

## **Criminal Law Section Executive Council Minutes of the October 21, 2016 Meeting**

- I. Call to Order and Welcome by Chair, Joel Silvershein.** Chair Joel Silvershein called the CLS EC meeting to order at 9:10 a.m. Chair Silvershein and several members participated from the Miami-Dade Children's Courthouse, 13<sup>th</sup> Floor Conference Room, 155 NW 3<sup>rd</sup> Street, Miami, Florida 33128, arranged by the Honorable Angelica Zayas. Additional members participated from a conference room at the Alachua County Courthouse, arranged by the Honorable William Davis. Those conference rooms were linked by video conferencing. Other members participated by conference call.
  
- II. Roll Call.** Present in Miami were Chair Silvershein, David Barksdale (secretary), Judge Zayas, Jason Blank, Jeffrey Harris, David Rothman, Susan Hugentugler, Richard Polin, and Brian Tannebaum. Present in Gainesville were Jennifer M. Zedalis (treasurer), the Honorable William Davis, Brian Kramer, and Larry Turner. Participating by phone were Chair-elect Martin McDonnell, Jose De Jesus-Arrojo, the Honorable Robert Dillinger, Scott Fingerhut, Mac Heavener, Cynthia Imperato, Abraham Laeser, the Honorable Jeffrey Levenson, Harvey Sepler, and Michael Sinacore. Also participating by phone were BOG Liaison Sam Masters and Cheryl Lowenthal.

Not present were the Honorable Lisa Campbell, the Honorable Richard Hersch, Tonya Johnson, Warren Lindsey, Donald Murrell, Kenneth Swartz, George Tragos, and Whitney Untiedt.

- III. Approval of the Meeting Minutes.** Judge Zayas moved to approve the agenda, with a second from Jason Blank, and the motion carried with no objections. Judge Zayas moved to approve the minutes of the June 17, 2016 meeting. BOG Liaison Masters commented that Section V, Board of Governors Liaison Report, describes the opposite of what occurred, that the Board of Governors went against the Board of Bar Examiners and overwhelmingly felt that a full-blown background check was not necessary for Certified Legal Interns (CLI's), and voted to send that recommendation to the Florida Supreme Court. The BOG recommends that only a Level II check be required that can be completed in 1-2 weeks, as opposed to a full-blown check that can take 6-8 months. Marty McDonnell noted that there was confusion at the June, 2016 meeting about what Level I and Level II constituted. Abe Laeser noted that the question is whether the

proposed minutes are what was actually discussed, even if that discussion was incorrect. Jason Blank seconded the motion to approve the minutes. Mr. McDonnell noted that he had a digital recorder and took written notes, and did his best and believes the minutes to be accurate as to what was discussed. The motion was approved with no objections.

- IV. Report of the Chair – Joel Silvershein.** Mr. Silvershein thanked Judges Zayas and Davis for arranging for the Miami and Gainesville facilities to host the meeting. Chair Silvershein reported that the committee lists had been completed in short order, that all Executive Council members should be on at least two committees, and that there are a lot of non-Executive Council members assigned to committees. Chair Silvershein thanked Jennifer Zadalis and Paul Zacks for their assistance in helping recruit young lawyer members to the CLS. Chair Silvershein encouraged all Executive Council members to encourage younger lawyers to become involved with the Section.

Chair Silvershein reported that he has been participating in conference calls with Florida Bar President Bill Schifino; this communication included discussion about amendments to the CLS EC by-laws, which changes still await final approval.

Chair Silvershein recognized that this fall CLS EC meeting is the most difficult for members to attend in-person. Chair Silvershein reports his understanding that Sections were not to hold meetings during the fall Bar meeting in Tampa. He noted his belief that there is a need for the CLS EC to hold a September or October meeting.

- V. Board of Governors Liaison Report.** BOG Liaison Masters said that the Board of Governors' May Meeting Report shows that the Board of Governors recommended to the Supreme Court to change Rule 11-1.3 and 11-1.9 governing certified legal interns to require a Level II background check, which can be completed in 1-2 weeks. Currently, CLI's must complete a full Board of Bar Examiners background check, which can take 3-4 months or if non-routine, 6-8 months. BOG Liaison Masters did not believe that this had been filed with the Supreme Court yet, but was supposed to be in October.

Chair Silvershein noted the Level II background check could be a minimal requirement and individual offices could continue to have their own rules as to the background checks they wish to use. (At approximately 9:27

a.m., the meeting was briefly delayed by technical difficulties with the Gainesville participants.) Chair Silvershein asked Michael Sinacore if Mr. Sinacore felt the proposal would be a problem for Mr. Sinacore's office (the State Attorney's Office in Tampa) because of access to NCIC and more secure documents. BOG Liaison Masters noted his understanding that a Level II background check is more basic - a criminal background check - more surface than a full-blown background check. (The connection with Gainesville was restored.) Michael Sinacore answered that he did not expect that his office would need more than the Level II background check for CLI's. Bob Dillinger said that it would be the same for Public Defender Offices. Abe Laeser said his understanding was that some people feel that a State Attorney's Office might want a more detailed background check than either a Public Defender's Office or Legal Services office. Jose Arrojo said that the Miami State Attorney's Office does its own background checks on prospective CLI's; Mr. Arrojo's opinion was that setting a Level II background check as a minimal requirement was not inconsistent with each individual office doing whatever background check the respective office wants to do. David Rothman noted that the Florida Board of Bar Examiners will be continuing its full investigation on all applicants, and that any individual office considering a CLI would have the option to wait until that full background check is complete. Jason Blank said that requiring a Level I background check is preventing some otherwise eligible students from serving as CLI's because the Level I background check isn't completed until after the student's graduation; he feels that the CLS EC should vote and take a position. Richard Polin reported that he used to supervise the CLI's for the Attorney General's Office, and that his office did its own background checks for prospective CLI's. BOG Liaison Masters commented that he thinks that there really was only one matter/individual that triggered this issue, and that problems have been few and far between. He also noted that CLI's are not intended to be set loose, but rather are to be supervised. He reported that there is nothing currently pending before the Florida Supreme Court on this issue, unless it was very recently filed, and that he would check on whether there is still an opportunity to comment. Chair Silvershein asked BOG Liaison Masters to keep the CLS EC advised of the status. David Rothman suggested that the CLS EC figure out how to join in with comments made by the Public Defender Association or comments by other affected associations. Mr. Blank reiterated his belief that the CLS EC should have its own comment to emphasize the Section's voice. Jeffrey Harris agreed with Mr. Blank. Mr. Blank asserted that the CLS EC should comment that requiring only a

**Level II background check is not a problem. Chair Silvershein formed an ad hoc committee to prepare a CLS EC comment: Harvey Sepler (P.D.); Jose Arrojo (SAO); Richard Polin (AG); Jeff Harris (private defense lawyer); and David Rothman volunteered to serve as well (private defense lawyer).**

**VI. Treasurer's Report.** (The Gainesville site again developed brief technical problems, so the Chair tabled the Treasurer's Report until Treasurer Zedalis could re-join. The Treasurer's Report was given after the Capital Cases Committee Report.) Treasurer Zedalis noted that the financial records in the meeting materials provide the same data as presented at the June, 2016 CLS EC meeting. Chase Early, the CLS EC Florida Bar Program Administrator, said that the Bar is undergoing an overhaul of how it maintains its financial data, and that he can provide monthly statements to Treasurer Zedalis for review.

**David Rothman, who serves on the Florida Bar Foundation Board, reports that interest rates have not gone up as much as was hoped. This has resulted in less money being available, so that the entire provider system has had to re-evaluate how it can assist citizens. He asked that the CLS EC to consider a contribution to the Foundation. The Chair asked that this decision be made at the January, 2017 CLS EC meeting. Chase Early noted that the Foundation contribution is not budgeted for.**

**VII. Committee Reports.**

**A. Capital Cases.** Abe Laeser reported that the Capital Cases Committee has not met since the June meeting because of the difficulty of trying to predict what might next occur regarding the death penalty law in Florida. He noted that with the Florida Supreme Court's recent decision regarding unanimity, there remain many open issues such as retroactivity and cases on appeal. Chair Silvershein noted that on a previous occasion when the legislature considered changes to death penalty law, the CLS EC had only a short window and Marty McDonnell on short notice was sent as the CLS EC's voice. Mr. Laeser noted that because of the CLS EC's diverse membership, there could be division in attempting to formulate specific positions. Jose Arrojo said that he has heard informally that the Legislature will not call a special session. David Rothman commented that considering how emotional an issue the death penalty is, he would not want the CLS EC to fall behind on the topic and not be able on short notice to develop recommended positions, even if done by a

**format of providing majority and minority positions. Mr. Rothman suggested that the several experienced death penalty lawyers on the CLS EC outline the potential issues so that they can be discussed at the January, 2017 CLS EC meeting. Mr. Laeser noted that will be helpful but he does not believe that this can go far beyond an outline of potential issues because it is unknown what course the legislature will take. Judge Zayas noted that the legislature or individual lawmakers may ask for input from the CLS EC on short notice and that the CLS EC can read the leading opinions to recognize the potential issues. Mr. Rothman noted the potential opportunity to educate the legislature about death penalty issues. Chair Silvershein noted that the Legislature meets in March, 2017 rather than in January. Marty McDonnell noted that the legislators would benefit from input about potential constitutional pitfalls as the legislature considers the death penalty, and Mr. McDonnell's recommendation is that the CLS EC should not wait to be asked for its input. Jeff Harris also noted that he felt the CLS EC should avoid falling behind.**

**Chair Silvershein tasked the death penalty committee with looking into the potential issues. The Chair noted that Peter Overstreet is a new member of the Capital Case Committee. Mr. Laeser inquired if it was appropriate for him and his committee to speak to lawyers outside the CLS EC who work in the death penalty field and Chair Silvershein said yes. Mr. Rothman asked for the Capital Case Committee to try to prepare a writing before the January CLS EC meeting and Mr. Laeser will try to do so.**

- B. CLE. Susan Hugentugler reported a December 2, 2016 criminal law update CLE at the Hillsborough County Bar Association's new facility. CLS EC members Judge Hersch and Judge Levenson are involved in the planning and there is a good line-up of speakers. Judge Levenson arranged for Second District Court of Appeal Judge Badalamenti as the lunch speaker. Larry Turner asked about the efforts to publicize the CLE, and Ms. Hugentugler reported that there was a CLS EC member e-mail blast; an upcoming Bar News ad; and there will be efforts to publicize through local organizations. Judge Levenson asked if local Bar associations would be contacted, and Ms. Hugentugler confirmed that they would, especially local criminal law Bar associations. Mr. Turner, as membership chair, noted that an e-blast that reaches Assistant Public Defenders and Assistant State Attorneys, as well as contacting law schools with criminal law**

**programs, would help recruit new members by showing the CLS EC's work. Ms. Hugentugler agreed and will plan to do that.**

**Ms. Hugentugler also reported that the planning is under way for the advanced federal practice seminar, again headed by Ken Swartz, February 10, 2017, Hyatt, Downtown Miami. She also reported that Michael Catalano and Carlos Canet have again agreed to spearhead the DUI masters seminar, tentatively for April, with the Tampa Marriott the first location choice. Chair Silvershein noted that the Bar has imposed new continuing legal education requirements for technology. Mr. Turner suggested that the CLS EC be out front in providing a technology CLE. Ms. Zedalis reported that she has had contact with several lawyers who are particularly good with technology, and she can ask for their assistance. Richard Polin noted that because only three hours are needed, this may be a good opportunity to experiment with one hour, easy-access webinars. Chair Silvershein asked Jason Blank to consider that, and Mr. Blank believes this to be a good opportunity to launch CLS EC webinars. Mr. Blank also asked that Mr. Swartz provide the speaker line-up for the federal practice seminar once it is set for posting on the CLS EC website.**

**C. Communications. There was no report given for this committee.**

**D. Federal Practice. There was no report given for this committee.**

**E. Legislative Committee.**

**F. Long Range Planning. Marty McDonnell, who chairs both the Legislative and the Long Range Planning Committees, presented both committee reports simultaneously.**

**Mr. McDonnell said that the Legislature's committee meetings begin in December when a lot of ground work is laid. He notes that the Public Defenders roll their sleeves up and get active with the Legislature. He feels the CLS EC should be more active in the legislative process. Mr. McDonnell feels the CLS EC needs to consider ways to more often act as a body, such as with amicus briefs or speaking before House and Senate committees about issue that matter to the CLS. He also thinks the CLS EC needs guidelines about when the CLS EC should take formal positions, in light of its diverse**

**body. Chair Silvershein asked if outside the death penalty realm Mr. McDonnell saw any significant criminal law issues in the upcoming Legislative session, and Mr. McDonnell noted that with the Legislature not meeting until March, not a lot of important Legislation has yet been filed.**

**Joel Silvershein said that when he headed the Long Range Planning Committee, he had not yet finished providing descriptions of each committee and hopes that the Long Range Planning Committee can accomplish that.**

**G. Membership. Larry Turner submitted a written report of the Membership Committee. Mr. Turner noted a carry-over topic from a previous meeting, that the CLS EC would sponsor local social events. Judge Davis volunteered to host an event in Gainesville. Mr. Turner asked if the CLS EC could make \$500.00-\$1,000.00 available for such local social events, to include the first in Gainesville. Chair Silvershein asked Chase Early about budget authority and Mr. Early confirmed that there is a discretionary line item to cover such expenses.**

**Jason Blank moved to raise the amount of the discretionary budget line item from \$1,500.00 to \$2,000.00 because the CLS EC's participation with the Kozyak picnic in Miami comes out of that same discretionary line item. The motion was seconded by Susan Hugentugler. During the discussion on the motion, Judge Zayas reported that based on last year's participation with the Kozyak picnic, Judge Zayas had received numerous invitations to participate with many other events sponsored by law school and other entities. Jason Blank stated that the membership committee felt that the CLS EC should participate in any of those events that do not require money. Larry Turner noted that it was previously discussed to appoint Executive Council members to serve as liaisons for each law school. Jennifer Zedalis noted that CLS EC already has contacts at many law schools, such as Scott Fingerhut at FIU, and she suggested those contacts be the liaisons.**

**Jason Blank then withdrew his pending motion because he had determined from Chase Early that there is a separate miscellaneous budget item for \$6,000.00.**

**H. Prosecutor/Public Defender Program.** Jennifer Zedalis reported that this summer's program was excellent. They plan to tweak the expert witness presentation. Each participant was sent a letter encouraging them to join the CLS.

Sadly, Ms. Zedalis had to report that Queen's Counsel, David Howker, who participated in this year's P/PD program, unexpectedly died in the U.K. Mr. Howker had been well-received at the program.

**I. Selig Goldin.** Harvey Sepler reported that the deadline for nominations, to be announced in the Florida Bar News, has been moved earlier, to December 16, 2016. Hopefully, this will allow the CLS EC to vote during the January CLS EC meeting.

Judge Zayas raised that last year, the CLS EC discussed whether current members were eligible. She noted an unwritten rule to recognize someone from outside the CLS EC, but that in light of the by-law changes to allow past Chairs to serve as ex-officio members, there are many CLS EC members who make wonderful contributions statewide to criminal law. Harvey Sepler asked if such rule was in the by-laws, and Judge Zayas said no. Harvey Sepler believes that the CLS EC should vote on whether to have such a rule. David Rothman noted that it should be an exception only to give the Selig Goldin award to a CLS EC member. Larry Turner feels that an active member should not receive the award and that a fair rule of thumb is that current CLS EC members be excluded from consideration, but that former chairs who are ex-officio members (based on the new by-law changes) should be considered for the award.

It was decided that the CLS EC does not need to vote on a specific rule.

Judge Zayas noted that people sometimes ask what the specific criteria for the award are, and wondered if there should be written guidelines. David Rothman noted that we don't have enough nominees. Abe Laeser recalled a slate approximately five years ago when there were many good nominees, and he thinks nominators aren't aware of a need to re-nominate and he recommends that if we have the information, that we go back further than 1-2 years to consider past nominees. Harvey Sepler noted that over the last year or two, previous year nominees had been reconsidered and he

wonders how many years back the CLS EC would like past nominees to be considered. Cheryl Lowenthal noted that she also recalls some good candidates in the past. Chase Early reported that he has the nominee lists for the past 5 years, and Chair Silvershein asked him to provide the list to Mr. Sepler. The question was raised whether the Selig Goldin Committee will automatically consider all the nominees going back 5 years, and Chair Silvershein stated that decision is delegated to Mr. Sepler and his committee to determine.

- J. Website/Social Media.** Jason Blank directed attention to a written agenda item from the vendor Netphiles included in the meeting materials. Mr. Blank said that the CLS EC needs and wants to provide members-only web-based CLE's. He feels that there may be cheaper options than the Netphiles proposal, but not significantly so, and he recommends the Netphiles proposal as a cost of convenience.

Jason Blank moved to approve the Netphiles proposal, with a second by Brian Tannebaum. During discussion, Richard Polin asked how long it would be until implementation and Mr. Blank reviewed his materials and answered six to eight weeks to full implementation. In response to a question from Larry Turner, Mr. Blank explained that the webinars would be available to CLS members through a separate portal and Mr. Blank said in his past experience presenting, the process was simple, requiring him only to upload his PowerPoint and then call in to a phone number and give his presentation. The motion then was approved with no opposition.

## **VIII. Old business.**

**By-law amendment for past chairs.** David Rothman noted that the amendment took a long time to pass the Board of Governors, and the question now is how to implement the change. There was discussion by Mr. Rothman, Chair Silvershein, and Judge Zayas as to the timing of implementation. Chase Early checked the specific language, which reads "past chairs become permanent members automatically, on approval of this amendment by the Board of Governors, or on expiration of their terms on the Executive Council, whichever is later." Based on that language, this will stagger the need for new members and avoid the necessity of an immediate large influx of new members.

**Judge Zayas noted that Bar staff had required stylistic changes to the language of the by-laws and that then staff asked for additional stylistic changes and that while there had been some debate as to whether the proposed stylistic changes might actually be substantive, the changes were approved to assure that the by-law change would be accomplished. Chair Silvershein explained that he had attended the PEC Committee, which reviews proposed by-law changes for the Board of Governors, and the PEC had recommended the CLS EC changes unanimously. Chase Early explained that the first reading of the proposed changes for the Board of Governors will be December 9, 2016 with the vote on January 27, 2017. Joel Silvershein noted that while this change will be gradually implemented, there will be at least three new CLS EC positions open by January, 2017. David Rothman encourages the appropriate committees to look for young lawyers to join the CLS EC, because the motivation for making past chairs ex-officio members was to open opportunities for younger lawyers.**

**Committee Summaries, Section Membership & Law Student Recruitment, and Young Lawyers Division Mentorship Program. As to these topics, there was nothing to add to the information already discussed during the committee reports.**

**Criminal Law Certification Standards Amendment. Richard Polin reported that approximately a year ago the CLS EC submitted about four recommendations, and he has not heard anything back.**

**Criminal Law Board Certification Exam. Jeff Harris gave a refresher that an ad hoc committee had been formed. The background for the ad hoc committee was that for a time period starting in 1987, approximately 69% of test takers passed, but from 2006-2011, the passage rate moved down from 33% to 29%, and then in 2014 to 17%. Mr. Harris reported that in 2015, however, the pass rate was 55%. In 2016, 62 applied, 50 sat for the test, and 43 passed, an 86% rate. The overall pass rate for 2016 for all certification exams was 48%. Mr. Harris notes that the FACDL sounded the alarm at the test preparation course that the takers had to take it seriously and study hard. Mr. Harris concluded that we don't really know the cause for the higher passage rate. Mr. Harris reports that the board certification subcommittee rejected a recommendation from the CLS EC to increase the essay portion from 5 to 6 with the requirement of 5 being answered.**

**Judge Zayas commented that around 2006 the number of applicants went up, but the committee had been seeing applicants with only bare minimum qualifications. She feels the Criminal Law Certification Committee took the CLS EC's concerns very seriously. Judge Zayas believes part of the reason for the higher passing rate is that both the Florida Association of Criminal Defense Lawyers and the Criminal Law Certification Committee members visited the test seminar and explained to applicants that the test is difficult and must be taken seriously. Judge Zayas noted that more people applied and then exercised the right to defer taking the test for a year. Jeff Harris noted that 20% of the applicants did not sit for the test.**

**Jeff Harris noted that the Board of Governors is considering allowing lawyers to call themselves experts, even if they are not certified. David Rothman noted that this issue involves a Northern District opinion that found a Bar rule unconstitutional, in a challenge brought by the Searcy Denny firm. Mr. Rothman noted that the issue for the Bar will be how to interpret the Northern District finding. BOG Liaison Masters said that his memory is the specific case involved something short of referring to oneself as an expert, and he will look into the current status. David Rothman said that lawyers with a lot of experience in a particular area in fact may be experts without being board certified, but Mr. Rothman agreed that it will hurt board certified lawyers that non-board certified lawyers might put themselves out as experts. Mr. Rothman felt that private lawyers may no longer want to apply for board certification and will just start calling themselves experts. Mr. Rothman asked BOG Liaison Masters to provide more information at the January, 2017 CLS EC meeting.**

**USDOJ Dear Colleague Letter. The United States Department of Justice released a "Dear Colleague" letter addressing the impact of monetary fines on the criminal justice system, specifically on the poor. Mr. Turner noted that he had previously raised the idea of sending the letter to every criminal law judge in the state, and this would be another way to make the CLS relevant. Mr. Turner suggested sending the letter to all State Attorneys and Public Defenders and circuit, county, and appellate judges and noted that this is an issue for every circuit and that while each circuit will deal with it differently, the CLS can take a position. Chair Silvershein noted there was an issue about people having their license suspended based on monetary reasons, and he wanted to check into a Palm Beach program that gives some relief to people whose licenses are suspended only for monetary reasons. Chair Silvershein feels the CLS EC can take**

a position. Chair Silvershein said he will send the USDOJ letter out under a cover letter, and it was suggested that he send it to county and circuit judges, DCA judges, and the elected State Attorneys and Public Defenders. .

**Death Penalty Review and PILS Legislative Position.** Marty McDonnell reminded the CLS EC that Mark Schlakman of the FSU Center of Human Rights had attended the June, 2016 CLS EC meeting to request a \$10,000.00 donation to the Center for its death penalty work. Because there was not enough time at the June, 2016 meeting for Mr. Schlakman to complete his presentation, it was suggested that he follow up with the Capital Cases Committee. Abe Laeser reported that he has not yet had follow up from Mr. Schlakman.

## **IX. New Business.**

**Monthly E-mail Newsletter.** Joel Silvershein asked Jason Blank and Richard Polin to meet to consider the best way to distribute a monthly newsletter. Chair Silvershein's goal is to improve the CLS EC's communication with the CLS members and specifically, he aims at a monthly communication. He has a draft of a newsletter for consideration. Larry Turner noted that the Chair is busy and he recommended a committee be tasked with sending the newsletter. Chair Silvershein responded that he feels it is incumbent on him to send the communication for now as the process is moved forward through Jason Blank and Richard Polin.

**Section Website Member's Portal and Enhancements Proposal.** This topic was discussed during the committee reports.

**Kozyak Minority Mentoring Picnic (Feb. 4, 2017, Amelia Earhart Park, Miami).** Jason Blank agreed to lead the CLS EC's participation in this picnic, as he did last year, and he encouraged more CLS EC members to attend. David Rothman noted that an e-mail went to several people from John Kozyak with an invitation to meet and greet minority students. Mr. Rothman said that he would attend – or someone else could – and try to get names of students who are interested in criminal law and perhaps connect them with mentors. David Rothman moved to spend \$1,000.00 for the picnic, with a second from Susan Hugentugler, and the motion carried with no opposition.

**XI. Next Meetings of the Executive Council. Joel Silvershein announced the next meeting at the Gaylord Palms Kissimmee/Orlando, January 27, 2017.**

**XII. Adjournment. The meeting adjourned at 11:33 a.m.**