CHAPTER 1

PRESIDENTIAL ADDRESS: THE EDUCATIONAL ROLE OF THE ACADEMY

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Forty-seven years ago the founders of the Academy conceived a set of purposes, which carried a vision of not only what the Academy should do, but what it should become. Thus, as originally drafted, the "purposes" of the Academy, as set forth in Article II of the Academy's Constitution, were:

> To establish and foster the highest standards of integrity, competence, honor, and character among those engaged in the arbitration of industrial disputes on a professional basis; to adopt and encourage the acceptance of and adherence to a canon of ethics to govern the conduct of arbitrators; to promote the study and understanding of the arbitration of industrial disputes; to encourage friendly association among the members of the profession; to cooperate with other organizations, institutions, and learned societies interested in industrial relations, and to do any and all things which shall be appropriate in the furtherance of these purposes.

Although there have been amendments in language, the essence of these purposes has not changed over the life of the Academy. For example, the term "industrial disputes" was replaced by "labor management disputes." The phrase "to adopt and encourage the acceptance of and adherence to a canon of ethics to govern the conduct of arbitrators" became "to secure the acceptance of and adherence to the Code of Professional Responsibility for Arbitrators prepared by the National Academy of Arbitrators, the American Arbitration Association and the Federal Mediation and Conciliation Service, or of any amendments or changes which may be hereafter made thereto."

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These purposes tell something about those who founded the Academy and, indeed, of those who came after. The founders of the Academy could have taken the low road and thought only in terms of a trade association. They were wise enough and visionary enough to recognize that, if arbitration as a means of resolving labor-management disputes was to endure and prosper, arbitrators must be above reproach, and that an understanding of the process by both arbitrators and the users of arbitration was a necessity if lingering suspicions about the process were to be overcome.

It is not my intention today to review in detail the success or failure of the Academy in meeting all its goals, but I do intend to emphasize the purpose that obligates the Academy "to promote the study and understanding of labor-management disputes" and to explore in some detail the success of the Academy in fulfilling this goal. A preliminary review of the other purposes is a necessary preface to my primary remarks.

The goal of establishing and fostering "the highest standards of integrity, competence, honor and character" is not an easy one to achieve, although it remains as essential today as in 1947. In its admission process the Academy attempts to determine whether an applicant meets the expected standards. The Membership Committee, however, does not have the resources to make an exhaustive background check of each applicant and must rely upon information obtained from Academy members and from the appointing agencies. When available information raises doubts as to an applicant's "moral character," the Committee does not recommend admission of the applicant until those doubts are resolved. In a few instances the Committee has recommended rejection of an applicant for lack of integrity or "moral character." This has occurred even though the Academy is aware that rejection of a candidate on this basis carries with it the possibility of a suit against the Academy.

The element of "competence" is also difficult to evaluate, especially in admitting new members. Essentially, the only practical criterion is the applicant's success in the arbitrator marketplace. In order even to be considered for membership, a candidate must have decided 50 cases over five years. Expedited cases are given little weight. I can assure you, however, that as a practical matter 50 cases is not likely to lead to membership in the Academy. Certification or licensing has been suggested as one answer to the

competence problem. This has been discussed at two annual meetings and rejected for various reasons.[1]

There have also been whispers that only lawyers should be arbitrators because this would ensure greater competence. Even less attention was paid to this suggestion for the simple reasons that a law degree does not assure competence as an arbitrator, and in fact many highly successful arbitrators have not had law degrees. Indeed, the Academy is one of the few professional organizations that has not required a prescribed course of study or degree as a condition for membership. This has resulted in a heterogeneous membership, which, in my opinion, has been healthy. This heterogeneous composition of the membership may be changing since those with law degrees have in recent years become the majority of newly admitted members of the Academy. Many of them are full-time arbitrators.

This brings me to the Academy's second purpose, namely, securing "the acceptance of and adherence to the Code of Professional Responsibility." The Academy endeavors to acquaint aspiring arbitrators with the importance of the Code and to promote adherence to it through training programs. For example, the Academy, the National Academy of Arbitrators Research and Education Foundation, and the American Arbitration Association recently joined in the production of a movie entitled *Ethics in Arbitration,* which has been extensively used. Evidence of failure to adhere to the Code can result in failure to be accepted into membership.

A condition of Academy membership is that the candidate agrees, in writing, to accept and to adhere to the Code. Adherence to the Code is foremost a matter of individual responsibility, that is, honesty and integrity. Enforcement of the Code, when there are derelictions, is the responsibility of the Committee on Professional Responsibility and Grievances. Fortunately, it has been necessary to suspend only two members for failure to adhere to the Code, although there have been several letters of advice.

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[1]Aaron, *Should Arbitrators Be Licensed or "Professionalized"?*, in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Dennis and Somers (BNA Books 1976), 152; Coulson, *Certification and Training of Labor Arbitrators: Should Arbitrators Be Certified? Dead Horse Rides Again,* in Arbitration—1978, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators, eds. Dennis and Somers (BNA Books 1978), 173.

The committee also has the responsibility of initiating changes to the Code and of interpreting it through advisory opinions, of which there are now more than 20. Since 1987, upon the recommendation of a special committee appointed by then-President Bill Murphy, one session at the Academy's Continuing Education Conference has been devoted to a discussion of the Code. While it would be ludicrous to claim that perfection has been achieved, I believe there has been reasonable success. Doubtless, the work of this Committee will remain as important in the future as it has in the past.

The purpose of promoting, "the study and understanding of the arbitration of labor-management disputes" was clearly one of importance to Academy founders. They had the humility to recognize that there was much to learn not only in terms of themselves but also in terms of those aspiring to become arbitrators. The users and potential users of arbitration were in the same position. Education (and that is what this purpose is all about) was important, is important, and will continue to be important in the future. The most visible result of this educational effort is to be found in the *Proceedings* of the Academy's annual meetings, which have been published annually since 1955. Selected papers from the first seven annual meetings are contained in the first volume. The papers in all of these volumes are generally of very high quality and contributed, and still contribute, to our knowledge of the arbitration process. But they do more than that. At one of the early annual meetings, when the seeming unimportance of many hearings was discussed, Ralph Seward remarked: "Nevertheless, I submit that when we look deeper, we may discover that in these little hearing rooms we are dealing with the basic intellectual and moral issues of our times."[2] How right he was, because these volumes reflect the changing moral, social, economic, and legal environment from the 1940s to the present.

In order to prevent misunderstanding, let me emphasize that the Academy's role was and is to promote the study and understanding of the arbitration of labor-management disputes. In this sense the Academy can be compared with a university, which accepts as part of its mission the expansion of knowledge through research and writing. If a faculty member wins a Nobel prize, that

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[2]Seward, *Arbitration in the World Today*, in The Profession of Labor Arbitration, Selected Papers From the First Seven Annual Meetings of the National Academy of Arbitrators, 1948–1954, ed. McKelvey (BNA Books 1957), 75.

is the work of the individual and not of the university. However, the university may take credit for the selection of the faculty member and for providing the resources and environment that helped make that award possible. This is the case with the Academy. Through the years Academy presidents have appointed program committees with the ability to discern the important issues of the time and to select speakers who could best present those issues. The Academy's role was to provide the resources and to disseminate the product. In this way the Academy fulfilled its express role and may take credit for doing so.

Publishing the *Proceedings*, however, is not the only way the Academy has promoted the study and understanding of the arbitration of labor-management disputes. Academy members have participated in numerous arbitrator and advocate training programs. Since 1977 the Academy has printed an internal publication called *The Chronicle*. While *The Chronicle* exists primarily to keep members informed of Academy activities, it also serves as an important educational device. For example (and so as not to show any favoritism), let me cite the latest of many such features appearing in *The Chronicle*—a two-part article by Christine Ver Ploeg, which discussed the latest psychological research on witness credibility. Last, but not least, is the Academy's Continuing Education Conference for members only. This well attended conference focuses on emerging problems and legislation. Discussion is facilitated by the frequent use of workshops.

The papers from the first seven annual meetings, 1948–1954, are for the most part what we would call today "think" papers marked by relatively few footnotes; indeed, what precedents were there available to cite? Included is a paper by Archibald Cox entitled, "The Place of Law in Labor Arbitration."[3] In this address Cox argued that, when a grievance alleged a violation of a statute or common law (public policy), the law could not be ignored. Not only was this the first salvo in a heated debate, which was to come later, but it was the first in a series of many articles on the law, and particularly on the meaning and impact of Supreme Court decisions from *Lincoln Mills*[4] to the present. Contributors included not only Cox but other legal scholars, such as Bernie Meltzer, David Feller, and Theodore St. Antoine. Also, there have been

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[3]Since my remarks are intended as a survey of the *Proceedings* through the years, exact citations for presentations at annual meetings are provided only when appropriate.

[4]*Textile Workers v. Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957).

addresses by noted jurists such as Justice Brennan and Judge Easterbrook.

The years from 1955 through the 1960s may be called the formative years in the establishment of arbitral concepts. There were discussions of issues such as seniority and discipline. With considerable prodding from arbitrators, the concept of corrective discipline was beginning to gain reluctant acceptance by employers and was explored in depth for the first time. In the aftermath of the *Trilogy*, the issue of arbitrability came to the fore and was discussed on several occasions. Due process considerations became important during these years, and Willard Wirtz and Robben Fleming led the pioneering effort in this regard. Past practice as a decisional factor was first addressed by Ben Aaron and then by Richard Mittenthal. Dick's address, "Past Practice and the Administration of Collective Bargaining Agreements,"[5] along with David Feller's later address, "The Coming End of Arbitration's Golden Age,"[6] were selected by members of the Academy as two of the classics in the field.

One cannot leave this era without noting an experimental approach that was highly rewarding. In 1965 then-President Russell Smith and President-Elect Robben Fleming conceived the idea that, if possible, it would be helpful to attain a consensus as to the rules of evidence and the procedures applicable to the arbitration process. To this end regional committees were established. The committees, chaired by Academy members and composed of equal numbers of management and union representatives, were given a common agenda under the general heading, "Problems of Proof." The committees met and discussed agenda items for over a year. Prior to the 1966 Annual Meeting in Puerto Rico (those were the days of "wild card" meetings), the chairs prepared reports, which were distributed in advance to those attending the meeting. At the meeting the reports were discussed in workshops and a transcript of each workshop report was made. The workshops were followed by a general session, also transcribed. These discussions are all reported in the *Proceedings* of the 19th Annual Meeting. This meeting was very fruitful, even though a consensus

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[5]Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in Arbitration and Public Policy, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Pollard (BNA Books 1961), 30.

[6]Feller, *The Coming End of Arbitration's Golden Age*, in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Dennis and Somers (BNA Books 1976), 97.

was not reached on many items. The effort was a success in another way. The *Proceedings* of the 19th Annual Meeting was a best seller; every copy was sold! Undoubtedly, it had a substantial impact on arbitrators and advocates as well. The volume is well worth reading today.

In reviewing the contents of the *Proceedings* over these years, I was struck by the gradual change in the style of the papers. Many of the earlier papers were conceptual in nature. The later papers were more research based because published arbitration cases and other source material became available. Many were certainly worthy of publication in refereed journals. That high quality continues today. The practice of using labor and management commentators not only brought spice to the program, but often raised important questions that had to be considered.

The decade of the 1970s witnessed the rise of public employee unionism, bringing new problems and new opportunities for arbitrators and for advocates. Interest arbitration (a little known concept to many of us at the time) and other facets of public employment disputes were discussed on several occasions and continued to be discussed into the early 1980s.

In the wake of Vietnam, new disciplinary issues and problems of managerial authority arose. As ridiculous as it seems today, questions of hair style, beards, and personal attire became important, highly emotional arbitral issues for discussion at the 25th Annual Meeting. Although these matters were of only temporary significance, this session raised another problem, which was more than temporary, namely, drug abuse. Speakers at annual meetings through the 1980s and into the 1990s spoke on drug testing, public policy, and the authority of the arbitrator to utilize postdischarge conduct in fashioning a remedy.

Two other knotty problems for arbitrators came to the fore in the 1970s and 1980s and even beyond: the duty of fair representation, and race and sex discrimination. The first issue arose following the Supreme Court's decisions in *Vaca v. Sipes*[7] and *Hines v. Anchor Motor*.[8] At the risk of oversimplification, the elusive problem was not whether arbitrators had a role to play but how active the arbitrator should be in ensuring fair representation. Among others, three of our distinguished members presented papers on this subject: Clyde Summers, William Murphy, and Benjamin Aaron.

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[7]386 U.S. 171, 64 LRRM 2369 (1967).
[8]424 U.S. 554, 91 LRRM 2481 (1976).

Sex discrimination was first addressed by Jean McKelvey in her presidential address in 1971 and carried the intriguing title, "Sex and the Single Arbitrator."[9] While that title could invoke many exciting scenarios, Jean was interested in the more mundane, although very important, matter of the impact upon arbitral decisions of restrictive state legislation prohibiting women from performing certain types of work. Although later in the decade papers touched upon sex discrimination, the main emphasis was on race discrimination and the impact of *Gardner-Denver* upon arbitration and arbitrators. Indeed, in a paper bordering on treason, Judge Harry Edwards, a former Academy member, questioned the competence of arbitrators to decide discrimination cases![10] Although William Murphy first mentioned sexual harassment in 1980, it was not until such conduct began to appear more frequently as an issue in arbitration that it was more fully addressed.

Thus far in the 1990s, the presentations at annual meetings have followed the pattern of the past: the papers dealt with emerging social, legal, and economic issues as well as the "old" issues, such as due process in discipline cases. For example, there have been papers on diversity in the workplace and the impact upon arbitration of industry "downsizing."

This brief survey of the contents of the *Proceedings* over the years clearly indicates that the Academy has enjoyed remarkable success in promoting "the study and understanding of the arbitration of labor-management disputes." The *Proceedings* volumes represent a valuable and unique collection of material on the arbitration process. This is not to say that all of the best writing is contained in these volumes; without hesitation, we can all think of many important writings that have not appeared in the *Proceedings*. But this does not undermine my thesis. The *Proceedings* has always been a valuable source of information for arbitrators, especially the full-time arbitrators, who often lack time for and ready access to other materials. I suspect the *Proceedings* has become even more valuable to all arbitrators over the past two decades since much of the research and writing in industrial relations became quantitatively based. To give a typical example, an author sets out to explore the

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[9]McKelvey, *Presidential Address: Sex and the Single Arbitrator*, in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Somers and Dennis (BNA Books 1971), 1.

[10]Edwards, *Arbitration of Employment Discrimination Cases: An Empirieal Study*, in Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Dennis and Somers (BNA Books 1976), 59.

question, "Do employees join unions for retirement benefits?" After 20 pages of mathematical calculations, the answer is "No, employees do not join unions for pension benefits." But then comes the inevitable caveat: "However, additional research is required to verify this conclusion!" Such writing does not make enjoyable reading, nor is it very enlightening to the practitioner, who must deal with real problems on a daily basis.

But that was the past. What about the future? Two years ago, before this assembly and after tracing the factors that have led to the decline in the volume of labor-management arbitration, Tony Sinicropi made an eloquent plea that the Academy endorse the report of the Alternative Labor Dispute Resolution (ALDR) Committee and embrace a broad range of employment-related arbitration matters arising outside the context of a collective bargaining agreement.[11] Tony's plea has been answered. Last year at its Denver meeting, the Board of Governors approved the ALDR Committee report, initiated the changes in the Academy's Constitution recommended by the report, and directed that the Committee on Professional Responsibility and Grievances take the necessary action to bring these employment-related disputes under the aegis of the Code of Professional Responsibility. Thus, in terms of the topic I have been discussing today, the Constitution will now read: "to promote the study and understanding of the arbitration of labor-management *and employment* disputes."

The question may well be asked as to the intent of the term, employment disputes. Included under this term are wrongful termination cases, arbitration of statutory claims, employer-promulgated arbitration, and fair share disputes arising out of agency-shop arrangements. Mediation work, other than grievance mediation, is not included within the term employment disputes.

Without doubt, the Academy has taken a giant step to ensure that it will continue as the premier organization in the arbitration field. In taking this step, however, the Academy members have implicitly assumed important responsibilities. Members who choose to do employment work must keep abreast of employment law. This is particularly true in wrongful termination cases. Even though these cases allege the violation of an implicit or explicit promise to discharge only for cause, this claim is often entwined

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[11]Sinicropi, *Presidential Address: The Future of Labor Arbitration: Problems, Prospects, and Opportunities*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), 1.

with a claim of a statutory violation, such as age or sex discrimination. At least that has been true in my experience. However, the application of employment law is not an unusual experience for arbitrators. Labor-management cases often require knowledge of employment law in spite of claims to the contrary.[12]

Employer-promulgated arbitration cases also present special problems. Due process considerations are perhaps at the top of the list, but I suggest that the issue of fair representation we confronted two decades ago may well involve a similar question of ensuring a fair hearing. Ethical problems will also arise. In this regard, I urge you to review the presentations of Alan Walt, William Rentfro, and Shyam Das at the 1990 Annual Meeting.[13] Their comments may be only the tip of the iceberg insofar as ethical problems are concerned.

For those of you who question or who are reluctant to accept this new initiative, do not despair. The Academy has no intention of forsaking its past. The Academy will remain at its core an organization committed to the arbitration of labor-management disputes. There is no plan or intent to change membership standards. The Academy will remain an organization of men and women experienced in the arbitration of such disputes.

I do have one concern, however, relative to the training of new arbitrators. This concern may appear strange at a time when there are cries of anguish about the declining volume of arbitration cases. There is no doubt that the volume of ad hoc cases has declined, as measured by American Arbitration Association and Federal Mediation and Conciliation Service statistics. While these same statistics show that the number of ad hoc cases has stabilized over the past three years, they do not tell the entire story. Although the demand for arbitrators will certainly be less than a decade ago, there will be a demand for new arbitrators as the second generation of arbitrators, to use Alfred Dybeck's phrase,[14] "fade away"—a process that is ongoing through reduced work loads, retirement, and death.

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[12]American Arbitration Association, Resolving Employment Disputes, 1993. This publication contains other startling statements or "suggestions," with regard to choice of arbitrators and burden of proof.

[13]Walt, *Arbitration Forums Revisited: Employer-Promulgated Arbitration*, in Arbitration 1990: New Perspectives on Old issues, Proceedings of the 43rd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1991), 189; Rentfro, *supra*, at 192; Das, *supra*, at 199.

[14]Dybeck, *Presidential Address: Reflections of a Second Generation Arbitrator*, in Arbitration 1990, *supra* note 13, at 1.

It is dangerous to generalize, but I believe the Academy has always realized that knowledge of the institutional aspects of unionism and collective bargaining is an important ingredient of an arbitrator's makeup. Such knowledge aids the arbitrator's understanding of many issues and helps avoid unnecessary problems. Labor arbitration is something more than a civil case. If I am correct in my belief that the arbitrator of the future will be a lawyer, that person may come to arbitration without this institutional background. Law schools typically do not offer courses leading to the kind of understanding I have described, but these courses were often offered in other units of the university. While I was teaching, I always had a good representation of law students in my classes. Such classes are no more. A means will have to be found to provide this understanding, and I am certain it will be found.

As the Academy moves forward into this new era, the challenges will be great. First comes the challenge of maintaining the "highest standards of integrity, competence, honor, and character" as we move into new and highly competitive areas of endeavor. Second will be the challenge of promoting "the study and understanding of the arbitration of labor-management and employment disputes"—a much broader responsibility than in the past. I am confident the Academy will successfully meet these challenges and will be regarded in the future with the same respect as in the past.