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ABA Section of Labor & Employment Law
2017 Midwinter Meeting Council Liaison Report

Committee: ADR in Labor and Employment Law

Meeting Dates & Location: January 26-29 – Puerto Vallarta, Mexico

Report Submitted By: Susan Grody Ruben

I. COMMITTEE LEADERSHIP & FELLOWS

Committee Co-Chairs (include terms and diversity information):
- Tom Allison*, Union & Employee, White Male, 2014-2017
- Kevin McCarthy**, Employer, White Male, 2015-2017
- Raquel Fas Bravo, Employee, Latina Female, 2016-2019
- Fred Dichter, Neutral, White Male, 2016-2019

*To be succeeded by Brenda Pryor, Black Female
**To be succeeded by Jim Rosenfeld, White Male

Vice Chairs/Program Co-chairs/Subcommittee Co-Chairs/Other Leadership (include terms and diversity information):

Government, YLD and Law Student Division Fellows (include terms and diversity information and indicate if they attended the Midwinter Meeting; if not, explain):

**Government Fellows:**
- Brandon Irye, FLRA, Asian Male
- Michael Franczak, FMCS, White Male
- Victor Voloshin, EEOC, White Male - LGBT

Were the Fellows given any Midwinter Meeting or other Committee assignment? If yes, please describe.

Each Fellow presented a 15 minute report on developments at their Agency.

II. MIDWINTER MEETING

1. Attach Program Agenda

2. Please provide the following Midwinter Meeting speaker diversity information. Preferably, speakers should be asked to supply this information themselves (on a voluntary basis, of course).
<table>
<thead>
<tr>
<th>White (not of Hispanic Origin)</th>
<th>Black (not of Hispanic Origin)</th>
<th>Hispanic</th>
<th>Asian or Pacific Islander</th>
<th>American Indian or Alaska Native</th>
<th>LGBT</th>
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3. Name of hotel and room rate(s):

**Westin Resort, Puerto Vallarta, Mexico**

Were there any aspects of the service, guest or meeting rooms or other elements of this property that warrant comment because they were especially good or bad?

**Pool and beaches are gorgeous.**

4. Name of alternate hotel and room rate(s) (if applicable):

N/A

Were there any aspects of the service, guest rooms or other elements of this property that warrant comment because they were especially good or bad?

N/A

5. Registration fee(s) (include discounted rates/categories):

- Section Member – $425
- ABA Member – $525
- Non-ABA Member – $625
- Government/Non-Profit – $275
- Spouse/Guest – $175

6. Social events included in registration fee(s):

- Welcome Reception
- Committee Dinner

7. Were sponsorships solicited/collected for this meeting? If so, indicate amount received and attach solicitation letter.

N/A

8. Were scholarships solicited/awarded for this meeting? If so, indicate amount of scholarships received and amount provided to attendees. Include criteria for selection of scholarship recipients and attach application form.

N/A
9. Provide total attendance per constituency and percentage of total:

- Employer/Management: 10/29%
- Union & Employee: 7/20%
- Employee/Plaintiff: 4/11%
- Government/Public: 4/11%
- Neutral (arbitrator/mediator): 9/26%
- Academic: 1/3%
- Press:
- Other:

**TOTAL ATTENDANCE: 35**

- In-House Corporate Counsel: 1
- In-House Union Counsel: 2
- Young Lawyers Division Member:
- Law Student Division Member:

Number of first-time attendees: 12
Percentage of attendees who were first-time attendees: 35%

### III. LIAISONS TO SECTION ADMINISTRATIVE COMMITTEES

List liaisons to the following Section Administrative Committees and include diversity information:

- Diversity in the Legal Profession (DLP):
- Membership Development Committee:
- Pro Bono Committee:
- Social Media Committee:

Please provide any suggestions from liaisons for improving the functioning of the Administrative Committee to which they are assigned.

### IV. COMMITTEE PUBLICATIONS & CLE PROGRAMS

List books or other publications the Committee produces and provide the following information for each:

**How Arbitration Works**

Date of last edition or supplement:

2016

Projected date of next edition/supplement:
Editorial Board/Publication Subcommittee Co-Chairs (include diversity information):

How often does the Committee produce newsletters?

Please attach copy of most recent issue, if applicable.

Has the Committee submitted articles for publication in the Section Newsletter, Hot Topics/E-Alerts or FLASH? If so, please attach.

Does the committee provide CLE programming other than Midwinter Meetings and Annual Section Conference/ABA Annual Meeting panels? If yes, please describe.

V. BEST PRACTICES

1. If the Committee uses any of the Best Practices for Recruiting and Retaining New Members listed below as examples, please indicate yes, and briefly describe, including remarks on whether they were effective and why.

   • Publicize the Committee Midwinter Meeting at conferences for attorneys from various constituencies?
   
   • Provide a time during the Midwinter Meeting that does not conflict with Committee programming for separate meetings for constituency groups?
   
   • Sponsor a law student program for local law schools during the Midwinter Meeting or other Committee program?
   
   • Provide programming or social events especially of interest to young lawyers or new lawyers?
   
   • Assign a mentor or “buddy” for first time attendees?
   
   • Hold an event for first-time attendees?
   
   • Hold regional meetings such as those involving government officials?
   
   • Follow-up with past first-time attendees to encourage attendance at the Midwinter Meeting?
   
   • Contact past regular attendees who have not yet registered to encourage attendance at the Midwinter Meeting?
   
   • Schedule programs in conjunction with other Committees or Sections?
2. Please describe any other activities by this Committee that may be useful to the Section or to other Standing Committees in the recruitment and retention of new members. Include lessons learned this year and recommendations to improve future recruitment and retention efforts.

3. Does the Committee follow any of the following Best Practices for attracting diverse members? Please answer yes or no and briefly describe, including remarks on whether they were effective and why.

   - Have a diversity task force or diversity committee?
   - Develop alliances with minority bar associations by invitations to participate in the Midwinter Meeting?
   - Invite minority bar associations to co-sponsor events celebrating diversity at the Midwinter Meeting?
   - Offer scholarships or reduced registration to members of minority bar associations or other organizations that co-sponsor diversity events at the Midwinter Meeting?
   - Offer events at the Midwinter Meeting of particular interest to diverse attorneys?
   - Involve diversity committee or task force members in decisions on Committee programs and speakers?
   - Invite women, attorneys of color, LGBT, disabled, government and in-house attorneys to participate as speakers on program panels?
   - Communicate with law school diversity directors and organizations for women and law students of color at local law schools about programs for law students?
   - Have you discussed with the Committee the need to implement steps to attract diverse members?
   - Do you think this Committee needs help in this area and if so what steps do you suggest?

4. Please describe any other activities by this Committee that may be useful to the Section or to other standing committees in attracting diverse members. Include lessons learned this year and recommendations to improve future diversity recruitment and retention efforts.

   Scholar-in-Residence

5. Does the Committee use any of the following Best Practices for Leadership Development? Please answer yes or no and briefly describe, including remarks on whether they were effective and why.
• Hold a “meet the leadership” event at the Midwinter Meeting to explain the process for becoming a speaker and/or Committee leader (e.g., subcommittee co-chair, editor, etc.) and describe other opportunities for active membership?

• Appoint an individual or committee to serve as the contact for new members who want information and assistance in becoming involved in Committee activities?

• Have positions such as vice chairs, program co-chairs, administrative co-chairs or subcommittee co-chairs to provide a transparent pathway to Committee leadership?

• Condition selection for leadership positions on demonstrated leadership and past work on Committee projects, including programs, publications or other subcommittee work?

• Encourage members to apply for the Section Leadership Development Program (LDP) and recommend those who have demonstrated leadership ability for admission to the Program.

6. Please describe any other activities by this Committee that may be useful to the Section or to other standing committees in developing leaders. Include lessons learned this year and recommendations to improve future leadership development efforts.

7. Were there any presentations/programs of particular interest that would be appropriate to repeat as webinars or speaker papers that should be submitted for publication in the ABA Journal of Labor & Employment Law?

8. Would you recommend any speakers, moderators or topics for the Annual Section Conference?

   Michael Green: ADR & Racial Prejudice in the Workplace

9. Are there any questions, suggestions or concerns that the Committee would like to raise with the Council or Section Leadership? Is there any way in which the Council can assist with the Committee’s attaining its goals?

Thank you for your input!
Thursday, January 26

6:00 – 7:30 pm Welcome Reception at Westin Resort Puerto Vallarta (Tlaquepaque Bar)

Friday, January 27

7:00 am – 8:00 am Registration and Breakfast (Terraza Pintores)

8:00 am – 8:15 am Introductory Remarks (O’Gorman/Anguiano/Cuevas)
Thomas D. Allison, Union & Employee Co-Chair, Chicago, IL
Raquel Fas Bravo, Employee Co-Chair, Boynton Beach, FL
Kevin M. McCarthy, Employer Co-Chair, Kalamazoo, MI
Fredric R. Dichter, Neutral Co-Chair, Vero Beach, FL
Gail Golman Holtzman, Chair, ABA Section of Labor & Employment Law, Tampa, FL
Don Slesnick, Chair-Elect, ABA Section of Labor & Employment Law, Coral Gables, FL

8:15 am – 9:15 am 2017 Scholar-in-Residence Presentation:
ADR and Racial Prejudice in the Workplace
Professor Michael Z. Green will present his thoughts and analysis regarding the use of
Alternative Dispute Resolution (ADR) to resolve workplace disputes and any potential
racial prejudice and bias involved in these pursuits. Our speaker will concentrate on the
opportunities and pitfalls of using negotiation, mediation, and arbitration in addressing
workplace discrimination claims while also considering aspects of racial prejudice that
may arise. Professor Green will review the work of leading scholars regarding issues of
race and prejudice in using ADR with a focus on work by Professor Richard Delgado
going back to 1985. This discussion will provide a modern examination of Delgado’s
work and its application in today’s workplace.

Speaker: Michael Z. Green, Texas A&M University School of Law, Fort Worth, TX

9:00 am – 10:30 am Spouse/Guest Breakfast (Terraza Pintores)

9:15 am – 10:15 am 2016 Circuit and Supreme Court Update:
Labor and Employment Law Arbitration Decisions
A trio of experienced labor, employment and management attorneys will discuss the
mischief created by the Circuit Courts and Supreme Court in the world of arbitration in
2016.

Speakers: Alyesha Asghar Dotson, Littler Mendelson, Morgantown, WV
Jennifer Liu, The Liu Law Firm, P.C., San Francisco, CA
Richard Siwica, Egan, Lev & Siwica, P.A., Orlando, FL

10:15 am – 10:30 am Break (Foyer)
10:30 am – 11:30 am  **Mediation: The Good, The Bad and The Ugly**
This program will address the different styles of mediation and what has worked and what has not worked in reaching the end goal, a successful conclusion to the mediation. The panel will give their insights learned from their experience with the Mediation Process.

**Speakers:**  
Anna M. Pohl, *Practical Law at Thomson Reuters, New York, NY*  
Jon H. Rosen, *The Rosen Law Firm, Seattle, WA*  
James S. Rosenfeld, *Butzel Long, Detroit, MI*  

11:30 am – 11:45 am  **Government Fellow Report: Federal Labor Relations Authority**
Our Committee’s Government Fellow will report on, discuss, and answer questions regarding current trends and initiatives at FLRA.

**Speaker:**  
Brandon H. Iriye, *Federal Labor Relations Authority, Washington, DC*

11:45 am – 12:00 pm  **Government Fellow Report: Equal Employment Opportunity Commission**
Our Committee’s Former Government Fellow will report on, discuss, and answer questions regarding current trends and initiatives at the EEOC.

**Speaker:**  

6:00 pm – 9:00 pm  **Reception and Dinner at Westin Resort (Beach Pergolas)**

Saturday, January 28

7:00 am – 8:00 am  **Breakfast (Terraza Pintores)**

8:00 am – 9:30 am  **Class Action Waivers in Arbitration Agreements: Are They Enforceable? (O’Gorman/Anguiano/Cuevas)**
The Supreme Court will be addressing the tension created by the diverging interests of the Federal Arbitration Act and the National Labor Relations Act. Do class action waivers really interfere with employees’ right to engage in concerted activities under the NLRA? Under what circumstances can they be enforced in whole or in part? Circuit Courts have reached differing conclusions, as our panelists likely will, too.

**Speaker:**  
Alejandro “Alex” Caffarelli, *Caffarelli & Associates, Ltd., Chicago, IL*  
J. Kevin Hennessy, *Vedder Price, Chicago, IL*  
Wesley G. Kennedy, *Allison, Slutsky and Kennedy, P.C., Chicago, IL*

9:30 am – 10:30 am  **The Inclusion of Non-Signatories to an Arbitration Agreement into an Arbitration Proceeding**
A basic rule of arbitration law is that one cannot be required to submit a dispute to arbitration unless one has agreed to do so. There are, however, at least five exceptions to this broad rule, in which disputes of a party to such an agreement with a non-signatory to the arbitration agreement will be placed into the arbitration process. Among them are intertwined claims estoppel, incorporation by reference, agency and veil-piercing.

**Speakers:**  
Kevin McCarthy, *Trillium Staffing, Kalamazoo, MI*  
David Weisenfeld, *Arbitrator and Mediator, New York, NY*
10:30 am – 10:45 am   Break *(Terraza Pintores)*

10:45 am – 11:45 am   Employment Arbitration after the Revolution
A panel of practitioners will discuss the empirical study conducted by California professors David Horton and Andrea Cann Chandrasekher of 5,883 matters initiated by employees with AAA between July 1, 2009 and December 31, 2013. The article published in the *DePaul Law Review* examines the status of employment arbitration in the U.S. after the Supreme Court opinions in *Rent-A-Center West, Inc. v. Jackson* and *AT&T Mobility LLC v. Concepcion* by investigating the impact of several variables on case outcomes.

**Moderator:**  
Raquel Fas Bravo, *The Law Office of Raquel Fas Bravo, Boynton Beach, FL*

**Speaker:**  
Thomas A. Doyle, *Wexler Wallace LLP, Chicago, IL*  
José J. Fas, *Goldman Antonetti & Cordóva, LLC, San Juan, PR*  
Susan Grody Ruben, *Arbitrator and Mediator, Cleveland, OH*

11:45 am – 12:45 pm   Interest Arbitration *(O’Gorman/Anguiano/Cuevas)*
*Joint Program with State & Local Government Bargaining & Employment Law Committee*
Each State has developed its own rules for Interest Arbitration. Each has done so believing its procedures best encourage parties to resolve matters short of Arbitration. Has the method chosen brought about this desired result or has it in fact led to even more interest arbitration?

**Speaker:**  
Gary L. Bailey, *Illinois Fraternal Order of Police Labor Council, Western Springs, IL*  
Emily Martin, *Washington Public Employment Relations Commission, Kirkland, WA*  
Steven L. Weld, *Weld Riley Prenn & Ricci SC, Eau Claire, WI*

5:00 p.m. – 7:30 p.m.   Sunset Cruise *(optional ticketed event)*

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**Sunday, January 29**

7:00 am – 8:00 am   Breakfast *(Terraza Pintores)*

8:00 am – 9:00 am   Arbitrators’ Ethical Obligations *(O’Gorman/Anguiano/Cuevas)*
The National Academy of Arbitrators first devised the Due Process Protocol for Employment Arbitration. It has recently promulgated new guidelines for arbitrators who hear employment cases regarding disclosure and other ethical issues. Professor St. Antoine, who was a member of the panel that drafted the new guidelines, will discuss how and why they came into being and the ethical obligations about which arbitrators should be aware.

**Speaker:**  
Theodore St. Antoine, *University of Michigan Law School, Ann Arbor, MI*

9:00 am – 9:15 am   Government Fellow Report: Federal Mediation and Conciliation Service
Our Committee’s Government Fellow will report on, discuss, and answer questions regarding current trends and initiatives at FMCS.

**Speaker:**  
Michael S. Franczak, *Federal Mediation and Conciliation Service, Independence, OH*
9:15 am – 10:15 am  Current Developments in Labor and Employment Arbitrations
Bloomberg BNA’s emeritus arbitration specialist, Kenneth May, will discuss the trends he is seeing in awards submitted for publication to Bloomberg BNA. A panel of practitioners will add their perspectives.

Speaker:  Raquel Fas Bravo, The Law Office of Raquel Fas Bravo, Boynton Beach, FL
Danielle Lucido, IFPTE Local 20, Oakland, CA
Kenneth May, Washington, DC
Jennifer Platzkere Snyder, Dilworth Paxson LLP, Philadelphia, PA

10:15 am - 10:30 am  Break (Terraza Pintores)

10:30 am - 11:30 am  2017 Scholar-in-Residence Presentation: Workplace Mediation of Psychiatric Disability Accommodations
Professor Green will explore the complex issue of how and why employers and employees may and should consider using mediation to develop a reasonable accommodation for a psychiatric disability. He also will discuss the pressing need to facilitate proper communication as a new and emerging concern as employers may face increasing accommodation liability after 2009 amendments to disability law and employees may face increasing stigma from insensitive and illegal employer and co-worker responses to psychiatric disability accommodation requests. Professor Green will highlight recent cases addressing the balance of legitimate concerns of insubordination, and in some situations potential violence, with the guaranteed rights of employees under employment discrimination law to be treated fairly without being stereotyped or harassed because of a psychiatric disability.

Speaker:  Michael Z. Green, Texas A&M University School of Law, Fort Worth, TX

11:30 am – 11:45 am  Committee Business Meeting
ABAJ Section of Labor & Employment Law
2017 Midwinter Meeting Council Liaison Report

Committee: _______Employee Benefits______________________________

Meeting Dates & Location: _______February 8-11, 2017 ~ Austin, Texas________________

Report Submitted By: ___________Joseph Torres and Eunice Washington______________

I. COMMITTEE LEADERSHIP & FELLOWS

Committee Co-Chairs (include terms and diversity information):


Vice Chairs/Program Co-Chairs/Subcommittee Co-Chairs/Other Leadership (include terms and diversity information):

See Exhibit A.

Government, YLD and Law Student Division Fellows (include terms and diversity information and indicate if they attended the Midwinter Meeting; if not, explain):

**Government Fellows:***

- Nicole Hagan (2014-2017), Pension Benefit Guarantee Corporation, Office of General Counsel (BF)
- Simon J. Torres (2015-2018), Pension Benefit Guarantee Corporation, Office of Chief Counsel (HM)

Were the Fellows given any Midwinter Meeting or other Committee assignment? If yes, please describe.

Simon Torres was invited to participate in the Ethics panel. Fellows also serve as editors on the Committee’s treatise and supplements.
II. MIDWINTER MEETING

1. Attach Program Agenda – See Exhibit B

2. Please provide the following Midwinter Meeting speaker diversity information. Preferably, speakers should be asked to supply this information themselves (on a voluntary basis, of course).

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<td>2</td>
<td>Unknown</td>
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3. Name of hotel and room rate(s):

   Hilton Austin $259

   Were there any aspects of the service, guest or meeting rooms or other elements of this property that warrant comment because they were especially good or bad?

   Not applicable

4. Name of alternate hotel and room rate(s) (if applicable):

   Not applicable

5. Registration fee(s) (include discounted rates/categories):

   Member                  $325
   ABAMember               $425
   Non-ABA Member          $525
   3 or More Attendees from Same Law Firm $295/each
   Government/Non-Profit   $225
   First-Time Attendee     $250
   LEL Section Law Students Waived
   Spouse/Guest(s)          $125

6. Social events included in registration fee(s):

   Welcome Reception
   First-Time Attendee/“Young” Lawyers / New Employee Benefits Law Lawyers Breakfast
   Diversity Luncheon
   Meet the Leadership Reception
   Networking Reception
7. Were sponsorships solicited/collected for this meeting? If so, indicate amount received and attach solicitation letter.

   Yes – $21,000

8. Were scholarships solicited/awarded for this meeting? If so, indicate amount of scholarships received and amount provided to attendees. Include criteria for selection of scholarship recipients and attach application form.

   Not applicable

9. Provide total attendance per constituency and percentage of total:

   Employer/Management: 106
   Union & Employee: 68
   Employee/Plaintiff: 43
   Government/Public: 12
   Neutral (arbitrator/mediator): 4
   Academic: 3
   Press: 0
   Other: 18

   **TOTAL ATTENDANCE: 254**

   In-House Corporate Counsel: 19
   In-House Union Counsel: 4
   Young Lawyers Division Member: 1
   Law Student Division Member: 1

   Number of first-time attendees: 19
   Percentage of attendees who were first-time attendees: 7.5%

III. LIAISONS TO SECTION ADMINISTRATIVE COMMITTEES

List liaisons to the following Section Administrative Committees and include diversity information:

   Diversity in the Legal Profession (DLP) – Clarissa Kang (AF), Eunice Washington (BF), Marcelle Henry (BF), Martina Sherman (WF)

   Membership Development Committee – David Cook (WM), Jayne Zanglein (WF), Bill Frumkin (WM), Sam Schwartz-Fenwick (WM – LGBT)

   Pro Bono Committee – Bill Kinney (WM), Barbara Borowski (WF)

   Social Media Committee – Don Sullivan (WM), Ashley Selwyn (WF)

   CLE Coordinating and Resources Committee – TBA

Please provide any suggestions from liaisons for improving the functioning of the Administrative Committee to which they are assigned.
IV. COMMITTEE PUBLICATIONS & CLE PROGRAMS

List books or other publications the Committee produces and provide the following information for each:


Date of last edition or supplement:

- 2015 Cumulative Supplement

Projected date of next edition/supplement:

- 2017

Editorial Board/Publication Subcommittee Co-Chairs (include diversity information):

See Exhibit A

How often does the Committee produce newsletters?

Quarterly

Please attach copy of most recent issue, if applicable.

See Exhibit C

Has the Committee submitted articles for publication in the Section Newsletter, Hot Topics/E-Alerts or FLASH? If so, please attach.

The Committee’s meeting activities have been featured in various issues of the FLASH.

Does the committee provide CLE programming other than Midwinter Meetings and Annual Section Conference/ABA Annual Meeting panels? If yes, please describe.

The Committee partners with the ABA Joint Committee on Employee Benefits (JCEB) to provide CLE programming through two national institutes: (a) the ERISA Litigation National Institute (last Spring/early Summer) and the ERISA Basics National Institute (Fall). The Committee also works with JCEB to provide CLE programming through teleconferences and webinars throughout the year. It also provides programming for the Annual Section Conference.
V. BEST PRACTICES

1. If the Committee uses any of the Best Practices for Recruiting and Retaining New Members listed below as examples, please indicate yes, and briefly describe, including remarks on whether they were effective and why.

- Publicize the Committee Midwinter Meeting at conferences for attorneys from various constituencies?
  
  Yes, at the Annual Section Conference Committee Expo and during JCEB seminars.

- Provide a time during the Midwinter Meeting that does not conflict with Committee programming for separate meetings for constituency groups?

  Yes, at caucus meetings.

- Sponsor a law student program for local law schools during the Midwinter Meeting or other Committee program?

  Held outreach programs at UT Austin and Thurgood Marshall, a Historically Black College.

- Provide programming or social events especially of interest to young lawyers or new lawyers?

  See above description of Midwinter Meeting agenda.

- Assign a mentor or “buddy” for first time attendees?

  Yes.

- Hold an event for first-time attendees?

  Yes.

- Hold regional meetings such as those involving government officials?

- Follow-up with past first-time attendees to encourage attendance at the Midwinter Meeting?

- Contact past regular attendees who have not yet registered to encourage attendance at the Midwinter Meeting?

  Yes.

- Schedule programs in conjunction with other Committees or Sections?

  *See above regarding JCEB.*
2. Please describe any other activities by this Committee that may be useful to the Section or to other Standing Committees in the recruitment and retention of new members. Include lessons learned this year and recommendations to improve future recruitment and retention efforts.

The EBC’s Membership Development Committee works to encourage new EBC members to get substantively involved with the Committee and to encourage existing members to stay active. Among other things, the Membership Development Committee is responsible for mentor assignments and the first-time attendee (“FTA”) breakfast at the EBC midwinter meeting. The mentor assignments pair FTAs with experienced EBC “mentors” to help introduce the FTAs to the EBC and its members. Once the EBC subcommittee sign-up sheets are collected from the midwinter meeting, the Membership Development Committee follows up with the various subcommittees to identify who has volunteered and encourage the co-chairs to incorporate those volunteers into the subcommittees’ activities.

3. Does the Committee follow any of the following Best Practices for attracting diverse members? Please answer yes or no and briefly describe, including remarks on whether they were effective and why.

- Have a diversity task force or diversity committee?
  
  Yes

- Develop alliances with minority bar associations by invitations to participate in the Midwinter Meeting?

- Invite minority bar associations to co-sponsor events celebrating diversity at the Midwinter Meeting?

- Offer scholarships or reduced registration to members of minority bar associations or other organizations that co-sponsor diversity events at the Midwinter Meeting?

- Offer events at the Midwinter Meeting of particular interest to diverse attorneys?

- Involve diversity committee or task force members in decisions on Committee programs and speakers?
  
  Yes

- Invite women, attorneys of color, LGBT, disabled, government and in-house attorneys to participate as speakers on program panels?
  
  Yes

- Communicate with law school diversity directors and organizations for women and law students of color at local law schools about programs for law students?
  
  Yes. See above.
• Have you discussed with the Committee the need to implement steps to attract diverse members?

• Do you think this Committee needs help in this area and if so what steps do you suggest?

4. Please describe any other activities by this Committee that may be useful to the Section or to other standing committees in attracting diverse members. Include lessons learned this year and recommendations to improve future diversity recruitment and retention efforts.

5. Does the Committee use any of the following Best Practices for Leadership Development? Please answer yes or no and briefly describe, including remarks on whether they were effective and why.

• Hold a “meet the leadership” event at the Midwinter Meeting to explain the process for becoming a speaker and/or Committee leader (e.g., subcommittee co-chair, editor, etc.) and describe other opportunities for active membership?

  Yes

• Appoint an individual or committee to serve as the contact for new members who want information and assistance in becoming involved in Committee activities?

  Yes

• Have positions such as vice chairs, program co-chairs, administrative co-chairs or subcommittee co-chairs to provide a transparent pathway to Committee leadership?

  See Exhibit A.

• Condition selection for leadership positions on demonstrated leadership and past work on Committee projects, including programs, publications or other subcommittee work?

• Encourage members to apply for the Section Leadership Development Program (LDP) and recommend those who have demonstrated leadership ability for admission to the Program.

  Yes

6. Please describe any other activities by this Committee that may be useful to the Section or to other standing committees in developing leaders. Include lessons learned this year and recommendations to improve future leadership development efforts.
7. Were there any presentations/programs of particular interest that would be appropriate to repeat as webinars or speaker papers that should be submitted for publication in the *ABA Journal of Labor & Employment Law*?

8. Would you recommend any speakers, moderators or topics for the Annual Section Conference?

9. Are there any questions, suggestions or concerns that the Committee would like to raise with the Council or Section Leadership? Is there any way in which the Council can assist with the Committee attaining its goals?
Exhibit A
Chapter 4 – Reporting & Disclosure

Employee/Plaintiff
Kirsten Scott
kirsten@renakerhasselman.com

Union & Employee
Tzvi Mackson
tmackson@cwsny.com

Employer/Management
Sean McMahan
smcmahan@morganlewis.com

Public/Neutral
Allison Hoots
allisonhoots@gmail.com

Chapter 5 – Retirement Plan Design, Qualification & Administration

Union & Employee
Sharon M. Goodman
sgoodman@slevinhart.com

Deborah Lerner
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Employer/Management
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Aliya Wong
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Neutral
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Chapter 6 – Regulation of Specialized Plans

Employer/Management
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Union & Employee
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Neutral
TBA

Chapter 7 – Welfare Plans – Technical & Statutory

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Rhona Lyons
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Employer/Management
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Neutral
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Chapter 8 – Regulation of Employee Health Care Benefit Plans

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Marcelle Henry
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Employer/Management
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Neutral
TBA

January 13, 2017
Chapter 18 – Collective Bargaining & Employee Benefits

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John Stember
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Neutral
TBA

Chapter 19 – Criminal Law

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Neutral
TBA

Union & Employee
TBA

Chapter 20 – Ethics

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Liaison to Government Fellows

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Employee/Plaintiff
TBA

Neutral
TBA
Exhibit B
Program Agenda

Wednesday, February 8

6:00 p.m. – 7:30 p.m. Welcome Reception (Salon G)
All meeting registrants and their registered guests are invited to attend the Welcome Reception at the Hilton Austin.

Thursday, February 9

7:00 a.m. – 8:00 a.m. Registration and Continental Breakfast (Salon GH Foyer)

7:00 a.m. – 8:00 a.m. Breakfast for First – Time Attendees/“Young” Lawyers (Salon J)
All first-timers, young lawyers, and new Employee Benefits Law lawyers are encouraged to attend.

8:00 a.m. – 1:10 p.m. PLENARY SESSIONS (Salon H)

8:00 a.m. – 8:10 a.m. WELCOME REMARKS
Judith Broach, Broach & Stulberg, LLP, New York, NY
Marjorie Butler, U.S. Department of Labor, Boston, MA
Denise Clark, Clark Law Group, PLLC, Washington, DC
Al Holifield, Holifield Janich Rachel & Associates, PLLC, Knoxville, TN

8:10 a.m. – 9:10 a.m. THE TRUMP PRESIDENCY AND THE NEW CONGRESS: WHAT’S NEXT
With the election of President Donald Trump, all practitioners will be watching to see how the new administration will maintain or change legislation and regulations affecting benefit plans. Also, the panel will discuss how a new Supreme Court justice will impact ERISA litigation.

Benjamin J. Conley, Seyfarth Shaw, Chicago, IL
Mary Ellen Signorille, AARP Foundation Litigation, Washington, DC
Peter K. Stris, Stris & Maher, LLP, Los Angeles, CA
Aliya Wong, U.S. Chamber of Commerce, Washington, DC

9:10 a.m. – 10:10 a.m. DOL’S CONFLICT OF INTEREST RULE AND RELATED EXEMPTIONS: THE LITIGATION CHALLENGES AND NEXT STEPS
ICYMI, in April 2016, the U.S. Department of Labor finalized a rule that expands the scope of those who become fiduciaries under ERISA and the Code in an effort to mitigate conflicts of interest. Certain aspects of the Rule are set to become effective in April 2017. Not so fast, say six lawsuits challenging all and parts of the Rule’s validity. Find out about the Rule, the exemptions, the litigation challenges, and what’s on the horizon.
10:10 a.m. – 10:25 a.m.  Break (Salon GH Foyer)

10:25 a.m. – 1:25 p.m.  BREAKOUT SESSIONS

10:25 a.m. – 11:25 a.m.  MULTIEMPLOYER PLANS: CURRENT LEGISLATION AND AGENCY GUIDANCE (Salon G)
Update on multiemployer plan agency guidance issued in 2016, including the unfolding world under the Multiemployer Plan Reform Act, proposed legislation on the composite plan designs and the Mineworkers Protection Act.

Anthony S. Cacace, Proskauer LLP, New York, NY
Robert Schwartz, Trucker Huss, San Francisco, CA
Joseph Shelton, Pension Benefit Guaranty Corporation, Washington, DC

FIDUCIARY LITIGATION PASTICHE (Salon H)
The panel will discuss a pastiche of issues: How will the Church Plan cases fare if they meet a higher authority (the Supreme Court)? Are cases involving publicly traded employer stock litigation the walking dead? Are agency principles poised to kill the ministerial exception?

Theresa Gee, Miller & Chevalier Chartered, Washington, DC
Karen Handorf, Cohen Milstein Sellers & Toll PLLC, Washington, DC
William Kinney, Dowd, Bloch, Bennett, Cervone, Auerbach & Yokich, Chicago, IL

HEALTH CARE PLAN UPDATE (Salon F)
The panel will provide an update on new guidance, regulations and litigation including: section 1557 regulations nondiscrimination in health benefits, your 2016 plan and employer reporting, wellness programs, Sierra Pacific settlement, Franciscan Alliance v Burwell, and House of Representatives v. Burwell.

Kathy Bakich, The Segal Company, Washington, DC
Sam Schwartz-Fenwick, Seyfarth Shaw, Chicago, IL
Nina Wasow, Feinberg, Jackson, Worthman & Wasow, Oakland, CA

11:25 a.m. – 12:25 p.m.  MULTIEMPLOYER PENSION AND WELFARE PLANS POTPOURRI (Salon G)
Update on collection of employer contributions, withdrawal liability (including decisions impacting the usage of AAA arbitration rules and the impact of MPRA), successor liability, pension overpayments, and control group issues. This session also will address other areas of general interest to multiemployer fund counsel and counsel to employers that participate in multiemployer funds.
**MEDICAL SERVICE PROVIDER CLAIMS (Salon H)**

There are a number of unique, thorny issues to be mindful of when it comes to litigating claims by medical service providers. What’s the difference between an authorization and an assignment? Are anti-assignment clauses in ERISA plans enforceable? This panel will address key phases of a medical service provider claim, from plan drafting to frequently litigated issues, including standing and scope of assignments.

Joseph Creitz, Creitz & Serebin LLP, San Francisco, CA  
D. Ward Kallstrom, Seyfarth Shaw, San Francisco, CA  
Suzanne Metzger, 1199 SEIU National Benefit Fund, New York, NY

**FINDING MISSING PARTICIPANTS AND STATE ESCHEAT LAWS? (Salon F)**

What steps does the DOL require to be taken to find a missing or lost participant when a defined contribution plan is terminated? Are there different requirements for other types of plans? The discussion will include an update on PBGC’s proposed regulation to expand its missing participants programs to include defined contribution plans, and the impact of state escheat laws.

Damarr Butler, Pension Benefit Guaranty Corporation, Washington, DC  
Lisa Dooley, Honeywell Int’l, Morris Plains, NJ  
David M. Fusco, Schwarzwald, McNair & Fusco LLP, Cleveland, OH  
Marc I. Machiz, Seattle, WA

**THE IMPACT OF NEW IRS RULES ON SEVERANCE AGREEMENTS (Salon G)**

Most severance arrangements fit within the purview of Code Section 409A/457 and must be properly structured to avoid the adverse tax consequences, including a 20% excise tax and immediate taxes on vested deferred amounts. Not only has the IRS pursued a Section 409A audit initiative project since 2014 aimed at determining companies' compliance with 409A's restrictions on the deferral of compensation, but it also has issued new regulations dealing with severance agreements. Learn about the key requirements of 409A and 457 and discusses the steps parties should take to ensure compliance given the IRS's new rules. This panel will outline best practices for reviewing nonqualified deferred compensation plans, employment agreements, and other severance arrangements.

Margo Hasselman Greenough, Renaker Hasselman Scott LLP, San Francisco, CA  
Jani K. Rachelson, Cohen, Weiss and Simon LLP, New York, NY  
Tolsun N. Waddle, NRECA, Arlington, VA

**CLASS ACTION WAIVERS (Salon H)**

This panel will discuss whether ERISA claims can be arbitrated and, if so, whether plan sponsors and fiduciaries should want to arbitrate ERISA claims. The discussion will focus on the split in the circuit courts over...
whether the NLRA invalidates collective action waivers in arbitration agreements – the Second, Fifth and Eighth Circuits held that the NLRA does not, and the Seventh and Ninth Circuit held that it does. This panel also will discuss these decisions and their impact on ERISA litigation, including whether a class is needed, at all, to obtain plan-wide relief.

R. Joseph Barton, Block & Leviton LLP, Washington, DC  
Joel Hurt, Feinstein Doyle Payne & Kravec LLC, Pittsburgh, PA  
Ian H. Morrison, Seyfarth Shaw, Chicago, IL

COMPLIANCE ISSUES FOR PENSION PLANS AFTER THE CHANGE TO THE DETERMINATION LETTER PROGRAM (Salon F)  
Revenue Procedure 2016-37 introduced a revamped IRS Determination Letter process effective January 1, 2017. This panel will discuss the new procedures and how they will affect new, current and terminating plans.

Sharon Goodman, Slevin & Hart, Washington, DC  
T. Katuri Kaye, Trucker Huss, San Francisco, CA

1:30 p.m. – 2:30 p.m. Diversity and Inclusion Luncheon (Salon G)  
Equity Matters: Creating an Inclusive Space in the Legal Profession  
Diversity, equity and inclusiveness in the legal profession are not for the faint of heart. Learn and discuss proven strategies to navigate the challenges, give higher priority to diversity and inclusion, and build equity into small and large legal organizations.

Kazique J. Prince, Ph.D., Jelani Consulting, LLC, Austin, TX

Luncheon Speaker Sponsored by:  
Clark Law Group, PLLC  
DeBofsky, Sherman & Casciari P.C.

2:30 p.m. – 3:30 p.m. Senior Book Editors Meeting (Salon K)

4:00 p.m. – 5:00 p.m. Meet the Leadership Reception (Meeting Room 602)  
All attendees are invited to meet the Section Chair, Council Liaisons, Employee Benefits Committee Co-Chairs and other committee leaders.

6:30 p.m. – 7:00 p.m. Government Fellow Meeting (Meeting Room 613)

7:00 p.m. – 10:00 p.m. Networking Reception (Speakeasy – 412 Congress Avenue)

FRIDAY, FEBRUARY 10

7:00 a.m. – 8:00 a.m. Continental Breakfast (Salon GH Foyer)

8:00 a.m. – 11:45 a.m. PLENARY SESSIONS (Salon H)

8:00 a.m. – 8:15 a.m. Report from the Employee Benefits Law Senior Editors
8:15 a.m. – 9:15 a.m. WRITING ERISA OUT OF THE PLAN: LITIGATION AVOIDANCE TACTICS (Salon H)
This panel will discuss topics of interest to all employee benefits practitioners, including how to draft and enforce – or challenge – contractual limitations periods, contractual venue provisions, and provisions for mandatory arbitration of individual claims.

Claude Cazzulino, Schwartz, Steinsapir, Dohrmann & Sommers LLP, Los Angeles, CA
Clarissa Kang, Trucker Huss, San Francisco, CA
Teresa Renaker, Renaker Hasselman Scott LLP, San Francisco, CA

9:15 a.m. – 10:15 am A RETROSPECTIVE: THE LAST EIGHT YEARS AT EBSA
Phyllis Borzi will talk about her tenure as the longest serving Assistant Secretary at the Employee Benefit Security Administration.

Phyllis Borzi, Former Assistant Secretary of Labor – EBSA, University Park, MD

10:15 a.m. – 10:30 a.m. Introductions and Welcome by Section Leadership and Council Liaisons
Gail Golman Holtzman, Section Chair, Jackson Lewis P.C., Tampa, FL
Joseph J. Torres, Employer Council Liaison, Winston & Strawn, Chicago, IL
Eunice Washington, Union & Employee Council Liaison, SEIU, Washington, DC

10:30 a.m. – 10:45 a.m. Break (Salon GH Foyer)

10:45 a.m. – 11:45 a.m. ETHICS
An ethics update, including the fiduciary exception to the attorney-client privilege and potential disqualification for taking inconsistent positions in other cases on the same issues. The panel will also lead a discussion using hypotheticals drawn from plaintiff, defendant, and government practitioner experiences and challenges on the areas of conflicts, changes in the scope and type of representation, and recent regulatory changes.

Tybe Ann Brett, Feinstein Doyle Payne & Kravec, LLC, Pittsburgh, PA
James S. “Chris” Christie, Bradley, Arant, Boult & Cummings, Birmingham, AL
Simon Torres, Pension Benefit Guaranty Corporation, Washington, DC

11:45 a.m. – 1:00 p.m. CONCURRENT BREAKOUT SESSIONS

LITIGATING AN INDIVIDUAL HEALTH CLAIM (Salon G)
Health claim litigation presents unique challenges to the ERISA practitioner. What is required by the claims regulations? This panel will examine each phase of litigation of a denied health benefit, including best practices for settlement and dealing with subrogation issues.

Shannon Callahan, Seyfarth Shaw, Chicago, IL
Marie Casciari, DeBofsky, Sherman & Casciari, Chicago, IL
Lisa Gomez, Cohen, Weiss and Simon LLP, New York, NY
HANDLING A DOL AUDIT (Salon H)
ERISA Section 504 gives the Secretary the power to investigate employee benefit plans, and DOL has increased its efforts to improve the quality of plan audits. This panel will take us through a mock DOL audit and will discuss what you can expect from start to finish, how to prepare your client for an audit, how to interact with the DOL during the audit and best practices to come out of the audit unscathed.

Russell L. Hirschhorn, Proskauer Rose LLP, New York, NY
Ivelisse Berio LeBeau, Sugarman & Susskind, Miami, FL

HOW TO GET THE CLASS ACTION SETTLEMENT YOUR CLIENT NEEDS (Salon F)
Statistically, most cases result in settlements, particularly in the ERISA space. This will be an interactive panel discussion of strategies and challenges to achieving a favorable settlement. Expert litigators will discuss the timing of settlement discussions, effective strategies, and common barriers to resolution.

R. Bradford Huss, Trucker Huss, San Francisco, CA
Jennie Arnold, Ledbetter Parisi LLC, Cincinnati, OH
Nicole Diller, Morgan, Lewis, Chicago, IL
Alison L. Martin, Chubb Insurance, Pittsburgh, PA
Erin M. Riley, Keller Rohrback L.L.P., Seattle, WA

1:15 p.m. – 3:15 p.m. Women’s Lunch at Searsucker Austin, 415 Colorado Street
Sponsored by Proskauer Rose LLP

3:15 p.m. – 5:15 p.m. Plaintiff’s Business Meeting (Meeting Room 615)

3:15 p.m. – 5:15 p.m. Union Business Meeting (Meeting Room 616)

6:00 p.m. – 7:00 p.m. Reception (Salon G)

9:00 p.m. – 12:00 a.m. Hospitality Suite (Salon G)
Join your friends and colleagues in the Hospitality Suite, which will feature cocktails and light snacks.

SATURDAY, FEBRUARY 11

7:30 a.m. – 8:30 a.m. Continental Breakfast (Salon GH Foyer)

8:30 a.m. – 11:30 a.m. GENERAL SESSIONS (Salon H)

8:30 a.m. - 9:30 a.m. RETIREMENT PLAN FEES 2.0
In the last year, federal courts across the country have been inundated with lawsuits alleging that participants were charged excessive fees for their 401(k) and 403(b) plan investments. Many of these lawsuits have challenged the offering of: (i) offering proprietary funds as plan investment options, (ii)
offering too many investment options, or (iii) using too many record keepers, all of which have allegedly caused fees to be too high. In this session, we will review a plan fiduciaries’ responsibilities for due diligence and monitoring fees, negotiating service provider agreements, the legal theories and causes of action advanced in these recent lawsuits and how courts have addressed them to date.

Mark G. Boyko, Bailey & Glasser LLP, Washington, DC  
Deidre Grossman, Proskauer Rose LLP, New York, NY  
Andrew Irving, Arthur J. Gallagher & Co., Newark, NJ  
Ginger LaChapelle, Blitman & King, LLP, Latham, NY

9:30 a.m. – 10:30 a.m.  MENTAL HEALTH PARITY LITIGATION AND DESIGN ISSUES  
Learn about the other “affordable care act.” The Federal Mental Health Parity and Addiction Equity Act, like many similar state parity laws, mandates that financial requirements and treatment limitations applicable to mental health benefits generally can be no more restrictive than the requirements and limitations applied to medical benefits. These parity laws, which are enforceable under ERISA, have been at issue in an increasing number of cases and raise a multitude of issues including standing, the propriety of class actions, the interaction of state and federal laws, and plan design.

Marcelle J. Henry, Cohen, Weiss and Simon LLP, New York, NY  
Lisa S. Kantor, Kantor & Kantor, LLP, Northridge, CA  
Molly Moriarty Lane, Morgan, Lewis & Bockius LLP, San Francisco, CA

10:30 a.m. – 11:30 a.m.  NEW DISABILITY REGULATIONS  
The panel will analyze the revised disability claims regulations, assuming it is still viable, and its impact on the benefit claims review process including areas where there may still be litigation potential. In addition, plan and plaintiffs’ counsel will discuss best practices for maximizing the best result for their clients.

Cassie Springer Ayeni, Springer Ayeni, Oakland, CA  
Neelam Chandna, Reich Adell & Cvitan, Los Angeles, CA  
Edna S. Kersting, Wilson Elser Moskowitz Edelman & Dicker, LLP, Chicago, IL  
Mala M. Rafik, Rosenfeld Rafik & Sullivan, P.C., Boston MA

11:30 a.m. – 12:00 p.m.  COMMITTEE BUSINESS MEETING
We thank our sponsors for their generous contributions:

**Gold Level**
- Cohen Milstein Sellers & Toll PLLC
- Morgan, Lewis & Bockius LLP
- Seyfarth Shaw LLP
- Trucker Huss APC
- Vedder Price P.C.

**Silver Level**
- Beeson, Tayer & Bodine, APC
- Blitman & King LLP
- Block & Leviton LLP
- Broach & Stulberg LLP
- Clark Law Group, PLLC
- Cohen, Weiss and Simon LLP
- Conner & Winters LLP
- DeBofsky, Sherman & Casciari, P.C.
- Gilbert & Sackman, A Law Corporation
- Holifield Janich Rachal & Associates, PLLC
- Keller Rohrback L.L.P.
- Neyhart, Anderson, Flynn & Grosboll
- O’Donoghue & O’Donoghue LLP
- Outten & Golden LLP
- Robein, Urann, Spencer, Picard & Cangemi
- Slevin & Hart, P.C.
- Schuchat, Cook & Werner
- Springer Ayeni, A Professional Corporation

**Exhibitors**
- Bloomberg BNA
- Practical Law – Thomson Reuters

We look forward to seeing you next year!

2018 Employee Benefits Committee
Midwinter Meeting
February 7-10, 2018
Clearwater Beach, Florida
Exhibit C
The days grow shorter and the holidays approach. Nature has blessed us all with unique local weather. The regular season of college football comes to an end, the championship playoff games begin and some of our thoughts turn to basketball. Meanwhile in the Southern Ocean the sailors in the Vendée Globe Les Sables d’Olonne round-the-world sailing race are strung out from Cape of Good Hope to Australia by the end of their 30th day at sea. All of which means that it is time for the final 2016 edition of the EBC Newsletter. Our continuing efforts to address a broad spectrum of issues and developments of interest bring you the following offerings in this edition:

- Robert Rachal surveys the aftermath of the first district court decision upholding the fiduciary regulations in his article, "U.S. Department of Labor Wins Big in First Ruling on Its New Fiduciary Rule;"
- Anthony F. Shelley and Michael N. Khalil provide an update on the availability of alternative pleading under ERISA Sections 502(a)(1)(B) and (a)(3);
- The American College of Employee Benefits Counsel inducted its 2016 class of Fellows;
- We have a brief preview of the Midwinter Meeting;
- Message from New EBC Plaintiff Co-Chair Denise Clark;
- We also have Sarah Johnson’s Restaurant Review for the Austin meeting for those inclined toward planning their culinary adventures ahead of time; and
- The ever popular As we go to e-Press is on hiatus while those in Washington sort out the election and await a new Administration.

The members of the editorial board remain keenly interested in your feedback on whether we are capturing what you would like to see in your newsletter. They would also be delighted to discuss article ideas you may have. Those with thoughts on issues they would like to see addressed and/or thoughts on articles should contact one of the editors. We close with the obligatory qualification that the views expressed by the authors are unlikely to be the views of all the individual editors, or reflective of the organizations with which the editors are affiliated or the ABA and from time to time...
time may not even reflect closely held beliefs of the authors themselves.
ABA Section of Labor & Employment Law
2017 Midwinter Meeting Council Liaison Report

Committee: ____ Federal Labor Standards Legislation ____________________________

Meeting Dates & Location: __February 22-24 ~ Playa del Carmen, Mexico___________

Report Submitted By: __David Borgen, Julie Richard-Spencer and Bernie Siebert____

I. COMMITTEE LEADERSHIP & FELLOWS

Committee Co-Chairs (include terms and diversity information):

Michele Fisher, Employee – 2016-2019 (WF)
Jeremy Glenn, Employer – 2016-2019 (WM)
Jason Marsili, Union & Employee – 2015-2018 (BM)
Dane Steffenson, Public Co-Chair, 2016-2019 (WM – LGBT)

Vice Chairs/Program Co-chairs/Subcommittee Co-Chairs/Other Leadership (include terms and diversity information):

Age Discrimination in Employment Act
Roxana Bell, Employer (BF)
Bernard Mazaheri, Employee (AM)
David Ricksecker, Union & Employee (WM)

USERRA
Ossai Miazad, Employee (AF)
George Wood, Employer (WM)

Equal Pay Act
Susan Ellingstad, Employer (WF)
Gina Janeiro, Employer (WM)
David E. Schlesinger, Employee (WM)

WARN & EPPA
Matthew Helland, Employee (WM)
Francis Lam, Employer (AM - LGBT)

Fair Labor Standards Act
Laura Ho, Employee (AF)
Ryan Hagerty, Union & Employee (WM)
Robert Boonin, Employer (WM)

Whistleblower Provisions of Sarbanes-Oxley
David Marshall, Employee (WM)
Hal Wellford, Employer (WM)

Family & Medical Leave Act
Heidi B. Parker, Union & Employee (WF)
James Paul, Employer (WM)
Melissa Pierre-Louis, Employee (BF)

Ethics
Jack Raisner, Employee (WM)
Jennifer Williams, Employer (WF)

Government Contracts
Terry Yellig, Union & Employee (WF)
Government, YLD and Law Student Division Fellows (include terms and diversity information and indicate if they attended the Midwinter Meeting; if not, explain):

**Government Fellows**
James Glickman – 2014-2017 (WM)
Kristin Murphy – 2014-2017 (WF)
*Dustin Saldiarraga – 2014-2017 (HM)*

**YLD Fellow**
Roxana Bell – 2014-2016 (BF)

*Cancelled his attendance for second year due to Zika Virus concerns.*

Were the Fellows given any Midwinter Meeting or other Committee assignment? If yes, please describe.

YLD Fellow Roxana Bell, a co-chair of the ADEA subcommittee, gave a presentation at the Midwinter Meeting as part of a panel discussion concerning “ADEA Collective Actions are Heating Up.” Government Fellow James Glickman and Kristen Murphy gave presentations at the Midwinter Meeting on “Front Line Insight from the Department of Labor.”

### II. MIDWINTER MEETING

1. Attach Program Agenda (See attached.)

2. Please provide the following Midwinter Meeting speaker diversity information. Preferably, speakers should be asked to supply this information themselves (on a voluntary basis, of course).

<table>
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<th>Black (not of Hispanic Origin)</th>
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3. Name of hotel and room rate(s):

   Grand Hyatt Playa del Carmen
   $290 (non-view) & $350 (ocean view)

Were there any aspects of the service, guest or meeting rooms or other elements of this property that warrant comment because they were especially good or bad?

   Beautiful hotel with direct access to beach; meeting area more than adequate. Outside meal locations were beautiful.

4. Name of alternate hotel and room rate(s) (if applicable):

   N/A
Were there any aspects of the service, guest rooms or other elements of this property that warrant comment because they were especially good or bad?

N/A

5. Registration fee(s) (include discounted rates/categories):

- Section Member – $325
- ABA Member – $425
- Non-ABA Member – $525
- Spouse/Guest Fee – $175
- Child (12-18) – $50
- Child (under 12) – No charge

6. Social events included in registration fee(s):

- Welcome Reception
- New Attendee Reception
- Committee Reception & Dinner
- Diversity Happy Hour
- Spouse/Guest Breakfast

7. Were sponsorships solicited/collection for this meeting? If so, indicate amount received and attach solicitation letter.

Yes – $19,000.

8. Were scholarships solicited/awarded for this meeting? If so, indicate amount of scholarships received and amount provided to attendees. Include criteria for selection of scholarship recipients and attach application form.

N/A

9. Provide total attendance per constituency and percentage of total:

- Employer/Management: 54 (49%)
- Union & Employee: 12 (10%)
- Employee/Plaintiff: 31 (28%)
- Government/Public: 5 (5%)
- Neutral (arbitrator/mediator): 1 (<1%)
- Academic: 1 (<1%)
- Consultant: 4
- Press: 0
- Law Student: 0
- Other: 3 (6%)

**TOTAL ATTENDANCE: 111**

- In-House Corporate Counsel: 3 (3%)
- In-House Union Counsel: 0
- Young Lawyers Division Member:
Law Student Division Member:

Number of first-time attendees: Unknown
Percentage of attendees who were first-time attendees: Unknown

III. LIAISONS TO SECTION ADMINISTRATIVE COMMITTEES

List liaisons to the following Section Administrative Committees and include diversity information:

Diversity in the Legal Profession: Jason Marsili (BM), and Veronica Jung (AF)

Marketing Committee / Social Media Subcommittee: Robyn Klinger (WF) and Mike Scimone (WM)

Membership Development Committee: Susan Eisenberg (WF)

Newsletter/Communications: Chip Aubrey (WM)

Pro Bono Work Committee: Juno Turner (WF)

CLE Coordinating & Resources: Rebekah Bailey (WF)

Please provide any suggestions from liaisons for improving the functioning of the Administrative Committee to which they are assigned.

IV. COMMITTEE PUBLICATIONS & CLE PROGRAMS

List books or other publications the Committee produces and provide the following information for each:

USERRA
Date of last edition or supplement:
See attached list of projected dates etc.

Projected date of next edition/supplement:

Editorial Board/Publication Subcommittee Co-Chairs (include diversity information):

The Fair Labor Standards Act
Date of last edition or supplement: 2016

Projected date of next edition/supplement: September 2016

Editorial Board/Publication Subcommittee Co-Chairs (include diversity information):

Ellen Kearns (WF)
Aaron Kaufmann (WM)
Dennis McClelland (WM)
Megan Yelle (WF)

*The Family and Medical Leave Act*
Date of last edition or supplement:
See attached list of projected dates etc.

Projected date of next edition/supplement:

Editorial Board/Publication Subcommittee Co-Chairs (include diversity information):

*State Wage & Hour Law: A State-by-State Survey*
Date of last edition or supplement: 2010
Projected date of next edition/supplement: 2016

Editorial Board/Publication Subcommittee Co-Chairs (include diversity information):

*Age Discrimination in Employment Act*
Date of last edition or supplement:
See attached list of projected dates etc.

Projected date of next edition/supplement: July, 2016

Editorial Board/Publication Subcommittee Co-Chairs (include diversity information):

Greg McGillivary (WM)

How often does the Committee produce newsletters?
Twice a year

Please attach copy of most recent issue, if applicable.

Has the Committee submitted articles for publication in the Section Newsletter, Hot Topics/E-Alerts or FLASH? If so, please attach.

Does the committee provide CLE programming other than Midwinter Meetings and Annual Section Conference/ABA Annual Meeting panels? If yes, please describe.

Historically no programming outside of the Annual Section Conference and Midwinter Meetings but last year participated in a webinar.
V. BEST PRACTICES

1. If the Committee uses any of the Best Practices for Recruiting and Retaining New Members listed below as examples, please indicate yes, and briefly describe, including remarks on whether they were effective and why.

- Publicize the Committee Midwinter Meeting at conferences for attorneys from various constituencies?
  
  Yes, done at the Annual Section Conference.

- Provide a time during the Midwinter Meeting that does not conflict with Committee programming for separate meetings for constituency groups?
  
  No.

- Sponsor a law student program for local law schools during the Midwinter Meeting or other Committee program?
  
  No.

- Provide programming or social events especially of interest to young lawyers or new lawyers?
  
  Yes. There is a Special Welcome Reception for first time attendees.

- Assign a mentor or “buddy” for first time attendees?
  
  Not done this year, but leadership plans to reinstitute this.

- Hold an event for first-time attendees?
  
  Yes. There is a Special Welcome Reception for First time attendees.

- Hold regional meetings such as those involving government officials?
  
  None this year. These have been conducted in the past on an as needed basis.

- Follow-up with past first-time attendees to encourage attendance at the Midwinter Meeting?
  
  Yes. The leaders on the Committee plan to reach out to encourage continued involvement and attendance.

- Contact past regular attendees who have not yet registered to encourage attendance at the Midwinter Meeting?
  
  This was done this year by the Co-Chairs and it will be continued.
- Schedule programs in conjunction with other Committees or Sections?

  Yes. The Committee is working with the Webinar Sub Committee to produce a Webinar in April on Arbitrating Wage and Hour Cases. The Committee is also developing a Webinar series on state wage and hour laws.

2. Please describe any other activities by this Committee that may be useful to the Section or to other Standing Committees in the recruitment and retention of new members. Include lessons learned this year and recommendations to improve future recruitment and retention efforts.

  The Committee believes it provides outstanding social activities as part of its programing. This attracts people to its program and encourages retention by members. Committee members do word of mouth contacts to encourage and recruit members, grass roots recruiting.

3. Does the Committee follow any of the following Best Practices for attracting diverse members? Please answer yes or no and briefly describe, including remarks on whether they were effective and why.

  - Have a diversity task force or diversity committee?
    
    Yes. This Committee was initiated at this Mid-Winter. It is in its infancy, however, and it needs encouragement and growth. We recommend tangible goals that can be achieved. Ellen Kearns has agreed to chair this Committee.

  - Develop alliances with minority bar associations by invitations to participate in the Midwinter Meeting?

    No.

  - Invite minority bar associations to co-sponsor events celebrating diversity at the Midwinter Meeting?

    No.

  - Offer scholarships or reduced registration to members of minority bar associations or other organizations that co-sponsor diversity events at the Midwinter Meeting?

    No.

  - Offer events at the Midwinter Meeting of particular interest to diverse attorneys?

    No.

  - Involve diversity committee or task force members in decisions on Committee programs and speakers?

    This is a suggestion that the Committee plans to utilize for next year’s meeting.
• Invite women, attorneys of color, LGBT, disabled, government and in-house attorneys to participate as speakers on program panels?

Yes. Many of the panels were diverse in all perspectives.

• Communicate with law school diversity directors and organizations for women and law students of color at local law schools about programs for law students?

Yes, in the past. However, the Committee met in Mexico this year.

• Have you discussed with the Committee the need to implement steps to attract diverse members?

Yes. This is why the Committee created the Diversity Committee.

• Do you think this Committee needs help in this area and if so what steps do you suggest?

Yes. Joe Tilson suggested outreach to NELC. We also suggest that the Committee’s DLP Liaison use the DLP group as a resource for information and speakers.

4. Please describe any other activities by this Committee that may be useful to the Section or to other standing committees in attracting diverse members. Include lessons learned this year and recommendations to improve future diversity recruitment and retention efforts.

There was a lively discussion and brainstorming about other ways to encourage more membership and diversity at the first Diversity Committee meeting.

5. Does the Committee use any of the following Best Practices for Leadership Development? Please answer yes or no and briefly describe, including remarks on whether they were effective and why.

• Hold a “meet the leadership” event at the Midwinter Meeting to explain the process for becoming a speaker and/or Committee leader (e.g., subcommittee co-chair, editor, etc.) and describe other opportunities for active membership?

None formally.

• Appoint an individual or committee to serve as the contact for new members who want information and assistance in becoming involved in Committee activities?

The Co-Chairs are considering appointing someone in this position.

• Have positions such as vice chairs, program co-chairs, administrative co-chairs or subcommittee co-chairs to provide a transparent pathway to Committee leadership?

The path to leadership in this Committee is through its many publications. Involvement in the book writing and editing is the first step. This leads to opportunities to speak at the Midwinter meetings. Experienced speakers assist in planning the programs and
eventually move into the Co-Chair positions. A new Government Co-Chair now exists. The Committee is considering implementing Vice Chairs to make the path to leadership even more transparent.

- Condition selection for leadership positions on demonstrated leadership and past work on Committee projects, including programs, publications or other subcommittee work?

  Yes

- Encourage members to apply for the Section Leadership Development Program (LDP) and recommend those who have demonstrated leadership ability for admission to the Program.

  Yes. Many leaders (past and present) of this Committee are LDP graduates.

6. Please describe any other activities by this Committee that may be useful to the Section or to other standing committees in developing leaders. Include lessons learned this year and recommendations to improve future leadership development efforts.

This Committee has an excellent Sub-Committee structure that drives its very successful publications but it also provides a clear mechanism for Midwinter programming and a path to leadership. It is impressive.

7. Were there any presentations/programs of particular interest that would be appropriate to repeat as webinars or speaker papers that should be submitted for publication in the ABA Journal of Labor & Employment Law?

Hot Topics FLSA, Pay Equity panel would both be good webinar topics.

8. Would you recommend any speakers, moderators or topics for the Annual Section Conference?

Not at this time.

9. Are there any questions, suggestions or concerns that the Committee would like to raise with the Council or Section Leadership? Is there any way in which the Council can assist with the Committee’s attaining its goals?

The Committee made the following suggestions:

1) Section Development Funds would aid the Committees if the amount distributed annually was less but over a longer time period. This would allow individuals to become more invested in the Committee and might increase likelihood of return once the Funds are no longer available.

2) Section operation documents should be available more easily to members at the Midwinter Meeting. This will allow them to see how the Section functions and how leadership is selected.
American Bar Association
Section of Labor and Employment Law
Federal Labor Standards Legislation Committee Midwinter Meeting
Playa del Carmen, Mexico
February 22-24, 2017

PROGRAM AGENDA

Wednesday, February 22

4:00 – 5:30 p.m. Registration (Grand Ballroom Foyer)

4:30-4:45 p.m. Welcome and Introductions (Grand Ballroom)
Michele Fisher, Employee Co-Chair, Nichols Kaster, PLLP
Jeremy Glenn, Employer Co-Chair, Cozen O’Connor
Jason Marsili, Union & Employee Co-Chair, Posner & Rosen LLP
Dane Steffenson, Public Co-Chair, U.S. Department of Labor

4:45-5:45 p.m. The U.S. Department of Labor: A Candid Conversation
The former U.S. DOL Solicitor will speak openly about working for the Obama Administration, the trials and tribulations of her work in public office, and her personal views on what we might expect to see for wage and hour in the future.

Moderator: Jeremy Glenn, Cozen O’Connor, Chicago, IL
Speaker: M. Patricia Smith, Former Solicitor, U.S. Department of Labor, Washington, DC

6:00-6:30 p.m. Reception for First-Time Attendees (Under the Bridge)

6:30-8:00 p.m. Welcome Reception (Under the Bridge)

Thursday, February 23

7:30 – 8:15 a.m. Continental Breakfast (Citrus Patio)

8:15-9:15 a.m. Front-Line Insight from the Department of Labor (Grand Ballroom)
Hear from DOL trial attorneys who are out in the field providing counsel to wage and hour during investigations, litigating cases, training investigators, and assisting wage and hour in identifying enforcement priorities and strategies. Gain some insights and learn some do’s and don’ts of wage and hour compliance through real stories from the field.

Moderator: Dane Steffenson, Senior Trial Attorney, U.S. Department of Labor, Atlanta, GA
Speakers: James Glickman, Trial Attorney, U.S. Department of Labor, Boston, MA
Jonathan Kronheim, Counsel for Trial Litigation, U.S. Department of Labor, Washington, DC
Kristin Murphy, Trial Attorney, U.S. Department of Labor, Atlanta, GA

9:00 – 10:30 a.m. Spouse/Guest Breakfast (La Cocina)

9:15-10:15 a.m. What’s Happening at the EEOC and Case Law Update (Grand Ballroom)
Hear from the EEOC’s top official about what is happening at the EEOC and with EEOC initiatives. Then get a case law update from an experienced EEO attorney
who gives an upbeat and colorful summary of the interesting and important employment cases from the year prior.

Katherine L. Butler, Butler & Harris, Houston, TX

10:15-10:30 a.m. Break (Citrus Patio)

10:30-11:30 a.m. BREAKOUT SESSIONS

SESSION A  ADEA Collective Actions are Heating Up (Grand Ballroom C)
ADEA collective actions, which follow the FLSA’s 216(b) procedure, present unique challenges and opportunities. This panel will explore the cases, developments and trends in federal courts.

Moderator: Roxana Bell, Visiting Assistant Clinical Professor of Law, Indiana University Robert H. McKinney School of Law, Bloomington, IN

Speakers: Michael Russell, Gilbert Russell McWherter Scott Bobbitt PLC, Nashville, TN
Martine Wells, Brownstein Hyatt Farber Schreck, LLP, Denver, CO

SESSION B  What Wage and Hour Case is Susceptible to Class Relief and What is Not: Has Tyson Foods v. Bouaphakeo Decision Helped Us Answer that Question? (Grand Ballroom A-B)
This landmark Supreme Court decision will be discussed by attorneys who handled the case through the Supreme Court, followed by a panel discussion on the extent of its fallout and significance.

Moderator: John Ho, Cozen O’Connor, New York, NY

Speakers: Michael J. Mueller, Hunton & Williams LLP, Washington, DC
Reed Russell, Phelps Dunbar LLP, Tampa, FL
Juno Turner, Outten & Golden LLP, New York, NY
Robert L. Wiggins, Jr., Wiggins Childs Pantazis Fisher & Goldfarb, LLC, Birmingham, AL

11:30-12:30 p.m. Trending Ethical Concerns from the Trenches (Grand Ballroom A-B)
This program will address significant and emerging ethical issues that arise under federal and state wage and hour laws and related employment statutes. It is intended for practitioners who represent parties in individual, class, collective, and joint actions. Topics include ethical considerations regarding soliciting & advertising, contact with potential/putative class or collective members before and after a complaint is filed, notices, ex parte contacts, and more.

Speakers: Jack A. Raisner, Outten & Golden LLP, New York, NY
Jennifer Williams, Cozen O’Connor, Miami, FL

12:30-1:00 p.m. Committee Business (Grand Ballroom A-B)
a. Report from Section Leadership
b. Publications
c. Liaisons to Section Administrative Committees
d. Future Meetings
1:30 – 5:00 p.m.  Tulum Tour (optional ticketed event)

6:30-7:00 p.m.  Promoting Diversity in the Section (Paseo Bar)
Open to all meeting attendees.

7:00-9:00 p.m.  Reception and Dinner Party (Beach Deck)

Friday, February 24

7:30 – 8:15 a.m.  Continental Breakfast (Citrus Patio)

8:15-9:15 a.m.  Pay Equity: Increasing Enforcement and Emerging Issues (Grand Ballroom)
As plaintiffs’ attorneys have taken a new interest in bringing pay equity cases in the
wake of several blockbuster settlements, states have jumped ahead of the federal
government to enact the toughest pay equity laws ever. These laws build on the
framework of the federal Equal Pay Act but go further. Panelists will update you on
these changes and discuss how you can protect your clients in this rapidly evolving
area.

Moderator:  Gina K. Janeiro, Jackson Lewis P.C., Minneapolis, MN
Speakers:  Carrie Amidon, Ph.D., Berkeley Research Group LLC, Tallahassee, FL
Susan Ellingstad, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN
David Schlesinger, Nichols Kaster, PLLP, Minneapolis, MN
Christopher Wilkinson, Orrick, Herrington & Sutcliffe LLP, Washington, DC

9:15-10:15 a.m.  FLSA Hot Topics (Grand Ballroom)
Based on cases found in the 2017 FLSA Midwinter Report as well as news from the
DOL, this panel will identify hot topics and trends under the FLSA and what they
mean for practitioners and their clients.

Moderator:  Robert Boonin, Dykema Gossett PLLC, Detroit, MI
Speakers:  Ryan Hagerty, Asher Gittler & D’Alba Ltd., Chicago, IL
Laura Ho, Goldstein, Borgen, Dardarian & Ho, Oakland, CA
Jonathan A. Keselenko, Foley Hoag LLP, Boston, MA

10:15-10:30 a.m.  Break (Citrus Patio)

10:30-11:30 a.m.  BREAKOUT SESSIONS

SESSION A  WARN/Sarbanes-Oxley (Dual Panel) (Grand Ballroom C)

You Have Been WARN’d
Explore WARN Act basics and case law developments through interactive exercises.
Audience participation will be strongly encouraged. Don’t say we didn’t WARN
you!

Speakers:  Matthew Helland, Nichols Kaster, PLLP, San Francisco, CA
Daniel Vliet, Buelow Vetter Olson Buikema & Vliet, Waukesha, WI
Whistleblower Provisions of Sarbanes Oxley
The panel will discuss legal reactions to heightened scrutiny by the SEC, DOL, and EEOC of confidentiality agreements that limit employee communications with government agencies. The panel will also address recent developments in SOX's anti-retaliation provision, including clarification of the “causation” standard for retaliation claims, and whether the Dodd-Frank Act protects internal reporting of perceived securities violations.

Speaker: Harry (Hal) Wellford, Jr., Littler Mendelson P.C., St. Louis, MO

SESSION B
Trying or Arbitrating a Wage and Hour Case (Grand Ballroom A-B)
While most wage and hour cases resolve before trial, practitioners must still litigate their cases with a trial plan and trial strategy in mind. Hear from FLSA litigators who have recently tried or arbitrated wage and hour cases, as they discuss what they would do the same and differently, representative testimony and evidence, witness preparation, motions in limine, and the trial/arbitration itself.

Speakers: Matthew Dunn, Getman & Sweeney, PLLC, New York, NY
Ellen Kearns, Constangy, Brooks, Smith & Prophete, LLP, Boston, MA
William “Billy” Ryan, Donati Law, PLLC, Memphis, TN
Michael Schmidt, Cozen O’Connor, New York, NY

11:30-12:30 p.m. FMLA Games: What if YOU were the Employee, or the Employer, or the Judge?! (Grand Ballroom A-B)
This interactive session will utilize actual fact scenarios from recent FMLA decisions summarized in the Midwinter Report to highlight emerging issues. Panelists and participants will discuss and debate the facts, the procedures, and the law. The panel of FMLA experts will discuss significant decisions from 2016 and compare to audience feedback. This hands-on exercise will demonstrate the complexities that employees and employers are often faced with when requesting or approving FMLA leave.

Speakers: Cara E. Greene, Outten & Golden LLP, New York, NY
Heidi Parker, Asher Gittler & D’Alba Ltd., Chicago, IL
James Paul, Ogletree Deakins, St. Louis, MO

7:00-9:00 p.m. Dinner at SUR Steakhouse (optional ticketed event)

We thank our sponsors for their generous contributions:

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Bronze Level
Akin Gump Strauss Hauer & Feld LLP
Constangy, Brooks, Smith & Prophete, LLP
Dykema Gossett PLLC
Goldstein, Borgen, Dardarian & Ho
Leonard Carder LLP
Wiggin and Dana LLP
Committee: Occupational Safety and Health Law

Meeting Dates & Location: March 7-10 – Jupiter, Florida

Report Submitted By: Victoria Bor and Randy Coffey

I. COMMITTEE LEADERSHIP & FELLOWS

Committee Co-Chairs (include terms and diversity information):

Melissa Bailey, Employer Co-Chair – 2017-2019 (WF)
Randy Rabinowitz, Union & Employee Co-Chair – 2014-2018 (WF)
Orlando Pannocchia, Public Co-Chair – 2014-2017 (HM)

Vice Chairs/Program Co-chairs/Subcommittee Co-Chairs/Other Leadership (include terms and diversity information):

The Committee has a program subcommittee; the co-chair positions are currently vacant.

Government, YLD and Law Student Division Fellows (include terms and diversity information and indicate if they attended the Midwinter Meeting; if not, explain):

Government Fellows:
Schean Belton, Office of the Solicitor, U.S. Department of Labor (BF)
Shelly Dufford, U.S. Occupational Safety and Health Review Commission (WF)
*Kimberly Robinson, U.S. Department of Labor (WF)

*Unable to attend the 2017 Midwinter Meeting.

Were the Fellows given any Midwinter Meeting or other Committee assignment? If yes, please describe.

Ms. Belton was a speaker on two panels: The “OSHA Primer,” presented for first-time attendees on the afternoon before the meeting officially begins, and “Legal Issues Arising from OSHA Inspections.”

II. MIDWINTER MEETING

1. Attach Program Agenda (See attached.)

2. Please provide the following Midwinter Meeting speaker diversity information. Preferably, speakers should be asked to supply this information themselves (on a voluntary basis, of course).
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3. Name of hotel and room rate(s):

Wyndham Grand Jupiter at Harbourside Place
$249/night

Were there any aspects of the service, guest or meeting rooms or other elements of this property that warrant comment because they were especially good or bad?

The participants seemed pleased with the accommodations. However, while the property is in walking distance to a variety of restaurants, participants had to drive to take advantage of any recreational options outside the hotel (beach, parks, etc.).

4. Name of alternate hotel and room rate(s) (if applicable):

There was no officially-designated alternate hotel. However, there were several inexpensive hotels in driving distance, at which a number of the union/employee attendees stayed.

5. Registration fee(s) (include discounted rates/categories):

Section Member: $350  
ABA Member: $450  
Non-ABA Member: $550  
Government Agency: $250

6. Social events included in registration fee(s):

Tuesday Welcome Reception  
Wednesday First-Time Attendee Breakfast  
Wednesday Spouse/Guest Breakfast  
Wednesday Diversity Reception  
Thursday Committee Reception

7. Were sponsorships solicited/collected for this meeting? If so, indicate amount received and attach solicitation letter.

Yes – $16,750.
8. Were scholarships solicited/awarded for this meeting? If so, indicate amount of scholarships received and amount provided to attendees. Include criteria for selection of scholarship recipients and attach application form.

No.

9. Provide total attendance per constituency and percentage of total:

Employer/Management: 115
Union & Employee: 5
Employee/Plaintiff: 0
Government/Public: 18
Neutral (arbitrator/mediator): 0
Academic: 2
Press: 0
Other: 7 (non-profit)
Unknown: 2

TOTAL ATTENDANCE: 149

In-House Corporate Counsel: 11
In-House Union Counsel: 0
Young Lawyers Division Member: 0
Law Student Division Member: 0

Number of first-time attendees: UNKNOWN
Percentage of attendees who were first-time attendees: UNKNOWN

III. LIAISONS TO SECTION ADMINISTRATIVE COMMITTEES

List liaisons to the following Section Administrative Committees and include diversity information:

Diversity in the Legal Profession (DLP): Shontell Powell (Employer – BF)

Membership Development Committee:

Pro Bono Committee:

Social Media Committee:

CLE Coordinating and Resources Committee: Elizabeth Nadeau (Union & Employee – WF)

Please provide any suggestions from liaisons for improving the functioning of the Administrative Committee to which they are assigned.
IV. COMMITTEE PUBLICATIONS & CLE PROGRAMS

List books or other publications the Committee produces and provide the following information for each:

*Occupational Safety and Health Law, 3d Edition*

Date of last edition or supplement:

2013

Projected date of next edition/supplement:

Undetermined.

Editorial Board/Publication Subcommittee Co-Chairs (include diversity information):

How often does the Committee produce newsletters?

N/A

Has the Committee submitted articles for publication in the Section Newsletter, Hot Topics/E-Alerts or FLASH? If so, please attach.

N/A

Does the committee provide CLE programming other than Midwinter Meetings and Annual Section Conference/ABA Annual Meeting panels? If yes, please describe.

N/A

V. BEST PRACTICES

1. If the Committee uses any of the Best Practices for Recruiting and Retaining New Members listed below as examples, please indicate yes, and briefly describe, including remarks on whether they were effective and why.

   - Publicize the Committee Midwinter Meeting at conferences for attorneys from various constituencies?

   - Provide a time during the Midwinter Meeting that does not conflict with Committee programming for separate meetings for constituency groups?

   - Sponsor a law student program for local law schools during the Midwinter Meeting or other Committee program?

     o In prior years, the Committee has attempted to partner with local law school student associations (e.g., Hispanic Student Associations), but we have not been successful.
• Provide programming or social events especially of interest to young lawyers or new lawyers?
  
  o The Committee conducts an “OSHA Primer” session on the afternoon before the meeting officially begins, for the benefit of lawyers new to the practice of occupational safety and health law.

• Assign a mentor or “buddy” for first time attendees?
  
  o After discussions with the Section leadership at the midwinter meeting, the committee plans to institute this next year.

• Hold an event for first-time attendees?
  
  o The Committee holds a breakfast for first-time attendees.

• Hold regional meetings such as those involving government officials?

• Follow-up with past first-time attendees to encourage attendance at the Midwinter Meeting?
  
  o Co-chairs intend to do in the future.

• Contact past regular attendees who have not yet registered to encourage attendance at the Midwinter Meeting?

• Schedule programs in conjunction with other Committees or Sections?
  
  o For several years, the Committee held its meetings in conjunction with the Workers’ Compensation Committee, scheduling the meetings at the same time and holding one or two joint sessions. The Committees had a hard time finding programming that appealed to both sets of constituents, so they ended the experiment.

2. Please describe any other activities by this Committee that may be useful to the Section or to other Standing Committees in the recruitment and retention of new members. Include lessons learned this year and recommendations to improve future recruitment and retention efforts.

  • The Co-Chairs had a very productive meeting with Chair Holtzman during the midwinter meeting, and they will be following up on some of her suggestions for increasing diversity (including, as indicated above, assigning buddies to first-time attendees; following up with this year’s first-time attendees; and contacting past regular attendees), as well as the items listed below.

3. Does the Committee follow any of the following Best Practices for attracting diverse members? Please answer yes or no and briefly describe, including remarks on whether they were effective and why.

  • Have a diversity task force or diversity committee?
The Committee has a liaison to the Diversity in the Legal Profession Committee and will be discussing whether it is feasible to create a committee-level subcommittee or task force.

- Develop alliances with minority bar associations by invitations to participate in the Midwinter Meeting?

The Committee’s past efforts in this regard have not been successful.

- Invite minority bar associations to co-sponsor events celebrating diversity at the Midwinter Meeting?

The Committee has once had success inviting a minority bar to provide a speaker at/bring members to our diversity reception, and will attempt to do so again.

- Offer scholarships or reduced registration to members of minority bar associations or other organizations that co-sponsor diversity events at the Midwinter Meeting?

No.

- Offer events at the Midwinter Meeting of particular interest to diverse attorneys?

No.

- Involve diversity committee or task force members in decisions on Committee programs and speakers?

The main focus in deciding on topics is to find those that appeal to the different constituency groups, which at times proves difficult. The Committee’s leadership generally attempts to identify diverse attorneys as speakers; although about 17% of the Committee's speakers/moderators at this year’s program were ethnically diverse and slightly over 37% were female, the Committee has had difficulty in ensuring diversity on all of the panel presentations. The Committee is exploring additional ways to attract diverse participants and attendees.

- Invite women, attorneys of color, LGBT, disabled, government and in-house attorneys to participate as speakers on program panels?

Yes, efforts are always made to invite diverse attorneys to speak on the panels.

- Communicate with law school diversity directors and organizations for women and law students of color at local law schools about programs for law students?

No.

- Have you discussed with the Committee the need to implement steps to attract diverse members?

Yes; and Gail had a particularly effective meeting with the Committee leadership at this year’s midwinter meeting.
• Do you think this Committee needs help in this area and if so what steps do you suggest?

After their meeting with Gail, the co-chairs have some fresh ideas of how to move forward in diversifying and broadening the membership, and are committed to doing so.

4. Please describe any other activities by this Committee that may be useful to the Section or to other standing committees in attracting diverse members. Include lessons learned this year and recommendations to improve future diversity recruitment and retention efforts.

5. Does the Committee use any of the following Best Practices for Leadership Development? Please answer yes or no and briefly describe, including remarks on whether they were effective and why.

• Hold a “meet the leadership” event at the Midwinter Meeting to explain the process for becoming a speaker and/or Committee leader (e.g., subcommittee co-chair, editor, etc.) and describe other opportunities for active membership?

The Section leadership and liaisons make a presentation at the beginning of each midwinter meeting, describing the Section’s structure and how to get more involved in the Section, and inviting the participants to contact the co-chairs to get more involved in the Committee. There is not otherwise a structured meeting on how to become a Committee leader. The Liaisons suggest that the Committee add a “feedback” session with Committee leadership at some point during the meeting, to allow comment on the program and to provide opportunities for those interested in a greater role in the Committee to express that interest.

• Appoint an individual or committee to serve as the contact for new members who want information and assistance in becoming involved in Committee activities?

The leadership speaks at the breakfast for new attendees and invites people to contact them if they want to get more involved.

• Have positions such as vice chairs, program co-chairs, administrative co-chairs or subcommittee co-chairs to provide a transparent pathway to Committee leadership?

No. (See next question.)

• Condition selection for leadership positions on demonstrated leadership and past work on Committee projects, including programs, publications or other subcommittee work?

With the exception of the program committee, the Committee does not have a subcommittee structure. The management bar has a semi-formal process of appointing members with demonstrated interest and leadership skills to the program committee as a step towards becoming committee co-chair. The union/employee bar has not had a sufficient number of participants to establish a formal process; and this is the end of the first term for the first public co-chair, and they have not yet established a formal succession process.
• Encourage members to apply for the Section Leadership Development Program (LDP) and recommend those who have demonstrated leadership ability for admission to the Program.

Yes, we have encouraged participants to apply for the LDP, and one of our regular attendees, Valerie Butera (WF) has recently been accepted into the program. We also encourage participants to apply to the Development Fund; we currently have one attendee, Jora Trang (AF), with a scholarship from the Fund.

6. Please describe any other activities by this Committee that may be useful to the Section or to other standing committees in developing leaders. Include lessons learned this year and recommendations to improve future leadership development efforts.

7. Were there any presentations/programs of particular interest that would be appropriate to repeat as webinars or speaker papers that should be submitted for publication in the ABA Journal of Labor & Employment Law?

Two panels may be appropriate for webinars: “Legal Issues Arising from OSHA Inspections” and “The Anatomy of an OSHA Case: Litigation Tips and Strategies.”

8. Would you recommend any speakers, moderators or topics for the Annual Section Conference?

The Committee is working on two panels with the planning committee for the 2017 Annual Section Conference and has submitted a number of speaker recommendations.

9. Are there any questions, suggestions or concerns that the Committee would like to raise with the Council or Section Leadership? Is there any way in which the Council can assist with the Committee’s attaining its goals?

The Committee leadership and/or members raised concerns to pass on to the Council:

1. The Committee wants to encourage the Council to increase the number of Government Fellows. At one time, the Committee had five fellows; it currently has three. Given the current governmental and Section budgetary constraints, it is difficult to get younger government lawyers to attend the midwinter meetings without these fellowships.

2. The union/employee members of the Committee are concerned about the implications of the Council’s reduced financial support for the midwinter meetings. All of the sponsorship money the OSH Law Committee raises comes from management law-firms; and the way it is budgeted, it fully funds the Committee’s support for government speakers. This year, the sponsorship money also paid for a dinner for government participants and the Committee’s current and past leadership (an event that, until a few years ago, the Section financed). If not an actual ethical issue, this seems to many to create an awkward and inappropriate situation.

Robust participation by government representatives is critical to the success of the Committee’s midwinter meetings. However, other than seeking additional support from the Council, we do not see alternative means of raising money to support their participation. The Committee has long had difficulty attracting many union/employee participants. This is in large part due to the nature of the practice: Because of the limited
role the relevant statutes give unions and employees, unions and employee organizations are more likely to use safety and health professionals in enforcement proceedings than lawyers, therefore, there is not a large union/employee-side bar – and the bar that exists is not well-financed. Consequently, they are not a source of sponsorship money. And given the limited resources of both the union/employee attendees and the government attendees whom the Committee does not finance, raising the registration fee to off-set expenses -- including covering the costs of government participants – is not a viable option.

The Committee therefore asks the Council to consider this in evaluating its policies for supporting midwinter meetings.

3. The resort-style hotels and half-day programming for these meetings has been viewed by the union/employee attendees as discouraging attendance. This year, several of the younger management attendees (particularly women) voiced similar concerns. The Committee would therefore like the Council to ask the leadership development and diversity committees to consider whether it would encourage more young and diverse lawyers to become more involved in the Section’s and Committee’s activities if the standing committees held their midwinter meetings at less costly venues and/or re-evaluated their half-day programming.

4. The Committee’s Liaison to the CLE Coordinating and Resources Committee, Elizabeth Nadeau, prepared a comprehensive review of the composition of the panels and the program evaluations. Her report is attached. Of particular note was that in contrast to the government and union/employee panelists, the management panelists were overwhelmingly white males (85%). With respect to the evaluations, the sample size was small. However, she notes that evaluators gave disproportionate numbers of negative reviews to the program’s female, minority and union/employee panelists, which she concludes shows a troubling level of bias among the attendees. The first issue – increasing the diversity of the panels – is a matter the Committee is committed to addressing. The Committee – and the profession – could use guidance on how to address the second issue.
Tuesday, March 7

3:00 p.m. – 7:30 p.m. Registration (Preserve Ballroom Foyer)

3:30 p.m. – 5:00 p.m. OSHA Primer (Dunes A)
The primer provides a description of the fundamentals of the Occupational Safety and Health Act, the Occupational Safety and Health Administration, and the authority of the Occupational Safety and Health Review Commission. The session will cover the statutes involved in OSHA practice, OSHA enforcement of the regulations and standards promulgated pursuant to the OSH Act, the role of the Commission and appellate courts, and practice before those tribunals.

Panelists: Schean Belton, Office of the Solicitor, U.S. Department of Labor, Nashville, TN
Randy Rabinowitz, OSHA Law Project, Washington, DC
Nelva Smith, Steptoe & Johnson PLLC, Columbus, OH

6:00 p.m. – 7:30 p.m. Welcome Reception (Preserve Ballroom)

Wednesday, March 8

7:00 a.m. – 8:00 a.m. Registration and Continental Breakfast (Preserve Ballroom Foyer)

7:00 a.m. – 8:00 a.m. First-Time Attendee Breakfast (Pelican)

8:00 a.m. – 12:50 p.m. General Sessions (Preserve Ballroom)

8:00 a.m. – 8:10 a.m. Opening Remarks by Committee Co-Chairs
Melissa A. Bailey, Employer Co-Chair, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Washington, DC
Orlando J. Pannocchia, Public Co-Chair, Office of the Solicitor, U.S. Department of Labor, Washington, DC
Randy Rabinowitz, Union and Employee Co-Chair, OSH Law Project, Washington, DC

8:10 a.m. – 8:20 a.m. Welcome Remarks by Section Leadership
Gail Golman Holtzman, Section Chair, Tampa, FL
Don Slesnick, Section Chair-Elect, Coral Gables, FL
Victoria L. Bor, Union & Employee Council Liaison, Washington, DC
J. Randall Coffey, Employer Council Liaison, Kansas City, MO

8:20 a.m. – 9:20 a.m. Remarks from the Solicitor’s Office
Susan Harthill, Deputy Solicitor for National Operations, Washington, DC
9:00 a.m. – 10:30 a.m.  Spouse/Guest Breakfast *(Beacon)*

9:20 a.m. – 10:20 a.m.  **2015-2016: Key Issues in Enforcement**
This panel will address developments on OSHA’s enforcement programs and initiatives, including OSHA’s programs for enforcement partnerships and enterprise-wide abatement.


**Panelists:** Eric Frumin, *Safety and Health Director, Change to Win*, New York, NY
Thomas Galassi, *Director, Directorate of Enforcement Programs, OSHA, Washington, DC*
Orlando J. Pannocchia, *Counsel for Regional Litigation and Legal Advice, Office of the Solicitor, Washington, DC*

10:20 a.m. – 10:35 a.m.  **Break (Preserve Ballroom Foyer)**

10:35 a.m. – 11:50 a.m.  **Anatomy of an OSHA Case: Litigation Tips and Strategies**
The elements of an OSHA violation and common affirmative defenses such as unpreventable employee misconduct are relatively straightforward, but litigating an OSHA matter often is not. An Administrative Law Judge as well as seasoned litigators from the management and union bars, as well as the Office of the Solicitor, will discuss tips and strategies for litigating OSHA enforcement matters.

**Moderator:** Ronald W. Taylor, *Venable LLP, Baltimore, MD*

**Panelists:** Hon. Covette Rooney, *Chief Judge, U.S. Occupational Safety and Health Review Commission, Washington, DC*
Steven R. McCown, *Littler Mendelson P.C., Austin, TX*
Evert Van Wijk, *Office of the Solicitor, Kansas City, MO*
Steve Yokich, *Dowd, Bloch, Bennett, Cervone, Auerbach and Yokich, Chicago, IL*

11:50 a.m. – 12:50 p.m.  **Issues of Ethics, Professionalism and Civility in OSHA/MSHA Practice**
This panel will consider ethical, professionalism and civility issues related to lawyer conduct in the practice of safety and health law before Administrative Law Judges and the Commissions.

**Moderator:** George R. Salem, *Washington, DC*

**Panelists:** Hon. Robert J. Lesnick, *Chief Judge, U.S. Federal Mine Safety and Health Review Commission, Washington, DC*

5:30 p.m. – 7:00 p.m.  **Reception (Pool Deck)**
Thursday, March 9

7:00 a.m. – 8:00 a.m.  Continental Breakfast *(Preserve Ballroom Foyer)*

8:00 a.m. – 10:30 a.m.  **General Sessions (Preserve Ballroom)**

8:00 a.m. – 8:30 a.m.  **Remarks from OSHA**  
Dorothy Dougherty, *Deputy Assistant Secretary, Washington, DC*

8:30 a.m. – 9:30 a.m.  **Update from the Occupational Safety and Health Review Commission and the Federal Mine Safety and Health Review Commission**  
This panel will provide an update on the OSHRC and FMSHRC, including providing insights on caseloads, procedural issues and changes, and the current state of the Commissions. Questions from the audience are encouraged.

**Moderator:** Dennis J. Morikawa, *Morgan, Lewis & Bockius LLP, Philadelphia, PA*

**Panelists:**  
Heather MacDougall, *Acting Chairperson, Occupational Safety and Health Review Commission, Washington, DC*

9:30 – 10:30 a.m.  **From Promulgation to Litigation in OSHA Rulemaking**  
OSHA has issued multiple regulations and standards in the past two years, some of which have been challenged. This panel will discuss the process OSHA follows in promulgating regulations and standards, recent rulemaking trends, the settlement negotiations that may ensue after a challenge, and recent court decisions.

**Moderator:** Tressi L. Cordaro, *Jackson Lewis P.C., Reston, VA*

**Panelists:**  
Jordan A. Barab, *Consultant, Washington, DC*  
Lauren S. Goodman, *Senior Attorney, Office of the Solicitor, Washington, DC*  
Kathryn M. McMahon, *Conn Maciel Carey, LLP, Washington, DC*

10:30 a.m. – 10:45 a.m.  **Break (Preserve Ballroom Foyer)**

10:45 a.m. – 11:45 a.m.  **Breakout Sessions**

**A. New Developments in Process Safety Management (Preserve Ballroom C)**  
This panel will discuss recent developments, including OSHA’s oil and gas guidance memorandum, RAGAGEP, and the exemption for atmospheric storage tanks.

**Moderator:** Gregory C. Dillard, *Katten Muchin Rosenman LLP Houston, TX*

**Panelists:**  
Madeleine T. Le, *Regional Counsel, OSHA, Dallas, TX*  
Peter Vassalo, *Acting Deputy, Directorate of Enforcement Programs, OSHA, Washington, DC*
B. Recent Developments in Mine Safety and Health Law (*Dunes A*)
This panel will discuss developments in regulations and enforcement of the Mine Safety and Health Act.

**Moderator:** Kristin Baker White, *Jackson Kelly PLLC, Denver, CO*

**Panelists:**
- Mark E. Heath, *Spilman Thomas & Battle, PLLC, Charleston, WV*
- April Nelson, *Associate Solicitor for Mine Safety and Health, Arlington, VA*
- Arthur Traynor, *United Mine Workers, Washington, DC*

C. Legal Issues Arising from OSHA Inspections (*Dunes B*)
This panel will discuss the legal issues that may arise during inspections, which can range from multiple agencies having jurisdiction following an accident to subpoenas issued by OSHA during an inspection. The panel will also talk about recent litigation involving warrants and other inspection issues.

**Moderator:** Kenneth D. Kleinman, *Stevens & Lee, Philadelphia, PA*

**Panelists:**
- Schean Belton, *Office of the Solicitor, Nashville, TN*
- Steven G. Biddle, *Littler Mendelson P.C., Phoenix, AZ*
- Elizabeth Nadeau, *Law Office of Elizabeth Nadeau, Washington, DC*

D. Congress’s Legislative Agenda and the Potential Impact on OSHA (*Preserve Ballroom AB*)
The 115th Congress was sworn in in January. With Republicans in control of the House, Senate and White House, legislative activity on a variety of issues affecting OSHA may move forward. The legislation under consideration includes significant reforms to the Administrative Procedure Act. If they become law, these regulatory reform bills will significantly change the way federal agencies regulate workplaces. This panel will discuss Congressional legislative developments and their potential impact on OSHA.

**Moderator:** David G. Keller and Heckman LLP, *Washington, DC*

**Panelists:**
- Marc Freedman, *United Chamber of Commerce, Washington, DC*
- Jonathan Karmel, *The Karmel Law Firm, Chicago, IL*

11:45 a.m. – 12:45 p.m. **General Session (*Preserve Ballroom AB*)**

11:45 a.m. – 12:45 p.m. **State Criminal Prosecutions Following Workplace Fatalities and Injuries**
States often have significant authority to prosecute employers for workplace injuries and deaths. Some states have new programs to target workplace violations for criminal prosecution. This panel will discuss recent federal criminal prosecutions as well as current trends in criminal enforcement efforts by the states.

**Moderator:** Jason S. Mills, *Morgan Lewis & Bockius LLP, Los Angeles, CA*
Panelists: Nadira Clarke, *Katten Muchin Rosenman, Washington, DC*
Diane Florence, *Attorney-in-Charge, Construction Task Force, Senior Investigative Counsel, New York, NY*
Katie Tracy, *Center for Progressive Reform, Washington, DC*

12:45 p.m. – 1:00 p.m. **Committee Business Meeting**

5:30 p.m. – 7:00 p.m. **Diversity Reception (Mangrove)**

**Friday, March 10**

7:00 a.m. – 8:00 a.m. **Continental Breakfast (Preserve Ballroom Foyer)**

8:00 a.m. – 12:30 p.m. **General Sessions (Preserve Ballroom)**

8:00 a.m. – 9:00 a.m. **2015-2016 Significant Decisions**
This panel will discuss the most important decisions of the Occupational Safety and Health Review Commission and the United States Courts of Appeal during the past year.

**Moderator:** James J. Sullivan Jr., *Buchanan Ingersoll & Rooney, Philadelphia, PA*

**Panelists:**
Ann Rosenthal, *Associate Solicitor for Occupational Safety and Health, Washington, DC*
Jora Trang, *Worksafe, Oakland, CA*

9:00 a.m. – 10:15 a.m. **The Recordkeeping Anti-Retaliation Provision and Section 11(c) Whistleblower Rights: What Is the Current State of Play?**
OSHA included an anti-retaliation provision (Section 1904.35(b)(1)(iv)) in the amendments to the Recordkeeping regulation, and issued compliance guidance explaining how post-accident drug testing and the administration of safety incentive programs can violate that provision. This panel will discuss the impact of the anti-retaliation provision on those types of programs as well as the interplay between Section 11(c) and Section 1904.35(b)(1)(iv).

**Moderator:** Jonathan L. Snare, *Morgan Lewis & Bockius LLP, Washington, DC*

**Panelists:**
Howard A. Mavity, *Fisher Phillips, Atlanta, GA*
Douglas V. Parker, *Worksafe, Oakland, CA*
Ann Rosenthal, *Associate Solicitor for Occupational Safety and Health, Washington, DC*

10:15 a.m. – 10:30 a.m. **Break (Preserve Ballroom Foyer)**

10:30 a.m. – 11:30 a.m. **How Do OSHA Standards and Policies Filter Down to Frontline Managers and Workers?**
In the past few years, OSHA has issued significant standards, regulations and policies on topics ranging from post-accident drug testing and safety incentive programs to protection from exposure to
silica and beryllium. These issues may be hotly debated (or even litigated) by attorneys representing various stakeholders, but the methods used to communicate the impact of these changes in the workplace are not frequently discussed. This panel of in-house corporate safety directors and employee representatives will discuss how they analyze and implement significant OSHA issues.


**Panelists:** Matt Compher, *Vice President, Safety, Health & Environment, Quanta Services, Inc.*, Houston TX  
Steven E. Fine, *Messner Reeves LLP*, Chicago, IL  
Eric Frumin, *Safety and Health Director*, Change to Win, New York, NY

11:30 a.m. – 12:30 p.m. **OSHA Interpretations after Agricultural Retailers Association: What Does the Future Hold?**
The United States Court of Appeals for the District of Columbia held in *Agricultural Retailers Association v. OSHA* that an interpretation of the PSM standard issued by OSHA was a “standard” under the OSHA Act that required notice-and-comment rulemaking. OSHA often issues interpretation letters at the behest of employers and other stakeholders, and the regulated community may rely on those letters to understand OSHA’s position. The panel will discuss the meaning of the decision and if and how it may affect OSHA’s ability and willingness to issue interpretation letters.

**Moderator:** William J. Wahoff, *Steptoe & Johnson PLLC*, Columbus, OH

**Panelists:** Victoria L. Bor, *Sherman Dunn Cohen Leifer & Yellig PC*, Washington, DC  
Manesh K. Rath, *Keller and Heckman LLP*, Washington DC
MEMORANDUM

TO: ABA LEL Section CLE Coordinating and Resources Committee
FROM: Elizabeth Nadeau
RE: OSH Law Committee Mid-winter Meeting - March 7 to 10, 2017

Conference Agenda – Programs Topics

The Co-Chairs may wish to seek input from 2017 attendees on the program topics for the 2018 conference. While only 17 attendees submitted written evaluations, six (or 35 percent) stated that the program topics “somewhat” relate to “timely issues and concerns at your company/firm.” It would be useful to know which topics they would have preferred. The remaining 11 evaluations (65 percent) stated that the topics “very much” related to timely issues and concerns.

Attendees requested that the conference sponsors provide evaluation forms after each program rather than at the end of the conference, because it is difficult to remember each presenter after three days of presentations.

Policy Versus “Usable” Information

One in-house counsel commented that she preferred sessions that focused on information that she “needed to know” to do her job rather than on policy. Other attendees echoed her comments. She also mentioned that the breakout session on inspections was helpful.

There is a large contingency of management lawyers who come to the conference on an annual basis. Of the relatively small number of union/employee advocates who attend, several come each year. Information that is new and useful to attorneys with five to ten years of experience in safety and health (or who practice safety and health law on a part-time basis) may be well-known to attorneys with decades of experience. I note that five of 17 evaluators stated that the program content was “too basic.” The use of more breakout sessions could easily accommodate this issue.

Some very experienced attorneys speak “off the cuff” rather than take the time and effort to prepare a thoughtful presentation. Howard A. Mavity held the floor too long with a lot of rambling in “The Recordkeeping Anti-Retaliation Provision and Section 11(c) Whistleblower Rights: What Is the Current State of Play?” Since Associate Solicitor Ann Rosenthal was limited in what she could say about the Recordkeeping rule and the other panelist and the moderator did not interject, the program was dominated by Mavity’s remarks.

Discussion of the Content of Standards Versus Enforcement of Standards

There is relatively little emphasis on the content of OSHA standards. The emphasis on enforcement appears to reflect the interests of most attendees based on their practices.

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1 Steve Yokich, Randy Rabinowitz, Vicki Bor, Liz Nadeau, and Art Traynor
Strong Programs at 2017 Conference

I heard good feedback on “Anatomy of an OSHA Case: Litigation Tips and Strategies,” and “From Promulgation to Litigation in OSHA Rulemaking.” I especially enjoyed the presentation of Prosecutor Diane Florence, who participated in “State Criminal Prosecutions Following Workplace Fatalities and Injuries.” Her dedication to protection of workers is very inspiring. She is a lively and engaging speaker, and one of the best speakers at the conference.

Only four written evaluations identify programs that were “especially valuable.” Three of the four identified “Legal Issues Arising from OSHA Inspections,” and two identified “State Criminal Prosecutions Following Workplace Fatalities and Injuries.” No other program was mentioned more than once.

Open Remarks of Co-Chairs - Ratings Reflect Gender Bias

The evaluations of this “program” may demonstrate a strong gender bias, since Co-Chair Randy Rabinowitz (union/employee representative) received the lowest ratings even though she made no comments at all, and was sitting in the back of the room while Management Co-Chair Melissa Bailey gave a very brief welcome. Government Co-Chair Orlando Pannocchia received higher ratings than those received by Randy and Melissa even though my notes reflect that he did not speak at all. My notes are corroborated by the recollections of Melissa and Randy. Orlando recalls making comments “albeit” brief.

All of Orlando’s 12 ratings were either effective or very effective. Randy received four ratings of “neither effective nor ineffective,” four effective, and four very effective.

The evaluations of the “Opening Remarks” of the Co-Chairs illustrate the need for providing the opportunity to complete evaluations at the end of each session, or at the end of each day. The evaluators clearly forgot that Randy did not speak.

Constraints on Ability of Government Personnel to Discuss Issues

This conference was unusual because there is no Secretary of Labor. The presentation of the Deputy Solicitor for National Operations, “Remarks from the Solicitor's Office” was very guarded and uninformative. If a speaker is unable to make meaningful comments, there is no reason to schedule a separate program for him or her. The Deputy Solicitor did not use the entire time allotted to her. Only one of 14 evaluators rated her remarks as “very effective,” two rated the remarks as “neither effective for ineffective,” one rated the remarks as “very ineffective.” The ratings of remaining evaluators were “effective.”

2014-2015 Key Issues in Enforcement

The ratings of this panel were particularly high. Except for the ratings of the union presenter, all ratings were either effective or very effective, with a total of 35 highly effective ratings for the moderator and both government presenters, and 13 effective ratings for them. Eric Frumin, Safety and Health Director of Change to Win, received much lower ratings than the management
moderator and his government co-panelists. Eric Frumin’s ratings were two “ineffective,” three “neither effective nor ineffective,” five “effective,” and six “highly effective.”

Like at least three other presenters, it appears that his evaluations appear to have been downgraded based upon his pro-worker viewpoint. As discussed below, the nine panelists who are union/employee advocates\(^2\) received a disproportionate percentage of the ineffective ratings.

**Significant Decisions Panel**

The “Significant Decisions” panel is repeated each year. The panelists typically discuss (primarily a summary of key facts and the holdings) at least 7 or 8 cases for an hour even if the cases issued in the year preceding the conference are not particularly significant. The panelist from the SOL’s office cannot comment on active cases, and this often greatly limits his or her remarks since the decisions discussed are often on appeal.

If a case is truly significant, such as *Agricultural Retailers Association*, a program on a single case provides time to have a more analytical discussion of the case. This year, the “Significant Decisions” panel discussed *Agricultural Retailers Association*, and another panel’s topic was “Interpretations after Agricultural Retailers Association: What Does the Future Hold?” It would have been better to summarize *Agricultural Retailers Association* and then analyze it on a single panel, and to include copies of “significant” cases and/or summaries on-line rather than have a “Significant Decisions” panel.

Twenty-five percent of the 12 evaluators stated that the “Significant Decisions” program was “neither effective nor ineffective.” These lower evaluations are consistent with the lower evaluations of programs with at least two female panelists and/or a female moderator.

**Breakout Sessions**

There were four breakout sessions at the conference held at the same time: “New Developments in Process Safety Management,” “Recent Developments in Mine Safety and Health Law,” “Legal Issues Arising from OSHA Inspections,” and “Congress’s Legislative Agenda and the Potential Impact on OSHA.” Attendees stated that the breakout sessions should have been repeated so that they could have attended more than one. They also stated that smaller groups allow for a greater amount of discussion.

Since I was on the “Legal Issues Arising from OSHA Inspections,” I was not able to attend any of the other breakout sessions, but I heard positive comments about the “New Developments in Process Safety Management” program. There was aggressive anti-union rhetoric following my presentation on union accompaniment of OSHA inspectors during "walk-arounds." At prior conferences, management attorneys have expressed hostility to union accompaniment on walk-arounds, so the negative reactions were expected. This hostility is reflected in the lower ratings of the union presenter relative to the other two panelists and moderator.

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\(^2\) Since UMWA in-house counsel Art Traynor participated in a breakout session and received only two ratings, his scores are not included in this evaluation of the conference.
Recommendation: Post Statutory or Regulatory Language

Most presenters discuss regulations and statutes without showing the audience the relevant language. When statutes or regulations are discussed, presenters should post the language in a powerpoint even if the presenter has not prepared a powerpoint of his or her entire talk. Douglas Parker of Worksafe used a PowerPoint effectively to discuss applicable regulations during the program, titled “The Recordkeeping Anti-Retaliation Provision and Section 11(c) Whistleblower Rights: What Is the Current State of Play?”

Midwinter Meeting Culture

The sparse attendance of worker safety advocates greatly impacts the overall culture at the conference. While OSHA, SOL, OSHRC, MSHRC representatives attend, they are typically careful to be neutral, and are often forced to defend OSHA policy. Thus, the pervading culture is less about worker safety and more about burdens on employers. Management repeatedly stated from the stage and in informal conversations that Trump’s likely policy of non-enforcement will negatively impact their business. I did not hear any comments from management about the impact of non-enforcement on the safety and health of workers.

The conference fees and costs of attending conferences in resort areas prevent higher representation of employee interests ABA OSHA conferences. To encourage greater attendance, the Committee should select cheaper locations and provide increased subsidies.

Comments of Co-Chairs

I asked the Co-Chairs to send a brief evaluation of the programs to me. I have included their comments verbatim.

Randy Rabinowitz, Union and Employee Co-Chair

I think that doing all the same panels each year is boring. The enforcement panel with T. Galassi reading a bunch of statistics and then having the head of OSHA separately talk about those statistics is redundant. I personally would prefer if we spent more time talking about law and legal issues and not talking about OSHA policy and personnel matters or Congressional response to their policies.

Over the past several years, every panel has had both a speaker from OSHA and one from SOL. I think this creates too much focus on what OSHA is doing and takes away from discussion of legal issues that OSHA policies may raise. We do this because in order for the ABA to pay, each person has to speak. But, it makes several of the panels unwieldy and repetitive. On speakers, I think too many of the same people from the management bar speak each year on the same topics. We have a similar problem, but there are no other potential speakers. They have plenty to choose from.
Finally, I think the scope of OSHA practice is broader than just OSHA. We rarely include NIOSH (John Howard would be glad to attend and is an excellent speaker). This year I suggested people from the Chemical Safety Board only to be told the management bar doesn’t care. I also suggested some speakers on how environmental law, particularly TSCA, affects workers, and again was told the management bar doesn’t care. Many of the attendees have a very narrow practice and the scope of what we present is too heavily influenced by their practices rather than by the scope of government health and safety activity.

Orlando Pannocchia, Public Co-Chair

Hi Liz – here are my impressions of the programs and moderators/speakers at this year’s OSH Committee Conference. As an initial matter, I am of Hispanic origin and that should be reflected/amended in your chart below for the Key Issues in Enforcement panel. Although you mention that the chart does not include race or ethnicity, maybe the ABA would be interested in knowing. We had a Committee meeting with Gail Holtzman that last Friday morning where she emphasized the ABA’s push for promoting more racial diversity in our panelists.

Overall, attendees that I spoke to were satisfied with the subject matter of the panels and most of the individual panelists that participated. The Committee’s new format of having four breakout sessions, instead of three, also received positive reviews – many were pleased with having an additional practice issues discussed in a smaller setting. The chosen venue in Florida was very popular as well. As with past conferences, the Committee has to be careful in its selection of moderators in future gatherings. Designated moderators should have advanced facilitator skills and encourage more conversational exchanges among the panelists and with the audience. At times, some panelists had a tendency of “hijacking” the microphone making it all about their agenda/message, rather than having a dialogue, and the moderator should have intervened. Besides this, I believe that the conference as a whole was very well received.

Melissa Bailey, Employer Co-Chair

In terms of feedback, my report is similar to Orlando’s. Specifically, several attendees told me that they found the panels that involved “back-and-forth” and were “conversational” more useful and interesting than those where each panelist talked for 10 – 15 minutes and then the next panelist spoke. I also heard attendees comment that they enjoyed the focus on practical issues, such as litigation strategies or how decisions in cases would affect enforcement or litigation. Overall, I thought the meeting went well and the panels were well received.

Possible Gender/Ethnic Bias in Evaluations of Moderators

The ratings of the female moderators were generally lower than those of male moderators, and the ratings of non-white males were generally lower than the ratings of white males. All 12 moderators were management attorneys, and included two white females, eight white males, and two males who are minorities. White males received the five best scores based on the fewest number of ratings below effective or very ineffective, and two females and a Japanese American received three of the four worst scores.
I understand that the data are very small and may not be meaningful, but I was struck by Tressi Cordaro’s low score, so I checked to find out whether any of the white male moderators also received low scores. Her scores were significantly lower than the scores of male moderators.

The following chart ranks the moderators based on the fewest number of evaluations that were lower than effective or very effective. The chart also shows how each moderator scored relative to the panelists in the program. It is noteworthy that while James Sullivan had the lowest score of the white male moderators, he had the highest score in his program in which there were two female panelists and one male panelist.

<table>
<thead>
<tr>
<th>Name</th>
<th>Race/Ethnicity</th>
<th>Gender</th>
<th>Percentage of Scores Below Effective</th>
<th>Number of evaluations</th>
<th>Scores relative to panelists in the same program</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eric Hobbs</td>
<td>White</td>
<td>male</td>
<td>0</td>
<td>16</td>
<td>Higher than HM (gov’t), WM (gov’t), and WM (U/E)</td>
</tr>
<tr>
<td>Ronald Talyor</td>
<td>White</td>
<td>male</td>
<td>0</td>
<td>15</td>
<td>Higher than WM (management), WM (U/E), Pacific Islander M (gov’t), and BF (gov’t)</td>
</tr>
<tr>
<td>Ken Kleinman</td>
<td>White</td>
<td>male</td>
<td>0</td>
<td>9</td>
<td>Same as WM (management) and BF (gov’t), and higher than WF (U/E)</td>
</tr>
<tr>
<td>Jonathan Snare</td>
<td>White</td>
<td>male</td>
<td>0</td>
<td>14</td>
<td>Higher than WM (management), WM (U/E), and WF (Gov’t)</td>
</tr>
<tr>
<td>Jason Mills</td>
<td>White</td>
<td>male</td>
<td>5.88</td>
<td>17</td>
<td>Higher than WM (management) and WF (U/E), lower than WF (gov’t)</td>
</tr>
<tr>
<td>George Salem</td>
<td>Arab American</td>
<td>male</td>
<td>7.14</td>
<td>14</td>
<td>Lower than WM (gov’t), and higher than BF (gov’t)</td>
</tr>
<tr>
<td>David Sarvadi</td>
<td>White</td>
<td>male</td>
<td>9.09</td>
<td>11</td>
<td>Lower than WM (management) and WM (U/E)</td>
</tr>
</tbody>
</table>

3 I did not include on this chart moderators with fewer than eight evaluations (Greg Dillard (5) and Kristin White Baker (2)).
<table>
<thead>
<tr>
<th>Name</th>
<th>Race/Ethnicity</th>
<th>Gender</th>
<th>Evaluation</th>
<th>Number of Evaluations</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>William Wahoff</td>
<td>White</td>
<td>male</td>
<td>12.5</td>
<td>8</td>
<td>Same as Indian American M (WF – U/E - had one fewer evaluation)</td>
</tr>
<tr>
<td>Dennis Morikawa</td>
<td>Japanese American</td>
<td>male</td>
<td>18.75</td>
<td>16</td>
<td>Same as WM (gov’t), lower than WF (gov’t)</td>
</tr>
<tr>
<td>Melissa Bailey</td>
<td>White</td>
<td>female</td>
<td>20</td>
<td>10</td>
<td>Same as WM (management), higher than WM (management) and WM (U/E)</td>
</tr>
<tr>
<td>James Sullivan</td>
<td>White</td>
<td>male</td>
<td>25</td>
<td>12</td>
<td>Higher than WM (management), WF (gov’t), and Vietnamese F (U/E)</td>
</tr>
<tr>
<td>Tressi Cordaro</td>
<td>White</td>
<td>female</td>
<td>33.33</td>
<td>15</td>
<td>Lower than WM (U/E), WF (gov’t), and WF (management)</td>
</tr>
</tbody>
</table>

**Evaluations of Panelists**

Minorities, females, and the union/employee advocates received a disproportionate share of “ineffective” or “very ineffective” ratings.

Some of the 33 presenters are in more than one of these categories. “Significant Decisions” panelist Jora Trang falls into three categories – female, minority, and employee advocate from Worksafe. She was the only panelist on the “Significant Decisions” panel to receive an ineffective rating. With one exception (Steven McCown), when a panelist was singled out for more ineffective or very ineffective ratings than his or her co-panelists, the individual was female, a minority, a union/employee advocate, or a combination of these factors.4

This analysis includes only panelists and individual presenters, and does not include moderators.5 There were 14 female presenters and 19 male presenters. Four females (three gov’t and one U/E) presented twice, and one male (U/E/) presented twice for a total of 18 presentations by females, and 20 presentations by males.

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4 Liz Nadeau (U/E), Covette Rooney, Jora Trang (U/E), Eric Frumin (U/E), and Jordan Barab (U/E).

5 It also excludes the panelists in the two breakout programs with only two and five evaluations, respectively. I have excluded the “Opening Remark by Committee Co-Chairs” since, as noted above, two of the three Co-Chairs did not make opening remarks.
As discussed below, female management attorneys had limited opportunities to participate in programs. All but two of the 14 female panelists were representatives of government or unions/employees.

Individual evaluators gave a total of 22 ineffective or very ineffective evaluations to panelists (not including moderators); female panelists/presenters received 12 or 55 percent, and male presenters received 10 or 45 percent. If the nine ineffective scores (or 41 percent of the total) received union/employee advocates are excluded, female presenters received eight or 61.5 percent and male presenters received five or 38.5 percent.

Government Representatives

None of the five male government panelists received an ineffective or very ineffective rating. Six of the eight female government panelists or presenters (Sheann Belton, Covette Rooney, Ann Rosenthal, Susan Harthill, Lauren Goodman, and Diane Florence) each received an ineffective or very ineffective evaluation. Two of the female presenters with an ineffective rating are black.

Covette Rooney, Chief Judge of the Occupational Safety and Health Review Commission, received one ineffective rating in the Ethics program, and her overall score was significantly lower than the score of Robert J. Lesnick, Chief Judge of the Federal Mine Safety and Health Review Commission. Mr. Lesnick received 7 “very effective” evaluations, and Ms. Rooney received only three.

Associate Solicitor Ann Rosenthal was on two panels. On the “Significant Decisions” panel, she scored lower than the male management representative. The male panelist received six “very effective” evaluations, and Ann received only three. On the Recordkeeping panel, Ann scored lower than male management representative Howard Mavity and the male employee advocate from Worksafe.

On a bright note for female government presenters, Heather MacDougall, Acting Chairperson, Occupational Safety and Health Review Commission, scored significantly higher than William Althen, Acting Chairperson, Federal Mine Safety and Health Review Commission. Prosecutor Diane Florence also scored much higher than her co-panelists, including the male management attorney who was a last-minute replacement for Nadira Clarke on the Criminal Prosecutions panel. Twelve of her 17 scores were very effective; her co-panelists each received seven very effective scores. In my opinion, Heather MacDougall and Diane Florence were truly outstanding and among the very best presenters at the conference.

6 Orlando Pannocchia, Thomas Galassi, Evert Van Wijk, Robert Lesnick, and William Althen

7 Government presenters (Madeleine T. Le, Peter Vassalo, and April Nelson) on two breakout sessions with few evaluations are excluded.
Union Representatives

Three of the four female union/employee advocates received an ineffective or very ineffective evaluation for a total of four ineffective evaluations. Two of the five male union/employee advocates received ineffective evaluations for a total of five ineffective evaluations. With one exception, all the union/employee advocates are white. One of the three female advocates who received an ineffective evaluation is Vietnamese American.

As noted above, the nine union/employee advocates received a disproportionate share of the ineffective/very ineffective ratings for panelists/presenters. In the case of two of the four advocates (Liz Nadeau and Eric Frumin), they were the only presenters in their program to receive an ineffective evaluation. Both received two.  

Management Representatives

The two female management representatives who participated as panelists each received an ineffective rating. Not a single female management attorney who participated as a panelist or moderator avoided an ineffective or very ineffective rating.

Five of the seven male management panelists received an ineffective rating. All five are white. Manesh Rath, an Indian American, did not receive an ineffective rating. Please note that even though most of the male management panelists received an ineffective rating, their overall scores were higher than female participants on the panels in two cases (Steve McCown scored higher than Covette Rooney on Litigation Tips; and Howard Mavity scored higher than Ann Rosenthal on Recordkeeping). The three other male panelists who received an ineffective rating were in programs which all presenters received an ineffective rating.

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8 Liz Nadeau was on the Inspections panel. Eric Frumin received two ineffective ratings on Enforcement panel and one ineffective rating on the “How Do OSHA Standards and Policies Filter Down to Frontline Managers and Workers?” Former Deputy Assistant Secretary Jordan Barab two ineffective ratings on the “Promulgation to Litigation in OSHA Rulemaking” panel. His female co-panelists received only one ineffective rating.

9 Nelva Smith and Kathryn McMahon were panelists. The other three female management representatives, Tressi Cordaro, Melissa Bailey, and Kristin Baker White, were moderators. Nelva Smith, a panelist in the OSHA Primer” program, is included in this total even though she is excluded from the “Limited Speaking Opportunities for Women in Management Bar” section below.

10 Steven McCown, John Martin, Howard A. Mavity, Matt Compher, Steven Fine, Manesh Rath, and the white male replacement for Nadira Clarke on Criminal Prosecutions panel. Since “Recent Developments in Mine Safety and Health Law” received only two evaluations, I have excluded from this analysis two male management representatives, D.A. Duggar and Mark E. Heath, who were on panels.

11 The male management representatives who received an ineffective or very ineffective rating are: Steven McCown, Matt Compher, Steven Fine, Howard Mavity, and Nadira Clarke’s replacement.
“Penalty” for Participating on Programs with Higher Female Participation

When an entire panel received at least ineffective rating, the panels included at least two female panelists and/or a female moderator:

- Two female panelists (one U/E) and one male panelist: All the panelists and the moderator on Criminal Prosecutions received one ineffective rating.

- Female moderator and three WM panelists (one U/E advocate): All the panelists and the moderator on “How Do OSHA Standards and Policies Filter Down to Frontline Managers and Workers?” received one very ineffective rating.

- Female moderator, two female panelists, and one WM panelist (U/E): All panelist and the moderator on “From Promulgation to Litigation in OSHA Rulemaking” received at least one infective rating.

Likewise, two of the three presenters received an ineffective rating in the “OSHA Primer,” which was the only program with only female presenters.

Minority Participation in Programs

From Orlando Pannocchia

Besides myself as the Hispanic Public Co-Chair and panelist, Schean Belton, an African American attorney from our SOL Nashville office (and first year ABA Government Fellow), participated in both the “Primer” and “Legal Issues Arising from OSHA Inspections” panels. Evert Vanwijk (SOL Kansas City OSHA Counsel) is a Pacific Islander and was a panelist on “Anatomy of an OSHA Case: Litigation Tips and Strategies”. Madeleine Le (SOL Dallas OSHA Counsel) is Asian American and “New Developments in Process Safety Management” panelist. Hope this helps.

From Melissa Bailey

I am a little bit reluctant to start guessing the ethnicities of the various presenters, but here are my best guesses: Dennis Morikawa is Japanese-American (I think); George Salem is Arab-American; and Rath Manesh is Indian-American (I think). As you know, Nadira Clarke from Katten could not make it at the last minute – she is an African American female. Similarly, Shontell Powell (AA female) was originally slated to participate in the significant decisions panel. She had a trial scheduled during the week of the ABA meeting, but was hoping it would settle in time for her to prepare for the panel and participate. The case settled the week before the ABA meeting started, but by that point, John Martin had already done all of the preparation work for the panel.

Limited Speaking Opportunities for Women in Management Bar

In reviewing the programs at the ABA OSHA conference, I am struck by the lack of diversity in the management bar. Indeed, 84.6 percent of the moderators/panelists are male (22), and 15.4
percent are female (4). These numbers are particularly striking when compared with diverse participation from the government, unions and union law firms, and non-profit organizations.

In the government sector, 62.5 percent of the panelists are female. I counted Associate Solicitor Ann Rosenthal and Chief Judge Covette Rooney only once even though they both spoke more than once. I included lawyers and two non-lawyers (one male, one female) in my analysis of participation by government personnel.

In tallying union participants, I included Safety and Health Director Eric Frumin (only once) who was on two panels even though he is not an attorney. The male and female participation levels in the union/employee sector are equal if Eric is not included, and 60 percent male (3) and 40 percent female (2) if he is included. In the non-profit sector, 60 percent of the panelists are male (3) and 40 percent are female (2). I included former Deputy Assistant Secretary Jordan Barab in this calculation; if Jordan is excluded, the male and female participation levels in the non-profit sector are equal.

I did not include in the data participants on the "OSHA Primer" panel, which is held before the conference “opens,” is typically attended by attorneys who are relatively new to the field, and has relatively few attendees. All presenters - government, management, and union - are female.

There were substitutions on two panels after the conference began. On one panel, a male management attorney substituted for a female management attorney. On another panel, Union & Employee Co-Chair Randy Rabinowitz substituted for Vicki Bor.

<table>
<thead>
<tr>
<th>Programs from 3/8 to 3/10</th>
<th>Management</th>
<th>Government</th>
<th>Union and/or Employee</th>
<th>Academic or Non-profit</th>
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</thead>
<tbody>
<tr>
<td>Remarks from the Solicitor’s Office</td>
<td>1 M - moderator</td>
<td>1 F - Deputy Solicitor for Nat'l Operations</td>
<td>2 M</td>
<td></td>
</tr>
<tr>
<td>2015-2016: Key Issues in Enforcement</td>
<td>1 M - moderator</td>
<td>2 M</td>
<td>1 M – Safety &amp; Health Director Frumin*</td>
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<tr>
<td>Anatomy of an OSHA Case: Litigation Tips and Strategies</td>
<td>1 M – moderator</td>
<td>1 M</td>
<td>1 F – Chief Judge Covette Rooney*</td>
<td>1 M</td>
</tr>
<tr>
<td>Issues of Ethics, Professionalism and Civility in OSHA/MSHA Practice</td>
<td>1 M - moderator</td>
<td>1 M</td>
<td>1 F - Rooney*</td>
<td></td>
</tr>
<tr>
<td>Remarks from OSHA</td>
<td></td>
<td>1 F – Deputy Assistant Secretary</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Topic</td>
<td>Moderator Gender(s)</td>
<td>Panelist Gender(s)</td>
<td>Speaker Gender(s)</td>
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<tr>
<td>----------------------------------------------------------------------</td>
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<td></td>
</tr>
<tr>
<td>Update from the Occupational Safety and Health Review Commission and the Federal Mine Safety and Health Review Commission</td>
<td>1 M - moderator</td>
<td>1 F</td>
<td>1 M</td>
<td></td>
</tr>
<tr>
<td>From Promulgation to Litigation in OSHA Rulemaking</td>
<td>1 F – moderator</td>
<td>1 F</td>
<td>1 M - Former Deputy Ass’t Secretary</td>
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<tr>
<td>New Developments in Process Safety Management</td>
<td>1 M – moderator</td>
<td>1 F</td>
<td>1 M</td>
<td></td>
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<tr>
<td>Recent Developments in Mine Safety and Health Law</td>
<td>1 F – moderator</td>
<td>1 F</td>
<td>1 M - in-house attorney with UMWA</td>
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<tr>
<td>Legal Issues Arising from OSHA Inspections</td>
<td>1 M – moderator</td>
<td>1 F</td>
<td>1 F - sole practitioner</td>
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<tr>
<td>Congress’s Legislative Agenda and the Potential Impact on OSHA</td>
<td>1 M - moderator</td>
<td>1 M</td>
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<tr>
<td>State Criminal Prosecutions Following Workplace Fatalities and Injuries</td>
<td>1 M - moderator</td>
<td>1 F</td>
<td>1 M Non-profit</td>
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<tr>
<td>2015-2016 Significant Decisions</td>
<td>1 M - moderator</td>
<td>1 F – Associate Solicitor Rosenthal*</td>
<td>1 F Non-profit</td>
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<tr>
<td>How Do OSHA Standards and Policies Filter Down</td>
<td>1 F – moderator,</td>
<td></td>
<td>1 M – Safety &amp; Health Director Frumin*</td>
<td></td>
</tr>
<tr>
<td>to Frontline Managers and Workers?</td>
<td>2 M – panelists, including Safety &amp; Health Director</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>-------------------------------------------------</td>
<td>----------------</td>
<td>----------------</td>
<td>----------------</td>
</tr>
<tr>
<td>OSHA Interpretations after Agricultural Retailers Association: What Does the Future Hold?</td>
<td>1 M – moderator 1 M - panelist</td>
<td>1 F – panelist - F substituted for F</td>
<td></td>
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</tr>
<tr>
<td>TOTALS</td>
<td>22 M, 4 F</td>
<td>6 M, 10 F</td>
<td>3 M, 2 F</td>
<td>3 M, 2 F</td>
</tr>
<tr>
<td>Percentages</td>
<td>84.6% M 15.4% F</td>
<td>37.5% M 62.5% F</td>
<td>60% M 40% F</td>
<td>60 % M 40% F</td>
</tr>
</tbody>
</table>

*Rosenthal, Rooney, and Frumin are counted once in determining male/female participation.*
ABA Section of Labor & Employment Law
2017 Midwinter Meeting Council Liaison Report

Committee: Railway & Airline Labor Law

Meeting Dates & Location: March 8-10 ~ Sonoma, CA

Report Submitted By: Stephen B. Moldof and George L. Washington

I. COMMITTEE LEADERSHIP & FELLOWS

Committee Co-Chairs (include terms and diversity information):

Mary Johnson (2016-2017) (WF)
Elizabeth Roma (2015-2018) (WF)
Chris Hollinger (2016-2019) (WM)

With regard to the Public Co-Chair, that position has consistently been held, with the enthusiastic support of the Committee membership, by the General Counsel of the National Mediation Board, currently Mary Johnson. Mary has proven invaluable in ensuring the active participation and attendance at the Midwinter Meetings by the NMB’s members and staff, and the active participation by NMB staff in the editing and writing of the Committee’s publication, the RLA treatise. It is highly recommended that this practice of reappointing the NMB General Counsel to serve as Public Co-Chair be continued.

Vice Chairs/Program Co-chairs/Subcommittee Co-Chairs/Other Leadership (include terms and diversity information):

N/A

Government, YLD and Law Student Division Fellows (include terms and diversity information and indicate if they attended the Midwinter Meeting; if not, explain):

Government Fellow

Were the Fellows given any Midwinter Meeting or other Committee assignment? If yes, please describe.

Cristina Bonaca is a Senior Editor of The Railway Labor Act treatise.

II. MIDWINTER MEETING

1. Attach Program Agenda (See attached.)
2. Please provide the following Midwinter Meeting speaker diversity information. Preferably, speakers should be asked to supply this information themselves (on a voluntary basis, of course).

<table>
<thead>
<tr>
<th></th>
<th>White (not of Hispanic Origin)</th>
<th>Black (not of Hispanic Origin)</th>
<th>Hispanic</th>
<th>Asian or Pacific Islander</th>
<th>American Indian or Alaska Native</th>
<th>LGBT</th>
<th>Disabled</th>
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<td>25</td>
</tr>
</tbody>
</table>

3. Name of hotel and room rate(s):

   Fairmont Sonoma Mission Inn – $259 & $269

   Were there any aspects of the service, guest or meeting rooms or other elements of this property that warrant comment because they were especially good or bad?

   N/A

4. Name of alternate hotel and room rate(s) (if applicable):

   N/A

5. Registration fee(s) (include discounted rates/categories):

   - Section of LEL Member $350
   - ABA Member $475
   - Non-ABA Member $625
   - Government Agency $250
   - Spouse/Guest $175

6. Social events included in registration fee(s):

   - Welcome Reception
   - Reception & Dinner

7. Were sponsorships solicited/collected for this meeting? If so, indicate amount received and attach solicitation letter.

   N/A

8. Were scholarships solicited/awarded for this meeting? If so, indicate amount of scholarships received and amount provided to attendees. Include criteria for selection of scholarship recipients and attach application form.

   N/A
9. Provide total attendance per constituency and percentage of total:

Employer/Management: 37 (45%)  
Union & Employee: 25 (30.5%)  
Employee/Plaintiff: 0  
Government/Public: 14 (17%)  
Neutral (arbitrator/mediator): 5 (6%)  
Academic: 0  
Press: 0  
Other: 1 (1%)  

TOTAL ATTENDANCE: 82

In-House Corporate Counsel: 12  
In-House Union Counsel: 10  
Young Lawyers Division Member: 0  
Law Student Division Member: 0  

Number of first-time attendees: UNKNOWN  
Percentage of attendees who were first-time attendees: UNKNOWN

III. LIAISONS TO SECTION ADMINISTRATIVE COMMITTEES

List liaisons to the following Section Administrative Committees and include diversity information:

Diversity in the Legal Profession (DLP): Eileen Hennessey (WF)  
Social Media Committee: Angela Heverling (WF)  
Membership Development Committee: TBA  
Pro Bono Work Committee: W. Chris Harrison (WM)  
CLE Coordinating and Resources Committee: Mary Johnson (WF)  

Please provide any suggestions from liaisons for improving the functioning of the Administrative Committee to which they are assigned.

IV. COMMITTEE PUBLICATIONS & CLE PROGRAMS

List books or other publications the Committee produces and provide the following information for each:

The Railway Labor Act  

Date of last edition or supplement:  

2016 Fourth Edition; 2017 Supplement will be published in 2017
Projected date of next edition/supplement:

As noted, a 2017 Supplement will be published in 2017.

Editorial Board/Publication Subcommittee Co-Chairs (include diversity information):

Editors-in-Chief
Douglas W. Hall, Employer (WM)
Michael L. Winston, Union & Employee (WM)

Senior Editors
Matthew Babcock (WM)                      John Hodges-Howell (WM)
David S. Birnbaum (WM)                      Chris A. Hollinger (WM)
Cristina Bonaca (WF)                        Evan R. Hudson-Plush (WM)
David R. Broderdorf (WM)                   Rachel S. Janger (WF)
Thomas N. Ciantra (WM)                      Mary L. Johnson (WF)
Cameron R. Cloar-Zavaleta (WM)              Ronald M. Johnson (WM)
Darlin M. Dalmat (WM)                      Aparna B. Joshi (AF)
Erika Diehl-Gibbons (WF)                   Gary S. Kaplan (WM)
Elizabeth S. Dougherty (WF)                Andrew D. McClintock (WM)
Todd Duffield (WM)                         Marcus Migliore (WM)
Richard Edelman (WM)                       Stephen B. Moldof (WM)
Joseph Z. Fleming (WM)                     Joanna L. Moorhead (WF)
Molly Gabel (WF)                           Donald J. Munro (WM)
Ira L. Gottlieb (WM)                       James Petroff (WM)
Robert A. Grey (WM)                        Thomas E. Reinert, Jr. (WM)
John S.F. Gross (WM)                       Mark Robertson (WM)
Deirdre E. Hamilton (WF)                   Elizabeth A. Roma (WF)
W. Chris Harrison (WM)                     Daniel Rosenthal (WM)
Robert S. Hawkins (WM)                     Joshua B. Shiffrin (WM)
Eileen Hennessey (WF)                      Carla M. Siegel (WF)
Angela I. Heverling (WF)                   Lisa M. Vickery (WF)
Anders Yoder (WM)                          

How often does the Committee produce newsletters?

The Committee currently does not produce a newsletter.

Has the Committee submitted articles for publication in the Section Newsletter, Hot Topics/E-Alerts or FLASH?

N/A

Does the committee provide CLE programming other than Midwinter Meetings and Annual Section Conference/ABA Annual Meeting panels? If yes, please describe.

N/A
V. BEST PRACTICES

1. If the Committee uses any of the Best Practices for Recruiting and Retaining New Members listed below as examples, please indicate yes, and briefly describe, including remarks on whether they were effective and why.

- Publicize the Committee Midwinter Meeting at conferences for attorneys from various constituencies?

  The Committee Midwinter Meeting and opportunities for Committee membership and participation in the RLA treatise are advertised at the Committee’s Midwinter Meeting, the Section’s Annual Meeting and the ALI-CLE RLA Conference (the latter is held every 18 months in Washington, D.C., with one scheduled for April 2017).

- Provide a time during the Midwinter Meeting that does not conflict with Committee programming for separate meetings for constituency groups?

  N/A

- Sponsor a law student program for local law schools during the Midwinter Meeting or other Committee program?

  N/A

- Provide programming or social events especially of interest to young lawyers or new lawyers?

  N/A

- Assign a mentor or “buddy” for first time attendees?

  Not currently. This has been done in the past. The Liaisons recommend that this practice be reinstituted at next year’s Midwinter Meeting.

- Hold an event for first-time attendees?

  N/A

- Hold regional meetings such as those involving government officials?

  N/A

- Follow-up with past first-time attendees to encourage attendance at the Midwinter Meeting?

  This has not been done, but the Liaisons recommend that notes be sent by the Co-Chairs to the first time attendees who attend Midwinter meetings.

- Contact past regular attendees who have not yet registered to encourage attendance at the Midwinter Meeting?
• Schedule programs in conjunction with other Committees or Sections?

N/A

2. Please describe any other activities by this Committee that may be useful to the Section or to other Standing Committees in the recruitment and retention of new members. Include lessons learned this year and recommendations to improve future recruitment and retention efforts.

N/A

3. Does the Committee follow any of the following Best Practices for attracting diverse members? Please answer yes or no and briefly describe, including remarks on whether they were effective and why.

• Have a diversity task force or diversity committee?

The Committee has a diversity liaison (see above) but is not actively taking steps to increase diversity. There were, however, additional, new minority members present at this year’s Midwinter Meeting. Increased diversity is more likely to occur if there is an increase in RLA employment opportunities. The Section Leadership and Council Liaisons emphasized opportunities to support enhanced attendance by newer practitioners, such as the Section Development Fund, which could help encourage further participation and attendance by diverse members.

• Develop alliances with minority bar associations by invitations to participate in the Midwinter Meeting?

N/A

• Invite minority bar associations to co-sponsor events celebrating diversity at the Midwinter Meeting?

N/A

• Offer scholarships or reduced registration to members of minority bar associations or other organizations that co-sponsor diversity events at the Midwinter Meeting?

N/A

• Offer events at the Midwinter Meeting of particular interest to diverse attorneys?

N/A

• Involve diversity committee or task force members in decisions on Committee programs and speakers?

N/A

• Invite women, attorneys of color, LGBT, disabled, government and in-house attorneys to participate as speakers on program panels?
Yes

- Communicate with law school diversity directors and organizations for women and law students of color at local law schools about programs for law students?
  
  N/A

- Have you discussed with the Committee the need to implement steps to attract diverse members?
  
  Yes, and this was reinforced during the remarks by the Section Leadership at the Midwinter Meeting.

- Do you think this Committee needs help in this area and if so what steps do you suggest?
  
  No

4. Please describe any other activities by this Committee that may be useful to the Section or to other standing committees in attracting diverse members. Include lessons learned this year and recommendations to improve future diversity recruitment and retention efforts.

  N/A

5. Does the Committee use any of the following Best Practices for Leadership Development? Please answer yes or no and briefly describe, including remarks on whether they were effective and why.

- Hold a “meet the leadership” event at the Midwinter Meeting to explain the process for becoming a speaker and/or Committee leader (e.g., subcommittee co-chair, editor, etc.) and describe other opportunities for active membership?
  
  N/A

- Appoint an individual or committee to serve as the contact for new members who want information and assistance in becoming involved in Committee activities?
  
  No. However, the Committee Co-Chairs encourage RLA attorneys to be actively involved in Committee activities, including as Contributors to the RLA treatise.

- Have positions such as vice chairs, program co-chairs, administrative co-chairs or subcommittee co-chairs to provide a transparent pathway to Committee leadership?
  
  No. However, the RLA bar is a small one, but a substantial segment of it attends RLA Committee Midwinter Meetings and/or otherwise participates in Committee activities, primarily through work on the RLA treatise.

- Condition selection for leadership positions on demonstrated leadership and past work on Committee projects, including programs, publications or other subcommittee work?
All Co-Chairs have come from the ranks of ABA members who have demonstrated active involvement in the Committee, including through attendance at Committee Midwinter Meetings and work on the RLA treatise.

- Encourage members to apply for the Section Leadership Development Program (LDP) and recommend those who have demonstrated leadership ability for admission to the Program.

This was conveyed in presentations by the Section Leadership and Section Liaisons to attendees at this year’s Midwinter Meeting.

6. Please describe any other activities by this Committee that may be useful to the Section or to other standing committees in developing leaders. Include lessons learned this year and recommendations to improve future leadership development efforts.

   N/A

7. Were there any presentations/programs of particular interest that would be appropriate to repeat as webinars or speaker papers that should be submitted for publication in the *ABA Journal of Labor & Employment Law*?

   The presentations at this year’s Midwinter Meeting were of interest and value to the meeting attendees. The programs on Use of Med-Arb in Dispute Resolution and on Ignorance of Technology Is No Excuse and Other Legal Ethics Issues might have broader appeal because they need not be focused exclusively on RLA matters and, if so modified, could be of interest for inclusion in webinars and/or otherwise repeated.

8. Would you recommend any speakers, moderators or topics for the Annual Section Conference?

   If such recommendations are to be offered, they probably would come most appropriately from the Committee Co-Chairs.

9. Are there any questions, suggestions or concerns that the Committee would like to raise with the Council or Section Leadership? Is there any way in which the Council can assist with the Committee’s attaining its goals?

   N/A
American Bar Association
Section of Labor & Employment Law
Railway & Airline Labor Law Committee
Midwinter Meeting
March 8-10, 2017
Sonoma, California

Wednesday, March 8

6:00 p.m. - 7:30 p.m.  Welcome Reception (Pool Terrace)

Thursday, March 9

7:30 a.m. - 8:00 a.m.  Continental Breakfast & Registration (Sonoma Valley Patio)
8:00 a.m. - 8:15 a.m.  Welcome by Committee Co-Chairs (Sonoma Valley Room)

Mary L. Johnson
National Mediation Board

Chris A. Hollinger
O’Melveny & Myers LLP

Elizabeth A. Roma
Guerrieri, Clayman, Bartos, Parcelli & Roma, PC

8:15 a.m. - 8:30 a.m.  Remarks from Section Leadership

Joseph T. Tilson
Section Vice Chair
Cozen O’Connor

Stephen B. Moldof
Union & Employee Council Liaison
Cohen, Weiss & Simon, LLP

George L. Washington Jr.
Employer Council Liaison
Orange Business Services

8:30 a.m. – 9:30 a.m.  Remarks from Officials of the National Mediation Board
The panel will discuss bargaining trends, dispute resolution services and new NMB initiatives.

Harry Hoglander, Member
L. Daniel Rainey, Chief of Staff
Michael Kelliher, Deputy Chief of Staff – Mediation
9:30 a.m. - 10:30 a.m.  Use of Med-Arb in Dispute Resolution
The panel will discuss Med-Arb: What is it? (A fruit? A vegetable? A pluot?) The panel will examine the pros and cons of Med-Arb and how the process works in minor disputes vs. major disputes. The panel also will discuss the use of Med-Arb process in resolving rail and airline collective bargaining disputes.

Joshua Javits, Dispute Resolution Services, Washington, DC
Arthur M. Luby, Air Line Pilots Association, Washington, DC
Patricia Sims, National Mediation Board, Washington, DC

10:30 a.m. – 10:45 a.m. Break (Sonoma Valley Patio)

10:45 a.m. – 11:45 a.m. Airline Merger Issues
The panel will discuss legal and practical issues arising from airline mergers, with an emphasis on collective bargaining, seniority integration, the impact of differing pre-merger representation patterns, and the application of McCaskill-Bond. Specifically, it will discuss issues raised in the recent Alaska Airlines/Virgin America merger – as well as recent litigation and arbitration cases arising out of other airline mergers.

Jeffrey A. Bartos, Guerrieri, Clayman, Bartos, Parcelli & Roma, PC, Washington, DC
Deirdre Hamilton, International Brotherhood of Teamsters, Airline Division, Washington, DC
Rachel S. Janger, O’Melveny & Myers LLP, Washington, DC
Maranda Rosenthal, Alaska Airlines, Seattle, WA

11:45 a.m. - 12:45 p.m. Ignorance of Technology Is No Excuse and Other Legal Ethics Issues
This panel will explore Comment 8 to ABA Model Rule 1.1, which affirmatively requires lawyers to “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology,” and how the ABA’s recommendation has been adopted and is being applied at the state level. The panelists will discuss technology issues of particular interest to labor/employment lawyers, such as e-Discovery, as well as issues that implicate the practice of law generally, such as cloud computing, file-sharing, and document and information security as a whole.

Todd C. Duffield, Ogletree Deakins, Atlanta, GA
Joshua B. Shiffrin, Bredhoff & Kaiser PLLC, Washington, DC

7:00 p.m. – 10:00 p.m. Reception and Dinner (Sonoma Valley Room)

Friday, March 10

7:30 a.m. – 8:30 a.m. Continental Breakfast (Sonoma Valley Patio)

8:30 a.m. – 9:30 a.m. Rail and Airline Service Providers: Who Has Jurisdiction? (Sonoma Valley Room)
This panel will discuss the National Mediation Board’s recent decision in Southern California Regional Rail Authority, addressing both the RLA’s
electric railway exclusion as well as the State of Maine doctrine. The panel also will compare and contrast the National Mediation Board’s 2014 decisions in Airway Cleaners and Menzies Aviation, finding no RLA jurisdiction over airline service providers, with its 2015 decision finding RLA jurisdiction in Gateway Frontline Services. The panel also will discuss recent developments at the National Labor Relations Board as well as the legal and practical implications of asserting NLRA jurisdiction over service providers which have close commercial relationships with RLA carriers.

Darin Dalmat, *James & Hoffman, PC, Seattle, WA*
Richard Edelman, *Mooney, Green, Saindon, Murphy & Welch, PC, Washington, DC*
Douglas Hall, *Jones Day, Washington, DC*
Angela I. Heverling, *National Mediation Board, Washington, DC*

9:30 a.m. – 10:30 a.m. Norwegian Airlines Long Haul Expansion Model: “Flag of Convenience” or Fair Competition?
A Norwegian airline incorporated in Ireland flying into the United States with an Asian-based flight crew – what could be the issue? This panel will explore the various legal and labor implications raised by low-cost carrier Norwegian Airline’s planned expansion of its long haul routes in the United States, as well as discuss recent legal challenges raised in both Europe and the United States around same.

Kate Dowling, *National Mediation Board, Washington, DC*
Joseph Z. Fleming, *Greenberg Traurig, P.A., Miami, FL*
Marcus Migliore, *Air Line Pilots Association, Washington, DC*
Stephen Moldof, *Cohen, Weiss & Simon, LLP, New York, NY*

10:30 a.m. – 10:45 a.m. Break

10:45 a.m. – 12:30 p.m. Current Developments in Air, Rail and Hospitality
This panel will examine recent legal developments in the airline and railroad industries, including the recent Ninth Circuit decision in *Herrera v. Command Security Corp.*, judicial review of arbitration awards under the RLA based on public policy, recent litigation updates regarding federal preemption of state employment laws, how El Niño is impacting California’s wine industry and other topics.

Susannah Bender, *SMART – Transportation Division, North Olmsted, OH*
Evin F. Isaacson, *James & Hoffman, PC, Washington, DC*
Jonathan C. Fritts, *Morgan Lewis & Bockius LLP, Washington, DC*
Emily K. Pantoja, *Transportation Communications Union/IAM, Rockville, MD*
Jeffery D. Wall, *Ford Harrison LLP, Washington, DC*

12:30 p.m. – 12:45 p.m. Section Business
Plans for Future Meetings
*The Railway Labor Act Treatise*