

## **Criminal Law Section Executive Council Minutes of the June 23, 2017 Meeting**

**Boca Raton Resort and Club; 501 East Camino Real; Boca Raton, FL**

**Santa Margherita Room 9AM-12PM**

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

Chair Joel Silvershein called the CLS EC meeting to order at 9:02 a.m. Florida Bar President-Elect Michelle Suskauer was present at the beginning of the meeting. She noted that she is only the second criminal defense lawyer to serve as Bar president. The CLS congratulated her.

### **II. Roll Call**

The following attended the meeting: Chair Joel Silvershein, Chair-Elect Martin McDonnell, Secretary David Barksdale, Treasurer Jennifer Zedalis, Past Chair the Honorable Angelica Zayas, Jose De Jesus Arrojo, Jason Blank, the Honorable William Davis (by phone), Robert Dillinger (by phone), Scott Fingerhut, Mac Heavener, the Honorable Richard L. Hersch, Susan Hugentugler, Antonya Johnson, the Honorable James Klindt (by phone), Brian Kramer (by phone), Abraham Laeser, the Honorable Jeffery Levenson, Warren Lindsey (by phone), Board of Governors Liason Sam Masters (by phone), Richard Polin (by phone), David Rothman, Harvey Sepler, Kenneth Swartz (by phone), George Tragos (by phone), and Larry Gibbs Turner. The following CLS EC members could not attend: the Honorable Lisa Denise Campbell, Jeffery Harris, Cynthia Imperato, Donald Murrell, Michael Sinacore, Brian Lee Tannenbaum, and Whitney Untiedt.

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

The January 2017 meeting minutes were Exhibit 2 to the agenda. David Rothman moved to approve; Judge Zayas seconded. The minutes were unanimously approved.

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

Chair Silvershein reported on the Rules of Judicial Administration Committee's proposal that any rules change go through the RJA. Silvershein, on behalf of the CLS EC, argued before the Florida Supreme Court against the RJA proposal, and he feels that the Supreme Court did not view the RJA proposal favorably. The CLS EC was the only Section to be heard; all other committees that were heard were rules committees. George Tragos asked if the rules committees agreed with the CLS EC opposition to the RJA proposal and Chair Silvershein confirmed that they did. Chair Silvershein noted that the Board of

Governors and the Bar president may need to consider going forward whether the rules committees are too large.

#### **V. Board of Governors Liaison Report – Sam Masters**

Mr. Masters reported that Josh Doyle was selected to replace Executive Director Jack Harkness.

The most significant Board of Governors matter is approval of the new procedural rule requiring mandatory continuances for parental leave. That proposed rule will go to the Supreme Court for consideration. Mr. Masters noted that a lot of judges are opposed because they favor “may rather than shall.”

Following up on discussions at previous CLS EC meetings about background checks for certified legal intern applicants, Mr. Masters reported that the Board of Governors previously voted to lessen the required background checks, to make it easier for State Attorney and Public Defender offices to hire certified legal interns, but the Supreme Court rejected that proposition.

#### **VI. Treasurer’s Report – Jennifer Zedalis**

Treasurer Zedalis asked Chase Early to summarize the financial information which was Exhibit 3 to the agenda. Mr. Early noted that through April 30, 2017, the CLS EC revenue is up, with the Continuing Legal Education revenue particularly strong. Investment revenue is up and Mr. Early contrasted the current investment revenue to last year’s figure, which was down \$11,000. CLS expenses appear to be in line with last year’s expenses, and by year end the CLS likely will end up on par with last year’s numbers. Chair Silvershein asked the most popular CLE and Mr. Early noted that it is Hot Topics in Evidence, a program which the CLS does not present though the CLS shares in the revenue. Mr. Early’s overall assessment is that the CLS is doing well financially.

#### **VII. Executive Council Elections**

Judge Zayas presented the Nominating Committee’s two ballots for the CLS EC. Slate A: Jose Arrojo (Prosecution), Jason Blank (Defense), the Honorable Robert Dilliger (Defense), Mac Heavener (Prosecution), the Honorable Richard Hersch (Judiciary). Ben Kuehne moved to approve; Scott Fingerhut seconded. Slate A was approved with no opposition.

Slate B was considered: Huda Ajlani Macri (Defense), Richard Greenburg (Defense), Lauren Jorgensen (Prosecution), Neal Sonnett (Defense), Ryan Vescio (Prosecution). Abe Laeser asked if these nominees had expressed interest to participate. Judge Zayas said yes, that there had been requests for people who are interested in serving, and those who expressed interest were re-contacted to confirm their interest. The floor was opened for nominations; there were none. David Rothman moved to approve Slate B; Jason Blank seconded. Slate B was approved unanimously.

Abe Laeser asked what this did for balance on the CLS. Judge Zayas explained that her nominating committee considered balance, and that the CLS EC is as close to balanced as it has ever been. George Tragos noted that there is no requirement that there be equal representation between defense lawyers and prosecutors and that there are more defense lawyers in the CLS membership: Larry Turner expressed his view that while there is no requirement for balance between the defense and the State, that for creditability the CLS EC needs balance. Judge Zayas noted that the bylaws do not require absolute balance but that the CLS EC strives for balance for credibility, and that the CLS EC also looks to geographical diversity as well as diversity in all other areas such as ethnicity and gender. Mr. Laeser suggested that next year's nominating committee consider academics and that there are three to five professors at different Florida law schools that should be considered for the CLS EC. Jason Blank reported that he had contacted some professors, and that their interest was "back and forth."

Huda Macri and Richard Greenburg were present and introduced themselves. Chair Silvershein reported that Lauren Jorgensen (who was not present) was the first person to respond and volunteer to be on the CLS EC. Jason Blank introduced Ryan Vescio (who was not present). Chair Silvershein noted that Neil Sonnett may be the first Selig Goldin winner to come back and serve on the CLS EC. Chair Silvershein noted that we should look to Pensacola as well as the Naples/Fort Myers areas for CLS EC members.

Judge Zayas reported that the nominating committee decided to propose Mac Heavener to be Treasurer. Judge Zayas moved that Mr. Heavener be made Treasurer; Harvey Sepler seconded. Judge Zayas asked for any nominees from the floor; there were none. Mr. Heavener was approved to become Treasurer, with no opposition.

## **VIII. Committee Reports**

### **A. Capital Cases.**

Abe Laeser said that he feels that as a now ex-officio member he should not remain as chair of the capital cases committee. He noted that the Legislature hasn't made further changes to the capital statutory scheme, beyond the unanimous jury requirement. The criminal rules committee has proposed changes that are pending before the Florida Supreme Court. The United States Supreme Court has not addressed retroactivity for those sentenced to death by less than unanimous jury, an issue that will be litigated.

## **B. CLE**

Susan Hugentugler reported that there had been good reviews for CLE programs. She was told that at the Masters of DUI seminar, the ethics panel put together by Brian Tannenbaum was excellent. She knows that Jason Blank made a recording at a live CLE that will be given as webinar at a later date. The next CLE event is in Orange County. Susan Hugentugler noted that it is good to have future FACDL presidents involved with the CLS EC. She explained that the FACDL has asked the CLS to help promote the FACDL's board certification preparation CLE. The CLS EC in turn asked the FACDL to support CLS CLE, and that hopefully FACDL will change its bylaws which currently state FACDL may not promote any CLE that the FACDL does not produce.

## **C. Communications**

Richard Polin noted that the case law summaries are posted once a week. He understands a new committee will take up whether to renew the former quarterly newsletter. Chair Silvershein reported that he has a letter to go out to the CLS membership which will include a renewal reminder. Larry Turner reminded the CLS EC that the membership committee has for a couple of years pushed for an E-newsletter.

The CLS EC departed briefly from the agenda for David Rothman to introduce John Stewart, Vero Beach, Candidate for Florida Bar President. Mr. Rothman noted that Mr. Stewart previously was the president of the Young Lawyers Division and has served for a long time on the Board of Governors. Mr. Stewart introduced himself, explaining that he started with the Young Lawyers Board in 1999, serving as its president in 2006-2007, and that he has served on the Board of Governors since 2007, including serving when criminal defense lawyer Hank Coxe was Florida Bar President. Mr. Stewart said for now he is running unopposed.

## **D. Federal Practice**

Ken Swartz and Chair Silvershein both noted that the Federal Practice seminar had gone well. Mr. Swartz stated that a topic of interest will be the future process for selecting federal judges, noting that there are a lot of open seats in the Southern District.

## **E. Legislative Section**

Marty McDonnell reported that he did not think any laws came out requiring “mandatory” sentencing except in connection with narcotics trafficking under Chapter 893. There is an eyewitness identification procedure (Exhibit 6 to the agenda). In summary, if law enforcement does not comply with the eyewitness identification procedures, that does not make a photo lineup inadmissible but does allow the defense a jury instruction that law enforcement did not follow the procedure. There is a significant change to the Stand Your Ground law, with the burden of proof shifting to the State, by clear and convincing evidence. The CLS EC discussed that the change was not specifically made retroactive. Judge Hersch noted that a potential future issue is that the Legislature attempted to affect procedure after the Supreme Court had already established a procedure. Judge Levenson raised, rhetorically, what if a Stand Your Ground hearing has already been held in a pending case-is the defendant now entitled to another hearing with the new burden?

## **F. Long Range Planning**

Marty McDonnell would like to keep a focus on new membership. Mr. Turner noted that the membership committee has made various membership efforts, to include focus on a new website. Mr. McDonnell asked the CLS EC members to let him know they were interest in serving on particular committees, and he distributed a committee preference sheet for the CLS EC to complete. Mr. Turner said that he believes there should be a chair and co-chair for each committee so that the co-chair will have institutional memory.

## **G. Membership**

Larry Turner presented a written report, Exhibit 5 to the agenda. He noted flat growth this year and that the membership committee is looking forward to the new website.

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

Jennifer Zedalis reported that they are gearing up for the upcoming course and the faculty has good reviews. Hotel rates are going up and the P/PD committee is still looking for better rates. Costs for food and reception space continue to rise and the P/PD program cannot control rising costs. Currently 32 faculty are signed up; Ms. Zedalis would like more faculty from the Panhandle. Judge Levenson asked if the CLS EC tracks how many P/PD students join the CLS. Ms. Zedalis noted that the P/PD program hands out paperwork to participants to join the CLS; Judge Levenson asked again about tracking the follow up. Mr. Turner noted in the past that the membership committee has sent letters to people who did

not re-up, with mixed results; many times people don't sign up because they have new employment. Judge Samantha Ward, CLS member in attendance, suggested that the CLS EC consider presenting at the state-wide conventions of the state attorney and public defender associations.

Mr. Laeser stated his belief that the P/PD program is the CLS's guiding star and what the CLS does best, that CLS has over \$400,000 in reserve, and he moved that \$10,000 be budgeted to the P/PD program to make it even more attractive. Chair Silvershein asked that this motion be held until the new business portion of the agenda.

### **I. Selig Goldin**

Harvey Sepler reported that we had many nominees this year. He wondered if we should consider for the award a neutral such as a court administrator, though he does not know if the bylaws allow that.

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

Jason Blank asked to hold this report for the New Business agenda.

## **IX. Old Business**

- *Young Lawyers Division (YLD) Mentorship Program*

Larry Turner stated that he had sent a letter encouraging people to serve as mentors under the Florida Bar's SCOPE mentorship program. David Rothman said he thought this was the best thing the CLS EC could do because it provides access to young people. Scott Fingerhut asked Mr. Turner if his vision was that the CLS have its own mentorship program or work through the SCOPE program established by the Young Lawyers Division. Mr. Turner responded that he didn't think the CLS should compete with the YLD. Jason Blank said that he can put a link once the new website is up and running. David Rothman noted that on the Florida Bar website, the Criminal Law Section is not listed as a section that offers mentors through the SCOPE program.

- *Criminal Law Certification Standards Amendment*

Richard Polin stated that there is nothing new to report.

- *Criminal Law Board Certification Exam*

Judge Zayas reported, noting that Jeff Harris had provided her an email report. Judge Zayas said that they are monitoring the exams, that there had been a concern about the dismal pass rates, and that the pass rates have gone up. She

stated that they believed but do not know that it is in part because the FACDL has emphasized that people should not assume they can pass the exam only because they have met the minimum requirements. The 2016 test results were a 51% pass rate overall, but a 72% pass rate for the criminal law certification exam. The appellate passage rate was 60% but there were only 5 test takers. Mr. Harris after his email report suggested that the CLS EC maintain the ad hoc committee. Judge Zayas said that we do not have an explanation why the passage rates went askew for a few years.

- *Law School Liaisons*

Jason Blank said that it would be good to involve recent law school graduates with their schools, and he suggested creation of an ad hoc law school liaison committee. Judge Zayas said her take away from a conversation she had with the Nova Southeastern Dean was that he notes two extremes among the students: those who understand the importance of networking and involvement, and then others who do not. Mr. Blank said that it why he sees involvement of young CLS members as important, to report their experiences to law students. Judge Zayas agreed, saying that a message the CLS can send is that a law degree alone is not enough to be successful in one's career. Jennifer Zedalis and Larry Turner both spoke about the importance of recruiting young and student CLS members.

## **X. New Business**

Larry Turner discussed that he had sent the CLS EC four articles from the Sarasota newspaper on race in the criminal justice system, and noted that one article was titled "Bias on the Bench" and that the chief judge in that circuit had written a response. Mr. Turner was consulted about the articles before they ran and tried to explain that criminal justice system reflects greater society. Mr. Turner noted that the CLS EC frequently discusses ways to be relevant, and he proposed that the CLS is the appropriate group in the bar to look at the issue of race in the criminal justice system. Mr. Turner said that all he was asking at this point is that the chair appoint a committee to discuss this issue and to look at the pros and the cons of the section getting involved and report back to the CLS EC whether it seems to be a good or bad idea to be further involved. Mr. Tragos said he thought we should look more broadly than race but also at socio-economic issues. Mr. Laeser said that he does not think that we have the capacity to look into the souls of others. Mr. Rothman stated that the focus of the Bar in the next year per the new president is gender bias and how to equalize it. He asked rhetorically if that issue is too big for the Bar and he answered yes, but it still needs to be talked about; similarly, it would be a positive to talk about race in the criminal justice system. Jennifer Zedalis said she did not agree with Mr.

Laeser because she believes that awareness can cause change and she feels the CLS is ideally suited to deal with this issue. Chair Silvershein agreed that we should have an ad hoc committee. Larry Turner moved to appoint an ad hoc committee; Marty McDonnell seconded. The motion passed with no opposition.

Jason Blank moved to renew the CLS practice of paying the membership dues for new CLS members with less than 10 years practice and for the third year student program; Susan Hugentugler seconded. Judge Ward asked how people find out about the opportunity, and Mr. Blank noted that there has been a reach-out effort at events and will be through the website. The motion passed with no opposition.

- *Section Website Member's Portal and Enhancement Proposal*

Mr. Blank said that what started as a proposal for a members only portal evolved into a discussion of the website more broadly. He said that Susan Hugentugler had done a great job of getting the website up to speed but since then we have been stagnant as technology changes. Mr. Blank said that the consensus of his website committee had been to change the hosting company from Netphiles, but that there was no consensus as to which proposal from new companies to accept. The sub-committee decided that Mr. Blank should decide. Mr. Blank decided based on one proposal being local to Mr. Blank and because that company showed excitement, expressing that they really wanted the contract. Mr. Blank and Chase Early have communicated extensively on this topic. Jennifer Zedalis asked if the Bar had to approve our website and Chase Early said no. David Barksdale moved to approve the company chosen by Jason Blank; David Rothman seconded. Susan Hugentugler said it was important for us to have control, and we do need to move forward with the website. When asked, Mr. Blank said the proposal is for \$4,142.00. Mr. Tragos asked if we owned it, meaning if this company left us or we fired them, do we own the site and its content and Jason Blank said yes. David Rothman asked if the company had done work for the Bar; Mr. Blank said no. Mr. Rothman wondered whether if we get the company other work through the Bar, could we get a reduction in price. Mr. Blank explained that the company suggests that it would give the others within the Bar a reduction. Scott Fingerhut asked which other companies had submitted proposals and Mr. Blank noted that they are all in Exhibit 7 to the agenda. Richard Polin reported that in reviewing the proposals none had screened out as the best, and that in reviewing proposals, they don't all seem to be submitting bids on exactly the same thing. Joel Silvershein asked if the motion could be amended such that the price be made a budget line item; this amendment was accepted. Scott Fingerhut asked Mr. Tragos if Mr. Tragos felt this was worthwhile. Mr. Tragos

responded that as long as we own the codes and the content and the page it was. Mr. Tragos noted that one is never going to completely understand contracts like this. As an example, he noted that an hourly rate does not matter where one controls the number of hours, so there is going to have to be some trust. Mr. Tragos asked whether the three free hours proposed is for the company's process of getting the changed website up and running. Mr. Blank said it is not, that the work to get the changed website up and running is part of the fixed cost and the three free hours is for other things we might ask for. Mr. Turner wondered if we could negotiate for more than three free hours a month and Mr. Blank said that we can ask about it. Chase Early noted that at our current maintenance rate of \$175.00 a month, this proposal would save about \$1,000.00 a month. The motion passed without opposition.

Mr. Laeser renewed his previous motion to move \$10,000.00 to the P/PD program to help with expenses, and with the hope that the program could find a better lodging facility though that was not part of the specific motion. Jennifer Zedalis noted that there is approximately an \$8,000.00 expense overage, but that about half of that may be a leftover expense from 2015. Judge Levenson asked if Ms. Zedalis knew how much extra it would be to move to the University hotel. Ms. Zedalis said she does not know exactly, and that if the price was close and reasonable they could move, but it is the Bar's money. Chase Early said he has been in touch with the hotel with the idea of a lower joint rate for the trial lawyers and P/PD programs. Marty McDonnell asked if the \$10,000 would be applied to the approximate \$8,000 amount that the program was in the red, if in fact it is in the red that amount? George Tragos asked if the \$10,000 was for expenses we already know about, or expenses that have not been requested by the P/PD program. He opposes just increasing the budget \$10,000 without knowing where the money would be going. Mr. Laeser clarified that his motion is concerned only with future expenses, and that in particular he would like to see nicer facilities, believing that making a better impression would lead to better results. Mac Heavener seconded Mr. Laeser's motion. Mr. Tragos said he opposes the motion unless the chair people of the program came up with specific needs for the money; Mr. Tragos commented that he does not feel that people go to the program based on the hotel. Mr. Heavener asked, can we get the chair of the program to look into a new facility and then we consider the cost for the budget next year? Judge Levenson said he does not feel that people teach based on the facilities, but noted that he has taught at the ATA at the Hilton, and that the nicer facility would enhance the P/PD program, although the current facilities are fine.

David Rothman moved to table the motion. Mac Heavener seconded the motion to table. The motion to table passed without opposition. Judge Zayas asked for the purposes of appropriate budget conversation, could Jennifer Zedalis look at the budget projection so that we would have it when considering the motion for an additional \$10,000? Jennifer Zedalis said that she could. Chair Silvershein noted that we need a motion to increase the P/PD budget line to pay for the approximately \$8,000 short fall, if in fact we do have that short fall. Ms. Zedalis noted that the potential short fall is still being looked at for verification. Judge Zayas moved to pay the short fall amount, if it is in fact confirmed that there is a short fall amount that the CLS owes for the P/PD program; Marty McDonnell seconded. The motion passed without opposition.

- *Oxford Trial Training Course Scholarship Nominations*

Ms. Zedalis stated that we have an opportunity to send young public defenders and assistant state attorneys. There was discussion that the nominees should be section members. When asked, Ms. Zedalis thought the experience should be 1 to 3 years. Mr. Laeser noted that this a more sophisticated program than the P/PD program, so the participants should probably have 3 to 5 years experience. Chair Silvershein concluded the discussion by stating that a joint letter from Ms. Zedalis and Incoming Chair McDonnell would go to the state wide prosecutors and public defender organizations about the opportunity.

- *Jury Selection Manual by Eugene Zenobi*

Larry Turner wondered if we should note that this Jury Selection Manual, which is on our website, does not have the CLS imprimatur of approval. Mr. Blank stated that it seems unnecessary because the manual is only offered as a resource, but he will put a general disclaimer on the new website.

## **XI. Passing of the Gavel**

Chair Silvershein noted that it has been an honor for him to serve, and he thanked the CLS EC for its willingness to all be active participants. He also thanked those who had agreed to take ex-officio status. Chair Silvershein then said it was an honor to pass the chair to Marty McDonnell. Mr. McDonnell thanked Mr. Silvershein for his leadership during a hard substantive year. He

noted Mr. Silvershein's leadership was exemplified by the willingness to argue on behalf of the section before the Florida Supreme Court.

The meeting adjourned at 11:51AM.