Are You Qualified? A Process to Certify Labor Arbitrators as Qualified

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Introduction

For decades, legal scholars, unions, employers, and individual employees have attempted to sift through the labor arbitration field's issues, which include determining the role of an arbitrator, the extent of finality, the role of courts, and the checks on arbitrator power. The aim of resolving these issues is to create a robust, efficient system that lowers costs and increases expediency in a less adversarial setting than the court system. A critical step in achieving this goal is to determine who the current arbitrators are and how they got there. The answer to this question is slightly unclear as there is no certification program for arbitrators that exists today. First, this Note will explore the various existing arbitration organizations and some of the current issues prevalent in the field. Next, this Note will propose a solution rooted in the creation of a uniform certification program. Finally, this Note will recommend that the American Arbitration Association ("AAA") adopt ABA Model Rule 6.1: Voluntary Pro Bono Publico Service to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

I. Overview and History of Labor and Employment Arbitration

Labor arbitration clauses are embedded in collective bargaining agreements between unions and employers.[1] When one party files a grievance and the dispute remains unresolved, the collective bargaining agreement requires the conflict be resolved by an arbitrator rather than by the court system.[2] Arbitration also occurs as a result of individual employment contracts, when one party has entered into a contract of employment that includes an agreement to arbitrate to solve disputes.[3]

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1. Daniel Roy, *Mandatory Arbitration of Statutory Claims in the Union Workplace After Wright v. Universal Maritime Service Corp.*, 74 Ind. L.J. 1347, 1347–48 (1999).

2. *Id.* at 1348.

3. Martin H. Malin, James Oldham & Ted St. Antoine, *A Brief Overview and Historical Background on Labor and Employment Arbitration* (pt.1), Univ. of Mo. Sch. of Law (Sept. 26, 2015), https://law.missouri.edu/arbitrationinfo/2015/09/26/the-long-complicated-history-of-arbitration/ [https://perma.cc/DBA8-JVS7] (last visited Jan. 17, 2021).

This practice is commonly used as a less costly and more expedient alternative to the court system.[4]

Arbitration in the early eighteenth and nineteenth centuries in several states was quite robust.[5] According to James Oldham, former President of the National Academy of Arbitrators, by the late nineteenth century, eighty percent of states enacted "statutes that either allowed arbitration agreements or awards to be [enforced] as if they were court judgments."[6] One of the first significant federal legislative breakthroughs for the field of arbitration came in the form of the Federal Arbitration Act of 1925 ("FAA"), which upheld the enforceability of arbitration agreements as contracts.[7] But, seventy-five years later, in *Circuit City Stores, Inc. v. Saint Clair Adams*, the Supreme Court clarified the extent to which contracts of employment were subject to the FAA.[8] The defendant, Adams, argued that the FAA did not apply to any contract of employment, given the language of Section 1, which stated that the law does not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[9]. The Court held that the FAA's exemption was not all-inclusive, but rather, only applied to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[10] After *Circuit City*, employment contracts with an arbitration clause are required to arbitrate unless the employee was "a class of worker[] engaged in foreign or interstate commerce."[11]

Another significant breakthrough for arbitration began with Section 301 of the 1947 Labor Management Relations Act ("LMRA"), which governs private-sector agreements.[12] Three cases commonly referred to as the *Steelworkers Trilogy* clarified the application of the LMRA as it relates to labor arbitration and established its governing principles.[13] The Court's three central holdings were 1) "that an employer may not defend against an action to compel arbitration on the ground that the underlying grievance is frivolous," 2) "that grievances are presumed to be arbitrable and parties to a collective bargaining agreement should be compelled to arbitrate unless it can be said with positive assurance that the agreement

4. *Id.*

5. James Oldham, Presidential Address: Historical Perspectives on the Judicial Enforcement of Arbitration Agreements 1, 2 (2014).

6. *Id.* at 4, 9.

7. 9 U.S.C. §§ 1–16 (2012).

8. Circuit City Stores, Inc. v. Saint Clair Adams, 532 U.S. 105, 105 (2001) (A contract of employment is a contract between an employer and an employee regarding the terms of employment and the various rights and responsibilities of the parties).

9. *Id.* at 109.

10. *Id.* at 128.

11. *Id.* at 121.

12. *See* 29 U.S.C. § 185 (1947).

13. *See generally* Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S 593 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960).

withdrew the matter from arbitration," and 3) "that a court should enforce an arbitration award as long as the award draws its essence from the collective bargaining agreement."[14]

The *Steelworkers Trilogy* endorsed the arbitration process and allowed many of the benefits of arbitration to be realized. But it created many questions regarding to what extent arbitration awards are appealable.[15] However, since those decisions, less than three percent of arbitration awards have been appealed.[16] Additionally, the Court went on to hold that if a clause to arbitrate exists, then there is a presumption of arbitrability, and it is not the role of the courts to decide the merits of an arbitration claim as long as the decision "draw[s] its essence from the contract."[17] Furthermore, courts will enforce arbitration awards unless the enforcement of the decision violates "some explicit public policy,"[18] such as fraud or due process deprivation.

A. BECOMING A LABOR ARBITRATOR

The primary way individuals are selected to serve as arbitrators is through acceptance to an organization of alternative dispute resolution ("ADR") professionals. Although many of these organizations exist, there are two primary ADR providers: the AAA and the Federal Mediation and Conciliation Service ("FMCS"). All ADR providers have set membership requirements and keep an up-to-date roster of arbitrators that meet all necessary qualifications.[19] These rosters are then used by the parties to select the arbitrator deciding the dispute.[20] Parties often use arbitrators affiliated with ADR providers because of the rigid standards for acceptance, which ensures that arbitrators are qualified.[21]

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14. Martin H. Malin, Foreword: Labor Arbitration Thirty Years after the Steelworkers Trilogy, 66 CHI.-KENT L. REV. 551, 551 (1990).

15. *See, e.g.*, Affymax, Inc. v. Ortho-McNeil-Janssen Pharmaceuticals, Inc., 660 F.3d 281, 283 (7th Cir. 2011).

16. Martin H. Malin, James Oldham & Ted St. Antoine, *A Brief Overview and Historical Background on Labor and Employment Arbitration* (pt. 3), UNIV. OF MO. SCH. OF LAW (July 29, 2015), https://law.missouri.edu/arbitrationinfo/2015/07/29/the-legal-framework-for-labor-arbitration/ [https://perma.cc/39TJ-STBT] (last visited Dec. 17, 2020).

17. Eastern Associated Coal Corp. v. United Mine Workers of America, District 17, 531 U.S. 57, 62 (2000).

18. Interstate Brands Corp. v. Chauffeurs Local Union No. 135, 909 F.2d 885, 892 (6th Cir. 1990).

19. *See Application Process for Admittance to the AAA National Roster of Arbitrators*, AM. ARB. ASS'N 1 [hereinafter AAA], https://www.adr.org/sites/default/files/document_repository/application_process_for_admittance_to_the_aaa_national_roster_of_arbitrators.pdf [https://perma.cc/XZE3-NKCA] (last visited Jan. 18, 2021); *see also Information on Joining the Arbitration Roster*, FEDERAL MEDIATION & CONCILIATION SERVICE, https://www.fmcs.gov/services/arbitration/information-joining-arbitrator-roster/ [https://perma.cc/BJ8Z-WHN7] (last visited Dec. 18, 2020).

20. *See Application Process for Admittance to the AAA National Roster of Arbitrators*, *supra* note 19, at 2.

21. Penny Reid & Tiffanie Limbrick, *Selecting the Arbitrator A Key Decision for Your Next Arbitration*, TEXAS LAWYER (July 1, 2016), https://www.sidley.com//media/publications/texas-lawyer_selecting-the-arbitrator.pdf [https://perma.cc/C2UU-JSX6].

1. AMERICAN ARBITRATION ASSOCIATION

After the enactment of the Federal Arbitration Act, the AAA was established.[22] Acceptance into the AAA is very exclusive, and even strong candidates who meet all of the required criteria may not be accepted.[23] According to the AAA manual, the AAA seeks arbitrators "possessing judicial capacity, temperament and extensive knowledge, experience and acceptability to parties."[24] Additionally, because parties use a strike system when selecting AAA arbitrators, the AAA seeks candidates who have qualities that adjudicating parties are looking for.[25] Typically, when parties request an arbitrator from the AAA, the AAA's computer system generates a randomized list of arbitrators, which is then sent to both parties.[26] After the parties look into the arbitrators, they then take turns one by one striking off arbitrators until only one arbitrator is left.[27] That individual is the person who decides the dispute.[28]

Prior to beginning the formal application process, candidates must meet six threshold qualification criteria: 1) "a minimum of fifteen years of senior-level legal, business, or professional experience"; 2) "educational degree(s) and/or professional license(s) appropriate to the candidate's field of expertise"; 3) "training or experience in arbitration and/or other forms of dispute resolution"; 4) "honors, awards, and citations indicating leadership in the candidate's field"; 5) "membership in a professional association(s)"; and 6) "other relevant experience or accomplishments (e.g., published articles)."[29]

After meeting the minimum qualifications, the formal application process begins with a personal letter and resume.[30] Candidates are required to discuss their experience and expertise in their field, their experience with ADR, and why they think parties will select them to oversee a case.[31] Next, a member of the AAA will conduct an interview if they find the applicant to be strong, as well as if the applicant's expertise is not already represented by ADR professionals in the respective geographic location.[32] Third, if the AAA feels that the current caseload will benefit from the applicant, a well-respected ADR professional must nominate them.[33] The nomination letter must discuss the applicant's ADR capacity

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22. *The American Arbitration Association: A Long History of Working with Government*, AAA 1, https://adr.org/sites/default/files/document_repository/AAA%20Government%20Services.pdf [https://perma.cc/H9UD-TKAJ] (last visited Dec. 18, 2020).
23. *See Application Process for Admittance to the AAA National Roster of Arbitrators*, *supra* note 19, at 1.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 3.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*

and their ability to adjudicate cases.[34] Finally, the candidate must submit no less than three letters of recommendation from ADR professionals not professionally affiliated with the candidate, thus verifying the candidate's capabilities and moral worthiness.[35]

The AAA has four additional requirements for admittance to the AAA Labor Panel. An individual: 1) must have at least 10 years of experience directly related to labor and employment, 2) "cannot be an active advocate for labor or management," 3) must have significant practical knowledge about labor relations, and 4) "must have strong writing skills."[36]

2. FEDERAL MEDIATION AND CONCILIATION SERVICE

The FMCS is a division of the U.S. Department of Labor that promotes labor management dispute resolution.[37] Similar to other ADR organizations, FMCS has several requirements that an applicant must meet in order to be considered for placement on the FMCS roster. According to the FMCS website, the Service requires candidates to "demonstrate either (i) experience, competence, and acceptability in decision-making roles in the resolution of labor relations disputes; or (ii) extensive and recent experience in relevant positions in collective bargaining."[38] Furthermore, applicants must be able to hold hearings, adequately evaluate testimony and exhibits, and deliver well-written awards, clearly establishing the reasoning for a decision.[39]

II. THE IMPORTANCE OF A UNIFORM CERTIFICATION PROCESS

A. INCREASING ACCESSIBILITY TO THE PROFESSION

With the need for competent arbitrators growing continuously, one thing that has remained stagnant is the lack of diversity amongst the practitioners deciding disputes.[40] The expanded use of arbitration has created a strong demand for more qualified arbitrators. Stringent criteria required by the ADR providers has led to a concentrated demographic deciding most disputes. According to the AAA's demographic data on all registered AAA arbitrators, of the 2,805 arbitrators who responded to a demographics survey, less than twenty-two percent were female.[41] Further, eighty-eight percent were white, and ninety-eight percent were

34. *Id.*

35. *Id.* at 2–3.

36. *Qualification Criteria for Admittance to the AAA Labor Panel*, AAA 1, https://www.adr.org/sites/default/files/document_repository/Labor%20Panel%20Qualification%20Criteria.pdf [https://perma.cc/QRP5-T9HY] (last visited Jan. 18, 2021).

37. *See Information on Joining the Arbitration Roster*, *supra* note 19.

38. *Id.*

39. *Id.*

40. *See Arbitrator Demographic Data*, AAA (Jan. 13, 2020), https://www.adr.org/sites/default/files/document_repository/ArbitratorDemographicData_01132020.pdf [https://perma.cc/ERC2-XK5N].

41. *Id.*

heterosexual. [42] According to the International Institute for Conflict Prevention & Resolution:

> [O]ne prominent arbitrator . . . noted: "The first thing anyone notices when they drop out of the legal profession and into the 'neutral' business is the time warp. It's not exactly an old folks' home or an assisted living facility, but it is populated primarily with the people who were already practicing law when I entered the profession in 1980. These people were in their 30's then. *Now they're mostly over 60. They're white. And they are male."*[43]

The arbitrator's statement highlights that one of the systemic problems plaguing the arbitration profession is the homogeneity of their background in the legal profession.

These diversity issues are rooted deeper than simply the previous occupation of arbitrators, as both women and minorities face a plethora of hurdles upon entering an arbitration organization. The most significant barrier to entry and arguably the biggest deterrent for women and minorities is the acceptability requirement involved in the selection process that occurs when the parties decide who will preside over their dispute.[44] Scholars have suggested that even the most qualified and well-respected individuals will get passed over because of discrimination or implicit bias.[45]

Subconscious feelings and attitudes through which we analyze interactions and questions are implicit biases.[46] The theory of implicit bias was illustrated in 2012 by an Ohio State University study "which used identical case vignettes to examine how pediatricians' implicit racial attitudes affect treatment recommendations for four common pediatric conditions. Results indicated that as pediatricians' pro-White implicit biases increased, they were more likely to prescribe painkillers for vignette patients who were White as opposed to Black."[47]

With respect to implicit bias in hiring practices, the Wharton School of Business at the University of Pennsylvania conducted a study of over 800 graduates, all of

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42. *Id.*

43. Caley E. Turner, "OLD, WHITE, AND MALE": INCREASING GENDER DIVERSITY IN ARBITRATION PANELS 3 (Summer 2014) (unpublished manuscript), https://www.cpradr.org/news-publications/articles/2015-03-03–old-white-and-male-increasing-gender-diversity-in-arbitration-panels/_res/id=Attachments/index=0/Old_White_and_Male_Increasing_Gender_Diversity.pdf [https://perma.cc/J7AK-7W7T].

44. Martin H. Malin et al., *A Study Guide to Accompany The Art & Science of Labor Arbitration*, THE COLLEGE OF LABOR AND EMPLOYMENT LAWYERS AND THE NATIONAL ACADEMY OF ARBITRATORS RESEARCH AND EDUCATION FOUNDATION 34 (2013), https://www.laborandemploymentcollege.org/pdfs/AME%20Col%20Study%20Guide%20for%20Art%20Science%20of%20Labor%20Arbitration.pdf [https://perma.cc/P7U9-QK9K].

45. *Id.*

46. *State of the Science: Implicit Bias Review 2014*, THE OHIO STATE UNIVERSITY KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY 70 (2014), http://kirwaninstitute.osu.edu/implicit-bias-training/resources/2014-implicit-bias-review.pdf [https://perma.cc/ZZ2G-WMAN].

47. *Id* at 72.

whom were similarly qualified, applying to jobs from 72 employers.[48] In a job opening for STEM positions, the results of the study showed that "candidates with female and minority names" had significantly fewer callbacks than candidates with names that are usually attributed to white men.[49] Further, female and minority graduates received less recognition from employers for respected internships, only giving them approximately half of the benefit it gave to a white male.[50]

Although an implicit bias study has not been conducted within the arbitration field, early research indicates that gender and race bias are just as prevalent.[51] For example, a female arbitrator with a gender-neutral name reported that she is often selected over her peers because advocates think they are selecting a male arbitrator.[52] When she comes face-to-face with parties, they are often surprised that a female arbitrator is deciding their dispute.[53]

Labor grievances often include individuals from diverse backgrounds.[54] The primary goal of arbitration is to provide a chance to achieve a fair and just outcome to a dispute.[55] In order to maximize the probability of reaching fair outcomes, it is vital to have diverse adjudicators because of the power disparity that arises.[56] The International Institute for Conflict Prevention & Resolution stated, "for example, a young Latino woman [arbitrating] . . . against her boss, a white male, in front of . . . three white male arbitrators. The imbalance of power. . . may affect the arbitrators' decision, and will . . . affect the woman's perception of that decision."[57]

B. POTENTIAL SOLUTIONS TO REDUCE IMPLICIT BIAS IN ARBITRATOR SELECTION

One potential solution that may help reduce implicit bias and discrimination is to randomize arbitrators' selection entirely. Although technological advancements may make it more challenging to keep arbitrators anonymous, it will make it more cumbersome to search for them. Under a proposed randomized selection process, the parties would set minimum threshold requirements for the arbitrator they would like. These requirements could include a minimum number of disputes settled, a particular type of experience, and a minimum number of years

48. Roy Maurer, *Researchers Say New Study Method Catches Resume Bias*, SHRM (Feb 17, 2020), https://www.shrm.org/resourcesandtools/hrtopics/talentacquisition/pages/researchers-new-study-method-catches-resume-bias.aspx [https://perma.cc/R88E-VQVT].

49. *Id.*

50. *Id.*

51. *See* Turner, *supra* note 43, at 9.

52. *Id.* at 8–9 (bias studies in arbitration should be done to show how prevalent the issue is and to begin crafting solutions to combat the issue of bias).

53. *Id.*

54. *Id.* at 11.

55. *Id.*

56. *Id.* at 12.

57. *Id.*

practicing arbitration, including the number of years in an apprenticeship. The parties will then be given an arbitrator at random and continue with the strike process. Although this proposed solution comes with increased transaction costs initially because the parties will have to negotiate the threshold requirements for the arbitrator in the collective bargaining agreement, a randomized process removes some of the bias. Further, it removes parties' potential to inquire about a particular arbitrator's listed qualifications beforehand and prevents them from abusing the process by selecting that individual.

Reforming the process of arbitrator selection may have positive downstream effects on motivating and inspiring women and minorities to enter the labor arbitration profession because their odds of selection may increase. Moreover, the proposed process has the potential to remove some of the effects of "repeat player" arbitration. Repeat player arbitration is a process in which a party selects the same arbitrator as in the past because they have received favorable treatment from them.[58]

A randomized selection process will add minimal to no costs to the ADR organizations that compile rosters and recommend arbitrators under the current system. Organizations would simply need each affiliated member to send out a list of credentials. The ADR organization could then replace the individual names with the information. If the system switched to a uniform certification process, the organization overseeing and maintaining certification would be tasked with carrying out the redaction process. Reducing the barriers to entry and making a concerted effort to recruit more diverse arbitrators may lead to an increase of the variety of viewpoints and critical thinking skills in the field.

III. COMMENT AND CRITIQUE ON "CERTIFICATION AND TRAINING OF LABOR ARBITRATORS: SHOULD ARBITRATORS BE CERTIFIED?"

The debate on arbitrator qualification has spurred many, including the former president of the American Arbitration Association, Robert Coulson, and law student Alfred J. Smith, Jr., to discuss the issue and offer insight.[59]

A. COMMENTING ON THE SMITH'S FIVE STEP FRAMEWORK

Smith's certification program proposal begins with five criteria, 1) experience, 2) academic preparation, 3) references, 4) maintaining certification, and 5) time commitment, followed by a continuing education component to maintain certification.[60] The five criteria and the continuing education component are an

58. Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CAL. L. REV. 1, 58 (2019).

59. Robert Coulson, *Certification and Training of Labor Arbitrators: Should Arbitrators Be Certified? Dead Horse Rides Again*, 30 PROC. NAT'L ACAD. ARB. 173 (1977) (discussing whether arbitrators should be certified using Smith's certification proposal).

60. *Id*. at 183–84.

excellent framework for a uniform certification program; however, Smith's substance within the framework is flawed. This discussion will aim to critique the substance of Smith's proposal, and then propose a uniform certification program using Smith's framework.

Smith's argument rests on the idea that there are "current pressures in the field caused by an increase in expedited labor-arbitration cases and public-sector arbitration . . . demand experienced and expert arbitrators. All indications point to a continued growth in these and other closely aligned areas."[61] According to Smith, the expansion of arbitration creates an urgent "need to guarantee high standards of service, competency, and ethical fitness mak[ing] a strong argument for the training and certification of labor arbitrators."[62]

First, Smith discusses experience.[63] He states that, "five years' experience in industrial/labor relations positions in industry, government, teaching at the university level, or applicable experience in the legal profession should be required."[64] Five years of experience in one of the four fields mentioned will give arbiters the tools necessary to handle controversy and not just adjudication skills, in hopes of mending a fractured working relationship.[65] Without any support, five years is arbitrary. Traditionally, education requirements have come in four year increments or less.[66] Additionally, these requirements increase the barriers to entry in an already competitive field.

Smith proposes four potential experiential avenues to fulfill the experience requirement.[67] However, only the labor industry position seems feasible and has the lowest entry barriers for future arbitrators to meet Smith's threshold. Teaching at the university level requires a rigorous educational background and adequate experience in both the subject matter and the act of teaching itself.[68] The costs of traditional education and the time necessary to become an academic render this avenue difficult or even impractical.[69] The same argument can be made for experience in the legal profession but to a higher degree, given the necessary law degree component. Moreover, government positions in industrial/

61. *Id.* at 183.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Fast Facts: Time to Degree*, NATIONAL CENTER FOR EDUCATION STATISTICS (2017), https://nces.ed.gov/fastfacts/display.asp?id=569 [https://perma.cc/ES9B-QLSJ].
67. Coulson, *supra* note 59, at 183.
68. *See* Hannah Muniz, *The 19 Steps to Becoming a College Professor*, PREP SCHOLAR (Jan. 16, 2021, 12:00 pm), https://blog.prepscholar.com/how-to-become-a-college-professor-requirements [https://perma.cc/L8ZB-YZXK].
69. *See* Farran Powell & Emma Kerr, *See the Average College Tuition in 2020-2021*, U.S. NEWS AND WORLD REPORT (Sept. 14, 2020, 9:00 AM), https://www.usnews.com/education/best-colleges/paying-for-college/articles/paying-for-college-infographic [https://perma.cc/BL75-VR5T].

labor relations are so limited that this avenue creates a bottleneck issue for the supply of arbitrators needed now and in the future.[70]

Second, Smith proposes an academic preparation component. A bachelor's degree with an emphasis on labor management relations is required at a minimum.[71] This would eliminate most practicing arbitrators because most do not have a degree in labor management relations. An emphasis on labor management relations will significantly improve students' knowledge and skills. However, students will be required to meet necessary graduation requirements that may have no relation to labor arbitration or contribute to the students' skill development. Rather than requiring students to receive a bachelor's degree, centering the entire academic component around labor arbitration will enhance a candidate's acceptability to the parties. This includes teaching courses about the formal arbitration process, writing arbitration opinions, interpreting collective bargaining agreements, as well as negotiations and mediation.

Third, a prospective arbitrator will need references. Smith's proposal includes the AAA labor panel reference requirement.[72] At the time, the AAA required four management and four union references.[73] Moreover, a personal interview conducted by a AAA representative was required.[74] Requiring someone to attest to a future arbitrator's skills was important to ensure the future arbitrator's success. However, assuming the current standard of nine references, the reference requirement is excessive and may not adequately represent an individual's readiness. The approach should be one that focuses more on the quality of the references rather than the quantity, such as refences that speak to an individual's morals and integrity.

Fourth, to maintain certification, arbitrators would be required to attend at least one annual conference to update and maintain their knowledge.[75] The proposal uses a seminar and or panel discussion structure and administers it through regional offices.[76] The idea of a seminar is appealing and will help update labor arbitrators on current and evolving trends, as well as help them hone and develop new skills. However, updating and maintaining hundreds of offices could take one of the attractive central components of arbitration, low cost, and render it moot, as it is costly to pay a full-time staff to focus on conference planning alone.

Finally, Smith's proposal required an individual to commit time to new professionals allowing them to participate and discuss current disputes.[77] Formalizing a

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70. *Labor Relations Specialists*, U.S. BUREAU OF LABOR STATISTICS (Sept. 1, 2020), https://www.bls.gov/ooh/business-and-financial/labor-relations-specialists.htm [https://perma.cc/LQ58-XZKD].

71. Coulson, *supra* note 59, at 183–84.

72. *Id.* at 184.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

mentorship program would serve several purposes, primarily to develop and maintain the field of arbitration. An arbitration proceeding is dictated by the rules the arbitrator establishes, such as the level of witness testimony, formal court room rules, the scope of discovery, and several other rules.[78] The primary way for a new arbitrator to learn how to hold proceedings is to learn from experienced arbitrators what is optimal for all parties involved. Learning how to hold an arbitration proceeding is best done through real observation.

IV. UNIFORM CERTIFICATION PROCESS

Smith's proposal offers one way of establishing a uniform arbitration certification program.[79] The remainder of this Note will propose a uniform certification program using Smith's framework of 1) academics, 2) experience, 3) recommendations, and 4) continuing education. Finally, among the recommendations this Note proposes is the adoption of ABA Model Rule 6.1 to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

In the short term, the most realistic proposal is to have the AAA develop a uniform set of procedures created by a team of arbitrators currently on the AAA roster. Ultimately, the long-term solution would be to have the states adopt the certification requirements and move the governing body from the AAA to the individual states.

A. THE EDUCATION COMPONENT

As part of the training and certification component, following Smith's framework, arbitrators should be required to fulfill (1) academic requirements, (2) experiential requirements, (3) recommendation requirements, and if arbitrators wish to remain certified, (4) continuing education requirements.

1. ACADEMIC REQUIREMENTS

The baseline component should be the completion of five courses over one year: The courses include, History of Arbitration, The Formal Arbitration Process, Writing Arbitration Opinions, Interpreting Collective Bargaining Agreements, and Negotiations and Mediation.

First, the History of Arbitration should be a course that examines the emergence of arbitration in the courts in the United States in the nineteenth and twentieth centuries. Next, the Formal Arbitration Process should walk students through the process of filing grievances and the types of arbitration: grievance or rights arbitration and interest arbitration. Additionally, students should learn about arbitration's procedural requirements, including levels of arbitral immunity, minimum discovery

78. David McLean, *US Arbitral Institutions and Their Rules*, LATHAM & WATKINS LLP, https://www.lw.com/thoughtLeadership/us-arbitral-institutions-and-their-rules [https://perma.cc/TM9A-RK8B] (last visited Dec. 20, 2020).

79. *See* Coulson, *supra* note 59, at 183–88.

requirements, and counsel representation. Third, Writing Arbitration Opinions should focus on teaching students how to summarize the facts, present issues clearly, and form thoughtful analyses with support for the outcomes. Although arbitration awards do not serve as binding precedent, studies show arbitrators cite to other awards.[80] According to W. C. Mark Weidenmaier, "labor arbitrators cite past awards more frequently, and in greater numbers, than arbitrators in the other regimes, and labor arbitrators often justify their decisions by citing only other arbitration awards."[81] Therefore, it is important to teach how to write clearly and eloquently. Fourth, Interpreting Collective Bargaining Agreements should teach the most central activity an arbitrator carries out. According to Thomas Gentry, arbitrators derive their decisions from "the essence [of] the collective bargaining agreement," so it is essential to teach students about the components of a collective bargaining agreement and how to analyze oral testimony that traditionally is not admissible in court, but may be admissible in an arbitration hearing.[82] Finally, Negotiations and Mediation should be a practical course on helping parties reconcile their differences and reach an amicable agreement to both parties, without the arbitrator having to hand down a formal award.

The learning model and distribution of material present a challenge. The lowest cost approach involves the mass creation of twenty-six asynchronous lectures per course, followed by short assessments to practice applying the material from the lectures. The costliest and least desired approach is to structure it similar to a traditional vocational education with full-time staff. Regardless of which approach is taken to the administration of the educational component, the certification program only works in the short term with the full support of the major providers of arbitrators. Further, the curriculum will need to be designed and developed by leading professionals apart of the AAA.

Distributing certification material electronically is consistent with the aims of cost savings and reducing barriers to entry. Students will be able to receive an education solely tailored to the skills necessary to become a certified labor arbitrator for at least half the cost of a four-year degree, allowing students to escape the burden of crippling debt.[83] Most arbitrators are in the late part of their careers, using asynchronous lectures offers most individuals seeking to become arbitrators more flexibility in completing the courses.[84]

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80. W. C. Mark Weidenmaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1095 (2012).

81. *Id.*

82. Thomas Gentry, *The Essence Test: Picking Up a Supreme Court Fumble*, 67 CATH. U. L. REV. 737, 737 (2018).

83. *See* Powell, *supra* note 69.

84. Turner, *supra* note 43, at 3.

2. EXPERIENTIAL REQUIREMENTS

After completing the formal education requirement, aspiring arbitrators will be required to complete the apprenticeship component. The state of California has a robust system that allows individuals to do a four-year apprenticeship as opposed to attending law school.[85] The California Bar requires students to send bi-annual reports on their training, work eighteen hours per week for forty-eight weeks a year, and complete the traditional bar and ethics exam.[86]

Arbitration Apprentices would follow California Bar's proven framework, allowing individuals to work while learning the necessary practical skills. Following the California Bar's approach ensures a proven system that is sufficient for certifying future professionals. Formalizing a mentorship program would require the AAA to add a threshold service component that requires currently certified arbitrators to take on several apprentices. In the alternative, the process could be formalized through the NAA, an honorific organization made up of the leading arbitration professionals.[87] The NAA apprenticeship program is feasible but may be an arduous task because it would require convincing the members of the NAA to amend its requirements and adopt the formal process.[88]

3. RECOMMENDATIONS

Letters of recommendation should be a requirement but only to the extent that the relationship is one of multiple years, and either in an academic or professional relationship. I propose a multi-year relationship requirement because those individuals are situated in the best position to speak to a candidate's abilities and will help reduce, although not eliminate, friends or acquaintances from recommending individuals. According to a study done by the University of Alabama in Huntsville, "recommendations play an important role in decisions regarding whether applicants gain admission to graduate and professional education programs and in decisions regarding who is hired."[89] Applicants typically seek recommendations from individuals they know will speak positively about them.[90] This does not mean that recommendations serve no purpose. Therefore, recommendations should focus on the length of the relationship between the candidate and the recommender.

Further, more weight should be given to character recommendations while also considering skills and ability recommendations. Given the binding nature of

85. STATE BAR OF CALIFORNIA, TITLE 4 ADMISSIONS AND EDUCATIONAL STANDARDS r. 4.29 (2007).

86. *Id.*

87. *Who We Are*, NATL. ACAD. OF ARB., https://naarb.org/who-we-are/ [https://perma.cc/4SXL-BEU5] (last visited Jan. 30, 2021).

88. *The Constitution and By-Laws Art. VII*, NATL. ACAD. OF ARB. (Nov. 2020).

89. *Legal Implications of Letters of Recommendation*, UNIVERSITY OF ALABAMA IN HUNTSVILLE, https://www.uah.edu/images/administrative/legal/pdf_files/legal_implications_of_lltrs_of_rec.pdf [https://perma.cc/AL9F-Q6ZP] (last visited Dec. 20, 2020).

90. *See Id.*

the decisions and the significant deference courts have given to arbitrators, candidates must be of the highest moral character. According to arbitration professional Datuk Sundra Rajoo, "arbitration has been described as the most ethical institution in the society of labor relations; arbitrators exercising their ethical powers as to what is good or bad, right or wrong."[91] Moreover, the NAA, FMCS, and the AAA have emphasized the importance of ethics, going so far as to develop an entire code of ethics for labor arbitrators.[92] Although three different organizations developed the code of ethics, it is widely regarded as the code of ethics for the entire profession.[93] Therefore, candidates should be required to submit references about their character, morals, and integrity.

4. CONTINUED CERTIFICATION

There is a strong need to create continuing education resources for certified arbitrators. The AAA already has a framework for "Arbitrator Continuing Education" that is required for commercial, construction, and employment arbitrators to satisfy in order to remain on an eligible roster.[94] On an annual basis, arbitrators must complete the AAA's annual course or attend an AAA conference.[95] Conferences are valuable tools for administering information and offer professionals the opportunity to interact and learn from each other. One approach, which Smith mentions in his certification process, is mandatory conferences.[96] To avoid the massive costs associated with hosting several conferences, I propose requiring arbitrators to complete a series of modules compiled by leading AAA arbitrators on labor arbitration developments, followed by a short examination to ensure arbitrators digested the requisite material. The examination may be aspirational since it would require hiring individuals to grade the exams, develop a grading system, and establish consequences for failure. Another approach could be to require arbitrators to complete assignments that apply the material learned in the modules. Although the task of requiring arbitrators to complete these modules would be a difficult challenge, nevertheless, it would be advantageous. An independent module approach reduces some of the benefits individuals gain from interacting with peers; therefore, I recommend holding optional conferences. Individuals seeking to interact with peers may have this opportunity at their own expense.

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91. Datuk Sundra Rajoo, *Importance of Arbitrators' Ethics and Integrity in Ensuring Quality Arbitrations*, 6 CONTEMP. ASIA ARB. J. 329, 330 (2013).

92. CODE OF PROF'L RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES (AAA 2007).

93. *Id.*

94. *Arbitrator Continuing Education*, AAA (2019), https://www.aaaeducation.org/media/0/ace%20requirements%202019.pdf [https://perma.cc/RGG8-6H56].

95. *Id.*

96. *See* Coulson, *supra* note 59, at 184.

5. ADOPTING ABA MODEL RULE 6.1: VOLUNTARY PRO BONO PUBLICO SERVICE

As part of the uniform certification process, the AAA should add ABA Model Rule 6.1 to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes. Rule 6.1 states, "[every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year."[97] Typically, parties split the cost of arbitration, and in some instances, individuals are unable to afford it and are shut out from the process.[98] In the legal field, Rule 6.1 was created because of "the critical need for legal services that exists among persons of limited means."[99] The idea behind providing these services was that "when society confers the privilege to practice law on an individual, he or she accepts the responsibility to promote justice and to make justice equally accessible to all people."[100] This same need exists for arbitration services. Arbitration is a form of receiving justice and should be equally accessible in the same way.

B. ECONOMIC FEASIBILITY OF A UNIFORM CERTIFICATION PROCESS AND FUNDING STRUCTURE

One of the most critical considerations in developing a certification program and requiring new professionals to complete it is ensuring that the cost and efficiency components remain intact. Although arbitrators will internalize some of these costs, in the aggregate, the costs they internalize are far less than the costs of traditional college education or the costs of breaking through to a professional arbitration roster.

The primary cost of obtaining certification will be the tuition for fulfilling the educational component. Since the costliest approach is the long-term vocational education, as opposed to the virtual platform, I will analyze the costs under the long-term vocational education approach to illustrate that even under the costliest approach, the cost of certification will remain far less than any other avenue under the most extreme circumstance.

Studies show that an entire vocational education costs approximately $33,000.[101] This is one-fourth of the cost of a bachelor's degree and offers students the opportunity to enter their profession sooner.[102] Further, although this cost is solely internalized by aspiring arbitrators and does impose some entry barriers, it is an investment in a prosperous future with more opportunity.

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97. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2018).

98. *How much does arbitration cost? And, Who pays for it?*, UNIV. OF MO. SCH. OF LAW (Oct. 11, 2015), https://law.missouri.edu/arbitrationinfo/2015/10/11/how-much-does-arbitration-cost/. [https://perma.cc/QX4W-4PXD].

99. MODEL RULES OF PROF'L CONDUCT R. 6.1 cmt. 2 (2018).

100. *A Guide and Explanation to Pro Bono Services*, AM. BAR. ASS'N (Jan. 20, 2021), https://www.americanbar.org/groups/legal_education/resources/pro_bono/ [https://perma.cc/M3NM-YCJA].

101. Mel Bondar, *The Financial Case for Trade School Over College*, U.S. NEWS AND WORLD REPORT (Apr. 12, 2016, 10:55 AM), https://money.usnews.com/money/blogs/my-money/articles/2016-04-12/the-financial-case-for-trade-school-over-college [https://perma.cc/PRH3-APSA].

102. *Id.*

Next, under a uniform certification process, states would be required to administer licenses for certification. The ABA and all fifty state bar associations require lawyers to pay yearly licensing fees to remain active members.[103] The arbitration profession could consider adopting a similar fee schedule to maintain certification status. For example, on the higher end of this price index is the State Bar of California, which only requires an annual fee of $515.[104] This fee "includes a $395 base fee," and the remainder of the cost goes towards additional fees mandated by the legislature.[105] Finally, the cost of continuing education courses or conferences can be incorporated into the licensing fee structure.

Although most costs are passed onto arbitrators, the total costs relative to traditional education and professions remain on the low end. The reduction in cost should attract additional candidates.

CONCLUSION: THE TRAJECTORY OF A UNIFORM CERTIFICATION PROCESS

The current landscape of certifying labor arbitrators does not seem to be changing anytime soon. A dramatic transformation of the magnitude that this Note proposes will require assistance and buy-in from major arbitration organizations. A substantial overhaul of acceptance requirements or a higher acceptance rate when these criteria are met is the first component that must change. Due to the increased demand for arbitrators, there needs to be a way to meet future demand.

Professional organizations are focusing on diversity initiatives, and many have pledged to make recruiting a diverse and inclusive list of arbitrators a priority.[106] According to an AAA article on diversity and inclusion initiatives, "the AAA was an honoree of the New York Law Journal's Diversity Initiative Project, conducted in 2015."[107] Further, the AAA has pledged to provide rosters with at least 20 percent diverse panelists.[108] These efforts symbolize a positive start in increasing the diversity within the labor arbitration profession. However, additional efforts need to be made to focus on reducing barriers to entry and inspiring the next generation of arbitration professionals.

With a gradual approach towards making the profession more accessible while maintaining the integrity and high standards, states will be able to adopt this process or one with similar criteria.

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103. *Lawyer Licensing*, AM. BAR. ASS'N, https://www.americanbar.org/groups/legal_services/flh-home/flh-lawyer-licensing/ [https://perma.cc/95ZZ-LDJ6] (last visited Dec. 20, 2020).

104. *Frequently Asked Questions: 2021 Annual Fees*, STATE BAR OF CALIFORNIA http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/About-Your-State-Bar-Profile/Fees-Payment/Annual-Fees-FAQs [https://perma.cc/UV42-CMFL] (last visited Dec. 20, 2020).

105. *Id.*

106. *Diversity and Inclusion Initiatives*, AAA, https://www.adr.org/diversityinitiatives [https://perma.cc/AB2S-JWXP] (last visited Dec. 20, 2020).

107. *Id.*

108. *Id.*