JUANITA SALES LEE

Coming Home to Indian Country: More Firsts in Native Leadership

The Federal Bar Association is continuing its tradition of employing the talents of all Americans as national leaders. Next September, when Lawrence Baca becomes president of the association, he will be our first Native American president and the first of any national

nonminority bar. Born in Montrose, Colo., Baca grew up in El Cajon, Calif. He earned a B.A. in American Indian history and culture from the University of California, Santa Barbara, in 1973. Baca graduated from Harvard University Law School, after which he worked at the U.S. Department of Justice, where he was the first Native American ever hired under the attorney general's Honor Law Program. In addition, he was the first Native American lawyer ever hired to work in the department's Civil Rights Division. Because of his groundbreaking work in civil rights as well as his many years of service to the Indian Law Section, the section created the Lawrence R. Baca Lifetime Achievement Award to recognize individuals who have worked diligently in the field of federal Indian law.

In recognition of the FBA's 34th Annual Indian Law Conference, to be held in Santa Fe, N.M., in April 2009, I will use my message this month to present a brief history of Native American leadership in the national political process of the United States. The first person of color to be elected vice president of the United States was Charles Curtis, a Native American enrolled member of the Kaw Nation of Oklahoma. Curtis served as vice president from 1929 to 1933.

Vice President Curtis had previously served as a U.S. representative and senator from Kansas. Born in Topeka, Kan., in 1860, Charles Curtis began his law practice in Topeka. He served as prosecuting attorney of Shawnee County from 1885 to 1889 and was elected to the 53rd Congress and to the six succeeding Congresses, serving from March 4, 1893, until Jan. 28, 1907, when he resigned, having been elected to the Senate. He was re-elected to the 60th Congress and served from 1907 to March 3, 1913. He was re-elected to the Senate in 1914 and again 1920 and 1926. He resigned his senatorial seat to assume the vice presidency. In all, Curtis served 14 years in the House of Representatives and 20 years in the Senate before becoming vice president.

There is a connection between Vice President Curtis and the FBA. Justice D. Michael McBride III, the immediate past chair of the FBA's Indian Law Section, was a justice on the Supreme Court of the Kaw Nation from 1999 to 2004.

Last year, the Indian Law Section's Annual Indian Law Conference discussed a historical connection between Native Americans and African Americans. A small number of Indian nations held African slaves prior to the Civil War and the adoption of the 13th Amendment. After ratification of the amendment, the United States entered into new treaties with each of the slave-holding Indian tribes requiring their slaves and progeny be made members of those tribes. Today those members are called the Freedmen. In the modern era, some of the former slave-holding tribes have sought to alter their membership criteria in ways that exclude many of their Freedmen members. (See "Should the United States be Fighting for Jim Crow's Survival by Its Complicity in Denying Voting Rights to the Cherokee Freedmen" by Jon Velie, published in the February 2007 issue of *The Federal Lawyer*.)

In *Vann v. Norton*, a case discussed at length at the conference, the federal district court for the District of Columbia ruled that the Cherokee Nation of Oklahoma could be sued by disenrolled Freedmen members to enforce the 13th Amendment, because Freedmen who lost their membership in the tribe also lost their right to vote. Even though most of the provisions of the Constitution are not applicable to tribes, the 13th Amendment has been held to apply to tribes, because it forbids slavery anywhere "within the United States, or any place subject to their jurisdiction." The Freedmen allege that they are denied the right to vote on account of race and former condition of servitude and that this is a "badge or incident of slavery."

Last year the Court of Appeals for the D.C. Circuit modified the trial court's opinion, upholding the tribe's immunity from suit but finding that, under the doctrine of Ex parte Young, tribal officials may be sued for alleged violations of federal or constitutional law. As of this writing, neither side has sought certiorari;

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a purported infringer and that he would be "authorized to consider taking suitable legal and equitable action," but the party who filed the declaratory judgment was allowed to proceed because the letter was "suggestive of negotiations."[7] In another case, a sender wrote that he would have "little choice but to seek additional legal remedies," but there was no notice of a planned lawsuit.[8] A sender of a cease-and-desist letter who plans to rely on the notice exception to the first-to-file rule should be specific: the court, the date of filing, and the nature of the claims should be specified in the letter.

The rules are not hard-and-fast, and courts will make exceptions to the first-to-file rule when they believe that a party or an attorney has engaged in deceptive practice, forum shopping, or other inequitable conduct. In one case, the court disregarded the first-to-file rule when the party threatening a lawsuit had given a deadline for a response and the first party to file did so a day before the deadline expired.[9]

You should think hard before sending out that next cease-and-desist letter and be sure to advise your client of the potential consequences. **TFL**

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Endnotes

[1]28 U.S.C. § 2201.

[2]*Red Wing Shoe Co. v. Hockerson-Halberstadt Inc.*, 148 F.3d 1355 (Fed. Cir. 1998).

[3]514 F.3d 1063 (10th Cir. 2008).

[4]223 F.3d 1082 (9th Cir. 2000).

[5]*See*, for example, *Red Carpet Studios Div. of Source Advantage Ltd. v. Sater*, 465 F.3d 642 (6th Cir. 2006).

[6]*Red Wing Shoe Co.*, *supra* note 2.

[7]*J. Lyons & Co. Ltd. v. Republic of Tea Inc.*, 892 F. Supp. 486 (S.D.N.Y. 1995).

[8]*Abovepeer Inc. v. Recording Indus. Ass'n of America Inc.*, 166 F. Supp. 2d 655, 658 (N.D.N.Y. 2001).

[9]*Int'l Development Corp. v. INTP Inc.*, 2004 WL 2533560 (N.D. Tex. 2004).

Editorial Policy

The Federal Lawyer is the magazine of the Federal Bar Association. It serves the needs of the association and its members, as well as those of the legal profession as a whole and the public.

The Federal Lawyer is edited by members of its editorial board, who are all members of the Federal Bar Association. Editorial and publication decisions are based on the board's judgment.

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therefore, the matter will return to the trial court. The court may dismiss the case on the grounds that the tribe is an indispensable party that cannot be brought before the court, or the case may go to trial to test whether the actions taken do, in fact, violate any law.

Finally, the country has no active sitting federal judge who is Native American on the bench today, and in American history there have been only two Native American federal judges. It is simply impossible to believe that, in the history of the federal judicial system, only two Native Americans have met the qualifications to be appointed by the President. I encourage President Obama to cast the widest net possible in his search for men and women to fill vacant seats in the federal judiciary.

I invite you to meet me in Santa Fe for the exciting and history-making 34th Annual Indian Law Conference entitled "Coming Home to Indian Country." For the first time in history, the conference will take place in a tribal community, at the Pueblo of Pojoaque's Hilton Buffalo Thunder Resort and Casino, on April 2–3, 2009. I offer my congratulations to the officers of the Indian Law Section and the conference planning committee for what looks to be a superior program. **TFL**

Juanita Sales Lee