challenge to that assessment (which, under ERISA, is subject to mandatory arbitration).

(4) Public sector interest arbitration disputes over employer/employee contributions, benefits, inclusiveness, and conversion into cash balance or other defined contribution plans.

(5) Collective bargaining agreement disputes, where the issue pertains to claimed breach of an agreement provision dealing with a pension and related arbitrability issues.

(6) Arbitrations that arise following litigation, in which the arbitrator, rather than the court, is asked to resolve the underlying dispute that gave rise to the litigation.

II. Panel Discussion

The panelists, each experienced in various aspects of the arbitration of pension disputes, discuss the varieties and complexities of the cases they have heard, the lack of precedent for and the internal inconsistencies of the law they are required to apply, and the unique fiduciary relationships that pertain. They offer advice to labor arbitrators contemplating accepting appointment to such cases.

Moderator: **Mark I. Lurie,** National Academy of Arbitrators, West Palm Beach, FL

Panelists: **Norman Brand,** National Academy of Arbitrators, San Francisco, CA

Ira F. Jaffe, National Academy of Arbitrators, Potomac, MD

Catherine Harris, National Academy of Arbitrators, Sacramento, CA

John E. Sands, National Academy of Arbitrators, Roseland, NJ

Mark L. Irvings, National Academy of Arbitrators, Brookline, MA

Mark I. Lurie: John, how did you get your first pension case?

John E. Sands: After law school, I worked for a law firm that represented unions and employee benefit funds. As the new associate, I represented the employee benefit funds. This was pre-

ERISA. Later, when I became general counsel of New York City's Office of Labor Relations, I dealt with public sector fund issues.

One of my early awards was a pension case that CCH published, and that opinion showed that I had an understanding of the concept of present value and of how actuaries worked. After that, parties selected me to hear pension cases. Then, after September 26, 1980, the date that the Multiemployer Pension Plan Amendments Act, known as MPPAA, was added to ERISA, the International Foundation of Employee Benefit Plans set up a multi-city "road show" of how to deal with these issues. They asked me to speak about the arbitration procedure unique to that statute, and I said yes. As is the Foundation's wont, they papered the country with 300,000 brochures. This was at the time I was a professor at Albany Law School. Norm Brand, one of my colleagues, came into my office and said—

Norman Brand: "John, what do you know about MPPAA?"

John E. Sands: And what did I say?

Norman Brand: "As much as anybody else. I read the statute." And, at that moment, the light bulb went on over my head and I said to myself, "Self," I said, "you can read the statute, too." Pretty easy. And I joined John for some of his program session for the International Foundation.

At about that time, the Pension Benefit Guaranty Corporation (PBGC) had been given the task of creating rules for the pension arbitration that had been mandated by the statute. That responsibility, in turn, was largely assumed by the American Arbitration Association in affiliation with the International Foundation. At first, John chaired the committee. Then I became chair. And we wrote the arbitration rules that were then approved by PBGC. That approval came before the PBGC had developed its own rules. By virtue of being present at the creation, so to speak, people thought I must know something and I, too, started getting cases.

Mark I. Lurie: My experience, of self-education, was not dissimilar. When I first took an interest in pension arbitration, I didn't know John Sands personally. I knew of him and knew of his reputation. I read the statute and I tried to figure it out. I wrote up my understanding of what the pension law was. I sent it to John and asked him if I was on the right track. What I got back was like a Jackson Pollack painting. It was replete with notes. I had to revise much of my understanding. A word to the wise, it's not a simple area of law. Ira, could you give us some background on Multiemployer Pension Plans, their origin, and how they work?

Ira F. Jaffe: This is an extraordinarily complex area. We're more often in the weeds than we are elsewhere. What I'd like to do is give a three- to four-minute overview of what's there. It will help place the rest of the discussion about the crucial subject of withdrawal liability in context.

In 1974, ERISA was enacted, the first encompassing federal regulation of employee benefit plans. ERISA contained new fiduciary standards for the individuals administering the plans: the trustees and others.

Second, it provided for minimum vesting. Employees working a lifetime could no longer be discharged shortly before their retirement date and wind up with no benefit entitlements.

Third, it provided for minimum inclusionary standards, such that employees with sufficient hours of service could no longer be excluded from being allowed to participate.

Fourth, important for our purposes, it created a new entity, the PBGC, which provided a form of insurance for plans that lacked sufficient funds to fulfill their promised benefit obligations.

Multiemployer plans are plans in which a number of different employers contribute to a single trust fund. We often see these plans in the trucking and construction industries, but in a variety of other settings as well. The plans have joint trustees, as prescribed by the Taft-Hartley Act: the unions appoint the same number of trustees as those appointed by the employers. Pursuant to Section 302(c)(5) of the Labor-Management Relations Act, multiemployer plans are jointly administered and, in the event that the trustees deadlock over a question of plan administration, an arbitrator (known as an impartial umpire) is appointed to resolve those deadlock disputes.

Multiemployer plans were viewed as sufficiently complicated and as entailing sufficiently large potential liability to the PBGC insurance pool that a legislative expansion of the Employee Retirement Income Security Act (ERISA) was needed. The result was the MPPAA, passed in 1980.

MPPAA is a political answer to actuarial questions. It contains a number of things that are not necessarily rational. First, it recognizes that, as a matter of construction, it is assumed that multiemployer plans have indefinite lives; that contributions will continue to be made into the indefinite future. Much like Social Security. In reality, if the ratio changes—if you have a shrinking industry with a large number of retirees and a small number of active employees supporting it—the plan is no longer in financial equilibrium, and the increased contributions required from the remaining employers to maintain the plan may render the plan unaffordable. As you can imagine, employers want to extricate themselves from that circumstance. But Congress created a serious disincentive for such departure that leaves the remaining employers holding the financial bag. MPPAA requires the assessment of a "withdrawal liability" from employers who either permanently withdraw or partially withdraw from defined benefit multiemployer pension plans.

The statute wanted to make certain that the affected multiemployer plans were made whole when an employer withdrew—that the employer was assessed its allocable share of the fund's total unfunded vested benefit liabilities. The assessment is computed using a fairly complex statutory formula.

The plans that have withdrawal liability are those that have less by way of assets than they do by way of vested benefit obligations. The difference between the two is the "unfunded vested benefit liability" of the plan as a whole. MPPAA allocates that liability to each withdrawing employer pursuant to formulae that, in essence, prorate the amount of contributions that each employer has been making within the measuring period.

The statute is unusual in that, in several ways, it is stacked against employers. For example, it requires employers that are alleged to have withdrawn to pay their withdrawal liability first, and then challenge whether they have withdrawn and the amount of their liability.

The formulae for assessing liability are linked to a set of actuarial assumptions. Consequently, one category of disputes brought to arbitration deals with those assumptions. Did the actuary make reasonable assumptions with respect to interest rates (the single most important factor for dollar and cents purposes), mortality assumptions, disability assumptions, turnover assumptions, earnings, for future wages and the like. Review of the actuarial assumptions is supposed to be considered by the arbitrator in the aggregate. Consequently, MPPAA arbitration cases often present issues of conflicting actuarial testimony, by which I mean experts who do battle over financial and actuarial intricacies. Additionally, the date of withdrawal—which date demarks the moment when the employer's liability is to be quantified—has also become the subject of disputes. One year's interval can entail different plan assumptions and realities, and those differences can mean vastly greater unfunded liability calculations.

Once liability is established, that sum is amortized over an interval of up to 20 years. But unlike a conventional mortgage, where the term and interest rate determines the amount of the periodic payment, where an employer is paying an unfunded liability, the payment amounts determine the duration. The statute first calculates the amount of the ongoing payments, and then requires that those payments continue to be made (up to a maximum of 20 years) until the withdrawal liability has been paid. The statutory formula for determining the payment amount is based upon the highest contribution rate and the greatest number of contribution base units in the measuring period. Thus, an employer who has left the plan may ultimately pay more per month or per quarter than it would have paid had it remained in the plan. Further, after withdrawal, the employees of the withdrawn employer no longer obtain any benefits from those continuing payments. The plan's contribution base, however, is protected from harm associated with the withdrawal.

Another category of arbitrated issues are those that arise when an employer seeks to modify the assumptions about its plan's investment performance, contributions, or obligations. These issues deal with whether the changed assumptions are realistic, whether they were made in good faith, and whether they will impose greater liabilities than are appropriate upon other employer(s) that have left the plan.

It's not just the signatory employers who may be responsible for the unfunded liability. Under the statute, so may "controlled group" members, meaning other companies that qualify under the Internal Revenue Code as related entities. That liability may attach to a control group, even though the employer that was party to the collective bargaining agreement has gone bankrupt or has ceased to exist. This is grist for the arbitration mill, as are employers who leave the plan only in part. They might close one plant that contributes to the pension plan, but continue to have others and may incur partial withdrawal liability under MPPAA. And to add to the complexity, there are statutory provisions dealing with labor disputes, with transactions that are designed to evade or avoid withdrawal liability, with sales of assets, insolvencies, bankruptcies, and mergers. And some industries also have their own rules. The most common arbitrations of that nature deal with the building and construction industries, trucking and warehousing, entertainment and retail food. The application of those rules may also be a subject of arbitration.

The arbitration of such cases is often very challenging. They involve concepts that may not have been fully addressed by prior arbitrators, by the courts, or by the PBGC. Often, we're writing on a clean slate, giving it our best shot, but without the sense of security that comes when others have previously established the basic concepts and the norms.

In the early days of the statute, we saw a larger number of cases. Some related to whether employers had gotten out before the statute had taken effect; others related to dates of withdrawal and to assumptions about interest rates that had been made prior to the case law having developed. Then there was a hiatus of cases for about a 10-year period in the mid-1990s when the arbitration caseload diminished. The reasons for the lull were that, in general, plans had become fully funded, with plan trustees declining to increase benefits that they knew would increase potential withdrawal liability. Additionally, there had been years of robust growth in assets that outperformed the assumed rates of return. Many plans that were in poor funding condition often went to fully funded or, in some cases, overfunded status.

Then, in 2002–2003, and 2007–2008, everything went to hell in a hand basket. The economy tanked and a number of employers went out of business or substantially curtailed operations. Plans suffered huge investment losses and became underfunded. Withdrawal liability came back.

Norman Brand: And it came back in a new fashion. Previously, the interest rate assumption and date of withdrawal had been the big issues. Interest rates are important because they determine your present value. The date of withdrawal is important because you're looking backwards a year to determine what kind of shape the plan was in when you withdrew.

As a consequence of which, people have gotten very clever. For instance, a company plans to close a plant next year and does all the things it's supposed to do. It publishes a WARN notice saying that it will be closing on a specific date, and it negotiates the closing benefits with the union, including how the workforce will be laid off, what its members will be entitled to, etc.

Then their plan trustee learns that, uh oh, next year there's going to be a larger than expected withdrawal liability because the plan suffered from what every other plan suffered from: a bursting stock market bubble. So, instead of doing things as announced, the company decides, two days before its pension plan year ends, that *this* is the plan year—with *this* year's plan valuation—for which it wants its plan funding liability calculated. And it announces: "Day-after-tomorrow, everybody will be laid off. The plant will close its doors."

MPPAA has a section that says that any transaction, a principle purpose of which is to evade or avoid liability, will be disregarded in determining liability. Increasingly, plans that were in trouble are finding more ways of asserting that an employer who withdrew at a time when it had no unfunded liability engaged in a transaction to evade or avoid that liability. The one I just told you about was a company in the construction industry. Special rules apply in that industry: you do not have any withdrawal liability if you do not engage in work in the same jurisdiction as that in which the work for which contributions were required, or if you do not resume such work in five years. So companies "sell back" work, and end the contract with the union. Without a body of interpretative precedent, the limits of creativity to avoid liability are only in the cleverness of lawyers.

Finally, keep one thing in mind. The statute is one that our own Supreme Court has called, in places, incoherent. That gives all of us some problems.

Mark I. Irvings: I'll give some flesh to some of these points with an example. I think by now you've understood that these cases are extremely different from labor arbitration. These are not disputes between the parties to a negotiated agreement. Rather, these are disputes in which fund trustees are doing whatever they can to recapture or get money from withdrawing employers. And, because of the adverse economic positions of the funds, they are doing so with increasing frequency and urgency.

In these cases, one of the key issues is that of the control groups. If a withdrawing employer goes out of business, who else may be deemed responsible for the unfunded liability? You can go after any subsidiary companies, or a parent company. Or, you can go after a brother or sister company. We get to deal with a lot of arcane, clever, devious corporate structures.

Next, how is the withdrawal liability to be calculated? Again, this is not a matter of a collective bargaining agreement or the parties' past practice. In fact, you have a singularity of interests: the funds in the plan for the remaining employers and the unions are joint funds. It's in both their interest to recover as much money as possible. Employers who are withdrawing have a very different interest from those who are remaining.

Theoretically, you could look at legislative history. You can look at the regulations of the PBGC. You can look at court decisions. But doing so is often not helpful. First, as Ira said, MPPAA was a political act: the culmination of a lot of trade-offs that were made not necessarily for rational policy reasons, but to obtain the consent of people seeking their particular provisions. The result is that the Act's constructs are sometimes irrational and sometimes inconsistent.

Second, the PBGC has not issued many regulations that have been helpful. There is a dearth of agency expertise and competent guidance. The law has been around since 1980 and a lot of issues have arisen, but there are relatively few clarifying decisions, including arbitration decisions. This last is true because much of pension dispute arbitration consists of case management. Often the cases consist of discovery, and then, ultimately, settlement. You may rule on some threshold issue—often a narrow legal question. But as the process continues, the parties work out their differences, rather than risk going through the attenuated and very expensive process.

Fortunately, we are aided by the fact that the quality of advocacy is generally of an extremely high level, by advocates who are being extremely well paid. Those billable hours are an incentive for settlement.

There are few arbitration decisions. And, while I believe that the original plan was that all of those decisions would be published, that has not happened. Unless you have colleagues or advocates whose experience you can tap, you can't find out what other people have done in similar cases.

Even if there is an arbitration decision, and even if it is appealed to the Federal District Court, the parties will usually work out a settlement. You don't get the kind of definitive explanations from the District Courts, and then the Appellate Courts that you have in many other areas of the law.

In many ways, I find doing these cases analogous to arbitrating wage and hour class actions dealing with issues of statute. They affect not just an immediate beneficiary, but large numbers of other persons. If an employer is not compelled to pay a substantial portion of its unfunded withdrawal liability, that liability doesn't go away. It is shifted to the remaining employers or to the PBGC, which, ultimately, means that it gets shifted to taxpayers.

I will describe a particular withdrawal liability case that is illustrative of the kinds of issues and problems encountered. As noted, when the employer withdraws, the fund actuary has to do a calculation of the employer's allocable share of the unfunded vested liability, and of its annual payment schedule as defined by a statutory formula. (Ultimately, you're looking at the highest average annual contribution base units; contributions have to be made based on compensable hours. Those become contribution base units. You look at three consecutive highest years in a 10-year period and multiply that average by the highest contribution rate, the HCR, within the last 10 years.) Here's the catch. In a declining industry, the highest contribution base units may have been in years 1, 2, and 3. The highest contribution rate under its successive collective bargaining agreements may have been in years 8, 9, and 10. So, the employer could be paying more, annually, toward its withdrawal liability than it had ever paid previously.

To complicate this, the statute did not contemplate that there might be more than a single collective bargaining agreement per employer. Well, I'm dealing with a situation where the employer had three collective bargaining agreements that required contributions, each with different contribution rates for different job classifications. And, the agreements had three different contribution rates for each classification, depending on the date of hire. The contribution rates varied from a low of $1.69 an hour to a high of $3.69 an hour.

Congress never thought about what would happen when you have 15 or 20 contribution rates. God bless my good friend Ira there, who had dealt with this issue once. Ultimately, the case was settled and withdrawn. The one relevant PBGC opinion letter addressed a fund that had two contribution rates. The PBGC observed that it would be inequitable to assess all the withdrawing employer's contribution base units based upon the higher of the rates, but it didn't say what solution the statute required.

You're out there swimming with no support, no guidance, and where bargaining history and past practice are irrelevant. You are making up things. Just to give you a sense of scale, the swing could be $120 million. It's a not insignificant dispute, even for a large employer.

Norman Brand: One of the joys of doing this work is that a District Court reviews your decision on the law de novo. They'll tell you if you got it right.

Mark I. Lurie: That raises the question of who you are writing the decision for: both parties or the losing party, who should be left feeling that it has received a full and fair hearing, and a reasonable decision. In pension arbitration, you may be writing for the Court that's going to be reviewing your decision. Plus, the pension arbitrator must bear in mind that he or she may be deemed to be a plan fiduciary, subject to the same personal liability as a plan trustee. That is a potential liability that can get very expensive. Would the panelists care to comment about that?

John E. Sands: Yes, what I will do is segue happily from MPPAA to the LMRA and the Taft-Hartley Plan Trustee Deadlock cases. As you know, Taft Hartley Title 3, Section 301 gives Federal Court jurisdiction over the contractual enforcement of collective bargaining agreement obligations. Less well known are Sections 302(a) and (b), which prohibit and impose criminal penalties on payments by employers to persons or entities that are, essentially, employee representatives and unions, and which impose criminal liability on representatives demanding such payments. Section 302(c) lists exceptions, and 302(c)(5) is for payments by employers to employee benefit funds; and it sets the structural requirements for those funds. They must be trust funds that are jointly administered by a Board of Trustees with equal numbers appointed by the employers and by the union. Because you've got an even number of trustees, the trust document must provide for arbitration to break deadlocks arising over proposed resolutions. The Act provides for the Federal Court to appoint an arbitrator if the parties can't agree. Of course, the American Arbitration Association has a panel of deadlock arbitrators and deadlock arbitration rules.

Arbitrators hearing those deadlock cases essentially sit as tie-breaking trustees. We are subject to the same fiduciary responsibilities as the party-appointed trustees. The standard of decision is that we must exercise the same prudent judgment as a trustee and act in the exclusive interest of the plan participants and beneficiaries. By the way, Section 302(c)(5) does not just apply to pension plans. It also applies to welfare plans, training programs, legal assistance programs, and any other jointly administered employee benefit program.

Norman Brand: John, what are the dangers to arbitrators here?

John E. Sands: Not so much ultimate liability, but being sued. I suspect that if you follow your own moral compass, you'll have no problems. Here's the issue: if you're sitting as a fiduciary, you are potentially subject to fiduciary liability and more likely to litigation, notwithstanding that you may have common law quasi-judicial arbitral immunity. How do you deal with that?

Well, what I think all of us on the panel do is maintain the insurance provided through the National Academy, and we pay extra for a rider that gives us coverage as fiduciaries in cases involving ERISA issues. And, at the outset of cases like this or MPPAA, I tell the parties that they have three options. They can cover me on the same policy as the Trustees have for the period of the proceeding, plus the end tail of the period of the Statute of Limitations on claims against fiduciaries. Or, they can purchase a separate policy for me. Or, third, I will provide my own insurance, and I will self-insure the deductible for which they will pay a disbursement of $3,000. Most parties go for the first option. The second option is prohibitively expensive. The third option is occasionally taken, particularly when the parties are concerned with the potential dilution of the Trustees' own coverage.

Norman Brand: The trustees may not have coverage. They may have lost it.

Ira F. Jaffe: Alternatively, during the tail period, they could lose it or they could decide this is an expense we don't need. You don't know.

John E. Sands: And why do we have our own insurance? It's the safest thing to do. By the way, the Supreme Court has never dealt with this issue. I think that the Sixth Circuit did in *United Auto Workers v. Greyhound Lines, Inc.*[7] and ruled that we are not fiduciaries, but the Department of Labor has said otherwise. When MPPAA Section 4221, 29 U.S.C. §1401 was being drafted, there was a dispute among the Senate staff as to whether to call MPPAA arbitrators fiduciaries or to give them immunity. Their compromise was the sentence in Section 4221(a)(2) stating that the plan's sponsor—that's the Trustees—may purchase insurance to cover the potential liability of the arbitrator. I believe that's the only federal statutory provision that addresses the status of arbitrators as fiduciaries.

Norman Brand: The category of disputes we hear in Trustee deadlocks as John has noted varies widely. I do two things. First, I discourage the parties from making a transcript or recording of the proceeding. I explain loudly and clearly that, while I will be happy to go ahead and preside over a case with a transcript, based

[7]701 F.2d 1181, 4 EB Cases 1105 (6th Cir. 1983).

on my experience over the years, it is not uncommon for one or more of the Trustees to say something heartfelt in the context of testimony or argument that may present fiduciary breech concerns under ERISA. And I tell them that, at least from my perspective, we're better off not having a record of it.

The second thing is that I approach counsel at the front end of the case and inquire who they're representing. It may not be as obvious as everyone thinks. Often the separate groups of Trustees have separate counsel. That's "hat" number 1. Counsel may also be co-counsel to the fund; another client in relationship number 2. If I'm sitting as the equivalent of an odd-numbered Trustee or fiduciary, they're also *my* counsel, number 3. Clarifying the attorneys' roles makes clear what they can ethically argue to me or not argue to me. Though it's often a little discomforting for some of the attorneys to recognize they represent me as well as the Trustee groups, that is a relationship they must comprehend.

Catherine Harris: All of the concerns that have been raised by the panelists concerning private sector pension plans and unfunded liability are expressing themselves in one way or the other at the collective bargaining table when public sector parties fail to reach agreement and call in a third-party neutral to write the contract, often with the assistance of a management and union "arbitrators." In my practice, which includes public sector interest arbitration and a great deal of disability retirement work, I have found it essential, early on in each case, to determine for whom I am writing a decision. For example, in Hawaii, under their interest arbitration law, the interest arbitrator's decision will be presented to the legislature for approval. I write the decision with that in mind. On the other hand, if I am writing a final and binding interest arbitration award involving a city that has an interest arbitration ordinance, I take a different approach. If I am proposing a decision to a board of retirement in a public sector disability retirement case, I am writing for a board with the full realization that the decision may be appealed to the state court.

Most of the disability retirement claims made by public employees in California are governed by the Retirement Law of 1937. My home county of Sacramento is one of California's 37 Act counties. I began my neutral practice when, in 1987, I began hearing disability retirement matters for the Board of Retirement of the Sacramento County Employees Retirement System. These are unique cases that are governed by statute. Consequently, while all of the county employees in California are, for the most part, unionized, any right they may have to a disability pension is derived, not from the collective bargaining agreement or memorandum of understanding, but rather from the provisions of the 37 Act. Without exception, all of the public employees in the counties in which I have worked have defined benefit plans although, in Orange County, new County employees may choose between an existing defined benefit program or a hybrid that has a smaller defined benefit, plus a portable 401(k) account.

With the economic downturn in 2008, the number of disability retirement claims increased markedly. Very frequently, these cases have multi-million-dollar ramifications for the various funds, systems, or associations (as they are variously called) that administer the pension programs for public employees in California. For example, if a law enforcement officer is seriously injured during his or her initial training, he or she may be eligible for a service connected disability retirement benefit. If the claim is granted, the result will be lifetime disability benefits for the permanently disabled employee and, assuming a survivorship election, a survivor's benefit may continue during the life of the employee's spouse. Depending on the longevity of the employee and his or her spouse, these benefits may be payable for decades.

Based on the fiduciary duty that the fund owes all of its members and the growing concerns about unfunded liabilities, these cases are aggressively defended when the fund determines that an applicant for disability retirement benefits does not meet the legal standards set forth in the 37 Act and the case is referred for hearing. Generally speaking, most counties have an administrative process that evaluates the merits of a disability retirement application. Very few counties send every case to a hearing officer. In the cases in which a hearing is requested, there will either be live medical testimony or the parties will agree to submit the medical reports into evidence. In the vast majority of cases, most deliberation time is spent weighing contradictory medical evidence. The task of the administrative law judge, hearing officer or referee (as the neutral third party is variously called) is to explain to a board of retirement which of the medical opinions is the most credible. As with the MPPAA cases, there is little, if any, guidance up on the shelf that explains how to do this; however, the advocates will provide suggestions on how to resolve the discrepancies in medical opinion to achieve what they regard as the appropriate outcome.

The proposed decision is reviewed by the board of retirement, which has the option to accept, reject, or modify the recommendation. The board of retirement's decision may not be the final outcome, as each party has the right to file a writ in the superior court where the judge reviews the case de novo and is entitled to make an independent judgment with respect to all of the issues. Based on my experience, I would say that, in the vast majority of cases, the proposed decision is fully adopted by the board of retirement as long as it presents a reasoned explanation of why the applicant did, or did not, meet the burden of proof.

The main issues involved in these cases are first, whether an employee is permanently incapacitated from substantially performing the duties of the last permanent assignment and, if so, whether the disability arose out of, and in the course of, the employment, and whether the employment contributed substantially to the disability. The second issue is commonly referred to as the service connection issue. The applicant has the burden of proof with respect to both issues.

Disputes frequently arise over how to accurately describe the set of duties against which the applicant's capabilities should be measured, especially in cases where modified duty assignments have been offered. Other issues involve whether the claimed disability or disabilities have been accurately evaluated. For example, an advocate may be able to make a strong case that an evaluating physician was not provided with accurate information, thus detracting from the credibility of his medical opinion. On rare occasions, there is an issue about the effective date of the application.

Some applicants for disability pensions who have received workers' compensation benefits erroneously assume that they will immediately qualify for lifetime disability retirement benefits. That is not necessarily the case because the standards for workers' compensation and disability retirement are different. An injury that arises out of, and in the course of, the employment (the standard for workers' compensation) does not necessarily satisfy the standard for disability retirement (permanent incapacitation that precludes the substantial performance of duties). Thus, a lawyer who loses his arm in a work-related accident and receives workers' compensation may not qualify for disability retirement if the lawyer is still capable of substantially performing his or her duties.

Like workers' compensation, California disability retirement has experienced its share of scandals. One extraordinary case that comes to mind is that of a correctional officer who convinced a board of retirement that he suffered from a permanently incapacitating lower back disability and, later, while receiving lifetime disability retirement benefits, was videotaped competing in a bull riding contest at a county fair. The film was played over and over again on the news to the delight of critics of public pension programs. Having seen a fair amount of surveillance tapes in disability retirement cases, very few are that shocking or probative and most are like watching grass grow.

Mark I. Lurie: Panelists, what advice would you give to an arbitrator who has no experience in any of these pension and benefit cases that we've been discussing: multiemployer plan withdrawals and the like, who receives an appointment to such a case?

John E. Sands: Usually the appointments will come from an agency like the AAA, and you will have had to qualify to be on one of the specialized panels, either by experience or training. I think it's too late once you have the appointment, unless it's an issue within your competence, to get the training. But the International Foundation of Employee Benefit Plans has an excellent education department that does programs all around the country. In fact, many benefit funds send their Trustees to these programs, so that they can know the basic concepts, know the relevant law, and know their obligations. I think that's important.

I can think of three different approaches, in my experience, the best of which was Mark Lurie's. He told you when he decided he wanted to get into it; he did the research. Then he reached out to knowledgeable people to discuss and get more information. Now, he's qualified to hear these things.

At the other extreme was one of our colleagues whom a number of us had helped get started. He became a member of the Academy and started pushing himself into new and unfamiliar situations. He called me and said, "John, I've got my first MPPAA case. What do I need to know?" I said, "Gee, I'm so glad you called me because this is really a sophisticated area of arbitration. I'll be glad to help you out and, because you're a colleague and a friend, I'll only charge half of my consulting fee." I never heard from him again.

Yet another of our colleagues, who is not a lawyer and had no background in pension work, was appointed to a MPPAA case off a State Mediation Board panel that did not have a specific requirement of expertise in these programs. He had his first hearing. After the opening statements, he said to the parties, "I'm sorry.

I'm just not competent to handle this case. Here are the names of three of my colleagues who I think are." You've got to understand your limitations.

The parties will educate you on what you need to know for that particular case, but you need to know the area of the law generally in order to be educable.

Catherine Harris: However, there are trustee deadlock cases that are really quite simple. I have had a few and was selected from either a panel of the AAA or a Federal Mediation and Conciliation Service panel. I am sure that any Academy member in the room would be qualified to handle those cases. Not every trustee deadlock case is hugely complicated. It may involve an issue as simple as the selection of an accounting firm.

Mark I. Irvings: One kind of ERISA dispute that most of you are qualified to hear is "Tin Parachute" cases. These are cases in which Company A buys out Company B. Company B knows it's in play and promises severance benefits to employees who are dismissed after the change in ownership. Those are actually ERISA plans. The things that you need to know are not complicated and can be handled competently by most arbitrators.

Ira F. Jaffe: There are two types of cases that we haven't yet discussed that fall under the rubric of pension arbitration. One deals with plan claims disputes that may not involve disability issues, but may involve entitlement to receive particular forms or amounts of other pension benefits.

Then, of course, there are interest arbitrations that pose very significant retirement issues. These disputes arise largely, but not exclusively, in the public sector. These days, interest arbitration cases deal with ways to save costs. Plain and simple. Not just balance sheet costs, but real costs. What the parties seem to be doing at the bargaining table and after impasse relates primarily to plan design changes. They tend to focus on the following areas:

1. Increases in employee contributions: motions by the municipality or the state to increase the amount of money employees must contribute to their own retirement.
2 A new tier or benefits for new hires, which generally is less generous than the existing tier(s) for existing employees.
3. The reduction or suspension of cost of living adjustments that can be extremely expensive.

4. A change to a hybrid form of providing retirement benefits, perhaps through the addition of a defined contribution—a 401(k) or equivalent type of plan.
5. Addressing retiree health claims, which although a huge piece of this puzzle, have generally not been addressed as pension equivalents. In fact, the unfunded liabilities for retiree health can exceed, in dollar terms, those of basic pension benefits, particularly since they are often not funded or are not well funded.
6. Lastly, changing such features of the plan as the retirement age, early retirement subsidies, and anti-wage-spiking provisions.

Mark I. Lurie: Finally, we're going to have a delightful 15 seconds from John Sands.

John E. Sands: A cautionary tale. In New Jersey, Governor Christie and the Legislature did not get rid of interest arbitration for police and fire. They got rid of interest arbitrators. How did they do that? They placed a 2 percent increase cap on awards, and they placed a cap on arbitrator compensation for hearing, deliberating, and writing the decisions for those complex cases. Total compensation: $7,500. But worse, if an arbitrator does not issue his or her award within 45 days of appointment, that arbitrator is subject to a fine of $1,000 a day. How were these new terms of engagement received? The entire panel of arbitrators resigned.

Mark I. Lurie: Thank you very much. And thanks to the panelists, who were given the impossible assignment of covering the subject of pension arbitration in an hour and a half, and who did so with aplomb.