District Western NEWS

NEWSLETTER OF THE

WESTERN DISTRICT OF WISCONSIN
BAR ASSOCIATION

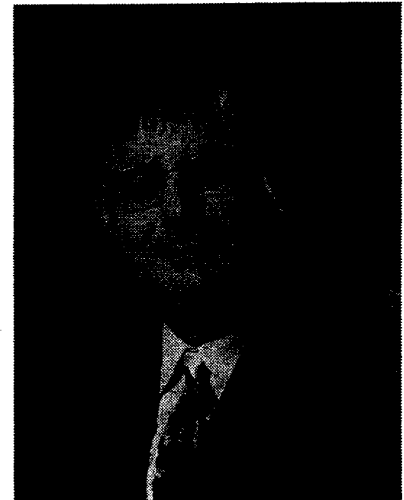
Volume 11, Number 1 April 2002

Dean Eisenberg to Provide Association's Annual Luncheon Keynote Address

The Board of Governors is please to announce that Dean and Professor of Law Howard B. Eisenberg, Marquette University School of Law, will be the keynote speaker at the WDBA's annual luncheon on April 25, 2002. Dean Eisenberg will be providing a thought-provoking and timely presentation: *The War on Crime, the War on Drugs, and the War on Terrorism – Can the Bill of Rights Survive the Battles?*

Dean Eisenberg is a native of Chicago and a graduate of the Chicago Public Schools. He received his undergraduate degree with highest distinction from Northwestern University and his law degree from the University of Wisconsin. He clerked for Wisconsin Supreme Court Justice Horace Wilkie before entering the State Public Defender's Office. In 1972 the Wisconsin Supreme Court appointed him the State Public Defender, a position he held until 1978. Dean Eisenberg drafted the legislation which created the current public defender system in Wisconsin.

From 1979 until 1983, he served as Executive Director of the National Legal Aid and Defender Association in Washington, D.C. Dean Eisenberg was Professor of Law and Director of Clinical Education at Southern Illinois University School of Law from 1983 to 1991. He served as Dean and Professor of Law at the University of Arkansas at Little Rock from 1991 until he joined the Marquette faculty as Dean and Professor in July 1995.


Howard B. Eisenberg

Dean Eisenberg has extensive practice experience in both civil and criminal cases. He has personally briefed and argued appellate cases before courts throughout the United States, including two cases before the United States Supreme Court. He has written widely, in both scholarly and practitioner publications, in the areas of criminal law and procedure, legal ethics, elderlaw, and delivery of legal services to low income persons. He is a fellow of the American Academy of Appellate Lawyers and is a member of the Wisconsin, Illinois, District of Columbia and Arkansas bar associations. Dean Eisenberg is also a Fellow of the Wisconsin Bar Foundation, serves as Chairman of the Rules Advisory Commission of the United States Court of Appeals for the Seventh Circuit, and is Chair of the Appellate Practice Section of the State Bar of Wisconsin.

Dean Eisenberg continues to teach criminal law and procedure, legal ethics, and appellate advocacy at Marquette.

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Western District of Wisconsin Bar Association 2001-2002

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Prompt Disposition Remains Western District Hallmark

The Western District's reputation for prompt handling of cases is borne out by statistics released recently by the Administrative Office of the United States Courts. For the twelve-month period ending September 30, 2001, this district's median time between civil case filing and trial was only 8.0 months. This compared to a national median of 21.6 months.

Unlike most other districts, the Western District had no cases pending more than three years. Nationally, the average number of cases pending per district court judge is 447, but in the Western District, there are only 152 cases pending per judge.

The low number of pending cases is likely attributable to two things: (1) this district's historic efficiency in handling cases; and (2) the drop in the number of filings this district has had to handle over the last several years. In the twelve-month period ending September 30, 2001, the number of new filings in the Western District totaled 886. This constitutes a 21.7% drop from 1996, when 1,132 cases were filed. The number of cases filed has been less than 1,000 in four of the last six years. The number dropped 2.4% from 908 filings in 2000 to 886 last year.

The drop in filings in the Western District last year is comparable to the drop experienced nationally. The number nationwide declined from 310,346 filings in 2000 to 302,104 filings in 2001. Neither on the local nor the national level do the statistics support the existence of a litigation explosion.

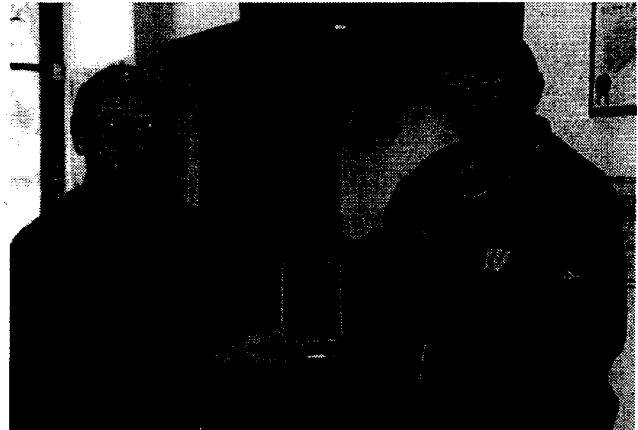
THE PRESIDENT'S CORNER

By
Thomas W. Bertz
President
Western District of Wisconsin Bar Association

I am writing this message six months to the day and hour that the terrorists attacked the Twin Towers in New York City. Moments thereafter came the attack on the Pentagon in Washington, D.C. and the crash of a highjacked plane in Pennsylvania. With these stunning events the world changed forever. We hope the Taliban has been soundly defeated in Afghanistan and the remaining al-Qaida fighters are in the process of being routed, but we have no assurance of a safe, secure and terrorist-free world. Instead, we are getting accustomed to carrying on our daily work under the added stress of dealing with the ramifications of the terrorist attacks.

Congress has passed the U.S.A. Patriot Act (USAPA) in response to the tragic events of September 11, 2001. This Act could affect the civil liberties of ordinary Americans. The Western District of Wisconsin Bar Association has as its Annual Meeting Luncheon speaker Dean and Professor of Law Howard B. Eisenberg, Marquette University School of Law, who will keynote this timely subject. He will address the participants regarding: *The War on Crime, the War on Drugs, and the War on Terrorism - Can the Bill of Rights Survive the Battles?*

This year's Annual Luncheon should again prove to be of great note. The luncheon, of course, will be followed by the CLE program and the reception. Chief Judge Barbara Crabb will present a program entitled *"Summary Judgment Motion Expectations and Procedures."* The other topics of interest are *"Trends in Intellectual Property Cases"* and *"Prisoner Litigation Update - Recent 1983 Issues."* The Judges' Panel and Discussion will be followed by the reception giving the attendees an opportunity to mix with their colleagues and the speakers.



Western District Bar Association President, Tom Bertz (right) presents a plaque thanking Immediate Past-President Paul Barnett for his service.

I received a call from a Milwaukee attorney who told me that the Eastern District of Wisconsin is forming a bar association and seeks WDBA's help in its organization. Because of the success of the WDBA, the Eastern District will have an opportunity to pattern itself after a very strong association. The Eastern District plans to be up and operating within the next few months.

Yet, there is still a lot of work to be done in our WDBA. My work as WDBA - President is still unfinished. The WDBA will always be a work in progress. At the Annual Meeting on April 25, 2002, I will be turning the reins over to Leslie Herje. I have worked with Leslie over the past several years on many projects. The WDBA is fortunate to have her to continue to lead the charge of WDBA into the future.

PRELIMINARY INJUNCTION MOTIONS IN THE WESTERN DISTRICT

by
Robert E. Shumaker
DeWitt Ross & Stevens S.C.

This article outlines the rules and procedures governing motions for temporary restraining orders and preliminary injunctions in the United States District Court for the Western District of Wisconsin.

As in the case of motions for summary judgment, the Western District employs unique procedures that usually govern motions for preliminary injunctions. Like the summary judgment procedures, the Court's "Procedure to be Followed on Motions for Injunctive Relief ("the Injunctive Relief Procedure)"is designed to narrow the issues by requiring the parties to identify which factual propositions are disputed as well as each party's proposed conclusions of law.[1]

TEMPORARY RESTRAINING ORDERS

Applicants for injunctive relief occasionally are faced with the possibility that irreparable injury will occur before the hearing for a preliminary injunction can be held. Wright, Miller & Kane, Federal Practice and Procedures: Civil 2d § 2951. In that event, a temporary restraining order may be available under Fed. R. Civ. Pro. 65(b), which provides:

> **(b) Temporary Restraining Order; Notice; Hearing; Duration.** A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained

the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Ex parte temporary restraining orders, of course, risk being unfair to parties who have no opportunity to be heard before the order is issued. Gullickson & Minter, Federal Civil Practice in the Western District, § 2.14. Judge Shabaz and Judge Crabb will only rarely grant temporary restraining orders without providing an opportunity for both sides to be heard. *Id.* Therefore, the Court will frequently follow the same procedure on application for temporary restraining orders as it does for preliminary injunctive motions. *Id.*

PRELIMINARY INJUNCTIONS

Notice Requirements

Fed. R. Civ. Pro. 65(a)(1) governs preliminary injunctions and provides that, "No preliminary injunction shall be issued without notice to the adverse party."

The Western District Injunctive Relief Procedure provides:

A. It is the obligation of the movant to give actual and immediate notice to the opposing party of the filing of the motion and of the date set for a hearing, if any.

B. The movant must provide the opposing party promptly with copies of all materials filed.

C. Failure to comply with provisions A and B may result in denial of the motion on that ground alone.

Preliminary Injunction Standard

The Court of Appeals, to "assist litigants in future cases," has outlined of the preliminary injunction standard as follows:

> As a threshold matter, a party seeking a preliminary injunction must demonstrate (1) some likelihood of succeeding on the merits, and (2) that it has "no adequate remedy at law" and will suffer "irreparable harm" if preliminary relief is denied. If the moving party cannot establish either of these prerequisites, a court's inquiry is over and the injunction must be denied. If, however, the moving party clears both thresholds, the court must then consider: (3) the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest, meaning the consequences of granting or denying the injunction to non-parties.

The court, sitting as would a chancellor in equity, then "weighs" all four factors in deciding whether to grant the injunction, seeking at all times to "minimize the costs of being mistaken." We call this process the "sliding scale" approach: the more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side; the less likely it is the plaintiff will succeed, the more the balance need weigh towards its side. This weighing process, as noted, also takes into consideration the consequences to the public interest of granting or denying preliminary relief. While we have at times framed the sliding scale approach in mathematical terms, it is more properly characterized as subjective and intuitive, one which permits district courts to "weigh the competing considerations and mold appropriate relief."

Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 11-12 (7th Cir. 1992) (citations and footnotes omitted). *See also Greer v. Amesqua,* 22 F. Supp. 2d 916 (W.D. 1998).

Western District Injunctive Relief Procedure

Often a motion for temporary restraining order and/or preliminary injunction is filed with the complaint. In such cases, the clerk's office will typically provide the plaintiff's attorney with a copy of the Injunctive Relief Procedure containing blank lines for when the parties' submissions will be due. Gullickson & Minter § 2.14. The judge assigned to the case will typically then review the pleadings and motion and establish a briefing schedule and hearing date. The clerk's office will usually contact the plaintiff's counsel with the briefing schedule and hearing date. The plaintiff's attorney, in turn, is expected to give *immediate actual notice* to the adverse party.

The movant's obligations under the Injunctive Relief Procedure are as follows:

A. It is the movant's obligation to establish the factual basis for a grant of relief.

1. In establishing the FACTUAL BASIS necessary for a grant of the motion, the movant may elect to serve and file:

    a. A stipulation of those facts to which the parties agree;

    b. A statement of record facts proposed by the movant;

    c. A statement of those facts movant intends to prove at any evidentiary hearing; or

    d. Any combination of a, b, and c.

2. Whether a movant elects a stipulation or a statement of proposed findings, it is movant's obligation to present no more and no less than the set of factual propositions that movant considers necessary to a decision in movant's favor.

a. The factual propositions are to be set forth in numbered paragraphs, the contents of each of which shall be limited as far as practicable to the statement of a single factual proposition.

b. At the close of each numbered paragraph shall be set forth one or more references to the source of the proposition (whether pleadings, deposition transcripts, affidavits,[2] exhibits or testimony to be adduced at the evidentiary hearing, etc.).

B. The movant is directed to serve and file a statement of the conclusions of law proposed by movant, in numbered paragraphs.

C. The materials in support of the motion for injunctive relief as specified in II A and II B, shall be served and filed with the supporting brief no later than ______________.

D. If, when the movant's submission is filed, the court finds that it does not comply substantially with the requirements set forth above, in its discretion, the court may deny summarily the motion for injunctive relief, or may cancel the hearing on certain stated conditions.

E. Similarly, if movant's submission is untimely, in its discretion, the court may deny summarily the motion for injunctive relief, or may cancel the hearing on the motion, or may continue the hearing.

The respondent's obligations under the Injunctive Relief Procedures are as follows:

A. When a motion and supporting materials and brief have been served and filed in compliance with II, above, the opposing party shall serve and file the following:

1. Such affidavits and other documentary evidence which the party may elect to serve and file in opposition to the motion.

2. A response to the movant's statement of proposed findings of fact.

a. With respect to each numbered paragraph of the movant's proposed findings of fact, the opposing party shall state clearly whether there is a dispute as to the whole or a part of that factual proposition; if the dispute goes only to a part of the proposition, the response shall identify precisely that part which the party disputes.

b. With respect to any paragraph as to which it is contended that there is a dispute, the response shall refer to the evidentiary matter of record or testamentary evidence to be adduced at the hearing that, in the opposing party's opinion, will refute the proposition contained in that paragraph.

(Continued on page 10)

WDBA

Western District of Wisconsin Bar Association

AGENDA

ANNUAL MEETING AND CONTINUING LEGAL EDUCATION PROGRAM
THURSDAY, APRIL 25, 2002

10:30 a.m.	**Annual Business Meeting** - United States Courthouse, Room 250
12:00 p.m.	**Luncheon** - White Horse Inn **Keynote Speaker:** Dean and Professor of Law Howard B. Eisenberg, Marquette University School of Law: *The War on Crime, the War on Drugs, and the War on Terrorism – Can the Bill of Rights Survive the Battles?*
1:30 p.m. - 1:40 p.m.	**Welcome and Opening Remarks**
1:40 p.m. - 2:30 p.m.	***"Trends in Intellectual Property Litigation"*** - Michelle Umberger, Heller Ehrman White & McAuliffe LLP; Joseph T. Leone, DeWitt, Ross & Stevens, S.C.
2:30 p.m. -3:20 p.m.	***"Prisoner Litigation Update - Recent 1983 Issues"*** - Paul Kinne, Gingras, Cates & Luebke; Charles Hoornstra, Wisconsin Department of Justice
3:20 p.m. - 3:30 p.m.	**Break**
3:30 p.m. - 4:00 p.m.	***"Summary Judgment Motion Expectations and Procedures"*** - Chief United States District Court Judge Barbara B. Crabb
4:00 p.m. - 4:30 p.m.	**Judges' Panel and Discussion** Chief Judge Barbara B. Crabb District Judge John C. Shabaz Chief Bankruptcy Judge Robert D. Martin Magistrate Judge Stephen L. Crocker Magistrate Judge and Clerk of Court Joseph Skupniewitz
4:30 p.m.	**Reception** (beverages and hors d'oeuvres)

WESTERN DISTRICT OF WISCONSIN BAR ASSOCIATION

ANNUAL MEETING RESERVATION FORM
Thursday, April 25, 2002

Name: ______________________________

Firm: ______________________________

Address: ______________________________

____

Phone: ____________ Email Address: ____________

I will be attending:

- ❑ 10:30 a.m. Business Meeting
- ❑ 12:00 p.m. Luncheon
- ❑ 1:30 p.m. CLE Program
- ❑ 4:30 p.m. Reception

Luncheon Menu Selection ($15.00 includes tax & gratuity)

- ❑ Pork Loin with Mashed Potatoes
- ❑ Grilled Chicken Cesar Salad
- ❑ Linguini Primavera

Please enclose a check to the Western District Bar Association to cover the following expenses:

Lunch ($15.00) ____________

Membership dues for 2002 - 2003 ($35) ____________

Cost of CLE Program ($50 for non-members; Free for members) ____________

TOTAL: ____________

Please return this form with your check by April 18, 2002 to:

PLEASE FEEL FREE TO COPY THIS PAGE AND USE THAT COPY TO MAIL IN AS YOUR RESERVATION!

Western District Bar Association
Post Office Box 44578
Madison, WI 53744-4578

(Continued from page 7)

3. A response to the movant's proposed conclusions of law.

   a. With respect to each such numbered proposed conclusion, the said response shall state clearly whether the said conclusion is agreed to or disputed in whole or in part; if the dispute is partial, the response shall state precisely which portion of the proposed conclusion is disputed.

   b. If an opposing party believes that the motion for injunctive relief must fail because of conclusions of law not stated by movant, that party may state such other conclusions of law.

B. The response in the form required by III, above, shall be served and filed together with a brief in opposition to the motion for injunctive relief no later than

C. The court does not consider that it is under any obligation to search the record for factual matters that might support either the grant or the denial of the motion. It is the duty of the parties to bring the court's attention all factual and legal matters material to the resolution of the issues in dispute.

The Injunctive Relief Procedure does not provide for the submission of reply briefs. Instead, a hearing on a motion for a preliminary injunction is usually scheduled for shortly after the submission of the respondent's materials. At the hearing, the movant has the opportunity to reply to respondent's arguments.

A preliminary injunction hearing may or may not include an evidentiary hearing. Because both the movant and respondent are required to submit affidavits setting forth facts as would be admissible in evidence, and because the parties are encouraged to enter into stipulations, the record sometimes contains a sufficient factual record for the Court to rule on the motion without the need for testimony from any witnesses. In such cases, the hearing on the motion would be limited to oral argument by counsel and a ruling by the Court. Where there are significant factual issues in dispute, or where the credibility of the witnesses is important, the Court, of course, will take testimony before ruling on the motion.

Security

Fed. R. Civ. Pro. 65(c) provides:

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

Therefore, a party moving for a temporary restraining order or a preliminary injunction, should make tentative arrangements for obtaining a bond or other security in advance of seeking a temporary restraining order or preliminary injunction.

SUGGESTIONS

The following are suggestions to consider when seeking a motion for injunctive relief in the Western District:

- Because *ex parte* temporary restraining orders are rarely granted, and because the Court will usually schedule a hearing on a motion for preliminary injunctions promptly, avoid applying for an *ex parte* temporary restraining order except in those cases where a true emergency exists.
- When applying for a temporary restraining order make every effort to give notice to the adverse party and to have the adverse party available in person or by telephone.
- When filing a complaint and motion for preliminary injunction in federal court, or in state court when removal to federal court is likely, anticipate the Court's Injunctive Relief Procedure and prepare the motion accordingly. Although the Court will provide the movant with the Injunc tive Relief Procedure, and an opportunity to "perfect" the motion, the Court may be able to schedule an earlier hearing if the movant can demonstrate that it has already met the movant's obligations.
- Attempt to establish as much as possible by stipulation or by affidavits facts that are not subject to dispute. The focus of the hearing should be in establishing those facts that are in dispute and, most importantly, demonstrating why an injunction should be granted using the "sliding scale" approach.
- Anticipate the requirement that security will be required. Make tentative arrangements for obtaining a bond and be prepared to address the amount of required security at the hearing.

1 *The "Procedure to be Followed on Motions for Injunctive Relief" quoted in this article is the procedure provided by the Court in a Judge Shabaz case. The procedure employed by Judge Crabb is substantially the same.*

2 *Affidavits must be made on personal knowledge setting forth such facts as would be admissible in evidence, and showing affirmatively that the affiant is competent to testify as to the matters stated therein.*

Celebrate National Library Week, Law Library Style

The Dane County Law Library and Wisconsin State Law Library are both observing National Library Week April 14-20 with a variety of activities and events.

Dane County Law Library staff have put together a fun-filled week of games and quizzes for the young and young-at-heart. The Dane County Law Library is located in Room 315 of the City-County Building, 210 Martin Luther King, Jr. Blvd. Hours are 8:30 to 4:30 Monday through Friday. For more information, call 266-6316.

The Wisconsin State Law Library's quiz will help you become familiar with their recently redesigned web site http://wsll.state.wi.us. Pick up a copy at the library, or print it from the web and fax it to Connie Von Der Heide at 608-267-2319. A drawing from all correct entries will be held to determine the prize winners.

Do you enjoy reading legal fiction? Then be sure to attend the State Law Library's book signing on Wednesday, April 17, 3-5 p.m. Chat with Wisconsin Supreme Court Commissioner and acclaimed legal fiction author Nancy Kopp about her latest thriller, *Final Justice,* available in bookstores April 2. Nancy has also written three other books, *Absent Witness, Acts and Omissions,* and *With Intent to Kill.* [NOTE: At press time, the location of this event is still being confirmed. Please call the State Law Library at 266-1600 for information.]

To cap off the week, the Supreme Court and State Law Library are hosting an open house on Friday, April 19 from 3 to 6 p.m. at the Library's new home in the Risser Justice Center, 120 Martin Luther King, Jr. Blvd. Lawyers, legislators, court staff and interested members of the public are all invited to come and see the new library, visit with the Justices and the Library staff, enjoy refreshments and observe both the library's 166th anniversary and the Supreme Court's upcoming 150th anniversary as a separate court.

VEHICLE FORFEITURE

By Stephen J. Eisenberg

It would not be a surprise to most of you that federal law allows for the seizure of conveyances, including aircraft, motor vehicles and boats, which are used, or are intended for use, to transport, or in any manner facilitate, the transportation or sale of drugs. See 21 U.S.C. § 881(a)4. 21 U.S.C. § 881(a) lists many different items that can be seized if they are involved with drug dealing, including real property, money, books and records. However, a drug dealer's car may be seized even if it is only used to drive to a meeting to talk about a drug deal and if the car never actually had drugs in it. United States v. 1990 Toyota 4Runner, 9 F.3d 651 (7th Cir. 1993).

Recently, there have been media reports about Internet sex crimes wherein federal agents have posed as minor girls on the Internet in an attempt to lure men to meet the non-existent child for sex. Can the government then forfeit your vehicle if you drive it across state lines simply as a means of transportation to meet what you believe to be a minor child when, in fact, it's a federal agent? This query actually addresses two issues:

1. Can a person who travels in interstate commerce for the purpose of engaging in a sexual act with a person under 18 years of age be convicted of that crime when there is no actual child?

The answer appears to be "yes." The Fifth Circuit Court of Appeals in United States v. Farner, 251 F.3d 510 (5th Cir. 2001), held that the defense of legal impossibility cannot preclude a conviction for attempting to persuade and entice a minor to engage in criminal sexual activity pursuant to

18 U.S.C. § 2422. It was legally impossible for Farner to have committed the crime since the "minor" was an adult police officer. The court held that if Farner believed he was dealing with a minor and acted on the belief, a conviction could result. The Seventh Circuit has not addressed this issue. However, the district court from the Northern District of Illinois in United States v. Echt, 2002 WL 188474 (January 25, 2002), agreed with Farner in a virtually identical case.

2. Can the government forfeit a vehicle driven across state lines for the purpose of engaging in sex with a minor?

This question has not been decided by any appellate court. 18 U.S.C. §§ 2421, 2422 and 2423 make it illegal for a person to travel in interstate commerce for the purpose of, among other things, engaging in sexual acts with a minor. 18 U.S.C. § 2254(a)(2) allows for the forfeiture of any real or personal property used or intended to be used to commit or to promote the commission of a child sex offense. Theoretically, if a person traveled across state lines in his own vehicle with the intent to commit a child sex offense, the vehicle may be subject to forfeiture. But does the forfeiture statute extend that far? Is the vehicle really used or intended to be used to commit or promote the commission of an offense or simply a tangential form of transportation? These questions do not yet have answers.

If your client's car is seized, the seizing authority will send your client a Notice of Seizure or "Factual and Legal Basis for Seizure." The Notice outlines the process for making a claim. 18 U.S.C. § 983 provides the actual procedure for making a claim. § 983(a)(2)(A) provides that any person claiming property seized may file a claim. § 983(a)(2)(C) requires that a claim (1) identify the property being claimed, (2) state the claimant's interest in such property; and (3) be made under oath, subject to penalty of perjury. Pursuant to § 983(a)(2)(D), a claim need not be made in any particular form. Further, any person may make a claim under subparagraph (A) without posting bond with respect to the property which is the subject of the claim. § 983(a)(2)(E)

Within 90 days of the filing of a claim, the government must file a complaint for forfeiture or return the property pending the filing of a complaint, except that a court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties. § 983(a)(3)(A)

In a suit brought under any civil forfeiture statute, the burden of proof is on the government to establish, by a preponderance of the evidence, that the property is subject to forfeiture. If the government's theory of forfeiture is that the property was used to facilitate the commission of a crime, the government must establish that there was a substantial connection between the property and the offense.

If property has been seized, a claimant may move for immediate release of the seized property pending final disposition if the claimant has a possessory interest in the property, the claimant has sufficient ties to the community to provide assurance that the property will be available, and if failure to return the property will cause substantial hardship to the claimant. See 18 U.S.C. § 983(f). The issue of release pending final disposition is decided by the FBI, so don't hold your breath.

Printed on pages 14 and 15 of this newsletter is a claim form that I have used in prior cases. Even if it may not be cost effective to litigate the seizure of an inexpensive vehicle, the filing of a claim is still warranted. As long as you file a claim, there is room for negotiation, including the return of the vehicle in exchange for a cash payment by the claimant.

CLAIM OF OWNERSHIP

Re: Property: 1998 Toyota 4Runner
Vehicle ID No.:
Asset ID No.: 01-FBI-000000
Seizure No.: 4500000000
Value: $13,000.00
Seizure Date: 1/5/02
Seizure Place: Madison, Wisconsin
Seized From: John Smith
Date of Notice of Seizure: 2/20/02
Judicial District: Western District of Wisconsin

TO: Special Agent In Charge
Federal Bureau of Investigation
ATTN: Forfeiture Paralegal Specialist
330 E. Kilbourn Avenue, Suite 600
Milwaukee, WI 53202-6627

The undersigned, John Smith, 123 Main Street, Chicago, Illinois 60000, hereby claims ownership of the above-described property, a 1998 Toyota 4Runner, appraised at $13,000.00, seized from John Smith by the Federal Bureau of Investigation on January 5, 2002, at Madison, Wisconsin.

I am the sole owner of the property. Attached hereto is a copy of the Illinois Department of Motor Vehicle's Title Registration indicating that I am the sole owner of the property. Claimant submits that the property is not subject to forfeiture pursuant to 18 U.S.C. § 2254 and 19 U.S.C. § 1602-1619.

Pursuant to 18 U.S.C. § 983(f), claimant is hereby requesting release of the seized property during pendency of the forfeiture proceedings. Pursuant to 18 U.S.C. § 983(f)(1)(A-E), claimant has a possessory interest in the property, claimant has sufficient ties to the community to provide assurance that the property will be available at the time of trial, the continued possession by the government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, the claimant's likely hardship from the continued possession by the government of the seized property outweighs the risk that the property will be destroyed, damaged, lost, concealed or transferred if it is returned to the claimant during the pendency of the proceeding, and none of the conditions set forth in 18 U.S.C. § 983(f)(8) apply. The property is a motor vehicle which claimant requires to use for transportation.

CLAIM OF OWNERSHIP
(Continued)

I hereby certify under oath and under penalty of perjury that the claim stated above is true and correct.

Dated this 1st day of March, 2002.

____
John Smith

Subscribed and sworn to before me
this 1st day of March, 2002.

____
Notary Public
State of Wisconsin
My Commission expires ________________

EISENBERG LAW OFFICES, S.C.

____
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