

The Criminal Law Section

June 23, 2011

Orlando Florida

Minutes

*This is what I sent Paige -  
draft which I plan on shortening -  
too long -  
I bolded the vote portions  
for Paige's report to BofG.  
had headache + emergency search warrant last night*

1. The meeting was called to order at 9:00a.m.
2. Attendance- Present in Orlando were the following council members: Hon. Lisa Porter, Susan Hugentugler, Sheryl Lowenthal, Ann Finnell, Jeffrey Harris, Richard Hersch, Les Hess, Hon. Cynthia Imperato, Abe Laeser, Calianne Lantz, Martin McDonnell, Joel Silvershein, Carolyn Snurkowski, Brian Tannebaum, Larry Turner, William Vose, Angelica Zayas, and Jennifer Zedalis. Present via phone were: Scott Fingerhut, David Rothman, Hon. Stanford Blake, Hon. Robert Dillenger, Douglas Duncan, Richard Polin, Scott Richardson, Harvey Sepler, Kenneth Swartz, and Paul Zachs. Donnie Murrell and George Tragos were excused. Absent was Hon. Samantha Ward. Also present during the meeting was Board of Governors liaison, Michelle Suskauer, FACDL representative Nelly King, Gary Blankenship of the Florida Bar News.
3. Chair Hon. Lisa Porter announced the committee assignments for this year. Anyone who wants to serve on additional committees is welcomed. The Chair particularly requests volunteers for the communications committee.
4. Approval of March 4, 2011, minutes was deferred at the June 2011, meeting - Jeff Harris moved to approve the minutes. Joel Silvershein stated that his recollection of the vote regarding the animal law section's legislative proposal, to extend judicial powers in domestic violence cases to animal abuse, differed from the minutes. The Chair noted her previous discussion with Ms. Silvershein, Mr. Fingerhut, Ms. Lowenthal, and other council members on the subject also conflicted with the minutes. Ms. Lowenthal stated that it was her recollection that a motion had been made to oppose the Animal Law Section's proposal, which vote failed, followed by a motion to take no position, which carried. This was also Mr. Silvershein's recollection. It was suggested that the votes as recorded in the minutes may have been backwards. The Chair suggested that the incoming secretary change the minutes to reflect the council's recollection. Former Secretary Fingerhut brought the Chair's attention to Robert's Rules of Order. When objections are made to the minutes, errors can be corrected upon a motion and vote to correct same. **Ms. Lantz moved to correct the minutes as set forth in the discussion and Ms. Lowenthal seconded the motion. The amendment to the minutes passed unanimously. The March minutes were then approved unanimously as corrected.** Mr. Fingerhut will forward his minutes to the present Secretary, Ms. Hugentugler, for correction.
5. **Ms. Zayas moved to approve the June 24, 2011, minutes and such were approved unanimously.**

6. The Treasurer's report was made by David Rothman and Paige Graham. Ms. Graham noted that our CLE revenues were less than anticipated, but the fund balance is good. Mr. Rothman noted that over the last three years, the financial health of the section has been good and continues to be good, with the exception of membership going down. Also, we should be able to increase CLE income. It was noted that the allocation of funds for a reception is a good way to increase membership. Also, our PPD program is most important to our section and should continue to be well funded. As for a lobbyist, Paige stated that we tend to move funds for that on a case-by-case basis. Recognizing the Legislature's actions last year, we may need to discuss that at a later time. Overall, the fund balance and therefore the financial state of the section is good. David suggested we spend money to promote our CLE and our section. If we promote the section, we will increase membership and revenue. Paige Graham stated that the standard CLE advertisement from the Bar is to provide two advertisements; first a ½ page ad in the Bar News and then a ¼ page ad closer to the CLE date. Paige has tried to have additional advertisement for CLE for other sections she works with, but has been shut down by the BAR. There are space limitations for traditional advertisement given all the CLE produced by all sections. We are trying to send e-blasts and also develop our web site, but we do not have a newsletter at this time. Council members also get the word out by notifying local bar organizations and other associations. The Bar web site lists all CLE courses and Terry Hill sends out e-mail blasts regularly to get the word out. Stan Blake asked if we could get the list serve of members from the FACDL so that we could get the word out in time when bar dues statements are sent out. It was suggested that membership applications on the bar forms also include a box to be checked off for membership in the Criminal Law Section. The Chair then recognized the representative of the FACDL, Ms. Nelly King, who was present at the meeting. Gary Blankenship of the Florida Bar News was also recognized as being in attendance.
7. Mark Schlakman, chairman of the board of the Innocence Project, was recognized by the Chair. Schlakman was on the phone regarding presentation of agenda item VII. He, along with former Justice Raoul Cantero, is seeking support from the Bar and the Criminal Law Section to recognize the need for oversight in Florida's administration of the death penalty. He noted the ABA's report and recommendations released five years ago, the Florida Legislature's recent act of abolishing the Commission on Capital Cases, established in 1997, which is the statutory oversight vehicle for post conviction collateral proceedings in capital cases, and a recent finding by a federal court, which may or may not be upheld, that certain portions of Florida's death penalty process is unconstitutional. His purpose is not to debate the philosophy or efficacy of the death penalty, but rather to focus on the administration of justice to establish oversight and a comprehensive review of Florida's death penalty scheme by all three branches of government. He is trying to develop common grounds for a comprehensive review and has spoken before the FPAA as well. David Rothman spoke in support of Schlakman's request which he believes is more of a section issue, not a board of governor's issue.

After requesting Mr. Schlakman to clarify what he was asking the section to do, **Larry Turner moved the council to support the comprehensive review of Florida's entire death penalty process by all branches of government. David Rothman seconded the motion.** Schlakman noted that the position of the bar or the section will

not control the issue, but that simply taking a position will assist when the issue is brought before legislative leadership. He states that the recognition of the compelling need for state officials to conduct a comprehensive review of the administration of Florida's death penalty process and to implement appropriate oversight will assist. Abe Laeser noted that this all sounds good, and surely no one wants innocent people to be executed, and that we can all vote for the position to feel good, but that nothing will be done about this because the powers in Tallahassee do not want their dollars to go to establishing commissions to look into something they don't care about especially when dollars are short. Schlakman stated that it was not their intention for the creation of a commission or the expenditure of any substantial resources, but rather there is a need to speak out and simply take a position to recognize the need for comprehensive review. Larry Turner shares Abe Laeser's skepticism and asked if there was an action plan. Schlakman offered to work with the section in this regard noting programs by the FSU law school and his consultation with Florida Tax Watch on the fiscal implications of the death penalty. He is specifically not asking the section to weigh in on particular findings and recommendations of the ABA because such matters can be debated, but merely asks for this sections support for a comprehensive review with the ABA report as a starting point.

Bill Vose's problem with this proposal is that it assumes the entire criminal justice system isn't doing its job and has a problem which is not being addressed. Isn't that what the innocence commission was established for? Schlakman said that the innocence commission mostly does not deal with capital cases or the death penalty process. He noted cases in Florida where persons on death row were later exonerated and that just recognizing the need for comprehensive review is an important step.

Paul Zacks noted that the proposal submitted to the council in the agenda calls for two things, (1) for us to support state officials to establish a framework to conduct a review and (2) for us to support the implementation of ongoing oversight of the state's administration of the death penalty. Mr. Zacks is troubled by the latter request because that contemplates some agency, body, or committee on a continuing basis to tinker with the death penalty which would create more uncertainty in the process. He does not oppose a review, but creation of a body which would tinker with the process on a continuing basis is troubling to him.

The question was called with the Chair noting that the motion, as proposed by Mr. Turner, does not contemplate oversight function.

The motion, as moved by Larry Turner, was for the council to support the comprehensive review of Florida's entire death penalty process by all branches of government. David Rothman seconded the motion. Bill Vose was concerned that the adoption of the motion may be construed to mean that we also agree not just with review, but also to oversight. To the extent that Bill Vose's comment was offered as an amendment, it was not accepted by Larry Turner.

**Mr. Turner amended his motion as follows: —“To support the comprehensive review of Florida's death penalty process, in its entirety, by all branches of government.”**

The amendment was seconded by Sheryl Lowenthal. A Roll Call Vote was conducted by the Secretary. **The motion, as amended, carried by a vote of 23 yes, to 3 no.**

The Chair recommended that Mr. Schlakman get in touch with our Capital Cases Committee for further assistance.

8. The Chair welcomed and recognized the President of the Florida Bar, Mr. ~~Jack Harkness~~. Mr. ~~Harkness~~ spoke of his concern with recent legislative and political issues, particularly merit retention of the judiciary. He spoke about the need for the leadership of the Bar to educate the public about the role of the judiciary. There will be three justices and 15 district appellate judges on the next merit retention ballot. The mission of the Florida Bar is to advance the administration of justice and to promote public service. In that regard, he asks the members of the council to educate the public on the importance of the merit retention challenge because the average person does not have an understanding of what judges do, particularly appellate judges. Across the country, there have been mass efforts to remove appellate judges on grounds which he believes were not exactly accurate or truthful. He is not suggesting that this a political effort by the Bar on behalf of a particular judge, rather this is an effort to educate the public on the importance and consequence of their vote. The Bar has spent money to communicate to lawyers, and in turn want the lawyers to educate the public, on key points. Such include questions on how to define whether a judge is good or bad when he or she is involved in adjudicating 15,000 decisions. Do you just look at one decision or their body of work? Judges can not defend themselves. It is up to the leadership of the Bar to communicate these concerns to the public. The present JNC system in Florida of merit selection and retention is the result of mass corruption in the legal system when the citizens of Florida voted to keep politics out of the court system. He will be sharing this message with the public and asks us, as officers of the court, to share this message of education with the public to maintain the integrity of the process. With respect to the JNC process, Mr. Harkness says that there is diversity in the Bar's nominees, but his observation is that there is a lack of criminal practitioners on the JNC. David Rothman noted that the Bar recruits criminal defense lawyers for appointment to JNCs, however the governor's office does not accept the nominees. Brian Tennebaum is concerned about the Legislature getting involved in how lawyers charge their fees such as in loan modification cases and in criminal cases and brought his concerns to Mr. Harkness's attention.
9. Agenda Item VI- regarding proposed legislative position on children criminally sentenced in adult court- was addressed next. The Chair recognized Barry University Law Professor Gerard Glynn who presented the issue to the council on behalf of the Legal Needs of Children Committee. Mr. Glynn spoke about the recent Supreme Court case of Graham v. Florida which held that a juvenile cannot be given life without the possibility of parole for a non-homicide offense and noted that we do not have parole in Florida. So the question becomes, what are we going to do in Florida with children who commit horrible crimes? Florida has more children sentenced to life than any other state. The Legal Needs of Children Committee has reviewed the issue and has proposed legislation, found in Exhibit 9 of the agenda. Pursuant to the Bar's regulations, the LNCC is presenting their proposal to the criminal law section because we are a section that may be impacted by their position. They would like for us to adopt their position, but Mr. Glynn

is merely here to inform us of the issue. In exhibits to our agenda, there are two bills filed last year and re-filed this year which are in strict compliance with the Graham decision, and the third is more in line with the LNCC's broader Legislative proposal. Their proposal is not limited to children who have been sentenced to life in prison, but would apply to children who are sentenced to long adult sentences. The LNCC's proposal is addressed to any child sentenced to more than 10 years. Specifically, the LNCC supports legislation that children sentenced in adult courts for more than 10 years have a meaningful opportunity for early release based on demonstrated maturity and rehabilitation. The LNCC does not take a position on when that review should take place, only that the "pool" of kids affected be those who are sentenced to more than 10 years in prison. Mr. Glynn pointed out similarities and differences in the proposed bills and criteria for application for early release. The LNCC has taken a position, and they hope we take a similar position, that there should be legislation that addresses a broader issue than just compliance with Graham. Ms. Carolyn Snurkowski asked Mr. Glynn if his proposal is to create or to maintain the parole system and if not, how does the committee contemplate accomplishing their objective? Have they taken a position on the mechanism for review? No, the LNCC does not take a position on that because some legislators want to eliminate the Parole Board altogether. Mr. Glynn personally believes that the only way there could be a process for giving children a meaningful opportunity for early release based on demonstrated maturity and rehabilitation is through the courts. Ms. Snurkowski stated that her problem with the LNCC's proposal is the 10 year time limit which is not within the spirit of Graham which contemplated much longer sentences. Mr. Glynn discussed recent research into the brain development of children. If a child is sentenced to more than 10 years, he should be past the age of 25 and should have an adult brain. Mr. Les Hess also has a problem with the 10 years. He asked if their proposal also allows the parole board or reviewer to take into consideration the heinousness of the offense because the proposed legislation only addresses the offender and not the crime. Mr. Glynn reviewed the criteria to be considered as set forth in the proposed bills, but noted that the committee did not take a position on what the factors should be. Judge Imperato noted that the criteria set forth in the bills is already considered by the sentencing court when the defendant is initially sentenced. Mr. Joel Silvershein also has a problem with the 10 year sentence which may have the effect of bypassing the 10/20/life minimum mandatories for use of a firearm during the commission of certain offenses. Mr. Glynn did not know if 10/20/life would be affected because the Supreme Court did not require a child to be released, only that there be a process to evaluate whether they should be. He did, however, acknowledge that a child who shot somebody would be subject to being released after 10 years under their proposal. When asked what it was the LNCC wanted us to do, Mr. Glynn responded that he would like the section to adopt their position. That would require a member of the council to so move. Mr. Larry Turner believes that the 10 year requirement will kill the position, however believes that we should take a second look for no other reason than because there is such disparity in sentencing from judge to judge. Bringing the case back after some time may not be a bad idea because we know that the adolescent mind is simply not mature. The Secretary asked Mr. Glynn to clarify the LNCC's position with regard to the three legislative proposals appended to our agenda. Mr. Glynn stated that they did not endorse any of the three, but that the third was the closest to their

recommendation. They merely want to take a position that any child sentenced to more than 10 years in prison be given a meaningful opportunity for early release based on demonstrated maturity and rehabilitation. A discussion of legal definition vs. biological definition of maturity ensued with some noting that 14 year olds could be more mature than 24 year olds. The Chair read the LNCC's proposal as follows: **The Legal Needs of Children Committee supports legislation that recognizes that children sentenced in adult court for more than 10 years should have a meaningful opportunity for early release based on demonstrated maturity and rehabilitation.** The LNCC does not believe that the so-called Graham compliance act is in line with recent research into the brain development of children. **Larry Turner moved to support the position of the Legal Needs of Children Committee. The motion was seconded by Brian Tannebaum.** Mr. Laeser is troubled by distinguishing between persons whose ages differ by weeks or months and further that the concern is placed on whether the offender behaved for a period of time and matured in prison and not upon the crime committed. He would like to think that the judge who originally sentenced the offender considered all factors and believed that the person deserved the sentence. Ms. Zayas would like to know what the biological difference is between a person who is 17 years and 10 months and an 18 year old? She does not disagree with Graham, but 10 years is not enough. Ms. Zayas asked when the review would take place? Would that be in 5 years into a 10 year sentence? Mr. Glynn stated that the LNCC does not take a position on when the review should be, only that the pool of persons eligible be those children who are sentenced to more than 10 years rather than only those children sentenced to life. Mr. Glynn stated that he believes the LNCC would prefer that we take a position with a longer threshold than 10 years rather than just rejecting the proposal altogether. Mr. Tannebaum does not believe that the Legislature or the Governor will support such a proposal, but we have to start somewhere. He thinks that we either agree to the framework of a second look without picking a number or pick any number. Mr. Turner thinks we are wasting everyone's time because it will never be approved by the Legislature. Mr. Glynn said that the LNCC, as advocates for children, came up with the 10 years because the child should be an adult in 10 years. Mr. Vose is concerned that there will be no finality in sentencing if this proposal passes. He believes that the Legislature needs to fix the problem by keeping a parole system. Ms. Snurkowski spoke about how other states are handling the Graham issue. Her problem with the LNCC's proposal is that they are not suggesting a mechanism for the review especially where the Legislature doesn't want to expend more money. Mr. Jeff Harris agrees with Ms. Snurkowski and asked how they would effectuate their position without specific wording? Mr. Glynn noted that their position is only the position of the LNCC and not the position of the Bar. They are following the procedure set by the Bar that before they can speak on the issue, they have to inform affected sections. It is their intention to speak in Tallahassee against the strict Graham compliance bills because, they believe, the Legislature has to address the broader issue. The Legislature needs to expand the pool from only those who strictly fall under Graham to those children who are sentenced to more than 10 years in prison and they intend to lobby in Tallahassee accordingly. The question was called on whether we should support the LNCC's proposal which reads: **The Legal Needs of Children Committee supports legislation that recognizes that children sentenced in adult court for more than 10 years should have a meaningful opportunity for early release**

**based on demonstrated maturity and rehabilitation.** A roll call vote was called by the Secretary. **The motion failed by a vote of 11 yes to 15 no.** Jeffrey Harris moved to adopt the proposal of the LNCC after removing the 10 year sentence requirement. The motion was seconded by Ann Finnell. An offer to amend the motion to include an offender sentenced in excess of 25 years was rejected by Mr. Harris. The Motion was: **The Criminal Law Section supports legislation that recognizes that children sentenced in adult court should have a meaningful opportunity for early release based on demonstrated maturity and rehabilitation.** Discussion on the motion ensued with some council members noting that the proposal was worse and that not having a number makes the proposal meaningless. Others stated that some dialog has to begin. A question was asked regarding advocacy in the Legislature. Mr. Glynn stated that it would be up to the Criminal Law Section to draft its own legislative proposal and that it would in turn have to comply with rules set forth by the Bar. A roll call vote was called by the Secretary on the motion. **There were 14 yes votes and 12 no votes.**

(The Chair called for a five minute break.)

Though it was originally believed that the motion carried, the Chair announced that the motion did not pass. That is because the motion involves proposed legislation and our bylaws require a 2/3 majority vote to pass such motion. Mr. Tannebaum questioned whether the vote involved proposed legislation or just a position. The Chair noted that Mr. Glynn had stated that it would be up to the section to draft its own Legislative position and that he had offered to help us draft it. Discussion was had on whether our bylaws covered proposed legislative positions or a proposed philosophy. The Chair pointed out that Article 7 Section3(b) of our current bylaws require a 2/3 majority vote for recommendations and resolutions on pending or proposed legislation. **Thus, the vote failed for lack of 2/3 majority.**

10. The Chair recognized Kyle Teal, the editor of the St. Thomas Law School Law Review, who was present via telephone. In March, the council had discussed the concept of partnering with the St. Thomas Law Review in a joint publication. A sample of the Law Review was passed around. The Chair reported on her and Joel Silvershein's meeting with Mr. Teal. The first joint criminal law review issue is projected to be released in April. It would be nice to have complementary copies available to pass out at our reception during the annual meeting of the Florida Bar. Some authors and articles have been lined up already and they were announced. Mr. Teal stated that a typical journal has 7 to 8 articles. If we have more, we can always do another journal. He welcomed the council's input to act as an advisory board on what should be included in the journal. They are looking for more practical real world practice articles, not just theoretical ones. The Chair sees the communications committee as spearheading the recruitment of authors and articles. We need council members to reach out to authors for this project. This would be great advertisement for the section at no cost to us. The sections logo could be printed on the cover of the journal. The law review articles would also be available on the school's web site. Mr. Teal noted that their two prior criminal law journals have been cited frequently and they are proud of that. Mr. Teal provided the council members with his contact information. The Chair asked if the articles could be posted on the section's web site or if there would be any proprietary issues? He did not think there would be any

The University problems, but that they had to clear this with the authors they had already contracted with.

11. Committee Reports: Capital Cases Committee – Ms. Snurkowski reported on the Evans case where U.S. District Judge Martinez found Florida’s death penalty scheme to be unconstitutional. A motion for rehearing was denied and the state will be filing its appeal. Judge Martinez did, however, modify his ruling that the order in Evans is limited to the facts of that case. There is an active death warrant in the Valle case which is set for September 28.
12. Legislative Committee- Mr. McDonnell did not have a report except to note that the Legislature is meeting in early January for redistricting.
13. Selig-Golden Committee- No report
14. PPD Committee- Paul Zacks reported on a successful program. There was a full number of students and we did not have to give out any scholarships. Paige is still getting registration money. We cut the days of the program to a minimum and need to tweak content. A report from the University shows that we have kept costs steady. We have gotten good feedback from the students. Jennifer Zadelis brought the comments. To summarize, they wanted more voir dire and more on real and demonstrative evidence. She and Paul have been working on a sanity problem instead of a competency problem for next year. A request to increase the QC stipend was made. Mr. Zacks said the QC is invaluable to the program and the increase is a good investment. **Less Hess made a motion to approve the increase in the QC stipend from \$2300 to \$3100. The motion was seconded by Jeff Harris. The motion passed unanimously.** Ms. Graham informed the council that it was important for the QC to fill out their forms properly or else the section would be liable for taxes. Discussion ensued about the forms and taxes. Patti Williams at the University of Florida will be retiring. She is willing to work on a contract basis. It will be money well spent to hire her to train her successor. We can deal with this budget issue at our next meeting. The Chair asked Mr. Zacks and Ms. Zadalis to consult and make a proposal at our next meeting in January.
15. CLE- The Chair reported that Ms. Calianne Lantz addressed the CLE Committee of the Bar on the issue of fee waivers for government employees. The Chair had provided Ms. Lantz with bullet points to make her proposal such as why do legal aid lawyers get fee waivers when APDs and ASAs do not, our section as well as government lawyers section has had drop in membership in part due to budget cuts, that the Florida Bar does nothing for them except to send fee statements that are no longer paid by their employer, that if fees are waived or reduced it may draw them into participation in the criminal law section, our section is unique in that it consists of a large percentage of government lawyers, that members of the section could get reduced or one free CLE in their area of practice. If members of the section could receive CLE free or at substantially reduced fees, more would join the section. Ms. Lantz presented the request to the CLE Committee and it was apparently well received. The CLE Committee created a subcommittee to explore this issue. The Chair suggested a free ethics webinar. Mr. Scott Fingerhut reported that the fee waiver issue is critical and that Ms. Lantz made a good presentation to the CLE Committee. Our mental health CLE was cancelled due to



low attendance despite Jennifer Zadalis's incredible efforts. It will be repackaged in the future. We still have our big three- The federal practice led by Ken Swartz, DUI Masters under Michael Catalano, and Criminal Law Update. We also have a post conviction seminar in the works with Angie Zayas. The CLE committee is exploring ways of delivery to keep competitive such as webinars. Mr. Fingerhut asked for suggestions for seminars even if they are only for one hour. The Chair reported on a future London Symposium with the Small Solo and General Practice Committee. The registration, including hotel and program, is around \$1800 double occupancy without airfare. It is the week before Memorial Day. She was asked to bring up to the council if we wanted to help subsidize the program.

16. Membership Committee- Mr. Turner reported on their phone meeting. They discussed ways to increase membership by asking prosecutors, public defenders and judges to identify and recommend potential members.
17. Communications Committee- Mr. Laeser is the new chair of the committee. He will meet with Kyle Teal of the St. Thomas Law Review regarding the law review project.

(did not finish talked about newsletter)

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**Larry Turner moved to adopt the amended bylaws, seconded by Brian Tannebaum.**

**The amended bylaws passed by a vote of 16 yes to 2 no.**

**The Chair wants the legislative committee to study revisions to our bylaws to create provisions, like the real property section, to deal with legislative matters.**

**The reception at the Gaylord Palms cost \$4000 and it was well received. It is a good idea and good value - we are planning on having another reception next year.**

**Meeting adjourned at 12:38**