Message from the Chair

Dear Members:

One of my duties as Chair of our Committee is to report biannually to the Officers and Council of the ABA Section of Business Law. Although these reports can be searched and retrieved on our website, it occurred to me that many of you have never seen them. During the Holidays, I was required to submit our 2006 Midwinter Report; and I decided to have it reproduced here, so that all of you had easy access to it. Click here to access the 2006 Midwinter Report. I think it presents a good picture of the status of our Committee, its successes and its future direction. As always, I welcome your reactions and input; and I wish all of you the very best for a healthy, happy and prosperous New Year.

Mitchell L. Bach
Chair, Committee on Business and Corporate Litigation
Eckert Seamans Cherin & Melott, LLC
mbach@eckertseamans.com

Featured Article

Enforcing Letters Rogatory in Canada
Bonnie Roberts

Our world is shrinking. Increasingly, American lawyers are faced with the task of attempting to obtain evidence from Canadian residents for use in American proceedings. However, unless the Canadian is willing to voluntarily provide the desired evidence, the American lawyer must obtain an order from a Canadian court to compel production.

Generally, orders to compel the production of evidence by a Canadian resident for a proceeding in a foreign jurisdiction are issued as a result of a request from the foreign court, called letters rogatory or a letter of request. Such international judicial assistance is based upon international comity, whereby the courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction out of mutual deference and respect.

The Canada Evidence Act authorizes a superior court of a province, pursuant to letters rogatory or similar orders from foreign jurisdictions, to order the examination of witnesses or the production of documents, or both, "for use in civil, commercial or criminal proceedings" out of the jurisdiction. An application to the Court for such an order is thus made under the rules of court of the Canadian province in which the witness resides.

The essential components of an application in Canada are valid and subsisting letters rogatory, a notice of application, and a supporting affidavit with accompanying exhibits.

More...
Subcommittee Updates

Subcommittee on Bankruptcy Litigation
Bill Zewadski

The Bankruptcy Litigation Subcommittee again joined the ABA's Creditor's Rights Committee to present a joint program at the National Bankruptcy Judges' Conference, in San Antonio, on November 3. Our own Bankruptcy Judge Elizabeth Strong joined in a discussion led by Bill Zewadski on the new business provisions under BAPCPA, the expansive new bankruptcy law, and regarding topics relating to management of court dockets and case administration. Miami Bankruptcy Judge Robert Mark led a discussion of the recent and sharply conflicting rulings from Arizona, Florida and Nevada on the scope of the homestead limitations under the new bankruptcy law, which became effective on its passage for cases filed on and after April 20, 2005.

A reprise of the presentation of new business bankruptcy developments was included in "Bankruptcy for Breakfast" at the Ritz Carlton in Washington D.C., on November 18 at the Fall Section Meeting, again led by Bill Zewadski and Bankruptcy Judge Elizabeth Stong.

The next program of the Bankruptcy Litigation subcommittee will be at the Tampa Spring meeting, April 6, 2006 at 1:00-2:30 PM. See you there. Let us know if you would like to be active in the committee if you are not a member, simply by dropping an email to Bill Zewadski, Tampa, at z@trenam.com.

Subcommittee on Business Courts
Merrick Lawrence Gross

The Business Courts Subcommittee will be presenting a program entitled "Business Courts: Are They Working and Why" during the Committee on Business and Corporate Litigation Committee Forum which will be held on Friday, April 7, 2006 from 8:15 AM to 10:00 AM during the Section of Business Law Spring Meeting in Tampa, Fla. The program will consist of a panel discussion involving three state court judges who preside over business court cases in jurisdictions around the country, and two attorneys who have been active in the creation of business courts around the country. The panel will be posed various questions regarding how these business courts are working, the benefits of litigating matters in the business courts and issues/problems that still have to be fixed.

Subcommittee on Membership
Elizabeth S. Strong

The Membership Subcommittee has been active in the Section's efforts to identify and expand ways for new members to become active and engaged in the work of the Section and its Committees. New members joined the Committee for its festive dinner at the Washington, D.C., Section CLE Meeting in November, and Section members who are active in other committees, including the Federal Regulation of Securities Committee and the Corporate Counsel Committee, attended programs offered by the Committee.

Outreach to new and prospective members at the Section's Spring Meeting in Tampa will include participation by the Committee's
leadership at the Committee Round-Up and WBLN Business Card Breakfast, hosting a first-ever reception for women judges from all around Florida, and as always, a Committee dinner that will be open to seasoned leaders and new members alike.

The Membership Subcommittee is seeking suggestions for ways to expand the Committee’s outreach to law students. Any ideas? Interested in becoming actively involved in the Committee’s programming, publications, and projects? Contact any of the Committee leaders listed on the leadership roster elsewhere in Network, or contact the Membership Subcommittee co-chairs Lisa Wager and Elizabeth Stong or Committee Chair and Vice Chair Mitchell Bach and Peter Walsh.

Subcommittee on Pro Bono
Mac McCoy

The Pro Bono Committee, the Business and Corporate Litigation Committee’s Subcommittee on Pro Bono and Public Service and the Young Lawyer Forum again will co-sponsor a public service project during the Section’s 2006 Spring Meeting in Tampa, Florida. The goal of this year’s project is to focus attention on the damaging effects of domestic violence by providing volunteers the opportunity to entertain and interact with displaced parents and children at The Spring of Tampa Bay, a local domestic violence shelter.

The Spring of Tampa Bay is a nonprofit organization that has been working for over 25 years to improve the lives of families affected by domestic violence, both through community education and outreach as well as through shelter services offering family members the chance for a better future. At any given time, children occupy approximately two-thirds of the available beds at the shelter. Section members attending the 2006 Spring Meeting in Tampa will have the opportunity to volunteer at a field-day-style event organized for children temporarily living at the shelter, including serving lunch, coordinating games and outdoor activities, and handing out prizes. The event is sure to be as exciting and uplifting for Section volunteers as it is for The Spring’s clients. Transportation will be provided from the hotels where the Section’s meetings will be held. The event is currently scheduled for Saturday, April 8, 2006 from 12:00 PM to 2:00 PM Please plan to attend this fun and worthwhile event. For more details or to volunteer in advance, please email Mac McCoy at mmccoy@carltonfields.com.

Subcommittee on Publications
Heidi McNeil Staudenmaier

The tremendous efforts of the Publications Subcommittee will be showcased at the Section’s Spring Meeting through the voluminous materials assembled for the 2006 Annual Review of Developments in Business and Corporate Litigation. This year, the materials will expanded from 22 to 23 chapters (adding a Tribal Courts Litigation chapter). The complete materials will be available to all meeting attendees on CD Rom.

The materials will be published in book form this summer by ABA Publishing. This will be the sixth straight year that the materials have been available for sale in book form.

Over 60 authors will be participating in this massive effort.

Subcommittee on Tribal Court Litigation

Gabriel S. Galanda

In its seven months of existence, the Tribal Court Litigation Subcommittee continues to make a big splash within the ABA. Through the leadership of Heidi McNeil Staudenmaier, the Subcommittee will be contributing a new, 23rd Chapter to the 2006 Annual Review of Developments in Business and Corporate Litigation, appropriately titled Tribal Court Litigation. The chapter will reduce over 200 years of convoluted federal Indian law into some 20 pages of law review quality scholarship. You won't want to miss it.

In addition, the Subcommittee will be co-sponsoring a program at the Tampa Bay meeting, along with the Gaming Law Committee and the Consumer Financial Services Committee, titled Morality Enforcement Through Payment Systems Regulation. Of significance to the Subcommittee, the program — scheduled for Saturday, April 8 at 8:00 a.m. — will address federal criminal enforcement against providers of payment systems such as 800 numbers and credit cards, which are used to engage in Internet Indian gaming, among other types of gambling. The Subcommittee is most interested in the aspects of this program related reservation-based Internet gaming activities and the tension between federal enforcement and tribal sovereignty and self-regulation. Yours truly is chairing and moderating the program.

Finally, at the Subcommittee’s urging, the Section will co-sponsor a program at the 2006 Annual Meeting in Honolulu entitled Native Hawaiian Sovereignty, along with the Section of Individual Rights and Responsibilities’ Native American Concerns Committee. The program will highlight the Native Hawaiian Government Reorganization Act of 2005 (S. 344), which is now before Congress. Senators Daniel K. Inouye and Daniel K. Akaka are invited presenters.
Section of Business Law ABA Annual Meeting

ABA Section of Business Law Annual Meeting
Honolulu, Hawaii
August 3 - 8, 2006

- Meeting Details

Committee Leadership Information

Committee Leadership Roster
Committee on Business and Corporate Litigation

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

More...
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The *Canada Evidence Act* authorizes a superior court of a province, pursuant to letters rogatory or similar orders from foreign jurisdictions, to order the examination of witnesses or the production of documents, or both, "for use in civil, commercial or criminal proceedings" out of the jurisdiction. An application to the Court for such an order is thus made under the rules of court of the Canadian province in which the witness resides.

The essential components of an application in Canada are valid and subsisting letters rogatory, a notice of application, and a supporting affidavit with accompanying exhibits.

**Obtaining Letters Rogatory from the American Court**

The first step in obtaining evidence from a Canadian source is for an American lawyer to apply to his or her own court for an order issuing letters rogatory to the Canadian court. Since Canadian courts will give effect to letters rogatory only if they satisfy the requirements of
Canadian law, American counsel should ensure that all of the conditions that have been
established by the Canadian legislation and case law are fulfilled in the letters rogatory.

The *Canada Evidence Act* requires that the competence of the foreign court be established before
a Canadian court can consider how it should exercise its jurisdiction. Thus, letters rogatory
should assert that the American court properly has jurisdiction over the American proceedings, is
a competent court of law and equity, and has the power to compel the attendance of witnesses
and the production of documents by corporations and individuals both in and outside the
jurisdiction. As a sign of mutuality and reciprocity, it is helpful if the letters rogatory confirm
that the American court issuing the request could reciprocate by granting enforcement of letters
rogatory from a Canadian court.

The evidence sought by letters rogatory must “be necessary for trial and intended to be adduced
at trial, if admissible”. It is helpful to establish not only an absolute need to invoke the process
of letters rogatory, but also that the evidence sought is necessary for the purposes of justice in the
American proceedings. Where possible, letters rogatory should, among other things: (a) provide
a summary of the American proceedings and relate the evidence sought to the case pending
before the American court; (b) assert that the evidence required is relevant to the American
proceeding; (c) explain the importance of the requested evidence to the proper and complete
adjudication of the issue before the American court; and (d) state that the evidence sought is
necessary for the purpose of the American trial.

Since the Court will not make an order beyond that specifically requested in the letters rogatory
of the American court, counsel must be careful to ensure that the letters rogatory request
everything that is required for the American proceeding. The letters rogatory should include the
names and addresses of all of the witnesses whose evidence is sought and any non-personal
capacity in which they are to be examined.

No order for the production of documents will be made by a Canadian court unless the
documents are "sufficiently identified". A general request to search out and produce all
documents relating to the issue is too broad. Thus, the letters rogatory should identify the
documents sought with such precision as is reasonable in the circumstances of each case. It is best to provide a specific description and list identifying the documents requested.

The inappropriateness of dates set out in letters rogatory will not frustrate otherwise valid letters rogatory. However, it is best if the letters rogatory do not specify a particular date for the examination.

The Canadian Application

Once the letters rogatory are obtained, the next step is for Canadian counsel to apply to the Canadian court for an order enforcing the letters rogatory. The application is made according to the rules of court of the particular province where the letters rogatory are to be enforced.

The affidavit should be sworn by the lawyer involved in the lawsuit in the American jurisdiction and it should contain certain elements. First, it should evidence the jurisdiction of the American court seeking assistance. It should state that the American court authorizing the letters rogatory has proper jurisdiction over the American proceedings, is a competent court of law and equity, and has the power to compel the attendance of witnesses and the production of documents by corporations and individuals both within and outside of its jurisdiction.

Second, the affidavit should outline the issues in the American action and stress that the evidence required is necessary to allow the American court to justly determine the issues before it. Exhibits outlining the progress of the proceeding through pleadings may be helpful in this regard. It is also helpful if the affidavit confirms that the evidence of the witness is not obtainable by consent or without the intervention of the Canadian court, and that the success of the American action depends on the granting or refusing of the order sought in the case.

Third, the burden imposed upon a witness who is to give evidence should be considered in the affidavit. The question considered by the court will be whether the burden to be placed upon the proposed witness by requiring him to attend and give oral testimony or produce documents for inspection is, in all of the circumstances, justified.
Fourth, the affidavit should address any concerns that the Court may have about the order interfering with Canadian sovereignty or public policy. A foreign request will be given full force and effect unless it is contrary to public policy of the Canadian jurisdiction or otherwise prejudicial to Canada or its citizens. Therefore, an order enforcing letters rogatory will be refused if the evidence is sought to be obtained from a person accused of a criminal offence in the US and is intended to be used to incriminate him in an American trial.

**Conclusion**

Having valid and complete letters rogatory, a notice of application and supporting affidavits before it, the Court can then make an order to enforce the letters rogatory. Such an order will name the parties to be examined and the documents to be produced, specify the time and place of the productions and appoint a commissioner.

* Bonnie Roberts is a lawyer practicing commercial litigation at Heenan Blaikie LLP, in Toronto, Canada. Bonnie has extensive experience in the enforcement of letters rogatory and foreign judgments in Ontario.
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
Kohner, 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 CO-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 CO-CHAIR
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

BANKRUPTCY LITIGATION 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

BANKRUPTCY LITIGATION VICE-CHAIR
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
Merrick L. Gross
Akerman Senterfitt
1 S.E/ 3rd Avemie. 28th Floor
Miami, FL 33131
e-mail: merrick.gross@akerman.com
(305) 982-5638
FAX: (305) 374-5095
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

BUSINESS TORTS CO-CHAIR
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

BUSINESS TORTS 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

BUSINESS Torts VICE-CHAIR
Dale Weppner
Danna McKitrick, P.C.
150 N. Meramec 4th Floor
St. Louis, MO 63105
Phone: (314) 726-1000
Fax: (314) 725-6592
dweppner@dmfirm.com

CLASS AND DERIVATIVE ACTIONS VICE-CHAIR
Jay W. Eisenhofer
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@rlf.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
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

CRIMINAL AND ENFORCEMENT LITIGATION CO-CHAIR
Martin Grant
Federal Reserve Bank of New York
33 Liberty Street
New York, NY 10004
e-mail: martin.grant@ny.frb.org
(212) 720-5032
FAX: (212) 720-1530

EMPLOYMENT LITIGATION CHAIR
Bret A. Cohen
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111
e-mail: bcohen@mintz.com
(617) 542-6000
FAX: (617)-542-2241

EMPLOYMENT LITIGATION VICE-CHAIR
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

ENVIRONMENTAL LITIGATION CHAIR
Seth R. Lesser
Bernstein Litowitz Berger & Grossman
1285 Avenue of the Americas
New York, NY 10019
e-mail: seth@blbglaw.com
(212) 554-1400
FAX: (212) 554-1444

ENVIRONMENTAL LITIGATION VICE-CHAIR
Steven Russo
Sive Paget & Riesel, PC
460 Park Avenue
New York, NY 10022-1906
e-mail: sprlaw@aol.com
(212) 421-2150
FAX: (212) 421-1891

ERISA & PENSION LITIGATION CHAIR
Jerome V. Bolkcom
Jorden Burt LLP
Suite 400 East
1025 Thomas Jefferson Street, N.W.
Washington, DC 20007-5208
e-mail: jvd@jordenusa.com
(202) 965-8100
FAX: (202) 965-8104
ERISA & PENSION LITIGATION
VICE-CHAIR
Jeanne L. Bakker
Montgomery McCracken Walker & Rhoads LLP
123 South Broad Street
Philadelphia, PA 19109
e-mail: jbakker@mmwr.com
(215) 772-7521
FAX: (215) 772-7620

PARTNERSHIPS & ALTERNATIVE
BUSINESS ENTITIES CHAIR
Kevin R. Shannon
Potter Anderson & Corroon LLP
Hercules Plaza, 1313 N. Market Street,
P.O. Box 951
Wilmington, DE 19899-0951
e-mail: kshannon@potteranderson.com
(302) 984-6000
FAX: (302) 658-1192

INDEMNIFICATION & INSURANCE
CHAIR
Janet R. McFadden
Drinkard Biddle & Reath LLP
1500 K Street, NW, Suite 1200
Washington, DC 20005
e-mail: janet.mcfaddenl@dbr.com
(202) 842-6800
FAX: (202) 842-8465

PRO BONO CO-CHAIR
Dale M. Weppner
Danna McKirick, P.C.
150 North Meramec Ave, 4th Floor
St. Louis, MO 63105-3907
e-mail: dweppner@dmfirm.com
(314) 726-1000
FAX: (314) 725-6592

INDEMNIFICATION & INSURANCE
VICE-CHAIR
Michael A. Pittenger
Potter Anderson & Corroon LLP
1313 N. Market Street
Hercules Plaza
P.O. Box 951
Wilmington, DE 19899
e-mail: mpittenger@potteranderson.com
(302) 874-6136
FAX: (302) 658-1192

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

INTELLECTUAL PROPERTY CHAIR
Andrew F. Halaby
Snell & Wilmer L.L.P.
One Arizona Center
Phoenix, AZ 85004-2202
e-mail: ahalaby@swlaw.com
(602) 382-6277
FAX: (602) 382-6070

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

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

SECURITIES LITIGATION CO-CHAIR
Jay A. Dubow
Wolf Block Schorr and Solis-Cohen, L.L.P.
1650 Arch Street, 22nd Floor
Philadelphia, PA 19103-2097
e-mail: jdbow@wolfblock.com
(215) 977-2058
FAX: (215) 405-2958

FINANCIAL INSTITUTION
LITIGATION CHAIR
Sandra J. Sutton-Simanski
Maurice & Needleman, P.C.
250 Route 28, Suite 203
Bridgewater, NJ 08807
e-mail: Sandra@mnlawpc.com
(908) 575-0230 x19
FAX: (908) 575-0632

SECURITIES ARBITRATION CO-CHAIR
W. Frank Carroll
WINSTEAD SECHREST & MINICK
P.C.
5400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270
214-745-5106 (phone)
214-745-5390 (fax)
e-mail: fcarrroll@winstead.com

INDEMNIFICATION & INSURANCE
VICE-CHAIR
Michael A. Pittenger
Potter Anderson & Corroon LLP
1313 N. Market Street
Hercules Plaza
P.O. Box 951
Wilmington, DE 19899-0951
e-mail: mpittenger@potteranderson.com
(302) 874-6136
FAX: (302) 658-1192

SECURITIES ARBITRATION CO-CHAIR
Duris L. Holmes
Deutsch, Kerrigan & Stiles, L.L.P.
755 Magazine St.
New Orleans, LA 70130
(504) 593-0650 (phone)
(504) 566-4059 (fax)
e-mail: dholmes@dkslaw.com

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
1000 Brickell Avenue, Suite 1020
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) 553-4054

MEMBERSHIP CO-CHAIR
Lisa K. Wager
19 Dickel Road
Scarsdale, NY  10583
(914) 472-3546
FAX:  (914) 472-3483

NEWSLETTER 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

NEWSLETTER VICE-CHAIR
Peter F. Valori, Esquire
Damian & Valori LLP
1200 Brickell Avenue
Suite 950
Miami, FL 33131
e-mail: pvalori@dvllp.com
(305) 371-3960
FAX:  (305) 371-3965

PROGRAMS CO-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@pacdelaware.com
(302) 984-6000
FAX:  (302) 658-1192

PROGRAMS CO-CHAIR
William D. Johnston
Young Conaway Stargatt & Taylor
The Brandywine Building
1000 West Street, 17th Floor
P.O. Box 391 (19899)
Wilmington, DE 19801-0391
e-mail: wjohnston@ycst.com
(302) 571-6679
FAX:  (302) 576-3304

PUBLICATIONS 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

SMALL FIRMS CHAIR
James R. Hawkins, II
Finn Dixon & Herling
One Landmark Sqa., 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
Pickett 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
e-mail: mreinhard@milchev.com
(202) 626-5800

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