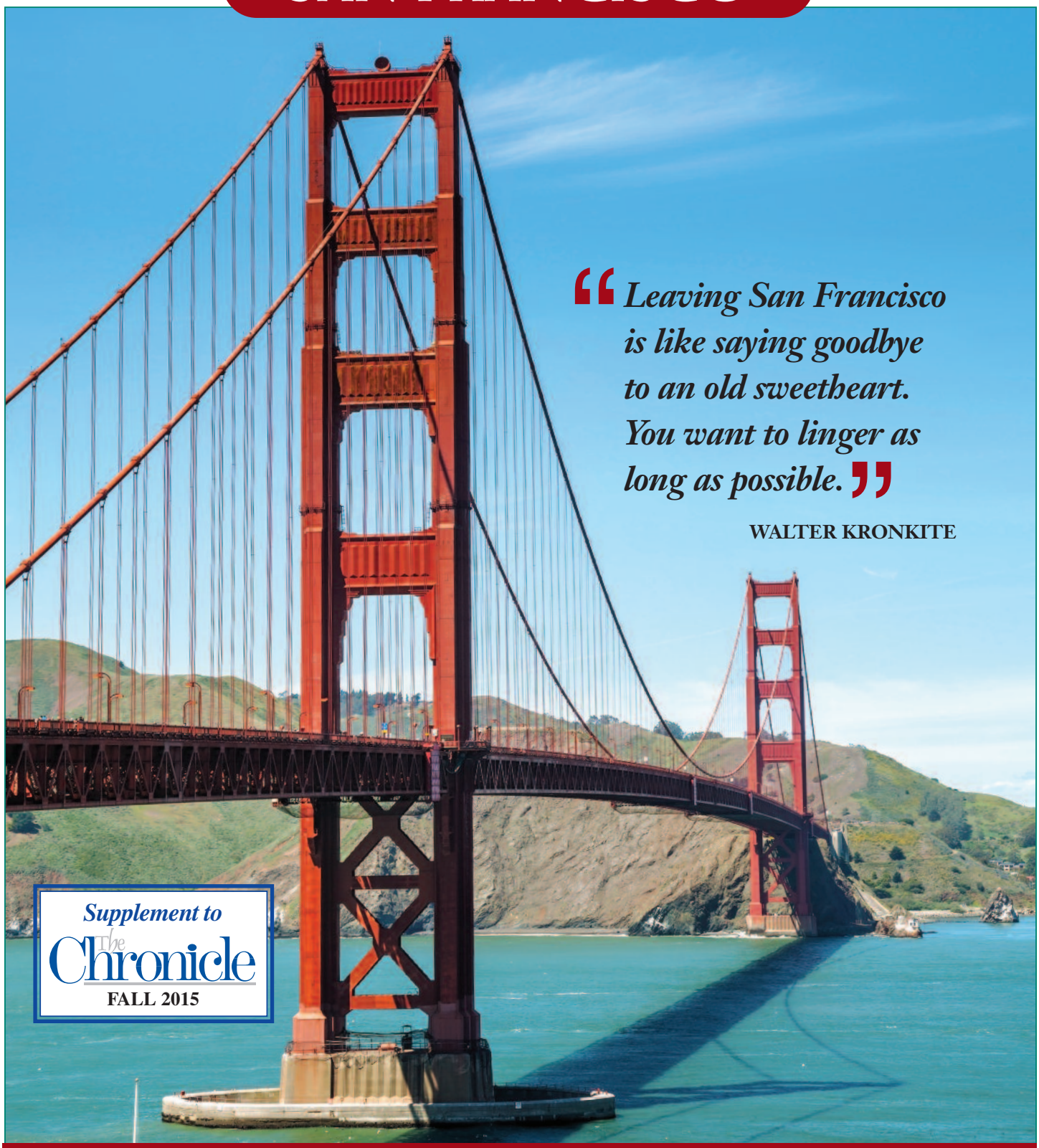
SAN FRANCISCO



"Leaving San Francisco is like saying goodbye to an old sweetheart. You want to linger as long as possible."

WALTER KRONKITE

Supplement to The Chronicle
FALL 2015

Who's In Charge?

The NLRB reverses *Olin Corp.* and *Spielberg Mfg.*

Reported by James S. Cooper

My father always told me "If it ain't broken, don't fix it," an aphorism the NLRB has blatantly ignored in its newest rendition of the deferral doctrine per *Babcock & Wilcox Construction Co., Inc.*, 361 NLRB No. 132 (2014) (*Babcock & Wilcox*), overruling over thirty years of precedent in *Olin Corp.* (*Olin*) and jettisoning nearly sixty years of *Spielberg Mfg. Co.*(*Spielberg*). NLRB Board Member Philip A. Miscimarra presented the opening plenary address at the 2015 Annual Meeting in San Francisco and delivered a knock down (if not, knock out) punch to all arbitrators who make a significant portion of their living on "just cause." There is a good reason the Board sent Member Miscimarra; he (along with Member Johnson) dissented from the Board's opinion and, God bless him, urged his dissent on us, which amounted to preaching to the converted. Of course, in the interest of showing us deference, if not deferral, Member Miscimarra read a letter from Board Chairman Mark Gaston Pearce and General Counsel Richard Griffin extending their best wishes "celebrating" arbitrators.

Before I get too far afield, let me outline the goal of this somewhat lengthy (with The Chronicle editor's blessing) article. Member Miscimarra explained what the Board's decision changed in terms of the deferral doctrine, evaluated the Board's rationale for doing so, and carefully attempted to point out the important points of his dissent as well as those of Member Johnson's. I would urge those NAA members who take the opportunity to read this article to, more importantly, read the full *Babcock & Wilcox* decision and put their thoughts into comments on the NAA's unofficial e-mail list, with a hash tag: *Babcock & Wilcox.*

What does *Babcock & Wilcox* change? As Member Miscimarra explained, under the current *Olin* doctrine, the Board would defer to an arbitrator's award where the proceedings before the arbitrator appeared to

Program Chair Laura J. Cooper with Philip A. Miscimarra

be fair and regular and the contractual issue was "factually parallel" to the unfair labor practice (limited to Section 8(a)(1) and (3) charges protecting employees' Section 7 rights); where the arbitrator was presented generally with the facts relevant to resolving the issue; and the arbitrator's award was not "clearly repugnant" to the National Labor Relations Act (the Act). In *Babcock & Wilcox*, the General Counsel argued that the Board should institute a very strict deferral standard whereby the Board would limit its deferral to the arbitrator's award only if the parties specifically incorporated the statutory right (i.e., Section 8(a)(1) interference with or (3) discrimination for exercising Section 7 rights) into their collective bargaining agreement or if, on a case by case basis, the parties specifically agreed that the arbitrator was to decide those statutory rights in his or her award. The General Counsel then argued that deferral should still not be granted unless the arbitrator "correctly enunciated the applicable statutory principles and applied them in deciding the issue." This would require every labor arbitrator to become, in essence, an NLRB administrative law judge, something that precious few of the NAA members could do and still eat. As Member Miscimarra noted, we should be happy that the Board majority shunned the General Counsel's contentions. Instead the Board, again by only a 3 to 2 vote, requires the following for deferral: assuming the procedure was fair and regular, the party urging deferral must show that (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue (or was prevented from doing so by the party opposing deferral); and (3) Board law reasonably permits the award.

The majority's rationale, Member Miscimarra explained, was based upon the Board's enforcement of the *public* rights under the Act to promote industrial peace and stability. At the same time, the majority recognized that the law encourages *private* collective bargaining agreements with final and binding arbitration as a favored method for promoting industrial stability. The Board's majority noted, however, that, under the Act, the Board's statutory obligation is to decide when and under what circumstances to yield its *public* function to a *private* arbitrator; hence, the specificity required and the "reasonable" consistency with Board law. The Board's majority determined that anything less than the parties and the arbitrator acknowledging and applying the law to a grievant's statutory rights and explaining such in an award is, henceforth, unacceptable. The majority's key rationale appeared in three sentences:

> The overriding aim of deferral is not to resolve disputes quickly or to reduce the Board's caseload, although those are worthwhile aspects of the policy. The point, rather, is to give effect to the parties' voluntarily chosen process for resolving workplace disputes, *provided* that process leads to decisions that adequately protect employees' statutory rights.

Members Miscrimarra and Johnson vehemently disagreed with their colleagues. Member Miscimarra focused

(Continued on Page 4)

2015 NAA Presidential Address

By Susan Grody Ruben

NAA President Shyam Das, who studied to become a historian before becoming an arbitrator, told a compelling narrative of his forty years with the U.S. Steel and Steelworkers Board of Arbitration. Shyam heard his first case with those parties in 1975. Since 1997, he has been Chair of the Board of Arbitration. (Shyam also served as arbitrator for Major League Baseball and its Players Association from 1999-2012.)

Shyam explained the U.S. Steel/Steelworkers Board of Arbitration originated shortly before the NAA was founded in 1947. Over the past seven decades, the parties have adapted their arbitration system to changing circumstances.

In 1951, when the U.S. Steel/Steelworkers contract was silent on subcontracting, Sylvester Garrett, then-Board Chair (and NAA President in 1963), issued a seminal decision holding that management's right to contract out was subject to an implied obligation under the recognition clause to "refrain from arbitrarily or unreasonably reducing the scope of the bargaining unit." In 1955, U.S. Steel was the second largest private employer in the United States with 268,000 employees.

Starting in 1960, due to the Board workload, Sylvester Garrett began to hire full-time assistants, who in essence were brought into the Board as apprentice arbitrators. Among the early assistants were Clare "Mick" McDermott (NAA President in 1979), Al Dybeck (NAA President in 1989), and Ed McDaniel.

A second generation of arbitration assistants was hired in the mid- to late-1970s. These included Helen Witt, James Beilstein, and Shyam Das, and somewhat later, David Petersen and Liz Neumeier. Al Dybeck succeeded Sylvester Garrett as Board Chair in 1979, serving until 1996.

Ben Fischer, long-time Director of the Steelworkers Contract Administration Department, in addressing the NAA in 1976, noted:

Jesse Oldham, Jason Das, Shyam Das, Kathleen Miller, Alex Gould, Bree Gould and Willa Gould

> The role arbitration [in the steel industry] has played during a period of nearly thirty years must be viewed as constructive, if not decisive. It is difficult to estimate the degree to which relaxation of many tensions in collective bargaining relationships has been a by-product of faith in the role of arbitrators.

Job security issues continued to be a primary focus of collective bargaining in steel. The parties included subcontracting language for the first time in their 1963 contract. When domestic steel production underwent drastic reductions in the 1980s, in part due to cheaper imports, steel unions focused on reining in subcontracting. Subcontracting grievances were a large part of the arbitration docket for the next few decades.

In 2008, the parties entered into a new contract in which the contracting out provisions of the contract were experimentally suspended in return for guaranteed staffing levels and substantial overtime opportunities. The parties seem to have agreed they were spending too many resources on contracting out disputes.

U.S. Steel currently has approximately 40,000 employees. Though diminished in size, it remains a vital part of the U.S. manufacturing economy. The parties' collective bargaining relationship clearly has evolved. Today, they have a notably more cooperative relationship. Arbitration still plays an important role in the parties' relationship.

Since the founding of the NAA in 1947, all four of the Chairs of the U.S. Steel/Steelworker Board of Arbitration – Ralph Seward, Sylvester Garrett, Al Dybeck, and Shyam Das – have served as President of the NAA. Shyam is proud to be part of that company.

We are proud that Shyam's distinguished career includes serving as NAA President this past year. Thank you, Shyam!

Workplace Drug Use:

A New Generation of Issues

By Sharon A. Gallagher

NAA Member Norman Brand (Moderator) opened the segment with an overview of the historical treatment of impaired employees in discipline cases, starting with employees impaired by alcohol in the 1960s and ending with the topic for discussion, how arbitrators deal with employees allegedly impaired by marijuana. The materials contained five recent cases from California, Oregon, Washington, Michigan, and Colorado[1] that demonstrated the tension between state laws allowing the use of medical marijuana, state fair employment laws, and federal criminal law. In all of the cases, the courts held that a private employer is not prohibited from discharging employees (who possess proper prescriptions for medical marijuana use) for either being tested impaired by marijuana at work or for merely admitting

(Continued on Page 5)

Norman Brand and John Sands with Fern Steiner, Rod Betts and Joe Elford

Olin Corp. and *Spielberg Mfg.* *(Continued from Page 2)*

heavily on the Taft-Hartley amendments to Section 10(c) of the Act, which prohibited the Board from reinstating or awarding back pay to an employee who was terminated for cause. From this, Member Miscimarra argued that the Board should accept an arbitrator's finding of "cause" for discipline as sufficiently broad to include a finding that the employee was not terminated for union or protected activities. Hence, to Member Miscimarra, the Board's standards set forth in *Olin* and *Spielberg* should continue to be the Board's deferral standard and every "cause" determination by an arbitrator should be given the same weight as the Board's determination of a Section 8(a)(1) and (3) violation. The majority rejected Member Miscimarra's reading of Section 10(c), citing the mixed motive cases and the U.S. Supreme Court's approval of the Board's "two stage" causation analysis in *Wright Line*, 251 NLRB 1083 (1980), approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). To the Board majority, it is a relatively simple matter for an arbitrator to articulate in his or her decision that, in finding just cause for discharge, the employer did not retaliate for the employee's protected activity. Member Johnson's dissent includes a direct stab at the majority's rationale for departing from the longstanding precedent, noting there is no evidence of a "nationwide wave of rogue arbitral decisions that threatens to undermine rights protected by" the Act. On this point, the Board majority noted that it called for "empirical and other evidence" bearing on the *Spielberg* and *Olin* deferral standards. The Board got a plethora of briefs (words…words…words, but no *empirical* data). Member Miscimarra's entire thrust to us was this: *Babcock & Wilcox Construction Co.* undermines the parties reliance on their agreement as "final and binding;" it also undermines the parties' ability to negotiate terms voluntarily because the Board now demands that employers agree with unions that collective bargaining agreements protect employees' Section 7 rights or add those rights on a case by case basis.

Needless to say, the audience went haywire with comments. Among my favorites were Matt Franckiewicz and Joan Dolan's plaintive plea: "Why?" Barry Winograd asked where is the empirical evidence for overthrowing thirty and sixty year precedents? Jim Oldham asked "Should we raise the statutory issue?" Luella Nelson's response was "Yes, we should." Joan Parker advised just the opposite: "Lie low and wait for the parties to raise the issue." Shyam Das said you better start following Board decisions because their eyes will be on your ability to be reasonably consistent with Board law. The best summary of how and when the Board will defer is set forth in the General Counsel's Memorandum, GC 15-02, which was included in the Conference Materials. The next question is whether this deferral doctrine will survive thirty years? Please let us know what you think.

 (Continued from Page 4)

they had a prescription for use of the drug. Three of the courts noted that the medical marijuana laws protected individuals from state criminal prosecution, but that use of marijuana is still prohibited by federal law.

The materials also contained seven pages summarizing current state law in the 16 states and the District of Columbia that have decriminalized the possession, use, and sometimes the cultivation and sale of small amounts of marijuana, without regard for medical need. The materials showed that in six states, Massachusetts, Rhode Island, Vermont, Mississippi, New York, and Nevada, state legislatures are actively considering legalizing marijuana. In a seventh state, New Jersey, the state senate has introduced a bill to legalize the drug which the Governor has vowed to veto.

After Mr. Brand's overview, the panelists discussed two of five case scenarios handed out to attendees. The first scenario concerned a Nevada middle school teacher who had a prescription for medical marijuana and smoked cigarettes, both of which helped her manage the constant pain of deteriorating intervertebral disc disease. One day after fourth period, while she was smoking a cigarette (in an approved area) when her class is being covered by another teacher; the Principal saw her smoking, criticized her cigarette smoking, shouted at her, and accuses her of being high. The Principal suspended her on the spot and sent her for a drug test. The teacher was fired for testing positive for THC metabolites.

The Union panelist argued that there is no policy against cigarette smoking or marijuana; that the teacher's smoking a cigarette is not a proper basis for a drug test; and that the teacher's testing positive for metabolites does not prove she smoked marijuana or that she was impaired on the day in question, given her medical condition and prescription. The Employer panelist argued that the teacher had a bad attitude and was insubordinate to the Principal and that the discharge should stand.

National Academy Arbitrator John Sands stated that he treats drug cases like alcohol cases. Sands stated he asks the same questions – What did the Employer know when it decided to discharge the employee? Why was the employee discharged and what was the proof in support? Is there a disability that must be accommodated? Was the drug test reliable? Are there mitigating factors? Were supervisors trained to detect impairment? Sands said that the fact that there is a positive drug test is not the end of the inquiry in these cases.

Scenario 2 concerned the Company that had a drug-free workplace policy requiring post-accident urine testing, which provided for immediate discharge for an adulterated test as well as a positive test and for the refusal to take a test. The grievant, a warehouseman, had an accident on a forklift and was sent for a urine drug test. The lab found the grievant's urine had 100 times the normal level of nitrites and declared the samples taken "non-testable," which indicates the presence of an adulterant. The grievant was discharged for providing an adulterated sample.

The Union panelist argued that the facts did not show that the grievant was in a safety-sensitive position so immediate removal was inappropriate for a "failed" urine test. In any event, having a bacteria infection or taking ADHD drugs or nitroglycerine can cause high nitrites in urine, as can the consumption of bacon and hot dogs. The Union asserted that the Company failed to prove the grievant tampered with or adulterated the sample that was used to test for nitrates. (The Griess reaction test is unreliable.)

The Employer panelist argued that it has a policy and the right to test under it; that the grievant drives forklifts so his job is safety-sensitive; that the policy provides that altering a urine sample is to be treated the same as failing the test; and 100 times higher nitrites constitutes proof of adulteration. Therefore, there was just cause for the discharge of the grievant.

Arbitrator Sands stated that this is the kind of case that would involve the testimony of several experts. Sands stated that, when he has "warring experts," he insists that they all listen to each other's testimony and that, after all experts have testified, he questions all of them in a group and they then answer and discuss or debate each other. This allows Arbitrator Sands to better evaluate their expert testimony.

---

[1] Ross v. Raging Wire Tele., 42 Cal. 4th 920 (2008); Emerald Street Fab. Co. v. Bureau of Labor and Ind., 348 Or.159 (2010); Roe v. Teletech Cust. Care Mgmt., 171 Wash. 2nd 736 (2011); Cassius v. Wal-Mart Stores, Inc., 695 F.3d 428 (2012); Coats v. Dish Network, LLC, 303 P.3d 147 (2013).

How Arbitrators and Advocates Can Understand and Avoid Unconscious Bias and Stereotyping

By James E. Dorsey

Impartiality is a foundation of adjudication in our legal system. Persons who are biased, have bias imputed to them, or give rise to a suspicion of bias are not considered to be impartial. Impartial and independent arbitrators pride themselves on their ability to make fair decisions based on unbiased findings.

Everyone knows they have preferences — a favourite colour, tea, or spelling choice. These are not biases and have no relevance to fair decision-making. However, an irrational preference, preconceived opinion, or prejudice might. Not everyone knows they have explicit or implicit biases or what they are. Sometimes, hidden biases in others are referred to as blind spots. Advertisers use them effectively in marketing. Persons who know and admit their explicit biases demonstrate less implicit bias.

Amy Oppenheimer (*www.amyopp.com*), founder and past President of the Board of the Association of Workplace Investigators, Inc., prescribes self-awareness of implicit biases to limit their impact on decision-making. In a fast paced, engaging presentation, Attorney Oppenheimer gave a comprehensive primer on the research on the origin and impact of biases.

The social psychology Implicit Association Test measures attitude through test takers' rapid associations. It has identified implicit biases in over 80% of the 2 million test takers. Take a test at *www.implicit.harvard.edu*. You might have more biases than you realized. The human mind uses categories to aid in recognition, judgment, and decision-making in daily living. Stereotyping, which aids in rapid assessment and operates without conscious intent, is a source of implicit or unconscious biases. It affects our rapid assessment of persons we interact with each day and how we react to others in such things as rating their performance and making assumptions about their character.

Biases are acquired through personal experience, the experience of others, media stereotyping, observations, and assumptions, such as the "surgeon" is male or the "housekeeper" is female. Implicit biases are the product of our personal history, culture, class, self-identify, etc. and operate without conscious intent.

Marsha Cox Kelliher with Amy Oppenheimer

Research shows people make assessments of others they see, hear, or meet within seconds or a fraction of a second based on even the most trivial information. One research finding is that most people have an implicit or unconscious bias against members of traditionally disadvantaged groups. Implicit biases impact compensation; customers tip service-providers differently depending on their ethnicity or colour. Another research finding is that unconscious biases are communicated in unconscious, non-verbal behaviour. Biases filter what we hear and see. Biases and assumptions can be the lens through which we selectively process information and complete the picture. They can distort what we hear and see, and prevent unprejudiced consideration of a question.

How can arbitrators deliver fair decisions when they have implicit, unconscious biases that influence how they interpret the world and the decisions they make?

In addition to varying degrees of preferences and stereotyping, we routinely operate with other cognitive biases that affect interpretation of information. Some are:

- **Confirmation Bias** – Preferring data that confirms or justifies a hypothesis or belief over data that does not. This can lead investigators, experts, and decision-makers to unconsciously look for or favour evidence consistent with their hypothesis over evidence that is not. Initial impressions have to be questioned and challenged. Deliberation is necessary to overcome or confirm intuition.
- **Memory Bias** – Confusing events that happened to someone else or did not happen at all as actual memories. Imagination inflation, rather than exaggeration, is not a lie. It is all an effort to reconstruct and can be inaccurate or completely non-factual.
- **Observer Effects and Priming** – External influences affect the perceptions and judgment of neutral observers. Persons can be primed to behave in a certain way or be inclined to certain decisions. Priming is part of the art of persuasion.
- **Attribution Effect** – Attributing bad motives to others, but not you when you act in the same way as others. (That driver cut me off, while I simply changed lanes quickly to keep up with the flow. They acted irrationally, but I acted for good reason in the situation.)
- **Anchoring** – Making judgments influenced by extraneous matters, such as the first piece of information received. An opening statement may anchor a decision maker in the same way the first offer may determine the mediation outcome. Does evidence heard but later ruled inadmissible never impact the decision?
- **Conformity Effect** – Crediting greater credibility to persons of higher social stature or authority.
- **Halo Effect** – A halo communicates positively about the person below. Seeing a halo characteristic in others, such as tall, strong, attractive, or kindred spirits can create a similar confirmation bias. Why are most CEOs above average in height, but not intelligence?

Some ways to reduce the impact of implicit biases in decision-making are: Recognize that intuitive cognitive processing is faster, but not necessarily more correct than deliberative reflection; Question stereotypes — actively consider alternative hypothesis and challenge the preferred hypothesis; Check and recheck assumptions; Ask yourself if anyone is being favoured in your decision and explain why — identify the criteria being applied and ensure the assessment meets the criteria; Broaden personal experiences and acquire cultural competency.

Teacher Tenure and Dismissal in the Public Sector

By Jan Stiglitz

For years, teachers and teachers' unions have been punching bags for those who want easy targets and simple explanations for the problems in public schools. This session focused on how teacher tenure has been targeted for attack and reform in California and New Jersey.

On June 10, 2014, a California Superior Court judge issued a tentative decision in a case in which plaintiffs had claimed that California's statutory tenure scheme violated the rights of students. (Vergara v. State of California, Case No. BC484642.) According to the plaintiffs in that case, that statutory scheme results in ineffective teachers who have a disproportionate impact on poor students.

Ray Combs, from Fagen Friedman & Fulfrost, reviewed the evidence presented by the plaintiffs that was ultimately relied upon by Judge True. Experts testified that an ineffective teacher costs students $1.4 million in lifetime earnings per classroom and that students taught by incompetent teachers lose 9.4 months of learning compared to students with an average teacher. The experts also convinced Judge True that there were between 2,750 to 8,250 "grossly ineffective" teachers in California.

The link between teacher protection statutes and continued employment of grossly ineffective teachers was provided by experts who testified that California's two year tenure provision resulted in schools making premature tenure decisions and that tenure protection made it too costly for districts to attempt to discharge those teachers. According to experts, these problems were exacerbated by collective bargaining agreements that determined layoffs by seniority, not competence, and that the majority of bad teachers wound up teaching in the poorest schools. As a result, Judge True held that California's statutory scheme violated students' equal protection rights under both state and federal equal protection provisions.

Diane Reddy, from the California Teachers Association, challenged the legitimacy of the experts' opinions. Reddy suggested that lack of funding and the poverty of some families had greater impact on students than allegedly poor teachers. She also pointed to high teacher turnover (e.g., over 75% in Oakland), which is the product of poor working conditions in poorer school districts. Reddy also emphasized that tenure rights are critical because teachers deal with sensitive subjects that easily might create controversy in our current toxic political environment.

Ray Combs, Diana Reddy, Stephen F. Befort and Walt De Treux

Walt De Treux presented an overview of a new statutory scheme in New Jersey known as "TEACHNJ" (i.e., the Teachers Effectiveness and Accountability for Children of New Jersey Act). TEACHNJ extended the teacher tenure requirement from three years to four. It also provides that teachers can be removed for inefficiency after two consecutive annual evaluations in which they received ratings of "ineffective" or "partially ineffective."

TEACHNJ also changes the process for teacher removal. There is a permanent panel of 25 arbitrators who must be members of the NAA, with a designated number selected by each of two teachers' organizations (the AFT and the NJEA) and two employer organizations (the NJ School Boards Association and the NJ Principals and Supervisors Association). Procedures have also been streamlined with limited discovery and short time lines. All decisions rendered by arbitrators under TEACHNJ will be published on the state's Department of Education Website. (*www.njleg.state.nj.us/education/legal/teachnj.*)

Understanding the Professional Practices and Decision-Making of Employment Arbitrators: The Impact of Institutional Environments and Workplace Context

By Jerry B. Sellman

Want to be an employment arbitrator? A good start would be to review the research findings of Professor Alexander Colvin that will be released later this year. Professor Colvin, the Martin F. Scheinman Professor of Conflict Resolution of Cornell University, ILR School, and the Associate Director of the Scheinman Institute on Conflict, presented a sneak preview of his initial findings on the current state of the employment arbitration profession. With financial support from the NAA Research and Education Fund, Professor Colvin has undertaken a study to analyze data from surveys sent in April-May 2015, to 1,000-1,100 employment arbitrators who had decided employment cases over the last ten years. He is examining the characteristics, backgrounds, and professional practices of employment arbitrators practicing today and analyzing which factors affect decision-making processes in employment arbitration.

Despite two decades of growing importance of employment arbitration, knowledge of what is happening in the field is limited. Existing studies mostly analyze archival data on cases and do not have any perspective on the arbitrators practicing in the field and what their practices are like. Professor Colvin's research provides insight into and useful information about this area of the arbitration profession. By comparing results from data provided by employment arbitrators who are members of the NAA and data provided by non-NAA employment arbitrators (Employment arbitrators), similarities and differences among the groups provide useful insights. Here is a summary of his preliminary findings.

What are the demographics of Employment arbitrators?

- Mostly white, non-Hispanic males; very little diversity (NAA same)
- Mostly J.D. or Ph.D. backgrounds; majority having J.D. backgrounds (NAA same)
- `About half (49%) were full-time arbitrators (NAA 71%)
- Part-time Employment arbitrators were predominantly Employer Counsel, Academics, and Employee/Union Counsel (NAA part-time primarily Academics)

Alexander James Colvin with Richard D. Fincher

In what type of work have Employment arbitrators been engaged over their careers?

Among Employment arbitrators, most had careers as Employer Counsel (58%), followed by Academic (42%) and government careers (35%). Arbitrators with prior Employee/Union counsel experience were close to the same percentage as those with government careers (32%). Contrasted to this group, the NAA members indicated that the majority of their prior employment was in Academics (51%), followed by careers in government (44%) or as Employer Counsel (32%).[1]

What type of training did Employment arbitrators have when entering into this profession?

Employment arbitrators indicated that their employment arbitration training came from apprenticeship, government, or professional training programs (19% for each). Others received their training from a university training program (16%). Of the NAA members responding, most had either apprenticeship or government training (43% in each category), with fewer having university or professional training (17% and 14%, respectively). The leading university training programs for employment arbitrators were at Cornell, Pepperdine, and Harvard Universities, in that order. The AAA is the leading professional organization with employment arbitration training. The FMCS is the leading government provider of training for employment arbitrators. It was interesting to note that, unlike labor arbitrators, where most enter the profession from apprentice programs, only 43% of the NAA Employment arbitrators and 19% of non-NAA Employment arbitrators came from an apprentice program.

It is suggested that an apprenticeship program should be set up to assist arbitrators in the employment area as is currently the case in the labor arbitration field.

Is certification necessary or desired?

There are currently no certification requirements to enter the field of employment arbitration. Employment arbitrators see less of a need for certification than NAA members. New entrants see more of a need than experienced arbitrators. And new entrants want certifications to focus on skills and knowledge, while established arbitrators prefer certification based on experience and past accomplishments. The standard "credentialing" debate is involved here. Those who want to break into the market believe that credentialing will help. Those already in the marketplace see lesser value in the credentialing because they are already in the marketplace.

What percentage of an arbitrator's practice is devoted to employment arbitration?

For most NAA members, labor arbitration comprises the majority of their practice (81%). Employment arbitration, on average, is approximately 6%, with mediation and other neutral work less than that. For non-NAA Employment arbitrators, employment arbitration is 25%, labor arbitration is 25%, other neutral work is 20%, and employment mediation is 15%.

(Continued on Next Page)

 (Continued from Page 8)

What are the average hourly fees charged by Employment arbitrators?

The hourly rates charged for Employment arbitration and mediation are higher than labor arbitration and mediation. NAA Members charge $347 per hour for employment arbitration vs. $249 per hour for labor arbitration. Non-NAA Arbitrators charge $386 per hour for employment arbitration vs. $258 per hour for labor arbitration. NAA members charge $370 for employment mediation vs. $323 per hour for labor mediation. Non-NAA Arbitrators charge $401 per hour for employment mediation vs. $282 per hour for labor mediation. It is noted that these are average rates. East and West coast rates are higher than other sectors of the U.S. It is also noted that fees for labor arbitrations are usually charged on a per diem basis. To account for this, daily per diem fees were divided by six hours to arrive at an hourly rate (although the AAA considers an arbitrator's day to consist of 7 hours).

Experience of Employment arbitrators and cases handled.

NAA members handling employment cases have, on average, 21 years of experience and handle approximately 8 cases per year. Non-NAA Employment arbitrators have an average of 15 years of experience and handle approximately 14 cases per year.

How are Employment arbitrators appointed?

Employment arbitrators are appointed by AAA, JAMS, Direct Appointment, Court referrals, and standing panels. AAA accounts for 61% of the cases given to non-NAA Employment arbitrators and 46% of the cases given to NAA members. The second largest appointing source is Direct Appointment: 22% for non-NAA Employment arbitrators and 37% for NAA members. Most of the appointed cases emanate from mandatory arbitration agreements promulgated by the Employer (almost 70%), while the second highest source of appointments is individually negotiated cases (20%). Post dispute/voluntary, FINRA, and other employment arbitrations comprise a small percentage of the cases.

Characteristics of an employment case.

The vast majority, 93%, of employment arbitrations are initiated by the employee, with 7% by the employer. The employee is represented 88% of the time by counsel and the employer is represented 95% of the time by counsel. Less than 2% of the cases involve class action claims.

Less than 10% of the agreements in the cases restrict arbitral power. Almost 50% of all agreements contain class action waivers.

Results of cases are interesting. The employee won 21% of the mandatory arbitration cases with an average $100,000 award. In individually negotiated cases, the employee won 37% of the time with an average award of $750,000. In post dispute/voluntary arbitrations, the employee won 44% of the time, with an average award of $2,000,000. The latter cases are typically executive breach of contract cases, so the awards are higher compared to mandatory arbitration cases, which are largely discrimination cases or wage and hour cases.

The impact of mediation, or in-house grievance procedures, on employment arbitration.

Parties to an employment arbitration agreement attempt mediation approximately 49% of the time before the claim is submitted to the arbitration process. Where mediation is undertaken, the employee is successful on a claim 42% of the time. This is probably because the weaker cases are settled. When there is no prior mediation, the win rate of the employee is 26%.

Companies with mandatory arbitration agreements tend to engage in mediation: they do so 82% of the time before a case goes to arbitration. With an internal mediation process in place, the employee wins 19% of the cases. If no internal mediation process is in place, the employees win 29% of employment arbitration cases.

Will this area of the practice be a growth area?

Growth of employment arbitration is uncertain. About 25% of non-union employees are covered by employment arbitration agreements. That is twice the number of employees represented by unions in the U.S. However, there are far more labor arbitration cases than employment cases. There are a number of reasons for this. Many of the cases set for employment arbitration do not reach arbitration as a result of a successful summary judgment motion. In other cases, many employers are successful in mediating an employment claim before it reaches arbitration: 8 cases settle to every 1 case that goes to arbitration.

Conclusion.

This current study is a work in progress and all the data obtained from arbitrator surveys have not yet been analyzed. A final report will be prepared when the study is complete. There are some early observations that can be drawn from information that has been submitted thus far:

- There is a continued need for greater demographic diversity among Employment arbitrators; Employment arbitrators are mostly a white, male profession.
- Professional background diversity is lacking: There are twice as many Employment arbitrators with an employer/defense background as an employee/plaintiff background.
- Entry to the profession is varied:
  - Apprenticeships are less common in employment arbitration. Are more needed? Could this enhance diversity?
  - There is a limited set of training providers: AAA, FMCS, Cornell, Pepperdine, Harvard. Are there enough opportunities?
  - New entrants are interested in more credentialing and certification programs.

Stay tuned for a more complete report!

---

[1]Note that the total percentages of some designated categories referenced herein may not always add up to exactly 100% of a designated category total. A close approximation is derived from the amalgamation of the different percentages that are provided by the multiple respondents.

– Smile, You're on Candid Camera – Surveillance and Police Misconduct Charges

By Randi Abramsky

This session, chaired by NAA Member Sharon Imes, with presentations by Richard Bolanos, employer-side counsel, and Michael Rains, union-side counsel, was both timely and powerful. In light of the numerous recent and explosive videos of alleged police misconduct, this program highlighted the pitfalls of making snap judgments based on what first appears through a video.

Ms. Imes began the session by relaying her own experience in arbitrating an alleged police misconduct case that a video camera had captured. A police officer had been discharged for excessive use of force. The video had been leaked to the press and a public outcry ensued. Pundits called it a "brutal beating." Yet when *all* of the evidence was heard at arbitration – much of which was not apparent from the video – she upheld the grievance and reinstated the officer. As a result of her ruling, she received substantial abuse, including threats. A professor emeritus of criminal justice, who had not read the award, was quoted as saying that the reinstatement of the police officer "by an arbitrator is an outrage that defies logic, undermines standards of police professionalism, and sets a dangerous precedent for the future." Ms. Imes posed the question: "Did it?"

Mr. Bolanos explained that these cases, which are often tried in the court of public opinion prior to an arbitration, pose great difficulty for the individual grievant as well as the union and management. The employer's investigation must go deeply into the surrounding circumstances – what led to the confrontation, what was said, what was heard – and not just rely on the video. In addition, a close examination of the reliability of the video must be made, including the chain of custody and potential editing.

In his view, there are pros and cons to videos. They can educate an arbitrator and can be forceful evidence as well as a useful impeachment tool. On the negative side, use of video can create a "battle of experts," each asserting different views on the video's reliability and accuracy. It often prolongs the hearing and significantly adds to its cost. He advocated the development of policies in regard to the use of cameras, including body cameras, with input from the union.

Members and Guests enjoying the concurrent session, Smile, You're on Candid Camera – Surveillance and Police Misconduct Charges

Mr. Rains asserted that counsel and arbitrators must ask "What does the video REALLY show?" He noted six assumptions about video evidence:

(1) It is usually graphic and ugly. It "looks horrible," creating pressure to discharge and not reinstate.
(2) Every contact between a police officer and an individual is being recorded – by the officer, fixed surveillance cameras, or bystander cell phones.
(3) The camera is a machine; the officer is not. That an officer does not recall the incident as captured on the video does not mean that the officer is lying. There are no cases where the officer's recollection perfectly matches the video.
(4) Video is more accurately analyzed if audio recordings accompany it.
(5) Video may only provide circumstantial evidence of the event, and not capture it precisely. It does not tell the full story.
(6) Analyzing video evidence accurately requires hours of time.

Real cases were presented to demonstrate these principles. The scene without sound was presented, then the scene with sound was presented. There can be no question that a much more complete understanding of what occurred resulted when audio was available. The visual alone does not reveal the repeated commands to stop or the threats made, which matters to a determination of whether the officer reasonably feared for his safety. The audio provided a much better sense of the tension and heightened atmosphere. Similarly, the quality of the video, its number of frames per second, is also a material factor. Important data can be seen or lost, depending on the speed and quality of the video.

(Continued on Next Page)

SERVICE ON TRIPARTITE BOARDS OF ARBITRATION:

How Discussions in Executive Session Can Trigger Questions of Ethics, Practice, and Finality

By Arne Peltz

A Thursday afternoon panel chaired by Ira Jaffe, NAA, explored the ongoing case of *UTU (Kite) v. BNSF Railway Company*, in which deliberative secrecy has been blown wide open and ethical issues abound for arbitrators. Donald J. Munro, an employer counsel, and Carmen R. Parcelli, a union attorney, expressed similar apprehensions about the implications of the case, joined by Stephen E. Crable, NAA. The question for arbitrators is this: What do you do when a party's representative on the board threatens you with economic injury to influence the outcome?

The grievant, Kite, was discharged after failing a randomly administered alcohol breathalyzer test. The Railway alleged this was a second offence and termination was justified. As required by the Railway Labor Act, a three member board was convened to hear the case. After the hearing, the neutral chair circulated a draft award in which she held that the record did not contain evidence of a prior offence and the employee would be reinstated.

During executive session, the employer representative on the board allegedly said to the chair, "If you are going to issue these kinds of opinions, you will never work for a Class One railroad again." The chair then recused herself and issued an order dismissing the case without prejudice. A second chair was appointed and sat with the original two party representatives. The new board found there *was* proof of a first offence and ruled in favor of the Railway. The Union applied to federal district court to reinstate the original decision, arguing the award had been obtained by fraud or corruption. The district court ruled that no sufficient claim had been stated, but the Ninth Circuit reversed and the case is presently headed for trial.

Ira Jaffe and Stephen Crable with Carmen Parcelli and Donald Munro

All speakers on the panel were uncomfortable that two arbitrators were cross-examined, forcing them to reveal their deliberative thoughts and reasoning. It emerged that the first chair did not recuse over the threat, but rather because she thought a settlement had been reached, which was then denied by the Railway representative on the board. The second chair said in his deposition that no one told him about the threat, but he personally regarded it as implicit in every case. The panelists and the audience discussed with some passion the rocky realities of serving as a neutral.

According to the panel, the Ninth Circuit hinted that a subjective standard for fraud or corruption should apply – was *this particular* arbitrator affected by the threat? All speakers agreed that an objective standard would be far preferable. Otherwise, uncertainty will prevail and the arbitration process will be vulnerable to gaming and attack by dissatisfied litigants. Don Munro felt that, with an objective standard, the threat in *Kite* did not amount to corruption. All panelists concurred that we work in a rough and tumble world, a point the appeal judges may not have appreciated in their more sheltered environment. Pressure is exerted in many ways, overt and subtle. But it should be presumed that arbitrators have a backbone.

Interestingly, Carmen Parcelli said that, as a union lawyer, she would not have advanced this case, but Kite is represented by an attorney from the plaintiffs' bar, and they "don't get our world."

In conclusion, several practical points of advice were mentioned: (1) keep your insurance up-to-date, (2) in your reasons, try to speak to the losing side so they feel heard and are less likely to attack the result, and (3) since blacklists and intimidation exist, just do the right thing and live with it.

SMILE, YOU'RE ON CANDID CAMERA *(Continued from Page 10)*

Often, there are numerous video clips of an event, from different angles. This was demonstrated by videos of a shooting at a subway station. Matching the numerous videos, from numerous sources, to establish time frames and details, is a painstaking and expensive process often involving hundreds of hours of time. Experts need to be called to explain that process and what occurred, using the various video clips.

The use of body cameras by police officers was also discussed at the session, with a draft representative protocol provided. It provides guidance in this important and developing area. An important issue is whether or not an accused officer should be able to see the video prior to giving his statement.

The session highlighted the fact that video is EVERYWHERE in today's society. Every cell phone and security camera offers potential evidence. Consequently, arbitrators, as well as advocates, need to learn how to evaluate this evidence. What I took away was the fact that the first video we see – the one shown over and over again on the evening news and commented on as "definitive" of abuse – may well not tell the whole story. We need to hear, and determine, all of the facts. This session truly opened my mind to both the strengths and limitations of video evidence. In my view, based on this presentation, the answer to Ms. Imes's question as to whether her ruling to reinstate the officer "defies logic, undermines standards of police professionalism, and sets a dangerous precedent for the future" is clearly "No." Quite the converse – it was a decision truly worthy of a member of the National Academy of Arbitrators.

By Susan Grody Ruben

Chris Sullivan deftly moderated discussion of two Invited Papers. "Labour Arbitration: Achieving Timely and Effective Dispute Resolution in a Radically Changed Environment," by Professors Kevin Banks and Richard Chaykowski of the Centre for Law in the Contemporary Workplace and the Industrial Relations Program, respectively, at Queen's University in Kingston, Ontario and Professor George Slotsve of Northern Illinois University, is a work in process supported by the NAA Research and Education Fund. "Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight," by Professor E. Gary Spitko at Santa Clara University School of Law, is being published this year in the Harvard Negotiation Law Review.

Labour Arbitration Research

Professor Banks presented a PowerPoint of his and his colleagues' research. The research is a statistical study of labour arbitration efficiency and delay in Ontario from 1994 to 2010. Many cases in Ontario are resolved through med/arb at the first day of hearing. Nonetheless, delay in getting to a hearing and concluding a hearing creates harm. The study identifies at which stage delay tends to arise and the institutional, legal, and procedural factors that tend to cause delay.

The research shows: 1) No evidence that expanded arbitral jurisdiction contributes to delay; 2) Most delay is before the hearing; 3) The number of legal issues dealt with in an award has no statistically significant effect on delay; 4) Time taken for study and writing of an award is a relatively small fraction of total time, and is not a source of delay; 5) Length of awards has little effect on award time; 6) Government parties are more prone to delay at every stage of the process; 7) While tripartite panels cause delay, their use is in sharp decline; 8) Selecting the busiest arbitrators has little or no statistically significant effect on delay; 9) Raising procedural issues has no statistically significant effect on delay; and 10) Use of counsel has no statistically significant effect on delay, except at the hearing, and there only use of counsel by unions has a statistically significant effect.

The study concludes the principal causes of delay lie not with arbitrators, but likely lie in the priorities of the parties and coordination problems between the parties. Further research is required to determine what prevents parties from moving more quickly.

Policy implications of the study are that addressing arbitration delay does not require: 1) Changes to arbitral jurisdiction; 2) Regulation of award deadlines; 3) A larger supply of arbitrators; or 4) Moving away from legal representation.

Chris Sullivan with Gary Spitko and Kevin Banks

Federal Arbitration Preemption

Professor Spitko considered the extent to which a state may refuse to enforce an arbitration agreement on the basis of public policy. While some state courts have refused to compel arbitration when the process would fail to afford an opportunity for the effective vindication of a statutory claim, the U.S. Supreme Court has not recognized the existence of a state court effective vindication exception to the Federal Arbitration Act.

One theory used to justify a state effective vindication exception is the FAA intends for states to have the power to exempt state statutes from the application of the FAA on public policy grounds. The California Supreme Court, in *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066, held a claim for public injunctive relief under California's Consumer Legal Remedies Act was not arbitrable because "arbitration in not a suitable forum" for public injunctive relief.

A second theory used to justify a state effective vindication exception relies on the notion that, pursuant to the FAA savings clause, a state may refuse to enforce an arbitration contract on grounds that would apply to any contract. Thus, a state may refuse on public policy grounds to enforce a contract that purports to waive an unwaivable statutory right.

These two theories share the common assumption that state public policy may trump the FAA in certain circumstances. The U.S. Supreme Court's opinions in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) and *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013), however, cast serious doubt on that assumption.

Concepcion held California's supposed necessity for a ban on class action waivers was irrelevant to an FAA preemption analysis. The Court held, "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion* calls into question any state arbitration doctrine grounded in public policy. *Concepcion* clarifies the state effective vindication exception must give way to the FAA if application of the exception would frustrate the purposes of the FAA.

Italian Colors Restaurant held the federal effective vindication exception is narrow. The Court held, "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." The distinction is between a disincentive and a bar.

The California Supreme Court considered the effects of *Concepcion* and *Italian Colors Restaurant* on employment arbitration. In *Sonic-Calabasas A., Inc. v. Moreno* (2013) 57 Cal.4th 1109, the court held the FAA preempts California's rule that an employee may not waive the right to bring a wage claim in a state administrative proceeding. In *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, the court held the FAA preempts California's *Gentry* doctrine, which provides that a class arbitration waiver is not enforceable in a case asserting an unwaivable statutory right if class arbitration would be a significantly more effective means to vindicate that right.

In *McGill v. Citibank, N.A.*, 232 Cal. App. 4th 753, *review granted*, 345 P.3d 61 (Cal. April 1, 2015), the California Supreme Court granted review of a court of appeals decision applying *Concepcion* and *Italian Colors Restaurant*, holding that the FAA preempts the *Broughton* doctrine. *McGill* will allow the California Supreme Court to further define the reach of its *Iskanian* doctrine. One might expect that if the California Supreme Court extends its *Iskanian* exception to claims for public injunctive relief, the U.S. Supreme Court will review the *Iskanian* exception.

LABOR HISTORY TOUR OF SAN FRANCISCO

By James S. Cooper

Labor History Walking Tour Participants

It is not often that a walking tour is led by a *local participant* in the labor history scene. Our guide, Christine Powell, however, was that, because she has marched in various labor disputes with her family members as part of the UNITE HERE labor strikes and campaigns over the past twenty years. Ms. Powell is still marching, as she led us on a brief walking tour as the Director of the Labor Archives and Research Center at San Francisco State University. Ms. Powell focused on what she knows best, the long history of labor organizations within the ever-booming San Francisco hotel and restaurant business where 89% of Class A hotel workers are organized.

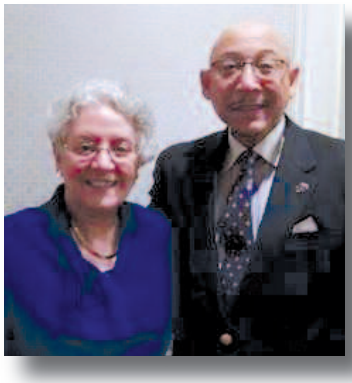
Starting right in the lobby of our hotel, Ms. Powell traced the history of organizing at the St. Francis Hotel, which dated back to the Benevolent Society of Cooks & Waiters who struck in 1863, the first recorded labor action and long before anyone enjoyed the protections of law. Thereafter, the bartenders were added. Then, Hugo Ernst organized on an industry-wide basis, including all skilled and unskilled workers. Three years after the 1934 general San Francisco strike, over 3,000 hotel union employees struck fifteen Class A hotels and successfully won recognition for the Hotel Service Workers Local 283. Their success became the foundation for other organizing efforts in the hotel and restaurant industry across the country.

From the lobby, Ms. Powell lead us across the street to Union Square, a square NOT named for labor unions, but as a tribute to California's commitment to the Union cause during the Civil War, or, as Bill Holley put it, The War Between the States. In the middle of Union Square is a monument celebrating Admiral George Dewey's Victory in Manila harbor on May 1, 1898, during the Spanish-American War. The statue's wreath was dedicated to President McKinley, who broke ground for the monument but was assassinated before the monument was completed. Union Square remains a hotbed for all protesters.

From there we walked a few blocks to the Mechanics Monument designed by Douglas Tilden. It is a tribute to workers on a gigantic metal punch that, Ms. Powell pointed out, was a fanciful rendition of a metal punch in which the individual elements are correct, but unworkable as presented. The most interesting aspect of Douglas Tilden's sculpture is that each of the male figures represents an age of man, including a youth, a young man, a middle-aged man, and an old man. Many California labor organizations have appropriated this image and have incorporated it in their letterhead or publications.

The final stop was the Palace Hotel, organized by labor in 1918 and the first of the upscale hotels to recognize a union. The original building was destroyed during the 1906 earthquake but was rebuilt in 1910. At first the Palace Hotel was staffed exclusively by African-Americans as a "southern style" hotel, but, when that style went out of vogue around 1900, the hotel fired its black employees and hired caucasians only. That ended in the 1960s as the NAACP, CORE, and the Ad Hoc Committee to End Discrimination organized demonstrations that ultimately led to 200 minority hiring agreements city-wide and were well supported by the union movement. The tour ended as we marched into the Palace Hotel to see the wonderful mural over the bar, *The Pied Piper,* by Maxfield Parrish. Of course, more than a few of the NAA walking tour participants simply could not resist the temptation to bend their elbow while looking at the mural. All walking tours should end with such opportunity. Thank you, Catherine Powell. Catherine may be contacted at *cpowell@sfsu.edu*.


St Francis



"Scene" in San Francisco

The 68th Annual Meeting of the Academy, May 20 - 23, 2015 at the Westin St. Francis in San Francisco was a great success, with 186 members, 98 spouse/companion/partners, and 99 guests attending. Laura J. Cooper was Program Chair and Claude Dawson Ames chaired the Host Committee. Prior to the meeting, 62 advocates participated in a highly successful Advocacy Continuing Education Program directed by Louis L.C. Chang. A big THANK YOU to all of the members who submitted photos for this issue of The Chronicle: Bonnie G. Bogue, Linda S. Byars, Richard D. Fincher, and Kathryn VanDagens.

Workers with Personality Disorders, Their Workplaces, and the Americans with Disabilities Act:

REFLECTIONS ON THE DISCUSSION

By Jeanne Charles Wood

This session was a follow-up to the "Personality Disorders under the APA's Diagnostic and Statistical Manual – V and Just Cause" session at the 2014 Annual Meeting in Chicago. Moderated by James Oldham, NAA, it featured panelists M. Gregg Bloche, J.D., M.D., Chai Feldblum, U.S. EEOC Commissioner, and John M. Oldham, M.D. (Jim's twin). The 2015 panel presented their perspectives on the interplay between the diagnosis of Personality Disorders (PDs) and the Americans with Disabilities Act (ADA), as amended in 2008 (ADAAA).

This is such a timely topic as the effect of mental illness in our society is both acute and pervasive. Among the various reports about the sudden outbreaks of violence perpetuated on the citizenry in various settings (i.e., schools, federal buildings, movie theaters, churches, recruiting stations, etc.), it is high time that more discussion coupled with solutions for early detection and treatment take place among law makers, policy makers, the medical and legal communities, and society at large. The workplace is no stranger to this topic as many individuals demonstrate characteristics that fall into a category of mental illness or psychological disorder that can affect an employee's behavior on the job (often resulting in disciplinary action) or ability to perform the essential functions of a position.

While the commonly known psychiatric disorders such as depression, bipolar disorder, and schizophrenia have achieved certain designation as disabling disorders, the variety of PDs and their place in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders-V (DSM-V) remain somewhat controversial as experts in the field work to develop an alternative analysis for categorizing PDs. In this regard, John Oldham enlightened the audience with the emerging definition for a PD.

A PD is defined as a moderate or greater impairment in personality functioning, manifested by characteristic difficulties in two or more of the following areas: *Identity, Self-direction, Empathy,* and *Intimacy*. Further, a list of the current designations for PDs was provided. They are Antisocial, Avoidant, Borderline, Narcissistic, Obsessive-Compulsive, Schizotypal, and PD-Trait Specific (a catchall diagnosis where the traits are present but not falling into the other known PDs.)

James C. Oldham, Chai Feldblum, John M. Oldham and Gregg Bloche

These are brain disorders and are inheritable. The treatment of choice is therapy for about a year to be effective. This long-term course of treatment may raise questions about protection the ADA can provide for affected employees.

According to Commissioner Feldblum, all PDs are covered under the ADAAA. This is so because the ADAAA has broadened the definition for what is considered to be a disability. For example, a condition having an effect on one's neurological system will be considered an impairment that limits a major life activity as long as its existence is certified by a medical professional. While the courts interpreted the definition of disability narrowly prior to the ADAAA, the amendments make it clear that a broader definition is in order. Courts and arbitrators are deferring to medical professionals when it comes to making the disability determination and ultimately, the question whether an employee is covered under the ADA. It should be noted that, when evaluating whether a person has a disability, the condition must be examined absent the use of mitigating measures such as medication and therapy. And, for those who suffer with disorders only episodically, the active state is the key to evaluating the condition.

Obtaining the diagnosis of the PD as a disability is only the first hurdle. As with any other disability, it must be determined whether the employee is still qualified to perform the essential functions of the job with or without accommodations that do not place an undue burden on the employer. Courts and, to the extent that the issues are a subject of an arbitration hearing, arbitrators are now having to look at the hard question of qualifications, which they rarely reached before the ADAAA because many cases were determined not to be covered by the narrowly interpreted definition of a disability under the ADA.

One example discussed during the panel presentation was a situation where an employer accommodates an employee to alleviate an unpleasant task that other employees must still perform — a doctor who has a sleep disorder does not want to be assigned "on-call" duties. The requested accommodation creates resentment among the other doctors on staff who must still be on-call. As Commissioner Feldblum noted, the essential function of the job for a doctor is to provide medical care for patients. A qualification standard for this function may be to provide the services at night. It is up to the employer to include such a standard in the position description. If that is the case, then would it be an undue hardship for the employer to accommodate the sleepy doctor? Like many legal analyses — it depends.

Undue hardship requires showing either a significant financial impact or a significant logistical/operational impact. The regulations specifically exclude low morale as an undue burden on the employer. Accommodating the sleepy doctor will depend on whether the employer can show that the medical operation will be significantly affected.

In sum, the new amendments to the ADA have shifted the focus from determining coverage to a more concentrated examination of essential job functions and qualification standards. As Dr. Bloche pointed out, there can be great ambiguity whether various tasks are truly essential functions. Certainly the courts, and perhaps arbitrators, will find themselves immersed in deliberation about job duties and qualification standards more than they ever thought possible. When it comes to PDs, this journey may involve varying and challenging determinations.

DISTINGUISHED SPEAKER: THE HONORABLE GOODWIN LIU

Justice of the California Supreme Court[1]

By Dan Zeiser

The Honorable Goodwin Liu was born in Georgia to Taiwanese doctors who came to the United States to work in underserved communities. As a youngster, his family moved to Florida and then Sacramento, California. He attended Stanford University, then Oxford as a Rhodes Scholar, and, eventually, Yale Law School. Before law school, Justice Liu worked in the Clinton Administration in community service and educational programs. After law school, he clerked on the D.C. Circuit and for Justice Ruth Bader Ginsburg during the Supreme Court's October 2000 term.

In 2003, Justice Liu returned to California and the faculty at the University of California, Berkeley, School of Law. At Berkeley, he was a prolific writer, particularly on the topics of constitutional law and education, and received the Distinguished Teaching Award in 2009. In 2010, then Professor Liu was nominated for the Ninth Circuit Court of Appeals. With his nomination in limbo, he withdrew from consideration. Governor Jerry Brown then appointed Justice Liu to the California Supreme Court.

Justice Liu has written a number of decisions regarding arbitration. In his first year, he authored *United Teachers of Los Angeles and Los Angeles Unified School District*[2], in which he examined the statutory language governing California's charter schools to decide of a grievance were arbitrable. In *Sonic-Calabasas A v. Moreno*[3], which followed the U.S. Supreme Court decision in *AT&T Mobility v. Concepcion*[4], the state court dealt with FAA preemption, state administrative law, and the doctrine of unconscionability. Last year, he wrote *Iskanian v. CLS Transportation*[5], involving class action waivers in arbitration agreements. The court concluded that the FAA did not preempt California's Private Attorneys General Act, which permitted citizens to pursue wage and hour violations in the workplace. The U.S. Supreme Court has denied review in *Sonic-Calabasas and Iskanian*[6].

Margaret R. Brogan, Barry Winograd, Justice Liu, Shyam Das and Kathleen Miller

In his presentation, Justice Liu offered a perspective on the evolution of the Federal Arbitration Act, with particular emphasis on recent developments and the interrelationship of federal and state laws regarding arbitration.

---

[1]As a sitting judge, Justice Liu declined the opportunity to have his speech published in the NAA Proceedings. Consequently, the Managing Editor decided it would not be appropriate to summarize his remarks. This article is submitted in its stead.
[2]54 Cal.4th 502 (2012).
[3]57 Cal.4th 1109 (2013).
[4]563 U.S. 321 (2011).
[5]59 Cal.4th 348 (2014).
[6]June 9, 2014 and June 20, 2015, respectively.

Making Credibility Determinations

By Jan Stiglitz

As arbitrators, one of our basic functions is to resolve disputed questions of facts based on competing witness testimony. This often involves making credibility determinations. Clark Freshman, a Professor of Law at Hastings College of Law, gave a presentation on science-based clues to making these determinations. While informative and thought provoking, I do not believe that any member of the audience walked away with many helpful new tips or techniques for making credibility determinations.

Professor Freshman started the presentation by showing the audience of video clip from Kato Kaelin's testimony in the O.J. Simpson murder trial. Professor Freshman then used that video to discuss and illustrate "micro expressions" that correlate to stress. However, he also indicated that there are many causes of stress and that one needed to look for patterns. Even then, according to Professor Freshman, most patterns correlate to emotion and only some patterns correlate to credibility.

Chris Knowlton with Clark Freshman

One pattern identified by Professor Freshman was a disconnect between verbal and non-verbal communication. In the Kato Kaelin testimony, Professor Freshman pointed to Kaelin's "shoulder shrug" in conjunction with his forceful verbal assertion that something was "not true." According to Professor Freshman, there is a high correlation between these verbal and non-verbal mixed messages and deception.

Even where there are cues available, Professor Freshman noted that more often than not, arbitrators will either miss the cues or misinterpret them. He identified several reasons for that. Professor Freshman stated that these cues might be fleeting – taking no more than 1/6 of a second. He also stated that we often have mistaken beliefs as to what to look for and suggested we may be subject to "confirmation bias," which occurs when we form an early view of the person and then look for anything that might confirm our first impression.

Professor Freshman concluded by discussing how success in making credibility determinations is to occur when people are specifically trained to look for and understand verbal and non-verbal cues and when they have the opportunity to study a witness by reviewing a videotape of their testimony. Unfortunately, even if we, as arbitrators, take additional training, we are unlikely to have the luxury of being able to study videotapes of witnesses prior to making our decisions.

Collaboration and Compatibility in the Sky: What's Different about the American Airlines-US Airways Merger

By James S. Cooper

Someday, this merger will be the subject of a mystery movie. It has all the elements of a real thriller with competing forces applying full pressure while dealing with financial moguls who are anxious to safeguard their security interest in the enterprise. Imagine mustachioed, sunglass-wearing management people meeting secretly with disguised leaders of a competing airline's union leadership who secretly fly on an undisclosed third party airline to plot strategy. Such is a compelling scenario for the movie set. Life mimics art and this merger is a classic example of a real business thriller (i.e., "The Wolf of Wall Street").

This presentation featured Laura Glading, President of the Association of Professional Flight Attendants, Neil Roghair, Vice President of the Allied Pilots Association, Lucretia D. Guia, Managing Director and Associate General Counsel for American Airlines, and Beth Holdren, Managing Director Labor Relations–Flight for American Airlines. Our host was the inimitable NAA member Joyce Klein. The presentation in this case was a handout comparing the saga of many airline mergers, including the United-Continental, US Airways-America West, and American-US Airways.

There is always great risk in airline mergers that are usually done for survival, and that means unavoidable conflict and mix-matched business models. To understand these comparisons, one must be steeped in the airline industry and its unique lingo, which most of those participating in this session were. I was not so steeped, but what I got out of this session was that the American Airlines-US Airways merger was a relative success story compared to the prior mergers and the reasons for this were two-fold. First, the successful entity (in this case US Airways) made great efforts to woo the employees of its competitor (American Airlines) and get them fully on board (no pun intended) with their efforts.

Joyce M. Klein with Laura Glading, Lucretia Guia, Neil Roghair and Beth Holdren

The open-minded leaders of the American Airlines' unions and their willingness to take on a serious risk for their members made this possible. Second, the parties agreed to arbitrate various disputes with firm drop-dead dates to backstop their bargaining arrangements. It was the existence of the backstop with a strict timeline that made the merger manageable and successful in meeting the terms of creditors for coming out of bankruptcy (airlines use the bankruptcy law without too much hesitation). From the management point of view, they had to know what their labor costs would be before emerging from bankruptcy and that is what the arbitrators provided. It was the certainty and the timeliness of the process to determine labor costs that was essential to management. This point was made loud and clear throughout this presentation. A good lesson for all industry.

Fit for Duty: Controllable Health Conditions and an Employee's Ability to Perform Safety Sensitive Work

By Randi Abramsky

In the United States, 12 million people have sleep apnea, in addition to 10 million people who have it but have not been diagnosed. A potential consequence is that an individual may become drowsy during the day. It does not, however, result in automatically disqualifying an individual from holding a commercial driver's license. This session discussed the state of the law and regulations, and how companies and unions have responded to the health and safety issues involved when it is suspected that an employee may have sleep apnea. The session was chaired by NAA Member David Vaughn (pinch-hitting for Alan Symonette, who wrote a paper for the presentation), with panelists Richard Rahm, employer counsel, and Paul Tylor, union counsel.

The Department of Transportation and the Federal Motor Carrier Safety Administration (FMCSA) have issued regulations and recommendations on this topic. 49 CFR §391.41(b)(5) reads: "A person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of a respiratory dysfunction likely to interfere with his/her ability to operate a commercial motor vehicle safely." Obstructive sleep apnea (OSA) may be considered a respiratory dysfunction and, as a group, drivers with OSA are at an increased risk for a motor vehicle crash compared to drivers who do not have OSA.

Unfortunately, without a clear medical history or sleep study being done, it is difficult to arrive at a definitive diagnosis of OSA. There is a lack of standardized criteria, although there are accepted signs and symptoms. A person with one or more of the following health risks may be viewed as at risk: coronary artery disease, cardiovascular disease, sleep complaints, recurrent atrial fibrillation, hypertension, obesity, type 2 diabetes, or large neck circumference. Diagnosis also depends on the accuracy of the information reported by the employee, creating concern that individuals may have an incentive to misrepresent symptoms and their severity – especially since a diagnosis may mean a loss of employment.

Both panelists recognized that OSA involves a significant safety issue, as well as a potential liability issue for employers. A number of labour relations issues were identified by the panelists. If an employee

(Continued on Next Page)

The Postal Industry: Arbitration Remains the Future

By Michelle Miller-Kotula

During the 2015 Annual meeting in San Francisco, one of the Friday afternoon breakout sessions was titled *The Postal Industry: Arbitration Remains the Future*. This session was moderated by NAA member Nancy Hutt and included panelists Thomas J. Branch from the National Postal Mail Handlers Union (NPMHU), Joey Johnson from the National Rural Letter Carriers Association (NRLCA), Michael R. Mlakar from the United States Postal Service, and Manuel Peralta from the National Association of Letter Carriers (NALC). Due to pending negotiations, the representative from the American Postal Workers Union, Tony McKinnon, was unable to attend. The panel discussed how changes will affect the future of the Postal Service and its unions and examined trends, including the continuing decline in mail volume and its effect on arbitration.

Each Union representative provided the audience with an overview of what is unique in its grievance procedure. The Unions also explained how the arbitration process has changed since the last collective bargaining agreement. The representatives discussed how the files used in arbitration are jointly developed. They stressed it is very important for the arbitrators to remember the files should be complete by the date of the arbitration hearing. The parties recognize the importance of ascertaining the facts as early as possible and having a complete set of facts as the grievance moves through the process. The Unions requested arbitrators to continue to write educated decisions to guide the parties in the future. The arbitrators were also reminded that the purpose of regional arbitration is to apply the language.

Over the past several years, the total number of grievances have been reduced. The files are thoroughly reviewed by both parties during the grievance process. If necessary, the parties will withdraw or settle a grievance while another proceeds through the process. All of the Unions agreed it is important to resolve the grievances at the lowest level possible.

Nancy Hutt with Michael Mlakar, T.J. Branch, Manuel L. Peralta and Joey Johnson

The panel discussed the process in place for arbitrators to apply to different panels. Typically resumes must be submitted to both the Postal Service and the particular Union for whom the arbitrator wants to be considered. Some of the panels only select NAA members as their arbitrators. It was suggested that more cases be placed on the docket for a hearing date to give the parties the "biggest bang for its buck."

The issue of workplace behavior was discussed. Each panel member gave his perspective of what has occurred with his specific Union. The Joint Statement of Violence and Behavior in the Workplace was discussed. The employees have been educated on what is proper and improper behavior in the workplace. Relevant policies have been included in the handbooks and manuals. The parties have made a commitment to change the behaviors that have caused problems in the past. The panelists agreed the parties do not want to revisit past cases that resulted in unfavorable publicity.

Rules are in place for a safe working environment. Supervisors and employees have all been educated about the workplace expectations. The Unions provide specific training for employees on how to get along in the workplace. Supervisors are taught to intervene when problems arise. Union representatives are taught to document events that occur, obtain witness statements, and use effective methods of intervention. It was agreed by all of the panel members there must be a focus on working together and reacting to situations before problems occur. The panel members agreed both sides have come a long way, but should always work to seek improvement.

A discussion occurred about new ventures within the Postal Service. It is necessary to get into new business areas because of the huge decline in first class mail. The Postal Service's package business has grown. Some areas across the country are testing same day delivery service since the Postal Service has a significant number of vehicles and huge processing plants. It would be an advantage to use some plants as warehouses to fill orders. The Postal Service is committed to looking for new ventures to compete and remain viable. The Unions are willing to work with management to make adjustments to grow its business.

Fit for Duty *(Continued from Page 18)*

is removed from the job due to having one or more of the risk factors, is he paid for that lost time pending a sleep study? Who pays for the sleep study? The cost for such a study ranges from $1500 to over $4000, and may take time to arrange. According to Mr. Tylor, these are subjects for collective bargaining. He related the story of an employee who was in limbo for a significant period because the insurance company would not pay for a sleep study. Arbitral cases are making their way through the system, but there are no reported decisions yet.

A diagnosis of OSA does not preclude an individual from obtaining a commercial driver's license: it precludes an unconditional one. There are differing severity levels – mild, moderate, or severe, based on the Apnea Hypopnea Index (AHI). There are also different treatments available, from behavioral therapy and use of a CPAP device to surgery. All of this raises many questions for those in the industry. In this area, however, to date there are no regulations with the force of law, only guidelines. Perhaps the suggestion made by Mr. Tylor, who advocated for better wellness programs, should be seriously considered as a starting point, since so many of the risk factors for OSA can be improved by better nutrition and exercise.

Don't Click Until You Think: Remedies for Social Media Ethical Violations

By Jan Stiglitz

We all know that social media is ubiquitous and constantly changing. While many of us have chosen not to participate in some forms of social media such as Facebook and LinkedIn for reasons of privacy or sanity (Do I really need to see what my second cousin had for breakfast yesterday?), the program in San Francisco on social media and ethical violations made it clear that arbitrators cannot ignore potential problems that can arise as a result of these new means of communication.

The panel, moderated by Katherine Thomson, included two NAA members (Sara Adler and Lisa Salkovitz Kohn), and two advocates (Carol Koenig, from Wylie McBride Platten & Renner, and Jay J. Wang, from Fox, Wang & Morgan P.C.). The presentation focused on three hypothetical situations illustrating some of the problems arbitrators might face as a result of social media.

The first hypothetical involved an attorney who represented a company in an arbitration over the discharge of an employee named Jane. The attorney, who monitors his daughter's Facebook page, recalls that Jane's daughter had requested to become friends with his daughter. The attorney asks his daughter to become friends with Jane's daughter to have access to Jane's Facebook page and possibly discover information that would help in the arbitration involving Jane's discharge. The panelists discussed that the attorney's actions probably violated ABA Model Rule 4.2, prohibiting contact with a represented individual, and ABA Model Rules 4.1 and 8.4(c), which prohibit making false statements, dishonesty, fraud, deceit, or misrepresentation. They then discussed what actions the arbitrator in the case should take if he or she discovers that evidence being presented was obtained as a product of the attorney's unethical actions. The panelists suggested that an arbitrator has the right and obligation to protect the integrity of the process and should not allow the evidence to be introduced. They believed the arbitrator did not have the ability to disqualify the attorney from participating in the hearing as a sanction for the misconduct. Nor did the arbitrator have an obligation to report the attorney's misconduct to the relevant bar association because the arbitration process is confidential and because the general reporting requirements regarding attorneys are for violation of "law."

Katherine Thomson, Sara Adler, Jay Wang, Carol Koenig and Lisa Salkovitz Kohn

A second hypothetical dealt with comments on a union advocate's listserv posted by Stone, an attorney about to appear in front of Kim, an arbitrator she does not like. Jones, another attorney on the listserv, shows those comments to Kim. In addition, Stone, who wrote the negative post, has now discovered information about Kim by researching Kim's social media presence. The panel discussed whether Kim should have read Stone's posted comments and, if she had read it, what disclosures she needed to make to both Stone and the management advocate at the hearing, and whether Stone had violated any ethical rule by doing social media research on Kim.

A third hypothetical dealt with an arbitrator with a blog on which he discusses topics of interest and comments on recent developments. One post dealt with his views on the legalization of marijuana and whether its legal status would prevent management from discharging an employee who tests positive for marijuana use. After that post, the arbitrator is selected to hear a case involving a worker in that exact situation. The panel discussed the extent to which the arbitrator needed to disclose the existence of his blog on resumes he maintained with providers, whether the arbitrator had an obligation to disclose his prior post to the parties in the case before him, whether a party advocate who was aware of the post had an obligation to disclose that information to the arbitrator or the other side, and what the arbitrator should do if an advocate asked to friend him on Facebook or recommend him on LinkedIn.

Norman Brand once wrote that arbitrators walk into a hearing with "curable ignorance." After hearing this panel discussion, I believe that in the current world of over-sharing and instant access to the innermost thoughts and seemingly confidential communications of others, the importance of ignorance cannot be overstated.

U.S. Designating Agencies Update on Labor Arbitration

By Michelle Miller-Kotula

The session was moderated by NAA member Jeffrey Tener. The panelists of this session included John English, representing the American Arbitration Association (AAA), Arthur Pearlstein from the Federal Mediation and Conciliation Service (FMCS), and Roland Watkins with the National Mediation Board (NMB). The panel provided a review of current developments and trends in labor arbitration, including statistical information about arbitrators, arbitration procedures, and issues heard in arbitration.

Mr. English from the AAA explained case trends from the prior year. There was a 7.6% reduction in the caseload from 2013 to 2014. Some of the decreases occurred due to changes in laws. He pointed out as more states move toward right-to-work, organizing efforts have decreased. The AAA is hopeful this trend does not continue. He said the filings for arbitration to date in 2015 have been higher than at this point in 2014. It was noted the number of awards issued in 2013 declined by approximately 10.8%. The average per diem rate in 2013 was $1200 and increased to $1275 in 2014.

Mr. English explained, after arbitrations are complete, the AAA asks the parties to complete an evaluation. The case management team was rated 4.6 in 2014 on a scale of up to 5. The neutrals rated at 4.5 in 2014 on the same scale. He noted the parties are pleased with the case management services and the arbitrators being used.

Mr. English addressed the need to increase the ethnic diversity of the labor panel. He said there are not enough new arbitrators coming in to replace those who leave. He discussed the adopt-a-mentor program that has been successful in areas such as New York.

Mr. Pearlstein from the FMCS began his discussion by explaining in a light-hearted manner that he is not Vella Traynham. He told of several interesting conversations he had with arbitrators since he began his current role. He pointed out he has a strong interest in technology. He noted some of the software has been used since the 1980s and noted the FMCS is close to implementing new software. He pointed out that requests from arbitrators regarding case management could be scanned and e-mailed. He explained it takes approximately 7-10 days to receive U.S. Mail through the federal government system.

Jeffrey B. Tener, John English, Roland Watkins and Arthur Pearlstein

Mr. Pearlstein alerted the audience that arbitrators will soon be able to update their own bios. The audience recognized Peggy Shoulders, who retired after 35 years of service as the administrator of the bios. The FMCS plans to continue to enhance its customer service and welcomes feedback to improve its services. The FMCS has a diverse list of arbitrators and is proud of its minority arbitrators.

Mr. Watkins from the National Mediation Board reviewed that Board members of the NMB started a new term July 1, 2015. He said the NMB is experiencing a 5% cut in the 2016 budget, but there is still pressure to obtain more funds. He noted funds need to be cleared from previous fiscal years.

He pointed out the NMB in 2015 has been able to operate every fiscal month of the year and additional money has been funded for certain cases. He said the fiscal year started with 42% of the caseload being funded. The largest pending cases are ready for arbitrators to hear and decide. Mr. Watkins stated last fiscal year there were 1361 more cases, with the trend of the arbitration caseload increasing. He said a training manual is being created. Mr. Watkins asked the arbitrators on the roster to review their resumes and contact information. He ended his discussion by stating that more arbitrators are needed in the system.

The panel members thanked the NAA arbitrators for their commitment to the panels. They answered questions presented by the audience.

ESTOPPEL IN CANADIAN LABOUR ARBITRATION

By James E. Dorsey

In this session a debate was phrased around the question: Is estoppel too much of a good thing? Andrew C.L. Sims, NAA, argued it is not. He was supported by Allan Black (Black Gropper). Jane H. Devlin, NAA, argued it might be. Arne S. Peltz, NAA, moderated.

The panelists identified three distinct approaches to estoppel in Canada. Mr. Sims described the Alberta approach as a strict, traditional approach that has not evolved since 1953. Mr. Black described the wide scope given to estoppel in British Columbia, where arbitrators' holdings on the application of estoppel receive deference by the reviewing authority, the Labour Relations Board, in the unique institutional structure in B.C. Ms. Devlin described the liberalization of the traditional approach in Ontario, where estoppel has been applied to enforce practice in the absence of any collective agreement provision on the subject or benefit the union seeks to maintain.

In a 2011 high water mark in judicial deference to grievance arbitration, the Supreme Court of Canada upheld an arbitration decision estopping a union from enforcing strict rights under a collective agreement until the expiry of the agreement because of the union's longstanding acquiescence to the employer's practice. An initial union application for judicial review was dismissed, but allowed by the Manitoba Court of Appeal. In restoring the arbitrator's decision, the unanimous Supreme Court applied a standard of reasonableness, not correctness, and stated: "Labour arbitrators are not legally bound to apply equitable and common law principles – including estoppel – in the same manner as courts of law. Theirs is a different mission, informed by the particular context of labour relations." (*Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals* 2011 SCC 59, ¶ 5) The Court stated:

> In my view, the labour arbitrator's reasons are not just transparent and intelligible, but coherent as well. They set out in detail the evidence, the submissions of the parties, and the arbitrator's own analysis. The arbitrator reviewed the decisions relied on by the parties, and he identified and applied the precedents he found relevant and persuasive. They are consistent with his decision, and his reasons are amply sufficient to explain why he imposed the remedy of estoppel in this case.
>
> With respect to substance, the respondent submits that the labour arbitrator did not make a factual finding that the Union intended to affect its legal relationship with Nor-Man, as required by the test for promissory estoppel laid down by this Court in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, at p. 57.
>
> I would reject that submission as well. The question is not whether the labour arbitrator failed to apply *Maracle* to the letter, but whether he adapted and applied the equitable doctrine of estoppel in a manner reasonably consistent with the objectives and purposes of the *LRA*, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of Ms. Plaisier's grievance. (¶ 58 – 60)

Mr. Sims argued this decision finally frees arbitrators to turn away from the language and tests in the common law application of estoppel, ground the remedy in workplace fairness, and reinforce the primacy of collective bargaining. Unions and employers have a duty to speak up and negotiate with one another directly, not through litigation. Arbitrators should focus on good faith collective agreement administration as the organizing principle of workplace conduct.

An organizing principle is a standard used to understand and develop the law in a coherent and principled way. It states in general terms a requirement of justice from which more specific legal doctrines are derived. Mr. Sims argued arbitrators should ditch the term and language of "estoppel" and take a new approach to collective agreement law, just as the Supreme Court of Canada recently did to the common law of contract in *Bhasin v. Hrynew* , 2014 SCC 71. The Court decided good faith contractual performance is a general organizing principle of the common law of contract, underpinning and informing common law rules that recognize good faith obligations in contractual performance. This organizing principle of good faith is the basis for a common law duty to act honestly in the performance of contractual obligations.

Mr. Black underscored the point that labour relations disputes between parties with unique relationships and cultures are complex and context specific. A flexible approach to the application of estoppel enables arbitrators to recognize and consider the entire factual matrix and uphold agreed deviations from the language of the collective agreement. It supports a holistic approach to the realities of specific labour relationships.

Good faith exercise of management rights is not a novel notion in Ontario. Ms. Devlin argued that allowing practice to trump rights in a collective agreement diminishes the value of collective bargaining. It fosters drift away from the language of the collective agreement. This slippery slope has led to enforcing practice that was unknown to the union and representations made to individual employees, not the union or persons in the union hierarchy. Is this contract interpretation and enforcement; or is it rather someone's notion of fairness in the situation?

As a practice note, Ms. Devlin cautions the volume of evidence that can accompany cases where estoppel is argued requires active pre-hearing case management to determine whether the alleged practice has been consistent and widespread or is an aberrant and isolated management approach. Clarity in the use of past practice evidence is necessary. Is the issue really about a deviation from clear language? Or is there no consensus on the meaning of agreed language? Is the practice evidence adduced to establish the basis for estoppel? Or is it adduced to assist in discerning the meaning of ambiguous language?

A question for future consideration is how estoppel intersects with legislated rights and obligations in grievance arbitration.

Managing Multiple Employment Arbitration Cases with Class Action Waivers

By Maretta Comfort Toedt

This excellent workshop examined an area in which it is still unclear just how much authority an employment arbitrator has. The panel looked at some of the procedural tools that might be available to both employers and claimants; an arbitrator entering uncharted territory can decide whether these tools might be helpful. The panel comprised Courtney Baird of Duane Morris, LLP, who represents employers; Steve Zeiff, of Rudy, Exelrod, Zeiff & Lowe, LLP, who represents employees and unions; arbitrator Mark Irvings of the NAA; and American Arbitration Association representative Patrick Tatum. Catherine L. Fisk, of the University of California, Irvine, School of Law, served as moderator.

Recent Supreme Court decisions involving consumer contracts have upheld arbitration clauses prohibiting class actions, even when prohibiting class actions would make it difficult or impossible for claimants with small recovery amounts to vindicate their claims. See AT&T Mobility v. Conception, 563 U.S. 321, 131 S. Ct. 1740 (2011) and American Exp. Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013). Those were consumer cases, not employment cases. Still, some might argue that the same reasoning applies in employment disputes that are subject to mandatory pre-dispute arbitration with class action waiver provisions.

The panel discussed a number of issues that might need to be considered in a given case, including the following:

- Does the arbitration agreement itself allow the consolidation of claims, or of parties, when the actions present common issues of law or fact (notwithstanding the existence of an express class-action waiver)?
- Although courts allow issue preclusion (collateral estoppel) to prevent re-litigation of claims, can an arbitrator do likewise?
- State and federal procedure rules (e.g., Federal Rule of Civil Procedure 20) allow joinder of parties. Generally speaking, however, state and federal procedure rules do not apply to arbitration. Can an arbitrator join parties anyway, to prevent re-arbitration of claims?
- Can discovery materials obtained in one arbitration be used in another arbitration?
- What is the effect of a confidentiality provision in an arbitration agreement?

Mark L. Irvings with Catherine L. Fisk, Courtney L. Baird, Patrick Tatum and Steve Zieff

The panelists observed that for the arbitrator, the touchstone for answers to these questions should be the arbitration agreement itself and which rules apply (for example, AAA, JAMS, the Uniform Arbitration Act, or no rules referenced), as well as who pays. Patrick Tatum noted that if there is a dispute regarding which rules apply, the AAA has designated staff members who review the filing documents in order to make an initial determination regarding which AAA rules apply (e.g., commercial, employment).

In addition to arbitration rules, there may be overlapping federal and state laws or procedural rules that come into play. Consolidation might be useful when separate actions present common issues of law or fact. The parties might have strategic reasons for allowing or agreeing to consolidation. For example, if an employer, by agreement, is paying for the cost of the arbitrations, the employer might want to consolidate to reduce costs and attorney's fees.

The lead case is another possible approach; the parties might agree that the outcome of a lead case will determine the value of the cases that follow. From the employer's perspective, if a lead case has a large liability attached, it might be too great a risk to have the case decided by a single arbitrator. On the other hand, allowing one claimant to serve as a template for other cases might deny one or both parties the opportunity to elicit significant facts.

JAMS Employment Rule 6(e) explicitly provides for consolidation of separate arbitrations when certain conditions are met. The AAA rules do not address consolidation of arbitrations. Depending on the language of the arbitration agreement, the Uniform Arbitration Act or state procedural rules may apply, allowing a party to go to court to seek consolidation. Courtney Baird observed that, in California, a party to the arbitration may petition the court to consolidate claims. In other jurisdictions, it may not be clear who makes these determinations, the court or the arbitrator.

Joinder is another procedural tool that might be available to the parties (if not prohibited by the arbitration agreement). Federal and state procedural rules generally allow for liberal joinder of parties to promote judicial economy, for example, under Rule 20 of the Federal Rules of Civil Procedure and comparable state rules. But again, as a general rule, federal and state civil procedure rules do not apply in arbitration. Whether civil procedure rules can be used at all in arbitration might be a threshold issue for the arbitrator to decide.

To be sure, express language in the arbitration agreement can resolve some or all of these issues. But many arbitration agreements are silent on issues of consolidation, joinder, issue preclusion, and use of materials obtained in discovery in one case for another case. Employer representative Courtney L. Baird noted that many employers are "cleaning up" their arbitration agreements and specifically addressing some of these issues.

Those who are interested in this topic but were unable to attend the workshop are encouraged to read the excellent course materials prepared for this workshop.

The Surprisingly Complex Issue of Resignation in Just Cause Cases

By James E. Dorsey

The scripts of termination arbitrations in which the employer relies on an employee's resignation raise complex issues. Moderator Rafael Gely (University of Missouri School of Law) and panelists Melissa H. Biren (NAA), Daniel T. Purtell (Altshuler Berzon LLP), and Stacey A. Mufson (Kaiser Foundation Health Plan, Inc.) prepared five hypothetical scenarios that engaged session attendees in lively discussion and disagreement.

While employer reliance on employee resignation arises infrequently, the scripts in these scenarios test advocates and arbitrators to articulate and apply a coherent analytical framework.

The session discussion highlighted the fact-dependent nature of the issues, the absence of clear answers and the difficulty articulating a framework within which to pose the questions. Tactical advantage for the union or employer dominates the choice of approach and how the question to be resolved is stated.

Employers might object to an arbitrator's jurisdiction to determine whether there was just cause for dismissal because the employee resigned – "The employee quit. The employee was not dismissed." The employer will say the employee's voluntary words and action evidence a clear intention to quit on which the employer reasonably relied. It was not a coerced employee decision or a constructive dismissal by the employer.

The factual determination of a clear intention to resign on which the employer could reasonably rely is often clouded by a context that includes unfriendly exchanges between the employee and a supervisor, emotional outbursts, and impulsive employee responses. Did the employee act in a manner that confirmed the resignation statement? Or did the employee retract the resignation before there was employer detrimental reliance on the resignation? Agreement language can introduce other dimensions. Is detrimental reliance a relevant factor if the collective agreement language provides for loss of seniority at the moment of resignation?

Melissa H. Biren, Rafael Gely, Daniel Purtell and Stacey Mufson

When the nature of the "resignation" is job abandonment, the employer might rely on an agreed job abandonment standard in the collective agreement, which is often an absence without leave provision. If the employer does, which party has the burden of proof in the arbitration? Is it a contract interpretation dispute or a just cause dismissal dispute? Does the employer's past consistent or inconsistent application of the standard make a difference?

There can be factual disputes over whether the job abandonment standard was met. If it was not met, can the employer rely on a lesser standard such as just cause for dismissal? For example, can the employer argue the employee was AWOL the three days agreed to be the standard, but, alternatively, if not for three days, then being AWOL for two days is just cause? Is the intent of the agreed standard to allow administrative dismissal and insulate the employer from having to make further explanation? Or is it to protect the employee from dismissal if the standard is not reached?

Coerced resignation, perhaps on threat of disciplinary action or being subjected to a stigmatizing process, can give grounds for an assertion of unjust dismissal. Is it coercion to allow an employee caught in misconduct to resign rather than face dismissal? When will the employer have to establish there was just cause if an employee resigns but seeks to retract or says the resignation was coerced?

"You cannot resign. I dismiss you." Are there regulatory regimes that require employers to refuse to accept a resignation in the face of misconduct because of employer obligations to report to licensing or other authorities or an employer wish to trigger an agreed never-rehire provision or employer policy? Is it involuntary servitude to seek to continue a relationship when the employee has resigned? If it is, can it be justified on the basis of public policy in some employment situations?

The twists raised in discussion about each hypothetical demonstrated why so few grievances involving resignation proceed through arbitration.

NEW MEMBERS WELCOMED IN SAN FRANCISCO

STUART BAUCHNER
NEW YORK, NY

Stuart Bauchner, Esq., has been a full-time arbitrator and mediator in New York City for twenty years. He has arbitrated and mediated more than a thousand disputes in numerous industries in both the public and private sector.

Stuart graduated from Yale Law School in 1984. After law school, he clerked for U.S. District Court Judge Joseph S. Lord, III (E.D. Pa.). He then worked for seven years as an associate and partner at Vladeck, Waldman, Elias & Engelhard, P.C. in New York City, where he represented unions and multi-employer benefit funds in virtually every aspect of labor law.

Stuart lives on the upper west side of Manhattan with his wife, Kate, and daughter, Emma. He loves to spend his free time bicycling and enjoying many of the cultural and dining experiences available in New York City.

ROBERT BERGESON
SHERMAN OAKS, CA

Bob Bergeson's labor relations neutral career began in 1981 as a Public Employment Relations Representative for the California PERB. Three years later, he was appointed PERB's L.A. Regional Director. Employment with PERB was enjoyable and challenging, but Bob aspired to work as an arbitrator, which the Board's moonlighting and conflict of interest policies virtually prohibited. Accordingly, Bob left in 1989 to venture out on his own.

Although arbitration appointments were initially sparse, Bob began obtaining considerable hearing officer work for civil service commissions and similar entities. Thanks partially to NAA member Doug Collins's decision to desist from such work, by the mid-90s, Bob was getting the lion's share of fact finding appointments under California's K-12 bargaining law so as to once again be fully employed. When Doug retired in 2000 as the part-time Executive Director of the L.A. City Employee Relations Board, Bob again followed in his footsteps in being hired for that job. The ERB gig was great in allowing for withdrawal from Postal Service arbitration panels which had taken Bob to the hinterlands of the West and away from his family. Bob still holds the ERB position, but frequently cannot find enough hours in each day.

Bob's wife, Sue, is an underwriter for Liberty Mutual Insurance. Among other things, they enjoy attending sporting events and movies. Although their twenty-one year old son, Matt, works construction, he still lives with Bob and Sue. It sometimes seems as though Matt's girlfriends do, too.

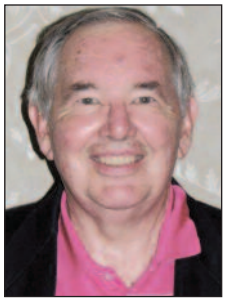
LAWRENCE M. COHEN
CHICAGO, IL

Lawrence Cohen has been an arbitrator since 1972. He presently serves on the FMCS and AAA rosters, is on the permanent panel of the Chicago Board of Education and the Chicago Teachers Union, a tenured teacher dismissal hearing officer for the Illinois State Board of Education, and a hearing officer for the Chicago Commission on Human Relations.

Mr. Cohen practiced labor and employment law in Chicago for nearly fifty years, was an adjunct professor teaching various labor and employment subjects at IIT Chicago-Kent School of Law, and worked for the NLRB in Washington and Chicago. He is a graduate of the University of Michigan business school and the University of Chicago law school. He is a member of various Bars, including the United States Supreme Court and the College of Labor and Employment Lawyers.

Lawrence and his wife, Marilyn, divide their time between homes in Evanston, IL and Naples, FL.

JEROME A. DIEKEMPER
ST. LOUIS, MO



Jerome A. (Jerry) Diekemper graduated from St. Louis University (1968) and St. Louis University School of Law (1971). He worked at the Regional Office of the NLRB in St. Louis as a field examiner and field attorney from June 1971 through July 1972. From 1972 to 2006, Jerry was in private practice representing unions and individual employees. During that time, he tried two hundred fifty arbitration cases as an advocate. In 1993, Jerry began acting as a mediator and has mediated over fifteen hundred cases.

In 2006, Jerry left private practice to become a full-time neutral. He began arbitrating cases in 2007.

Jerry is a Fellow in the College of Labor and Employment Lawyers and an Advanced Workplace Practitioner in the Association of Conflict Resolution. He has been listed in every edition of Best Lawyers in America since 1983, including as Best Arbitrator in St. Louis in 2013. In 2006 and 2007, he was listed by Super Lawyers as one of the Top 100 Attorneys in Missouri and Kansas. He is on the Roster of Arbitrators of the FMCS and is on the mediation panel and the labor, employment and commercial arbitration panels of the American Arbitration Association.

(Continued on Page 25)

Panel Discussion, "How Parties Pick Arbitrators"

By Linda Byars

NAA Member Susan Grody Ruben from Cleveland moderated the panel discussion that included NAA member Susan Stewart from Toronto and two experienced labor management attorneys from the Bay Area, John Baum (Hirschfeld Kraemer, LLP) and Geoffrey Piller (Beeson Tayer & Bodine, APC).

With her experience as Chair of the Ontario Grievance Settlement Board, Susan Stewart gave the view from the North. She believes that arbitrators in Ontario, as well as other provinces, must be mediators. Arbitrators who assure a respectful process, transparency in the process, and never forget their purpose is to serve the parties are the ones the parties seek. Advocates also express their desire for arbitrators who will insure civility. Susan believes that "getting in there quickly" when an exchange gets heated is key to controlling the hearing. As Board Chair, Susan sees the most complaints over late decisions.

Geoffrey Piller presented the view from the union side. If he had his way, there would be no court reporter at the hearing and there would be a bench decision. The criticism he hears of arbitrators includes taking long lunch breaks, prolonging the hearing, a decision that is longer than necessary, difficulty selecting dates, and cancellation fees. Geoffrey listed some factors that he knows his clients consider, but he does not necessarily agree are the crucial factors to consider. For example, his clients want an arbitrator who is less analytical and more emotional for discipline cases. His clients prefer a practical approach, rather than a judge, an arbitrator who will go out in the hall and explore settlement with the parties. His firm keeps track of wins and losses and impressions of the arbitrator and considers the arbitrator's track record more important than an understanding of the industry.

John Baum provided the view from the employer side. He is looking for an arbitrator who will look at the case completely objectively and with an open mind. He particularly likes arbitrators who have "real world" experience. Great care is taken to check the track record of proposed arbitrators by finding, reviewing, and analyzing previous decisions. Even if there are limited published decisions, colleagues discuss their experiences with the arbitrator, good and bad. If an arbitrator mostly handles public sector disputes, he will normally avoid using the arbitrator for private sector disputes because those arbitrators tend to impose public sector due process concepts even when handling private employer disputes. He wants an arbitrator who understands how difficult it is to manage employees and make tough discipline and termination decisions.

Susan Grody Ruben with John Baum and Geoffrey Piller

The panel discussion included an entertaining exercise demonstrating how parties strike a panel. As they struck an arbitrator, the advocates explained their reasoning. John explained that, when they get a panel with arbitrators they do not know, they default to the ones they do know, explaining that "the devil we know is safer than the one we don't know." Geoffrey and John agreed that they may ask for NAA members. John says that they strike about half the time and default to people they know. Geoffrey says they pick without striking as "often as possible." Both panelists agree that they are "driving the train" when it comes to selection, not the client.

New Members Welcomed *(Continued from Page 25)*

BRIAN SHEEHAN
ONTARIO, CANADA

Brian Sheehan practices as an arbitrator and mediator in the Province of Ontario. He graduated from Osgoode Hall Law School in 1983. He subsequently worked for over 20 years as in-house counsel with Canada's largest trade union, Canadian Union of Public Employees. He commenced his arbitration and mediation practice as of 2007.

Brian is on the Ontario Ministry of Labour's approved list of grievance arbitrators. He is also a Vice Chair of the Ontario Grievance Settlement Board. Additionally, he has been a part time adjudicator member of the Ontario Human Rights Tribunal and an approved adjudicator under the Canada Labour Code. His practice includes adjudicating and mediating grievances and disputes in both the public and private sector and he is a named arbitrator under a number of collective agreements.

Brian resides in Mississauga, Ontario with his wife Cecilia and their three children, Erin, Brendan, and Kiera, and their dog, Kayla.

Fireside Chat with William B. Gould IV

By Bonnie Bogue and Claude Dawson Ames

Wow, what an amazing Fireside Chat this was! William B. Gould IV -- NAA Member and the Charles A. Beardsley Emeritus Professor of Law at Stanford Law School – is known to Academy members and the labor management community as a prolific scholar of labor law and employment discrimination law and as an influential voice on worker-management relations for over 40 years. But the depth and breadth of his life experience and influence came as a surprise to many, during the delightful interview by fellow NAA Member, Host Committee Chair, and good friend, Claude Dawson Ames.

Most of us already knew that Professor Gould, known as "Bill" to colleagues and friends, served as Chairman of the National Labor Relations Board from 1994 to 1998. But many did not realize, until he was awarded his 45-year pin at this Annual meeting, that Bill has been a leading arbitrator, admitted to the Academy in 1970. Now emeritus at Stanford Law, he is very involved in workplace issues, serving as an Independent Monitor to resolve workplace issues for the transportation firm First Group America (2008-2010) and as Special Advisor to the Department of Housing and Urban Development (HUD) on project labor agreements. Then in 2014, Governor Jerry Brown honored Bill by appointing him Chairperson of the California Agricultural Labor Relations Board, charging him with breathing new life into the statute that was passed in 1975 during Brown's first administration, in response to the farm workers movement spearheaded by Cesar Chavez. Bill's appointment was overwhelmingly approved by the California State Senate.

We also learned that Bill is a great story teller, demonstrated throughout his Fireside Chat to the delight of an overflow audience of admiring colleagues, family, and friends at the St. Francis Hotel in San Francisco. Bill is a critically acclaimed author of 10 books and more than 65 law review articles. One of the most fascinating is his book recounting his great-grandfather's experiences as an escaped slave and Union sailor in Diary of a Contraband: The Civil War Passage of a Black Sailor, based on his diary and Bill's meticulous research. Then there is his own Washington story, Labored Relations: Law, Politics and the NLRB--A Memoir. A tenth book, Bargaining With Baseball: Labor Relations in an Age of Prosperous Turmoil, appeared in 2011. In 2013, the fifth edition of Bill's A Primer on American Labor Law was published by Cambridge University Press. Bill has been a Guggenheim Fellow (1975), Rockefeller Foundation Fellow (1975-1976), and Fulbright Professor in South Africa (1991). He is a recipient of five honorary doctorates for his significant contributions in the fields of labor law and labor relations.

William B. Gould IV with Claude Dawson Ames

Bill's life story was enhanced by the two large posters picturing Bill's family history and professional career, prepared by Claude's wife, Sheila, and daughter, Lauren. The posters on both sides of the stage created a warmly intimate setting for the chat, which began with Bill recounting the highlights of Diary of a Contraband.

Bill's great-grandfather, the first William B. Gould, was born into slavery in Wilmington, North Carolina and escaped to freedom in 1862 by stealing a boat and rowing under the cover of darkness, in the company of six others escapees, down the Cape Fear River and out to sea. He was taken aboard a Union gun boat patrolling off the coast of Wilmington, part of the North's blockade of Confederate ports. He served the rest of the Civil War in the Union navy. The great-grandfather's diary chronicles his daily life from 1862-1865, as a slave and a Union sailor. Bill told the audience how his own father discovered the diary in the 1950s while cleaning out an attic. Bill decided to write Diary of a Contraband to tell his great-grandfather's story because he was moved by his bravery and courage to escape slavery and be free.

What makes the diary even more remarkable is that his great-grandfather, a skilled plasterer and mason, could read and write quite eloquently, although slaves were prohibited from learning how to read or write, punishable by death if discovered. The term "contraband" was used by the Union to describe property and anything of value coming into its possession, so

(Continued on Page 28)

Fireside Chat with William B. Gould IV (Continued from Page 27)

designated to prevent its return to the Confederates. Slaves were highly valued and designated as property.

Bill's great-grandmother was emancipated in 1858, being bought out of slavery and taken north in 1858. She married William B. Gould in the Boston area after the war ended and had six sons. Bill is sure that he got his perseverance and purpose in life from his great-grandparents.

Bill also entranced his listeners with the tale of his own professional life, a remarkable journey that began at Cornell Law School, where he wrote a paper on Steele v. Louisville & Nashville Railway, the 1944 U.S. Supreme Court ruling that established the duty of fair representation for labor unions. The paper came to the attention of Kurt Hanslow, a law professor, who recommended Bill as a summer law clerk in 1960 to the UAW in Detroit. Bill met with Walter Reuther. During their twenty minute chat, he set his career path in labor law, labor arbitration, and exposure to the NLRB. He returned to the UAW after he graduated from Cornell and began presenting arbitration cases to Umpire Harry Platt at the Ford Motor Company-UAW Office of Umpire.

In the fall of 1962, Bill became a research student at the London School of Economics studying under Professor Otto Kahn Freund in comparative labor law. That, he told his audience to great laughter, is how he met his wife, Hilda, who was a professor at the School during their courtship. Bill went on to the NLRB in Washington after leaving London, writing draft opinions and speeches for Board members from 1963 to 1965. He left to work for Ted Kheel's law firm in New York. He apprenticed to Kheel, who was then arbitrating and mediating major labor disputes. Bill said that got him on the lists and he began being selected for his own cases. He was on the first fact finding panel under New York's Taylor Law in 1967. As Consultant to the EEOC, he conciliated race discrimination complaints in southern states during this time.

Bill began his academic career in 1968, teaching at Wayne State University Law School in Detroit. While there, he became lead counsel for plaintiffs in the racial discrimination case of Stamps v. Detroit Edison, resulting in a $5 million award and job progression opportunities for black workers. He did a lot of arbitrating then, saying he enjoyed getting out of the academic atmosphere and in touch with the "real world" of labor arbitration. At that time, he noted, arbitration was more informal – very few transcripts or lawyers. Bill was inducted into the National Academy of Arbitrators in 1970.

Next was a brief stop at Harvard. Derek Bok, then Dean at Harvard Law School, invited Bill to become a Visiting Professor in 1971, after being introduced by Professor Roderick Hill, former Chairman of the SEC during the Nixon administration. While at Harvard, Bill received a call from Stanford University inviting him to talk about a job at Stanford Law School. And, as Bill said, "the rest is history," as he joined the faculty in 1971, becoming the first African-American Professor at Stanford Law School.

In 1994, Bill was appointed Chairman of the NLRB by President Bill Clinton. He characterized his tenure as "four and a half years of tumult and challenge" that began with his highly contested confirmation hearing, which Bill recounted with great flare. He noted that during his term, the Board brought the most Section10(j) petitions for injunctions in its 80 year history. One was when the Board intervened in the longest strike in baseball history (1995-96), which the parties settled after the Board's intervention. But Bill reports not all of his time in Washington was bad, as he found an apartment above the One Step Down jazz club where he was able to hang out and meet many well-known jazz musicians. Although he said he loved writing Board opinions, these times were one of the few things that he actually enjoyed and missed after his term at the NLRB ended.

Bill was asked to share with the audience some of the most memorable experiences in his life. First, he said, is being married to Hilda and his love of family and grandkids. Second was his relationship with the Kennedys. Bill shared wonderful posters of photos and letters from Senator Ted Kennedy congratulating him on his Senate confirmation as NLRB Chairman, President John F. Kennedy thanking Bill for his support in his presidential campaign, and Bobby and Ethel Kennedy's handwritten invitation to an ice skating party at Rockefeller Center. Although Claude did not ask if Bill could skate, we assume he can, since he lived in Boston and is still nimble, witty, and fast on his feet.

As time drew short and the Fireside Chat came to a close, Bill reflected proudly on two other memorable moments. One, memorialized in a picture included on his career poster, was meeting Nelson Mandela in South Africa two years before he became President; they had a short tete-a-tete and he got his picture taken with Mandela. Bill had gone to South Africa three times in the 1970s, but was not allowed to return despite a Fulbright and a university's invitation because of his close association with union leadership locked in the struggle against the apartheid government. But after Mandela was released from jail, Bill got his Fulbright and returned in 1991 to teach, when Union leader and political activist Cyril Ramaphosa arranged his meeting with Mandela.

The other great moment, of course, is when he threw out a first pitch ball for his beloved Boston Red Sox baseball team, plus his thrill when the team won three World Championships in the 21st century.

Just when one would believe Bill had achieved it all, along comes Governor Jerry Brown, appointing him Chairperson of California's Agricultural Labor Relations Board in 2014. In contrast to his NLRB experience, he said this confirmation breezed through the state's strongly Democratic Senate. Bill told his audience that there are enormous factors pushing back against collective bargaining in agriculture that have nothing to do with labor law. How that turns out will be something we will talk about at our next Fireside Chat with William B. Gould IV.