APPENDIX B

REPORT OF THE SPECIAL COMMITTEE ON PROFESSIONALISM*

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One of the purposes of the Academy, according to Article II of our Constitution, is "to establish and foster the highest standards of integrity, competence, honor and character among . . . arbitrators." President Murphy, with that purpose in mind, has charged this Special Committee with the task of "assess[ing] . . . professionalism in labor arbitration and the Academy." He has asked us to address "what we mean by professionalism" and "whether there has been a decline in [professionalism]." These questions seem particularly appropriate today given that 1987 is the 40th anniversary of the Academy and that many appear to believe labor arbitration has become "just another economic occupation" and the Academy "just one more trade association." These concerns deserve the most serious consideration.

The Committee has endeavored in this report to describe the state of the "profession," its triumphs and failings. We seek as well to describe the state of the Academy in relation to the professional behavior of arbitrators. We find real shortcomings and we recommend a number of possible remedies. We caution the reader to understand that we have not engaged in a fact-finding process. Our findings are based, not on any methodical study of the work product or behavior of arbitrators, but rather on the shared perceptions of the members of this Committee.[1] Our findings refer to arbitrators as a group, not just to Academy members.

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*Committee members include Bryon R. Abernethy, Edgar A. Jones, Jr., Richard Mittenthal, Eva Robins, Eli Rock, and Ralph T. Seward, Chair.

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[1]We believe a large number of Academy members have the very same perceptions.

Labor Arbitration as a "Profession"

"Profession" is a much abused word. The usual hallmarks of a profession are a formal course of university study leading to a degree in the subject matter of the profession, an examination by the state to determine one's competence, and the granting of a license to practice after fulfilling these requirements.[2] Obviously arbitration does not possess any of these characteristics. There is no college offering a degree in arbitration; there is no state which requires us to pass an examination before we can practice as arbitrators; there is no licensing or certification process.

Notwithstanding these realities, many among us persist in referring to ourselves as members of a "profession." The Academy's Constitution speaks of our being engaged in the "arbitration of labor-management disputes on a professional basis" and of our being "a non-profit professional and honorary organization of arbitrators. . . ." Our conduct as arbitrators is governed by a Code of Professional Responsibility. It seems clear that when we use the term "profession," we are referring to our common occupation and our common dedication to making ourselves expert in our chosen field. Such expertise assumes a continuing quest to achieve the highest possible level of competence and the greatest possible sensitivity to the necessary proprieties, that is, to matters of ethics and good practice. These are, we believe, the characteristics upon which arbitrators must focus in furthering their professionalism. And it is precisely these characteristics upon which the Committee has focused in evaluating the state of the "profession."

Competence

We recognize that arbitration has been an extraordinarily successful institution. It is written into almost every collective bargaining contract in the country. Its use has expanded far

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[2]For a larger perspective of the term "profession" in relation to arbitration, *see* a penetrating analysis by Harry Arthur, *Arbitration: Process or Profession?*, in Arbitration—1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1977), 222–23. Professor Arthur argued that the most telling characteristics of a profession are "theoretical knowledge, a monopoly, authority, a code of ethics, and a culture" and that because arbitration now possesses all of these characteristics it should be viewed as a "profession." He regarded the professionalization of arbitration as an unfortunate development.

beyond what anyone could have imagined 40 years ago. It has helped to place a sense of fairness and reason into grievance administration. Its availability has reduced dramatically the number of wildcat strikes. None of this would have been possible if arbitrators had not, over the years, done their job well. The success of arbitration is, at least in part, a reflection of the ability of arbitrators.

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

This can be explained in part on historical grounds. Consider, to begin with, the early days of arbitration. There were relatively few cases, the process then being fairly unusual. The parties tended to view their grievance disputes as being significant. Hence, they insisted on high level representatives being involved in the arbitration process. That in turn meant an insistence on arbitrators whose credentials were of the highest order. The arbitrators found little, if any, precedent to guide them. They were frequently engaged in breaking new ground, in creating new principles for applying contract language. Few arbitrators were dependent on cases for a livelihood. Given these circumstances, an arbitrator understandably had a sense of high responsibility and public service. The result, more often than not, was high quality work.

Today the situation is entirely different. The enormous growth in arbitration has made grievance disputes a commonplace matter for labor and management. There is no longer a sense of uniqueness. Many cases are of limited significance and involve questions of fact rather than questions of principle.

Hence, the parties have delegated the arbitration function to ever lower levels within their organizations. They often act as if the identity and experience of the arbitrator are not matters of importance, as if almost anyone can do the job. Such developments have led to large numbers of new people entering the field. Many of them have little or no background in collective bargaining or contract administration. They have the benefit, however, of a vast amount of precedent and a large body of theoretical knowledge. Arbitration is no longer a pioneering pursuit. And ever larger numbers of arbitrators are dependent on cases for a livelihood. Given all of these changes, it would be surprising if the quality of arbitrators' work had not declined.

The Academy and Competence

Has the Academy met its obligation with respect to fostering the "highest standards of . . . competence?" If not, what more should we do to further this objective?

Any attempt to deal with these questions must begin with Academy membership standards. The principal requirement for membership is "substantial and current experience as an impartial arbitrator . . . so as to reflect general acceptability by the parties."[3] These words have generally been applied by the Membership Committee to mean 5 years of arbitration experience and a minimum of 50 awards, but have not precluded further inquiry when circumstances warrant. Suggestions for a standard more stringent than 5 and 50 have been rejected by the Academy.[4]

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[3]Alternatively, membership can be conferred with "limited but current experience" where the applicant has "attained general recognition through scholarly publication or other activities as an important authority on labor-management relations."

[4]*See,* for instance, the Report of the Special Committee to Review Membership and Related Policy Questions (the so-called Reexamination Committee), Appendix F, in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 367, 370. This Committee stated in part:

> As to the application of the "substantial and current" standard, we think—and we note that the vast majority of the membership recorded the same sentiment on the questionnaire—that the translation to about 50 cases over the past five years is sound. . . .
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> . . . So long as reasonably and intelligently applied, we think th[is] standard constitutes the right balance between the Academy's legitimate demand that applicants make a showing that they are qualified to arbitrate and proper regard for the fact that membership in the Academy aids the process of becoming fully established as an arbitrator—from which it follows, we believe, that a public-spirited organization confers

Thus, the criterion for admission is more quantitative than qualitative. The Academy makes no attempt to judge the competence of applicants—their opinion-writing or decision-making abilities and their knowledge of the world of arbitration. Our Membership Committee defers in effect to the parties' judgment, to the experience of the marketplace. It will, by and large, accept for membership anyone whom the parties have accepted to arbitrate their disputes.[5] What this means is that the parties, not the Academy, set the standards for the profession. But the parties' main concern is results. They frequently pay little attention to such matters as art, method, and theory. Because of these realities, competence as a criterion for admission is secondary to acceptability. Or, to put the proposition more politely, everyone assumes competence on the basis of acceptability. We question that assumption and we find that the Academy has done relatively little to reverse the equation, to make competence the prime consideration.

We do not mean to suggest that the Academy has not done significant work. Our annual meetings produce excellent papers on a wide range of arbitration subjects. These papers have provided critical insights into the practical and theoretical problems arbitrators face. Our educational conferences promise in time to be equally valuable. Our regional functions offer an opportunity to discuss issues of common interest with our peers. To the extent to which our members participate in these meetings, the Academy is helping to improve competence. Apart from this educational effort, it is difficult to see how the Academy fosters the "highest standards of . . . competence."

The irony here is that everyone, parties and arbitrators alike, seems to view Academy membership as proof of competence. Indeed, a former Academy president stated some years ago that "election to the Academy is equivalent to certification of compe-

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membership at a stage appreciably below full establishment.

See also the Report of the Special Committee on Membership Standards, which unanimously stated in 1980 that "the Membership Committee should continue to regard 50 arbitration cases decided in the five-year period prior to the date of application . . . to be the basic 'experience' benchmark for consideration for admission." It recommended that the Membership Committee also evaluate the "character, variety and relative difficulty reflected . . ." by such experience, the "diversity" of the parties served, and the "professional growth" of the applicant.

[5]The only exception is that applicants will be rejected, regardless of "substantial and current experience", if they "serve partisan interests as advocates or consultants for Labor or Management in labor-management relations" or if they "are associated with or are members of a firm which performs such advocate or consultant work."

tence by leaders in the profession. . . ."[6] The parties sometimes provide in their collective bargaining contracts that only Academy members may be chosen to arbitrate a dispute. Such behavior fails to appreciate that membership signifies acceptability, nothing more. We suspect that it would ordinarily take arbitrators hundreds of cases, not just 50, to achieve the kind of knowledge and understanding which would make them truly competent. We make this statement not as a basis for recommending a tightening of the Academy's membership requirements but rather as a means of underscoring the difference between competence and acceptability.

Possible Remedies

What, if anything, should the Academy do to improve competence?

Some have proposed that arbitrators be certified or licensed by the state or perhaps by the appointing agencies. Under such a system only those with a certification would be presumed expert in the field. We reject this concept. To begin with, certification would interfere with the long-standing freedom of the parties to choose their own arbitrator. It would also be inconsistent with the Code of Professional Responsibility.[7] There are several papers in our annual proceedings which offer compelling arguments against certification. Ben Aaron has explained that "a license would be no guarantee of even minimal competence" given the "nature of the arbitrator's function" and the unlikelihood that any license examination would tell much about one's ability to perform this function.[8] Marcia Greenbaum has

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[6]Witte, *The Future of Labor Arbitration—A Challenge*, in The Profession of Labor Arbitration, Selected Papers from the First Seven Annual Meetings of the National Academy of Arbitrators, 1948–1954, ed. Jean T. McKelvey (Washington: BNA Books, 1957), 17–18.

[7]Part 1A1a of the Code states:

> 1. Essential personal qualifications of an arbitrator include honesty, integrity, impartiality and general competence in labor relations matters. . . .
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> a. *Selection by mutual agreement of the parties or direct designation by an administrative agency are the effective methods of appraisal of this combination of an individual's potential and performance,* rather than the fact of placement on a roster of an administrative agency or membership in a professional association of arbitrators. (Emphasis added.)

Note too that the earlier Code of Ethics stated,

> Any person whom the parties or the appointing agency choose to regard as qualified to determine their dispute is entitled to act as their arbitrator.

[8]Aaron, *Should Arbitrators Be Licensed or "Professionalized"?*, in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 155.

explained that certification "is invoked primarily to protect the consumer, who supposedly is not expert enough or lacks the necessary information to evaluate the quality of available services." But, she emphasizes, "labor and management consumers are knowledgeable and have a variety of methods for determining the quality of available arbitrators."[9] In other words, the usual objectives for adopting a certification process are not relevant to labor arbitration. Finally, it has been argued that the evaluation procedures presently being used by the parties, the appointing agencies, and the Academy constitute a form of certification.

Others have suggested that the Academy, through its Membership Committee, attempt formally to evaluate the quality of the applicant's work (e.g., style, clarity, and analysis in opinion writing) as a means of placing greater emphasis on competence. We reject this idea. Any evaluation of opinion writing involves highly subjective judgments. "One man's meat is another man's poison." More important, the critical feature of an applicant's work is the quality of decision making. The difficulties encountered in judging another's decision should be obvious to all members of this Academy. We have left these matters to the parties' judgment in the belief that they will not continue to use arbitrators who make poor decisions. The Academy's Reexamination Committee reached the same conclusion in 1976.[10]

Probably the most constructive contribution to competence by Academy members has been their participation in training programs for new arbitrators. These programs have taken many forms. They have been sponsored by universities, bar associations, or appointing agencies. Their purpose, more often than not, is to enlarge the pool of available arbitrators. The students are interested in arbitration careers but are not yet listed with the appointing agencies. Other programs initiated by labor and management have taken the training several steps further. For

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[9]Greenbaum, Comment, *Should Arbitrators Be Certified?*, in Arbitration—1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1978), 210.

[10]*Supra* note 3, at 370.

Note that applicants for placement on the FMCS list are supposed to pass a competence review. Its admission standards state in part that all applicants "must be able to demonstrate acceptable ability in analysis, recommendations, and decision writing . . . be able to speak and write in a clear and concise manner . . . [and] be able to demonstrate experience, competence, and acceptability in a decision-making role in the solution of labor relations disputes. . . ." *See* Policies, Functions & Procedures, (Washington: FMCS, Office of Arbitration Services, Nov. 1976). In practice, FMCS requires that applicants submit at least five arbitration awards they have written. Whether one can judge the qualities quoted above from a review of arbitration awards is highly questionable.

example, the General Electric-IUE effort at the University of Michigan some years ago involved not only an extended period of study and lectures but also a promise of placement on the AAA list plus several arbitration cases from the parties themselves. The steel industry and the Steelworkers have employed apprentice (or assistant) arbitrators in different companies to assist the permanent arbitrators. Similarly, some Academy members have engaged apprentices to help manage their large case loads. These arrangements, at their best, involved seasoned arbitrators sharing insights born of a lifetime of experience and providing valuable critiques of a neophyte's draft awards. Apprentices who experienced this type of intensive, long-range training have generally become highly competent arbitrators.

Unfortunately, much of this effort has been directed at getting people on the lists rather than helping people already on the lists perform competently, once they are called upon to arbitrate. Training programs, we believe, should focus on the most promising individuals in the latter group. It should not be difficult to identify them or to find experienced arbitrators who are willing to assist in their training. Eva Robins and Peter Seitz conducted lengthy seminars for such neophytes in New York City for a number of years.[11] Such an intensive, highly focused approach is far more likely to improve competency and to do so among precisely that group of people most likely to be asked to arbitrate. The Committee on the Development of New Arbitrators (CDNA) recommended this type of program in its most recent report. It stated:

> the Academy *should be willing to entertain ad hoc proposals* from individual regions *for* official *co-sponsorship* or *sponsorship of* differently structured, *less formal programs designed to upgrade the skills of existing arbitrators* . . . (Emphasis added.)

The Board of Governors approved this recommendation at its October 1986 meeting. We believe the Academy should go further. It should encourage this kind of training and develop a model program which could be easily adopted by the regions without a large effort. We recommend that the CDNA consider this further initiative and, should it agree with our observations, urge the Academy to take these additional steps.

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[11]Robins and Seitz, *Not Training but Sharing*, 37 Arb. J. 41–45 (1982).

One other challenging proposal has been called to our attention. Mark Kahn made the following suggestion at a recent SPIDR meeting:

> any applicant for the AAA Labor Panel who has not benefited from a substantial internship experience must complete successfully an AAA-supervised apprenticeship designed as follows: the applicant must observe at least ten arbitration hearings conducted by five different AAA-selected 'mentor' arbitrators; she or he must prepare a practice decision on each of these cases, prior to reading the mentor's decision, and provide copies to the AAA and the mentor; each mentor will evaluate the performance of the applicant, providing the AAA with a written appraisal that includes an estimate of the applicant's readiness for serving as an arbitrator; and the AAA will then advise the applicant concerning her or his qualifications and whether the applicant is qualified for placement on the Labor Panel . . . The successful applicant's biographical sketch, as distributed by the AAA, would of course indicate the completion of this apprenticeship and might even identify the arbitrators who served as her or his mentors. . . .[12]

Such a program would stress the AAA's commitment to competence and should prevent incompetents from being placed on the AAA list. It would also provide a useful training experience for those whose practice awards are reviewed and would provide a type of peer approval for those who successfully completed the program. We believe that any administrative procedure which demands a show of competence is a step in the right direction. We recommend that the Academy study this proposal and urge the AAA to adopt such a program.

We recommend further that the annual meeting place greater stress on the "bread and butter" subjects of arbitration. The Committee's impression is that too many sessions are devoted to matters which have little direct relevance to our daily work. We urge that ordinarily at least one half of the program at the annual meeting be set aside to discuss the practice and theory of arbitration. We believe many subjects dealt with in past meetings can be revisited and discussed in a new and challenging manner; we believe some significant subjects have never been dealt with in past meetings. In order to implement these ideas, we recommend that the Program Committee have greater continuity in its membership and that it consider the development of themes

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[12]Kahn, *The Supply of Arbitrators: Who's "Making It"?*, in 1983 Annual Proceedings of SPIDR, 16, 19.

which might be continued over a period of several consecutive meetings. We suspect that these changes together would make the annual meeting a more successful tool for improving our competence.

Similarly, we recommend that the annual education conference be expanded and improved. We think this is a prime opportunity for arbitrators to speak to one another about common concerns. We urge that the Academy seeks ways in which to make the conference more attractive to our members and more productive from the standpoint of competence.

By itself, however, technical competence is not enough. Knowledge of sound hearing procedure, skill in unraveling complicated testimony, thoroughness in case analysis, and felicity in opinion writing are valuable professional assets, and the Academy should do what it can—and more than it is currently doing—to provide opportunities for its members to hone their abilities in these respects. But what is also needed, we think, is a broader and deeper understanding of our profession and of its role in the labor relations world. As labor arbitrators we are entrusted with far more than the function of resolving specific grievances or disputes over contract terms. We have the responsibility of understanding, preserving, and developing the process itself as an integral part of free and democratic collective bargaining. In planning its meetings, seminars, workshops, and regional discussions, we urge that the Academy, through its planning committees, give heed to this objective.

Necessary Proprieties

For arbitration to have succeeded as it has, the parties must have had faith in the character of their arbitrators. That faith plainly has been justified. Arbitrators generally have been sensitive to their ethical obligations. They have understood the special responsibilities of serving as a judge in a labor-management dispute and they have behaved with dignity and integrity. Had they done otherwise, arbitration could not have become such a widely accepted institution. There is good reason, from a historical perspective, to be proud of our performance.

We believe, nevertheless, that in recent years and among a minority of arbitrators there has been a declining level of respect for the necessary proprieties. We are aware, in discussing this subject, that much of the evidence of impropriety comes to us by

way of hearsay—what someone said he had heard from a union representative or a management attorney or what someone else was told by an official of an appointing agency—and we all know how hearsay (and particularly disturbing or shocking hearsay of the sort here involved) can spread and multiply until a few exceptional incidents are made to appear a pervasive practice. But we think that there is sufficient evidence of improper conduct—sometimes on the part of our own members—to require the Academy's attention and corrective action.

Some arbitrators openly solicit work. They write letters to the parties noting their availability, sometimes enclosing samples of their awards. They occasionally call on the parties at their offices for the same purpose. One arbitrator hands out ballpoint pens with his name printed on them; another hands out business cards to any and all takers. The AAA has felt it necessary to state in one of its publications a caution to arbitrators against giving gifts to its employees and a caution to employees against accepting such gifts. The Code prohibition against solicitation simply has been ignored in all of these instances.

Some arbitrators have been responsible for long delays in issuing awards. They keep the parties waiting many months, sometimes a year or more. They think nothing of asking helpless parties for extensions or simply holding pending cases without even requesting an extension. Worse still, some fail to adjust their own work schedules so that past-due awards and future awards will be rendered in a timely fashion. All of this is clearly inconsistent with professional responsibilities stated in the Code.

One hears other stories as well. Some arbitrators have scheduled two cases in a day for different parties, one in the morning and one in the afternoon. They then charge a full day for each hearing. Other arbitrators are reported to charge some fixed ratio of study days for each hearing day, regardless of their actual study time. Such practices are expressly forbidden by the Code. One arbitrator recessed a hearing and went to the men's room where one of the advocates said he was seen reading *How Arbitration Works*. Another held a hearing in a remote location with poor plane service, was forced to stay overnight because of a lengthy hearing, and shared the only available hotel room with one of the advocates.

These are merely examples of what the Committee perceives as a growing insensitivity to Code requirements. No doubt part of the problem arises from the forces of the marketplace. All of

us are aware of an ever increasing pool of arbitrators competing for a decreasing number of cases. This occurs at a time when more people are dependent on arbitration alone for their livelihood. Given these circumstances, it is hardly surprising that solicitation is on the rise. This may help to explain the phenomenon but it certainly does not excuse it.

The other ills are more difficult to explain. Apart from being given a copy of the Code when one is first put on the AAA or FMCS list, or perhaps when one becomes a member of the Academy, there is little mention of the Code in our work. The Code is placed in our desk or filing cabinet and rarely seen again. It is not a burning presence in the life of arbitrators. How many of us refer to it regularly for guidance? How many of us are truly familiar with most of its terms? Without such close familiarity, arbitrators are bound to overlook some phase of their professional responsibility.

Equally important, there are those among us who view arbitration primarily as a business. They are likely to concentrate more on self-interest than the interest of the profession. Such a mindset may help to maximize one's income. It does not help to maximize one's sensitivity to Code obligations and the necessary proprieties. We recognize that arbitrators are no less ambitious than other professionals; we recognize that many of us are dependent on arbitration fees for a livelihood. But self-serving instincts must always be subordinated to the need to uphold the integrity and honor of the profession.

The Academy and Necessary Proprieties

Has the Academy met its obligation with respect to fostering the "highest standards of integrity, . . . honor and character among . . . arbitrators"? If not, what should we do to further this objective?

Any attempt to deal with these questions must also begin with Academy membership standards. One of the requirements for membership is that the applicant be "of good moral character, as demonstrated by adherence to sound ethical standards in professional activities." The Membership Committee is not likely to have first-hand knowledge of the "moral character" of any applicant. It relies on letters from the applicant's references and comments from Academy members. Obviously, the references are not going to be critical of the applicant. And Academy

members from the geographic area in which the applicant works ordinarily have, at best, a dim idea of the applicant's reputation. Thus, the Membership Committee has little to go by. It simply assumes that the applicant is of "good moral character" because no one has come forward to suggest otherwise.

We note that the Membership Committee has on rare occasion rejected applicants because of "moral character." But that happened only because certain Academy members with knowledge of the applicant's "character" raised the issue and thereby prompted an in-depth examination of the applicant's ethical behavior. We believe it is unfortunate that the Membership Committee, as presently constituted, obtains so little information regarding the "moral character" of applicants.

The necessary proprieties, as stated in the Code, are of course the province of the Committee on Professional Responsibility & Grievances (CPRG). Its duty is to provide advisory opinions as to whether certain conduct conflicts with Code requirements and to determine whether a complaint made against an Academy member for an alleged Code violation is justified. However, it has issued just 15 advisory opinions in the 40 years of the Academy's existence. It has processed relatively few complaints against members. Most of them were resolved—either by labor or management dropping the complaint after the charged member had taken some kind of corrective action[13] or by the charged member resigning from the Academy rather than face the rigors of the complaint procedure or the embarrassment of peer discipline.[14] We know of just one instance where the final resolution of the complaint was the imposition of discipline, specifically, "advice" to the member.

All of this seems extraordinary, given the many instances in which arbitrators reportedly have failed to live up to their Code responsibilities. The answer is suggested by the parties' ignorance and unfortunately the arbitrators' peer group loyalty. The parties are largely unaware of the Code requirements and almost totally unaware of the Academy's complaint procedure. Even if all of this were within the parties' knowledge, it is doubt-

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[13]Typically, this involved a complaint about lengthy delay in issuing an award. When informed of the complaint, the member promptly wrote the award and the complaining party dropped the charge.

[14]Some of those resignations concerned members whose arbitral performance had become erratic because of personal tragedy or illness. They resigned even though the CPRG would in all probability have been sympathetic to their situations and imposed no more than light discipline.

ful that they would take the trouble to file many complaints. Their remedy is simply to stop using the arbitrator who is the object of their ire. To go further and submit a complaint to the Academy involves a kind of vindictiveness with which most people would be uncomfortable.

Arbitrators do hear from the parties about other arbitrators' actions which sound suspiciously like Code violations. But they seldom are willing to "blow the whistle." That may be because their knowledge in these situations is almost always second-hand. But also, we suspect, they are as susceptible to peer-group loyalty as any other professional. Would any of you inform the CPRG of a friend, a fellow arbitrator, who has failed to issue an award for more than a year without good reason? We think not. The CPRG itself has often appeared reluctant to act on its own motion and begin an investigation. It seemed more appropriate to wait until someone made a formal complaint.

It should be emphasized that the CPRG has been responsible for reviewing complaints against Academy members only. There are a great many arbitrators outside the Academy who cannot be reached by our complaint procedures. They can be disciplined only by the AAA, FMCS, or other appointing agency. We are not aware of these agencies charging arbitrators with Code violations. Nor are we informed that they have removed people from their lists because of misconduct.

Realistically viewed, we do not believe the Academy has done much to police the profession. The CPRG has performed with distinction. But, from the standpoint of the labor-management world, the CPRG functions largely in anonymity. The Academy has not really publicized its presence, its availability to deal with alleged Code violations. We do not wish, however, to end this part of our discussion on a note of criticism. We believe the Academy deserves high praise for the leading role it played in the creation of the Code of Professional Responsibility. Without the Academy's initiative, without the strong support of its membership, the present Code would not have come into being.

Possible Remedies

What, if anything, should the Academy do to enhance sensitivity to the necessary proprieties? We see three possible ways of attacking the problem—a greater educational effort, a more

effective publicizing of the Code and the complaint procedure, and possible innovations in both Academy and appointing agency operations.

As for education, we recommend that the Academy devote at least one session each year to Code questions at the annual meeting and at the annual education conference. We recommend similarly that the regions be encouraged to consider Code questions at least once a year. We urge, too, that the CPRG issue more advisory opinions.[15] For we are convinced that the more we discuss the necessary proprieties, the more likely we are to achieve a heightened awareness of our Code responsibilities.

As for publicity, we recommend that the Academy provide wider distribution of CPRG advisory opinions through the appointing agencies and the publishing houses. We recommend, too, that the Academy urge the publishing houses to reprint the Code and the complaint procedure from time to time in their arbitration publications. The purpose of these actions is to reach those who would ordinarily be beyond our reach, namely, the parties and nonmember arbitrators. We believe it is vital that they too develop a greater awareness of the necessary proprieties.

As for innovations, we recommend that the following proposal be made to the appointing agencies. Before applicants are placed on the AAA or FMCS panel of arbitrators, they should be required to attend seminars sponsored by the agency to discuss the Code and questions of good practice and ethics. The Academy should help staff these seminars with members who have a sound knowledge of Code requirements. The seminars should be more than mere cursory talks. They should involve detailed discussion of the significance of the principal Code requirements.

We also suggest that the Academy study the possibility of a structural change which would permit new arbitrators to be connected in some formal way with the Academy long before they would otherwise qualify for membership. We sense that many new arbitrators have entered the field without the proper kind of background and training. We suspect this has contributed to what we have already described as a decline in the quality of opinion writing and in the sensitivity to Code obligations. We think that it would be of great value to the profession if the

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[15]One source of such additional opinions is likely to be the AAA which, we understand, has agreed to seek the advice of the CPRG on Code questions which arise in cases administered by the AAA.

Academy had an immediate, direct, and pervasive influence upon these new arbitrators. We believe this can be accomplished by creating a type of "candidate for admission" status that would require newcomers to attend meetings, particularly the fall education conferences, and to learn more of the standards expected of them. We realize that such a proposal, if adopted, would entail many changes in the manner in which the Academy functions. But we feel the time has come for the Academy to play a larger role in the education of future generations of arbitrators. We urge that this subject be placed on the Academy's agenda, not as a matter of charity or good works, but rather as a matter of enlightened self-interest. Sound arbitral behavior is essential to the health of arbitration and the parties' confidence in the process.

A Plea for Excellence

The recommendations made by this Committee, even if adopted, are not likely to effect any dramatic change in the competence or ethical sensitivity of arbitrators; for the Academy has only a limited impact on how arbitrators work or how arbitrators behave. The Academy cannot, through rules or exhortations, lift the practice of arbitration to a higher plane. But the fact that these limitations exist does not mean that this Committee, or any Academy member, should accept the present state of affairs. We must not settle for mediocrity; we must not stray from the necessary proprieties.

Ultimately, regardless of what the Academy does, the responsibility for excellence rests upon the individual arbitrator. Each of us has the capacity to do better. Each of us is capable of improving work performance, of developing a deeper understanding of the issues which confront us daily. Each of us is capable of becoming more sensitive to Code obligations, of behaving in a manner consistent with the highest ideals of the profession.

This may strike some ears as self-righteous moralizing. That is not what we intend. The members of the Committee admit that we have been guilty of some of the very faults discussed in this report. We have written slovenly opinions because of the pressures of a busy schedule; we have been responsible for lengthy delays in answering grievances without justifiable reason; we

have not always been aware of our Code obligations. What has happened to us on more occasions than we care to remember must have happened to each of you as well.

The need for excellence should be a shared concern. If arbitration is to prosper as an aid to free and healthy collective bargaining, arbitrators must do better. They must look at their work product and their behavior with the same critical eye they use on the parties' arguments. They must be teachers who, through their display of excellence in interpreting and applying the collective bargaining contract, help the parties better understand the uses and techniques of reason. They must be role models who, through their respect for the necessary proprieties, provide the arbitration process with the dignity and integrity it requires. Only through the pursuit of such excellence can arbitrators realize the professionism to which we all aspire.

Discussion

William P. Murphy: Before I turn the chair over to the Committee, I want to read from the mandate which I gave to the Committee when I appointed it, dated June 25, 1986:

> The Academy was founded 40 years ago to give the newly emerging candidates for labor arbitration the values and attitudes of a profession. Article II, Section 1, of the Constitution attests to this purpose. Since then labor arbitration and the Academy itself have undergone great changes. For some time doubts and fears have been expressed by many over a transition in values and attitudes towards the profession and the Academy.
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> The question before the Committee is whether labor arbitration has become just another way of making money and the Academy is just one more trade organization. The 40th anniversary of the Academy seems to be an opportunity, the time for a blue-ribbon comparative assessment of the professionalism in labor arbitration and the Academy. This is your Committee charge, and you may interpret it as broadly as you like.
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> Although your method of inquiry is for you to decide, I should say that I do not contemplate any full membership surveys or questionnaires. Doubtless you will consult many individuals, but in the end it is your views that I would like to see expressed. Nor do I expect that you will duplicate any function of existing Committees such as those on Professional Responsibility, Membership, or New Member Orientation, although you may wish to comment on their areas of activity.

And then I mention that I have asked the Program Committee Chair to reserve this portion of our program for presentation and discussion of the report.

The reason I read you that mandate is because it manifests that this Committee was not asked to be a fact-finding body. They were not asked to document anything. What they were asked to do was to give their judgments, their perceptions, on the basis of their experience, their observations, and their conversations with other people. So, if any of you have fault to find with the Committee report because it lacks documentation, I want to assure the membership that the fault is not in the Committee's report but in the mandate itself, and for that I will accept responsibility.

The Committee consists of six very senior members of this Academy, all of whom are past presidents, five of whom are full-time arbitrators, and one of whom is a part-time arbitrator and an academic. With that background explanation, I will turn the chair over to you, Ralph, to proceed as you see fit.

Ralph T. Seward: This is quite a job that Bill worked out for us. In the early fall, when we began to get organized, something happened which was unfortunate for me but amazingly fortunate for the Committee and for the Academy. I got really very sick so that I couldn't do much of a job as chairman and, fortunately for the Committee and the Academy, I was able to persuade Dick Mittenthal to take over in my place. Therefore, with reference to the Committee report which you all have received, the words, the labor, the initiative, the self-discipline, everything that goes into a splendid piece of writing, come from Dick. And the Academy and the Committee are in his debt.

However, the ideas are those of the Committee. We haven't found the facts: we haven't conducted research. We have expressed the beliefs and impressions that we acquired over many years of arbitration and membership in the Academy. We think that, although we're as fallible as anyone else, in the main we're sound in our impressions and conclusions. Whether our recommendations make sense is for you to judge.

I am going to turn the meeting over to Dick, because he acted as chairman all year, and it's only right that he should act as chairman at this meeting. Before I do, though, I want to share with you the first paragraph of a letter which has been received by a number of people in the Academy. It's from a person in the state of Michigan. The first paragraph reads as follows:

> This is a letter of self-introduction. It is important that you know me as a person and as an arbitrator. Western Michigan needs an experienced labor arbitrator with broad experience in every aspect of labor relations. I am that arbitrator. I am available and can respond to your needs quickly and at relatively low cost.

It is followed by two pages of self-description. I am not saying that this is typical of the state of arbitration. But I am saying that unfortunately it's not as unique an approach as we would all hope.

God bless us all in this Academy as we take a fresh look at our profession and at the state of it, and consider what we can do to improve it and to do better the job which we started to do 40 years ago in this Academy.

Richard Mittenthal: It was a great pleasure for me to have the assistance of members of this Committee in preparing this report. I am in their debt for their efforts and their encouragement.

I just want to make a few preliminary remarks of my own about the report and then I will call back each of the Committee members to do the same. Then we're going to hold the floor open for discussion.

First, the Committee methodology: As Bill and Ralph said, the Committee did not engage in any fact finding. Our report is impressionistic; it is based on shared impressions of the six of us.

With respect to the competence of arbitrators, for example, there was really no way of documenting competence even if we had chosen to proceed in a different manner. Even if we had made a survey of the parties' views or of arbitrators' views, the results would still have been impressionistic. The evaluation of competence will always be an extremely subjective matter. The Committee sample was, of course, limited to just six views. The unanimity of our opinion was impressionistic based on our background and experience. A truly objective evaluation of competence would have been difficult, if not impossible, to achieve.

With respect to the necessary proprieties, we could have asked the parties for detailed complaints about arbitrators' misconduct, but that would have been largely impressionistic as well. A complete picture would have required work far beyond the Committee's charge or capability. Nevertheless, we have heard complaints from the appointing agencies and the parties and the Committee on Professional Responsibility and Grievances, and we are convinced that substantial inproprieties are occurring under the Code.

With respect to the Committee's recommendations, the remedies suggested in the report are quite modest with one exception. They involve no major initiatives and no major structural changes. That may be a disappointment to some of you. It certainly is a disappointment to me, but the Committee experienced real difficulty in finding practical and appropriate remedies for the kinds of problems identified in the report.

This difficulty suggests the limited institutional reach of the Academy. There may be issues which the Academy at this point in its life is not capable of addressing.

The one exception I mentioned earlier is the idea of enlarging the Academy's educational function by permitting new arbitrators, those with less than 50 cases, for example, to become involved in the Academy's activities in some fledgling capacity. We could have an immediate, direct, and pervasive effect on the newcomers, and have some influence on their behavior from the very outset of their careers. We do not recommend that change, but we do urge that serious study be given to the idea; it should not be overlooked.

Finally, if Abe Stockman is listening, I thought we should give him full credit for the Committee's use of the phrase "the necessary proprieties." That comes from an article Abe prepared many years ago for the *Stanford University Law Review.*

Byron R. Abernethy: With regard to the report, I think it speaks for itself. All of you have had copies for some time, and have had a chance to read it and to know what it contains. So there would appear to be very little point in attempting to rehash the report. What I would like to say is that the Committee had and still has no desire to create or to participate in an intergenerational controversy between the old arbitrators and the newer arbitrators. It seems to me that all of us, the old and the new, live and work under the same Code of Professional Responsibility. At least I think that, as we have become arbitrators and as we have become members of the Academy, we supposedly have undertaken to do so.

From the time this Academy first met in its organizing meeting on September 13, 1947, 40 years ago, it has been committed to the establishment and fostering of high standards of integrity and competence among those engaged in the arbitration of industrial disputes on a professional basis, and we have worked since that time at attempting to arrive at those types of arbitral conduct which promote that goal.

To that end, the Academy, along with the AAA and the FMCS, adopted a Code of Ethics and Procedural Standards in 1951, and our current Code of Professional Responsibility in 1974. We of the Committee will be the first to agree that not all of us have always conducted ourselves as professionally as we might have. And if you were to go back through the minutes of the annual business meetings of the Academy and the meetings of the Board of Governors, you would find that there have been many discussions and Academy actions during the last 40 years concerning our professional conduct. It has been an ongoing and evolving matter since September of 1947.

I envision this effort on the part of the Committee, at the request of President Murphy, as but the most recent step along the path first charted for us in 1947, of pursuing that goal of seeking to foster and establish the highest standards we can of integrity, competence, and professionalism for our profession. This effort deserves your thoughtful and constructive consideration and discussion.

Edgar (Ted) A. Jones, Jr.: There is a sense among us on the Committee that there has been a deterioration in quality of arbitrators. I am inclined to say that perhaps there always was a factor of deterioration, the human situation being what it is. We on the Committee may have greater sensitivity to some of the characteristics among arbitrators that led Bill Murphy to launch this Committee. In our discussions we gave a good deal of thought to what the Academy might do to remedy the situation. We talked about these things and asked, what are we going to do about them?

The idea emerged, at least a question emerged, which seemed to me to be the one that might open up a new road that would lead to changes in the business attitude which has come to prevail lately. It's the same old dilemma which occurred at the founding of the Academy: whether arbitrators should be persons who have a serious interest in arbitrating, as demonstrated by some criteria that we could dream up, or persons who were already accepted as arbitrators by the parties. That was a debate that most of our founders engaged in, and the Proceedings of the Academy emphasize that factor very strongly for the first several years, perhaps the first decade. It has settled down into a somewhat exclusionary approach: We left it to the parties essentially to identify those persons whom they considered to be competent and qualified, and therefore entitled to come before our Membership Committee with some experience credentials.

My own sense is that we're going to have to look very carefully at our admission policies if, in fact, we do want to affect the tenor and environment of arbitration. I am hoping that we'll be able to make constructive contributions as we have in the past. If we should be trying to influence people who are seriously intent upon an arbitration career, that would require us to have some kind of outreach program at a fairly early stage. In that case, we might find the quality of our meetings changing rather drastically.

I recognize that to be a very serious problem. I can think of several people in the Southern California Region, for example, who are seriously trying to make a career of arbitration and for whom I would not hesitate to recommend acceptance by our Academy as potential candidates for admission; that is, somebody whom we identify in a region and then, if that person is interested in becoming involved with this group, require that person (maybe for a three-year period or some other period of time) to attend, as a condition of continued status as candidate for admission, the annual meetings and, even more importantly, the educational midyear meetings. This program could be structured into the midyear meeting, particularly so that we would all get to know these candidates and they, us, and perhaps we might then begin to affect their attitudes.

People who have great criticism of the Academy are typically those who don't come to the meetings. If we had a mechanism whereby we welcomed these folks in and then educated them, we would have more of an impact on their thinking and their conduct than we do now.

Eva Robins: To begin with, I would like to think that everybody read the report and everybody reread the Code of Professional Responsibility as an integral part of the Committee's report. I think what has happened over a period of years is that we revise the Code and then put it away in a drawer someplace and don't look at it anymore. And I think that happens to new members as well.

The Academy has this problem, and it shouldn't be too hard to correct. It is something we all ought to recognize needs to be done. The Code has to be brought to the attention of the membership again and again because it is easy to forget.

There were two general areas that were the most talked about by the designating agencies and by the parties to whom some of us talked in the process of considering and writing this report.

The major problem as far as the Federal Mediation and Conciliation Service was concerned is delay, delay, delay. For other agencies the main problem is solicitation and advertising. A lot of the agencies did not know how to address that, but they figure that they have to live with it. I do not minimize the third problem, which is creative billing, but I don't want to talk about that at this point.

On the question of solicitation, which a lot of people don't call solicitation, it is something that the parties resent, so solicitation is probably counterproductive to the arbitrator who engages in it. We hope that there is something in the report that will persuade arbitrators that this is so.

I think we might have made a mistake some years back, although I am not criticizing the people who did it. We used to have a code of ethics that had in part 3 a code for the parties, and I'm going to read a little piece of that to you:

> The parties should select the arbitrator, in accordance with their agreement, to determine the controversy existing between them, and this designation should be based on the arbitrator's integrity, knowledge, and judgment. A party should not seek to obtain the appointment of an arbitrator in the belief that he will favor that party and thereby give him an advantage over his adversary.

The next item is what I want to get over to you:

> In keeping with the desire for complete impartiality, parties should reject as arbitrators persons who solicit cases.

That came out of the Code. It might well have stayed in. Whatever the reason, the parties are becoming sensitive to the question of solicitation, and arbitrators really should recognize that this is not the way to make friends and influence people.

The temptation is to look at people who talk as we have been talking today as though we were taking a stand that's way up high, but we're not. We're presenting to you what we have perceived to be the concerns of arbitrators, of the Academy, and of the parties. I think that a great big vote of thanks should go to Bill Murphy for having initiated this study and this report and, of course, to the people who drafted it, because it is something that's long been needed.

Eli Rock: I think the report speaks for itself, and I am going to say very little until we get into the discussion period. In many ways it is perhaps the most important discussion that I will have taken part in in my entire period in the Academy.

Self-scrutiny, or whatever you want to call it, is what we do as individuals to evaluate and examine our own decisions and our own motivations, conscious or otherwise, our own thought processes. Those are qualities that are inherent in this kind of a profession, where a person is selected by two contending parties and given the distinction of deciding a dispute. These parties apparently have enough confidence in us and believe we can decide fairly. This self-scrutiny is something we're indulging in as a group. I think it's terribly important that we let our hair down.

We may not be able to change anything. There are basic factors at work in this society, as well as in other societies, which we really can't change. Very often you are just a voice crying in the wilderness, tilting at windmills, whatever; we need to do that here. I feel that we need desperately to do it. And I know a lot of you feel that way. We had some very good discussions of this subject at a number of regional meetings in Philadelphia. The question is how do we maximize this effort. I hope we'll get some answers to that today.

Mr. Mittenthal: It's now your turn. I thought it would be convenient if we divide the discussion into two parts: spend the first half of the discussion speaking about competence and possible Academy remedies, and the second half of our discussion will come later about the necessary proprieties.

Mr. Murphy: I want it to be part of the record that the creation of this Committee was announced to the membership in the fall issue of *The Chronicle* in my column. In fact, it's the principal topic of that first column I wrote—the creation of the Committee—and I invited the membership to make input to the Committee.

In addition to that, the Committee itself circulated a memorandum to the membership, soliciting their input while the Committee's inquiry was in progress. I do not know the extent to which those memos resulted in any input. I will let the Committee add to the record on that if they wish to do so, but I did want to make it clear that the Committee's creation and its report have been matters of membership knowledge ever since last fall.

Mr. Mittenthal: The Committee received very few responses, less than five. That was disappointing, but I suspect it was due in part at least to a certain vagueness as to what we were about. I don't think that the membership was sufficiently aware at that

point that competence and ethical sensitivity were to be the two major themes of our professionalism study. But we'd like to hear your views on those two aspects now.

Member from Illinois: I have a question which goes to the subject of the report and the possibility of having arbitrators with some experience attend our meetings as candidates for admission to membership. This seems to me to present a good many problems. The Committee has considered other alternatives, such as to invite arbitrators to the annual meetings. It seems to me that another way would be some kind of test of competency.

Mr. Mittenthal: I don't think we considered that specific proposal, but a final recommendation, in connection with adherence to the necessary proprieties does raise the whole issue of the extent to which newcomers who are not members should participate in Academy functions. I hope that this matter will be fully addressed in the coming years.

Member from California: Ted Jones will recall that our regional discussion on the subject-matter before the Committee was very frustrating. We spent a good part of the session going through all the horror stories that I am sure you all have heard. At least some of the people at that session were themselves causes of those horror stories, and at the end we started talking about what we could do about it.

I think it was a general rather depressed feeling that there really wasn't very much the Academy could do or was prepared to do. We talked about all kinds of things from sanctions to midnight riders, having people knock on somebody's door late at night to talk about the things they have been doing wrong, to expelling people from the Academy. The feeling was that, given the state of the law, given an unwillingness on the part of the Academy to actually feel up front about some of those very tough issues, there really wasn't a great deal that we felt could be done. I would like to know to what extent the Committee considered some of those same aspects of actually enforcing the Code and whether or not you see anything developing along those lines.

Mr. Seward: Sure, we gave consideration to what to do. That's what we were really considering most. What you do about competence is really tough, because the approach to it is necessarily so subjective. One person's incompetent is another's great arbitrator. And their views of opinion writing or decisions vary

equally. For one arbitrator it represents real hard work and something to be proud of. But others may wonder, "My God, how did he or she get that way?" So this is really, really tough. And we have come up largely with the idea of helping out in the training, not only of new arbitrators but of practicing arbitrators through expansion of the educational approach.

As to good practice—integrity, honesty, solicitation—this aspect is somewhat easier. It depends really on the extent to which the Academy develops its spinal column. The Academy as an organization and we as individuals are going to have to stand up and be counted. We cannot go on forever ignoring horror stories, merely because those involved are friends or acquaintances, members of the Academy. Sometime we're going to have to bite the bullet and expel.

We all know the dangers of legal repercussions, suits, and all. But we either are going to carry out the mandate which we adopted back in 1947, or we ought to stop pretending that there is such a mandate. That's rugged. That's where eventually this thing is going to pay off or not going to pay off. But that part of it, of course, is for the second half of the discussion.

As far as competency is concerned, right now at the beginning of the discussion, we need your help in the most constructive thoughts we can get from you.

Mr. Mittenthal: Let me refer briefly to the structure that exists for handling complaints about unethical conduct. The Code is there; the complaint procedure is in place. The difficulty is that people who are privy to improprieties do not come forward and file complaints with the Committee on Professional Responsibility. And while the Committee can act on its own motion, it is reluctant to do so. The reports it receives are secondhand or worse, so the problem is largely one of making people aware that these remedies are available and getting them to use the procedure, to actually come forward and make the complaint so that the Committee on Professional Responsibility can take some action. Unfortunately, most of the stories that you have referred to have never reached the ears of the Committee.

Member from Michigan: I agree strongly with Ralph about the importance of an Academy spinal column. I am troubled by the fact that our Committee on Professional Responsibility, although in theory it may act on its own motion, really does not do so. Last year I received on the telephone a complaint from an experienced union agent who had received what was obviously a

letter of solicitation, including a full resume, from an Academy member. I said that it sounded to me like an ethical violation of the Code and suggested that he send me the material.

The union advocate did so, and I passed it on to the Committee. It turned out that the Committee then expected me to be the accusing party. I had to be a complainant. But in my view I was merely referring appropriate documentary evidence to the Committee to do whatever in its judgment should be done.

What finally happened in this particular case is that the decision was made at the level of the Board of Governors to publish the text of this solicitation letter as a violation of the Code and to declare this an interpretation of the Code. And because this interpretation of the Code was being published with the actual text of the letter, it would be necessary for me, the unwilling complainant, to drop the charges, which I intended to do anyway.

I think we must recognize that, if we want to be serious about this, clearcut, blatant violations of the Code should be dealt with properly, and not take the view that to declare someone violated the Code by publishing an advisory opinion is going to be sufficient.

I want to make one other comment. I think strongly that we should involve nonmember arbitrators in our meetings. We ought to recognize that two thirds of the arbitrators on the AAA panel and one third of the FMCS list don't get cases and have no real potential. I think we should involve ourselves with those who do get cases as the best indication of people who are potential Academy members. I certainly support the idea of candidacy in the Academy and other methods of inviting them into our club.

Mr. Mittenthal: Perhaps someone from the Committee on Professional Responsibility would like to respond to some of those comments.

Arthur Stark (Chair of Committee on Professional Responsibility and Grievances): I don't really want to respond. I had hoped that the people who would be speaking here would be recipients of that report, the members out there, not the Committee or chairman or the holders of official positions. I thought that's really the purpose of this meeting.

As far as our Committee is concerned, we do act on our own motion when that is indicated. In the case mentioned, we were sort of feeling our way along. It was the first such case we had. In

subsequent cases we have had documents dropped on our desks, so to speak, which on their face appear to constitute violations of the Code. And this is going to be part of my report tomorrow, but I can get into it right now and skip it then.

We have taken action in such cases; we have instituted the procedures which are in the Constitution and Bylaws; we have held investigations; we have found probable cause to proceed; we have had a hearing officer conduct a hearing; we have had a hearing officer issue an opinion, finding a member guilty of violating the Code. That member ultimately accepted that finding. We are now in the process of interpreting that into an opinion, which is the procedure called for by our Bylaws, which the Committee helped to revise a couple of years ago.

This is difficult, I think, as was indicated earlier. You are all very familiar with hearsay evidence, and the Committee is very sensitive to that kind of problem. We hear many stories; the Committee receives documents; upon follow-up we are told that the person who submitted them is prepared neither to verify their receipt nor to back up the story which surrounds them. And we have felt that we cannot proceed in cases like that. As was mentioned before, there is an urgency in some of these situations. It takes more than just the Committee sitting there. It takes somebody willing to step forward and take whatever kind of action is necessary since the Committee cannot proceed with something which it considers inappropriate.

Many of us feel that we don't squeal on each other, and normally this is true. And I'm not asking that anybody do this. In terms of how we proceed now, we act on our own motion only if we have sufficient evidence. If we don't, we're not going to probe around into people's lives and activities.

In the above mentioned case it has ended with an opinion which the Committee thought would alert all of our members. We felt that it was more important to alert all members in a specific opinion to certain conduct considered inappropriate. If the individual who originally engaged in this conduct repeats, then we have another story and another charge and perhaps another case of discipline. We have to choose between alerting the entire membership to what we think is improper and selecting one person for some kind of discipline.

Mr. Mittenthal: Even though we asked you to speak on the question of competence, most of the discussion so far has involved necessary proprieties. I ask you again, at least at this

point in our discussion, to limit your observations to questions of competence. Or is the Committee to assume that your silence, your lack of comments, means that you largely agree with the observations of the Committee on the matter of competence? I think we would like to know.

Member from Pennsylvania: With regard to competence, the Academy in my estimation has moved essentially from a hands-off position of a decade ago to a more and more involved posture regarding the preparation and training of arbitrators. Years ago we did nothing. Today we have the Continuing Education Conference, new member orientation, and now this Committee report on Professionalism. We also have various regional efforts.

I would suggest that what is at issue, when it comes to competence, is not that we be involved in training but what type of mechanism we choose. And here I would support the previous speaker's comments. We in Philadelphia have made great strides in educating new arbitrators through our seven-year training program. If we in the Academy depended on the availability of training to reach more people who have never arbitrated before, we would spend the rest of our lives screening the people waiting to come aboard. If we adopted an open-ended posture toward membership admission policies, we would have members on our neck for diluting the employment opportunities.

Accordingly, we have said that we're interested in what has been indicated: Those people who have at least five cases can enter the training program, and we have about 30 such people in the program. I would urge the Academy to stay away from soliciting any more than that except as was indicated in the original Aaron report, where there are specific demands for affirmative action for minorities and women.

The second point I wanted to make is that I have considerable discomfort with the candidate-for-membership idea. I think there is no problem with our fostering greater interaction and training opportunities. As I look at our group of 30 people, I can tell you now that there are three or four who will be in the Academy in the shortest possible time. But when it comes to the next 10, it's very much of a variable. I don't think we should place ourselves in the position of offering Academy membership prematurely, early in an individual's career, thereby selecting one over another. In dealing with the future situation, we know that some of the people who are currently in training programs will fall by the wayside, either through lack of case load or lack of

character. I see all kinds of problems with early membership. If the goal is to improve interaction and offer training opportunities to new arbitrators, we can find ways of doing that without offering Academy membership.

Member from Illinois: I have come before this panel this morning with great trepidation because I have such tremendous respect and admiration for each member of the panel. I debated almost all night as to whether I should say anything in the face of the observations of this distinguished panel. But I have decided that I will bite the bullet, as Ralph says, and say that I think this panel has taken too much under its scrutiny when it begins to deal with both competence and then a whole series of ethical kinds of issues or practice. I think the two are quite distinct and need quite different treatment.

Let me turn first to the question of competence, touching on Ted Jones's observation. Some years ago, after continued debate, this Academy made a determination that the Academy would not simply be an organization which would open its membership to all who were interested in the process of settling disputes but, more particularly, would confine its membership to those actively arbitrating labor disputes. That was a conscious decision after great debate in which I participated over a period of at least 10 years. I happened to be on the other side of that debate as an academic issue. I thought we ought to let this organization be open also to those who were academically and intellectually interested in the problem, but were not active practitioners. That view did not prevail, and I think that was perhaps correct.

But once it did not prevail, the Academy had a new set of demands imposed upon it, and that is the very difficult question that Ralph addressed. What are going to be the tests of admission to an organization that holds out the highest standards for an undertaking that has the elements of a profession? And certainly among those standards must be competence, integrity, and the items that have been previously enumerated.

Let me turn to the question of competence. I am very troubled by the paragraph on competence in the Committee report. I do not see a lessening of competence, and I would like to see the Committee's evidence of this. We find ourselves becoming increasingly concerned over the current level of quality; we complain that opinions are often much too long or poorly written. Who is to determine whether or not an opinion is too long or

too short? All arbitrators worth their salt have been in situations in which they wrote a short opinion in one circumstance and a long one in another. Who is to decide which is better? It depends on the issues that were raised and the number of problems that were before the arbitrator. Incidentally, I think I might point out to you that the courts of the United States are afflicted with some of these same problems. Some judges write lengthy opinions; others, short ones. We're not all blessed with the skill of Justice (Oliver Wendell) Holmes.

But I think there is another problem. Arbitrators too often base their rulings on principles taken, not from the parties' agreement, problems, and needs, but from some treatises on arbitration or from published awards dealing with other parties, other agreements, and other problems. I read a lot of arbitration awards, and I'm not sure where the evidence is on lack of competence. We should have the facts: how many, who, under what circumstances?

The Committee also complains that theoretical principles are too often imposed on the parties without regard to considerations of justice. What does that mean? I don't understand that, particularly since there are instances in which theoretical principles properly articulated underlie some of the high standards that this Committee professes.

The Committee also states that self-restraint is often ignored, and awards attempt to decide far more than needs to be decided. I think that's probably true. I have done my share of that. I believe that even the members of the Committee have done that on occasion.

The Committee sees evidence, too, of lack of fairness in determining compensation. These shortcomings have been with us for a long time, and I think they are likely to continue to be problems.

One of the things that I respect this Committee for is calling each and every one of us to re-examine ourselves to see to it that we try to overcome our deficiencies, but I have great difficulty in making any kind of a determination that these deficiencies have substantially increased today as against other periods.

My second point is to indicate one inconsistency in the report. The Committee says that the parties are interested in results, but that we as arbitrators should not be too much concerned with how the parties view us. You make that point on page 5, but

several pages later, you rely heavily on the knowledge, the experience, and the demands made by the parties in determining competence. We can't have it both ways.

So now, let me summarize by saying that I am not totally persuaded that the evidence supports the contention of this rather broad indictment. In my view, competency is a problem that, as an Academy, we have to deal with as long as we are going to admit people to membership. Admission must be on some basis. But we should separate that problem from a second series of ethical problems that are more readily subject to consideration, such as advertising, delay, and those kinds of matters to which we may be able to direct more specific answers.

Mr. Mittenthal: Just as a brief response, I think we have all said at the very beginning that the report is based on shared impressions. We did not attempt a fact-finding process. Had we done so, I think it would be extremely difficult to document the view of the Committee that there has been a decline in opinion-writing skill. But the fact remains that we unanimously concluded (coming as we do from different parts of the country and having read thousands of awards over a long period of years) that there has been a marked decline in opinions and the quality of the work of arbitrators. Now, there is no way for us to prove that, in the same sense that you would require proof in an arbitration proceeding. We give you impressions, nothing more.

Ms. Robins: This conclusion does not come merely from looking at published awards and saying that is what is going on. We have been talked at by the parties and mostly by attorneys. And for some unaccountable reason, which I choose not to try to analyze, I get a lot of those things in the mail. I shut up about them for the most part. But people tend for some reason to send me more and more samples. I get copies of awards and opinions which are made up of incredible stuff. In one I got just recently, the first eight pages in the opinion consist of listings of exhibits. Of course, it may be that the arbitrator decided he was going to show up the parties for giving him so much paper. But thereafter there were pages upon pages of quotations from the contract and from some of the exhibits. And then there were two pages, mayby three, of study and findings and then the award.

I don't know what prompted it. I have no idea. I just know that the attorney who sent it to me had just a long exclamation point running through page 1 and nothing more. No letter, nothing else. Now, I keep getting these things. You can't ignore some of

this stuff that comes to you. And I think many of us have heard these complaints. We can't ignore what comes to us and a lot of it does. We read it and see it, and our perceptions are formed and I'm afraid we can't help that.

At an earlier point after becoming involved with the Committee, I went and looked at the first 20 volumes of the Academy output as reflected in BNA. I didn't read every case obviously, but I just sort of fished through. I noticed some of the names that I had always revered and still revere, even after reading some of the illiterate output of those earlier volumes. There are really some gems in there which do not exactly radiate great wisdom, articulation, vocabulary, whatever. But after looking at some of the more recent output, I came away quite frankly with the judgment that we're at a rather static level, which the Committee report phrased very accurately, and many who regularly read arbitration awards perceive as a declining level of competence.

I totally agree with the report as it is written, but I didn't share the sense that there is this declining level of quality. I think that the quality is pretty much the same as it was, and this points up one of the big problems about assessing quality in writing an opinion: You don't know whether that person has handed down a really bad decision or whether he just hasn't written well about it. He may have developed the case well, and may have done a great service to the parties by the decision that was made. We can't evaluate that, so I think there is a hazard in assessing quality based on literary output.

My second observation is that I have been disturbed at the way precedent has come to be used in the last 10, 15 years. I am constantly seeing in arbitrators' awards the phrase "the weight of arbitral opinion." That's disturbing to me, and the reason it is disturbing is that we have no requirements imposed upon us that we adhere to anybody's opinion, let alone any decision. And one of the hallmarks, in fact the unique historical hallmark of labor-management arbitration, is that innovation takes place, that there is a unique response to problems as they arise. Arbitration awards have been made in past years certainly without any great concern about what Charlie, Joe, Harry, or those other folks have done which might constitute the weight of arbitral opinion.

One of the refreshing aspects of coming to these meetings for me has been to hear people tell war stories and talk about having done something which seems to be out of the realm of arbitral opinion. I know that's a very healthy thing, and I have been

concerned that it not get stultified by a notion that we have to take cover, that, if we say something unusual, we might be thought by management or union counsel to be somewhat too venturesome. It's easier to just wrap it up, saying that it's the weight of arbitral opinion. In other words, if you think I'm a nut, you have to think everybody else is a nut too.

Member from Oklahoma: The great value to me of the Academy has been precisely the educational function. I have seen an improvement in that educational function in the 17 years of my membership. In terms of certifying competence, I don't think that we should do that. I think it is presumptuous for us to do it; the parties do it, and they do it very well.

If the parties prefer to keep using an arbitrator who writes like a third grader or uses language that shows he has no appreciation of erudition, or those other things that might displease us, what does it matter if he's fulfilling a function desired by the parties? Have the parties suddenly become incompetent so that they are no longer able to make good choices among arbitrators? I don't think so.

Member from District of Columbia: I am very concerned about competency in our work, in our writings. I don't believe that competency is necessarily measured by the acceptability to the parties. Put a sadist and a masochist together in a room and everyone is satisfied. Still there are a lot of problems going on.

For purposes of discussion I understand that it is possible to separate the concepts of competency from the credentials we use for admission to Academy membership; that is to say, from various practical and, I think, legal problems. I doubt that this Academy is going to get into a posture of evaluating arbitration opinions and work for the purposes of admitting people. I don't think that's going to happen.

I also have some questions about admission standards for other reasons. We don't have to address those now, although I have always been concerned about the fact that someone who has 10 cases a year for 5 years gets close to admission, whereas if you have 5 cases a year for 10 years, you are not considered. In any event I don't think that addresses the concept of competency.

I think it is appropriate that this Academy deal with competency because we must be concerned with continually raising our level of competency whether we find a lack of it or not. It ought to be a continuing concern. And we're doing that. So, I think

that, if this discussion has been what the Committee might regard as perhaps somewhat apathetic, it's because there is not disagreement about this matter. There is no major problem in this area. The Academy has done very well in dealing with the education of its members.

Member from California: When you compare our current discussion with other sessions that the Academy has had, those of you who attend our meetings will recall that there was always a line of people waiting behind several microphones. I think that the slowness of response this time is caused by the difficulty of the Committee's undertaking. I think that questions of ethics are profoundly difficult questions. When you try to apply an ethical code to a group of people who make a living by handling cases alone and on an ad hoc basis, the problem is much compounded.

If I had any criticism of the report, it would be that the Committee has understated the profound difficulties of dealing with ethical questions in the context of an organization made up of those who make their living partially or wholly as arbitrators. Those of you who have read the Code recently (or perhaps not so recently) will notice that the word "ethics" does not appear in the Code. The title is Code of Professional Responsibility for Arbitrators, and from what I gather, the word "ethics" doesn't appear because it's the judgment of those who drafted the Code that professional responsibility covers much more than ethics.

If you look carefully at the Code standards, you might agree with me that they fall into several categories: Some are ethical standards, that is, they purport to relate to conduct which we could call standards of morality. Others slip outside that category and fall into what could be compared with those defined in the Code of Civil Procedure, that is, professional matters for the sake of good practice. Then there are some matters in the Code which don't seem to fall into either category—they deal with matters over which many people differ, matters on which arbitrators should have complete discretion to do whatever they would like to do. For example, the Code governs how you should conduct a hearing and how you should make a ruling on evidence. Well, to me neither of these two falls on the ethics side and they don't fall on the side of professional responsibility either. So this is a very difficult undertaking, and I think Bill Murphy should be commended for at least raising our sights to improve our standards of professionalism.

I think that the Committee has already succeeded in doing that. I just want to take a minute and give a couple of examples which I think support my notion that we have underestimated the difficulties of this Committee's undertaking. At one point in the report, the Committee discusses what I would regard as very serious violations of ethical standards, the open solicitation of work, scheduling two hearings in one day and billing a whole day for each appearance. After saying these are "violations," on the very same page the Committee describes an arbitrator who was caught reading Elkouri & Elkouri in the men's room. I can't see anything wrong with that. I don't even think that falls on the professional responsibility side.

There also seems to be an attempt to dodge some difficult questions by suggesting that the Committee is not a fact-finding body. Of course it isn't. But I think there are some issues about which there is no question of fact. We have a colleague in Los Angeles, for example, who tells us what he's doing and says, "I think what I'm doing is not unethical. If you throw me out of the Academy for doing what I'm doing, I'll sue and I'll get back in." We all know that he wrote up a brochure about a year ago and circulated it all over the country. In it he advertises his training program and describes himself in the most exemplary terms, saying that he is held in great esteem by his colleagues in the Academy. One year ago at this meeting, the chairman of the Committee on Professional Responsibility and Grievances announced to the Board of Governors that "this brochure has caused more complaints to the Committee on Professional Responsibility than anything I have dealt with in my 10 years as a member of the Committee." At this year's meeting of the Academy, we learn that it is the position of the Committee that the brochure has resulted in no violation of the Code. If that is not a violation, then nothing is a violation.

I know the organization is aware of these profound difficulties, but we are unwilling to come to grips with them. That's why so many of these issues are disposed of as matters on which we have no evidence or, as in the case of this brochure, we know exactly what happened but we don't think that it is a violation of the Code. We all know that no one has ever come close to being dismissed from the Academy because of a Code violation.

The Committee, in my judgment, was very much on track when it implicitly criticized the Committee on Professional Responsibility for not being tougher in enforcing the Code.

Page 23 of the report says that the Committee on Professional Responsibility and Grievances has performed its work with distinction. Well, how have they performed their work with distinction when they have been too lax in enforcing the Code?

Member (unidentified): I think the issue is not one that can be divided up into neat categories, discussing each one separately, and I believe that other people have found the same difficulty that I have. For example, there's a portion of the Code that provides that it's improper conduct and a violation of the Code for an arbitrator to clarify an award at the request of a single party. In other words, you're not supposed to clarify an award unless both parties make the request. I happen to like that provision. I think there is sound reason for its being in the Code.

However, many of us are aware that there are statutes across the country which are in conflict with that provision in the Code, statutes which explicitly say that one party may go to an arbitrator and say, please clarify your award. Not only are there internal organizational conflicts on what we individually consider unethical or unprofessional conduct that ought to be regarded as violations of the Code, but there are conflicts between statutes and the Code.

I want to close with what to me is the difficult question of whether there ought to be a Code at all, or whether the people who believe in the free-market theory are really correct in this profession in which we operate on an individual basis. In fact, I would like to put it in the form of a hypothetical question which I hope the Committee will address. I have answered it in my own mind in the negative, but I respect the views of those who believe otherwise. The question is: Why can't two parties, union and employer, who are unethical, hire to decide their labor dispute a kindred, unethical arbitrator with whom they feel completely comfortable?

Member from California: I thought I heard Ralph say that one man's competence may be another's incompetence, and I don't believe that is so. I believe there are standards of competence. I am reminded of a fellow's statement in another context to the effect that he can't define it but he knows it when he sees it. I can see and know incompetence when I see it, and, in reading arbitrators' awards, I see it. Whether it has increased or not, I don't know. That requires a quantitative determination which I am incapable of making. But I do see it, and I see it in a particular context which bothers me.

In preparation for a brief, I reviewed various decisions of the Courts of Appeals in which arbitrators awards were attacked, and I discovered that the number of appellate court cases (not counting district court cases) has doubled in 10 years. It is possible to ascribe that to increasing distrust and ignorance and backward thinking of the courts, but it's also possible that this is happening because arbitrators' opinions are such as to invite this kind of review because a judge, looking at such an opinion, says, "My God, this is incompetent!" I myself have made an effort, in some of the cases in which the arbitrator's opinion is not reported, to get the arbitrator's opinion by writing to the attorney involved, and I entirely sympathize with the court.

I think it's possible to judge as incompetent an opinion that goes off into irrelevancies for 20 pages before finding that the grievant didn't do what he was charged with. I think it's perfectly possible to find incompetence in an opinion which comes out with a finding one way, but says really the facts are the other way. And I think that is a problem.

I read with great joy page 4 of the Committee's report, and I said, finally somebody has said it. I won't read it to you because it's been read before at this meeting. Where I find difficulty in the report is that there isn't much of a suggestion about what we do about this.

I happen to disagree with almost all of my peers that incompetence has nothing to do with admission to the Academy. Let's stop kidding ourselves. The world regards your name on the list of Academy members as a certificate of competence. And I do not believe that, when we get that certificate, we can rely entirely on the fact that "unethical" parties have chosen "unethical" arbitrators or that incompetent parties have decided that they like this incompetent arbitrator and therefore have appointed him for 50 cases. It seems to me that some minimum standard of competency (and I mean really minimum) should be an essential element of admission to membership in the Academy because, when you just list the fact that you are a member or when the parties decide that you should be picked because you are an Academy member, we're certifying to something that we really do not in fact have a right to certify to.

Member (unidentified): I would like to commend the Committee for having raised problems that need further discussion. What I want to say about competence is something apart from the question of craftsmanship. I think the educational programs

now being conducted tend to develop good craftsmanship. I think they are highly desirable, but there are substantive or qualitative factors which I think deserve additional attention. They are difficult problems.

Some people may regard others as incompetent. Maybe they are, but I do think that the Academy has, as its function and probably as its goal, the promotion of excellence as well as the retention of competence. That goes beyond the questions of whom shall we admit for membership or whom shall we throw out because of abuse. The real question is how do we promote excellent arbitrators and excellent awards.

Many years ago, when I was interested in discovering what arbitration really meant, I had the good fortune to talk to two preeminent arbitrators. I will recite a little of my experience. The first of those arbitrators issued an award in which he declared for the first time that the garment industry should have a preferential union hiring clause. And among the things that I was privileged to talk to him about was how he could square such a decision with impartiality. Among other things, he said that there are many people who are impoverished and unions will give them an opportunity to improve their condition, and we must help them that way.

The second eminent arbitrator to whom I spoke was my professor at the University of Chicago. Commenting on arbitration, he said among other things that arbitrators must do something to preserve and protect collective bargaining.

I am aware that there are many people in industrial relations, including arbitrators, who question whether or not an arbitrator can maintain impartiality and still seek what he regards as economic justice. I have encountered arbitrators who studied at Cornell and others who have studied at the Wharton School, and I found that their philosophies of industrial relations are very wide apart.

It is important that we attempt to define some of the qualitative factors of good arbitrators. How do you do that? I think that some of the speeches that are given at annual meetings can illustrate that. Maybe some of the corridor conversations we have at the annual meetings promote that. But I think that, if we really want to promote excellence in arbitration, we need to do something in addition to giving courses, in addition to occasional lectures.

In my experience, the closest we have come to instilling this qualitative attitude toward collective bargaining has been in some regional meetings where some arbitrators say how they would handle cases, and others, how they would handle them. Somehow or other, in that exchange there comes across the idea that it is possible to have good awards or bad awards, depending on the view the arbitrator has of industrial relations. I think this is far more important than whether we expel anybody or not.

Mr. Mittenthal: This discussion is open not just to the question of competency but also at this point to the question of necessary proprieties. Feel free at this point to discuss both aspects of the Committee's report.

Member from California: As we continue this discussion, I think we might keep in mind that tomorrow we will hear from Judge (Stephen) Reinhardt of the Ninth Circuit in Los Angeles, who I am certain will be talking about the competence of arbitrators and their relationship to the courts. A previous speaker has talked about his perception that some of the opinions he has read reflect very badly in terms of competence.

I would suggest that ethics also is an extremely difficult problem. If we don't police ourselves, others will. A profession, which for me at least was an absolutely wonderful second career, may well become a profession that I want to get out of as quickly as I can.

Let's talk about a hypothetical arbitrator whose deposition is being taken for some reason, and he discusses his open solicitation of work from particular parties at particular social events or his acceptance of gratuities. I think that those things are out there. I think there could well be that kind of case, and I hate to think what it would do to this organization. It could be absolutely disastrous.

I can tell you in the State of California (and I assume it's happening everywhere), the public is fed up with attorneys policing themselves. The state legislature is giving a lot of attention to this matter, and, if the attorneys aren't going to do it, others will. And I would suggest that, although it is difficult, maybe even impossible, if we don't do it, we're going to have it done to us.

Dallas Jones (Secretary-Treasurer): I would like to support the remark which has just been made because I believe the ethical problem is the most serious problem facing the Academy. There are small and insidious ways in which the Academy could be considered to tolerate some unethical conduct unknowingly.

For example, I am looking up at the front table and see at least one person wearing an Academy 30-year service pin. I personally believe that's a form of advertising, although I will admit that in six years I will be proud to be wearing one. There are numerous inconsistencies in our attitude toward violations of the Code. But we must set standards of professionalism. If we don't do it, who's going to do it? And we give the most ridiculous excuses when we're not acting responsibly.

In my position as Secretary, I receive numerous complaints. Very recently I received a letter from a union advocate. First of all, he disagreed with the award because it went against him, but he wasn't really interested in that. He also enclosed a copy of the arbitrator's letter, in which he said, "Please forgive the six months' delay in rendering this award because I was sick with the flu." Now, if you were that advocate and received that letter, what would you think about the arbitrator's integrity?

The part of the Committee's report I like best is that we ought to be more serious about training and/or educating our members in provisions of the Code. I think the report hit this problem right on the head. New members get a copy of the Code and put it away in their desks; old members haven't looked at it in years. It's time we did. I can remember during the time Dick Mittenthal was president, the Academy started a research project, which involved a questionnaire to members. I happened to be chairman of the Research Committee at the time. We were dealing with various types of procedural problems, and we threw in three questions regarding the Code. As I recall, 70 percent of the responses were in violation of the Code.

How many of you know that under the Code you are compelled to make a plant visit if either party asks for it? Now I think that should be at the discretion of the arbitrator, but, if it's in the Code, you have to obey it. Yet, when the questionnaire came back, 70 percent of the arbitrators said, "I would decide whether it was important to do so." Very few responses indicated that they would make the plant visit because they were required to do so by the Code.

Therefore I strongly support the proposition that we stress the Code in regional meetings, at annual meetings, wherever. We should spend more time on the Code. I also fully agree that, if we don't start policing ourselves, meaning blowing the whistle, we're going to be in trouble.

Member from Wisconsin: I think the issues that we're talking about show that the more you start talking about them, the more you see that it's just the tip of the iceberg. I think what we're doing is what the lawyers have been doing since 1975. They have been challenged as to whether they are professional and what quality of professionalism they are going to have. I think that's what we're doing. Creation of a Committee is a major step forward, irrespective of whether we agree on the answers. The real question is whether we have enough backbone to enforce what we say we believe in or whether the Committee's report is to go by the wayside and five or ten years from now someone is going to stand up again and complain about lack of standards. I don't think that ought to happen.

This is the toughest issue lawyers are facing: What kind of professional self-regulation are they going to add? That is what we're talking about—professional self-regulation—and I don't think you are going to get the answer today. Those up there, members of the Committee, know arbitrators better than anyone else, but I think that the parties may also have some critical comments as to how well we're policing ourselves. I am convinced that many people from the designating agencies and the services find this is a problem also. We all like to see our names in print, but at some point as professionals we ought to look at the quality of the writing. And I think, if the Committee were extended, there would be other areas that would come up that otherwise might not be addressed, and that's my suggestion.

Member from New York: I would like to make two practical suggestions which I think are useful. The first is that the Academy undertake to inform the parties of the availability of our grievance procedures. At the last meeting of the Academy, I was in one of the breakout sessions, and also present were a number of people from the AFL-CIO Executive Board. They were conducting some kind of study of arbitration, and they told a series of horror stories regarding billing procedures. I asked them over and over, when these things came to their attention, why had they not informed our Committee on Professional Responsibility and Grievances. They looked at me with glazed eyes. They didn't seem to know of the existence of that Committee or that it was available to them as a means of correcting what they believed was appalling.

They also spoke again and again about delays. And I said to them, one, don't use the arbitrator again and, two, bring it to the attention of our Committee on Professional Responsibility and

Grievances. And, if you guys don't have the will to notify the Committee, write to me and I'll inform them. And I would have done so, had they communicated with me. I was outraged by their ignorance.

I must confess that, in thinking about the report, the problem seems to be how do you go about informing the parties of the availability of our procedure? Obviously, we are eager to be informed about improprieties committed by arbitrators, and the only persons who know about these violations are the parties. I don't know whether we can take out advertisements in the publications of the AAA or the FMCS or BNA, but I'm sure that we could place articles strategically in various magazines which are read by labor and management advocates, informing them of the existence of our grievance procedure and in a tactful and diplomatic way expressing to them our desire as an organization that they inform us of improprieties so that we may take appropriate action. That would be my first suggestion, and I admit there are some practical problems involved in implementing it. But I do think that the parties themselves are not aware of the existence of our grievance procedure or of our willingness to do something once a grievance is filed.

My second suggestion to the Board of Governors and to the Committee on Professional Responsibility is that we modify our Code so as to require members of the Academy, when an impropriety comes to their attention, to inform the Committee. Make the matter of self-policing itself a Code responsibility, and the refusal to do so, for whatever reason, a violation of the Code itself.

In that connection, I have had a small problem involving a single union in New York City which has failed to pay a bill of mine. I persuaded the AAA with considerable difficulty to write to this union, telling them that they ought to pay the bill. There are five other arbitrators in New York City who have also been stiffed by this particular local, but none of the five has taken any action. The matter will be litigated at some point soon. I've waited a long time to do this. I pursued the international, I pursued the AAA, and I pursued my colleagues. I asked the AAA to inform arbitrators as to the possibility of such stiffing, but they are unwilling to do that. I informed my colleagues in the New York chapter about my problem and then learned of the existence of five others who were similarly situated. They have been and are today unwilling to take any action against this

particular local union and the attorney there, who is quite a strange character. It's an interesting example of the unwillingness of Academy members to take action even in their own interest.

I would like to make just two brief comments on the issues of competency, excellence, and admissions policies. I have spoken on this subject perhaps twice before at Academy meetings over the last decade, and I am still persuaded (though my point of view has not prevailed) that it is possible to look at an award and decide whether or not the person's thought processes move along with a certain degree of logic. This certainly has something to do with competency; it isn't just a matter of crafting an award. In the case cited here earlier today, where an arbitrator lists all the exhibits and quotes copiously from the contract, undoubtedly we can all decide for ourselves whether this is incompetency or impropriety. This kind of thing can be detected by taking a look at 10 or 15 awards of a candidate at the point of admission. I think we are shirking responsibility by continually throwing up our hands and saying it is impossible to make any determination as to craftsmanship, as to competency, as to excellence. I think it's a mistake. I think there are elements in all three areas that can be defined. Whether you can define them in writing or not I don't know. I haven't tried. But it would certainly seem to me that, by looking at 10 or 15 awards, you can reach a conclusion that this man or this woman can analyze and put together an opinion in some kind of coherent form, maybe not the way you or I would write it, but at least make some kind of determination in the area of excellence and competency. The sooner we do it with respect to admission to membership, the better it will be for us.

I would like to close by commenting on the immoral parties who choose an immoral arbitrator. We know New York City has immoral parties, just like the rest of the country. And we have our share of immoral arbitrators. Some of them are very good, and some of them have made great fortunes and have great reputations as arbitrators, yet essentially they are immoral. On one occasion, when a union leader with whom one of them had had a continuing relationship over a period of 15 years was put in the slammer, he called and said, "Get me my arbitrator!" And that was the headline in the newspaper the next day.

Those of us in the industrial relations community knew that when this chap asked for his arbitrator, he was indeed speaking a truth. And when you look at this labor-management relationship, you can see the catastrophic consequences inflicted on the parties as a result of his lack of impartiality.

In any event, we must consider the requirements for excellence and the realization that there are social and economic consequences imposed on the parties as a result of immoral activities by an arbitrator. Sure, you can lay it at the feet of the parties, but they may not see the consequences because they are frequently very shortsighted. In a couple of other industries in New York City, having an arbitrator who will do the bidding of one party or another has had a tremendous economic and social impact on those industries. For instance, we now have in New York just three newspapers, and that is in major part a result of the arbitrators who acted under certain shortsighted considerations which had highly negative long-run consequences on the labor-management relationship.

The issue of excellence and the issue of objectivity and impartiality are hard to resolve, but there is no reason to throw up our hands in despair. We must keep edging forward as we have in this discussion since we all desire to get to a point where we will have greater professionalism.

Member from Canada: As a green dot member of the Academy, I am happy to see that the Academy intends to go forward with its Code. I would like to urge that we enter into a program of inviting state referral agencies and municipal referral agencies, and other government and nongovernment agencies to accept our Code. In that way the Code will spread and be available and applicable to many arbitrators who are not part of the AAA or the FMCS panels, and who are not Academy members. I have an example in mind where an individual who was not an Academy member, as an arbitrator accepted an invitation to speak to one of the national industrial relations organizations about a case on which he was working but had not yet finished. He assumed that he would be finished by the time the speaking engagement took place. However, this did not happen, and he nevertheless spoke about the substance of that case while he was in the middle of his deliberations. That person had been selected from a state referral list.

For this reason I urge that we invite all state referral agencies to accept our Code. Becoming a member of the Academy is perceived as acknowledgment of the arbitrator's competence, essentially that this person has the qualifications that make for selection potential by the parties.

Member (unidentified): On page 25 of the Committee's report the Committee suggests that new arbitrators be connected with the Academy in some formal way, and on page 26 they describe this more specifically, suggesting that these people be designated candidates for admission. My initial reaction to that was good. I think that involvement of people in this category would be very positive. But I think it raises a question.

When arbitrators are designated as candidates for educational purposes, does that give the Academy the right or the obligation to police them or subject them to the ethics procedures of the Academy? In answering this question, we may conclude that we do not want that responsibility. Thus, while their involvement would be positive, I think that any such involvement should be strictly informal since we do not want that responsibility.

Member from Ohio: As some of the prior members have indicated, I, too, find some inconsistencies in the report. One of my concerns is a matter that was mentioned briefly earlier, namely, professionalism. I feel that there is too much emphasis on a narrow definition of professionalism. I think our Constitution assumes a professional character. I think judges, teachers at colleges including law schools, and others, are similarly in a professional status. It doesn't require that much discussion. I think what we're trying to do is to achieve the things that professionals are supposed to do and assume they will do. And we have done that in many respects.

We have tried to educate people who are coming in and those who are in the Academy through these meetings annually and in other ways, through papers that are distributed to members each year. I think that we're at least as professional as judges and are in the same position.

I think, however, that we should give more attention to the credentials of candidates for membership submitted to the Membership Committee. I think that the Membership Committee always tries to get input from those members who are listed as references by the people who apply. I used to comment off and on about persons on the list, but now I do that only for the ones that I know personally. I try to indicate my knowledge of that

person, personality, background as teachers, or whatever. In most instances lately I have been trying to get copies of their opinions to review and make some comments about. I think it is the responsibility of members to do that, especially for those who mentioned you as reference and on whom you are asked to comment. I think that, if we fail to do that and simply automatically support the candidate, we are making a mistake, and the Membership Committee should encourage more of that kind of input.

I think competence is important. I don't think that we can expect everybody, however, to be top flight in every respect including writing. I think we have to accept some members who don't write so well but who may be doing a good job at the hearing and come out with a correct result. That's the most important thing.

I also think that, as Eva mentioned, there is a problem with the fact that our present Code makes no reference to the parties and their obligations. I think they have distinct obligations which should be recognized in some way.

In connection with the considerations of competence, I have been involved in a number of cases. The Membership Committee asked me a number of years ago, when I was regional chairman, to talk to one of the candidates because a member had raised several questions about the professionalism and background of that particular individual. I did that. And the Committee definitely had input in this instance in response to their own request about things that went far beyond the number of cases that person happened to have. He had plenty of them, by the way, and he is now a member. I think that in many respects we do consider competence, and I think we should continue to do so.

Member (unidentified): There have been a number of generalizations offered both in the Committee report and in comments that were made this morning about competence, presumably as shown by examination of the published arbitration decisions of the good old days versus current days. I think it's important to call to the attention of those who are not aware of the fact that the published decisions represent simply the tip of the iceberg. Less than half of all decisions (probably much less than half) are submitted to the publishers to start with, and of those submitted only a very small percentage ever find their way into the published volumes. There are selective criteria for pub-

lication, and some of these criteria show that there is a bias in favor of new arbitrators. We all know that the arbitration profession has been heavily populated with newcomers in the last ten years. Of the decisions that are considered for publication, probably less than 5 percent are actually published. There is also a selection by a certain type of decision, such as in sensitive cases. Certain others are hardly ever published, and there is this bias in favor of new arbitrators. So if the impression about the level of competence in the arbitration profession rests on published decisions, the foundation is very shaky. I don't know how you would go about getting a firmer foundation. Perhaps soliciting select decisions from a large number of practicing arbitrators might help. Then there would be the tremendous job of reading and analyzing and perhaps arguing about the decisions in order to reach a justifiable conclusion.