

CRIMINAL LAW SECTION EXECUTIVE COUNCIL MEETING

Gaylord Palms Resort and Convention Center

6000 W. Osceola Parkway

Orlando, Florida

June 27, 2014 – 9:00 am – 12 Noon

Meeting Minutes

1. The meeting was called to order at 9:05 a.m. Chair Susan Hugentugler began the meeting with introductory remarks and attendance was taken.

2. Attendance

Present: Susan O. Hugentugler, Hon. Angélica D. Zayas, Joel M. Silvershein, Martin Patrick McDonnell, H. Scott Fingerhut, O. David Barksdale, Jeffrey Harris, Hon. Richard Hersch, Les Hess, Hon. Cynthia Imperato, Abraham Laeser, Calianne Lantz, Hon. Jeffery R. Levenson, Sheryl Lowenthal, Hon. Donald Scaglione, Harvey Sepler, Carolyn Snurkowski, James Wesley Smith III, Brian L. Tannebaum, George Tragos, Larry Turner, William C. Vose, Hon. Samantha Ward, Paul H. Zacks and Jennifer Zedalis.

Also present: Eugene Sherman, Program Administrator, The Florida Bar and Michelle Suskauer, Florida Bar, Board of Governors, Liaison, Ben Kuehne, Jason Blank, Mac Heavener, and Mark Dobson, Professor, Nova University

Present Telephonically: Hon. Robert Dillinger, Richard Polin and Kenneth Swartz

Not present: Stephen Echsner and Gary S. Winston

Excused: Larry Donald Murrell, Jr. and David B. Rothman

3. Chair Hugentugler introduced Michelle Suskauer and welcomed her back as a returning Board of Governors Liaison. Ms. Suskauer invited all members to contact her with concerns and issues.

4. Approval of Minutes: Minutes of January 24, 2014, were corrected to correct the spelling of the name “Kelly Hancock” and subsequently

approved as corrected. The minutes of March 11, 2014, were approved without correction.

5. Board of Governors Liaison Report: Current Liaison Stephen Echsner was not present due to a trial conflict. Incoming Liaison Michelle Suskauer was introduced. However, no report was given.

6. Treasurer's Report: Mr. Silvershein reported that revenues are on track with current budget. Mr. Silvershein noted certain items in the budget, including the expenses for the 2014 convention and the CLE revenue, which continues to come in as a result of after market sales. Mr. Silvershein reported: "So far, so good."

7. Committee Reports

Capital Cases: Ms. Hugentugler reported that as a result of the prior vote of the Executive Council, the CLS had filed a comment in the Florida Supreme Court in response to the Capital Postconviction Proceedings Subcommittee proposed changes to postconviction rules in capital cases and noted that the comment and related materials could be found in the agenda materials. Judge Ward reported that as a result of comments and/or responses from the CLS, the Office of the Attorney General, and the Public Defenders Association, the Subcommittee amended some of their initial proposals. As a result of the comments and responses, the Subcommittee clarified the role of lead counsel, revised the proposal to require trial counsel to provide a copy of the trial file instead of the original as initially suggested, and the time limitation for newly discovered evidence was amended from 60 days to 180 days. The Subcommittee did not change the deletion of the oath from the defendant, but did amend the proposal to require that the lawyer certify that the lawyer had discussed the contents of the motion with the defendant before filing the motion. The Subcommittee also changed the proposal regarding the deadline and page limitations for written closing arguments and the deadline for filing an order granting or denying the claim. The Office of Capital Collateral Regional Counsel filed comments objecting to the provision that copies of the trial files, and not originals, would be provided to postconviction counsel. Oral argument was held June 5, 2014, and the proposals were still pending at the time of the meeting. Ms. Hugentugler reported that she had called Judge Kevin Emas, Chair of the Capital Postconviction Proceedings Subcommittee, and advised him that the CLS had not been consulted before the proposals were made even though

the Criminal Rules Procedure Committee had been. Judge Emas acknowledged the expertise of the members of the CLS and the CLS Executive Committee and agreed to consider input from the CLS in the future.

CLE: Mr. Silvershein reported that plans are underway with a schedule already in place beginning with the Criminal Law Update, led by Judge Levenson, in December 2014 in Orlando. Ken Swartz will lead the Federal Law Seminar in January 2015. The program will likely be held in Miami. The DUI Masters program will be held in February 2015 and will be led by Michael Catalano and Carlos Canet. The program will likely be held in Tampa or Orlando. Mr. Silvershein reported that the CLE Committee is exploring an advanced appellate seminar as appellate certification credits are rarely available. The CLE Committee is also looking into commemorating the 50th anniversary of the Miranda decision in 2016 as a possible showcase event. Mr. Tragos is working with the Real Property, Probate and Trust Law Section of the Florida Bar (RPPTLS) to develop a program to include mortgage fraud. However because of the internal structure of the RPPTLS, coordination is slow and difficult. At this time, the CLS is waiting for dates and other details. Ms. Hugentugler attended the Federal Practice Seminar, held in Miami in January 2014 and reported that the seminar was well attended and well received. Ms. Hugentugler also reported that federal prosecutors participated in the program for the first time in many years and that the reviewers appreciated participation by the prosecutors. Ms. Hugentugler also attended the DUI Masters Seminar presented by Carlos Canet and Michael Catalano. The DUI seminar was also well attended and received good reviews. Judge Zayas opened a discussion of the Criminal Law Certification review course, questioning whether the CLS should present a second review course or join forces with the FACDL in its presentation of the review course. Judge Zayas, who has been a member of the Criminal Law Certification Committee for several years, suggested that there might be a need since the passage rates in recent years have not been great. A brief discussion revealed that FACDL and the CLS had historically worked on the course together, but because of Florida Bar rules regulating the division of the proceeds, the partnership came to an end. Also, it was suggested that the FACDL course was so highly regarded, that it would not be realistic or feasible to attempt to compete with the course. Others questioned whether low passage rates should cause the CLS to be concerned about whether the test or the certification process was fair or reasonable. Some also questioned the value of the certification process. It was also

suggested that the CLS should play a role in the certification process. However, it was explained that the Florida Bar Board of Legal Specialization and Education (BLSE) governs the certification process. Because these questions were philosophical questions that were best left for another day, the CLE Committee was asked to consider the question of whether the CLS should or should not offer a certification review course as a benefit to the members of the CLS who might be interested in becoming certified and report back with the reasons for offering the course or declining to offer the course. Mr. Silvershein also reported that the CLE Committee was developing a course regarding the use of emerging technology in criminal prosecutions. Mr. Silvershein added that the CLE Committee was hoping to develop half-day seminars that would be presented live in different, and often underserved, geographical areas. Mr. Silvershein would also like to develop a CLE on mental health issues. Finally, Mr. Silvershein reported that the committee is looking to develop a seminar to conform with the newly amended rules regarding education on *Brady* and discovery issues.

Communication: Ms Hugentugler began by recognizing Richard Polin for his herculean task of posting case law updates regularly on the new section website, taking specific care to post cases accepted for review by the Florida Supreme Court. Mr. Polin reported that the Communications Committee has been posting updates with the assistance of the Office of the Attorney General. He noted however, that only the two most recent postings remain on the site. He would like to work with the website manager to keep cases on the site a bit longer, perhaps through the use of hyperlinks. Also, he would like to see the items posted more quickly, particularly with significant emerging cases. Mr. Polin reported a significant lag time between submissions by him and posting by the website manager.

Mr. Polin reported more difficulties with the newsletter, but believed that the new website would facilitate matters. Mr. Polin reported that the greatest difficulty is in getting persons to actually write articles once they have agreed to do so. Mr. Polin asked again for volunteers. Mr. Polin explained that he was not looking for "Law Review type articles," but was instead looking for shorter articles with "practical advice."

Ms. Hugentugler discussed the new website and the improved communication offered by the new site. Calianne Lantz suggested that the CLS should consider "app based access" to the information on the website. Ms. Hugentugler mentioned the intent to form a "Website Committee" in the

coming year. Larry Turner noted that although the new site allowed members to join the section online through the new website, there was no way for student members to join. Jennifer Zedalis questioned how participants and staff of the P/PD could sign up for free as previously approved. After a brief discussion of the issues, it was decided that the Florida Bar Program Administrator would address those concerns at a later time.

Legislative: Marty McDonnell reported that section members had previously been sent a package with all relevant legislation that had been passed and was awaiting signature by the Governor. A week prior to the annual meeting, all pending legislation was signed by the Governor. Significantly, the legislature addressed the issues raised by *Graham* and *Miller*. Also, as a result of the new legislation, all sentences in excess of thirty years in juvenile cases will be entitled to a sentencing review. Also the prosecution of sex offenses was dramatically impacted by the new legislation. The summaries of the legislation were provided in Exhibit 5 of the agenda materials. Retroactivity of juvenile sentencing cases was not addressed in the new legislation. Ms. Hugentugler thanked Mr. McDonald for a thorough and comprehensive job of providing all members with the proposed legislation, noting that the report was e-blasted to all section members. Mr. McDonald also included in the materials a summary of the bills that did not pass and suggested that members look at the failed bills as well because many of those bills are likely to be raised again. The CLS should be prepared to address the issues when they are raised again.

Long Range Planning: David Rothman was not present, therefore no report was presented. Ms. Hugentugler did report Mr. Rothman's intent to form a Website Committee in the upcoming year.

Membership: Larry Turner reported 200 more members this year than the same time last year. Mr. Turner believes that the website is a good way to attract new members. The Membership Committee "strongly feels" that the CLS needs to use more social media, e.g. Facebook, to attract and retain members, particularly younger members. The Membership Committee obtained names of former members and asked committee members to reach out to those persons in their area and ask why they were no longer active. There was some positive feedback and renewed memberships. Mr. Turner would like Executive Council members to do the same. The Membership Committee is also reaching out to FACDL and would like Executive Council

members to reach out to other organizations (FPAA, FPDA, etc.) to do the same. The Membership Committee feels that the CLS lacks a message or mission statement, i.e. a few words that tell people why the CLS is different from other organizations such as FACDL, FPAA etc. Because it is a marketing issue, Ms. Hugentugler suggested that the Membership Committee draft something appropriate. Ms. Hugentugler suggested that the Membership Committee consider using the savings that will be realized by holding the December Criminal Law Update at the Orange County Bar Association instead of a more expensive venue for CLE scholarships to promote membership. Mr. Turner also recommended that the Executive Council recruit non-council members of the section to work on the CLS committees. Nova Professor Mark Dobson volunteered to assist with the Communications Committee. Mr. Kuehne suggested that this would be a good way to not only promote section involvement, but also a way to recruit future Executive Council members. Mr. Tragos suggested that a section-wide e-mail blast be sent to all members to invite members to sign up for committees. All ideas were well received. It was suggested that the reception be used to recruit committee volunteers. However, it was also suggested that many section members are government employees who do not traditionally attend the Florida Bar meetings because of the costs involved.

P/PD: Paul Zacks and Jennifer Zedalis reported that the program was ready to go on August 3. At the request of the recent participants for younger faculty, the program is slowly incorporating new instructors. Ms. Hugentugler reported that the endowment is up to date. The contract ends next year and will likely be renewed next year. The program was to be fully funded at \$500,000 and is currently funded in excess of \$600,000. The program began in 1978. Mr. Zacks would like the Florida Bar and the CLS to celebrate the 40th anniversary in a big way since P/PD is a significant program. The program has educated 72 students per year, many of whom have moved on to illustrious legal careers. Ms. Zedalis reported that student registration is still ongoing and that Statewide Prosecutors and Regional Conflict Counsel have asked to participate and are currently on a waiting list.

Selig Golden: Harvey Sepler reported that Chuck Morton is scheduled to receive the award and the luncheon is sold out.

8. Section Liaison Reports

Appellate Section: Calianne Lantz reported that the CLE Committee of the Appellate Section would like to work with the CLS on an update to "Navigating Appellate Practice" in the spring of 2015. The Appellate Section is also willing to work with the CLS on other projects. Also, the DCA Judges have voted to allow the Appellate Section members to join the judges at the DCA Judges Conference every other year. The Appellate Section meetings will be held at the DCA Judges Conference and there will be some joint meetings.

9. Old Business

a. Referral From The Florida Bar Disciplinary Rules Committee Re: Ex Parte Communications: Ms. Hugentugler reported that as a result of the referral, the subcommittee chaired by Mr. Tragos recommended no change in the rules, but instead an ethics opinion on the matter. The Professional Ethics Committee declined to issue an opinion. Ms. Hugentugler spoke to Dennis Kainen of the Florida Bar Board of Governors about the matter. Mr. Kainen thought the CLS recommendation was a reasonable way to provide guidance to attorneys and reported that the matter was fairly debated amongst the Board of Governors. The Board of Governors ultimately decided that the best resolution was to have a Bar Staff Attorney write an article on the issue. Mr. Tragos was concerned about the fact that the CLS was invited to review the matter and make a recommendation, but was ultimately disregarded and not invited to address the Board of Governors. However, Mr. Tragos encouraged the CLS to remain involved and be willing to speak up when necessary, even when not invited.

This discussion led to a conversation of the Rules of Judicial Administration Committee (RJA) and certain initiatives under consideration by the RJA that could impact the members of the CLS. Mr. Tragos was particularly concerned with a rule regarding coverage attorneys that could make it more difficult for assistant state attorneys or public defenders or law partners to stand in for each other on minor matters. Mr. Tragos, Mr. Vose and Mr. Silvershein were concerned that some RJA members were attempting to have all rules of procedure in RJA, depriving the members of the other rules

committees of the ability to create rules applicable to specific areas of practice.

b. Proposed Fla. Rule Crim. P. 3.113: Larry Turner reported on the status of proposed Rule of Criminal Procedure. On May 15, 2014, the Florida Supreme Court adopted the proposed rule concerning the minimum standards for attorneys in felony cases. The new rule reads: Before an attorney may participate as counsel of record in the circuit court or an adult felony case, including postconviction proceedings before the trial court, the attorney must complete a course of at least 100 minutes and covering the legal and ethical obligations of discovery in criminal cases including the requirements of Rule 3.220 and the principles of *Brady v. Maryland* and *Giglio v. United States*. According to the rule, judges are not to appoint counsel unless they have taken the course and judges are required to remove attorneys who have not taken the course. The rule takes effect in two years, in 2016, to give attorneys time to comply. The rule can be found in Florida Supreme Court Case No. SC13-532. The Criminal Court Steering Committee recommended that the FPDA and FPAA create courses to allow attorneys to comply easily and that the courses be offered for free. The rule applies only to trial cases, not to appellate cases. Brian Tannebaum wants to take lead on this, to be relevant, and suggests that we offer it for free. Several were concerned that The Florida Bar will not allow the CLS to offer a free CLE course. The counter-argument is that this would not be a CLE course, but would simply be a way to allow members to comply with rules and that at any rate, a waiver should be available in light of the mandate of the rule. Mr. Turner moved that the CLE Committee be charged with developing a proposal to meet the requirements of the new rule. The matter was referred to the CLE Committee. Mr. Tannebaum and Mr. Silvershein will explore the matter and develop a plan. Mr. Vose suggested reaching out to the FPAA and FPDA to offer assistance, to demonstrate relevance and potentially recruit members.

c. St. Thomas Law Review Project - Ms. Hugentugler reported that the latest volume was just sent out. The bill had not yet been received. Also, the articles should be up loaded to the website soon.

10. New Business

a. Membership Survey: Ms. Hugentugler reported the results of the membership survey. According to the responses, people want to participate,

they want more communication, were not aware that we had a website, they are interested in social media.

David Barksdale suggested e-blasting case law updates to membership to meet requests for increased communication and to provide service to members. It was suggested that rather than a case law summary, a hyperlink be sent. A spirited discussion ensued regarding how much communication was sufficient to be useful, but not so much to be considered a nuisance. Mr. Tragos suggested that the Attorney General Updates was a great synopsis of recent cases and volunteered to help. Carolyn Snurkowski agreed to work with Mr. Tragos on providing updates to membership.

b. Juvenile Direct File Study: Ms. Hugentugler reported that as a result of the telephone conference in March, the CLS decided not to support the proposal of the Legal Needs of Children Committee (LNCC) regarding direct file cases because of lack of sufficient information in the proposal. Abe Laeser was appointed to Chair the subcommittee to investigate the matter further. Ms. Hugentugler reported on the efforts that she had made to obtain updated information from the State and the Defense and others regarding juvenile direct file cases inasmuch as the materials provided by the LNCC was outdated. Todd Bass of the Miami-Dade State Attorney's Office offered to assist. Rob Mason, an assistant public defender from Jacksonville and a member of the LNCC, also volunteered to help. The judges on the Executive Council were also available to discuss their experiences with direct file cases. Mr. Laeser made several observations about the LNCC proposal and materials. First, Mr. Laeser noted that not one member of the 31-member LNCC was a prosecutor or Assistant Attorney General. Mr. Laeser also noted that the concern of the LNCC was simply that too many children were being treated as adults, yet the statistics provided by the LNCC showed that the number of direct file cases was actually decreasing. Due to the decline in direct file cases and the outdated materials, Mr. Laeser suggested that the proposal was more relevant 10 years ago. Mr. Laeser also noted that the statistics provided by the LNCC show that most direct file cases involve 17 year olds when the state is losing jurisdiction over the child. Although the proposed legislation failed this year, Mr. Laeser suggested that the CLS investigate the concerns raised by the proposed legislation because it will likely be raised again. Mr. Harris noted that the Human Rights Watch Report provided in the agenda materials suggested a racial bias. Mr. Laeser acknowledged that the numbers suggested a potential bias and recommended further inquiry to determine whether the reports were

accurate. Marty McDonnell, Less Hess, Abe Laeser, Jeff Harris, Joel Silvershein, Larry Turner, and Judge Levenson have been assigned to the committee to investigate the matter for further recommendation.

c. Website Update: Ms. Hugentugler unveiled the new website for Executive Council members, explained the changes and reported that the site was also mobile optimized. Judge Zayas and Ms. Hugentugler encouraged members to contribute pictures for the photo gallery and other items of interest to the members.

d. Letter From Bar President Eugene Pettis: Ms. Hugentugler reported that the Mr. Pettis had received a letter from Howard Finkelstein, Broward County Public Defender, regarding perceived racially motivated stops and arrests in Broward County. Mr. Finkelstein suggested that the Florida Bar take a position regarding racially motivated stops, sentencing decisions etc. similar to the position taken by United States Attorney General Eric Holder. It was suggested by some Executive Council members that it was not the job of the CLS to take a position similar to the United States Attorney inasmuch as the CLS is not a legislative body or law enforcement agency. It was also suggested that the CLS does not have the resources to investigate the allegations, compile statistics, etc. The matter appears to be a civil rights issue that perhaps should be referred to the Civil Rights Division of the Office of the Attorney General. Believing the issue to be a statewide issue of concern, James Smith volunteered to look into the issue.

11. Recognitions: Ms. Hugentugler thanked Executive Council members for their service and presented them with pens and thank you notes.

12. Elections: Bill Vose, Nominating Committee Chair presented the slate of nominees. Before the presentation of the nominees, Mr. Laeser commented on the composition of the Executive Council and encouraged age and racial diversity on the Executive Council to more accurately reflect the composition of The Florida Bar. Mr. Laeser also reminded Executive Council members of the need to maintain a balance of prosecution, defense, and neutrals (judges and professors) in order to maintain credibility as an independent organization. Ms Hugentugler reported 11 vacancies. According to the by-laws, there are 10 vacancies each year. The first 5 (Slate 1) are to be filled by a vote from the Executive Council and the next 5 (Slate 2) are to be filled by a vote from the section members in attendance, including Executive Council members. Traditionally, the Nominating

Committee has determined which names are placed on which slate. Slate 1 included Bob Dillinger (defense), Scott Fingerhut (academic), Less Hess (retired prosecution), David Rothman (defense), and Joel Silvershein (prosecution). Slate 1 was approved by acclamation. Ms. Hugentugler noted that the current composition of the Executive Council included 9 neutrals, 6 active prosecutors, and 14 defense attorneys. Both Mr. Vose and Mr. Hess were considered "prosecution" since both had retired as prosecutors and were not practicing. This changed the composition of the Executive Council to 9 neutrals, 8 prosecutors, and 14 defense attorneys.

Slate 2 included Judge Richard Hersch, Abe Laeser, Calianne Lantz, Harvey Sepler, Carolyn Snurkowski, Brian Tannebaum, Jason Blank, Mac Heavener, and Brian Kramer. David Barksdale spoke in favor of Mac Heavener. Larry Turner spoke in favor of Brian Kramer. Jason Blank introduced himself and spoke in favor of his nomination. Abe Laeser and Brian Tannebaum also spoke in favor of Jason Blank. Section members were asked to select 6 from the slate. No nominations were made from the floor. The initial count resulted in the election of Jason Blank, Judge Hersch, Brian Tannebaum, and Harvey Sepler with a three-way tie between Mac Heavener, Abe Laeser and Calianne Lantz. As a result of a runoff vote, Mac Heavener and Abe Laeser were elected to the Executive Council.

Mr. McDonnell was named Treasurer of the CLS, by acclamation.

13. Adjournment: The meeting was adjourned at 12:05 p.m.