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## The Arbitration Profession in Transition: A Survey of the National Academy of Arbitrators

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# The Arbitration Profession in Transition: A Survey of the National Academy of Arbitrators

## Abstract

[From the Foreward]: That the experience, talents, and integrity of the members of the National Academy of Arbitrators are called on to resolve disputes beyond collective bargaining is not surprising. But The Arbitration Profession in Transition shows that this process is far more widespread, and is accelerating, beyond what most of us had speculated.

The study provides the baseline for the new century as to the role of Academy members in the expanding use of ADR in employment and in conflicts concerning statutory rights. It is also a remarkable census of who the Academy is, notable for the extraordinarily high participation and cooperation of those studied. It has been compiled with dedication, care, and skill.

It is more than a snapshot of a profession; it is an image worthy of contemplation as the Academy, and the users of arbitration and mediation, continue their quest for fairness and equity in the workplace.

John Kagel, President –elect, National Academy of Arbitrators, June 1, 2000.

## Keywords

arbitration, arbitrators, profession, survey, academy, arbitrator, NAA, ADR, alternative dispute resolution, profile, academy, statutory rights, due process

## Comments

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Dispute Resolution

*The*  
Arbitration  
Profession  
*in*  
Transition

*A Survey of the  
National Academy of Arbitrators*

Michel Picher  
Ronald L. Seeber  
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National  
Academy of  
Arbitrators



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INSTITUTE ON  
CONFLICT  
RESOLUTION

# The Arbitration Profession in Transition

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*A Survey of the National Academy of Arbitrators*

Michel Picher  
Ronald L. Seeber  
David B. Lipsky

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*A partnership between*

THE SCHOOL OF INDUSTRIAL  
AND LABOR RELATIONS AT  
CORNELL UNIVERSITY



THE FOUNDATION FOR  
PREVENTION AND EARLY  
RESOLUTION OF CONFLICT

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## Foreword

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That the experience, talents, and integrity of the members of the National Academy of Arbitrators are called on to resolve disputes beyond collective bargaining is not surprising. But *The Arbitration Profession in Transition* shows that this process is far more widespread, and is accelerating, beyond what most of us had speculated.

The study provides the baseline for the new century as to the role of Academy members in the expanding use of ADR in employment and in conflicts concerning statutory rights. It is also a remarkable census of who the Academy is, notable for the extraordinarily high participation and cooperation of those studied. It has been compiled with dedication, care, and skill.

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John Kagel  
President-elect, National Academy of Arbitrators  
June 1, 2000





# 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.

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. Al-

though 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).

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 relation-

ships, 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 jurisdic-

tion 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 di-

versified 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 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

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### 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 sur-

veys 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 de-

cline of Academy members' involvement in non-union 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

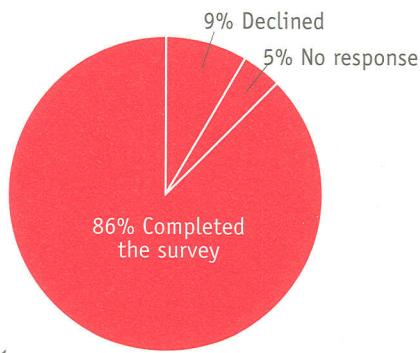


Figure 1  
Response rate among the 535 Academy members eligible to participate in the survey

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-as-

sisted telephone interviewing) system, or to complete a faxed questionnaire.

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

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.

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.

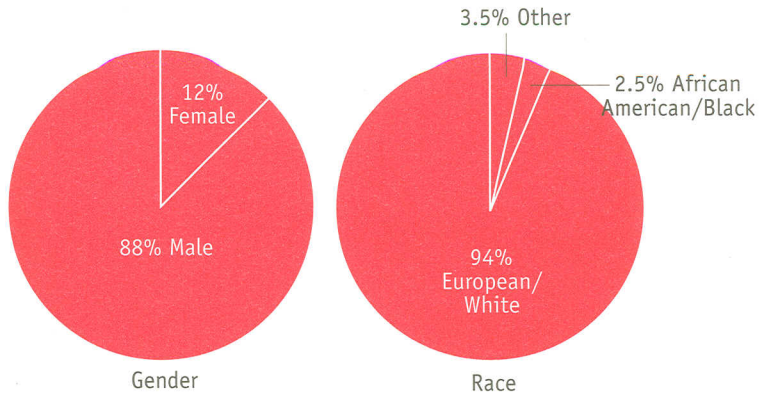


Figure 2  
Gender and race distribution of Academy members

Table 2  
Distribution of Academy Members by Education

Degree	All members		Men		Women	
	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.

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

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

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	

*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 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 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 uni-

versity 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 griev-

ance, 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.

*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 per-

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

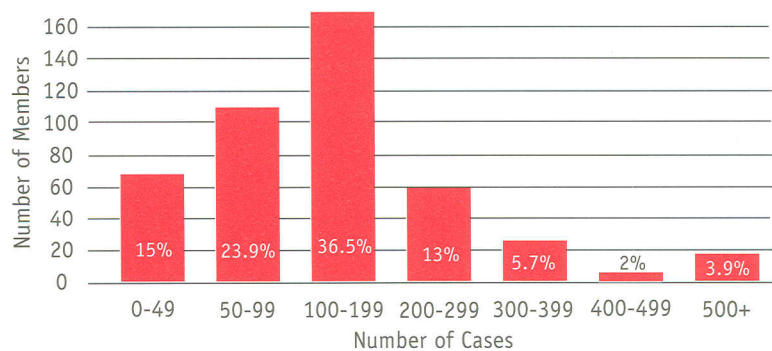
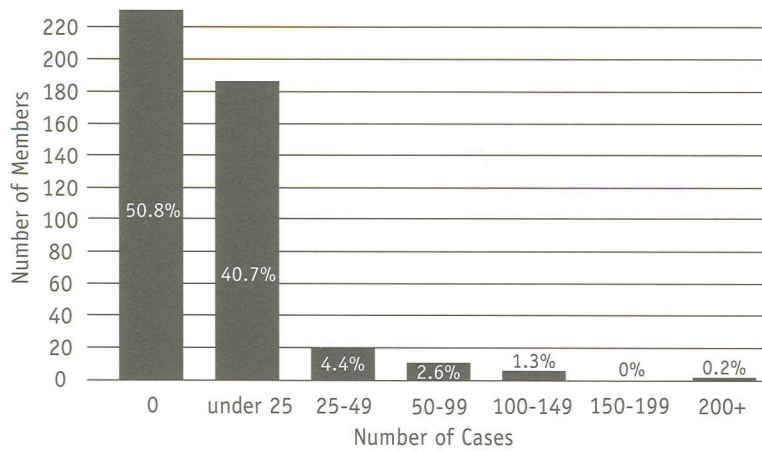


Figure 4  
Three-Year Union-Management Mediation Caseload of Academy Members (1996–98)



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

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.

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.

# 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.”

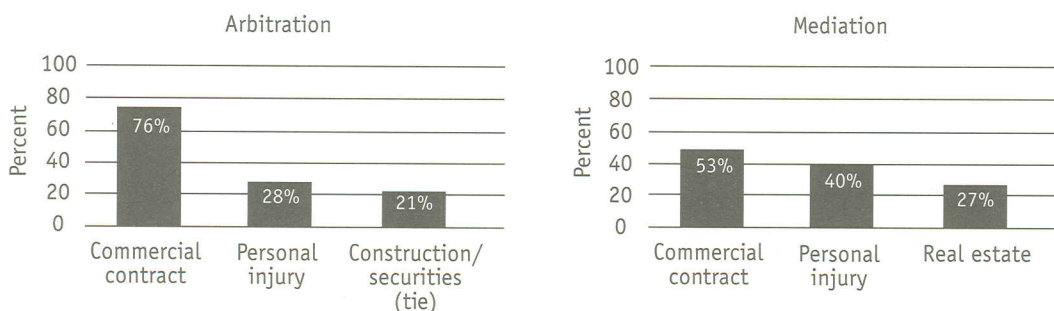
Other arbitrators also said that their acceptance

*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.”

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.

of these types of cases depended on the scheduling of such cases and their own availability.

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 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 re-

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.

spondents reported that, during 1996–98, they had been designated to serve as an arbitrator in a union-management case by a private 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 non-union 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 non-union 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

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

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. 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.,

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).

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 multi-neutrals) 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

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

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

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

be union-management 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 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 educa-

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



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
Masters'	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

tional 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.

### 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 fre-

quency 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.

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.

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

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



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

	Mediation		Arbitration	
	Lowest	Highest	Lowest	Highest
<i>A. Education</i>				
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
<i>B. Age</i>				
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
<i>C. Sex</i>				
Male	824	1112	664	887
Female	1026	1465	627	901
<i>D. Work</i>				
Full-time neutral	884	1168	646	906
Full-time work, part-time neutral	839	1164	628	828
Part-time work	710	1055	655	765
<i>E. Years as NAA member</i>				
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
<i>F. Years as Arbitrator</i>				
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
<i>G. Fees by Region</i>				
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

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 sur-

prise, 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

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

	No.	Mediation		Arbitration	
		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

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 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.

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

	No.	Mediation		Arbitration	
		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

# 7

## Statutory Rights and Due Process

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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 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 be-

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.

lieve 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 respondents’ 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 ar-

reas 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.

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.

## 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 non-employment 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-manage-

ment 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 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 *Cole 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.

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

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 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 pro-

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

Party represented by legal counsel	Union-management arbitration		Nonunion employment arbitration	
	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

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



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
<i>Overall</i>	2.88	2.89	2.23	2.50	3.95
<i>Practice Type</i>					
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	4.03
Multineutrals	2.41	2.53	1.93	2.76	3.83
<i>Region</i>					
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
<i>Gender</i>					
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.

portion of time the elements had been denied. The elements most important to Academy members are those least likely to be denied 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 trans-

lating 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."

"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."

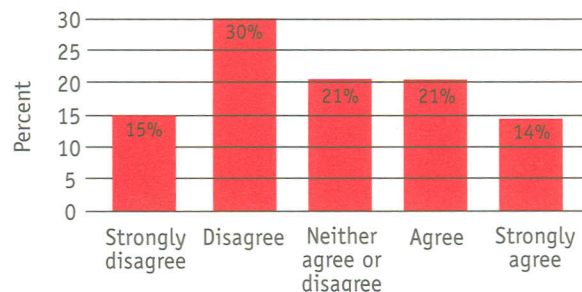
"I think we're not all as rational as we'd like to be. It's very likely to have an insidious effect on the arbitrator's decision."

"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 pre-*

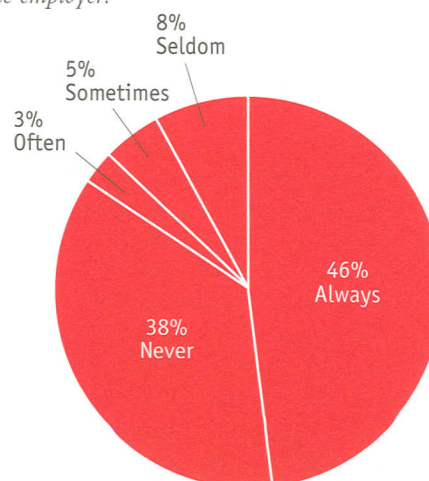
Figure 7. Response of Academy Members: If fees are paid entirely by one party, the arbitration process is compromised.



*vious 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

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?



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.

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 lockouts 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 non-union 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.3d 1465, D.C.Cir. 1997), plainly does not offend those members of the Academy who have done nonunion employment 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 con-

cern. 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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## Previous Academy Surveys

in chronological order

“Survey of the Arbitration Profession in 1952.” 1954. Appendix E, in *The Profession of Labor Arbitration: Cumulative Selection of Addresses at First Seven Annual Meetings, National Academy of Arbitrators, 1948 through 1954*, ed. Jean T. McKelvey. Washington, D.C.: BNA Books, pp. 176–82.

“Research and Education Committee Report and Recommendations.” 1959. Appendix D, and “Statistical Tables Based on the Survey of Arbitration Work of Members of the Academy in 1957,” Appendix E, in *Arbitration and the Law, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators*, ed. Jean T. McKelvey. Washington, D.C.: BNA Books, pp. 179–90.

“Survey of Arbitration in 1962.” 1964. Appendix C, in *Labor Arbitration—Perspectives and Problems: Proceedings of the 17th Annual Meeting, National Academy of Arbitrators*, ed. Mark L. Kahn. Washington, D.C.: BNA Books, pp. 292–316.

[Jean T. McKelvey and Derek L. Rogers]. 1971. “Survey of the Arbitration Profession in 1968.” In *Arbitration and the Public Interest: Proceedings of the 24th Annual Meeting of the National Academy of Arbitrators*, ed. Barbara Dennis and Gerald G. Somers. Washington, D.C.: Bureau of National Affairs, p. 275.

Petersen, Donald J., and Julius Rezler. 1977. “Fee Setting and Other Administrative Practices of Labor Arbitrators: Study by Professors Petersen and Rezler of Loyola University of Chicago.” In *Awards of Arbitrators, Reports of Fact-Finding Boards, Court Decisions on Labor Arbitration*, 68 LA 1383.

[Michael F. Bognanno and Clifford E. Smith]. 1989. “The Demographics and Professional Characteristics of Arbitrators in North America.” In *Emerging Issues for the 1990s: Proceedings of the 41st Annual Meeting, National Academy of Arbitrators*, ed. Gladys W. Gruenberg. Washington, D.C.: Bureau of National Affairs, p. 266.

[Michael H. Beck, Chair]. 1994. “Report of the Committee to Consider the Academy’s Role, If Any, with Regard to Alternative Labor Dispute Resolution Procedures.” In *Arbitration 1993: Arbitration and the Changing World of Work—Proceedings of the 46th Annual Meeting, National Academy of Arbitrators*, ed. Gladys W. Gruenberg. Washington, D.C.: Bureau of National Affairs, p. 325.

# Survey Instrument

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## National Academy of Arbitrators Survey of Professional Practice

We are going to ask you a series of questions about your work as a neutral during the past three years (1996-1998)

### Section 1: Your Labor-Management Arbitration Practice

1. In the past 3 years, please estimate in how many cases did you render a decision as a labor-management arbitrator: (Please circle ONE response.)

- |   |              |   |         |
|---|--------------|---|---------|
| 1 | less than 50 | 5 | 300-399 |
| 2 | 50-99        | 6 | 400-499 |
| 3 | 100-199z     | 7 | 500 +   |
| 4 | 200-299      |   |         |

2. Of these, please estimate what percentage were public sector: \_\_\_\_\_ %

3. In the past 3 years, of all the cases in which you rendered a decision as a labor-management arbitrator, please estimate how many were interest disputes: \_\_\_\_\_ number

4. In the past 3 years, in which of the following industries did you serve as a labor-management arbitrator? (Please circle ALL that apply)

- |  |                                  |
|--|----------------------------------|
| 1 Manufacturing                          | 6 Mining/Construction            |
| 2 Transportation/Communication/Utilities | 7 Government-Federal             |
| 3 Trade (wholesale/retail)               | 8 Government-State/Province      |
| 4 Finance/Insurance                      | 9 Government-Local               |
| 5 Private-sector service industries      | 10 Other (please specify _____ ) |

5. In the past 3 years, have you been designated to arbitrate a labor-management case by: (Please circle ALL that apply.)

- 1 private agency referral (e.g. AAA)
- 2 direct appointment of the parties
- 3 court referral
- 4 government tribunal or agency
- 5 being part of a permanent panel
- 6 other (please specify \_\_\_\_\_ )

6. In the past 3 years, how often have your arbitration fees, other than cancellation fees, been paid by: (Please circle ONE response for each item.)

	Always	Often	Sometimes	Seldom	Never
a. the employer and union equally	1	2	3	4	5
b. the employer and union unequally	1	2	3	4	5
c. the loser	1	2	3	4	5
d. the employer alone	1	2	3	4	5
e. the union alone	1	2	3	4	5
f. other (e.g. a government agency, an industry agency) (please specify _____)	1	2	3	4	5

### Section 2: Your Labor-Management Mediation Practice

1. In the past 3 years, please estimate in how many labor-management disputes you were originally designated to serve as a mediator: (Please do not consider any cases where you were an arbitrator and then asked to mediate.) (Please circle ONE response.)

- |   |  |   |         |   |       |
|---|--|---|---------|---|-------|
| 1 | none <del>☐</del> Please go to Section 3, Question 1 | 4 | 50-99   | 7 | 200 + |
| 2 | less than 25   | 5 | 100-149 |   |       |
| 3 | 25-49  | 6 | 150-199 |   |       |

2. Of these, please estimate what percentage were public sector disputes: \_\_\_\_\_ %
3. In the past 3 years, have you been designated to mediate a labor-management dispute by: (Please circle ALL that apply.)
- |                                      |                                   |
|--------------------------------------|-----------------------------------|
| 1 private agency referral (e.g. AAA) | 4 government tribunal or agency   |
| 2 direct appointment of the parties  | 5 being part of a permanent panel |
| 3 court referral                     | 6 other (please specify _____)    |
4. In the past 3 years, in which of the following industries did you serve as a labor-management mediator? (Please circle ALL that apply)
- |  |                                 |
|--|---------------------------------|
| 1 Manufacturing                          | 6 Mining/Construction           |
| 2 Transportation/Communication/Utilities | 7 Government-Federal            |
| 3 Trade (wholesale/retail)               | 8 Government-State/Province     |
| 4 Finance/Insurance                      | 9 Government-Local              |
| 5 Private-sector service industries      | 10 Other (please specify _____) |

**Section 3: Statutory Rights Arbitration Under Collective Bargaining**

In this section, all the questions refer to arbitration under a collective bargaining agreement.

1. In the past 3 years, have you arbitrated a dispute that required you to interpret or apply a statute? (Please circle ONE response.)

- 1 Yes      2 No  Please go to Section 4, Question 1

2. In the past 3 years, please estimate what percentage of all the cases you arbitrated to decision involved a claim of statutory rights: \_\_\_\_\_ %

3. In the past 3 years, in your statutory rights arbitration cases, how often has: (Please circle ONE response for each item.)

	Always	Often	Sometimes	Seldom	Never
a. only the employer been represented by legal counsel	1	2	3	4	5
b. only the employee/union been represented by legal counsel	1	2	3	4	5
c. both the employer and employee/union been represented by legal counsel	1	2	3	4	5
d. neither the employer nor the employee/union been represented by legal counsel	1	2	3	4	5

**Section 4: Non-Union Employment Arbitration Experience**

In this section, all the questions refer to the arbitration of employment claims that do not arise under a collective bargaining agreement.

1. In the past 3 years, have you arbitrated to decision a non-union employment case? (Please circle ONE response.)

- 1 Yes  Please go to Question 3      2 No

2. Assuming acceptable due process protections, would you accept a non-union employment arbitration case? (Please circle ONE response.)

- 1 Yes  Please go to Section 5, Question 1  
 2 No  Please go to Section 5, Question 1  
 3 It depends  Please go to Section 5, Question 1  
 (Please explain \_\_\_\_\_)

3. In the past 3 years, please estimate how many non-union employment cases you have arbitrated to decision: \_\_\_\_\_ number

Of these decisions, please estimate how many involved claims of statutory rights: \_\_\_\_\_ number

4. In the past 3 years, have you been designated for a non-union arbitration employment case by: (Please circle ALL that apply)

- 1 private agency referral (e.g. AAA)  
 2 direct appointment of the parties  
 3 court referral  
 4 government tribunal or agency  
 5 being part of a permanent panel  
 6 other (please specify \_\_\_\_\_)



5. In the past 3 years, have you ever been selected under an employment contract that made arbitration mandatory as a condition of hire? (Please circle ONE response.) 1 Yes 2 No

6. Of all the non-union employment cases you have arbitrated in the past 3 years, please estimate in what percentage you were selected after the dispute between the employee and employer had arisen: \_\_\_\_\_ %

7. In the past 3 years, how often have your fees (in the non-union employment cases), other than cancellation fees, been paid by: (Please circle ONE response for each item)

	Always	Often	Sometimes	Seldom	Never
a. the employer and employee equally	1	2	3	4	5
b. the employer and employee unequally	1	2	3	4	5
c. the loser	1	2	3	4	5
d. the employer alone	1	2	3	4	5
e. the employee alone	1	2	3	4	5
f. a government agency	1	2	3	4	5
g. an industry agency	1	2	3	4	5
h. pro-bono (no fees paid)	1	2	3	4	5
i. other (please specify _____)	1	2	3	4	5

8. In the past 3 years, in your non-union employment arbitration cases, how often: (Please circle ONE response for each item.)

	Always	Often	Sometimes	Seldom	Never
a. has only the employer been represented by legal counsel	1	2	3	4	5
b. has only the employee been represented by legal counsel	1	2	3	4	5
c. have both the employer and employee been represented by legal counsel	1	2	3	4	5
d. have neither the employer nor the employee been represented by legal counsel	1	2	3	4	5

9. In the past 3 years, did you decline a case because of perceived unfairness of procedures? (Please circle ONE response.) 1 Yes 2 No

10. In the past 3 years, have you sought to have procedures amended to conform to the Due Process Protocol/ Academy Guidelines? (Please circle ONE response.) 1 Yes 2 No

11. In the past 3 years, in your non-union employment arbitration cases, have you ever heard a case where you did not have: (Please circle ALL that apply.)

1 subpoena power	7 access to a court reporter
2 the authority to administer oaths	8 access to a pre-hearing conference
3 the authority to order production of documents	9 post-hearing briefs
4 the authority to conduct pre-hearing discovery	10 other panel members
5 the authority to provide a decision with reasons	11 the authority to order remedies other than a compensatory order (e.g. punitive, cease & desist, attorney fees)
6 the authority to provide a decision without reasons	

12. On a scale of 1 to 5, where 1 is very important and 5 is not important at all, how important is it to you in your non-union employment arbitration cases to have: (Please circle ONE response for each item.)

	Very important				Not important at all
a. a neutrally administered panel	1	2	3	4	5
b. subpoena power	1	2	3	4	5
c. access to a court reporter	1	2	3	4	5
d. access to a pre-hearing conference	1	2	3	4	5
e. the authority to order production of documents	1	2	3	4	5
f. the right of representation for the parties	1	2	3	4	5
g. the right of deposition	1	2	3	4	5
h. the right of discovery	1	2	3	4	5
i. the authority to administer oaths	1	2	3	4	5
j. post-hearing briefs	1	2	3	4	5
k. the authority to provide a written decision with reasons	1	2	3	4	5
l. the authority to grant remedies consistent with statutes	1	2	3	4	5
m. the authority to order remedies beyond a compensatory order (e.g. punitive, cease & desist, attorney fees)	1	2	3	4	5

**Section 5: Non-Union Employment Mediation Experience**

In this section, all the questions refer to the mediation of employment disputes that do not arise under a collective bargaining agreement. Please do not consider any cases where you were an arbitrator and then asked to mediate.

1. In the past 3 years, have you mediated a non-union employment dispute? (Please circle ONE response.)

- 1 Yes  Please go to Question 3      2 No

2. If offered the opportunity, would you agree to mediate a non-union employment dispute? (Please circle ONE response.)

- 1 Yes  Please go to Section 6, Question 1  
 2 No  Please go to Section 6, Question 1  
 3 It depends  Please go to Section 6, Question 1  
 (Please explain \_\_\_\_\_  
 \_\_\_\_\_)

3. In the past 3 years, please estimate how many non-union employment disputes you have mediated: \_\_\_\_\_ number

Of these, please estimate how many involved statutory rights: \_\_\_\_\_ number

4. In the past 3 years, have you been designated for a non-union employment mediation dispute by: (Please circle ALL that apply.)

- 1 private agency referral (e.g. AAA)  
 2 direct appointment of the parties  
 3 court referral  
 4 government tribunal or agency  
 5 being part of a permanent panel  
 6 other (please specify \_\_\_\_\_)

5. In the past 3 years, of all the non-union employment disputes you have mediated, please estimate in what percentage you were selected after the dispute between the employee and employer had arisen: \_\_\_\_\_ %

6. In the past 3 years, how often have your fees (in non-union employment cases) other than cancellation fees, been paid by: (Please circle ONE response for each item.)

	Always	Often	Sometimes	Seldom	Never
a. the employer and employee equally	1	2	3	4	5
b. the employer and employee unequally	1	2	3	4	5
c. the employer alone	1	2	3	4	5
d. the employee alone	1	2	3	4	5
e. other (e.g. a government agency, an industry agency) (please specify _____)	1	2	3	4	5

7. In the past 3 years, in your non-union employment mediation cases, how often: (Please circle ONE response for each item.)

	Always	Often	Sometimes	Seldom	Never
a. has only the employer been represented by legal counsel	1	2	3	4	5
b. has only the employee been represented by legal counsel	1	2	3	4	5
c. have both the employer and employee been represented by legal counsel	1	2	3	4	5
d. have neither the employer nor the employee been represented by legal counsel	1	2	3	4	5

**Section 6: Arbitration Experience Other than Employment**

In this section, all the questions refer to non-employment disputes, which are disputes outside the employment or collective bargaining relationship (e.g. commercial disputes, environmental disputes, etc.).

1. In the past 3 years, have you arbitrated a non-employment dispute to decision? (Please circle ONE response.)

- 1 Yes  Please go to Question 3      2 No

2. If offered the opportunity, would you accept a non-employment arbitration case? (Please circle ONE response.)

- 1 Yes  Please go to Section 7, Question 1  
 2 No  Please go to Section 7, Question 1  
 3 It depends  Please go to Section 7, Question 1  
 (Please explain \_\_\_\_\_  
 \_\_\_\_\_)

3. In the past 3 years, please estimate how many non-employment cases you have arbitrated to decision:  
                     number

4. In the past 3 years, in which of the following dispute areas did you serve as an arbitrator? (Please circle ALL that apply.)

- |   |   |    |                              |
|---|---|----|------------------------------|
| 1 | Commercial/Contract Disputes              | 9  | Real Estate Disputes         |
| 2 | Financial Reorganization/Workout Disputes | 10 | Construction Disputes        |
| 3 | Consumer Rights Disputes                  | 11 | Family Disputes              |
| 4 | Corporate Finance Disputes                | 12 | Community Disputes           |
| 5 | Environmental Disputes                    | 13 | Health Care Disputes         |
| 6 | Intellectual Property Disputes            | 14 | Securities Disputes          |
| 7 | Personal Injury Disputes                  | 15 | Landlord/Tenant Disputes     |
| 8 | Product Liability Disputes                | 16 | Other (please specify _____) |

5. In the past 3 years, have you been designated for a non-employment arbitration case by: (Please circle ALL that apply)

- |   |                                    |   |                                 |
|---|------------------------------------|---|---------------------------------|
| 1 | private agency referral (e.g. AAA) | 4 | government tribunal or agency   |
| 2 | direct appointment of the parties  | 5 | being part of a permanent panel |
| 3 | court referral                     | 6 | other (please specify _____)    |

6. In the past 3 years, how often have your fees (in non-employment arbitration cases), other than cancellation fees, been paid by: (Please circle ONE response for each item)

	Always	Often	Sometimes	Seldom	Never
a. all parties equally	1	2	3	4	5
b. all parties unequally	1	2	3	4	5
c. the loser	1	2	3	4	5
d. one party alone	1	2	3	4	5
e. a government agency	1	2	3	4	5
f. an industry agency	1	2	3	4	5
g. pro-bono (no fees paid)	1	2	3	4	5
h. other	1	2	3	4	5

(please specify \_\_\_\_\_)

7. In the past 3 years, in your non-employment arbitration cases, how often have: (Please circle ONE response for each item)

	Always	Often	Sometimes	Seldom	Never
a. some, but not all parties been represented by legal counsel	1	2	3	4	5
b. all the parties been represented by legal counsel	1	2	3	4	5
c. none of the parties been represented by legal counsel	1	2	3	4	5

8. In the past 3 years, did you decline a non-employment arbitration case because of perceived unfairness of procedures? (Please circle ONE response.)

- 1      Yes      2      No

9. In the past 3 years, have you sought to have procedures in a non-employment arbitration case amended for due process reasons as a condition of service? (Please circle ONE response.)

- 1      Yes      2      No

10. In the past 3 years, in your non-employment arbitration cases, have you ever heard a case where you did not have: (Please circle ALL that apply)

- 1 subpoena power
- 2 the authority to administer oaths
- 3 the authority to order production of documents
- 4 the authority to conduct pre-hearing discovery
- 5 the authority to provide a decision with reasons
- 6 the authority to provide a decision without reasons
- 7 access to a court reporter
- 8 access to a pre-hearing conference
- 9 post-hearing briefs
- 10 other panel members
- 11 the authority to order remedies beyond a compensatory order (e.g. punitive, cease & desist, attorney fees)

11. On a scale of 1 to 5, where 1 is very important and 5 is not important at all, how important is it to you in your non-employment arbitration cases to have: (Please circle one response for each option)

	Very important				Not important at all
a. a neutrally-administered panel	1	2	3	4	5
b. subpoena power	1	2	3	4	5
c. access to a court reporter	1	2	3	4	5
d. access to a pre-hearing conference	1	2	3	4	5
e. the authority to order production of documents	1	2	3	4	5
f. the right of representation for the parties	1	2	3	4	5
g. the right of deposition	1	2	3	4	5
h. the right of discovery	1	2	3	4	5
i. the authority to administer oaths	1	2	3	4	5
j. post-hearing briefs	1	2	3	4	5
k. the authority to provide a written decision with reasons	1	2	3	4	5
l. the authority to grant remedies consistent with statutes	1	2	3	4	5
m. the authority to order remedies beyond a compensatory order (e.g. punitive, cease & desist, attorney fees)	1	2	3	4	5

### Section 7: Mediation Experience Other than Employment

In this section, all the questions refer to non-employment disputes, which are disputes outside the employment or collective bargaining relationship (e.g. commercial disputes, environmental disputes, etc.). Please do not consider any cases where you were an arbitrator and then asked to mediate.

1. In the past 3 years, have you mediated a dispute that was not employment related? (Please circle ONE response.)

- 1      Yes  Please go to Question 3                      2      No

2. If offered the opportunity, would you accept a non-employment mediation case? (Please circle ONE response.)

- 1      Yes  Please go to Section 8, Question 1  
 2      No  Please go to Section 8, Question 1  
 3      It depends  Please go to Section 8, Question 1  
 (Please explain \_\_\_\_\_)

3. In the past 3 years, please estimate how many non-employment cases you have mediated:  
 \_\_\_\_\_ number

4. In the past 3 years, in which of the following non-employment dispute areas did you serve as a mediator?  
 (Please circle ALL that apply)

- |  |                                   |
|--|-----------------------------------|
| 1    Commercial/Contract Disputes              | 9    Real Estate Disputes         |
| 2    Financial Reorganization/Workout Disputes | 10   Construction Disputes        |
| 3    Consumer Rights Disputes                  | 11   Family Disputes              |
| 4    Corporate Finance Disputes                | 12   Community Disputes           |
| 5    Environmental Disputes                    | 13   Health Care Disputes         |
| 6    Intellectual Property Disputes            | 14   Securities Disputes          |
| 7    Personal Injury Disputes                  | 15   Landlord/Tenant Disputes     |
| 8    Product Liability Disputes                | 16   Other (please specify _____) |

5. In the past 3 years, have you been designated for a non-employment case by: (Please circle ALL that apply)

- 1      private agency referral (e.g. AAA)  
 2      direct appointment of the parties  
 3      court referral  
 4      government tribunal or agency  
 5      being part of a permanent panel  
 6      other (please specify \_\_\_\_\_)

6. In the past 3 years, how often have your fees (in non-employment mediation cases), other than cancellation fees, been paid by: (Please circle ONE response for each item.)

	Always	Often	Sometimes	Seldom	Never
a. all parties equally	1	2	3	4	5
b. all parties unequally	1	2	3	4	5
c. one party alone	1	2	3	4	5
d. a government agency	1	2	3	4	5
e. an industry agency	1	2	3	4	5
f. pro-bono (no fees paid)	1	2	3	4	5
g. other	1	2	3	4	5
(please specify _____)					

### Section 8: Attitudes/Training

1. On a scale of 1 to 5, where 1 is very familiar and 5 is not familiar at all, how familiar are you with the Due Process Protocol? (Please circle ONE response)

Very Familiar				Not familiar at all	
1	2	3	4	5	

2. In general, do you agree or disagree that if the fees are paid entirely by only one party, the arbitration process is compromised? (Please circle ONE response)

1	Strongly Disagree
2	Disagree
3	Neither Agree Nor Disagree
4	Agree
5	Strongly Agree

Please explain \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

3. When you serve as an arbitrator under a collective bargaining agreement, do you disclose to the union any non-collective bargaining arbitration or mediation cases that you have conducted with the same employer? (Please circle ONE response.)

1	Always	2	Often	3	Sometimes	4	Seldom	5	Never	7	Not Applicable
---	--------	---	-------	---	-----------	---	--------	---	-------	---	----------------

4. When you serve as a neutral in a multi-party dispute, do you disclose to each of the parties to the dispute your previous relationships with all of the other parties? (Please circle ONE response.)

1	Always	2	Often	3	Sometimes	4	Seldom	5	Never	7	Not Applicable
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5. As a mediator, how often do you make settlement recommendations to the parties? (Please circle ONE response)

1	Always	2	Often	3	Sometimes	4	Seldom	5	Never	7	Not Applicable
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6. As an arbitrator, how often do you meet with the parties separately to mediate settlements? (Please circle ONE response)

1	Always	2	Often	3	Sometimes	4	Seldom	5	Never	7	Not Applicable
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7. Have you ever served as a mediator or arbitrator in a dispute that required you to have knowledge or apply any of the following statutes? (Please circle ALL that apply)

1	Title VII of the Equal Employment Opportunity Act
2	Age Discrimination in Employment Act
3	Americans with Disabilities Act
4	Occupational Safety & Health Act
5	Family and Medical Leave Act
6	Any whistle-blower statute
7	Employment Standards Legislation (e.g. Fair Labor Standards Act, etc.)
8	Human Rights Code
9	Canadian Charter of Rights
10	Federal/State or Provincial Labor Relations Statues
11	Other (please specify _____)

8. Since becoming an arbitrator or mediator, have you participated in a formal training program that lasted a day or longer in the following statutes? (Please check ALL that apply)

	Received training	Provided instruction
a. Title VII of the Equal Employment Opportunity Act	<input type="checkbox"/>	<input type="checkbox"/>
b. Age Discrimination in Employment Act	<input type="checkbox"/>	<input type="checkbox"/>
c. Americans with Disabilities Act	<input type="checkbox"/>	<input type="checkbox"/>
d. Occupational Safety & Health Act	<input type="checkbox"/>	<input type="checkbox"/>
e. Family and Medical Leave Act	<input type="checkbox"/>	<input type="checkbox"/>
f. Any whistle-blower statute	<input type="checkbox"/>	<input type="checkbox"/>
g. Employment Standards Legislation (e.g. Fair Labor Standards Act, etc.)	<input type="checkbox"/>	<input type="checkbox"/>
h. Human Rights Code	<input type="checkbox"/>	<input type="checkbox"/>
i. Canadian Charter of Rights	<input type="checkbox"/>	<input type="checkbox"/>
j. Federal/State or Provincial Labor Relations Statues	<input type="checkbox"/>	<input type="checkbox"/>
k. Other (please specify _____)	<input type="checkbox"/>	<input type="checkbox"/>

9. From the following list, select three statutes in order of priority in which you would like to receive additional training: (Please write ONE number for each priority.)

- 1 Title VII of the Equal Employment Opportunity Act
  - 2 Age Discrimination in Employment Act
  - 3 Americans with Disabilities Act
  - 4 Occupational Safety & Health Act
  - 5 Family and Medical Leave Act
  - 6 Any whistle-blower statute
  - 7 Employment Standards Legislation (e.g. Fair Labor Standards Act, etc.)
  - 8 Human Rights Code
  - 9 Canadian Charter of Rights
  - 10 Federal/State or Provincial Labor Relations Statues
  - 11 Other (please specify \_\_\_\_\_)
- \_\_\_\_\_ 1st priority      \_\_\_\_\_ 2nd priority      \_\_\_\_\_ 3rd priority

### Section 9: Personal Background

1. What is the highest degree you have completed? (Please circle ONE response)
 

1 High School Diploma	5 Masters Degree (MA, MS, MBA)
2 GED	6 Law Degree
3 Associates Degree (AA, AS)	7 Medical Degree (MD, DDS, DVM)
4 Bachelors Degree (BA, BS, AB)	8 Doctorate
2. What year did you complete your highest degree? 19\_\_\_\_\_
3. What is your age? \_\_\_\_\_ years
4. What is your race or ethnicity? (Please circle ONE response)
  - 1 European-North American/White (Non-Hispanic)
  - 2 African-North American or Black (Non-Hispanic)
  - 3 European-North American/White (Hispanic)
  - 4 African-North American or Black (Hispanic)
  - 5 Native North American
  - 6 Asian, Pacific Islander, or Indian Subcontinent
  - 7 Multi-Ethnic \_\_\_\_\_
  - 8 Other \_\_\_\_\_
5. What is your gender? (Please circle ONE response)
 

1 Male	2 Female
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6. Have you ever served: (Please circle ALL that apply)
 

1 as a fact-finder	4 as a neutral in a mini-trial
2 on a peer review panel	5 as a final offer selector
3 as an ombudsperson	6 as a mediator-arbitrator

7. Do you work full-time (in any work activity)? (Please circle ONE response.)

1 Yes 2 No

8. How many years have you served as an arbitrator? \_\_\_\_\_ years

9. How many years have you served as a mediator? \_\_\_\_\_ years

10. How many years have you been a member of the National Academy of Arbitrators? \_\_\_\_\_ years

11. Looking back at 1998, please estimate what percentage of your earned income was generated by your work: (Please do not include any investment or retirement income)

- a. as a neutral \_\_\_\_\_%
- b. from a college or university \_\_\_\_\_%
- c. from the practice of law \_\_\_\_\_%
- d. as an author or writer \_\_\_\_\_%
- e. as a trainer \_\_\_\_\_%
- f. other (please specify \_\_\_\_\_) \_\_\_\_\_%

12. In the last year, have you served as a mediator or arbitrator in any dispute in which you did not charge any fees (i.e. you worked pro-bono?)

1 Yes 2 No

	Rate	Is this an hourly or daily rate?		Is this in U.S. or Canadian dollars?		Is this a block fee?	
		Hourly	Daily	U.S.\$	Can.\$	Yes	No
		1	2	1	2	1	2
13. In the last year, apart from any pro-bono work, what is the lowest fee rate you have charged as a mediator?	_____	1	2	1	2	1	2
14. In the last year, what is the highest fee rate you have charged as a mediator?	_____	1	2	1	2	1	2
15. In the last year, apart from any pro-bono work, what is the lowest fee rate you have charged as an arbitrator?	_____	1	2	1	2	1	2
16. In the last year, what is the highest fee rate you have charged as an arbitrator?	_____	1	2	1	2	1	2

Please add any additional comments on any of the questions or the state of your profession in general:

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Thank you for your participation!

Please fax the survey back to:  
1-607-255-7118

If you have any questions, please call toll-free  
1-888-367-8404

# Due Process Protocol

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## for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship

The following protocol is offered by the undersigned individuals, members of the Task Force on Alternative Dispute Resolution in Employment, as a means of providing due process in the resolution by mediation and binding arbitration of employment disputes involving statutory rights. The signatories were designated by their respective organizations, but the protocol reflects their personal views and should not be construed as representing the policy of the designating organizations.

### Genesis

This Task Force was created by individuals from diverse organizations involved in labor and employment law to examine questions of due process arising out of the use of mediation and arbitration for resolving employment disputes. In this protocol we confine ourselves to statutory disputes.

The members of the Task Force felt that mediation and arbitration of statutory disputes conducted under proper due process safeguards should be encouraged in order to provide expeditious, accessible, inexpensive and fair private enforcement of statutory employment disputes for the 100,000,000 members of the workforce who might not otherwise have ready, effective access to administrative or judicial relief. They also hope that such a system will serve to reduce the delays which now arise out of the huge backlog of cases pending before administrative agencies and courts and that it will help forestall an even greater number of such cases.

### A. Pre or Post Dispute Arbitration

The Task Force recognizes the dilemma inherent in the timing of an agreement to mediate and/or arbitrate statutory disputes. It did not achieve consensus on this difficult issue. The views in this spectrum are set forth randomly, as follows:

Employers should be able to create mediation and/or arbitration systems to resolve statutory claims, but any agreement to mediate and/or arbitrate disputes should be informed, voluntary, and not a condition of initial or continued employment.

Employers should have the right to insist on an agreement to mediate and/or arbitrate statutory disputes as a condition of initial or continued employment. Postponing such an agreement until a dispute actually arises, when there will likely exist a stronger re-disposition to litigate, will result in very few agreements to mediate and/or arbitrate, thus negating the likelihood of effectively utilizing alternative dispute resolution and overcoming the problems of administrative and judicial delays which now plague the system.

Employees should not be permitted to waive their right to judicial relief of statutory claims arising out of the employment relationship for any reason.

Employers should be able to create mediation and/or arbitration systems to resolve statutory claims, but the decision to mediate and/or arbitrate individual cases should not be made until after the dispute arises.

The Task Force takes no position on the timing of agreements to mediate and/or arbitrate statutory employment disputes, though it agrees that such agreements be knowingly made. The focus of this protocol is on standards of exemplary due process.

### B. Right of Representation

#### 1. Choice of Representative

Employees considering the use of or, in fact, utilizing mediation and/or arbitration procedures should have the right to be represented by a spokesperson of their own choosing. The mediation and arbitration procedure should so specify and should include reference to institutions which might offer assistance, such as bar associations, legal service associations, civil rights organizations, trade unions, etc.

#### 2. Fees for Representation

The amount and method of payment for representation should be determined between the claimant and the representative. We recommend, however, a number of existing systems which provide employer reimbursement of at least a portion of the employee's attorney fees, especially for lower paid employees. The arbitrator should have the authority to provide for fee reimbursement, in whole or in part,



as part of the remedy in accordance with applicable law or in the interests of justice.

### 3. Access to Information

One of the advantages of arbitration is that there is usually less time and money spent in pre-trial discovery. Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to mediation and/or arbitration of their claims. The employees' representative should also have reasonable pre-hearing and hearing access to all such information and documentation.

Necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available. We also recommend that prior to selection of an arbitrator, each side should be provided with the names, addresses and phone numbers of the representatives of the parties in that arbitrator's six most recent cases to aid them in selection.

## C. Mediator and Arbitrator Qualification

### 1. Roster Membership

Mediators and arbitrators selected for such cases should have skill in the conduct of hearings, knowledge of the statutory issues at stake in the dispute, and familiarity with the workplace and employment environment. The roster of available mediators and arbitrators should be established on a non-discriminatory basis, diverse by gender, ethnicity, background, experience, etc. to satisfy the parties that their interest and objectives will be respected and fully considered.

Our recommendation is for selection of impartial arbitrators and mediators. We recognize the right of employers and employees to jointly select as mediator and/or arbitrator one in whom both parties have requisite trust, even though not possessing the qualifications here recommended, as most promising to bring finality and to withstand judicial scrutiny. The existing cadre of labor and employment mediators and arbitrators, some lawyers, some not, although skilled in conducting hearings and familiar with the employment milieu is unlikely, without special training, to consistently possess knowledge of the statutory environment in which these disputes arise and of the characteristics of the non-union workplace.

There is a manifest need for mediators and arbitrators with expertise in statutory requirements in the employment field who may, without special training, lack experience in the employment area and in the conduct of arbitration hearings and mediation sessions. Reexamination of rostering eligibility by designating agencies, such as the American Arbitration Association, may permit the expedited inclusion in the pool of this most valuable source of expertise.

The roster of arbitrators and mediators should contain representatives with all such skills in order to meet the diverse needs of this caseload.

Regardless of their prior experience, mediators and arbitrators on the roster must be independent of bias toward either party. They should reject cases if they believe the procedure lacks requisite due process.

### 2. Training

The creation of a roster containing the foregoing qualifications dictates the development of a training program to educate existing and potential labor and employment mediators and arbitrators as to the statutes, including substantive, procedural and remedial issues to be confronted and to train experts in the statutes as to employer procedures governing the employment relationship as well as due process and fairness in the conduct and control of arbitration hearings and mediation sessions.

Training in the statutory issues should be provided by the government agencies, bar associations, academic institutions, etc., administered perhaps by the designating agency, such as the AAA, at various locations throughout the country. Such training should be updated periodically and be required of all mediators and arbitrators. Training in the conduct of mediation and arbitration could be provided by a mentoring program with experienced panelists.

Successful completion of such training would be reflected in the resume or panel cards of the arbitrators supplied to the parties for their selection process.

### 3. Panel Selection

Upon request of the parties, the designating agency should utilize a list procedure such as that of the AAA or select a panel composed of an odd number of mediators and arbitrators from its roster or pool. The panel cards for such individuals should be submitted to the parties for their perusal prior to alternate striking of the names on the list, resulting in the designation of the remaining mediator and/or arbitrator.

The selection process could empower the designating agency to appoint a mediator and/or arbitrator if the striking procedure is unacceptable or unsuccessful. As noted above, subject to the consent of the parties, the designating agency should provide the names of the parties and their representatives in recent cases decided by the listed arbitrators.

#### 4. Conflicts of Interest

The mediator and arbitrator for a case has a duty to disclose any relationship which might reasonably constitute or be perceived as a conflict of interest. The designated mediator and/or arbitrator should be required to sign an oath provided by the designating agency, if any, affirming the absence of such present or preexisting ties.

#### 5. Authority of the Arbitrator

The arbitrator should be bound by applicable agreements, statutes, regulations and rules of procedure of the designating agency, including the authority to determine the time and place of the hearing, permit reasonable discovery, issue subpoenas, decide arbitrability issues, preserve order and privacy in the hearings, rule on evidentiary matters, determine the close of the hearing and procedures for post-hearing submissions, and issue an award resolving the submitted dispute.

The arbitrator should be empowered to award whatever relief would be available in court under the law. The arbitrator should issue an opinion and award setting forth a summary of the issues, including the type(s) of dispute(s), the damages and/or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim(s).

#### 6. Compensation of the Mediator and Arbitrator

Impartiality is best assured by the parties sharing the fees and expenses of the mediator and arbitrator. In cases where the economic condition of a party does not permit equal sharing, the parties should make mutually acceptable arrangements to achieve that goal if at all possible. In the absence of such agreement, the arbitrator should determine allocation of fees. The designating agency, by negotiating the parties share of costs and collecting such fees, might be able to reduce the bias potential of disparate contributions by forwarding payment to the mediator and/or arbitrator without disclosing the parties share therein.

### **D. Scope of Review**

The arbitrator's award should be final and binding and the scope of review should be limited.

Dated: May 9, 1995

Christopher A. Barreca, Co-Chair  
*Partner, Paul, Hastings, Janofsky & Walker  
Rep., Council of Labor & Employment Section,  
American Bar Association*

Max Zimny, Co-Chair  
*General Counsel, International Ladies' Garment  
Workers' Union Association  
Rep., Council of Labor & Employment Section,  
American Bar Association*

Arnold Zack, Co-Chair  
*President, Nat. Academy of Arbitrators*

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*President, National Employment Lawyers Association*

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*Director, Workplace Rights Project, American Civil  
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## About the Authors

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*Michel Picher* has been the permanent arbitrator of the Canadian Railway Office of Arbitration since 1986. A graduate of the Harvard Law School, he was a professor of law at the University of Ottawa and served as a vice-chairman of the Ontario Labour Relations Board from 1976 to 1982. In addition to the CROA, he has arbitrated extensively in the railway shopcrafts.

A fluently bilingual native of Ottawa, Picher now resides in Toronto. His arbitration experience includes extensive work in broadcasting, education, public utilities, and health care as well as police and firefighters disputes. A former salary arbitrator for major league baseball, he is currently on the panel of salary arbitration of the National Hockey League and the NHLPA. He is a member of the board of governors of the National Academy of Arbitrators, as well as being a member of the Ontario Labour Management Arbitrators' Association and the Conférence des Arbitres du Québec. He is a frequent public speaker on arbitration and mediation and has published a number of articles on collective bargaining and issues related to labor arbitration.

*Ronald L. Seeber* is Executive Director of the Cornell/PERC Institute on Conflict Resolution. He is also Associate Professor and Associate Dean at the New York State School of Industrial and Labor Relations at Cornell University. His research activities have covered a wide range of topics in the field of labor-management relations. All reflect his interest in union and management strategies in the workplace and their connection to collective bargaining in the United States. He has also been an active participant in the professional meetings of the Academy of Management, the Industrial Relations Research Association (IRRA), and the University and College Labor Education Association.

Seeber has published extensively in scholarly academic journals. His most recent book, coauthored with Lois Gray, is *Under the Stars: Essays on Labor Relations in Arts and Entertainment* (Cornell University Press, 1995). He is also the coeditor of *Restoring the Promise of American Labor Law* (Cornell University Press, 1994) and *Research in the Sociology of Organizations: Unions and Labor Relations* (JAI Press, 1993). Most recently, he has been involved in two studies of alternative dispute resolution, one on the use of ADR by American corporations and the other a pilot project on ADR in Workers' Compensation in New York.

*David B. Lipsky* is Professor of Industrial and Labor Relations and Director of the Institute on Conflict Resolution at Cornell University. Lipsky served as dean of the School of Industrial and Labor Relations from 1988 until 1997. Between 1997 and 1999 he established and served as the first director of Cornell's Office of Distance Learning. He has been a member of the Cornell University faculty since 1969. He received his B.S. in 1961 from the School of Industrial and Labor Relations at Cornell and his Ph.D. in economics from M.I.T. in 1967.

In his research and teaching activities he primarily focuses on negotiation, conflict resolution, and collective bargaining. He is the author of over forty articles and the author or editor of eleven books, including *Collective Bargaining in American Industry: Contemporary Perspectives and Future Directions* (Lexington Books, 1987) and *Strikers and Subsidies: The Influence of Government Transfer Programs on Strike Activity* (W. E. Upjohn Institute, 1989). He is a member of the Board of Directors of the Industrial Relations Research Association and the New American Realities Committee of the National Policy Association. He was also a member of the inaugural class of the National Academy of Human Resources.



# The Cornell/PERC Institute on Conflict Resolution

The Cornell/PERC Institute on Conflict Resolution, founded in 1996, is a partnership between Cornell University's School of Industrial and Labor Relations and the Foundation for the Prevention and Early Resolution of Conflict (PERC). The mission of the institute is to educate practitioners, users, teachers, and students in the field of conflict resolution through research, collection and dissemination of information, assistance to public and private organizations, curriculum development, and training programs. The institute focuses on all areas of conflict prevention and resolution, including those relating to business, environment, communities, civil rights, and health care.

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