


**Midwinter Meeting**  
**ERR: March 18-22, 2014**  
**Ethics: March 20-22, 2014**  
 Westin Resort • Los Cabos, Mexico

ABA Section of Labor and Employment Law

# Midwinter Meeting

Westin Resort • Los Cabos, Mexico

**Employment Rights and**  
**Responsibilities Committee**  
**March 18-22, 2014**

**Ethics and Professional Responsibility Committee**  
**March 20-22, 2014**



We thank the following for  
their generous contributions  
in support of our  
2014 Midwinter Meeting:

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Join us in beautiful Los Cabos, Mexico for the 2014 Midwinter Meeting of the ABA Employment Rights and Responsibilities Committee, March 18-22. You will have your pick of a variety of lively presentations covering the most recent and significant developments in labor and employment law with national experts in their fields. Our CLE panels are practical, substantive and engaging, and present the perspectives of management, employee, union, in-house, government, academics and neutrals.

We look forward to an exciting program at the wonderful Westin Resort & Spa overlooking the Sea of Cortez. Los Cabos features two towns with two very different vibes: Cabo San Lucas, a vivacious party town, and San Jose del Cabo, a charming traditional Mexican town. The Westin is situated between these sister towns.

We are thrilled that the Ethics and Professional Responsibilities (“EPR”) Committee will join us in Cabo from March 20 to 22. It will be an outstanding opportunity to expand your options for CLE, as you may partake of the EPR programming at no additional cost.

There also will be plenty of time for relaxing and enjoying Los Cabos’ many activities, such as sport fishing, golf, snorkeling and horseback riding. In addition, the restaurants are amazing—everything from one of the world’s best seafood taco restaurants to haute cuisine.

On behalf of the ERR family, we hope that you will join us in Los Cabos for this fabulous and distinctive Midwinter Meeting.

**Denise K. Drake**, *Employer Co-chair*

**Lori D. Ecker**, *Employee Co-chair*

**Louis Lopez**, *Public Co-chair*

**Amy Shulman**, *Union & Employee Co-chair*

# Employment Rights and Responsibilities Committee

# Midwinter Meeting

## Tuesday, March 18

### • 6:00 – 7:30 P.M.

#### Welcome Reception & Registration

We would like to thank the following firms for their generous contributions in support of this evening's reception:

**Fish & Richardson P.C.**

**Foley Hoag LLP**

**Heenan Blaikie LLP**

**Law Office of Lori D. Ecker**

**Mitchell Silberberg & Knupp LLP**

**Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**

**Orrick, Herrington & Sutcliffe LLP**

**Pedersen & Houpt**

**Spilman Thomas & Battle PLLC**

**Weil & Associés**

**Wilentz Goldman & Spitzer P.A.**

## Wednesday, March 19

### • 8:30 – 10:00 A.M.

#### Continental Breakfast and Registration

### • 8:30 – 9:30 A.M.

#### Formaldehyde Is Your Friend: How to Best Preserve Critical Claims, Arguments and Objections for Appeal

This panel will review the most common pitfalls and strategies for preserving issues for appeal during trial, including *voir dire*, the timing of Rule 50 motions, offers of proof, jury charge conferences and motions *in limine*.

##### **MODERATOR:**

**Stephen E. Fox**, *Fish & Richardson, P.C., Dallas, TX*

##### **SPEAKERS:**

**Mark P. Grajski**, *Seyfarth Shaw LLP, Sacramento, CA*  
**Ty Hyderally**, *Hyderally & Associates PC, Montclair, NJ*

**Daniel T. Vail**, *U.S. Equal Employment Opportunity Commission, Washington, DC*

### • 8:30 – 9:45 A.M.

#### ERR Subcommittee Co-Chair Meeting

### 9:00 – 11:30 A.M.

#### Corporate Counsel Caucus

Jeffrey Heller from BP and George L. Washington, Jr. from Orange Business Services will host a caucus meeting for in-house attorneys focusing on emergent issues important to the in-house labor and employment practitioner. The topics will be discussed from the unique perspective of in-house counsel responsible for providing legal advice to corporate clients on these topics. The meeting format allows participants to discuss and compare approaches for addressing risk management and other legal issues. Attendance is limited to in-house corporate counsel to promote a free flow of information. Discussion topics will be solicited from in-house registrants in advance of the meeting.

### • 9:45 – 10:30 A.M.

#### Pathways to Leadership

##### **COMMITTEE CO-CHAIRS**

**Denise K. Drake**, *Littler Mendelson P.C., Kansas City, MO*

**Lori D. Ecker**, *Law Office of Lori D. Ecker, Chicago, IL*

**Louis Lopez**, *U.S. Department of Justice, Civil Rights Division, Washington, DC*

**Amy Shulman**, *Broach & Stulberg, LLP, New York, NY*

##### **PROGRAM CO-CHAIRS**

**Daniel L. Bonnett**, *Martin & Bonnett PLLC, Phoenix, AZ*

**Jeffrey S. Heller**, *BP America, Inc., Houston, TX*

**Eric W. Iskra**, *Spilman Thomas & Battle, PLLC, Charleston, WV*

**Glen D. Savits**, *Green Savits & Lenzo LLC, Morristown, NJ*

**Diane I. Smason**, *U.S. Equal Employment Opportunity Commission, Chicago, IL*

##### **ADMINISTRATIVE CO-CHAIRS**

**Lori L. Deem**, *Abrahamson Vorachek & Levinson, Chicago, IL*

**Samantha C. Grant**, *Mitchell Silberberg & Knupp LLP, Los Angeles, CA*

### • 10:30 – 11:30 A.M.

#### One Size Doesn't Fit All: How Far Should Internal Investigations Go?

##### **Presented by the Workplace Investigations Subcommittee**

How far an internal investigation should go depends on the circumstances and goals. This program will explore issues regarding the scope of investigations, including: conducting investigations, even where the conduct complained of may not implicate legal concerns (e.g., bullying); expanding the scope of the investigation as it progresses; and, in a unionized setting, having a shop steward present during interviews. The panel also will address the question: if the goal is to eradicate conduct, does it make sense to deal with all potential issues rather than limit the investigation to the precise complaint raised?

##### **MODERATOR:**

**D. Jan Duffy**, *Management Practices Group, San Francisco, CA*

##### **SPEAKERS:**

**Stephanie Michelle Jones**, *U.S. Equal Employment Opportunity Commission, Charlotte, NC*

**Jeffrey D. Patton**, *Spilman Thomas & Battle PLLC, Winston Salem, NC*

**KristyAnne Thompson**, *Peer 1 Hosting, Atlanta, GA*



# 2014



• **11:30 – 12:45 P.M.**

**First-Time Attendee Luncheon**

Sponsored by Morrison & Foerster LLP

First-time attendees are invited to an informal luncheon with Section and Committee leaders who will discuss what ERR does and how to get involved.

• **1:00 – 2:00 P.M.**

**Put Up Your Dukes! Two Judicial Buddies Spar over Summary Judgment**

Two federal district court judges who have been close friends for over thirty years have polar opposite views of the role of summary judgment in federal court labor and employment cases. You will want a ringside seat as these two engage in a battle royal over the role of summary judgment.

**SPEAKERS:**

**The Honorable Mark W. Bennett**, U.S. District Court for the Northern District of Iowa, Sioux City, IA

**The Honorable John A. Jarvey**, U.S. District Court for the Southern District of Iowa, Davenport, IA

• **2:00 – 3:15 P.M.**

**We Signed What? You Sure Did! Controversies over Compelled Arbitration of Employment Claims and Class/Collective Action Waivers**

Presented jointly by the Alternatives to Litigation and Complex Litigation Subcommittees

Our panelists will update and analyze the continuing controversy over conflicting decisions in the courts and at the NLRB.

Federal and state courts have been and are reviewing a host of complicated legal issues involving this area of the law, including whether and under what circumstances class arbitrations may proceed, especially in the context of discrimination and wage-hour claims. A mock arbitration will highlight the controversy.

**MODERATOR:**

**Thomas Christopher**, Kilpatrick Stockton LLP, Atlanta, GA

**SPEAKERS:**

**Bobby Simpson**, General Electric Company, Louisville, TN

**Jennifer Spector**, National Labor Relations Board, Philadelphia, PA

**Douglas L. Steele**, Woodley & McGillivray, Washington, DC

**CASE MANAGEMENT CONFERENCE:**

**John E. Sands**, Arbitrator and Mediator, West Orange, NJ

**Andrew R. Livingston**, Orrick, Herrington & Sutcliffe LLP, San Francisco, CA

**Pearl Zuchlewski**, Kraus & Zuchlewski LLP, New York, NY

• **3:15 – 3:30 P.M.**

**Break**

• **3:30 – 5:00 P.M.**

**Implicit Bias, Take II**

Presented by the Diversity Outreach and Inclusion Taskforce

Back by popular demand, Dr. Freada Kapor Klein will expand on last year's fascinating discussion of implicit bias. A series of tests will be taken to identify the biases that reside in each of us. Dr. Klein will explain studies showing the effects of bias, followed by an audience discussion of how the findings impact our workplaces. Most importantly, Dr. Klein will examine what we can learn from these studies and develop with the audience a top 10 list of take-home suggestions to help eliminate (or work with) implicit bias.

**MODERATOR:**

**Eric A. Tate**, Morrison & Foerster, San Francisco, CA

**SPEAKER:**

**Freeda Kapor Klein, Ph.D.**, Level Playing Field Institute and the SMASH Academy, San Francisco, CA

• **6:00 – 7:00 p.m.**

**Subcommittee Fiesta**

For those having a hard time deciding which ERR subcommittee to join, the Membership Committee will present the Subcommittee Fiesta. First-time attendees are encouraged to meet with subcommittee co-chairs and other ERR and Section leaders in a festive and relaxed setting to learn more about ERR's subcommittees and how to become involved in ERR activities.

• **7:00 – 8:30 p.m.**

**Diversity Reception**

Hosted by the Diversity Outreach and Inclusion Taskforce

We thank the following firms for their generous contributions in support of this evening's festivities:

**Greenberg Traurig LLP**

**Laner Muchin**

**Littler Mendelson P.C.**

**Outten & Golden LLP**

**Practical Law Company**

**Proskauer Rose LLP**

**Saul Ewing LLP**

## Thursday, March 20

### • 7:00 – 8:15 A.M.

#### Continental Breakfast

### • 7:15 – 8:00 A.M.

#### \*Breakfast Roundtable: U.S. Immigration Law Reform: What You Don't Hear in the Press

Presented by the Immigration Law Committee

Regardless of whether or not Comprehensive Immigration Reform (CIR) makes it through Congress and becomes law, there is far more at play than just addressing the estimated 11 million undocumented workers in the United States. Legal immigration needs reform as well, and ERR members should take note. From enhancing enforcement efforts to ensuring that visa classifications themselves meet the needs of a changing economy, CIR is a monumental task. At this roundtable, led by Jonathan Grode from the Section's Immigration Law Committee, we will discuss what labor and employment lawyers need to know about the changing immigration law landscape and how best to advise their clients.

##### MODERATOR:

Jonathan Grode, Green and Spiegel LLC, Philadelphia, PA

##### SPEAKERS:

Sean G. Hanagen, Jackson Lewis LLP, White Plains, NY

Mary Pivec, Williams Mullen, Washington, DC

Orin Kurtz, Gardy and Notis, New York, NY

### • 8:00 – 9:00 A.M.

#### \*Breakfast Roundtable: Gab with the Government

Come hear the newest developments at our government agencies from attorneys at the Department of Justice, Equal Employment Opportunity Commission, Department of Labor and National Labor Relations Board.

##### SPEAKERS:

Louis Lopez, U.S. Department of Justice, Civil Rights Division, Washington, DC

Jamila B. Minnick, U.S. Department of Labor, Washington, DC

Diane I. Smason, U.S. Equal Employment Opportunity Commission, Chicago, IL

Jennifer Spector, National Labor Relations Board, Philadelphia, PA

### • 9:00– 10:15 A.M.

#### "I'm Not Sick—Yes You Are!"

#### Perceived Disability, Fitness for Duty and Workplace Safety under the ADA and FMLA

Presented by the Disabilities and Leaves of Absence Subcommittee

What happens when an employer believes an employee needs to take leave to obtain treatment for physical, mental or emotional disability, but the employee disagrees? What are the employee's and employer's rights and obligations? What are the employer's duties if it feels the employee poses a safety

risk? The panel will explore these issues, including disability discrimination claims, third-party examinations of the employee and the "direct threat" defense.

##### MODERATOR:

Susan Martin, Martin & Bonnett PLLC, Phoenix, AZ

##### SPEAKERS:

Tami A. Earnhart, Ice Miller LLP, Indianapolis, IN

Ann Henry, U.S. Equal Employment Opportunity Commission, Chicago, IL

Daniel Kohrman, AARP Foundation Litigation, Washington, DC

### • 10:15 – 10:30 A.M.

#### Break

### • 10:30 – 11:30 A.M.

#### But-For Causation for Title VII Retaliation Claims: Mixed Reactions

Presented by the Statutory Rights Subcommittee

In 2013, *Univ. of Texas Sw. Med. Ctr. v. Nassar* held that Title VII's retaliation provision, which requires a plaintiff to prove retaliation "because of" the plaintiff's protected activity, precludes a mixed-motive framework. The Supreme Court's 5-4 decision relied heavily on its earlier opinion in *Gross v. FBL Financial Services, Inc.*, in which it concluded—based on similar reasoning—that "but-for" causation is required to prove discrimination under the ADEA. Congress has responded to these decisions by introducing bipartisan legislation to restore the "motivating factor" causation standard for discrimination and retaliation claims. Our panel of experts will examine the implications of these controversial cases and offer practical tips to assist litigants bringing and defending discrimination and retaliation claims.

##### MODERATOR:

Louis Lopez, U.S. Department of Justice, Civil Rights Division, Washington, DC

##### SPEAKERS:

The Honorable Mark W. Bennett, U.S. District Court for the Northern District of Iowa, Sioux City, IA

Laurie Burgess, Burgess Law Offices, P.C., Chicago, IL

Michael Rosen, Foley Hoag, Boston, MA

### • 11:30 A.M. – 1:00 P.M.

#### Handling Whistleblower Claims: New Opportunities Create More Complex and Emerging Issues for Employment Lawyers

Presented by the Whistleblower Subcommittee

Our experienced panel will explore in depth the fast-changing legal landscape for whistleblowers while offering practical insight on the latest issues. Topics covered will include: latest developments on forum and claim selection for relaxed burdens of proof; financial incentives and other remedies; managing thorny confidentiality issues; handling highly public whistleblower cases; contingent labor as whistleblowers; mandatory arbitration (or not); and key recent cases defining the scope of protected activities.

##### MODERATOR:

Stacey A. Campbell, Littler Mendelson P.C., Denver, CO

\*The Breakfast Roundtables on Thursday and Friday mornings are informal gatherings designed to permit group discussions. There will be no written materials distributed about the topics and, due to their informal nature, these sessions are not approved for CLE credit.

#### **SPEAKERS:**

Lloyd B. Chinn, *Proskauer Rose LLP, New York, NY*  
Philip Hilder, *Hilder & Associates, PC, Houston, TX*  
Gerald Waites, *O'Donoghue & O'Donoghue, Washington, DC*  
Jason M. Zuckerman, *Washington, DC*

#### **• 1:00 – 2:00 P.M.**

##### **Subcommittee Luncheon**

ERR's subcommittees will meet over lunch to plan activities for the next year and their panels for the 2015 Midwinter Meeting in Naples, Florida. Newcomers are encouraged to attend! We thank the following for their generous contributions in support of the Subcommittee Luncheon:

Abrahamson Vorachek & Levinson  
Broach & Stulberg, LLP  
The Case Law Firm  
David J. Carr, Ice Miller, LLP  
Davis Wright Tremaine LLP  
Flaster/Greenberg PC  
Hyderally & Associates PC  
Martin & Bonnett PLLC  
Ritz Clark & Ben-Asher LLP  
Van Dermyden Maddux Law Corporation

#### **• 2:30 – 5:00 P.M.**

##### **Beach Volleyball**

Sponsored by the Membership Subcommittee

#### **• 5:30 – 7:00 P.M.**

##### **Sunset Cruise (Optional Ticketed Event)**

We have arranged an optional Sunset Cruise on the Sea of Cortez. Cruise by *El Arco de Cabo San Lucas* at the extreme southern end of the Baja Peninsula while enjoying an open bar, snacks and entertainment. (Limited availability—pre-registration is required.)

#### **• 7:30 – 10:00 P.M.**

##### **Cabo San Lucas Dine-Around**

Meeting registrants and guests are invited to participate in an organized "dine-around" in downtown Cabo San Lucas. We will make reservations at some of Cabo's best restaurants, and you choose your favorite! Sign-up sheets will be posted on Wednesday at the ABA Registration Desk.

## **Friday, March 21**

#### **• 7:00 – 8:30 A.M.**

##### **Continental Breakfast**

#### **• 7:15 – 8:15 A.M.**

##### **\*Breakfast Roundtable: Global Perspectives on Family Responsibility Discrimination**

Presented by the International Subcommittee

A group of international lawyers from various countries will discuss family responsibility legislation and employment issues in their respective jurisdictions.

#### **MODERATOR:**

Jo Linda Johnson, *U.S. Equal Employment Opportunity Commission, Washington, DC*

#### **SPEAKERS:**

Lisa C. Cabel, *Borden Ladner Gervais LLP, Toronto, Ontario*  
Magali Cournoyer-Proulx, *Heenan Blaikie LLP, Montréal, Québec*  
Melanie Crowley, *Mason Hayes & Curran Solicitors, Dublin, Ireland*  
Déborah David, *JeantetAssociés, Paris, France*  
Javiera Medina Reza, *Littler Mendelson P.C., Mexico City, Mexico*

#### **• 8:15– 9:15 A.M.**

##### **Healthcare Reform Goes Live! Make Sure Your Clients Don't Get Electrocuted**

Presented by the Employee Benefits Subcommittee

This panel will help you keep your clients safe by ensuring you appreciate the critical healthcare reform questions that must be addressed, understood and implemented by every employer, employee and insurance carrier in 2014, and will help employers, employees and unions avoid landmines by identifying hot relevant issues and important trends in benefits litigation and related regulatory guidance.

#### **MODERATOR:**

J. Timothy McDonald, *Thompson Hine LLP, Atlanta, GA*

#### **SPEAKERS:**

Audrey Browne, *AFSCME District Council 37, New York, NY*  
Ellen M. Doyle, *Stember Feinstein Doyle Payne & Kravec LLC, Pittsburgh, PA*  
Jamila B. Minnicks, *U.S. Department of Labor, Washington, DC*  
Erin M. Sweeney, *Dickstein Shapiro LLP, Washington, DC*

## **CONCURRENT PROGRAMS: TRACK 1**

#### **• 9:15 – 10:15 A.M.**

##### **Balancing Interests in a BYOD World**

Presented by the Employee Privacy Subcommittee

Use of employee-owned devices, such as smartphones, tablets and laptops, for both personal and professional use has become increasingly common. While there may be some advantages for employers in having a "bring your own device" (BYOD) policy, such a policy also likely will raise a host of potentially thorny problems, such as issues related to data security and ownership, preservation, ediscovery, privacy, safety, and wage and hour issues. While employers want to protect their proprietary information, employees may view a BYOD policy as invasive of their privacy if their personal data can be monitored or their location can be tracked via their own personal mobile device. This panel will explore the tension created by the BYOD concept and will discuss practical tips for implementing a BYOD policy.

#### **MODERATOR:**

J. Lindsay Johnston, *Bryn Mawr, PA*

*\*The Breakfast Roundtables on Thursday and Friday mornings are informal gatherings designed to permit group discussions. There will be no written materials distributed about the topics and, due to their informal nature, these sessions are not approved for CLE credit.*



## **SPEAKERS:**

**Brian J. LaClair**, *Blitman & King, LLP, Syracuse, NY*  
**Cynthia N. Sass**, *Law Offices of Cynthia N. Sass, P.A., Tampa, FL*  
**Julie A. Totten**, *Orrick, Herrington & Sutcliffe LLP, Sacramento, CA*

### • **10:15 – 10:30 A.M.**

#### **Break**

### • **10:30 – 11:30 A.M.**

#### **Hotter than a Habanero— Current Issues in EPLI**

**Presented by the Insurance Subcommittee**

Panelists will discuss: (1) the latest trends in coverage issues for employment-related claims; (2) hybrid cases with covered and uncovered claims and how those are managed; (3) the conflicts that may arise in settlement of EPL claims and how to handle them; and (4) Medicare, Medicaid and SCHIP Extension Act (MMSEA) and suggested language for settlement agreements.

#### **MODERATOR:**

**Stephanie D. Gironda**, *Wilentz Goldman & Spitzer P.A., Woodbridge, NJ*

#### **SPEAKERS:**

**Rowan Leathers**, *Butler Snow, Nashville, TN*  
**Bridget A. Murray**, *Chubb Insurance, Pittsburgh, PA*  
**Stacey Wildansky**, *Allied World Assurance Company, Farmington, CT*

### • **11:30 – 12:30 P.M.**

#### **Get It In, Keep It Out— ESI in Evidence: You Have Collected It— Now How Do You Use It?**

**Presented jointly by the Technology and  
Trial and Appellate Advocacy Subcommittees**

This program will demonstrate in a courtroom setting under the Federal Rules of Evidence the laying of evidentiary foundations and overcoming hearsay and best evidence objections for email, text messages, social media materials and other ESI. The panelists also will demonstrate strategies to challenge ESI offered by your adversary.

#### **MODERATOR:**

**Jeffrey A. James**, *Sebris Busto James, Bellevue, WA*

#### **SPEAKERS:**

**The Honorable Andrew J. Peck**, *U.S. District Court for the Southern District of New York, New York, NY*  
**Erin Foley**, *Seyfarth Shaw, Chicago, IL*  
**Toni Jackson**, *U.S. Department of Justice, Civil Rights Division, Washington, DC*  
**Christopher Lenzo**, *Green Savits & Lenzo LLC, Morristown, NJ*  
**David J. Walton**, *Cozen & O'Connor, Philadelphia, PA*

## **CONCURRENT PROGRAMS: TRACK 2**

### • **9:15 – 10:15 A.M.**

#### **Non-Compete Purgatory: Leaving But Not Yet Gone**

**Presented by the Covenants Not to Compete Subcommittee**

When employees change jobs, questions concerning confidentiality, intellectual property, non-solicitation, trade secrets, and the duty of loyalty arise for the departing employee, as well as the current and future employer. What advice do you give to an employee who plans to leave his or her employer but has not yet left? When an employer suspects that an employee will depart, what should the employer do to protect confidentiality and property? And does the individual's future employer have any obligations—even before the individual joins its firm? Our panel will explore all of these legal and practical issues as well as the ethical implications that could arise in the course of representation in these instances.

#### **MODERATOR:**

**Eric A. Tate**, *Morrison & Foerster, San Francisco, CA*

#### **SPEAKERS:**

**Deirdre Fox**, *Scharf Banks Marmor LLC, Chicago, IL*  
**Arnold Pedowitz**, *Pedowitz & Meister, New York, NY*  
**George L. Washington, Jr.**, *Orange Business Services, Oak Hill, VA*

### • **10:15 – 10:30 A.M.**

#### **Break**

### • **10:30 – 11:30 A.M.**

#### **Around the World in 60 Minutes: A Global Perspective on Employer Liability**

**Presented by the International Subcommittee**

In employment legal matters, a common focus around the globe is identifying the responsible employer entity, whether it be a parent corporation or a subsidiary. More complex are issues concerning integrated entities, co-employers, joint employers, insolvent entities, successors, and individual owner/managers/contractors. In many parts of the world, it is critically important to identify the correct legal entity(ies) in employment matters, and success or failure of a case may hinge upon it. An experienced panel of international practitioners will explore the formal and informal aspects of identifying the appropriate employer parties in global employment cases.

#### **MODERATOR:**

**Henry Eickelberg**, *General Dynamics, Falls Church, VA*

#### **SPEAKERS:**


**Paul Callaghan**, *Taylor Wessing LLP, London, United Kingdom*  
**Ignacio Funes de Rioja**, *Funes de Rioja & Asociados, Buenos Aires, Argentina*  
**Ronald A. Pink**, *Q.C., Pink Larkin, Halifax, Nova Scotia, Canada*  
**Gerlind Wisskirchen**, *CMS Hasche Sigle, Cologne, Germany*

### • **11:30 A.M. – 12:30 P.M.**

#### **Employee Misclassification Enforcement: Navigating the Shifting Current**

**Presented by the Contingent Workforce Subcommittee**

Increased enforcement efforts by both public and private sources have turned up the heat on employee misclassification issues. Both



the firms that employ contingent workers as well as the companies that use such workers are experiencing enhanced scrutiny of these arrangements. This panel will explore the latest DOL enforcement initiatives as well as review the latest strategies being used by firms litigating these issues on behalf of contingent workers.

**MODERATOR:**

**Tamika D. Lynch**, *Siemens Industry, Inc.*, Buffalo Grove, IL

**SPEAKERS:**

**The Honorable M. Patricia Smith**, *U.S. Department of Labor*, Washington, DC

**Joseph Y. Ahmad**, *Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing P.C.*, Houston, TX

**Michael P. Royal**, *Fisher & Phillips LLP*, Dallas, TX

• **1:00 – 6:00 P.M.**

**Golf Tournament**

• **7:00 – 11:00 P.M.**

**Reception, Dinner and Dance**

## Saturday, March 22

• **7:30 – 8:30 A.M.**

**Continental Breakfast**

• **8:15 – 9:15 A.M.**

**Ethical Issues in Representing Multiple Clients: We're All in This Together—Or Are We?**

**Presented jointly by the Contracts & Executive Compensation Subcommittee and Ethics & Professional Responsibility Committee**

This panel will focus on representing multiple clients, with some emphasis on representing company/management and executives/subordinates in various situations, including executive employment agreement negotiations, purchase/sale transactions and lift-outs. It also will cover situations where only one side is formally represented by counsel and the unrepresented side ends up relying on the single lawyer's efforts and expertise.

**MODERATOR:**

**James F. Allmendinger**, *NEA–New Hampshire*, Concord, NH

**SPEAKERS:**

**Roberta J. Burnette**, *Dentons*, Los Angeles, CA

**Cara E. Greene**, *Outten & Golden LLP*, New York, NY

**Stephanie S. Padilla**, *Johns Manville*, Denver, CO

• **9:15 – 10:15 A.M.**

**Off-Duty Conduct—Is It Grounds for Disqualification or Termination?**

**Presented by the Employment At Will Subcommittee**

A number of states have enacted legislation that prohibits employers from disciplining or discharging employees for off-duty conduct. Certain states have legalized the use of medical marijuana and the use of recreational marijuana. An even larger number of states have limited an employer's ability to use of social media, criminal background checks, and credit reports when making employment decisions. These ongoing changes in the law make it increasingly difficult for employers to take any type of adverse employment action against an applicant or employee.

**MODERATOR:**

**Jeffrey Dretler**, *Fisher & Phillips LLP*, Boston, MA

**SPEAKERS:**

**Wynter P. Allen**, *Alden Law Group PLLC*, Washington, DC

**Kristen M. Case**, *The Case Law Firm*, Chicago, IL

**James M. Shore**, *Stoel Rives LLP*, Seattle, WA

• **10:15 – 10:30 A.M.**

**Break**

• **10:30 – 11:30 A.M.**

**Adios, DOMA—Hola, Same-Sex Marriage and LGBT Protections at Work**

**Presented by the State Law Subcommittee**

The Supreme Court's rejection of the Defense of Marriage Act paired with new federal regulations and recent waves of state legislation have dramatically shifted the sands on issues of same-sex marriage and LGBT concerns at work. This panel will explore key developments in employment and employee benefits, as well as the question of whether the law is leading or trailing societal acceptance of the LGBT community and what to expect in the future.

**MODERATOR:**

**Eric L. Barnum**, *Schiff Hardin LLP*, Atlanta, GA

**SPEAKERS:**

**Michael D. Homans**, *Flaster/Greenberg, P.C.*, Philadelphia, PA

**Anna M. Pohl**, *U.S. Equal Employment Opportunity Commission*, New York, NY

**Teresa Renaker**, *Lewis, Feinberg, Lee, Renaker & Jackson, PC*, Oakland, CA

• **11:30 A.M. – 12:30 P.M.**

**Lawyers Without Borders: The Ethical Implications of the Multijurisdictional Practice of Law**

**Presented by the Ethics Subcommittee**

In February 2013, the ABA Commission on Ethics 20/20 revised the Model Rules of Professional Conduct concerning the multijurisdictional practice of law. Due to the expansive nature of our practice, attorneys must know what the rules are and how to comply. The panel will address what it means to "practice" law within the meaning of the ethics rules and how these new rules impact the modern day lawyer. The panel also will discuss representing clients and advising clients on the Internet, or in an arbitration or administrative proceeding outside your home jurisdiction.

**MODERATOR:**

**Marisa Warren**, *Pedowitz & Meister LLP*, New York, NY

**SPEAKERS:**

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

**T. Warren Jackson**, *The DIRECTV Group*, El Segundo, CA

**Harry Korrell**, *Davis Wright Tremaine LLP*, Seattle, WA

• **12:30 P.M.**

**Wrap-Up and Feedback**



# Midwinter Meeting 2014

## Thursday, March 20

- 6:00 – 7:30 P.M.

### Welcome Reception

## Friday, March 21

- 7:00 – 8:00 A.M.

### Registration and Continental Breakfast

- 8:00 – 8:15 A.M.

### Welcome and Introductions by Committee Co-Chairs

James F. Allmendinger, *Union & Employee Co-Chair, Concord, NH*  
Cara E. Greene, *Employee Co-Chair, New York, NY*  
Christopher Lage, *Public Co-Chair, Washington, DC*  
Myra L. McKenzie-Harris, *Employer Co-Chair, Bentonville, AR*

- 8:15 – 9:15 A.M.

### Steering the Clear Course: How to Navigate the Professional and Ethical Waters When Working with a *Pro Se* Plaintiff

Litigating with *pro se* plaintiffs presents unique ethical and professional challenges. Defense counsel must be careful to avoid providing legal advice to *pro se* plaintiffs and maintain professionalism—regardless of the *pro se* plaintiff's conduct. Counsel representing labor unions should be aware of the risk of duty of fair representation claims and other potential claims against the union, and plaintiffs' counsel must be careful not to inadvertently enter into an attorney-client relationship by providing advice or assisting a *pro se* litigant. Panelists will discuss these topics along with other ethics issues presented by *pro se* plaintiffs and will give practical suggestions on how to address these challenges.

#### MODERATOR:

Andrew M. Schpak, *Barran Liebman LLP, Portland, OR*

#### PANELISTS:

Michelle D. Craig, *Adams and Reese LLP, New Orleans, LA*  
Dolores Dorsainvil, *Office of Bar Counsel, Washington, DC*  
Brenda Sutton-Wills, *California Teachers Association, Santa Fe Springs, CA*

- 9:15 – 10:15 A.M.

### Maintaining Impartiality in the Age of Electronic Social Media

Reports of judges who have crossed the line by using electronic social media to make snarky comments on pending cases have made the news. But do judges cross the line with a seemingly innocuous "friend request" on Facebook? Are the ethics rules different depending on what type of neutral—whether judge, arbitrator or mediator—is involved? What should practitioners

do when faced with a neutral who crosses the line by, for example, posting comments on Facebook or refusing to disclose conduct or connections that could call into question her impartiality? This panel will survey state bar ethics opinions and explore the ABA's recent ethics opinion on the topic of social media interactions between neutrals and practitioners. It also will delve into how practitioners can avoid ethics traps when interacting with neutrals, while still acting in the best interests of the client.

#### MODERATOR:

Matthew D. Marca, *Gutierrez Marca LLP, San Francisco, CA*

#### PANELISTS:

The Honorable Mark W. Bennett, *U.S. District Court for the Northern District of Iowa, Sioux City, IA*  
The Honorable Evangelina Hernandez, *Administrative Law Judge, Social Security Administration, Stockton, CA*  
Lisa Salkovitz Kohn, *Arbitrator and Mediator, Chicago, IL*  
John E. Sands, *Arbitrator and Mediator, West Orange, NJ*

- 10:15 – 10:30 A.M.

### Break

- 10:30 – 11:30 A.M.

### Let's Make a Deal (Part I): Ethics of Settling Individual Employment Disputes

Every labor and employment attorney negotiates settlement agreements, but the landscape is constantly shifting. Settlement discussions can become an ethical mine field. Puffery is not always a good idea and dissembling may come back to haunt you. Keeping your client in the loop is key, but managing expectations and dealing with organizational clients can be tricky. Technological innovations are changing how we do business. This panel will provide nuts and bolts guidance on how to balance your ethical responsibilities with your obligation to negotiate the best deal for your client.

#### MODERATOR:

Wendy L. Kahn, *Zwedling, Paul, Kahn & Wolly PC, Washington, DC*

#### PANELISTS:

Michael Z. Green, *Texas A&M University School of Law, Fort Worth, TX*  
David D. Powell, Jr., *Ogletree Deakins, Denver, CO*  
Marissa Warren, *Pedowitz & Meister, LLP, New York, NY*

- 11:30 A.M. – 12:30 P.M.

### Let's Make a Deal (Part II): Ethics of Resolving Class and Collective Actions

Resolving class and collective action employment litigation involves more than agreeing on a settlement amount, drafting a release, and cashing a check. Counsel must be aware of conflicts of interest that can cloud settlements and divide a potential class, act with honor and fair-dealing in negotiating terms, and candidly counsel their clients about the impact of settlement terms. Issues such as the reasonableness of the attorneys' fees, service payments to class representatives, allocation formulas,



interclass disagreement, the scope of releases, opt-out rights, notices, communications with putative class members, and the implementation of injunctive relief and court oversight can quickly disrupt best laid plans for a settlement. Further, are the ethics rules different before and after a class is certified or when dealing with the EEOC at the conciliation and litigation stages? This panel will explore these and other ethics issues in settling class and collective action employment disputes.

**MODERATOR:**

**J. Hagood Tighe**, *Fisher and Phillips LLP, Columbia, SC*

**PANELISTS:**

**Christopher Lage**, *U.S. Equal Employment Opportunity Commission, Washington, DC*

**Roberta L. Steele**, *Goldstein, Borgen, Dardarian & Ho, Oakland, CA*

• **12:30 – 12:45 P.M.**

**Section Report**

**Joel A. D'Alba**, *Section Chair, Chicago, IL*

**Joyce Margulies**, *Section Chair-Elect, Memphis, TN*

**Lynlee Wells Palmer**, *Employer Council Liaison, Birmingham, AL*

**Michael P. Posner**, *Union & Employee Council Liaison, Los Angeles, CA*

• **7:00 – 10:00 P.M.**

**Reception and Dinner**

## Saturday, March 22

• **7:15 – 8:15 A.M.**

**Continental Breakfast**

• **8:15 – 9:15 A.M.**

**Ethical Issues in  
Representing Multiple Clients:  
We're All in This Together—Or Are We?**

Presented jointly with the  
**Contracts & Executive Compensation Subcommittee  
of the Employment Rights & Responsibilities Committee**

This panel will focus on representing multiple clients, with some emphasis on representing company/management and executives/subordinates in various situations, including executive employment agreement negotiations, purchase/sale transactions and lift-outs. It also will cover situations where only one side is formally represented by counsel and the unrepresented side ends up relying on the single lawyer's efforts and expertise.

**MODERATOR:**

**James F. Allmendinger**, *NEA-New Hampshire, Concord, NH*

**PANELISTS:**

**Roberta J. Burnette**, *Dentons, Los Angeles, CA*

**Cara E. Greene**, *Outten & Golden LLP, New York, NY*

**Stephanie S. Padilla**, *Johns Manville, Denver, CO*



• **9:15 – 10:15 A.M.**

**Who Let the Cat Out of the Bag?  
The Ethics of Inadvertent  
Disclosure and Informal Discovery**

Discovery often includes more than just the documents intentionally produced from one party to another. Privileged documents may be inadvertently disclosed to the other side. The employee may have left the company with documents in his possession. A third party may be willing to provide documents outside the course of ordinary discovery. Panelists will explore an attorney's ethical obligations when encountering informal discovery or inadvertent disclosure, including whether an attorney has an obligation to return documents, whether he or she may use certain documents, and what disclosures must be made to the other side.

**MODERATOR:**

**Amy F. Shulman**, *Broach & Stulberg, LLP, New York, NY*

**PANELISTS:**

**Delyanne D. Barros**, *Outten & Golden LLP, New York, NY*

**Diane I. Smason**, *U.S. Equal Employment Opportunity Commission, Chicago, IL*

• **10:15 – 10:30 A.M.**

**Break**

• **10:30 – 11:30 A.M.**

**Getting Paid: The Ethics  
of Atypical Fee Arrangements**

What happens when a third party, whether pursuant to an indemnification agreement, insurance policy, or otherwise, is paying the fees? What happens when more than one firm is splitting fees? Are referral fees ethical? What disclosures must be made to the clients in those situations? Panelists will explore these questions and more related to atypical fee arrangements.

**MODERATOR:**

**Michael P. Posner**, *Posner & Rosen LLP, Los Angeles, CA*

**PANELISTS:**

**Susan Grody Ruben**, *Arbitrator and Mediator, Cleveland, OH*

**Dayna E. Underhill**, *Hinshaw & Culbertson LLP, Portland, OR*

• **11:30 – 12:30 P.M.**

**Committee Business Meeting**

# Registration Information

## Meeting Registration

The ERR Committee Midwinter Meeting registration fees cover the Tuesday and Wednesday Receptions and the Friday Reception, Dinner and Dance, continental breakfasts and refreshment breaks during the meeting, and all meeting materials on CD-ROM. The ERR spouse/guest registration fee includes all evening events.

The Ethics & Professional Responsibility Committee Midwinter Meeting registration fees cover all meeting materials and scheduled meal functions on Thursday, Friday and Saturday. The Ethics spouse/guest registration fee includes the evening functions on Thursday and Friday.

You are encouraged to register online at [www.americanbar.org/groups/labor\\_law.html](http://www.americanbar.org/groups/labor_law.html). You also may register by filling out the attached registration form and returning it with your payment by March 10, 2014 to the Section office. Registration fees are refundable, less a \$50 administrative fee, for cancellations received in the Section Office by March 10, 2014.

## Hotel Accommodations

We have negotiated a special group rate at the Westin Resort Los Cabos of **\$192 USD** for Deluxe Rooms, plus a 4% daily resort fee. The reservation deadline for the group rate is **February 4, 2014**. If necessary, cancellations must be made 72 hours prior to the scheduled day of arrival to avoid a one-night cancellation charge. Reservations may be made by calling the hotel at **800-WESTIN1**. Be sure to mention you are attending the “ABA ERR Committee Midwinter Meeting” to receive the group rates. You also may register online at [www.starwoodmeeting.com/Book/ABAERR](http://www.starwoodmeeting.com/Book/ABAERR).

## Air Travel

American Airlines and United Airlines provide two types of airfare discounts to ABA meeting attendees. You can receive these discounts offline by calling, toll free, American Airlines at 800-433-1790 or United Airlines at 800-521-4041 or Orbitz for Business at 877-222-4185. For more information visit the ABA Travel Website at [www.americanbar.org](http://www.americanbar.org).

## Social Events

### Welcome Reception

We will hold an ERR Welcome Reception on Tuesday, March 18 from 6:00 to 7:30 p.m. at the Westin Resort. All midwinter meeting attendees and registered guests are welcome to attend.

### Diversity Reception

Following a special “Subcommittee Fiesta” reception for First-Time Attendees, New ERR Committee Members and Subcommittee Co-chairs from 6:00–7:00 p.m., the ERR Diversity Reception will be held on Wednesday, March 19 from 7:00 to 8:30 p.m.

### Sunset Cruise

We have arranged an optional Sunset Cruise on the Sea of Cortez. Cruise by *El Arco de Cabo San Lucas* at the extreme southern end of the Baja Peninsula while enjoying an open bar, snacks and entertainment. (Limited availability—pre-registration is required.)

### Cabo San Lucas Dine-Around

Meeting registrants and guests are invited to participate in an organized “dine-around” in downtown Cabo San Lucas. We will make reservations at some of Cabo’s best restaurants, and you choose your favorite!

### Golf Tournament

The annual Golf Tournament will be held on Friday, March 21. The cost for the tournament is \$195 per player, which includes green fees, shared cart and range balls.

### Friday Reception, Dinner and Dance

You will not want to miss our Friday dinner party for meeting attendees and registered guests, which begins at 7:00 p.m. The evening will feature great food, drinks and live entertainment. The cost of this event is included in the registration fees.

## Continuing Legal Education Credit

Required sponsor documentation will be forwarded to and credit requested from MCLE states with general requirements for all lawyers. Each state determines the number of hours to be credited for attendance. Uniform Certificates of Attendance will be available at the meeting.

## Financial Assistance

Visit the Section of Labor & Employment Law website at [www.americanbar.org/labor](http://www.americanbar.org/labor) for information about the Section Development Fund and Government and YLD Fellowship Program opportunities.





# Registration Form

ABA Section of Labor and Employment Law

## Midwinter Meeting

### Employment Rights and Responsibilities Committee

March 18–22, 2014 • Westin Resort • Los Cabos, Mexico

### Ethics and Professional Responsibility Committee

March 20–22, 2014 • Westin Resort • Los Cabos, Mexico

**Registration Deadline: March 10, 2014**

#### ONLINE:

[http://www.americanbar.org/groups/labor\\_law/events\\_cle.html](http://www.americanbar.org/groups/labor_law/events_cle.html)  
(Credit card payments accepted online only.)

#### FAX:

(312) 988-5814

#### MAIL:

ABA Section of Labor & Employment Law  
Attn: Lynette Kelley, Meetings Registrar  
321 North Clark Street, Chicago, IL 60654

☐ **Enclosed check**

(made payable to American Bar Association)

NAME

NICKNAME/BADGE NAME

FIRM/ORGANIZATION

STREET ADDRESS

CITY

STATE/PROVINCE

POSTAL CODE

PHONE

FAX

E-MAIL ADDRESS

NAME OF ATTENDING SPOUSE/GUEST(S)

#### Affiliation:

☐ Employer/Management ☐ Employee/Plaintiff ☐ Union & Employee ☐ Public/Government ☐ Neutral ☐ Other

☐ **First-Time Attendee**

If any special arrangements are required under the ADA, contact Judy Stofko at 312/988-5813.

#### ERR Registration

##### Registration Fees:

Number Attending      Total

\*Section Member (after 1/6/14) \_\_\_\_\_ @ \$525 \$ \_\_\_\_\_

ABA # \_\_\_\_\_

Early Discount (on or before 1/6/14) \_\_\_\_\_ @ \$475 \$ \_\_\_\_\_

Non-Section Member \_\_\_\_\_ @ \$625 \$ \_\_\_\_\_

Government Agency, \_\_\_\_\_ @ \$325 \$ \_\_\_\_\_

Full-Time Academic or Non-Profit \_\_\_\_\_ @ \$325 \$ \_\_\_\_\_

First-Time Attendee \_\_\_\_\_ @ \$325 \$ \_\_\_\_\_

Spouse/Guest(s) \_\_\_\_\_ @ \$175 \$ \_\_\_\_\_

Children (12–18) \_\_\_\_\_ @ \$75 \$ \_\_\_\_\_

##### Social Events:

Tuesday Welcome Reception \_\_\_\_\_ (included in ERR registration fee)

Wednesday Diversity Reception \_\_\_\_\_ (included in ERR registration fee)

Thursday Sunset Cruise \_\_\_\_\_ @ \$65/person

Friday Golf Tournament \_\_\_\_\_ @ \$195/player

Friday Reception and Dinner \_\_\_\_\_ (included in ERR registration fee)

**Total Enclosed: \$ \_\_\_\_\_**

#### Ethics Registration

##### Registration Fees:

Number Attending      Total

\*Section Member \_\_\_\_\_ @ \$295 \$ \_\_\_\_\_

ABA # \_\_\_\_\_

Non-Section Member \_\_\_\_\_ @ \$395 \$ \_\_\_\_\_

Government Agency, \_\_\_\_\_ @ \$195 \$ \_\_\_\_\_

Full-Time Academic or Non-Profit \_\_\_\_\_ @ \$195 \$ \_\_\_\_\_

Law Student \_\_\_\_\_ @ \$195 \$ \_\_\_\_\_

First-Time Attendee \_\_\_\_\_ @ \$195 \$ \_\_\_\_\_

Spouse/Guest(s) \_\_\_\_\_ @ \$125 \$ \_\_\_\_\_

Children (12–18) \_\_\_\_\_ @ \$50 \$ \_\_\_\_\_

##### Social Events:

Thursday Welcome Reception \_\_\_\_\_ (included in Ethics registration fee)

Friday Golf Tournament (with ERR) \_\_\_\_\_ @ \$195/player

Friday Reception and Dinner \_\_\_\_\_ (included in Ethics registration fee)

**Total Enclosed: \$ \_\_\_\_\_**

\* Not a Section of LEL member?

Join online at [www.abanet.org/join/](http://www.abanet.org/join/) to register  
for the meeting at the Section Member rate.