



# Celebrating 30 Years Of Employee Rights Advocacy

## 2015 Annual Convention

### June 24–27, 2015

### Westin Peachtree Plaza

### Atlanta, GA

## PROGRAM

*Program subject to change without notice.*

### WEDNESDAY, JUNE 24, 2015

- |                             |  |  |
|-----------------------------|--|--|
| <b>9:00–10:00 a.m.</b>      | <b>2015 Affiliate Leadership Workshop Registration &amp; Networking Breakfast</b><br><i>(By Invitation Only)</i>   | <i>Chastain Foyer, 6<sup>th</sup> Floor</i>    |
| <b>10:00 a.m.–5:00 p.m.</b> | <b>2015 Affiliate Leadership Workshop &amp; Forum</b><br><i>(By Invitation Only)</i>   | <i>Chastain D, 6<sup>th</sup> Floor</i>        |
| <b>12:00–8:00 p.m.</b>      | <b>2015 Annual Convention Registration</b>   | <i>Peachtree Terrace, 8<sup>th</sup> Floor</i> |
| <b>6:30–8:00 p.m.</b>       | <b>President's Welcome Reception</b><br>Convention participants are invited to join NELA President David L. Lee, the NELA Executive Board, and the 2015 Annual Convention Committee for an informal gathering to celebrate 30 years of employee rights advocacy, renew friendships, and make new ones. First-time Convention participants are especially encouraged to attend. | <i>Peachtree Terrace, 8<sup>th</sup> Floor</i> |

*The President's Welcome Reception is generously co-sponsored by AARP Foundation and NELA-GA.*

### THURSDAY, JUNE 25, 2015

- |                                 |   |  |
|---------------------------------|---|--|
| <b>7:00–9:00 a.m.</b>           | <b>Registration &amp; Continental Breakfast</b><br><i>Continental breakfast is available to Convention registrants only.</i>  | <i>Peachtree Terrace, 8<sup>th</sup> Floor</i>   |
| <b>8:30–9:30 a.m.</b>           | <b>Roll Call Of The States &amp; Opening Remarks</b><br>Paul H. Tobias, NELA Founder, David L. Lee, NELA President & Terisa E. Chaw, NELA Executive Director  | <i>Peachtree Ballroom, 8<sup>th</sup> Floor</i>  |
| <b>9:30–9:45 a.m.</b>           | <b>NELA Ethics &amp; Sanctions Committee Presentation</b>   | <i>Peachtree Ballroom, 8<sup>th</sup> Floor</i>  |
| <b>9:45–10:00 a.m.</b>          | <b>BREAK</b>  | <i>Peachtree Terrace, 8<sup>th</sup> Floor</i>   |
| <b>10:00–11:30 a.m.</b>         | <b>The Year In Review: Significant Developments In Employment Law</b><br>Moderator: Paul H. Tobias<br>Speakers: Professor Eric Schnapper & Richard T. Seymour<br>The 2015 Annual Convention will open with Professor Schnapper and Mr. Seymour discussing the employment cases decided by the U.S. Supreme Court during its 2014–2015 term, significant legislative and state law developments, as well as emerging issues in plaintiffs' employment law.   | <i>Peachtree Ballroom, 8<sup>th</sup> Floor</i>  |
| <b>11:30 a.m.–12:30 p.m.</b>    | <b>Annual Luncheon</b><br>The Annual Luncheon is included in the registration fee for Convention registrants only. Guest tickets for the Annual Luncheon may be purchased at the Registration Desk or at the door.  | <i>Augusta Ballroom, 7<sup>th</sup> Floor</i>    |
| <b>12:45–2:00 p.m.</b>          | <b>CONCURRENT SESSIONS</b>  |  |
| <i>Discovery</i>                | <b>Smart Technology In Ethics &amp; In Evidence</b><br>Moderator: Subhashini Bollini<br>Speakers: The Honorable Alan J. Baverman & David Wachtel<br>Smart technology is fundamentally changing information processing, behavior, and the law. This panel of two experienced litigators and a U.S. Magistrate Judge will discuss difficult ethical and evidentiary issues arising out of the use of smart phones and other portable devices containing electronically stored information (ESI). Ethical concerns include confidentiality, privacy, and security. They also will explore issues related to the discoverability of the range of evidence found on smart devices and the admissibility of electronic communications, including building the requisite foundation to get your important ESI evidence admitted. | <i>Peachtree A &amp; C, 8<sup>th</sup> Floor</i> |
| <i>Strategies &amp; Tactics</i> | <b>Common Interest Doctrines: A Double-Edged Sword</b><br>Moderator/Speaker: Jon W. Green<br>Speakers: Kevin D. Fitzpatrick, Jr. & Robin B. Potter<br>Worker centers and unions are key players in the battle for a living wage and a variety of other workers' rights. They are allies who send us clients and work with us during litigation—we like to keep our conversations with them private and shielded from discovery. On the other hand, defense counsel for subsidiaries, staffing agencies, and co-employers are teaming up against plaintiffs and refusing to disclose the content of their communications. Employers even claim   | <i>Savannah A &amp; B, 10<sup>th</sup> Floor</i> |

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12:45–2:00 p.m.

**CONCURRENT SESSIONS**

relevant conversations with former employees are privileged! Shouldn't we be entitled to this information? This panel will address the current state of the case law relating to the joint defense and common interest doctrines and other theories and best practices that we can use to keep conversations with allies privileged or, in the alternative, force their disclosure.

**Accommodating Employees With Mental Disabilities**

*Chastain D–E, 6<sup>th</sup> Floor*

Moderator/Speaker: Brian East

Speakers: John A. Beranbaum & Lorrie McKinley

Handling mental disabilities in the workplace can be problematic for both the employee and employer. Our speakers will examine the social science literature on the difficulties faced by employees with mental disabilities in performing their jobs and recognized accommodations used to overcome those obstacles; case law on what accommodations courts have found reasonable (and not) for employees with mental disabilities; issues that arise caused by the failure of employees with mental disabilities to disclose their condition or to give adequate notice of their need for accommodations; misconduct relating to mental disability; issues relating to the interactive process; and lingering prejudice against people with mental illness by both employers and courts.

**Navigating The Maze Of Private Sector Whistleblower Anti-Retaliation Laws**

*Peachtree B & D, 8<sup>th</sup> Floor*

Moderator/Speaker: Ann Lugbill

Speakers: Debra S. Katz & Jordan A. Thomas

The proliferation of whistleblower retaliation and reward laws has created a complex maze of claims and remedies. This presentation will examine issues that frequently arise in private sector whistleblower cases. Our speakers will examine recent developments under the Sarbanes-Oxley and Dodd-Frank Acts, preserving retaliation claims while pursuing reward claims, choosing the optimal forum, minimizing claim splitting and claim preclusion risks, and exhausting administrative remedies.

**Feedback Blowback: How We Use Or Abuse The Feedback Loop**

*Chastain F–G, 6<sup>th</sup> Floor*

Moderator/Speaker: Elizabeth A. Rodgers

Speakers: Carol Gillam & Fern H. Singer

Feedback blowback is the adverse reaction to appreciation, coaching, or evaluation. It affects every employment lawyer and every employee. As employment lawyers, we are trained to attack, evaluate, and rebut false or biased feedback in employment. Many of us have no training in giving or receiving feedback ourselves. We in turn may give feedback, often in a zealous way, to colleagues and subordinates, leaving our own employees feeling unappreciated, criticized, or unsupported. Negative or absent feedback can explode into discharge or an employee quitting. Few of us know how to accept and be grateful for negative feedback, or how to coach our clients to do so when a curious and grateful response actually can illuminate misunderstandings or identify deficiencies which can be corrected. Can we teach our still-employed clients how to have challenging conversations to preserve their job after a devastating review? Our panelists will discuss the research, theory, and practice in giving and receiving feedback.

**Advocating For Servicemembers & Veterans: Recent Developments In The Law**

*Chastain H–J, 6<sup>th</sup> Floor*

Moderator/Speaker: Kathryn S. Piscitelli

Speakers: Peter Romer-Friedman & Captain Samuel F. Wright

The Uniformed Services Employment & Reemployment Rights Act protects civilian job rights and benefits for veterans and members of the active and Reserve components of the U.S. armed forces. USERRA provides that returning servicemembers must be promptly reemployed in the same position that they would have attained had they not been absent for military service with the same seniority, status, and pay, as well as other rights and benefits determined by seniority. Our experts will provide you with an overview of recent developments in the law and connections to networks so you can help our country's servicemembers and veterans enforce their rights.

2:00–2:15 p.m.

**BREAK**

*Peachtree Terrace, 8<sup>th</sup> Floor*

2:15–3:30 p.m.

**CONCURRENT SESSIONS**

*Alternative Dispute  
Resolution*

**Arbitration: If You Can't Avoid It, Win It!**

*Chastain D–E, 6<sup>th</sup> Floor*

Moderator/Speaker: Barbara E. Figari

Speakers: Joyce F. Glucksman & Paul J. Lukas

This presentation will focus on using various techniques to navigate the arbitral forum should it be unavoidable. Topics include how to oppose a motion to compel arbitration after the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, evidence found during hearings on the Arbitration Fairness Act, discovering conflicts of interest among arbitrators, strategies to obtain all necessary discovery, forcing greater transparency in the process, and successful tips to achieve a favorable award.

*Strategies & Tactics*

**Strategic Thinking On Selected Issues In The Employment Relationship**

*Savannah A & B, 10<sup>th</sup> Floor*

Moderator/Speaker: Ed Buckley

Speakers: Lisa J. Banks & Kevin G. Powers

This interactive session will explore strategies to fight against non-compete, confidentiality, and trade secret agreements, the employee's duty of loyalty, at-will employment, and other unfair terms and conditions of the employment relationship. Consideration will be given to what to do when your client is accused of breaching a restrictive covenant and how to defend at the TRO and preliminary injunction stages. The panelists and audience will also share successful tips and advice to provide clients who face these and other workplace challenges.

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2:15–3:30 p.m.

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**What You Need To Know Before Taking A Case**

*Peachtree A & C, 8<sup>th</sup> Floor*

Moderator/Speaker: Chip Muller

Speakers: Janet E. Hill & Geraldine Sumter

Case selection is vital for a successful employment law practice. What do you need to learn from a potential client before agreeing to take the case? This presentation is geared for new lawyers and will focus on client intake, retainer agreements, and getting paid. Our speakers will share best practices on client intake, vetting potential plaintiffs, protecting yourself through retainer agreements, collecting payment, dealing with non-paying clients, and developing a case plan that will endure.

**A Motive Centric To Motive Neutral Theory Of Proof In Discrimination**

*Chastain F–G, 6<sup>th</sup> Floor*

Moderator/Speaker: Thomas A. Newkirk

Speakers: Professor Anthony G. Greenwald & Richard E. Johnson

Advances in social science tell us that old assumptions about the nature of bias are in error. The causes of discrimination are not entirely due to conscious nor entirely due to subconscious behavior—it is often both. Science also confirms that bias can include positive images of the in-group that contribute to harm even if no negative images of the out-group are present. On the legal front, greater appreciation for multiple motives shows us that going forward, the law should be capable of providing a remedy for any form of bias—conscious, subconscious, favorable, or unfavorable. These forms of bias all generate decisions because of protected status and should violate the law. The question is how to understand these concepts and how to frame them properly to fit within the law. This session advances a better understanding of the science and framing to allow us all to move farther down the inevitable road to a more motive-neutral approach to discrimination—a road that allows us to do more good and win more cases.

**Dealing With Difficult People**

*Chastain H–J, 6<sup>th</sup> Floor*

Moderator: Glen D. Savits

Speakers: Jane Juliano, Ellen J. Messing & Richard Zitrin

Most people know someone who seems to make every situation toxic and impossible. Pointing out that these people are difficult and demanding won't get you anywhere though because odds are they don't even see a problem. You can learn how to navigate interactions with difficult people and preserve your own sanity. This presentation will offer strategies and tactics for identifying and defusing people with difficult personalities—potential clients, current clients, and others. Our panelists will share practical solutions for helping you to cope effectively and alleviate potential burnout while maintaining your ethical obligations in representing mistreated employees. Ethical issues to be explored are zealous representation of your client, client confidentiality, defining the boundaries in the attorney-client relationship, and more.

**Proving Damages In An FLSA Case**

*Peachtree B & D, 8<sup>th</sup> Floor*

Moderator/Speaker: Trang Q. Tran

Speakers: Robert J. Camp & Jamie G. Sypulski

You are pretty sure you have an open and shut case on liability under the Fair Labor Standards Act (FLSA). Now what? An understanding of damage calculation issues is just as important in assessing and litigating FLSA cases. This panel of FLSA experts will address issues regarding damage calculations including how to determine a regular rate of pay, dealing with the fluctuating workweek method, determining if and when liquidated damages apply, what to do if the employer has untrustworthy payroll records—or none at all—how to estimate damages for settlement discussions, and how to deal with damages issues at trial.

**An Insider's View: Tips On Forging A Career Path In Employee Rights Advocacy**

*Savannah C, 10<sup>th</sup> Floor*

Moderator/Speaker: Clark Taylor, Paul H. Tobias Attorney Fellow

Speakers: Amanda A. Farahany, Kristi L. Graunke & Marcus G. Keegan

Law students and recent graduates are invited to join NELA and The Employee Rights Advocacy Institute For Law & Policy (The Institute) for an engaging and interactive discussion on a career in plaintiffs' employment law. Experienced employment law practitioners will answer questions on how to enter the plaintiffs' employment law field and tips on identifying and securing job opportunities in this ever-changing area of the law. The panelists will discuss what skills and experience can help law students be successful employee advocates as they begin their legal careers. NELA and The Institute encourage Convention attendees to participate in this program as part of our continuing commitment to developing the next generation of employee advocates.

3:30–3:45 p.m.

**BREAK**

*Peachtree Terrace, 8<sup>th</sup> Floor*

3:45–5:00 p.m.

**CONCURRENT SESSIONS**

*Trial Advocacy*

**The Art Of Trial Preparation**

*Peachtree A & C, 8<sup>th</sup> Floor*

Moderator/Speaker: J. Bernard Alexander, III

Speakers: Michelle Dye Neumann & David Schlesinger

Whether you're a seasoned trial lawyer or preparing for your first trial, this panel will cover all you need to know about preparing for trial—from the basics to the advanced. Trial preparation is as much an art as the trial itself. Three trial lawyers with varying styles and experiences will discuss what to do—and not to do—to prepare for a successful trial.

*Strategies & Tactics*

**Taming The Beast—Proven Summary Judgment Response Strategies**

*Peachtree B & D, 8<sup>th</sup> Floor*

Moderator/Speaker: Rebecca G. Pontikes

Speakers: Katherine L. Butler & Jonathan J. Margolis

Responding to summary judgment motions is a critical aspect of any NELA member's practice. There are several things that need to be done in each case that can help all of our members have better chances of surviving summary judgment. Our panelists will examine key elements that will help you in choosing good summary judgment-proof cases,

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gathering sufficient facts in discovery to respond to the inevitable motion for summary judgment, and marshalling the evidence within your response brief and appendix.

#### **The Impact Of *Hobby Lobby* On Employee Protections**

*Chastain D–E, 6<sup>th</sup> Floor*

Moderator:

Zena E. McClain

Speakers:

John P. Madden & Paul W. Mollica

Our speakers will examine the U.S. Supreme Court's definition of "persons" under the Religious Freedom Restoration Act (RFRA); the scope of the RFRA's protection of religious practices; the legal effects of the Court's decision on employer challenges to the Affordable Care Act's coverage of other medical procedures; the decision and its nexus to banned employment practices like race and LGBT discrimination; and the next big test—applying *Hobby Lobby* to nonprofits and large publicly traded corporations.

#### **Ethics In The Age Of Technology**

*Chastain F–G, 6<sup>th</sup> Floor*

Speakers:

Charles W. "Bill" Day, Jr. & John L. Mays

In an age where office and communication technology has been improving and expanding at an exponential rate, the practice of law has changed significantly. While many of these changes have made life easier for the practicing attorney, it has become difficult for even the most tech-savvy attorney to keep abreast of all of the changes and its associated risks. Our speakers will explore issues that could create ethical problems for today's plaintiffs' employment attorney, such as maintaining client confidentiality in the cloud, spoliation, potential *ex parte* contact through social media, and other issues created by electronic discovery and the use of smart devices.

#### **"Similar In Their Ability Or Inability To Work": How The Interaction Of The PDA & ADAAA Heightens Employers' Obligations To Accommodate Pregnant Workers**

*Chastain H–J, 6<sup>th</sup> Floor*

Speakers:

Professor Samuel R. Bagenstos & Sarah Crawford

Our panelists will examine the issue of pregnant workers who have been denied workplace accommodations that they need to continue working safely during pregnancy; the legal obligation to accommodate pregnant workers that arises under the Pregnancy Discrimination Act (PDA) when employers accommodate other workers who are similar in their ability or inability to work; how this obligation is heightened by the interaction of the PDA and Americans with Disabilities Act Amendments Act (ADAAA); the role of the EEOC in addressing discrimination against pregnant workers under the PDA and ADAAA; and proposed legislation to strengthen pregnant workers' rights to accommodations. They also will focus on PDA and ADAAA claims available to pregnant workers who are denied workplace accommodations for pregnancy-related impairments that rise to the level of a disability.

#### **What Employment Lawyers Need To Know About Criminal Investigations**

*Savannah A & B, 10<sup>th</sup> Floor*

Moderator/Speaker:

Matt Kaiser

Speakers:

Ethan Levin-Epstein & Ingrid S. Martin

There are a few ways that employment lawyers can be affirmatively helpful when there's a pending criminal investigation—without compromising the employment representation—and there are a few ways that an employment lawyer can make things significantly worse for later criminal counsel. This presentation will explore how criminal investigations work so that employment lawyers have more insight about the process. Our speakers will address not only how you can help in a criminal investigation, but how to tell when you need to reach out to criminal counsel in the first place.

6:00–7:00 p.m.

#### **Annual Reception**

*Augusta Ballroom, 7<sup>th</sup> Floor*

The Annual Reception is included in the registration fee for Convention registrants only. Guest tickets for the Annual Reception may be purchased at the Registration Desk or at the door.

## FRIDAY, JUNE 26, 2015

7:00 a.m.

#### **Tobias 5K Run**

*Westin Peachtree Plaza Lobby*

Participants are requested to meet in the lobby of the Westin Peachtree Plaza at 6:45 a.m.

7:00–9:00 a.m.

#### **Registration & Continental Breakfast**

*Peachtree Terrace, 8<sup>th</sup> Floor*

*Continental breakfast is available to Convention registrants only.*

9:00–10:00 a.m.

#### **Keynote Address By Taylor Branch**

*Peachtree Ballroom, 8<sup>th</sup> Floor*

Introduction:

Alan Banov

NELA is privileged to welcome acclaimed American author and historian Taylor Branch as our keynote speaker for this year's Annual Convention. Mr. Branch is best known for his landmark trilogy on the civil rights era, *America in the King Years*, for which he won the Pulitzer Prize and the National Book Critics Circle Award. Mr. Branch will be introduced by his friend and longtime NELA member Alan Banov.

10:00–10:15 a.m.

#### **BREAK**

10:15–11:30 a.m.

#### **Rules Of The Road For The Plaintiffs' Employment Lawyer**

*Peachtree Ballroom, 8<sup>th</sup> Floor*

Moderator:

Carla D. Brown

Speakers:

Dennis E. Egan & Patrick Malone

Back by popular demand for the 2015 Annual Convention is Patrick Malone's *Rules of the Road*, America's bestselling trial guide on proving liability. Since its original release in 2006, it has helped plaintiffs' lawyers throughout the country

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to secure significant victories in cases with difficult liability issues. Mr. Malone will be joined by two veteran plaintiff employment lawyers who will discuss how to apply *Rules of the Road* to employment cases, how to troubleshoot your rules, and how to use *Rules of the Road* to win your next trial.

11:30 a.m.–12:45 p.m.

### **Box Lunch**

*Peachtree Terrace, 8<sup>th</sup> Floor*

*Box lunch is available to Convention registrants only.*

### **NELA Members Forum: Meet EEOC Chair Jenny Yang**

*Peachtree Ballroom, 8<sup>th</sup> Floor*

Moderator: Diane S. King, NELA Vice President Of Public Policy

Speaker: Honorable Jenny R. Yang

Jenny R. Yang assumed leadership of the EEOC on September 1, 2014, after joining the EEOC as a Commissioner in May 2013. Chair Yang will share with NELA members her plans for expanding the EEOC's impact and more effectively serving the public, and invites NELA members to share their recommendations for how the EEOC can achieve these goals.

### **Making The Most Of The NELA Exchange**

*Augusta A–B, 7<sup>th</sup> Floor*

Presenter: Pedro A. Valverde, NELA Technology & Office Administrator

NELA's online community, The NELA Exchange, allows you to harness the power of the largest plaintiffs' employment law firm in the country through subject-matter communities, blogs, resource libraries, and more. The NELA Exchange mobile app keeps you connected when you are on the go! Join Pedro Valverde, NELA's Technology & Office Administrator, to learn about The Exchange's features and how to make the most of this valuable members-only resource.

### **“The Hand That Feeds”**

*Augusta C–D, 7<sup>th</sup> Floor*

Host: Cathy Junia, Communications Director, Interfaith Worker Justice

This documentary chronicles organizing efforts at the Hot & Crusty on Second Avenue at 63rd Street in Manhattan. Employees of the 24-hour restaurant speak of poor working conditions, wages below the legal minimum, and concerns about job loss. The film illustrates a contrast between two advocates for a union: the quiet Mahoma López, who gradually grows into a skilled spokesman for the movement, and Gonzalo Jiménez, described by a lawyer as “the iron fist to Mahoma's velvet glove.”

### **NELA Committee & Practice Group Meetings**

Convention participants are welcome to attend the committee and practice group meetings of their choice.

Ansley Rooms are located on the 12<sup>th</sup> Floor and Piedmont Rooms are located on the 14<sup>th</sup> Floor of the Westin Peachtree Plaza. Please check the bulletin board in the Registration Area for other meetings.

#### **Age Discrimination Law Practice Group**

**Ansley 1**

Daniel B. Kohrman, Meeting Convener

#### **Class & Collective Actions Practice Group**

**Ansley 2**

Christine E. Webber, Chair

#### **Disability Rights Practice Group**

**Ansley 3**

Brian East, Chair

#### **ERISA Practice Group**

**Ansley 4**

Margo Hasselman, Chair

#### **Ethics & Sanctions Committee**

**Ansley 5**

David L. Kern & Richard R. Renner, Chairs

#### **Federal Employee Rights Practice Group**

**Ansley 6**

Susan E. Jewell & Elbridge W. Smith, Chairs

#### **Low Wage Workers Practice Group**

**Piedmont 2**

Edgar F. Ndjatou, Meeting Convener

#### **Religious Discrimination Law Practice Group**

**Piedmont 3**

Todd R. McFarland, Chair

#### **Sexual Harassment Law Practice Group**

**Piedmont 4**

Cedar P. Carlton & Scott M. Pollins, Chairs

#### **Sexual Orientation & Gender Identity Law Practice Group**

**Piedmont 5**

Rob Wiley, Chair

#### **Trial Practice & Litigation Practice Group**

**Piedmont 6**

Dennis E. Egan, Chair

#### **Wage & Hour Law Practice Group**

**Piedmont 7**

Justin M. Swartz, Chair

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1:00–2:15 p.m.

CONCURRENT SESSIONS

*Strategies & Tactics*

**Playing With A Full Deck, Or Playing Your Strongest Hand?**

*Chastain H–J, 6<sup>th</sup> Floor*

Moderator/Speaker: Amanda A. Farahany

Speakers: Karen Jo Koonan & R. Scott Oswald

When there are multiple potential theories, what strategies produce remarkable success with judges, jurors, and opposing counsel? Our panelists will propose successful approaches for planning and recovering large awards when there are multiple possible claims. They will discuss how you may play your cards when the employer engaged in several types of bias and retaliation; the strengths and pitfalls of filing a broad complaint to preserve all possible theories; and cases where increased evidence of misconduct in several distinct ways intensified the juror's anger at the employer, and those cases where multiple theories appeared to antagonize jurors as overreaching. They also will share cases where juries have found employers not liable for discrimination but have given large awards for retaliation with punitive damages—and vice versa! When, if ever, do you drop one claim and bring only the strongest claim? If you keep in two theories, how do you best play your hand with the stronger and weaker claims? What has brought six- and seven-figure verdicts in such claims? How do you stay nimble and persuasive as the facts strengthen in one area and weaken in another? Our experts will explore the theories, plans, and techniques to evaluate and test your case to produce the maximum result.

*Trial Advocacy*

**Storytelling For The Plaintiffs' Employment Lawyer**

*Chastain D–E, 6<sup>th</sup> Floor*

Moderator/Speaker: Bruce A. Fredrickson

Speakers: Susan L. Brackshaw & Professor Philip N. Meyer

Good lawyers have an ability to tell stories. Whether they are arguing a murder case or a complex financial securities case, they can capably explain a chain of events to judges and juries so that they understand them. The best lawyers are also able to construct narratives that have an emotional impact on their intended audiences. But what is a narrative, and how can lawyers go about constructing one? How does one transform a cold presentation of facts into a seamless story that clearly and compellingly takes readers not only from point A to point B, but to points C, D, E, F, and G as well? Our panel of storytellers will provide practical tips that will help you craft your own legal stories.

*Professor Meyer's book, Storytelling for Lawyers, is available for purchase at The NELA Store (located on the Peachtree Terrace, 8<sup>th</sup> Floor). Proceeds benefit NELA/The Institute's Employee Rights Advocacy Scholarship Program. Professor Meyer will sign books at The NELA Store on Thursday, June 25 from 1:45–2:30 p.m., and Friday, June 26 from 2:30–3:15 p.m.*

**"Because Of": Trying Retaliation Cases After Nassar**

*Chastain F–G, 6<sup>th</sup> Floor*

Moderator/Speaker: Amy L. Coopman

Speakers: Margaret A. Harris & Robert S. Mantell

Following the 1991 amendments to Title VII of the Civil Rights Act of 1964, the causation standard for status-based discrimination—race, color, religion, sex, and national origin—was statutorily defined as “a motivating factor.” In 2009, the U.S. Supreme Court in *Gross v. FBL Financial Services* concluded that the ADEA's language “because of such individual's age” requires proof of “but for” causation. In 2014, in *Univ. of Texas SW Med. Ctr. v. Nassar*, the Court determined that Title VII's anti-retaliation provisions—which were not amended in 1991—also require proof that the protected activity was the “but for” cause of an alleged adverse action. How does this impact trying a case, particularly where both discrimination and retaliation are asserted? How do you handle jury instructions, motions *in limine*, and proving damages? Join our distinguished panel of lawyers as they explore the practical issues of proving and defending retaliation claims post-*Nassar*.

**Ethics Tips From The Experts**

*Augusta A–B, 7<sup>th</sup> Floor*

Moderator/Speaker: Janet E. Wise

Speakers: Paul H. Merry & Richard R. Renner

NELA's Ethics & Sanctions Committee fields queries on a wide variety of ethical issues. This year, Committee members distill the most common and vexing issues into a comprehensive review. They will present their top tips for addressing (1) conflicts of interest, such as waiver agreements for representing multiple plaintiffs in the same matter and attorney-client conflicts over whether to dismiss, settle, or proceed with claims; (2) document dilemmas, including inadvertent receipt of an adversary's confidential documents, how to handle so-called purloined documents from the employer, and spoliation of evidence (including Facebook takedowns) by the defendant or plaintiff; (3) witness contacts, with unrepresented witnesses and management employees, and addressing when you may contact them and how it must be done; (4) retainer agreements, including presentation of the NELA Ethics & Sanctions Committee's model contingent retainer agreement; and (5) avoiding sanctions threats and bar discipline, with tips on maintaining good client relationships, recognizing warning signs and addressing them proactively, and responding to safe harbor letters, defense threats, and disciplinary complaints. The Committee is hopeful that this comprehensive review will inspire synergistic thoughts of managing ethical issues with good sense, legal compliance, and eminent practicality.

**Recent Developments On LGBT Rights In The Workplace**

*Augusta C–D, 7<sup>th</sup> Floor*

Moderator/Speaker: Julie Wilensky

Speakers: Cathy A. Harris & Gregory R. Nevins

With the U.S. Supreme Court's decision in *United States v. Windsor*, combined with recent lower court decisions recognizing the right of same-sex couples to marry, it is easy to overlook that members of the LGBT community remain largely unprotected in the workplace. In the majority of states, employees can still be fired for being gay. How do the marriage equality cases affect the legal arguments made for equality in the workplace? Join a panel of experienced practitioners to discuss this cutting-edge issue, including constitutional considerations, the EEOC's interpretation of Title VII and LGBT protection, President Obama's amendments to Executive Orders 11478 and 11246, and federal guidance on employee benefits law.

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**1:00–2:15 p.m.**

**CONCURRENT SESSIONS**

**The Cases All NELA Members Need In Their Hip Pockets**

*Augusta E–F, 7<sup>th</sup> Floor*

Moderator: David L. Lee

Speakers: Alice W. Ballard & Diane S. King

As NELA celebrates its 30<sup>th</sup> anniversary of employee rights advocacy, we have witnessed positive as well as negative changes that have significantly affected employment litigation from the Americans with Disabilities Act to the Whistleblower Protection Enhancement Act, fighting forced arbitration and summary judgment motions, different standards of causation, recognition of LGBT rights, and more. Whether it is a case that advances the law, an obscure opinion with great legal reasoning, or one that defines victory for workers, our experts will scan the vast legal landscape and identify those cases that you need to have in your hip pocket as you advocate for your clients' workplace rights.

**2:15–2:30 p.m.**

**BREAK**

*Peachtree Terrace, 8<sup>th</sup> Floor*

**2:30–3:45 p.m.**

**CONCURRENT SESSIONS**

*Alternative Dispute  
Resolution*

**Decisions, Decisions: Evaluating Case Values During Mediation**

*Chastain D–E, 6<sup>th</sup> Floor*

Moderator/Speaker: Daniel M. Klein

Speakers: Adrienne Fechter & Judge Elaine Gordon (Ret.)

This session is aimed at helping you “think on your feet” when you are in mediation and must make important negotiation decisions quickly. Some mediators and lawyers use a method called a decision tree to help analyze case values that shift while agreements are being negotiated. Our panel of mediators will examine the use of this method, but also discuss more generally how to assess potential success of certain claims and defenses, how to set priorities, how to explain the time-value of money to your client, what gives you leverage outside of just the facts and law of your case, how to negotiate for multiple co-plaintiffs, how to deal with a document or testimony that is a serious problem but that you must confront, and other practical issues that arise while you are mediating. This interactive session is geared to help you negotiate more strategically in the future.

*Discovery*

**E-Discovery In Plaintiffs' Employment Cases: Going Native**

*Chastain H–J, 6<sup>th</sup> Floor*

Moderator/Speaker: Jeff Kerr

Speakers: David L. Scher & John W. Simek

This session will explore the discovery, production, and review of native format documents: emails, Word documents, Excel spreadsheets, PowerPoint® presentations, images, PDF files, and more. These items exist in their native form as files on computers, and our experts will discuss the benefits of obtaining these items in this form and how to request them. In doing so, they will explain some computer concepts that will clarify misconceptions about the production of native documents and will help practitioners to avoid pitfalls in this area.

*Strategies & Tactics*

**Protecting Employees & Job Applicants From Improper Criminal Background Checks**

*Augusta E–F, 7<sup>th</sup> Floor*

Moderator/Speaker: E. Michelle Drake

Speakers: James Kan & Christopher J. Wilmes

The vast majority of employers engage in formal background screening of applicants and employees. This session will cover the multitude of state and federal laws that govern the use of background information in the employment realm, from the requirements of the Fair Credit Reporting Act governing disclosures and notices that must be provided before and after a check is run, to the EEOC's Title VII guidance covering the use of criminal and credit information in the employment process. This presentation will take a start-to-finish approach, with an eye to providing you with both the practical tools you need to advise clients about tricky legal issues, such as how to answer questions about criminal background on employment applications, and the tools attorneys need to identify in pursuing litigation opportunities.

**Cutting-Edge Issues In Age Discrimination & The Aging Workforce**

*Chastain F–G, 6<sup>th</sup> Floor*

Moderator/Speaker: Cathy Ventrell-Monsees

Speakers: Daniel B. Kohrman & L. Steven Platt

Employees age 50 and older represent almost a third of the U.S. workforce. By 2018, the number of employees over 55 will increase by almost 30% in just one decade. Many older workers plan to continue working well beyond what used to be considered the “normal” retirement age. This presents a dilemma for some employers who feel the aging workforce blocks the progression of younger workers while other employers are grateful to retain experienced older workers. The number of age discrimination charges filed with the EEOC has increased, yet some believe that it is harder to win a case alleging age discrimination than it is for other types of discrimination. This panel will discuss the effect of the changing demographics, cases since the 2009 U.S. Supreme Court decision in *Gross v. FBL Financial Services Inc.*, the recent regulations from the EEOC, and best practices in drafting and administering severance agreements and releases.

**Statistics For Lawyers Who Hate Math**

*Augusta C–D, 7<sup>th</sup> Floor*

Moderator/Speaker: Rachel Geman

Speakers: Cyrus Mehri & Christine E. Webber

This session will address two cutting-edge issues that arise in FLSA and Title VII cases. In FLSA cases, there has been a push to require use of statistical sampling, sometimes supported by expert testimony, to establish that “representative testimony” really is. This can benefit plaintiffs in some cases (random selection of opt-ins to respond to discovery instead of letting the defendant cherry pick), but it can also make trial more complicated by requiring an expert to establish your evidence really is representative. In Title VII class actions, the proper standard for evaluating statistical evidence post-*Dukes* is in flux, as disaggregated statistical analyses raise new questions about how to determine if the results are significant evidence of discrimination. While both issues are very important for anyone litigating class or collective actions, and may require expert testimony, the concepts and arguments can be understood even by those who hate math.

## FRIDAY, JUNE 26, 2015

2:30–3:45 p.m.

### CONCURRENT SESSIONS

#### **What Every NELA Lawyer Should Know About ERISA**

*Augusta A–B, 7<sup>th</sup> Floor*

Moderator/Speaker: William D. Frumkin

Speakers: Denise M. Clark & Joshua Davidson

This primer will introduce you to employee benefits issues with a focus on client intake and settlements. NELA's experts will help you spot issues involving the Employee Retirement Income Security Act (ERISA), teach you how to resolve them when you can, and tell you when you need to get expert help.

4:00–5:00 p.m.

#### **What Great Movies Can Teach Us About Ethics & Professionalism**

*Peachtree Ballroom, 8<sup>th</sup> Floor*

Introduction: Roberta L. Steele, NELA Program Director

Speaker: Larry J. Cohen

Not since Atticus Finch have lawyers been able to take ethical cues from lawyers portrayed in the movies. After all, screen writers get paid big bucks to ensure that lawyers in movies face issues that will entertain, not enlighten. But sometimes the lawyers in movies are faced with the same types of ethical issues that real practitioners face. What choices do celluloid lawyers make when confronted with ethical dilemmas from real life? It is fair to say that the Hollywood choices are not reliable guides for real lawyers? Join Mr. Cohen for this interactive and entertaining presentation that will keep you on the edge of your seat as you learn about what movies can teach you about ethics and professionalism.

6:00–7:30 p.m.

#### **Annual Dinner**

*Grand Atrium*

The Annual Dinner is included in the registration fee for Convention registrants only. Guest tickets for the Annual Dinner may be purchased at the Registration Desk or at the door. Please note the Annual Dinner precedes NELA's Gala Fundraiser and is a separate event.

8:00–11:30 p.m.

#### **NELA's 30<sup>th</sup> Anniversary Gala Fundraiser**

*Savannah Ballroom, 10<sup>th</sup> Floor*

##### **The Power Of NELA ~ Vision • Inspiration • Passion**

Join us for NELA's Annual Gala Fundraiser to support NELA's advocacy initiatives to advance equality and justice in the American workplace. As NELA celebrates its 30<sup>th</sup> anniversary, we look forward to honoring the founding leaders of NELA for their vision, inspiration, and passion. The Gala Fundraiser follows NELA's Annual Dinner and is a separate event. Tickets for the Gala Fundraiser may be purchased at the Registration Desk or at the door.

## SATURDAY, JUNE 27, 2015

7:30–9:00 a.m.

#### **Registration & Continental Breakfast**

*Peachtree Ballroom, 8<sup>th</sup> Floor*

*Continental breakfast is available to Convention registrants only.*

9:00–10:15 a.m.

### CONCURRENT SESSIONS

*Alternative Dispute  
Resolution*

#### **Strategies For Handling Post-Settlement Setbacks**

*Chastain D–E, 6<sup>th</sup> Floor*

Moderator/Speaker: Nieves Bolanos

Speakers: Linda M. Correia & Lori L. Deem

You have finally got to a number—settlement is reached, but then come the non-monetary terms. This session will explore how to maximize your client's recovery and issues that every practitioner needs to consider during negotiations and settlement. Our experts will provide guidance and updates on how to broach some of the most problematic issues relating to non-monetary terms in settlement negotiations, including confidentiality, anti-disparagement, and indemnification clauses; reporting unemployment compensation; and IRS and Medicare/Medicaid obligations and disclosures. Learn what settlements require court approval, what terms to incorporate, and those to avoid for your next settlement agreement.

*Discovery*

#### **Planning Discovery In Individual Discrimination & Wrongful Termination Cases**

*Chastain F–G, 6<sup>th</sup> Floor*

Moderator/Speaker: Brian E. Koncius

Speakers: Jennifer I. Klar & Michael J. Leech

This presentation is for lawyers and paralegals, new and experienced, to help you identify better ways to prepare cases for trial and motion practice. Our speakers will focus on often overlooked issues including informal information gathering during initial case evaluation, identifying witnesses, obtaining witness statements and documents before filing suit, using administrative agencies to gather information, online investigation, informal discussions with opposing counsel, identifying missing evidence at the time of drafting a demand letter and when drafting a complaint, as well as using project management, checklist techniques, and case management meetings in federal court and arbitration with the overarching goal of improving discovery outcomes.

*Trial Advocacy*

#### **Emotional Distress Damages: Discovery, Proof Issues & Maximizing Your Client's Recovery**

*Chastain H–J, 6<sup>th</sup> Floor*

Moderator/Speaker: Steven E. Wolfe

Speakers: Neil L. Henrichsen & Debra E. Schwartz

Employment cases provide unique issues in proving emotional distress damages. The plaintiff's attorney, treating therapist, and experts must be careful in walking the minefield to avoid workers' compensation exclusions and maintain a legal basis for recovering emotional distress damages. Our panel of NELA lawyers will explore issues such as assessing "garden variety" and more serious emotional damages; discovery protection and disclosure; the psychiatrist/patient privilege; issues related to the plaintiff's expert (e.g., selection, treating v. non-treating expert, and deposition preparation); conducting an IME of the plaintiff; defense expert issues; and trial issues (e.g., proof of damages, developing compelling testimony, and cross-examination of a defense expert).

## SATURDAY, JUNE 27, 2015

9:00–10:15 a.m.

### CONCURRENT SESSIONS

#### **Strategies For Representing Whistleblowers In The Federal Government**

*Augusta A–B, 7<sup>th</sup> Floor*

Moderator/Speaker: Jason Zuckerman

Speakers: Michelle F. Bercovici & Thomas M. Devine

After a 13-year legislative campaign, Congress finally and unanimously passed the Whistleblower Protection Enhancement Act (WPEA), which broadens the scope of protected conduct under the Whistleblower Protection Act (WPA), authorizes uncapped compensatory damages in WPA actions, establishes all-circuit review, and expands Individual Right of Action rights. Our speakers will discuss the impact of the WPEA, offer tips for representing whistleblowers before the U.S. Office of Special Counsel and the Merit Systems Protection Board, and discuss the role of Inspectors General in investigating whistleblower disclosures and assisting whistleblowers.

#### **Sexual Harassment & Assault Under Title IX**

*Augusta C–D, 7<sup>th</sup> Floor*

Moderator/Speaker: Nina T. Pirrotti

Speakers: Kristen Galles & Jennifer A. Reisch

Title IX of the Education Amendments of 1972 (Title IX) prohibits discrimination on the basis of sex in education programs and activities at all levels of academia. All public and private schools receiving any federal funds must comply with Title IX. Under Title IX, discrimination on the basis of sex includes sexual harassment or sexual violence, such as rape, sexual assault, sexual battery, and sexual coercion. Not many private practitioners are currently litigating these cases despite the need and even though attorneys' fees are available. While these cases are not unlike Title VII sexual harassment and retaliation cases, there are some important differences. Our experts will provide a primer for litigating Title IX causes of action.

#### **Some Things Old, Some Things New: (Re)Emerging Issues Of “Race” In Title VII Race Discrimination Cases**

*Augusta E–F, 7<sup>th</sup> Floor*

Speakers: Professor D. Wendy Greene & Alicia K. Haynes

Interestingly, the elephant in the room when discussing race discrimination is often “race” or rather “what is race?” This question generally goes unanswered since many people are of the opinion that defining race is inherently easy—“we know it when we see it.” In several types of employment discrimination cases, however, before we can address the issue of whether the employer's policy, decision, or practice constitutes unlawful race discrimination, lawyers and judges must deal with this fundamental question: What is race and how do we define it? Over the past 50 years since Title VII's enactment, simplistic notions of race—proffered by plaintiff- and defense-side practitioners as well as judges—have complicated employment discrimination practice and theory. This presentation will investigate the state of “race” in Title VII race discrimination cases by examining instances where the definition and classification of race have been critical to the viability of recent Title VII race discrimination cases.

10:15–10:30 a.m.

### **BREAK**

*Peachtree Ballroom, 8<sup>th</sup> Floor*

10:30–10:45 a.m.

#### **Raising Our Voices For Change!**

*Peachtree Ballroom, 8<sup>th</sup> Floor*

Speakers: Laura M. Flegel, NELA Legislative & Public Policy Director & Roberta L. Steele, NELA Program Director

NELA is raising our voice for change in courtrooms around the country and on Capitol Hill. Learn how you can become involved in NELA's advocacy initiatives, including our *Amicus*, Judicial Nominations, and Legislative & Public Policy Programs, as we advocate together for equality and justice in the American workplace.

10:45 a.m.–12:00 p.m.

#### **The Changing FRCP: What Every Litigator Needs To Know**

*Peachtree Ballroom, 8<sup>th</sup> Floor*

Moderator: Joseph D. Garrison

Speakers: Judge David G. Campbell, Judge John G. Koeltl & Justice David E. Nahmias

The amendments to the Federal Rules of Civil Procedure are poised for adoption. There have been major changes to the originally proposed amendments and every litigator ought to know about them because these amendments will reshape the landscape of the litigation process, especially discovery practice. The amendments have been approved by the Judicial Conference's Committee on Rules of Practice and Procedure and are now expected to be implemented without further revisions. The new rules, taken together, should promote faster and more efficient case management, with tighter deadlines to serve the summons and complaint; require earlier scheduling conferences with contemporaneous discussions involving the courts and attorneys, and possibly earlier discussions between attorneys about requests for production.

12:00 p.m.

#### **Convention Adjourns: Closing Remarks By Paul H. Tobias**

*Peachtree Ballroom, 8<sup>th</sup> Floor*