

ADR IN LABOR & EMPLOYMENT LAW COMMITTEE NEWSLETTER

Fall 1999

AMERICAN BAR ASSOCIATION

SECTION OF LABOR AND EMPLOYMENT LAW

SECTION COUNCIL LIAISON REPORT

[Editors' Note: Carl Ver Beek is our Committee Liaison to the ABA Section of Labor and Employment Law Council. A new segment of our Newsletter is Carl's reports of Council meetings. Thanks, Carl!]

The Council of the Labor & Employment Law Section met on October 2-3, 1999, in Colorado Springs. As usual, much of the time spent in the meeting was the routine business of hearing reports, including that of the Section Chair, the Membership and Finance Committee, the CLE Institutes and Meetings Committee, the Commission on Women, the Commission on Opportunities for Minorities in the Profession, and so forth.

The most controversial topic discussed was the question of multi-disciplinary practice ("MDP's"). The ABA is continuing to discuss this complex question and is seeking information regarding the effect of changing the "fee splitting rule" in each sector of American law practice.

Another topic discussed at some length was the potential impact of a proposed Uniform

Mediation Act draft on labor and employment matters. The ADR Section of the ABA has been active in shaping this proposal but with minimal coordination with the ADR Committee of our Section. We are trying to exempt our subject area from the coverage of this proposed Uniform Act.

Each of the foregoing topics was referred to a small group to make recommendations on behalf of the Section.

Our Section is growing and currently has a record-setting membership in excess of 22,000. Our financial condition is excellent because of the sale of publications on which we receive royalties.

Everyone was encouraged to attend the ABA Annual Meeting in New York and London in July 2000.

MID-WINTER MEETING IN MEXICO HAS SOMETHING FOR EVERYONE!

The Committee's Mid-Winter Meeting is packed with programs on the cutting edge of our practices. The Meeting takes place February 13-16 at the Marriott CasaMagna Resort in Puerto Vallarta, Mexico.

The President of the National Academy of Arbitrators, Ted St. Antoine, will be joining us at the Meeting. Ted will be on a panel with

management attorney Jim Adler and plaintiff attorney Rick Seymour to debate "The Pro Se Claimant in Handbook Arbitration: Call for a New Protocol?" Arbitrator John Sands will moderate the panel, which will focus on the issues that arise when an unrepresented employee raises statutory claims.

The President-Elect of the National Academy of Arbitrators, John Kagel, also will be

What's Inside

Relevant Websites Listing.....	3
Atlanta Review	3
Interview with Max Zimny.....	4
Alliance for Education in Dispute Resolution.....	7
Subcommittee Co-Chairs	8
Committee Co-Chairs.....	10
Leadership Development Initiative	10

joining us at the Meeting. John will be on a panel with plaintiff attorney Randy Freking, union attorney Lynne Hicks, and management attorney Tim Bittel to address "This May Be Arbitration, But I Object!" Arbitrator Susan Grody Ruben will moderate the panel, which will consider the question of what evidentiary standards should be used in arbitration hearings.

Taking advantage of our exciting setting for the Meeting, we will have a panel on the impact of NAFTA on labor relations. Union attorney Carlos de Buen, a highly-experienced Mexican attorney, will present the perspective of Mexican unions. Internationally-renowned management attorney Roy Heenan will present the employer view. We will get an inside look at the NAFTA complaint process when the Secretary of the National Administrative Office of the Department of Labor, Irasema Garza, explains how the process works and where it is heading.

Diversity issues in ADR is a subject that is just beginning to receive attention. A groundbreaking article in the August 1999 issue of *Dispute Resolution Journal*, "Rethinking Neutrality: Race in ADR," addressed whether ADR can effectively handle racial issues, given that racism often is an unconscious process. The author of that article, Sara Rankin, along with ADR trainer Stuart Rankin, will address this question. Wayne Outten will moderate.

Recent changes in the various Codes of Professional Responsibility applicable to ADR practitioners will be explained by a well-qualified panel. Our Committee Co-chairs of the Subcommittee on Professional Responsibility, Mark Irvings, Kevin Conlon, Kevin McCarthy and Randy Freking, will provide guidance on these essential issues. The panel also will alert us to open issues that are still being debated.

The President of the Substance Abuse Plan Administrators Association, Matthew Fagnani, will update us on the new technologies in drug testing, including the instant urine test, saliva testing, and

other new tests you've never even heard of. Arbitrator Richard Humphries will moderate the session, which also will address testing validation issues.

The annual ADR Service Providers Panel has been expanded this year. Joining senior representatives of AAA and FMCS, who will talk about the many changes in their organizations, will be JAMS, CPR, and the Private Adjudication Center, service providers in the employment arena. Arbitrator Debra Neveu will moderate this popular panel.

What do you know about ERISA arbitration? You will know much more after hearing from ERISA specialist Dan Campbell, who will explain how ERISA arbitration works, and how it differs from other labor and employment arbitration.

"Absenteeism in the Millennium: Policies for the New Age" is the subject of a session featuring union attorney Jon Rosen, management attorney Jeff Belkin, and arbitrator Margery Gootnick. These experienced panelists will focus on how absenteeism policies are changing in response to FMLA, ADA and other statutory requirements, whether no-fault attendance policies remain viable, and what types of policies are most likely to survive.

Arbitrator Ed Pereles will address the unique issues pertaining to legal and illegal aliens in the workforce. Ed's broad experience will alert us to an area of our practice that receives little attention.

One of our premier Committee publications, *How Arbitration Works*, having reached middle age, is reassessing its goals. Come to an optional session to review the new topics being considered for the next edition of Elkouri & Elkouri.

So come join us in Mexico! You will find the Mid-Winter Meeting to be a substantive, yet relaxed and convivial experience. First-timers are more than welcome – our Committee is known for its openness and willingness to make new friends. Coming to the Mid-Winter Meeting is a great way to get involved, get your CLE's, and have fun all at the same time!

MORE WEBSITES OF RELEVANCE TO OUR PRACTICES – A CONTINUATION OF AN UNSCIENTIFIC SAMPLING

www.uscode.house.gov/usc.htm
www.fedlaw.gsa.gov/legal12.htm
www.fedworld.gov
www.adrr.com/adr9/mediation.htm
www.peacemakers.ca/bibintro99.html
www.conflict-resolution.net/articles
www.interarb.com
www.flra.gov
www.mspb.gov
www.access.gpo.gov/su_docs/aces/aces140.html
www.bna.com/resources/DLR
www.dwp.bigplanet.com/john123/disputeresolutionresources1
www.osu.edu/units/law/JDR

a searchable library of U.S. Code
labor & employment statutes and regs
database of federal government documents
Mediation On-Line Newsletter
bibliography of ADR publications
articles on ADR
international arbitration info
Federal Labor Relations Authority official site
Merit Systems Protections Board official site
Federal Register
BNA Daily Labor Report
bibliography of ADR websites
Ohio State University Journal of Dispute
Resolution

ATLANTA REVIEW

Yes, Atlanta in August was hot, but the topics were also, making the ABA Annual Meeting a highly worthwhile venture. The Annual Meeting is quite a different experience from a Mid-Winter Meeting. Not only is the rest of the Section of Labor and Employment at the Annual Meeting, but the entire ABA is there, making for quite an enormous event.

Of particular interest to our Committee is the ability to attend Section of Dispute Resolution presentations. Mixing with DR practitioners from other disciplines is an eye-opening experience. Many of these people from other practice areas are unaware of labor's rich ADR history. Mention *Enterprise Wheel*, and you get a blank stare. "Reinventing the wheel" comes to mind. Our Committee needs to stay aware of Section of Dispute Resolution activities, particularly when that Section is involved in activities such as influencing the drafting of the Uniform Mediation Act. (See Carl Ver Beek's Section Council Liaison report.) To this end, Jay Siegel has been appointed as our Section Liaison to the Section of Dispute Resolution. Thank you, Jay, for taking on this assignment.

Our Committee and Section put on some terrific, standing-room-only presentations. A mock arbitration was held to showcase "Recurring Evidentiary Issues in Employment and Discrimination Cases." Arbitrator Al Felio ably

fended off numerous pesky evidentiary objections from plaintiff attorney Wayne Outten and management attorney Weyman Johnson. Plaintiff attorney Joe Garrison deserves praise for having put together and moderated this very effective program.

"Basic ADR in Employment Law Practice" was expertly presented by arbitrator Sara Adler, plaintiff attorney Evan Fray Witzer, and management attorney Jim Adler. Moderator Chip Kohler and his outstanding panel definitely won over some converts to the cause.

"Discipline and Discharge" originally was devised to hawk our Committee's new book of the same name. The program did that plus more. The lively and knowledgeable panel of arbitrator (and Editor-in-Chief) Norm Brand, union attorney David Cook, plaintiff attorney Randy Freking, and management attorney Ed Hopson explored such issues as handling arbitrations where both the union and the plaintiff attorney show up, and dealing with grievances that pit one bargaining unit member against another. Arbitrator Susan Grody Ruben moderated, keeping the brawls to a minimum. Actually, the panel was remarkable for the cooperative spirit demonstrated. If only all labor and employment disputes were so friendly!

The ever-present Mr. Gilmer received his due in a "Gilmer Update" presented by plaintiff attorney Joe Garrison, management attorney Judy

Sadler, and arbitrator John Sands. Management attorney Dave Cathcart moderated this informed up-to-the-minute panel.

Mr. Wright was not forgotten either. In “Statutory Claims Under Collective Bargaining Agreements: Where Do We Go From Here?” the experienced panel of arbitrator Jackie Drucker, management attorney Mac Irvin, and union attorney Carl Yaller gave guidance on negotiating and administering contractual arbitration provisions that implicate statutory rights. Union attorney Connye Harper ably moderated this superb panel.

A highlight of the Atlanta Annual Meeting was the address by President Clinton. Regardless of political persuasion and personal opinion, it was a thrill to hear the speech. As widely reported in the national media, President Clinton spoke about the congressional logjam over federal judicial appointments.

As you are aware, the 2000 Annual Meeting takes place in New York from July 8-11 and in London from July 15-20. Check your calendars! Registration materials can be obtained by calling 312/988-5870 or by accessing the ABA website, www.abanet.org/labor.

INTERVIEW WITH MAX ZIMNY

By Catherine Chapman

On November 12, 1999, I interviewed the co-founder of the ADR Committee, Max Zimny. Although he didn't know me personally, Max discussed his career as a lawyer and a leader in the ABA Labor and Employment Section as if he were my mentor. Max Zimny's example defines this Section and its Committees and the legal profession. The following summary of my conversation with Max Zimny illustrates this point.

In 1952, Max Zimny noticed a job opening for lawyers in the Textile Workers Union in the *New York Law Journal*. He applied and was hired for the job. He didn't make much money (in 1958 he was making \$75 a week), “but I really didn't care about that. I cared about doing the work which was closest ideologically to what I wanted to do.” However, in 1952, the textile industry was moving from New England to the South. Although Max Zimny lived in New York, he worked down South in the Southeast four out of five days a week representing textile workers. Anecdotes such as this demonstrate Max Zimny's commitment to the union movement and the law. These examples resonate throughout Max's career as a lawyer.

For example, Max Zimny brought life to the

textbook case, *Lincoln Mills*. As he recalled:

“... it was during the summer of 1954 when the general counsel was on vacation, I got a phone call from a business agent, who told me there was an unresolved workload dispute at Lincoln Mills of Alabama. The Union felt that it was a violation of the contract and there were monetary consequences because this had been going on for awhile. And so they wanted to go to arbitration. I communicated with the attorney for the company, a lawyer called Frank Constagny. Incidentally, if you go back far enough, he was one of the early chairs of this Section out of Atlanta. Frank sent a letter to the AAA saying it's not arbitrable, don't handle it, and the AAA responded, in the customary way, which is that, on its face, it appears to be subject to arbitration. So we are going to administratively handle it. If you feel that's not right, you may go to court, you know, get a stay. . .

I felt that I shouldn't wait for the company to move to stay arbitration, I'm

gonna jump in first and move to compel arbitration. . . . Alabama in 1954, . . . you've got to remember that Section 301 presented a very serious question: was it procedural or was it substantive? If it was procedural, it would be unconstitutional. It had to be substantive federal law or it wouldn't comport with the constitutional requirement. Well, I needed an attorney in Alabama to help me handle the case. . .

Now, in those years, there was a firm called Cooper, Mitch and Black. Black was a son of Hugo Black, the Supreme Court Justice. He suggested a Judge Grooms . . . and we tried it before Judge Grooms . . . and we won . . . It was appealed to the Fifth Circuit, which reversed Grooms, and then we appealed it to the U.S. Supreme Court. Dave Feller . . . was really the bright guy in Arthur Goldberg's law firm, and he worked with me in presenting the case to the U.S. Supreme Court. He handled a number of the important Supreme Court cases in the '50's and '60's. Dave argued it in the Supreme Court, and you know, we won. . . That's what federalized the practice of labor law . . ."

Not only did Max participate in the Supreme Court case that defined the law of arbitration, but he also continued to develop the guidelines in this area for the good of union and non-union workers alike. Among his many achievements, Max Zimny worked on the brief in the *Weingarten* case. In sharing his experience with me, he breathed life into the textbook phrase "Weingarten rights." Although Max's case was *Quality Manufacturing Company*, the language in the Union's brief was adopted by Judge Brennan in his decision in the *Weingarten* case. As Max explained it,

"the facts in *Weingarten* were more typical and a better vehicle than in *Quality* . . . the *Weingarten* facts were typical – you had a woman clerk who was accused of stealing and she was confronted not only by the manager of the supermarket but also by

their security guy. She was alone, she was in tears, she denied she had done anything wrong, and she asked for her union rep and they told her "no." The whole factual sequence was very attractive as a vehicle, and so the Court selected *Weingarten* as the doctrinal vehicle, and I think they did the right thing."

Max pointed out, however, that the narrowing of *Weingarten* to only union situations was never a position he advocated:

"We took a position from the point of view of concerted activity. If an employee is subject to a disciplinary interview and asks that another employee, whether in a non-union or a union situation, join him or her, that is a form of concerted activity and it ought to be equally protected. But the Board went on to confine it, . . . to union activity."

In 1977, Max Zimny helped to shape the future of what is now the ADR Committee, together with Chris Barreca and Bob Coulson. They were co-chairs on what was then a nominal committee called the "Arbitration and the Law of Collective Bargaining Committee." Max was the Union Co-Chair, Barreca was the Management Co-Chair and Coulson, the then-President of the AAA, was the Neutral Co-Chair. At that time, there were approximately a dozen members on the Committee. The three co-chairs decided to hold a founding committee meeting in Clearwater, Florida and invited:

"a very prominent group of folks. And we decided that the way to increase the membership and activity of the Committee was to establish a series of sub-committees, with subsets of the larger topics, which would involve more people because if people want to get involved in this area, they want to be involved actively. . . . And so, that's what the three of us did. I think we created something like a dozen or so sub-committees, and we had a very successful meeting in Clearwater. . ."

The co-chairs served in that capacity for

three years, through 1980. Since then, Max and Chris have attended nearly every Mid-Winter Meeting of the Committee through the present. Chris and Max helped their successors, as well as other active members of the Committee by providing their expertise and guidance on numerous issues.

One of Max and Chris's major achievements was encouraging the Committee to take over the editing of the seminal arbitration book Elkouri *How Arbitration Works*. As a result of Max's relationship with Chris, they have authored three books, including *Labor Arbitrator Development: A Handbook* (BNA 1983), *Labor Arbitration, A Practical Guide for Advocates* (BNA 1990) and *Arbitration Casebook* (BNA 1997).

Max Zimny emphasized that although he and Chris often hold different views (Chris represents management):

“. . . we continue to be good friends, good personal friends, including our spouses, and we see each other, communicate with each other, and Chris and I to this day, continue to do lecture programs together.”

In fact, Chris and Max will do a lecture program in mid-December 1999 at the University of Louisville Law School at the request of a former neutral co-chair of the Committee, Bill Dolson, the Associate Dean at the Law School. Chris and Max will lead mock arbitration instruction at the Law School program:

“. . . so, as you see, the relationships which one forms within the ABA, particularly our Section, . . . really are very fruitful on a professional level certainly. And on a personal level as well.”

Max believes that despite the fact that members of the ADR Committee often have different views on labor-management issues, the amicable relationships developed among the Committee's members are quite unique. “It's wonderful, I think, this is a tribute to the

professionalism of the participants.”

Max Zimny is still an extremely active participant in the ABA. He is currently the Chair of the Labor and Employment Section of the ABA and spends approximately four hours a day on Section work, in addition to his full-time position as General Counsel of UNITE, which is the successor to the International Ladies Garment Workers Union. In describing his typical day, Max referred to his morning in which he participated in the preparation of a written position statement on the proposed Uniform Mediation Act (which should not touch labor-management mediation because it has a long and distinctive separate history). He also began to assemble a task force to address substantive labor and employment issues relating to federal contracting law, and filed objections with the ABA's House of Delegates on a request for blanket authority by another ABA section. The morning he spoke with me, Max had already discussed these national issues with several attorneys from across the country.

Max Zimny continues to focus not only on the general national issues related to labor and employment law, but also on the rights of the less than fully privileged. He discussed the future of arbitration in both the union and non-union settings and his participation as Co-Chair of the Due Process Protocol. We discussed the future of employment rights under Title VII for low wage employees and their limited access to plaintiff attorneys. Max articulated what he described as his “minority” view that low-wage employees need an inexpensive way to get justice and that the alternate dispute resolution process under union contracts may be an answer.

Max Zimny represents the commitment and professionalism that all members of the ADR Committee and all members of the legal profession should emulate. Max Zimny embodies both the history of labor arbitration as well as its bright future – the very best of what the ADR Committee stands for.

ALLIANCE FOR EDUCATION IN DISPUTE RESOLUTION

Our Committee and Section played a major role in the inaugural training program offered by the Alliance for Education in Dispute Resolution. The Alliance, of which the Section is a founding member, conducted a five-day training program on Mediating Employment Disputes. The Section prepared and presented the program segment dealing with key employment law issues with which mediators should be familiar. The program was held in Montreal from October 18-22, 1999, immediately following the Fall Education Meeting of the National Academy of Arbitrators. Attendees primarily were experienced labor arbitrators seeking to update their knowledge of employment law and to refine their mediation skills for use in the employment arena.

The program consisted of two days of substantive law review followed by three days of mediation process training within the employment context. The two-day substantive law training was a collaborative effort of our Committee, and the Section's EEO Committee and Employee Rights and Responsibilities Committee. The substantive program was developed and presented by Jim Adler, Richard Seymour, Monica Goebel, Burt Kainen, Adele Rapport, and Marilyn Teitelbaum. Sara Adler participated in the development and coordination of the Section's work and was on hand to add mediation practice pointers.

The Section members presented what Rocco Scanza, the newly-appointed Executive Director of the Alliance, called a "tour de force." The panelists covered topics that ranged from a refresher on the processes of proof in Title VII cases to an analysis of the methods by which attorneys' fees are calculated. Using the Section's book, *Equal Employment Law Update, Fall 1998*, along with materials prepared especially for the course, the Section speakers interspersed well-structured reviews of legal theory with candid discussions of practical considerations and litigation strategies,

giving attendees valuable perspectives for their work as employment mediators. Scanza thanked the Section for its commitment to the Alliance and for "the extraordinary contribution of expertise, insight, and talent that made the Alliance's first program a unique and valuable learning experience and an important contribution to the future of ADR."

The Section's two-day program segment was followed by three days of employment mediation process training, presented by the Cornell University School of Industrial and Labor Relations and the Cornell Institute on Conflict Resolution, including faculty member (and Committee member) Jackie Drucker. The training included an analysis of negotiation theory, discussion of ethics in mediation, step-by-step study of the mediation process, and role-playing exercises using employment-based fact patterns.

The Alliance is a nationwide consortium of universities and organizations involved with ADR. Participating organizations, in addition to our Section, include SPIDR, FMCS, IRRA, and the NAA. Sara Adler, Richard Seymour, and Barry Hartstein are the Section's liaisons to the Alliance. The Alliance plans to offer at least three additional employment mediation programs during 2000, building on the curriculum and format introduced in Montreal. The next training program will take place April 10-14, 2000 in Atlanta, hosted by The William J. Usery Center for the Workplace at Georgia State University. As in Montreal, the first two days of the program will consist of the Section's presentations on substantive law. The three-day mediation process training will be conducted by nationally-renowned mediators and trainers Linda Singer and Michael Lewis. For further information, contact Alliance Executive Director Rocco Scanza, through the Cornell Institute on Conflict Resolution at 607/255-5378, or by mail at 621 Catherwood Library Tower, Cornell University, Ithaca, New York 14853.

NEWLY-APPOINTED SUBCOMMITTEE CO-CHAIRS

Our Committee Co-Chairs have appointed the following Committee members as Subcommittee Chairs, to help lead the way in the coming year:

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Many thanks to all for agreeing to work on behalf of the Committee. Union attorneys who wish to fill the two open spots, please contact Committee Co-Chair Lynne Hicks at 303/832-8955.

We encourage every member of the Committee to get involved on a Subcommittee. Please pick a Subcommittee, and fax in the form on page 11.

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LEADERSHIP DEVELOPMENT INITIATIVE REPORT

At its October meeting, the Section Council approved a plan for increasing diversity in its membership and leadership. The Section enthusiastically embraces the concept of diversity as a strength for the Section. Diversity in our membership brings a variety of unique and valuable skills and perspectives to the Section. We recognize that to make great strides in achieving diversity, we must focus on our leadership as well as our membership.

Our diversity goals are not temporary goals. These concerns are vital to the future of the Section and much needs to be done to address them fully. We must do more to recruit lawyers of all races and ethnicities and of both genders, and to foster the spirit of inclusiveness in all of the Section's activities. This will help to ensure that the Section will remain a growing and integral contributor to the legal profession.

Diversity can only be achieved only with the unequivocal support and participation of the Section's leadership and its Committees, as well

as with the individual commitment of each active Section member. In order to achieve our goals, the Section leadership, committees, and active members would all benefit from guidance, encouragement, and training to:

- * actively recruit lawyers of color, women lawyers, and newer lawyers;
- * foster an atmosphere of inclusion to assist in retaining new members;
- * seek the participation of lawyers of new members on panels, task forces, and working groups; and
- * provide new members opportunities and training to take on leadership roles at both the Committee and Section levels.

The complete diversity plan is available from the Section's website, www.abanet.org/labor. Committee members wanting to get more involved in this initiative should contact one of the ADR Committee co-chairs.

**American Bar Association
Section of Labor & Employment Law**

ADR in Labor & Employment Law

SUBCOMMITTEE SIGN-UP

I would like to be a member of the following subcommittee(s):

- ADR Advocacy and Development and Training of Neutrals
- Book Publication
- Professional Responsibility
- Publication of Arbitration Awards
- Newsletter

I primarily represent ____ management ____ unions ____ individuals or ____ I am primarily a neutral.

NAME:

FIRM/AGENCY:

ADDRESS:

PHONE: _____ ABA ID#:

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**ADR COMMITTEE ANNOUNCES THE RELEASE OF ELKOURI &
ELKOURI *HOW ARBITRATION WORKS, FIFTH EDITION, 1999*
SUPPLEMENT**

We are pleased to announce the release of the 1999 supplement to the “bible” of our profession, *How Arbitration Works, Fifth Edition*. This publication will go a long way toward freshening up your arbitration briefs! Section members are eligible for a 25% discount on the supplement by calling BNA books at 800/960-1220 and mentioning order code ABA99. Over 75 ADR Committee member contributed their considerable talents to the supplement as authors and editors. Our greatest thanks are reserved for Committee members Edward P. Goggin and Alan Miles Ruben who did a spectacular job as Co-Editors-in-Chief of the supplement. Thanks so much to Ed and Alan!