

Public Law News

A Publication of the Minnesota State Bar Association Public Law Section

Volume XIII, Issue 2, Winter 2003-2004

Public Law Section

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Visit the PLS web site:

<http://www2.mnbar.org/sections/public-law/index.htm>

Public Law Section Seeks Nominations For 2004 Public Attorney Awards

By: Louis Thayer, Esq., Minnesota Department of Human Services

The Minnesota State Bar Association-Public Law Section (PLS) invites nominations for awards honoring attorneys and judges engaged in public service and in the public practice of law. Through these awards the PLS celebrates our commitment to public service and the public practice of law. These awards are also used to recognize attorneys and judges who have distinguished themselves by their significant and outstanding contributions to public service and the public practice of law. Nominations are due **FEBRUARY 20, 2004**. Please contact any Executive Council member of the PLS for further information about the awards. A nominee does not need to be a member of the Minnesota State Bar Association to be eligible for an award. The awards include:

1. **Rosalie E. Wahl Judicial Award of Excellence**

This award is named for former Minnesota Supreme Court Justice Rosalie Wahl whose work as a Justice encompassed the attributes of the award. Justice Wahl is highly regarded, not only for her work as a judge but also for her dedication to and tireless efforts on projects improving the justice system.

The PLS seeks to honor appellate, federal court, state district court, or administrative law judges in Minnesota who not only have high ideals, personal character and judicial competence, but also have gone beyond the ordinary call of duty, participating in projects focused on improving the quality of justice or the justice system. Nominated judges must have been on the bench for at least five years.

2. **Julius E. Gernes Public Attorney Award**

This award is intended to recognize the work and dedication of an outstanding public attorney working in the State of Minnesota as a County/City Attorney and/or as a criminal prosecutor at the federal, state, or local level. The award is named in memory of the late Julius E. Gernes, former Winona County Attorney and Chief Prosecutor who was well known and highly regarded by County Attorneys throughout Minnesota and whose professional achievements as a public attorney encompass the attributes of this award.

3. **William E. McGee Public Defender Award of Excellence**

The William E. McGee Public Defender Award of Excellence is intended to recognize the work and dedication of an outstanding public attorney working in the State of Minnesota as a public defender at the federal, state or local level. The award is named in memory of the late William E. McGee, former public defender, to recognize his contributions and commitment to the fair, nondiscriminatory administration of justice and representation of citizens of limited means. The award would also recognize his extraordinary leadership, initiative and innovation in the performance of his duties as Hennepin County's Chief Public Defender.

4. **Public Attorney Award of Excellence**

The Public Attorney Awards of Excellence are the primary method of recognizing the work and dedication of outstanding Public Attorneys. Awards are given annually with the goal of including award recipients from diverse areas of public practice. Recipients are selected from the following areas:

Public Law Office Counsel in noncriminal law positions

In-house agency counsel, including lawyers with such titles as staff attorneys, legal analysts, law clerks, or holding nonlegal government leadership positions.

Persons nominated for the Julius E. Gernes Award, the William E. McGee Award, or Public Attorney Awards of Excellence must have at least 5 years of experience as a public attorney. They must have engaged in activities that show dedication and commitment to public service and the public practice of law. Nominees may also distinguish themselves by making significant contributions that aid in the operation of government or the practice of law and/or by demonstrating extraordinary leadership, initiative, or innovation in the performance of their duties.

5. **Douglas K. Amdahl Public Attorney Career Achievement Award**

This award is intended to recognize retired or retiring Public Attorneys who have had distinguished careers

as Public Attorneys, have made many significant contributions to public service and are recognized as models of the dedication and commitment of Public Attorneys.

Nominations must be submitted no later than February 20, 2004 by mail, fax, or email to:

Jay Heffern (Jay.Heffern@ci.minneapolis.mn.us)
Minneapolis City Attorney's Office
333 South 7th Street, Suite 300
Minneapolis, MN 55402-2453
Phone: 612-673-3272; Fax: 612-673-3811

OR

Louis Thayer (louis.thayer@state.mn.us)
Minnesota Department of Human Services
Appeals Division
444 Lafayette Road
St. Paul, MN 55155-3813
Phone: (651) 296-2384; FAX: (651) 297-3173

A nomination should consist of the following:

- 1) Nominee's full name, employer, address and phone number;
- 2) Nominator's name, employer, phone number and address;
- 3) Attach a short narrative statement (not to exceed two pages) explaining how you know the nominee and describing the nominee's qualifications for the award; and
- 4) Nominee's resume, if available.

Public Law Section Volunteers in Action!

By: Nancy McLean, Assistant Hennepin County Attorney

Public Law Section members and friends are invited to help prepare food for those less fortunate. The first Wednesday of every other month we volunteer to prepare a meal through Loaves and Fishes. We gather at Holy Rosary Church at 2424 18th Avenue South in Minneapolis at approximately 3:00 p.m. to begin the food preparation. We are usually done by 5:30 p.m., when another group comes in to serve the meal. We will be preparing meals on December 3, 2003; February 4, 2004; and April 7, 2004. Come join us! Please contact Nancy McLean at (612) 348-6755 if you're interested.

Loaves and Fishes Volunteers, August 6, 2003



*Taking a break from the hard work:
Claudia Zweber, Nancy Gove, Steve Fouts, Nancy McLean, Al Harris, Leeann Lundberg, Kim Buechel Mesun, John Kirwin.*



"It is so much fun to wrap forks and spoons in napkins!"

**THE NEXT LOAVES & FISHES OPPORTUNITY IS
WEDNESDAY, DECEMBER 5**

IMLA Comes To Minnesota

By: Terry L. Adkins, Rochester City Attorney

Each year, usually during the fall, city attorneys from the United States and Canada gather to discuss municipal legal issues, establish or renew friendships with fellow municipal lawyers and get the latest legal information on hot public law topics. We do so under the umbrella of the IMLA: International Municipal Lawyers Association. In October of 2003, and for the first time, this annual rite of fall occurred in Minnesota. The Minneapolis City Attorney's Office hosted the 2003 IMLA Annual Conference from October 12-15 at the Minneapolis Hilton Hotel.

One always wonders about Minnesota weather in October. But, as it turned out, the weather was beautiful and very fall-like for our North American visitors. The Conference began on Sunday, October 12th with various meetings on relevant topics, a day-long "crash course" on a variety of municipal topics for new municipal attorneys and a wonderful land use tour that highlighted several land use issues occurring in Minneapolis (and also gave visitors to view brilliant fall colors on a bright, sunny October day). That evening, the Conference's social events began with a marvelous opening reception at the Minneapolis Institute of Art. Many attendees complimented the wonderful exhibits at the Institute and, as well, the abundant food and drink made available during the reception.

On Monday, October 13th, the Conference presented a full day of educational and useful seminars. The land use section addressed the U.S. Supreme Court's Lake Tahoe decision and its impact on development moratoria as well as innovative land use controls for the 21st Century. There were presentations on the recent international trade laws/treaties and their impact on municipal government, the legal relationship between Indian nations and local governments, and the ongoing impact of the preemption and federalism doctrines upon the relationship between the federal and local governments.

On Tuesday, October 14th, the "roundtable series" continued its traditional appearance at the Conference. The "roundtable" involves separate tables staffed by knowledgeable practitioners concerning specific legal topics. The idea is that a municipal lawyer can go to a roundtable, throw out a subject germane to that particular roundtable and see what discussion occurs. This year's roundtable subjects included warrantless entries in

domestic violence cases, Indian gaming law, and technology and the public law office.

However, the highlight for Tuesday was the appearance of Minnesota's own Al Franken at the noon luncheon. Many "old timers" could not recall seeing a noon luncheon as well-attended as this one. He was, as one would expect, entertaining and controversial. Many attendees stood in line for up to an hour following the luncheon to have Franken sign for them a copy of his most recent book.

Wednesday, October 15th saw the Conference's adjournment. The last substantive topic was legal ethics, which may not be the most captivating way to conclude a seminar. But, to bring the Conference to an entertaining conclusion, a speaker used movie clips from well-known lawyer movies to prompt a discussion on legal ethics. Some of the movie scenes included in the discussion were *My Cousin Vinny*, *Liar, Liar, And Justice For All*, *Legally Blonde* and *The Rainmaker*. It was a novel approach to a presentation on legal ethics and it successfully captured the attendees' attention.

The Minneapolis IMLA Conference was well-received and quite successful. Many attendees sought out members of the Minnesota delegation to thank them for their hard work, effort and hospitality. Members of the Host Organizing Committee are thankful all went well during the Conference and, quite frankly, are pleased it is over with as well.



National Association Of Hearing Officials 2003 Conference

By: Louis Thayer, Esq., Minnesota Department of Human Services

The Minnesota State Bar Association-Public Law Section was proud to co-sponsor the 2003 annual conference of the National Association of Hearing Officials (NAHO). NAHO is a national organization dedicated to improving the professionalism of administrative adjudicators. www.naho.org The conference was held in Minneapolis at Millennium Hotel September 14-17, 2003.

The participants attended four days of workshops conducted by judges, administrative law adjudicators, law professors and other legal professionals from across the country. Minnesota was well represented at the conference including instructors from the area law schools, the state law library, the Office of Administrative Hearings and co-sponsor the Minnesota Department of Human Services. Special mention must be made of the workshops by **Edward Toussaint, Jr.**, Chief Judge of the Minnesota Court of Appeals and district court judges **Pamela Alexander**, **Kathleen Gearin**, and **Tanya Bransford**.

In addition to the workshops, there were several keynote speakers. The keynote speaker to open the conference was **Kevin Goodno**, Commissioner of the Minnesota Department of Human Services. The commissioner spoke

about the importance of the U.S. Supreme Court decision of *Goldberg v. Kelly* in an age of rising case loads, shrinking government budgets and ever increasing complexities of substantive issues. Senator **Mee Moua** provided an impassioned luncheon address on the challenges faced by immigrants and people of color in accessing government agencies. Chief Judge Toussaint addressed the group with reminders about professionalism in the administrative hearing process. Finally, **Laurence Geller**, Presiding Administrative Law Judge with the California Department of Social Services, gave the closing address. He urged attendees to examine their own prejudices as they approach their work.

The event garnered high praise from the 110 administrative law adjudicators and hearing officials from 27 different states. Evaluations of the workshops noted the high caliber of the workshops and friendliness of Minnesotans. The Board of Continuing Legal education awarded the event 15 CLE credits.



Louis Thayer talking with Sharon Kulp (former president of NAHO, now chair of the certification committee)



MN Court of Appeals Chief Judge Toussaint (left), Victoria Lemberger (center) (Mn DHS Appeals Referee and Boardmember of NAHO), and David Stebing (right) (NAHO president).

Public Defenders Seek Supreme Court Relief

By: The Honorable Warren Sagstuen, Hennepin County District Court Judge

The State Board of Public Defense and the State Public Defender have petitioned the Minnesota Supreme Court to exercise its supervisory power over the judicial system to “help address an unprecedented crisis in the provision of public defense services.” That crisis, an overwhelming caseload that far exceeds American Bar Association guidelines and funding that has not kept up with the need for defense services, has already led to the loss of twenty lawyers statewide, and may lead to a further loss of attorneys and staff if additional funding isn’t found.

The petition requested three emergency procedural changes:

1. the creation of a presumption that orders for continuances by public defenders will be granted where the defendant is not incarcerated;
2. the imposition of a limitation on appointment of public defenders in child protection cases to one party per public defender and one public defender per case; and
3. the establishment of a requirement that no child protection case can be accepted for filing unless the petitioning party represents that the case has been subject to pre-petition screening.

The Supreme Court had requested comment on the petition from various governmental agencies and professional

organizations, and a hearing before the Supreme Court was held on October 15, 2003. At that hearing, the Court heard from State Public Defender John Stuart, as well as other District Chief Public Defenders, and Assistant Public Defenders. Other speakers representing a broad range of views, including the courts, prosecutors, counties, and human services, also spoke.

The hearing comments from the defenders detailed the overwhelming caseloads handled by the defenders, the exorbitant time demands placed on the defenders, and the concern that the clients were not being well served by defenders too busy to handle the crush of cases.

At the same time, other hearing participants voiced concern that delays in cases would likely adversely impact the children in child protection cases and the victims of crimes in criminal cases. Of equal concern was the fear that the proposed changes would negatively affect the general administration in justice as cases are delayed, and the costs of the delay placed on other stakeholders increased.

In general, there was an agreement on the nature of the problem, but disagreement as to the solution. What was clear from the hearing, however, was the complex, interrelated nature of the problem, with each solution having a differing impact on the courts, counties, prosecutors, police, victims and defenders. The Supreme Court is expected to rule on the petition soon.

Public Attorneys In Military Service

By: Nancy McLean, Assistant Hennepin County Attorney

Many government lawyers in the state are volunteer members of the Guard or Reserves. Some have been called into active service, leaving their public law jobs and families behind. Here is the story of one government lawyer who was recently called into active service.

Fred Karasov, an Assistant Hennepin County Attorney, has been called up to active military duty. Fred, a Lieutenant Colonel in the Minnesota Army National Guard, will join other soldiers from the Minnesota and Iowa based 34th

Infantry Division for training first at Ft. Stewart in Georgia and then at an army base in Germany. Eventually, they will be part of a peacekeeping mission at Camp Bonsteel in Kosovo. Fred will be the Deputy Staff Judge Advocate, working with five other lawyers and law clerks. Their duties will include assisting with claims; reviewing contracts; advising commanders about legal issues, operational law issues and military justice issues; and providing legal assistance to soldiers. The unit will leave in December and return next August.

The MSBA Public Law Section and the Law & Inequality: A Journal of Theory and Practice Present: Symposium



***SPEAKING LAW TO POWER:
THE LEGAL AND POLITICAL
IMPLICATIONS OF THE UNITED STATES AS THE
WORLD'S LONE SUPERPOWER***

**Friday, January 23, 2004
University of Minnesota Law School**

Schedule:

8:30: Breakfast

9:00: Welcome and Introduction

9:15: Keynote Address

Marco Sassoli, University of Quebec, Montreal

10:15: Panel 1: Historical and Global Implications

Kathryn Sikkink, University of Minnesota, Political Science

Anthony Winer, William Mitchell College of Law

Peter Erlinder, William Mitchell College of Law

Moderator: David Weissbrodt, University of Minnesota Law School

11:45: Lunch Break

1:00: Panel 2: Implications for International Law

Fred Morrison, University of Minnesota Law School

Barbara Frey, University of Minnesota, Human Rights Program

Oren Gross, University of Minnesota Law School

Moderator: Sally Kenny, University of Minnesota, Humphrey Institute

2:45: Guest Presenter

Juan Mendez, Notre Dame Law School

3:45: Panel 3: Impact on Human Rights Here & Abroad

Jay Krishnan, William Mitchell College of Law

Michele Garnett McKenzie, Minnesota Advocates for Human Rights

Elizabeth Heger Boyle, University of Minnesota, Sociology

Moderator: Ruth Okediji, University of Minnesota Law School

How have the brutal attacks of September 11th changed the role of the United States, the structure of international law, and international organizations? What have been the consequences for the rest of the world? Join Law & Inequality in exploring the legal and political implications of the United States as the world's lone superpower, and the impact the United States' "war against terror" has had on human rights here and abroad.

A request has been made for 5 CLE credits (3 of which are elimination of bias). A fee of \$25 will be requested from practitioners desiring CLE credit. For more information or to reserve a space for CLE credit, email lawineqj@umn.edu or call 612-625-5807.

Eyes On The Courts

By: Greg Brooker, Assistant U.S. Attorney

THE 2004 U.S. SUPREME COURT TERM



The U.S. Supreme Court has agreed to hear several cases of interest to public lawyers. What follows are summaries of some of the cases in which cert has been granted.

Licensing of Adult Uses

City of Littleton v. Z.J. Gifts

The question presented in this adult use zoning case is whether the requirement of prompt judicial review imposed by *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990) entails a prompt judicial determination or a prompt commencement of judicial proceedings. The City of Littleton, Colorado, denied a license to Z.J. Gifts as an adult entertainment establishment. The Tenth Circuit held that Littleton's ordinance does not sufficiently guarantee promptness because it allows for only an appeal of a license denial under a state-court rule providing for expedited review at the state court's discretion. Case below: 311 F.3d 1220 (10th Cir. 2003).

Miranda Warning

Yarborough v. Alvarado

On the night of September 22, 1995, a murder occurred at a shopping mall in Santa Fe Springs, California. One month later, a sheriff's detective contacted Alvarado's mother and informed her that police officials needed to speak to her 17-year-old son. Alvarado's mother told the detective that Alvarado's father would bring her son to the sheriff's station that evening so that he could be interviewed. Both Alvarado's mother and father accompanied Alvarado to the sheriff's station that night; however, they were refused permission to be present during the interview. Alvarado was ultimately convicted of second degree murder and attempted robbery, primarily based on statements he made during the two-hour interrogation. The Ninth Circuit granted Alvarado's habeas writ, holding that the 17-year-old juvenile was "in custody" when he was interrogated by the police and thus a Miranda warning was required. The Ninth Circuit panel found that no reasonable 17-year-old, with no prior history of arrest or police interviews, would have felt that he was at liberty to terminate interrogation and leave. Moreover, the circuit court noted, Alvarado's "voluntary" appearance at the police station was not

obtained through his own consent, but rather his mother's authority, and Alvarado was never informed that he was not under arrest. The Supreme Court granted cert to consider whether a court must consider the age and experience of a person if he or she is a juvenile in determining whether a person is "in custody" so that a Miranda warning is required. Case below: 316 F.3d 841 (9th Cir. 2003).

The Internet and Free Speech

Ashcroft v. ACLU

The Third Circuit found the Child Online Protection Act, which criminalizes knowing communication for commercial purposes on the Internet of "any material that is harmful to minors," unconstitutional under the First Amendment because it was a content-based speech restriction that is not narrowly tailored to achieve a compelling state interest. The Court granted cert to review the constitutionality of the Act. Case below: 322 F.3d 240 (3rd Cir. 2003).

Compelling Persons to Identify Themselves to the Police

Hiibel v. Sixth Judicial District Court of Nevada

In response to a call from police dispatch, a deputy sheriff drove to the scene where a concerned citizen had observed someone striking a female passenger inside a truck. When the deputy approached the truck, he saw Larry Hiibel standing outside the truck and suspected that Hiibel was intoxicated based on his eyes and mannerisms. Hiibel's minor daughter was seated in the passenger side of the truck. When the deputy asked Hiibel to identify himself, Hiibel refused, instead placing his hands behind his back and challenging the officer to take him to jail. After 11 requests for identification, to no avail, the officer arrested Hiibel for resisting a police officer. Ultimately the Nevada Supreme Court affirmed the arrest and conviction, 4-3. The U.S. Supreme Court granted cert to consider whether the Fourth and Fifth Amendments "bar a state from compelling people to identify themselves during a police investigation when someone has been seized upon less than probable cause." Case below: 59 P.3d 1201 (Nev. 2002).

Free Exercise of Religion

Locke v. Davey

Joshua Davey was awarded a state "Promise Scholarship" by virtue of his high school grades, family income, and his attendance at an accredited college in the state. He lost the scholarship when he declared his major in Pastoral

Ministries. Davey sued, contending that the state's action violated his First Amendment right to freedom of speech and his 14th Amendment right to equal protection. The state argued that it did not prohibit Davey from pursuing religious studies but simply declined to fund them and that state funding for Davey's religious instruction was barred by a state statute and the state constitution. The Ninth Circuit held for Davey, concluding that the state policy lacked neutrality on its face and thus was subject to strict scrutiny. In accepting the cert petition from the state, the U.S. Supreme Court limited the question to this: "Does the First Amendment's free exercise clause require a State to fund religious instruction if it provides college scholarships for secular instruction." Case below: 299 F.3d 748 (9th Cir. 2002).

International Border Searches & the Fourth Amendment

U.S. v. Flores-Montano

The Court granted cert to decide whether, under the Fourth Amendment, customs officers at the international border must have reasonable suspicion to remove, disassemble, and search a vehicle's fuel tank for contraband. Relying on one of its previous rulings, the Ninth Circuit summarily affirmed the district court judgment suppressing marijuana found in the gas tank, holding that the removal of a gas tank did not fall within the scope of "routine border search." Previous 9th Cir. Case: 279 F.3d 709 (9th Cir. 2002).

Federalism and Bribery

Sabri v. U.S.

In a case originating from the District of Minnesota, the Supreme Court granted Sabri's petition to decide whether he was entitled to dismissal of the indictment charging him with three counts of bribing a Minneapolis City Council Member, in violation of 18 U.S.C. § 666(a)(2). That statute makes it a federal crime to bribe a state or local official if the governmental entity receives more than \$10,000 annually in federal funds. Sabri argues that the statute is facially unconstitutional because it lacks a nexus to a federal interest. The Hon. Richard Kyle found the statute unconstitutional; the Eighth Circuit reversed 2-1. The Eighth Circuit held that the statute was a valid exercise of Congress' authority under the Spending Clause and the Necessary and Proper Clause and that the statute does not require the prosecution to prove connection between the criminal conduct and the federal funds received by the local government. Case below: 326 F.3d 937 (8th Cir. 2003).

The Pledge of Allegiance

Elk Gove Unified School District v. Newdow

The Court granted the petition of the Elk Grove School District to decide whether the school's policy of requiring

teachers to lead elementary students in reciting the Pledge of Allegiance violates the Establishment Clause of the First Amendment. The Court also voted to consider whether the non-custodial parent of the child has standing to challenge the school policy. The Ninth Circuit, sitting en banc, held that elementary school students' daily recitation, pursuant to school district policy, of the phrase "One Nation Under God" in the teacher-led pledge of allegiance, places an impressionable student in a untenable position of choosing between participating in the exercise of religious content – the profession of belief in monotheism – or protesting and thus coerces a religious act in violation of the First Amendment's Establishment Clause. Case below: 321 F.3d 772 (9th Cir. 2003)(en banc).

Pro Se Criminal Defendants

Iowa v. Tovar

The Court granted cert in this case from the Iowa Supreme Court to consider whether the Sixth Amendment requires a state court to give a detailed admonition to a pro se defendant pleading guilty (1) as to the usefulness of an attorney, (2) that an attorney may provide an independent opinion whether it is wise to plead guilty, and (3) that without an attorney the defendant risks overlooking a defense. Case below: 656 NW.2d 112 (Iowa 2003).

Diversity Jurisdiction

Grupo Dataflux v. Atlas Global Group

In this case the Fifth Circuit held that, although federal jurisdiction ordinarily depends on facts as they exist when a complaint is filed, an exception exists for an action that is filed or removed without jurisdictional requirements having been met when neither the parties nor the judge raise error until after a jury verdict has been rendered and the jurisdictional defect is cured before the verdict. The case concerned a breach-of-contract action against a Mexican corporation in which jurisdiction was predicated solely on diversity of citizenship. The initial lack of diversity, which was not raised by defendant until after the verdict was rendered, had been remedied prior to trial by plaintiff. The district court thus had jurisdiction over the parties throughout the trial and at the time the jury rendered its verdict. The Court will decide whether the Fifth Circuit erred in creating the exception to the well-established diversity rule. Case below: 312 F.3d 168 (5th Cir. 2003).

Criminal Jurisdiction Over Indians

U.S. v. Lara

Billy Jo Lara, who is an American Indian but not a member of the Spirit Lake Nation, was charged with five violations of the Spirit Lake Tribal Code after he struck a BIA police officer on the Spirit Lake reservation. In tribal court Lara

plead guilty to three of the counts and was sentenced to a jail term of 155 days. Thereafter, a federal grand jury returned an indictment charging Lara with assault on a federal officer in violation of a federal statute. Lara ultimately moved to dismiss the indictment on double jeopardy grounds. The district court denied the motion and a panel of the Eighth Circuit affirmed. En banc review was granted and the entire court reversed in a split decision, holding that double jeopardy applied and that the federal indictment must be dismissed. The en banc court noted that the double jeopardy clause does not permit successive prosecutions under the “dual sovereignty doctrine” where the authority for the prosecution derives from the same sovereign source. Because the source of the Tribe’s jurisdiction over Lara resulted from Congress, the same sovereign source as the later federal indictment, double jeopardy principles required that the later federal indictment be dismissed. Case below: 324 F.3d 635 (8th Cir. 2003)(en banc).



all the occupants of the car violated the Fourth Amendment. Case below: 805 A.2d 1016 (Md. Ct. App. 2002)

Arrests of Car Occupants & the Fourth Amendment

Maryland v. Pringle

At 3:16 a.m. on the morning of August 7, 1999, a Baltimore County police officer made a routine traffic stop. When the driver of the car opened up the glove compartment for his registration card, the officer noticed a roll of cash. The officer did not ask the driver about the money but went back to his car to check for any outstanding violations. There were none and the officer asked the driver to exit the car and issued him an oral traffic warning. At this time, a second patrol car arrived on the scene and the officer then asked the driver if he had any drugs or cash in his car. The driver said no. The officer then asked for and received permission from the driver to search the car. Prior to doing so, the officer asked the two passengers in the car, one of whom was Pringle, to exit the car. The officer seized almost \$800 from the glove compartment as well as five plastic baggies containing cocaine. None of the men offered any information regarding the ownership of the drugs and money and so all were placed under arrest. Pringle ultimately gave a statement to the police in which he admitted that the drugs were his and that he intended to sell them at a party that night.

The Maryland Court of Appeals suppressed the confession, holding that Pringle’s arrest was unlawful because it was not supported by probable cause. The state appellate court noted that in order for Pringle’s arrest to be valid the officer must have had probable cause at the time of the arrest to believe that Pringle, who was merely an occupant of the car, was in possession of the controlled substance and money. The U.S. Supreme Court granted cert to determine if the police officer’s action in arresting

The Legal Status of 660 Detained Suspected Terrorists

Rasul v. Bush

The Court agreed to consider whether the federal courts have jurisdiction to consider actions by non-citizen aliens detained by the United States at the U.S. Naval Base at Guantanamo Bay, Cuba. Most, if not all, of the aliens were detained after the U.S. invasion of Afghanistan. The Ninth Circuit and D.C. Circuit each ruled in separate cases that U.S. District Courts have no jurisdiction to hear such cases. The Court granted cert in the D.C. case, which consolidated two separate cases, one involving a British citizen and the other involving Kuwaiti nationals. All of the detainees have been held without access to lawyers and without any hearings in court or by military commissions. The Ninth and D.C. Circuits relied on a 1950 Supreme Court case, *Johnson v. Eisentrager*, 339 U.S. 763 (1950), in which the Court upheld the dismissal of petitions by German nationals held in China during WWII and tried by a U.S. military commission in China. The circuit courts held that the military base in Cuba is outside of the sovereign territory of the U.S. and under *Eisentrager* writs of habeas corpus are not available to aliens held outside of the sovereign territory of the U.S. Case below: 321 F.3d 1134 (D.C. Cir. 2003).

Search Incident to Arrest

Marcus Thornton v. United States.

A police officer approached Marcus Thornton after he had exited his vehicle in a parking lot. The officer had followed Thornton’s vehicle after he determined that the license tabs did not match the car. The officer later testified that for his own safety he asked Thornton if he could pat Thornton down. Thornton agreed and the officer felt a bulge in Thornton’s front left pocket. The officer asked Thornton what it was and Thornton said a bag of “weed.” Thornton then reached into his pocket and pulled out three bags of marijuana and crack cocaine. The officer then arrested Thornton and conducted a search of Thornton’s car “incident to that arrest.” The officer found a handgun. The district court denied Thornton’s motion to suppress the evidence of the firearm, and Thornton was convicted of possessing a firearm as a felon. The Fourth Circuit affirmed. The issue for the Supreme Court is whether a police officer may search the passenger compartment of an automobile as a contemporaneous incident of a lawful custodial arrest of the vehicle’s recent occupant when the arrestee exited the vehicle voluntarily rather than on police direction. Case below: 325 F.3d 189 (4th Cir. 2003).

FIRST TWO DECISIONS OF THE TERM:

As of November 10, 2003, the Supreme Court has issued two decisions:

Deference to Administrative Decisions Under *Chevron*

Barnhart v. Thomas

No. 02-763 (November 10, 2003)

The Supreme Court sustained under *Chevron* the Social Security regulation providing that a person is not disabled if she can perform her previous work, even if that work does not exist in significant numbers in the national economy. Pauline Thomas worked as an elevator operator until her job was eliminated. Thereafter she applied for Social Security disability benefits at age 53 based upon hypertension, cardiac arrhythmia, and cervical and lumbar strain or sprain. The Commissioner denied her claim, holding that Thomas was physically and mentally able to perform her former work. The Third Circuit, sitting en banc, reversed. It held that the ability of a claimant to perform her previous work disqualifies her from benefits only if that work is “substantial gainful work which exists in the national economy.”

On November 10, 2003, the Supreme Court reversed in a unanimous opinion by Justice Scalia. The Court noted that the relevant statute provides, “An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that [1] he is not only unable to do his previous work but cannot, considering his age, education, and work experience, [2] engage in any other kind of substantial gainful work which exists in the national economy.” 42 U.S.C. 423(d)(2)(A) (emphasis added). The statute also requires that the work must exist “in significant numbers” to be “work which exists in the national economy.” *Ibid.*

The Court held that this statute “establishes two requirements for disability,” and it noted that Social Security’s regulation applies the qualification “which exists in the national economy” only to the second requirement, not to the first “previous work” requirement. The Court then held that this construction was reasonable, and therefore controlling under *Chevron*.

Closing Arguments and Effective Assistance of Counsel

Michael Yarborough v. Lionel Gentry

No. 02-1597 (October 20, 2003)

On October 20, 2003, the Supreme Court reversed the Ninth Circuit and held that a defense counsel’s closing argument was not so bad as to deprive the defendant of his Sixth Amendment right to assistance of counsel. Defendant Gentry was tried for stabbing his pregnant girlfriend. He testified that he had stabbed her accidentally while pushing her out of the way during a dispute with a drug dealer. The girlfriend, a drug addict, testified that she could not recall the details of the stabbing. Gentry was convicted of assault with a deadly weapon. The federal court denied habeas review, but the Ninth Circuit reversed, holding that defense counsel’s closing argument omitted to mention key facts in the testimony.

The Supreme Court summarily reversed in a unanimous per curiam opinion. After quoting virtually the entire closing argument, the Court held that it survived the “objectively unreasonable” test. The Court also stated: “Judicious selection of arguments for summation is a core exercise of defense counsel’s discretion.”

Adopt A Family For The Holidays

By: Nancy McLean, Assistant Hennepin County Attorney

It’s that time of the year again. Time to adopt a family for the holidays.

The MSBA Public Law Section is sponsoring an “Adopt a Family” again this year. Last year, we provided gifts and food for 14 families throughout the metro area! This year, we hope to do even more and focus our efforts on the families of military personnel who have been called overseas.

There are many ways to participate - you can sponsor a family, join with others and sponsor a family, make a financial contribution, or assist with shopping, wrapping,

and delivering gifts. For example, last year, the Hennepin County Attorney’s Office Juvenile Division sponsored three families - they posted the wish lists, people signed up and purchased gifts, and they delivered the gifts in time for the holidays. The Hennepin County Child Protection Division also sponsored three families. Several students earned community service hours by helping with shopping and delivery.

If you would like more information, would like to make a financial contribution, or would like to adopt a family, please contact Nancy McLean at (612)348-6755 or Theresa Treptau at (612)348-6569.

Desyl Peterson Receives Distinguished Public Service Award

By: Corrine H. Thomson, Kennedy & Graven, Chartered

Minnesota attorneys had an extra reason to attend the 68th Annual Conference of the International Municipal Lawyer's Association (IMLA) in Minneapolis, held October 12-15, 2003. One of Minnesota's own – Desyl Peterson, Minnetonka City Attorney – was honored with IMLA's Distinguished Public Service Award to a Local Government Attorney. The award was presented at the Monday luncheon on October 13.

The Distinguished Public Service Award honors an attorney for a significant and surpassing achievement in local government law that occurred or culminated during the previous year. This year, IMLA found two exceptionally deserving candidates and took the unusual step of presenting two awards in the same year. Ms. Peterson's co-recipient of the award is A. Paul Burton, city attorney for Hampton, Virginia.

For Minnesota city attorneys, Ms. Peterson's selection was no surprise. She is one of the most widely-known city attorneys in the state, with a reputation for excellent legal skills, sound judgment, and dedicated public service. The letters of support for her nomination cited her "unerring legal judgment, integrity, diplomacy, astuteness, tact and political acuity," her "comprehensive understanding of municipal law," and her "innovation and creativity."

Ms. Peterson has served as city attorney for Minnetonka since 1984. She heads up a three-person in-house law department for the city. During her tenure, her department has come to be one of the most highly regarded municipal legal departments in the state. Prior to joining the City of Minnetonka, Ms. Peterson engaged in a municipal law practice at the firm of Popham, Haik, Schnobrich, Kaufman & Doty. She joined Popham Haik after receiving her B.A. summa cum laude from Concordia College, an M.A. in East Asia Studies from Claremont Graduate School, and a J.D. cum laude from the University of Minnesota.

In addition to serving Minnetonka with distinction, she has generously shared her time and talents with colleagues around the state. She is a frequent lecturer on municipal topics and annually gives a presentation at the League of Minnesota Cities' Newly Elected Officials Conference. She

actively participates in several municipal associations and has held leadership positions in those associations, including President of the Minnesota City Attorneys' Association (1988-89), member of the League of Minnesota Cities Board of Directors (1991-94), member of the League of Minnesota Cities Insurance Trust Board of Trustees (1991-94).

This is not the first time her peers have recognized Ms. Peterson's talents and efforts. The Public Law Section awarded its Public Attorney Award of Excellence to Ms. Peterson in 2000. She also received the "Peacemaker Award" from the Association of Metropolitan Municipalities for her role in mediating a dispute between two cities. Her colleagues know Ms. Peterson is not one to rest on her laurels. That wouldn't sit well with her stoic, unassuming North Dakota upbringing. But a word to those who learn by example – keep an eye on this uniquely talented and dedicated municipal attorney.



Minnetonka City Attorney Desyl Peterson took a moment after receiving the IMLA award to stand next to the man who nominated her, League of Minnesota Cities General Counsel Thomas Grundhoeffer.

Highlights Of The September 12, 2003 Board Of Governors' Meeting

By: Mary Miller, Compensation Attorney Principal, Minnesota Department of Labor & Industry

The MSBA Board of Governors met in Minneapolis on September 12, 2003, in conjunction with the Bar Leaders Conference. Some of the Highlights follow:

No Fault Arbitration Process

President Jim Baillie explained that there had not previously been a process in place for selecting or evaluating a provider of administration of the No Fault Arbitration. Consequently a committee is being developed under the direction of former Justice John Simonett. The committee will include several court personnel, several from the MSBA, a representative of the trial courts and a public member. The meetings, including conference calls, will take place from October of 2003 through January of 2004. If you know of someone who is, or are interested yourself, submit the name to Tim Groshens.

Elmer H. Wiblishauser Award

The Elmer H. Wiblishauser Award was granted to Judge Bernard Boland for his article, "Shopping for Judges at Wal-Mart."

Election of Representatives to Outside Boards

Lawyers Professional Responsibility Board – Judith Rush
State Board of Legal Certification – James Sherburne
Lawyers Trust Account Board – Charles Reynolds
Southern Minnesota Regional Legal Services – Sally Scoggin

Report and Recommendations of the MSBA Task Force on Business Law Pro Bono

Funding of \$15,000 to get this project started was approved.

Recommendations of the Legislative Committee

Adding members and establishing subcommittees passed.

Judicial Elections Committee

Mark Gehan reported on the development and work of the Judicial Elections Committee. It was the consensus of the Committee that lawyers and judges have a potential problem with, if not current problems under, the Republican Party of Minnesota case (Wersal challenge). The U.S.

Supreme Court has spoken on the Announce Clause. So far in Minnesota there is not really any "politically-charged case." However, because of the potential for problems, three subcommittees are being developed:

1. Best-of-all-Possible-Worlds Subcommittee
2. Changes that Could be Recommended to Maintain High Quality Subcommittee
3. What Can the Bar Association Legally Do? Subcommittee

Subcommittee reports will be due October 25 for November 6th and 20th Committee meetings. The Committee's goal is to make a report with recommendations by December 5, 2003.

Association Governance

Mike Ford reported on the work of this Committee which has 25 members. Three subcommittees have been formed. Some of the discussion involved has included reducing the size of some boards or even eliminating the General Assembly. The goal for their report, including recommendations, is March of 2004. (See separate article on this committee on pg. 13).

Additional Information

The minutes of the Board of Governors meetings can be accessed at www2.mnbar.org/boardofgovernors/minutes. Marcy Harris is the official Public Law Section member of the Board. The next meeting of the Board will take place on Friday, December 5, 2003.

Government Data Practices Update

By: Ronald Whitehead, Esq., Deputy Chief of Police, Bloomington

Report from the Public Law Section, Data Practices Sub-Committee

Ron Whitehead, Bloomington Police Department, and Tony Palumbo, Anoka County Attorney's Office, continue as co-chairs of the Data Practices Sub-Committee. The importance of this topic and those who venture to make sense of it cannot be overemphasized as we continue to integrate the multitude of records and information maintained by governmental agencies. Those manual files that were kept in someone's desk and their existence known to only a few are becoming a thing of the past. With automation there is essentially an endless potential to collect information about people and events. As we do so and as we integrate that data the obligation to manage that data and its dissemination continues to assume a greater role in the public dialog.

Increasingly a topic of public concern, the public policy debate over data practices is growing in importance. A data practices act that evolved out of manual systems is

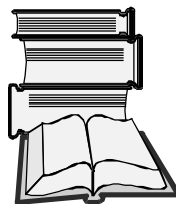
being applied to evolving technologies. You need not only manage the data you collect, but now you must manage access to the back up copies of automated system and the audit records of inquiry made against those record system. The implications are endless and answers become more challenging as we all try to achieve the efficiencies of automation and balance the policy and practical implications of data practices against the need to perform our primary responsibilities.

For those of you interested in being part of this policy discussion and the answers others working in this field have devised, you are invited to join regular meeting of the Data Practices Sub-committee to the Public Law Section. The sub-committee meets on the first Monday of every month at 3:00 p.m. at the Minnesota Department of Health Building, 1645 Energy Park, St. Paul, MN. If you have any questions, please call or e-mail Ron Whitehead, 952-563-8800, rwhitehead@ci.bloomington.mn.us or Tony Palumbo, 763-323-5550, tony.palumbo@co.anoka.mn.us.

Reforming The Infrastructure Of The MSBA

By: Greg Brooker, Assistant U.S. Attorney

Many Public Law Section members are involved in studying ways to restructure the MSBA to make it more effective and efficient. In 2002, the MSBA Board of Governors formed a 22-member task force, chaired by Phyllis Karasov and Dick Pemberton. The task force is charged with the duty of studying the governance structure and makeup of the MSBA, including the House of Delegates, the General Assembly, and the Board of Governors. The task force has been meeting since March 2003 and plans to make its recommendations by March 2004. Expect major changes to make our MSBA a better organization.



The following Public Law members are serving on the MSBA Task Force on Association Governance:

Honorable George W. Perez
Minnesota Tax Court Judge

Timothy J. Kuntz
LeVander Gillen & Miller, P.A.

Susan Nolting Burke
Assistant U.S. Attorney

Allen Giles
General Counsel
Minneapolis Public Schools

Robert M.A. Johnson
Anoka County Attorney

Greg Brooker
Assistant U.S. Attorney

Upcoming CLE Seminars

By: Mary Miller, Compensation Attorney Principal, Minnesota Department of Labor & Industry

Date	Topic	Time	Place	Sponsor/Contact
12/5/03	Prosecution of Domestic Assaults without a Cooperative Victim	1 p.m. to 4:30 p.m.	Hennepin County Medical Center, Pillsbury Auditorium	Minneapolis City Attorney's Office & MSBA Public Law Section, 612-673-3201
12/10/03	Prescription Drug Litigation	Noon to 1 p.m.	Radisson City Center, Ballroom B	Attorney General's Office/Marty Casserly, 651-297-5919
12/11/03	Minnesota Supreme Court Roundup	Noon to 1 p.m.	Basement Hearing Room, State Office Building	Revisor of Statutes Office, 651-296-2868
12/18/03	HIPAA for Litigators & General Practitioners	9 a.m. to 12:15 p.m.	Minnesota CLE Conference Center, Minneapolis	Minnesota CLE, 651-227-8266
Winter 2004	Appellate Court Practice	½ day	To be announced	Attorney General's Office/ Marty Casserly, 651-296-2868
1/21/04	Conceal & Carry Law	Noon to 1 p.m.	State Office Building, Room t.b.a.	Revisor of Statutes Office, 651-296-2868
1/23/04	The Legal Implications of the U.S. as the World's Lone Superpower	9:00 a.m. to 3:45 p.m.	U of M Law School	U. of Minn. Law School Journal of Law and Inequality, Aaron Marcus, 612-237-1734
2/11/04	Utility Regulation/ Deregulation	Noon to 1 p.m.	Radisson City Center, Ballroom B	Attorney General's Office/Marty Casserly, 651-296-2868
Spring 2004	Litigation Strategy Issues	½ day	To be announced	Attorney General's Office/ Marty Casserly, 651-296-2868
4/14/04	Negotiation Skills	Noon to 1 p.m.	Radisson City Center, Ballroom B	Attorney General's Office/ Marty Casserly, 651-296-2868
<i>To include a notice of an upcoming CLE in the next issue, contact Mary Miller 651/284-5306</i>				

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