



NETWORK

Mitchell L. Bach – Chair
Paul J. Masinter – Newsletter Co-Chair
Francis G.X. Pileggi – Newsletter Co-Chair

The Newsletter of the Business Law Section
Committee on Business and Corporate Litigation
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FROM THE CHAIR

by Mitchell L. Bach

A friend of mine recently ribbed me about the “graying” of the leadership of a community organization which had just elected me as president. Since I am not even 59 yet, I was surprised about this remark. Nevertheless, I have noticed a few more gray hairs lately. Accordingly, it would not surprise me if some of you are wondering about the role of young people in our Committee, and whether it has become a bastion for “old” fellows like me. In all seriousness, nothing could be further from the truth.

As long as I can remember, our Committee has been welcoming to young business and commercial litigators. We have always encouraged Committee leaders to recruit young attorneys. Our Committee CLE programs are often organized and chaired by young members, and many young attorneys who were qualified to speak about particular subjects have been included in many of our CLE programs. Indeed, some of our Subcommittees are even chaired or vice-chaired by relatively young leaders.

One of the reasons for our success in this respect is the Section of Business Law's Fellows Program. The program targets leaders amongst young lawyers, and fosters their development within the Section of Business Law. The Fellows Program has been extremely successful in getting young lawyers involved in our Committee, often from other parts of the ABA, and encouraging them to pursue leadership positions.

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A couple of people stand out in this respect. Pat Clendenen, a young partner at the Mintz Levin firm in Boston, was one of the first Business Law Fellows who became active in our Committee. Pat quickly became one of the Section of Business Law leaders in the pro bono and public service areas. Even at a relatively young age, Pat demonstrated dedication and persistence in furthering the Section's pro bono objectives. Pat currently Co-Chairs the ABA Section of Business Law Fellows Program. He is also Co-Chair of the Class and Derivative Actions Subcommittee of our Committee, and the former Co-Chair of our Committee's Subcommittee on Pro Bono. As one of the outstanding young leaders of our Committee, I recently had the pleasure of recommending Pat for nomination to the ABA Standing Committee on Pro Bono and Public Service.

Other Fellows have been assigned to our Committee, as Pat was, including Suzanne Gilbert, Jeff Paskert and Dale Weppner. Dale, like Pat, became fully integrated into our Committee. We have also had Fellows, previously assigned to other Section committees during their fellowships, who later got very much involved with, and assumed leadership positions in, our Committee: Kendall Butterworth (previously assigned to the Committee of Corporate Counsel), Rick Lambert (Dispute Resolution), Melody Wilkinson (Executive Benefits) and Judge Jennifer Rymell (UCC).

Other young lawyers have become leaders of our Committee completely outside the Fellows program. For example, Robert Witte and Kendyl Darby, two products of the Young Lawyers Division from Texas, have become Chair and Co-Chair of our Appellate Litigation Subcommittee. Breaking from tradition, after two years of active service with the Committee, both Robert and Kendyl have recently applied to the Section's Fellows Program. Another young lawyer from New Jersey, Sandra Sutton-Simanski, recently was appointed as Chair of our Financial Institutions Litigation Subcommittee.

The involvement of young lawyers in our Committee recently manifest itself in a new way. At the Spring Meeting in Nashville several months ago, our Committee leadership met and decided to form two entirely new Subcommittees. The first was named Women Business and Commercial Advocates, and will become a new home for female business and commercial litigators. The moving force behind this new group is a young lawyer from Miami, Melanie Damian. If you are interested in joining this new group, please contact Melanie as follows:

Melanie E. Damian
Damian & Valori LLP
1200 Brickell Avenue
Suite 950
Miami FL 33131
Telephone: 305 371-3960
Facsimile: 305 371-3965
mdamian@dvlip.com

The other new Subcommittee is the Subcommittee on Tribal Court Litigation chair by our long-time member and leader, Heidi McNeil Staudenmaier. Along with Heidi, the Vice Chair and driving force of this new Subcommittee is a dynamic young lawyer from Seattle, Gabe Galanda. Gabe's contact information is as follows:

Gabriel S. Galanda
Williams, Kastner & Gibbs PLLC
601 Union St., Ste. 4100, Seattle, WA 98101
Phone: (206) 628-2780
Fax: (206) 628-6611
ggalanda@wkg.com

Gabe is a product of the Section's Ambassador Program which is designed to increase the participation on lawyers of color, and we are fortunate that this talented and energetic young man has been assigned to our Committee. Gabe's article entitled "What's Indian Law Got to Do With It?", a tribal commercial litigation primer, appears in this edition of *Network*.

Our Committee is justifiably proud of its record and commitment with respect to the active participation of young lawyers. If you are a young lawyer looking for a way to get involved, or if you have an idea as to how we can do even better in this respect, please feel free to contact me. Also, welcome again, all you new members! As always, I invite input, thoughts and suggestions from all Committee members. Please contact me by telephone, email or snail mail at Eckert Seamans Cherin & Mellott, LLC, 1515 Market St., Philadelphia, PA 19102, 215-851-8466 (phone); 215-851-8383 (fax); mbach@eckertseamans.com.

I look forward to seeing many of you at the ABA Annual Meeting in Chicago, this coming August. A schedule of our Committee activities at the Annual Meeting appears in this edition of *Network*. I shall be sending out an email or letter soon giving you more details on these Committee activities, as well as our Committee Dinner in Chicago, which will be at Narcisse Restaurant on Saturday, August 6, 2005, with cocktails beginning at 7:30 p.m. and dinner at 8:15 p.m. The Committee dinner is always a wonderful event. A registration form for the dinner is included in this issue of the *Network*. I hope all of you enjoy the rest of Spring and have a great Summer.

AUTHOR! AUTHOR! – “BUSINESS LAW TODAY” ARTICLES REQUEST

“Business Law Today” is the national magazine of the Section of Business Law of the American Bar Association. The magazine is published six times a year as a membership benefit for approximately 60,000 Section members. “Business Law Today” is a magazine, not a law review. We are looking for articles that are enjoyable to read. We publish basic articles directed to business lawyers unfamiliar with a substantive area as well as articles on technical legal issues, but the presentation should be direct and comprehensible.

Articles run around 2,000 to 3,000 words. Manuscripts must not have been published

previously. However, seminar materials that have been revamped into simple, readable articles are acceptable. Additionally, any articles previously published in an ABA newsletter (such as *Network*) or firm newsletters are acceptable. The complete author guidelines are available through the Section’s Website, www.abanet.org/buslaw/blt/guidelines.html, or Rew Goodenow directly at “Business Law Today,” Editor-in-Chief, Marshall Hill Cassas & deLipkau, Reno, Nevada 89505-2790 (775) 323-1601, (775) 348-7250 (fax), rgoodenow@mhcl-law.com.

SCHEDULE OF COMMITTEE PROGRAMS AND MEETINGS AT THE SUMMER MEETING

Business and Corporate Litigation

Bankruptcy Litigation Joint Luncheon

Saturday 8/6/2005 12:30PM - 2:00PM

The Drake Hotel

Venetian Room, East Mezzanine

Speaker: Chief Bankruptcy Judge Gene Wedoff

Speaking on Business Bankruptcy Changes under the New Bankruptcy Law

Administrative Subcommittees and Subcommittee Chairs and Vice Chairs

Saturday 8/6/2005 5:00 PM – 6:00 PM

Westin Michigan Avenue

Ontario Room, 3rd Floor

Committee Dinner

Saturday 8/6/2005 7:30 PM – 9:30 PM

Narcisse, 710 N. Clark Street, Chicago, IL 60610

Cocktails at 7:30 PM; Dinner at 8:15 PM at Grande Salon

Alternative Dispute Resolution

Sunday 8/7/2005 11:00AM - 12:00PM

Westin Michigan Avenue

Windsor Room, 2nd Floor

Antitrust and Trade Litigation

Sunday 8/7/2005 10:00AM - 11:00AM

Westin Michigan Avenue

Windsor Room, 2nd Floor

Appellate Litigation

Monday 8/8/2005 9:00AM - 11:00AM
Westin Michigan Avenue
Windsor Room, 2nd Floor

Business Courts

Monday 8/8/2005 10:00AM - 11:00AM
Westin Michigan Avenue
Huron Room, 3rd Floor

Business Torts

Sunday 8/7/2005 8:00AM - 9:00AM
Westin Michigan Avenue
Windsor Room, 2nd Floor

Class and Derivative Actions

Monday 8/8/2005 10:00AM - 11:00AM
Westin Michigan Avenue
Ontario Room, 3rd Floor

Committee Forum: What Is a BAP and Why Did I Go There? Strange and Wonderful Tales From the Bankruptcy Appellate System

Monday 8/8/2005 8:15AM - 10:00AM
Westin Michigan Avenue
Regent Room Two, 3rd Floor

Corporate Counseling & Litigation and Indemnification & Insurance Joint Meeting

Sunday 8/7/2005 10:00AM - 11:30AM
Westin Michigan Avenue
Ontario Room, 3rd Floor

Criminal and Enforcement Litigation, Financial Institution Litigation and Securities Litigation Joint Meeting

Monday 8/8/2005 10:30AM - 11:30AM
Westin Michigan Avenue
Consulate Room One, 2nd Floor

Employment Litigation

Monday 8/8/2005 11:00AM - 12:00PM
Westin Michigan Avenue
Windsor Room, 2nd Floor

Environmental Litigation

Sunday 8/7/2005 11:00AM - 12:00PM
Westin Michigan Avenue
Huron Room, 3rd Floor

ERISA and Pension Litigation

Monday 8/8/2005 11:00AM - 12:00PM
Westin Michigan Avenue
Ontario Room, 3rd Floor

Intellectual Property Litigation

Sunday 8/7/2005 2:00PM - 3:00PM
Westin Michigan Avenue
Windsor Room, 2nd Floor

Partnerships & Alternative Business Entities

Sunday 8/7/2005 1:00PM - 2:00PM
Westin Michigan Avenue
Windsor Room, 2nd Floor

Pro Bono

Sunday 8/7/2005 10:00AM - 11:00AM
Westin Michigan Avenue
Huron Room, 3rd Floor

Program: Employment Law Issues/Traps for the Unwary: The 5 Hottest Topics Facing In-House Corporate Counsel

Saturday 8/6/2005 2:30PM - 4:30PM
Westin Michigan Avenue
Regent Room One, 3rd Floor

Program: Getting Commercial in Indian Country: High-Stakes Tribal Contractual & Litigation Considerations

Saturday 8/6/2005 10:30AM - 12:30PM
Westin Michigan Avenue
Buckingham Room

Securities Arbitration

Friday 8/5/2005 9:00AM - 10:00AM
 Westin Michigan Avenue
 Windsor Room, 2nd Floor

Task Force on Litigation Reform and Rules Revision

Saturday 8/6/2005 4:00PM - 5:00PM
 Westin Michigan Avenue
 Ontario Room, 3rd Floor

FEATURE ARTICLE

WHAT'S INDIAN LAW GOT TO DO WITH IT?

By Gabriel S. Galanda¹

Indian tribes are not merely casino entrepreneurs or cigarette wholesalers. In conjunction with America's largest corporations, Indians are now engaged in real estate development, banking and finance, telecommunications, wholesale and retail trade, and tourism. By 2005, U.S. tribes have become an economic, legal, and political force to be reckoned with. Consider these facts:

- Most of *Fortune* 500's top 20 companies now do business in Indian Country, including Wal-Mart, Exxon, G.M. and Ford (#1-4), Verizon, AT&T, Home Depot, Target and Bank of America.
- Gaming tribes contributed \$32 billion in revenue, \$12.4 billion in wages and 490,000 jobs to the U.S. economy in 2001.
- Indian gaming generated \$18.5 billion in gross revenues in 2004.
- Tribes occupy more than 55 million acres of land in 30 states.

Both the cause and effect of the dramatic rise in Indian economic development is the increased interaction of tribes and non-tribal parties who seek business, employment, or recreation on Indian reservations. Consequently, Indian tribes and non-Indian corporations – perhaps some of your clientele – are executing *billions* of dollars in commercial transactions and frequently litigating those deals. Indian Country is beginning to look a lot like Corporate America.

The body of tribal, state and federal law known as "Indian law" is the foundation for every transaction in Indian Country. Indian law now intersects virtually every arena of commercial practice – tax, finance, merger and acquisition, antitrust, debt collection, real estate, environmental, land use, labor and employment . . . this list goes on and on, and on. In the increasingly likely event you find yourself in tribal litigation, here's what you need to know to get going.

The Third Sovereign. Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Worcester v. Georgia*, 31 U.S. 515 (1832). While no longer "possessed of the full attributes of sovereignty," tribes remain a "separate people, with the power of regulating their internal and social relations." *U.S. v. Kagama*, 118 U.S. 375 (1886). Essentially, Indians possess "the right . . . to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

Much like the Federal and state governments, tribal governments are elaborate entities, consisting of executive, legislative, and judicial branches. The office of the tribal chairperson or president (like that of the President or a governor) and the tribal council (a legislature) operate the tribe under a tribal constitution and/or code of laws, and tribal courts adjudicate most matters arising under tribal law.

Tribal Corporations. Frequently, an Indian tribe is organized pursuant to the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 461. Under Section 16 of the IRA, a tribe will have adopted a constitution and bylaws that set forth the tribe's governmental framework and the authority that each facet of its government possesses. A tribe may also be incorporated under Section 17 to the IRA, 25 U.S.C. § 477, by which the Secretary of Interior issues the tribe a federal charter. Through Section 17 incorporation, the tribe creates a separate legal entity to divide its governmental and business activities. The Section 17 corporation has articles of incorporation and bylaws that identify its purpose, much like a state-chartered corporation.

Alternatively, an Indian corporation may have been organized under tribal or state law. If the entity was formed under tribal law, the tribe will have done so pursuant to its corporate code. Under federal common law, the corporation likely enjoys immunity from suit, as discussed below. Thus, the state-chartered tribal corporation is generally not immune from suit and may be sued in state court. When assessing a tribal litigation matter, you should first review the tribe's organic documents and code of laws, which taken together identify the tribal real party in interest and your client's legal rights and remedies.

Tribal Courts. While generally modeled after Anglo-American courts, the 150 Indian courts in the U.S. are significantly different. Tribal judges, who are often tribal members, may not necessarily have law degrees. Tribal courts operate under the tribes' written and *unwritten* set of laws. Most tribal codes contain procedural rules specific to tribal court, as well as tribal statutes and regulations. Increasingly, tribes are adopting commercial laws modeled after the Uniform Commercial Code. Tribal procedural laws outline the tribal court's adjudicatory authority and may set forth limitations on tribal jurisdiction. Tribal laws also include traditional practices, including commercial customs, which are based on oral history but may not be codified.

Tribal judges generally follow their own precedent and, although each and every tribal court and the tribal laws they follow are distinct from the next, tribal judges give significant deference to the decisions of other Indian courts. However, because there is no official tribal court reporter and not all tribal courts keep previous decisions on file, finding such case-law can be difficult. While federal and state court opinions can serve as persuasive authority, particularly in business litigation, tribal judges are not bound by such precedent. Nevertheless, many state courts extend full faith and credit to tribal court orders, and federal courts generally grant comity to tribal judges' rulings. Before stepping foot in tribal court, you and your client must appreciate the character of Indian courts and judges, understand pertinent tribal laws, and acknowledge both the differences and inter-relatedness of tribal, state and federal courts.

Tribal Sovereign Immunity. Like other sovereign governmental entities, tribes enjoy federal common law sovereign immunity. A tribe is subject to suit only where Congress has "unequivocally" authorized the suit or the tribe has "clearly" waived its immunity. *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 757 (1998). Tribal immunity generally extends to tribal casinos and businesses, and to Section 17 and tribally-chartered corporations. Tribes and their officials, however, can be subject to suit under various exceptions recognized by courts. For example, courts have created an exception to the general rule of immunity when an official acts outside of the government's authority.

Tribes retain immunity from suit when conducting business both on- and off-reservation. As a general proposition, a tribe can only be sued in contract if the parties expressly negotiated a sovereign immunity waiver into the four corners of the contract. Nonetheless, the U.S. Supreme Court held in *C&L Enterprises v. Citizen Band Potawatomi Tribe of Oklahoma*, 532 U.S. 411 (2001), that an agreement to arbitrate disputes constitutes a clear waiver of immunity. While the Court held that a tribe's waiver must be "clear," it expressed for the first time that a

waiver need not include the express terms "waiver of sovereign immunity" and that an arbitration clause was sufficient to evidence such intentional waiver.

Tribal immunity generally shields tribes from suit for damages and requests for injunctive relief. In recent years, the Ninth Circuit Court of Appeals, in *Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893 (2002), *certiorari granted*, 123 S. Ct. 618, and the U.S. District Court Southern District of New York, in *Park Place Entertainment Corp.*, 206 F.R.D. 78 (2002), have made clear that tribes are also immune from subpoena enforcement to compel production of corporate witnesses or tribal documents. Thus, if a high-stakes reservation-based transaction between non-Indian companies (e.g., financiers and/or developers) implodes, as was the case in *Park Place*, the tribe on whose lands the deal arose cannot be compelled to produce non-party discovery.

Tribal Lands. The Secretary of Interior must approve any contract or agreement that "encumbers Indian lands for a period of 7 or more years," unless the Secretary determines that approval is not required. 25 U.S.C. § 81. Under revisions to "Section 81" enacted in 2000, the Secretary will not approve any such contract or agreement if the document does not set forth the parties' remedies in the event of a breach, disclose that the Tribe can assert sovereign immunity as a defense in any action brought against it, or include an express waiver of tribal immunity. Leaseholds for Indian lands, which typically run 25 years in duration, also require Secretarial approval. 25 U.S.C. § 415. If a dispute arises from a transaction relative to tribal lands, counsel must analyze whether the Secretary approved the underlying contract or lease because, if not, a court could render the agreement null and void.

Labor & Employment. Labor and employment issues affect the possibility and practicability of every tribal contract. Both Title VII, 42 U.S.C. § 2000e(b), and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, expressly exclude Indian tribes. Likewise, state discrimination

laws usually do not apply to tribal employers, e.g., Arizona Revised Statute § 41-1464 which expressly exempts tribes from the state's discrimination laws. Tribal officials are also immune from suit arising from alleged discriminatory behavior, so long as they acted within the scope of the tribe's authority.

The circuits, however, are split regarding whether federal regulatory employment laws apply to reservation employers. The Tenth and Eight Circuits have refused to apply to tribes such laws as the Occupational Safety and Health Act (OSHA), Employee Retirement Income Security Act (ERISA), Fair Labor Standards Act (FLSA), and National Labor Relations Act (NLRA), because doing so would encroach upon well-established principles of tribal sovereignty and tribal self-governance.

Conversely, the Ninth, Seventh and Second Circuits have applied OSHA, ERISA and NLRA to tribes, reasoning that such statutes of general applicability govern tribal employment activity because Indian tribes are not explicitly exempted from the laws. Following that logic, this past summer the National Labor Relations Board reversed several decades of its own precedent in ruling that the Board had jurisdiction to apply NLRA to tribal businesses in Indian Country. State labor laws and workers' compensation statutes generally remain inapplicable to tribal businesses.

Given that U.S. tribes now employ half a million Americans, it will not be long before the Supreme Court is asked to resolve the conflicting circuit court decisions. Until then, employment litigators must not presume that non-tribal labor and employment laws apply to a tribal employer (or that the tribe has waived its immunity), when considering whether to initiate suit against the tribal sovereign.

Tribal Court Jurisdiction. Tribal jurisdiction depends largely upon (1) whether the defendant is Indian or non-Indian; and (2) whether the events at issue occurred in Indian Country, particularly tribal or non-Indian lands within the boundaries of a tribal

community. These two highly complex issues should be the first area of inquiry for any jurisdictional question involving a business dispute arising on a reservation. A third threshold determination is whether Public Law 280, 28 U.S.C. § 1360(a), grants the state civil authority to adjudicate the deal. Public Law 280 applies fully in California, Minnesota, Nebraska, Oregon, Wisconsin and Alaska.

Generally speaking, tribal courts have jurisdiction over a suit by any party – Indian or non-Indian – against an Indian defendant for a claim arising on the reservation. However, under *Montana v. U.S.*, 450 U.S. 544 (1981), a tribal court can only assert jurisdiction over a claim against a non-Indian defendant when “necessary to protect tribal self-government or to control internal relations.” Essentially, an Indian court only has jurisdiction over non-Indian parties “who enter consensual relationships with the tribe . . . through commercial dealing, contract, leases, or other arrangements.”

The Supreme Court has made clear that a private contract qualifies as a consensual relationship under the so-called “*Montana* rule,” thus affirming that tribal courts have jurisdiction over non-Indian parties to tribal contracts. However, parties to a tribal contract should not be required to litigate in tribal court so long as the agreement includes an express waiver and specific dispute resolution provisions permitting adjudication in another forum.

State courts may exercise jurisdiction over non-contract claims against a non-Indian party that arises in Indian Country, or contract disputes involving a state-chartered tribal corporation or a tribal entity for which the tribe has waived immunity. Federal courts can assert jurisdiction over claims arising from reservation business activities if there a federal question under 28 U.S.C. §§ 1131, 1343, or diversity under § 1332. While tribes generally destroy diversity because they are not state citizens, a state-chartered tribal enterprise can be sued in diversity.

While tribal courts retain personal jurisdiction over non-Indian parties to tribal contracts and subject matter jurisdiction over disputes concerning the agreement, a series of recent Supreme Court cases casts serious doubt as to whether tribal authority over non-Indian business reservation activity remains “necessary to protect tribal self-government or to control internal relations.” In *Nevada v. Hicks*, 533 U.S. 353 (2001), the Court held that tribes lack adjudicatory jurisdiction to hear claims under 42 U.S.C. 1983 arising from the activities of state officials on reservation land but expressly left open “the question of tribal court jurisdiction over nonmember defendants in general.”

The Court explained, however, that “we have never held that a tribal court had jurisdiction over a nonmember defendant,” observing that it had previously dodged the question of whether tribes may generally adjudicate claims against non-Indians arising from on-reservation transactions. As a result of *Hicks*, many tribal attorneys are now counseling their clients to consider settlement of business disputes with non-Indians, rather than litigation, for fear that the next appellate or high court decision will outright foreclose tribal adjudicatory jurisdiction over non-Indians.

Tribal Exhaustion Doctrine. When sued in tribal court, non-Indian parties can challenge tribal jurisdiction in federal court. The question of whether a tribe has jurisdiction over a non-Indian party must be answered by federal law and thus poses a federal question under Section 1331. *National Farmers Union v. Crow Tribe*, 471 U.S. 845 (1985). Ordinarily, however, “a federal court should stay its hand ‘until after the tribal court has had a full opportunity to determine its own jurisdiction.’” *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

If the tribal court determines it has jurisdiction, it will proceed to rule upon the merits of the case. The non-Indian party can then file suit in federal court, where the district court will review *de novo* the federal question of tribal jurisdiction. The

district court is guided but not controlled by the tribal court's jurisdictional determination. If the federal court decides tribal court had jurisdiction, it will not relitigate issues already determined on the merits. *Iowa Mutual v. LaPlante*, 480 U.S. 9 (1987).

There are several exceptions to the requirement that a federal court should stay its hand – where “an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith . . . or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.” *National Farmers, supra*. Moreover, “when . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule,” exhaustion “would serve no purpose other than delay.” *Strate, supra*.

While the exceptions to the exhaustion rule can assist non-Indian defendants in getting into federal court, they offer little assistance to non-Indian parties to tribal contracts, who, absent negotiated choice-of-forum or dispute resolution provisions, remain subject to tribal jurisdiction under *Montana*. Because a tribal court could be the only trier of fact in a commercial dispute, a non-Indian litigant should thoroughly present the merits of its case to the tribal judge, being ever mindful of the unique aspects of tribal courts described above.

Conclusion. Corporate America is witnessing firsthand both the tremendous rise in Indian economic development and an array of commercial litigation matters arising on the reservation. With *Fortune* 500 companies increasingly doing business on reservation, Indian law has been transformed from a niche practice, into a body of law intersecting every area of practice and engaging attorneys and clients of all types. Notwithstanding, Indian law defies everyday corporate litigation practice. For these reasons, it is vital that today's commercial litigators have some understanding of basic Indian law, particularly those

whose “blue-chip” clients are already doing business in Indian Country.

1. Mr. Galanda is an attorney in Seattle with Williams, Kastner & Gibbs, PLLC. His practice focuses on the litigation of complex, multi-party commercial and Indian law matters, and consultation with tribes and non-tribal parties doing business in Indian Country. Mr. Galanda is a descendant of the Nomlaki and Concow Tribes, and an enrolled member of the Round Valley Indian Confederation in Northern California. He is a 2005-06 ABA Business Law Section Ambassador and also serves as Vice Chair to the Business & Corporate Litigation Committee's new Tribal Court Litigation Subcommittee.

SUBCOMMITTEE REPORTS

CLASS AND DERIVATIVE ACTIONS SUBCOMMITTEE

by Patrick T. Clendenen

The Committee's Class and Derivative Actions Subcommittee hosted a program titled, Non Federal Question Class Actions: Recent Developments and Strategies, at the Business Law Section's Annual Meeting in Nashville, TN. The program was timely, as Congress recently passed the Class Action Fairness Act this Spring, and it was one of the first programs nationwide to discuss the Act in detail. The program not only described the Act and its implications but also focused more broadly on three major areas: recent developments and cases in non-federal question class actions; strategies for plaintiff and counsel selection, forum selection, and jurisdiction; and strategies for responses to class action complaints, including removal and certification practice. The program was organized by Patrick T. Clendenen, Co-Chair of the Subcommittee, and speakers and contributors included: Kevin McGinty, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. (Boston); Mac McCoy and Joe Ianno, Carlton Fields (West Palm Beach); Michael Flynn, Senior Vice

President and Senior Counsel, World Savings (Oakland); Kathryn Barnett, Lieff, Cabraser, Heimann & Bernstein, LLP (Nashville); Matthew Shors, O'Melveny & Myers, LLP (Washington, DC); and Marsha Rabiteau, Vice President and Assistant General Counsel, Hartford Financial Services Group (Hartford). The program's comprehensive materials are available on the Section's website.

CRIMINAL AND ENFORCEMENT SUBCOMMITTEE

by Jay Dubow

Our Subcommittee will be meeting jointly with two other subcommittees, the Financial Institution Litigation and Securities Litigation Subcommittees at the Annual Meeting in Chicago. The meeting is scheduled for Monday, August 8, 2005, from 10:30 a.m. to 11:30 a.m. at the Westin Hotel. I am pleased to announce that we will have a special guest at the meeting, Merri Jo Gillette, who is the Regional Administration of the United States Securities and Exchange Commission's Midwest Regional Office located in Chicago, IL. Merri Jo has been on the SEC's staff for a number of years. Prior to becoming the head of the office in Chicago, Merri Jo was a Senior Enforcement Official in the SEC's Philadelphia Office. We look forward to having an opportunity to hear from Merri Jo about the activities of the SEC's generally and her office specifically and to have the opportunity to ask questions and discuss issues of concern with a senior SEC official.

At the Subcommittee meeting, we are also looking for persons interested in assisting in the annual developments publication. If you cannot attend the meeting, but are interested in working on the annual developments publication on behalf of the Criminal and Enforcement Litigation Subcommittee, please feel free to contact me directly.

FINANCIAL INSTITUTION LITIGATION SUBCOMMITTEE

by Sandra J. Sutton-Simanski

As the newly appointed chair of the Financial Institution Litigation Subcommittee, I am very eager to meet with all of the members of the Subcommittee at the upcoming Annual Meeting in Chicago. Our Subcommittee meeting will be held jointly with the Criminal and Enforcement Litigation Subcommittee and the Securities Litigation Subcommittee on Monday, August 8, 2005 from 10:30 a.m. to 11:30 a.m. We will discuss recent developments in case law and work together to develop proposals for upcoming programs, forums and articles. Attending the Subcommittee meeting will provide you with a great opportunity to learn the latest developments in financial services industry, as well as, to learn about future speaking and publishing opportunities available to members. Please join us – you will discover that it is easy to get involved and that our members are also a lot of fun!

New members are always welcome and can join by sending an e-mail to Sandra J. Sutton-Simanski. Please send your e-mail expressing your interest in joining the Subcommittee to sjs@mnlawpc.com. I look forward to seeing all of you in the Windy City!

INDEMNIFICATION AND INSURANCE SUBCOMMITTEE

by William D. Johnston

During the upcoming Annual Meeting in Chicago, members of the Indemnification and Insurance Subcommittee will again meet jointly with members of the Corporate Counseling and Litigation Subcommittee – this time on Sunday, August 7, from 10:00 a.m. to 11:30 a.m. Please join us for a lively discussion of recent developments, D&O insurance market conditions, and practical tips.

The Annual Meeting will also be the occasion for Janet McFadden of Drinker Biddle & Reath LLP to succeed me as chair of the Indemnification and Insurance Subcommittee, and for Mike Pittenger of Potter Anderson & Corroon LLP to succeed Janet as vice chair of the Subcommittee. It has been my privilege and pleasure to serve as chair of the Subcommittee for the past eight years, and I wish Janet and Mike all the best in their new positions. In addition, I am grateful for the interest and involvement on the part of our Subcommittee members – a rich mix of private practitioners, in-house counsel, academics, and law students. And special thanks to members of the judiciary who have contributed so generously of their time and insights in participating in CLE programs – whether as part of the larger ABA meetings or during the “standalone” meetings of the Business and Corporate Litigation Committee and the more recent, joint meeting with the Federal Regulation of Securities Committee.

As always, new members of the Subcommittee – and “visitors” – are welcome. I hope to see you in Chicago!

MEMBERSHIP SUBCOMMITTEE

by Elizabeth S. Stong

The Committee is the home in the Business Law Section for litigators. But it is also a great place for non-litigators who need to stay abreast of the most recent developments in a broad range of subjects of keen relevance to business lawyers in every practice setting, from the latest in corporate compliance to trends in bankruptcy case filings. Our Committee's programs at the Section's Spring Meeting confirmed this, as the topics covered – non-Federal question class actions, arbitration, and the comprehensive Review of Developments in Business and Corporate Litigation – were attended by a cross-section of Section membership, including seasoned litigators, in-house transactional lawyers, judges, and law students. Our Committee also held its regular, and very successful, Committee dinner, which is open to

all with an interest in the Committee and its activities. Planning for Committee programs and events, including a dinner and the fourth annual hands on public service project, are under way for the ABA's annual meeting on August 5 to 9 in Chicago, so it is a great time to get involved.

TRIBAL COURT LITIGATION SUBCOMMITTEE

by Gabriel S. Galanda

At the Spring Meeting in Nashville, the Committee established a subcommittee to create awareness about the complexities of federal Indian law and tribal court litigation practice – the Tribal Court Litigation Subcommittee. Heidi McNeil Staudenmaier of Snell & Wilmer, LLP was appointed to serve as Chair of the Subcommittee and I was honored to have been anointed Vice-Chair.

The Subcommittee jumped into action quickly by successfully submitting a program for the Chicago Annual Meeting, titled **Getting Commercial in Indian Country: High-Stakes Tribal Contractual & Litigation Considerations**, and contributing the accompanying article in this edition of *Network*, styled **What's Indian Law Got To Do With It?**

The Subcommittee's inaugural program, and the Subcommittee itself, are founded on the recognition that the \$18.5 billion Indian gaming industry has attracted millions of people to the reservation for business, employment or recreation, and in turn drawn *Fortune* 50 companies like Wal-Mart, Exxon, Ford, Verizon, Starbucks, Home Depot and Target to do business in Indian country. In turn, such blue chip companies are finding themselves litigating business or commerce-related claims in tribal court. Most recently, Ford was hailed to an Arizona tribal court to defend a product liability claim. See *Ford Motor Co. v. Todecheene*, No. 02-17048 (9th cir. 2005).

Lawyers and business litigators in any of the thirty states that are Indian Country now need some working knowledge of Indian law, as states like New Mexico and Washington recognize, having added Indian law to their bar exams.

The Annual Meeting program, which will be presented by a slate of Indian law attorneys and a tribal court judge, will answer the following types of questions: What incentives are there for corporations to do business on the reservation? What need Big Business understand about federal Indian jurisdiction before dealing or litigating in Indian Country? What are the unique aspects of tribal court adjudication? The program will be held on **Saturday, August 6 from 10:30 a.m. to 12:30 p.m., at the Westin Buckingham Room. Don't miss it!**

The Tribal Court Litigation Subcommittee is also co-sponsoring a second Annual Meeting program, ***Emergent Regulatory & Policy Issues Surrounding the \$18.5 Billion Indian Gaming Industry***, which will take place Friday, August 5, from 2:30 to 4:30 p.m. in the Westin Mayfair Room. In addition, the Subcommittee is already busy preparing a chapter for the next edition of the Committee's *Annual Review of Developments in Business and Corporate Litigation*, and lobbying for a program at the 2006 Annual Meeting in Honolulu entitled *Sovereign Rights of Native Hawaiians*.

For information about the Subcommittee, or about tribal business or litigation practice, please do not hesitate to contact Heidi in Phoenix at (602) 382-6366, or hstaudenmaier@swlaw.com, or myself in Seattle at (206) 628-2780, or ggalanda@wkg.com.

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SUBCOMMITTEE ROSTER

CHAIR:

Mitchell L. Bach
 Eckert Seamans Cherin & Mellott, LLC
 1515 Market St., 9th Floor
 Philadelphia, PA 19102
 e-mail: mbach@eckertseamans.com
 (215) 851-8466
 FAX: (215) 851-8383

VICE-CHAIR:

Peter J. Walsh, Jr.
 Potter Anderson & Corroon
 1313 N. Market St., 6th Floor
 Hercules Building, P.O. Box 951
 Wilmington, DE 19899
 e-mail: pwalsh@potteranderson.com
 (302) 984-6000
 FAX: (302) 658-1192

**ALTERNATIVE DISPUTE
RESOLUTION CHAIR**

Abigail Pessen
 Mediation Services
 80 Broad St., 30th Floor
 New York, NY 10004
 e-mail: pessenadr@earthlink.net
 (212) 961-0668
 FAX: (212) 961-0669

**ANTITRUST AND TRADE LITIGATION
CHAIR**

Robert L. Gegios
 Kohnner, Mann & Kailas, S.C.
 1572 East Capitol Drive
 P.O. Box 11982
 Milwaukee, WI 53211-0982
 e-mail: rgegios@kmklawfirm.com
 (414) 962-5110
 FAX: (414) 962-8725

**ANTITRUST & TRADE LITIGATION
VICE-CHAIR**

Hilary E. Ware
 Commercial Litigation Counsel
 Google Inc.
 1600 Amphitheatre Parkway
 Mountain View, CA 94043
 e-mail: hware@google.com
 (650) 623-5807

APPELLATE LITIGATION CO-CHAIR

Robert J. Witte
 Winstead Sechrest & Minick P.C.
 1201 Elm Street
 5400 Renaissance Tower
 Dallas, TX 75270
 e-mail: Rwitte@winstead.com
 (214) 745-5861
 FAX: (214) 745-5390

APPELLATE LITIGATION CO-CHAIR

Kendyl Darby
 Haynes & Boone
 901 Main Street, Suite 3100
 Dallas, TX 75202
 e-mail: kendyl.darby@haynesboone.com
 (214) 651-5705
 FAX: (214) 651-5940

**BANKRUPTCY LITIGATION
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Philip S. Warden
 Pillsbury Winthrop, LLP
 50 Fremont Street
 San Francisco, CA 94105
 e-mail:
 pwarden@pillsburywinthrop.com
 (415) 983-7260
 FAX: (415) 983-1200

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CO-CHAIR**

William Knight Zewadski
 Trenam Kemker Scharf Barkin
 Frye O'Neill & Mullis
 2700 Bank of America Plaza
 101 East Kennedy Boulevard
 P.O. Box 1102 (33601)
 Tampa, FL 33602-5150
 e-mail: z@trenam.com
 (813) 227-7484
 FAX: (813) 229-6553

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The Honorable Margaret A. Mahoney
 Bankruptcy Judge
 United States Bankruptcy Court for the
 Southern District of Alabama
 201 St. Louis Street
 Mobile, AL 36602
 e-mail: mahoney@als.uscourts.gov
 (334) 441-5628
 FAX: (334) 441-5612

BUSINESS COURTS CHAIR

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 Eckert Seamans Cherin & Mellott, LLC
 1515 Market Street, 9th Floor
 Philadelphia, PA 19102
 e-mail: mbach@eckertseamans.com
 (215) 851-8466
 FAX: (215) 851-8383

BUSINESS COURTS VICE-CHAIR

Lee Applebaum
Fineman, Krekstein & Harris, P.C.
United Plaza, 18th Floor
30 S. 17th Street
Philadelphia, PA 19103
e-mail:
lapplebaum@finemanlawfirm.com
(215) 893-8702
FAX: (215) 893-8719

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Rick L. Lambert
Godwin Gruber, LLP
1700 Renaissance Tower
1201 Elm Street
Dallas, TX 75270
e-mail: rlambert@godwingruber.com
(214) 939-4456
FAX: (214) 527-3148

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Paul J. Masinter
Stone Pigman Walther Wittmann LLC
546 Carondelet Street
New Orleans, LA 70130-3588
e-mail: pmasinter@stonepigman.com
(504) 581-3200
FAX: (504) 581-3361

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Patrick T. Clendenen
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111
email: ptclendenen@mintz.com
(617) 348-1827
FAX: (617) 542-2241

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Grant & Eisenhofer
1220 North Market St., Suite 500
Wilmington, DE 19801-2599
e-mail: jeisenhofer@gelaw.com
(302) 622-7000
FAX: (302) 622-7055

CORPORATE COUNSELING & LITIGATION CHAIR

Anne C. Foster
Richards Layton & Finger
One Rodney Square
P.O. Box 551
Wilmington, DE 19899
e-mail: foster@rf.com
(302) 651-7744
FAX: (302) 651-7701

CORPORATE COUNSELING & LITIGATION VICE-CHAIR

Kurt M. Heyman
The Bayard Firm
222 Delaware Avenue, Ste. 900
Wilmington, DE 19801
e-mail: kheyman@bayardfirm.com
(302) 429-4235
FAX: (302) 658-6395

CRIMINAL AND ENFORCEMENT LITIGATION CO-CHAIR

Jay A. Dubow
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1650 Arch Street, 22nd Floor
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e-mail: jdubow@wolfblock.com
(215) 977-2058
FAX: (215) 405-2958

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Elizabeth K. Ainslie
Schnader Harrison Segal & Lewis, LLP
1600 Market Street, Suite 3600
Philadelphia, PA 19103-7286
e-mail: eainslie@schnader.com
(215) 751-2000
FAX: (215) 751-2205

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Martin Grant
Federal Reserve Bank of New York
33 Liberty Street
New York, NY 10045
e-mail: martin.grant@ny.frb.org
(212) 720-5032
FAX: (212) 720-1530

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e-mail: bcohen@mintz.com
(617) 542-6000
FAX: (617)-542-2241

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Stacey A. Campbell
Shook, Hardy and Bacon
2555 Grand Avenue
Kansas City, MO 64108
e-mail: SACAMPBELL@shb.com
816-559-2167
FAX: (816) 421-5547

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Seth R. Lesser
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e-mail: sprlaw@aol.com
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FAX: (212) 421-1891

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(202) 965-8100
FAX: (202) 965-8104

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Montgomery McCracken Walker &
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123 South Broad Street
Philadelphia, PA 19109
e-mail: jbakker@mmwr.com
(215) 772-7521
FAX: (215) 772-7620

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250 Route 28, Suite 203
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(908) 575-0220 x19
FAX: (908) 575-0632

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The Brandywine Building
1000 West Street, 17th Floor
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Wilmington, DE 19801-0391
e-mail: wjohnston@ycst.com
(302) 571-6679
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VICE-CHAIR**

Janet R. McFadden
Drinker Biddle & Reath LLP
1500 K Street, NW, Suite 1200
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e-mail: janet.mcfadden@dbr.com
(202) 842-8800
FAX: (202) 842-8465

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Snell & Wilmer L.L.P.
One Arizona Center
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(602) 382-6277
FAX: (602) 382-6070

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Potter Anderson & Corroon LLP
Hercules Plaza, 1313 N. Market Street,
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Wilmington, DE 19899-0951
e-mail: kshannon@potteranderson.com
(302) 984-6000
FAX: (302) 658-1192

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Dale M. Weppner
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150 North Meramec, 4th Floor
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e-mail: dweppner@dmdfirm.com
(314) 726-1000
FAX: (314) 725-6592

PRO BONO CO-CHAIR

S. Kendall Butterworth
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1155 Peachtree St., N.E., Suite 1700
Atlanta, GA 30309-7629
e-mail:
kendall.butterworth@bellsouth.com
(404) 249-3388
FAX: (404) 249-2118

PRO BONO VICE-CHAIR

Honorable Jennifer S. Rymell
County Court at Law #2
100 West Weatherford St., Rm. 240-A
Fort Worth, TX 76196
e-mail: jarymell@email.msn.com
(817) 370-9684
FAX: (817) 370-6279

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Donald S. Davidson
Bingham McCutchen, LLP
399 Park Avenue
New York, NY 10022-4689
e-mail: donald.davidson@bingham.com
(212) 318-7700
FAX: (212) 752-5378

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Lisa K. Wager
19 Dickel Road
Scarsdale, NY 10583
e-mail: kleinwager@aol.com
(914) 472-3546

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James R. Hawkins, II
Finn Dixon & Herling
One Landmark Square, Ste. 1400
Stamford, CT 06901
e-mail: jhawkins@fdh.com
(203) 325-5042
FAX: (203) 348-5777

SECURITIES LITIGATION CO-CHAIR

Stephen D. Poss
Goodwin Procter L.L.P.
Exchange Place
Boston, MA 02109-1000
e-mail: sposs@goodwinprocter.com
(617) 570-1886
FAX: (617) 523-1231

**TRIBAL COURT LITIGATION
CHAIR**

Heidi McNeil Staudenmaier
Snell & Wilmer, LLP
One Arizona Center
Phoenix, AZ 85004-2202
e-mail: hstaudenmaier@swlaw.com
(602) 382-6366
FAX: (602) 382-6070

**TRIBAL COURT LITIGATION
VICE CHAIR**

Gabriel S. Galanda
Williams, Kastner & Gibbs PLLC
601 Union St., Ste. 4100
Wattle, WA 98101
e-mail: ggalanda@wkg.com
(206) 628-2780
FAX: (206) 628-6611

**WOMEN BUSINESS AND
COMMERCIAL ADVOCATES
CHAIR**

Melanie E. Damian
Damian & Valori LLP
1200 Brickell Avenue, Suite 950
Miami, FL 33131
e-mail: mdamian@dvllp.com
(305) 371-3960
FAX: (305) 371-3965

**ADMINISTRATIVE
SUBCOMMITTEES****MEMBERSHIP CO-CHAIR**

The Honorable Elizabeth S. Stong
United States Bankruptcy Judge
United States Bankruptcy Court for the
Eastern District of New York
75 Clinton Street
Brooklyn, NY 11201
e-mail:
Elizabeth_Stong@nyeb.uscourts.gov
(718) 330-2188, ext. 272
FAX: (718) 643-9694

MEMBERSHIP CO-CHAIR

J. Tate London
Assistant United States Attorney
700 Stewart Street, Suite 5220
Seattle, WA 98101
email: tate.london@usdoj.gov
(206) 553-4064

NEWSLETTER CO-CHAIR

Paul J. Masinter
Stone Pigman Walther Wittmann LLC
546 Carondelet Street
New Orleans, LA 70130-3588
e-mail: pmasinter@stonepigman.com
(504) 581-3200
FAX: (504) 581-3361

NEWSLETTER CO-CHAIR

Francis G.X. Pileggi
Fox Rothschild LLP
Citizens Bank Center, Suite 1300
919 Market Street
Wilmington, DE 19801
e-mail: fpileggi@foxrothschild.com
(302) 655-3667
FAX: (302) 656-8920

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Peter J. Walsh, Jr.
Potter Anderson & Corroon
1313 N. Market St., 6th Floor
Hercules Building, P.O. Box 951
Wilmington, DE 19899
e-mail: pwalsh@pacdelaware.com
(302) 984-6000
FAX: (302) 658-1192

PUBLICATIONS CHAIR

Heidi M. Staudenmaier
Snell & Wilmer, LLP
One Arizona Center
Phoenix, AZ 85004-2202
e-mail: hstaudenmaier@swlaw.com
(602) 382-6366
FAX: (602) 382-6070

PUBLICATIONS VICE CHAIR

Melody M. Wilkinson
Cooley Manion Jones LLP
Water Gardens Place
100 East 15th Street, Suite 320
Fort Worth, TX 76102
e-mail: mwilkinson@cmj-law.com
(817) 870-1961
FAX: (817) 878-2573

SMALL FIRMS CHAIR

James R. Hawkins, II
Finn Dixon & Herling
One Landmark Sq., Ste. 1400
Stamford, CT 06901
e-mail: jhawkins@fdh.com
(203) 325-5042
FAX: (203) 348-5777

**TASK FORCE ON LITIGATION
REFORM AND RULES REVISION
CO-CHAIR**

Jan P. Helder, Jr.
Helder Law Firm
2300 Main Street, 9th Floor
Kansas City, MO 64108
e-mail: jan@helderlaw.com
(816) 561-5000
FAX: (816) 561-5001

**TASK FORCE ON LITIGATION
REFORM AND RULES REVISION
CO-CHAIR**

Michael C. Flynn
Senior Counsel/Loan Legal
World Savings Bank
1901 Harrison Street
Oakland, California 94612
e-mail: mflynn365@worldsavings.com
(510) 446-4080
FAX: (510) 446-3963

LIAISON TO DIVERSITY COMMITTEE

Sandra J. Sutton-Simanski
Maurice & Needleman, P.C.
250 Route 28, Suite 203
Bridgewater, NJ 08807
e-mail: Sandra@mnlawpc.com
(908) 575-0220 ext. 19
FAX: (908) 575-0632

**LIAISON TO TECHNOLOGY
COMMITTEE & CYBERSPACE
COMMITTEE**

Bruce E. Jameson
Prickett Jones & Elliott
1310 King Street
P.O. Box 1328 (19899)
Wilmington, DE 19801
e-mail: bejameson@prickett.com
(302) 888-6532
FAX: (302) 658-8111

LIAISON TO BUSINESS LAW TODAY

Francis G.X. Pileggi
Fox Rothschild LLP
Citizens Bank Center, Suite 1300
919 Market Street
Wilmington, DE 19801
e-mail: fpileggi@foxrothschild.com
(302) 655-3667
FAX: (302) 656-8920

JUDICIAL DESIGNEES

The Honorable Alvin W. Thompson
United States District Judge
United States District Court for the
District of Connecticut
U. S. Courthouse
450 Main Street
Hartford, CT 06103
e-mail:
alvin_thompson@ce2.uscourts.gov
(860) 240-3224
FAX: (860) 240-3465

The Honorable Myron T. Steele
Chief Justice
Delaware Supreme Court
Supreme Court Building
57 The Green
Dover, DE 19901
e-mail: msteele@state.de.us
(302) 739-4214
FAX: (302) 739-2004

The Honorable Elizabeth S. Stong
United States Bankruptcy Judge
United States Bankruptcy Court for the
Eastern District of New York
75 Clinton Street
Brooklyn, NY 11201
e-mail:
Elizabeth_Stong@nyeb.uscourts.gov
(718) 330-2188, ext. 272
FAX: (718) 643-9694

SECTION FELLOW DESIGNEE

Matthew T. Reinhard
Miller & Chevalier Chtd
Suite 900
655 15th St NW
Washington, DC 20005-5799
email: mreinhard@milchev.com
(202) 626-5800
FAX: (202) 628-0858

AMBASSADOR DESIGNEE

Gabriel S. Galanda
Williams, Kastner & Gibbs PLLC
601 Union St., Ste. 4100
Wattle, WA 98101
e-mail: ggalanda@wkg.com
(206) 628-2780
FAX: (206) 628-6611

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