ARBITRATION 1992
IMPROVING ARBITRAL
AND ADVOCACY SKILLS
In Memoriam

William J. Fallon
1923-1991
William Fallon was 68 when he died early in December 1991. He was a graduate of St. Michael's College and Suffolk University Law School.

Bill had made his contribution to the Academy. He chaired numerous committees, including Arrangements and Professional Responsibility. He served on the Board of Governors and, after two terms as Vice President, was elected President in 1985. He attended both national and regional meetings regularly, where he became known for his early morning walks surrounded by loyal followers.

Bill also had made his contribution to the profession. A former chairman of the Massachusetts Board of Conciliation and Arbitration, he was the undisputed dean and brightest light of New England arbitrators. His receipt of the Cardinal Cushing-Gavin Award as an outstanding neutral in New England, and of the Whitney North Seymour Medal of the American Arbitration Association, testify to that standing.

He long reigned with mutual respect of the parties in the most difficult of umpireships and was always willing to share his wisdom with those of us who sought him out for guidance on problems new to us but old hat to him.

Besides being the ever willing listener and advisor, Bill was a true believer in the worth of mediation and arbitration and in the importance of training to ensure that the institution retained its credibility and integrity with the entry of qualified new members. No arbitrator was more generous or so selflessly committed to that goal. He introduced apprentices to clients, discussed cases with them, listened to their concerns, and encouraged their entry into this uncertain field. Bill trained more than a dozen currently active arbitrators, nine of whom are already NAA members. The extent of his legacy is reflected in their establishment of a William Fallon Memorial Fund to train a new generation of arbitrators in his admirable mold.

Bill's greatest contribution was to his community, his friends, and his family. Bill and his wife Ruth had seven children: Jill, Kevin, Deborah, William, Colleen, Robert, and Julie. It was a closely knit and loving family, always accepting the intrusion of Bill's commitment to the Academy and the profession.
loving eulogy his children emphasized the elements of their father's success: Find the work you love, never stop learning, stay healthy, be kind, be funny, be reasonable, be fair, be loving, enjoy life, and lighten up.

Arnold Zack
William E. Simkin, one of the founding members of the National Academy of Arbitrators and its second president, died in Haverford, Pennsylvania, on March 4, 1992. He was two months beyond his 85th birthday, and he had attended meetings of the Academy until he was well into his 80s.

After Bill graduated from Earlham College, he became principal of the school he had himself attended. Later he moved on to Brooklyn Friends School of New York, where he met and married Ruth Commons. They both became involved in an American Friends Service Committee project among unemployed miners of the Crown Mine in Arthurdale, West Virginia. Bill taught carpentry, and Ruth taught weaving.

In 1937 Bill began graduate study at the University of Pennsylvania, where he came under the influence of Professor George W. Taylor, that dean of so many arbitrator-mediators. Bill soon became an assistant to Taylor in the field of arbitration, especially in the Full-Fashioned Hosiery Industry, which then flourished in Philadelphia.

When World War II came along, Taylor brought Bill to the War Labor Board where, among other responsibilities, he was chairman of the Shipbuilding Commission. After the war he held umpireships in a number of industries, as a result of which he became one of the most respected figures in the field. For eight years during the Kennedy-Johnson administrations, Bill was director of the Federal Mediation and Conciliation Service and was intimately involved in the great labor disputes of that time. Thereafter, he taught graduate courses at Harvard, while at the same time resuming his career in arbitration.

In addition to his contributions as a founding member of the Academy and its second president, Bill chaired the Academy-AAA-FMCS committee which hammered out the Code of Professional Responsibility for arbitrators in 1973–74.

After Bill and Ruth had moved to Tucson, Arizona, in their mid-70s, he continued his mediation career by working on a long-standing territorial dispute between some of the American Indian tribes in that area.

Bill was a quiet man, given nevertheless to plain talk. His integrity was so well known and so respected that even those who occasionally disagreed with him never doubted his honesty and good faith. He was also, among his colleagues, a source of wise counsel and great wisdom.
Those of us who had the privilege of knowing Bill will miss him greatly, and those who did not know him can find no better model to study.

Robben Fleming
PREFACE

The 45th Annual Meeting, held at Atlanta, Georgia, May 27–30, 1992, continued the “change” theme for the 1990s. In his presidential address Tony Sinicropi outlined the changes that had occurred in the workplace, on college campuses, and in the arbitration profession. He warned Academy members that failure to recognize and react positively to those changes would result in loss of the Academy’s role as a leader in the profession (Chapter 1). While Distinguished Speaker Marvin Miller applauded the ability of Academy members to weather these new challenges, he emphasized that arbitrators should be pro-active in mediating disputes, citing his experience in both the United Steelworkers Union and the Major League Baseball Players Union (Chapter 2).

Ability of arbitrators to analyze evidence relating to new medical and health issues was discussed by Fredric Gerr. John Phillips (management) and Joel D’Alba (labor) agreed that new issues would arise under the Americans with Disabilities Act, but assured Academy members that arbitral decisionmaking would remain basically the same (Chapter 3). A similar upbeat prognosis was made during a discussion on the decline of the private sector. Stephen Hayford concluded that the public sector and individual employee suits would take up the slack, especially if states adopted the American Bar Association’s model Uniform Employment Termination Act promoting the just cause standard and arbitration in individual employee discharge cases. Steven Rynecki (management) and Gregory Freersken (labor) supported that view (Chapter 4).

Ira Jaffe pointed out that statutorily based employment disputes created the greatest challenge for the arbitration profession because they required special knowledge and skills, but Jacob Hart warned that most management representatives did not look favorably on a pro-active arbitrator. However, Jean McKee of the Federal Labor Relations Authority stated that federal-sector advocates did expect arbitrators to apply external law, rules, and regulations in making their awards under the Civil Service Reform Act (Chapter 5). Since closer scrutiny of...
arbitration awards by the courts is a logical result of the intrusion of external law into the arbitration process, George Cohen gave arbitrators some tips on how to make their opinions and awards less likely to be overturned. Calvin Sharpe stressed that the Supreme Court's most recent decisions supported closer judicial oversight, and Judge Abner Mikva suggested that the NLRB deferral to arbitration had some less fortunate consequences for dissident union members (Chapter 6).

To give arbitrators more discretion in correcting their awards, Erwin Ellman proposed that the functus officio requirement in the Code of Professional Responsibility be scrapped, but Michael Campbell (management) and Robert Nichols (labor) disagreed, warning that such action would deprive awards of their finality (Chapter 7). Several speakers offered helpful hints for arbitrators to improve the hearing process (Chapter 8), and for advocates to assist the arbitrator in that endeavor (Chapter 9), with a special workshop session on the use of hearsay evidence (Chapter 10).

To the delight of everyone, Academy honorary life members, Robben Fleming and Willard Wirtz, reminisced about their careers in dispute resolution, hoping that the best elements of the "good old days" would not entirely disappear (Chapter 11). However, the memorial in this year's Proceedings indicates that the Academy has lost two of its most dedicated members, Bill Fallon and Bill Simkin, who will be difficult to replace in the hearts of our members.

Other Academy business included a report on governance (Appendix B), submitted by a special committee appointed by past president Howard Block and continued by Tony Sinicropi, offering suggestions for improvement of the Academy's internal structure and governance. The excellent program was arranged by a committee headed by Marvin Hill, and Joe Clarke ably chaired the Arrangements Committee.

We thank this year's contributors who were especially prompt in submitting their manuscripts, and working with BNA's Cheryl Drew has again been a pleasure.

July 1992

Gladys W. Gruenberg, Editor
## CONTENTS

**IN MEMORIAM**
- For William J. Fallon .................................................. v
- For William E. Simkin .................................................. ix

**Preface** ............................................................... xiii

**CHAPTER 1. Presidential Address: The Future of Labor Arbitration: Problems, Prospects and Opportunities** .................................................. 1
  by Anthony V. Sinicropi

**CHAPTER 2. Distinguished Speaker: Arbitration and Baseball** .................................................. 21
  by Marvin J. Miller

**CHAPTER 3. Arbitration of Medical and Health Issues** .................................................. 29
  by Fredric Gerr
  Management Perspective .................................................. 39
  by John R. Phillips
  Labor Perspective .................................................. 52
  by Joel A. D’Alba

**CHAPTER 4. The Changing Character of Labor Arbitration** .................................................. 69
  by Stephen L. Hayford
  Management Perspective .................................................. 88
  by Steven B. Rynecki
  Labor Perspective .................................................. 92
  by Gregory N. Freerksen

**CHAPTER 5. The Arbitration of Statutory Disputes: Procedural and Substantive Considerations** .................................................. 110
  by Ira F. Jaffe
  Management Perspective .................................................. 133
  by Jacob P. Hart
Agency Perspective ........................................ 143  
by Jean McKee

CHAPTER 6. Arbitration and the Courts ............... 149  
Part I. Erosion of the Arbitration Process by the  
Courts: Can the Award and Opinion Be  
Immunized? ........................................... 149  
by George H. Cohen  
Part II. Adjusting the Balance between Public  
Rights and Private Process: Gilmer v. Interstate/  
Johnson Lane Corporation ............................ 161  
by Calvin William Sharpe  
Part III. NLRB Deferral to Arbitration ............ 184  
by Abner J. Mikva

CHAPTER 7. Functus Officio Under the Code of  
Professional Responsibility: The Ethics of Staying  
Wrong .............................................. 190  
by Erwin B. Ellman  
Management Perspective ............................. 204  
by Michael H. Campbell  
Labor Perspective ............................... 210  
by Robert H. Nichols  
Comment ........................................... 219  
by Dennis R. Nolan

CHAPTER 8. Investigatory Due Process and  
Arbitration .......................................... 220  
by Christine D. Ver Ploeg  
Management Perspective ............................ 241  
by Alexander E. Wilson III  
Labor Perspective .................................... 246  
by Harris Jacobs

CHAPTER 9. Ten Commandments for Labor and  
Management Advocates: How Advocates can  
Improve the Labor Arbitration Process .......... 253  
by William P. Murphy  
Management Perspective ............................ 267  
by Robert J. Berghel  
Labor Perspective .................................... 273  
by David G. Alexander and Marcus Widénor
CONTENTS

CHAPTER 10. The Use of Hearsay Evidence by Arbitrators .............................................. 289
  by James A. Wright

CHAPTER 11. Reminiscences: Honorary Life Members .................................................. 307
  by Robben W. Fleming
  by Willard Wirtz ................................................. 319

APPENDIX A.

APPENDIX B. Report of the Committee on Governance ............................................... 337

FORTY-FIFTH ANNIVERSARY CUMULATIVE AUTHOR INDEX. 1988 Through 1992 ............ 355

FORTY-FIFTH ANNIVERSARY CUMULATIVE TOPICAL INDEX. 1988 Through 1992 ............ 363

TOPICAL INDEX .................................................... 421