

## MARK YOUR CALENDARS

### PLAN TO ATTEND...

#### 2018 Fall Education Conference

October 26 - 28, 2018  
Sheraton Austin Hotel at the Capitol  
Austin, TX

#### 2019 Annual Meeting

May 29 - June 1, 2019  
Lowes Philadelphia Hotel  
Philadelphia, PA

#### 2019 Fall Education Conference

September 20 - 22, 2019  
Savannah Marriott Riverfront  
Savannah, GA

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## PRESIDENT'S CORNER

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*By Amedeo Greco  
Program Chair*

The Academy’s 2018 Fall Education Conference will be held in Austin, Texas, on October 26-28, 2018. The Program is entitled “Arbitration Practice: A Sea of Uncertainty” and centers on our considerable discretion and the many choices we make throughout the arbitration process.

“Best Practices” is the opening plenary session. Panel members Christopher J. Albertyn, Jacquelin F. Drucker, Jeffrey B. Tener, and Barry Winograd will offer tips on pitfalls to avoid and advice on practices to follow.

“Hearing Matters” is the second plenary session. Panel members Richard Adelman, Margaret R. Brogan, Kathy L. Eisenmenger, and M. David Vaughn will address a host of issues that can arise before and during hearings.

“Remedies and Retaining Remedial Jurisdiction” is another plenary session. Panel members George R. Fleischli, Edward B. Krinsky, and Jeanne M. Vonhof will discuss a number of issues such as the extent of an arbitrator’s authority to issue

remedies; how and when discretion should be exercised; what factors are used to reduce discipline and in computing back pay; and whether a discharged grievant is required to look for other work.

“Navigating the Federal Sector Pay System for Arbitrators” is a concurrent session where panel members Jack Clarke, FMCS Director of Arbitration Services Arthur Pearlstein, and Alan A. Symonette will help explain the complexities of the U.S. federal sector billing and payment practices.

“What is an Arbitrator’s Role?” is another concurrent session. Harry Shulman wrote: “A proper conception of the arbitrator’s function is basic.” Panel members Joshua Javits, Susan Grody Ruben, and Arnold M. Zack will address the various functions we perform as decision makers; what standard of review we use when we decide disciplinary cases; and when we act as case managers, contract readers, and as guarantors that the grievance-arbitration process is fair.

“The Academy’s Public Sector Initia-  
(Continued on Page 3)

# 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](mailto:danzeiser@aol.com) or contact the feature author directly.

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

*On The Job Training* provides first person accounts of arbitrators who have to experience hands-on the work lives of employees who appear before them.

*Off Duty Conduct*, written by Barry Goldman ([bagman@ameritech.net](mailto: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. 🏠

## Plan to Attend 2019 Annual Meeting May 29 – June 1, 2019



**Loews Philadelphia Hotel  
Philadelphia, PA**

## 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). Copyright 2018. All rights reserved.

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*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](mailto:naa@naarb.org)

### 2018-2019 NAA OFFICERS

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**Production Manager**  
Kathleen E. Griffin



The Host Committee welcomes you to Austin, a “happenin’ place” on the edge of LBJ’s fabled hill country. Below is information to help with your arrival and the time spent in this fast-growing city.

## TRANSPORTATION

**Cabs:** The cab fare from Austin-Bergstrom International Airport (ABIA) to the Sheraton, according to a website fare finder, will be about \$28 per person, airport fees and a 15% tip included. Recent deregulation may result in lower cab fares. Cab fare from the downtown Amtrak station is about \$10.75 per person, tip included.

**SuperShuttle:** The SuperShuttle fare is \$12 per person to the hotel, but a 10% discount from October 24-30 has been provided. The discount code is T678P, to be used with advance reservations on the SuperShuttle/Execucar app or at [SuperShuttle.com](http://SuperShuttle.com). Also, there should be a link on the Academy website or electronically for automatic use of the discount code.

**Uber, Lyft and RideAustin:** The fares are reported to be \$15-20, \$14-22, and \$20.42, respectively, without tips. The RideAustin app can be downloaded from the [RideAustin.com](http://RideAustin.com) web page.

**Public Transportation:** The #350 bus comes about every 30 minutes pretty much on the half hour and hour. You must transfer to the #2 bus at Airport and Oak Springs, as the #2 bus stops very close to the Sheraton. The bus ride, which takes about an hour, costs \$2.50 for a day pass. The schedule will be different on Sunday.

**Private and Rented Vehicles:** For those driving, the hotel can be seen from I-35. Hotel



# THE AUSTIN FEC TAKE TWO

By Beber Helburn

parking is \$30/day for self-parking and \$38/day for valet parking, with in-and-out privileges. Rental cars are available at ABIA or at a Hertz facility immediately behind the hotel, about a five-minute walk from the front of the Sheraton.

**Alternate In-City Transportation:** For something different, try Austin Pedicab Company, 512-210-7914. Pedicabs cost more than motor-driven cabs and can be ordered. Horse-drawn carriages are available downtown.

## PRESIDENT’S DINNER

The President’s Dinner will be at the Headliner’s Club on Thursday, October 25 on the top (21<sup>st</sup>) floor of the Chase Tower, just under a mile from the Sheraton. Entrée choices will be steak, salmon, and a vegetarian plate. Go to [www.headlinersclub.com](http://www.headlinersclub.com) for a look at the spectacular views from our venue.

## SATURDAY, OCTOBER 27 DINE-AROUND

We have selected an eclectic group of five restaurants for the dine-around. They are listed below, along with the number of available reservations, contact information for each host, and distance from the hotel. Check the menus on the various websites, make your choices, and reserve with your host. The reservation for Olamaie is 6:15; all others are 6:30.

**El Naranjo:** .9 mi., Mexican, 8 reservations. Hosts: Mareta & D.C. Toedt, 713-667-8988, [mctoedt@toedt.com](mailto:mctoedt@toedt.com). Maybe the best Mexican restaurant in Austin. Hardly Tex-Mex. Probably the best mole sauce ever.

**Olamaie:** 1.1 mi., way upscale Southern, 6 reservations. Host: Steve Owens, 828-342-0754, [steve.owens@morrisbb.net](mailto:steve.owens@morrisbb.net). No. 1 restaurant in Austin in 2017.

(Continued on Page 4)

## AUSTIN FEC (Continued from Page 1)

tive Committee” - Dan Nielsen is Chair of the Academy’s Public Sector Initiative Committee which has been established in response to *Janus v. AFSCME*. He will give a brief committee report at lunch and, at 4:00 p.m., will have a discussion with members regarding *Janus* and the

Academy’s response.

“Red Light/Green Light,” a plenary session, starts off the next day. Panel members Lise G. Gelernter, Dennis R. Nolan, and Theodore J. St. Antoine will discuss issues such as whether to apply external law; contract interpretation; admissibility of

evidence; disciplinary matters; and past practice.

“Update Your Technology Skills” is a concurrent session. Panel members Mark I. Lurie and Will Hartsfield will offer tips and tricks to using the latest technology, how to get the best use of your software, and what is in the cloud.

“What To Do When: An Ethics Primer,” another concurrent session, will have Panel members Sarah Kerr Garraty, Jasbir O. Parmar, and Andrew M. Strongin answer how best to respond when we are confronted with various ethical issues. 📌



## Austin FEC Take Two (Continued from Page 3)

**Red Ash Italia:** 1.0 mi., Italian, 7 reservations. Hosts: Ruben and Rachel Armendariz, 210-379-0860, [arbruben@gmail.com](mailto:arbruben@gmail.com). Substantial portions, consider sharing. Texas Monthly listed it as one of the 10 best new restaurants in Texas in 2017. They also serve steaks by the ounce.

**Parkside:** .6 mi., Texas Bistro, 8 reservations. Hosts: Kathy Eisenmenger and Bill Drasky, 720-438-8791, [kleisenmenger@gmail.com](mailto:kleisenmenger@gmail.com). Our dinner there with the Wolitzes was very good.

**Emmer and Rye:** 1.0 mi. 8 reservations. Hosts: Louise and Seth Wolitz, 646-246-9063, [lwolitz@earthlink.net](mailto:lwolitz@earthlink.net). It is hard to describe this restaurant. There will be a set menu at \$50/person with allowances for allergies. A unique adventure in fine dining.

### WHILE IN AUSTIN

A good deal of information about things to do in Austin may be found at [www.visitaustin.org](http://www.visitaustin.org). Briefly, for the museum goers there are the LBJ Presidential Library and Museum, the Bob Bullock Texas State History Museum, the Blanton Museum of Art, and the Harry Ransom Center — all on or adjacent to the University of Texas campus. For foodies there are the Whole Foods flagship store and Central Market — both with astonishing selections. For those who want to be outdoors there are the Lady Bird Johnson Wildflower Center, the Zilker Park Botanical Gardens, the Umlauf Sculpture Garden and Museum, and the Laguna Gloria Sculpture Garden and Park. Shoppers with transportation might wish to head to the upscale Domain Shopping Center in north Austin or the extensive discount malls in San Marcos, about 45 minutes south on I-35. At night there is 6<sup>th</sup> Street (think Bourbon Street in New Orleans), which includes Esther's Follies if you enjoy political satirical comedy. And, hopefully, the free-tailed bat colony will still be in town, making their nightly exit from under the Congress Avenue bridge.



6<sup>th</sup> Street (think Bourbon Street in New Orleans)



Lady Bird Johnson Wildflower Center

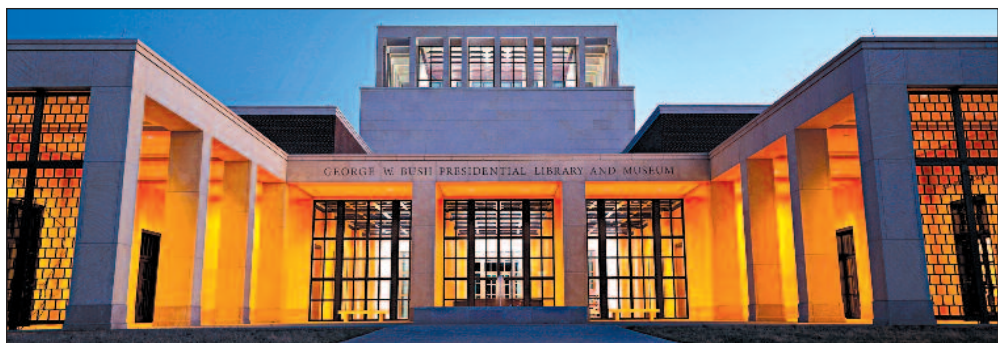
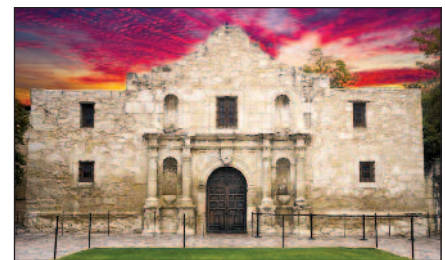
## And If You Stay For Extra Tourist Time...

For those interested in staying past the FEC and exploring beyond Austin, San Antonio, with the Alamo and the Riverwalk, is about 80 miles southwest of Austin. Natural Bridge Caverns is about 60 miles northwest, the LBJ Ranch is about 50 miles west, the George H. W. Bush Presidential Library is in College Station, about 120 miles northeast, and the George W. Bush Presidential Library is in Dallas, about 200 miles north. If you want a taste of Africa, travel 200 miles northwest to the Fossil Rim Wildlife Center and drive the approximately 10 miles through the park, with the animals semi-wild and you confined to your auto/cage. Buy food pellets as some of the animals will eat out your hand, possibly a giraffe if you are lucky.

As you can see, there will be plenty to keep you busy during the FEC in Austin, and before or after if you want to extend the trip. We are looking forward to your being here. 🦒



Alamo and the Riverwalk, San Antonio



George W. Bush Presidential Library and Museum

# National Academy of Arbitrators

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### **Fall Education Conference Program Committee Austin**

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Timothy D.W. Williams, Chair

### **Tribunal Appeals Committee**

Roberta L. Golick, Chair

### **Supplement to “50 Years in the World of Work” Committee**

Barry Goldman, Chair



# REGIONAL ROUNDUP

Reported by Kathy L. Eisenmenger  
*National Coordinator of Regional Activities*

Summertime fills the calendar with so many glorious activities and so few bright, sunny days in which to do them. Many of the Regions' NAA Members skipped through the daffodils and lanky sunflowers or hopped narrow-gauge trains to ride canyon cliffs through the Rocky Mountains or settled in a bobbing boat patiently waiting for that bite on the line or browsing through the farmers' markets bursting with heirloom tomatoes or hitting the links first thing in the morning or spending time watching your garden grow while reading the newest thriller. The burst of Vitamin D also brought the Regions' members to collegially plan and prepare their varied activities for the calm of the fall and winter months ahead. The Regions' have paid close attention to the tsunami evolving in our labor-management and employment relations disciplines. As ever, the Regions gear up to meet these challenges, to present our professional hand to our arbitration and mediation practices, and to provide to our members, fellow practitioners, and clients our quality educational opportunities.

## CANADA REGION

The Canadian Region held its conference in Quebec City between Thursday, August 2, 2018, and Sunday August 5, 2018. NAA Members Randi Abramsky and Andre Rousseau co-chaired the meeting. Both Canadians and our American friends were invited to attend and join in the festivities. To complement all the learning, we promised an amazing convivial meeting. In addition to the treat "*magnifique beaucoup*" to spend time in Quebec City, they enjoyed a weekend away from the news cycle *fou*.

Regional Chair is Andre Rousseau -  
[rousseau-arbitre@qc.aira.com](mailto:rousseau-arbitre@qc.aira.com)

## CENTRAL MIDWEST

Regional Chair is Jacalyn Zimmerman -  
[JacalynZimmerman@gmail.com](mailto:JacalynZimmerman@gmail.com)

## METROPOLITAN D.C.

The DC Region holds *ad hoc* Sunday morning breakfast meetings about every 2 months at Jake's American Grille, Connecticut and Nebraska Avenues, NW, Washington, DC.

Regional Chair is Sean Rogers - [rogerssj@erols.com](mailto:rogerssj@erols.com)

## METROPOLITAN NEW YORK

The NY/NJ Metro Region held a meeting on April 11, 2018, at the 101 Club in New York City, NY. Arbitrator and Mediator Al Felihu led a review and discussion of significant case law impacting arbitration and mediation. Approximately 22 people enjoyed the topic for discussion. The Region plans a fall meeting to encompass the developments following the Supreme Court ruling in *Janus v. AFSCME*.

Regional Chair is Debbie Gaines - [dgaines.nyc@gmail.com](mailto:dgaines.nyc@gmail.com)

## MICHIGAN

The Region has been planning its 2018-19 fall/winter meeting schedule. NAA Member John Obee is co-chair.

Regional Chair is Charles Ammeson -  
[cammeson@tplaw.com](mailto:cammeson@tplaw.com)

## MID-ATLANTIC

Region 3 planned its annual summer "do-dah" for our members at the home of Alan and Vanessa Symonette on Sunday afternoon, August 28, 2018. We are planning our contributions to the 2019 Annual Meeting.

Regional Chair is Ralph - [Colflesh-rafeart@comcast.net](mailto:Colflesh-rafeart@comcast.net)

## MISSOURI VALLEY

Regional Chair is George Fitzsimmons -  
[georgefitzsimmonsllc@hotmail.com](mailto:georgefitzsimmonsllc@hotmail.com)

## NEW ENGLAND

Mary Ellen passed the baton as Chair to NAA Members Sheila Mayberry and Bonnie McSpirtt.

Regional Chairs are Sheila Mayberry -  
[sgmayberry@gmail.com](mailto:sgmayberry@gmail.com); Bonnie McSpirtt -  
[bjmcspirtt@comcast.net](mailto:bjmcspirtt@comcast.net)

## NORTHERN CALIFORNIA

Once again, NAA Member Luella E. Nelson spearheaded the Region's participation in a charitable event for the Bike-A-Thon/Walk-A-Thon sponsored by the Justice & Diversity ("J&D") Center of The Bar Association of San Francisco. Luella met the Region's "Gold Sponsors" team at Crissy Field's West Bluff Picnic Area on July 14, 2018, and finished the event by reaching the funding goal and having a BBQ. This was an approved "visibility" event for the Region for a number of reasons:

- (a) It funds legal services for San Francisco's most at-risk communities;
- (b) It gets NAA's name and purpose in the public eye; and,
- (c) It does not present a conflict of interest.

The J&D Center provides free legal services to San Fran-

*(Continued on Next Page)*

## LEGAL REPRESENTATION FUND


Spring, 2018

*Sara Adler, LRF Coordinator*

Well, I guess all good things must (or at least, do) come to an end – including our 3+ years of not making a payout from the fund. Since my last report we have reimbursed three members for legal fees. One member has been alleged to have caused unnecessary expenditures by the grievant. One member was alleged by a pro se grievant to have engaged in fraud, apparently by believing the evidence provided by his employer. The third member was the subject of a motion to force him to recuse himself mid-hearing while acting as a hearing officer. I also note that the issue of mid-hearing recusal has been appearing with increased frequency – so please call us and/or the CPRG if this happens to you!

As of the latest available reports, as of March, 2018, LRF has \$415,031.14 in the investment account and \$73,618.63 in the checking account. No assessment will be due.

### **Please remember that:**

1. The very **FIRST** call or email is to the Coordinator (or alternate Coordinators) or the LRF will not cover the matter.
2. President Krinsky honored our team by keeping it together for the 2018-19 year. The Coordinator is Sara Adler (310-474-5170, [sadlerarb@gmail.com](mailto:sadlerarb@gmail.com)), assisted by Luella Nelson (503-281-8343, [luella.nelson@SBCGlobal.net](mailto:luella.nelson@SBCGlobal.net)) and Barbara Deinhardt (917-763-0906, [bdeinhardt@aol.com](mailto:bdeinhardt@aol.com)).
3. If legally permitted in the jurisdiction please, please strip your file when the **award** is issued – it saves you from a number of potential hassles later on. Do not, however, destroy documents after the request, demand, or subpoena is served. Call and we will work out a proper response at that point.
4. Call if you have any questions related to legal issues as an arbitrator or mediator and we can discuss them even if the LRF will not cover the matter. 

## REGIONAL ROUNDUP *(Continued from Page 6)*

cisco's most at-risk communities. The Region gives a hearty thanks to the many NAA Members who made contributions to the Region's team to reach their goal of \$2,500.00.

Regional Chair is Nancy Hutt - [nancyhutt@naarb.com](mailto:nancyhutt@naarb.com)

### **OHIO-KENTUCKY**

The Ohio-Kentucky Region held its regional conference jointly sponsored by the Region and the FMCS on Thursday, April 26, and Friday, April 27, 2018, at the Crowne Plaza Columbus North hotel.

Regional Chair is Colman Lalka - [clalka@roadrunner.com](mailto:clalka@roadrunner.com)

### **PACIFIC NORTHWEST**

Regional Chair is David Gaba - [davegaba@compasslegal.com](mailto:davegaba@compasslegal.com)

### **SOUTHEAST**

Stay tuned for more information about the Region's 2019 annual meeting. The meeting location continues as a point of discussion. Let us hope and pray for better weather.

Regional Chair is Phil LaPorte - [plaporte@gsu.edu](mailto:plaporte@gsu.edu)

### **SOUTHERN CALIFORNIA**

Regional Chair is Robert Bergeson - [robertbergeson@earthlink.net](mailto:robertbergeson@earthlink.net)

### **SOUTHWEST ROCKIES**

The Region will hold its 42nd Annual Labor-Management

Conference on Thursday, February 28 to Saturday, March 2, 2019, at the Double Tree Hotel, Houston Hobby Airport (HOU), Houston, TX. The Region will hold its traditional separate all-day sessions for experienced and new arbitrators and for training of arbitration advocates. NAA Member Kathy Eisenmenger is the Program Chair and NAA Member Norman Bennett is the Program Co-Chair. The 2019 conference is dedicated to our beloved long-term NAA Member Mark Sherman. Arbitrator Sherman left us much too early in life after a long illness and complications from the hurricane and flooding in his Gulf home. Mark is survived by his loving wife, Tera, and precocious daughter, Cloe, six years old. You may recall from a previous Milestone article of Cloe's birth and Mark's announcement she would be available for arbitration cases in 20 years. To reach this ambitious goal, the Shermans established the Mark Sherman Memorial College Fund at [YouCaring.com](http://YouCaring.com) <<https://www.youcaring.com/cloesherman-1172705>>.

The Region promises a stellar variety of topics primarily focusing on the current developments in collective bargaining. More information may be obtained in the future on the Region's website at [www.naaswr.org](http://www.naaswr.org).

Regional Chair is Kathy Eisenmenger - [kleisenmenger@gmail.com](mailto:kleisenmenger@gmail.com)

### **WESTERN PENNSYLVANIA**

Regional Chair is Michelle Miller-Kotula - [millerkotula@comcast.net](mailto:millerkotula@comcast.net) 



# Northern California Region Visibility Project

By Luella Nelson

Bastille Day in San Francisco dawned cool, a little foggy, a little breezy, and gorgeous. (See the pictures; one has Alcatraz in the background.) The NAA No Cal team girded our loins for a walk-a-thon/bike-a-thon fundraiser for the Bar Association of San Francisco's Justice and Diversity Center ("JDC"). We had chosen this "visibility" project for many reasons, including:

(a) the JDC funds legal services for San Francisco's most at risk communities;

(b) participating got NAA's name and purpose in the public eye;

(c) participating did not present a conflict of interest; and,

(d) San Francisco was a great place to walk or bike on Bastille Day (or any time, but this event was on that July 14th).

We exceeded our \$2,500 fundraising goal (with additional contributions coming in even on the day of the event). We offer a big thank you to all who contributed and solicited donations from your friends and associates. As a result, the NAA will have a quarter-page ad in the Bar Association of San Francisco's magazine. Bonnie Bogue designed the ad for us last year when we fielded our first team. It describes what the NAA is and what we do.

Half of our team experienced transportation challenges to get to the start of the event, but we worked together and got



a team 33% larger than last year's team to the starting point at Crissy Field and back to our respective homes. Norm Brand, Margie Brogan, Luella Nelson, and Barry Winograd were the team this year. We had a "picket sign" and stickers with the NAA logo and name, thereby answering last year's question from other participants, "What does that elegant graphic stand for?"

All four of us elected to do the walk-a-thon, at least after one of us discovered part-way to the event that the wind blowing through that team member's hair meant the bicycle helmet was at home instead of on the member's head. Officially, the walk-a-thon was a 1.4-mile stroll along the Bay, from the picnic area to "the marsh" and back. But our able-bodied team (well, almost able-bodied—one was getting over a cold) decided we could do better. We walked 4 or 5 miles — depending on whose GPS/fitbit/

phone you believe — in a loop around Crissy Field. We returned to our starting point for a tasty BBQ and picnic, and learned that the NAA No Cal team had won a prize for getting the most donations per team member. (It helps to have a small team.) That meant that we each went home with not only a JDC tote bag featuring the names/logos of the various sponsors' teams, but also a brightly-colored pair of JDC athletic socks. After a stop at the Sports Basement to take advantage of a discount coupon (see Luella with her new bike tires, displaying the stylish JDC tote bag and even more stylish NAA tablet bag from a few years back), the team disbanded.

It was a lovely day of walking, chatting, laughing, noshing, and snapping a few pictures. We invite more members to join us next year (most likely on July 13<sup>th</sup>). Put it on your calendars now! 📅





# EXECUTIVE SECRETARY-TREASURER REPORT

*By Walt De Treux*

A very fast and busy year has gone by since we have transitioned from the late, great David Petersen to a new Executive Secretary-Treasurer. Katie Griffin and Suzanne Kelley of the Operations Center were the keys to keeping the Academy running smoothly and efficiently as they guided me through on-the-job training. At the Annual Meeting in Vancouver, I reported on the current state of the NAA finances and some of the changes we have implemented. I want to share that report with the full membership.

As of May 2018, the Academy has 602 total members, with 459 members paying full dues and 143 members on 50% or 100% waivers. Those numbers represent a decrease of 7 total members and 17 full dues-paying members from 2017. In the Academy's continuing challenge to maintain and increase membership levels, it is important to recognize that 17.5% of our members pay no dues because they are not actively serving as arbitrators, and almost 6.5% pay half dues because they have severely curtailed their practices. On the bright side, 10 new members will be inducted at the 2018 FEC in Austin.

David Petersen had a simple explanation for the NAA's financial model. "Meetings pay for themselves, and dues pay for everything else." It is a sound model, but not one that the Academy has been able to meet the last several years because the meetings are not paying for themselves. The 2016 Chicago meeting finished approximately \$60,000 in the red, and the 2018 Vancouver meeting lost \$27,000. The primary reason is that attendance is not reaching the projected levels, and the hotel contracts, so successfully negotiated and implemented over the last decade, include guarantees based on higher expected attendance. As a result, the NAA often subsidizes the meetings with dues money.

The Academy has taken steps to address the meeting issues. Immediate Past President Kathy Miller appointed the Bloch Committee, which issued a comprehensive report with numerous recommendations on modifying our meeting structure. Most significantly, beginning in 2020, the NAA should hold one meeting only per year. President Ed Krinsky appointed the Bloch Report Implementation Committee to carry out the recommendations. The goal is to make the meetings more attractive to both members and advocates and revamp the meeting structure to ensure financial stability.

The Operations Center has also taken steps to reduce costs and become more efficient. We invested in new meeting software that allows for meeting registration, dues payments, and REF contributions to be completed online with deposits and donations automatically routed to our bank accounts. This change reduced our administrative time and costs associated with manually entering each registration, dues payment, and contribution. The software also includes a mobile and computer app through which all meeting materials can be downloaded for easy access. The app provides a personalized meeting schedule and direct

messaging between meeting attendees. Additionally, we used a large number of expiring American Express rewards points to purchase new computers, monitors, and laptops to replace the more than 10-year old equipment the Op Center was using.

As I hope you have seen, the NAA website revamp was completed and makes for a much more user-friendly experience. We continue to work on improvements to the REF and Proceedings section. Following Board policy approved a few years ago but not implemented, an online Chronicle will be available starting with this edition. We have also engaged a professional meeting planner (at no cost to the NAA) to begin exploring future meeting sites and updating our standard hotel contract.

It is important to note that the Academy overall is financially healthy. Board policy requires reserve funds of just over \$1 million, and we hold approximately \$600,000 over and above those reserves in our investment account. But that surplus will be used to cover losses at our meetings until the meeting restructuring can be implemented. It is also subject to potential market loss. In the end, we have to return to the financial model in which meetings pay for themselves, and dues cover the rest. I am confident we will achieve that goal in the next year or two.

I appreciate all the assistance, advice, and suggestions I have received from officers and members. In the next edition, I will provide more detailed financial information, and report on our plans for future meetings. 🏠

## Mark Your Calendar

**2019 Fall Education Conference  
September 20 – 22, 2019**



**Savannah Marriott Riverfront  
Savannah, GA**

# REMEMBERING...

## Remembering Thomas Lewis

*By Alvin Goldman*

Thomas P. Lewis died on March 7, 2018, at age 87. He joined the Academy in 1972 and was active for several decades during which he formed close friendships with a number of members and worked on, and chaired, NAA committees.

He completed his law degree at the University of Kentucky College of Law in the early 1950s. Like many in his generation, Tom's entry into the profession was delayed during the Korean War era by a four-year tour of duty as a naval officer. A top student at the law school, Tom returned to his alma mater in 1957 to teach and soon was recognized as a well-published, highly respected law professor whose primary areas were labor law, constitutional law, and federal jurisdiction.

Tom took time off to earn an SJD from Harvard in 1964 and, in 1965, he left Kentucky to join the University of Minnesota's law faculty. He later accepted a professorship at Boston University's law school. He returned to Kentucky to become dean in 1976, serving in that capacity until 1982. During those years, he expanded the school's academic horizons and strengthened its financial development. Tom remained at Kentucky until retirement in 1998.

Tom and his wife, Nancy, had four children. When Nancy died, their youngest, now a lawyer, was still only 12 years old and was raised by Tom, with the help of his daughters, as a single parent.

An avid golfer, Tom resided in Florida for much of his retirement and continued golfing until age 85, when he returned to Lexington to be closer to his four children and six grandchildren. He will be missed by his friends and colleagues.

## Remembering Mark R. Sherman

*By Trya Sherman and Kathy Eisenmenger*

Mark R. Sherman passed away on April 20, 2018 at St. Luke's Hospital in Houston, Texas after a very long battle with liver cancer, post Hurricane Harvey related accident complications, and transplant complications.

Mark was born November 29, 1956 in Buffalo, NY to (deceased) NAA Member James "Jim" Sherman and Marilyn "Fritzi" (Robertson) Sherman. He obtained a baccalaureate in Florence, Italy and Schiller College in London, a B.A. from Duke University in 1977, an L.L.B. (Law) degree from University of Warwick in Coventry, England in 1979, and in 1981 earned an L.L.M. (Law) degree from The London School of Economics. From 1979 to 1982, Mark worked as a Corporate Consultant/Legal Advisor in London, England and, from 1982 to 1985, he was an Industrial Relations Lecturer at University of New South Wales in Sydney, Australia. From 1986 to 1989, Mark was a Visiting Assistant Professor of Management at the University of South Florida in Tampa, Florida. He earned his Ph.D. in Industrial Relations/Management from University of New South Wales in Sydney in 1988. In 1989, Mark took a position as an Associate Professor of Management at the University of Houston Clear Lake in Houston, Texas, where he remained until his passing. Annually, Mark served as a Visiting Associate Professor of Management at Bond University on the Gold Coast in Australia.


Mark researched and published in numerous legal periodicals, including journals on labor relations, fair employment practices, industrial discipline, and dispute resolution. Mark's professional affiliations were also extensive and included membership/leadership in the Labor and Employment



*(Continued on Next Page)*



Relations Association (Houston), the Association for Conflict Resolution (Houston), the National Academy of Arbitrators, the Labor and Employment Relations Association, and the International Society for Labor Law and Social Security. Mark served on several fact-finding, mediation, and arbitration panels. As an arbitrator and mediator, he heard hundreds of disputes in various industrial settings.

Mark met his wife, Tyra (Byrd-Macktal), in January 1998, and they married in August 2003. Mark is survived by his wife, Tyra, his step-son, Ryan Byrd, his daughter, Cloe Sherman, born on February 17, 2012, his younger sister, Holly Sherman, his mother, Marilyn (Fritzi) Sherman, and many other extended family members. NAA members may recall fondly Mark's proud announcement of Cloe's birth and, as a third generation Sherman, she would be available to conduct arbitration hearings in 2037. To reach Mark's and Tyra's vision for Cloe, they established the Mark Sherman Memorial College Fund at [YouCaring.com](https://www.youcaring.com/cloesherman-1172705), <https://www.youcaring.com/cloesherman-1172705>. 

## IN MEMORIAM

*It was recently learned that the following  
Member has passed away:*

William H. Dorsey  
NAA Member since 1976

Bernard Marcus  
NAA Member since 2006

A Remembrance will appear  
in a future *Chronicle*.

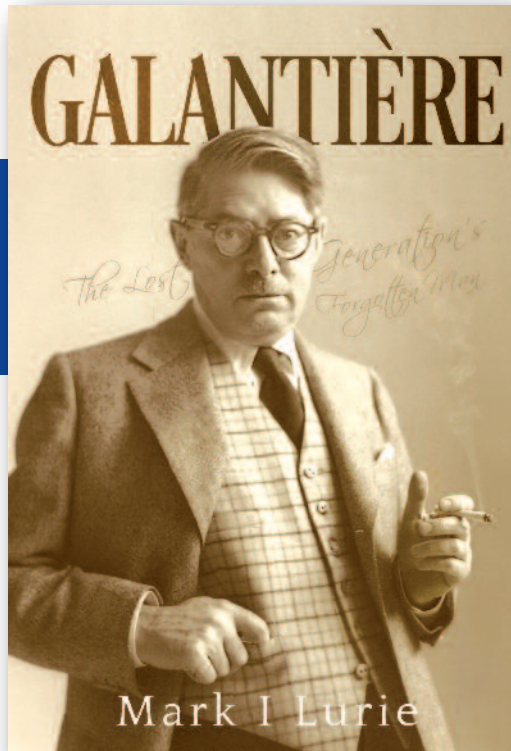
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## The Research and Education Foundation's Silent Auction

*The Research and Education Foundation's Silent Auction will be held again at our Annual Meeting in Philadelphia. The proceeds will help fund research on labor arbitration that is vital to our field.*

*As you know, one's own trash is another's treasure.  
So, start cleaning out your closets for items to offer at the auction.*

*More details will follow as we get closer to the auction.  
In the meantime, for all of our members who are downsizing,  
please keep the silent auction in mind before you let go of your treasures!  
Also welcome are trips, gift certificates, and guest houses in cool places.*



## BOOK REVIEW

[W. Palm Beach: Overlook Press, 2017].

**Review by Barry Goldman**

When *Ulysses* was finally published after a protracted struggle, James Joyce gave the first inscribed copy to his wife. He gave the second copy to Lewis Galantière.

Galantière “lived in Paris in the 1920s and knew everyone who was there then - Hemingway, Fitzgerald, Gertrude Stein, Picasso - the whole starry sky of talent that lit up that glittery city in those days.”

In the 1960s he lived at the Dakota on Central Park West. At the first annual residents’ picnic, “contributions included lemon icebox pies that Rex Reed made, Lauren Bacall’s

brownies, John Lennon and Yoko Ono’s sushi and Eugenia Shepherd’s spinach salad. Lewis brought one hundred of the Century Association’s fresh oysters.”

In the intervening decades Galantière “started John Houseman in his theatrical career, saw Antoine Saint-Exupéry through his wartime exile in America as his friend and as his collaborator and translator in life and in print. He was a playwright, a literary and cultural critic, author, Federal Reserve Bank economist, director of the French Branch of the Office of War Information, ACLU director, counselor to Radio Free Europe, and, at a crucial time in its history, president of PEN America, the writers advocacy organization.”


**“... researching this book was one of the most enjoyable experiences of my life; writing the book — fitting the evidentiary fragments of Lewis’s life into a cohesive narrative — was one of the most challenging.”**

“During the first six Decades of the 20<sup>th</sup> century, Lewis seemed to be magically present and a consequential participant at crucial moments in history.”

But Galantière was not the man he pretended to be. While his accomplishments are entirely real, his background was almost entirely fabricated. He was not a Frenchman with a fancy education. He was a poor Jewish kid from Chicago who never finished grade school. He was also Mark Lurie’s first cousin once removed.

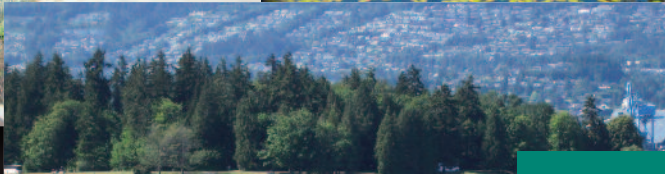
Lurie spent four years visiting archives and libraries and interviewing people in America and France to prepare for writing Galantière’s life. He says “researching this book was one of the most enjoyable experiences of my life; writing the book — fitting the evidentiary fragments of Lewis’s life into a cohesive narrative — was one of the most challenging.” Lurie took the book through four complete drafts.

The result is a triumphant success.

Lurie missed the Vancouver meeting of the Academy because he was addressing the Jewish Book Council Conference in New York. In July he will speak to the Hemingway Society at La Sorbonne in Paris. They view Mark’s book as a significant contribution to Hemingway studies. It certainly is a prodigious work of scholarship. But it is more than that. It is also an astonishing story and a hell of a good read. 



# VANCOUVER



## MEETING COVERAGE

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13 thru 39





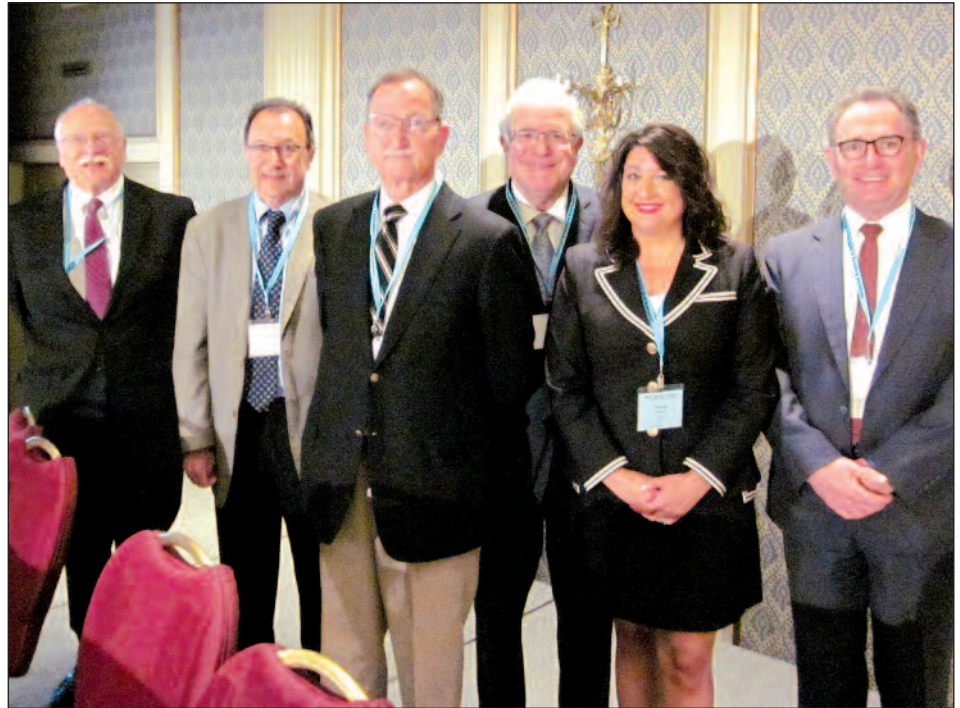
# Comparison of U.S. and Canadian Approaches

By James Cooper

This session, ably chaired by Bill Marcotte, compared the arbitral approaches to damages in each of the national jurisdictions, with NAA members Christopher Albertyn of Toronto and Gordon Luborsky of Markham, Ontario presenting the Canadian view, while NAA members Stephen Befort of Minneapolis and Matthew Franckiewicz of Pittsburgh countered with the U.S. rules or practices. Matt focused his presentation on the basis of the recent survey conducted among NAA members, including 136 U.S. members, 14 Canadian members, and 3 members who did not know in which country they lived. On the issue of whether unemployment compensation should be deducted from a back pay award, 80% of the U.S. arbitrators would specifically order the deduction, reasoning that no one should get compensated twice for the same work. This, of course, flies in the face of the long-standing NLRB rule that refuses to deduct unemployment compensation on the basis that it is the employee's obligation to refund such funds. In Canada, arbitrators never expressly adjust for unemployment compensation, because employers automatically make such deductions. Why should U.S. arbitrators not assume that U.S. employers will do the same?

On the issue of the obligation to seek employment following termination, there was significant difference between Canadian and U.S. arbitrators. Only 20% of the U.S. arbitrators would refuse to award back pay if there were no showing of effort to obtain work, while 50% of Canadian arbitrators declined to award back pay under these circumstances. The interesting question raised was what happens when the discharged employee takes off to Europe following a discharge and lollygags around Paris. For that situation, there was remarkable unity among the participants, stating that back pay was suspended for the duration of the lollygag, and the survey confirmed such unity. But what if he sits home instead of going to Europe? The fact of the matter is, if he sits home, he gets back pay. Go figure.

Gordon Luborsky's presentation



Matt Franckiewicz, NAA, Stephen Befort, NAA, Bill Marcotte, NAA, Gordon Luborsky, NAA, Tracey Henry, and Christopher Albertyn, NAA

raised the issue of the amount of back pay awarded by U.S. versus Canadian arbitrators. His point was that he operated under an Ontario statute requiring full remittances, including loss of benefits for breach of contract. As such, there is no hesitation in making a full and complete award to make the employee "whole." However, U.S. arbitrators without the benefit of statutory authority leave such calculation to the employer and this can lead to wide discrepancies in the amounts of awards paid. Luborsky thought the U.S. system was "low and slow." Furthermore, under Ontario law, he often arbitrated violations of Canadian human rights law that allowed arbitrators to include an award for "pain and suffering," "aggravated damages," "mental distress," and "mental suffering," citing cases such as *Webber v. Ontario Hydro Electric* and *Gale v. Walmart* (\$1.6M C awarded). Chris Albertyn further astounded many of the Americans in the audience when he described his obligation to assess not only compensatory damages but punitive damages as well, describing in detail the types of evidence, including medical and consequential evidence introduced in his cases.

Stephen Befort brought the Americans back to earth: Don't try that without the full backing of the legislature and the courts. The Canadian system relies far less on jury trials of these cases than the U.S. The vast majority of discrimination cases, no matter what type, are handled via agencies (no jury) or class action lawyers seeking jury trials (or settlements) and are not usually within the confines of the arbitration process.

During the question and answer session that followed, Dennis Nolan posited that the U.S. system amounted to one that disincentivizes unionization. Use the agencies and don't pay dues. Alvin Goldman wondered whether the judicial system of remittitur on appeals was a common circumstance in Canada, because it is very much alive and well in the U.S. court system. Barry Winograd suggested arbitrators are better off to leave these damage awards for jury trials. This program, originally scheduled for a concurrent session was moved up to the main stage due to a snafu with the original speaker. Whatever the snafu, this represented a real chance for the U.S. members to marvel at the work of their Canadian counterparts. ⚖️



## The Impact of Words in the Workplace

### “We’ve Come A Long Way, Baby, or Have We?”

By Lisa Gelernter

Barbara Diamond, a lawyer who provides training to all sorts of organizations on implicit bias, got her audience thinking about the unrecognized or implicit biases of the parties in arbitration cases and their own subconscious prejudicial assumptions. In an interactive session designed to examine the impact of words in the workplace with respect to gender bias, she first gave three minutes for each table of attendees to list stereotypical attributes of men and women and turn them in. Ms. Diamond read out a sampling of the responses, and many of them reflected the stereotypes we are all familiar with, such as: women are “shrill,” “emotional,” “collaborative,” and men are “strong,” “smart,” and “territorial.” Of course, everyone in the room assumed that they did not consider such prejudicial labels to be accurate, but Barbara’s program was centered on challenging those assumptions.

A short film concerning a news story on the results of a Yale University study showed how prevalent implicit gender bias is. Focus groups of men and women recruited for the study watched a video recording of men or women respond to a series of job interview questions. The interviewees all used the same words to respond to the questions, but the focus groups rated the interviewed men much more highly as potential hires than the interviewed women. And the reaction was the same from men and women focus group members!

To further explore the issue of implicit



gender bias, Barbara showed us a film documentary that she had produced in which our own Betsy Wesman played a starring role. The film consisted of excerpts from interviews of women with varied life experiences who had experienced gender discrimination and bias in a variety of contexts. For example, Betsy talked about how often parties assume she is the court reporter or a secretary when she walks into a hearing room, despite the fact that the parties already know her gendered name. And she also talked about how gender bias influenced her professional career. As a teenager, she had a tremendous crush on an older college man who had a great deal of influence over her. Because he told her that it would be “unfeminine” for a woman to go to law school, she made the life decision at an early age not to pursue a career in law despite her prior interest.

The documentary’s interviews of a transgender man and a transgender

woman “before” and “after” their gender transitions were particularly instructive because each subject had personally experienced differential treatment based on their perceived gender. The man talked about how people assumed he knew what he was doing at work as a man, but had questioned his authority or experience when he was still identified as a woman. He also spoke about his feeling of safely walking down the street at night as a man that contrasted sharply with the insecurity he felt before his transition. The woman experienced the same sense of security associated with being a man and insecurity as a woman. She also saw a change at work: as a woman, she experienced, for the first time, sexual comments from co-workers and a perceived lowering of her status.

Some of the documentary’s interview subjects were also living examples of the bias issues arising from “intersectionality,” meaning that a person has two or more characteristics that lead to implicit or explicit bias, such as gender and race. For example, a Korean female lawyer talked about the heightened level of bias she experienced due to a perception that (a) women are not aggressive enough to be good litigators; and further (b) that Asian women, in general, are timid and meek.

Although the audience show of hands showed there was a general consensus that “things had gotten better” than they used to be, it was clear to all that there was still a long way to go in eliminating subconscious assumptions and biases in general and in our own lives. 🗡️

## Impact of Words in the Workplace: Continuing the Conversation Poster Session

By Dan Zeiser

During the 15 minute poster sessions, Barbara Diamond continued where she left off in her plenary session. Using photos of diverse people holding signs with questions they have been asked or statements made to them, such as “Why do you sound white?” and “No, you’re white,” Diamond talked about implicit bias and micro-aggressions. Implicit biases favor certain people over others. There is a physiological basis for this, as our brains use shortcuts to categorize people and things. Diamond’s point, though, was that we should treat individuals as individuals, not a category. 🗡️

Hon. Sheila Greckol  
Associate Justice, Alberta Court of Appeals  
Distinguished Speaker, Vancouver 2018 NAA Annual Meeting

## “Access to Justice”

*Reported by James Cooper*

There was a standing ovation for Justice Greckol upon the conclusion of her thirty minute speech. It was very well deserved and anyone who was there will vouch for its perceptive view of the Canadian justice system, but equally and perhaps more descriptive of the status of the American judicial system. There is no meaningful way that I can put into words what Judge Greckol has said in terms of the analysis of the current access to law and her proposed reform. Her words on judicial independence and the meaning of the rule of law hit hard and accurately at what it means to profess to live in a democracy espousing freedom under the rule of law. She quoted former Supreme Court Justice Anthony Kennedy's speech to the American Bar Association. I repeat Justice Kennedy's words here:



Hon. Sheila Greckol

The Law is superior to, and thus binds, the government and all of its officials.

The Law must respect and preserve the dignity, equality and human rights of all persons. To these ends the Law must establish and safeguard the constitutional structures necessary to build a free society in which all citizens have a meaningful voice in shaping and enacting the rules that govern them.

The Law must devise and maintain systems to advise all persons of their rights and it must empower them to fulfill just expectations and seek redress of grievances without fear of penalty or retaliation.

This epitomizes the Law and Justice Greckol's speech enumerates the current difficulties that effectively preclude the Law from reaching many, many Canadians and, as stated, many, if not most, Americans. Some of Judge Greckol's speech is reproduced in this issue of the Chronicle, but I urge members of the NAA to read the speech in its entirety. It is 16 pages and I offer to send the entire speech to anyone who e-mails me at [jcooper@jcooperlaw.com](mailto:jcooper@jcooperlaw.com).

### I. Introduction

Living in a democratic, developed country, we go to bed each night secure in our faith that there will be no police breaking down the door to take us or loved ones to an unknown fate; there will be no gunfire or scatter bombs showering our city; or that we will not be pushed from land inhabited by our families for generations, without recourse to a court of law....

But do these principles necessarily translate into meaningful justice...

The justice system has been under attack from above, and faltering in its duty to serve people. We have seen examples of the independence of the courts challenged by political action both directly by legislative incursions on judicial discretion through, for example, imposition of mandatory minimum sentences; and indirectly by withholding resources or neglect of judicial appointments and administration....

### II. The Rule of Law

.... [W]hat do we actually mean by the “rule of law”? It has been described by a former Secretary General of the United Nations in 2004 as:

... a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights and norms and standards.

### III. Access to Justice

...[What] do we mean when we say “access to justice”. Those working within the system, all of us in this room, probably think about administrative fairness and access to due process. But whether there is access to fair process is truly a matter of perspective and place. Those with power and resources have a different view than those without. The Justice of Alberta, Catherine Fraser, used this metaphor in a speech to the Canadian Bar Association in 1994:

But we must also recognize that to the public, access to justice is not just about courts and lawyers. They may not even know much about those things. To the public justice is more than process, more than delivery and execution.

It's like taking a trip on the subway. From the insider perspective, access to justice relates to the size and number of the turnstiles in the station, how many there are in the queue and whether those waiting their turn in line are restless. Everyone is treated the same. The line moves; the cord proceeds. Life marches on. And as long as none is pushed off the train, it all seems to work well enough.

But from the outside looking in, the perspective may be quite different and there lies the problem. Some people are afraid to go to the station. Some are upset because they are taken against their will. Others can't afford the ticket. Some say they cannot get into the station as easily as others. And they are not sure they want to get in anyway because it looks very crowded and the queue is not moving very fast. And once into the station, they cannot figure out which line to go into because they do not understand the signs. And finally making it to the front of

*(Continued on Next Page)*



# Class Action Waivers in Arbitration

By James Cooper

Poster sessions, like speed dating, are supposed to give one a hint of attraction (or, more likely, complete rejection). There were four poster sessions scheduled on Thursday afternoon during the 2018 Vancouver meeting. Lise Gelernter, NAA member from Buffalo, presented this session. I sat through all four sessions as different members and guests rotated through the twenty minutes or so allotted for Lise's repeated presentation. Her topic could not have been more timely since it was only three days earlier that the U.S. Supreme Court handed down its decision in *Epic Systems v. Lewis*. This case required one-on-one arbitration of disputes by individual employees who sign employment agreements requiring arbitration and agree to waive his or her right to participate in class actions. As the whole world (except the Supreme Court) knows, such individual arbitrations are a gimmick, a sham designed so that few, if any, employees will be able to challenge their employer. It is only through collective action, as the vigorous dissent asserts, that there will be vindication of substantial rights.

It was against this background that Lise presented the cases, along with the preceding case of *AT&T v. Concepcion* and *American Express v. Italian Colors Restaurant*, among others. Needless to say, in every one of the four groups presented, there was very little appetite (more like regurgitation) over this constant demeaning of the arbitration




process. The difficulty of identifying the difference between these ersatz arbitrations and union-management arbitration makes it likely that the general public will view our profession as hacks for employers. Upset does not describe the full tenor of each of the groups, but alas, in every single group, someone raised the possibility that some attorney will gather many individual employees and insist that the company arbitrate each case, an expensive proposition since the companies foot the bill for the arbitrator.

Lise later posted on the members' informal e-mail list, as reported in the BNA Law Week on July 13, 2018, that this is precisely what has happened with respect to Buffalo Wild Wings, Inc. (She noted that the wings were not truly "Buffalo" wings!) Three hundred and ninety-one individual arbitrations were filed against the company for violation of wage and hour laws. Buffalo Wild Wings

is now in settlement talks concerning the 391 employees. While this may prove to be an alternative, the article also teaches that Joe Sellers, an attorney with Cohen Milstein of Washington, D.C., that it is very difficult to get many workers' names without a class action list, although some could be found from scanning informal networks or through referral. Sellers states:

It's not to say that this could never be replicated, but I think the likelihood of this kind of scenario arising several years from now, when there's a significant increase in the number of class action waivers in enforceable arbitration clauses, is going to make this kind of strategy more challenging or [less] likely to be available.

With that said, it occurs to me that the employers' tactic may be an excellent organizing tool for unions to show why in unity there is strength. 

## "ACCESS TO JUSTICE" (Continued from Page 16)

the line, they feel that for some reason the change maker is nicer to some people than to them.


As you can see, access to justice is all a matter of perspective. Therefore, when we talk about access to justice, whose perspective is it that we would be concerned with? While the insider perspective is vital to the efficient delivery of justice, I suggest that these broader perspectives of access to justice — as seen through the eyes of the diverse groups in our community — must also be of critical concern to all of us involved in the administration of justice. How then can we respond to these differences in perspective?

My anecdotal experience over 17 years as a judge reveals a slow but dogged deterioration of our beloved justice system... Judges are exhausted and have little time for reflection. Even

the most stalwart exclaim that the wheels are off the bus. This situation is antithetical to access to justice.

### IV. Proposed Reform

[Proposed reforms enumerated from Access to Justice Report, Access to Civil & Family Justice: A Roadmap for Change (Ottawa: Canadian Forum on Civil Justice, 2013)]

V. Judicial Independence, Impartiality, Equality Lie at the Heart of the Rule of Law ... I suggest to you that meaningful access to justice must go beyond the call for more funding, better administrative measures, and more procedural safeguards. It calls for judges and tribunals to make decisions honouring the fundamental principles of our Constitution and the rule of law, including judicial independence, impartiality, and equality. 

# Current Trends in Arbitration, Mediation and Upcoming Bargaining Issues in the Airline Industry

By Katherine Thomson

In a wide-ranging and informative session, panelists from the airlines and unions explored social media issues relevant to the industry, the impact of social media and other trends in bargaining, and a new process to handle some categories of grievances. NAA member Jeanne Vonhof moderated a discussion of two hypothetical discipline cases before turning to bargaining and grievance processing innovations.

The panelists first debated whether off-duty postings on a password-protected pilots' union electronic bulletin board are immunized from discipline. The grievant pilot posted several crude remarks about a post-operative transgender pilot that ranged from musings about how her anatomy was designed to comments referring to emasculation of pilots and their union. The transgender pilot complained about his demeaning, offensive sexual harassment, which she believed had affected her relations with other pilots in the cockpit. The airline suspended him for violation of the anti-discrimination policy. The facts were adapted from American Airlines, Inc. and APA (Goldberg, 2005).

Carla Siegel, deputy general counsel of the IAM, asserted that the airline had no right to discipline the pilot for posts on the electronic bulletin board, which functions as a "virtual union hall." Sara Nelson, president of the Association of Flight Attendants, agreed that the company should not be interfering in internal union conversations and relations, noting that his posting included complaints

about the Union's bargaining tactics. In addition, there was evidence pilots did not understand that they could be disciplined for what they said on the message board. Maranda Rosenthal, senior attorney at American Airlines, acknowledged that the Railway Labor Act provides the union a protected environment to discuss issues, but emphasized that the employer is placed in an impossible position if it cannot investigate and discipline employees for comments that implicate anti-discrimination laws. Robert Siegel, a partner at O'Melveny and Myers who represents airlines, noted there was a nexus between the pilot's comments and the workplace, since the transgender pilot asserted the postings affected her relationship with other pilots at work. The company could not ignore the complaint. He distinguished the case of *Konop v. Hawaiian Airlines*, 302 F.3d 868 (2002), where the court held that a company vice-president violated the RLA (as well as the federal Stored Communication Act) when he used another person's log-in credentials to investigate whether he was being defamed on a union dissenter's secure website. Siegel also noted that courts have held the RLA does not protect employees who attempt to incite illegal behavior on social media in the context of labor disputes.

The second hypothetical featured a truck driver for an airline contractor who had tried several avenues to report and remedy a safety problem on his truck, to no avail. He recorded the unsafe condition on his cell phone by holding the phone out the drivers' side window as he

drove on the airline's premises. He then posted the video on Facebook, where friends from work commented on it. The contractor terminated him for violating a policy forbidding taking photos of the airline's premises and the contractor's rule about driving while using a handheld phone. He testified at arbitration that he drove for only 30 seconds in a location where no one else was present.

Nelson asserted that the driver should be reinstated since he acted in the interest of public safety and did not endanger anyone. He had exhausted other channels to remedy the unsafe condition. Robert Siegel agreed that the driver's conduct might be condoned as actions of a whistleblower if he had truly exhausted other remedies, but, if OSHA had found no cause to act, the employer should have the right to discipline for the clear rule violations. Rosenthal noted that factual details could affect the result. She noted that there was an argument that the driver was engaged in concerted action protected by RLA Sec. 2, Fourth. But if the driver had posted a video with derogatory comments that tended to diminish the airline's brand on a widely-read Facebook account, the company might prevail, as videos can be highly damaging. An audience member cautioned that NLRB cases under Section 7 may not be applicable because the RLA's language in Section 2, Third and Fourth, is different.

The panelists turned to the impact of social media on bargaining. Union representatives noted that social media

(Continued on Next Page)



Airline panel: Jeanne M. Vonhof, NAA, Carla Siegel, Maranda Rosenthal, Sara Nelson, and Robert Siegel



# DO ARBITRATORS PROCRASTINATE?

By Tom Nowel

During the afternoon of the first day of the 2018 annual meeting of the National Academy of Arbitrators, participants had the opportunity to attend four “poster sessions.” Over the course of the session, those in attendance moved from one mini-session to the next, each approximately 15 to 20 minutes in length. Arbitrator Allen Ponak convened a session that examined and reported on research conducted around the question of procrastination among labor and employment arbitrators. In a 2010 study of Canadian arbitrators, 40 NAA members were surveyed regarding work habits and procrastination. Results of the survey found that Canadian arbitrators had among the lowest procrastination scores ever recorded for research of this nature. The average time to issue a decision following the last day of hearing was 57 days.

Now, the 2018 USA survey. One hundred ninety-five American NAA arbitrators voluntarily participated in the survey, which was nearly a 50% response rate. Many of you participated, including yours truly. Of the American NAA members who participated, 60% are 70 years of age or older; 73% are male; and 70% possess law degrees. Two-thirds had issued more than 50 decisions in the past three years, and almost half have heard employment arbitration cases. Seventeen percent of those surveyed do not plan to retire, and 77% prefer to maintain part-time practices as long as capable. American arbitrators, like their Canadian



counterparts, had low procrastination rates, and this is especially true compared to other professionals, accountants, lawyers, engineers and librarians.

Although 40% of respondents indicated they had experienced a traumatic personal or family event during the previous three years, the survey found that arbitrators who are at the top of their game are able to withstand personal trauma, multiple pressures, and are resilient and confident. The survey found that younger arbitrators are more likely to procrastinate. On a five-point scale, with 5 being the highest level of procrastination, American arbitrators scored 2.17 overall and 2.14 regarding susceptibility to temptation. American arbitrators scored 2.05 regarding lack of

energy. Again, the average score for a variety of factors was 2.17 for American arbitrators and 2.13 for their Canadian colleagues. These scores are significantly lower than most professional occupations. Gender, marital status, years arbitrating, years of being an NAA member, number of hearing days per month, and other factors had no impact on any of the scores.

Other interesting statistics from the survey are as follows. Ninety-six percent do not work in an office with other arbitrators; 76% do not have an assistant; and 5% stated that they have no arbitrator friends. A critical conclusion to be drawn from the survey is that individuals who do not possess the attributes required to be successful arbitrators will exit the profession, while people who value the work will remain. “The work chooses the people as much as the people choose the work. That explains the extraordinarily low procrastination scores, and the really high self-efficacy scores,” concluded Arbitrator Ponak.

Some comments from survey takers. “Best job in the world.” “My mentor practiced into his 80’s. I want to as well.” “Being an arbitrator is not for the meek. It requires a tough skin.” “I feel that being an arbitrator is a privilege and an honor.”

Conclusion? American and Canadian arbitrators are not procrastinators. An example? This Arbitrator completed this article one week following the end of the annual meeting and five weeks prior to the deadline. 📌

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## BARGAINING ISSUES IN THE AIRLINE INDUSTRY *(Continued from Page 18)*

makes it easier to survey members and inform them of developments in bargaining, but several new concerns have arisen. Where a minority of the bargaining unit feels ignored or disadvantaged by a position, the small group can now stir up opposition more effectively with social media, imperiling ratification. Union leaders must balance the benefit of keeping members engaged during bargaining with the dangers of creating unrealistic expectations. The parties have learned to carefully time information releases about tentative agreements only after details are nailed down. Social

media allows union leaders to avoid the rumors that resulted from the ratification “roadshow” meetings in the past.

The panelists had a brief discussion about upcoming major contract negotiations in the industry. They noted that interest arbitration has benefits. It may shorten the bargaining process and takes ratification out of the picture. However, since the parties lose control over the outcome, the panelists agreed that it is better to use interest arbitration to resolve only a small number of issues.

The session ended with a discussion

of a new expedited grievance procedure in the Alaska Airlines-IAM agreement, in which overtime cases bypass the usual procedures and are presented only on the papers — no witnesses — at arbitration. The arbitrator issues a non-precedential bench decision with no verbal explanation required. The advocates generally are not lawyers. The panelists likened the procedure to casual “speed-dating” arbitration, but cautioned that the procedure needs engagement and commitment of the local parties to succeed. 📌









## “Scene” in Vancouver

The 71st Annual Meeting of the Academy, held from May 23 - 26, 2018 at the beautiful Fairmont Hotel Vancouver was another success, with 131 members, 68 spouse/companion/partners, and 54 guests attending. Elizabeth C. Wesman was Program Chair and Randi Hammer Abramsky chaired the Host Committee.





# Examining the Potential Impact of Positive Train Control

*By Sheila Mayberry*

Catherine Rinaldi, President of the Metro North commuter rail in the New York City region, and Carmen Parcelli, labor attorney with Guerrieri, Bartos & Roma, representing railroad labor unions, discussed the status of the implementation of Positive Train Control in the railroad industry. Recent high-profile accidents like the ones in DuPont, Washington, and Frankford Junction (Philadelphia), Pennsylvania have heightened the public interest in what safety measures are being pursued and a need to understand the status of their implementation.

In 2008, Congress passed the Railway Safety Improvement Act, an unfunded mandate of the railroad industry, both passenger and freight, to implement new safety technology, including Positive Train Control (PTC), by 2015. PTC is technology being built into the railroad safety infrastructure that will automatically stop a train if it detects a violation of safety measures or an imminent equipment failure. The system integrates GPS, wayside sensors, and communication units with centralized dispatching systems. It will be able to track trains, convey operating instructions, and monitor the railroad crews' compliance, and is designed to prevent certain types of accidents due to overspeed derailments, movement through a misaligned switch, incursions into established work zone limits, malfunctioning grade crossings, and those caused by excessive speed. PTC is a safety measure that overlays others already built into railroad safety systems. For example, automatic train control will adjust train speed if it is not manually adjusted by the engine crew. However, it can be manually overridden by the crew under certain circumstances. PTC technology, on the other hand, cannot be manually overridden.

PTC is not meant as a silver bullet to prevent all accidents. It will not prevent an accident due to defective rail; a car on the rail at a crossing; debris on a railroad; or trespassers walking on the rail. The technology is not sophisticated enough to prevent a speeding train from entering a terminal, but that scenario is to be handled by different methods.

It was clear by 2015 that the industry



Jacalyn Zimmerman, NAA, Catherine Rinaldi, Carmen Parcelli

was not going to meet the deadline to implement PTC. In 2018, Congress extended the deadline to December 31, 2020. Many railroads have not met deadlines for various reasons. For example, there is a finite number of vendors capable of the complicated installation of the technology. There also have been intellectual property disputes over the technology. Cooperation between vendors has been problematic when their installations overlap with one another on different railroads. However, in New York, a consortium has been set up to improve the integration of different vendors installing competing and parallel systems. Even when some PTC systems were tested, defects in operational systems were discovered, thereby slowing down completion. In addition, public safety radio transmission spectrum for the installation of PTC was not set aside in the 2008 legislation. Therefore, radio spectrum needed to be acquired from the market place. Based upon these problems, extensions on complete installation can be approved until December 31, 2020 if four metrics have already been met by October 2018. For the freight industry, 51% of a railroad's territory must have installed PTC in order to get an extension. In the passenger rail sector, certain metrics must be met to receive an extension, including the ac-

quisition of radio spectrum; completion of employee training; installation of PTC hardware; and at least one representative rail line must be operating in full PTC mode.

Even when PTC is fully implemented on individual railway lines, there will be interoperability problems between railroad companies to resolve. Not all railroads are using the same technologies, so they do not automatically communicate with each other as they are passing through each other's territories. This will be an issue going forward.

Ms. Rinaldi explained that at least the Metro North commuter rail, the second busiest commuter rail line in the country, is on track to meet the four metrics required to request an alternate schedule for completing PTC installation on all of its lines. It was ahead of the game in implementing the Enhanced Employee Protection System, which met the PTC functional requirement for protecting workers. It had already implemented civil speed enforcement to avoid overspeed derailments. Metro North has almost completed intensive training for all employees involved in the PTC system.

The question raised for discussion was whether there will be an increase in

*(Continued on Next Page)*



# A COMPARATIVE LOOK AT EVIDENTIARY PRIVILEGES AND MEDICAL RECORDS IN THE U.S. AND CANADA

By Arne Peltz

This session considered the balance between an individual's right to privacy in their medical records and the right of arbitration parties to access such information in order to prosecute or defend a grievance. Randi Abramsky gave the Ontario perspective as a proxy for the Canadian experience. Lisa Salkovitz Kohn provided an overview of U.S. law and practice, which she cautioned may vary considerably depending on the jurisdiction.

The panelists discussed a typical case where a grievant/grievor is disciplined for assaulting his supervisor but claims it was due to a previously undisclosed mental health condition. Can the employer demand pre-hearing production of the grievant's medical records? In Canada, the clear answer is yes, subject to relevance and any necessary protective conditions on use and reproduction of the documents. Arbitrators are empowered by statute in this regard. However, in the U.S., while an arbitrator can issue a subpoena or direct the grievant to consent, it is not estab-

lished that labor arbitrations are "administrative proceedings" under the Health Insurance Portability and Accountability Act, so a court order may be necessary for enforcement. The workaround is to subpoena the custodian of the records, open the hearing, receive the records, and adjourn to allow the parties to prepare for the main hearing.

The panelists also addressed a scenario where the grievor is discharged from a health facility for patient neglect and the union seeks production of the victim's health records. In Canada, the patient's consent is not required, but, in the U.S., efforts would be required to secure consent or make anonymous the records. Finally, the panel discussed independent medical examinations as an aid to the accommodation process. Canadian law and practice allow for production when necessary to the case, but U.S. procedure under the Americans with Disabilities Act is more complex and demanding. Agencies become involved and arbitrators play less of a role.

Overall, it was apparent that



Canadian arbitrators are likely better equipped to manage difficult privacy issues when they arise, although the balancing of interests is similar in both countries. 🏠

## POSITIVE TRAIN CONTROL *(Continued from Page 22)*

disciplinary actions attributed to employees' conduct if PTC is triggered. One view is that proper training will resolve potential problems. Another is that there is a potential to develop the ability to monitor PTC data for the purpose of detecting employee misconduct or negligence. Repeat offenders could be identified more immediately. This type of monitoring would be in addition to the various electronic data already available as well as video monitoring in the cars that can detect, for instance, whether a crew member is using his cell phone. However, there has been no suggestion that PTC data monitoring for that purpose is planned. Potential issues at grievance arbitration could include proper notice and/or training on PTC.

Other questions raised included whether the number of crew members could be reduced in light of increased safety measures. Ms. Rinaldi did not consider this to be a serious threat because PTC is meant to be an enhanced safety measure rather than a relinquishment of skills needed by human crews. Betsy Wesman commented that PTC should be considered similar to GPS in a car. The driver is needed. Dan Nielsen wondered whether these issues could be discussed in negotiations. Ms. Parcelli noted that the decision to reduce crew size from three to two had been historically difficult and took decades to resolve. She predicted that a further reduction in crew size would be even more unpalatable.

In summary, the implementation of PTC is moving forward, but more slowly than anticipated. It is hoped that full installation will be completed by the end of 2020. The implications for labor management issues emerging from the use of the new system are only speculative at this juncture. Time will tell if management will introduce more intensive monitoring of engine crew conduct given the additional data created from the system. Issues on appeal in disciplinary actions based upon causes that trigger PTC may include notice provisions and proper training. However, it is too early to determine whether evidence created by PTC will result in higher numbers of disciplinary actions and appeals to arbitration. 🏠

# Developments Affecting Union Security and Union Strength at the Workplace – Ripe for Export to Canada?

By Randi Abramsky

This compelling session was presented by Dan Nielsen, as moderator (and commentator), Marty Malin, who laid out what is happening in the U.S., and Allen Ponak, who commented on his view as to whether or not what is happening in the U.S. is “ripe for export to Canada.” The session was well attended by both U.S. and Canadian arbitrators. My bet, however, is that after hearing what has been happening in the U.S. and Canada, a number of the U.S. arbitrators may start investigating how to move up north. The U.S. situation was, in a nutshell, depressing.

Dan Nielsen began by outlining what has happened in his beloved state of Wisconsin legislatively, and it isn't pretty. Wisconsin, one of the first states to legislate collective bargaining in the public sector, has become a right to work state. The duty to bargain has been reduced to almost nothing, recertification is required annually, and union dues may not be compelled, even for collective bargaining and grievance administration. Other states have followed Wisconsin's lead.

Martin Malin followed up with more depressing facts. Currently, there are 28 “right to work” states, with the addition of Missouri (2017), Kentucky (2017), West Virginia (2016), and Wisconsin (2016) as well as a number of close calls. Illinois, Minnesota, and Ohio are now the only Midwestern states that are not right to work states.

Court challenges to these statutes have not been successful, in Indiana, Wisconsin, or Kentucky. As of the date of the conference, the *Janus v. AFSCME Council 31*, 851 F. 3d 746 (7<sup>th</sup> Cir. 2017), cert. granted, 138 S.Ct. 54 (2017), oral argument Feb. 26, 2018, which had not been decided at the time of the annual meeting. It was one of several judicial assaults on *Abood v. Detroit Board of Education*.

The goal of this approach, according to Marty, is evident from an October 2017 fundraising appeal letter by the Freedom Foundation, which stated: “[Janus] should take government unions out of the game for good – yet we know the unions won't go away without a



fight. They won't go away even with a fight. They won't go away until we drive the proverbial stake through their hearts and finish them off for good.”

Other legislative changes have limited the scope of collective bargaining, such as Iowa, which limits it to “base wages and other matters mutually agreed upon.” Mandatory subjects are to be interpreted “narrowly and restrictively.” Also, to be certified as exclusive bargaining agent, the union must receive the votes of a majority of employees in the bargaining unit, not merely a majority of the votes cast. Recertification elections must be held prior to the expiration of any collective bargaining agreement, and, to retain certification, the bargaining representative must receive the votes of a majority of employees in the unit, not just the majority of the votes cast. In Florida, effective July 2018, as part of their registration each year, each employee organization representing K-12 teachers must specify the number of employees in the bargaining unit and the number who pay union dues. If less than 50 percent of the bargaining unit pays dues, the union must petition for a recertification election. Even the federal sector has not been exempt, as there have been attacks on “official time” — paid time off from assigned duties to represent a union or its bargaining unit employees, and there are attempts to limit such time.

In Marty's view, there is now an existential threat to unions and unionization in the U.S. His comment, he stated, was not an exaggeration; it is a fact.

Allen Ponak then addressed the state of union security in Canada, where labor relations are mostly provincially governed. The federal government's jurisdiction is constitutionally restricted to telecommunications, banking, airlines,

ports, and nuclear facilities, which constitutes less than ten percent of the workforce. Consequently, the provinces control the rest and are free to craft their own labor laws as long as the laws confirm to the Canadian constitution. While the labor laws could vary among the provinces, in practice there is a common core of principles, derived from the Wagner Act model. Some may be viewed as more union-friendly than others, but all share common core values and share far more similarities than differences.

There is no right to work legislation in Canada and, according to Allen, for political and legal reasons, there is unlikely to be such legislation in the future. Politically, Canada's labor movement has been effective at pushing back against any restrictions to mandatory dues collection for all members of the bargaining unit. This, in part, is due to a relatively high unionization rate (30%), and the presence of the New Democratic Party (NDP) with direct union affiliation. The idea of “right to work” surfaces from time to time, but is quickly quelled by strong opposition from organized labor — even in the more employer-friendly province of Alberta. In fact, most Canadian labor codes have the very opposite of right to work laws — it is considered an unfair labor practice for an employer to refuse a request by a union to collect regular union dues from all members of the bargaining unit, subject to an employee's religious objections.

Further, there are legal impediments that would block any attempt to introduce a “right to work” law. The 1991 case of *Lavigne* is instructive. Lavigne, a bargaining unit employee, complained that his dues were being used by his union to support political causes he opposed. The case went to the Supreme

(Continued on Next Page)



# POSTAL DISCUSSION – PANEL SELECTION

By Linda Byars

Arbitrator Angela McKee (Dallas, Texas) moderated a panel including Michael Mlarker, Manager Contract Compliance, U. S. Postal Service (Chicago); Mark Gisler, of Peer, Gan, and Gisler (Washington, D.C.), representing the National Rural Letter Carriers Association; and Coby Jones representing the National Association of Letter Carriers (Seattle, Washington). Also participating in the discussion from the audience were Joey Johnson (Director of Labor Relations, National Rural Letter Carriers Association) and Steve Stromquist (Labor Relations, Collective Bargaining, and Arbitration, USPS Headquarters) as well as many arbitrators serving on postal panels.

Panelists discussed the qualities and experience they are looking for in permanent arbitrators and how they select a panel of arbitrators. The discussion also included questions from the audience of general interest.

The panelists agreed that they are looking for experienced arbitrators. They also agreed they are looking for

well-reasoned, fair decisions that demonstrate the arbitrator considered the facts, but not especially long decisions. Coby Jones added that they want decisions to educate and are helpful in explaining the result to members. Mr. Jones also expressed his disagreement with arbitrators who “split the baby.” Mike Mlarker expressed his opposition to punitive damages and to ingenious methods of punishing employees or management.

The only real area of disagreement was Mr. Gisler’s approval of arbitrators sometimes mediating an issue they have become familiar with over the contract period. Both Mr. Jones and Mr. Mlarker stated their expectation of a decision, not a mediation, at arbitration.

The expedited panels that have been used for trying out postal arbitrators are not used as frequently as they once were, primarily because most of the cases (discipline of 14 days or less) are settled prior to arbitration. Mr. Mlarker offered that there is a panel for determining which craft is assigned as the primary craft for new operations that

could be a source of employment for new arbitrators. Also, there is a new Article 19 panel for deciding issues related to Handbooks and Manuals that are incorporated in the contract.

For regional panels, the local advocates have considerable input in the decision to add an arbitrator and they appreciate recommendations from arbitrators on the panels. National arbitrators are selected at the headquarters level. Mr. Gisler expressed his preference for NAA members as a starting point for permanent arbitrators. Mr. Johnson added that seeing arbitrators at NAA meetings influences his decisions. Mark Gisler expressed his opinion that permanent panels are especially beneficial for the NRLCA because they need arbitrators who have been educated about the pay structure. Mr. Gisler added that the disadvantage to permanent panels is that they are stuck with an arbitrator they do not like for the entire contract period.

NAA member Kathy Eisenmenger reminded us of our obligation to mentor less experienced arbitrators. Many of us have become full-time arbitrators because of the willingness of long-time postal arbitrators to recommend us, invite us to hearings, and to read and provide feedback on our mock decisions.

The panelists asked interested arbitrators to send a vita and examples of their decisions (discipline and contract) to Lew Drass for NALC, 100 Indiana Avenue, NW, Washington, D.C. 20001; Steve Stromquist, USPS Headquarters, 475 L’Enfant Plaza SW, Room 9420, Washington, DC 20260-4101; and Joey Johnson, National Rural Letter Carriers’ Association, 1630 Duke Street, 4th Floor, Alexandria, VA 22314-3465. ✍️



Angela McKee, Michael Mlarker, Mark Gisler, Lucien Drass

## UNION SECURITY AND UNION STRENGTH AT THE WORKPLACE *(Continued from Page 24)*

Court of Canada. In a split decision, the majority ruled that compelling the payment of dues and using them for causes unrelated to collective bargaining violated Mr. Lavigne’s freedom of association. However, the Court went on to find that the limitation on his freedom was justified under Section 1 of the Charter of Rights and Freedoms, which examines whether an infringement is justified in a free and democratic society. The Court held that the limitation on his free-

dom was justified because enabling employees to choose not to pay dues for matters with which they disagreed would inhibit the ability of unions to participate in the social and political debates that contribute to democracy. It also concluded that parsing out union dues to valid and non-valid expenditures was something the courts ought not be drawn into. Court decisions since *Lavigne* have established a strong connection between collective bargaining and

the freedom of association, all of which make it very probable than any right to work legislation, if passed by a province, would be overturned by the courts.

The presentation established that the contrast in regard to union security between the U.S. and Canada could not be greater. The recent Supreme Court ruling in the *Janus* case will likely only accelerate that divide. If you decide you want to speak to an immigration lawyer, let me know. ✍️

# Performance Impairment – Assaulting Our Assumptions

*By Jerry B. Sellman*

Legislation legalizing recreational and medical use of marijuana in Canada and the U.S. is increasing at a rapid pace. Regardless of one's opinion on the matter, the reality of its impact in the workplace is here. Testing policies and practices seeking to improve safety and productivity in the workplace have been implemented by employers in the majority of both U.S. and Canadian workplaces. Even though research shows no evidence that drug testing policies and practices improve safety or productivity, it is inevitable that new marijuana users will be drawn into the drug testing web. NAA member Sylvia Skratek moderated a panel of experts who examined the interplay between drug testing in the workplace, its effectiveness or necessity, and the necessity of diversion or referral to substance use treatment as a solution to workplace impairment. The panelists addressed the need to rethink our approach to address performance impairment at the workplace and consider whether the performance impairment is due to impairment from substance abuse or is caused by other, often more prevalent, factors such as fatigue, prescription medication, or daily stresses of life.

Jonathan Chapnick, a labor and human rights lawyer who currently is Senior Advisor for Workplace Mental Health with the University of British Columbia, whose primary job is to help solve workplace performance problems using conventional and unconventional approaches to performance impairment; Dr. Karen Urbanoski, the Canada Research Chair in Substance Use, Addictions, and Health Services with the Research Centre for Addictions Research of British Columbia (CARBC) and an Assistant Professor in Public Health and Social Policy at the University of Victoria since July 2015; and NAA member Luella E. Nelson comprised the panel addressing the subject.

## What is the Problem?

Conventional wisdom is that many workplace injuries are due to performance impairment and can be reduced by drug testing, which will identify substance abuse. Once employees with substance abuse are identified, they are either then subject to mandatory treatment or are eventually terminated for violation of health and safety rules relating to alcohol and drug abuse/use. The panel of experts recognized that substance abuse can result in workplace injuries, but maintained that there is no credible evidence to suggest that employees' substance use is a major and consistent cause of workplace injuries and accidents. Focusing on impairment due to substance abuse and the resultant treatment is too narrow and often aimed at the wrong problems. The focus should be on the factors that more likely than not caused the injury or accident rather than just a substance use issue. Other factors such as fatigue, prescription medication, or effects of stresses of daily life could have been the cause of the injury or accident instead of the positive test for suspected substance abuse.

Is the assumption valid that an employee testing positive for the presence of a drug in his/her system is impaired and could cause an injury or accident in the workplace? Consider the following scenario. If a parent had a choice of one of the following three bus drivers to drive their young child to school, which of the following drivers would she choose:

- A driver who smoked marijuana the night before to relax, had a good night's sleep and was ready and alert to start work in the morning;
- A driver who was up all night with a sick child; or
- A driver who was withdrawing from amphetamine use but continued to work despite impairment.

Most parents would choose the first driver to drive their child. Yet, under current drug testing used by employers, the first driver would be removed from the workplace.

The standard approach to someone with a detected substance use in the workplace is to (1) remove the individual from the workplace and send the individual out for a medical evaluation; (2) require abstinence; (3) require attendance at mutual support group meetings (12-step); (4) continue abstinence on an ongoing basis; and (5) require ongoing random drug testing. The problem with this approach is that the performance impairment observed at the workplace may not have been the result of the substance abuse; the treatment often chosen by the employer is almost always a homogenous approach to a problem, when not all individuals are alike; and this negative approach often does not solve a substance abuse or workplace performance issue.

There is a difference between substance use and a substance-use disorder. Substance use is widespread. In Canada (and it is suggested the numbers are similar in the U.S.), 80% of the population consumes alcohol; 10% consume amounts that are not good for their health, but do not experience any problems with the use; 10% experience substance-related harm (e.g. citations for driving under the influence, workplace issues, etc.); and, in this last 10% category, 4% experience a substance-use disorder. Substance-use disorder is manifested by continuous use of a substance despite harm to the body, reprioritizing life around the substance use, and an occupation of time in finding, using, and recovering from the use of the substance. Although most people who use alcohol or drugs do not have a substance-use disorder, the standard approach of mandatory treatment is used. This approach may help individuals with substance-use disorders, but it is questionable as a tool to use with the normal substance-use individual.

## Ways to approach accidents/injuries due to performance impairment

It should not be concluded that someone testing positive to a drug test was involved in a workplace accident or injury due to the presence of the drug in their system or that the presence of a drug in an employee's system will result in a workplace accident or injury. Use by employers of this Standard Approach to dealing with accidents and injuries should be reexamined. Other methods should be considered.

Management should implement a Safety Management System, or variations of such a system, which is evidence based and data driven. A Safety Management System deploys safety risk management components. The employer should identify all safety hazards in the workplace (physical, environmental, work processes, performance impairment), prioritize the potential risks associated with each hazard, and implement mit-

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## PERFORMANCE IMPAIRMENT – ASSAULTING OUR ASSUMPTIONS (Continued from Page 26)



Performance Impairment panel: Sylvia Stratek, NAA, Dr. Karen Urbanoski, Jonathan Chapnick, Luella Nelson, NAA

igation methods. By doing this, management will not only more effectively prevent safety risks but will instead direct focus to the problem causing the accident or injury in a rational way rather than assuming it was a result of performance impairment due to drug use.

To provide an example of how a Safety Management System would help prevent accidents assumed to be a result of an employee's substance abuse, the panel analyzed the case of *Stewart v. Elk Valley Coal Corp.* (2017 SCC 30). While this landmark decision by the Supreme Court of Canada reinforced the right of employers to take proactive risk mitigation and management measures through alcohol and drug policies to ensure workplace safety and denied Stewart's claim that he was terminated for his addiction, which constituted discrimination, it was the underlying facts of the case the panel examined. The grievant was a loader operator at the mine. He had a history of performance deficits and performance impairment on the job and was involved in numerous incidences of falling asleep on the job and accidents over several years. In 2005, Mr. Stewart returned from a 4-day weekend to work 12-hour shifts starting at 6:30 A.M. After 8 hours on the job the first day, he was required to attend a two-hour meeting (lecture style) from 3-5. Mr. Stewart then returned to his 260-ton loader to unload coal from a 170-ton truck with multiple trucks in close proximity waiting to be unloaded. There were no supervisors at the site at the time. In unloading one of the trucks, he struck and broke a mirror on the truck, which was observed by a supervisor just arriving at the scene. The supervisor ordered a urine test; Mr. Stewart was found to have used cocaine; and he was terminated. He admitted using cocaine over the 4-day weekend.

Mr. Stewart filed an action claiming that he was terminated for an addiction, which was a discriminatory act. The Court

denied the claim and held that employers had the right to terminate employees if there were alcohol and drug policies to ensure workplace safety, which in this case involved a deterrence policy and a substance abuse treatment policy. The deterrence policy was the notice given to employees that they would be terminated for substance abuse related accidents (if tested positive for a drug). The substance abuse treatment policy was the self-reporting of a substance problem and participation in a substance abuse program sponsored by the employer. While the Court did not find Mr. Stewart's substance use caused the accident, it did not matter, since he violated the employer policies.

Panel members noted that the threat of termination under the drug and alcohol policy did not prevent Mr. Stewart from using cocaine, the offer of treatment for self-reporting an addiction did not act to prevent Mr. Stewart from using cocaine, and his use of cocaine was found not the cause of the accident. It was more likely than not that the real contributing factors were that he was tired from the long work day after a long weekend, the long meeting made him further drowsy, he had not had any snack or beverage after leaving the meeting, the close spacing of the mega-trucks provided too little clearance, and there was no supervision.

Had the coal company had a Safety Management System in place, the accident probably would not have occurred. This case exemplifies that the advocacy of drug testing and deterrence as a workplace safety strategy is highly questionable. These strategies do not prevent accidents but make employees (and economically the employer) pay for them. Under a Safety Management System, management would discourage long meetings at the end of a normal shift, rethink asking employees to perform critical tasks after long work hours, consider the congestion of multiple large pieces of equipment under these circumstances, and make sure an employee with prior performance impairment issues had supervision when fatigued and required to perform a critical task at the end of a shift. Employees with prior performance deficits should be required to take alertness tests. A Safety Management System would put in place better mitigation factors than drug testing to prevent accidents.

Random drug testing is generally costly to the employer and generally does not test for performance impairment. There are many other effective ways to address safety in the workplace, such as mandating treatment where appropriate, using breathalyzers before a task is initiated when alcohol abuse is suspected, and implementing tests for alertness from time to time with "alertness meters." There is evidence that supervisor interaction is better than testing. As an example, the supervisor should ask if the employee is tired, why, and perhaps prevent him or her from using equipment under those circumstances.

With the prospects of more employees arriving at work having used medical or recreational marijuana, more focus on Safety Management Systems and less focus on the use of drug testing and deterrence as a workplace safety strategy may be the best solution to preventing accidents and injuries in the workplace. 🛠️

### What's in it for Arbitrators?

## A Source of Potential Appointments for Independent Arbitrators in Canada

By Gordon F. Luborsky

Canadian member of the NAA and former Chair of the Canada Industrial Relations Board (CIRB), Elizabeth MacPherson, moderated an informative discussion with the current Chair of the CIRB, Ms. Ginette Brazeau, and the Chair of the Alberta Labour Relations Board (ALRB), Mr. William Johnston, about recent changes to labour legislation in their respective jurisdictions that may present opportunities for future appointments of qualified Canadian labour arbitrators to work with those tribunals.

### *The Canada Labour Code (Pending) Changes*

Ms. Brazeau, Chair of the CIRB since December 28, 2014, gave an overview of relevant provisions of Bill C-44, the *"Budget Implementation Act,"* which is federal omnibus legislation that, among other things, expands the authority of the CIRB that was adopted by the Canadian Parliament and received Royal Assent on June 22, 2017, but has yet to be proclaimed in force.

Presently, non-unionized employees within federal jurisdiction who have claims against employers for contravention of minimal employment standards, unjust dismissal prohibitions, and health and safety concerns under the *Canada Labour Code* (CLC) must apply to the Minister of Labour for the appointment of an independent Referee (in the case of a wage recovery dispute), adjudicator (in unjust dismissal cases), or an occupational health and safety officer, who have the power to determine whether the CLC was violated and may order appropriate relief. When Bill C-44 is declared in force (anticipated for June 2019), it will mark the introduction of a new "Part IV" to the existing three other parts of the CLC that will administratively move the supervision of all three of those enforcement mechanisms under the direction of the CIRB.

The amendments to the CLC will give the CIRB greater authority and, Ms. Brazeau estimated, a considerable increase in its workload. As a result, the CIRB will be empowered to appoint external adjudicators to rule on any matter



Ginette Brazeau, William Johnston, Elizabeth MacPherson, NAA

under Part II (Occupational Health and Safety) and Part III (Standard Hours, Wages, Vacations, and Holidays) of the CLC, along with jurisdiction to adjudicate complaints of unjust dismissal. It will also bring into effect, under Part IV of the CLC, a new penalty system including fines up to \$250,000 for non-compliance and increased powers to Occupational Health and Safety Inspectors to sanction employers for retaliating against non-unionized employees invoking the protections of the CLC. (Generally, unionized employees will be expected to utilize the dispute resolution mechanisms under their collective agreements, where the current procedures for the appointment of an arbitrator by the Federal Minister of Labour will continue in effect.)

With the changes to the CLC, Ms. Brazeau stated that a new list of outside adjudicators spanning the country would be established under the direction of the Chair of the CIRB with the input of the labour relations community. As Ms. Brazeau explained, "If we want a list with credible adjudicators we need to know that it is acceptable to the (labour relations) community." Consequently, the CIRB will be seeking input from what was called a "stakeholder committee" to help establish that list over the upcoming several months

### *Changes to the Alberta Labour Relations Landscape*

Mr. Johnston, Chair of the Alberta Labour Relations Board since November 1, 2016, reviewed significant changes to

labour legislation under that province's new NDP ("social-democratic") government, which had not been updated for decades. These include enhancements to Alberta's *Labour Relations Code* that were passed in the fall of 2017 as part of Bill 17, referred to as *"the Fair and Family-Friendly Workplaces Act,"* along with amendments to the province's occupational health and safety legislation to provide additional protections and a new "whistle-blower" enactment prohibiting reprisals by employers for an employee's disclosure of internal information in the public interest.

Changes to Alberta's *Labour Relations Code* followed many of the recommendations of a former Chair of the ALRB and NAA member, Andrew Sims, that included, among other things, introduction of "first contract arbitration" to end an impasse between an employer and a newly-certified union; a new process granting authority to the ALRB to refer disputes where there have been egregious unfair labour practices to binding arbitration; a new review and approval process for complaints that a union has not fairly represented employees prior to taking such complaints to the ALRB for adjudication; the ability of the ALRB to defer a case where some other remedy, or a more appropriate forum, may be available to deal with a dispute (such as human rights tribunals or arbitration under a collective agreement); and new authority for the ALRB to review arbitration awards (applying the criteria currently adopted by

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# The Mythology of Mandatory Arbitration in Employment Relations

By Richard D. Fincher

This program focused on exploring three key myths concerning employment arbitration in the United States. Hosted by the very able and energetic Professor David Lipsky of Cornell University, the presentation included ample empirical data, an excellent PowerPoint presentation, and an engaged audience. The moderator was Fredric Dichter, who is also the NAA liaison to LERA. Professor Lipsky was the former Dean of the ILR School at Cornell, a former National President of LERA, and conducted extensive research of the NAA membership in 2000.

The first discussion concerned the myth that **“employment arbitration has displaced the civil justice system.”** Professor Lipsky contends this claim is not accurate, as revealed by substantial empirical data. For example, the caseload of employment litigation in federal court is still robust. In addition, very few arbitration cases actually go to an award. In 2016, about 1000 arbitration cases (based on AAA/JAMS data) went to an award, out of 10,000 claims that year. A similar view is that employment arbitration suppresses EEO claims; but the data is unclear, other than to admit that a plaintiff attorney is less likely to accept a claim in arbitration due to the lack of a jury trial, with its lottery potential. The speaker also observed there is some recent backsliding (generally reducing the scope of claims) by employers in withdrawing the terms of mandatory arbitration for employees, or carving out certain claims from arbitration, such as sexual harassment. In summary, Professor Lipsky contends our civil justice sys-



David B. Lipsky and Fred Dichter, NAA

tem (the public court system) may be flawed, but is still very much alive and well.

The next discussion concerned the myth that **“employment arbitration provides a level playing field.”** Professor Lipsky contends there is not consistently a level playing field, due to systemic reasons (mainly unfair policy design by rogue employers), but not because of arbitrator bias. He specifically referred to cases that are not administered by AAA, JAMS, or CPR. He acknowledged that the repeat player theory is very controversial (claiming employers receive better treatment), but may not be accurate in the majority of cases in which workers are represented by plaintiff law firms who handle dozens of cases per year. He referenced an arbitrator who opines that there may be a “reuser tilt” by arbitrators in some cases. He mentioned that Professor Colvin of Cornell University has determined that 54% of all non-union employees are now employed under mandatory arbitration, and 40% of the employers have embraced mandatory arbitration since 2007. In summary, Pro-

fessor Lipsky contends the reality of a few rogue employers who do not use AAA/JAMS/CPR can impair a level playing field.

The third discussion concerned the myth that **“there are only two choices in public policy concerning employment arbitration: accept it or ban it.”** Professor Lipsky contends there is really a third way: to regulate employment arbitration. He commended the work of the NAA from years ago in crafting the due process protocol, which served as the foundation of building a level playing field. He discussed attempts in Congress to ban mandatory employment arbitration, led by former Congressman Al Franken. One idea to regulate employment arbitration is to amend the FAA of 1925, which is routinely used by the U.S. Supreme Court as the basis for its current support of arbitration. Another idea would be to amend the due process protocol, which has not been updated for many years. A few researchers in ADR have written articles concerning the best means to regulate employment arbitration. In summary, Professor Lipsky contends that regulating employment arbitration (mending it) by legislation, rather than outright banning it, is the better approach.

This session was well produced and delivered by Professor Lipsky, a prolific investigator, researcher, and author in ADR. The audience was exceptionally active and chimed in with their opinions on each so-called myth. The allotted time was over before we knew it. We should invite Professor Lipsky back to explore more possible myths in employment arbitration. And we thank LERA. 🚧

## CANADIAN FEDERAL AND ALBERTA PROVINCIAL LEGISLATIVE CHANGES *(Continued from Page 28)*

the Supreme Court of Canada) before a challenge to an arbitrator’s decision can be taken to the civil courts in an effort to further insulate arbitration decisions from judicial interference. The new legislation will also give the ALRB the ability to “case manage” disputes, with wide discretion to consolidate complaints to be heard together, as well as other procedural innovations to facilitate the streamlining of litigation before the Board.

With its extended jurisdiction and procedures now in place, Mr. Johnston reported that “unfair labour practice” applications had already increased some

43% in the past fiscal year, with the ALRB making more use of mediation and the appointment of outside arbitrators to cover the demands on its resources, giving many examples of the innovative use of outside adjudicators to help facilitate the ALRB’s new mandate.

### *What does this mean for Independent Arbitrators?*

With the expansion in jurisdiction but limited full-time resources and financial challenges faced by labour relations boards throughout Canada, Ms. Brazeau and Mr. Johnston foresaw a growing need

for independent arbitrators to satisfy the statutory enhancement of duties and responsibilities of employers and workers brought about by the recent legislative changes. While this will take time to unfold and will be subject to regulatory enactments in different regions of the country, there was general consensus that opportunities for arbitrators seeking such assignments with their home labour boards would likely increase as a result. Whether the NAA can be of assistance in the process of selecting arbitrators for that purpose may be a subject for future discussions with all interested stakeholders. 🚧

# Mediation of High Performance Sports Disputes

By Jerry B. Sellman

Conflicts in high performance sports are typically tense and emotionally charged experiences for the athletes, coaches, and sports organizations involved. In Canada, these disputes are resolved through either arbitration or mediation, with increased focus on mediation. This presentation focused on the practice and benefits of mediating these disputes. Such disputes raise intriguing challenges for the mediators handling them. These disputes typically involve multiple parties who often have intensely competitive personalities negotiating a volatile mix of high-stakes win/lose issues. Mediators typically confront numerous process challenges and must operate within the rigid policy parameters of the various governing organizations involved. High performance sports, or elite sports, are sports at the highest level of competition. In sports administration, the focus of high performance sports is on winning prestigious competitions, such as those in the Olympics, and not on professional sports.

Moderated by NAA member Alan A. Symonette and joined by several of our Canadian members, the panel provided insight into how mediation is used in High Performance Sports Disputes in Canada. The panel included Paul Denis Godin, Alexandre Maltas, and Carol Roberts. Paul Denis Godin, owner and principal in Katalyst Resolutions, is a lawyer and mediator, with

a specialization in sport mediation. He is a roster mediator for a variety of international organizations, including the international Court of Arbitration for Sport (CAS), the Sport Dispute Resolution Centre of Canada (SDRCC), the Ontario Mandatory Mediation Program, the Trinidad and Tobago Mediation Board, the Civil Roster of Mediate BC in British Columbia, and is designated a Chartered Mediator by the ADR Institute of Canada.

Alexandre Maltas is a lawyer with Whitelaw Twining. He practices primarily in the areas of insurance law, construction law, commercial and employment litigation, and sports law. He regularly acts for the Canadian Centre for Ethics in Sport Anti-Doping hearings and for other individuals and organizations in sports related matters. He has appeared before the SDRCC and CAS in sports disputes and routinely provides advice to individuals and organizations on sport governance, disciplinary matters, risk management, and related matters.

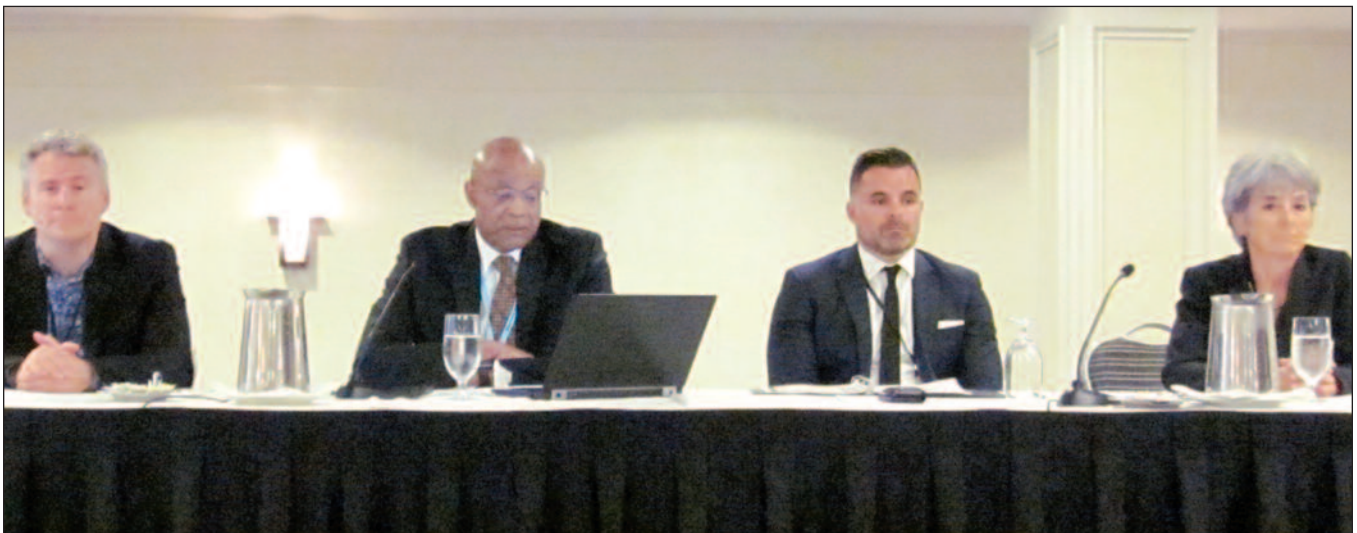
Carol Roberts is a lawyer with extensive experience as an arbitrator and mediator in a number of areas including employment, human rights, workers' compensation, property assessment, and sports. She is an arbitrator and mediator with the SDRCC and CAS, an adjudicator with the Indian Residential Schools Adjudication Secretariat, a member of the British Columbia Employment Standards Tribunal, and a grievance arbitrator, unjust dismissal adjudicator, and wage

recovery referee under the Canada Labour Code. She is also a Judicial justice with the Provincial Court of British Columbia. She was a competitive figure skater and, for over 20 years, was a figure skating judge. Ms. Roberts is a member of the Ethics Commission for the International Floorball Federation and was a member of the CAS ad hoc panel for the 2016 Olympics in Rio and the 2018 Olympics in PyeongChang.

High performance sports disputes in Canada are administered through the SDRCC, which is funded by the Government and must be used by all high performance sports to resolve disputes. The SDRCC has made mediation mandatory for almost all cases, with an overall settlement rate over a twelve-year period of 46%, with rates as high as 94% for mediations requested by the parties. Mediation has generally been used only sparingly elsewhere in the world for resolving high performance sports disputes. The types of disputes that are handled by the SDRCC include: (1) contractual; (2) disciplinary; (3) anti-doping; (4) funding complaints about the allocation of government funding and services to sports federations or athletes; (5) team selection; and (6) rules and governance.

Anti-doping cases are the highest percentage of cases handled, followed by team selection. Anti-doping disputes arise from violations of applica-

*(Continued on Next Page)*



Paul Denis Godin, Alan Symonette, NAA, Alexandre Maltas, Carol Roberts



## MEDIATION OF HIGH PERFORMANCE SPORTS DISPUTES *(Continued from Page 30)*

ble anti-doping regulations by athletes, coaches, medical professionals, sport officials, or related individuals. Most countries have a national body responsible for administering the World Anti-Doping Agency's Code or their national equivalents. In Canada, the Canadian Centre for Ethics in Sport (CCES) administers the Canadian Anti-Doping Program (CADP), which is closely modeled on the World Anti-Doping Code. Team selection disputes involve one or more athletes claiming they were wrongly excluded from a given national team.

The resolution of sports disputes in Canada initially was through arbitration, but three types of mediation became prevalent over the years: voluntary mediation, med-arb, and resolution facilitation. If a demand for arbitration was made, the parties could choose initially to have their dispute submitted to voluntary mediation or a voluntary med-arb. In 2006, the resolution facilitation format was created, which was a mandatory three hour mediation process for any person or entity seeking to resolve a dispute at the SDRCC.

There are a number of dynamics at play in sports mediation with which the mediator will be confronted. Some recognized common threads are: (1) a desire to avoid harm (athletes do not want to harm a fellow athlete or the sports organization); (2) shared goals, such as avoiding harm to the federation; (3) the concept of a sports family; (4) high personal stakes (failure to be selected on a team may be the end of an Olympic career); (5) timing and urgency (if not resolved within hours of submission, parties often must submit their dispute to arbitration the same day because team selection is being completed the same day); (6) win/lose scenarios (one athlete must be chosen over the other with no compromise); (7) geographic spread (multiple parties are spread in cities throughout the country); (8) small world (everyone knows everyone); and (9) potentially public issues (exposure of the dispute to the news media).

Additionally, there are a number of common challenges in mediating

sports disputes, including timing constraints (must be handled within hours of submission), participation of highly competitive individuals, the high stakes of a win-lose situation for the athlete, the uncontrollable external policies (e.g., international bodies will limit number of athletes that can participate in the competition), coordinating the presence of individuals spread throughout the country or throughout the world on a short notice telecom, dealing with unrepresented minors, following non-negotiable disciplinary rules, lack of adequate representation or financial resources of opposing parties, and fights over jurisdiction.

There are a number of best practices that are recommended in sports mediation.

- Design and utilize pre-mediation processes so the parties come prepared. Inform parties of required evidence, e.g., make sure parties know scientific evidence is needed in an anti-doping case
- Understand the issues (legal, practical, technical)
- Develop trust and respect among the parties
- Conduct frank discussion regarding the outcome of a settlement or an arbitration
- Suggest solutions for the parties
- Use brainstorming
- Use both traditional (caucus meetings) and transformative (keep parties together) mediation depending on what works for the parties before you


The panelists were in favor of mandatory mediation in these sports' disputes. It often brings the parties together in otherwise unexpected ways and, even if the mediation itself is unsuccessful, there are often some resolutions that streamline the arbitration process.

Of the various disputes handled through the SDRCC, not only do the anti-doping cases represent the highest case volume, they also have some unique challenges since they occur in a highly rules-based environment.

Specific inflexible international rules govern the handling of these cases, and there is no discretion in resolving sanctions. As such, there are always two issues that are examined in these cases: was there a violation and what are the sanctions. Because of these challenges, one would think that mediation would not be a desired or effective forum for arriving at a resolution, but in practice most of the anti-doping cases settle. The mandatory three-hour mediation sessions are effective in identifying the rules, narrowing the issues, and discussing the type of evidence that would be needed to reduce a probable sanction.

A benefit of resolution facilitation in anti-doping cases is that the athlete, who wants to be heard, gets that chance to explain his or her position; gets an explanation of his or her rights, obligations, and options; and receives help in understanding that the sooner he or she accepts the sanction, the sooner he or she will be able to get back into competition.

Does mediation work in these high performance sports disputes? Statistics show from recent studies that 93% of the voluntary mediations settle, 55% of the med-arb mediations settle, and 28% of the mandatory resolution facilitation mediations settle. While it would appear that the mandatory settlement rate is somewhat low, prior to its initiation, only 2% of the non-mediated cases settled. Apparently, it does work.

With the success of mediation in high performance sport disputes, the next question is can mediation work in professional sports disputes? It could, but it is unlikely. The parties in professional sports disputes are usually well prepared, and the issues are fairly narrow. There is probably little input a mediator could offer to assist the parties in narrowing the issues or bringing the parties closer to a settlement. Additionally, the commissioner of each sport probably does not want to give up power, which is a roadblock. Nonetheless, lessons can be learned from our Canadian members in regard to resolving high performance sports disputes in the U.S. more effectively and efficiently. 

# NAA PRESIDENT KATHLEEN MILLER

Presidential Address

Vancouver

May 25, 2018

*Reported by James Cooper*

In a repeat performance of 2016, President Kathleen Miller was introduced by her somewhat well-known arbitrator husband Shyam Das. Besides all the family photos on a PowerPoint presentation, Shyam was not shy about Kathy's history as a kid, including that as a young girl she had no hesitation about punching a boy with whom she had a slight disagreement.

Kathy paid tribute to all those who inspired her to join the arbitration profession, paying particular tribute to the War Labor Board cadre and George Nicolau who told her that the NAA's founding arbitrators did not consider themselves "giants" in the field, but simply worker bees trying to figure out what arbitrators should be expected to do. In this the NAA has aspired to be the gold standard in our Code of Ethics, something she has been proud to espouse before and during her presidency and will continue to do for the balance of her career.

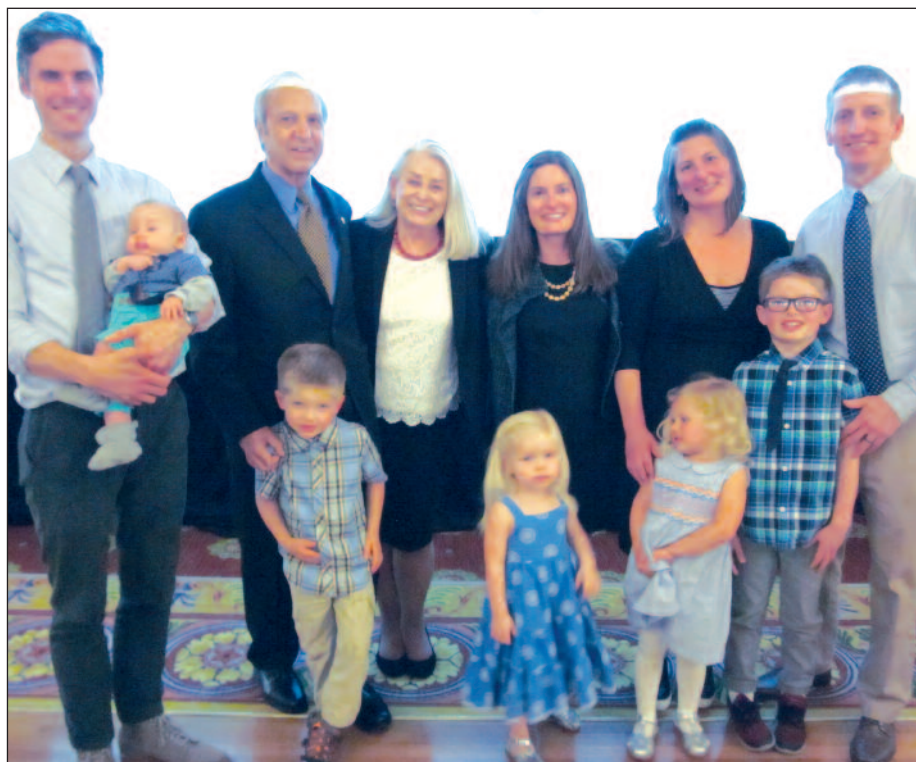
Kathy did not hesitate to suggest that given the current legal, political, and cultural challenges facing our nation, things will get worse before they get better. Just listing the outrages of *Janus*, then pending, but accurately predicted, and *Epic Systems*, recently decided, are simply the tip of the iceberg. There are real cultural challenges to worker empowerment, including the recent addition of Michigan and Wisconsin as Right to Work states; the increasing use of zero tolerance versus just cause as a standard of behavior; the re-definition of political correctness as elitism; not to mention

our leader stating that facts don't count if he labels them as "fake." These issues present new and unprecedented challenges to our work as labor arbitrators, trying to bring reason and fairness to the workplace.

Despite these steep obstacles of ignorance, Kathy, as a former English teacher, did something that no other NAA President has ever done in their presidential address, she quoted William Butler Yeats's *Sailing to Byzantium*:

An aged man is but a paltry thing,  
A tattered coat upon a stick, unless  
Soul clap it hands and sing, and louder sing  
For every tatter in its mortal dress,  
Nor is there singing school but studying  
Monuments of its own magnificence;  
And therefore I have sailed the seas and come  
To the holy city of Byzantium.

Kathy's Byzantium has been the work-a-day administration of fair and honest judgment in the administration of collective agreements. No matter how "tatter in its mortal dress," she joins with her brother and sister arbitrators in studying the "monuments of its own magnificence," that being what is fair and right without regard to the political or cultural winds. Her service as president of the NAA has done nothing but inspire her to believe that we will find the holy city of Byzantium. 🏛️





# Complex Procedural Issues in the Arbitration of Mass Employment Claims

By James Cooper and Phil LaPorte

Keep organized and stay laser focused. This is what I learned from the trio of NAA employment arbitrators including Richard Fincher, moderator, and participants Jacquelin Drucker and Thomas Gibbons. From Patrick Tatum of the AAA, I learned that they collect a boatload of fees for these cases. For employment arbitrators, these cases include a torrential downpour of wage and hour claims filed either as a class action or a tsunami of individual claims, if the employer has obtained class action waivers and plaintiff attorneys represent many claimants. The examples discussed in this session involved eight individuals who filed EEO claims against the same employer, which in turn involved eight arbitrators jockeying for hearing dates and deciding the same motions. Needless to say the first to decide frequently becomes the lead horse in the race to the finish. Of course, this is on a sloppy track, so the horses change leads frequently.

The second case involved sixty sales agents with ten arbitrators administered by the AAA as wage and hour cases. Both the EEO and FLSA case arbitrators faced substantial scheduling issues (eventually sorted out) and then issued preclusion decisions as the results dribbled in from the various arbitrators. The panel could not emphasize enough the need to stay organized with filing deadlines for each step of the procedure. The best way of handling such a large volume of cases is for the parties to designate one arbitrator as the discovery arbitrator, so that all of the discovery requests can be handled consistently. The AAA keeps the cases sorted and applies the same discovery ruling in each of the other cases.



Patrick Tatum, Jacquelin Drucker, NAA, Richard Fincher, NAA, Thomas Gibbons, NAA

From the audience, Alvin Goldman suggested that, in cases where there have been consistent and reasonable findings of fact, arbitrators should be willing to accept those facts without further litigation and thereby limit the amount of “new” evidence required. Lise Gelernter suggested that arbitrators should follow the practices adopted by judges in cases of mass tort liability whereby once liability has been established in the underlying case, the only issue adjudicated is the damages. There has been much back and forth on these issues by arbitrators on the e-mail circuit; however, the discovery and decisional issues in these types of cases continue to raise problems and issues unforeseen in traditional labor-management arbitration. 📌

## Body Cameras – The Police Perspective

By Barry Goldman

Howell Lankford served as Moderator for this session. Will Aitchison of Labor Relations Information System in Portland and Daniel Swedlow of Summit Law Group in Seattle were the panelists.

The bottom line is that police officer body cameras raise at least as many questions as they answer. Now there is tangible evidence in what used to be he said/she said situations, but that can cut either way. The politics and public relations aspects of the situation are shifting. For example, while there is a general increase in the number of police departments using body cameras, jurisdictions with strong public disclosure requirements are discontinuing them — and even removing dash cams from squad cars — because of the burdens imposed by mandatory public disclosure.

The data are still preliminary, but the few studies that have been done appear to show a reduction in the use of lower levels of force early in an encounter by officers wearing cameras. But the data also show both an increase in the number of officers being assaulted and an increase



Will Aitchison, Howell Lankford, NAA, and Daniel Swedlow

in the frequency of the use of deadly force. So far there is only speculation about why this should be so.

There are issues everywhere: Is the introduction of body cameras a negotiable change in working conditions? Can command use body camera recordings to “trawl” officers to look for misconduct? Following an incident, should an officer be allowed to review the body cam recording before preparing a statement? What should the default condition be? Is the camera always on unless it is turned off;

always off unless it is turned on? When may an officer turn it off? When must she?

For arbitrators, the big question is how to evaluate body cam recordings. In doing that, it is important to remember that the camera does not see what the human eye sees. The camera does not follow the officer’s gaze. It doesn’t focus; it doesn’t pay attention to one thing rather than another; it doesn’t have the same sensitivity to light. And, of course, the actions of real people in real situations take place in real time. You cannot slow down real life and look at it frame by frame. There is a crucial distinction, as Howell pointed out, between reviewing a video to find out what happened and reviewing it to find out whether the officer’s conduct under the circumstances was “objectively reasonable.”

The most troubling, but not entirely unforeseeable, point the presenters made was that, “What we take from a body camera video is highly influenced by our pre-existing beliefs about police.” In other words, police body cameras, like so much else, are subject to Miles’ Law: Where you stand depends on where you sit. 📌

# DESIGNATING AGENCIES

*By William W. Lowe*

NAA Member Joshua Javits moderated the distinguished panel reporting on the latest trends and statistics from the American Arbitration Association (John English, AAA V.P., Labor/Employment and Elections Division); the Federal Mediation and Conciliation Service (Arthur Pearlstein, FMCS Director of Arbitration); and the National Mediation Board (Roland Watkins, Director of Arbitration Services).

**Roland Watkins** of the **National Mediation Board (NMB)** began the panel's report discussing the NMB's recent Board changes. Currently, Member Gerald W. Fauth III serves as the Board chairman; Kyle Fortson serves as Board Member as does Linda A. Puchala. Mary L. Johnson serves as General Counsel. The NMB functions to facilitate the flow of interstate commerce in the U.S. airline and railroad industries through handling union representation proceedings and mediation and arbitration of labor-management disputes. Mr. Watkins reported that a current reorganization within the NMB will eliminate the Chief of Staff and Assistant Chief of Staff positions and create a new Office of Fiscal Services and an Office of Information Services. He also reported that the current budget represents the largest budget in recent years allocated for arbitrations. However, there is still a large pending arbi-

tration caseload with a GAO audit addressing the rail arbitration backlog. Mr. Watkins closed by reminding attendees to respond to the NMB current email regarding serving on their panels in 2019 and to insure they are registered for the federal System for Award Management (SAM).

**John English** of the **American Arbitration Association (AAA)** discussed the overall cases filed within AAA in 2017. Of the 6424 cases filed, Detroit, New York, and New England had the heaviest concentration of cases. Also, the median per diem rate in 2017 was \$1500. Of the outliers, there were some 48 individual rates that were lower than \$1,000 and a couple that exceeded \$3,000. Mr. English also discussed a recent quality survey conducted by the AAA with the users of the arbitration service. It reflected a range of 1 through 5, with 5 representing the highest quality. AAA case managers were rated at 4.45 and arbitrators at 4.4. Mr. English also showed slides showing union membership reversing its downward trend in 2017 and maintaining a relatively steady 6.5% union membership in the private sector and 34.4% in the public sector. Within the total workforce, union density is at 10.7%. There were also 262,000 new union members in 2017, with younger members showing the greatest union growth.

**Arthur Pearlstein** of the **Federal Mediation and Conciliation Service (FMCS)** spoke of President Trump's nomination of Michael Stoker to head up the FMCS although the nomination has not yet been confirmed by the Senate. Mr. Pearlstein's presentation centered on the new online case management system recently placed into operation to facilitate the arbitration process and giving arbitrators more independence in creating and modifying their resumes and availability to parties. With respect to geographical selection, parties can choose between regional, sub-regional (now a 250 mile radius) and metropolitan (now a choice between a 60 or 125 mile radius of the dispute site) by simply checking a block on the form. Arbitrators can restrict their availability by geography and opt out of selected states or regions. They can also limit their cases to within any specified radius of one or two zip codes of the arbitrator's choosing. Arbitrators can now complete the R-19 form online as well. The system also gives arbitrators full control of their digital biographies as well as various exclusions and inclusions in companies, industries and locations acceptable or unacceptable to the arbitrator. Speaking personally, it is a vast improvement over the former system and a real blessing to arbitrators who can make changes at a moment's notice. 🖱️



John English, Arthur Pearlstein, Roland Watkins, Joshua Javits, NAA



# THE OLYMPIC DOPING PROBE AND DISCIPLINE IN ELITE INTERNATIONAL SPORT

*Reported by Bill McKee*

To this Texas-based arbitrator, the saga presented by colleague Richard McLaren is reminiscent of a famous phrase from Texana lore, “One riot, one Ranger.” In this instance, it took McLaren and his investigative team only 57 days to uncover evidence that would ultimately bring to justice the entire Russian Ministry of Sport and shake the foundations of the Kremlin. James Bond, the CIA, and every presidential administration since World War II should be jealous.

Academy member Richard McLaren gave us a detailed, inside look into the International Court of Arbitration for Sport (CAS) and his unique experience as the “Independent Person” assigned by the International Olympic Committee (IOC) to investigate allegations of an institutional doping conspiracy and cover-up within the Russian Ministry of Sport and its infrastructure. McLaren is a long-standing arbitrator with the CAS.

The CAS was formed by the IOC in 1983 to address increasing numbers of international sports disputes through arbitration. Modeled on the international arbitration process, its foundation is the law of contracts. All disputes connected to the Olympic Games must be submitted to the CAS for resolution. In addition, most sports-related disputes arising in recognized Olympic International Federations and National Olympic Committees are within the jurisdiction of the CAS.

CAS has its seat of arbitration in Lausanne, Switzerland. There, and in New York City and Sydney, Australia, it hears sports-related and disciplinary disputes. Temporary courts also are established in current Olympic host cities, where ad hoc appeals are heard during the Olympic Games. Speed is critical at the Games, with hearings held overnight and decisions due within 24 hours of appeals.



Richard McLaren, NAA, and  
David Williamson, NAA

In compliance with the 2009 World Anti-Doping Code, all signatories to the Code recognize the jurisdiction of CAS for violations of anti-doping rules. Starting in 2016, an anti-doping division of CAS judges began hearing doping cases at the Olympic Games.

Hints of widespread Russian doping problems began to be published by the mainstream media in 2014, first through a German documentary film that focused on Track and Field corruption. As the designated Independent Person, McLaren was commissioned by the World Anti-Doping Agency in May 2016 to investigate the allegations of Grigory Rodchenko, former director of Russia’s anti-doping agency, about significant state-sponsored doping in Russia. Similar allegations were reported by the *New York Times*. Fifty-seven days later in July 2016, McLaren presented Part 1 of his report, which found systematic state-sponsored subversion of the drug testing processes by the Russian government during and subsequent to the 2014 Winter Olympics in Sochi, Russia. In December 2016,

he published Part 2 of the report on Olympics-related doping by the Russians.

McLaren’s reports revealed a culture of cheating, corruption, bribery, and doping within Russian Olympic sports that went back in time to the London 2012 Games. He and his investigative team identified a manipulated testing process that involved urine sample swapping by Russian athletes and officials. This frequently was accomplished by Russian lab technicians who switched clean and dirty urine samples through a hole in the wall of a testing room to and from an adjoining room. To avoid detection, the lab personnel removed the seal on the sample test tube, poured out the dirty sample, deposited a clean solution, and replaced the test tube’s cap and seal. Scientists under McLaren’s supervision detected microscopic scratches on the caps, which verified that tampering had taken place.

McLaren’s report estimated that more than 1,000 Russian athletes may have benefited from the scheme. As a result, 43 Russian athletes were found to have committed anti-doping rule violations during the 2014 Winter Games. All 43 were subsequently banned for life from Olympic competition, though several later had their suspensions reduced. Most importantly, the official Russian team was suspended from participation in the 2018 Winter Olympics, although certain “clean” athletes were allowed to participate independently.

McLaren concluded that the anti-doping investigation was good for future generations of athletes who should be able to compete outside the specter of performance-enhancing drugs and the concomitant threats to their physical and emotional health.

One corruption of Olympic proportions, one Arbitrator. 🏊

# NEW MEMBERS WELCOMED IN VANCOUVER

## **WILLIAM E. HARTSFIELD**

*Dallas, TX*

Will Hartsfield has been a full-time arbitrator since 2010 and an adjunct professor at the University of North Texas since 2009 teaching Basic Arbitration and Dispute Resolution in the Workplace. A Texas A&M University and Harvard Law School graduate and a former Navy Judge Advocate General Officer, he began his ADR practice in 1989 as a commercial arbitrator and mediator. He has served as an ADR trainer for the American Arbitration Association, the Attorney-Mediators Institute, and other groups. He serves on the arbitration panels for the Federal Mediation and Conciliation Service, the American Arbitration Association, and the National Mediation Board. Will currently serves as an arbitrator or hearing examiner for Lockheed Martin and the Office & Professional Employees International Union, Local 277; the City of Houston and the Houston Police Officers' Union; and the City of Fort Worth and the Fort Worth Police Officers' Association. He was a Certified Independent Hearing Examiner for the Texas Education Agency from 2009 to 2015 and a Hearing Officer for the DART Authority Trial Board from 2008 to 2010. He is the author of *Investigating Employee Conduct* published by Thomson Reuters.



## **JARED NOAH KASHER**

*Bryn Mawr, PA*

Jared Kasher, the son of a National Academy labor arbitrator, spent much of his youth listening to, and sometimes participating in, discussions regarding labor disputes. Prior to graduating college, where he studied labor relations, Jared would frequently attend hearings with his father. This early exposure to labor-management workplace disputes was fundamental in his growth and desire to assist with the peaceful and efficient resolution of such conflicts. Jared continued to study labor relations in law school and began his practice as a labor arbitrator in 2008. Since starting his practice, Jared has been named to a number of permanent panels in the transportation, public safety, healthcare, and pharmaceutical industries. Jared also has frequently been selected as a neutral arbitrator for interest arbitrations in the Commonwealth of Pennsylvania. Over the past several years, Jared has been invited to sit on various panels with other labor arbitrators, many of whom are members of the Academy, to answer questions for municipal managers, various unions, and some private organizations. Jared lives in the suburbs of Philadelphia with his wife Jackie, son Dylan, daughter Kelsey, dog Sadie, and cat Wiggs.



## **JASBIR PARMAR**

*Oakville, OH*

Jasbir Parmar has been a full-time labour arbitrator since 2008. She is on the Ontario Minister of Labour's list of approved arbitrators, the Grievance Settlement Board, and the Ontario Police Arbitration Commission. In addition, Jasbir is named as arbitrator in several collective agreements in a variety of sectors. Jasbir is an active member of the Ontario Labour-Management Arbitrators' Association, and since 2015 has held the role of Secretary-Treasurer.



Prior to becoming an arbitrator, Jasbir practiced labour law for several years in British Columbia and Ontario. She was also a vice-chair of the Workplace Safety and Insurance Appeals Tribunal. Jasbir taught at Osgoode Hall Law School at York University from 2012-2014, and has served as coach of the school's team for the National Labour Competition since 2013. She has been a frequent guest speaker at other universities and at various conferences.

Jasbir has a Bachelor of Arts from the University of British Columbia (1991), and a Bachelor of Laws from the University of Windsor (1995). She lives near Toronto, Ontario.

## **PAUL D. ROOSE**

*Oakland, CA*

As a 29-year old letter carrier in Oakland, California in 1983, Paul was elected full-time president of his union local. He served four two-year terms as head of NALC Branch 1111, then went to work for Healthcare Workers Local 250 (SEIU). In 1998, Paul became a mediator for the California State Mediation and Conciliation Service (CSMCS) and head of the service in 2005. There, he mediated grievance and contract disputes for employers and unions in hundreds of public agencies.



In May 2012, he left his position as head of the CSMCS to launch a practice as a labor-management neutral, doing business as Golden Gate Dispute Resolution (GGDR). The mission of GGDR is to provide professional, neutral, and timely dispute resolution services to the labor-management community.

Paul joined the National Academy of Arbitrators in Vancouver. He is on the rosters of many agency and collective bargaining arbitration panels, including AAA, FMCS and CSMCS. He is the author of several articles about arbitration and mediation, including "Surviving Your First Labor Arbitration: Tips for the New Advocate," *American Arbitration Association Dispute Resolution Journal*, March 2015 (with Catherine Harris).

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## NEW MEMBERS WELCOMED *(Continued from Page 36)*

### CHRISTINE SCHMIDT

*Toronto, ON*

Christine Schmidt is an arbitrator and mediator practicing mainly in the province of Ontario. Christine is on the Ontario Ministry of Labour's approved list of grievance arbitrators. Her practice includes mediating and adjudicating both rights and interest disputes in both the private and public sectors. She is named as a roster arbitrator in a number of collective agreements.



Christine is a graduate of McGill University (B.A., summa cum laude, 1989), Dalhousie (LL.B., 1992), and the University of Toronto (B.Ed., 1998). After her call to the bar in 1994, she worked as Discipline Counsel, then Staff Lawyer, at the Law Society of Upper Canada. She then moved to another regulatory body - the College of Nurses - before becoming counsel at the Ontario Nurses' Association.

Christine became an arbitrator and mediator in 2008. Shortly thereafter she was appointed as a Vice-Chair at the Ontario Labour Relations Board where she served until 2015. Christine resides in Toronto with her husband, Mark, and any one or more of their four children at any given time.

### PATRICK R. WESTERKAMP

*Matawan, NJ*

*(Site of the shark attack on which "Jaws" was based)*

In the 1970s, as a young AAA staff member, Pat frequently worked with Academy members. Interacting with these decent and perceptive men and women started his gravitation toward neutral practice. NAA membership became his ultimate career objective.

Earning a Master's Degree in Industrial Relations followed by a law degree filled the next several years. Pat next practiced labor and employment law. In 2005, he left advocacy and established a full time practice restricted to serving as an arbitrator and mediator in all areas of labor and employment dispute resolution. His panel memberships now include "the usual suspects."



His years as an advocate delayed Pat from following his heart. This said, he values the honor of NAA Membership. 🦋

## Vancouver 2018 New Member Orientation

*By James Cooper*

Six new members celebrated their admittance in the wonderful City of Vancouver. They represented a true cross-section of the profession and demonstrated once again that with adequate recruitment and publication of the NAA brand it is possible to get Canadians to join an American organization. No twittering or tariffs required. Committee Chair Jules Bloch welcomed: Jared Noah Kasher (be careful to insert the middle name and spell the last name correctly!) joins us following the footsteps of his illustrious arbitrator father, Richard of the City of Brotherly Love. A pair of Torontonians: Jasbir Parmar and Christine Adele Schmidt, both from the Ontario Labor Board, bring a wealth of Canadian knowledge to our table, and as is always the case with our Canadian brothers and sisters, more is better. From the great state of New Jersey, Patrick R. Westercamp, a lawyer who did yeoman service at the AAA office in Chicago, many, many moons ago. From that Great Border state of Texas, Will Hartsfield, a former Merchant Marine with the Masters, Mates and Pilots Union, who traded in shipping out for yapping in as a lawyer and a commercial arbitrator. At the urging of our own Jack Clarke, he switched to labor and took off on Southwest Airlines. Paul Roose, former Director of California Mediation Services, joins us from Oakland. He made me laugh when he told me NAA represented the Gods of the Labor World. Sorry to say, only we mortals exist, but who knows for how long.

The session benefited from the workers and do-ers who came by to say hello and urge them to get involved, including President Kathy Miller, and incumbent President Ed Krinsky, as well as Margie Brogan soliciting their help on the NAA outreach program, Joshua Javits for dealing with AAA, FMCS and NMB, Kathy Eisenmenger as Coordinator of Regional Activities, Dick Fincher for dual roles as a member of the Employment Arbitration Committee and as 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. Sara Adler of the Legal Representation Committee told them to throw away everything after they issue the award and call her if someone nasty calls them.

Intermittently, Jules raised various substantive issues which were discussed as time permitted. Sadly, none of the twenty-five year members who have been invited to these sessions for the past few years appeared. My thinking is we should broaden the invitation to include all members admitted more than 25 years ago. This would open the session to a lot more discussion and introductions, as important a role as anything for the organization. 🦋

# FIRESIDE CHAT

James C. Oldham

Interviewed by Roberta L. Golick



*By Dan Zeiser*

Bobbie Golick met Jim Oldham in 1985 at an Academy meeting dinner. She vaguely recognized him. After staring at Jim throughout dinner, she finally asked "Do you have a brother?" The answer? "I have two brothers." "Is one of them a doctor?" "Both are doctors." Further cross-examination elicited that one of the brothers, John, is Jim's twin and a psychiatrist. It seems Bobbie had a summer job during her college years at a New York psychiatric hospital where John worked and developed something of a crush on him, which she quickly transferred to Jim. So her first question was "How is your brother?" Answer: "Still married."

Jim Oldham was born in Muskogee, Oklahoma, yes, Merle Haggard's Muskogee, where they like living right and bein' free. Jim's paternal grandfather grew up in Kentucky where he became a doctor and later moved to Muskogee, Indian Territory, where Jim's father was born and reared. His

maternal grandfather was a farmer in Shawnee, Oklahoma, where his mother grew up. Family lore has it that grandmother Walsie drove a wagon and sold girdles to Indian women. Jim and his brothers spent weeks on the farm during summers. His grandfather was a dairy farmer. He also raised hogs, which he butchered and smoked. Jim recounted how his maternal grandmother would swing a chicken around by the head until it severed from the body. The boys would catch the still-running, headless chicken and grandmother would then pluck it and cook it for Sunday dinner.

Jim's parents met at Oklahoma Baptist University and fell in love. His father transferred to the University of Arkansas, quickly realizing it was his only hope of getting any work done. After they graduated, his parents married and settled in Oklahoma. Jim's father was a civil engineer and worked on building roads. Since asphalt contained asbestos, this eventually led to his early death at 58. Jim's mother became active in the Baptist Church and

an amateur poet. Her mother had been interested in the English language and would memorize poetry, which she would recite. According to Jim, his mother was the cultured side of the family and infused a love of language in him. Later in life, Jim took a book-binding class and literally put together a book of his mother's poetry.

Jim's father had a successful business career in the natural gas industry. The family lived in Carlsbad, N.M. for Jim's first 10 years, then 5 years in Dallas, then the family moved to the west Texas town of Lubbock, where Jim and John attended high school. Lubbock High School's two most famous alumni (after Jim, of course) are Buddy Holly and Mac Davis. At their 50th high school reunion, Jim and John were reacquainted with a classmate who was selling copies of her book, *What Ever Happened to Peggy Sue*. It turned out that she was Peggy Sue, the namesake of Holly's hit "Peggy Sue." She had been the girlfriend of one of The Crickets. Mac

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Davis's first hit was "Happiness is Seeing Lubbock, Texas in My Rearview Mirror." I believe Jim agrees.

When it came time for college, Jim and John applied only to Rice Institute, where their older brother had attended. They had also spent a summer at Rice in a program for promising math students and were confident they would be accepted. They were denied. Their father called the president of Rice, who said that a friend of his was president of Duke University, and maybe he could help. Jim's father said, "Call him!" The president of Rice complied, and the boys were admitted to Duke without applying! Growing up as a twin had its challenges. Jim and John refused to dress alike. As the elder by thirteen minutes, Jim claimed to be the boss. In fact, John, who eventually became a Freudian psychoanalyst, claims it was because Jim beat him up so often!

Coming from a family of doctors, Jim naturally took the exams for business and law school. He was ready to flip a coin to decide on a career when he was accepted to Stanford's law school and wound up in law. After law school, Jim clerked in Chicago, but decided he did not want to live there. He moved to Denver where he spent five years practicing law. He got into labor law and had a mentor who advised him to dictate his writing in almost final form. In fact, he once filed a brief in the 9th Circuit Court of Appeals without changing a single word. He lost.

Following the Civil Rights Act of 1964, clients were trying to figure out what they could and could not do. Jim researched state laws protecting women to learn which state statutes protecting women might no longer be enforceable because of Title VII. He expanded that research into a 1967 law review article. In the article, he looked at states that prohibited females, among other things, from being bartenders on the grounds that bars were indecorous places. He wrote that states where it was not forbidden experienced no known problems. What empirical evidence did Jim have for this statement? Well, the bar across the street from his law firm, The Gaiety, had a female bartender. Jim and his colleagues occasionally stopped for a drink after work and he observed

no problems. Years later, this sentence was cited by the Supreme Courts of California and New Jersey as authority! The lesson? We can shape the law.

In the late 1960s, Jim received a draft notice. Not keen on going to Vietnam, Jim applied to the University of Denver for an MBA, since he had taken the GMAT. He was accepted and then was deferred from the draft. He earned his MBA while working full time, but never used the degree. In fact, it was not until recently that Dibble, his wife of 23 years, learned he had an MBA! By this time, Jim decided he did not want to practice law his entire life. He applied for positions, among others, at Stanford and Georgetown. The Stanford position was Assistant Dean — not tenure track. Georgetown offered an Assistant Dean and Associate Professor of Law position, which he accepted. He has now been at Georgetown for 48 years. He began teaching just one class, labor law. He later added contracts and, after four years or so, stopped serving as Assistant Dean.


The contracts class led to an interest in 18th century English common law. On sabbatical, he traveled to London to research Lord Mansfield and his impact on the law. Fortuitously, while Lord Mansfield's library had been destroyed in the Gordon Riots of 1780 (which he noted was the setting for a minor Dickens novel, *Barnaby Rudge*), some of the notebooks Mansfield kept during trials had recently been found. Through pluck and luck, Jim spent a cold winter in Edinburgh, Scotland reading the notebooks. He was just about to despair when he came across notes from a leading case and realized that, though the plaintiff's name was male, the real plaintiff was the gentleman's wife. Mansfield had scratched out the wife's name and had written the husband's name above it. This had not been known before. Jim's research led to the publication of his major scholarly work, *The Mansfield Manuscripts and the Growth of English Law in the 18th Century*, in two volumes.

Bobbie then suggested that, since Jim had been accepted into college without applying, got a job at Georgetown without having taught, and written a history book without any training as a historian (to which he added

earning an MBA without understanding it), perhaps someone should review his Academy application! Because of his experience in labor law, it was suggested that he become a labor arbitrator. After writing a letter to the AAA and FMCS, Jim was put on their lists, and slowly began to be selected. Years later, Jim was offered a position on the panel at Bethlehem Steel, which he then chaired until Bethlehem closed in 2003.

Jim has served on several sports arbitration panels. He pointed out that he has been fired twice by the NHL. He first served as the grievance arbitrator from 2004-2007 (2004 was the year of the NHL lockout, which raised a number of issues). Later, in 2013, he became the neutral discipline arbitrator. In 2016, he issued a decision in the Dennis Wideman case. Wideman had been suspended for 20 games for knocking down a referee. However, the rules called for 20 games where the player intended to injure the referee. Jim found no intent on Wideman's part and reduced the suspension to 10 games under the rules. He was fired again.

Jim has also served on MLB salary arbitration and NFL panels. He found the baseball work fun, especially because of collaboration with fellow Academy members. The NFL created an appellate panel, one of which was required to be a federal judge. In the end, the NFL hired two federal judges and Jim was the third member. His first case was the New Orleans Saints bountygate case, where players were rewarded for knocking opposing players out of a game.

On a personal note, Jim has two grown children (by his first wife) living in Colorado and four grandchildren. He has been married to Dibble for 23 years. When Jim was ready to date again after his divorce, he told a friend, Willie Lewis, who had been encouraging him to get back in the game. Willie had a book of names, and she immediately gave him five names, with phone numbers. Jim then asked Willie and her husband, Finlay, to rank them. He proceeded to date all five in rank order. Dibble was number two on the list, but number one in the end. She says that she knew after two weeks they would marry. They did, and it has been a truly successful match. 



## THE PRESIDENT'S CORNER

*By Ed Krinsky*

Those of you who went to the annual meeting in Vancouver know what an emotional experience it was for everyone. The Academy acknowledged the profound loss of David Petersen in several ways. At the Business Meeting, the membership approved the posthumous nomination of David as 2018 Academy President. David's wife, Angela, accepted the plaque and gavel on his behalf, before she then handed the gavel to me as President for 2018-19. That was followed by a very moving memorial hour attended also by David's three children, and which featured many photos of David's family life projected on a large screen, and moving testimonials given by many of our members who were close to David during his many years as an arbitrator and as an Academy Officer. In addition, the David Petersen Service Award was presented to our wonderful office staff, Suzanne Kelley and Katie Griffin, who were also made honorary members of the Academy. My personal sense of loss was profound. David and I were friends at Academy meetings, and he and I had many conversations during the course of his illness. In addition, I regret that I missed the opportunity to serve as President-Elect for the year when David would have been President, and to benefit from his guidance and wisdom.

In Vancouver, I expressed my thanks to the Nomination Committee and the members for allowing me the great honor of becoming Academy President. As you might imagine, it was a difficult transition under the circumstances, but it was made immensely easier thanks to the help given to me by Kathy Miller, Margie Brogan, and Walt DeTreux, and the cooperation of many of you who agreed to be appointed as Chairs or members of our important committees.

This year, the Academy is dealing with some very important issues. As all of you know, the Bloch Committee submitted its report to the Board of Governors in Vancouver, and the BOG approved it. We owe Rich Bloch and his committee a great deal of thanks for their work and important recommendations. The Committee was formed to address the need to put the Academy on sound financial footing going forward at this time of gradually declining membership and declining member and advocate attendance at our meetings. Among other things, the Report recommended combining our FEC and annual meetings, preserving a portion of the meeting for members only, scheduling the meeting at a time other than Memorial Day weekend, and perhaps engaging a hotel planner to assist the Academy in finding hotels, dates, and rates, which will enable us to continue to have high quality meetings, in good locations and at times that will result in higher attendance by members and advocates. To implement these and the other recommendations, I appointed a Bloch Report Implementation Committee. I am grateful to Paula Knopf for agreeing to be Chair of the committee, and I anticipate that the committee will make recommendations to be acted upon by the BOG at the Austin FEC meeting.

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Another development affecting the Academy is the U.S. Supreme Court's decision in the Janus case that will affect public employee unions in the United States and is likely to affect the amount of arbitration in the public sector, which will have an effect on the work of our U.S. members. In anticipation of the decision, and at the initiative of President-Elect Winograd, he and I agreed to put in place a Public Sector Initiative Committee to work during the course of our presidencies, to study the effects of the decision generally, and on our members' work specifically, and try to catalog the various types of dispute settlement work that is already taking place at the state level and might be available work for our members. Barry and I are grateful to Dan Nielsen for agreeing to Chair this committee.

Another development arose when the AAA sent members a notice about the procedures which it would be following affecting continued placement on its panels. Several members expressed concern, and I asked our DALC Coordinator, Josh Javits, to approach AAA to find out what the AAA communication meant for our members. Josh did so, and the Academy Office sent to all of you Josh's account of what he learned that allayed our members' concerns. Thank you, Josh, for a job well done.

All of this has happened during the first month of my presidency. Who knows what is yet to come? There are two important developments on the horizon. One is the Austin FEC meeting, and I urge all of you to attend. I appointed Amedeo Greco as Program Chair, and he and his committee have put together a fine program that I hope will inspire you to come to Austin. The other is the annual meeting in Philadelphia next May. David Petersen appointed Bill McKee as Program Chair for that meeting, and Bill and his committee are hard at work putting together a fine program to inspire you to come to Philadelphia. I have been in close contact with both Amedeo and Bill and I want to thank them in advance for the work that they have been doing.

Lastly, I again want to thank all of you for the support you have given me. Please do not hesitate to contact me if there are things that you would like the Academy to do during my term as your President. I look forward to seeing you in Austin as well as at the regional meetings I am planning to attend before then in Montana and Atlanta.