CHAPTER 10

NEW VOICES IN THE ACADEMY

I. THE ACADEMY'S FUTURE: BY DESIGN OR BY DEFAULT?

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When Bruce Fraser asked me to become part of this panel today, I was not sure what new ideas I could contribute that the Academy in its periodic soul-searching sessions had not already heard and considered. Now that I have done some research on the matter, I am convinced that all the questions and issues that I plan to raise today have already been raised by more experienced and more eminent members, and have already been wrestled with extensively. As an organization the Academy "has engaged in a self-examination that borders on masochism" as Bill Murphy remarked in his Presidential Address in 1987.[1] So my thoughts will not be new. Arnie Zack attributed a relevant quote to Edna St. Vincent Millay. She was reputed to have said: "It's not true that life is just one damn thing after another—life is the same damn thing all the time."

The most fundamental question I would like to raise is: How activist a philosophy and approach is the Academy willing to adopt in determining its future and in accomplishing its stated purpose of "establish[ing] and foster[ing] the highest standards of integrity, competence, honor, and character among those engaged in the arbitration of labor-management disputes"?[2] Specifically, how activist is it willing to be in determining the future membership of the arbitration profession and of the Academy, in enforcing its Code of Professional Responsibility,

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[1]Murphy, *The Presidential Address: The Academy at Forty*, in Arbitration 1987: The Academy at Forty, Proceedings of the 40th Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1988).

[2]National Academy of Arbitrators, *The Constitution and By-Laws*, Article II, Section I (reprinted: *Appendix A*, in Arbitration 1987: The Academy at Forty, *supra* note 1, at 205).

and in providing continuing education and training to its current and potential members? Should the Academy resolve to make renewed efforts in these challenging areas? I will restrict my questions to these three areas, and although I will not raise questions about how activist the Academy should be in other areas, such as protecting the arbitration process from court review or defining research areas or funding research, I do not mean to underestimate the importance of such areas to the future of the Academy.

Selection of New Members

The future of the Academy, as with any organization, is fundamentally directed by its selection of new members. After all, what is more important to the Academy than its membership—and what is more consequential in determining its evolution? Selecting members for any profession tends to be a three-step process: (1) securing a pool of candidates, (2) training and developing the candidates, and (3) selecting among the candidates.

What role should the Academy play in each of these three steps? And if it does not play a substantial, activist role, is it not, then, leaving its future to chance?

Securing a Candidate Pool

The National Football League has done an excellent job in securing its pool of candidates. Has the Academy? What kind of a net is being cast among the population to determine the future candidates for our profession and for the Academy? Is it a haphazard net, and do we play any part in the design of the net? Does it secure for us the best possible candidates? Does it generate a fruitful mix of candidates? Should we start an outreach program by inviting selected non-Academy members to participate in some of our activities, to become acquainted with our profession, and to help us identify and encourage exceptional potential candidates?

Training and Developing the Candidates

Should the Academy play a more activist role in the training and development of candidates, or should we rely on other organizations and individuals to do so? What kind of training is

currently available to interested candidates with potential? If the training and its availability is a random affair, will not the Academy's future membership be a random affair?

How activist a role should the Academy and its members play in outlining the scope, content, and nature of the training of potential arbitrators—and potential future Academy members? Eva Robins, in her Presidential Address in 1981, suggested that any arbitrator development program should include, in addition to the procedure of arbitration and case law, the philosophy of arbitration and the ethical values that the Academy considers essential.[3] Should the Academy act as advisor, participant, or sponsor of training programs? Should the Academy restrict its interest in this area to times when there are perceived shortages of arbitrators, and abandon its interest in the development of new arbitrators in times of decreasing caseloads?

Selecting Among the Candidates

This third step gets considerable attention from the Academy. Even so, by selecting "acceptability by the parties" as its main criterion, the Academy has elected to let the parties play the major role, not the Academy. It is the users, as Mark Kahn noted in his Presidential Address in 1984, who decide who gets into the Academy.[4]

Do we know what really determines acceptability by the parties? Do we know what random misadventures or fortunate happenstances often affect success in the critical early years of candidacy? Do we know what myths, preconceptions, hunches, prejudices, and grapevines determine a candidate's acceptability?

The stated criterion for membership in the Academy is "substantial and current experience as an impartial arbitrator," not "competence," and this criterion has been reexamined and reaffirmed at least twice, in 1976 and in 1980, and it was studied and reported on in 1987.[5] The criterion of acceptability assumes

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[3]Robins, *The Presidential Address: Threats to Arbitration*, in Arbitration Issues for the 1980s, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1982).

[4]Kahn, *The Presidential Address: Labor Arbitration—A Plea to the Parties*, in Arbitration 1984: Absenteeism, Recent Law, Panels, and Published Decisions, Proceedings of the 37th Annual Meeting, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books, 1985).

[5]Seward, *Appendix B: Report of the Special Committee on Professionalism*, in Arbitration 1987: The Academy at Forty, *supra* note 1.

competence, although as Rich Bloch noted in the 1977 Annual Meeting: "Acceptability is simply not synonymous with excellence."[6]

Are we misleading the parties by conferring what Ed Witte in the first Annual Meeting in 1948 called "the equivalence of a certificate of competence" when, in fact, we use acceptability as the criterion for membership? The 1987 Report of the Special Committee on Professionalism states baldly that "[t]he 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."[7] And notwithstanding the fact that Mark Kahn has unequivocally asserted that it is a fantasy that membership in the Academy confers acceptability and that acceptability gets one into the Academy,[8] the parties do look upon membership in the Academy as a certification of competence. The Special Committee noted the irony that "everyone, parties and arbitrators alike, seems to view Academy membership as proof of competence."[9] Why else do so many arbitrators bother to apply for membership, and then never participate in Academy affairs or attend Academy meetings? It certainly is not the attractiveness of the Academy dues that propels them to apply for membership. The 1984 Report of the Future Directions Committee found that only about 37 percent of the membership attended the Annual Meetings between 1970–1981.[10] Even fewer new members might attend the meetings if the Academy did not, on the recommendation of that same Committee, start requiring newly accepted members to attend the Annual Meeting in order to get inducted into the Academy.

Should the Academy set its own standards for admission? The Special Committee on Professionalism noted that "[o]ur Membership Committee defers in effect to the parties' judgment" and "will, by and large, accept for membership anyone whom the parties have accepted to arbitrate their disputes. What this

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[6]Bloch, *Future Directions for Labor Arbitration and the Academy: II. Some Far-Sighted Views of Myopia*, 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), 239.

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

[8]Kahn, *supra* note 4, at 3.

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

[10]*Report of the Future Directions Committee*, in Arbitration 1984: Absenteeism, Recent Law, Panels, and Published Decisions, *supra* note 4.

means is that the parties, not the Academy, set the standards for the profession."[11] Heaven knows that the parties' interests do not necessarily dovetail with the Academy's, conferring acceptability to candidates that the Academy might otherwise not invite into membership, and denying acceptability to candidates that the Academy may otherwise invite to join. I'd like to think, if acceptability were not the sole criterion, that the Academy would display more gender and cultural diversity in its membership. And even if we feel obliged to let broad acceptability be a sure path to membership, it need not be the only path. Should the Academy take a more activist role in deciding who shall become part of the Academy and contribute to its culture, its direction, and its governance—or should we be satisfied to let others decide? Is it the difficulty of the task that prevents us from taking a more activist role in developing our membership criteria?

Well, as Edna St. Vincent Millay said, these questions are the same damn thing all over again. We have raised them, considered them, done our handwringing about them, and we have decided not to make any changes, because there are no alternatives that lend themselves to a pragmatic and workable implementation of these principles. As a naive new member, I ask the question whether we should not resolve to make renewed efforts to solve these old dilemmas.

Enforcing the Code on Existing Members

We are all aware of the fact that there are members who have displayed what the Special Committee on Professionalism in 1987 delicately referred to as an "insensitivity to Code requirements."[12] It notes the "declining level of respect for the necessary proprieties."[13] These behaviors include soliciting work, handing out business cards, distributing brochures, scheduling two cases in a day for different parties and charging a full day for each, and delaying the issuance of awards. We have done much handwringing about these problems, spending many meetings lamenting these behaviors, but ultimately we have done little in the way of enforcing the Code. The Special Committee on Professionalism does not believe that "the Academy has done

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[11]Seward, *supra* note 5, at 225.
[12]*Id.* at 231.
[13]*Id.* at 230.

much to police the profession."[14] We have not played an activist role in policing ourselves. Should we?

The current structure does not provide for an activist role for the Academy in these matters, nor does the current structure facilitate the enforcement of Code violations.

1. The Committee on Professional Responsibility and Grievances (CPRG) is the only entity in the Academy that deals with matters involving Code violations, and it acts only when there has been a written complaint. Should the CPRG be encouraged to act on its own motion, even though it is reluctant to do so?

2. Usually the Committee does not act unless a specific individual, Academy member, party, or entity is willing to initiate the complaint procedure and act as the accusing party. Evidence alone, such as a clear solicitation letter addressed to a potential party, is considered insufficient for the Committee to start its investigation. Since few are willing to act as the accusing party, very few complaints actually make it to the investigatory stage, and even fewer to the sanction stage, in which discipline is actually imposed. Should this structure be changed to facilitate such investigations?

3. Should the Academy publicize its procedures for handling and enforcing Code violations to the parties and rely on them to initiate complaint procedures?

4. Is it possible or desirable to devise a structure that protects the individual members of the CPRG from liability if they act on their own motion? Fear of lawsuits has an inhibitory effect on action by the Academy. Should we look to other professional associations and study how they enforce their equivalent to our Code violations and the concomitant liability from lawsuits?

With regard to prospective members, should the Academy put them on notice that engaging in behaviors that constitute violations of the Code is likely to bar them from membership in the Academy? Would we not be on weak ground and leave ourselves open to an accusation of disparate treatment if we denied membership to a candidate who engaged in these violations but did nothing to existing members who continually violate these same Code provisions? Should we wrestle again with these difficult questions and make renewed efforts to find effective answers?

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[14] *Id.* at 234.

Continuing Education

The subject of continuing education is probably the least problematic and least controversial. Starting with the Stark-Mittenthal 1977 two-year plan to "enhance arbitral competency through a systematic program of continuing education,"[15] and the subsequent implementation of the recommendation of the Future Directions Committee to "sponsor in the fall of each year a national continuing education program for members only,"[16] the Academy has taken a more activist role in this area. The issue now is whether we should relax comfortably with what has been accomplished, or whether we should resolve to build further on these excellent beginnings. I believe we do greatest honor to the work already done by committing ourselves to improve upon it. In these brief comments, I intend only to raise a few minor questions.

Should the continuing education fall meetings be conducted as they are—presentations, followed by smaller, open-ended discussion sections? Or should we call upon the membership to devise learning and study processes that might be more effective, given our member population and continuing education objectives? For example, should we explore more interactive learning processes and more participative processes?

To illustrate possibilities, should we follow up plenary sessions, not with small "discussion groups" which may simply share "war stories," but with small "task groups" given specific challenging assignments? Depending upon the topic of the session, these groups could be assigned a task to outline an implementation plan, or to devise a set of objective criteria for interpreting an Academy rule, or to identify the pros and cons of the various approaches that arbitrators may take with regard to a particular procedural issue. The task would compel each group, in minimal time, to concentrate its attention, reconcile viewpoints, and produce a product that could be compared with the output of other groups. This type of discussion is more likely to be focused and in earnest. Rather than simply "discussing" enforcement of professional standards, each group could face the task of devising objective definitions, or practical investigative procedures, or a graduated set of sanctions. The resulting products may be

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[15] *Supra* note 10, at 256.
[16] *Id.* at 258.

overly hasty, but they will tend to generate meaningful interaction. They will provide an opportunity for the Academy to tap the talents, perceptions, and potential contributions of more of its members. Any promising ideas generated by the groups could be followed up with more serious study.

How can we encourage our more reticent members to participate in the interactive question portion of the presentations rather than only the distinguished members whose presence and stature and articulate skill tend to intimidate the rest of us?

Should the Academy sponsor more continuing education programs at the regional level, on specific subject areas and/or procedures, or use smaller groups and more interactive learning processes, inviting prospective members to participate?

Are we taking full advantage of technological advances in videos and computers in updating our educational opportunities?

I cannot resist ending on a controversial question: Should members be required to attend the continuing education programs on a periodic basis in order to maintain their membership in the Academy in good standing?

II. THE NATIONAL ACADEMY OF ARBITRATORS: TRADE ORGANIZATION OR PROFESSIONAL SOCIETY?

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On September 13, 1947, at the Stevens Hotel in Chicago, 43 members of the small but expanding "occupation" of labor arbitration met to discuss how their activity as arbitrators might advance to professional status.[1] They resolved that a professional society of arbitrators should be formed, and out of that resolution was born the National Academy of Arbitrators.

Industrial relations scholars and practitioners regard the Academy as *the* professional association for labor arbitrators. Indeed, a standard labor relations text characterizes Academy

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[1]Murphy, *The Presidential Address: The Academy at Forty*, in Arbitration 1987: The Academy at Forty, Proceedings of the 40th Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1988).