National Academy of Arbitrators
WINTER 2016

The Chronicle

MARK YOUR CALENDARS

PLAN TO ATTEND...

2016 Annual Meeting
June 22 – 25, 2016
Wyndham Grand Pittsburgh Downtown
Pittsburgh, PA

2016 Fall Education Conference
September 30 – October 2, 2016
Loews New Orleans Hotel
New Orleans, LA

2017 Annual Meeting
May 24 – 27, 2017
Fairmont Chicago, Millennium Park
Chicago, IL

2017 Fall Education Conference
September 15 – 17, 2017
Four Seasons Miami
Miami, FL

2018 Annual Meeting
May 23 – 26, 2018
The Fairmont Hotel Vancouver
Vancouver, BC

June 22 - 25, 2016

2016 Annual Meeting in Pittsburgh

By Walt De Treux
Program Chair

Developed in collaboration with the leading labor and management advocates in the Pittsburgh area, the program will feature engaging sessions focused on pre-hearing, evidentiary, and post-hearing issues. Mark Hornak, U.S. District Judge for the Western District of Pennsylvania and a former management attorney, will lead a panel discussion on judicial review of arbitration awards. The final plenary session will examine ways in which management and union advocates can improve their chances of success when presenting arbitration cases. In a related session, Cornell University Professor Jeffrey Rachlinski and University of Ottawa Professor and arbitrator Pamela Chapman will explain concepts and tactics that may help persuade the arbitrator.

NAA Members Catherine Harris and Richard Fincher will lead two practice sessions focused on case management conferences and discovery and motions in employment arbitration cases. The program will feature industry sessions in the postal and airline industries, the education field, and in police use-of-force policies and training. Attendees can enjoy a lighthearted, but educational, presentation by NAA Member Scott Buchheit on the similarities between arbitrators and baseball umpires. Representatives of the AAA, FMCS, and NMB will be present for the popular U.S. Agency

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ON THE INSIDE

FEATURES

COLUMNS

PRESIDENT'S CORNER
– *BACK COVER*

Message from the Editor

The Fall FEC in Denver was fun and informative, and the Four Seasons Hotel a fabulous host. If you have not been to a meeting in a while, please join us in 2016 in Pittsburgh for the annual meeting and New Orleans for the Fall FEC. The dates are listed elsewhere in this issue, so mark your calendars now. And if you have been a regular attendee, I will see you in the Steel City and the Big Easy next year.

Please note that the meetings are not far apart. We will be in Pittsburgh June 22-25 and New Orleans September 30-October 2. And remember, everyone is invited to the President's Dinner. You will receive information about it before the meetings, so watch for it and join us if you can.

Dan Zeiser, *Managing Editor*

Submissions

The Chronicle runs several features and columns highlighting the lives, stories, and work of the members of the Academy. We are always in need of new subjects for the articles and new story ideas. If you have any suggestions, want to write, or would like to see someone profiled in one of these columns, please contact Daniel Zeiser, Managing Editor, at *danzeiser@aol.com* or contact the feature author directly.

Alongside Every Good Arbitrator…, written by Linda Byars (*lindabyars@byarsandbyars.com*), highlights the volunteer accomplishments of spouses and partners of Academy members.

NAA Book Review is a review by an NAA member of a book written by an NAA member.

Off Duty Conduct, written by Barry Goldman (*bagman@ameritech.net*), highlights the esoteric passions that members pursue in their time away from the hearing room.

Tales from the Hearing Room is a compilation of members' stories of strange, funny, and unusual happenings during arbitration proceedings.

We hope these features, complementing our current roster of outstanding columns and features like *Technology Corner, Canadian Perspective,* and *Arbitration Outside the CBA*, capture your attention and interest.

The Chronicle

The Chronicle is published by the National Academy of Arbitrators (Operations Center located at Suite 412, 1 North Main Street, Cortland, New York 13045).

The Chronicle is published three times a year: Spring, Fall, and Winter. Copy deadlines are March 15 (Spring), July 15 (Fall), and November 15 (Winter). Please direct submissions to Daniel Zeiser Managing Editor, and the NAA Operations Center. For submission instructions, contact NAA Operations Center at (607) 756-8363 or email, *naa@naarb.org*

PITTSBURGH

Mighty, Beautiful, and Ready for the NAA!

By Michelle Miller-Kotula, Host Chair

The Host Committee is preparing to welcome NAA members and guests to Pittsburgh for our Annual Conference in June 2016. We are excited to showcase our region as a story of transformation spanning two generations — from smoke control and urban redevelopment in the 1950s and 1960s to the thirty year comeback from a severe recession that cost our region much of its industrial base. Today, the Pittsburgh region's prosperity is powered by five key industry sectors: advanced manufacturing, energy, financial and business services, health care and life sciences, and information and communications technology. These diverse sectors represent more than half the region's private sector employment. And not by accident, they are the result of an economic transformation launched in the early 1980s as the steel industry restructured and the region lost more than 100,000 jobs.

MARKET SQUARE

Working with leaders from the public and private sectors as well as labor, Pittsburgh has built on the region's historic strengths in advanced manufacturing, energy, and finance, and has invested in new industries through its 36 colleges and universities, creating strengths in health care and life sciences, and information and communications technology. These new industries created jobs that offset those lost and provided an innovation-based economy that is not dependent on any one industry. The diverse economy has provided the region with rela-

(Continued on Page 4)

HEINZ HISTORY CENTER

RIVERS CASINO

PITTSBURGH: JUNE 22-25, 2016 *(Continued from Page 1)*

Update, and our Canadian members will hold a special session on Human Rights issues.

David Shribman, Executive Editor of the *Pittsburgh Post-Gazette* and op-ed contributor to the *Toronto Sun*, serves as the Distinguished Speaker. His experienced and informed insight into political and labor issues will surely serve as the basis of a thought-provoking presentation. NAA Member Joe Sharnoff has the honor of interviewing NAA Past President Jim Harkless in a highly anticipated Fireside Chat, and NAA President Allen Ponak will engage the audience with his Presidential Address.

There are many other reasons to come to Pittsburgh in June – the museums, the restaurants, Pirates baseball, to name a few. And the program is guaranteed to capture and keep your interest as well. Make your plans now to join the Academy from June 22-25, 2016 at the Wyndham Grand Hotel on the Three Rivers waterfront in the beautiful City of Pittsburgh.

WYNDHAM GRAND HOTEL

Pittsburgh . . . Mighty, Beautiful *(Continued from Page 3)*

tive stability through the "Dot Com Bust" and the "Great Recession." From September 2007 through September 2012, the region ranked fifth in the nation in terms of the number of jobs gained during that period (20,100).

Pittsburgh has been remade, with a focus on regional growth. We are taking the Pittsburgh region to the next level as a global business hub and international destination. We look forward to hosting you and showing you what has been accomplished. Here is our preliminary agenda for the NAA Annual Conference as well as some places that we believe showcase the new Pittsburgh…

The President's dinner will be held at a local restaurant within walking distance of the Wyndham Grand. Host Committee members are working on options to highlight areas in Pittsburgh such as Mt. Washington, the Cultural District, the Strip District, Station Square, the Southside, and Market Square during the popular dine around dinners. A dining guide is in the process of being prepared that will contain various cuisines available at differing prices from a variety of local restaurants. Pittsburgh restaurants are consistently in the news for outstanding and unique culinary offerings.

Our Pittsburgh Pirates will be in town and we are working to secure a block of tickets at PNC Park. The Pirates are scheduled to play the San Francisco Giants and will host the Los Angeles Dodgers later in the week. PNC Park is one of the top baseball parks in the country and a short walk from our hotel.

Closer to the meeting, information will be sent to all members regarding the transportation options into our City, to include walking, biking, local transportation, and riding the Duquesne and Monongahela Inclines to enjoy spectacular views of the City. Many tours are available to highlight some of our region's greatest assets. Shopping information and other points of interest will be detailed, as well as how to go to the Rivers Casino for those who wish to try their luck.

Information will be provided about the great museums such as the Heinz History Center, the Andy Warhol Museum, Carnegie Museums of Natural History & Art, Phipps Conservatory and Botanical Gardens, the Frick Museum, the Pittsburgh Zoo, and the National Aviary. There is something to interest everyone. Many points of interest are within walking distance of our hotel, including Point State Park, the Fort Pitt Blockhouse Museum, Market Square, PNC Park, and Heinz Field. Festivals and other events occurring in the area during the conference will be noted.

The Host Committee is pleased to showcase our beautiful City of Pittsburgh. When you visit you will realize why Condé Nast Traveler has named Pittsburgh one of the "Top 15 places to go in 2015." We know you will enjoy the great food, outdoor adventures, scenic landscape, history, tax-limited shopping, and a thriving cultural district. We look forward to the NAA members and guests visiting our vibrant City.

PNC PARK

PITTSBURGH ZOO

ANDY WARHOL MUSEUM

DUQUESNE

2016 REF SILENT AUCTION




Clear Out for a Cause

The Auction Sub-Committee of the Research and Education Foundation is pleased to report that we have already received some wonderful donations for our 2016 Silent Auction at the NAA Annual Meeting in Pittsburgh. Among the items pledged so far from individuals are a central Oregon condo stay, handcrafted jewelry, art deco pottery, and tickets for a gala charity dinner.

We are hoping that many of you (members and regions) will follow their lead. Items that have been successful in attracting generous bids during our previous silent auctions were stays in vacation condos, sports memorabilia, rare quality wine and whisky, historic items from the labor movement, and both painted and photographic art work. This is your opportunity to clear closets and attics of surplus cherished items, knowing they will be treasured anew by their successful bidders, while helping to increase the number of worthy projects REF grants can support in the coming years.

For those of you with uncluttered closets, shelves, and attics, dinner cooked by an NAA member, spa certificates for the Wyndham Hotel in Pittsburgh, or gift cards for one of the many excellent Pittsburgh restaurants are also great items for your tax-deductible donation. (Canadian members should check with their tax advisors.) Feel free to be creative in your chosen donation.

The donation form may be found on the NAA Web Site under the REF link. The form may be sent to the NAA Operations center or e-mailed to any of the members of the auction committee. If you have questions about the auction, or about items to donate, please contact any member of the committee (Linda Byars: lindabyars@naarb.org; Sheila Mayberry adr@maine.rr.com; or Pattie Bittel: ptbittel@naarb.org;). Please help us make this auction a real success!

MILESTONES

Edited by Michael P. Long

NOTEWORTHY HONORS & PROFESSIONAL ACTIVITIES

Tim Bornstein – has been roasted, toasted, and posted. The New England Region of the NAA gathered over a fine dinner on November 5, 2015 to honor their long-tenured colleague, Tim Bornstein, who has decided to embark on retirement from a distinguished and active arbitration practice. Tim was applauded many times as he was recognized for his service as a former NAA Vice President, a member of the Board of Governors, the CPRG, and the Membership Committee. **Marcia Greenbaum** toasted (roasted!) Tim with the opening words: "What can I say about Tim that he has not already said about himself?" As always, Marcia spoke the truth and thereafter more friends expounded on Tim's success, his teaching, his writing, and his deigning to issue 3500 awards. Tim took this all in, extended his thanks to all, but said nothing more. The Region wished Tim well as he rode off into his next new chapter.

■ ■ ■

Barbara Deinhardt and **Ann Kenis** – were named by President Barack Obama to serve with Chairwoman **Elizabeth C. Wesman** as members of the Presidential Emergency Board No. 248, whose duty is to investigate and make recommendations for settlement of the recent disputes between the New Jersey Transit Rail and certain of its employee unions. The Executive Order established the Presidential Emergency Board effective July 16, 2015, with the Board to report its findings and recommendations for settlement to the President within thirty days of its creation. President Obama said, "The transit rail system is vital to our nation's economy, and it's crucial that we ensure it runs smoothly. That's why I'm grateful these talented individuals have agreed to serve the American people by helping to swiftly and appropriately resolve these labor-management disputes." The Board has received positive feedback from both sides regarding its report on PEB 248.

■ ■ ■

Walt De Treux, **Art Riegel, Andrew Strongin,** and **Dan Zeiser** – were inducted and became Fellows in the College of Labor and Employment Lawyers on Saturday, November 7, 2015 in Philadelphia, PA.

■ ■ ■

Bill Holley – has been selected as one of the ***Top 100 for 100*** by the College of Business at Mississippi State University as it celebrated its 100 year anniversary on November 13, 2015. Alumni, faculty, and students selected the top 100 for 100. The top 100 were selected for their "demonstrated distinguished service to the profession, including outstanding achievement in their field." The top 100 were selected from 33,000 graduates from 142 countries. Among those selected were Author John Grisham, U. S. Congressman for 30 years Sonny Montgomery, Chief Justice of the Mississippi State Supreme Court William Waller, and Associate Justice Charles Easley. The biographical summary for Bill in the university publication "100 for 100" included his service as Executive Secretary-Treasurer and President of the National Academy of Arbitrators.

■ ■ ■

Daniel F. Jennings – was recently honored by being recognized as an outstanding alumnus of the Industrial and Systems Engineering Department at the University of Tennessee-Knoxville. Dan graduated from Tennessee in 1961 with honors. He later joined the Texas A&M faculty in 1997, after 22 years of industry experience and then 13 years at Baylor University. He earned his master's degree in finance from Northeast Louisiana University and his PhD from Texas A&M.

■ ■ ■

James Oakley – has been appointed to serve as Queen's Counsel for the Province of Newfoundland, Canada. Being appointed a Queen's Counsel, or Q.C., is an honorific recognizing senior legal counsel. The appointment has been described as a significant honour that recognizes contribution to the legal system, the legal profession, and the community. The Q.C. appointment is also known informally as **"taking silk"** because the title holder wears a silk gown when appearing as a Barrister in Superior Court, and has precedence over other Barristers. The Q.C. appointment is made by the Provincial Cabinet and recognized by the Court. The Honourable Darin King, Minister of Justice, stated, "Being appointed as Queen's Counsel comes only after considerable and significant work as a lawyer in the province."

PUBLICATIONS & PRESENTATIONS

Barry Goldman – continues to serve as a popular freelance op-ed columnist in publications throughout the United States. His article entitled *There's only one part of arbitration to bemoan: The 'cram-down'* was published by the Minneapolis Star Tribune in November 2015. It incorporates, according to Barry, "a primer — including that part where the process goes wrong."

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MILESTONES *(Continued from Page 6)*

Allan McCausland – well known as a distinguished economist, presented what has been termed startling research: "The Impact of Technology on Employment and Earnings" at the New England Region's meeting on November 5, 2015. The presentation focused on two major findings/trends.

- First: technology is eating up so many jobs that in the not so distant future it will be extremely hard for anyone to find any remunerative work.
- Second: the labor participation rate has been sinking for the past fifteen years and this trend will continue (as the first trend prevails).

Allan states that the implications of these two findings are enormous and have yet to be enumerated, much less subject to any proposed solutions.

Allan's research graphically demonstrated the specific, imminent (and mostly negative) impacts that technology poses for employment and earnings. Be prepared: all baseball umpires may be replaced by computers analyzing photographic images from cameras around the field. Computers can instantly (and accurately) call balls and strikes, never miss a call at first base (or any other base), and determine definitively when a runner makes it safely across home plate. Consider: cabbies and truck drivers will not be needed when all vehicles are equipped with computerized controls and can be operated by remote command. Disc jockeys will continue to be replaced as mega-radio stations use computerized programing to deliver what their audiences will hear. Even now, psychologists are being replaced by avatars to conduct interviews with veterans; and the work of news writers and stock traders is being replaced by algorithms.

Allan explained how artificial intelligence means that computers now "learn" on their own, eliminating the need for computer programmers. Thus, feed a computer enough arbitration decisions, and it will be able to issue reasoned decisions and awards, replacing 99% of arbitrators! There was a collective, but audible, gasp as Allan announced the latter possibility. We should all be glad we were born in the last century.

ON A PERSONAL NOTE

David Vaughn – has been elected National Director of the *Nickel Plate Historical and Technical Society*. The Society is one of the oldest railroad historical organizations in the United States, having been founded in 1966 for the purpose of obtaining, preserving, and disseminating information and material related to the New York, Chicago & St. Louis Railroad Company, commonly known as the Nickel Plate Road, and its predecessor, constituent, and affiliated railroads. The organization of over 800 members includes authors, historians, photographers, railroad employees and officials, model railroaders, and rail-fans of all interests.

David's 18' x 90' model railroad is featured in Great Model Railroad 2016 Magazine (Kalmbach Publ., Milwaukee).

Continuing Call for MILESTONES

Honors? Publications? Exceptional activities - professional or otherwise?

Please alert us if you know of a noteworthy activity or event, whether it involves you or another member. We are a diverse and vigorous group, and, while one may be modest and restrained regarding personal accomplishments with the parties to disputes, friends and colleagues in the National Academy from around Canada and the USA enjoy hearing about not only your professional service, but your noteworthy activities outside the hearing room as well.

Please send your news to Mike Long by e-mail at *mlong@oakland.edu* (preferred way). If you are not on line, just mail it to:

Professor Michael P. Long
Department of Organizational Leadership
495-A Pawley Hall
Oakland University, Rochester, MI 48309.
Phone: (248) 375-9918

REGIONAL ROUNDUP

Reported by Kathy L. Eisenmenger
National Coordinator of Regional Activities

The Region Chairs who were able to attend the Denver FEC meeting imparted vibrant, stimulating discussion, and some good ideas to share about what is going on in the Regions. So many activities, so little time, in just a few months. The Regions have big plans for 2016. With the ease of using our "smart" calendars, now would be a good time to jot in the dates for coming events. The Regions offer a wide variety of opportunities between the NAA's Annual Meeting and the FEC. Drop in and visit a Regional activity if you are traveling in the neighborhood.

CANADA
Regional Chair is Jules Bloch - *jbloch@sympatico.ca*

CENTRAL MIDWEST
Regional Chair is Brian Clauss - *brianclauss@brianclaussadr.com*

METROPOLITAN D.C.
The DC Region held its regular Sunday breakfast meeting on June 21 and August 23, 2015. The breakfasts were attended by about 10 NAA DC Region members and two guests. The guest speaker on June 21 was Arthur Pearlstein, FMCS Director of Arbitration Services. Pearlstein spoke on the FMCS arbitrator selection process. Director Pearlstein also gave advice about how best to work with the process. On August 23, Betty Ginsburg, Esq., Director, Representation Department, Air Lines Pilots Association, spoke on the ALPA's vision, structure, and arbitrator selection. The Region's next meeting will feature guest speaker Allison Beck, Director, FMCS, to be followed with a subsequent meeting with guest speaker Ryan Smith, the new National Air Traffic Controllers Association, Director of Labor Relations.

Regional Chair is Sean J. Rogers - *rogerssj@erols.com*

METROPOLITAN NEW YORK
The Region plans to hold four to five programs for the year to include updates, educational, and social events. The Region hosted a holiday party in December and plans to host a NYC labor-management relations program later in the season. (Dates to follow - watch for the announcements on the NAA website, Regional Activities).

Regional Chair is Melissa H. Biren - *mhbiren@aol.com*

MICHIGAN
Regional Chair is George T. Roumell, Jr. - *roumell2000@yahoo.com*

MID-ATLANTIC REGION
The Region celebrated the summer with a "Do-Dah" party at the lovely Philadelphia home of NAA member Martha Cooper and her family on Sunday, July 13, 2015. Martha's husband Fred, the cook in the family, made fabulous meatballs and other members contributed salads, desserts, and many libations. Such a good time was had by the crowd of colleagues and spouses that Martha has generously offered to make this get-together an annual event. Our revitalized Region currently has three business meetings annually, one of which is a joint May meeting with the local LERA chapter. Our Fall dinner meeting, with President Allen Ponak, was held on November 5, 2015, at Maggiano's restaurant, 12th and Filbert Streets, Philadelphia, close to the locale for the annual meeting of the ABA's Labor and Employment Section. The Region will hold a training session in conjunction with the FMCS in May 2016. Any member who would like to attend a meeting may contact chair Mariann Schick at *schickarb@comcast.net* for more information.

Regional Chair is Mariann E. Schick - *schickarb@comcast.net*

MISSOURI VALLEY
Regional Chair is - *georgefitzsimmonsllc@hotmail.com*

NEW ENGLAND
The Region plans to hold two meetings in the near future. Details to be announced.

Regional Chair is Mary Ellen Shea - *ArbitratorMEShea@gmail.com*

NORTHERN CALIFORNIA
The Northern California Region held a fabulous dinner meeting and program on November 5, 2015 at the Lake Chalet Seafood Bar & Grill in downtown Oakland on the shores of Lake Merritt. Our speakers were warmly welcomed by 25 Academy members and non-member arbitrators. After dinner, an enlightening program with Andy Baker from the Union side (Beeson Tayer & Bodine) and Gina Roccanova for Management (Meyers Nave) aired their "best practices and pet peeves" about arbitration and arbitrators. A spirited discussion accompanied their remarks. A great time was had by all. The Region awarded Claude Ames with a heart-felt framed certificate for his role as Host Chair for the Annual Meeting in San Francisco. The Region's next dinner meeting is on March 1, 2016. The speaker will be Allen Ponak, our new national NAA President, who will be our guest of honor.

Regional Chair is Nancy Hutt - *nancyhutt@naarb.com*

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OHIO-KENTUCKY
The Region held its annual meeting on April 30, 2015, and co-chaired the Arbitrator and Advocate Symposium in Columbus along with the FMCS and the Columbus, Ohio LERA on April 30 and May 1, 2015. The Symposium has been held almost 40 years, although the Region has been co-chair for the last several years. Then-President Shyam Das met with the Region's members and opened the Symposium with an address. The Symposium was well attended with approximately 175 attendees.

Regional Chair is Daniel Zeiser - *danzeiser@aol.com*

PACIFIC NORTHWEST
The Region held its annual meeting in November 2015 at the lovely Orchid Fairmont Hotel. The Region plans to hold its Arbitrators' Day conference in Seattle, Washington, probably on March 9, 2016. Watch for further announcements on the NAA's website, "Regional Activities." Additionally, NAA Arbitrator Robert W. Landau, Alaska, will host a one-day meeting.

Regional Chair is Michael Cavanaugh - *mec@cavanaugh-adr.com*

SOUTHEAST REGION
The Region has scheduled its annual regional meeting and training program for February 26-27, 2016, at the Crowne Plaza Atlanta Airport Hotel, Virginia Avenue in Atlanta, Georgia. The Advocates Training program will be on Friday, February 26th featuring NAA arbitrators from the Southeast Region. The meeting will feature participants preparing and presenting two mock cases to NAA arbitrators. The training program will begin at 9 a.m. and conclude at 4:30 p.m.

The regional meeting will begin on February 26th with a cocktail reception at 6 p.m. followed by dinner at 7 p.m. NAA President Allen Ponak will give the Presidential Address on Saturday morning, February 27th. The program will feature an agency update from the AAA, FMCS, and NMB along with advocates and arbitrators addressing the latest labor law and arbitration issues facing the labor and management communities. For further information please go to the NAA SE region website at *www.NAASoutheast.org* or contact Regional Chair Phil LaPorte at *plaporte@gsu.edu* or 404-316-6798.

Regional Chair is Philip LaPorte - *plaporte@gsu.edu*

SOUTHERN CALIFORNIA
The Region held one of its bi-monthly meetings on September 29, 2015. A panel discussed advanced issues in decision writing for hearing officers and civil service cases. The Region also held a conference on Advocacy on November 3, 2015 and an advocate training session in conjunction with the OCLERA on November 10, 2015. The Region is in the planning stages for a session on remedies.

Regional Chair is Jon Monat - *monat@verizon.net*

SOUTHWEST ROCKIES
The Region will hold its annual Labor-Management Relations conference at a Houston Hobby airport hotel on March 2-5, 2016. Information about the conference is posted on the NAA website, Regional Activities, and at the Region's website *www.naaswr.org*. All NAA members and their guests are welcome. The conference is also open to all labor-management practitioners.

Regional Chair is Tom Cipolla - *tcipollapc@msn.com*

UPSTATE NEW YORK
The Region has postponed its program development while the Region is working with the Buffalo, Rochester, and Syracuse LERA Chapters to reorganize into one organization.

Regional Chair is Douglas J. Bantle - *bantle@rochester.rr.com*

WESTERN PENNSYLVANIA
The Region held its most recent meeting on Friday, September 18, 2015, at the Doubletree Hotel in Greentree near downtown Pittsburgh, PA. The participants discussed issues important to the arbitrators in the Region. They also shared ideas for the upcoming NAA Annual Meeting for June 22-25, 2016, to be held at the Wyndham Grand Pittsburgh Downtown hotel. The Region looks forward to showcasing beautiful Pittsburgh. The Region plans to develop programs to support new arbitrators.

Regional Chair is Michelle Miller-Kotula - *millerkotula@comcast.net*

"More than just an Opinion…"

By Daniel J. Nielsen, CPRG Chair

I suspect that, when the majority of the NAA members think of the CPRG, they think of its role in investigating allegations of misconduct and meting out sanctions when misconduct is found. However, the bulk of the CPRG's efforts are directed at helping members avoid getting crossways with the Code. We get far more inquiries about what the Code would require or forbid in a given situation than complaints about member conduct. In addition to answering individual inquiries, the Committee engages in educational efforts, such as the sessions at the Denver FEC on Aging Gracefully, and Code and Insurance issues. Finally, we also publish Advisory Opinions that provide guidance to arbitrators by answering questions about a specific situation or scenario. The hope with the Opinions is both that members will find them useful if faced with similar situations and that they will serve a general educational purpose.

Opinions are usually generated in response to inquiries, where the Committee believes that the issue is of general interest or raises important issues. There are 25 numbered Opinions, although 11 of them have been rescinded, leaving 14 Opinions still in effect. Opinion No. 1 was issued in 1953 and, not surprisingly, addresses fees. It gives one a sense of the power of inflation that the fact situation involves an arbitrator who originally agreed to hear the case and write the award for $100, but then asked for an increase to $200 when he arrived at the hearing. The Committee of course found the conduct unethical under the then-existing 1951 Code. When the Code was later revised, a note was added stating that the decision and rationale were consistent with Section 2.K of the new Code.

Opinions are subject to being rescinded if changes to the Code or external law render them obsolete or inaccurate. They may be revised if changes render them partially inaccurate or, more rarely, if on reflection it appears that the advice given may be unhelpful. That was the situation with Opinion No. 6, which dates from 1980. Opinion No. 6 addressed an arbitrator's obligations where a union's advocate in a discharge case made an ex parte comment to the effect that his case was a loser and he did not expect the arbitrator to rule in his favor. The Opinion advised that, if the arbitrator thought this was a genuine effort to induce her to deny the grievance, she could either recuse herself or she could proceed with the case, so long as she advised both the company representative and the grievant of the comment and received their informed consent to proceed.

The Committee thought this advice was unhelpful on several levels. Not only is it difficult to follow, it suggests a course of action that, in practice, does not make much sense. If the arbitrator concludes that the union is seeking to throw the case, he or she cannot, as a practical matter, proceed to hear the case. An employee who for some reason consented to going forward would have some sort of expectation that the arbitrator would safeguard his or her interests in the course of the hearing, but that is not really the role of the arbitrator. The logistics of it would be difficult to sort out as well. Would the arbitrator have an obligation to take over cross-examination if the advocate was insufficiently aggressive? Call witnesses? Demand the production of exhibits? Obviously not. But if the arbitrator does not, then what good has the informed consent done? The arbitrator is still presiding over a case being thrown. Even if the arbitrator can somehow surmount those problems, the credibility of an award issued under these circumstances would be open to substantial questions.

The even more serious practical difficulty is with the aftermath of the disclosure to the employee. It is reasonably foreseeable that the arbitrator who follows the advice in Opinion No. 6 will be called as the first witness in the employee's duty of fair representation case. It is also reasonably foreseeable that the arbitrator would resist testifying, both to safeguard arbitral immunity and comply with the general precept that arbitrators subject to the Code will not voluntarily appear in litigation connected to a case. Thus, the advice in the Opinion could lead a member to preside over what is likely a sham hearing, issue an award with no credibility, be called as a witness against the employer and the union, and then litigate to avoid violating a different Code provision by testifying. Is all of that likely? No, but all of that is possible, and the Committee's view was that an Opinion that opened up these possibilities was not helpful to the members or the labor-management community. Instead, the Committee concluded that the Opinion should be revised to recommend recusal any time an arbitrator is convinced that a union advocate is genuinely attempting to induce the arbitrator to rule against a discharged employee.

The Committee drafted a revision to the Opinion and presented it to the Board of Governors for consideration in Denver. The Board unanimously approved the revision, and it is now on the Academy's web site, along with the rest of the Advisory Opinions, at *http://naarb.org/advisoryopinions.asp*. The text of the new Opinion is set forth on the next page:

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OPINION NO. 6 (Revised)

Originally issued - June 10, 1980. Withdrawn, rewritten, and reissued: October 23, 2015

[NOTE OF THE CPRG:
The rewriting and narrowing of Opinion No. 6 is undertaken to produce a more practical and helpful Opinion. It should not be viewed as taking a substantive position on any of the withdrawn portions.]

Arbitrator's Duty Regarding Union Representative's Off-the-Record Remark Prejudicial to Grievant in a Discharge Case

Facts: Prior to the start of a discharge hearing, the Union representative approached the arbitrator out of hearing of the Company representative and said, "I've got a loser. I don't expect to win this one."

Issue: What is the arbitrator's duty under the Code in these circumstances, with respect to required disclosures and/or withdrawal from the case?

Opinion: In Paragraph 1.A.1 of the Code "honesty, integrity and impartiality" are included among the essential personal qualifications of an arbitrator. Further, an arbitrator "must demonstrate ability to exercise these personal qualities faithfully and with good judgment, both in procedural matters and in substantive decisions." Paragraph 1.C.1 requires that an arbitrator "uphold the dignity and integrity of the office and endeavor to provide effective service to the parties." Section 2.A.2 provides that an arbitrator has a "responsibility to seek to discern and refuse to lend approval or consent to any collusive attempt by the parties to use arbitration for an improper purpose." At the same time, under Section 2.I.1, if an arbitrator "believes that a suggested award is proper, fair, sound and lawful, it is consistent with professional responsibility to adopt it."

Remarks like those made by the Union representative to the arbitrator are inappropriate. However, they may or may not reflect an effort by the Union to induce the arbitrator to sustain a discharge. The arbitrator may tell the Union representative that the arbitrator will disregard the Union's statement and make a decision based solely upon the record developed at the hearing. If the arbitrator believes that he or she can effectively disregard the remarks in weighing the evidence and continue to an impartial decision in the case, the arbitrator may go forward. The fact that the remarks were made does not, in and of itself, require withdrawal or disclosure of the remarks.

However, if the Union's remarks are or become, in the arbitrator's view, a genuine attempt to induce the arbitrator to rule against the Grievant, the arbitrator has an obligation to inform the Company of the communication and to recuse from the case. Notice to the Company is required because of the ex parte nature of the comments, and the arbitrator's conclusion that they are substantive. Recusal is required because it is, practically speaking, impossible to issue an Award that upholds the dignity and integrity of the office, and is consistent with the essential personal qualifications of honesty and integrity required by the Code. Any Award in favor of the Company would reasonably be viewed as the result of improper pressure from the Union, and any Award in favor of the Grievant might reasonably be viewed as an effort by the arbitrator to demonstrate his or her independence or otherwise prove a point. Either way, it creates an unavoidable appearance that the Award was based on considerations other than the merits of the case.

Paragraph 2.A.2 is also specific regarding a mutual, and collusive, attempt by both Union and Management to improperly influence an arbitrator's decision. While the Union representative's remarks in this situation do not, of themselves, reveal collusion with management, the Arbitrator should remain alert to the possibility and recuse from the case if circumstances so warrant. The Arbitrator should, however, be mindful of the fact that not all agreements are collusive, and that agreed upon terms may properly be adopted, so long as the Arbitrator "believes that a suggested award is proper, fair, sound, and lawful" per Paragraph 2.L.1.

THE RESEARCH AND EDUCATION FOUNDATION

The NAA Research and Education Foundation is pleased to report that the project headed by Dr. Alex Colvin of Cornell University is completed, including a very successful presentation at the NAA Spring meeting in San Francisco, and under budget! The team submitted its final report to the REF Board in late summer and the vote of the Directors was unanimous to approve the final report. We believe this is a body of research that was well worth our support.

The University of Missouri Web Site project is well underway. A Glossary and FAQ section have been completed (with the likelihood of additional entries as the site gets user feedback), and the University has produced a brochure describing the project. Professor Rafael Gely, who heads the project at the University of Missouri Law School and is working directly with REF Director Robert Bailey, expects that the site will "go public" in time for the 2016 Annual Meeting in Pittsburgh. Many NAA members have contributed to the web site, so the end product will be one that reflects very well on the Academy, as well as providing a much needed reference for those who may be less than well informed regarding labor and employment arbitration. Clearly, this is an area in which it is appropriate for the NAA to be providing accurate information, in contrast to what has been recently presented in political discourse and mass media.

In addition, the REF received a new proposal from the Cambodia Arbitration Council. The proposal is currently under further review pending clarification of some questions raised by the Directors, but on the whole we believe it likely to be a worthwhile project to fund. The proposal would create a much needed digest of arbitration awards that would be made accessible to advocates, neutrals, parties, and academics in the region, with an interest in continuing Cambodia's current progress in the use of labor arbitration.

Moreover, for the first time since the REF was founded, we supported a plenary session, "Aging Gracefully," at the Fall Education Conference in Denver. REF Vice President Catherine Harris moderated and NAA Member Ed Pereles offered a thought provoking introduction for the session. The main speaker, Dr. Claudia Jacova from Pacific University's School of Professional Psychology in Oregon, offered both cautionary and optimistic information for all of us as we age in our demanding careers as arbitrators and mediators. If members have suggestions for other relevant topics and speakers appropriate for REF sponsorship at FEC meetings, please feel free to contact the REF with your ideas. We think this is one significant way in which NAA members can benefit directly from their contributions to the Research and Education Foundation.

Finally, we are going "full speed ahead" on organizing the 2016 REF Silent Auction at the Annual Meeting in Pittsburgh. Our silent auctions have proved a valuable addition to our funding, and we hope the auction in Pittsburgh will surpass the previous ones. Information regarding the auction may be found in the relevant article in this issue of the Chronicle.

Keep in mind that the REF always welcomes new proposals for funding from both members and non-members. If you know of possibly worthy proposals, please encourage the parties involved to contact the REF. Details regarding application for funding may be found on the NAA web site under the REF link. Your continued support of the REF is support for our profession.

PLAN TO ATTEND:

2016 Fall Education Conference

September 30 – October 2, 2016

Loews New Orleans Hotel • New Orleans, LA

MY (MEMBER'S) SPACE

The picture above is not of a Russian gulag or some old, run-down factory building, but rather of Roger Sullivan High School in the East Rogers Park neighborhood of Chicago — the high school that I graduated from in 1965. This urban high school was originally built as a junior high school and plunked down on a square block amid crowded 1920s apartment buildings in a rough-and-tumble Northside neighborhood of Chicago. It has no sports fields, not even a blade of grass, and a gym with such a low ceiling that you have to fire a line drive at the basket to sink a half-court shot.

But I am proud to say that, with the recent admission of Ruth Moscovitch to membership in the NAA, Sullivan High School can now claim that, of the total 600 or so members of the Academy, five of us are graduates of this fine institution. That number on a percentage basis is staggering. It's true: in addition to Ruth and myself, Barry Simon, George Larney, and Richard Block all hail from this truly urban, inner city Chicago Public School. Despite

"...of the total 600 or so members of the Academy, five of us are graduates of this fine institution."

Sullivan's lack of the usual physical elements, it was quite good academically. (Other prominent alumni: Comedian Shecky Greene, the Lone Ranger Clayton Moore, New York Times sports columnist Ira Berkow, Congresswoman Jan Schakowsky, and former Senator Chuck Percy, to name just a few.)

But I doubt there is another prestigious North American organization, other than the NAA, that can state that such a large percentage of its membership came from one rather modest high school.

Peter R. Meyers

SEW: A NEW DAY AT THE NATIONAL LABOR RELATIONS BOARD

Reported by James S. Cooper

[Editor's Note: This article is a follow-up to Mr. Cooper's article in the fall 2015 edition of *The Chronicle* "Who's In Charge? The NLRB reverses *Olin Corp.* and *Spielberg Mfg*."

The NLRB (or Board) came out in full force at the Denver FEC and put on an outstanding performance designed to help arbitrators comply with the *Babcock & Wilcox Construction Company, Inc.* 361 NLRB No. 132 ("*Babcock & Wilcox")* case so that the purpose of the statute will be fulfilled. Present at the session were Jennifer Abruzzo, Deputy General Counsel, and John Doyle, Deputy Assistant General Counsel in the Division of Operations-Management of the General Counsel, and six staff members of NLRB Region 27 (Denver). The object of the Board's deferral policy is to allow the parties to litigate Section 8(a)(1) and/or Section 8(a)(3) charges before an arbitrator and have the Board accept the arbitrator's award as full resolution of the dispute. For the Board to accept the award, the parties must agree that the arbitrator has the authority to do so, the parties must present sufficient facts to decide the statutory issue, the arbitrator must consider the issue, and Board law must reasonably permit the award. *Babcock & Wilcox* is a stark departure from precedent and calls upon arbitrators to recognize potential violations of federal law, make findings of a Section 8(a)(1) and/or (a)(3) violation (or not), and issue an award with an eye as to what the Board would do.

While the Board's decision explicitly denied turning arbitrators into "mini" NLRB Administrative Law Judges (ALJ), the truth is that arbitrators need to act more like ALJs and this workshop was designed to teach arbitrators what the Board expects before it will honor the parties' request to defer. The NLRB plans to take this type of presentation on the road around the country in hopes of spreading the word as to these expectations. The Board's desire is that the NLRB will do *less* work, the arbitrators can do *more* work, and the parties will be *happy (or unhappy)* with a single bite at that old apple. The last thing the Board needs is to have to repeat hearings on the statutory issue(s) *and* litigate whether the Board should have deferred to the arbitrator's award. Thus, unless *we (the arbitrators, collectively)* get it, the Board's decision will more than double its workload on deferral and it will spend endless years litigating the deferral issues before the United States Courts of Appeal.

The General Counsel (who wanted a stricter standard for deferral) has taken on this task with gusto and topflight personnel, including a notebook prepared for this course by NLRB personnel. The notebook was simply spectacular and, as the Board is wont to do, it overwhelms those not familiar with the Board's dedication to being thorough with lots of citations to Board decisions. Any arbitrator who can get a copy of the notebook would do himself or herself a huge favor.

Moving to the substance of the FEC discussion, the Board neatly divided the session into five segments. First, Deputy General Counsel Abruzzo carefully reviewed the Board's decision in *Babcock & Wilcox* indicating the changes the Board made and why [NAA members in the audience whined, just like they did after Member Miscimarra's keynote address in San Francisco — forget the whine, it's over]. Second, Deputy Assistant General Counsel Doyle explained the difference between deferral in Section 8(a)(5) charges and deferral under *Babcock & Wilcox* and the clear reasons for the distinction, namely: (1) that a refusal to bargain charge may be defended by contract language, i.e., a unilateral change may be fully defensible based on contract language as interpreted by an arbitrator; (2) employer anti-union motivation is less likely to be an issue; and (3) *Spielberg Mfg.* and *Olin Corp.* continue to apply.

The third segment dealt with whether deferral was appropriate. On this issue, the Board will consider deferral appropriate if the collective bargaining agreement contains language granting an arbitrator authority to apply Section 7 of the Act through Section 8(a)(1) and/or Section 8(a)(3). While the Board did not announce "safe harbor language" on this issue, contractual language that prohibits the employer from engaging in unlawful discriminatory conduct would probably pass muster, although the Deputy General Counsel carefully announced that this issue needed to be fully litigated before the Board and that she could not give any guarantee in this regard. Alternatively, the parties, on an *ad hoc* basis, could decide that they were willing to litigate the unfair labor practice before an arbitrator and agree to be bound by that decision. For cases where there is a charge pending and one party seeks deferral, the Board's Regional Director will have made a decision that there is enough evidence to establish arguable merit to the charge and whether the parties are bound by their contract or an agreement to proceed before the arbitrator. In short, there will be no heavy lifting by arbitrators on this issue.

The fourth segment of the program examined the framework or theories the Board expects an arbitrator to apply for the Board to defer. On this subject, the Board's Region 27 staff led the discussion of what conduct is "protected" and "concerted," particularly in the context of discipline that the union alleges was unlawfully motivated by the employer. This was the "meat and potatoes" of the discussion, including a thumbnail review of the Board's standards under *The Continental Group, Wright Line, Atlantic Steel, Clear Pine Mouldings* and *Burnup and Sims* line of cases. Naturally the Board's notebook (Tab 3) includes about two hundred other cases and subjects for consideration. My take on this material is that the parties will have to do some homework and present cases to you

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A New Day... (Continued from Page 14)

because no arbitrator could be fully familiar with all these cases. On this issue, the Board clearly decided to give arbitrators some leeway and it some fudge room by simply requiring that Board law "must reasonably permit" the arbitrator's decision. However, under this standard, the Board will be *less* likely to defer than under the "not repugnant standard" as currently applied under *Olin Corp.* and *Spielberg Mfg.*

There was a lively discussion about the arbitrator's obligation to impose Board remedies where the arbitrator finds a violation of the law. On this issue, the Board has specifically announced that counting unemployment compensation toward back pay (something the Board will not do) would not be grounds for refusing to defer. The issue of requiring an employer posting, something arbitrators are loathe to do, was discussed, without consensus, except noting, in the Board's language, "[t]he absence of any effective remedy… would preclude deferral."

The fifth segment of the presentation consisted of a hypothetical with six parts. The facts of the hypothetical were simply too easy to test experienced arbitrators who are certainly capable of recognizing unlawful conduct. It would take far more subtle and conflicting factual issues (like real life!) to bring out the distinctions about which arbitrators, and even the Board, may sincerely disagree and the evidence needed to prove such violations. I am certain the Board will have opportunity to examine these difficult factual situations in the future.

One final note: the notebook included (at Tab 6) a handy-dandy flow chart showing whether to apply *Babcock & Wilcox* or *Spielberg, Olin,* and *Alpha Beta.* This is because the Board delayed implementation of the *Babcock & Wilcox* standards until the parties have an opportunity to negotiate a collective agreement after the Board's December 15, 2014 decision, unless their current agreement provides for arbitral decisions on Sections 8(a)(1) and/or (a)(3) or the parties specifically agree that the arbitrator should decide the Section 8(a)(1) and/or (a)(3) statutory issue. This chart will give you a headache, and everyone, including the Board, will be happy when there are no more pre-December 15, 2014 contracts to worry about.

To be sure, the Board compressed what should be a full day or perhaps two days of instruction into four hours. Luckily for the Board, the group attending this session included many seasoned arbitrators, including former Board attorneys and field examiners, so this was about as learned a group as the Board is going to reach. If this show appears in your region, I suggest you attend because, as previously mentioned, the notebook alone is worth the price of admission.

ETHICS AND PROFESSIONAL LIABILITY UPDATE

By Benjamin A. Kerner

This session, chaired by Robert Landau, featured a review of insurance policies from the counsel for Lloyds of London (the policy we get through our broker, Complete Equity Markets), a review of procedure to be used in the event of a member seeking reimbursement from the NAA Legal Representation Fund, and a review of procedures utilized by the Committee on Professional Responsibility and Grievances.

Mr. Robert Badgley is our contact for Lloyds of London, the insurance carrier that covers most arbitrators. He noted that, whereas in the past their policies covered only arbitration activities, now they are written to cover arbitration, mediation, hearing officer work, case evaluation, early case evaluation, training, and other ADR activities. Under the typical policy, the coverage is for claims made, not occurrences. There are two basic types of coverage: for liability for professional malpractice; and for cost of defense (subject to a deductible). It is still necessary to get a separate endorsement for ERISA cases.

It is in regard to the deductible, frequently, that arbitrators seek the assistance of the NAA Legal Representation Fund. Sara Adler, former President of the NAA and coordinator of the Fund, reminded the audience that it is necessary to contact the Fund first — before you call your insurer — if you want reimbursement from the Fund. The limit of the Fund's authorization to assist any one individual member is $3,000 and is available only for labor-management arbitration. This assistance may be denied if, on preliminary determination as to whether the claimant violated the Code, it is determined that the individual probably did violate the Code.

Dan Nielsen is Chair of the Committee on Professional Responsibility and Grievances. On matters brought to its attention by grievance, the Committee determines if there is probable cause to believe a violation of the Code has occurred. If so, the Committee assigns a Hearing Officer to investigate the matter de novo and make a recommendation to the Committee concerning the member's conduct and the disposition of the grievance. The member may participate in the investigation, of course.

There was a brief discussion of the duty to disclose, pursuant to the Code of Conduct. It was recognized that, in many locales, labor-management arbitrators have heard many cases with a given advocate or sometimes with both of the present advocates. It is believed that it is not necessary to reveal prior contact with advocates in the course of administering a current arbitration case. However, in regard to employment cases, prior contact with an advocate for one of the parties probably should be disclosed and prior contacts with the parties must be disclosed.

Inheriting the Wind: A Mock Arbitration, Part I

Statements, Preliminary Issues, Examination and Cross-Examination of Witnesses

By Randi H. Abramsky

An all-star cast entertained and educated our members to open the conference. This session involved a cross-border mock arbitration - with counsel and arbitrators from both the U.S. and Canada - exploring how the same facts and issues would be handled on both sides of the border.

The hearing took place before a panel of distinguished arbitrators – Michel Picher and Tom Jollife, from Canada, as well Barbara Zausner and Margie Brogan, from the U.S. Howard Goldblatt, a distinguished union-side lawyer from Toronto, and Ray Deeny, a distinguished management-side lawyer from Denver, represented their respective parties.

The opening statements set up the dispute, which mirrors the famous Scopes trial pitting creationism against evolution. The Grievant (or Grievor, as one is called in Canada) is Betty Scopes, a former teacher, who has grieved her dismissal as well as claiming harassment and discrimination on the basis of religion. According to the Employer, the Grievant, despite numerous warnings, willfully and intentionally taught creationism to her impressionable students, contrary to state law and explicit direction. It asserts that management's informing her, repeatedly, not to teach religion does not constitute harassment, as the Grievant claims, or discrimination on the basis of her religion. It submits that it had just cause to terminate her when she refused to stop teaching her students the "truth" of creationism.

The Union asserts that the Grievant was not teaching religion; she simply exposed her students to religious concepts in an effort to foster their critical thinking skills. No one was forced to accept creationism or abandon their beliefs, and the Employer's actions, in the Union's view, constituted harassment and discrimination on the basis of religion. The Union sought reinstatement, full back pay, and the right to teach creationism as an alternative view.

Back Row: Howard Goldblatt, Jules Bloch, Michel G. Picher, Barry Winograd, Barbara Zausner, Thomas A.B. Jolliffe, Ray Deeny. Front Row: Margaret R. Brogan, Catherine Harris and Marsha Cox Kelliher

Counsel for the Employer, in a tricky move, sought to call the Grievant as its first witness. The Union objected. Arbitrator Joliffe would have allowed it, as either side can call a witness, but Arbitrator Zausner sustained the objection, as the Employer cannot make its case out of the Grievant's testimony. In an exemplary display of international cooperation, the Canadians acceded to the American's sensibilities on this issue.

Susan Jacobs, a.k.a. Arbitrator Catherine Harris, was the first Employer witness. She explained how her little boy, Benny, a happy and lively (though large) child had become upset and confused by what he was learning in school about creationism. He was obsessing about it and told them he learned all about it in school. When they asked whether he was learning about evolution, he told them "yes" but it was not correct and that he credited what Ms. Scopes had told him. He began calling his sister a "baby gorilla" and challenged the Rabbi at synagogue. When the Rabbi told him that creationism was "rubbish," Benny got very upset and his performance fell at school. His Mother believed that Benny was being "brainwashed with Christian fundamentalism" when she was expecting a secular education, based on scientific facts. So she called to speak to Ms. Scopes, who told her that "God's truth is the truth" and would not yield at all. She then complained to the school Principal. On cross-examination, she acknowledged that she did not attend the classroom to observe what was being taught. She admitted that Ms. Scopes told her that students need to hear diverse ideas, but in her view, that was "lip service." She was not aware of any other parents who had complained; her concern was with Benny.

Benny Jacobs, a.k.a. Jules Bloch, age 10 and complete with a beanie, testified that he knew right from wrong, but when asked to raise his right hand, he raised his left one. (He might know right from wrong, but not his left from his right – which happens.) Benny testified that he began having nightmares, thinking that his father was an ape. He made

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Inheriting The Wind: A Mock Arbitration, Part I …

(Continued from Page 16)

fun of his sister, who was a baboon. All of this began after his teacher, Ms. Scopes, told the class that God created everything in six days. He found it very confusing, as the teacher told him that creationism was the "truth" – God's "grand design." It made sense to him since no one had ever explained how the world began. Because his teacher was "so nice" and he wanted to do well in school and get good grades, he accepted that God created the world. He was upset when, in his bar mitzvah training, the Rabbi did not agree. On cross-examination, he admitted that his teacher had not told him that he must accept her view, but said that "it was clear that if I did not believe it (and I do), I wouldn't do well." He disagreed that he was taught evolution. He was shown the book with the pictures of apes becoming a man, but he said it was "clear she [Betty Scopes] didn't believe it." He never told her he was confused – after all, he was only ten.

Next up was Dr. Darren Clarence, who terminated the Grievant. He testified that he did so because she insisted on teaching her view of creationism in a science class, and state law required her to teach evolution. She had been advised, prior to being hired, that she could not do so, and she assured the school that she would not. There was no problem while she was a substitute teacher or while she was on probation. It began afterward, and he received a complaint from Benny Jacobs's mother. In his view, the Grievant was not harassed or discriminated against on the basis of her religion. She was free to practice her religion and teach creationism at Sunday school, but not in her science classroom at the public school. In his view, she was "indoctrinating" the students with her religious beliefs. On cross-examination, he acknowledged that she was teaching creationism and exposing students to an alternative view. He disagreed, however, that state curriculum allowed the discussion of creationism because this was a science class, not a religion class. He acknowledged that he did not sit in on a class, nor did he ask the Principal to do so.

The Employer rested and moved for a bench decision. All of the arbitrators denied that request.

The Union then presented its case – the testimony of the Grievant. She explained that she had previously taught at Christian schools and her teaching there was "very different." There, she taught only one theory, creationism, and they would study scripture. Here, she exposed students to multiple views in an effort to foster critical thinking and let the students know there was "no one right answer." She taught no scripture and no prayers. She insisted that the Canadian Education Act mandated a multicultural approach and fostered multiple perspectives. It was only Benny's mother who complained. No one sat in on her class to observe. No one asked to see a lesson plan. As to Benny's confusion, she stated that he wanted to be told what to think, as he lacks critical thinking skills. No other students were confused. She agreed that she indoctrinates students – at Church, not at school. On cross-examination, she acknowledged that she told students that creationism was one theory and the one that she believed. She acknowledged that Benny parroted that on his exam, which, in her view, showed he had not developed critical thinking skills. In her view, the state curriculum was the "floor," the minimum content, which could and should be supplemented with other viewpoints, such as creationism. She admitted that she was told, more than once, not to do so. She did not teach the Koran or other theories. She felt she was harassed from the outset, at her interview when she was questioned about her religious beliefs, and that the school was not supportive of her views. She felt it was unfair that she could not teach creationism. The Union rested.

It was a riveting performance by the actors and counsel. Who knew we had such thespian talent among our members?









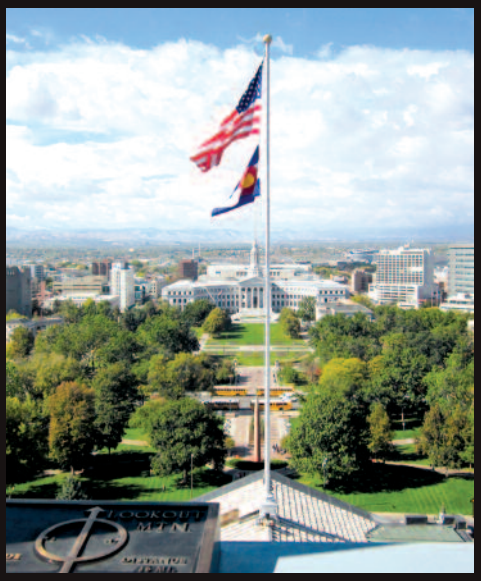


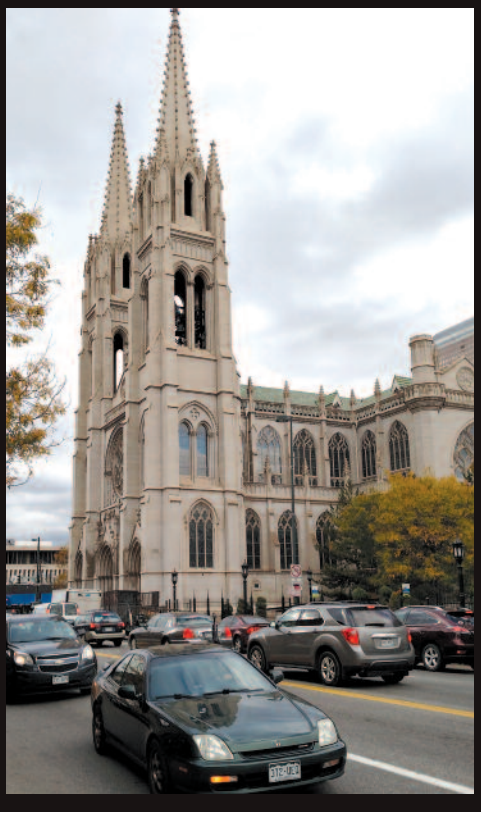




Scene in Denver

The Academy's Fall Education Conference held from October 23 - 25, 2015 at The Denver Four Seasons Hotel was another successful FEC, with 115 members, 46 spouse/companion/partners, and 3 interns attending. Jane H. Devlin and Paula Knopf were the Program Co-Chairs and John F. Sass served as Host Chair. Many interesting and thought provoking topics were discussed at the plenary and concurrent sessions throughout the meeting. A good time was had by all. Thank you to Melissa Kelley and Kathryn Van Dagens for their photo submissions.





Inheriting the Wind: A Mock Arbitration, Part II

Closing Arguments, Arbitrators' "Bench" Rulings, and Discussion

By Jerry B. Sellman

With suspenseful anticipation of closing arguments and the bench decision of the distinguished Panel of Arbitrators, attention shifted from the adroit testimony of the witnesses and laser sharp questioning of the lawyers for the Dayton Board of Education and the Dayton Elementary and Secondary Teachers' Association to summations and closing arguments. In what can be described as educational and entertaining deliveries,[1] attorneys Deeny and Goldblatt were both up to the task of competently and succinctly presenting their clients' positions. Ray Deeny, on behalf of the Employer, drew to the attention of panel members Margie Brogan, Thomas Jolliffe, Michel Picher, and Barbara Zausner what he described as an "untenable grievance." Howard Goldblatt, on behalf of the Grievant, countered that, in light of the undisputed facts, not those misstated by the Employer, and the clear pronouncement of the law, the Employer not only lacked just cause to terminate the Grievant, but its actions constituted harassment and infringed upon her freedoms of expression and religion.

Mr. Deeny argued that the Grievant was indoctrinating a ten year old in contravention to the clear instructions given by the School Board to teach the required curriculum. She exerted her will and power over her students. The students knew that, if they did not meet her expectation of the truth (i.e., creationism), their grades would suffer. Her declarations that she gave equal time to the teaching of creationism and evolution should be considered unavailing. She was instructed not to teach creationism and her references that man came from apes, so disturbing to her complainant student, was incorrect to begin with.

Mr. Deeny drew the panel's attention to the Grievant's defiant email in response to the School Board's warning that she would be fired if she continued to teach creationism or intelligent design in her classroom. In her email she stated: "The true historic story started with God's perfect creation and I assert my right to teaching in accordance with my firm religious beliefs. However, I also affirm that I encourage my students to think critically and for themselves."

Mr. Deeny drew an analogy of this case to that of *Miller v. Davis*,[2] in which the U.S. District Court for the Eastern District of Kentucky ordered Ms. Davis to comply with the U.S. Supreme Court decision in *Obergefell v. Hodges*, 576 U.S. __ (2015), and issue marriage licenses to gay couples. She was refusing to issue the licenses because of her religious beliefs. Here, as in the *Davis* case, the Grievant was required by law to teach a curriculum that had been established by the state; not her own curriculum embedded with religious views. By teaching creationism, she was defying the direction of the School Board and the law.

Mr. Deeny opined that the Grievant's reliance on the Education Act was grossly overstated. She was not given enabling authority to teach religion in her class. The Education Act only indicates that there should be respect for other religions. Ironically, she was the one who did not show respect for any other religion. The remedy she seeks, which is permission to teach her religious beliefs in the classroom, is nothing more that seeking a bona fide occupational qualification (BFOQ). A BFOQ is a quality or an attribute that employers are allowed to consider when making decisions on the hiring and retention of employees — qualities that, when considered in other contexts, would constitute discrimination and thus a violation of civil rights employment law. She does not meet the very narrow and qualified limitation of the BFOQ, which only applies where religion is the issue in performing the essential functions of the job. Teaching religion in a secular science class does not meet the criteria.

He concluded that the Employer clearly demonstrated just cause for the termination. The Grievant was informed before she was hired that she was not to teach any religious views in the classroom; she was warned repeatedly after being hired that she was not to teach creationism in the science class; she was given a chance to respond to her termination letter; and she refused to teach the curriculum given to her. She was not discriminated against. To so conclude would be to create an illogical inference. The School Board hired her knowing she had Christian beliefs. It would be illogical to conclude that the School Board terminated her for her religious beliefs. She was terminated for indoctrination in violation of law. To specifically tell her the duties of her job and then hold her to those requirements is not harassment.

Mr. Goldblatt reminded the panel that the Grievant was undisputedly a superb teacher who taught the curriculum as required. She had conducted herself the same in her probationary period as she did when hired full time. If she were teaching a religious class in a religious school, she would not be teaching in the same manner. She is a professional educator, and she has not indoctrinated her students.

The only objection raised about the Grievant's teaching methods was by a confused ten year old. None of the other students complained. The evidence is clear that no adults sat in her classroom. It is only the hearsay evidence of a ten year old that supports any action by the School Board. There is no evidence that the Grievant threatened any of her students with lowering their grades based upon their answers on a test.

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A Mock Arbitration, Part II *(Continued from Page 20)*

Mr. Goldblatt argued that the Grievant did not indoctrinate her students. She was supplying students with alternatives to stimulate critical thinking. Indoctrination requires that someone fully accept the ideas or beliefs of a particular group being taught and not consider other ideas or opinions. That was not what the Grievant was doing. The Grievant did not impose one religious belief on her students. She was giving the students the opportunity to consider other views.

Mr. Goldblatt pointed out that the Education Act guarantees freedom of expression and religion in the classroom. The School Board is bound by the law. Likewise, the state's Charter of Rights and Freedoms guarantees freedom of expression and religion. Those rights must be protected, not accommodated. This is not a BFQO. The Grievant was expressing, not imposing, her religious views. Threatening to terminate someone for expressing their views, not imposing them, violates the Education Act and the Charter of Rights and Freedoms.

The test for infringement of religious beliefs is that the individual demonstrates a sincerely held religious belief that has a clear nexus with religion, and the interference with those beliefs is more than trivial. That is the case here.

Mr. Goldblatt concluded that secular schools must be tolerant of, not extinguish, religious beliefs. The curriculum does not demand that it be delivered in a particular way. The School Board does not have the right to restrict her right to deliver the curriculum.

With closing arguments complete, the Panel of Arbitrators issued their decision, which was unanimous in favor of the School Board.

Arbitrator Brogan found that a denial of the grievance was supported by the evidence presented in view of the collective bargaining agreement, state laws, and U.S. statutes. Several reasons for her conclusion were cited. At the time the Grievant was hired, she was given notice of the duties of her job and the scope of the curriculum for the science class. Under the state School Code, the Board had the right to set the curriculum. The Grievant accepted the job indicating that she would follow the curriculum, which excluded the teaching of creationism, and she did not follow the curriculum or the direction of the School Board. Her testimony at the hearing and her email to the School Board made it clear that she was teaching creationism in violation of the School Board's directive. In regard to the harassment claim, under freedom of expression principles, a teacher does not have the right to say whatever he or she wants. In regard to the Grievant's claim that the School Board violated her freedom of religion rights, the evidence did not demonstrate that she was treated differently than anyone else because of her religion. Therefore, there was no violation.

Arbitrator Michel Picher found in favor of the School Board, concluding that he found no statutory or contractual right of the Grievant to teach her own personal religious beliefs in a science class. There is no statutory or contractual basis for the Grievant to proselytize. For the Grievant to say she was "laying out options" to a ten year old is disingenuous. The evidence does indicate that she was indoctrinating her students. Moreover, the Grievant was warned twice not to teach creationism, yet she chose not to comply. After being given full notice of possible termination, she did not show any remorse to either the School Board or the Arbitration Panel, and she demonstrated that she was unwilling to change. She was an ungovernable employee.

Arbitrator Thomas Jolliffe found in favor of the School Board because the Grievant did not teach in accordance with the Education Act curriculum. While the only testimony was that of the Grievant and Benny, it was clear that Benny was impacted by the teaching of religious principles in a science class. The job of a school system is to be neutral and the Grievant's method of teaching was far from that. If she were to be reinstated, the evidence is clear that she would not be neutral, but would continue teaching her religious beliefs. As it relates to any infringement of freedom of expression or religion under the Charter of Rights and Freedoms, Arbitrator Jolliffe found no violation. He saw the Charter as ensuring that the schools remain neutral in regard to these freedoms, whereas the Grievant was imposing her beliefs on the students. The Grievant cannot get over the fact that she was teaching a science class, not a religious class, and therefore her views were not protected under the Charter.

Arbitrator Zausner agreed with her colleagues and found in favor of the School Board. Having drawn the short straw and being forced to opine last, her comments for the sake of the audience were also short, but erudite. She did see parallels between this case and the *Davis* case. While Ms. Davis was entitled to her religious views, she, as the Grievant here, was required to follow the law, which was not to express her religious views, but to fulfill the duties of her job.

In a lively followup discussion, some arbitrators believed that the Grievant was not indoctrinating her students and that broadened views should be acceptable in the classroom. Probably the most salient point made following the delivery of the decision was by attorney Goldblatt: "I now know four arbitrators I'll never use again!!" I am sure he will get over it!

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[1] For those not in attendance, it must be noted that the advocates, witnesses, and panel members all interjected a sufficient dose of humor to keep the audience entertained, yet kept the focus on the nuances of the issues presented.

[2] Miller v. Davis, Civil Action No. 15-44-DLB, United States District Court, Eastern District of Kentucky, Northern, Division, August 12, 2015.

Aging Gracefully

By Randi Abramsky

This session explored the topic of aging gracefully, as arbitrators. Arbitrator Catherine Harris, fresh from her outstanding performance as Benny Jacobs's mother, chaired this session, pinch-hitting for Elizabeth Wesman. She introduced Arbitrator Ed Pereles, who would speak of his own experience, and Professor of Psychology Claudia Jacova, who would speak of aging from a clinical perspective.

Ed began by questioning whether this was a "skills maintenance" or an "ethics" session and determined it was both. Maintaining adequate arbitration skills – both mental and physical – is an ethical requirement. Ed relayed two stories. The first was a grievant, with more than twenty years of service, who had been discharged for yelling. He would not take direction without yelling. During the hearing it became obvious that he had a major hearing loss. The second was a mechanic who was accident-prone. Progressive discipline did not change the behavior. The hearing revealed that all of his accidents took place after his lunch break. It turned out he was not eating well and did not take his blood sugar medication. In these situations, Ed believed, it was relatively easy to see the problem. It is much harder to recognize our own issues.

Ed discussed how, as he ages, it is harder to read small print or drive at night. He tires more easily and cannot do what he had done before, such as drive three hours, do a full day hearing, and drive home again. The television volume is higher and he asks people to speak up. Finally, after this had been occurring for about two years, he was tested by an ophthalmologist and had his hearing tested. He advised that we might not notice these subtle changes, so it is important to have someone we trust to let us know, and discuss it.

NAA Members Edward Pereles and Catherine Harris with Claudia Jacova, Ph.D.

Dr. Jacova agreed, and advised that aging is highly variable. She has been studying aging and cognition for twenty years and is still learning. She outlined the normal characteristics of cognition – the mental processes of acquiring, storing, and utilizing information, including hearing and visual perception, memory and language. In her view, aging is multidirectional – some gains and some losses. Processes that rely on past learning such as vocabulary remain stable, while processes that rely on new learning such as memory and problem-solving begin to decline in middle age.

Inevitably, our abilities decrease with age, and we can all expect a decline in function. But there are many coping mechanisms - writing things down, no driving at night, or delegation of tasks that help ease the way. A socially active lifestyle, with mental and physical activity, proper diet, and moderate alcohol, also helps. In her view, it is "never too late." Reading, board games, playing cards, playing an instrument, dancing – all help keep us cognitively and physically well.

Dr. Jacova also discussed Alzheimer's Disease and how it differs from normal aging. With Alzheimer's, memory loss disrupts daily life, the person has difficulty completing familiar tasks at home and at work, and has challenges planning as well as solving problems. It often leads to increased depression, anxiety, and apathy. Although women are more susceptible to Alzheimer's than men, only a small percentage of older adults get it. It is not inevitable.

As arbitrators, we are in the unusual situation that others – the parties who select arbitrators – let us know, subtly or not, through their selection about our ability to function well. Some arbitrators have a "buddy system" whereby each agrees to tell the other if they are "losing it." The take away is that it is indeed an ethical responsibility to know whether we can do the job as an arbitrator, with all that it entails. It is something we all need to think about – while we still can.

Technology for Arbitrators

By Michelle Miller-Kotula

A Saturday afternoon breakout session, *Technology for Arbitrators,* was moderated by David Williamson. The panelists included Mark Lurie and James Cooper. Another panelist, Patricia Bittel, was unable to attend due to an emergency. However, her portion of the presentation was discussed. The purpose of this session was for the panelists to address different uses of technology in arbitration. Topics of the session included setting up a website, practical issues involved in holding a hearing by video conference, and technology essentials in the world of computers.

Mark Lurie started the presentation by showing Ms. Bittel's website. She started her website after attending a meeting of the NAA and "Googling" herself. She discovered outdated information and found it necessary to create her own website. She used Webs.com, which costs approximately $89 for two years. On her website, Ms. Bittel lists her education, experience, publications, presentations, prior experience, honors and awards, professional training, bar admissions, and resources. She said it was not too difficult to start her own website, but it required patience. Mr. Lurie indicated that it was easy to add pages to your website using the Webs.com site. Other sites such as Square Space offer opportunities to create a website in a fairly easy manner. It was noted that mobile websites are made to look different. Ms. Bittel found the best way for her to cope with inaccurate information on the internet was to provide accurate information from the most reliable source.

Mr. Lurie explained the necessity to have secure passwords. He said that the longer the password, the more secure the password. He suggested using a phrase that is easy to remember, but hard to crack. He discussed how to install new programs on a computer in a manner that limits the risk of viruses. While anti-virus software defends against viruses, Mr. Lurie suggested another way to stop viruses from self-installing is to log onto the computer as a standard user rather than as administrator. He reviewed that a virus is essentially a self-installing program; and programs can be installed only when the user is logged on as the administrator. He suggested a computer should be set up with two user accounts, one for the administrator and one for the standard user. The arbitrator should log on as the administrator only when installing or removing programs. The arbitrator should log on as standard user for regular daily use of the computer. The log-in screen is the place to choose to log in as the administrator or the standard user. There should be only one administrator account.

Mr. Lurie also discussed the process of inserting a signature into a pdf document. He explained the use of Adobe Reader. The steps are as follows:

1. Create a jpg image file of signature.
2. Scan signature.

NAA Members Mark I. Lurie, David R. Williamson, and James S. Cooper

3. Capture and save the area occupied by signature (For Windows use snipping tool, for MAC use grab tool).

4. Using Adobe Reader, open the pdf document. Click on fill and sign.

5. To increase or decrease the size of the signature, drag a corner of the box that contains it. Drag the signature to where it is to appear. Save the pdf document.

The signature feature is helpful for subpoenas or other documents that need to be signed.

Jim Cooper discussed hearings that are video conferenced. He explained he does not arrange for the video conferencing because it is done by the parties. The responsibility to ensure the equipment works rests with the parties. Mr. Cooper likes to know who is in the room when the video conferencing is done. He has used this method for a number of cases, when witnesses are at a distance or as a matter of convenience for the parties. He encourages exhibits to be provided to the witnesses prior to the hearing. He asks for the video-conferenced witness to put the exhibits face down on the table and to pick them up one at a time.

Some of the problems he has encountered include witnesses waiting to be video conferenced and doctors being unavailable due to their schedules. He noted that, if one side objects to a video-conferenced witness, he would evaluate the situation to determine if it is reasonable for the person to come to the hearing to testify. He has found government facilities offer the best places for video conferencing. He noted issues may arise due to the laws of some states, which may need to be considered.

The presentation ended with the panelists answering questions from the audience members. It was a helpful as well as informative session. The ideas presented could greatly enhance the arbitrator's everyday practice.

THE DOPE ON DOPE: ROCKY MOUNTAIN HIGH

By Jerry B. Sellman

At the time of the Fall Education Conference, twenty-four jurisdictions (twenty-three states plus the District of Columbia) had legalized medical marijuana. Alaska, Colorado, Oregon, and Washington have legalized the recreational, private possession and use of marijuana by adults. There are sixteen jurisdictions that have decriminalized the possession and use of small amounts of marijuana by adults (no jail time). The legalization of marijuana, for use and possession for medical and recreational use, is on the ballots of several states. When an employer seeks to discipline an employee for the use of marijuana under its drug and alcohol policy, what considerations should an arbitrator apply, given the societal change that is indicated by the above-noted legal landscape?

Moderator Robert J. Herman guided NAA panel members John F. Sass, Kathy L. Eisenmenger, and Luella Nelson through informational presentations and discussions about marijuana use and issues facing arbitrators in disciplinary hearings. The audience was primed for the ensuing discussion after FEC Program Committee Co-Chairs Paula Knopf and Jane H. Devlin, in their 1960-70s hippie garb, passed out brownies to make sure the discussion was abuzz.

John Sass summarized the current status of state and federal laws and regulations relating to the use and possession of marijuana. The focus of the presentation was primarily from a U.S. perspective. There is one federal law in Canada, passed in 2001, applicable to all of the Provinces, that legalizes the medical and prescription use of marijuana.

In addition to the above summary of marijuana laws in the various states, marijuana is also regulated on the federal level. It is classified as a Schedule I Drug under the Federal Controlled Substances Act. Schedule I drugs are those that are deemed to have a high potential for abuse *and* no currently accepted medical use. There is currently some bipartisan support in Congress to reclassify marijuana as a Schedule II Drug, which, if achieved, would reduce, but certainly not eliminate, criminal penalties associated with marijuana possession, use, purchase, sale, and cultivation. In August 2013, the Department of Justice announced that the federal government would not enforce federal criminal laws against individuals or businesses that are in states where recreational and/or medical marijuana is legal, *as long as* those individuals or businesses are in full compliance with state law.

NAA Members John F. Sass, Kathy L. Eisenmenger, Robert J. Herman, and Luella E. Nelson

The Federal Drug-Free Workplace Act has applicability in the federal sector, but really does not have much impact. The Act requires a policy or plan for achieving and maintaining a drug free workplace, but it does not specify what the policy or plan must include. The employer need only develop a plan that "strives" for the workplace to be drug free. The Act does not require the employer to test for drugs or terminate employees who may be using drugs, either on or off duty. Generally, the mode of compliance under the Act is determined through collective bargaining.

Federal Department of Transportation regulations have more bite. They apply to safety-sensitive positions including aviation personnel, commercial drivers, maritime crews, pipeline operations and maintenance crews, railroad personnel, and urban transit workers. The regulations require pre-employment, post-accident, and random drug and alcohol testing as well as when there is a "reasonable suspicion." Termination is possible after a failed drug test, but the regulations do not require it. Often, employees who fail the tests are removed from safety-sensitive transportation positions for a period of time, but are permitted to qualify to "return to duty" under the regulations.

Prior to discussing what new considerations arise in disciplinary hearings as a result of the relaxed laws on the use and possession of marijuana, Luella Nelson educated the audience about what is known scientifically about marijuana use.

Testing is primarily performed on blood, urine, or other fluids (such as saliva), and hair. In the employment setting, urine is most frequently tested, because it is non-invasive, and a professional is not needed to conduct the preliminary testing.

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ROCKY MOUNTAIN HIGH *(Continued from Page 24)*

Arbitrators will be confronted with certain protocols that the employer must follow to establish the integrity of the testing process. These include minimally (1) a proper chain of custody, showing no contamination from obtaining a sample to testing; and (2) split samples, with a second sample available to confirm an initial positive test.

When testing for the presence of marijuana in an individual's system, the lab is generally looking for Tetrahydrocannabinolic acid (THCA). While Tetrahydrocannabinol (THC) is the chemical compound in marijuana that gets you "high," it is not excreted in any of the bodily fluids or hair except blood. Since blood tests are more difficult to administer and must be administered by a medical professional, most tests focus on identifying the presence of THCA. *An individual's body metabolizes THC into THCA, and THCA is then excreted into the body's fluids*. THCA is not psychoactive; it only indicates that at one time an individual has used cannabinoids. THC generally metabolizes within the system within three to four hours. After that, it usually does not have any effect. There are no standards to determine how much THC in an individual's system would determine that an individual is under the influence. The presence of THCA does not prove that an individual is under the influence.

Some tests on the lingering effects of marijuana have not brought clarity, but have introduced confusion into the discussion. Many scientific tests have indicated that, after THC metabolizes in the system, in about three to four hours, the psychoactive effects wear off. The University of Stanford conducted a test of nine airlines pilots who were asked to smoke marijuana and then use a flight simulator hours later. After four hours, the pilots all indicated that they were no longer "feeling the effects," but twenty-four hours later, seven of the nine pilots' performance on a flight simulator was "clearly modified." In other tests, it was discovered that THCA, which is fat soluble, remained in an overweight individual's system considerably longer than an individual of average weight.

So, what issues will arbitrators need to consider in this changing landscape? Kathy Eisenmenger presented some interesting considerations.

Many workplace policies regarding marijuana were developed unilaterally by the employer and must be applied in a manner that does not conflict with just cause requirements for discipline. In an analysis of just cause, the arbitrator may take into consideration changing societal attitudes and norms along with the problems and limitations of current drug testing methods. In those instances where workplace policies regarding drugs and alcohol were the subjects of the collective bargaining process, generally, societal norms and attitudes, as well as the limitations of various testing methods, will often yield to the express terms of the negotiated agreement.

Since the NLRB has determined that a drug and alcohol policy is a mandatory subject of bargaining, arbitrators may begin to see additional changes in policies in the future. That may include provisions for accommodating an employee's need of medical marijuana or opportunities for rehabilitation.

The issue of reasonableness may become an issue. Why should an employee who smoked marijuana on Saturday night, and who shows up "sober" and ready to work on Monday, be treated differently than the individual who drank heavily on Saturday night and shows up for work on Monday? If medical marijuana is being used to treat spasms, which spasms would prevent the individual from working; why should that employee be terminated for marijuana use?

What consideration should be given to the type of work in which the employee is engaged? Those employees in "safety sensitive" jobs will probably continue to come under zero tolerance policies. Police officers will probably still continue to be held to a higher standard for even off duty conduct.

It can be concluded that new standards will inevitably be established and arbitrators will see unions using new information on drug testing to bolster their position in disciplinary proceedings involving the use of marijuana. So far, laws generally will continue to protect a traditional employer's policies concerning marijuana use by employees, even when off duty. In *Coats v. Dish Network,* 2015 Co 44 (2015), the Colorado Supreme Court decided that an employer had a right to terminate an employee who used medical marijuana even though the company stipulated that the employee was never "high" or "under the influence" on the job.

In union represented cases, employees will generally continue to be protected by a just cause requirement for discharge. If discipline is based upon a violation of an employer's unilaterally imposed drug policy, the issue of "nexus" will be an issue. It may be that a state's legalization statutes will have little impact on the arbitrator's analysis, other than to render the employer's nexus argument harder to make.

But, as has always been the case, arbitrators will continue to consider the facts of each case, the relevant employment policies, the express terms of the contract, and any outside laws or regulations with which the parties are required to comply.

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[1]Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington.

[2] Efforts are underway to put a full legalization initiative on the ballot in California, Arizona, Nevada, and Massachusetts. In November, Ohio voters turned down legalization proposals, but initiatives are promised for the next election.

THE AFTERMATH

By Linda Byars

The presentation was designed to enlighten us on some of the positive and negative unintended consequences that may follow our decisions. Lisa Ramos, who is National Counsel in the Denver Field Office for the National Treasury Employees Union, and Chad Orvis, Director of the Specialized Legal Services Department at Mountain States Employers Council, generously agreed to share their experience and expertise with us on a Sunday morning. NAA member George Marshall moderated, frequently including the audience of Academy members in a lively discussion.

NAA Member George E. Marshall with Panelists Lisa Nadine Ramos and Chad Orvis

Both Lisa and Chad began with problems with remedies. Both reported that there are times when arbitrators do not spell out the remedy sufficiently and the parties have to return to the arbitrator. They also reported that there are times when the arbitrator goes too far in spelling out the remedy. We walk a fine line.

As an example of a negative consequence, Lisa reported that an arbitrator summarily dismissed attorney fees in the award when the parties had an agreement for attorneys' fees. Fortunately, the party did not insist on enforcing the arbitrator's decision. Chad expressed his opinion that "a little bit of guidance" is welcomed from the arbitrator, but the parties expect to negotiate the remedy within the confines of their contract. Chad also gave an example of an unintended consequence, where the award was so inconsistent with the opinion part of the decision that the parties had to ask for a clarifying decision, obviously creating problems for both sides.

As another example of a negative consequence, Lisa reported that an arbitrator left the remedy unspecified and did not retain jurisdiction, creating problems for the parties. Lisa expressed her opinion that the more specificity the better because more than likely the parties will not be able to negotiate a remedy. Another example of an unintended negative consequence was a decision that included a last chance agreement that did not enumerate the terms. Both panelists expressed general disapproval with including a last chance agreement, especially where the parties are left to negotiate the terms.

Chad complained about employees being reinstated to positions where they were unsuccessful and, as an unintended consequence, neither the employee nor the employer benefits. However, Lisa noted that, in her experience, such fear is greater than the reality and that most reinstated employees go on to have productive careers.

As a positive, and more likely an intended consequence, both Chad and Lisa expressed appreciation for a decision that is so well-written that it serves to educate the parties and prevent similar disputes in the future. Chad gave an example of a manager who expressed a whole new understanding of "just cause," even after the employer lost the case. Lisa gave an example of a decision concerning the dress code that, nine years after the decision, stewards are still using with management to settle disputes.

Several NAA members participated in the discussion from the audience. One member expressed a dilemma he often encounters when the record demonstrates that the employer did not have just cause for discharge, but fails to address the appropriate discipline. Another member asked for the panelists' opinions of his suggestion that, for remedies, both parties offer an amount, similar to baseball arbitration, and the arbitrator selects one. The panelists expressed some appreciation of such an arrangement. There was also a suggestion from the audience that we avail ourselves of FLRA training that includes the subject of remedies.

When asked what arbitrators should take home from the discussion, Lisa said that she would rather have a well-reasoned decision that the union lost than one so cautious that it does not help the parties' relationship. Both Lisa and Chad expressed approval of a decision that creates a learning experience, helps the parties settle future grievances, and helps them build a better relationship.

NAA NEW MEMBER ORIENTATION

By James S. Cooper

The Academy welcomed ten new members at the Denver meeting, the largest class since 2009, a welcome sign that our profession is alive and well and living in North America. Chairman Dick Adelman pulled off the amazing act of starting on time, finishing on time, and getting through all of the assigned material, for which one new member dubbed him dictatorially "Colonel Adelman." Each and every one of the new members kept to their three minute limit during their introductory remarks and kept the "thank you's" to an absolute minimum, again per Col. Adelman.

As a new member of this committee, I must admit I was startled by two things during this session. First, the experience these new members brought to the organization was so extensive that I wondered why they had not been admitted years earlier so we could have relied on their capabilities (and collected their dues) to add to the organization. At various times during the discussion of substantive issues (e.g., arbitral authority, arbitral remedies, and avoiding ethical issues) the new members made comments demonstrating their knowledge and experience, and asked some insightful questions. Of course the committee members could not provide definitive answers, but would make suggestions and share their experiences.

Perhaps our decisions-issued standard for admission is too stringent or maybe we should have an online application form which makes it easier for applicants to complete. I just hope these members do not fade into the woodwork, happy to have been admitted. The NAA needs new participatory blood to survive. The geographical dispersion from Texas to Ottawa and from eastern Long Island to the Pacific Northwest bodes well that the NAA's tentacles have not been concentrated in any single region. Many regions should benefit from this class. The pictures and the biographies of the new members appear elsewhere in *The Chronicle*.

The second startling theme came from the chairs of the various committees who made fifteen minute presentations about some of their committees' work. I was amazed at the work done by Sara Adler in her role as Coordinator of Legal Representation (assisted by Luella Nelson); Joshua Javits in dealing with the AAA, FMCS and NMB; Kathy Eisenmenger as Coordinator of Regional Activities; Catherine Harris, Vice President of the Research and Education Foundation; Dan Nielsen, Chair of the Committee on Professional Responsibility; and Dan Zeiser as Managing Editor of The Chronicle. Mark Lurie gave a virtual seminar on using computer technology to track cases and expenses that would have tickled the heart of our other computer guru, Doug Collins. The amount of work done by these people made Alan Ponak's job as President and Margie Brogan's as President-Elect look easy. Of course, there are many other committees and the Board of Governors who easily could have made an extraordinary impression on newcomers. It dawned on me sitting there that I had not been to a New Member Orientation since 1989. Perhaps we should open up these sessions to members on their fifth, tenth, and every fifth year anniversary thereafter. Offer them a free lunch, and they will show up, but it would be well worth it to remind as many members as possible every five years of the work going on in the organization.

Colorado, Rockefeller, and Labor Relations:
Trains, Planes, Oil and Mounties

Using photos and archival documentation, Professor Daphne Taras, a professor of industrial relations and Dean of the Edwards School of Business, University of Saskatchewan, provided a fascinating snapshot of her groundbreaking research on the origins of the non-union employee representation system that came to be known as the "Rockefeller Plan" and later the "American Plan."

In fact, the American Plan was invented by a Canadian. And not just any Canadian, but a future Canadian Prime Minister, William Lyon Mackenzie King. King, with a Ph.D. in labor economics from Harvard, was hired by John D. Rockefeller Jr. after a deadly confrontation at a Rockefeller-owned coal mine in Ludlow, Colorado resulted in the death of thirteen women and children. King, who had helped write early Canadian labor laws, believed strongly that dialogue between workers and business owners could solve most disputes. At Colorado Fuel and Iron, he invented and implemented a system that allowed for worker-manager dialogue, but without unions. Rockefeller was so impressed with the results he introduced the system throughout his business empire. In the 1920s, the plan spread to other American and Canadian industry, most often as a union avoidance strategy.

The passage of the Wagner Act put an end to non-union employee representation plans because of their management domination. Ironically, they were not outlawed in Canada because King, now prime minister, influenced the law to ensure their continued legality. To this day, the progeny of the original Rockefeller Plan can be found in Canadian oil companies, airlines, and the Royal Canadian Mounted Police, and, in United States, at Delta Airlines (covered by the Railway Labor Act).

NEW MEMBERS WELCOMED IN DENVER

LISE GELERNTER

Amherst, NY

Lise Gelernter arbitrates and teaches at SUNY Buffalo Law School. Her path to a career in arbitration started during a summer internship in New York City's Office of Labor Relations. After college (Harvard/Radcliffe) and a few years working (including a year as an organizer for the ILGWU), Lise attended and graduated from law school (New York University). After working at a law firm in Washington, D.C., she then went on to work in various capacities for New York State's governor and agencies.

Lise finally got a chance to work on labor relations every day at a law firm in Albany that represented a correction officers union and represented the union in many arbitration cases. After leaving the law firm, teaching for a semester at Brandeis University, and then moving to Buffalo, Lise began in 2001 to realize (slowly, at first) her goal of becoming an arbitrator. Lise is delighted to have been welcomed into NAA membership at the Fall 2015 Education Conference not only for the professional recognition and camaraderie, but also because the NAA members seem to know how to have a really good time.

BILL HEMPFLING

East Moriches, NY

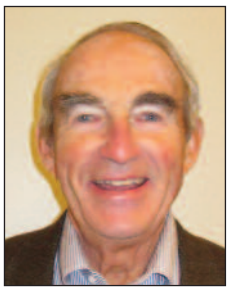
Bill is a full-time arbitrator practicing primarily in the New York Metropolitan area and the Midwest. Prior to beginning his arbitration practice, he was the Labor Relations Manager and the Director of Human Resources for Brookhaven National Laboratory in Long Island, New York. Bill retired from the Laboratory in 2009 and has been an arbitrator since that time.

He serves on the rosters of the American Arbitration Association, Federal Mediation and Conciliation Service, National Mediation Board, New York Public Employee Relations Board, New Jersey State Board of Mediation, and the New York City Office of Collective Bargaining. In addition, he is permanent arbitrator for IBEW, Local 589 and Bombardier, Inc. He also serves as a discipline arbitrator, hearing disputes between Transit Workers Union Local 100 and the New York City Transit Authority.

Bill is a graduate of Fairfield University in Connecticut and has taken certificate programs offered through Cornell University ILR. He resides in East Moriches, New York on Eastern Long Island where he plays as much golf as time will allow.

CHARLES S. "CHUCK" LOUGHRAN

Oakland, CA



Chuck is an arbitrator and mediator who specializes in labor and employment disputes. He serves on the labor arbitration rosters of the Federal Mediation and Conciliation Service, California Mediation and Conciliation Service, American Arbitration Association, National Mediation Board, and the Oregon Employment Relations Board. Prior to commencing his practice as a neutral in 2000, he held a number of executive management positions, including Assistant Circuit Executive for the Ninth Circuit Federal Courts, Vice President of Human Resources for Alaska Airlines, and Director of Industrial Relations for Louisiana-Pacific Corporation. He also practiced labor and employment law for a large San Francisco law firm. Chuck taught labor relations at the University of Michigan Executive Management Program and the University of Washington Business School. He is the author of two books: *How to Prepare and Present a Labor Arbitration Case (*2nd Ed. BNA Books, 2006) and *Negotiating a Labor Contract* (3rd Ed., BNA Books, 2003). Chuck graduated with a BA from The Johns Hopkins University, an MA from the University of California (Berkeley) and a J.D. from Golden Gate University. He is a native of Pittsburgh, PA and now currently resides and maintains an office in Oakland, California.

M. ZANE LUMBLEY

Brenham, TX

Zane grew up in a small town in Texas, attended the University of Oregon, where he ran the mile briefly for the legendary Bill Bowerman, and ultimately graduated from the University of Texas in 1966. After four years as an Air Force officer and ten years with the NLRB in Seattle, Zane was convinced to intern as an arbitrator, mediator, and fact finder under his good friend, Mike Beck, beginning in 1980. He continues to maintain an office in the Seattle area as well as a second office opened in Texas in 2000 and presently located in the town of Brenham, midway between Austin and Houston.

During his arbitration career, Zane has presided over more than two thousand labor disputes throughout the southern and western United States from Key West, Florida, to Hilo, Hawaii, to Prudhoe Bay, Alaska. He has served on nearly fifty industry panels and is listed on the panels maintained by the AAA,

(Continued on Next Page)

NEW MEMBERS *(Continued from Page 28)*

FMCS, Idaho Department of Labor and Industrial Services, Montana Board of Personnel Appeals, and Washington Public Employment Relations Commission.

Zane has pursued a number of diverse interests over the years, including racing sports cars, fishing, birdwatching, showing livestock, collecting antique angling books and tackle, and buying and selling Native American art. He and Debbie, his wife of eighteen years, spend as much time as possible in joint pursuits including traveling; tending a small beef cattle herd; fly fishing the Rio Del Pueblo and other streams in northern New Mexico; and spin fishing for northern pike, smallmouth bass, and other species out of Chaudiere Lodge on the French River in Ontario.

ELIZABETH MACPHERSON

Kemptville, ON

After graduating from McGill University in Montreal with a Bachelor of Arts degree in Industrial Relations in 1971, Elizabeth MacPherson worked in the field of labour-management relations in the Quebec para-public sector. She joined the federal Department of Labour as a conciliation officer in 1979 and subsequently obtained an LL.B. and an LL.M. from the University of Ottawa. She is a member of the Bars of Ontario and New Brunswick. As Director General of the Federal Mediation and Conciliation Service (Canada) from April 1999 to December 2007, Elizabeth was the chief labour mediator for the Government of Canada and mediated numerous high profile collective bargaining disputes between unions and employers subject to the *Canada Labour Code*. On the recommendation of the Minister of Labour, the federal Cabinet appointed Elizabeth as Chairperson of the Canada Industrial Relations Board effective January 1, 2008. She retired from this position in December 2014. In addition to an active arbitration practice, Elizabeth currently serves as a part-time Vice-Chair of the New Brunswick Labour and Employment Board. In February 2013, Elizabeth was awarded the Queen's Diamond Jubilee Medal for her contribution to labour-management relations in Canada. She is very pleased to have been accepted into membership by the National Academy of Arbitrators.

RICHARD C. MCNEILL, JR.

Lima, PA

Throughout his professional career, Rick McNeill has been involved in the resolution of workplace disputes. Before practicing law, he was a union member, a shop steward, and a management-side labor relations representative. From 1986-2009, Rick practiced labor, employment, and employee benefits law, initially representing management with the City of Philadelphia, and then in private practice in Philadelphia representing labor unions, individual employees, and Taft-Hartley employee benefit funds.

A full-time arbitrator since 2009, Rick is a member of the American Arbitration Association's Labor and Employee Benefits panels, the AAA's National Roster of Arbitrators for employment and commercial cases, and the rosters of the Federal Mediation and Conciliation Service, the National Mediation Board, and the Pennsylvania Bureau of Mediation.

Since 1986, Rick has also taught courses related to workplace law at several universities in the Philadelphia area.

Rick received his B.A. degree from St. Joseph's University and his J.D. from Temple University School of Law. He is admitted to practice law in Pennsylvania and the District of Columbia. He is a member of the American and Pennsylvania Bar Associations, the International Foundation of Employee Benefit Plans, and three chapters of the Labor and Employment Relations Association.

JAMES G. MERRILL

Livermore, CA

Jim Merrill, a native of Boston, grew up in Bethesda, Maryland, where he graduated from the University of Maryland. Subsequently, he served as a Navy Officer aboard the aircraft carrier USS *Forrestal*. Upon his discharge from the Navy, Jim was hired by United Airlines as a Recruiter in New York and was then promoted to an Employment Manager in Washington, D.C.

He joined the U.S. Postal Service in Washington, D.C. in 1972. During his twenty-three year career as an Executive in Headquarters, the Northeast and Western Regions, he managed the grievance process, negotiated several national contracts, and managed Labor Relations.

In 1995, he joined FMC Corporation in San Jose, California and was responsible for Labor Relations and negotiating labor agreements with the IAM and the Teamsters. Prior to his retirement, he was Human Resources Director for Calpine Corporation, a power plant company in San Jose, California.

After working in the airline, government, defense, energy, and construction industries, Jim had a passion to become an arbitrator. During his thirteen years as an arbitrator, he served on several permanent panels and expanded his business to

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NEW MEMBERS *(Continued from Page 29)*

many public and private sector organizations and unions.

Jim and his wife, Peggi, a former United stewardess, have been married for forty-seven years and reside in Livermore, California. They have one son, who is a retired police officer, and two grandchildren. Jim loves to play tennis, swim, and cook, is an authentic San Francisco Giants fan, and takes cruises with his wife, family, and friends.

THOMAS J. NOWEL

Cleveland, OH

Thomas J. Nowel started his arbitration and mediation practice in 2009 following thirty-nine years of collective bargaining and arbitration advocacy, first with AFSCME Ohio Council 8 for thirty years and then as Human Resources Director in a county child welfare agency. He is currently listed on a number of rosters, including the FMCS, AAA, Ohio SERB, and the regional Arbitration and Mediation Service. Arbitrator Nowel serves as an umpire on five closed panels and provides arbitration and grievance mediation services for the State of Ohio and three of its unions. In addition, he is an active fact finder and interest arbitrator in Ohio's public sector. Mr. Nowel provides training in arbitration advocacy and mediation for both sides of the table in a number of forums. Mr. Nowel is married to Lynne Nowel, who provides legal services for the Airline Division of the Teamsters Union. He has four children and three grandchildren and serves on a number of community committees and boards. Mr. Nowel expresses his gratitude to the Academy for his admission to membership and feels honored to be associated with an organization which represents excellence and service.

DAVID J. REILLY

New York, NY

David Reilly is a full-time arbitrator and mediator. Since establishing his practice in 2007, he has served in hundreds of cases involving a wide range of issues, focusing principally on labor, employment, and commercial disputes. He is listed on the roster of arbitrators and mediators of the AAA, Cornell University Scheinman Institute on Conflict Resolution, FINRA, FMCS, New Jersey Public Employment Relations Commission, New York Public Employment Relations Board, NYC Office of Collective Bargaining, and U.S. Nuclear Regulatory Commission, as well as the mediation panels of the New Jersey Superior Court and New York Supreme Court, Commercial Division. He also serves as a contract mediator for the U.S. Equal Employment Opportunity Commission. In addition, he is named as a permanent arbitrator in a number of collective bargaining agreements, including Realty Advisory Board on Labor Relations/SEIU Local 32BJ, NYC Department of Education/UFT Local 2 - §3020-a panel, and Allied Barton Security Services/Securitas Security Services USA/SEIU Local 32BJ.

Prior to becoming a neutral, David was a practicing attorney for nearly twenty-four years, both in private practice and as in-house counsel. In addition, he served as Senior Vice President – Labor Relations for a Fortune 100 healthcare corporation for more than a decade

He is a member of the Advisory Board of the New York University School of Law Labor and Employment Law Center and has been a regular speaker at a number of the Center's programs, including its annual conference on labor.

He received his law degree *cum laude* from New York University's School of Law, where he was elected to the Order of the Coif, and his bachelor's degree summa cum laude from Siena College.

JOHN THOMAS TRELA

Schenectady, NY

John is a native of the Albany, New York area and holds a BS from Syracuse University. Shortly after graduating, he was commissioned as a Second Lieutenant from the Empire State Military Academy (ESMA-OCS) and served in the National Guard as an MP Training Officer.

John has gained extensive experience representing both labor and management prior to becoming an arbitrator in 2005. His labor relations career started as an advocate for CSEA in grassroots organizing and grievance processing. He then served for many years as a Labor Relations Specialist for the New York State United Teachers (NYSUT) negotiating collective bargaining agreements and processing grievances through conclusion at arbitration. Thereafter, he represented many school districts as Director of Labor Relations Services for a New York State BOCES.

John currently serves on many panels, including New York State Tenure/Disciplinary, Interest Arbitration, and Mediation/Fact-finding panels. He resides in Guilderland, New York with his loving wife, Reneé, and two Labrador Retrievers. He is blessed with three grandsons, a daughter, and son-in-law. He also has a passion for German sports cars and has recently learned to escape a sand bunker in less than three swings.

REMEMBERING...

Remembrance of Neil N. Bernstein

by Gladys W. Gruenberg

Neil Norlin Bernstein, J.D., professor of law emeritus, died on August 7, 2015. He was 83 years old, having been born in Cheyenne, Wyoming in 1932. After graduating from Cheyenne High School, he earned an A.B. (political science major) from the University of Michigan in 1954 and a J.D. from Yale University in 1957.

Neil served as motions clerk in the U.S. Court of Appeals for the District of Columbia Circuit (1957-58). He was an associate at the law firm of Fischer, Willis & Panzer in Washington, D.C. from 1961-67. He then joined the faculty of Washington University in St. Louis in 1967, which became his professional home for 45 years. In 1973, he took a leave of absence from teaching to serve as general counsel for the Missouri Division of Insurance (1973-74) and as senior antitrust attorney for the State of Missouri (1974-75). He also acted as a consultant for the Administrative Conference of the United States and to the National Association of Attorneys Generals (74 LA 1309).

Neil joined the Academy in 1972 and served on several committees from 1977 to 1994, most recently the Audit Committee (1991-94). He received his 30-year award in 2002. Many of his opinions are published in BNA's Labor Arbitration Reports. After his health began to deteriorate, he assumed "emeritus" status at Washington University in 2005 and requested Academy "Standing" membership in 2007.

His published works include "Volume 19: Appleman on Insurance," monographs for the International Encyclopedia for Insurance Law, a two-volume treatise "Insuring Real Property," and a three-volume treatise "Labor and Employment Arbitration." (Washington University Newsroom obit.)

I knew Neil only as a 30-year colleague in the Academy, mostly from my conversations with him at the meetings he attended with his wife, Marcia. He eagerly participated in the Academy's discussions at meetings and later contributed to its internet chats. His comments were always cogent and sometimes humorously sarcastic. He was very good at what he did professionally, as an advocate, professor, and arbitrator.

Neil will be remembered as an avid scuba diver and bicyclist. (His obit picture on the St. Louis Post-Dispatch depicted him in his bike outfit with billed cap and T-shirt.) He toured regularly on the pathways in St. Louis's Forest Park, which, according to one of his bike-mates, usually ended with a welcome home by Marcia serving iced grapefruit juice at the Bernstein apartment on Hanley Road.

Judging from remarks during his memorial service at Congregation Temple Israel in St. Louis County on August 12, 2015, Neil was also a model father and grandfather. His two children (Paul and Laura) and four grandchildren (Tyler, Ryan, Caitlin, and Kenan) praised his devotion to family values, especially his continuing insistence that children and later grandchildren accompany him and Marcia on their many travels to historic sites in the U.S. and countries around the world. His colleagues at the Law School stressed his willingness to work with students and new faculty members, orienting them for success in St. Louis, in law school, and in life. Students flocked to his classes in insurance law, labor law, international law, antitrust, regulated industries, employment discrimination, and employment law. His devotion to education and reading in general was made clear by the request for donations to the St. Louis County Library Foundation in lieu of flowers.

Neil Bernstein was a faithful follower of Judaism. At the memorial service, Temple Israel Rabbi Mark Shook remembered that Neil never missed a chance to introduce pertinent questions at Torah services. After asking the audience to recite the 23rd Psalm ("The Lord is my Shephard"), Rabbi Shook led Mourner's Kaddish, praying that "his repose be peace," to which his Academy friends say "Amen!"

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Remembrance of Robert W. Foster, Sr.

by Dennis R. Nolan

Bob Foster, a member of the Academy for many years, died in Columbia, South Carolina on May 29, 2015, aged 88.

A native of Charleston, Bob graduated from the U.S. Merchant Marine Academy in 1948 and immediately began studying law at the University of South Carolina in Columbia. After graduating in 1950, he studied at Duke University, earning a master's in 1951. He taught law at the University of Louisville from 1951-62, then returned to his home state to teach at the University of South Carolina, specializing in torts and commercial law. He served as dean of the USC Law School from 1970-76, during which period the law school more than doubled in size and moved into a badly-needed new building that he had planned and convinced the legislature to fund. He retired from teaching in 1991, but remained a loyal supporter of the law school and retained an office there for many years.

While teaching, he served in the U.S. Navy Judge Advocate General's Corps, retiring in 1986 at the rank of Captain. He was also a strong supporter of local cultural and environmental organizations, particularly those promoting drama and conservation.

Bob began arbitrating while teaching at the University of South Carolina and continued to have a very busy arbitration practice until late in his life. He was admitted to the Academy in 1976 and served on several committees, most frequently the Law and Legislation Committee. In 1979, the American Arbitration Association honored him with its Whitney North Seymour Award for distinguished contributions to arbitration. Bob arbitrated throughout the Southeast, working with the largest companies and unions in the region and forming many close friendships with advocates on both sides. One of the most common questions South Carolina arbitrators were asked, even many years after his retirement, was "How is Bob Foster doing?" The Southeast Region will miss him.

Remembrance of Milden J. (Bob) Fox, Jr.

by Beber Helburn

Milden J. (Bob) Fox Jr., an Academy member since 1980, died peacefully at home in Bryan, Texas on December 16, 2015. Bob was born in Tulsa, Oklahoma on August 2, 1926. He served on active duty in World War II and the Korean conflict and ended 27 years in the Naval Reserves with the rank of Commander. Bob graduated from Oklahoma A&M University (now Oklahoma State University) in 1948 with a B.S. in Industrial Engineering and went on to earn his M.S. in the same field at Oklahoma A&M. After holding several positions in industry, Bob joined the faculty at Texas A&M University (TAMU) in 1963, where he earned his Ph.D. in 1969 and stayed for 30 years until his retirement as an Emeritus Professor. While at TAMU, Bob taught industrial engineering and labor relations courses at both the undergraduate and graduate levels. His academic study of the differences in efficiencies in union and non-union petrochemical facilities along the Texas Gulf Coast led to his long-time interest in labor arbitration. He arbitrated into his eighties, serving on the labor panels of the FMCS and AAA and holding "permanent panel" appointments in a variety of industries.

While Bob did not regularly attend national NAA meetings, he was a regular attendee at our regional meetings until health issues intervened. He served as regional Chair from 1995-1997.

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Moreover, beginning possibly as early as 2001 until 2013, Bob served as regional Treasurer—a position of importance within the region because of our annual labor relations conference. His insistence on documentation for expenses before he wrote a check and his careful stewardship of regional funds were the hallmarks of his work. He contributed in other ways as well. With his passing, the region has lost one of its mainstays.

Bob is survived by his wife of almost 60 years, Pat, son Tom and his wife, Michele, daughter Mary Seals and her husband, Freddie, a grandchild, and four great-grandchildren. No remembrance of Bob would be complete without mentioning his legacy to the profession. Bob authored the arbitration award that was appealed to the U.S. Supreme Court and resulted in the Court's decision in *Paperworkers v. Misco*, 484 U.S. 29, 126 LRRM 3113 (1987). On a personal note, as faculty members of The University of Texas at Austin and Texas A&M University, Bob and I carried on the rivalry between schools at a personal level, always in a light-hearted and respectful way. We were very good friends for a very long time, having come into the Academy together, and, like his other, many friends in the region, I shall miss him dearly.

Remembrance of James J. Sherman

by Michael Prihar

Jim earned a basketball scholarship to Canisius College and was a member of a team that played in the National Invitation Tournament. In those days, the NIT was as prestigious or more than the NCAA tournament. His basketball/college career was interrupted by World War II. Jim served in the European theater. One day, Jim was in a foxhole and General George Patton drove up in his jeep, next to Jim's foxhole. General Patton cried out: "Soldier, where are the Germans?" Jim hollered out: "General Patton they are over there (pointing toward the Germans)!" General Patton responded: "Thank you, Soldier." From then on, Jim was known as General Patton's Adviser. During the war, Jim was promoted to the rank of Sergeant.

After the war, Jim returned to Canisius College, where he earned a football scholarship as an offensive tight end and continued his education. He ultimately obtained both a law degree and a Ph.D. After practicing law, he began teaching and it was his teaching career that brought him to the University of South Florida, in Tampa.

Cicero said that fortune, not wisdom, rules life. That is certainly the case with my life. I met Jim as a teacher of industrial relations - before it became human resources - within months following my military discharge, at a time when I was uncertain about a career goal. Jim had an outstanding reputation among students at the University of South Florida, where he served as a tenured professor. Based on his legal experience and active arbitration practice, he brought reality to the classroom in a way that thoroughly engaged all students. He did not lecture, but rather used questions to elicit thought. Jim's love for arbitration became very evident to me through his teaching and I started asking about this work and what it entailed. He was patient with me in answering my questions, and I am sure that his kindness and attention were some of the reasons I decided to make labor arbitration my ultimate career goal. After I began my post-graduate studies at USF, Jim

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agreed to be my mentor and allowed me to apprentice with him. When situations permitted, I travelled with him to arbitrations. We would then discuss my attempts at writing "awards" after he submitted his decision to the parties. Jim's teaching and mentoring was not only substantive, they gave me an appreciation for the role the arbitrator plays in the parties' relationship. He also instilled in me a strong sense of the ethical obligations held by an arbitrator. Just as an example, I asked Jim once why he kept his rate as low as he did. He explained that he did not want to deny any party the right to arbitrate a grievance because of his fee.

Jim so loved arbitration that, during working hours, time not spent at hearing was time spent on decision writing. He so loved arbitration that he gave up the security of a tenured full-professorship to devote his time to arbitration. Almost immediately after an arbitration, Jim would handwrite his awards on a yellow pad and give them to his typist. Fritzi, his wife, would proofread them, and then Jim would issue the award. Each award was concise and clear, which Jim always made certain, not for himself, but the benefit of the parties.

Once the work day was over, Jim turned to his other great love, his time with Fritzi enjoying the lakeshore view from their beautiful Florida home. At least two binoculars were at the ready in case the need arose for a closer look at an alligator or a bird. Jim and Fritzi fed the wildlife and the animals returned the favor by entertaining them, be it a pair of cranes landing in their back yard or an alligator coming on shore to explore the area. The other source of entertainment were their ever-present "Yorkies." Luckily for them, Jim and Fritzi kept them indoors, away from the gators.

Jim told me he was in love with Fritzi from the first time they dated and he felt himself to be the luckiest man alive to wake up each morning and see this beautiful woman by his side. Fritzi, in turn, was Jim's biggest fan. The two travelled extensively, often in conjunction with an Academy function and in the company of the many Academy members who were proud to call them friends.

During his tenure as an Academy member, Jim served in several capacities and chaired several committees, all ending with his proudest accomplishment, that of becoming the Academy president. It was the same level of pride that Jim felt when their son, Mark, became an academy member and in watching their daughter, Holly - whose personality and demeanor resemble that of her father - succeed in her entrepreneurial venture, The Haven at College.

I am lucky to have had someone like Jim, whom I could point to as having given direction to my life and contributing to my success. I write these words with a very heavy heart, trying to extol the virtues of a gentle giant, a man who in every sense was at the heart of any success I might have realized in my career, a man whose company I sought and enjoyed whenever the opportunity arose, and a man whose wisdom and friendship I will greatly miss.

MARK YOUR CALENDAR

2017 Annual Meeting

May 24 – 27, 2017

Fairmont Chicago, Millennium Park
Chicago, IL

THE PRESIDENT'S CORNER

(Continued from Back Cover)

Academy can publicly support the institution of collective bargaining without jeopardizing our neutrality. The committee will begin its work under my presidency but is not expected to report until the next president, Margie Brogan, is in office. The Committee's mandate requires extensive consultation with membership so nothing will happen until every member has a chance to provide input. The committee is composed of Dennis Nolan (Chair), George Fleischli, Joshua Javits, Michel Picher, Alan Symonette, Maretta Toedt, Betsy Wesman, and Barry Winograd.

Speaking personally, I am in favor of the NAA publicly endorsing the institution of collective bargaining. Despite the growth of employment arbitration for many of our members, acceptability as an arbitrator under collective bargaining agreements remains the *sine qua non* for Academy membership and still lies at the heart of most of our practices. Our claim to be different from the kind of arbitration excoriated in the New York Times is rooted in the institution of collective bargaining. If our voice is to be credible, it is time to make that apparent.

Plan to Attend

2017 Fall Education Conference

September 15 – 17, 2017

Miami Four Seasons
Miami, FL

THE PRESIDENT'S CORNER

By Allen Ponak

"May you live in interesting times" is a well known curse that carries an ironic message. Interesting times are synonymous with turbulence and an unsettling environment. This aptly sums up the current situation for the Academy and labor arbitration.

The New York Times' scathing critique of consumer and employment arbitration in November 2015 failed to separate the righteous arbitration conducted by NAA members from the "cram-down" process (to quote Barry Goldman) that calls itself arbitration, but bears no real resemblance to what we do. All arbitration was tarred, a perverse outcome given that the very success of labor arbitration was a significant factor in the spread of arbitration to other arenas. What initially should have been seen as an endorsement of what we do – after all, mimicry is a high form of flattery – instead damaged the reputation of our form of arbitration as a fair method of resolving disputes.

Labor arbitration and arbitrators have also been attacked. It is not unusual for interest arbitration decisions to gain media attention, usually critical. More recently, grievance awards, especially in education, correction services, and law enforcement, have been the subject of nasty and uninformed editorials questioning the integrity of the arbitrators and the process under which we operate. It is very difficult for individual arbitrators who are being targeted to defend themselves against these attacks.

The weakened state of collective bargaining increases our vulnerability. Collective bargaining coverage hovers at ten percent. The decline is hardly an accident. While the changing nature of the labor market is an important factor, concerted attacks on the institution of collective bargaining have played a major role. Thirty years ago in a *Harvard Law Review* article (Vol 96, No. 8, 1983), Professor Paul Weiler (a former NAA member) lamented that the NLRA risked becoming an "elegant tombstone for a dying institution." His prophecy has come all too true, making it more difficult for the NAA to have its voice heard as labor arbitration becomes a shrinking part of our economic system.

There are a number of steps that the Academy and its members can and have taken to rebut the criticisms. Individually, members have written strong letters to the editor of the New York Times print and on-line editions. Thank you Lise Gelernter, Ted St. Antoine, and Barry Winograd. Barry Goldman published a terrific op-ed in the Los Angeles Times that was reprinted in the Minneapolis Star Tribune. These submissions (and my apologies if I have omitted anyone) emphasized that labor arbitration, designed and monitored by relatively equal parties, should not be confused with the faux arbitration systems that have attracted so much criticism. As a group we are smart and articulate. I urge our members not to be silent – we are justly proud of what we do and we have every right to vigorously defend our profession.

Our web site initiative goes live early in 2016. In partnership with the University of Missouri's Center for the Study of Dispute Resolution, we will provide an authoritative one-stop shop for accurate information about labor arbitration. The web site will contain extensive material about how arbitration works, with sections aimed at professionals, academics, journalists, and the general public. There will be a glossary of terms and FAQ's (Frequently Asked Questions). The important current events section will highlight arbitration in the news and provide a forum for Academy responses as appropriate; we will be working with the University's School of Journalism to make sure our messaging is effective. The web site will allow Academy members to refer the media to a comprehensive source of information about labor arbitration and enable the Academy to quickly respond to events as they occur. We owe a huge debt of gratitude to the leadership of Gil Vernon and Kathy Miller in launching this initiative and the incredible amount of work they and their committees have done in bringing the web site to fruition.

The Academy is working with LERA, the Labor and Employment Relations Association (formerly IRRA), to provide "branded" reciprocal sessions at each other's annual meetings in 2016. This is a special opportunity for the NAA to "educate the educators." LERA members teach courses on myriad topics relevant to what we do: collective bargaining, labor policy, unionism, non-union employee voice, and dispute resolution. Yet there is a surprising lack of knowledge about labor arbitration — how hearings are conducted, how we are chosen, the NAA's code of professional responsibility, the kinds of issues we routinely address, and how what we do differs from other forms of arbitration. In the NAA session at the next LERA meeting in Minneapolis, Dan Brent, Laura Cooper, and Gil Vernon will tell an influential audience about the NAA and how labor arbitration works. The LERA session in Pittsburgh will allow academics to educate us on leading-edge research about workplace issues on the horizon that may well impact arbitration in the years to come.

Finally, I have appointed a special committee to recommend whether the

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