

## **Criminal Law Section Executive Council Minutes of the January 27, 2017 Meeting**

### **I. Call to Order and Welcome by Chair, Joel Silvershein**

Chair Joel Silvershein called the CLS EC meeting to order at 9:04 a.m. Chair Silvershein and several members participated from the Tallahassee 2 conference room at the Gaylord Palms Hotel, Orlando, Florida. Other members participated via conference call.

### **II. Roll Call**

Present in Orlando were Chair Silvershein, David Barksdale (secretary), Jennifer Zedalis (treasurer), the Honorable Angelica Zayas (past chair), Jason Blank, the Honorable Lisa Denise Campbell (who joined partway through), Jeffrey Mark Harris, the Honorable Richard L. Hersch, Susan Hugentugler, Warren Lindsey, Larry Donald Murrell, Jr. (who specially requested that the minutes reflect that he arrived on time), Harvey Joel Sepler, George Euripedes Tragos, and Larry Gibbs Turner. Participating by phone were Chair-elect Martin McDonnell, the Honorable William Davis, Mac Heavener, III, Cynthia Imperato, and Antonya Johnson (who joined partway through), the Honorable James Robert Klindt, Brian Kramer, Abraham Laeser, the Honorable Jeffrey Levenson (who had to depart before the meeting finished), Richard Polin, David Rothman, Michael Carl Sinacore (who had to depart before the meeting finished), Kenneth Swartz (who joined at 9:40 a.m.), and Brian Lee Tannebaum. Absent were Jose De Jesus Arrojo, Robert Dillinger, Scott Fingerhut, Whitney Untiedt, and board liaison Sam N. Masters.

### **III. Approval of the Meeting Minutes**

It was moved that the minutes from the October 21, 2016 meeting be approved, and after a second the motion carried with none opposed.

### **IV. Report of the Chair – Joel Silvershein**

Chair Silvershein noted that complete revenue numbers were not available at the previous CLS EC meeting, and that the Bar has transitioned to a new accounting system. He reported that the Council of Sections meets January 28, 2017. The Chair noted his concern that there has been discussion by some in Florida of judicial term limits.

David Rothman reported that the Bar's long-time Executive Director, Jack Harkness, announced at the last Board of Governors (BOG) meeting his retirement effective in approximately a calendar year. Chair Silvershein reported that there is a new Bar counsel, Booter Imhof.

## **V. Board of Governors Liaison Report**

Chair Silvershein reported that our bylaw change was approved by the BOG. This means that four current members who would have been up for election in 2017 now will become ex-officio members of the CLS EC: David Rothman, Scott Fingerhut, Harvey Sepler, and Abraham Laeser. The Chair notes that the Nominating Committee, chaired by Judge Zayas, will want to consider that some geographic areas are not as well represented on the EC, for example, West Palm Beach, Naples/Fort Myers, and the Panhandle.

David Rothman reported that he had sent an e-mail to the Executive Council leadership that he learned that the BOG had been unaware if the CLS had renewed its previous position that there should be a comprehensive review of the death penalty.

Michelle Suskauer, candidate for Florida Bar President, joined the meeting in Orlando. As a member of the Board of Governors, she was asked to provide a BOG report in Sam Masters' absence. Ms. Suskauer reported that there is a new program, Lawyers Advising Lawyers, that replaces the previous Scope program, to give newer lawyers access to veteran mentor lawyers. CLE credit will be made available to the mentors. Jeff Harris noted that the Scope program was around approximately 40 years. Ms. Suskauer noted that the Scope program had not been well-advertised. The Lawyers Advising Lawyers program is a new and improved program, and is a significant member benefit.

Ms. Suskauer reported that the Board of Governors approved two legislative positions: opposing any amendment to the Florida Constitution that restricts or overturns the courts' authority to review the constitutional validity of legislation, and opposing any amendment to the United States Constitution that restricts or overturns the courts' authority to review the constitutional validity of legislation.

Ms. Suskauer noted the BOG's concern over the possibility of attacks on the Florida Bar's ability to self-govern, and that the Bar is trying to be proactive and will put out educational programs.

Ms. Suskauer then was given the opportunity to discuss her candidacy for Florida Bar President.

## **VI. Treasurer's Report - Jennifer Zedalis**

Treasurer Jennifer Zedalis reported that based on her reading of budget records, the CLS is doing fine. Chair Silvershein noted that CLE revenue is coming in. George Tragos asked why the year's budget was approved by e-mail. Treasurer Zedalis noted that at the October, 2016 meeting, the CLS EC did not have the actual proposed budget to approve.

Mr. Tragos noted that it is important to hear discussion over the budget. Chair Silvershein noted that the approval by e-mail this year was caused by changes in the Florida Bar's accounting system, which meant that the proposed budget was not available for consideration and discussion at the October, 2016 meeting. Chair Silvershein and Mr. Tragos expressed a preference going forward that budget approval not be done electronically.

## VII. Committee Reports

### A. Capital Cases

Abe Laeser noted previous CLS EC discussion that the Bar or the Legislature might come to the CLS with questions about capital matters, but that the Legislature did not seek input from the CLS before passing the requirement for a 10-2 verdict to support the death penalty. Mr. Laeser is aware that there is legislation pending, but does not have a personal prediction of where such legislation might be headed and he feels no one can predict, though it remains a good idea that the CLS be heard and have influence. Chair Silvershein noted again that the BOG had not noted that the CLS had a position favoring an overall review of the death penalty. Mr. Laeser stated that he felt the CLS should again notify the BOG that the CLS cares deeply about the issue.

David Rothman reported on his communication with BOG member Mike Tanner. Every three years, the Bar has to restate lobbying positions. For whatever reason, the BOG did not have the CLS EC position supporting a comprehensive review of the death penalty, so the BOG deferred until the next meeting.

The CLS EC discussed two separate motions. The motions were made close in time to one another, and the comments sometimes addressed both motions. These minutes report the motions in the official order in which they were considered.

Brian Tannebaum stated his understanding that there is a current bill in the Legislature to require a 12-0 verdict for death (Abe Laeser confirmed this). Mr. Tannebaum noted that the CLS could be contacted by the Legislature about the CLS view. Mr. Tannebaum moved that the CLS adopt a position supporting a 12-0 verdict for death. This was seconded by Warren Lindsey.

Mr. Laeser commented that there are some members of the CLS who feel the death penalty should be abolished, while there are others who probably feel that a 12-0 verdict is required under the law; Mr. Laeser suggested that a percentage of CLS members might not support a CLS position in favor of a 12-0 verdict because they in fact feel that there should be no death penalty whatsoever. Jennifer Zedalis stated her view that the *Hurst* opinion was consistent with the *Apprendi/Ring* line of cases. Mr. Silvershein asked Brian Kramer if the

Florida Prosecuting Attorneys Association had discussed this issue and whether the FPAA was prepared to support a 12-0 verdict requirement. Mr. Kramer said his opinion is that the FPAA will go along with a 12-0 verdict. Larry Turner commented that he is an abolitionist with respect to the death penalty for many reasons, one of which is that it clogs up the system; Mr. Turner respectfully noted that he did not expect to change anyone else's opinion about the death penalty, but that his opinion is that some CLS members would not want the Section to adopt a position favoring a 12-0 verdict because of a concern that such position might be interpreted as the CLS supporting the death penalty. Mr. Turner asked Mr. Tannebaum to consider a friendly amendment to the motion that in substance would note that the CLS supported a 12-0 verdict, if the death penalty remains the law. Brian Tannebaum rejected the friendly amendment to his motion.

At this point, Jason Blank moved that the CLS EC vote to re-affirm the CLS's previous position for a comprehensive review of the death penalty, to include whether there should be a death penalty. David Rothman seconded. There then was discussion over which motion in fact was pending. Mr. Tannebaum's motion was recognized as the pending motion. Warren Lindsey noted his personal opposition to the death penalty, but believes that sometimes things must be accomplished incrementally and that to be relevant, the CLS should take a position on this issue. Mr. Tragos asked for clarification of the motion. Mr. Tannebaum restated his motion that the CLS adopt a position in support of the current bill to require a 12-0 verdict for the death penalty. Mr. Tragos noted his concern to support a specific bill which the CLS EC has not actually seen.

Mr. Tannebaum then amended his own pending motion as follows: the CLS supports legislation to require a 12-0 verdict. Warren Lindsey seconded this amended motion. Mr. Turner spoke in opposition to the amended motion, stating in substance his belief that the amended motion would suggest and be interpreted as the CLS approving the death penalty itself. Jason Blank joined Mr. Turner's opposition, because he felt that the amended motion would be seen as the CLS approving the death penalty itself, while many CLS members oppose the death penalty.

At this point in the proceedings, Florida Bar President Bill Schifino joined the meeting. The discussion of the pending amended motion was tabled so that Mr. Schifino could address the CLS EC. Mr. Schifino reported his belief that the criminal justice system is the backbone of the entire justice system. He noted that the Constitutional Revision Commission (CRC) will be commissioned shortly. He spends much of his time in Tallahassee talking to legislators about issues such as the separation of powers. Mr. Murrell asked if the CLS EC should be concerned about potential actions by the CRC. Mr. Schifino noted that the speaker has made clear that he has some issues that if they are not passed in the next session, then they will be seen in the CRC. Mr. Schifino reported that once the CRC proposes any constitutional amendments, there will be five months for public discussion and

for organization of any opposition to proposed amendments, which would require a 60% passage. Jeff Harris asked if the CLS EC should be preparing a plan to address any proposed constitutional amendments which the CLS might oppose. Mr. Schifino reported that he believes there will be sufficient time, but that it would be helpful for the CLS to have a small group to begin preparations.

George Tragos noted that the Governor had rejected some Judicial Nominating Commission slates and asked if the Bar is meeting with the Governor as to the Governor's reasons why. Mr. Schifino reported that yes there are meetings with the Governor, but the Governor won't share his reasons for rejecting any specific JNC nominees. The Governor has shared with Mr. Schifino the Governor's belief that each branch of government should "stay in its lane." Mr. Blank asked if Mr. Schifino had seen areas where the Governor might attack the judicial branch. Mr. Schifino noted his belief that the Governor does not consciously think about attacking the judicial branch, and that there is more of a push for limitations of the judicial branch from the House of Representatives. Mr. Schifino noted his belief that Rulemaking is an important issue. He explained that the Governor has 15 appointments to the CRC, the House has nine, and the Senate has nine. The CLS EC thanked Mr. Schifino for his willingness to address the CLS EC meeting.

The CLS EC then resumed discussion of Mr. Tannebaum's amended motion. Jennifer Zedalis recalled that many years before, previous members of the CLS EC had raised the issue of a comprehensive review of the death penalty, and Ms. Zedalis expressed her opinion that it is the comprehensive review that the CLS should ask for, but that she does not support the amended motion; she believes that a 12-0 verdict is what is required by the law and that others will realize that. Harvey Sepler wondered why the CLS could not advance two positions, which he summarized in substance as: (1) if Florida will have the death penalty, then a 12-0 verdict should be required, and (2) there should be a comprehensive review of the death penalty process. Mr. Rothman expressed his opinion that the current state of the law requires a unanimous verdict. He felt that Mr. Tannebaum's amended motion might be interpreted as an official position that the CLS supports the death penalty itself, and Mr. Rothman believed that the pending amended motion could be modified to be more generic - in substance a position that the CLS supports the current state of the law. Warren Lindsey did not believe Mr. Tannebaum's amended motion would be an expression that the CLS supported the death penalty itself.

Larry Turner then proposed another friendly amendment to the amended motion: without taking a position for or against the death penalty, if there is a death penalty, then the CLS supports a requirement of a unanimous verdict. Mr. Tannebaum accepted this friendly amendment to the amended motion. Warren Lindsey seconded. There then was a discussion among the CLS EC as to whether it was appropriate for judges on the CLS EC to vote, and generally it was felt that judges should abstain from voting on this specific amended, amended

motion. The secretary then individually polled the CLS EC, with Chair Silvershein tallying. The amended, amended motion passed with one nay, and with the five present judges on the EC abstaining.

Lansing Scriven, candidate for Florida Bar President, then appeared at 10:27 a.m. and like Ms. Suskauer, was given the opportunity to discuss his candidacy.

Jason Blank then moved that the CLS re-affirm its previous position supporting a comprehensive review of the capital system. David Rothman seconded. There then was a discussion as to whether judges should abstain from the vote; unlike the previous motion, there was not a consensus that judges should abstain. The motion passed with none opposed, and Richard Polin abstained.

It was agreed that Chair Silvershein will write a letter communicating the two positions approved by the CLS EC with respect to the death penalty.

## **B. CLE**

Susan Hugentugler commended Judge Richard Hersch for a marvelous job at a Hillsborough County CLE. She reported that the venue was good, and that the CLS offered scholarships for assistant state attorneys and public defenders, and that five assistant state attorneys did attend. Ken Schwartz is in planning for the March 17, 2017 Advanced Federal Practice Seminar. The DUI Masters Seminar is scheduled for April 28, 2017 at the Tampa Airport Marriott, again headed by Carlos Canet and Michael Catalano. Ms. Hugentugler said Chase Early reports that after-market CLE sales are good. There is work towards a webinar, which is to focus on the new technology CLE requirement. Across the board with CLEs, in-person attendance is down but with after-market sales good, the lower in-person attendance is not a worry, although Ms. Hugentugler expressed her opinion that in-person attendance is important. There was to be an evidence seminar in March, sponsored jointly with the Trial Lawyers Section, but right now the exact time is up in the air. Mr. Turner, as Chair of the Membership Committee, noted that Jason Blank has worked towards a lunch time seminar and asked if pieces of CLS-sponsored seminars could be made into lunch time webinars. Ms. Hugentugler answered yes, and that per the Bar it is possible to separate out a piece of a seminar and re-number it. Ms. Hugentugler noted that the Advanced Federal Practice seminar on March 17, 2017 is a half day seminar and that because the AV equipment will already be set up, she encourages anyone who can present on a CLE topic to take advantage of that opportunity on that day.

## **C. Communications**

Richard Polin had no report. He noted that because of his pending mandatory retirement, he will have additional time in which he will work on possible quarterly publications.

**D. Federal Practice**

There was no report.

**E. Legislative**

Marty McDonnell reported there are two identical pending bills, House Bill 527 and Senate Bill 2800, which propose a simple fix to the current death penalty law, whereby in each place where the law currently requires “at least 10 jurors” to be struck and replaced with “a unanimous jury determines,” with Mr. McDonnell pointing out that the language is neither recommendation nor verdict. Mr. McDonnell has created a legislative subcommittee for death penalty issues, chaired by Adam Debrugge. Mr. McDonnell reported on Senate Bill 128, which would amend the Stand Your Ground law and shift the burden of proof to the prosecution beyond a reasonable doubt. This bill came out of committee by a five to four vote. Mr. McDonnell has not found a House counterpart to the bill. He notes that Senate Bill 128 also provides that if the defense pretrial motion is not granted, the motion and its contents are to be inadmissible at trial. Harvey Sepler asked if that would include the testimony of a defendant, and Mr. McDonnell responded by restating what the language of Senate Bill 128 provides. Mr. McDonnell noted Joint Resolution 121 for a constitutional amendment providing that the Legislature could overrule any judicial finding that legislation is unconstitutional, and would further provide that any legislation found unconstitutional by a court would nonetheless remain in effect for five years until the Legislature decided whether to overrule the court. Mr. McDonnell also noted that the current House speaker has a priority that appellate court judges should be subject to a term limit of 12 years.

**F. Long Range Planning**

With respect to the change in the CLS EC bylaws to make former chairs ex-officio members, Judge Zayas asked if there would be an attempt to reach out to former chairs to so notify them. Chair Silvershein noted that that topic was to be addressed in the new business portion of this CLE EC meeting and that he would address that new business item at this point. The materials for the meeting listed previous chairs as could be determined, and Abe Laeser noted that the correct spelling for the 1981 chair’s name is Ira Dubitski and the 2002 chair correct spelling was DeDee Costello.

**G. Membership**

Larry Turner noted that a letter had gone out reminding CLS members to renew; that contact was made with new members of the Section, welcoming them to work on committees; and there was communication to third-year law students encouraging them to join the CLS under the existing program that provides free membership. The membership committee will target assistant public defenders and assistant state attorneys. Jennifer Zedalis has contacted her colleagues at other state law schools regarding the possibility of establishing criminal law clubs. Chair Silvershein has agreed to assign an EC liaison to each law school. The CLS will participate at the Kozyak Minority Mentoring Picnic as was done last year. Warren Lindsey will attend the Central Florida Diversity Mentoring Picnic in Orlando, and the CLS will have a table. Technology problems so far have prevented the lunch time webinars to be up and running, but they are still planned. The Young Lawyers Division has encouraged Bar members to sign up to serve as mentors, and Mr. Turner also encouraged this.

#### **H. P/PD Program**

Jennifer Zedalis reported that the seminar would benefit from a new fact pattern reflecting current electronic evidence issues. She also invited suggestions for faculty members.

#### **I. Selig Goldin**

Harvey Sepler reported the positive news that the Committee considered 14 nominees, 10 new and four previous nominees. The Committee selected four candidates: James E. Felman, the Honorable Brad King, State Attorney for the Fifth Judicial Circuit, the Honorable J. Marion Moorman, former Public Defender for the Tenth Judicial Circuit of Florida, and the Honorable Thomas Petersen, retired Circuit Court Judge. There then was discussion by several CLS EC members in support of various of the nominees. The CLS EC members present in Orlando then submitted their votes by secret written ballots. The CLS EC members participating by conference call submitted their votes by e-mail to the secretary. The votes were tallied by the secretary, with Harvey Sepler assisting in the tally. (These minutes will record the winner under the New Business section, below.)

#### **J. Website/Social Media**

Jason Blank reported that we still await a "Members Only" section on the CLS website to open, and that webinars will follow shortly thereafter. Mr. Blank asked that those council members hosting CLEs should send to Mr. Blank the CLE presenter names and biographies for publication on the CLS website and the Florida Bar News.

### **VIII. Old Business**



- **Bylaw Amendments for Past Chairs**

Judge Zayas asked if the Chair was going to write to former Chairs to let them know of the bylaw change. Mr. Tragos suggested that former Chairs who review the minutes would know about the change. Chair Silvershein suggested that he should write a letter to all the members of the Section to let them know of the change.

- **Young Lawyers Division Mentorship Program**

This was previously discussed at the meeting, and there was nothing more to discuss.

- **Criminal Law Certification Standards Amendment**

Richard Polin reported that we had not heard from the Certification Committee whether they acted on that. Judge Zayas noted that when she last followed up, it was still on the agenda. Chair Silvershein said that the CLS EC will keep this on the old business agenda.

- **Criminal Law Board Certification Exam**

There was discussion to follow up on discussion at previous meetings about the passage rate. Jeff Harris reported that there had been a recommendation to expand the essays by one, and it is his understanding that the Certification Committee did not accept that recommendation. Mr. Harris noted a previous discussion about a concern over the passage rate, which in 2014 got as low as 17%. Last year, 62 signed up for the trial certification exam, 50 actually sat for it, and 43 passed. On the appellate exam, the pass rate was 60%. Overall, board certification passage rate was 48%. It was agreed that the CLS EC would maintain the board certification pass rate as an old business item at the next meeting. Jeff Harris noted his concern if the Bar allows people to call themselves experts when they are not Board Certified.

- **CLI Background Checks**

Following up on discussions at previous CLS EC meetings, Mr. Silvershein noted that this issue remains on the radar; that State Attorney's Offices have access to NCIC, which requires a test every two years, and that each State Attorney's Office likely will choose how it wishes to proceed regarding employee-required background checks.

## **IX. New Business**

- **House of Representative Rules 19 1 and 19 2**

Mr. Laeser expressed his opinion that these are unconstitutional on their face as void for vagueness. Mr. Murrell noted that if these proposals do not pass, they may be back with the constitutional revision commission. Chair Silvershein reported that this will be kept on the radar and that he will send an e-mail to the CLS EC if it appears there is a need to act before the next meeting.

- **Annual Convention Judicial Luncheon Sponsorship**

Larry Turner moved that the CLS EC again sponsor this judicial luncheon. Jennifer Zedalis seconded. The motion passed with none opposed.

- **Florida Bar Foundation Contribution**

It was discussed whether the CLS EC should make a contribution to the Florida Bar Foundation. Chair Silvershein noted that based on the current annual budget, the CLS is in the red. Jason Blank asked if this topic could be tabled until the CLS EC is provided actual budget numbers. Mr. Rothman discussed that the loan repayment assistance program (LRAP) provides assistance to young lawyers working in public interest law to pay off student debt. He anticipates that the amount of money available next year will go down. This year, there were more applicants than expected, and the amount budgeted meant that not all the applicants could be awarded through the LRAP. The LRAP provides \$5,000.00 in assistance. Jennifer Zedalis inquired if it would be possible to discuss the topic today and then do a future e-mail vote. Mr. Rothman noted that the CLS twice before has made \$25,000.00 contributions. He also noted that the Family Law Section had seen the example of the Criminal Law Section and then itself voted to make a contribution. Larry Turner then moved that the CLS EC vote to make a \$25,000.00 contribution to the LRAP. Susan Hugentugler seconded. The motion passed with none opposed.

George Tragos then expressed his belief that it was important for the CLS to participate in the Constitutional Revision Commission process. He noted that the CRC meetings are open to the public and take place across the state, and that it is important to be present. Mr. Tragos moved that \$5,000.00 be budgeted for necessary expenses with reference to CLS activities with reference to the Constitutional Revision Commission. (Mr. Tragos further discussed his intention that this money would be used for CLS members' travel expenses for CRC meetings, but the actual motion was as stated in these minutes.) Jeff Harris seconded the motion. Jason Blank asked if Mr. Tragos would accept a friendly amendment to raise the amount to \$10,000.00. This friendly amendment died without a second. The CLS EC then voted to approve Mr. Tragos' motion, with none opposed. Chair Silvershein designated Marty McDonnell to be the CLS EC member to attend these Constitutional Revision Commission meetings.

- **Kozyak Minority Mentoring Picnic**

This picnic is February 4, 2017 in Miami. Susan Hugentugler, Judge Zayas, and Chair Silvershein will attend to represent the CLS and those in south Florida are asked to participate in the event at the Amelia Earhart Park.

- **Central Florida Diversity Mentoring Picnic**

This picnic is February 11, 2017 in Orlando and Warren Lindsey will be there to represent the CLS. Anyone who can help out is encouraged to do so.

- **Past Chairs List**

See discussion of this New Business item earlier in these minutes.

- **Selig I. Goldin Memorial Award Selection**

Chair Silvershein announced that the Honorable Thomas Petersen is the winner of this year's Selig I. Goldin Memorial Award.

## **XI. Next Meeting of the Executive Council**

The next meeting of the Executive Council is June 23, 2017 at the Annual Bar Meeting at the Boca Raton Resort & Club.

## **XII. Adjournment**

Judge Zayas moved to adjourn. Harvey Sepler seconded. The meeting was adjourned at 12:09 p.m.