

The Seitz Report

Substance and Status of Present Policy

“This report deals, primarily, with the provisions of “(2)”.

As publicly declared, the standard is substantial and current arbitration experience which reflects general acceptability by the parties. Thus, “acceptability” has been made the basic criterion.

Membership committees in the past, even before the term “acceptability” was included in the policy, have had to reach conclusions whether an applicant’s arbitration experience has been so “substantial and current” as to qualify an applicant for membership. The Special Committee has been unable to determine precisely when it occurred, but, apparently, some time in the late 1950’s there developed a practice in the membership committees to test “substantial and current experience” by a numerical formula. Thus, as a matter of administrative practice, in applying “(2)” in the Policy, ¹successive membership committees inquired whether the applicant had at least 50 arbitration cases in the five years preceding the date of application.² This usage—testing the qualifications of applicants for membership by the number of arbitration cases completed by an applicant within a five-year period—developed into an established and accepted practice of successive membership committees. It remains a kind of “rule of thumb” today; but this characterization will be misunderstood unless two observations are made.

First, that “rule” or “standard”, formally, officially and ceremoniously, has never been adopted by the Academy. It does not appear in the Constitution and Bylaws nor in the published Statement of Policy Relative to Membership. Its legal status was best described in the Valtin Report where it was said “The ‘substantial and current’ standard has in recent years been translated to something like 50 cases over approximately a five year period preceding the application.” (Emphasis supplied.)³

Second, the Valtin Committee⁴ which had devoted its attention, intensively, to the merits or demerits of what it called the “50 and 5 standard” endorsed that standard in its Report.⁵ However, it is necessary to draw attention to the statement of the Valtin Committee which preceded that endorsement. It declared:

“We are convinced that the Membership Committee cannot effectively function if left without discretionary latitude – if left to a mechanical counting of cases and without adequate authority to assess the membership application in all its aspects.”⁶ (Emphasis supplied.)

This observation in the Valtin Report recognizes a state of facts and of procedures without which the character of the numerical standard cannot be properly understood. In

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² It appears that at one time the number of cases was set at a lower figure than 50.

³ Arbitration – 1976, Appendix F, pp. 362, 363.

⁴ Only three years ago, in 1976.

⁵ Arbitration – 1976, Appendix F, p. 370.

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reality, the various membership committees in the past (and presently) – according to the best information obtainable – have regarded that standard of an applicant’s experience and acceptability, not as one to be applied mechanically and literally, but with the exercise of a broad range of professional discretion and judgment. That is to say, the fact, standing alone, that an applicant had 50 arbitration cases in five years would not result, automatically, in the favorable recommendation of the Membership Committee to the Board of Governors. So far as we can ascertain, to an extent deemed appropriate, on a case by case basis, the Membership Committee has always undertaken to appraise and evaluate the arbitration experience claimed by an applicant by satisfying itself (when the data presented by the applicant seemed to require it) that the applicant was acceptable as an arbitrator by a diversity of clients, that there was “growth” in his professional career and that, on the whole, his arbitrations, in character, were fairly representative of the kinds of cases decided by seasoned and experienced members of the Academy.”

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“It seems fair to speculate that much of the concern that has been expressed in respect to the adequacy of the Academy’s standards for admission to membership which has resulted in the establishment of our Special Committee is due to the fact that those standards and the manner of their application had not been officially promulgated and published and are imperfectly understood by Academy members.”

Findings and Conclusions of the Committee

A. Quality and Proficiency Test

“Some members have urged that the Membership Committee, before satisfying itself that an applicant is deserving of membership, should study and appraise a selection of the applicant’s decisions. One suggestion is that the reading and appraisal be done by somebody who is retained for that purpose and compensated by the Academy inasmuch as the task, undoubtedly, would be more time-consuming and exacting than the members of the Membership Committee could undertake.

We are unanimous in regarding that procedure as undesirable and impracticable. A study of an applicant’s decisions offered as proof of “journeyman” status will tell the reader whether he is literate; but it will not demonstrate much of anything else. Unlike court decisions which are written for the approbation of a reviewing appellate court or for the admiration of posterity, arbitration decisions are written for the disputing parties. One who has not attended the hearing, examined the documentary exhibits, listened to the summing-up, or read the briefs is not in the most advantageous position to pass judgment on the quality of the product.⁷”

⁷ Nomenclature choices confronted by the Special Committee in the preparation of this Report need to be explained. By “journeyman” we mean an arbitrator, regardless of sex, who is recognized as a fully developed, highly acceptable and competent professional in Arbitration capable, on the basis of his or her

B. The Numerical Standard

“We are aware of no overriding or persuasive reason for changing the requirement that, in normal circumstances, the applicant must show that he has been arbitrating for at least five years. This standard has worked well in the past and the onus is borne by those who believe a change is desirable.⁸”

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“It is the opinion of the Special Committee that the five-year period of arbitration experience should be waived (if the sound discretion of the Membership Committee so dictates) in certain exceptional cases as, for example, applicants who have completed distinguished careers in the administration of collective bargaining contracts (or who were associated with public or private institutions with programs related thereto) and, as new entrants in the field, can demonstrate an unusually swift and high degree of acceptability by the parties. Manifestly, a strict and mechanical application of the five-year standard to such persons will serve no purpose that is discernible and would deny the Academy the benefits of their membership.”

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“Second, as to the Fifty Cases Requirement:

The basis of concern here, as we understand it, is that with fairly recent developments in arbitration (both in the number and kinds of cases arbitrated) it may be relatively easy for an applicant with limited experience and narrow acceptability to claim to have decided fifty cases and, consequently, to be entitled, automatically, to Academy membership.”

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“These changes in arbitration, in the last decade, have placed a much heavier responsibility on membership committees, presently and in the future, to appraise the quality of an applicant’s arbitration experience than

experience, skill and other personal attributes, of arbitrating in a wide variety of disputes (in the private or public sector) presenting difficult issues for decision.

⁸ We have conducted no audit of the operations of the membership committees nor have we attempted to determine whether there has been a deterioration in quality of the Academy’s membership. We have no facts on which a finding can be made that membership committees have failed to act responsibly or that there has been a falling off of quality in the Academy’s membership.

the kind or extent of responsibility they bore in the past.⁹ Manifestly, the mechanical and literal application of the numerical standard (especially as to the number of arbitrations), without more, would be disastrous! It would result in the destruction of the reputation of the Academy as having a membership representing the best in the profession. Nothing like that has occurred in the past; it should not occur in the future.

Membership committees would scrutinize applicants and the data they present with sedulous care; and if their examination leads to the conclusion that the Academy's standards have been met and that there is no apparent reason to raise questions as to the fulfillment of the intent and purposes of the numerical standards, the application should be recommended for Board approval. If there is anything in the application or the supporting material, however, which raises a question or doubt as to the quality of the applicant's arbitration experience, the Membership Committee is obligated to inquire into the matter and to satisfy itself that the considerations on which the numerical standard is grounded, are found in such experience.

What are those considerations? One of the core problems is what is a "case" that would be counted under the numerical standard. Were reasoned opinions issued? Was there a diversity of issues decided? Did the arbitrations completed present difficulties such as are found in the generality of cases decided by "journeyman" arbitrators who are members of the Academy? If a large number of the cases were decided under a single system of arbitration, what was the nature of that system?¹⁰

There are additional questions to which the Membership Committee must address itself when in any doubt that the rationale and the purpose of the numerical standard has been satisfied. Were the applicant's arbitration services largely performed for a narrow and restricted group of parties, or was there such a diversity of disputing parties as to demonstrate "general acceptability"? Was there professional growth in the applicant's arbitration experience evidenced by the information supporting the application? Manifestly, absent special considerations and explanations growth would not be demonstrated by a record of a considerable number of the 50 arbitration cases having been decided in the first two years of the

⁹ We distinguish, sharply, between appraisal of the qualifications of an applicant by studying the work-product (the decision) and appraisal of an applicant's arbitration experience by inquiring into the kinds of arbitration conducted, for whom, et cetera.

¹⁰ The Special Committee has given thought and consideration to whether it should spell out, for the Membership Committee, what constitutes a "case" for the purpose of acting on an application for membership. It has concluded that definitions on this and other details in the admission process are best left to the Membership Committee. A priori judgments by such a group as the Special Committee on such matters are likely to be too restrictive or too liberal. Such judgments are best made by the Membership Committee in its consideration of applications.

applicant's professional experience and a diminishing number in the last three years of that period."

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"There are strong and compelling administrative reasons for an objective minimum numerical standard to demonstrate "substantial and current" arbitration experience and "general acceptability"; and it is equally clear that a numerical standard that is administered without the kind of responsible professional evaluation and discretion we have sought to describe will be highly unsatisfactory. There seems to be no practicable or more desirable alternative to the system and procedure described; and the fact that the quality of the Academy membership for the future depends on the faithful performance of its duties by membership committees exercising professional judgment and discretion in the application of the standards we endorse does not cause us to be apprehensive.

Conclusions and Recommendations

1. The Special Committee is unanimous on the point that the membership standards as published in the Academy's Annual Directory (and as set forth in Appendix A) should remain unchanged, undisturbed, and unamended.
2. The Special Committee is unanimous on the point that the Membership Committee should continue to regard 50 arbitration cases decided in the five year period prior to the date of the application (the "numerical standard") to be the basic "experience" benchmark for admission.
3. The Special Committee gave extensive consideration to the view that future misunderstanding might be avoided if the membership standard as published in the annual directory were amended to include, expressly, the numerical standard and the need for the membership committees to make the evaluations of an applicant's arbitration which have been described in this Report. With recognition that meritorious arguments can be made for this approach, the Special Committee, nevertheless, was unanimous in rejecting it. In doing this, it accepted the considered judgment of members of the Special Committee (most of whom had had broad experience as chairmen of membership committees of the Academy) that the inclusion of the numerical standard in that "Statement of Policy Relative to Membership" would lead to misunderstandings by applicants as to the criteria of eligibility. It was believed that the purposes of such an amendment would be fully served if the substance of these Conclusions and

Recommendations were communicated to those who applied for membership.

Accordingly, it was the unanimous recommendation of the Special Committee that an application for membership should not be approved, mechanically, because the applicant has demonstrated compliance with the numerical standard; that the Membership Committee should evaluate the arbitration experience and acceptability of the applicant as an arbitrator; and that in acting on an application the Membership Committee should consider, inter alia, the following:

- a) the character, variety and relative difficulty reflected by the arbitration experience of the applicant and the kinds of systems and procedures under which he arbitrates; and
- b) the extent to which the arbitration experience and acceptability of the applicant demonstrate professional growth within the period covered by the numerical standard; and
- c) the extent to which there has been diversity in the parties requesting the applicant to serve as arbitrator.

In conclusion, then, the Special Committee is unanimous in the conviction that the objectives of the Academy in respect to membership will be achieved if the current standards of membership, as published, are left undisturbed; and if the “numerical standard” of 50 arbitrated cases in a five-year period should be applied by the Membership Committee with the breadth of professional discretion and judgment discussed in this report.”
