



CHALLENGE STRATEGY KNOWLEDGE RESULTS

# Labor Law & Labor Arbitration

February 12-14, 2012

Miami Beach, Florida

LABOR ARBITRATION INSTITUTE

[www.laborarb.com](http://www.laborarb.com)

# Labor Law & Labor Arbitration

The place to learn is where the teachers are among the top tier of labor arbitrators, the materials are complete, your questions are answered, and the instruction is practical so you can put the training to use.

At this conference, you will learn the latest developments in labor law and labor arbitration, refine your advocacy skills, and engage in strategic thinking for your own work.

Each year, we change the program to reflect what has changed in the field and to give new perspectives on the standard issues.

The Conference begins on Sunday afternoon and ends on Tuesday afternoon. Each day's schedule is compact, so you have some free time, while still putting in a full day of work.

Information on the hotel, continuing education credits, faculty credentials, the registration form, and a complete agenda is reprinted below.

We welcome you to Miami Beach. Come for the education — and especially the insights to tackle the next case or personnel issue.

## Conference Agenda

Sunday, February 12, 2012

**3:00-4:00 p.m. Registration and Reception**

**4:00-4:45 p.m.**

### ■ Practical Advice about Filing Grievances on Every Case and Arbitrating only the Difficult Cases

Whether you've handled one case at any step in the grievance procedure or presented dozens of cases before an arbitrator, in this session you will gain new insights into case investigation, the rules of evidence, and winning at arbitration.

*Arb. Richard Adelman*

**4:45-5:30 p.m.**

### ■ Procedural Due Process

Due process (defined as fundamental fairness) is a complex doctrine that draws upon decades of judicial and arbitral decisions. A deadline in the contract may be subject to exceptions? But when can management add charges to the discipline/discharge letter? When can management change its mind about the quantity of discipline? Does the harmless error rule apply in arbitration? These questions and more will be answered.

*Arb. Mark Suardi*

**5:30-7:00 p.m.**

### ■ Difficult Evidentiary Cases

The panelists explain their rulings in actual cases regarding the rules on relevance, competency and

## Faculty Credentials

All of the faculty members have appeared at past LAI conferences. The criteria for selection were experience level, teaching ability, and most importantly, past audience ratings. We looked at how attendees in other cities rated each faculty member on knowledge of subject matter and communication skill. Each of these faculty members has received the highest ratings.

If you have attended this program before in Miami, you will have heard from some of the same faculty members, but each will be presenting on new topics. (The one exception is Arb. Roumell on FMLA, which is being repeated because of the high audience ratings and subject difficulty.)

One of the benefits of attending is hearing from arbitrators who are analytical and multi-faceted in their thinking. They look at cases from the perspective of both sides, and with detailed memory, raise their own cases. In summary, you will hear from the best teachers in the field.



hearsay. Understand how the Federal Rules of Evidence persuade arbitrators on the issues of admissibility and weight.

**Panel:** *Arbs. Richard Adelman, Joan Parker, Ted St. Antoine, Mark Suardi & George Roumell*

**7:00 p.m. Recess until 8:00 a.m. Monday**

**Monday, February 13, 2012**

**7:15-8:00 a.m. Continental Breakfast**

**8:00-8:45 a.m.**

**■ Off-Duty Misconduct**

For over 60 years, arbitrators have balanced the employer's interest and the employee's right to a private life in off-duty misconduct cases. In the public sector, the line can be more difficult to draw. Plus, employees have found varied ways to express their individuality after hours and off-site. A dynamic lecture on what is at stake and the arbitral/legal principles.

**Arb. Ted St. Antoine**

**8:45-10:00 a.m.**

**■ Computer & Internet Use**

These cases are controversial and often, complex. On one end, an employee uses the employer's computer (there is no rule) and on the other end, the employee is on his own computer posting or emailing about the employer or his co-workers. Most of the cases fall on this continuum, and as much as the facts vary, so do the results. The faculty discuss actual cases, the arguments that were made, the legal principles to apply, and the likely outcome.

**Panel:** *Arbs. Adelman, Parker, St. Antoine, Suardi & Roumell*

**10:00-10:15 a.m. Break**

**10:15-11:00 a.m.**

**■ Insubordination**

The surprise to many employees is that the order does not have to be direct or that the consequences for refusal must be explained at the same time as the refusal. A bigger surprise is that a job description may be sufficient notice of both elements in an insubordination case. And for the employer, the wake-up call is the health & safety exception and that arbitrators expect an interactive dialogue in many more cases. A new lecture on this age-old topic.

**Joan Parker**

**11:00-12:30 p.m.**

**■ Discipline & Discharge Cases from 2011**

The arbitrators on the panel discuss the legal and arbitral principles which apply in several areas of employee discipline. Learn the latest developments on sexual harassment, workplace threats, horseplay,

drug-testing, and other controversial areas.

**Arbs. Suardi, St. Antoine, Roumell, Parker & Adelman**

**12:30-1:15 p.m.**

**■ Job Performance**

The starting point is a Fair Day's Pay for a Fair Day's Work. But how scientific (reasonable) do the production standards have to be? How many attempts at retraining? Does an employee get a coach, a training tape/CD, and progressive discipline?

**Arb. Mark Suardi**

**1:15-4:30 p.m. Free Time**

**4:30-5:30 p.m.**

**■ Leniency and Appropriate Remedies in the case of Difficult & Troubled Employees**

When do you order a fitness for duty exam, opt for a last chance agreement, or order rehab? Do you treat the troubled employee case as a disciplinary matter or as a performance problem? A review of the issues and the most likely resolution.

**Arb. Joan Parker**

**5:30-6:30 p.m.**

**■ Family and Medical Leave Act**

New regulations and the Military Caregiver Leave provision can affect your compliance with the FMLA. Plus, advice on cases involving abuse of leave, the medical certificate, and other coverage issues.

**Arb. George Roumell**

## Location

The Miami Beach Resort is 11 miles from the Miami International Airport and a 30-minute ride from the Fort Lauderdale Airport. For information on the area, see the website, [www.visitsobeonline.com](http://www.visitsobeonline.com)

This is high season, so we recommend that you make your airline and hotel reservations as early as possible. See the registration form for information on the group rate.

When you check-in, the view will include the Intercoastal Waterway and the Atlantic Ocean. The lobby and the meeting rooms are stylish and conducive to a pleasant stay. The outdoor pool and the beach are right there. Mid-February is the most perfect time to be in Miami, for the number of sunny days and ideal evenings.

Miami Beach is internationally known for its restaurants and music, but if you are looking for a superb place to learn, just walking down Lincoln Mall or along the beach will give you time to reflect and problem-solve. Our goal is to make your stay supremely comfortable while giving you a first rate education.

6:30 p.m. Recess until 8 a.m. Tuesday

Tuesday, February 14, 2012

7:15-8:00 a.m. Continental Breakfast

8:00-9:00 a.m.

■ **Contract Interpretation & Past Practice**

Contract law includes ancient rules and contemporary notions of how negotiating parties deal with each other. In the labor context, arbitrators also look at past contracts, bargaining notes, and industry standards. And they do this at the same time they are looking at the legal principles. A new lecture for the new and experienced advocate from the editor of the treatise *Common Law of the Workplace*.

*Arb. Ted St. Antoine*

9:00-10:00 a.m.

■ **Contract Law – Applying the Principles**

We present interesting and educational cases to the panel and ask them to rule. Then, they individually explain their rationale. This is one of the best ways to learn contract law and understand how arbitrators weigh your arguments.

*Panel: Arbs. Parker, St. Antoine, Suardi, Roumell & Adelman*

10:00-10:15 a.m. Break

10:15-11:00 a.m.

■ **Advanced Issues in the Past Practice Doctrine**

Real cases illustrate the answers to these questions: How many instances for a practice to meet the repetitive and longevity elements? When is a practice a permitted versus prescribed way of doing business? If there is a newly agreed-to zipper clause, does an old practice continue?

*Arb. Richard Adelman*

11:00-11:45 a.m.

■ **The Closing Argument & the Brief which Won the Case**

The goal is to find excerpts from your brief in the Arbitrator's award. Other goals are a fair recitation of the facts, concession on key points, and appeals to reason. Advice from a distinguished arbitrator who was once an advocate.

*Arb. George Roumell*

11:45 a.m.-12:30 p.m.

■ **External Law**

A firefighter posts a derogatory comment on a public website, after being instructed by the Chief to not do so. Will an insubordination case be upheld if the firefighter claims constitutional protection of free speech? A warehouse worker who rarely drives temporarily loses his driver's license, but does he also lose his job? A nurse violates HIPAA, and the employer discharges for all

intentional violations. But what happens when she has a personal defense and the hospital is not fined by a regulatory authority? We present actual cases, and ask the arbitrators for their analysis.

*Panel: Arbs. Suardi, Roumell, St. Antoine, Parker & Roumell*

12:30-1:15 p.m.

■ **Keys to Improving the Grievance Procedure and the Arbitration Hearing**

How do you tell your client about the merits and shortcomings of their case? What are the unforeseen consequences of not settling? Are stipulations and sidebars opportunities or traps? Which objections do you have to make? Advice from one of the top labor arbitrators in the country, who draws upon the thousands of cases he has heard and decided.

*Arb. Mark Saurdi*

1:15 p.m. Conference Adjournment

## Other Important Information

**Tax Deductibility** — Expenses incurred in attending this conference, such as tuition, travel, meals and lodging are deductible under the Internal Revenue Code (Treas. Reg. 1.162-5). Check with your tax professional about the details.

**CLE Credit for Attorneys** — CLE credit is available in all states with mandatory CLE requirements. Just let us know where you hold a license (see the box to check on the registration form). The Labor Arbitration Institute is an accredited provider for Illinois, Pennsylvania, and California attorneys. This program has been approved in other states, as well.

**HRCI** — This program has been approved for 15.0 recertification credit hours toward PHR, SPHR and GPHR through the HR Certification Institute. For more information about certification or recertification, please visit the HR Certification Institute homepage at [www.hrci.org](http://www.hrci.org).

**Tuition** — We have two rates. The early enrollment rate helps us plan for space and other conference expenses. If you register by October 1, 2011, tuition is \$595. After October 1, the regular tuition rate of \$645 applies. Tuition covers admission to all sessions, course materials, two continental breakfasts, and all coffee breaks. It is not necessary to pay by October 1, since we can bill your office. We do ask that tuition be paid by the first day of the conference, unless prior arrangements are made. Our cancellation policy tries to accommodate all registrants whose plans change. In the spirit of good relations, call us and we will work something out.

## More to learn?

The fun in attending a conference is discovering that there is more to learn. Here are just three examples where the faculty goes in-depth.

### Past Practice

*Audience Question:* “Is it black letter law that a past practice does not supersede clear contract language?” The faculty gave a mixed answer that reveals the nuances of this doctrine. Here are quoted excerpts from that discussion:

“First, there are some arbitrators who will say, if you do it long enough and it’s clear enough what the practice is, that’s the agreement. I don’t know if that is a minority opinion. I have a suspicion that it is a minority opinion, because I know many arbitrators who stretch to avoid overruling clear contract language.

So, in our written award, we will either say it wasn’t a practice or the language isn’t so clear.

I am reluctant to say, when you have clear language and a clear practice, that the practice supercedes the language. I am much more likely to say the language isn’t so clear, and that the practice gives meaning to the less-than-clear language. In effect, the practice has amended the less-than-clear contract language.

I know this is a concern to both parties. But I believe the labor agreement is more like a treaty or a pact. I think it’s tough to change clear contract language.”

Another faculty member responded: “I take a firm position, that if there is clear contract language, the language is superior to a past practice. There’s no wishy-washy part about it. There may well be a past practice that would otherwise be binding. But the practice is not binding, when there is clear language going the other way. The clear language wins.”

A third arbitrator answered: “I agree, and there’s almost a standard paragraph that I insert into my awards. It says, ‘The language to which the parties agreed-to represents their mutual agreement at the highest levels of union and employer involvement. The past practice may be open and notorious, repeated many times (most of the time or 90 percent of the time), but it represents an acquiescence at lower levels of union and employer involvement.’”

### Longevity

The concept is related to seniority — that the longer you have worked for the employer, the more credit you have in the bank. And from the employer’s

perspective, that management has more of an investment in the employee, which warrants consideration before discipline or discharge is meted out.

When these cases get to arbitration, nearly all arbitrators consider long-standing service to be a factor in the employee’s favor; but this is not the end of the analysis.

One arbitrator put it this way: “As often as the union has argued it is a mitigating factor, the employer has argued: You would think after 20 years, they would know better.”

Secondly, longevity is not a mitigating factor in serious offense cases. This same arbitrator told the audience: “You don’t bring a gun to work. You don’t intentionally drive your bus through a red light. I don’t care how long you have been there. There are some things you cannot do. But it depends on all of the facts of the case. Once a rule violation or offense has been proven, I want to know all of the other factors which go into whether the penalty itself is a fair penalty.”

### Workplace Threats

In criminal law, a threat is defined as an expression of an intention to harm someone else.

An audience member asked an arbitrator on the faculty this question: A supervisor where we work is a bit paranoid and easily intimidated. Can you imagine a case where there is no formal threat, but the simple physical presence of the grievant could be considered a threat?

Answer: Yes. The context is very important. If they are out in a big field and they are separated, doubtful that it could be considered a threat. But in a crowded room, maybe. The test is whether a reasonable person, in the place of the alleged victim, would perceive it as a threat.

Remember the case of the security officer who stood in the doorway of a beauty parlor that was part of a nursing home? The elderly residents were terrified when he yelled at them to ‘keep it down, you bitties.’ The security guard was disciplined and the arbitrator upheld the discipline. It’s the context that drives these cases.

These are just three areas in which the faculty will go in-depth. Come to Miami Beach, and learn more.

## Registration Options

1. Register Online at [www.laborarb.com](http://www.laborarb.com)
2. Complete this form and mail to the Labor Arbitration Institute, or
3. Complete this form and fax to 507-645-2474

# 12th Annual National Institute Labor Law & Labor Arbitration

February 12-14, 2012

Miami Beach Resort

4833 Collins Avenue • Miami Beach, FL 33140

[www.miamibeachresortandspa.com](http://www.miamibeachresortandspa.com)

Name \_\_\_\_\_ Email \_\_\_\_\_

Name \_\_\_\_\_ Email \_\_\_\_\_

Name \_\_\_\_\_ Email \_\_\_\_\_

Name \_\_\_\_\_ Email \_\_\_\_\_

Organization \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Telephone(include area code) \_\_\_\_\_

**Privacy Policy:** The email address you provide is only used by the Labor Arbitration Institute (LAI). LAI does not sell or share its email lists, or any customer lists.

**TUITION:** \$645 per registrant (if registering after October 1, 2011)  
**Save by Registering Early!** Register before October 1, 2011, and tuition is \$595.

### PAYMENT

Check Enclosed \$ \_\_\_\_\_

Credit Card Payment \$ \_\_\_\_\_

Card Number (VISA, MasterCard or American Express) \_\_\_\_\_

Exp. Date: \_\_\_\_\_; Cardholder \_\_\_\_\_

Payment must accompany registration, unless other arrangements are made ahead. Please call the conference registrar at 507-663-1220 for details. Checks may be made payable to Labor Arbitration Institute.

### HOTEL INFORMATION

A block of rooms has been reserved at the Miami Beach Resort. Conference attendees and everyone in their party are entitled to a group rate of \$159.00 (single or double). Please make your reservation as early as possible by calling the hotel at 305-532-3600. This special rate will expire on January 13, 2012 or earlier, if the room block is exhausted. We recommend that you make your reservation as soon as possible, and preferably before the early enrollment deadline of October 1, 2011.

### MISCELLANEOUS

- I am an attorney and request information on CLE credits for the state of \_\_\_\_\_. The Labor Arbitration Institute is an accredited provider in several states. Please let us know in which states you hold a license.
- I would like to subscribe to "Wisdom of the Week", which provides strategies and tips from the best labor arbitrators in the country. Wisdom is a weekly (500-700 word) email on current issues in labor law and labor arbitration. The annual subscription rate is \$95.
- I cannot attend, but please send me information on future conferences.

**MAIL TO:** Labor Arbitration Institute, 205 South Water Street, Northfield, MN 55057

*For more information, call 507-663-1220 or FAX number 507-645-2474.*

