MACDL
Missouri Association of Criminal Defense Lawyers

ACTION REPORT

Newsletter

P.O. Box 1543 • Jefferson City, Missouri 65102 • Phone (573) 636-2822 • September, 2001 • www.macdl.net

President's Letter

Since the beginning MACDL has had two core missions: to provide education to the criminal defense bar in this state and to promote fairness and equity in the adoption of legislation affecting the administration of justice. Of course, both of these objectives serve our overall commitment to justice for all citizens be they rich, poor or from different cultures and races.

In many respects this organization and its members are on the front line of the fight to preserve and bring meaning to the bill of rights. Often times we are the only ones standing between our clients and the wolf that is fast approaching the front door. In a society and government that strongly believes the only way to control crime is to build more prisons, establish tougher sentences, implement mandatory sentences and stubbornly cling to a policy of capital punishment that has been shown time and again to discriminate against the poor and people of color, it is the criminal defense bar that must try and stem the tide against injustice. To that end we recognized long ago that there is strength in numbers and value in developing our skills for the clients we serve.

As an organization we are getting better as we get older. Every year we try to offer seminars that improve on the year before. This year we teamed up with the Missouri Public Defender's Office and brought nationally recognized speakers to our spring seminar in St. Louis. Those who attended picked up valuable knowledge about the shortcomings of eyewitness identification among a host of other topics.

This fall will be no different. Former assistant attorney general and target of Ken Starr, Webb Hubbell will headline our October 19th seminar (see page 7) at the Arrowhead Club in Kansas City, Missouri. Aside from his unique insight and experience in the inner circle of the Clinton Administration, Webb Hubbell was a defendant in a case that went all the way to the United States Supreme Court and reaffirmed the enforcement of government grants of immunity as well the vitality of the 5th Amendment. Also featured at the fall seminar will be important information about drug recognition testing that is sure to be the next big thing in impaired driving cases. MACDL has a responsibility to provide top-notch training and we intend to honor that through better and better seminar presentations.

In the legislative arena we've also had some success. Foremost was passage of a new forfeiture law in Missouri that will bring a halt to state sponsored federal forfeitures that were designed to bypass due process requirements under Missouri's old forfeiture law. By strictly defining "seizure" the new forfeiture law will eliminate inherent conflicts of interest by law enforcement agencies and guarantee that seized money will go to public schools rather than law enforcement coffers but then only after a fair hearing.

Missouri also outlawed the death penalty for mentally retarded defendants. MACDL has endorsed this legislation for many years and provided valuable testimony before the legislature. Randy Scherr, our lobbyist, did an outstanding job in bringing our point view to the legislature and coordinated all aspects of our legislative efforts.

Randy, as Executive Director of MACDL, has also been instrumental in increasing our membership and putting us on sound financial footing. With his help and a talented board of directors, MACDL is poised to play an even more prominent role in the formulation of future legislation.

Everyone who is part of MACDL should be proud of our accomplishments and the service we have provided to lawyers across the state. Your continued participation in MACDL guarantees a strong and intelligent voice for reason and compassion in the legislative process and, ultimately in the courtroom. Whether you attend a seminar or go to Jefferson City to testify before a legislative committee or pay your dues, you are part of a unique organization dedicated to the preservation of a free society and due process of law. So thank you for your help. Because of it, MACDL will continue as a powerful advocate for the principles of fair play and justice for all.

Thomas D. Carver
MACDL President

MIRA – A Trap for the Unwary Prison Inmate

By Elizabeth Unger Carlyle

Under Missouri law, the State of Missouri can recover 90% of the eligible assets of a prison inmate to compensate the state for the expense of incarcerating him. The law that permits this recovery is the Missouri Inmate Incarceration Act (MIRA). This draconian little statute can be found at Mo. Rev. Stat. §217.825 et seq.

Many of our clients are too poor for this to make any difference to them, but MIRA suits are becoming more frequent, and criminal defense attorneys need to be aware of the provisions of this law. This article discusses how clients can avoid MIRA actions and how to assist clients against whom MIRA actions have been filed.

Most clients learn that a MIRA action has been filed against them because a freeze is placed on their prison accounts. The statute permits this to be done *ex parte*. The excuse given is that if the defendant gets the usual notice and opportunity to answer the civil action, he will conceal or dispose of his assets. Once the freeze is in place, the prisoner is permitted to spend only $7.50 per month. This gets their attention quickly!

A MIRA action typically is triggered by too much money in the inmate's prison account. The statute permits the attorney general to file suit "if the attorney general. . . has good cause to believe that an offender or former offender has sufficient assets to recover not less than ten percent of the estimated cost of care of the offender. . . for two years."[1] The Department of Corrections has a chart showing the costs of incarceration for each institution. The average cost is about $15,000 per year. When an inmate's account balance exceeds roughly $3,000,[2] the attorney general is notified, and MIRA proceedings begin. Prison inmates should be advised to make sure that their prison accounts stay below $2,000.

Sometimes, other events will trigger a MIRA action. For example, the payment of a civil rights settlement into an inmate account will attract the attention of the attorney general. Or, the inmate treasurer may notice that a prisoner is getting regular payments from some source, and call it to the attention of the attorney general. Obviously, inmates should avoid attracting the attention of the inmate treasurer as much as possible.[3]

MIRA provides that the attorney general may file the reimbursement action in circuit of the county in which a prisoner was sentenced or in Cole County.[4] In practice, all of these suits are filed in Cole County. Once the action is filed and the account frozen,[5] an order is issued requiring the offender to show cause why the state shouldn't get his money. The defendant has no right to court-appointed counsel in this matter.

What can a lawyer do for a defendant in a MIRA case? First, the lawyer can make certain that the money the state is trying to snatch is actually subject to a MIRA judgment. The statutory definition of "assets" of an offender[6] subject to MIRA is very broad:

> property, tangible or intangible, real or personal, belonging to or due an offender or a former offender, including income or payments to such offender from social security, workers' compensation, veterans' compensation, pension benefits, previously earned salary or wages, bonuses, annuities, retirement benefits, or from any other source whatsoever, including any of the following:
>
> a. Money or other tangible assets received by the offender as a result of a settlement of a claim against the state, any agency thereof, or any claim against an employee or independent contractor arising from and in the scope of said employee's or contractor's official duties on behalf of the state or any agency thereof;
>
> b. A money judgment received by the offender from the state as a result of a civil action in which the state, an agency thereof or any state employee or independent contractor where such judgment arose from a claim arising from the conduct of official duties on behalf of the state by said employee or subcontractor or for any agency of the state.[7]

There are a few statutory exclusions. The value of the offender's homestead is excluded up to $50,000.[8] Money which the offender is paid by the Department of Corrections while incarcerated, up to $2,000, is also excluded.[9] The Cole County circuit court typically allows the exclusion of all of this "state pay" up to $2,000 without requiring an analysis of whether the money has been spent and supplanted by other

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money.

In addition to the statutory exclusions, federal law insulates certain government benefits, such as veterans' benefits and social security, from judgment.[10] And the Eighth Circuit has held that civil rights judgments or settlements cannot be the subject of a MIRA judgment.[11] Further, if the offender is a beneficiary of a discretionary spendthrift trust, the trustee cannot be required to make payments to the state.[12] (If the trustee makes distributions to the offender, however, those sums are subject to the MIRA.)

One asset that may be subject to MIRA is the savings bonds that can be purchased by prison inmates through the inmate treasurer. This program is presented to inmates as a method of saving for their children. Inmates who use this program should do two things to avoid MIRA problems. First, they should have the savings bonds issued in the name of someone other than themselves. (Either the child or the custodial parent would be appropriate.) Second, if possible, they should take advantage of the opportunity to have the bonds sent outside the prison to another custodian. Having the bonds issued to the inmate with the name of the child as the beneficiary upon the inmate's death will not satisfy the attorney general.

In addition to making sure that any judgment entered under MIRA is limited to "assets" legally subject to that type of recovery, an attorney can be of assistance in protecting the defendant's dependents. Under the statute, before entering an order under MIRA, the court is to take into consideration any legal obligation to support dependents or any moral obligation to support dependents for whom the offender has provided support.[13] When the assistant attorney general becomes aware of a child support order, or of actual support to dependents, he or she is generally willing to agree that the assets be transferred for the benefit of the dependents rather than forfeited to the state.

If the court finds that there are assets which meet the requirements of MIRA, it will order that 90% of the value of the assets be given to the state. This is to be used to pay the expenses of MIRA collections and to pay prison expenses. Generally, the court does not enter continuing orders unless an income stream is involved. Therefore, once the order is entered, the MIRA action is over. A new action can be filed, however, if the prison account again exceeds the target amount.

I hope this basic introduction to MIRA will be of assistance. I would be interested in hearing about the experiences of other practitioners with this statute.

[1] Mo. Rev. Stat. §217.831.3. If the offender is to be incarcerated less than two years, the triggering amount is the actual cost of incarceration. Also, the attorney general may file suit if the offender has a stream of income which will reach the triggering amount within five years.

[2] This figure is based on my experience only; the attorney general will not divulge the actual amount.

[3] Mo. Rev. Stat. §217.829 provides that each offender is to be required to list his assets and swear to the truth of the information provided. I am unaware of whether this requirement has been implemented.
An offender who fails to comply with the requirement can be denied parole.

[4] Mo. Rev. Stat. §217.835.1

[5] If the attorney general is aware of any other assets of the prisoner, the freeze order will be directed to the custodian of those assets, too.

[6] "Offender" means an inmate confined in a correctional center, camp, community correction center or honor center. County jail inmates are not included. Mo. Rev. Stat. §217.827(a)(5).

[7] Mo. Rev. Stat. §217.827(1)(a)

[8] Mo. Rev. Stat. §217.827(1)(b) a.

[9] Mo. Rev. Stat. §217.827(1)(b) b.

[10] Bennett v. Arkansas, 485 U.S. 395 (1988).

[11] In Hankins v. Finnel, 964 F.2d 853 (8th Cir. 1992), the court held that such a recovery is exempt from seizure under MIRA because to allow such a seizure would violate the Supremacy Clause of the United States Constitution. However, the Cole County Circuit court recently held that this holding did not apply in a case where the civil rights recovery was money wrongfully taken by the Highway Patrol without forfeiture proceedings. An appeal is pending.

[12] State ex rel. Nixon v. Turpin, 994 S.W.2d 53 (Mo. App. 1999)

[13] Mo. Rev. Stat. §217.835.4.

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Also, please check out your directory listing and submit any updates/corrections to info@macdl.net.
If we do not have your e-mail address, please let us know.

Recent Decisions Regarding Federal Sentencing Consecutive to Yet-To-Be-Adjudicated State Charges

By Caterina DiTraglia, Assistant Federal Defender, St. Louis
Special Thanks to Janet Hinton, Federal Defenders Office

It is not unusual for a criminal defense attorney to represent a client in federal court who has a case or two pending in state court. The pending cases may be a probation violation, an unrelated state charge which occurred before or after the federal charge or a state offense for the same conduct for which the client is federally charged. Even if defense counsel represents the client only in federal court, it is important to determine what effect the client's choices in state court may have on the potential sentence if convicted in federal court. The often bewildering Federal Sentencing Guidelines make this analysis inherently confusing and complex. However, recent 8th Circuit law has added another wrinkled corridor to the labyrinth of determining what advice to give a client who is being prosecuted in both state and federal court. As with most appellate decisions, the news is bad for our clients, but there may be a silver lining in the cloud.

Generally, attorneys familiar with the Federal Sentencing Guidelines, recognize that a client who is concurrently charged in federal and state court should resolve the federal case before the state case if possible. The reason for this is that the state disposition will increase the client's Criminal History category (and thus increase the federal sentence) if a plea of guilty or finding of guilt is made prior to being sentenced on the federal case.[1] This is true even if the client is participating in a Diversion Program such as the popular Drug Court if the program requires a finding or admission of guilt to participate.[2] It does not matter that the client has not been sentenced in state court for the case to count - a plea or finding of guilt is sufficient. Another reason to resolve the federal case first is it has never been as easy to secure concurrent sentences in federal court as it has been in some state jurisdictions.[3] Under Federal law, if the sentencing Judge is silent regarding multiple federal sentences, they must be run consecutive to each other and the reverse is true under State law for state sentences.[4] There are numerous circumstances when the federal court has no discretion and must run sentences consecutive.[5]

Technically, a federal trial court does not even have the power to make a federal sentence run concurrently with a state sentence. The trial court can only recommend to the Attorney General that a prisoner's federal time be served in a state institution concurrently with a pending state sentence.[6]

However, although Federal judges do, on occasion, exercise their discretion to recommend/order that federal sentences run concurrent with state cases, the flexibility of the state jurisdiction has been considered the safer place to attempt to secure a sentence concurrent with a federal charge rather than the reverse.

The only time a concurrent sentence is required in federal court is if the client is convicted in state court *and* the state court case is part of the same conduct as the federal case[7] or the state sentence is for an offense that has been fully taken into account in the determination of the offense level for the federal case.[8] Under these limited exceptions the federal court is required to sentence a client concurrent with state case(s).

It should also be noted that it is possible for a court to fashion a departure in a federal case to effect a close to concurrent time outcome for a client.

Recently, some decisions from the 8th Circuit may have an impact on this issue. In United States v. Robinson, 217 F.3d 560 (8th Cir. 2000) the Court held that a District court has the authority to impose a federal sentence to be served consecutively to a *yet-to-be-imposed* state sentence and did not abuse its discretion in doing so. In United States v. Mayotte, 249 F.3d 797 (8th Cir. 2001) the Court held that the District Court may impose a federal revocation sentence to run consecutive to a *yet-to-be-adjudicated* state case and did not abuse its discretion in doing so. In the Mayotte case the defendant was charged in State court but had not pled guilty at the time that the federal sentence was imposed to run consecutive to any state sentence that he *may* receive. The Mayotte court further held that the State court's attempt to run the state sentence concurrent with the federal sentence after the fact had no effect - the federal sentence controlled. Id at 798.

There is a conflict in the Circuits on the issue of the *yet-to-be-imposed* state sentence, with the Sixth Seventh and Ninth Circuits concluding that a district court may not impose a federal sentence to be served consecutively to such a state sentence: Romandine v. United States, 206 F.3d 731 (7th Cir. 2000); United States v. Quintero, 157 F.3d 1038 (6th Cir. 1998) and United States v. Eastman, 758 F.2d 1315 (9th

(Continued on page 5)

(Continued from page 4)

Cir. 1984). The Eighth Circuit has joined the Second, Fifth ,Tenth and Eleventh Circuits which have concluded that the District Court may fashion such a sentence: United States v. Williams, 46 F3d 57 (10th Cir.) *cert. denied,* 516 U.S. 826 (1995); United States v. Ballard, 6 F.3d 1502 (11th Cir. 1993); United States v. Brown, 920 F.2d 1212 (5th Cir.), *cert. denied* 500 U.S. 925 (1991); Salley v. United States, 786 F.2d 546 (2nd Cir. 1986). This circuit conflict might make a challenge at the United States Supreme Court worth a try on both the *yet-to-be-imposed* and *yet-to-be-adjudicated* issues. However, previous attempts at convincing the court to consider this issue have failed.

One argument to consider in challenging the Mayotte decision is the goal of USSG §5G1.3 and USCA 18 §3553(a), both written to guide the sentencing Court's decision regarding consecutive or concurrent sentences. None of the factors set out in section 3553(a) appear to contemplate an unadjudicated sentence. Furthermore, USSG §5G1.3, comment (n.3(c)) states:

> To achieve a reasonable punishment and avoid unwarranted disparity, the court **should** consider the factors set forth in 18 U.S.C. §3584 ... **and** be cognizant of:
>
> (b) the time served on the undischarged sentence and the time likely to be served before release.

A court cannot possibly comply with these directions to fashion a reasonable and non- disparate punishment where the state sentence is unknown.

Short of an appellate challenge, it would appear that all efforts to acquiring a better outcome for a client by avoiding resolution of state charges until federal charges are finished may be useless if the forces (i. e. the Judge and the Assistant United States Attorney) are not inclined to cooperate.

It can be argued, however, that these cases, if applied in the reverse, may provide some benefit to a client. In those circumstances where the State prosecutor or Judge has indicated that he or she is not going to be satisfied with the federal outcome and intends to run unadjudicated state sentence(s) consecutive to a federal sentence, perhaps it can be argued that the federal sentence (which could be run consecutively regardless of the State court's intentions) could be imposed concurrently regardless of the State's intentions. The logistics of this maneuver would likely be complicated, requiring the client to be writted into and remain in state custody immediately after the federal sentencing until he or she is charged, convicted and sentenced. Further, it would require the cooperation of the Bureau of Prisons to designate the state facility location for the service of the federal sentence (see footnote #6 above).

It is already possible to bind another federal jurisdiction to a concurrent sentence via a plea agreement, see: United States v. Van Thournout, 100 F.3d 590 (8th Cir. 1996). The possibility, albeit remote, of binding a state jurisdiction to a concurrent sentence would be a useful transformation of the United States v. Robinson and United States v. Mayotte decisions.

In the meantime, every attorney faced with the possibility of the dangers that these cases present should consider aggressive and creative sentencing options and record preservation for the client's appeal.

[1] USSG §4A1.2(a)(4)

[2] For example, if the client is participating in the St. Louis City Drug Court, where a finding or admission of guilt is not required for participation, the state case would not be counted as part of the client's criminal history. However, if the client is participating in the St. Louis County Drug Court, where a finding or admission of guilty is required for participation, the state case would be counted as part of the client's criminal history. USSG §$A1.2(f)

[3] Obviously this varies from judge to judge and from jurisdiction to jurisdiction.

[4] Compare USCA 18 §3584 to Missouri Supreme Court Rule of Criminal Procedure 29.09.

[5] See e.g.: USSG §5G1.3(a), §5G1.3(c), §5G1.3, comment (n.6), 8USCA §1326, 18USCA §924(c), 18USCA §844, 18USCA §929.

[6] See e.g. Clemmons v. United States, 721 F.2d 235, 238 (8th Cir. 1983); Greathouse V. United States, 548 F.2d 225, 226 (8th Cir. 1977). Furthermore, the Bureau of Prisons under U.S.C. 18 §3585(a) does not appear to be bound by the Court's order should they choose to designate the "official detention facility" to be a federal facility instead of the state departments of corrections. As a practical matter however, a judicial recommendation of concurrent time, not statutorily barred) with a statement in the record that the federal sentence commence immediately, is frequently honored by the Bureau of Prisons.

[7] USSG § 1B1.3(a)(2)

[8] USSG § 5G1.3(b)

Article on Voting Rights of Convicted Felons

by Dan Viets

The extended controversy surrounding the outcome of the 2000 Presidential election in the state of Florida has highlighted issues related to the voting rights of convicted felons throughout the nation. I have often had defendants who have faced the prospect of a felony conviction express concern about whether they will lose their right to vote.

The answer to this question is illuminated by a study published by The Sentencing Project of Washington, D.C. and Human Rights Watch of New York City. The report of those organizations which was issued in October of 1998 is the basis for much of the information in this article.

Under the statutes of the state of Missouri, a person convicted of any offense, misdemeanor or felony, is deprived of the right to vote while incarcerated or while under supervision on parole or probation after conviction of a felony. RSMo §. 115.133 (2), 561.026 (1). This loss of voting rights includes convictions for any federal offense.

Persons convicted of offenses in another jurisdiction which would be a felony if committed in our state lose the right to hold office and must forfeit any public office held at the time of conviction. The right to hold office is reinstated upon the completion of the sentence and/or any probation. RSMo §. 561.021 (1) (1) (2).

It is interesting to consider that a person incarcerated pending trial has not lost his or her right to vote and should be permitted to exercise that right through the use of an absentee ballot. Our clients who are incarcerated pending trial should be advised of their right to vote.

The right to vote is automatically restored upon final release from incarceration and/or any period of parole or probation. RSMo §. 115.133 (2). However, there is so much confusion about this point that relatively few of our clients realize that their right to vote is automatically reinstated upon the completion of their sentence and supervision. It should, therefore, be part of our mission to advise our clients at the time they come to us that, although their right to vote may be lost temporarily, it is automatically restored at the conclusion of any incarceration and probation and/or parole.

I recently represented the MACDL at a meeting in St. Louis sponsored by the American Civil Liberties Union which included a representative of the Missouri Probation and Parole office. Each defendant who is released from parole or probation in the state of Missouri receives a letter. The P&P representative was encouraged to make a specific and explicit notice of the automatic restoration of voting rights a part of that letter.

It is generally necessary to register again following restoration of voting rights in order to be assured the right to vote at the time of the next election. If the defendant returns to the same residence where he or she resided prior to the conviction, the registration of that individual as a voter may have been maintained, but should always be verified in order to
insure that voting rights can be exercised.

Any time the defendant moves to another address, even if within the same ward or township within the same city or county, that individual must reregister at the new address in order for his or her registration to be valid.

The right to hold public office is also restored upon the completion of a sentence. RSMo §. 561.021.2 (3). The only exception is that one who has been convicted of a felony is permanently ineligible to hold the office of sheriff. RSMo §. 57.010. Convicted felons are permanently disqualified from serving on a jury unless pardoned by the Governor of the state of Missouri RSMo §. 561.021(3).

The state of Missouri is prohibited from denying an occupational license to a felon solely on the basis of that conviction, but state agencies are permitted to consider such a conviction as one factor in the process of deciding whether to issue such a license. RSMo §. 314.200.

The State Board of Education may refuse to issue or revoke a teacher's certificate upon conviction of any felony or a misdemeanor if a "crime of moral turpitude." RSMo § 168.071.1. I represented a teacher a couple of years ago who was threatened with the loss of his teaching certificate because the state's records of SIS dispositions had been opened to the Board of Education under a newly passed statute. The Board threatened to revoke this teacher's license because of an eight year old misdemeanor SIS disposition on the misdemeanor charge of marijuana paraphernalia possession.

Upon inquiring with the Board of Education which other crimes had been held to involve "moral turpitude" I discovered that the offense of Driving While In-

(Continued on page 8)

MACDL FALL SEMINAR

Friday, October, 19, 2001
Arrowhead Club at Arrowhead Stadium
Kansas City, Missouri

This full-day seminar includes continental breakfast, breaks, and lunch. Webb Hubbell, Former U.S. Assistant Attorney General, is scheduled as the featured speaker. Other invited speakers include Mike McIntosh, N. Scott Rosenblum, Art Margulis, Joe Passanise, The Honorable Jackie Cook, Carl Ward, Jeffrey Eastman, Dr. Russell Keeling, Gene Gietzen, Donald Fiedler, and Patrick Eng. Topics to be discussed include The Art of Advocacy, Ethics, DWI & DRE, Anatomy of a Murder Case, and Power Point Made Simple.

Registration: 8:00 a.m.
Seminar begins at 8:30 a.m.

Over 8 MCLE hours, including 1.0 Ethics

2001 MACDL FALL SEMINAR
REGISTRATION FORM
Friday, October 19, 2001- Arrowhead Club at Arrowhead Stadium, Kansas City

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Registration fee: _____ **MACDL Member ($150)**
_____ **Non-Member ($165)**

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(Continued from page 6)

toxicated had been excluded. I requested a hearing on how the Board of Education would justify this classification. Rather than engage in that discussion, the Board of Education reconsidered and allowed my client to retain his teaching certificate.

Missouri statutes also provide that a person convicted of a felony or a "crime of moral turpitude" may not serve as the superintendent of the Missouri State Highway Patrol nor be a member of the patrol nor work for the patrol as a radio dispatcher. RSMo §. 43.060.1.

The one exception to the rules stated above is that if an individual is convicted in our state of a felony related to the exercise of the right of voting, his or her loss of voting rights is permanent, as is his or her ineligibility for holding any elective or appointive office. RSMo §. 561.026 (2), RSMo §. 561.021 (3).

A bill is presently pending before the United States Congress, HR 2830, which would restore the right of convicted felons to vote in federal elections. This bill gives appropriate deference to the right of the states to determine qualifications for voting in their elections, but if passed, HR 906 would insure that persons convicted of felonies throughout our country will not lose their right to vote for President except during the time such individuals are actually serving a felony sentence in a correctional institution or facility.

This bill points out that presently 13% of the African-American adult population, some 1,400,000, have lost their right to vote and that, "given current rates of incarceration, 3 in 10 of the next generation of black men will be disenfranchised . . .." This fact has caused many organizations concerned with the rights of African-Americans to express their support for this legislation. I urge that all of us do likewise.

- MACDL PAC Fundraiser -

Thursday, October 18, 2001 at 6:00 p.m.

Wyrsch Hobbs Mirakian & Lee, 1101 Walnut #1300, Kansas City, Missouri

- The MACDL Fall Seminar is set for Friday, October 19, 2001 at the Arrowhead Club, Kansas City. (see page 7)-

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