REPORT OF THE SPECIAL COMMITTEE ON THE ACADEMY'S FUTURE

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I. The Committee's Charge

The Committee was created in February 1999, by President James M. Harkless. He did so in consultation with President-elect Theodore J. St. Antoine and the nominee for his successor to that position, John Kagel. President-elect St. Antoine and nominee Kagel participated in the decisions to create the Committee, define its initial charge and determine its composition, because it was anticipated that more than two years would be required to complete its work. In a letter to the membership, President Harkless stated that the Committee's charge was to provide an answer to the following, primary question:

A. Whether to expand the Academy's membership to those who act as arbitrators mostly in cases involving employment disputes arising outside the labor-management field; and, if so, how?

When President St. Antoine met with the Committee at its first meeting in New Orleans, he asked the Committee to address the following two questions, which were "implicated" in the primary question put before us:

B. Regardless of how the principal issue is resolved, does the Committee have any recommendations about how to make our national meeting programs more *substantively* attractive to our members and guests?

C. Are there any standards or guidelines to assist us in maintaining a proper balance between the NAA as an "academy" in the pure intellectual or professional sense and as a "trade association" concerned with advancing its members' more mundane business or occupational interests?

Finally, President St. Antoine urged the Committee to give some consideration to the following additional question, during the course of its deliberations:

D. Whether there are standards or guidelines that the Board of Governors and the Executive Officers should apply in deciding when an issue is of such importance that it should be discussed by the full membership before the Board takes final action?

II. Procedures Followed

At the outset of its deliberations, the Committee made two decisions that had a significant impact on the procedures followed. First, the Committee decided to bifurcate the principal question and make a preliminary judgment as to whether it was inclined to make a recommendation to expand the membership as described.

Secondly, the Committee decided that this preliminary decision should be made, based upon input from existing members of the Academy and information already available in Academy-sponsored studies and other sources. The Committee recognized that there are risks

involved in taking such an approach when attempting to chart a course for the future. However, the Committee believes there were sound reasons for doing so.

Many Academy members have substantial experience in the performance of non-labor ADR work, including employment arbitration. (See "The Arbitration Profession in Transition: A survey of the National Academy of Arbitrators," Cornell Studies in Conflict Resolution, No. 3, Cornell University, 2000.) Some of our members have studied employment arbitration and written extensively on the subject. For a number of years the programs at our national meetings have included presentations on the subject. The idea of changing our membership criteria has been discussed on several occasions, beginning with the presidential address of Anthony Sinicropi in 1992 and the 1993 report of the Beck Committee, and culminating with the presentation of a paper by Dennis Nolan at our 52nd Annual Meeting in New Orleans in 1999, urging the Academy to "move quickly and decisively toward becoming a National Academy of Labor and Employment Arbitrators."

In short, the Committee concluded that our membership is generally well informed on the subject of employment arbitration, but it has never been asked to carefully consider the pros and cons of modifying our membership criteria to include employment arbitrators as such. The Committee felt that if substantial support for the idea was not forthcoming after our members were given that opportunity, it would be a mistake to expend the time and resources necessary to conduct the studies necessary to formulate a concrete proposal at this time. (See Appendix A.) It was also our judgement that the other three questions could be addressed more appropriately once the Committee formulated its recommendation on the principal issue.

A number of steps were taken by the Committee and others, to give the membership an opportunity to consider the pros and cons and express their views. Committee Chair Fleischli prepared an article that appeared in the Winter 2000 issue of *The Chronicle*, describing the history referred to above, and inviting members to express their views in writing and/or by participating in one of the discussion groups that were scheduled to be held in San Francisco on June 1, 2000. An article by Arnold Zack, seeking to rebut the position advanced by Dennis Nolan, was published in that same edition of *The Chronicle*. Reply articles, written by Dennis Nolan and Arnold Zack, appeared in the Spring 2000 edition.

On April 24, 2000, a letter was sent to every member of the Academy, reminding them that the issue was pending before the Committee, and urging them to participate in discussion of the issue in breakout groups at the membership meeting in San Francisco on June 1, 2000. Included with the letter was a general description of three possible alternatives, which would modify the membership criteria to give no consideration, some consideration or equal consideration to experience as an arbitrator of employment disputes. (Appendix B)

A total of 45 members took the time to express their views in writing. In San Francisco, approximately 125 members participated in 10 discussion groups, each led by a member of the Committee. Committee members reported back to the full Committee concerning the content of those discussions. Thereafter, we prepared an interim report which was forwarded to the Board of Governors for consideration at its meeting in Scottsdale, Arizona on October 26, 2000.

In our interim report, we advised the Board of certain preliminary conclusions we had reached, and indicated our intent, with Board approval, to develop a specific proposal for presentation to the membership for discussion purposes only, in an open forum in Atlanta. The

Board gave its approval, and a number of steps were taken to insure that the membership was informed and prepared to discuss the proposal and had an opportunity to send in written comments. On December 1, 2000, every member of the Academy was sent a letter of notification with an attachment that described existing membership criteria and set forth a copy of the proposal. Committee Chair Fleischli prepared an article for the Spring 2001 issue of *The Chronicle*, explaining the purpose of the open forum and setting forth a copy of the proposal. A copy of the proposal is attached as Appendix C.

III. The Decision to Conduct a Telephone Survey

During its initial deliberations, the Committee gave considerable attention to a question raised by Committee member Richard Bloch, in response to some of the arguments advanced by Dennis Nolan. In its simplest form that question is: What's wrong with the Academy? An attempt to answer that question, it was felt, could provide valuable guidance as to whether the solution proposed by Dennis Nolan was one that the Academy should embrace. It might also provide some guidance in answering the other three questions posed.

The Committee realized that any attempt to provide a comprehensive answer to this question would take us far beyond our mandate. However, the Committee felt that this question was of sufficient importance to our deliberations to justify the conduct of a telephone survey of those members of the Academy who never, or almost never, attend our national meetings.

The best measure of the vitality of a voluntary organization is to be found in the extent of membership participation. Presidents have frequently complained that there are always more well-qualified applicants than openings for service on committees. Many of our members willingly give large amounts of their time to service on committees and in other capacities. Many of our members attend nearly every national meeting and many others frequently do so. Why is it that over one third of our members did not attend more than one of the last seven national meetings, from the Fall of 1996 through the Fall of 1999?

Committee member Alvin Goldman coordinated the survey and compiled the results. The procedures followed and the results of the telephone survey are discussed in Appendix D. A subcommittee, consisting of Committee members Alvin Goldman, Calvin Sharpe and Richard Bloch, chair, prepared the analysis in Part VII of this report.

IV. Membership Input

The input received from members provided the Committee with a clear answer to our preliminary question. After having had an opportunity to consider the pros and cons, our members made it clear that currently there is very little support for expanding the Academy's membership to include those who act as arbitrators mostly in cases involving employment disputes arising outside the labor-management field.

<u>Responses Favoring the Change</u>

Only 4 of the 45 members who wrote the Committee to express their views in advance of the meeting in San Francisco urged the Committee to answer this question in the affirmative. One of those members urged the Committee go further, and recommend that membership be expanded to include arbitrators of all types of disputes. The other 3 simply favored expansion as described in the wording of the principal question. Of those three, Sara Adler, a member with extensive experience in the ADR arena, offered the most complete rationale. Her letter, which was written before the decision in *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302 (2001) and recent changes in the Code provision on advertising, read as follows:

> "I believe that we should count non-union employment cases toward admission standards and that someone who meets the qualifications should be admitted based entirely on employment cases. I would not vary the requirements for the applicant not to be an advocate and the cases to be counted would be only those in which an Opinion was written. It is my educated guess that, at least initially, we would find few applicants able to meet these standards except for some of the most acceptable retired judges and an occasional retired advocate. Over time it's impossible to guess what direction the field will go in--the NAA began with admitting advocates and I wouldn't rule that future possibility out altogether in the employment arena. However, it is certainly possible that eventually the Supreme Court will take the issue on, decide against employment arbitration under the FAA or otherwise, and there will be even fewer people who might qualify on this basis.
>
> "Having practiced now for a number of years in both areas, I believe that the overlap of skills and interest in justice in the workplace is greater than the differences. The need for NAA members to learn about the statutes covering the workplace has already arrived under most collective bargaining agreements and in many disputes, even the most seemingly prosaic regarding absenteeism. To the extent that issues of pre-hearing procedure and remedy differ, that can be handled in breakout sessions at the meetings and articles for some to skip in the Chronicle.
>
> "Some members have articulated a fear that employment arbitrators may be more frequently subject to suit becoming a drain on the Legal Representation Fund. The empirical evidence does not support those fears. Possibly a greater number of those cases are subject to a Motion to Vacate, but there has been no trend reported anywhere that the arbitrators themselves are more likely to be subpoenaed or sued.
>
> "It seems to me that the Cornell study points up the need for an expanded focus of the NAA. It is likely that enough work will be available for NAA members (and others) to have a continuing interest in traditional collective bargaining issues well into the future. However, it seems equally likely that the traditional practice will form a much smaller share of the practice for many of our younger members which, in turn, would greatly diminish their interest in active involvement in the life of the NAA. Arnie Zack may be copasetic about watching the NAA fade slowly into the sunset, but I'm not.
>
> "If the NAA does not expand its jurisdiction, it seems to me only a matter of time until another organization is formed to meet the needs of employment

arbitrators. I think those hoping the NAA will spin off the other organization are trying to have their cake and eat it too. I, for one, would oppose the NAA's direct involvement in setting up a separate organization. The compromises I'm willing to live with in order to achieve the twin goals of keeping the NAA vital and avoiding the costs in time and money to establish a separate organization would not be worth while if the separate organization is focused solely on employment ADR.

"One of the most emotional issues appears to relate to the advertising ban and I believe (and have always believed) it was inappropriate. There would need to be few other changes in the Code of Professional Conduct.

"Thanks very much for providing a forum for members' opinions."

Responses Opposing the Change

Thirty-two of the 45 members who wrote the Committee to express their views in advance of the meeting in San Francisco urged the Committee to answer the preliminary question in the negative. Many of these respondents simply indicated their agreement with the position taken by Arnold Zack in the article that appeared in the Winter 2000 edition of *The Chronicle*. While numerous reasons were advanced in support of this position, the two most common reasons had to do with the reputation of the Academy and incompatibility.

These respondents were most concerned about the potential impact such a change would have on the Academy's reputation generally, and in the labor-management community in particular. However, they also anticipated problems of compatibility due to differences in the background of persons who function as employment arbitrators, the manner in which they are selected and compensated and the procedures under which they operate. Several expressed the view that even if the admission of employment arbitrators were initially limited to those who do not simultaneously serve as advocates or consultants, their admission would inevitably lead to modification of that requirement, thereby greatly exacerbating the incompatibility problem. Finally, some expressed the view that admission of employment arbitrators would inevitably lead to the admission of employment mediators and other practitioners in the ADR arena, leading to what some referred to as a "Spidrization" of the Academy.

Significantly, none of these respondents expressed concern about the prospect of a further decline in the number of labor-management cases and membership in the Academy. Some saw that possibility as having a positive influence on the reputation of the Academy in the labor-management community. A few challenged the assumption that the number of labor-management cases would continue to decline and expressed the belief that the efforts of organized labor to increase its membership and effectiveness at the bargaining table and elsewhere were beginning to show positive results.

Member William Rule of Rancho Santa Fe, California, made the following observations:

"I do not see any justification at all for changing the Status Quo to credit experience as an arbitrator of employment cases for membership in the NAA. There is simply no real commonality between employment arbitration and labor/management arbitration. Obviously there are no unions involved and more importantly there is no continuing relationship between the parties which is such an important factor in labor/management arbitration....

"The typical employment arbitrator will have to be an attorney and by training and experience is very unlikely to have had any labor/management experience in either the public or private sector. They will be former, if not current, legal advocates trained and experienced in employment law and also trained to win for their client at all cost regardless of the damage to continuing relationships between the parties. Not that they will not make fair decisions as they see fairness but that they will not share the same interests and understandings developed by active labor/management arbitrators. There is nothing wrong with this of course, but it does not make sense to bring them into the very different NAA family.

"Clearly, one of the main reasons their admission has been proposed is the objective of NAA growth and the seeming "bigger is better" concept. When I became a member in 1976, total membership was around 350 with probably not more than one third of that number really active. In the late 70s and early 80s the public sector came on stream and the membership soared....I would much prefer a smaller NAA with the majority of members more interested in putting something back in instead of getting something out.

. . .

"I would also note that anyone who reads the press of late both nationally and locally here in California must be aware that organized labor is definitely growing in membership and prestige. The techs success at Boeing, the cabin attendants at US Air, the janitors in LA and San Diego have all managed to get better contracts than expected and, in my opinion it is only the beginning. There is little, if any, loyalty left in many jobs which in the past would have been difficult to unionize because of belief in white collar job security now badly damaged through downsizing and the unions are becoming much more skilled at organizing. The labor movement will continue to grow in the future as will labor/management arbitration....

Member Robert Stevens of Rochester, New York, made the following observations:

"Membership in the Academy is grounded on the bedrock of acceptability to the parties. If a member loses that acceptability for whatever reason, he simply will not be selected to hear and decide cases....

. . .

"It is tempting to enlarge the Academy's purposes and membership, and presumably the employment opportunities for Academy members, by including the arbitration of all employment disputes under our banner. This, however,

would dilute and weaken our leadership in our primary area of concern, the arbitration of labor-management disputes.

"This is not to say that the Academy should not provide training support and assistance to equip members and others in employment disputes. It should, but we should not lose sight of the fact that we have a vital stake in preserving and promoting collective bargaining and democracy in the work place which results."

Member Louis Zigman of Los Angeles, who states that he has handled numerous "at-will arbitration and mediation cases," made these observations:

"I have listened and read about the arguments on this issue. Admittedly, I have changed my mind. Although I am generally in favor of change and creativity, I...now believe that the status quo is the best course of action. The reason being is that I like the tradition and the commonly shared values that the Academy stands for.

. . .

"Personally, if I want to "expand" the breath of my "contacts" and/or learning skills, I know that there are other organizations that I can join, be involved with, and develop camaraderie. As such, for me, I see no reason for the Academy to change and expand. To those who worry about being left behind, I see an emergence of unionization and I do not see a "dying organization."

Member Thomas Levak of Portland, Oregon, who states that he has served as an employment law arbitrator for approximately ten years, made these observations:

"...Labor arbitrators and employment law arbitrators work in totally distinct areas of the law. Labor arbitrators administer the common law of the shop, while employment law arbitrators essentially sit as trial judges and apply state common law and statutory law. The parties to an employment law dispute expect that the arbitrator will be ready and willing to apply the laws of the state which governs the case, will be familiar with trial procedure, including discovery, and will apply rules of evidence. The fact is that many, if not most, labor arbitrators do not keep current on what they view as "external" law, particularly the laws outside their home states, and have no idea how to run an employment law hearing."

"...Agencies who maintain panels of employment law arbitrators, and the advocates who utilize those panels, have no expectation that the arbitrator selected will be a full-time neutral. The vast majority of employment law arbitrators on those panels are practicing attorneys, normally employment law litigators or general trial attorneys. The neutrality that the agencies, the advocates and the parties expect relates not to full-time neutrality, but to specific case neutrality."

<u>Responses Supporting Some Change</u>

Seven of the 45 members who wrote to express their views in advance of the meeting in San Francisco, favored the compromise position, giving "some consideration" to experience as an arbitrator of employment cases. One of those members who favored giving equal consideration specifically stated that this alternative would be his second choice. We assume the other three members who favored equal consideration would probably agree. Thus, it is fair to say that 11 members, or approximately 24% of those taking the time to write the Committee, would like to see some change in the *status quo*.

Member Parker Denaco of Concord, New Hampshire favored a compromise approach, possibly increasing the numerical standards for admission while giving applicants credit for employment arbitration work up to a maximum of 50% of the cases considered for purposes of admission. He sees this as desirable in current circumstances in order to maintain the Academy's status as the premier professional organization of arbitrators, embrace the future and avoid the loss of members and financial support that will result if the Academy maintains the *status quo*.

Member Eric Lawson of Buffalo, New York favored giving some consideration, but not equal consideration. Member James O'Grady of St. Louis, Missouri, took the same position, stating that we need to do so in order to recognize the decline in the use of labor arbitration, the increase in the use of employment arbitration, and "the need to have influence on the development of employment arbitration based on our over 50 years of experience and recognition by the courts."

Members Jack Stieber of East Lansing, Michigan and Eric Schmertz of New York, both favored giving some consideration to experience as an employment arbitrator, in order to preserve the Academy's role as an organization of arbitrators of labor-management disputes, while giving recognition to the employment arbitration work our members are performing. Jack Stieber proposed that applicants be permitted to rely on employment cases in the same proportion that some of our current members are performing such work, i.e., "not more than 20%". He goes on to state:

> "...If, at some future date, we find that NAA members are doing more than 20% non-union cases, we can raise the proportion of such cases that would be acceptable. This would maintain the labor-management composition of the Academy, while recognizing that some or even most of our members will continue to accept non-union cases."

Finally, Chuck Rehmus of Poway, California urged the Committee to take seriously the need to increase our membership. In his view, the decline in Academy membership has led to "tensions and strains" within the organization that will worsen if action is not taken to offset the decline. He urged the Committee to consider a way to accomplish that purpose, i.e., give recognition to the fact that many applicants have difficulty accumulating the number of labor-management cases actually required for admission, and accept the minimum number of labor-management cases needed for consideration, in the case of applicants who also possess employment arbitration experience.

V. Possible Consensus Emerges in Workshops

The workshop format, first suggested by Committee member Richard Bloch, proved to be extremely effective as a mechanism for the free exchange of information and opinions and consensus building. Comments received by Committee members from participants indicate that nearly all felt that they had an equal opportunity to share information, express their views and explore common ground. In our view, it provided the Committee with the most valuable input we received in the course of our deliberations.

Participants were assigned to the 10 workshops on a random basis. This was done to avoid a situation where too many of the participants came from the same geographic or demographic background. The random nature of the assignments did result in considerable variation in the size of the groups, which ranged from 6 to 20 members. All but three fell within the range between 9 and 14 members.

In no two groups was the course of the discussion the same. However, there were significant, common themes. In general, the participants did not believe that the Academy should embrace the change in order to offset or reverse the recent decline in our membership, and quickly moved past that question on the agenda. To varying degrees there was some discussion of "other considerations," including those suggested on the agenda sheet, i.e., our ability to influence the development of law and policy, the vitality of the organization, the content and quality of our educational programs, our ability to maintain and enforce a single set of ethical standards, the admission of other neutrals, governance of the organization, the shared values and beliefs of our members, the acceptability of our current members to handle either type of cases, and the acceptability of the newly eligible members to handle either type of cases.

In each group there was a significant number or a clear majority of members who, at least initially, were opposed to any change in our membership criteria. In some groups there were no members who favored giving equal consideration to work as an employment arbitrator. In all of the other groups it was clearly a minority view.

As the discussion progressed, many of the participants appeared to change their position from one of opposition to any change, to a willingness to consider the middle position, i.e., giving "some consideration" to work as an employment arbitrator. While it is impossible to attribute specific reasons to any of the participants who changed their mind, many of those in attendance seemed particularly receptive to the argument that our standards for admission ought to reflect the fact that many of our current members are performing this work, which is similar to the work we perform as arbitrators of labor-management disputes, and the fact that in 1993 the Academy modified two important parts of its statement of purposes, to include the arbitration of employment disputes. Many felt that a failure to give any recognition would be inconsistent with the role the Academy has sought to play in educating our members and the public and helping to develop minimum standards of fairness and due process in the field of employment arbitration.

Some groups chose to conduct straw polls at the outset and/or at the end of their workshop. Those who did both recorded an increase in the number who favored the middle position. Those who conducted a straw poll at the end of the discussion all found that a majority favored the middle position, with no change being the second choice. Many members who tended to favor the middle position were reluctant to commit on the question in the absence of a specific proposal. In particular they were concerned about the impact of any change on continuation of the expectation that all applicants "meet a minimum requirement of current

experience as an impartial arbitrator of labor-management disputes." Except for those members who favored equal consideration, all were in agreement that we should continue to apply criteria that insure that the Academy remains, at its core, an academy of arbitrators of labor-management disputes.

VI. Results of the Open Forum

The Committee received nine written comments on the proposal that was sent to members in December 2000 and reprinted in the Spring 2001 edition of *The Chronicle*. Most of the comments were either supportive of the proposal or offered constructive criticism. Two of the responses opposed the proposal and raised questions about the adequacy of the numerical standards for admission currently employed by the Membership Committee.

Member Norman Harlan of Montgomery, West Virginia, expressed opposition to any change that would credit experience as an employment arbitrator. He expressed dissatisfaction with the existing standards for admission and urged the Committee to recommend an increase to 75, the minimum number of countable labor-management cases required for admission. Member Lou Imundo of Dayton, Ohio, agreed with that position, expressing his belief that, in recent years, there has been a lowering of the standards for admission based on an apparent desire to increase membership.

Members Mollie Bowers of Baltimore; Beber Helburn of Austin, Texas, John Sass of Golden, Colorado; Tony Sinicropi of LaQuinta, California; and Rolf Valtin of Lovettsville, Virginia, all expressed their support for the proposal. Member Allan Harrison of Port Angeles, Washington questioned the need for the change, noting that "[t]he membership committee is or ought to be free to consider all relevant information regarding professional competence once an arbitrator meets some minimum standards of activity and acceptability."

Two of the correspondents made a point, the implications of which were discussed at some length in the open forum. Those comments are particularly important, because they prompted the Committee to refine the wording of the proposal in a significant way.

Beber Helburn understood the proposal to say that employment cases of the type described would become "countable" cases, if the applicant met the 50 case minimum threshold. Based on that reading, which he was willing to accept, he urged the Committee to recommend that the Membership Committee give equal treatment to expedited postal cases, if the arbitrator includes a rationale. Member Susan Brown of Newburyport, Massachusetts, made the same point. She too read the proposal as treating the employment cases as "countable" once the minimum threshold is met. She supported the proposal, provided the Committee was willing to recommend that fact-finding, advisory arbitration and mediation cases be given equal treatment.

None of 14 members who spoke at the open forum opposed the proposal. They included Susan Brown, who qualified her support as indicated; Mike Beck of Seattle; Dan Brent of Princeton, New Jersey; Jack Dunsford of St. Louis; David Feller of Berkeley, California; Walter Gershenfeld of Flourtown, Pennsylvania; Jim Harkless of Washington, D.C.; Beber Helburn; Mark Kahn of Dearborn, Michigan; Jack Stieber of East Lansing, Michigan; Rolf Valtin; Gil Vernon of Eau Clair, Wisconsin; Barry Winograd of Oakland, California; and Arnold Zack of Boston.

Many of the speakers gave reasons why they favored the proposal. The Committee agrees with those reasons, which are referred to below. Certain of the comments were of particular significance, based on the identity of the speaker. Mike Beck, who chaired the "if any" committee, expressed the view that the proposal was consistent with and supportive of the recommendations of that committee. Gil Vernon, who currently chairs the Membership Committee, expressed the view that the proposal is practical and workable. Arnold Zack, whose article in *The Chronicle* was cited by many opponents of the original proposal, stated that the proposal was acceptable to him, because it preserved the status of the Academy by maintaining the current standards for admission, while acknowledging the relevance of employment arbitration work.

Jack Dunsford expressed concern that the proposal, as written, seemed to imply that employment arbitration work would be given consideration, but that other types of experience that had been considered relevant in the past, would not. He expressed even greater concern, if the proposal was interpreted to allow the Membership Committee to treat employment cases as "countable" after the minimum threshold was met, while other cases such as those referred to by Beber Helburn and Susan Brown were denied such status.

VII. Analysis

Our Membership Criteria

The Committee wishes to make it clear at the outset that we did not, and do not, view our role as limited to polling the membership in order to make a recommendation that is consistent with the majority view. We have viewed our role as one of leadership, requiring us to insure that the relevant arguments have been laid before all our members in order to obtain the benefit of their informed opinion, before the Academy attempts to chart the best course of action for the future. We believe that the procedures we have followed have served to educate the membership as well as the members of the Committee, allowing us to make a recommendation that will not only be accepted, but serve the best interests of the Academy in the long run.

We have carefully considered the pros and cons of expanding our membership to include those who act as arbitrators mostly in cases involving employment disputes outside the labor-management field. In our opinion it would be a mistake to do so. In reaching this conclusion we do not wish to foreclose the possibility of reconsidering the question at some time in the future. On the contrary, we believe that the Academy should keep an open mind, and by means of Foundation grants and otherwise, encourage scholars to study developments in the field.

Proponents of the change argue that we should act now to expand our membership criteria to include arbitrators of employment disputes in order to offset the recent decline in our membership; help restore our vitality and recognition as the preeminent organization of arbitrators in the United States and Canada; and avoid the possibility that some other organization will fill the gap. Each of these arguments enjoys some factual support, but in the last analysis we find them to be unpersuasive.

It is true that after a spurt of growth associated with the growth of union representation in the public sector, our membership has plateaued and begun to decline. It is also true that the phenomenal growth in popularity of ADR procedures has resulted in a situation where developments in that field have taken center stage. Unless it expands its membership to include

all who hold themselves out to be professional arbitrators, the Academy will never again enjoy the distinction of being the most well-recognized professional association of arbitrators.

The Committee does not believe that the proposed change should be adopted to offset the recent decline in our membership. The other arguments advanced, pro and con, are of far greater importance. Even so, we question the assumption that the decline in both union membership and the need for arbitrators of labor-management disputes will continue unabated. We certainly do not foresee the demise of the labor movement predicted by some. Organized labor is making great strides in its efforts to reverse the decline in its membership. The increasing popularity and effectiveness of other means of avoiding and resolving differences between labor and management will no doubt continue to have a significant impact on the number of labor-management disputes submitted to arbitration. That trend is a good one and one in which we have a professional obligation to participate and support. However, it would be a mistake to conclude that these alternative approaches will eliminate the need for arbitration.

Also, there is no reason to believe that the proposed change in our membership criteria would result in a significant increase in our membership. Even those members who favor the change acknowledge that, at the current time, there are very few individuals who would qualify for membership in the Academy based upon their work as employment arbitrators. Mediation of employment disputes is more common and appears to be the preferred method for resolving many employment disputes. Most of those who serve as employment arbitrators do so on an occasional basis. Many are advocates and would not qualify for membership for that reason. Those who are not advocates frequently perform other ADR work in a variety of settings. This includes some current members and others who may eventually qualify for membership based on their work as arbitrators of labor-management disputes.

The laws and practices governing the use of arbitration to resolve labor-management disputes are well settled. The Academy and certain of its members have played a key role in that development. The laws and practices governing use of arbitration to resolve employment disputes are just beginning to evolve. This process is exciting and requires our careful attention, because it has the potential to affect the laws and practices governing the work we do, and the public's perception of the work we do. We believe that the Academy has played and should continue to play an important role in that process. In doing so, we can continue to draw on our experience and reputation as a professional organization of arbitrators, many of whom perform such work. However, we can continue to do so without making a fundamental change in our membership criteria that we view as unnecessary and potentially harmful to the reputation the Academy and acceptance of its members by the parties we have served for over 54 years.

We do not mean to suggest that there is anything inherently wrong or improper about service as an arbitrator in employment cases. If the procedures are balanced and fair and the preexisting rights of employees are properly preserved, it is a process that has as much to commend itself as does the arbitration of labor-management disputes. However, we are concerned that allowing into membership individuals who practice as employment arbitrators, but do not have a substantial background as arbitrators in labor-management cases, will strain our relationship with labor organizations and cause both parties to begin to question the credentials of our members to serve as arbitrators in labor-management cases. We are also concerned that pressure would then build to include as members those employment arbitrators who also serve as advocates or consultants in employment disputes. To do so would reverse an important part of our past efforts to establish and enforce standards of professional conduct.

It is possible that the basis for these concerns may dissipate in the future. Labor organizations may come to view employment arbitration in a different light, based upon legislative enactments or other legal developments. The parties who utilize the services of employment arbitrators may begin to insist on using arbitrators who no longer perform any work as advocates or consultants. If these changes take place, we would agree that the question should be revisited. Even if, as some predict, a separate organization emerges to represent the professional interests of employment arbitrators, the Academy ought to keep an open mind on the question of whether it would be desirable and possible to have one organization represent the professional interests of both groups.

While the Committee believes, for the reasons stated, that the Academy's membership ought not be expanded to include those who act as arbitrators mostly in cases involving employment disputes, we believe that the Academy's admission policy ought to be modified to give some formal recognition or credit for experience as an employment arbitrator.

The application form currently in use does not encourage applicants to provide any information about their employment arbitration experience. Committee members Roberta Golick and Barbara Zausner, both of whom had served as chair of the Membership Committee, conducted a thorough review of the information provided by applicants during their tenure. They found that applicants had made almost no reference to such work.

The Academy-sponsored study conducted by the Institute on Conflict Resolution at Cornell University in 2000, *The Arbitration Profession in Transition*, confirmed that a near-majority of our members do a little of this work and a few do a lot. It is similar in many respects to the work we do as arbitrators of labor-management disputes. The way in which this work is performed (as reported in court decisions and the press) inevitably reflects on our members and the process itself.

In 1993, partly in response to this latter concern, the Academy amended two of its stated purposes, set forth in Article II of the Constitution. Pursuant to those amendments, we have undertaken efforts to help educate our members and the public and to improve and defend the integrity of the arbitration process in both types of cases. A continuing failure to give any recognition or credit for the performance of employment arbitration work by applicants for membership is arguably inconsistent with those efforts. It also serves to undermine our credibility when we seek to influence the development of the law in cases involving employment arbitration. By agreeing to give recognition or credit only in those cases conducted under procedures that are balanced and fair, we will help further the goal of improving and defending the integrity of the arbitration process in employment cases.

For these reasons, we have recommended that the Board of Governors adopt a policy statement on admission to membership which, in our opinion, serves these existing Constitutional purposes, while preserving the status of the Academy as an academy of arbitrators of labor-management disputes. The statement is similar to the proposal discussed at the open forum in Atlanta. It has been modified to make clear that employment arbitration cases of the type described will not be treated as "countable" cases, and that experience as an employment arbitrator is only one of several types of relevant experience that the Membership Committee may consider, provided the applicant meets the minimum threshold requirement for consideration.

Our National Meetings

Attendance at national meetings has been steadily declining. This year, the Board of Governors will hear from the Arrangements Committee that the attendance, and the income from the Annual Meeting, is substantially down from last year's meeting - preliminary figures indicate a drop of some 35%. The Canadian Region has complained of low Academy visibility in Canada. The new President suggests he will be requesting guidance from the membership as to how the Academy can be more recognized in the South. It is essential that the Academy act now to bolster its most important and visible annual event. This will require earnest re-thinking of some fondly-held assumptions concerning budgets and meeting structure.

Over the past two years, this committee has engaged in a series of inquiries to review, among other things, reasons for the attendance problem. These will be discussed in some detail below, but it is clear that a major problem concerns program content of the Annual Meetings. There are a variety of forces working against the meeting, many of which were not true in the days when the meeting was overflowing with attendees.

Ironically, some of the success and widespread acceptance of the arbitration process has contributed to this problem. While in the early decades, Academy meetings might have been viewed by parties as a place to meet new arbitrators and learn more about the process, efforts of the various appointing agencies and the comfort level of the parties in dealing with a better-known cadre of neutrals makes the Annual Meeting less of a business necessity. This, taken together with tighter budgets and greater budgetary scrutiny, particularly on the part of the Unions, may have resulted in a dampened appeal.

Demographics of the organization itself should not be overlooked. At its inception, this Academy was a relatively small and notably homogeneous group that saw itself in a social/fraternal light as well as in the context of a professional organization. Annual Meetings were a natural gathering point. Today, to the extent there is this atmosphere, it is served at least in part, by more formalized regional meetings and a mid-year education conference that can lead some to believe they have overdosed on Academy functions. The Annual Meeting is a more expansive venture, particularly considering dramatic increase in airfare and travel restrictions such as Saturday stay-overs. Even without these elements, the meeting itself is costly: Attending this year's closing banquet was a very substantial expense.

Competing organizations have arisen and thrived over the years, so Academy programs now have extensive competition from other labor relations organizations, bar associations, academic gatherings and similar groups.

In an effort to gain an informal sense of the membership, the Committee conducted a 2000 telephone survey of members who had not attended more than one of the last seven national meetings. Alvin Goldman summarized the findings, which are appended. His comments and observations, with which we fully concur, will not be repeated at any length here. Our purpose here is to comment generally on program content and on the results of that survey as they may be applicable to program considerations.

In the overall, for the reasons to follow, the conclusion is that the Academy must do a better job of making the Annual Meeting not merely informative, but also engaging. The

meeting must be one that compels attendance. As it stands, the Annual Meeting is properly serving neither the professional nor the collegial functions of the Academy.

One begins with the recognition that some 64% of the 165 respondents said that program content was never a factor in their non-attendance. (A full 80% said that program format was never a factor). This response should not, however, be interpreted as meaning that better programs would not stimulate attendance. Among those offering more expansive comments, 28% cited busy schedules and 33% offered family conflicts as reasons for their absence. But schedules for the primarily self-employed are forged on the basis of what is most important to the individual at the time. Truly important programs will find their way onto calendars.

At the outset, then, some overview of the survey results is in order. First, while interpreting this admittedly non-scientific data can be a bit troublesome, some general conclusions appear appropriate. One notes, for example, that the cost of the Annual Meeting would not appear to be a major factor. It is true that the open-ended comments reflect 15 people for whom cost was apparently a factor. But in the responses to specific questions, 59, 66 and 71 percent of the respondents found that cost of travel, lodging and registration, respectively was never a factor. Of these, the 71 percent who found the registration fees unobjectionable are worthy of some note. It suggests there is room, without substantial impact, for the current registration fee to be adjusted upward to cover the cost of high-profile speakers.

Alvin's analysis treats with some skepticism (properly so, in our judgment) some of the open-ended responses in terms of "family responsibility" and "busy schedules". Specifically, he suggests that the "too busy" group might arguably be included among those who candidly stated that their "only interest in being in the Academy is being listed as a member." For the purpose of discussing this, we have combined the "inconvenient locations" response and the "too expensive" response categories, since virtually all locations can be reached by air with, at most, one change of plane. That done, this category constitutes the third largest response area, "time away from family" and "too busy' ranking 1st and 2nd. (Again, however, the overwhelming number of respondents discount expense as a meaningful factor.)

We would also combine the "too busy" and "family" categories (as does the basic "reasons" inquiry in the questionnaire) for purposes of this discussion. Taken together, a review of the various categories supports the conclusion that people are not attending the Annual Meeting not because they can't but because they don't want to: Other things attract them more. Some of these are fully understandable - graduations, etc. But committees have wrestled with date change issues in the past and have discovered there is no universal appealing date. Family conflicts are, indeed, a meaningful factor, particularly for full time arbitrators who may be on the road a great deal. But some of those conflicts can be addressed by providing a meeting that will accommodate family interests, as well. None of this, however, will be effective if the basic substance is lacking from the standpoint of labor arbitration.

A comment on some of the other "spikes" is in order. The "not enough nuts and bolts" cannot be readily dismissed. At the same time, this is the flagship meeting of this society, not to be confused with an AAA training program. The complaint that programs are too esoteric is somewhat surprising, coming from a group of this skill, education and experience. It may well be that this should, instead, be read as "too dull" and that even programs of high academic content can be proffered so long as they are interesting.

Making a program interesting, year after year, is by no means easy. Labor arbitration is a relatively narrow field. The Academy is composed of many academics, but many more practitioners. The practice itself (as distinguished from the law that surrounds it) has undergone relatively little change over the years. The Academy faces a dilemma. In holding itself open to both members and guests at annual conventions, the group welcomes a broad range of people, virtually all of whom are practitioners. With due recognition for varying levels of sophistication, many are looking for "nuts and bolts" type programs that give them practical guidance on how to successfully present arbitration cases. Surely, it will attract substantial numbers of attendees. It is also, however, the type of program that has been done many times by the Academy and is echoed annually by national and regional programs throughout the country. This is not to say there is no place for practical, as distinguished from academic, programs. To the contrary, as indicated above and as will be discussed in greater detail below, it is probable that an overall program that fails to cater to this audience with a healthy dose of "how to" materials will fail to attract attendees on a continuing basis.

Along with a certain broadening of our thinking with respect to budget should be a broader approach to subject matter. There is no dearth of speakers who are qualified to speak on many engaging topics in today's society. We should offer our meeting as a forum for those thoughts.

In the past, the *Proceedings* of our annual meetings have proven to be the richest source available, of scholarly material on the labor arbitration process. Nothing said in this report is intended to suggest that we abandon or diminish the practice of publishing *Proceedings* of comparable quality. The problem is that, with respect to day-to-day labor arbitration practice--and much of its law--everything has been said before, often many times. There is undoubtedly a role to be served in educating members and guests on very basic nuts and bolts topics, but as indicated above, there is substantial competition in the market.

What needs to be done with respect to programs is to make them both informative and attractive. Prospective attendees must be given a reason for coming to the meeting. Papers of substance must be delivered, but there should also be a focus on providing a synergism that cannot be gained by staying home and reading the proceedings.

There are several ways to approach this goal. First, there should be a strong effort to provide speakers that people wish to hear. To be sure, there are cost consequences to this, but it is time the Academy confronts that. This is not to suggest that we modify our policy of utilizing in-house talent. However, the Academy has paid speaking fees in the past when a program committee deemed it appropriate to solicit a person who could make a contribution in a particular subject area. A single, high profile speaker can single-handedly attract large audiences that more than offset the necessary increase in the program committee budget.

Related to this approach might be a certain broadening, as well, in the types of topics available for general sessions. Sporadically over the years, there have been offerings that were off the beaten arbitration path. During the 40th Annual Meeting in New Orleans, for example, the program committee took the opportunity of the southern situs to offer a William Faulkner seminar to spouses. A short reading list was assigned ahead of time, a brilliant speaker on literature of the south was engaged, and the session was inspiring and enormously successfully. In recent meetings there have been successful programs in which outside experts talked about

such topics as stress management, conflict resolution in a communal culture, and the like. Some exploration into these types of offerings is in order.

Finally, it is worthwhile exploring varying changes to the format of sessions. The speaker-and-respondent approach serves well, but recent experiments by last year's San Francisco committee, utilizing a mock trial approach in one session and a "talk show" format in another, were exceptionally well-received. The answer appears to lie in the presentation of relevant subjects in interesting formats. To be sure, there have been programs that miss the mark. But this has been true of traditional formats as well. One ought not to be afraid to experiment. Innovative formats can be very important. We need to attract to the meeting those who would otherwise be content to read the papers in the proceedings and we need to develop the reputation that these will be interesting and enjoyable events from both a professional and a social standpoint. There is too much competition from other meetings to conclude that "business as usual" can prevail.

On a related note, program committees should resist the continued reliance on the "talking heads" presentation. (Speaker, respondents and a few questions from the floor.) Break-out sessions, with multiple group leaders have strong appeal on a variety of levels. They inspire widespread participation among members, thereby helping to combat the "outsider" perceptions of many and offer the opportunity for lively exchange of view. They are under-utilized. All these changes warrant serious consideration. The Annual Meeting is the centerpiece of the Academy's functions. It presents our public face to the labor and management community and acts as a profoundly important forum where members can meet, establish and renew friendships, exchange ideas and contribute in a wide variety of ways to the overall organizational health. All that is simply lost if members don't attend. The more the membership attendance dwindles, the closer the Academy comes to being little more than a membership directory.

A discussion of the content of the Annual Meeting cannot overlook the non-substantive aspects. For many years, the Meeting has served as a meaningful common ground where the parties and the arbitrators could mingle in a more informal collegial setting. The hospitality suites provided a central gathering place. Due in no small measure to the Academy's hosting these sessions, complete with light hors d'oeuvres and drinks, these rooms were packed, sociable and fun. Members and guests had the opportunity to meet and socialize in an off-the-record context that was a welcome relief to the sometimes high-pressured arbitration events. Some years ago, the Board of Governors acceded to the notion that it was somehow unfair to non-drinking members and guests to subsidize these gatherings. The result was profound and immediate. Attendance dropped at the "hospitality" suites to near-zero. Members and guests chose instead, to break up into smaller groups and go off by themselves. In that manner, one of the most enjoyable and, in terms of the Annual Meeting, important functions was lost.

There are, to be sure, drawbacks. There is some merit to the charge that such hospitality subsidizes the drinkers at the others' expense. And, there is the opportunity for over-indulgence that is as unseemly as it is unnecessary. This can be addressed by chits (perhaps two per event) that will serve to contain costs and avoid excesses, while at the same time preserve the intended goal of our hospitality rooms. The Board of Governors ought to revisit this issue and it ought to revise the policy.

Our Status as an Academy

In the Committee's view, the decline in the number of labor-management cases alluded to above has created an atmosphere of discontent among some of our members. A relatively small but possibly growing number of our members are asking two questions that are as old as the Academy itself: Why does the Academy sometimes take positions that are harmful to the business interests of its members; and why doesn't the Academy do something to promote the business interests of its members?

The most direct answer to these questions is to be found in Article II of the Constitution and the Academy's long history of striving to act in a way that is consistent with the principles set forth therein. As founding member Benjamin Aaron put it in a letter to President Harkless, dated June 11, 1998:

> "When we founded the Academy in 1947, it was fully understood and agreed that our underlying purpose was to promote the arbitration of labor-management disputes as a preferable alternative to resorting to strikes and lockouts; the idea of making the Academy a means of promoting the prestige and financial welfare of its individual members, though perhaps favored by a few of the founding members, was rejected by the majority. If we are to depart from those principles, it seems to me we ought, in all honesty, to reformulate Article II to reflect that change; those who disagree can then decide whether they wish to remain members.[Letter to President Harkless, dated June 11, 1998.]

As Ben Aaron acknowledges, if a majority of its members favored such action, the Academy could modify its stated purposes to include the promotion of our business interests. In our view, doing so would not only inflict serious damage on our status as professionals, it would actually be counterproductive for those who would prefer to see the Academy function more like a trade association. Ironically, the Academy's efforts to adhere to the principles set forth in our statement of purposes has unquestionably served to promote the prestige and financial welfare of its members, albeit indirectly. See, Bognanno and Coleman, *Labor Arbitration in America: The Profession and Practice* (Praeger, 1992).

We do not mean to suggest that the Academy should disregard the business interests of its members. Members should not be hesitant to remind those who serve in leadership positions in the Academy that the positions the Academy takes can and often do have an impact on the business interests of our members. In those circumstances, an honest and open debate should follow. Members who express concerns about the impact of some proposed decision on their business interests should not be criticized and their concerns should not be ignored. However, the focus of the debate should be on the merits and relative importance of the principles alleged to be involved, not the impact on our individual business interests.

Referring Questions to the Membership

Article IV, Section 1 of the constitution states: "The government and management of the Academy shall be vested in the Board of Governors..." Article III, Section 1 of the By-Laws states: "The Board of Governors shall be the governing body of this Academy." Section 9 of that article goes on to state: "Between meetings of the Board of Governors, the authority of the Board shall be vested in the Executive Committee..." The By-Laws place important but more specific powers in the various standing committees, particularly the Committee on Professional

Responsibility and Grievances (Article IV, Section 2) and the Membership Committee (Article VI).

Under the Constitution and By-Laws, all officers and other members of the Board of Governors and regional chairs must be elected by the membership. However, the stated decision-making role of the membership is quite limited. It includes: approval of proposed amendments to the Constitution and By-Laws, including germane amendments added at the membership meeting (Constitution, Article VII); ratification of proposed amendments to the Code of Professional Responsibility (By-Laws, Article IV, Section 2 (a); and ratification of proposed changes in the annual dues (By-Laws, Article V, Section 3).

Of course, this does not mean that members have no power to influence the decision making process. They can express their views at annual meetings and by communicating directly with other members, officers and other members of the Board, and chairs and members of committees. The means of communication now being used for that purpose include, the telephone, fax machines, e-mail, regular mail, and the submission of letters and articles for possible publication in *The Chronicle*. In addition, regions have the recognized right, under Article VIII, Section 4 of the By-Laws, to take a vote and send a formal communication to the President and Secretary-Treasurer, with regard to any public policy position adopted by the membership of the region.

The question posed does not ask the Committee to recommend any changes in this allocation of decision-making authority under the Constitution and By-Laws. Instead, we have been asked if there are any standards or guidelines we would recommend for use by the Board of Governors and Executive Officers in deciding when an issue is of such importance that it should be discussed by the full membership before the Board takes final action.

There are actually two variables that must be considered in addressing this question. In addition to the relative importance of the issue, there is the matter of its urgency.

Many decisions need to be made between meetings of the Board of Governors. That is the function of the Executive Committee. Obviously, the Executive Committee ought not defer action on routine matters, such as the approval of routine expenditures. However, if a matter *appears to* be of such importance that it *might* be desirable to obtain membership input before acting, the Executive Committee ought not take any final action between Board meetings. In those circumstances the matter should normally be referred to the Board.

Obviously, there will be times when deferral of the issue for Board consideration is simply not possible. Authorizing the filing of friend-of-the-court briefs is a recurring example of this problem. It is our understanding that steps have already been taken to deal with this problem, by soliciting input from a number of legal scholars holding views that are representative of the differing views of our members, before making the decision. That is a sound approach that ought to be formalized through the establishment of a committee, with responsibility for keeping the membership informed of the positions they have taken and anticipate taking in appropriate cases that may arise in the future. This can best be accomplished through regular postings of committee minutes on the Academy's website.

When an issue comes before the Board for the first time, a decision must be made as to whether it is in fact of such importance that membership input should be obtained before acting.

It is not enough to say that it *appears* to be such an issue and that it *might* be desirable to obtain such input. If membership input were sought for every such issue the Academy's decision making process, which is often criticized as painfully slow, would become even slower. In addition, the willingness of the members to read and respond to the materials they receive would be quickly exhausted.

Like beauty, the importance of an issue is often in the eye of the beholder. It is easy to give examples of issues that, all would agree, are of such importance. The principal issue pending before this Committee is an obvious example. However, it is nearly impossible to articulate a standard or guideline for making the judgment, other than to observe that they typically involve issues that appear to implicate business interests, ethical principles or well established Academy traditions and policies. In the last analysis, the decision as to need for membership input, or further membership input, must be made by the Board of Governors.

VIII. Summary of Recommendations

A. The Academy should not expand its membership to include those who act as arbitrators mostly in cases involving employment disputes arising outside the labor-management field. Instead, the Board of Governors should adopt the following policy:

> "The Membership Committee shall continue to require that all applicants for membership, except those who qualify under the 'alternative' criterion, have substantial and current experience as an impartial arbitrator of labor-management disputes. If the Membership Committee determines that an applicant has decided a sufficient number of countable, labor-management cases to meet or exceed the minimum, threshold requirement for consideration [currently 50 decisions in the last five years], it shall continue to carefully evaluate that experience, as it has in the past, to determine if it reflects general acceptability by the parties. It shall also give such weight as it deems appropriate to the applicant's other experience in the field of labor-management relations and to the following:
>
> The applicant's experience as a jointly-selected neutral, issuing final and binding decisions, with accompanying rationale, in employment disputes of the following types:
>
> 1. Cases involving the application of statutory protections to employees, provided that the procedures followed were consistent with the requirements of the Due Process Protocol of 1995 and the Academy Guidelines of May 1997.
>
> 2. Cases involving the interpretation and enforcement of individual contracts of employment negotiated by an employer with an employee holding a job that is not covered by any law authorizing collective bargaining.
>
> 3. Cases arising under an employer-promulgated policy or procedure, applicable to employees holding jobs that are covered by a law authorizing collective bargaining, provided that the procedures followed afforded the employee due process rights equivalent to those contained in the Due Process Protocol of 1995 and the Academy Guidelines of May 1997."

B. While the declining attendance of members at our fall educational conference is also a matter of concern, the declining attendance of members and guests at the Annual Meeting is a matter of critical concern and importance to the future of the Academy. The Board of Governors should recognize the problem and take appropriate steps to deal with it. We would urge the Board to consider the following suggestions:

1. Adopt a policy statement recognizing that attendance by members and guests at the Academy's Annual Meeting is a matter of critical importance to the Academy.

2. The program offered at the Annual Meeting should not only be educational and informative, it must also serve as a strong attraction for attendance.

3. In designing the program for the Annual Meeting, a balance must be struck between two competing interests. While some attendees might prefer practical "how to" presentations, such presentations should be limited and offered as an option.

4. The Academy should continue to offer programs at the Annual Meeting that deal with sophisticated issues and have a high substantive content, but the presentations must be made in a way that is interesting and compels the attention of the audience.

5. The Program Committee should be encouraged to use breakout sessions and formats that are innovative and new. Speakers should be asked to not read papers that will be published in the Proceedings. Use of the traditional "talking head" format of "speaker, reactors and questions from the audience" should be limited. Use of that format should be reserved for speakers who are known for their ability to make presentations that are engaging as well as educational or informative.

6. The Program Committee should not hesitate to invite an outside, high-profile speaker whose stature or speaking ability will serve as a "draw" for purposes of attendance. The Academy should plan on recapturing the cost of doing so through an increase in the registration fee and any anticipated increase in attendance.

7. The Program Committee should not be reluctant to include one or more sessions involving a topic unrelated to the field of labor or employment arbitration, if there is reason to believe that it will be of great interest to the members and guests in attendance.

8. The Hospitality Suite concept should be restored and revitalized. In that way, arbitrators and guests can meet, mingle and discuss the program and other topics in an informal, collegial setting. The objections that led to the demise of the Hospitality Suites can be mollified by the use of chits (perhaps two per event). This will address the concerns of those who do not wish to subsidize drinking by others, and help discourage over-indulgence.

C. In its decision-making procedures, the Academy should continue to place primary and controlling importance on the purposes of the Academy, as set forth in Article II of the Constitution. When considering issues that may have an impact on the business interests of our members, such concerns should not be ignored. However, the focus of the debate should be on the merits and relative importance of the principles involved and not the business interests that have been identified.

D-1. At times an issue will come before the Executive Committee, that implicates the business interests of some of our members, ethical principles or well-established Academy traditions or policies, and it *appears* that it *might* be desirable to obtain membership input before acting. In such circumstances, the Executive Committee ought not take any final action, except in those few cases where it is not possible to delay action on the issue. When such an issue comes before the Board of Governors, the Board must decide whether it would be desirable to obtain membership input, or further membership input, before acting.

D-2. The President should create a standing committee, comprised of three or five members who are recognized legal scholars, to serve terms of indefinite duration. The purpose of the committee should be to provide advice to the Executive Committee and Board of Governors about pending court cases where it might be desirable for the Academy to file a friend-of-the-court brief, and obtain permission to do so. The members of the committee need not be members of the Board, but should serve at the pleasure of the President. If possible, the committee should include legal scholars who hold divergent views on questions that are considered controversial by the membership of the Academy. It should be the responsibility of the chair of the committee to keep the membership informed of positions the Academy has taken or intends to take in the future, through postings on the Academy's official website.

E. If any of these recommendations are accepted by the Board of Governors for inclusion in its Policy Handbook, they should be reworded as necessary for that purpose.

November 1, 2001 *Special Committee on the Academy's Future*

George R. Fleischli, Chair
Richard I. Bloch
Howard S. Block
Joseph F. Gentile
Alvin L. Goldman
Roberta L. Golick
George Nicolau
Calvin William Sharpe
Gerald E. Wallin
J.F.W Weatherill
Barbara Zausner

APPENDIX A

COMMITTEE ON THE ACADEMY'S FUTURE

Questions that May Need to be Addressed

In its deliberations, the Special Committee on the Academy's Future, identified a number of questions, which we might wish to address if the Academy were to expand its membership to include those who act as arbitrators mostly in cases involving employment disputes arising outside the labor-management field. They can be grouped as follows:

1. **Who are we talking about?** What are their numbers? What is their professional background? How many would be ineligible for membership under existing standards, because they currently serve as advocates or consultants in labor or employment relations?

2. **What is the nature of their practice as neutrals?** For how many years have they served as arbitrators of employment disputes and how many written decisions have they rendered? How many of the written decisions they have rendered would be considered "countable" under existing criteria applied by the Membership Committee if they involved a labor-management dispute? What is the nature of the employment cases they have decided, *e.g.*, did they arise under an *ad hoc* agreement, an individual contract of employment or an employer promulgated procedure, and did they involve statutory rights? Do they work primarily as arbitrators of employment disputes or do they primarily mediate and perform other ADR work? Do they perform any work as arbitrators of labor-management disputes? What are the sources of their appointments as arbitrators of employment disputes?

3. **How compatible are the two groups?** How many potentially eligible, employment arbitrators are interested in joining the Academy and becoming active in its affairs? Why? If employment arbitrators were admitted to membership in the Academy, without regard for their acceptability as arbitrators of labor-management disputes, what impact will it have on our relations with the representatives of labor? Are there any differences in the standards of professional conduct subscribed to by the two groups that would render membership in the same organization undesirable to either group?

APPENDIX B

COMMITTEE ON THE ACADEMY'S FUTURE

Three Possible Recommendations

Status Quo - No Consideration

Make no change in the standards for admission to the Academy. Currently, no consideration is given to experience as an arbitrator of employment cases for the purpose of determining if an applicant has "substantial and current experience as an impartial arbitrator of labor-management disputes, so as to reflect general acceptability by the parties."

Modified Status Quo - Some Consideration

Modify the standards for admission to the Academy to give some consideration to experience as an arbitrator of employment cases. Under this approach, applicants would be required to meet a minimum requirement of current experience as an impartial arbitrator of labor-management disputes, but would be allowed to count experience as an impartial arbitrator of employment cases to help meet the requirement that the experience be "substantial" and that it "reflect general acceptability by the parties."

Equal Consideration

Change the standards for admission to the Academy in order to admit arbitrators of employment cases on an equal basis with arbitrators of labor-management cases. Under this approach, the applicant would still be required to demonstrate "substantial and current experience as an impartial arbitrator...so as to reflect general acceptability by the parties." However, none of that experience would need to be as an arbitrator of labor--management disputes. Some or all of it could be as an arbitrator of employment disputes.

NOTE: If some consideration or equal consideration is to be given to experience as an impartial arbitrator of employment disputes, it will be necessary to establish guidelines regarding the number and type of employment cases that ought to be considered for purposes of meeting the admission requirement.

In addition, if equal consideration is given, the policy on admission would need to be changed to state that:

> Membership will not be conferred upon applicants who serve partisan interests as advocates or consultants for labor or management in labor-management relations or employment relations or who are associated with or are members of a firm which performs such advocate or consultant work.

APPENDIX C

NAA MEMBERHIP CRITERIA

Proposed Change for Discussion by the Membership

June 2, 2001

If it is determined that an applicant for membership has decided a sufficient number of countable, labor-management cases to meet the threshold requirement for consideration [currently 50 cases in the last five years], the Membership Committee may give consideration to the following, for purposes of determining if the applicant has substantial and current experience and has general acceptability as an impartial arbitrator:

Any final and binding arbitration decisions issued to resolve employment disputes of the types listed below, where the applicant was jointly selected by the parties to the dispute:

A. Cases involving the application of statutory protections to employees, provided that the procedures followed were consistent with the requirements of the Due Process Protocol of 1995 and the Academy Guidelines of May 1997.

B. Cases involving the interpretation and enforcement of individual contracts of employment negotiated by an employer with an employee holding a job that is not covered by any law authorizing collective bargaining.

C. Cases arising under an employer-promulgated policy or procedure, applicable to employees holding jobs that are covered by a law authorizing collective bargaining, provided the procedures followed afforded the employee due process rights equivalent to those contained in the Due Process Protocol of 1995 and the Academy Guidelines of May 1997.

APPENDIX D

COMMITTEE ON THE ACADEMY'S FUTURE

Results of Telephone Survey

Survey Method

The national office provided the Committee with a list of members who attended not more than one of the past seven national meetings (annual or mid-year) dating back from late 1999. That list was reduced to 232 members by eliminating those known by the Committee to be unable to attend due too infirmity or other compelling reasons or who were known to be retired even though not in the Standing Member category. A brief telephone questionnaire was prepared and each of the 11 Committee members was given the names of 20-22 persons from the culled list (a few less for Canada). To the extent possible, calling assignments were based on the geographical areas proximate to the caller's locale. Nine committee members completed their calls[1] prior to the 2000 Annual Meeting. The other two, after examining the survey results, stated that they thought the pattern of responses would have been similar for their survey group. In all, responses were received from 165 members, about 71 percent of the total.

The questionnaire was designed to learn why members did not attend most or all of the Academy's national meetings during the prior three years. For this purpose respondents were asked a short series of questions eliciting a specific answer. In addition, respondents were asked for their open ended comments. Some respondents answered some but not all of the questions.

Summary of Responses to Specific Questions

Question- Which of the following possible reasons had a significant influence on your decision not to attend national meetings in the past three years, and with what frequency:

Reason	Always		Sometimes		Never	
	No.	%	No.	%	No.	%
Dates of Meetings	40	24.5	53	32.5	70	42.9
Location of Meetings	17	10.6	62	38.8	81	50.6
Cost of:						
Travel	21	13.0	44	27.3	96	59.6
Lodging	20	12.5	34	21.3	106	66.3
Registration	19	11.9	27	17.0	113	71.1
Lost time:						
From work	27	17.3	53	34.0	76	48.7
From family	33	21.3	41	26.5	81	52.3
Program:						

[1] One Committee member made a considerable number of the contacts by e-mail.

Content	6	4.0	50	31.6	102	64.6
Format	4	3.0	24	17.1	112	80.0

Summary of Open-Ended Comments

There are some difficulties in summarizing the points made by respondents in their extended comments. The following uses the comments of 140 respondents. Not included were comments by which a few respondents noted that they no longer are arbitrating. Because many respondents gave multiple reasons for non attendance, the total number of notations for all categories exceeds 140. Inevitably, different judgments might be made both respecting how to categorize the answers and in which category a particular response should be counted. Thus, there is an inherent inaccuracy in the list below.

Category	Number Noting this Reason
Too busy (includes protective of my time, can't schedule, conflicts with hearing dates, takes time away from work, etc.)	28
Takes time away from family (includes conflicts with graduations, spouse's schedule, etc.)	31
Takes time away from leisure or social activities	15
Age and/or health prevents attending (includes spouse's health problems	12
Regional activities satisfy my needs (includes regional meetings are more satisfying")	7
Neglect to put on calendar with result of conflicting engagements	5
Locations are inconvenient (includes too much travel time or expense)	10
Same old places or sites are not sufficiently interesting	7
Don't know many others in attendance	3
Too expensive or expense excessive in relation to cost of other available meetings	15
Outsiders in attendance are a distraction	1
Should reinstate parties' sponsored receptions	2

Not enough activities for personal interaction (includes “too serious”)	5
Too many cliques — old boy network	10
Not being asked to do things (or be on Board)	3
Too much self-promotion	2
Not enough Canadian content	2
Programs are the same old stuff	5
Programs not geared to interests of full time Academicians	1
Not enough nuts and bolts (includes programs too esoteric)	12
Full timers are losing out to academicians	2
Not enough mediation content	2
Not enough non labor-management content	2
Personal hang-ups (includes “I’m not a sociable person” and “someone once offended me”)	3

Observations

A significant portion of respondents indicated that the timing and location of meetings (when and where) influenced their decisions to not attend. At least with respect to location, the open ended responses suggest that each possible change to satisfy one group of respondents (consistently use a central location, use location that is much closer to respondent’s residence, meet in more interesting or more novel locations) would further exacerbate the complaints of other respondents and probably give rise to complaints from some more frequent attendees as well.

The open ended responses indicate that complaints about meeting dates fall into two broad categories: a) family responsibilities prevent attendance and b) making more money or social and leisure pleasures are higher priorities than Academy participation. Several who cited family responsibilities indicated that in a few years, with children grown, they will be able to attend more frequently. Changing meeting dates to coincide with school recesses would remove this problem for some but may be more than offset by the increased costs for others of travel and lodging during more active vacation and travel periods. In addition, family responsibilities is a less persuasive explanation for not attending the mid-year meeting. Thus, the family responsibilities explanation may be a surrogate for a different explanation of non participation in the national organization’s gatherings. Similarly, the assertion that the regional meetings provide all the member needs may be another surrogate for other explanations. Hence, arguably an

accurate characterization of these responses is that for this group of respondents NAA activities have a relatively low priority in the member's allocation of time and other resources.

Clearly, one category of open ended comments is "my only interest in the Academy is being listed as a member." A couple of respondents made explicit statements to this effect and it is likely that this category also includes some of the 10-20% who gave competing leisure or social activities, or "too busy", as their explanation for non attendance. There is no apparent way to deal with this group other than to impose a minimum frequency of attendance as a condition of continued NAA membership. (Some professional specialty organizations do this on the thesis that the group's purpose cannot be accomplished if members do not participate.) That perhaps overly drastic solution might not answer the assertion of one such respondent who said he gets what he needs by reading the annual proceedings. On the other hand, if we truly value the opportunity to learn from each other, reading the Academy's proceedings fulfills only part of the obligation to give as well as to receive.

More than one respondent argued that we should have no frills meetings or at least offer lower cost alternative hotels and make all conference meals optional. These suggestions probably are the domain of another committee. It should be noted, however, that offsetting that recommendation are the comments of those who indicate that the attractiveness of the meeting locale is for them an attendance incentive.

Although there were some complaints about program content and format, many extended comments were complimentary about both. In addition, some of the changes proposed by respondents were offset by opposite proposals from others. Further, some of these complaints seemed to be addressed to a particular session that the respondent did not like. It should also be observed that assertions such as "too esoteric" or "need more practical sessions" lack some credibility coming from respondents who have attended no more than one of the last seven meetings. On the other hand, the key complaint about format (need more small group sessions) can be addressed and the other comments suggest the need for more consistent attention to providing different strokes for different folks, putting more pizzazz into our programs, and finding ways to make members more aware of what is being offered.

A number of responses reflect unhappiness with the "tone" of the Academy's internal dynamics. Some of these criticisms come from both directions (to paraphrase: we need more opportunity for relaxed socializing/I feel left out of the social activities; or, bring back the sponsored parties/the outsiders spoil the atmosphere). Obviously, as to such criticisms there is the problem that satisfying one group will only exacerbate the complaint of a countervailing segment of those who seldom or never attend national meetings.

Other comments, including several that criticized program content, indicate antagonism toward the influence that academicians and part timers are perceived to have on the Academy, or antagonism toward "cliques" who are perceived as wielding too much influence over the Academy and toward those perceived as using the Academy for their own aggrandizement or to promote their own careers. It is not unusual, of course, for academicians to play a greater role than their numbers in a professional academy and there are sound reasons for that pattern due to the different nature of their available time, resources and experience. Nevertheless, the Academy's activities ought to be accessible to all members. However, before attempting to make adjustments in response to such assertions, it would be best to ascertain the accuracy of these complaints. In order to assess their degree of accuracy it would be necessary to look at how

many different members have been a) committee appointees, b) committee chairs, and c) board members and officers in the past three or more years, and identify their academic affiliations if any, their part time or full time status, and their NAA pals. Unfortunately, that task is fraught with the complexity of drawing relatively arbitrary lines in categorizing many active members. For example, should Carlton Snow be treated as an academician because he teaches full time and publishes his share of scholarly works or should he be treated as a full time arbitrator because he probably carries a larger than average caseload? How should we count emeritus academicians such as David Feller, Bill Murphy, Tony Sinicropi, Ben Aaron, Ted St.Antoine, Frances Bairstow, Walter Gershenfeld, Jack Flagler, Jim Sherman, etc.? How should we count non-academicians who have relatively small caseloads? And how do we ascertain whether particular members gravitate toward each other for the purpose of manipulating the institution or because they have come to know and like each other as a result of working closely on difficult Academy assignments. Finally, whatever the body count, no doubt there will never be an accepted answer to the inevitable few who are passed over because their prior performance has shown them to be unproductive or ineffective committee participants or who are passed over because their effectiveness is unknown for the very reason of their non-attendance at Academy meetings.