AMERICAN BAR ASSOCIATION
SECTION OF LABOR AND EMPLOYMENT LAW
Employment Rights and Responsibilities Committee
2005 Midwinter Meeting

March 9-12, 2005
Sonesta Beach Resort ~ Key Biscayne, Florida

TUESDAY, MARCH 8, 2005
EMPLOYMENT LITIGATION SKILLS TRAINING

**Note: This program requires separate and advance registration for attendance**

To register, please go to www.abanet.org/labor/calendar.html or contact the Section Office at (312) 988-5813 or laborempllaw@staff.abanet.org.

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<td>Registration (Continental Breakfast will be served)</td>
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<td>8:50 a.m. – 9:00 a.m.</td>
<td>Welcome and Introductions</td>
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<td>9:00 a.m. – 9:45 a.m.</td>
<td>Administrative Process: EEOC Do’s and Don’ts, Ins and Outs</td>
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<td>Avoiding/Exploiting Pleading Pitfalls</td>
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<td>Refining Your Discovery Tactics</td>
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<td>11:30 a.m. – 12:15 p.m.</td>
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<td>Overcoming Obstacles Presented by the Temperamental Judge and the Difficult Adversary</td>
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<td>Winning Trial Techniques and the Importance of Themes</td>
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(This Training Program will be chaired by Ida Castro, former Chair of the Equal Employment Opportunity Commission.)
WEDNESDAY, MARCH 9, 2005

PROGRAM AGENDA

7:30 a.m. – 8:30 a.m.  Let’s Eat: Continental Breakfast and Registration

8:30 a.m. – 10:30 a.m. It’s Elementary … Actually, It’s Basic: Basic Employment Rights & Responsibilities

This program provides an introduction to some of the major legal issues of interest to the ERR Committee, including employment agreements, workplace privacy, employer investigations, wrongful discharge and employment torts. This panel will also give practical tips for dealing with clients, adversaries and judges in employment matters.

Moderator: Louis Lopez, U.S. Department of Justice, Washington, DC

Panelists: Mark Risk, Filippatos Risk LLP, New York, NY
Eric Tate, Morrison & Foerster LLP, Palo Alto, CA
Ken Willner, Paul, Hastings, Janofsky & Walker, Washington, DC
Samantha Grant, Mitchell, Silverberg & Knupp, Los Angeles, CA
Laura Khare, Motley Rice LLC, Charleston, SC

9:30 a.m. – 10:30 a.m. Please Pass a Donut: Subcommittee Co-Chair Meetings

10:30 a.m. – 10:45 a.m. Break

10:45 a.m. – 11:45 a.m. The Development and Implementation of Effective Organizational Diversity Initiatives

This program will focus on legal issues and practical benefits and challenges that employer organizations (including law firms and corporate law departments) encounter when they set goals and implement policies trying to achieve diversity in their workforces.

Speakers: Ida Castro, CUNY School of Law, New York, New York
Warren Jackson, The DIRECTV Group, Inc., El Segundo, CA
Sylvia James, Holland & Knight, LLP, Washington, DC

(This Program Will Be Coordinated by the ERR Committee’s Diversity Outreach Initiative Taskforce – “DOIT”)

11:50 a.m. – 12:50 a.m. New Kids on the Block: First Timer Luncheon / Orientation

There is such a thing as a Free Lunch. Section and Committee Leaders will mingle with and speak to new people about what ERR does and how people can get involved.

1:00 p.m. – 1:15 p.m. Opening Ceremony: My Kind of Town (Welcome and Greetings from The Mayor)

The Honorable Don Slesnick, Mayor, Coral Gables, Florida
To ERR Is Human

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PROGRAM AGENDA

1:15 p.m. – 2:15 p.m. Joint Plenary Session with the ERR Committee and the Technology Committee:
Misuse of Technology in the Civil Context

Necessary and useful technology can be misused by the employer and the employee. The discussion will
include possible types of misuse, employer and employee rights and responsibilities, including the extent of
possible employer control, and employer liability arising from employee misuse.

Speakers:  Doug Dexter (Management), Farella Braun + Martel LLP
Alan Schuchman (Management), Holland & Hart LLP
Robert Kilbride, VP & Assoc. GC, The Wackenhut Corporation, Palm Beach Gardens, FL
Ben Barrett (Individual Employee/Plaintiff), Barrett & Farahany LLP, Atlanta, GA

2:15 p.m. – 3:15 p.m. Joint Plenary Session with the ERR Committee and the Technology Committee:
Cybersmear: It’s What the Internet is For, Right?

This program will focus on the (often anonymous) use of the Internet and the World Wide Web to defame,
degrade and breach confidences of employers and employees, and what can be done – legally and
practically – to stop it.

Speakers:  James Barber (Management), Clausen, Miller, Chicago, IL
Mark Risk (Individual Employee/Plaintiff), Filippatos Risk LLP, New York, NY
Julie Totten (Management), Orrick Herrington & Sutcliffe, Sacramento, CA
Stephen E. Fox, Fish & Richardson, Dallas, TX
Sean R. Gallagher, Hogan & Hartson, Denver, CO

3:15 p.m. – 3:30 p.m. Break

3:30 p.m. – 4:15 p.m. We Can Search and We Can Inspect – And We Have Documents That Say So!:
The Effect and Legal Implications of Employer Anti-Privacy Disclaimers

This program will explore whether judicial rulings on these disclaimers are destroying the law of privacy.
How should courts respond to employer claims that such disclaimers preclude reasonable expectations of
privacy or constitute implied consent? An update on the current state of the law on privacy disclaimers,
followed by a lively debate among privacy attorneys from various viewpoints.

Speakers:  Cary Schwimmer (Management), Kiesewetter, Wise, Kaplan, Schwimmer & Prather,
Memphis, TN
Craig Cornish (Individual Employee/Plaintiff), Cornish & Dell'Olio, Colorado Springs, CO
Paul Tobias (Individual Employee/Plaintiff), Tobias, Kraus & Torchia, Cincinnati, OH

(Presented by the Employee Privacy Subcommittee)
To ERR Is Human

WEDNESDAY, MARCH 9, 2005

PROGRAM AGENDA

4:15 p.m. – 5:00 p.m. Welcome to the Jungle: Pick a Fund, Any Fund: Mutual Fund Scandals as a Stacked Deck for Employers: How Much Must an Employer Do To Protect Its Employees? And How Are These and Other ERISA Issues Affected in the Litigation Context by the Aftermath of the Supreme Court’s decisions in Varity Corp. and Great West?

Speakers: Jim Zalewski (Management), DeMars, Gordon, Olson & Zalewski, Lincoln, NE
Erin Sweeney (Public), U.S. Department of Labor, Washington, D.C.
Ned Milenkovich (Management), Jones Day, Chicago, IL
Susan Martin (Individual Employee/Plaintiff), Martin & Bonnett, Phoenix, AZ

(Presented by the ERISA and Employment Benefits Litigation Subcommittee)

6:30 p.m. – 7:00 p.m. How Are You? First-Timer/New Member Meet-and-Greet Reception

7:00 p.m. – 9:00 p.m. Let’s Party: Welcome Reception … and Then To South Beach …
THURSDAY, MARCH 10, 2005

PROGRAM AGENDA

7:30 a.m. – 8:00 a.m. Breakfast for Five … or More: Continental Breakfast and Round Table Discussions

The Breakfast Sessions at 7:30 a.m. on Thursday, Friday and Saturday mornings are informal gatherings of interested lawyers, and they are designed to encourage group discussions about various topics that have been identified as issues of importance to ERR Committee members. These will not include any formal lecture or presentation, and no written materials will be distributed about the topic. Instead, the issues raised by the attendees and the facilitators will drive the group discussion. These breakfast discussions will last thirty to forty-five minutes and, because of their informal nature, are not approved for CLE credit.

- A Matter of Trust – What Makes it and What Breaks it Among Opposing Counsel
  Discussion Facilitator: Denise M. Mercherson, Chicago, IL

- In-House/Out-House: The Sears Catalog of Wish Lists
  Discussion Facilitator: Robert Wood, Hughes & Luce, Dallas, TX

- A Discussion of the Status of the American Law Institute’s “Restatement of Employment Law” Project
  Discussion Facilitators: Wayne Outten, Outten & Golden, New York, NY and Paul Tobias, Tobias, Kraus & Torchia, Cincinnati, OH

8:00 a.m. – 8:45 a.m. Background Checks: Keeping Murderers, Thieves and Miscreants from Our Midst

The Wall Street Journal recently reported that 90% of major employers in the United States are now conducting background checks. This program addresses the burgeoning number of statutes and cases dealing with background checks, negligent hiring tort claim developments, the Fair Credit Reporting Act's recent amendments dealing with investigations, the tensions created by new state laws protecting arrest records and sealed/expunged convictions, and the "neutral references" conundrum (focusing on recent media reports about how companies hired serial killers and other bad actors after their prior employers gave only neutral references).

Multi-media presentation of articles and news reports, followed by a discussion by a security consultant and practicing attorneys.

Moderator: Paul Starkman, Arnstein & Lehr, Chicago, IL

Speakers: Margaret A. Daley, Navigant Consulting, Chicago, IL
Amanda Farahany, Barrett & Farahany, LLP, Atlanta, GA

(Presented by the Employment At-Will/Collateral Torts Subcommittee)
THURSDAY, MARCH 10, 2005

PROGRAM AGENDA

8:45 a.m. – 9:30 a.m. Staying Alive: Best Practices in Corporate Compliance Programs

Corporate counsel will present this program detailing employment law issues that should be covered in formal employee complaint programs (e.g., Sarbanes-Oxley, harassment, discrimination, health and safety issues, etc.) Also included in the program are elements of a successful program (guidance from federal sentencing guidelines, Farragher and Ellerth, Sarbox regulations, agency guidance, etc.)

Speakers: Jeffrey S. Heller, BP America Inc., Warrenville, IL
Adele Rapport, EEOC, Detroit, MI
Lindsay Johnston, PJM Interconnection, L.L.C., Norristown, PA
Melinda Burrows, Progress Energy Service Company, LLC, Raleigh, NC

(Presented by the Corporate Counsel Caucus)

9:30 a.m. – 9:45 a.m. Break

9:45 a.m. – 10:30 a.m. How Do You Say Covenant in French … Spanish … German? Enforcing Covenants Not to Compete In the International Workforce.

A panel of experts from Canada, France, Germany, and the United Kingdom will discuss issues that must be considered in drafting and enforcing covenants-not-to-compete under the laws of those countries and the European Union. The panelists will focus on practical pointers that American attorneys should keep in mind when advising clients about the extent to which an employee working overseas can be restricted from competing against a former employer here and abroad.

Moderator: Wayne Outten, Outten & Golden, LLP, New York, NY
Ming Henderson Vu Thi, Paris, France
Thomas Roper, Ogilvy Renault, Vancouver, BC
Gerlind Wisskirchen, Norton Rose Vieregge, Cologne, Germany

(Presented by the International Law Subcommittee)

10:30 a.m. – 10:45 a.m. Hello from Howard

Welcome and News From the Section Chair, Howard Shapiro
10:45 a.m. – 11:30 a.m. Nothing Up the Sleeve: Are There Any Rights When There Is No Written Covenant?

In a world where all of a company’s key trade secrets can be instantaneously emailed to a competitor or walk out the door in a device the size of a matchbook, what are the respective rights and obligations of employees and employers when there is no written agreement such as a covenant not to compete or a nonsolicitation agreement? What is the impact of statutes like the Computer Fraud and Abuse Act (which includes criminal penalties), the Sherman Antitrust Act (which permits claims for “predatory hiring”), and the Uniform Trade Secrets Act? What should employers do to protect themselves when hiring employees from competitors? This fast-paced session will combine an entertaining fact pattern with a review of the underlying law and the latest developments, as well as practical advice for counseling both employers and employees, including electronic discovery and evidence preservation issues.

Moderator: Bob Blackstone, Davis Wright Tremaine, Seattle, WA

Speakers: Michael Rosen (Management), Foley Hoag, Boston, MA
Charles Poplstein (Management), Thompson Coburn, St. Louis, MO
Robert Whitman (Management), Orrick Herrington & Sutcliffe, New York, NY
Steve Fox (Management), Fish & Richardson, Dallas, TX
Cassandra Ferrannini (Management), Downey Brand, Sacramento, CA
Arnie Pedowitz (Individual Employee/Plaintiff), New York, NY
John Rubiner (Individual Employee/Plaintiff), Bird Marella, Los Angeles, CA

(Presented by the Proprietary Information/Trade Secrets/Survey on Individual Responsibilities, Covenants Not To Compete, Loyalty and Conflicts of Interest Subcommittee)

11:30 a.m. – 12:30 p.m. Who’s On First?: Conflicts and Confusion in the Representation of Multiple Parties

This hour-long ethics program discusses conflicts from the management attorney perspective, including continuing the joint representation of the corporate and individual defendants after the individual has been terminated by the employer, as well as insurance coverage implications when such representation is no longer possible. It also explores the employee attorney’s decisions in representing multiple plaintiffs in disparate treatment cases. There will also be discussions about what happens when the EPL carrier wants to settle, but not all defendants agree, and what to tell your client (insurer/employer/employee) when he/she asks your opinion about engaging in one-on-one communications with the opponent during litigation.

Speakers: Yvonne C. Ocrant, Hinshaw & Culbertson, Chicago, IL
David L. Keenan, Chubb & Son, Tampa, FL
H. Rowan Leathers, Manier & Herod D.C., Nashville, TN
Liz Bair, Wilentz Goldman & Spitzer, Woodbridge, NJ
Robert Kraus, Salisbury & Ryan, New York, NY
Jerome Richey, Buchanan Ingersoll P.C., Pittsburgh, PA
Joseph Yastrow, Laner Muchin, Chicago, IL

(Jointly Presented by the Ethics in Litigation and Insurance Subcommittees)

12:30 p.m. – 1:15 p.m. What’s In Your Box Lunch?: Subcommittee Meetings
THURSDAY, MARCH 10, 2005

PROGRAM AGENDA

2:00 p.m. Beach Volleyball (Arrangements by the Membership Subcommittee)

5:00 p.m. – 7:00 p.m. Refresh Yourself: Catch Your Breath and a Drink --Come-As-You-Are Cocktail Reception (Cash bar)

7:30 p.m. – 11:00 p.m. Anyone Hungry? South Beach Dine-Around (Definitely Not the South Beach Diet!!!!)
Sign-up sheets posted Wednesday at Registration Desk (Buses Depart @ 7:30 pm)
FRIDAY, MARCH 11, 2005

PROGRAM AGENDA

7:30 a.m. – 8:15 a.m. Can We Talk With Our Mouths Full?: Continental Breakfast and Round Table Discussions Continued

The Breakfast Sessions on Thursday, Friday and Saturday mornings are informal gatherings of interested lawyers, and they are designed to encourage group discussions about various topics that have been identified as issues of importance to ERR Committee members. These will not include any formal lecture or presentation, and no written materials will be distributed about the topic. Instead, the attendees and the facilitators will drive the group discussion.

- Arbitration Success Tips From the Pros
  Discussion Facilitator: John E. Sands, Arbitrator and Mediator, West Orange, NJ

- “Ni Hao”: First Hand Observations of Labor and Employment Law Practice in China from Committee Members Who Have Been There
  Discussion Facilitators: Wayne Outten, Outten & Golden, New York, NY; Denise M. Mercherson, Chicago, IL; Paul Tobias, Tobias, Kraus & Torchia, Cincinnati, OH

- Nightmare Clients: Ethical and Insurance Issues
  Discussion Facilitator: Eugene A. Boyle, Neal, Gerber & Eisenberg LLP, Chicago, IL

8:15 a.m. – 10:15 a.m. This Program Has Appeal!!

Closing arguments from an actual trial with an appeal following. This harassment case will focus on whether the plaintiff suffered severe and pervasive treatment based on comments that were made to her about her interracial relationship and various other sexual advances and crude remarks. The closing argument at trial will address whether under Title VII there was an environment of illegal sexual harassment, while the appeal will consider whether the trial court properly dismissed the plaintiff’s race discrimination claim. A trial judge will preside over the closing arguments, and a panel of appellate judges will hear the appeal.

Participants: The Honorable Milton I. Shadur, U.S. District Judge, Northern District of Illinois
The Honorable Henry Lee Adams, Jr., U.S. District Judge, Middle District of Florida
The Honorable Denise Page Hood, U.S. District Judge, Eastern District of Michigan
U.S. Magistrate Judge Andrew Peck, Southern District of New York
Bob Goldich (Management), Wolf, Block, Schorr & Solis-Cohen, LLP, Lafayette Hill, PA
Lloyd Chinn (Management), Proskauer Rose LLP, New York, NY
Ed Buckley (Individual Employee/Plaintiff), Buckley & Klein, Atlanta, GA
Adele Rapport (Public), EEOC, Detroit, MI
Ben Ghess (Management), Neal, Murdock & Leroy, LLC, Chicago, IL

(Presented by the Trial Advocacy Subcommittee)
FRIDAY, MARCH 11, 2005

PROGRAM AGENDA

10:15 a.m. – 11:00 a.m. Settlement Strategies in Class, Collective or Pattern and Practice Cases

The mediator’s, plaintiff’s, defendant’s and EEOC’s perspectives for resolving complex cases. Topics to be considered will include: feasibility of settlement at different phases of a case; the role of the mediator in settlement negotiations and the consent decree; notice requirements to absent class members; potential for stipulating to the class; achieving finality, including the risk of "copy-cat" litigation and obtaining res judicata; financial and publicity considerations; monetary damages, settlement fund, claims process and formula versus individualized relief; injunctive relief, opt-out/opt-in considerations; controlling the risk of objections; monitoring and reporting options; ethical issues in obtaining settlement approval from class members; and fallout if settlement negotiations fail.

Speakers: Richard L. Alfred (Management), Seyfarth Shaw LLP, Boston, MA
Greg Gochanour (Public), EEOC, Chicago, IL
Hunter R. Hughes (Management), Rogers & Hardin, LLP, Atlanta, GA
John M. Husband (Management), Holland & Hart LLP, Denver, CO
Roberta L. Steele (Individual Employee/Plaintiff), Goldstein, Demchak, Baller Borgen & Dardarian, Oakland, CA

(Presented by the Class Action Subcommittee)

11:00 a.m. – 11:15 a.m. Break

11:15 a.m. – 11:30 a.m. Extra, Extra!! Publications Subcommittee Report

Meet our new ERR Committee Editorial Board: Samantha Grant, David Carr, Christine Cooper, Jim Barber, Elizabeth Bair, Ed Reeves, Margaret Angelucci, Kathleen Mulligan

11:30 a.m. – 12:15 p.m. Hot Topics In Sexual Orientation Cases

Presentation of legislative developments pertaining to sexual orientation, including benefits issues and stereotyping.

Moderator: Frank Van Dusen, Miller Nash LP, Seattle, WA

Speakers: Margaret Angelucci (Employee/Union), Asher, Gittler, Greenfield & D'Alba, Chicago, IL
Delner Franklin-Thomas (Public), EEOC, Miami, FL
Karla McKanders (Management), Miller, Canfield, Paddock and Stone, PLC, Detroit, MI

(Presented by the Legislative Developments Subcommittee)

1:00 p.m. – 6:00 p.m. Golf Tournament and Tennis Round Robin

1:30 p.m. – 5:00 p.m. Everglades Tour (optional ticketed event)

7:00 p.m. – 11:00 p.m. Time to Eat and Party: Friday Night Dinner and Dance Reception
SATURDAY, MARCH 12, 2005

PROGRAM AGENDA

7:30 a.m. – 8:15 a.m. Still Not Full? Continental Breakfast and Round Table Discussions Continued

The Breakfast Sessions on Thursday, Friday and Saturday mornings are informal gatherings of interested lawyers, and they are designed to encourage group discussions about various topics that have been identified as issues of importance to ERR Committee members. These will not include any formal lecture or presentation, and no written materials will be distributed about the topic. Instead, the attendees and the facilitators will drive the group discussion.

- Juice with the Judiciary
- When Your Employee is Deployed: How the Use of the Military in the War on Terror Affects Your Workplace
  Discussion Facilitator: Sam Brock, Spilman Thomas & Battle, Charleston, WV

8:15 a.m. – 9:00 a.m. My Protected Category Trumps Yours!: Bridging Conflicting Anti-Discrimination Rights

This program will address the potential for conflict between various protected groups of employees, focusing on recent case law developments. In one such case, an employee in Colorado, who refused to sign a diversity policy that required him to respect the values of homosexuals and Buddhists, won a $150,000 verdict after he was fired. In another, a court dismissed the religious discrimination claim of an evangelical Christian who was fired for harassing a lesbian employee.

Speakers: Peter Ohr (Public), NLRB, Honolulu, HI
          Niall Paul (Management), Spilman Thomas & Battle, Charleston, WV
          Christopher Lenzo (Individual Employee/Plaintiff), Wilentz Goldman & Spitzer, Woodbridge, NJ

(Presented by the Statutory Rights Subcommittee)
9:00 a.m. – 9:45 a.m.  Should I Stay or Should I Go?: The Role of the Courts in Private ADR Agreements

A discussion of a variety of issues in which the courts are involved in otherwise private ADR procedures, including:

“Front-End” Issues: Considerations for motions to stay/compel; Whether the FAA empowers courts to compel a form of ADR other than arbitration; Judicial involvement in ADR case management.

“Back-End” Issues: Contractual efforts to modify standards for judicial review; Vacating/enforcing arbitration awards.

Speakers: Daniel B. Boatright (Management), Spencer Fane Britt & Browne LLP, Kansas City, MO
Elizabeth Pryor Johnson (Management), Fowler White Burnett, PA, Miami, FL
Felix J. Springer (Management), Day Berry & Howard LLP, Hartford, CT
Pearl Zuchlewski (Individual Employee/Plaintiff), Goodman & Zuchlewski LLP, New York, NY
U.S. Magistrate Judge Ted E. Bandstra, U.S. District Court for the Southern District of Florida

(Presented by the Alternatives to Litigation Subcommittee)

9:45 a.m. – 10:30 a.m.  What They Said and What It Means: The Supreme Court’s Year in Review Plus Other Recent Developments in ERR

Our expert panel will analyze the Court’s significant employment law decisions and how they affect employee relations, litigation strategy, and damages.

Moderator: Eric Iskra, Spilman, Thomas & Battle, PLLC, Charleston, WV

Speakers: Ty Hyderally (Individual Employee/Plaintiff), Montclair, NJ
David L. Johnson (Management), Miller & Martin PLLC, Nashville, TN
Delner Franklin-Thomas (Public), EEOC, Miami, FL
Michelle M. Gallardo, Office of General Counsel, Ford Motor Company, Detroit, MI

(Presented in Conjunction with the Young Lawyers Division)

10:30 a.m. – 10:45 a.m.  Break
PROGRAM AGENDA

10:45 a.m. – 11:30 a.m. Mind Over Matter: Interconnected, Interrelated and Interesting Issues in Interpreting FMLA and ADA Claims, with a Focus on Mental and Emotional Impairments

This program will address issues that surface when addressing mental conditions such as ADD, ADHD, bipolar disorder and severe depression, which are potentially covered under both FMLA and ADA. Topics will include the interplay between the leave obligations of the FMLA and the reasonable accommodation obligations of the ADA, return to work issues under both statutes, and the availability of assistive technology to provide an accommodation.

Moderator: Glen D Savits, Green & Savits, LLC, Morristown, NJ

Speakers: Tami Earnhart (Management), Ice Miller, Indianapolis, IN
Bennet Zurofsky (Employee/Union), Reitman Parsonnet PC, Newark, NJ
Dan Kohrman (Individual Employee/Plaintiff), AARP Foundation Litigation, Washington

(Presented by the Health, Disability and Leave of Absence Subcommittee)

11:30 a.m. – 12:15 p.m. Wondering About WARN: 10 Questions You Never Thought to Ask

When can an employer escape the obligation to give notice? How should a company handle notice if it is going into bankruptcy? Is there a right to a jury trial? This session will address some unsettled or otherwise quirky issues under this amorphous statute.

Speakers: Eric Tate (Management), Morrison & Foerster, LLP, Palo Alto, CA
Julie Gottshall (Management), Katten, Muchin, Zavis Rosenman, Chicago, IL
Mark Fancher, Sugar Law Center

(Presented by the Worker Dislocation Subcommittee)

12:15 p.m. – 12:45 p.m. Time to Say Good Bye: Feedback and Wrap Up

A participatory forum to discuss your views of this year’s program and your ideas for 2006.