

CRIMINAL LAW SECTION EXECUTIVE COUNCIL MEETING

Orange County Bar Association

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October 4, 2013 – 9:30 am – 12:30 pm

Meeting Minutes

1. The meeting was called to order at 9:31 a.m. Chair Susan Hugentugler began the meeting with introductory remarks and attendance was taken.

2. Attendance

Present: Susan O. Hugentugler, David B. Rothman, Hon. Angélica D. Zayas, Jeffrey Harris, Hon. Richard Hersch, Les Hess, Hon. Cynthia Imperato, Hon. Jeffery R. Levenson, Sheryl Lowenthal, Larry Donald Murrell, Jr., Brian L. Tannebaum, Larry Turner, William C. Vose, Hon. Samantha Ward., Gary S. Winston, and Jennifer Zedalis. Also present: Eugene Sherman, Program Administrator, The Florida Bar.

Present Telephonically: Joel M. Silvershein, H. Scott Fingerhut, O. David Barksdale, Hon. Robert Dillinger, Abraham Laeser, Calianne Lantz, Richard Polin, Hon. Donald Scaglione, Harvey Sepler and George Tragos. Also present: Tony Musto, Chair, Public Interest Law Section.

Not present: James Wesley Smith III and Carolyn Snurkowski

Excused: Martin Patrick McDonnell, Kenneth Swartz, and Paul H. Zacks

3. The minutes of the June 28, 2013, meeting were approved unanimously.

4. Board of Governor's Liaison Report - Ms. Hugentugler reported that per Steve Eschner, the Board was meeting in Chicago on October 4, 2013, and had nothing new to report.

5. PILS Pro Bono Joint Project Request (Agenda Item 9) Tony Musto, Chair of the Public Interest Law Section (PILS) reported on PILS pro bono project designed to assist Human Trafficking victims in sealing and expunging criminal records resulting from victimization because Legal Services cannot appear in criminal courts on behalf of clients because of funding issues. PILS is interested in establishing a list of attorneys willing to handle such cases and would like Criminal Law Section to assist. David Rothman pointed out that Dade County Bar has such a program, noting that there have been problems with screening cases to ensure that alleged victims are truly entitled to the services and benefits of the program. Mr. Musto explained the intended program and the proposed legislation and addressed concern that there might be a duplication of efforts.

Larry Turner suggested that PILS might seek the assistance of the FACDL instead of the Criminal Law Section since neither the judges nor the prosecutors in the section could assist in these matters. Mr. Musto was referred to the current FACDL president for assistance.

6. Treasurer's Report Joel Silvershein reported that the Section is financially sound. Mr. Silvershein did note a loss in CLE revenue and suggested that it might simply be an issue of expensive venues. Mr. Silvershein reported that the PPD program was doing well financially. Eugene Sherman added that there was a \$10,000 refund from The Florida Bar to the Section for administrative services. The refund is an indication that the Section is not active enough to use the pre-paid budgeted services. Mr. Sherman also reported that the section did come in under budget on the Annual Meeting expenses, resulting in a savings, spending approximately \$6,200 instead of \$10,000. Mr. Sherman also reported that the Section did make the Endowment Fund payment to the PPD program as required and that the Section was back on track with those obligations. Fund Balance is approximately \$330,000, and the Section is currently preparing the budget for the next year. For the moment the budget requests will remain the same as last year with the exception of an increased request for web page services.

David Rothman suggested that the Section should not be concerned with "making money," since the only two ways to make money is through CLE and dues. Emphasizing revenue from CLE courses is misguided since the purpose of the Section is to educate members and most members are in government service. Instead, the focus should be on raising income through increased income from dues, i.e. increased membership. Naturally, one way to increase membership is to increase services to members.

7. Committee Reports

- a. Capital Cases: Judge Ward reported that that there was nothing new to add.
- b. CLE: Ms. Hugentugler referred the committee to Exhibit 4 of the Agenda Materials, commented on the income and expenditures related to CLE, and noted that there was a decline in CLE revenue in part because the Section did not present the Criminal Law Update last year. Ordinarily, the Section presents at least four seminars: Criminal Law Update, DUI Masters, Advanced Federal Practice, and one joint seminar with the Trial Lawyers Section. Ms. Hugentugler reported on upcoming deadlines. The Federal Practice seminar, chaired by Ken Swartz, is on target and is scheduled for January 31, 2013, in Miami. Michael Catalano is not interested in chairing the DUI Masters program, but Carlos Canet is willing to take lead on the program. Former ASA Lee Cohen is willing to help with the program. Ms. Hugentugler would like Judge Hersch to assist and participate with the program. If the program is to be presented in February, the deadline for putting together the program is "now." Because Mr. Fingerhut resigned as Co-Chair of the CLE Committee, Ms. Hugentugler requested assistance in putting the program together. Judge Hersch agreed to help, but declined the opportunity chair the program. Brian Tannebaum agreed to Co-Chair the CLE Committee with Joel

Silvershein. Calianne Lantz asked Mr. Tannebaum to keep her informed since she is on the Annual Meeting CLE /Planning Committee.

A review of the budget raised the question of the level of actual CLE income compared to the budgeted CLE income. Mr. Sherman reported that the CLE income was lower than budgeted because the Section had presented fewer CLE courses in the last year than had been presented in the past. The committee discussed the possibility of partnering with other sections to present courses and the possibility of lunchtime seminars on current topics as is done in other sections. Many members expressed support for free or low cost seminars in an effort to promote or encourage membership. Ms Hugentugler charged the CLE Committee with the task of exploring costs associated with lunchtime seminars or webinars. The Executive Council was given permission to present two webinars at no charge to current members within the next eight months. Mr. Sherman assured the Committee that no budget amendment was necessary for costs associated with these webinars. Mr. Rothman reminded all members, particularly CLE, Membership, Communications, and Webpage committee members, to communicate with each other to coordinate efforts.

c. Communications: Richard Polin reported that the communications committee is in the process of reviving the quarterly journal online with articles to be published as they come in. The advantage to publishing on the webpage as the articles come in will encourage members to return to the page to see what has been added. Also, in the past, it has proven difficult to accumulate enough articles for publication in a quarterly journal. The communications committee has a series of articles planned and should be ready to publish within one month. It is expected that the publication of articles will encourage others to write and contribute.

d. Legislative: Martin McDonnell was not present to report. Judge Hersch reported that the legislative committee looked at HB 39 and SB 94 concerning the composition of juries in felony cases and recommends that the Section take no action because the bills are not likely to pass. Mr. Tannebaum, also a member of the FACDL legislative committee, reports that Representative Matt Gaetz is currently interested in sentencing reform and is speaking to various groups for input as to where sentences should be increased and where sentences should be decreased. Mr. Murrell reminded the Section that in order to remain relevant to the practice of criminal law, the Section must be willing to offer an opinion when asked. Several members agreed that even if the Section cannot reach a consensus or cannot formally take a position on a matter, the Section should be willing and able to contribute to the conversation. For example, rather than taking no position on the jury composition question, the Section could comment on the practical effects of the proposal. Judge Hersch suggested that the legislative committee make an effort to watch the legislative proposals more closely and be prepared to act before the course of the legislation is etched in stone. In response to concerns that it would be difficult to take a position quickly without the permission of The Florida Bar, Mr. Rothman suggested that the Section could educate and inform section members of the proposals without taking a position as a section. Several members suggested that a

blog or blog survey would be one way engage section members in a conversation, which in turn would help inform the legislators before action is taken.

e. Long-Range Planning: David Rothman would like the CLS subcommittees to engage in long term future planning to achieve stability and continuity. One way to achieve this goal is to have the chair of a subcommittee designate a vice-chair with the understanding that the vice-chair would assume leadership in the following year. Also, Mr. Rothman suggests that the Section have a strategic planning meeting to determine the mission or focus of the Section and to establish a plan for moving forward with that mission. Third, Mr. Rothman would like the Section to engage in a mentoring type program that would provide assistance to section members. The members of the Executive Council could act as mentors, on a rotating basis, and answer questions posed to the Section via the webpage. Finally, Mr. Rothman would like to send a survey, at no cost to the Section, to section members to help determine the needs of the section members. Mr. Rothman is willing to serve as chair of the ad hoc committee to create the survey and would like volunteers for the survey committee.

f. Membership: Larry Turner reported that the membership committee was meeting later in the day and would have information to report at the next meeting.

g. P/PD (Prosecutor/Public Defender Trial Advocacy Program): Jennifer Zedalis reported that the program went well this year. The comments from the participants were very nice and complimentary to the faculty. Ms. Hugentugler reported that the program was well within budget. Mr. Murrell reported that a \$10,000 donation in the memory of Kirk Kirkconnell had been made to the P/PD program.

Following the positive report about the program, several members questioned whether student and faculty participants in the program are required to become members of the section as a condition of participation and whether the Section does anything after the program to invite the participants to join the section. After some discussion, the Section unanimously voted, to extend one year free section membership to all student participants in the P/PD program who are not currently members of the section. The cost of section membership will be paid by the section. This expense will begin with the next P/PD class.

h. Selig Goldin: Harvey Sepler reported that the first notice and request for nominations has already been sent out. Notices will be sent monthly. Nominations are due December 10, 2013. Notices will be sent to the Florida Prosecuting Attorneys Association, the Florida Association of Criminal Defense Lawyers, and the Florida Public Defenders Association, and any other organization suggested by the Executive Council members. The goal is to have a slate of nominees presented at the January Section meeting.

7. Section Liaison Reports No Report

8. Old Business

a. *Kidder v. State*: Ms. Hugentugler reported that she had sent a letter to the Criminal Procedure Rules Committee as agreed by the Council at the June meeting, recommending that Rule 3.220 be amended to conform with the federal rule as suggested by Kidder. The Chair of the CPRC responded that the CPRC committee had met September 30 and a vote to amend the rule failed to get 2/3 support of the committee necessary to change the rule. The Council questioned whether the Section should take any further action or whether the Florida Supreme Court would change the rule in light of the CPRC's failure to act. Judge Ward reported that the proposal failed, in part because the CPRC believed that the case will ultimately go to the Florida Supreme Court. Abe Laeser reported that the vote in the CPRC was 17/11 in favor of a rule amendment and also observed that several of persons who voted against the amendment did so with the intent to let the FSC act. After debating whether the Section should file an *amicus* brief or recommend a rule change, it was agreed that Judge Ward would draft a proposed rule amendment modeled after the proposal placed before the CPRC and send it to the Council for an email vote.

b. Referral from The Florida Bar Disciplinary Procedure Committee Ex Parte Communications: Before discussing the referral and the report of the subcommittee, Ms. Hugentugler and Mr. Rothman assured the Council that the documents provided, including the bar complaint and related materials, were public record despite the finding of no probable cause by the Florida Bar.

George Tragos reported that he chaired the subcommittee assigned to evaluate the matter. The subcommittee consisted of defense attorneys, prosecutors, a law professor and a judge. Mr. Tragos reported that the subcommittee focused on the question presented by the referral and the factual scenario presented, without considering any individuals involved and that the report of the subcommittee was unanimous. The written recommendation of the subcommittee (set forth in Exhibit 6 of the Agenda Materials) concluded that no change was needed in the Rules of Criminal Procedure or the Florida Bar Rules governing attorney conduct, but the issues involved could be handled by an ethics opinion issued by the Florida Bar addressing judicial conduct when a request for ex parte communications is made. Mr. Tragos recognized that some of the recommendations might best be addressed by a change in the Rules of Judicial Administration or by a judicial ethics opinion from the Judicial Ethics Advisory Committee.

There was an extensive and detailed discussion about the report and recommendations. Most agreed that the factual scenario leading to the question was unique and difficult for all involved, especially in the absence of any guidance as to how to proceed in the difficult situation. Most also agreed that judges and prosecutors would benefit from some guidance as to how to proceed where ex parte communications were deemed to be

necessary because of extraordinary circumstances and no alternative process exists. Ultimately it was agreed that since the Florida Bar cannot govern or regulate judicial conduct and can only regulate conduct by the attorneys, the recommendations should be rewritten or revised to govern the actions of attorneys during these types of ex parte communications. It was further suggested that the matter be raised with the Board of Governors to explore the possibility of an ethics opinion governing lawyer conduct and, perhaps a referral by the Florida Bar to the appropriate committee /agency governing judicial conduct.

c. **Affiliate Membership:** Ms Hugentugler provided the committee with materials from other sections of the Florida Bar to provide a basis of comparison as to whether other sections have student members and, if so, what student members are charged to belong to the section. (See Agenda Exhibit 7). The Section bylaws do allow student members, so the question that remains is what students should be charged. A motion to charge the student members nothing was made and seconded. Mr. Turner indicated that the issue was going to be raised by the membership committee later in the day. Mr. Tragos suggested that the vote on the motion be delayed until after the membership committee fully explored the issue. The motion was withdrawn by agreement to allow the membership committee to explore the matter.

d. **Criminal Law Section Position on Death Penalty:** Ms. Hugentugler reminded the Council that at the last meeting, Mark Schlakman spoke to the Council and that the Council unanimously agreed to write a letter to the Florida Bar Board of Governors restating or reaffirming the Section's support of a comprehensive review of the death penalty process. Ms. Hugentugler reported that the position is clearly posted on the Florida Bar webpage. Because the Section's position is clear and evident to the Florida Bar, the Council agreed that it was not necessary to write a letter reminding the Florida Bar of the Section's position.

Ms. Hugentugler further reported that Mr. Schlakman has requested assistance from the Section in restoring the civil rights of convicted felons. With very little discussion, the Council agreed that the Section would not be assisting in those efforts.

9. New Business

a. PILS Pro Bono Joint Project Request (see above)

b. Membership Survey – David Rothman (see above)

c. **St. Thomas Law Review Project:** Ms. Hugentugler reported that when the partnership with St. Thomas began, the Council agreed that the Section would pay for the mailing cost associated with the delivery of the Law Review to Section Members. Initially \$6,000 was budgeted to pay for these costs for the first year. This year, the second year, there was no line item in the budget and the postage bill is approximately \$4,700 for the books sent out last spring (2013). A motion to pay the outstanding bill

was made, seconded and unanimously approved. Council members questioned whether the Section wished to continue the collaboration with St. Thomas. After some discussion of the cost and benefits of the continued collaboration, the Council agreed to explore the matter further and invite St. Thomas representatives to discuss the Council's concerns before taking any action. It was understood that it may be too late to withdraw from participation in the Spring 2014 edition. The possibility of an electronic edition was also considered.

d. Website Proposals: Ms. Hugentugler reported that a review of other section websites suggests that the CLS site is "pretty dismal." Because a prior request for volunteers to assist in revamping the site was unsuccessful, Ms. Hugentugler did look into the matter. Thus far, the content has been updated and is current. However, the site is not "user friendly." The Council gave Ms. Hugentugler authority to proceed with updating the site.

e. Other: Mr. Turner reported that he has been asked to advise the Council of a proposed amendment to the Criminal Rules of Procedure to include a new rule (Rule 3.113) relating to the Minimum Standards for Attorneys handling felony cases. The proposal originated with the Criminal Courts Steering Committee and would read "Before an attorney may participate as counsel of record in the circuit court for any adult felony case, including postconviction proceedings before the trial court, the attorney must complete a course, approved by The Florida Bar for continuing legal education credits, of at least 100 minutes and covering the legal and ethical obligations of discovery in a criminal case, including the requirements of rule 3.220, and the principles established in *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972)." Because the matter was not placed on the agenda with sufficient notice, the COUNCIL was not asked to take a position on the matter. The matter will be placed on the agenda for the next meeting.

10. Upcoming Meetings of the Executive Council

Ms. Hugentugler reported that the next meeting is scheduled for January 24, 2014. As usual, the CLS has requested the meeting for Friday morning, but Florida Bar has not yet confirmed. The meeting will be held at the Hilton Resort in Orlando, Florida. No other dates were discussed. The meeting was adjourned at 12:19 p.m.