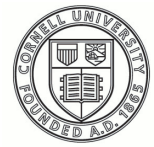

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The Arbitration Profession in Transition: Final Report to the National Academy of Arbitrators

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Abstract

[Excerpt] In recent years there has been a dramatic increase in the arbitration and mediation of employment disputes outside the collective bargaining context. This increase has been part of a larger shift from reliance on litigation and enforcement agency resolution of disputes to the use of alternative dispute resolution (ADR), a trend particularly evident in the employment field. Over the course of several decades employees have gained a long list of rights and protections included in a variety of laws, ranging from anti-discrimination statutes to pension safeguards to statutory attempts to guarantee safer and healthier workplaces. The growing use of arbitration, mediation, and related techniques to resolve statutory claims arising in employment relations is in part the consequence of the high costs and long delays associated with the use of administrative agencies and the court system to resolve disputes. The unpredictability of jury awards has also prompted employers and employees to opt for ADR.

The growing use of ADR in employment disputes has occurred both inside and outside collective bargaining. In some union workplaces, the parties attempt to resolve statutory claims using the grievance and arbitration procedures in the collective bargaining agreement. In others, many, if not most, statutory claims are handled outside the collective bargaining arena, with employees pursuing their claims through the normal channels of agency and judicial resolution. In a minority but growing number of union-management relationships, the parties have created procedures for resolving statutory claims that are separate or "sheltered" from the collective bargaining agreement (Dunlop and Zack, 1997, particularly pp. 53–72; see also Zack, 1999, pp. 67–94).

The growing use of arbitration and mediation to resolve employment disputes has been especially noteworthy in the nonunion sector. In the United States, as most people know, the proportion of the workforce that is unionized has been steadily declining for over forty years and currently stands at about 14 percent. Although the membership in the Canadian labor movement has not suffered as steep a decline, a similar trend is apparent there. As in organized workplaces, the growth of employment ADR in the nonunion sector is one consequence of employers' attempts to avoid the high costs and long delays of the judicial and administrative routes. Of course, some nonunion employers are also motivated by a desire to provide their employees with fair and equitable dispute resolution procedures (Bingham and Chachere, 1999, pp. 95–135).

Keywords

alternative dispute resolution, ADR, conflict management, arbitrators, mediation

Comments

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APPENDIX B

THE ARBITRATION PROFESSION IN TRANSITION

A Survey of the National Academy of Arbitrators

Michel Picher
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1

The Rise of Alternative Dispute Resolution

In recent years there has been a dramatic increase in the arbitration and mediation of employment disputes outside the collective bargaining context. This increase has been part of a larger shift from reliance on litigation and enforcement agency resolution of disputes to the use of alternative dispute resolution (ADR), a trend particularly evident in the employment field. Over the course of several decades employees have gained a long list of rights and protections included in a variety of laws, ranging from anti-discrimination statutes to pension safeguards to statutory attempts to guarantee safer and healthier workplaces. The growing use of arbitration, mediation, and related techniques to resolve statutory claims arising in employment relations is in part the consequence of the high costs and long delays associated with the use of administrative agencies and the court system to resolve disputes. The unpredictability of jury awards has also prompted employers and employees to opt for ADR.

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agreement. In others, many, if not most, statutory claims are handled outside the collective bargaining arena, with employees pursuing their claims through the normal channels of agency and judicial resolution. In a minority but growing number of union-management relationships, the parties have created procedures for resolving statutory claims that are separate or "sheltered" from the collective bargaining agreement (Dunlop and Zack, 1997, particularly pp. 53–72; see also Zack, 1999, pp. 67–94).

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Most observers believe there has been a "litigation explosion" in the United States that began in the 1960s and, some contend, continues to this day. An estimated 30 million civil cases are now on the dockets of federal, state, and local courts, a number that has grown dramatically in recent years, and a significant proportion of these cases involve employment law. In the last quarter century, the number of suits filed in federal courts concerning employment matters grew by more than 400 percent (Commission on the Future of Worker-Management Relations, 1994, pp. 25–33). The clogged dockets of federal and state courts, and also of administrative agencies such as the EEOC (Equal Employment Opportunity Commission) in the U.S., have led to longer and longer delays and excessive costs. In addition, new federal statutes have expanded individual employment rights in the workplace, thus adding to the potential for further clogging of the administrative agencies and courts.

In theory, using arbitration and mediation to resolve employment disputes is a means of circumventing the expensive, time-consuming features of conventional litigation. These dispute resolution processes are not usually confined by the legal rules that govern court proceedings, such as those governing the admissibility of evidence and the examination of witnesses. Arbitrators, for

example, may conduct expedited hearings, dispense with briefs, consider hearsay evidence, and allow advocates to lead their witnesses. Discovery is almost never a part of the mediation process and is often limited in arbitration. The parties, in both union and nonunion relationships, have significantly more control over an arbitration or mediation process than they would over a court or agency proceeding. Within broad limits, the parties can design the dispute resolution procedure themselves. Because the disputants usually select the neutral, they are likely to have more trust and confidence in the neutral's ability than they would in a judge or agency officer assigned to hear the case. Moreover, it is widely believed that compliance with the eventual settlement is less likely to be a problem when the disputants have controlled the process that produced the outcome.

The use of ADR in employment disputes involving statutory rights has been approved by courts in both the United States and Canada. Most notably, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the U.S. Supreme Court ruled that a stockbroker who had agreed to the New York State Stock Exchange's rule requiring arbitration of employment disputes between brokers and member firms could not sue his employer for an alleged violation of the Age Discrimination in Employment Act but instead must arbitrate the dispute. Since *Gilmer,* most federal appellate courts in the U.S. have applied the principle in that case to other industries and a variety of employment statutes. Encouraged by *Gilmer* and its progeny, a growing number of nonunion employers have required their employees—as a condition of their hiring or continued employment—to agree to use arbitration to resolve statutory complaints rather than resorting to the courts. This form of mandatory pre-dispute arbitration agreement has proven to be very controversial. A federal commission appointed by the Clinton administration and headed by former Secretary of Labor John Dunlop condemned its use (Commission on the Future of Worker-Management Relations, 1994, pp. 25–33). On the other hand, defenders of such agreements argue that, if the process is properly designed, both employers and employees have the advantage of a fast, fair, and inexpensive means of resolving complaints (Sherwyn and Tracey, pp. 73–150; U.S. General Accounting Office, 1997, pp. 38–41).

Canadian arbitrators have long been mandated, by the decision of the Supreme Court of Canada in *MacLeod v. Egan* (1974), 46 D.L.R. (3d) 150; [1975] 1 S.C.R. 517, to interpret and apply statutes that relate to provisions in collective bargaining agreements,

under a judicial review standard of correctness. A more recent Supreme Court of Canada decision, *Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583; [1975] 2 S.C.R. 929, holds that under a collective bargaining regime arbitrators, and not the courts, have exclusive jurisdiction to determine the constitutional, statutory, and common-law rights of employees in disputes that flow from the collective bargaining agreement. Several subsequent reported awards in Canada involve boards of arbitration under collective bargaining agreements taking jurisdiction of claims in negligence and defamation cases, and granting remedies, including aggravated damages, previously available only in the courts.

Although there may be many advantages to the use of mandatory arbitration in employment disputes, some observers contend that these processes also present serious problems in achieving fairness and equity for the disputants. While employment contracts have been arbitrated without great controversy for years, many observers are concerned about the more recent use of ADR to resolve statute-based employment disputes in the nonunion sector. In the absence of unions or other forms of employee representation, it is the employer that designs, implements, and (ordinarily) pays for the dispute resolution procedure. Whether employers, acting entirely on their own discretion, give sufficient regard to due process considerations in their design and use of ADR procedures remains an open question and one that has been the subject of much litigation in recent years (Zack, 1999, particularly pp. 77–89).

The Response of the Academy to the Rise of ADR

All of the developments sketched above have had significant—and possibly dramatic—effects on the practice of arbitration. Arbitrators are increasingly being given responsibilities that would have been unimaginable at the dawn of arbitration, more than fifty years ago, when labor arbitrators resolved disputes between employers and unions concerning the interpretation or application of their collective bargaining agreements. The controversies surrounding the rise of employment arbitration have generated debates within the National Academy of Arbitrators, the premier organization of labor arbitrators in North America.

As the Academy moves into the new millennium, changes in the law of the workplace, in both the union and nonunion sectors, and the response of the courts to the arbitral process will substantially influence the evolving practice of arbitration. Inevitably, the evolution of the practice of arbitration will affect a wide range of

Academy interests, including its admissions policies, training programs, and ongoing services to members.

The Academy has responded in a preliminary fashion to the changing realities of employment relations through its endorsement of the "Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship." The Due Process Protocol was developed by a task force consisting of representatives from the Academy, the Labor and Employment Law Section of the American Bar Association, the American Arbitration Association, the Society of Professionals in Dispute Resolution, the U.S. Federal Mediation and Conciliation Service, the National Employment Lawyers Association, and the American Civil Liberties Union. The task force debated the question of mandatory pre-dispute arbitration agreements as a condition of employment but did not "achieve consensus on this difficult issue," other than to agree that such agreements should be knowingly made.

The task force did, however, agree on a set of "standards of exemplary due process," including the right of employees in arbitration and mediation cases to be represented by a spokesperson of their own choosing, employer reimbursement of at least a portion of employees' attorney fees, especially for lower-paid employees, and "adequate" employee access to "all information reasonably relevant to mediation and/or arbitration of their claims." The Due Process Protocol also calls for the use of qualified and impartial arbitrators and mediators drawn from rosters that are diversified on the basis of gender, ethnicity, background, and experience. To guarantee an adequate supply of qualified neutrals, the protocol calls for "the development of a training program to educate existing and potential labor and employment mediators and arbitrators." (See Due Process Protocol, p. 45 of this report*; see also the discussion in Dunlop and Zack, pp. 93–118.)

Concerned that unfair procedures in employment arbitration and the involuntary pre-dispute exclusion of employees from access to the courts and regulatory agencies was tainting the image of all workplace arbitration, the Academy went on record at its 50th annual meeting (in Chicago, May 1997) as being opposed to the mandatory arbitration of the statutory rights of employees as a

*[*Editor's Note:* The Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship was reprinted at the end of this report, but it has not been reprinted here. The text of the Protocol is available at <http://www.naarb.org/protocol.html>.

condition of employment where such schemes preclude recourse to the courts and statutory tribunals. Recognizing that such arbitrations are nevertheless lawful, as confirmed by *Gilmer*, at the same meeting the Academy promulgated guidelines to assist its members in conducting employment arbitrations that involve statutory rights. The guidelines strive to ensure fairness and due process, giving the fullest scope to the procedural protections, evidentiary burdens, and remedies available under the statutes themselves. To further its interest in protecting the integrity of the arbitration process the Academy has also intervened as amicus curiae in a number of court cases involving the application and refinement of *Gilmer*.

2

The Survey of the National Academy of Arbitrators

The Need for a Survey

Although the Academy has taken such significant steps as establishing guidelines and endorsing the Due Process Protocol, it has acted on the basis of only anecdotal or dated information about the extent and nature of the actual professional activities and goals of its members. (Since its inception in 1947, the Academy has conducted, so far as we can determine, seven previous surveys of its members; these are listed in the References section.) In unionized settings, for example, the Academy needs empirical data on cases in which arbitrators are called upon to adjudicate statutory rights under the terms of collective bargaining agreements. Prior to this survey, we lacked current data on the frequency of such cases, the types of statutory rights involved, the procedural and evidentiary rules applied, and the scope of remedial jurisdiction exercised by the arbitrators.

To what extent do the parties to collective bargaining agreements vest labor arbitrators with jurisdiction over employment-related statutory rights? If the parties pursue that option, do they incorporate the full scope of statutory remedial authority as part of

the arbitrator's jurisdiction? Have the arbitrators who hear statutory claims under collective bargaining contracts received education or training in the relevant statutes? Are these arbitrators familiar with the standards stipulated in the Due Process Protocol and do they apply them? On these and other matters of fundamental interest to the National Academy of Arbitrators and to the practice of arbitration in general, there is a need for an up-to-date body of empirical knowledge.

Of equal significance to the Academy, and to the practice of dispute resolution generally, is information regarding Academy members who have been serving as arbitrators or mediators in nonunion employment disputes. The Academy needs to be aware of the extent to which its members—one of the most important groups of arbitrators in North America—have moved into the burgeoning field of ADR beyond collective bargaining. How many labor arbitrators have undertaken the arbitration or mediation of nonunion cases? How many have moved outside the workplace to serve as mediators or arbitrators of commercial, environmental, product liability, or other types of disputes?

When labor arbitrators expand their practice into nonunion areas, what due process standards and procedural safeguards do they apply in these cases? To what extent do arbitrators in all types of cases use pre-hearing discovery and require the exchange of documents? To what extent do arbitrators' hearings involve representation of the disputants by advocates, the use of sworn testimony, and the use of transcripts? Outside collective bargaining, to what extent are written and reasoned decisions encouraged or discouraged? What percentage of the union or nonunion cases handled by labor arbitrators originate in private, agency, or court referral? What are the sources and methods of the remuneration of arbitrators? What factors are related to arbitrator rates of remuneration?

Gaining empirical knowledge on these critical questions is essential for the Academy in making decisions on its current policies and future directions. For example, benchmark data would be useful in designing training initiatives and in assessing the future growth or decline of Academy members' involvement in nonunion arbitration or mediation. There has been no current information on the extent to which Academy members are familiar with or tend to apply the standards enumerated in the Due Process Protocol and the Academy's own Guidelines. By signing the Due Process Protocol and promulgating its Guidelines, however, the Academy has pledged itself to vigilantly promote and protect

fairness and due process in the activities of its members in the mediation and arbitration of employment-related disputes. There can be no informed vigilance, however, in the absence of a base of knowledge.

Survey Methodology

In 1998 the Academy decided to undertake a new survey of its members and assigned responsibility for the survey to its Committee on Employment-Related Dispute Resolution, chaired by the senior author of this report. The Academy also commissioned the Cornell/PERC Institute on Conflict Resolution at Cornell University to supervise the design, implementation, and analysis of the survey, working in association with the ERDR Committee. A joint Academy-Cornell team was formed consisting of members of the ERDR Committee and faculty and staff from the Institute on Conflict Resolution and the Computer-Assisted Survey Team (CAST), Cornell's survey research unit.

Design of the survey instrument began in the fall of 1998. The joint team met in Boston on December 4 to review the purposes and objectives of the survey and to set out a schedule of work. Development of the instrument continued through December and into January of 1999. A focus group of Academy members was formed and a draft survey was administered to members of this group on January 16 and 17. Feedback from this group led to further revisions of the instrument, and a pilot test was conducted on 23 randomly selected Academy members between January 25 and February 1. After further revisions in the instrument on the basis of the pilot, the full-scale survey was launched on February 5 and completed on May 1. Altogether there were about 30 iterations of the survey instrument before the final form was adopted for use in the full survey.

The sample for the survey was the entire membership of the National Academy of Arbitrators. As of January 1999, the Academy had a total of 599 members. Not all Academy members, however, are actively engaged in the practice of arbitration. Eligibility for inclusion in the survey was determined by whether the Academy respondent had either arbitrated or mediated any type of case during the years 1996–98. Respondents were offered three options for completing the survey: to complete a mailed questionnaire and return it by mail, to participate in a telephone survey using a CATI (computer-assisted telephone interviewing) system, or to complete a faxed questionnaire.

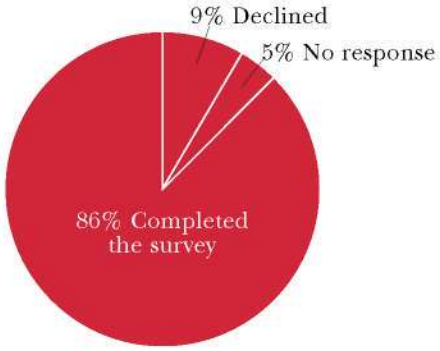


Figure 1
Response rate among the 535 Academy members eligible to participate in the survey

Of the 599 Academy members, 64 (11 percent) were deemed ineligible because they had not arbitrated or mediated in the previous three years. Another 25 Academy members did not respond to the survey and could not otherwise be reached. Forty-eight members declined to participate. Completed surveys were obtained from 462 Academy members, 77 percent of the total membership and 86 percent of those deemed eligible to participate (see figure 1). Of those completing the survey, 274 did so by telephone interview and 188 by either mail or fax. The mean (or average) length of a telephone interview was 31 minutes. Needless to say, an 86 percent response rate is an extraordinary result, significantly higher than the norm for surveys of this type. Because of the high response rate, we use the terms "respondents" and "Academy members" interchangeably in this report.

3

A Profile of Academy Members

Age and full-time status. The average Academy member is 63 years old, has been an arbitrator for 26 years, has been a member of the Academy for 16 years, and earned 76 percent of his or her income during 1996–98 from work as a neutral. Table 1 gives a more detailed age distribution for Academy members. About 10 percent of Academy members are under age 50, while nearly 7 percent are

over age 80. About a fifth of the Academy members reported that they do not engage in full-time work activity. The age distribution of "full-time" neutrals—defined as those working full time and earning 90 percent or more of their income from work as a neutral—is slightly different, as table 1 shows. The average age of full-time neutrals is 61.

Gender and race. Figure 2 shows the distribution of Academy members by gender and race. Only 12 percent of Academy members are women and less than 6 percent are nonwhite. A significantly greater proportion of women members are full-time neutrals (66.1 percent) than men (47.4 percent). On the other hand, a higher proportion of whites are full-time neutrals than nonwhites. On average, the female members of the Academy are younger (mean age of 56) than the males (mean age of 64).

Education. As table 2 shows, 61.4 percent of Academy members reported having a law or J.D. degree. Most of the remaining Academy members have either a master's degree (12.6 percent) or a doctorate (22 percent). Further analysis suggests that the members' level and type of education is not related to their age. On the other hand, there is some relation between education and gender as shown by table 2. Relatively more men than women have law degrees and Ph.D.s.

Experience as a neutral. The average Academy member has served as an arbitrator for 26 years; the range for this variable is from 7 to 59 years. The average Academy member has also served as a mediator for 15 years. About 49 percent of Academy members reported serving as union-management mediators in the 1996–98

Table 1
Age Distribution of Academy Members

Age	No.	% of all respondents	% of full-time neutrals*
Under 50	47	10.4	14.8
50 to 59	155	34.4	35.9
60 to 69	118	26.2	26.5
70 to 79	100	22.2	18.8
80 to 89	30	6.7	4.0
90 or over	1	0.2	0.0

*A "full-time neutral" is defined as a respondent who reported both that he or she was engaged in full-time work and that 90 percent or more of his or her income was derived from work as a neutral.

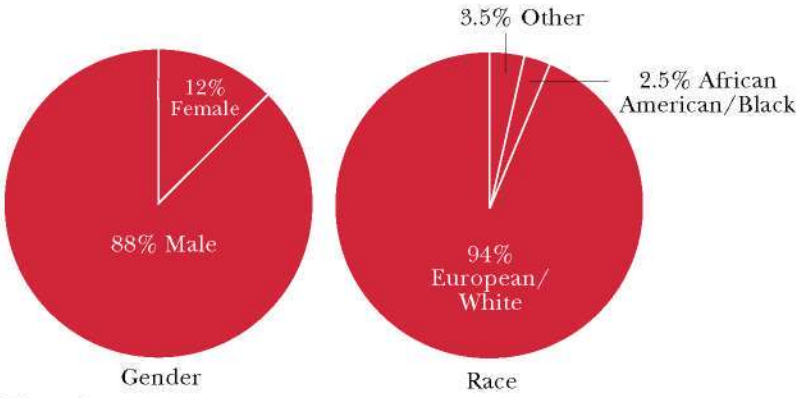


Figure 2
Gender and race distribution of Academy members

Table 2
Distribution of Academy Members by Education

	All members		Men		Women	
Degree	No.	%	No.	%	No.	%
Bachelor's or less	18	3.0	14	3.5	4	7.1
Master's	58	12.6	43	10.7	15	26.8
Law degree	282	61.4	250	62.5	30	53.6
Doctorate	101	22.0	94	23.3	7	12.5

Note: Of the 462 respondents, 3 failed to provide information regarding their education.

period. Of those who have served as mediators, the range is from 1 to 57 years.

The average respondent has been a member of the Academy for 16 years, as table 3 shows. A handful have been members since the Academy's founding in 1947. Those who work part time, not surprisingly, are the oldest and most experienced members of the Academy. We did a further analysis of the relationship between the work activity of Academy members and their education and full- or part-time status, which is shown in table 4. In relative terms, lawyers tend to be full-time practitioners, either as full-time neutrals or as

Table 3
Experience in the Field (means for each category)

	Years as NAA member	Years as mediator	Years as arbitrator	Age	Date of highest degree
Full-time neutral	15.2	15.3	24.0	60.4	1967
Full-time worker, part-time neutral	14.2	14.7	25.4	59.8	1967
Part-time worker	21.0	13.0	30.3	73.0	1956
Total	16.0	14.7	25.6	62.6	1965

Table 4
Work Activity of Academy Members by Education

	Full-time neutral		Full-time work, part-time neutral		Part-time work		Total	
	No.	%	No.	%	No.	%	No.	%
High school					2	2.3	2	0.4
Bachelor's	8	3.5	2	1.5	5	5.7	15	3.3
Master's	37	16.3	7	5.1	13	14.9	57	12.7
Law degree	151	66.5	81	59.6	46	52.9	278	61.8
Doctorate	31	13.7	46	33.8	21	24.1	98	21.8
Total	227		136		87		450	

neutrals who also maintain a law practice. Academy members with a doctorate, on the other hand, are much more likely to engage in neutral work on a part-time basis. Many of these members hold full-time teaching positions.

Income and work activity. We asked Academy members to tell us what percentage of their income was generated by their work as a neutral and what percentage from other kinds of work activity. On average, respondents reported that they earned 76 percent of their income (not including any investment or retirement income) from their work as either an arbitrator or mediator. On average, they reported earning 14 percent of their income from a college or university and 4 percent from the practice of law. Not surprisingly,

the percentage of income an Academy member earned from his or her practice as a neutral was significantly related to whether the respondent worked full time or part time. This relationship is shown in table 5. For example, those respondents who reported working full time as a neutral also reported earning virtually all (99 percent) of their income from their practice as a neutral. Those working full time but only part time as a neutral reported earning 37 percent of their income from their work as a neutral.

The proportion of their income the respondents earned as a neutral also depended on the type of education they received. Academy members with a bachelor's or master's degree tend to earn a higher proportion of their income from their work as a neutral, as table 6 shows. Lawyers in the Academy are slightly less dependent on their work as a neutral for their livelihood: about 78 percent of their income is from this source. Members who have Ph.D.s earn 65 percent of their income from their practice as a neutral and over 28 percent from a college or university, reflecting the fact that many of these individuals hold full- or part-time faculty appointments.

There is also a relationship between the proportion of income an Academy member earns from his or her practice and the member's age. As table 7 shows, those members who are under 70 have a wider range of sources of income than those who are over 70. It seems clearly to be the case that retirement from other work activity affects this relationship. Academy members who hold academic appointments tend to lean more heavily on their work as neutrals after they retire from college or university faculties.

Table 5
Sources of Income for Academy Members (percent)

	Work as neutral	College or university	Law practice	Writing	Training	Other
Full-time neutral	99	0	0	0	0	0
Full-time worker, part-time neutral	37	41	10	2	1	9
Part-time worker	80	5	6	1	0	9
Total	76	14	4	1	1	5

Note: Row totals in this and subsequent tables may not add to 100 because of rounding.

Table 6
Percentage of Academy Members' Income from Various Sources, by Education

Education	No.	Work as neutral	College or university	Law practice	Writing	Training	Other
High school	2	100	—	—	—	—	—
Bachelor's	16	90.3	5.6	—	—	—	—
Master's	58	84.5	5.2	0.7	0.3	0.4	9.0
Law degree	280	77.9	10.6	6.4	0.7	0.7	4.4
Doctorate	100	64.8	28.4	1.5	1.0	1.5	3.8

Table 7
Percentage of Academy Members' Income from Various Sources, by Age

Age	No.	Work as neutral	College or university	Law practice	Writing	Training	Other
Under 50	47	84.5	6.7	4.3	0.7	1.3	2.6
50–59	155	71.5	20.4	3.1	1.2	0.8	3.0
60–69	116	74.2	16.5	4.4	0.3	1.5	4.8
70–79	99	83.5	4.9	5.7	0.5	0	6.3
80 or over	31	75.5	5.7	7.3	0.3	0.3	11.0

4

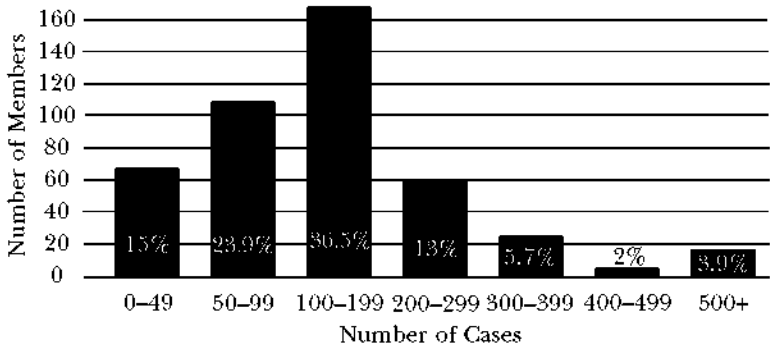
Academy Members' Caseloads in Union-Management Relations

All members of the Academy, of course, have the core of their practice in union-management arbitration. Our findings imply that the 462 respondents to our survey arbitrated over 74,000 cases of all kinds during the period 1996–98. In addition, Academy members mediated over 7,000 cases of all kinds during the same period. About half the respondents (49 percent) reported that they had mediated at least one union-management dispute during the preceding three years. The average member of the Academy arbitrated 160 cases and mediated 15 during the period 1996–98. The average yearly caseload for Academy members would therefore be about 55.

Union-management arbitration. There is significant variation in the labor arbitration caseload across the membership, however. Figure 3 shows the caseload distribution. Eighteen respondents (about 4 percent of the total number), for example, reported rendering decisions in 500 or more union-management arbitration cases during the 1996–98 period. At the other end of the spectrum, 69 respondents (15 percent of the total) told us they had rendered decisions in fewer than 50 cases during the same period. On average, a significant proportion of an Academy member's caseload is in the public sector—38 percent—although the range is very wide. Some members, about 10 percent, said they had done no work in the public sector during the 1996–98 period, while others, also about 10 percent, reported doing virtually all of their work in the public sector. About 88 percent of the Academy respondents told us they had arbitrated at least one local government case during the three years that preceded our survey.

Academy members told us that the vast majority of the union-management cases they arbitrated were rights, or grievance, disputes, and not many were interest disputes. On average, an Academy member reported hearing 7 interest disputes in the 1996–98 period, about 4 percent of the typical respondent's caseload. A majority of the respondents, however, reported that they had rendered no decisions at all in interest dispute cases over the preceding three years.

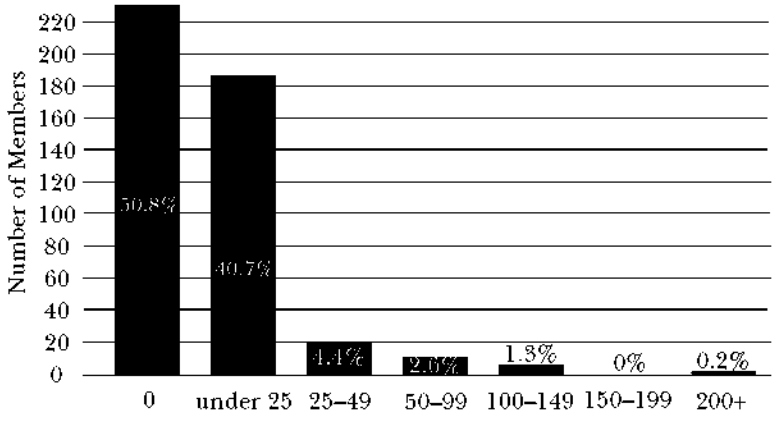
Figure 3
Three-Year Union-Management Arbitration Caseload of Academy Members



Union-management mediation. Since the inception of the Academy, the mediation of union-management disputes has been an important activity for a significant number of Academy members. The rise of collective bargaining in the public sector, especially during the 1960s and 1970s, created new opportunities for Academy members and other neutrals to engage in union-management mediation. We asked Academy members to report the number of union-management disputes in which they had been designated to serve as mediators. Figure 4 summarizes the answers to our query. It shows that about half the members did not engage in union-management mediation during the 1996–98 period. Of the half that did, about 80 percent (40.7 percent of all respondents) told us they had mediated 25 or fewer cases during the preceding three years. (One respondent mediated more than 200 cases during 1996–98.) Academy members also reported that nearly 6 out of 10 cases (58.9 percent) they mediated were public sector cases. Recall that 38 percent of the Academy's union-management arbitration caseload is in the public sector.

In the previous three years, 57 percent of the Academy's members reported mediating at least one case involving local government. Thirty-nine percent had mediated at least one state or provincial case and 19 percent reported mediating one or more

Figure 4
Three-Year Union-Management Mediation Caseload of Academy Members (1996–98)



federal cases. Otherwise, the mediation caseload is centered in transportation, communications, and utilities (34 percent) and manufacturing (30 percent).

The average caseloads discussed above mask important differences across members of the Academy. We examined average caseloads across a number of different demographic variables. There were no significant differences in either mediation or arbitration caseloads between men and women. When we looked at two other variables, region of residence and age, however, we found reasonably large differences in the number of cases heard. These results are presented in Tables 8 and 9. Arbitrators in the northeastern U.S. and in Canada have heard significantly more cases than those in the rest of the United States. Northeastern members also have conducted slightly more labor-management mediations than have the other members of the Academy. As we will see later, this workload discrepancy in part reflects differences in the composition of a member's practice. Residents of the western U.S., for example, tend to have smaller labor-management caseloads but larger nonunion and nonemployment caseloads than the remainder of the Academy members.

We also detected, not surprisingly, that caseloads decline with age. Table 9 presents average caseloads by age groups. Academy members under the age of 50 have the highest arbitration and mediation caseloads, 207 arbitrations and 22 mediations on average in the 1996–98 period. Caseloads decline steadily among the older members of the Academy with those in their 70s hearing 146 arbitrations and 6 mediations during the same period.

Table 8
Union-Management Caseload by Region (means, 1996–98)

	No.	Arbitration cases	Mediation cases
Northeast, U.S.	142	194	13
North central, U.S.	119	155	10
West, U.S.	67	144	10
Elsewhere, U.S.	105	132	9
Canada	27	171	10

Table 9
Union-Management Caseload by Age (means, 1996–98)

	No.	Arbitration cases	Mediation cases
Under 50	47	207	22
50–59	155	169	13
60–69	117	159	8
70–79	99	146	6
80+	31	74	3*

*Mean is 11 if one respondent reporting 200+ cases is included in calculation.

5

To What Extent Have Academy Members Moved into ADR?

To what extent has the rise of ADR led Academy members to move into the arbitration or mediation of disputes outside the union-management arena? Our survey results suggest that member experience as a neutral outside collective bargaining is reasonably extensive but not very intensive. Of the Academy members responding to the survey regarding their experience during the period 1996–98,

- 46 percent arbitrated one or more nonunion employment disputes.
- 23 percent mediated one or more nonunion employment disputes.
- 25 percent arbitrated one or more nonemployment disputes.
- 16 percent mediated one or more nonemployment disputes.

In our survey, we probed those respondents who had not engaged in neutral work outside of union-management relations to find out under what circumstances, if any, they would accept a nonunion case. Table 10 summarizes Academy members' attitudes about accepting nonunion arbitration and mediation work. It shows that at least 30 percent of the members would do nonunion

mediation and arbitration work if there were acceptable due process protections. Those Academy members who have not entered the ADR arena appear to be somewhat more interested in undertaking the mediation of nonunion employment disputes than other forms of neutral activity.

The third row of table 10 shows that some Academy members told us they would accept cases outside union-management relations depending on the circumstances. We probed respondents to discover the circumstances they thought were essential. In most cases, the respondents again emphasized that their willingness to accept nonunion cases depended on the nature of the due process protections in such cases:

> "I'd want to make sure that the arrangement was fair to begin with."
>
> "It's only recently that the Academy and other organizations have agreed upon the Due Process Protocol. I wouldn't consider anything that didn't meet the protocol's requirements unless I was satisfied with the process."
>
> "The FMCS and the Academy issued some guidelines that arbitrators must take into consideration when taking a nonunion case. If those conditions are met, I would accept."

Other arbitrators also said that their acceptance of these types of cases depended on the scheduling of such cases and their own availability.

Table 10
Member Attitudes on Accepting Cases Outside Labor-Management Relations (percent responding yes)

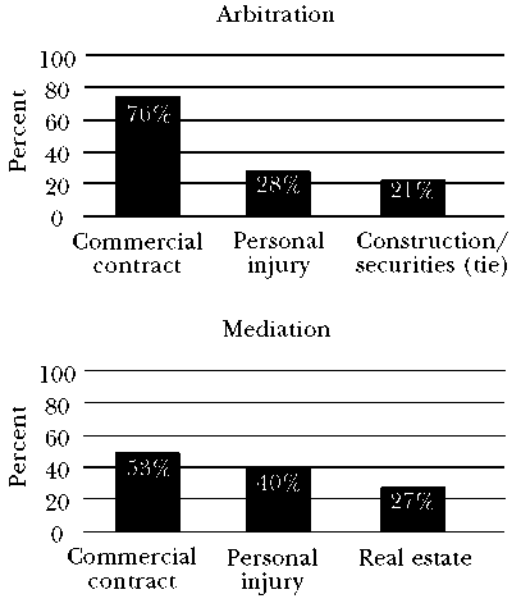
	Nonunion employment arbitration	Nonunion employment mediation	Nonemployment arbitration	Nonemployment mediation
Have accepted and completed cases	45.9	22.7	24.7	15.6
Would accept cases*	32.9	39.8	30.5	33.1
It depends	12.6	17.5	22.3	23.4
Would not accept cases	6.9	17.3	19.9	25.5
Declined to answer/ don't know	1.7	2.6	2.6	2.4

*Respondents were asked whether they would accept such cases "assuming acceptable due process protections."

Table 10 also shows the proportion of respondents who told us they would not accept cases outside union-management relations; about 7 percent of the Academy's members apparently will not agree to arbitrate a nonunion employment case, while over one-quarter will not accept a nonemployment (commercial, etc.) mediation case.

We asked survey respondents to tell us what types of disputes they had handled outside the union-management relations and employment arenas. Recall that about 25 percent of the Academy had arbitrated nonunion and nonemployment cases and 16 percent had mediated such cases. Figure 5 summarizes the results of our queries, with greater detail given in table 11. The bulk of the work Academy members have accepted outside the labor and employment area is in the commercial category (for example, 76 percent of the Academy members who have arbitrated a nonemployment case have served in a commercial or contractual dispute). A

Figure 5
Most Common Nonemployment Dispute Areas



Note: Percentages represent members who have served in these dispute areas as a proportion of all members who have arbitrated or mediated nonemployment cases.

Table 11
Types of Nonemployment Disputes in Which Academy Members Served as Neutrals, 1996–98 (percentage of respondents)

Type of dispute	Respondent as arbitrator	Corporate use of arbitration*	Respondent as mediator	Corporate use of mediation*
Commercial/contract	76	85	53	78
Financial reorg	14	8	11	10
Consumer rights	12	17	9	24
Corporate finance	10	12	9	13
Environment	8	20	16	31
Intellectual property	7	21	7	29
Personal injury	28	32	40	57
Product liability	6	23	7	39
Real estate	18	26	27	32
Construction	21	39	17	40
Family	5	—	24	—
Community	5	—	20	—
Health care	17	—	14	—
Securities	21	—	9	—
Landlord/tenant	6	—	13	—
Other	31	—	29	—

*These columns are results reported in David B. Lipsky and Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations,* 1998, p. 11.

considerable number of Academy members have also served in personal injury, real estate, construction, and health care cases. On the other hand, very few Academy members have any experience in disputes involving intellectual property, product liability, and corporate finance.

It is interesting to compare NAA member experiences with the results we obtained when we surveyed corporate counsel for the Fortune 1000 about their experiences in using ADR. The column showing corporate use in table 11 represents the proportion of corporate respondents who reported using arbitration or mediation during 1994–96 in the types of disputes listed. Business use of neutrals very closely parallels experiences of NAA members, indicating that Academy members are moving into the available range of neutral opportunities.

We were interested in understanding how Academy members obtained their cases, and table 12 displays the various sources of referrals. Not surprisingly, the vast majority of Academy respondents reported that, during 1996–98, they had been designated to serve as an arbitrator in a union-management case by a private

Table 12
Sources of Case Referrals for Academy Members (percent reporting at least one referral)

Referral source	Union-management arbitration	Union-management mediation	Nonunion employment arbitration	Nonunion employment mediation
Private agency	86	31	56	39
Direct appointment	97	78	65	76
Court referral	20	5	13	24
Government agency	84	42	20	13
Permanent panel	93	29	16	12
Other	12	3	2	3

agency referral (86 percent of the respondents answered "yes"; the American Arbitration Association and other private providers would be included in this category); by direct appointment of the parties (97 percent); by a government agency (84 percent; the Federal Mediation and Conciliation Service and local and state labor relations agencies would be included in this category); and by being part of a permanent panel (93 percent).

As the table shows, however, the pattern of referral sources is different for other types of disputes. For example, Academy members who have served as mediators in union-management cases have obtained this type of work primarily by direct appointment of the parties and secondarily through a government agency. Those who have served as arbitrators in nonunion cases have obtained such cases primarily by direct appointment of the parties but secondarily through a private agency. (The AAA and JAMS-Endispute would be major sources of this type of work.) Most members who have mediated nonunion cases have been directly appointed by the parties.

In sum, direct appointment by the parties is the most significant means by which most Academy members obtain cases for all types of disputes, perhaps reflecting the members' vast experience and the parties' knowledge of their reputations. Private agencies such as the AAA are an important source of both union and nonunion arbitration cases, but a much less important source of union and nonunion mediation cases. Case referrals through government agencies are more important in the union-management relations arena than elsewhere. Similarly, being a member of a permanent panel is a common experience for union-management arbitrators

but not a common experience when they deal with other types of disputes. It appears that the channels through which Academy members obtain cases outside union-management relations are not yet well defined, and the pattern shown in table 12 may change in future years.

Other types of neutral work. Many Academy members have been involved in a variety of other types of neutral work. For example, almost all members (86 percent) served as a fact-finder in at least one dispute during the 1996–98 period. Also, a large majority of members (78 percent) told us they had served as a "mediator-arbitrator" (i.e., they used "med-arb") at least once during the same period. On the other hand, only about 11 percent of the Academy's members also served as an ombudsperson during the previous three years and only about 13 percent served as a neutral in a mini-trial, a form of ADR frequently used in commercial disputes. About 58 percent have served as a final-offer selector and 24 percent on a peer review panel.

In table 13, we further analyze the amount of other neutral work in which Academy members have engaged. There are three roles that are closely related to the core practice of Academy members—fact-finder, mediator-arbitrator, and final-offer selector. The Academy members are very likely to have engaged in those activities during their careers. They are much less likely to have served as a member of a peer review panel, a neutral in a mini-trial, or an ombudsperson. Also, it is notable that Academy members who are not full-time neutrals are less likely to engage in core activities and more likely to have engaged in the more peripheral roles within the profession.

Table 13
Other Types of Neutral Work: Full-time Neutrals vs. All Others (percentage who have ever served in each role)

	Full-time neutral	All others
Fact-finder	90	83
Mediator-arbitrator	82	73
Final-offer selector	66	50
Member of peer review panel	16	32
Neutral in a mini-trial	12	13
Ombudsperson	9	12

6

A Practice Typology

In this section of the report, we divide the Academy respondents into five groups, based on the types of neutral work they engaged in over the 1996–98 period. These types are significantly different from one another, and those differences are associated with differences in other behaviors and attitudes. We asked the Academy members about the number of various kinds of cases in which they had served as a neutral during the past three years. Those six types of cases—union-management arbitration, union-management mediation, nonunion employment arbitration, nonunion employment mediation, nonemployment arbitration, and nonemployment mediation—represent all the possibilities for arbitration and mediation work. When we divided the Academy population into the groups that did each of these kinds of work, it became apparent to us that there were very different types of members engaged in the different kinds of work.

We present in table 14 the Academy membership allocated across five types of practice, each type constructed on the basis of the nature of the respondent's caseload over the past three years. We call respondents in the first type of practice *union-management arbitrators.* This group of members has done no work during the past three years outside the primary jurisdiction of the Academy, i.e., arbitration in unionized employment settings. Reading across the columns, one sees all zeros in the other types of cases. This group represents approximately one-quarter of the respondents to our survey. We label respondents in the second type *union-only neutrals.* This group has worked outside basic union-management arbitration, but has only branched out into union-management mediation. They represent a smaller percentage (13 percent) of the membership, but are still a sizable minority within the Academy.

The third group of respondents is *workplace neutrals.* This group of Academy members has conducted either nonunion arbitration or mediation in addition to their basic union-management practice. The workplace neutrals, however, have not served as neutrals outside the workplace, with no nonemployment mediation or arbitration reported. This group is the largest within the Academy—140 members or 31 percent of the respondents to the survey.

Table 14
Average Caseload by Type of Practice, 1996–98

	No.	Union-management arbitration	Union-management mediation	Nonunion employment arbitration	Nonunion-employment mediation	Non-employment arbitration	Non-employment mediation
Union-management arbitrators	117	128.4	0	0	0	0	0
Union-only neutrals	58	129.3	23.8	0	0	0	0
Workplace neutrals	140	184.8	11.8	4.8	6.6	0	0
Union-management & nonemployment neutrals	41	156.7	12.5	0	0	5.9	8.3
Multineutrals	99	188.9	14.3	7.8	13.5	10.6	17.8

Note: Average number of cases in each cell were constructed by setting individual respondents to midpoints. For maximum values, 20 percent above maximum was used as individual response (i.e., 500+ = 600).

Respondents in the fourth practice type we call *union-management and nonemployment neutrals.* This group has worked outside the union-management context, but not in nonunion employment settings. They have practices outside employment, however, in either arbitration or mediation (e.g., environmental, commercial, etc.). This group is the smallest of the five with only 41, or 9 percent, of the members reporting practices that fit this type. Respondents in the last practice type we have called *multineutrals.* This group has worked not only in the union-management world but also as arbitrators and mediators in both nonunion and nonemployment settings. This group is about one-fifth of the Academy membership, with 99 individuals fitting this profile.

We have included the mean number of cases in table 14 for each of the categories. Those with the broadest practices (workplace neutrals, union-management and nonemployment neutrals, and multineutrals) also have the largest practices in terms of cases conducted. Those who confine their work solely to the union-management arena (union-management arbitrators and union-only neutrals) are the Academy members with the smallest practices. They have conducted approximately 30 percent less union arbitration than their workplace and multineutral counterparts, despite doing no neutral work outside union-management relations.

Despite the widespread activity outside union-management relations, it is worth noting that the number of union-management arbitrations is much larger than even the sum of all the other work done by all Academy members. Even multineutrals on average conducted a total of only 63 cases outside union-management arbitration, compared to 189 within that area of practice. As we noted earlier, a large number of Academy members are practicing outside union-management relations, but their experience is quite thin. For example, among those who have conducted nonunion arbitrations, on average they have done so less than three times a year. These practice typologies could become more important in the future, however, as the growth areas of demand for neutrals are outside union-management relations.

An initial explanation of the data in table 14 might be that there really are no differences in practice typologies, but other differences between the members explain the differences in types of caseloads. For example, many Academy members are either part-time neutrals (due to other work as an academic or an attorney) or do not work full time at all, maintaining an arbitration practice as

a part-time job. Table 15 explores that proposition. In our survey we asked each respondent whether he or she worked full time in any activity. We also asked the respective percentages of income earned from various activities, including neutral work

There is some variance in practice typology by full- or part-time status of the respondent. Academy members who are part-time workers are much more likely to concentrate their neutral work as union-management arbitrators and mediators. Full-time workers are more likely than the other groups to be workplace neutrals. It is interesting to observe that part-time neutrals engaged in full-time work (e.g., professors and practicing attorneys) are the group most likely to have expanded their practice outside employment.

Part-time employment status is conventionally associated with age, with older individuals presumed to lessen gradually their commitment and time devoted to work activity. We therefore turned to a comparison of age with practice typology to further examine that proposition. Table 16 presents the NAA membership broken down into age groups and practice typology. Continuing with the theme that we developed in table 15, there is a very strong correlation between age and type of work.

The older an NAA member is, the more likely that he or she will be solely a union-management arbitrator. This trend is strongly apparent in table 16. The youngest category, those under 50 years of age, are the group least likely to be only union-management arbitrators and most likely to be multineutrals. The oldest group (those over 80) are most likely to be union-management

Table 15
Practice Typology by Full- and Part-Time Status (percent falling into each type)

	Full-time neutral	Full-time worker, part-time neutral	Part-time worker	Total
Union-management arbitrators	22	19	46	26
Union-only neutrals	11	14	16	13
Workplace neutrals	37	30	18	31
Union-management & nonemployment neutrals	8	10	10	9
Multineutrals	23	26	9	21

Table 16
Practice Typology by Age (percent)

	No.	Union-management arbitrators	Union-only neutrals	Workplace neutrals	Union-management & nonemployment neutrals	Multi-neutrals
Under 50	47	8.5	14.9	34.0	6.4	36.2
50–59	153	15.7	14.4	31.4	8.5	30.1
60–69	117	29.1	9.4	36.8	8.5	16.2
70–79	98	37.8	13.3	30.6	8.2	10.2
80 or over	30	46.7	13.3	10.0	16.7	13.3

arbitrators only and least likely to be workplace neutrals. A reasonably clear pattern emerges from these data. Older members are less likely to work full time, more likely to stick to traditional union-management arbitration in their neutral practices, and least likely to have sought to expand their practices outside union-management relations.

We also hypothesized that expansion of practice outside union-management relations might be a function of area of residence. While it is not universally true, most practices are regionally based. In certain areas of the country, the movement to nonunion ADR systems and the acceptance of mediation and arbitration outside employment has been occurring at a rapid pace. Those NAA members who reside in parts of the United States where these trends are strong could be much more likely, because of a rise in demand for their services, to move into nonunion and nonemployment work. Table 17 reports the results of our analysis of this question.

We divided the NAA membership into five groups based on area of residence. All of the Canadian members are in one group, as it was small to begin with (27 members). We broke the United States members into four groups: northeast (Pennsylvania, Maryland, and all states to the northeast), north central (north of Kentucky, east of the Mississippi River, and west of the northeast group), west (California, Washington, Oregon, and Nevada), and elsewhere in the United States. An inspection of table 17 reveals some differences by region of residence. Those in Canada and the U.S. West Coast are most likely to be multineutrals. Certainly that mirrors expectations, at least on the West Coast, that increased demand for nonunion and nonemployment services will lead NAA members in those regions into those areas of work. Nor is it surprising in Canada where mediation has been substantially introduced into civil litigation and the practice of ADR has grown, particularly

Table 17
Practice Typology by Region (percent)

	No.	Union-management arbitrators	Union-only neutrals	Workplace neutrals	Union-management & nonemployment neutrals	Multi-neutrals
Northeast, U.S.	161	23.0	17.4	29.2	11.8	18.6
North central, U.S.	89	22.5	14.6	34.8	6.7	21.3
West, U.S.	65	23.1	6.2	33.8	1.5	35.4
Elsewhere, U.S.	113	34.5	8.8	28.3	12.4	15.9
Canada	27	22.2	11.1	29.6	3.7	33.3

among attorneys. Those in the northeastern U.S. and elsewhere in the U.S. are the members most likely to stick to union-management work, although that is a less strong tendency. A correlate of the first observation is apparent here as well, with West Coast members least likely to remain in union-management work.

We also thought that practice typology might be associated with the level of education of the respondent. As discussed later in this report, nonunion arbitration and mediation are much more likely to demand statutory knowledge than other forms of neutral work. Thus, it seems that lawyers might be more highly represented in the workplace neutral group. The picture presented in table 18, however, is not as clear as the hypothesis above. Those with Ph.D.s and master's degrees are the most likely to work only in unionized employment settings. Lawyers are no more likely than those with Ph.D.s or bachelor's degrees to be workplace neutrals. However, lawyers are significantly more likely to be multineutrals than are any other educational group. Perhaps it is easier for lawyers to have their skills and knowledge accepted outside the workplace than it is for non-lawyers who have specialized in employment matters.

The conclusions that can be drawn from these data are suggestive and demand more rigorous statistical analysis. But it seems reasonably clear that there are strong predictors of the likelihood of individual members moving outside union-management neutral work based on full-time status, age, and region of residence. Later in this report, we examine statutory rights experiences and attitudes of members, showing that practice typology is significantly correlated with attitudes held by the members.

Table 18
Practice Typology by Educational Level (percent)

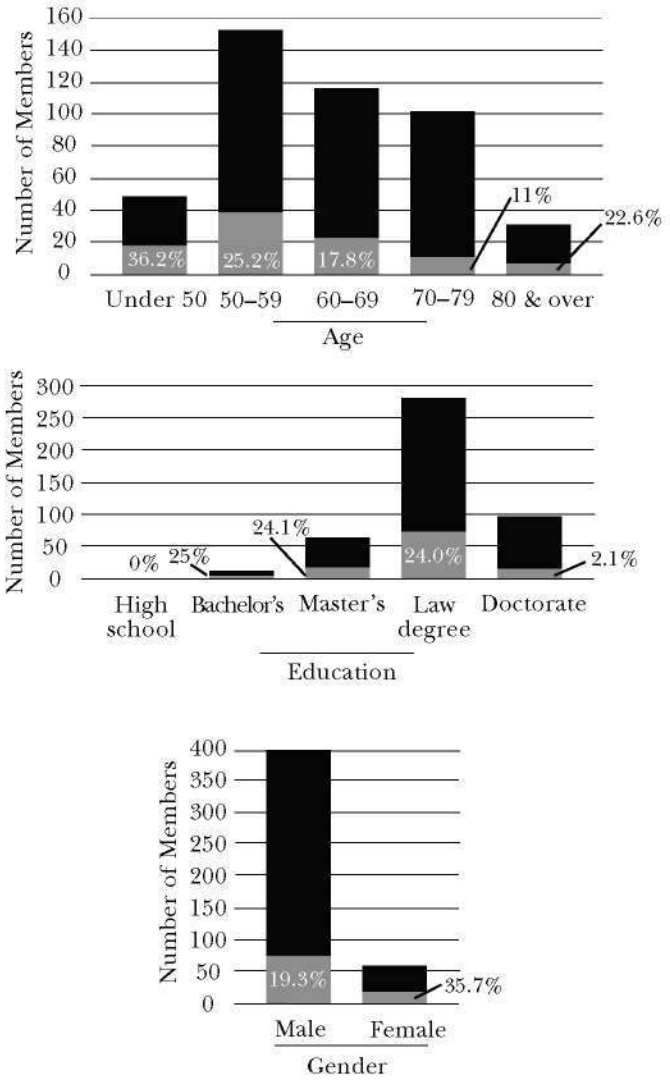
	No.	Union-management arbitrators	Union-only neutrals	Workplace neutrals	Union-management & nonemployment neutrals	Multi-neutrals
High school	2	—	—	50.0	—	50.0
Bachelor's	16	31.3	12.5	37.5	—	18.8
Master's	57	35.1	14.0	22.8	14.0	14.0
Law degree	278	23.4	8.3	32.0	9.4	27.0
Doctorate	99	27.3	24.2	31.3	6.1	11.1

Remuneration

We asked Academy members to tell us the fee rates they charged for their work as arbitrators and mediators. We allowed them to provide us their rates on either an hourly or daily basis and in either U.S. or Canadian dollars. We also asked whether the rate they were quoting was a "block fee," a practice common in Canada. A block fee is a fixed amount charged for one or more days of hearing time, with no further charge for research and writing time. The block fee implicitly includes some allowance for research and writing. We asked for the lowest and highest fee rates members had charged for their work as arbitrators in the last year, and we asked parallel questions regarding their work as mediators. We subsequently converted all reported hourly rates into daily rates, multiplying the hourly rate by 7.0 hours. We also converted Canadian fee rates to U.S. dollars by multiplying Canadian dollars by 0.6507, the exchange rate that prevailed as of December 31, 1998.

It should be noted that 21 percent of the respondents reported doing pro bono work as an arbitrator or a mediator within the last year. In reporting their fee rates, we asked respondents to disregard any pro bono work they had done. It is of some interest to examine how the frequency of Academy members' pro bono work varies by their age, gender, and education. Figure 6 displays the results of this analysis. It is clear that a significantly higher proportion of pro bono work is undertaken by the younger members and by women in the Academy. Over 35 percent of those under age 50 have performed pro bono work in the past year, the highest of any age group. Women are nearly twice as likely as men to have done pro bono work. It is also the case that lawyers are more likely to do pro bono work than Ph.D.s.

Figure 6
Percentage of Academy Members Performing Pro Bono Work within Past Year, within Age, Gender, and Education Groups



Pro bono work is a much less common feature of union-management disputes than it is of certain other types of disputes. For example, in 1995 the Equal Employment Opportunity

Commission adopted policies encouraging the use of mediation to resolve charges filed with the agency (U.S. Equal Employment Opportunity Commission, 1995; Miller, 1995, pp. 17 and 87).

The EEOC is relying heavily (but not exclusively) on the willingness of mediators to do pro bono work for the agency. Some federal and state agencies have adopted similar policies, and pro bono work is also common in some court-annexed ADR systems. It may be that younger people who are eager to develop a practice in alternative dispute resolution are willing to accept cases on a pro bono basis as a means of gaining experience and developing a reputation in the field.

We also analyzed the average rates charged by Academy respondents. It is interesting to note that those Academy members who engage in mediation—recall that about half the members do—charge higher rates for mediation than is the norm for arbitration. The lowest daily rate charged for arbitration was $640 and the highest was $851. For mediation, the lowest rate was $854 and the highest, $1158. As our subsequent analysis demonstrates, the higher rates charged for mediation are in part a consequence of the fact that arbitrators who have moved into the mediation of disputes outside employment relations (such as commercial, environmental, and international disputes) have been able to take advantage of the higher prevailing rates offered in these types of disputes.

Obviously, these average fees mask differences between various groups within the Academy. It is interesting to analyze these differences, as some reflect expected labor market outcomes and some do not. In table 19 we present the results of our basic analysis of fee differences by some important independent characteristics. Part A shows that arbitration rates charged vary somewhat by type of education. For example, lawyers generally charge more than do members in other educational categories. We see, however, larger differentials in the mediation rates, with lawyers charging significantly more than any other educational grouping for their services as mediators. We suspect that this difference is due in part to the surge in demand for lawyers in nonunion mediation and in some of the other nonemployment disputes in which lawyers are able to transfer their skills and training more easily than Ph.D.s or other degree holders. It may also be that when lawyers step outside the role of union arbitration they more readily tie their rates to those of the lawyers who represent the parties.

Table 19
Average Daily Fees of Academy Members, 1998 (U.S. dollars)

	Mediation		Arbitration	
	Lowest	Highest	Lowest	Highest
A. Education				
High school			550	600
Bachelor's	755	1020	673	831
Master's	705	927	618	845
Law degree	942	1292	688	949
Doctorate	709	919	601	751
B. Age				
Under 50	754	1275	624	921
50–59	939	1235	643	926
60–69	826	1157	684	914
70–79	854	986	688	856
80 or over	588	643	620	668
C. Sex				
Male	824	1112	664	887
Female	1026	1465	627	901
D. Work				
Full-time neutral	884	1168	646	906
Full-time work, part-time neutral	839	1164	628	828
Part-time work	710	1055	655	765
E. Years as NAA member				
Under 10	726	1021	613	851
10–19	917	1239	656	921
20–29	952	1239	654	840
30 or over	877	1007	820	951
F. Years as Arbitrator				
Under 10	467	683	550	700
10–19	783	1123	608	874
20–29	876	1167	645	901
30–39	1008	1317	721	870
40 or over	785	1156	660	888
G. Fees by Region				
Northeast, U.S.	753	1106	629	905
North central, U.S.	650	908	607	727
West, U.S.	1243	1608	700	1027
Elsewhere, U.S.	882	1066	643	761
Canada	955	1319	663	854

In other sections of table 19 we examine questions of normal life-cycle changes over the course of a working life. It is a well-established fact of labor market analysis that income from work grows as one ages, reaches a peak that varies with occupation, and then begins to decline. We suspected this would be true for arbitrators as well, and the data confirm that pattern. If we first examine the arbitration rates of Academy members by age (part B), we see that low rates charged increase for each decade from the 40s to the 70s, and then decline for members over age 80—a negligible age category for most occupational analysis but an important and sizable group within the Academy. High arbitration rates do not behave in such an easily explainable manner, however. Peak arbitration rates are charged by the younger members of the Academy, with those in their 50s charging higher fees than any other category. This appears to be a more normal age-earning profile, at least when compared to other occupational groupings.

Mediation rates, as we have suggested earlier, are even more interesting in some ways. A smaller group of Academy members engage in mediation, and they charge significantly more than they do for their arbitral services. Lowest mediation rates peak in the 50s, as they do for highest arbitration rates. At the high rate level for mediation, however, the highest fees are charged by the youngest mediators, and rates decline with each decade of age advancement. We suspect that this is due to the fact that the youngest members of the Academy are moving into the new areas of mediation more easily and rapidly than are the older members of the Academy, and these new areas of practice are more lucrative.

Part C of table 19 presents the differences in rates charged by men and women within the Academy. Many results of the analysis of gender differences within the Academy have been a surprise, and the analysis of fees fits that pattern. Women charge significantly more for their mediation services than do men—about 25 percent more at the lowest rate and nearly 30 percent at the highest rate. We suspect that this is largely due to the high demand for female neutrals within the newer areas of practice, particularly the mediation of employment discrimination charges. This finding, however, is quite unusual in the wider context of the U.S. economy, where women are typically paid less than men in nearly every occupation. Arbitration rates reveal that male Academy members charge more at the lowest level, and roughly the same at the highest levels.

In part D we present the means of fees charged by full- and part-time neutrals. As we noted earlier, we define full-time neutrals as those who work full time and derive more than 90 percent of their income from neutral work. We also include in this table a comparison of full-time neutrals with part-time neutrals and part-time workers. The differences here are not striking or surprising. Full-time neutrals charge slightly more for mediation than do part-time neutrals, a pattern repeated for arbitration.

In part E of table 19, we look at the effect of years of membership in the Academy on rates charged. Academy membership is associated with elite status in the arbitration profession, and would be expected to allow members to charge more than other neutrals. From the standpoint of fees it would be reasonable to expect Academy membership to become even more valuable over time. For low mediation rates and high mediation rates, increasing years of membership in the Academy does result in higher fees charged through 29 years of membership, and then declines after one has been a member over 30 years. Low arbitration rates, in contrast, continue to increase the longer one has been a member of the Academy. High arbitration rates reveal an unexpected pattern in which rates ascend as expected, then decline for members with more than 20 and less than 30 years of membership, and then increase again for the most senior members of the Academy.

When we look at the more general measure of experience, years as an arbitrator (part F), we see a better-behaved age-earnings profile, with rates charged in all categories rising with increasing experience, peaking at around 30 years as an arbitrator and then beginning to decline. Comparison of the information in these sections suggests that years as an arbitrator is a more normal and consistent predictor of rates than years as an Academy member.

In the final section of table 19 we examine fees charged in different regions of the United States and Canada. Note that these are given in U.S. dollars. Even though many arbitrators maintain national practices, their rates are probably influenced by the type of work they do and where they base their practice. It is interesting to note that arbitration rates vary little—at least on the low end of the scale—by region, with West Coast arbitrators charging only slightly more than the rest of the Academy membership.

At the high rate level, regional variances are important. West Coast arbitrators charge the most, followed by northeastern U.S. and Canadian arbitrators. Arbitrators based in the north central U.S. and elsewhere in the U.S. charge significantly less. Mediation

rates vary widely at both the low and high rate levels. We believe that this reflects the more localized nature of the labor market for mediators, where regional differences in practice and demand influence rates up or down. Again, and even more significantly than for arbitration rates, West Coast Academy members charge considerably more than other members. Again, Canadian and northeastern U.S. mediation rates are in the middle, and north central and elsewhere U.S. rates are the lowest.

There is another interesting facet of the differences across members based on practice typology. When we examined fees charged by the various practice types, we found that fees varied, sometimes by large amounts. Here we present average fees by practice type for all NAA members (table 20) and for full-time neutrals (table 21).

When one examines the fee practices of all NAA members in table 20, the disparity in fees charged is quite striking. Multineutrals charge (or are offered) significantly more than all other categories for mediation and arbitration work. In all cases except the low arbitration rate, the lowest fees charged are by the union-only

Table 20
Average Daily Fees of All Academy Members, 1998, by Practice Typology (U.S. dollars)

		Mediation		Arbitration	
	No.	Lowest	Highest	Lowest	Highest
Union-management arbitrators	108	—	—	624	730
Union-only neutrals	55	634	778	653	732
Workplace neutrals	130	916	1182	643	850
Union-management & nonemployment neutrals	38	704	883	605	865
Multineutrals	93	1005	1519	666	1075
Ratio of high to low group		1.59	1.95	1.10	1.47

Table 21
Average Daily Fees of Full-Time Neutrals, 1998, by Practice Typology (U.S. dollars)

		Mediation		Arbitration	
	No.	Lowest	Highest	Lowest	Highest
Union-management arbitrators	49	—	—	635	800
Union-only neutrals	24	643	769	619	772
Workplace neutrals	77	939	1173	682	916
Union-management & nonemployment neutrals	17	599	820	560	850
Multineutrals	50	1058	1495	669	1122
Ratio of high to low group		1.77	1.94	1.22	1.45

neutrals. The ratios of multineutral fees to the lowest in each category vary from a 10 percent premium (lowest arbitration rate charged) to 95 percent (highest mediation rate charged). A more sophisticated approach to disentangling the reasons behind this difference in fee practices would involve trying to separate supply and demand forces. On the supply side, the market may reward those who diversify their practices and are willing and qualified to serve as neutrals in a variety of settings. On the demand side, perhaps the market determines who is able to do the wider variety of work and offers them higher fees to move into those arenas. The variety of options available to multineutrals may allow them to be more selective through higher prices for their services.

Table 21 replicates the analysis of table 20, while restricting the sample to those who are full-time neutrals. The results closely mirror those found in table 20. Except for the low arbitration fee, multineutrals charge a significant premium over all other groups for their services. It is not always the union-only neutrals who are the lowest in this analysis, however, and workplace neutrals actually charge more than multineutrals at the lowest arbitration fee level.

7

Statutory Rights and Due Process

An important concern of the Academy is the rising importance of statutory rights in arbitration cases. It is presumed that there is a rise in the prevalence and importance of statutory rights in the normal work of Academy members, union-management arbitration. There is also evidence that statutory rights may be an even more important subject of nonunion mediation and arbitration. Thus, the move of Academy members and neutrals in general into these new arenas suggests a need for neutrals to be expert in the content and application of workplace law. This represents a change not only for Academy members but for the profession in general. Questions naturally arise concerning the preparation and expertise of Academy members as they are called upon to resolve a wider scope of disputes, creating expectations beyond the historical expectations for arbitrators in the union-management world.

Accompanying this concern over the rise of statutory rights in arbitration is the importance of due process in these new forums. The model of union-management arbitration is well established. It is widely presumed that unions and management groups are able to mutually assure that due process is guaranteed to individuals. While the increased arbitration of statutory rights makes these considerations more important than in the past, it is still expected that the normal tension between union and management will provide appropriate incentives and expertise for the protection of due process rights.

Post-*Gilmer* litigation has shown that it cannot be presumed that this respect and mutual assurance of due process will automatically move into the nonunion employment dispute resolution world, however. As reflected in Academy Guidelines for members, if questions of statutory rights between nonunion employers and employees are to be resolved in private dispute resolution settings, there should, so far as possible, be due process guarantees parallel to those provided in the courts, in a manner consistent with the Due Process Protocol. This protocol sets minimum due process standards for arbitration in nonunion settings.

In this section of the report, we present the survey information we gathered on statutory rights and due process. We asked a number of questions of the respondents that related to the issue of

statutory rights, the connection to due process, and attitudes of Academy members on these topics.

Statutory Rights in Neutral Work

To what extent has the increasing statutory regulation of the employment relationship affected the nature of an Academy member's practice? About four out of five Academy members in our survey (82 percent) reported that they had arbitrated a dispute within the past three years that required them to interpret or apply a statute. They told us, further, that cases involving a claim of statutory rights now constitute about 10 percent of the total number of union-management cases they are arbitrating.

Among nonunion arbitration cases, 60 percent involved claims of statutory rights, as did 73 percent of nonunion mediations. In some respects this is a tautological finding, as many of the nonunion ADR systems are set up explicitly to resolve statutory claims outside the normal court or agency setting. Nonetheless, it is noteworthy that these issues dominate the nonunion neutral work of Academy members, making due process protection and the preparation of neutrals to hear these cases even more important than they might otherwise be.

Members of the Academy, and many others, have expressed concerns about the adequacy of representation in arbitration cases that involve the application of statutory rights. Table 22 provides evidence on this issue. Over 80 percent of the arbitrators we

Table 22
The Nature of Representation in Statutory Rights Arbitration Cases (percent of Academy members reporting frequency of type of representation)

Parties represented by legal counsel	Always	Often	Sometimes	Seldom	Never
Employer only	4	20	22	22	33
Employee/union only	2	7	11	29	52
Both employer and employee/union	32	50	10	4	3
Neither employer nor employee/union	1	6	13	30	51

Note: Rows may not add up to 100 percent because of rounding.

surveyed told us that both the employer and the employee (or union) were represented by legal counsel "always" or "often" in their statutory rights arbitration cases. Conversely, about the same proportion told us that "seldom" or "never" were neither the employer nor the employee (or union) represented by legal counsel in their statutory cases. For those who believe that having a lawyer as an advocate in an arbitration proceeding is the sine qua non of representation, these results are probably reassuring. On the other hand, table 22 also shows that a significant number, albeit a minority, of Academy respondents have heard cases involving statutory rights in which one of the parties was represented by legal counsel but the other was not. About one-quarter of the respondents, for example, say that "always" or "often" only the employer is represented by counsel in a statutory case.

What statutory rights are most often at stake? In table 23 we present the answers to several questions regarding a specific list of statutes. Respondents were asked whether they had been required to interpret or apply each of these statutes. In addition, we asked the respondents whether they had received training in the substance of each statute or whether they had taught the statute. The respondents were also asked for their priorities for training that the Academy might sponsor.

The first column of table 23 presents the actual application of the specific statutes in the order of their prevalence in the respon-

Table 23
Knowledge and Application of Statutory Rights (percentage of respondents)

	Required to apply statute	Received training on statute	Have taught statute	Training priority (rank)
Title VII	78	33	25	1
ADA	71	31	20	2
Federal/state/provincial labor relations	71	30	30	
FMLA	61	21	14	3
Age Discrimination	60	26	19	
Employment Standards	58	15	14	
OSHA	53	15	12	
Human Rights (Canada)	20	8	7	
Whistle-Blower	19	5	6	
Canadian Charter	5	2	2	
Other	19	4	6	

Note: Title VII is part of the Civil Rights Act of 1964; ADA = Americans with Disabilities Act; OSHA = Occupational Safety and Health Act; FMLA = Family and Medical Leave Act.

dents' caseloads. The rankings indicate the importance of a wide range of statutes, from Title VII of the Civil Rights Act of 1964 (78 percent) to OSHA (53 percent). Because there were so few Canadians in the sample, the small number required to apply the Canadian human rights code (20 percent) and the Canadian Charter of Rights and Freedoms (5 percent) significantly understate the importance of those statutes in Canadian arbitration practices.

When we asked the respondents whether they had received or provided training on the same list of statutes, a similar ranking was revealed. In general, the most prevalent statutory applications were the same areas in which Academy members had sought training. We asked respondents whether they had provided training on each of the statutes, recognizing the substantial proportion of Academy members who regularly teach in university classrooms or possess expertise useful to training programs in the specific statute. There are, however, fairly significant gaps between column 1 and the sum of columns 2 and 3. For example, while 78 percent have been required to interpret or apply Title VII, only 58 percent have received or given training that would allow a presumption of contemporary knowledge of the statute.

Where do the remaining Academy members acquire their expertise on the statute? Presumably this gap in knowledge is reflected in the priority the members placed on training on Title VII matters. Similar potential gaps between required application and knowledge are apparent for all the other laws. The response to the training priority question reflects the statutes most frequently applied; such training would help to fill a potentially troubling lack of expertise.

Due Process Outside Union-Management Arbitration

Academy members reported strong familiarity with the Due Process Protocol, with 79 percent answering either 1 or 2 on a 5-point scale (1 being very familiar and 5 not familiar at all). Only 7 percent responded 4 or 5. We were curious as to whether those who had a caseload outside union-management arbitration were more or less familiar with the protocol. When we examined that question and compared many other subgroups of the Academy, we found that all groups responded similarly to the question.

Specific aspects of procedural matters outside the world of union-management arbitration merit special attention in this

report. A debate has existed for some time as to whether fairness, or the appearance of fairness, is compromised when the fees of a neutral are paid by one party. With that in mind we asked about fee practices in union-management arbitration, in nonunion mediation and arbitration, and in nonemployment arbitration. We present a summary of the responses to those questions in table 24. The questions were not exactly the same for obvious reasons. We could not ask, for example, whether unions and management equally split the arbitration fee except in the union-management arena. We were, however, able to ask parallel questions for nonunion arbitration, nonunion mediation, and nonemployment arbitration—employer/employee equally or all parties equally.

The table reveals some important differences in fee sources among the four areas of practice. To no one's surprise, the dominant model in union-management arbitration is for the union and the employer to split arbitration fees equally. Academy

Table 24
Sources of Fees in Different Forums (percentage saying fees paid in this manner always or often)

	Union-management arbitration	Nonunion employment arbitration	Nonunion employment mediation	Non-employment arbitration
Employer/union equally	98	—	—	—
Employer/employee equally	—	36	51	—
All parties equally	—	—	—	74
Employer/union unequally	3	—	—	—
Employer/employee unequally	—	11	11	—
All parties unequally	—	—	—	5
Loser	3	2	—	7
Employer alone	2	46	33	—
Union alone	1	—	—	—
Employee alone	—	1	0	—
One party alone	—	—	—	11

members reported that fees are paid always or often in this manner 98 percent of the time. This same practice is the dominant fee pattern in nonemployment arbitration, with 74 percent of the respondents reporting that the parties pay fees equally always or often. The practice in nonunion mediation and arbitration is different, however. There is still a significant portion of the cases in which fees are split equally by employers and employees—36 percent for arbitration and 51 percent for mediation. When unequal splits are included, employees bear responsibility for at least a portion of the arbitration fee 47 percent of the time in arbitration and 62 percent of the time in nonunion mediation.

An important fear of Academy members is reflected in a significant proportion of nonunion neutral fee practices. Forty-six percent of Academy members reported that employers alone paid the fees for nonunion arbitration always or often. When we asked Academy members about their attitudes toward this practice, a significant proportion of the respondents said that single-party payment unconditionally compromised the arbitration process. (This issue is further discussed in connection with table 27.)

The increased involvement of Academy members in schemes of unequal payment by the parties has prompted an internal debate. It may herald a shift in traditional attitudes, reflecting a recognition that allowance must be made for the limited means of unorganized employees. In *Coles v. Burns International Security Services,* 105 F3rd, 1465 (D.C. Cir. 1997), the court ruled that due process requires that the employer pay the full expenses of the arbitration when the employment contract mandates the arbitration of statutory disputes.

Another area of potential practice differences between union and nonunion arbitration is presented in table 25. We asked a series of questions about the presence of counsel in these different forums in an effort to determine whether employees in nonunion arbitration receive adequate representation. The results reveal only small differences between union and nonunion arbitration, although there are some disquieting results. The fear regarding nonunion employment representation patterns is that employees might be unrepresented while employers benefit from legal counsel being present. This is the case in a significant minority of cases, with 22 percent of the respondents reporting this to be the practice always or often.

What is surprising is that this pattern is nearly exactly the same in the unionized sector, with 24 percent of the respondents

Table 25
Legal Representation in Union and Nonunion Arbitration (percentage of respondents)

	Union-management arbitration		Nonunion employment arbitration	
Party represented by legal counsel	Always/ often	Seldom/ never	Always/ often	Seldom/ never
Employer only	24	55	22	67
Employee only	9	81	5	91
Both employer and employee	82	7	67	19
Neither side	7	81	11	78

reporting that this occurs always or often in union-management arbitration. However, it is inaccurate to characterize a union grievant as unrepresented in the absence of legal counsel. Even if an attorney is not present, union members would always be represented by a union official.

Not surprisingly, it is extremely rare in both sectors that only the employee would be represented, with 81 percent (union) and 91 percent (nonunion) reporting that this happens seldom or never. The dominant mode for representation in both sectors is that both parties have counsel present, with 82 percent saying that occurs always or often in unionized arbitration and 67 percent reporting that to be the case in nonunion arbitration. As can be seen in the final row of table 25, it is rare for neither side to be represented in arbitration in either sector. While the parallel nature of the results in the union and nonunion worlds may belie some of the fears, there is still a significant minority of Academy members who report cases where the employer is represented by counsel and the employee is unrepresented.

The respondents were asked a series of questions about the importance of various elements of due process, some included in the Due Process Protocol, some not. Table 26 presents the results of those questions for nonunion employment arbitration and nonemployment arbitration. We also asked, for many of the same elements, how often those elements had not been available to the respondents. The results are encouraging. There is a rough negative correlation between the ranking of importance and the proportion of time the elements had been denied. The elements most important to Academy members are those least likely to be denied

Table 26
Rating of Due Process Elements and Instances of Elements Denied (percentage of respondents)

	Nonunion employment arbitration		Nonemployment arbitration	
	% rating very important	% denied	% rating very important	% denied
Right of representation	85	—	78	—
Authority to grant remedies consistent with statute	74	—	64	—
Authority to order production of documents	69	5	54	10
Authority to administer oaths	62	2	60	5
Neutrally administered panel (e.g. AAA)	61	—	53	—
Authority to provide written decisions	61	10	31	20
Subpoena power	58	8	51	9
Authority to order remedies beyond compensatory order	41	24	34	37
Right of discovery	33	15	38	19
Access to prehearing conference	33	19	29	17
Post-hearing briefs	28	28	18	35
Right of deposition	19	—	20	—
Access to court reporter	14	43	12	42

them in actual practice. For example, 69 percent of Academy members thought it very important to have the authority to order production of documents during the arbitration process. Only 5 percent reported that they had been denied that right during a nonunion arbitration hearing. On the opposite end of the ranking, 14 percent thought it very important to have access to a court reporter, a procedural guarantee that had been denied to 43 percent of the members.

Comparing the attitudes of Academy members regarding nonunion employment arbitration and nonemployment arbitration, one sees that members generally report the same rankings for those two different settings. Likewise, similar patterns of an absence of those procedures exist in the two sectors. Again, the procedural facets considered most important are those least likely to be denied in nonemployment arbitration.

We also considered another aspect of the importance of these rankings in the actual practice of Academy members. We asked whether respondents had refused a case because of a perceived

lack of fairness of procedures, thus translating their beliefs into action. Only 17 percent of Academy members reported that they had done so in the case of nonunion arbitration and even fewer respondents (7 percent) had done so for nonemployment arbitration. Similar percentages of respondents reported that they had sought to have a process amended to conform to guidelines present in the Due Process Protocol—17 percent for nonunion arbitration and 6 percent for nonemployment arbitration. The Academy itself will have to consider the question of whether these responses, in sum, reflect an adequate respect for procedural fairness in nonunion arbitration or whether the procedural protections that were denied are important enough to consider strengthening member adherence to Academy guidelines.

Other Attitudes of Academy Members

Respondents were asked a series of questions about their attitudes on various facets of arbitration and mediation. These results are reported in table 27. In addition to overall mean responses to the questions, we have also considered various subcategories of the Academy.

The first column reports the results of the previously discussed *single-payer fee question.* The Academy is sharply divided on this question, as figure 7 highlights, and solely examining the mean responses covers up the extremes. Fourteen percent of the respondents strongly agree that having one party pay the arbitration fee compromises the process. Fifteen percent strongly disagree with that proposition, with the remainder of the Academy almost equally divided into less strongly held beliefs. Interestingly enough, those who have worked in the nonunion arbitration sector are least likely to feel that one party paying the fees compromises the arbitration process. As can be seen in the first column of table 27, workplace neutrals and multineutrals are least likely to believe that to be the case. Regionally, Canadians believe more strongly than any other group that single-payer arbitration is a flawed process.

Respondents who told us that the source of fees doesn't matter offered comments along the following lines:

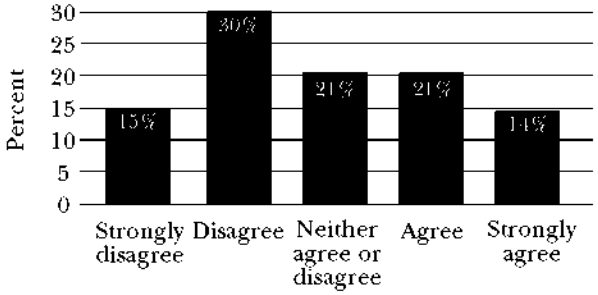
> "Arbitrators take pride in ensuring decisions that are based on the facts of the case. They protect their integrity and self-worth and I can't imagine anyone would make a decision based on who's going to pay the freight."

Table 27
Average Attitudes of Academy Members on Various Issues, by Practice Type, Region, and Gender

	Fees paid by one party compromise process	Disclose previous cases	Disclose previous relationships in multiparty dispute	Make settlement recommendations in mediation	Meet separately with parties to mediate dispute in arbitration
Overall	2.88	2.89	2.23	2.50	3.95
Practice Type					
Union-management arbitrators	3.08	2.89	2.31	2.65	4.29
Union-only neutrals	3.41	2.69	2.31	2.16	3.64
Workplace neutrals	2.77	3.36	2.55	2.48	3.88
Union-management & nonemployment neutrals	3.10	2.50	1.96	2.31	4.08
Multineutrals	2.41	2.53	1.93	2.76	3.83
Region					
Northeast, U.S.	2.98	3.02	2.42	2.38	3.79
North central, U.S.	2.76	3.03	2.13	2.74	4.01
West, U.S.	2.75	2.83	2.38	2.61	3.98
Elsewhere, U.S.	2.73	2.56	1.87	2.44	4.34
Canada	3.81	3.71	2.50	2.33	2.96
Gender					
Men	2.93	2.81	2.24	2.43	3.93
Women	2.63	3.36	2.14	2.92	4.09

Note: Column 1: 1 = strongly disagree; 5 = strongly agree. All other columns: 1 = always; 5 = never.

Figure 7
Response of Academy Members: If fees are paid entirely by one party, the arbitration process is compromised.



"I don't have a problem with who pays—I call it the way I see it as long as I get paid for it by someone."

"If fees must be split, access to arbitration may be limited to those with resources."

Other respondents, however, offered comments such as these:

"The appearance of undue influence by one party taints the process."

"Who pays the piper calls the tune."

"I think we're not all as rational as we'd like to be. It's very likely to have an insidious effect on the arbitrator's decision."

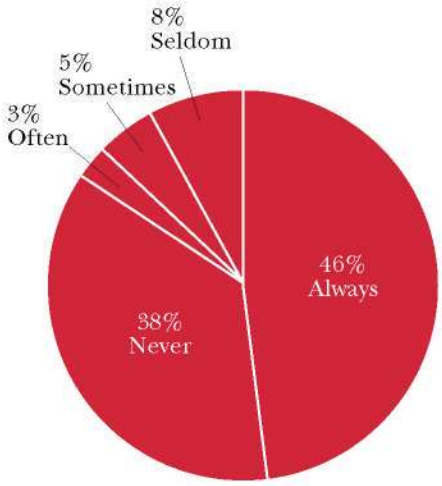
"You don't bite the hand that feeds you."

"Even if an arbitrator is scrupulously fair, he or she must retain the appearance of neutrality by equal division of the fee."

The second column reports the practice of Academy members regarding the *disclosure of previous cases* to unions. This is seen as important by some members of the Academy (see figure 8) as the possibly misleading appearance of impartiality may be created by an arbitrator in a collective bargaining case who does not disclose that he or she has done nonunion arbitration work for the employer and could be seen as dependent upon that employer for future work. Those who view that as a concern believe the relevant union should be made aware of such prior relationships. Workplace neutrals—those that might be in such a situation—are the least likely to disclose such relationships to unions in arbitration. Again, Canadians hold views stronger than the remainder of the Academy on this question. They hold the strongest belief that these relationships need not be disclosed.

The third column of table 27 reports parallel questions regarding *disclosure in multiparty disputes*—that is, whether members disclose to the union any cases conducted with the same employer in non–collective bargaining arbitration or mediation cases. It should be kept in mind that only 61 percent of Academy members have done this type of neutral work. Academy members are ambivalent on this question, with the mean response near the middle of the attitudinal scale. There are no important differences within the subgroupings that we report.

Figure 8
Response of Academy Members: Do you disclose to the union any non–collective bargaining arbitration or mediation cases you conducted with the same employer?



Columns 4 and 5 report the results of important stylistic differences across Academy members. Some members believe that, as a matter of practice, they should never make *settlement recommendations in mediation*. Others see this as a normal, even necessary, aspect of sound mediation practice. Attitudes in this area of practice are neutral with approximately equal proportions of respondents responding from always to never.

Academy members reveal more strongly held norms on the question of whether they *meet separately with the parties to mediate an arbitration dispute*. According to the respondents, most never do this, with the overall mean being 3.95 (1=always, 5=never). While this practice is the norm across nearly all segments of the Academy, again Canadians report different practice. The Canadian respondents are much more likely to meet separately with the parties in an attempt to mediate an arbitration dispute.

8

Conclusion: The Academy at a Crossroads

In 1947 the National Academy of Arbitrators was conceived as an organization dedicated to the advancement of labor arbitration in the collective bargaining setting. Grievance arbitration became a critical part of the social contract underlying the collective bargaining regime, as it substituted for recourse to strikes and lock-outs during the term of a collective bargaining agreement. It has, in that sense, come to be an essential lynchpin in industrial relations stability in North America. Academy members and other labor arbitrators resolve disputes by the application of principles that have evolved over decades and have become well established in a widely reported jurisprudence. The procedures followed by labor arbitrators, the principles they apply, and the remedies they direct are generally conciliatory and supportive of the ongoing relationships that they serve.

The arbitration of nonunion employment disputes, including disputes relating to the statutory rights of employees, brings different principles and factors to bear. More often than not they involve a one-time conflict flowing from the termination of a relationship not to be renewed. To the extent that the procedures followed and remedies that may result mirror those within a statute being applied, the adjudicator is called upon to apply an instrument of public policy, vindicating individual rights in a manner largely unknown to the union arbitration forum. So understood, union arbitration and employment arbitration are substantially different forms of adjudication which call for different skills, background, and knowledge. Because of the inherent institutional differences between them, they may also involve different approaches to due process.

This survey reveals that Academy members are becoming increasingly active in both nonunion workplace and nonemployment adjudication. As collective bargaining has declined in North America and workplace arbitration among the unorganized has increased, the activity of Academy members in the arbitration and mediation of nonunion employment disputes, including disputes relating to statutory rights, has increased dramatically. Not surprisingly, this has led to intense debate within the Academy itself. Some

argue that the Academy must change with the times, opening its membership and activities to workplace adjudicators with relatively less experience in the field of collective bargaining. Others respond, with equal conviction, that while Academy members may choose to arbitrate and mediate employment disputes, the Academy should never stray from its roots, which are in collective bargaining. For many Academy members, the prospect of admitting into membership persons who might both arbitrate as neutrals and advocate for employees or employers in the nonunion sector, and whose activities may not be constrained by codes of ethics and rules against solicitation deeply rooted in union arbitration, raises critical existential questions. Can union arbitrators and employment arbitrators coexist within the same house? Can an organization with a justly proud history of advancing the scholarship and practice of union arbitration spread its focus to the practice of employment arbitration without compromising its soul?

As we release this report the Academy has charged two committees with the important task of recommending future directions for the Academy in matters as fundamental as admission standards, ethical policies, ongoing training, and the content of meeting programs. While it is not the mandate or purpose of this report to recommend policy directions, it will no doubt serve as a document of some importance to the discussions that will take place in these and other committees of the Academy in the years to come. Quite apart from the information it provides concerning the involvement of Academy members in work as neutrals outside the traditional union-management field, it serves as a critical empirical baseline from which the Academy can chart its progress. It provides a benchmark against which the Academy may follow the evolution of its membership, including changes in their caseloads, interests, and values in a society that promises to make ever greater use of professional neutrals as both adjudicators and mediators.

While previous surveys of Academy members have been done (most recently the Bognanno and Smith report in 1988 and the Beck report in 1994), this survey is the most comprehensive undertaken to date to examine both the practice and views of Academy members. Its results provide an empirical basis for discussions within the Academy of policy issues, and most particularly policy issues relating to disputes involving statutory rights in nonunion employment arbitration and mediation, and the increasing activities of Academy members within that arena. Employment arbitration, an endeavor that was much less widely known at

the time most members joined the Academy, has gained substantially more significance in the North American workplace and in recent years has nearly doubled in the activities of Academy members. The Bognanno-Smith and Beck reports found 24 percent and 28 percent of Academy members, respectively, doing nonunion employment arbitrations. Now 46 percent of Academy members responding to this survey confirm that they have arbitrated cases in the employment field over the three years surveyed. Significantly, a further 33 percent expressed the view that they would accept such cases, "assuming acceptable due process protections." More broadly, the evolution of statutes concerning workplace rights has brought a greater involvement of Academy members in the adjudication and mediation of statutory rights, both in the union and nonunion employment setting. While it is evident that statutory rights arise more frequently in nonunion employment arbitration, they nevertheless do comprise an important segment of issues decided by Academy members in arbitrations within the collective bargaining regime.

To date, the depth of activities of Academy members in the arbitration and mediation of nonunion employment disputes has not been great. While it appears that for a relatively small number of Academy members such work is significant, if not preponderant within their day-to-day practice, the survey reveals that among Academy members who have conducted nonunion employment arbitrations, on average they have done fewer than three cases a year. However, there is every reason to believe that Academy members will participate more and more in the growing field of nonunion employment arbitration and mediation, particularly given that younger Academy members are more active in employment cases and that they appear to represent more lucrative work.

On a more philosophical level, the survey offers intriguing insight on the startlingly disparate views of Academy members on sensitive issues of perceived fairness in the arbitration process. It may not be surprising that members steeped in the traditions of collective bargaining arbitration, whose fees have always been shared equally by both parties, consider that the payment of fees by a single party would compromise the arbitration process. However, the concept of the employer paying all of an arbitrator's fees in the context of a nonunion employment arbitration, which has received express judicial approval (*Cole v. Burns International Security Services*, 105 F. 3rd 1465, D.C.Cir. 1997), plainly does not offend those members of the Academy who have done nonunion employ-

ment arbitrations and mediations, where such arrangements are commonplace. Interestingly, when surveyed on this question, Academy members are evenly divided across the spectrum, as to whether they view the payment of a neutral's fee by a single party to be a factor that compromises the process.

The demographic picture the survey draws will no doubt give some analysts cause for concern. Apart from the average age of Academy members being at a relatively high 63, the data reveal that women and minorities appear to be substantially underrepresented in Academy membership whether by comparison with the population generally or with other professions. These findings should be of interest to agencies involved in the recruitment and development of professional neutrals, and to Academy members involved in mentoring.

Just as a periodic census is an instrument essential to the informed administration of a city or nation, an organization concerned with its vitality should know as much as possible about its own current makeup. We submit this report as a contribution to a more informed discussion and debate of important issues that face the Academy and as a document of interest to all who value and respect the role of professional neutrals. We believe that that view is deeply shared by the members of the Academy, as reflected in their remarkable rate of participation in the survey leading to this report, of which they are the true authors.

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