Chapter 1

PRESIDENTIAL ADDRESS

Barbara Zausner

I. Introduction

Roberta Golick*

I have the great honor today of introducing our luncheon speaker, National Academy of Arbitrators President Barbara Zausner. People have asked, in a kind way, of course, why did we pick Barbara as President? It is certainly *not* that we needed a woman. Marjorie Gootnick was more than enough woman for this organization. No, what we needed was a clean break from tradition. We needed a President who was over 5'2".

I met Barbara more than 30 years ago when, at a crowded cocktail party, she mistook the top of my head for an ashtray. I have been looking up to her, literally and figuratively, ever since.

I asked Barbara if there were any highlights in her youth or career that I could mention. About her childhood, Barbara said it was miserable and much too short. She said she ran away from home for the first time when she was seven. We quickly moved on to discuss her career. Barbara began her arbitration career in 1975 as an apprentice to Philadelphia arbitrator Joe Raffaele, attending hearings and writing decisions. Armed with a master's degree in labor relations from Rutgers, she entered an arbitrator training program sponsored by state and local arbitration agencies. She also participated in an arbitration salon run by Eva Robins and Peter Seitz, and soon after that, the cases started to roll in. Admitted to the National Academy in 1983, Barbara has been an enthusiastic member, chairing several important committees, culminating in her current role as President.

Now, as you all know, Barbara has many presidential qualities: She is a fearless, imaginative, and energetic problem-solver. What

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you do not know is where she honed these splendid traits. The answer lies in a series of girl-only trips Barbara and I took together to Europe. It was on these adventures that I saw the character, the wisdom, and the fortitude that would later define Barbara's presidency.

Barbara's unwavering confidence, for example, was revealed on our trip to Spain. We had spent a pleasant afternoon driving through the countryside. It was not until our drive back towards evening that we observed we had very little gasoline in the tank and almost no money. Not to worry, Barbara crooned, as she is an intrepid map-reader. Barbara found us a shortcut. Honestly, I was not the least bit nervous, even when we found ourselves on a one-lane unpaved road surrounded by darkening forest. Terror did not set in until we came to a bridge, soon after we had passed several signs in a language I did not understand. It wasn't just *any* bridge. This bridge was an open lattice of planks. It had no sides and the rapids raged below. Well, I closed my eyes—did I mention that Barbara was driving?—while Barbara, with surgical precision, maneuvered our car over the splintered wood and got us to the other side. "What *did* all those signs say," I wondered aloud, when safely back at the hotel. Barbara sipped her sangria and I drank straight from the pitcher. "Oh those?" Barbara asked dismissively, as she reached for an olive, "they just said 'Bridge Under Construction'."

To be a good president, one must exercise fiscal austerity. Barbara demonstrated that in Paris when she insisted we *split* the black truffle salad that cost $75 and tasted like dirt.

Her analytical skills? Impeccable! Barbara immediately knew we made a mistake when we inadvertently strolled into a private governmental party in the Villa Borghese and came upon a row of guards facing us with their weapons drawn.

I could go on, but Barbara's greatest presidential attribute—the ability to focus on what is most important—was confirmed on a trip she took without me. Barbara was on a cruise to the North Atlantic Waters off Canada with her sister just a week or so after she had had her first date with Clem. When she returned, I asked her how she had enjoyed herself. She said, "To tell you the truth, I was so busy daydreaming about Clem that I missed Newfoundland."

The daydreaming paid off. Barbara and Clem today live in Woodstock, New York. Their home is surrounded by gardens lovingly tended by Barbara, and filled with books, art, and the intoxicating aromas of Clem's culinary creations.

Of all her accomplishments, Barbara is most proud of her parental success in rearing her daughter Erica. Ricki has followed in her mother's footsteps. She is Manager of Labor Relations at Staten Island University Hospital in New York City. Ricki's only regret is that she cannot choose her mother to sit as arbitrator in any of her hospital disputes.

Barbara is many things to many people. For Clem, she is an adoring, if somewhat sarcastic, partner in life. For Ricki, she is a strong, nurturing role model. For us, Barbara's colleagues in the NAA, Barbara is a generous friend—a good-humored, forward-thinking, straight-talking, hard-working, clever, and yes, tall, friend.

I am so thrilled to bring you our luncheon speaker, President Barbara Zausner.

II. Address: Barbara Zausner

Members, guests, friends, and family, I am delighted to see you here and I hope you have been enjoying the excellent program put together by Bob Moberly and his committee and the seamless arrangements of Pam and Michel Picher and their committee. It is wonderful to meet members of the Canadian labour management and arbitration communities.

Although we live in two different countries and speak at least two different languages, we share similar values. And our work—dealing with workplace disputes—is very much the same.

Being President of the Academy has been the greatest honor of my life. Visiting the regions and seeing NAA friends across the country has been a great pleasure. I am indebted to the many Chairs and Coordinators with whom I have consulted this year. I have been astonished by the amount of work that gets done in this volunteer organization.

Our Amicus Brief Advisory Committee, the folks who present our views to the U.S. Supreme Court, recently decided that the NAA should file an amicus brief in an important U.S. case.[1] One of our most brilliant legal scholars, Matthew Finkin, wrote the brief, assisted by a committee of brilliant legal scholars.

As for day-to-day responsibilities, David Petersen does all the work. He provides perspective and guidance to a new president

[1] 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 24, 171 L. Ed. 2d 927 (2008).

each year, and keeps watch over our institutional interests. Katie and Suzanne Kelley, efficiently and with constant good cheer, run the home base.

Like most of my predecessors, I stewed over what I would say to this august body. Aware as I am that brevity is the soul of wit, I was particularly interested in how long these talks ought to be.

In the chapter on the Academy in Ben Aaron's autobiography I found some very useful and reassuring advice. He modestly (and inaccurately) characterized his 1963 presidential address as "inconsequential and forgettable." He concluded with hindsight that he had "passed up [the] opportunity to expound on some major issues affecting the arbitration process and the Academy's role in it" because he felt "a noon luncheon was not an appropriate time or place for a serious speech."[2] I'm sure it will be welcome news to my audience that I took his advice to heart.

As president-elect-elect, and as president-elect, I paid careful attention to the most recent addresses. I was transfixed by Margery Gootnick's multimedia extravaganza and wowed (and cowed) by Dennis Nolan's scholarly flourishes. I was told it would take elephants and fireworks to be equally entertaining. I had something more informal in mind and continued the search in our historical documents.

There have been more than 50 presidential addresses in our 61-year history. I either had to replace my bedside reading with volumes of the NAA *Proceedings* or narrow the choices. In the end I read them all and not only learned Academy history but got to know some of our most endearing characters through their writings.

I thought I'd start with our foremothers (for a change). I am only the fourth woman to serve as President of the NAA. I was looking for specific guidance. Jean McKelvey's presidential address is a very scholarly study titled "Sex and the Single Arbitrator," a more risqué title when the paper was presented in 1971.

Jean is most loved for her warmth and generosity toward new arbitrators. She was actively involved in increasing opportunities for women arbitrators and was mentor to many men and women. Her paper is not about women arbitrators but it reflects an interesting view of the arbitral mindset of the times.

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[2]Aaron, *A Life in Labor Law: The Memoirs of Benjamin Aaron* (UCLA Institute for Research on Labor and Employment 2007), at 335.

McKelvey studied arbitration opinions on the interplay between protective legislation and women's rights under collective bargaining agreements in the post–World War II era. Then as now, the vast majority of arbitrators were married white men of a certain age. That is, male, pale, and stale. The prevailing social attitude at the time is reflected in the following quote from Jean's paper:

> The [ ] candid arbitral view that females as a class are to be regarded as the "weaker sex" was given most eloquent and definitive expression by Arbitrator Peter Seitz, who opined:
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> > There is no basis on which it should seem sound to deny to the Company the right to indulge the assumption made in most of the States in this nation that females, *as a class,* and because of their biological structure and function, require more protective regulation as a part of the labor force than males.[3]

Not too many years before that, Odysseus described a Grecian queen as being "of noble birth, good mind, honored like a goddess by the citizens and accepted as an arbitrator of quarrels, even for men."

This brings me to the bottom line, first articulated by Gladys Gruenberg. Her "Lesson Number 3 for Women in Business" is: "It's better to have government help if you can get it." She elaborated: Her career was aided by the passage of the 1972 amendments to the Civil Rights Act of 1964, which included public employees. The perception was, "Sex discrimination cases needed women arbitrators—at least that's what the men involved thought. They didn't discover until it was too late that when it comes to deciding cases, women arbitrators think the same way as men."[4] I think that's very true, as is the corollary, "men arbitrators think like women."

In 2002 and in 2006, Cynthia Alkon, a professor at Appalachian School of Law, surveyed women members of the Academy. In 2002 there were 54 women listed in the directory. The response rate to the survey was 28 percent or 15 female members. In 2006 there were 96 women listed in the directory. The response rate to the survey was 36 percent, or 34 female members. It was between 2002 and 2006 that the percentage of women in the Academy increased from 8 percent to nearly 15 percent. By 2006 only 10 of the

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[3]McKelvey, *Sex and the Single Arbitrator,* in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1971), at 11, quoting from 46 LA 961 (1965).

[4]Gruenberg Society of the St. Louis University John Cook School of Business. Available online at alumni.slu.edu/gruenberg/lessons.

respondents saw their gender as a barrier to establishing an arbitration career compared with 80 percent of the respondents (still only 12 people) who thought so in 2002. In 2002 many respondents "criticized the NAA for its lack of women in leadership positions, although not a single [2006 response] included this criticism," which led the author to conclude "that the NAA has addressed these concerns."[5] Unlike the 2002 respondents, no response from 2006 "strongly criticized male NAA members or complained about the treatment of women by male members." The sense of an "old boys'" network, however, remained. As the author of the study concedes, neither year's return rate is very high, which "lead[s] to problems of bias. It is possible that those who returned the survey in both [years] had a particular interest in the topic and that interest may skew the results."[6]

When I was accepted into the NAA in 1983, women comprised about 7 percent to 8 percent of the membership. Now we comprise 15 percent. Still relatively few. I always thought, however, that the members of the Academy went out of their way to create opportunities for us and to ensure full participation of women and new members in general. I know there are some who disagree about that, but my own experience has been very positive. I've served on numerous committees (by invitation or by volunteering) and was elected to the Board of Governors in 1991. I have always felt that anyone who wanted to become active in the Academy could do so simply by looking for things to do.

A number of past presidential addresses have raised questions that deserve more study. I was tempted by many of these but there is one I couldn't resist. Lew Gill's topic was "The Role of the Arbitrator's Wife." Lew didn't know many arbitrators who had husbands. In those days, most didn't. But he was introduced by Jean McKelvey, and in an aside he said his title was "without prejudice to the role of the arbitrator's husband, where applicable."[7]

I'll quote briefly from his earliest questions on getting to the hearing, to give you the flavor of his remarks: "If the wife goes to the hearing, should she drive? Does that depend on whether the arbitrator has a hangover? If she drives, should he study the case file . . . , or sleep, or criticize the wife's driving technique?"

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[5] 6 APPALACHIAN J.L.195, p. 208.

[6] *Id.*

[7] Gill, *Presidential Address: The Role of the Arbitrator's Wife*, in Labor Arbitration at the Quarter-Century Mark, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators Dennis & Sommers (eds.) (BNA Books 1972), at 3.

Many of my male arbitrator friends have wives who are willing and able to accompany them on our glamorous and luxurious journeys to far-flung hearing locales. I envied them. Now my husband, Clem, and I often travel together to hearings, so Gill's comments resonate with me.

Clem never sits in on the hearings—he gets his heavy reading done—so I didn't have to confront some of the issues Gill raises such as, "What should the arbitrator do if the spouse 'bursts out laughing at ridiculous testimony? Or at ridiculous rulings by her husband?' "

A few years ago my Aunt Ann was visiting me and she said that she would like to sit in on a hearing. It was a discharge case. As a witness finished testifying that the grievant had threatened to assault her, my aunt piped up, "She did not!"

Often when we're driving back from a hearing I tell Clem the "story of the case." Sometimes I ruminate on the subtle nuances of contract interpretation or the merits of a discharge—I do that until I hear humming. And at the end of it all Clem invariably says, "Well, that's a no-brainer." Which is why I conclude from my research that spouses should not be consulted about arbitration cases, the gender of an arbitrator is irrelevant, and we've come a long way, baby.

Tomorrow at our business meeting we will be voting on whether or not to amend our constitution and bylaws. I won't bore our guests with the details of the issue, but I do want to emphasize its importance to our members. Over the past few years both proponents and opponents of the proposed changes have put in a lot of thought and hard work on the question of expanding the Academy's reach. There are strong feelings on both sides. Regardless of the outcome, we must maintain our united commitment to the sort of fair and neutral proceedings with which we are familiar.

This organization and its members have been successful in overseeing the maturation of the system of resolving workplace disputes through collectively bargained grievance and arbitration procedures. We know that this system is fair to all parties. I take issue with the view Ben Aaron expressed on the general subject of expansion at our 2007 Annual Meeting. He was opposed to the notion raised early in the debate that we had to either increase our membership or become irrelevant. He said, rather than "admit to membership arbitrators concentrating primarily on disputes between employers and unorganized employees…" that we should recognize the end of our organizational life cycle.

We should not "keep[ ] the body of our beloved organization alive at the cost of losing its soul."[8] I believe we best preserve our soul by continuing to share our values and our expertise in the hopes of influencing the development of contemporary forms of workplace dispute resolution.

Many United States labor arbitrators have active employment arbitration practices. In both our countries we engage in forms of workplace dispute resolution other than grievance arbitration. Why not foster the highest standards our constitution speaks of in workplace dispute resolution for all employees?

I will end with a point made in Bill Fallon's presidential address. His subject was the use of humor in arbitration and his advice to us all was to "lighten up." He said, "The lighter touch is an antidote to the tension, to the hostility, to the distrust that accompanies so much of what we do. What [humor] can do is release that tension, perhaps draw people together, implant the idea that all problems are solvable among people of goodwill, and, not least, break up the sometimes overwhelming monotony of each side relentlessly ignoring the other's point of view."[9] I leave you with that thought, which applies not only to our work but to the debate within the Academy.

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[8]Aaron, *A Life in Labor Law: The Memoirs of Benjamin Aaron* (UCLA Institute for Research on Labor and Employment 2007), at 369.

[9]Fallon, *The Role of Humor in Arbitration*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1986), at 5.