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The Arbitration Profession in Transition: Preliminary Results From a Survey of the National Academy of Arbitrators

Abstract

[Excerpt] In recent years, there has been a dramatic increase in the arbitration and mediation of employment-related disputes. This increase has been part of a larger shift from reliance on litigation and 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 been granted a long list of rights and protections included in a variety of laws, ranging from antidiscrimination 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 largely the consequence of the high costs and long delays associated with the use of administrative agencies and the court system to resolve disputes arising under these various statutes.

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 their collective bargaining agreements. In other union workplaces, many, if not most, statutory claims are handled outside the collective bargaining arena. Employees in many such organizations pursue their statutory 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.

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 work force that is unionized has been steadily declining for over 40 years and currently stands at about 14 percent. Although the Canadian labor movement has not suffered as steep a decline as in the United States, a similar trend is apparent there. The growth of employment ADR in the nonunion sector is largely the consequence of employer attempts to avoid the high costs and long delays associated with the use of judicial and administrative means to resolve disputes. Of course, some nonunion employers are also motivated by a desire to provide their employees with fair and equitable dispute resolution procedures.

Keywords

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

Comments

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APPENDIX B

THE ARBITRATION PROFESSION IN TRANSITION: PRELIMINARY RESULTS FROM A SURVEY OF THE NATIONAL ACADEMY OF ARBITRATORS

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The Rise of ADR: The Growing Use of Arbitration and Mediation in Employment Disputes

In recent years, there has been a dramatic increase in the arbitration and mediation of employment-related disputes. This increase has been part of a larger shift from reliance on litigation and 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 been granted a long list of rights and protections included in a variety of laws, ranging from antidiscrimination 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 largely the consequence of the high costs and long

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This paper is based on a presentation by the authors at the Annual Meeting of the National Academy of Arbitrators in New Orleans, Louisiana, June 3, 1999.

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delays associated with the use of administrative agencies and the court system to resolve disputes arising under these various statutes.

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 their collective bargaining agreements. In other union workplaces, many, if not most, statutory claims are handled outside the collective bargaining arena. Employees in many such organizations pursue their statutory 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.

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 work force that is unionized has been steadily declining for over 40 years and currently stands at about 14 percent. Although the Canadian labor movement has not suffered as steep a decline as in the United States, a similar trend is apparent there. The growth of employment ADR in the nonunion sector is largely the consequence of employer attempts to avoid the high costs and long delays associated with the use of judicial and administrative means to resolve disputes. Of course, some nonunion employers are also motivated by a desire to provide their employees with fair and equitable dispute resolution procedures.

The trend toward the use of ADR in employment disputes has been approved by courts in both the United States and Canada. Most notably, in *Gilmer v. Interstate/Johnson Lane Corp.*,¹ 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.² Since *Gilmer*, most federal appellate courts in the United States have applied the principle in that case

¹500 U.S. 20, 55 FEP Cases 1116 (1991).

²29 U.S.C. §§621 et seq. (1967).

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—to agree to use arbitration to resolve statutory complaints rather than resorting to the courts. This form of *mandatory predispute arbitration* has proven to be very controversial. A federal commission appointed by the Clinton Administration and headed by former Secretary of Labor John T. Dunlop condemned its use.³ On the other hand, defenders of such agreements argue that, if properly designed, both employers and employees have the advantage of a fast, fair, and inexpensive means of resolving complaints.

The Response of the Academy to the Rise of ADR

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.⁴ 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 Federal Mediation and Conciliation Service, and the American Civil Liberties Union. The task force debated the question of mandatory predispute arbitration but did not achieve consensus on this difficult issue,⁵ 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,”⁶ 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”

³Commission on the Future of Worker-Management Relations, Fact-Finding Report (U.S. Dept of Labor & U.S. Dept of Commerce, May 1994), at 25–33 [hereinafter referred to as the Dunlop Commission].

⁴Appendix B: *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, in *Arbitration 1995: New Challenges and Expanding Responsibilities*, Proceedings of the 48th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1996), 298.

⁵*Id.* at 299.

⁶*Id.*

employee "access" to "all information reasonably relevant to mediation and/or arbitration of their claims."⁷ The Due Process Protocol also calls for the use of qualified and impartial arbitrators and mediators drawn from rosters that are diversified on the basis of gender, ethnicity, background, and experience. To guarantee an adequate supply of qualified neutrals, the Protocol calls for "the development of a training program to educate existing and potential labor and employment mediators and arbitrators."⁸

The Need for a Survey

Although the Academy has taken these significant steps, it has acted on the basis of only anecdotal information about the extent and nature of the actual professional activities and goals of its members. In unionized settings, for example, there has been to date no empirical study on the frequency with which arbitrators are called upon to adjudicate statutory rights under the terms of collective bargaining agreements. We have historically lacked data on the frequency of such cases, the types of statutory rights invoked, the procedural and evidentiary rules applied in such cases, and the scope of remedial jurisdiction exercised by arbitrators in such disputes. To what extent do the parties to collective bargaining agreements vest jurisdiction in labor arbitrators in respect to employment-related statutory rights?

Of equal significance to the Academy and to the practice of dispute resolution generally, is the absence of information regarding the number of Academy members who have been serving as arbitrators or mediators in nonunion employment disputes. We have known nothing whatsoever of the extent to which Academy members—arguably the most important group of arbitrators in North America—have moved into the burgeoning field of ADR. How many labor arbitrators have undertaken the arbitration or mediation of nonlabor 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 nonlabor areas, what due process standards and procedural safeguards do they apply?

⁷*Id.* at 300.

⁸*Id.* at 301.

The absence of empirical knowledge on these critical questions has hampered the Academy in making decisions with respect to its current policies and future directions. The Academy, for example, has had no meaningful benchmark data for designing its training initiatives nor has it had any baseline data for assessing the future growth or decline of its members' involvement in nonlabor arbitration or mediation. There has been to date no information on the extent to which Academy members apply the standards enumerated in the Due Process Protocol and the Academy's own guidelines. By signing the Due Process Protocol, however, the Academy has pledged itself to vigilance and responsibility concerning the activities of its members who mediate and arbitrate employment-related disputes. There can be no informed vigilance, however, in the absence of a base of knowledge.

Survey Methodology

Accordingly, in 1998 the Academy decided to survey its members about these and related issues. It assigned responsibility for the survey to its Committee on Employment-Related Dispute Resolution (ERDR), chaired by Michel G. Picher, the senior author of this paper. 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. It consisted 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.

The sample for the survey was the entire membership of the National Academy of Arbitrators. As of January 1999, the Academy had a total of 599 members. Not all Academy members, however, are actively engaged in the practice of arbitration. Eligibility for inclusion in the survey was determined by whether the Academy respondent had either arbitrated or mediated any type of case during the years 1996–1998. Respondents were offered three options: (1) complete a mailed questionnaire and return it by mail, (2) participate in a telephone survey using a CATI (computer-assisted telephone interviewing) system, or (3) complete a faxed questionnaire.

Figure 1 summarizes responses to the survey. Of the 599 Academy members, 64 (11 percent) were deemed ineligible because

Figure 1. Survey Response Summary.

Academy
Membership = 599

64 members have
been inactive over the
past 4 years



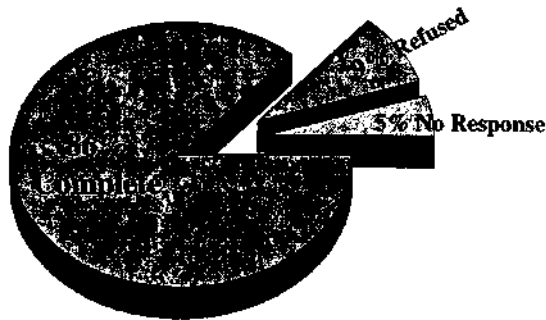
Source: National Academy of Arbitrators: *Survey of Professional Practice*, Picher/Seeber/Lipsky, June 3, 1999.

they had not arbitrated or mediated in the previous 3 years. Another 25 Academy members did not respond to the survey and could not otherwise be reached. Forty-eight Academy members refused to participate in the survey. Completed surveys were obtained from 462 Academy members. That figure represents 77 percent of the total membership and, as Figure 2 shows, 86 percent of the members deemed eligible to participate in the survey. Of those completing the survey, 274 did so by telephone interview and 188 by either conventional mail or fax. The average length of the telephone interviews 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.

A Profile of Academy Members

Age and Full-Time Status

The average Academy member is 63 years old and earned 76 percent of his or her income from work as a neutral during 1996–1998. 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.

Figure 2. Percent of Those Eligible to Respond.*Of those eligible to respond (N = 534) . . .*

Gender and Race

Figures 3 through 6 show the distribution of Academy members by gender, education, and race. Only 12 percent of Academy members are women (Figure 4) and 6 percent are nonwhite (Figure 5). On average, the female members of the Academy are younger (mean age of 56) than the male members (mean age of 64).

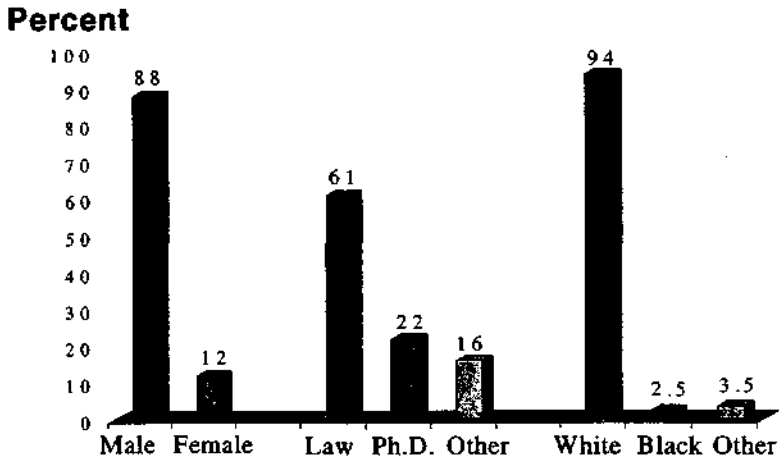
Education

As Figures 3 and 6 show, 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.

Experience as a neutral

The average member of the Academy has served as an arbitrator for 26 years and the range for this variable is from 7 to 59 years. The average Academy member has also served as a mediator for 15 years. The average respondent has been a member of the Academy for 16 years. A handful have been members since the Academy's founding in 1947.

Figure 3. Demographic Characteristics of Academy Members.



Source: National Academy of Arbitrators: *Survey of Professional Practice*, Picher/Seeber/Lipsky, June 3, 1999.

Figure 4. Academy Members by Gender.

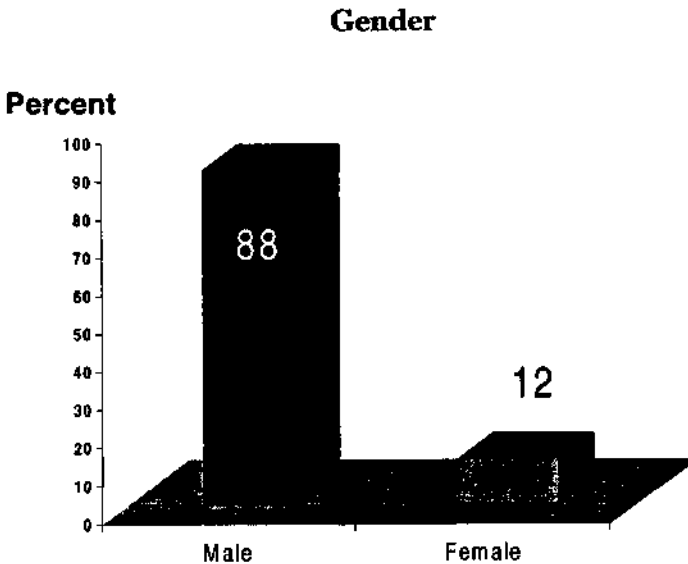


Figure 5. Academy Members by Race.

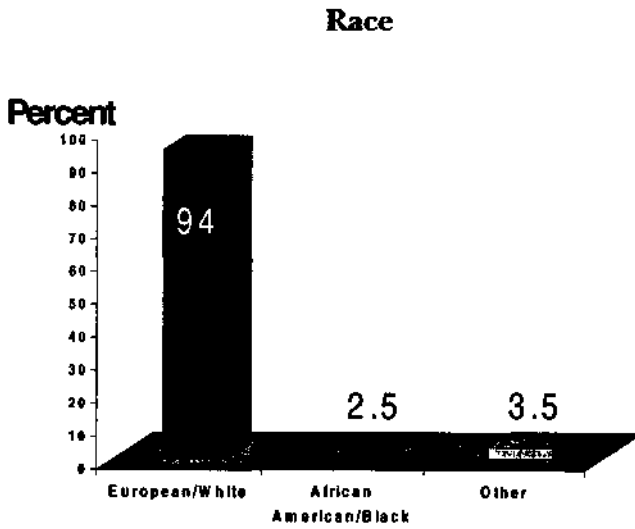
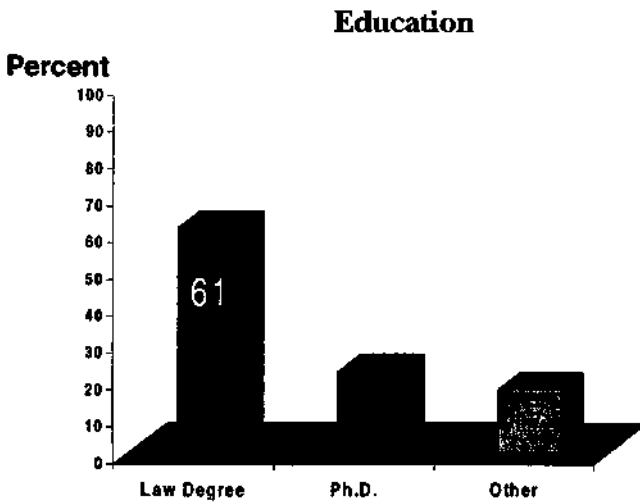


Figure 6. Academy Members by Educational Level.



The Extent and Nature of Academy Members' Caseloads Inside and Outside Labor-Management Relations

All members of the Academy, of course, have the core of their practice in labor-management arbitration. Academy members' experiences are summarized in Figure 7. Our findings imply that the 462 respondents to our survey arbitrated over 73,000 cases of all kinds during the period 1996–1998. 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 labor-management dispute during the preceding 3 years. The *average* member of the Academy arbitrated 160 cases and mediated 15 during the period 1996–1998. The average yearly caseload of an Academy member would therefore be about 55.

To what extent has the rise of ADR been associated with Academy members moving into the arbitration or mediation of disputes

Figure 7. Academy Members' Professional Experience.

From 1996–1998, Academy members:

served as arbitrators in over 73,000 cases of all kinds

served as mediators in over 7,000 cases of all kinds

Of the Academy members responding to the survey:

82% arbitrated disputes that required them to interpret or apply a statute

49% mediated a labor-management dispute

46% arbitrated a nonunion employment dispute

23% mediated a nonunion employment dispute

25% arbitrated a nonemployment dispute

16% mediated a nonemployment dispute

Source: National Academy of Arbitrators: *Survey of Professional Practice*, Picher/Seeber/Lipsky, June 3, 1999.

outside of the labor-management arena? As Figure 7 shows, our survey suggests 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 1996–1998,

- 46 percent arbitrated a nonunion employment dispute
- 23 percent mediated a nonunion employment dispute
- 25 percent arbitrated a nonemployment dispute
- 16 percent mediated a nonemployment dispute

As Figure 8 shows, however, Academy members who have moved into neutral work outside of labor-management relations had very light caseloads during the 1996–1998 period. On average, they *arbitrated* 5 nonunion employment cases, *mediated* 11 nonunion employment cases, *arbitrated* 9 nonemployment cases (commercial, product liability, etc.), and *mediated* 15 nonemployment cases.

In our survey, we probed those respondents who had not engaged in neutral work outside of labor-management relations to find out under what circumstances, if any, they would accept a nonunion case. Figure 9 summarizes Academy members' attitudes about accepting nonunion arbitration and mediation work. It shows that at least 70 percent of the members would do nonunion mediation and arbitration work if there were acceptable due process protections.

We also asked survey respondents to tell us what types of disputes they had handled outside the labor-management relations and employment arenas. Recall that about 25 percent of the Academy members had arbitrated nonlabor or nonemployment cases and

Figure 8. Members' Experience Outside of Labor-Management Arbitration.

Of those who have:

Arbitrated nonunion employment, they have conducted 5 cases

Mediated nonunion employment, they have conducted 11 cases

Arbitrated nonemployment, they have conducted 9 cases

Mediated nonemployment, they have conducted 15 cases

Figure 9. Members' Attitude About Expanding Practice Outside Collective Bargaining Arbitration.

Strong Desire to Expand Practice Outside Collective Bargaining Arbitration

Of those who have *not* practiced outside labor-management arbitration,

87% *would* accept a nonunion arbitration case

77% *would* accept a nonunion mediation case

73% *would* accept a nonemployment arbitration case

69% *would* accept a nonemployment mediation case

under the *right* circumstances.

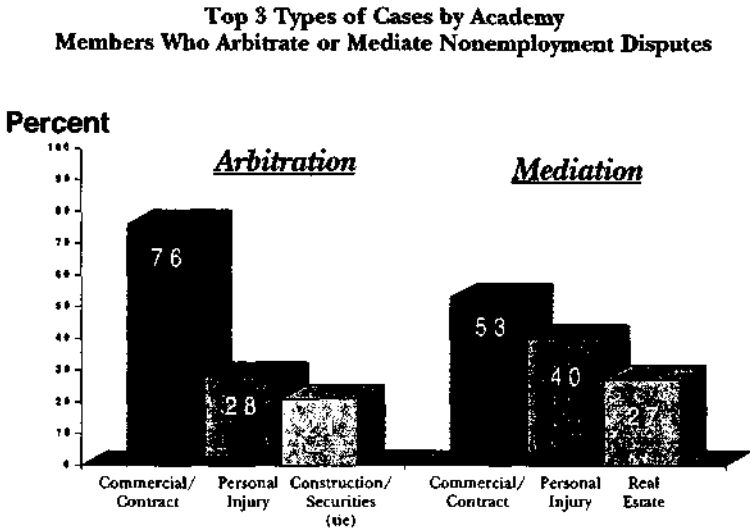
16 percent had mediated such cases. In Figure 10, we observe that the bulk of the work Academy members have accepted outside the labor and employment area is in the commercial category (e.g., 76 percent of the Academy members who have arbitrated a nonemployment case have served in a commercial or contractual dispute). A considerable number of Academy members have also served in personal injury, real estate, construction, and securities cases. On the other hand, very few Academy members have any experience in disputes involving intellectual property, product liability, and corporate finance.

A Practice Typology

As part of our data analysis, we divided Academy respondents into five groups, based on the types of neutral practices that they maintained over the 3-year period, 1996–1998. We found that the type of neutral work performed by individual respondents is significantly different one from another, and that those differences are associated with differences in other behaviors and attitudes.

Recall that we asked Academy members about the various kinds of cases in which they had served as a neutral during the past 3 years. Those six types of cases—labor-management arbitration, labor-management mediation, nonunion employment arbitra-

Figure 10. Types of Nonemployment Disputes Academy Members Arbitrate or Mediate.



Source: National Academy of Arbitrators: *Survey of Professional Practice*, Picher/Seeber/Lipsky, June 3, 1999.

tion, 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 types of practice.

In Table 1 we present the Academy membership allocated into five types of practice, each type constructed on the basis of the nature of the respondent's caseload over the past 3 years. We call the first type of practice "labor-management arbitration only." This group of members has done no work during the past 3 years outside the primary jurisdiction of the Academy, that is, arbitration in unionized employment settings. It represents approximately one-quarter of the respondents to our survey. We label the second group "labor-management relations only." This group of members

Table 1. A Practice Typology

<i>Respondent's Type of Practice</i>	<i>Number of Respondents</i>	<i>Types of Cases</i>					
		<i>Labor- Management Arbitration</i>	<i>Labor- Management Mediation</i>	<i>Nonunion Employment Arbitration</i>	<i>Nonunion Employment Mediation</i>	<i>Nonemploy- ment Arbitration</i>	<i>Nonemploy- ment Mediation</i>
Labor-Management Arbitration	117	X	—	—	—	—	—
Labor-Management Relations Only	58	X	X	—	—	—	—
"Workplace Neutral"	140	X	X	X	X	—	—
Labor-Management Relations and Nonemployment	41	X	X	—	—	X	X
"Multineutral"	99	X	X	X	X	X	X

Note. An "X" in the table indicates respondent accepted this type of case in 1996–1998.

has engaged in both labor-management arbitration and mediation but has not moved into ADR. They represent a smaller percentage (13 percent) of the membership, but are still a sizable minority within the Academy.

The third group of respondents we call "workplace neutrals." This group of Academy members has conducted either nonunion arbitration or mediation in addition to their basic labor-management practice. "Workplace neutrals," however, have not served as neutrals outside the workplace, reporting no nonemployment mediation or arbitration cases. This group is the largest within the Academy—140 members or 31 percent of the respondents to the survey. The fourth practice type consists of Academy members who have accepted both labor-management and nonemployment cases. This group has worked outside the labor-management context, but not in nonunion settings. It is the smallest of the five with only 41 (9 percent) of the members reporting practices that fit this type. The final group we have labeled "multineutrals." Residents in this group have worked not only in the labor-management arena, but also have served as arbitrators or mediators in both nonunion and nonemployment settings. Multineutrals comprise about one-fifth of the Academy membership, with 99 individuals fitting this profile.

When we compared Academy respondents who fell into the category "multineutrals" to respondents who confined their work to labor-management arbitration, we found that multineutrals have been members of the Academy for a significantly shorter length of time, tend to be younger, are more likely to be lawyers, and have different attitudes about due process (being somewhat more flexible). On the other hand, and contrary to our expectations, the proportion of multineutrals who are women is not significantly different from the proportion of women among the members who do only labor-management arbitration. In fact, gender ratios are about the same across all five practice types. The relationship between type of practice and other key variables is a matter we will explore in greater depth in our final report to the Academy.

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. We asked them what was the lowest fee rate they had charged for their work as an arbitrator in the last year; we also asked the highest rate they charged as an arbitrator in the last year. In addition, we asked parallel questions regarding their work as mediators. We subsequently converted all reported rates into daily rates, multiplying the hourly rate by 7.0 hours. We also converted fee rates given in Canadian dollars to U.S. dollars by multiplying Canadian dollars by 0.6507, the exchange rate that prevailed as of December 31, 1998.

In Table 2, the average rates charged by Academy respondents in 1998 are displayed. 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. We speculate that the higher rates charged for mediation are in part a consequence of the fact that the 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 to neutrals in these types of disputes.

We also found that the practice typology that we constructed for Academy members is related to the fees they charged in 1998. This relationship is illustrated in Figure 11. In this figure, fees charged by respondents have been divided into quartiles; for example, 25 percent of the respondents charged more than \$900 a day and 25 percent charged under \$650 a day. It is apparent that multineutrals, for example, charged higher fees than respondents who fall into one of the other practice types. Examine the last column of the figure: 50 percent of multineutrals charged over \$900 a day,

Table 2. Average Daily Rates Charged for Arbitration and Mediation by Academy Respondents in 1998

	<i>Lowest Fee Rate Charged</i>	<i>Highest Fee Rate Charged</i>
Arbitration	\$640	\$ 851
Mediation	\$854	\$1,158

Figure 11. Arbitration Fees by Practice Type.

	<i>Under \$650 per day</i>	<i>\$650-749 per day</i>	<i>\$750-899 per day</i>	<i>Over \$900 per day</i>
L-M Arb Only	39%	23%	21%	17%
L-M Arb & Med	29%	22%	41%	8%
"Workplace Neutral"	23%	23%	27%	27%
L-M and Nonemp	29%	20%	20%	32%
"Multineutral"	14%	13%	23%	50%

compared with 17 percent of the respondents who confined their practice to labor-management arbitration.

The Application of Statutory Rights

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 (82 percent) Academy members in our survey reported that within the past 3 years they had arbitrated a dispute that required them to interpret or apply a statute. They further told us that cases involving statutory claims now constituted about 10 percent of their total labor-management arbitrations. As shown in Figure 12, the bulk of the statutory claims heard by labor-management arbitrators involve the application or interpretation of Title VII of the Civil Rights Act⁹ (78 percent of respondents reported applying this statute), the Americans with Disabilities Act (ADA)¹⁰ (71 percent), and the Family and Medical Leave Act (FMLA)¹¹ (61 percent). Some Canadian arbitrators reported applying the Human Rights Code and the Canadian

⁹Civil Rights Act of 1964, 42 U.S.C. §2000a et seq.

¹⁰42 U.S.C. §§12101-12213 (1994).

¹¹26 U.S.C. §2601 et seq. (1994).

Figure 12. Application of Statutory Rights.

	<i>% Applied Statute</i>	<i>% Received Training</i>	<i>% Provided Training</i>	<i>Priority for Training</i>
<i>Title VII EEO</i>	78	33	25	1
<i>ADA</i>	71	31	20	2
<i>FMLA</i>	61	21	14	3

Charter of Rights. Most of the Academy respondents also reported applying a variety of state, provincial, or local statutes in their labor-management arbitration decisions.

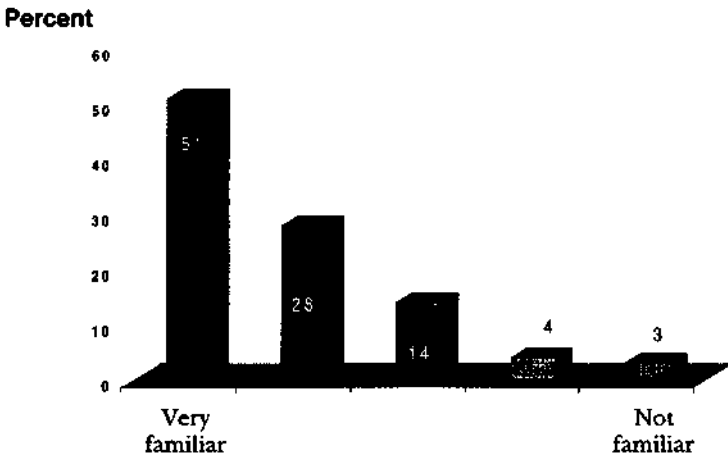
In addition, we asked the respondents (1) whether they had received training in the substance of that statute, or (2) whether they had provided such training. The respondents were also asked for their priorities for training the Academy might sponsor. We recognize that a substantial proportion of Academy members regularly teach in university classrooms or possess expertise useful to training programs on specific statutes. There are, however, fairly significant gaps between columns (2) and (3) in Figure 12, on the one hand, and column (1), on the other. For example, although 78 percent of the respondents have been required to interpret or apply Title VII, only 58 percent have either received or given training on that statute. Presumably, receiving or giving training in a subject suggests contemporary knowledge of that subject. Where do the remaining Academy members acquire their expertise on the statute? Perhaps this gap in knowledge is reflected in the priority respondents placed on receiving training on Title VII, which is shown in the last column of Figure 12. Similar potential gaps between the application and knowledge of statutes are apparent for the ADA and FMLA, as well. Responses to the training priority question may reflect respondents' consciousness of these gaps and provide useful guidance for the Academy in planning future training programs.

Attitudes About Due Process

Familiarity With the Due Process Protocol

Academy members reported strong familiarity with the Due Process Protocol, as demonstrated in Figure 13. When asked to report their familiarity with the Protocol, 79 percent answered either “one” or “two” on a five-point scale, with one being “very familiar” and five being “not familiar at all.” Only 7 percent responded four or five. We were curious about whether those who had a caseload outside labor-management arbitration were more familiar or less familiar with the Protocol. When we examined that question, we found that all groups responded similarly to the question.

Figure 13. Familiarity With the Due Process Protocol.



Source: National Academy of Arbitrators: *Survey of Professional Practice*, Ficher/Seeber/Lipsky, June 3, 1999.

Attitudes About the Source of Fees

Specific aspects of procedural matters outside the unionized world of arbitration merit special attention. For example, we asked about fee practices in unionized arbitration and mediation, in nonunion mediation and arbitration, and in nonemployment arbitration and mediation. 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 labor-management arena. We were able to ask parallel questions for nonunion arbitration and mediation and for nonemployment arbitration and mediation—that is, we were able to ask whether employers and employees split fees equally or, where appropriate, whether all parties split fees equally. Figure 14 reveals some important differences in sources of fees across areas of practice. As one would expect, the dominant practice in labor-management arbitration is for the union and the employer to split the fees equally. Almost all Academy members (98 percent) reported that fees are paid "always" or "often" in this manner. This same fee practice is the dominant pattern in nonemployment (i.e., commercial, etc.) arbitration, with 74 percent of the respondents reporting that the parties pay fees equally "always" or "often." The practice in nonunion employment mediation and arbitration is different, however. There is still a significant number of respondents reporting that fees are split equally by employers and employees—36 percent for nonunion arbitration and 51 percent for nonunion mediation—but significant numbers of respondents reported that fees were paid by the employer alone in these types of cases "always" or "often." Figure 14 shows 46 percent of Academy members reported that employers alone paid the fees for nonunion arbitration "always" or "often."

We also found that Academy members were sharply divided in their attitudes toward the practice of having one party pay the fee entirely. As Figure 15 shows, a significant proportion of the respondents (35 percent) said that single payers compromised the arbitration process, while 45 percent did not agree with this opinion.

Academy members' interview comments on the issue of how fees are paid in arbitration cases cast additional light on the nature of the debate. Respondents who told us that the source of fees *doesn't* matter offered comments along the following line:

Figure 14. Sources of Fees.

	<i>% Saying Fees Paid Equally by Parties Always or Often</i>	<i>% Saying Fees Paid by Employer Alone Always or Often</i>
<i>Labor-Management Arb</i>	98	2
<i>Nonunion Arb</i>	36	46
<i>Nonunion Med</i>	51	33
<i>Nonemployment Arb</i>	74	NA
<i>Nonemployment Med</i>	64	NA

Source: National Academy of Arbitrators: *Survey of Professional Practice*, Picher/Seeber/Lipsky, June 3, 1999.

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.

Perception of fairness is not the same as arbitrator's neutrality and integrity.

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

Integrity is integrity.

Respondents who told us that the source of fees *does* matter gave their views on the topic:

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

Who pays the piper calls the tune.

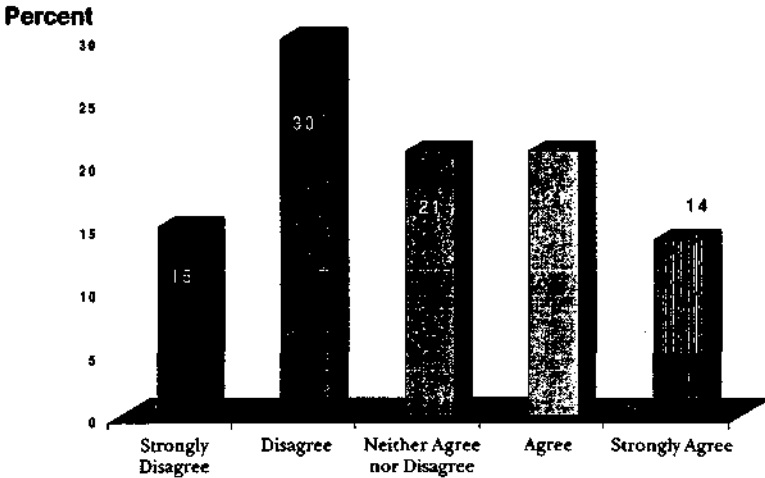
I think we're not all as rational as we'd like to be. It's very likely to have an insidious effect on the arbitrator's decision.

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.

Figure 15. Attitude Regarding One Party Paying the Entire Fee.

If fees are paid entirely by one party,
the arbitration process is compromised.



Source: National Academy of Arbitrators: *Survey of Professional Practice*, Ficher/Seeber/Lipsky, June 3, 1999.

It must not only be just, but it must appear to be just and if only one party's paying, nothing appears fair.

Some Academy members neither agree nor disagree with the view that the source of fees matters. They say "it depends":

It depends on numerous things. I think you can have absolute fairness in some situations where the employer pays where the employee cannot pay because they may not have access to a lawyer.

The pay factor alone does not necessarily compromise the process. One must look at the entire procedure. It must be remembered that an employee who has been discharged may be unable to pay.

These differences of opinion constitute an important dilemma for the Academy, especially as it considers its future directions.

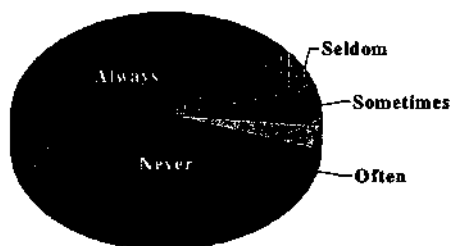
Practices on Disclosure

We asked Academy members certain questions regarding their practices on disclosure. For example, we asked them whether, when they served as arbitrators under a collective bargaining agreement, they disclosed to the union any noncollective bargaining arbitration or mediation cases they had conducted with the same employer. About 40 percent of the respondents reported they had had experience with this type of situation. It turns out, however, that the respondents with such experience were sharply divided on the question of disclosing their prior relationship to the employer. This division is illustrated in Figure 16. It shows that 46 percent of the Academy members who faced this particular situation reported that they "always" disclosed their prior experience with an employer to the union, while 38 percent reported that they "never" did.

The remaining respondents—16 percent of the total—fell into the categories "often did," "sometimes did," and "seldom did." This is yet another difference of opinion among Academy members that may pose a dilemma in shaping the organization's future.

Figure 16. Disclosure to Union of Prior Relationship With Employer.

Do you disclose to the union any noncollective bargaining arb/med cases you conducted with the same employer?



Source: National Academy of Arbitrators: *Survey of Professional Practice*, Ficher/Seeber/Lipsky, June 3, 1999.

Conclusions

The results of our survey confirm the view that labor-management arbitration is a profession in the midst of transition. On the one hand, a significant number of Academy members continue to focus on the practice of labor arbitration and, for one reason or another, have not moved into ADR. On the other hand, an equally significant and presumably growing proportion of the Academy has accepted cases outside the labor-management arena. As our results demonstrate, Academy members' experience in ADR is extensive but not intensive. Caseloads during the 1996–1998 period, for those members who had accepted ADR-type cases, were relatively light. Nevertheless, the differences between Academy members who have and have not entered the ADR realm are noteworthy. As we have pointed out, for example, Academy members with ADR experience tend to be younger, more likely women, and more probably lawyers. Those members with more diverse practices—the “multineutrals,” for example—also tend to charge higher fees. Perhaps most notably, attitudes about certain aspects of due process—the source of fees, for example—distinguish one group from the other. Our final report to the Academy will include a more comprehensive analysis of these issues.

We also found that most Academy members—82 percent—had been required to apply or interpret a statute in their arbitration cases during the 1996–1998 period. Yet, we also found that a significant number of Academy members had neither received training nor offered training in the statutes they were required to apply. This finding certainly suggests that training programs on statutory matters would be a valuable undertaking.

Lastly, it is very difficult to evade the reality that Academy membership is exceptionally homogeneous with respect to race and gender. The numbers tell the story: 94 percent white and 88 percent male. We know also that past and present leaders of the Academy, as well as rank-and-file members, have been acutely conscious of this issue and have been seeking effective methods of increasing the Academy's membership diversity.

In our final report to the Academy, which is in preparation, we will have the opportunity to analyze all of these issues in much greater depth.