

# STATE & LOCAL LAW NEWS

The Section serves as a collegial forum for its members, the profession, and the public to provide leadership and educational resources in urban, state, and local government law and policy.

## Daniel J. Curtin, Jr., 1933–2006

**D**aniel J. Curtin, Jr., a Walnut Creek, California, resident and legendary land use lawyer, died of natural causes on November 30 in San Francisco. He was seventy-three.

For nearly fifty years, Dan was the most instrumental figure in shaping land use and local government law in California. A prolific writer and speaker, Dan taught land use law throughout the state to local government staffers, elected officials, lawyers, judges, and others. He authored several major publications, including *Curtin's California Land Use and Planning Law*, currently in its 27th edition, the legal treatise *California Subdivision Map Act and the Development Process*, *Bargaining for Development: A Handbook on Development Agreements, Annexation Agreements, Land Development Conditions, Vested Rights, and the Provision of Public Facilities*, and the *Subdivision Map Act Manual*, along with hundreds of articles for other publications. Dan also was in constant demand as a speaker on land use and municipal law topics statewide, nationwide, and internationally. In 2005, Dan spoke at the World Jurist Association's 22nd Biennial Congress in China's Great Hall of the People on how local governments can use the general plan to guide local land use decisions.

Dan's many professional accomplishments and devotion to land use and planning earned him national accolades. In 2003, he was presented with the Jefferson Fordham Lifetime Achievement Award by the American Bar Association's Section of State and Local Government Law for dedicating more than forty years to advancing the practice of state and local government law. In 1992, Dan earned the International Mu-



nicipal Lawyers Association's Charles S. Rhyne Award for Lifetime Achievement in Municipal Law for his leadership and service to the legal profession and for his contributions to IMLA and the municipal law community. In 1988, Dan was awarded the American Planning Association's Distinguished Leadership Award, recognizing more than two decades of writing and teaching and his encouragement of and support for planning ideas and education.

The dean of California land use lawyers, Dan leaves an enduring professional legacy in the generations of lawyers and planners he taught, mentored, inspired, and befriended. He was selfless with his time and facilitated a web of relationships that will continue far into the future.

Dan earned the respect and admiration of his peers, who considered him in the highest regard. His intelligence, thoughtfulness, passion, and decency set the highest standard of professional practice. Those of us who knew and worked with Dan were blessed for the opportunity and honored to have

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# CHAIR'S MESSAGE

## Chair's Message

By Edward J. Sullivan

In my initial column, I mentioned three Section initiatives for the 2006–07 year. The first initiative, to promote a Section as diverse as the nation we serve, was highlighted in that column and has been the subject of intense work. On page 5, you will see the fruit of that work in the Miami CLE program aimed at helping women and minority lawyers and those lawyers new to the profession. That program, co-sponsored by the Government Lawyers Division, illustrates the commitment of both entities to lend our collective experience and expertise to assist newer lawyers.

This column sets out an initiative not unrelated to the diversity initiative, which is to involve Section members, as much as possible and as much as those lawyers desire, to participate in the work of the Section. We are not a very large section, so the opportunity to work collegially is available, and the Section, through its Executive Committee and substantive committees, attempts to enrich the knowledge and skills of our members through meetings, their continuing education activities, and our Section publications.

Section committees are open to all members. I became involved in the work of the Section through assisting the Land Use Committee in an annual survey of the role of the comprehensive plan in land use regulation, an activity that morphed into an annual report, which is published annually by our flagship publication, *The Urban Lawyer*. Writing and presenting that report brought me into contact with knowledgeable Section members who expanded my horizons in state and local government law. And getting to know the



Edward J. Sullivan is Chair of the Section and a member of the Portland, Oregon, firm of Garvey Schubert Barer.

“movers and shakers” in the area gives members confidence in practicing in this area.

The benefits of participation are not limited to the sharing of knowledge and experience. Members who participate meet their peers and potential mentors periodically through Section meetings. Whether those meetings take place with the larger ABA, as this past summer in Honolulu, or in conjunction with the Wisconsin Bar, as occurred in Madison in October, members have both a stimulating intellectual experience and a good time interacting with other members as well.

Membership also provides the opportunities of serving the profession and the legal community through leadership  
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## STATE & LOCAL LAW NEWS

### Public Law Produces Public Benefit

*State & Local Law News* (ISSN: 0195-7686) is published quarterly, as a service to its members, by the Section of State and Local Government Law of the American Bar Association, 321 North Clark Street, Chicago, IL 60610-4714.

*State & Local Law News* provides information concerning current developments in the law of interest to state and local government lawyers, news about the activities of the Section, and other information of professional interest to Section members.

Any member of the ABA may join the Section by paying its annual dues of \$40. Subscriptions to *State & Local Law News* are available to nonlawyers for \$44.95 a year (\$49.95 for foreign subscribers).

The views expressed herein are not necessarily those of the American Bar Association or its Section of State and Local Government Law.

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The Editor invites submissions of articles for publication in *State & Local Law News*. Articles should be no longer than 2,000 words and lightly footnoted.

Address corrections should be sent to the American Bar Association Service Center.

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# SECTION NEWS

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## Call for Nominations: Tenth Annual Jefferson Fordham Awards

The ABA Section of State and Local Government Law established the Jefferson B. Fordham Awards Program in 1998 to recognize and honor the accomplishments of practitioners and institutions active in the varied areas of practice associated with state and local government law. The awards honor outstanding attorneys and law offices that have achieved professional excellence within this area of the profession. Awards may be presented in the following categories on an annual basis: (1) Law Office Accomplishment, (2) Lifetime Achievement, (3) Advocacy, and (4) Up & Comers.

### Who Was Jefferson Fordham?

The Fordham Awards commemorate the career of Jefferson B. Fordham, who was elected the first Chair of the Section of Local Government Law in 1949. During his years of outstanding service, the Section became the distinguished national resource for the advancement of state and local government law practice. His local government law case book, in which he addressed planning and finance, housing and blight, transportation and congestion, in short, the entire range of urban problems whose solutions required a larger concept of community, revolutionized the teaching of this field. He pioneered the concepts of home rule and the landmark decisions sustaining interdisciplinary studies under bar sponsorship. He was a visionary in teaching that the tough problems of local government did not lend themselves to simplistic solutions.

### Submission of Nominations

Nominations must be received on or before **April 20, 2007**, by the ABA Section of State and Local Government Law. The Section's Awards Committee will select recipients by July 6, 2007, and the awards will be presented at the ABA Annual Meeting at a special luncheon in San Francisco, California, on Friday, August 10, 2007.

### Detailed Criteria for Selection

Below is a list of the four different areas for which the Jefferson Fordham Award may be presented on an annual basis and a brief description of the criteria used to select recipients in each category.

*Law Office Accomplishment Award*—Recognizes sustained outstanding performance or a specific extraordinary accomplishment by a state and local government law office. Eligible candidates include all state and local government public sector law offices, including departments or units within such offices.

*Lifetime Achievement Award*—Recognizes outstanding contributions to the practice of state and local government law by an individual over an entire career. This award is given for contributions over a number of years.

*Advocacy Award*—Recognizes outstanding advocacy or legal writing within the area of state and local government law. This award fosters and encourages excellence in advocacy, both written and otherwise, in state and local government law.

*Up & Comers*—Presented to a young practitioner (thirty-six or under) as defined by the ABA who, through his or her efforts and accomplishments, shows great promise to continue these contributions for future achievements.

### Guidelines for Submission

Nominations for recipients in each of the four categories must be submitted in the following format with all the information requested:

1. Full name, addresses, and telephone numbers of the nominee.
2. Name of law office's director or manager for Government Law Office Award, including the size and mission of the office.
3. Summary of nominee's or office's achievements (brief explanation of outstanding or extraordinary public and/or professional services rendered (50 to 100 words)).
4. An explanation of the nominee's performance and service; information regarding the time frame for the services described; accomplishments or superior contributions over a number of years; outstanding advocacy or legal writing; qualifications as a young lawyer for the Up & Comer's Award whose past efforts and accomplishments show great promise to continue contributions for future achievement; assessment of the impact of the service for which you are nominating the individual or office (no more than two typed pages).
5. Names, titles, and phone numbers of three other persons (including at least one lawyer or jurist), who are familiar with the nominee's performance, achievements, etc.
6. A brief statement about the nominator's background that would assist the Awards Committee in evaluating the nominations.

### Submit All Materials to:

Jackie Baker, ABA Section of State and Local Government Law, 321 North Clark Street, Chicago, IL 60610, fax 312/988-5121, or e-mail [jl baker@staff.abanet.org](mailto:jl baker@staff.abanet.org).

# Public Education Committee Report

The Public Education Committee works collaboratively with the members of the Section of State and Local Government to address the full breadth of issues faced at all levels of public education, including legal issues involving public educational employees, the First Amendment, students, public contracts, and school safety and security. The Committee is presently chaired by Mary Kay Klimesh, an attorney with Seyfarth Shaw LLP in its Chicago office, and the Committee's

vice-chair is James C. Hanks, an attorney with Ahlers & Cooney, P.C. in Des Moines, Iowa.

The Committee is presently focusing its efforts on organizing a teleconference to address the serious issues of public school safety, particularly at the K-12 level. The teleconference will address risk management strategies to address school safety concerns as well as emergency response measures. This teleconference will be linked to the recently published Section book, *School Violence: From Discipline to Due Process*, edited by Mr. Hanks. This book, written as a practical resource for practitioners, addresses the constitutional and statutory requirements involved in preventing and responding to school violence and school safety issues. The Committee is very pleased that this book provides a useful resource to assist practitioners in addressing an important issue, which is applicable to public schools across all jurisdictions. It is hoped that the teleconference, which hopefully will occur in early 2007, will include panelists who authored chapters in *School Violence* and will give participants an opportunity to further their practical and legal knowledge base to assist in advising public schools in risk management, school safety, and responding to violence that occurs on school premises.

The Committee is focusing on increasing participation in its efforts and welcomes any suggestions. Feel free to contact Committee Chair Mary Kay Klimesh at [mkklimesh@seyfarth.com](mailto:mkklimesh@seyfarth.com) with any comments, suggestions, or questions.

## Join a Committee!

One way to ensure that you are maximizing your Section membership is to sign up for a Section committee. Even if you do not want to be an active member, please sign up for the committees that deal with the areas of law in which you are interested.

- Condemnation Law
- Environmental Law
- Ethics
- Government Operations and Liability
- Homeland Security/Emergency Management
- Land Use, Planning & Zoning
- Public Education
- Public Finance

**Committee membership is free.** Committees offer access to special information, networking, and leadership opportunities. Working through substantive subcommittees, committee members help ensure that the Section provides services—and addresses issues—important to your practice. For more information about a specific committee, visit [www.abanet.org/statelocal/home.html](http://www.abanet.org/statelocal/home.html) or contact Edwin P. Voss, Jr., committee coordinator, at [evoss@bhlaw.net](mailto:evoss@bhlaw.net).

**Send your committee enrollment information** to Leigh Stewart, Administrative Assistant, by fax at 312/988-5121, or by mail to 321 N. Clark St., Chicago, IL 60610-4714.

Committee(s): \_\_\_\_\_

Your Name: \_\_\_\_\_

Address \_\_\_\_\_

E-Mail: \_\_\_\_\_

Telephone: \_\_\_\_\_

Fax: \_\_\_\_\_

## Ethics Committee Update

The Ethics Committee had a productive 2005–06. During the year the Committee, on behalf of the Section, submitted comments to the ABA Task Force on Attorney-Client Privilege. The Task Force was set up and charged with the task of investigating the effect of current regulations and government policies on the confidentiality of attorney-client communications and attorney work product. The Task Force historically focused on the attorney-client privilege issues from the corporate and business perspectives, and that government should not be allowed to obtain privileged information from a business during a government investigation of that business.

With the assistance of Patty Salkin, the committee has educated the Task Force that government lawyers also face great challenges with the attorney-client privilege as it relates to effectively representing government. In addition, Patty Salkin published a law review article, titled *Eliminating Political Maneuvering: A Light in the Tunnel for the Government Attorney-Client Privilege*. This article addresses many of the concerns raised with the Task Force. The Committee plans during the coming year to make a formal presentation to the Task Force, with the goal of issuing a resolution or other guidance from the Task Force to the ABA that assists in addressing these issues.

The chair of the Ethics Committee continued this year to serve as a member of the ABA Center for Professional Responsibility/Section Officers' Conference, Joint Committee on Ethics and Professional Responsibility. The Joint Committee

# CLE Program Set for ABA Midyear Meeting in Miami, Florida

The Section of State and Local Government Law and the Government and Public Sector Lawyers Division are sponsoring a continuing legal education program that will take place at the ABA Midyear Meeting in Miami, Florida, on February 9 at the Hyatt Regency Hotel, Miami Lecture Hall, 3rd Floor.

## Promoting Diversity in the Practice of State, Local, Government, and Public Sector Law

*This session is complimentary*

**8:30–9:45 a.m.**

One of the major challenges of the new century is building a legal profession that reflects a society that is rapidly becoming more diverse. As society become more heterogeneous, leaders within state, local, government, and public sector law (the practice) will have to address the issues, challenges, and opportunities in promoting diversity by addressing key questions: Why is diversity in the practice important? How diverse is the practice today? What are the barriers to further diversity? How can the practice overcome these barriers? What are the ethics of diversity? How can we best shape the future?

Faculty Members: Lysia Bowling, State Attorney's Office, 11th Judicial Circuit; Sidney Calloway, Shutts & Bowen LLP; Jorge L. Fernandez, City Attorney, Miami; Ardyth Walker, Staff General Counsel, Miami-Dade Commission on Ethics and Public Trust.

## Public Law Office Management 101: Strategies, Solutions and Ethics Rule Implications

**10:00 a.m.–12:00 noon**

Confirmed panelists: Gregory Brooker, Assistant U.S. Attorney, District of Minnesota; Jorge L. Fernandez,

City Attorney, Miami; Ellen Lazarus, Acting Assistant Director, Congressional Research Service, American Law Division; and Sharon Pandak, Chair, CLE Committee, Government and Public Sector Lawyers Division.

## Ethical Considerations in Public Sector Law

**1:30–3:30 p.m.**

Confirmed panelists: Prof. Anthony Alfieri, University of Miami School of Law; Dean Bob Butterworth, St. Thomas University School of Law; Marcia G. Cooke, U.S. District Judge, Southern District of Florida; Dexter Lee, Senior Litigation Counsel, U.S. Attorney's Office, Southern District of Florida; Sharon E. Pandak, Chair, CLE Committee, Government and Public Sector Lawyers Division; and Vivian Reyes, Former UPL Counsel, Office of Bar Counsel, The Florida Bar, Miami Branch.

## Pathways to Success for Women and Minorities in the Public Sector

**3:45–5:15 p.m.**

Confirmed panelist and program coordinator: Anne Dewey Balzhiser, President, Women Lead LLC; Panelist: Iris Jones, Former President, International Municipal Lawyers Association.

## Complimentary Reception

**5:15–6:30 p.m.**

**For registration information contact Sarah Hilton at 202/662-1022 or visit [www.abanet.org/govpub/meet.html](http://www.abanet.org/govpub/meet.html).**

assists sections and divisions in coordinating professionalism initiatives by identifying issues and alerting members to ABA projects and initiatives that could benefit members. In addition to the above activities, Marti Chumbler, a past chair of the Committee, this year assisted in the publication of a book that addresses many ethical issues concerning technology and access to public records. The working title of the book is *Open to the Public: The Impact of Information Technology and Electronic Access on State Public Records Laws*. It is anticipated that the book will be published in mid-2007.

The Ethics Committee is currently planning to present a stand-alone CLE ethics program this year at the Section Spring Meeting in San Juan, Puerto Rico. Although in the past presentations have consisted of role-playing by a cast of characters used to highlight ethical issues frequently

encountered by government lawyers and lawyers who practice before state and local governments, the Committee is working this year on a new approach to the ethics presentation that will be informative but hopefully entertaining at the same time. We are currently considering several topics for the upcoming CLE. The Committee is certainly open to ideas for hot topics. Please do not hesitate to contact the Committee should you have any suggestions.

A primary mission of the Committee continues to be enlisting new members who will actually participate and contribute to Committee activities. The Committee looks forward to a very active 2006–07. If you have an interest in joining the Committee, please contact Michael Donaldson at 850/224-1585, or e-mail [mdonaldson@carltonfields.com](mailto:mdonaldson@carltonfields.com).

# Spring Meeting

Caribe Hilton • San Juan, Puerto Rico • May 18–20, 2007

## Friday, May 18, 2007

8:00 a.m.–5:00 p.m.

### **Registration and Hospitality Room**

8:00 a.m.–12:00 noon

Executive Committee Breakfast Meeting

1:00–2:00 p.m.

### **Metadata and Its Implications to the Government Lawyer**

The program will consider the ethical problems and issues caused by disclosing to the public, opposing counsel, or clients e-mail pleadings or other electronic documents and the metadata embedded therein. Together we will try to navigate this growing ethical issue.

2:15–3:30 p.m.

### **Environmental Protection and the Role of Supplemental Environmental Projects (SEPs) in Civil Enforcement**

#### **Moderator:**

Prof. John (Jack) H. Minan, University of San Diego School of Law, San Diego, California

#### **Speakers:**

Luis E. Rodriguez, Professor, University of Puerto Rico School of Law, San Juan, Puerto Rico

Patricia McKenna, U.S. Department of Justice, Washington, D.C.

Steven Bonorris, Associate Director, Center for State and Local Government Law, University of California, Hastings College of Law, San Francisco, California

This distinguished panel of legal experts will present their views during the environmental law program. Prof. Rodriguez, who is on the faculty at the University of Puerto Rico School of Law, will begin the program by sharing his views on environmental protection and economic development in Puerto Rico. He teaches environmental law and international environmental law and has been involved in a wide-range of government service activities. Patricia McKenna, a trial attorney with the Environmental Enforcement Section of the U.S. Department of Justice, will then explore the federal policy on Supplemental Environmental Projects (SEPs), which are environmental projects undertaken by environmental defendants in mitigation of civil penalties. Her litigation experience includes the 2006 civil settlement

between Puerto Rico Aqueduct and Sewer Authority and the United States of America that resolved environmental violations at sixty-one wastewater treatment plants throughout the Commonwealth and that required the Authority to spend \$1.6 billion to improve wastewater treatment facilities. Steven Bonorris, who is the editor of the definitive fifty-state study on SEPs, as well as other significant published research, will conclude the session by providing a useful survey of SEPs under state law. Jack Minan, who is the chair of the Section's Environmental Law Committee and responsible for organizing the environmental law program, will moderate the panel. Prof. Minan is on the law faculty at the University of San Diego School of Law.

3:45–5:00 p.m.

### **Church, State and Dirt: RLUIPA and Land Use in 2007**

#### **Moderator:**

Robert B. Foster, Rackemann, Sawyer & Brewster, Boston, Massachusetts

#### **Speakers:**

Marci Hamilton, Professor, Cardozo Law School, New York (author of *God vs. The Gavel: Religion and the Rule of Law* (Cambridge 2005)).

Kevin J. (Seamus) Hasson, Founder & President, Becket Fund for Religious Liberty, Washington, D.C.

Daniel P. Dalton, Tomkiw Dalton, Detroit, Michigan

6:00–7:30 p.m.

### **Welcome Reception, Banco Popular**

Sponsored by Banco Popular and Foley & Lardner

*Dinner on your own*

## Saturday, May 19, 2007

8:00 a.m.–5:00 p.m.

### **Registration and Hospitality Room**

8:00–9:00 a.m.

Newsletter & CLE Advisory Board Meeting

### **2007 Hot Topics What's New in Your Legal World?**

9:15–10:15 a.m.

### **HOT TOPICS—Homeland Security/Emergency Management**

9:15–10:15 a.m.  
HOT TOPICS—Condemnation Law

10:30–1:30 a.m.  
HOT TOPICS—Government Operations & Liability

10:30–11:30 a.m.  
HOT TOPICS—Public Finance

11:45 a.m.–2:15 p.m.  
Land Use Box Luncheon Meeting

2:30–4:00 p.m.  
Publications Oversight Board

4:00–5:00 p.m.  
All Committee Business Meetings

6:00–8:30 p.m.  
Calypso Theme Reception, Caribe Hilton  
Buffet Caribbean Food Fair & Open Bar—\$75 per person

### Sunday, May 20, 2007

8:00–8:45 a.m.  
Urban Lawyer Advisory Board Meeting

8:00–8:45 a.m.  
Membership & Special Committee on Diversity and  
Minority Outreach

9:00 a.m.–12:00 noon  
Council Breakfast Meeting

## REGISTRATION APPLICATION

The registration fee includes all CLE and Hot Topics sessions, a Reception, and CLE materials. Payment must accompany registration. Confirmations will be sent to all registrants.

Register online through the Section website at [www.abanet.org/statelocal/home.html](http://www.abanet.org/statelocal/home.html) (credit card only)

or

Send via fax to: 312/988-5121 (credit card only)

or

Mail directly to: Leigh Stewart, ABA, Section of State & Local Government Law, 321 North Clark Street, Chicago, IL 60610–4714

Please register the following individual for the ABA Section of State & Local Government Law's Spring Meeting, May 18-20, 2007, Caribe Hilton, San Juan, Puerto Rico.

### Registration Fees

- \$ 10 Law Student
- \$ 85 ABA & Section of State & Local Government Law member
- \$125 ABA & Non-Section Member — \$40 will be applied for LG Section membership
- \$155 Non-ABA Member
- \$ 50 Guest/Spouse
- \$ 50 CLE and Hot Topics Course Materials only
- \$ 75 Calypso Theme Reception per person
  - \$30 for Children

Please indicate which events below you will attend:

### Friday, May 18, 2007

6:00–7:30 p.m.

Welcome Reception — Banco Popular

Total number of adults attending \_\_\_\_\_

Total number of children attending \_\_\_\_\_

### Saturday, May 19, 2007

6:00–8:30 p.m.

Calypso Theme Reception, Caribe Hilton (Buffet Caribbean Food Fair & Open Bar)

Total number of adults attending \_\_\_\_\_

Total number of children attending \_\_\_\_\_

REGISTRANT NAME: \_\_\_\_\_

2ND REGISTRANT NAME: \_\_\_\_\_

GUEST/SPOUSE: \_\_\_\_\_

CHILD(ren): \_\_\_\_\_

FIRM: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

CITY, STATE, ZIP: \_\_\_\_\_

TELEPHONE NUMBER: \_\_\_\_\_

E-MAIL ADDRESS: \_\_\_\_\_

### Payment Information

- Enclosed is my check, made payable to the **American Bar Association**, for \$ \_\_\_\_\_.
- Government purchase order enclosed.
- Charge \$ \_\_\_\_\_ to my Credit Card:
- Visa    Mastercard    AmEx

Card Number \_\_\_\_\_

Exp. Date \_\_\_\_\_

Signature \_\_\_\_\_

# REGISTER NOW!

## CLE CREDIT

Accreditation has been requested for this program from every state (including California and Pennsylvania) with mandatory continuing legal education (MCLE) requirements for lawyers. Please be aware that each state has its own rules and regulations, including its own definition of "CLE." Certificates of attendance will be available at the program for both attendees and speakers. If you have questions about the number of CLE credit hours granted by each state, you may call 800/285-2221 starting two weeks before the program.

## AMERICANS WITH DISABILITIES ACT

For those individuals with disabilities who need special arrangements while attending the program, please contact Leigh Stewart, at the American Bar Association, 312/988-5649.

## HOTEL INFORMATION

**The Caribe Hilton**—One of the most luxurious resorts in Puerto Rico, the Caribe Hilton is set on an exclusive peninsula, made up of 17 acres of lush tropical gardens. This resort is ideally situated between historic old San Juan and the exciting Condado area, offering a secluded beach, lavish accommodations, and amenities tailored to families, couples, and business travelers alike. Just 15 minutes from Luis Munoz International Airport, the property offers beautiful ocean front swimming pools, whirlpools, and hammocks next to a secluded beach for relaxation and privacy. The resort offers a full service Olas Spa, nine restaurants and lounges, a fitness room, and even a peaceful bird sanctuary. Visit its website at <http://hiltoncaribbean.com/sanjuan> for further details.

A block of rooms has been reserved on a **priority basis for program registrants**. Room rates at the Caribe Hilton are \$200, single/double, plus a \$20 resort fee and tax per night. This rate is available 3 days prior and 3 days following the Section's listed meeting dates.

You may reserve your accommodations by calling the hotel directly at 787/721-0303, via e-mail at [reservations.caribe@hilton.com](mailto:reservations.caribe@hilton.com), or by calling toll free 800/468-8585. Be sure to refer to the **ABA Section of State & Local Government Law's 2007 Spring Meeting**, and guarantee your reservation by credit card or deposit check. Rooms will be available for check-in no later than 4:00 p.m. with check-out time of 12:00 noon. **Individuals with guaranteed reservations must cancel their reservations by May 14, 2007 to avoid a one-night cancellation charge.**

**Please, make your reservations NOW.  
The hotel will release our room block on  
Thursday, April 26, 2007, at 5:00 p.m. (CST).**

## SPECIAL AIRLINE DISCOUNTS

Airfare discounts to ABA meetings are available through ABA Online Travel, Travelocity Business, the ABA's travel agency, or directly from the airlines. To access ABA Online Travel, go to [www.abanet.org/travel](http://www.abanet.org/travel).

## CANCELLATION POLICY

Refund requests must be made in writing (via e-mail or U.S. mail) and received in the Section of State & Local Government Law's office **on or before April 25, 2007**. All refunds will be reduced by a \$25 administrative fee. Substitutions may be made at any time.

**NO refunds will be made after April 25, 2007.**





## Bringing the Ninth Circuit into Line: Voting Rights Act Minority Language Requirements Do Not Apply to Privately Circulated Petitions

By Wendy J. Phillips

In the case of *Padilla v. Lever*, 463 F.3d 1046 (9th Cir. 2006), the court considered whether privately circulated recall petitions must comply with the minority language requirements (MLR) of the Voting Rights Act of 1965 (VRA). Under the VRA, certain “covered” jurisdictions must conduct elections, provide materials, and assist voters in languages other than English. 42 U.S.C. § 1973aa-1a. Nationally, at least twenty-eight states have jurisdictions “covered” by the MLR. See 28 C.F.R. pt. 55 app. for a list of states and counties that must conduct elections in multiple languages.

A jurisdiction is required to conduct an election in languages other than English when the number of U.S. citizens of voting age in a single language group within the jurisdiction is

- more than 10,000; or
- is more than 5 percent of all voting age citizens; or
- on an Indian reservation, exceeds 5 percent of all reservation residents; and
- the illiteracy rate of the group is higher than the national illiteracy rate.

At issue in *Padilla* was the recall election of a school board member. Plaintiffs sought declaratory and injunctive relief and wanted to enjoin the recall election claiming that because the recall petitions had not been circulated in the five languages required within Orange County, California, that the petitions were invalid and the election illegal. The district court disagreed. Relying on two sister circuit decisions, which held the Voting Rights Act did not apply to privately circulated petitions because such petitions were not “provided by” the state nor were they “voting materials,” the district court declined to enjoin the recall election. *Montero v. Meyer*, 861 F.2d 603, 609–10 (10th Cir. 1988) (considering an initiative petition in Colorado); *Delgado v. Smith*, 861 F.2d 1489, 1496 (11th Cir. 1988) (considering an initiative peti-

tion in Florida). The district court dismissed the case on a 12(c) motion. Plaintiffs appealed.

In a 2–1 decision, the original three-judge panel of the Ninth Circuit issued a decision overturning the district court. In holding that the VRA does apply to recall petitions circulated by private citizens, the court found that the involvement of the elections officials was more than ministerial in nature because, for instance, the elections officials were required to approve the form and wording of the petition before it was circulated. *Padilla v. Lever*, 429 F.3d 910, 917 (9th Cir. 2005) (depublished by grant of *en banc* review). The original decision distinguished *Padilla* from *Delgado* and *Montero* claiming that the statutory constructs at issue were different, thus requiring a different result in *Padilla*. *Id.* at 917–18. The County of Orange petitioned for *en banc* rehearing based upon the conflict between *Padilla* and *Delgado* and *Montero*.

Upon rehearing, the *en banc* panel, like the *Delgado* and *Montero* courts, concluded that recall petitions are not “provided by” the state, but rather by private citizens, so the requirements of the VRA do not apply. *Padilla*, 463 F.3d at 1048. The *Padilla* decision is also in accord with the legislative intent recently expressed by Congress when the MLR was under consideration for renewal. Congress extended the MLR for twenty-five years when it passed H.R.9, which was signed by the President in July 2006. The House Judiciary Committee report, following hearings on H.R.9, noted that petitions that are initiated and distributed by private citizens are excluded from the MLR. H.R. REP. NO.109-478, at 73.

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### Chair’s Message

(continued from page 2)

and scholarship. If you have the time and interest, the Section provides a comprehensive list of committees for members to express themselves. Whether your interest is condemnation, land use, environmental, government operations, or ethics, the Section has a committee to allow members to enhance their knowledge, express themselves, and provide service to the larger community. Similarly, the Section offers leadership responsibilities through its officers and Executive Committee to participate in advice and policymaking at the national, state, and local levels.

We invite members to correspond with us, to assist us in our publications work, and to join us at our meetings. The size of our Section and its focus on state and local government law allow members to realize their potential in these areas. When members make the effort, both they and the Section benefit.

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Wendy J. Phillips is a deputy county counsel in the Office of the County Counsel for the County of Orange, California. Ms. Phillips briefed and argued *Padilla v. Lever* to the *en banc* panel.

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# SUPREME COURT WATCH



By Lani Williams

## Qualified Immunity for High Speed Chases

On October 27, the Court granted certiorari in *Scott v. Harris*, 433 F.3d 807 (11th Cir. 2005), *cert. granted*, 75 U.S.L.W. 3233 (Oct. 27, 2006)(No. 05-1631). By summer 2007, the Court will decide whether a law enforcement officer's conduct was "objectively reasonable" for Fourth Amendment purposes when the officer decided to end a high-speed chase by colliding with the fleeing suspect's vehicle. If the Court answers this question in the negative, the Court also will have to determine whether the law was "clearly established," so as to deprive the officer of qualified immunity.

## Background

The road to the Supreme Court began on March 29, 2001, just before 11 p.m., when a deputy sheriff with the Coweta County, Georgia, Sheriff's Department flashed his lights at a vehicle driving approximately 73 m.p.h. in a 55 m.p.h. zone. Rather than slow down or stop, the driver attempted to flee, accelerating to speeds of at least 90 m.p.h., crossing double yellow traffic control lanes to pass vehicles, and driving through at least two red lights. (Because the case is before the Court at the summary judgment stage, these facts are recited in the light most favorable to the nonmovant, Harris. Scott asserts that Harris traveled in excess of 100 m.p.h. during the course of the chase.)

The initial pursuit was eventually joined by a second Coweta County Sheriff's Deputy, Scott, as well as two Peachtree City, Georgia, police vehicles. Scott did not know that the initial violation involved driving at approximately 20 m.p.h. above the posted speed limit. The officers attempted to contain Harris after he entered a parking lot, but he was able to escape after colliding with one of the deputy sheriffs' vehicles. The pursuit continued at speeds between 90 to 100 m.p.h., until Scott requested permission to conduct a "PIT" (Precision Intervention Technique) maneuver. A PIT maneuver is designed to stop a vehicular escape by ramming a fleeing vehicle at a very precise point to place it into a spin. It is generally conducted at relatively low speeds (35 m.p.h.). After receiving permission, Scott determined the vehicles were traveling too fast, and instead rammed Harris's vehicle from behind. Harris lost control of his vehicle, left the roadway, and crashed. Harris was unbelted and as a result of the

accident is a quadriplegic. The chase, including Harris's use of his blinkers when changing lanes, was recorded on video.

Reviewing the district court's denial of qualified immunity at the summary judgment stage, the Eleventh Circuit began its analysis by noting that using a vehicle to stop and apprehend a suspect is a seizure for Fourth Amendment purposes. See *Brower v. County of Inyo*, 489 U.S. 593, 596-99 (1989) (a seizure occurs when a police cruiser sideswipes a fleeing car, producing a crash, and terminating a suspect's freedom of movement).

The Eleventh Circuit then asked whether Scott exerted a reasonable amount of force in seizing Harris. Although recognizing that an automobile is not a deadly weapon in every circumstance, the court pointed to several cases in which driving an automobile was found to constitute the "use of a deadly weapon." The court determined, under the facts present here, that there was "little dispute" that Scott used "deadly force" in seizing Harris.

Under *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985), the use of deadly force is only allowed when (1) an officer has probable cause to believe a suspect poses a threat of serious physical harm or has committed a crime involving infliction of serious physical harm; (2) deadly force is necessary to prevent escape; and (3) if, when feasible, warning of the use of deadly force has been given. The Eleventh Circuit reasoned that none of the factors required by *Garner* were present in this case. The court found that *prior* to the chase Harris had not posed an imminent threat of serious physical harm to the officers or others. The court also stated that Harris had not committed a crime involving the infliction or threatened infliction of serious physical harm.

The court concluded categorically that the use of deadly forces is not reasonable in a high-speed chase based only on a speeding violation and traffic infractions when there was little, if any, actual threat to pedestrians or other motorists and there is no question that there were opportunities for later arrest.

Further, according to the court, a high-speed chase of a suspect fleeing after a traffic infraction does not amount to the substantial threat of imminent physical harm that *Garner* requires before deadly force can be used. The Eleventh Circuit rejected the argument that Harris's driving must be considered sufficiently reckless to give the officers probable cause to believe that Harris posed a substantial threat of physical harm to pedestrians and motorists.

The Eleventh Circuit differentiated *Pace v. Capobianco*, 283 F.3d 1275 (11th 2002), and *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993). The suspect in *Pace* (who had been stopped for driving without his headlight on) swerved at police officers, nearly hit another driver while driving on the wrong side of the road, and accelerated toward a police roadblock. In *Cole*, the driver passed other vehicles on congested Interstate 70 using both shoulders and attempted to ram several police cars, in addition to forcing more than 100 cars off the road.

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Lani L. Williams volunteers with the Local Government Lawyer's Roundtable.

Both drivers were eventually shot and killed. In contrast, the Eleventh Circuit viewed Harris's speeding as nondangerous because he maintained control of his vehicle, used turn indicators, and did not attempt to run into or over anyone, and because the roads were largely clear of other motorists because of police roadblocks.

Having concluded that ramming Harris's vehicle constituted an unreasonable use of deadly force to affect a seizure, the court of appeals turned to the question of whether Scott was nonetheless entitled to qualified immunity. It concluded he was not because it was clearly established at the time of the incident that it was unreasonable for an officer to seize a fleeing suspect through the use of deadly force absent a threat of serious physical harm to the officer or others. Critical to the Eleventh Circuit was the low level of the offense committed by Harris (speeding) and the facts above indicating that at least in the eyes of the Eleventh Circuit, Harris's speeding was not a danger to anyone.

### Before the Supreme Court

Scott's successful petition for certiorari essentially asks the court how dangerous a suspect fleeing in an automobile must be before officers can use deadly force to seize the suspect. The Eleventh Circuit factually distinguished those cases in which suspects forced others off the road, drove through heavy traffic areas, and attempted to injure officers. Nonetheless, Scott's petition asserts that the Eleventh Circuit's opinion conflicts with *Scott v. Clay County*, 205 F.3d 867 (6th Cir. 2000) (officer shot at car after high-speed chase during which suspect drove his car near or at officers), and *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992) (officer shot suspect after a high speed chase and after the suspect repeatedly rammed the officer's vehicle), in addition to the *Cole* case mentioned above.

Scott's petition for certiorari states that under the Eleventh Circuit opinion "law enforcement officers are forced into the untenable position of waiting until a fleeing suspect . . . actually maims or kills an innocent bystander before initiating a seizure." This is not quite an accurate assessment of the Eleventh Circuit opinion. As mentioned above, the opinion draws a distinction between the facts of this case (late at night, relatively little other vehicular traffic, no attempts to affirmatively injure the officers or others by ramming them or running them off the road) and similar seizures in which the suspects have engaged in activity that constitutes a more grave and concrete threat to safety. The question before the Court is where along the continuum of actions for which deadly force is and is not reasonable does this case lie, and can the Court fashion a rule that officers in the field can apply easily?

The deadly force criteria from *Garner*, 471 U.S. at 11–12, bear repeating:

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving

the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

The question on these particular facts is whether Harris would have appeared to reasonable police officers to have been sufficiently dangerous. But, because the Court does not simply answer questions for the case before it, there are many more questions for future cases that the Court will surely consider:

- If traveling almost 20 miles an hour above a posted speed limit is not sufficiently dangerous to justify the use of deadly force, what about traveling 30 miles an hour above the speed limit? 40? 50?
- How should courts define the underlying crime in situations like this? The Eleventh Circuit cited *Graham's* statement that reasonableness depends on careful attention to facts, including the severity of the crime at issue. See *Graham*, 490 U.S. at 396. But what is the appropriate crime in cases involving high-speed chases? Is it the initial speeding infraction (or running a red light or failing to signal before making a turn) or is it the continued reckless driving and evasion of police officers?
- How much traffic must be on the road before other motorists are considered endangered enough to allow the use of deadly force? And is it really significant whether the police have been able to clear other motorists from the roadway, as the Eleventh Circuit posited? If it is significant and the police let the driver go because they cannot apprehend him without the use of deadly force, what responsibility do the police have to innocent parties who may later be injured by the suspect?
- What if the suspect carefully uses his turn signals and weaves through traffic like an accomplished stunt driver in circumstances akin to those in the *Cole* case?

It is unlikely the Court will answer all of these questions, but with luck practitioners may be able to tease some hints out of the opinion when it is issued.

The easier question for the Court likely will be whether Scott violated a clearly established right in 2001 when he rammed Harris's vehicle. The Eleventh Circuit posited that it was clearly established in 2001 that a seizure must be reasonable under the circumstances (including a review of the offense charged), that an automobile can be used as deadly force, and that deadly force cannot be used in the absence of the *Garner* preconditions. See 433 F.3d at 818–19.

Although these are true statements, questions remain when this framework is applied to this case. It is debatable whether a reasonable officer in Scott's position would have had probable cause to believe Harris posed a threat of serious physical harm. Traveling 15 to 35 m.p.h. over the speed limit surely is dangerous, especially at night. In light of this fact, one wonders whether it was "clearly established" that traveling at these speeds was not sufficiently dangerous to allow an officer to collide with a suspect to affect a seizure.

It will be interesting to see what kind of guidance the Court provides officers who often have only a few seconds to make decisions about the apprehension of criminal suspects.

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## Daniel J. Curtin, Jr.

*(continued from page 1)*

been a part of his wide-ranging community of friends and colleagues. Dan touched us with his unsurpassed knowledge, enthusiasm, dedication, kindness, and generosity of spirit.

Dan was a vibrant person and remained active and engaged throughout his life. An avid traveler, he visited more than sixty-five countries and voyaged on thirty-nine cruises. Dan traveled to Albania, Hungary, Australia, Ireland, and China, to offer his expertise in land use law to the international community. As an active member of the World Jurist Association, Dan promoted the rule of law to the international community during the association's biennial international conferences. Dan also actively participated in the American Bar Association's Central and Eastern European Law Initiative to promote law reform in emerging governments.

A native of San Francisco, Dan was raised by Irish immigrant parents. He earned his A.B. in political science from

the University of San Francisco in 1954, and his J.D. from the University of San Francisco School of Law in 1957. Dan served as an officer in the U.S. Army from 1956 to 1964.

After graduating from law school and completing his military service commitment, Dan began his legal career as assistant secretary for the California State Senate, and then served as counsel to the Assembly Committee on Local Government. Dan served for four years as deputy city attorney for Richmond, and in 1965 was appointed as the first full-time city attorney of Walnut Creek, where he served until 1982. He subsequently went into private law practice, and became a partner of the firm that is now Bingham McCutchen LLP, where he practiced land use and local government law for more than 20 years.

—Bryan W. Wenter

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