Chapter 11

INVITED PAPERS: THREE INSIGHTFUL VIEWS OF WHAT ARBITRATORS DO

I. Four Ways of Looking at an Arbitrator: Autobiographical Perspectives on the Profession[1]

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Introduction

The forecourt of the Temple of Apollo at Delphi carried the inscription "know thyself."[2] That is equally good advice for arbitrators, though too seldom followed. Fortunately the modern ease of publishing has prompted more arbitrators to make their self-examinations available to others in the profession. The recent appearance in quick succession of autobiographies of four distinguished members of the Academy—Ben Aaron's *A Life in Labor Law;*[3] *Hattie's Boy* by Jim Jones;[4] *A View From the Middle of the Valley* by Dick Mittenthal;[5] and the eponymous *Arnold Zack*[6]—piqued my interest. I immediately read the portions dealing with arbitration and the Academy, then went back for a more leisurely read of the entire works.

These four ways of looking at an arbitrator differ markedly in tone, style, and content. Those differences prompted me to consider just what purposes autobiography serves. Several possibilities come immediately to mind. In the simplest approach, one might

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[1]With apologies to Wallace Stevens. One of his most famous poems was *Thirteen Ways of Looking at a Blackbird*. Arbitrators are much simpler than blackbirds, so four ways will do.

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[2]*Γν θι σ εαντόν.*

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

[4]Hattie's Boy: The Life & Times of a Transitional Negro (University of Wisconsin Law School, 2006).

[5]A View From the Middle of the Valley: Memoirs of Richard Mittenthal (Awede Press, 2008).

[6]Arnold Zack: From A to Z (Lulu Press, 2007).

write just to recount one's experiences for the enjoyment of family and friends. Such a work would likely be unadorned and uncontroversial—and probably not of much interest to anyone outside those groups. Alternatively, one might seek to place one's own life in its temporal, geographic, and ideological context—"My Life and Times," in other words. Or one might write to justify one's self and one's acts, to show why one's decisions were correct and alternatives would have been incorrect, to refight old battles and settle scores with one's former adversaries. Most politicians' memoirs reflect that objective. More rarely, autobiographies are a tool for, or a byproduct of, deep introspection. The author asks how he or she became the writer, then reports the findings. Those works tend to be the frankest, often leading the reader through cringe-inducing revelations. No doubt there are many other options as well.

Those who have read widely among autobiographies can easily find examples illustrating each of these approaches. While most autobiographies serve multiple purposes, each tends to emphasize one goal rather than others. General Grant's memoirs are a good example of the "just the facts" approach, although with some military score-settling.[7] Benvenuto Cellini's Renaissance autobiography is one of the best of the "life and times" genre (albeit with a dose of justification).[8] Richard Nixon's and Bill Clinton's books demonstrate the justification style,[9] and St. Augustine's *Confessions* is a marvel of introspection.[10] No doubt you can all add your own examples.

The arbitrators' autobiographies examined here also reflect in varying degrees those purposes. Each is interesting in its own right but for different reasons. Each author's perspective—his way of looking at the arbitration profession—is as unique as the author himself. Together they provide, if not a 360° view, at least a multifaceted understanding of what it was to be an arbitrator in the last half of the twentieth century. Each subject had an extensive existence outside the arbitration world, but for this venue I will concentrate on their arbitration careers and their relationships with the Academy.

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[7] PERSONAL MEMOIRS OF U.S. GRANT (1885–86).
[8] The Autobiography of Benvenuto Cellini.
[9] Richard M. Nixon, THE MEMOIRS OF RICHARD NIXON (1979); William J. Clinton, MY LIFE (2004).
[10] St. Augustine of Hippo, CONFESSIONS.

I. Ben Aaron

Unlike the other three books, Ben Aaron's *A Life in Labor Law* is a memoir rather than a full autobiography. Ben decided for various reasons not to write about his personal life. The book therefore starts with his arrival as a newly minted lawyer in Washington, D.C., during the last months before the United States entered World War II, and continues for the next half century with his labor-related government work, scholarship, professional associations, and arbitration . (An editor's note states that he was working on a second volume that would have covered his academic life at the time he died.) Only a few remarks here and there reveal anything about his earlier life and education or his later family life. Although his pre-Washington background would have been interesting to have, he lived such a long life in labor law (about 66 years) that his first 26 years are hardly missed.[11]

The book begins with Ben's efforts to find a government job in Washington shortly after graduating from law school. Later chapters double back to a little of his educational career. Those few paragraphs may be the most surprising in the book. Who would have guessed that Ben was a terrible exam taker and graduated from Harvard Law School in the bottom quarter of his class? Or that he failed the Illinois Bar Exam the first time he took it, having decided that he did not need a prep course? Or that, in his early postlaw school years, he suffered from an almost total lack of self-confidence? (Professor Charles Gregory, with whom he briefly studied at the University of Chicago, later told him that he had never met anyone with less self-confidence.)

Most strikingly, in light of his intellectual dominance in several fields, who would believe that the young Harvard Law graduate would be rejected for one entry-level job after another even as the Government geared up for the next war? Ben's unsuccessful job seeking deepened his doubts about his competence. He writes that he was "overwhelmed by feelings of shame and worthlessness because of my continuing inability to find work."

Finally, with the assistance of the type of contacts that help so many Washington job seekers, Ben began working at the War Labor Board (WLB), and his Life in Labor Law was off and running. The

[11]Because Ben had such a long life, it would be comforting for the reader to think "If I live that long, I'll have a long list of accomplishments, too." Comforting, perhaps, but untrue. By the time he was 40, he had done more than almost any of us could do if we lived to 100.

key contact in this case was the Academy's own Ralph Seward, who introduced Ben to the Vice Chair of the WLB, George Taylor. Taylor hired Ben, mentored him at the WLB, and became a lifelong friend.

Ben's association with the Academy was longer than any of the other authors. Although he did not attend the organizational meeting, he was one of the 105 original "charter members." The Academy formed a great part of his professional life, although he also discusses several other organizations in which he took a leadership role—the Comparative Labor Law Group, the Labor Law Group, the International Society for Labor and Social Security Law, and more. Just attending all the conferences of those groups must have occupied a large part of his time.

Ben immediately rose to prominence in the Academy. He served on the Board from 1948–50, as Vice President in 1952 and 1953, and as president in 1962–63—at age 47, the youngest president up to that time, and perhaps since. So far so good. But even as early as his presidential term he became disenchanted with the Academy.

Noting the widespread belief in the labor relations community that there was a shortage of arbitrators, Ben believed that established arbitrators were obliged to solve that problem by preparing newcomers. As the professional association of those established arbitrators, he argued, the Academy should take the lead in that effort. With his successor, Sylvester Garrett, he embarked on a two-year project to train new arbitrators. His effort was doomed from the start. "I could scarcely have chosen a project less popular among my fellow Academy members, many of whom regarded arbitrator training as a threat to their livelihood." He quotes the infamous but perhaps tongue-in-cheek statement of Peter Seitz: "Show me a 'new arbitrator' and I will show you a person with his hand in my pocket, claiming my sustenance as his own and robbing my grandchildren of their security." Not until many years later did the Academy overcome its members' reluctance to train their competitors and become a major resource for arbitrator education.

That early incident convinced Ben of a firm division in the Academy between two very distinct types of arbitrators: those for whom arbitration was a *calling* and those for whom arbitration was simply a *job*. The first group consisted mainly of part-time arbitrators, particularly those with secure full-time jobs like teaching. The second group included most full-time arbitrators. Ben's insistence on that sharp division is puzzlingly simplistic for such a sophisti-

cated thinker. He implies—indeed, he says quite clearly—that a few members, mainly academics like himself, were idealistic and altruistic while most members were just out to make money. Academic arbitrators, in other words, didn't care about arbitration income while full-time arbitrators cared for nothing else. Most of us don't see the world in such Manichean terms, but Ben's later pages confirm his dualism.

In Ben's view, the first group wanted the Academy to be their professional association, producing scholarship, improving the arbitration process, and educating the public about its advantages, while the latter group wanted it to be a simple trade association to help them make more money. He saw the Academy's rejection of his training project as

> one of the first intimations of the slow but ineluctable transition from an academy of professional arbitrators and scholars pledged to promote the institution of arbitration to an organization on the trade association model devoted principally to enhancing the welfare of its individual members. (p. 334)

That "ineluctable transition" is the consistent theme of Ben's reflection on the Academy. He believed that the Academy's path went steadily downhill from its 15th birthday in 1962 until it ceased to exist on its 56th birthday in 2003. (More on that in a moment.) As people age, many tend to think the world is going to the dogs, but seldom has the journey to the kennel dragged on so long.

The trail markers on that trip were the Academy's decisions on advertising and solicitation. Like many other professional groups, the Academy banned advertising from its earliest days until the 1980s. Ben served on the ethics committee and its successor, the Committee on Professional Responsibility and Grievances (CPRG), for over 20 years and chaired those committees several times. He was particularly proud of the committee's early ruling during his chairmanship in 1957–1958 that merely listing one's professional associations on a letterhead violated the 1951 Code. Even by the standards of the time, that must have seemed like a rigidly puritanical interpretation of the advertising ban. Nevertheless, the revised Code, adopted in 1972, contained a detailed ban on almost any form of communication about one's credentials except for providing information for agency rosters and listings (not advertisements) in telephone directories.

Ben believed that two factors combined in the 1990s and after to undermine that strict anti-advertising position, namely, the decline in union membership and the rise of nonunion

arbitration systems. Both developments threatened labor arbitrators' incomes and he concluded that, in turn, convinced many members that advertising was not merely acceptable but essential.

The Academy's retreat from the advertising ban began in 1996 when the CPRG modified a 1988 CPRG Advisory Opinion to allow arbitrators to publish factual listings in dispute resolution directories like a proposed Martindale-Hubble ADR directory. Three years later, in 1999 (Ben erroneously says 1996), the Academy amended the Code to allow arbitrators to post substantial information on their personal websites, including references to or texts of published writings, publishable arbitration awards, panel memberships, and the names of parties for which the arbitrator has worked.

Ben's breaking point, however, came two years after that. In 2001, the CPRG proposed an amendment to the Code that would ban only "false or misleading advertising"—thus, in a backhand way, permitting other advertising. By that point, Ben had "become increasingly disturbed by changes in the internal culture of the Academy" (p. 356). Some of those changes stemmed from the growing number of full-time arbitrators who were more concerned about business than the "dwindling number of part-time arbitrators."[12] Worse, some new members seemed to want membership only to enhance their business. They either avoided our meetings, he writes, or came to them "to urge that the Academy devote greater efforts to promote the financial welfare of its members."

The advertising proposal symbolized everything Ben detested about the direction of the Academy. He therefore decided to fight it. Before telling the rest of that story, let me describe Ben's understanding of the reasons for the Academy's changes. Because his version varies so much from my own recollection, I will have to go into a little detail.

Here is Ben's version: Economic pressures on labor arbitrators, particularly the rise of a large group of employment arbitrators who could advertise because the Code didn't apply to employment arbitration, pushed the Academy to allow directory listings, personal websites, and ultimately advertising and direct solicitation. The CPRG's asserted reasons for its proposals, particularly its concerns about the possible illegality of advertising restrictions, were "ill founded and unrealistic." Therefore the CPRG's goal

[12]Ben does not cite any figures on this point.

must have been to further the Academy as a trade organization by allowing its members to engage in unprofessional conduct like advertising.

Now here is my recollection. I was on the CPRG from 1998–2001, during the years when we drafted the website policy and initiated the advertising proposal. While there had been some discussion, mostly hypothetical, among Committee members about the possible impact of advertising by mediators and employment arbitrators, the CPRG received no pressure from any members who wanted to advertise. In fact, I was only aware of one member, not an influential one, who did advertise, and he did not do any significant amount of employment arbitration. The subject of financial pressures and competition from employment arbitrators never arose at CPRG meetings during those years. Certainly no member of the committee during that period advertised or wanted to advertise, and (so far as I know) none has advertised since those changes. Nor, to the best of my recollection, was such competition discussed during the membership debates.

What happened was this. During the course of several CPRG discussions in those years, we realized that parties wanted and needed more information about potential arbitrators, largely because the profession had grown so rapidly that they no longer knew all the candidates. We also knew that even then the web was becoming the normal method for gathering information. Finally, we also knew that the Academy was not enforcing the existing advertising ban and that virtually every other professional association had been forced to abandon advertising prohibitions because of the antitrust laws.

Reg Alleyne, CPRG chair and something of a techie, recognized those realities sooner than most of us. He was the force behind the website rule, for example, although Tim Heinsz did most of the drafting. I recall that Reg made his point dramatically when he presented the website opinion at an Academy meeting. He knew that many members already had websites containing a lot of biographical information. Some members—academics at universities that were moving online—did not even know they had a website. During his presentation, Reg opened up his computer and showed on a large screen a University of Michigan website for Ted St. Antoine. Ted was distinctly *not* a techie and had no idea the university had created a website for him. Yet there was his biographical information for anyone with Internet access to see. Reg's point was clear: If even Ted St. Antoine had a website, it

couldn't possibly be unethical. Yet by Ben's puritanical reading of the Code, Ted was advertising and thus violating the Code.

With regard to the advertising ban, the "aha" moment came at a CPRG meeting in 2000 when someone passed around a copy of the California bar association's journal containing an ad from an Academy member. One could quibble about whether the ad's wording violated the Code, but the broader point was unmistakable: Academy members were advertising and we were doing nothing about it. We have a lot of California members, many of whom are also members of the bar, but none of them had filed an ethics charge against the member. More revealingly, no one on the CPRG itself chose to do so even with the evidence in our hands. When we realized that everyone went "tsk, tsk" at a blatant ad but didn't think it necessary to file an ethics charge, it was clear that the advertising ban no longer represented the views of our members.

A second factor on the committee's mind, the one that Ben describes as "ill founded and unrealistic," was the risk of an antitrust violation. This was hardly a new idea. President Dallas Jones and President-elect Arnold Zack appointed John Kagel in 1993 to chair a Code Revision Committee that considered the advertising ban. Kagel's 1994 report to the Board recommended that the advertising ban not be enforced except in cases of false advertising. The committee's report included a legal opinion warning that a total ban on advertising "runs a significant risk of per se invalidity under the Sherman Act."[13] The Board did not act on Kagel's advice, instead referring the question to the CPRG for an open forum at the 1994 Fall Education Conference. Eventually that led to retention of the advertising ban with some minor tinkering.

Concern for possible antitrust violations was still on our minds when the CPRG dealt with advertising issues in 1998–2001. By 2000, every major professional association had been forced to drop their advertising bans—the ABA, the AMA, the American Dental Association, and many more. It was only a matter of time before our Code's ban became a target. We realized that we could not possibly defend the same type of ban that the ABA, with its immensely greater resources, had to abandon. Better, we thought, to get rid of it before we faced litigation. That is what we proposed

[13]Gladys W. Gruenberg, Joyce M. Najita, and Dennis R. Nolan, THE NATIONAL ACADEMY OF ARBITRATORS: FIFTY YEARS IN THE WORLD OF WORK (BNA Books, 1998), at 291 n.191.

to do, retaining only bans on false advertising and on outright solicitation.

Ben formed an opposition group with several other distinguished former presidents, including Dick Mittenthal. He recognized their opposition as quixotic and so it proved. Despite their eloquent appeals at the meeting, the membership overwhelmingly approved the proposal. Ben reports that only 39 other members joined his opposition. To those of us on the CPRG, that was just common sense: The rule was outdated, unenforced and probably unenforceable, and very likely unlawful. To Ben, it was a portent of doom, a clear sign that barbarians had taken over his Academy.

Ben blames employment arbitrators for the loss, describing them as a "large group" of Academy members who "typically…did not participate in the debate on the question, other than to demand an immediate vote on the issue." To put it as gently as I can, that statement is creative history. In 1996 and 1998 and even in 2001, there was no "large group "of Academy members engaged in employment arbitration, at least not if he uses that term to apply to those for whom employment arbitration was a significant factor.[14] Employment arbitration's general legality was not even clear until the Supreme Court's *Circuit City* decision in 2001.[15] There were a few notable members who practiced some employment arbitration, but hardly enough to sway any decisions.

Moreover, the most important members who were doing a significant number of employment arbitration cases—among them John Sands, Norm Brand, and Barry Winograd—*did* participate in the debate. Interestingly, Barry confirms that he actually spoke against the proposal because he thought "the Academy remained a labor arbitration group and that I could both respect and defer to the earlier generation" and because he was swayed by Rolf Valtin's

[14]Norm Brand, one of the earliest leaders in employment arbitration, wrote me on June 2, 2010:

> My recollection is that around that time we were surveying members to see who did employment arbitration. I know I was working on "How ADR Works" (which was published in 2002) and searching for folks who had actual experience in employment arbitration. There was no significant number of Academy members who had actually done any employment arbitration. I can think of [John] Sands, [Rosemary] Townley, [Susan] McKenzie and that is about it. There may have been others, but that was not a significant part of anyone's business. I think I was involved in some AAA training of prospective employment arbitrators at the time, including Academy members. But there was no large group of Academy members who actually did employment arbitration.

[15]Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

opposition.[16] The other two supported the proposal on its merits. Even those employment arbitrators who favored the proposal did so for reasons other than self-interest.[17] I am not aware that any members doing employment arbitration at the time had any interest in advertising or that any of them have done so since.[18]

Supporters of the advertising proposal noted that the Code retained its prohibition on solicitation. They hoped, but could not be sure, that a solicitation ban stood on stronger legal footing than an advertising ban. Shortly after the Atlanta meeting, however, the Academy learned that the Federal Trade Commission (FTC) was preparing a formal complaint against us for our anticompetitive actions. So much for Ben's reference to our "ill founded and unrealistic" fears.

By then Rich Bloch, who had joined Ben in opposing the advertising proposal, was our president, and I had moved on from the CPRG to Vice President. Rich's first reaction was to fight the FTC in court. He then sought out an experienced antitrust lawyer in Washington. Her advice was unequivocal: We had little chance of winning, and even litigating the FTC complaint would cost far more money than our small organization could afford. With Executive Committee approval and Board knowledge, Rich negotiated with the FTC.

Despite our weak bargaining position, he reached a settlement that required us to drop the solicitation ban but allowed us to regulate false or misleading advertising and to require that arbitrators send solicitations to both labor and management in order to protect their neutrality. Rich and the Board were actually surprised at how much power the FTC let us retain. The Board unanimously approved the settlement and scheduled a vote on the Code amendment at our 2003 annual meeting in San Juan.

Predictably, Ben opposed the settlement. He believed that the FTC had ignored important differences between the Academy

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[16]E-mail from Barry Winograd to me, May 30, 2010. In an e-mail of the same date, John Sands confirmed that he and Norm Brand both participated in the debate.

[17]To quote again from Norm Brand's e-mail of June 2, 2010: "My position on the advertising ban was that Kagel had gotten a legal opinion some time before that said it was insupportable and I favored eliminating it. It was unrelated to employment arbitration."

[18]Ben also argued that the Academy differed from the other professional associations because membership in it was voluntary, while other professionals were required to join their organizations. That is inaccurate. While lawyers, for example, are licensed and in states with an "integrated bar" are automatically members of the state bar association, the ABA is only a voluntary federation. No one need join the ABA in order to practice law, the AMA to practice medicine, or the ADA to practice dentistry, but all of those organizations had to abandon restrictions on advertising.

and other professional organizations. He also believed the FTC had wrongly concluded the Academy engaged in economic activities and possessed significant market power. He concluded that

> The FTC order deprived the Academy of its right to protect its reputation for impartiality and integrity while providing employers and unions with no relevant information about individual arbitrators not already available to them. (p. 365)

Once again Ben mobilized his group of distinguished former presidents. Once again they spoke eloquently at the meeting against the proposal. And once again an overwhelming majority of members disagreed with them.

That was the end of the Academy as far as Ben was concerned. Here is his pessimistic conclusion:

> The outcome of the debate at the 2003 annual meeting convinced me that the organization I helped establish in 1947 no longer exists. The lofty purposes for which it once stood have gradually been abandoned and have been replaced by those designed to promote the economic interests of its members. (p. 368)

Ben was so disheartened by the San Juan vote that he seriously considered resigning from the Academy. He ultimately decided to remain a member because there was still a chance that the CPRG could take vigorous action to enforce the remaining limitations on advertising and solicitation, preferably by adopting his proposal to give the CPRG to act on its own motion against suspected violators.

Although he believed by 2003 that the original Academy "no longer exists," he reiterated his view at the 2007 meeting in San Francisco. The main item for the business session was the vote on a resolution by the New Directions Committee to incorporate employment arbitration within the Academy's jurisdiction. Before we turned to that topic, we had a few ceremonial items. One of those was to award Ben an honorary life membership. Recipients of that honor seldom say anything more than thank you. Departing from precedent, Ben seized the opportunity to make a lengthy argument against the NDC resolution. His conclusion was somber:

> Some of our members have repeatedly argued that the Academy must either increase its membership (and thereby enhance its influence on the practice of arbitration) or gradually fall into a state of innocuous desuetude. I suggest a third possibility. Every organization has a life cycle, and there may come a time when the pressures of expansion threaten to cause the abandonment of some of the principles upon which the Academy was founded. At present, that prospect seems

> distant, but when that time comes, as I believe it will, I hope that the Academy's members will accept that the cycle has come to an end rather than keep the body of our beloved organization alive at the cost of losing its soul. (p. 369)

Ben lost that vote, just as he had lost on the advertising issues. The very next year, however, changes in our governing documents that were necessary to implement the 2007 resolution came up for a vote at our Ottawa meeting. Seeking support for a compromise proposal, George Fleischli contacted Ben. I don't know what he said, but Ben not only agreed, he also contacted several of the other former presidents who had vigorously opposed the NDC in 2006. That, to me, was the ultimate mark of Ben's greatness as an Academy leader. He put aside his strongly held beliefs in an effort to unify the very Academy that he believed had abandoned its principles.

Perhaps Ben was right that the Academy he helped found no longer exists. Or perhaps the Academy he helped found just grew and changed with the times while Ben, at least on these issues, did not.

II. Dick Mittenthal

Like most of us, Dick accidentally fell into an arbitration career. He was born in New York in 1926, got his bachelor's degree from Cornell and his law degree from NYU, met his wife, Joyce, while working for the National Labor Relations Board (NLRB) in Washington, and moved back to her home state of Michigan. There, with an assist from Joyce's family, he became an apprentice to Harry Platt at age 27. The experience and exposure he got from working with Harry kick-started his arbitration career. Just four years later he went out on his own and joined the Academy the same year.

The middle and largest portion of *A View From the Middle of the Valley* (a play on his surname, which translated from the German means middle of the valley), describes Dick's arbitration work. Unlike most of us, the vast bulk of his work has been as an umpire. Just listing some of the parties who appointed him as their umpire testifies to the quality of his work: On the union side, the Steelworkers and the UAW; on the employer side, Dana Corporation, John Deere, Allis-Chalmers, Caterpillar Tractor, U.S. Steel, General Dynamics, Anheuser-Busch, and of course the U.S. Postal Service and its main unions, the NALC and APWU. His descriptions

of each relationship are brief but are highlighted with anecdotes and sketches of the most interesting participants.

What comes through in each of the book's sections—indirectly, not through any self-praise—is Dick's fundamental patience and open-mindedness. He readily confesses his mistakes and misjudgments but always learns from them. His modesty and even self-doubt echoes Ben Aaron's. Only at the rarest instants, and then under the provocation of slurs on his integrity, does he let the slightest bit of anger show through.

For our purposes, Dick's chapter on the Academy is the most important. He joined the Academy in 1958 at age 31 and just four years after starting to arbitrate. He made his name in the Academy a year or two later when he was asked to prepare a paper on past practice for the following year's annual meeting. Those of you who have read his paper (and every arbitrator should) know how good it is. It bears the marks of all his later works: He begins by taking the concept apart and looking carefully at each of its elements. He then puts the parts back together again in such a way that he can describe how each fits into the whole and makes the process work. What may have seemed amorphous at the start of the project seems precise, logical, even inevitable at the end.

Work like that does not spring full-grown from the brow of the writer. Even the most brilliant scholar sweats blood to finish a creation. Here is Dick's description of his work on that paper:

> During the following months, I worked almost every evening and every weekend on that paper. As I tried to dissect the subject, I went from one issue to another in an unending succession. I carefully read what the leading theorists—Archibald Cox, Harry Shulman, and Ben Aaron—had said about "past practice." And they led me back to the mother lode, the great Williston's treatise on the law of contracts. It was a grand voyage, full of surprises and unexpected insights. Occasionally, I felt I might never come to terms with so much complexity. (p. 103)

Needless to say, the paper was well received. Russ Smith, then the Assistant Dean of the University of Michigan Law School, asked him to submit the paper for publication in the school's law review, and in due course it came out. His first talk to the Academy put him on the path to leadership in the organization; his first published work was in one the nation's great law reviews—and all that was before he was 35.

After that, it was onward and upward through a succession of committee positions, notably including a committee to revise the

original Code. After Alex Elson gave a paper urging revision of the old Code of Ethics, Dick was asked to prepare a report for the Board on the pros and cons of Elson's suggestions. Dick did so and convinced the Board to start the revision process. It appointed Bill Simkin to chair a committee to write what became the Code of Professional Responsibility. As CPRG chair, Dick worked closely with him.

After getting AAA and FMCS approval for the new Code, the next step was to bring it before the members for their decision. President Dave Miller was supposed to chair the 1974 meeting in Puerto Rico but died before the meeting. Dick was selected to serve as acting president. Thrust into that position, he conducted a full-day business meeting on the proposed Code, at the end of which the membership overwhelmingly approved the revision.

Perhaps the only truly surprising part of Dick's comments on the NAA is his brief discussion of our decisions to permit advertising and, later, solicitation. Here is his discussion:

> I was particularly displeased by recent CPR changes that now permit arbitrators, in certain circumstances, to advertise and solicit work. The principal purpose of these changes, in my opinion, was to help arbitrators in their quest to find work. But such "business" considerations invite behavior that is completely contrary to the need to insulate ourselves from the parties, the need to project the image of a truly disinterested neutral. That image can only be tarnished when we seek the parties' favor. (p. 106)

The surprising part is not his opposition to the changes—as we saw earlier, that was common among the members of his generation and the previous one—but rather his erroneous belief that the purpose of the changes was to "help arbitrators in their quest to find work."

Apart from his displeasure with these policy changes, Dick's view of the Academy is uniformly positive. His impression at his first meeting, in 1958, is one many of us have shared:

> I became a member in 1958 when I was 31 years old. The names of the Academy elders were familiar to me because I had read many of their awards and articles. But I had never met them. I remember being in awe at my first meeting of the Committee on Law & Legislation, sitting with such notables as Archibald Cox, Syl Garrett, Russ Smith, and Willard Wirtz. These men were not only experienced arbitrators but were also the analytic giants who were exploring the strengths and

> weaknesses of the process. I was acutely aware of how much I did not know, how much there was for me to learn. (p. 102)

In contrast to his arbitration practice, where he did not "experience life first-hand," in the Academy he does:

> Its members are involved in the governance of this association—its ethical standards, its membership standards, its politics, its petty quarrels, its personalities. All of this is taken in through my own eyes and ears. (p. 110)

Looking back many years later, the awe has changed to appreciation of his Academy friendships. Dick mentions many of the members he found most interesting and most enjoyable, most of them greats from the arbitration's mythical golden age—Jim Hill, Peter Seitz, Lew Gill, Ben Aaron, Alex Elson, Ralph Seward, and many more. He adds anecdotes about most of them that illustrate their personalities. Those friendships, he concludes, are one of the great joys of membership in the Academy:

> My Academy friends have been an important part of my life. True, I may only have seen them once a year at the annual meeting, perhaps 4 to 6 hours together. But when that experience is repeated each year for 50 years, the sense of intimacy is far greater than one might imagine from merely multiplying those numbers, a sum total of 250 hours. And of course there were the telephone calls each year between meetings to catch up with what others were doing or to ask for assistance with a troubling arbitration issue. These relationships have been the most important benefit of my long Academy membership. (p. 111)

Although my focus here is on the arbitration aspects of the subjects' lives, I can't resist one comment about the rest of Dick's book. Any autobiographer can describe the facts and events of a life—one's public skin, as it were. Very few have the ability (or, to be honest, the willingness and objectivity) to look inside that skin and understand just what made one oneself. Fewer still would be willing to tell others what they have found. That's not a problem in this case. With the aid of psychoanalysis, Dick has spent a great deal of time learning just who he is, and why. He tells his reader about his discoveries in what must have been painful to write and is sometimes squirm-inducing to read. I won't give away the major items here lest I deprive you of the thrill of discovering them yourselves. Suffice it to say that while I have always regarded Dick as one of the brightest people in this organization, I now know that he is also one of the bravest.

III. Arnold Zack

Arnold Zack: From A to Z is the most exhausting and dispiriting books I have read in years, perhaps ever. That may sound like a critical statement, but it isn't. To the contrary, Arnold's autobiography is a marvelous work. I mean that it is exhausting just to *read* about all of his activities. I can't imagine how exhausting it was to *do* all of them. To take just one small example, consider Chapter 9 about his Fulbright in Ethiopia in 1963–64. In 26 pages, he takes us from Boston to New York to Paris to Tel Aviv to Athens to Addis Ababa. After a little time there, he travels to several cities around Ethiopia, then back to Addis Ababa and dinner with Emperor Haile Selassie. Soon he spends time in Kenya for that country's independence celebration. After a short trip to Paris, he returns to Ethiopia and then goes on an Easter Pilgrimage to the Holy Land, including Syria and Lebanon. That is just one year in his life and one chapter out of 16 in the book. At the chapter's end, he is just 33 years old, far less than halfway to the end of his literary journey.

But I'm getting ahead of the story. I should first provide a little background. Arnold was born in Massachusetts, attended Tufts University and then Yale Law School. Later he earned an MPA degree at the Littauer School (later the Kennedy School) at Harvard. He began working for a Ph.D. in Government but failed to study for his oral exams and flunked. He then left on a previously arranged Fulbright Fellowship to Ethiopia and never went back to complete his Ph.D. Later in life, he accomplished almost everything he could have done as an academic—teaching, lecturing, writing books and articles, and so on.

I also described his book as *dispiriting*. I meant that after reading what he has accomplished with his life, I am left with the depressing feeling that I have wasted my 65 years on this earth. The chapter titles alone illustrate my point. After "Tufts College" and "Yale," there are "Vienna to the Congo," "Working for the CIA," "Setting Up the Peace Corps," and more. What have we been doing with our lives while he was doing all that? The most that normal arbitrators could say would be "earning a living and raising a family," but Arnold did both of those things and all the rest besides.

And then there are the people. On and on they flow, one notable after another—Allard Lowenstein, Mike Dukakis, Harry Shulman, Arthur Corbin, Nick Katzenbach, Eugene Rostow, Otto Kahn-Freud, General Leslie Groves of the Manhattan Project, Abe

Raskin of the *New York Times*, Arthur Goldberg, Archibald Cox, John Dunlop, John Kenneth Galbraith, Paul Tsongas, George Shultz, Ted Kheel, George Taylor, Walter Reuther, George Meany, Tom Mboya, Golda Meier, Sarge Shriver, Bill Moyers. That's enough for now, but all of those appear in the first third of the book, before Arnold turns 33. This is not name dropping for effect. It is simply a recitation of the facts. In fact, he encounters many of those people long before they were famous.[19]

Apart from a few brief mentions, Arnold's arbitration and mediation practice does not enter the story until Chapter 12, about two thirds of the way through the book. Again we're off and running—Goodrich Tire, General Dynamics, railroads, airlines, Presidential Emergency Boards, major public sector disputes in New York and elsewhere, and the Foreign Service Labor Relations Board, not to mention relatively routine ad hoc work. Then there is the teaching at Yale and Harvard and the book writing.

But we're still not even close to a conclusion. At Chapter 14, we finally come to the NAA. That chapter is much shorter (just 14 pages) than I would have expected. The Academy is most members' primary professional association. Those members see Arnold at all our meetings and know that he has been involved in its operation for decades. They naturally assume that meant it was his primary professional association, too, and thus would expect that he would devote much of his autobiography to it.

Not so. As much as he has contributed to the Academy, for him it is just one among many activities. In the context of his busy life, 14 pages is just about right.

Nevertheless, for Academy members chapter 14 is where the book gets most interesting. Arnold joined the Academy in 1962 at the ripe age of 30. He tells us a little but not enough about various positions he held in the Academy, culminating in his presidency in 1994–95. His discussion of his committee work between admission and presidency is sketchy. One gets the impression that he regarded those assignments as duties more than pleasures, as tasks rather than real accomplishments.

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[19]Looking for a literary counterpart to serve as an analogy, I considered Forrest Gump and Woody Allen's Zelig, both of whom show up at their era's major events. Neither fits. They are merely bystanders, extras on the sets, in most of their scenes. Arnold was a major participant, frequently *the* major participant. A far better comparison is Professor Morris Zapp, the fictional creation of British novelist David Lodge. Zapp appears in two of Lodge's academic novels, Changing Places and Small World. Zapp blows into the novels' major events as if on a tornado, solves problems or wreaks havoc, and then blows out as quickly as he arrived.

He demonstrates that attitude most clearly in his single paragraph about his service on the Research and Education Foundation (REF). Alex Elson launched the REF and served as its first president. Arnold was his vice president. They "tried fund-raising of all sorts," he writes (p. 252), but "NAA members, like most people, are greedy and unwilling to give to charity—even in their own field and even when it is deductible." End of story and on to the next topic, the Honorary Life Membership Committee.

Unlike Dick Mittenthal, Arnold uses his autobiography to correct the record about some misunderstandings and problems during his membership. The biggest of these occurred in 1982. While serving as chair of the continuing education committee, Arnold and Rich Bloch had developed a number of innovative programs, including educational videotapes about problems arbitrators frequently encounter. Arnold used the videotapes at the Washington, D.C., meeting that year and received a lot of compliments. At the end of that meeting, however, he asked President Byron Abernethy which of two conflicting meetings he wanted Arnold to attend. He quotes Abernethy as replying:

> Neither. You are no longer chair of the continuing education committee. The committee is not in the Directory. You have been doing all this without authorization. (pp. 250–51)[20]

Only after asking some other members who were checking out of the hotel did he learn of rumors that he and Rich "had been fleecing the NAA," charging the Academy for their time and the use of the videos. The rumors were false, but Rich Bloch, the treasurer at the time, had accidentally recorded a $9,000 payment to the AAA for its work on malpractice complaints as going instead to the continuing education committee. That made it look as though the committee was getting a lot of money from the Academy, and some members apparently assumed that meant Arnold and Rich were pocketing it.

Arnold explains that "Rich had not paid close enough attention to his role as Secretary Treasurer, and it looked like a payoff." He also later learned that that the continuing education com-

[20]I don't doubt Arnold's description of the conversation, but I do find Abernethy's remarks extremely puzzling. If he were acting in response to rumors of misuse of Academy funds, one would expect him to have contacted Arnold and Rich to find out the truth and to recoup any losses. It is equally hard to understand his reliance on the Academy directory in concluding that the continuing education committee no longer existed. That might have triggered a question, as a similar event did during my own presidency, but the logical response would have been to contact other officials to find out the facts.

mittee had accidentally been left out of the directory during Ted Jones's term as president. It was all "innuendo and error," Arnold describes Mark Kahn as telling him, but "Byron was not one to admit such error."

Arnold was "absolutely demolished" (p. 251). Worse, he was "powerless to respond to innuendoes because neither Byron nor anyone else ever made specific charges against me." He believed that his role in the organization had come to an abrupt and premature end. Nevertheless, appointments from Abernethy's successors, Mark Kahn and Jack Dunsford, rehabilitated him and eventually led to his nomination as President.

That was just one example of a problem that Arnold corrects in his autobiography. True to form, he names names as he believes necessary. Another example was a project with another member, also named, to publish a Bureau of National Affairs (BNA) book of the best arbitration cases over the past 100 volumes of Labor Arbitration Reports. They divided up the work but it never came to fruition. "I did my share," Arnold writes, "but he did not do his." As a result, BNA canceled the project after two years of waiting for the manuscript.

Most of Arnold's Academy work around this time, however, was significant and successful: initiating the Common Law of the Workplace project; prompting and then largely drafting the Due Process Protocol; and conducting the 1994 Fall meeting in Boston, complete with a reception at the Kennedy Library, among many other things. In other words, enough accomplishments for almost anyone's entire professional life—except for Arnold, for whom these activities were merely a few more pearls on a very long strand.

IV. Jim Jones

Jim Jones's book, *Hattie's Boy: The Life & Times of a Transitional Negro,* is, at 818 pages, by far the longest of these four works but it has the least on arbitration and on the Academy. That is because arbitration has been a sideline for Jim while it (or in Arnie's case, the broader ADR movement) was central to the other three authors

Jim's story is remarkable in many respects. I recommend *Hattie's Boy* to all who know Jim and, more broadly, to all those interested in what it meant to grow up black from the 1930s to the late 20th Century, from Little Rock, Arkansas, in the earlier part of that

span to a professorship at the University of Wisconsin in the latter part, from "June Cummings" (his childhood name) to the Jim Jones many of us know. Because my focus is on arbitrators' views of themselves as arbitrators, however, I will leave the rest of his "life & times" to your independent reading and turn to his contact with arbitration.

One aspect of his life, however, is essential to an understanding of everything else in his book. Jim grew up in the South during the Jim Crow era. The persistent discrimination he saw and experienced then and later marked him permanently. Jim's real subject in *Hattie's Boy,* apart from telling the story of his life, is race. The book's subtitle reflects that focus, placing him as a "Transitional Negro" who lived through the country's massive racial changes from the end of Jim Crow to the present day. Race thus became the lens through which he viewed almost everything and everyone in his life.

While working for the Department of Labor, he handled legal work involving the FMCS. When he left the Department to go into teaching at the University of Wisconsin, Larry Schultz, then director of the FMCS, convinced him to serve as an arbitrator for arbitration cases involving discrimination. After gaining tenure, he began to arbitrate more widely.

Jim's chapter on the Academy is strangely limited by his concentration on racial issues. There is barely a word about the role of the Academy in improving dispute resolution procedures or about its training of arbitrators and advocates. Nor is there anything at all about the scholarship presented at its meetings and in its publications. Notably absent in this book are the frequent praises of Academy friendships found in each of the others. The only aspect of the Academy that seems to interest him enough to mention in his autobiography is the race and gender of its members. That focus—some might say tunnel vision—begins with his first words on the Academy and continues to his last words on the subject.

Many of his friends and colleagues in other professional associations like the Labor Law Group and the Industrial Relations Research Association were NAA members. One of them, Jean McKelvey, assumed that he, too, was a member and made a comment to that effect around 1980. His response was inauspicious (p. 670): "I'm not a member of your racist organization." He does not explain the reason for that remark, but he knew the Academy had very few black members at the time and seems to have con-

cluded that his nose count alone demonstrated that the Academy was racist: as the lawyers say, *res ipsa loquitur*. He does not discuss, or even seem to recognize, any other possible explanations for the organization's demographics.

Jean nevertheless convinced him to fill out an application. He explained his motivation for doing so:

> As it was a premier labor management relations organization just like the Industrial Relations Research Association, it was one that I felt worthy of some participation on my part in the likelihood that I might be able to facilitate more concern for its lack of diversity . . . I decided that I would devote some time to the Academy and reduce some of my activities in some other organization which seemed to have less of a need. (p. 671)

Read those sentences again to get their full flavor: He writes that because the Academy was a premier labor relations organization, it was "worthy" of "some participation" on his part, and that he chose to devote "some time" to the Academy in order to correct its lack of diversity. He may be the first and only person in the Academy's history who joined primarily because he believed the Academy needed him more than he needed it. By joining, he might save the Academy from its sins.

Jim's desire to promote diversity (a very modern term, by the way, not one that anyone would have used when Jim joined) had two aspects, membership numbers and leadership participation. On the numbers issue, he was severely disappointed by the time he wrote his memoir. While pleased at the success of Jean McKelvey's "Herculean efforts" to mentor women arbitrators and get them into the Academy, he saw little improvement in the admission of black arbitrators (p. 671): "By comparison [with the increase in female members], the last time I counted I could not come up with 20 black arbitrators, and not more than 25 minorities of any persuasion." He believed that the increase in public sector arbitration would increase the number of black arbitrators because most public sector work is in urban centers with more black professionals, but he was by no means sure that would help the Academy. "Whether they will be motivated to join the Academy and pay the sizeable fees, and whether the Academy's programs will [be] sufficiently attractive and inclusive, is yet to be determined."

Nor was he satisfied with black leadership in the Academy, with the exception of Jim Harkless's presidency. He writes that he had no ambition to become an Academy leader himself, but "I certainly was concerned that the avenues for leadership roles

by minorities would be open." His analysis of prospects for future black leadership consists of two cryptic sentences:

> There are at least two black males who seem to be extremely active in Academy affairs, one of whom has been a long-time activist and should have been the first black president in my judgment. The other is a younger law professor and he is, in my estimation, obviously a comer. (p. 671)

Jim comments that he cannot think of more than two black full-time arbitrators, but then engages in a little revisionist history:

> When the National Academy started, there wasn't such a thing as a full-time arbitrator. Most of those people who worked were academics, with perhaps a small sprinkling of practicing lawyers who did some arbitration on the side. (p. 672)

The list of the 105 charter members of the Academy is revealing.[21] To be sure, it includes a fair number of academics, probably a higher percentage than we have today, but they were still a small minority. Most of those whose names I recognize were established full-time arbitrators. Many War Labor Board alumni seem to have made a quick transition to arbitration as a career.

Conclusion

Because each of these books is highly idiosyncratic, it is difficult to pull out common themes or draw any universal conclusions. The only widely shared sentiment (and even that excludes one of the four) was that membership in the Academy led to many good friendships and productive collaborations.

Perhaps the books' very diversity is their greatest surprise. These four ways of looking at an arbitrator are very different indeed. For Ben Aaron and Dick Mittenthal, the arbitrator is a scholar–dispute resolver; for Arnold Zack, the arbitrator is just one facet of an activist's endeavors; for Jim Jones, the arbitrator is a person dedicated to redressing racial discrimination and reforming non-diverse professional associations. Ben and Dick were depressed about the Academy's shift, at least in their minds, from a professional association to a trade association, while Jim barely mentions the question and Arnold does not mention it at all. Jim's main interest in the Academy is about its racial makeup, but the other three have nothing to say on that subject. Ben and Dick (and,

[21] Gruenberg et al., *supra* note 13, at 28–29.

to a lesser extent, Arnold) regard their Academy friendships as high points in their personal and professional lives, but nothing in Jim's book even hints at a friend within the group. Ben and Jim largely gave up on the Academy while Dick loves it still. Arnold does not reach a general verdict on the Academy—after his 14 pages on it, he's off and running on his next adventure—although I suspect that if he wrote a few years later, after the New Directions Committee controversy, he might well have sounded more like Ben Aaron.

II. Personality and Time Delay Among Arbitrators

Daphne Taras, Piers Steel, and Allen Ponak*

The labor arbitration setting is a unique and exciting venue for developing an understanding of the nexus between personality and task completion. Arbitrators are highly autonomous professionals who have an incentive to render their decisions as expeditiously as possible. They review evidence, analyze submissions, and reach and write a decision, activities that lie almost entirely within their control. In this study, we examine various factors that explain the elapsed time between hearings and the issuance of awards. In particular, we use two sources of data: (1) a content analysis of 1,957 Canadian cases issued after 2002; and (2) the personalities of arbitrators, based on an extensive questionnaire completed by 38 Canadian arbitrators.

While arbitration deadlines are rarely explicit and can be perceived as "slippery" rather than fixed, arbitrators feel an obligation to dispense justice quickly, as they are well aware of the adage "justice delayed is justice denied." An arbitrator's future acceptability may be harmed by a reputation for tardiness, providing an added incentive to avoid delay.[1] There is a sense of alarm among practitioners that time delay is the most serious fault in the

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[1]Berkeley, A. E. (1989). The most serious faults in labor–management arbitration today and what can be done to remedy them. *Labor Law Journal* (Nov.), 728–33.