy can serve a salutary education function in that our members will thus be able to make more informed decisions regarding participation in unilateral employer or union procedures. If a member decides to participate in such an arbitration, then that member should be covered by the Code.

VII. Membership Standards

With respect to participation in employer-promulgated arbitrations and fair share disputes, we have reviewed Article VI, Section 6 of the NAA By-Laws and the Statement of Policy Relative to Membership and have concluded that serving as an arbitrator in

such situations does not constitute serving "partisan interests as advocates or consultants." Thus, such participation does not affect eligibility for membership.

On the other hand, we do not recommend any change in our current standards of admission to Academy membership. We recognize that arbitrators (be they Academy members or not) are increasingly engaging in all the foregoing activities lying beyond the arbitration of traditional labor-management disputes. However, we believe that, at its core, the Academy should continue to be a professional organization of arbitrators whose acceptability so to function has been established by joint selections of the representatives of labor and management. This, of course, is not the same thing as saying that the Membership Committee should cease to have regard for pertinent experience beyond the arbitration of traditional labor-management disputes. In assessing applications for membership, the Membership Committee has never confined itself to a mere counting exercise. It has always had regard for the pertinency and quality of the rest of the applicant's working life—academic pursuits, experience gained through employment with state or federal labor relations agencies, experience gained through advocacy work for one side or the other, and the tone of the reference letters. This is as it should be and as it should remain. And it manifestly includes that various ADR activities with which our Report is concerned.

IX. Conclusion

The Committee realizes that this Report is not a road map providing the Board with a clear path of how to go from here to there. Instead, it is the intent of the Committee that this Report generate focused discussion, and if the ideas and recommendations described in this Report, or at least a portion of them, are found meritorious, the actual order of how best to proceed can then be determined.

X Recommendations of the Committee

The recommendations of the Committees are presented below in summary form for the convenience of the reader. They should, of course, be read within the context of the full Report of the Committee.

A. *Arbitration.* The Committee recommends a significantly broader institutional role for the Academy with respect to the

arbitration of employment disputes outside the context of a collective bargaining agreement.

1. The Academy's Constitution should be amended in appropriate places by broadening the Academy's statement of purpose to cover the arbitration of such employment disputes in addition to the arbitration of labor-management disputes pursuant to collective agreements.

2. Members of the Academy performing employment arbitrations should be (a) bound by the Code; and (b) subject to the protection of the Legal Representation Fund (if such coverage does not threaten the financial integrity of the Fund, a matter to be determined by regular review). [*Editor's Note:* The Board of Governors referred these matters to the appropriate committees for recommendations.]

3. Employment arbitrations pursuant to an employer promulgated plan raise separate concerns from other employment arbitrations, and, therefore, the Academy should suggest areas of inquiry designed to permit members to make an informed decision regarding their participation in such plans. In so doing, the Academy should reaffirm that it neither encourages nor discourages member participation in employer promulgated arbitration.

4. Employment arbitrations involving agency shop fee fair share disputes are similar to arbitrations pursuant to an employer promulgated plan in that the arbitration procedure is set by one of the parties, here the union. Therefore, the Academy should consider developing areas of inquiry, similar to those established for employer promulgated arbitration, to guide members who are considering arbitrating an agency shop fee fair share dispute.

B. *Mediation.* The Committee recognizes that NAA members are increasingly involved in labor-management mediation, particularly grievance mediation, as well as employment mediation. We believe the NAA can and should play a role in mediation, albeit one that is secondary in its scope to the primary focus of the Academy on arbitration.

1. Members of the Academy performing labor-management and employment mediation should be subject to the protection of the Legal Representation Fund. Before implementation of this recommendation, a study of anticipated costs should be engaged in by the Legal Representation Committee.

2. Members of the Academy who perform mediation should have available a set of ethical standards to guide them in their

work. The Committee recommends that the Board, through an appropriate committee, determine whether adequate standards are presently available, e.g., through an organization such as SPIDR, or whether a separate code drafted by the NAA should be considered. [*Editor's Note:* The Board of Governors referred this matter to the CPRG Committee for recommendations.]

C. *Membership Standards.* Although we recommend a broader institutional role for the Academy with respect to mediation and employment arbitration, we believe the Academy should remain at its core a professional organization of labor-management arbitrators. Therefore, we recommend no change to our standards for admission to Academy membership.

D. *Matters Beyond the Labor and Employment Field.* The Committee does not recommend that the Academy take any institutional role regarding such matters.

E. *Education.* As detailed in the Report, the Committee recommends that the Academy continue and expand its educational programs with respect to topics beyond the arbitration of labor-management disputes, including arbitration of employment disputes and mediation of labor-management and employment disputes.

Respectfully submitted by the Committee on May 18, 1993.

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[*Editor's Note:* Approved by the Board of Governors on June 1, 1993.]