

Judge David Hoort, Chair
Charles Marr, Chair-elect
Stephen Gobbo, Secretary
Judge William Caprathe, Treasurer
Graham Teall, Parliamentarian
Elaine Spiliopoulos, Editor

Criminal Law Section Council Meeting Minutes

December 17, 2013 (Copper Restaurant, E. Lansing)

1. **Introduction** of Children's Law Section representatives by Chair Hoort: Eric Scott and Section Chair Christine (Chris) Piatkowski. Eric Scott was designated as voting representative of the Section for today's meeting.

Call to Order by Chair Hoort at about 6:30pm.

- a. Absence with notice: Brown, Posner, Sacks, McDonough, Taratuta, Thompson, Malkin, Manderfield, Cunningham (commissioner)
 - b. Absent without notice: Winters
 - c. Present: Hoort, Marr, Gobbo, Caprathe, Brady, Nichols, Gilbert, Guess, Farkas, Teall, Blanchard, Smith, Garretson, Timmons, Marutiak, Sherman, Scott. Non-voting: Spiliopoulos, Piatkowski
2. Piatkowski provided an update about the Section she chairs. The Section meets every third Thursday of the month at the State Bar of Michigan. On December 19th, the Council is meeting off site for a holiday event. An invite to attend the event or Section meetings was extended. The Section is looking at newest court decisions, juvenile competency, and developing a guidebook. There is overlap with the Criminal Law Section. Her Section also has an interest in sentencing guidelines.
3. **Secretary's Report/Meeting Minutes**-Stephen Gobbo
 - a. April 16, 2013: Deferred and former Secretary Marr will submit minutes for Council review at an upcoming meeting.
 - b. November 19, 2013 meeting minutes and addendum preparation delayed. Review postponed.
4. **Treasurer's Report**- Judge Bill Caprathe
Report shared with the Council via e-mail. Motion made by Nichols, supported by Marutiak, to accept the report. Motion passed on a voice vote.
5. **Committee Reports**
 - a. Shanty Creek Conference:
Reminder the conference will be held over President's weekend, starting Friday, 2/14/2014 and ending Sunday, 2/16/2014. The main program is planned for Saturday, 2/15/2014. Chair Hoort encourages all council members to attend and will be hosting a reception. An update on the program was provided. The main topic was switched to eye witness identification since the proposed speaker on forfeiture did not work out. Committee members have reached out to Michigan Supreme Court Justice McCormack, former SBM President and Wayne County

Assistant Prosecutor Nancy Diehl, and Dr. Jennifer Dysart (John Jay College of Criminal Justice), who has conducted research concerning eye witness identification.

- b. Frankenmuth Conference: Farkas and Marutiak reported on behalf of committee chair Malkin, who asked that the Council approve a budget of \$6,000 over revenues. After discussion and explanation, Marutiak made a motion, supported by Farkas, to approve up to, but not to exceed, \$6,000 over revenues for the event. The motion passed with 15 in favor and 1 opposed.

Malkin also had asked that a draft program agenda be circulated at today's meeting. Presentations are finalized. Hotel accommodations will occur for some presenters.

- c. Policy Conference: Marr stated there was nothing report at this time.
- d. CLS Journal: Committee chair Garretson acknowledged work is in progress.
- e. Advertising: No need to report at this time. The Committee will work with conference committees.
- f. Annual Meeting: Gilbert stated there was no report at this time.
- g. Nominating Committee: Gobbo stated there was no report at this time.
- h. Young Lawyers: Farkas asked about the registration fee for young lawyers and if the fee is paid, the lawyer becomes a Section member.
- i. Projects/other: Judge Caprathe mentioned an update on model jury instructions will be provided at future meeting as well as a proposal for a program concerning sexual assault cases and community response. There were no other committee reports provided at this time.
- j. Briefs/ Amicus Curiae: Nichols reminded the Council about what was pending and that there were four possible cases to consider. Discussion followed about:

People v Cunningham, 301 Mich App 218 (2013). Case involves the question of what is valid for assessment of prorated court costs to a defendant. Sherman expressed a concern with intervention in the case when the Section was not requested by the Court to do so. Discussion followed by Spiliopoulos and Farkas about the Court's inclusion of "interested parties." Brady expressed his view that if a consensus can be reached, the Section should weigh-in. Spiliopoulos added the Section filed an Amicus in the past as an "interested party." The Section should remain relevant. Sherman stated the Section should not give the appearance of one-sidedness with alignment to SADO's position. Chair Hoort said he would like PAAM to ask the Section to weigh-in on matters as well. Gobbo indicated that only focusing on the legal issue at question, rather than argument of case outcome, may be a path to follow for consensus; however, the Section should not weigh-in on everything that arises. Guess indicated she thought the assessment of costs was an important issue. Other comments: Did the COA properly decide about assessment? Is an assessment sometimes arbitrary? Why punish someone by an assessment when the individual asked for a jury trial as a constitutional right? Smith mentioned that district court fees and costs at the County level are oftentimes tied to budgetary concerns.

Brady recalled in the past judicial officers were paid directly from such fees/costs. This sometimes resulted in not too good situations, including bribery of judicial officials. *People v Sanders*, 296 Mich App 710 (2012). Case involved the sentencing court's consideration of overhead costs in determining court costs.

People v Newbold (COA docket 307360). Case started in Calhoun County and involves calculation and evidence of restitution. Restitution basis was not clear from "special verdict form." Questions include whether it is appropriate for restitution to be tied to a guilty plea?

People v Bynum (COA docket 307028) concerns expert testimony about gang activity.

Judge Caprathe mentioned other areas of interest jury criminal instructions, eye witness testimony, and juvenile resentencing. He was also contacted by MaryAnn Sarosi (Associate Executive Director at the SBM Access to Justice Program) about an Amicus. Further discussion led to Piatkowski mentioning the Children's Law Section has taken positions concerning juvenile lifer legislation, and has a lobbyist Bill Kandler (at Cusmano, Kandler & Reed) who helps sort through pending matters. Also, an informational brief was sent to the court on doctrine concerning children and parental involvement. The Children's Law Section was invited by the Court to provide a brief related to a preference for relatives (grandparent) for a juvenile guardianship (grandchildren), after parental rights are terminated. See In re: COH (docket number 147515). The Section was not invited to file an Amicus concerning retroactivity in juvenile lifer cases.

Further discussion is to occur in the future about briefs.

6. **Representatives to the Council and other reports or discussion:** Marutiak mentioned Prisons & Corrections rescheduled to 6/14/2014 an event at the SBM concerning jail programs, mitigating factors for resentencing juvenile lifers, MDOC policies. Children's Law Section representatives mentioned a concern with consent calendaring and judges becoming too involved with plea bargaining, rather than the parties.
7. **Traveling Road show:** Chair Hoort reported the event scheduled in Battle Creek, Calhoun County on December 7, 2013 at Kellogg Community College was cancelled, mainly due to lack of interest/attendance. The lack of interest is a concern and confusing because these events provide an opportunity to learn and network.
8. **Legislation:**
 - a. Chair Hoort provided an update about the preliminary examination legislation and that another version of a substitute Bill draft was worked on within the SBM, Section, and together with CDAM. Timmons also provided an update. A motion was made by Marr, supported by Teall, to adopt the drafted substitute for House Bill 5154.

Sherman expressed a concern with the draft because the Governor had requested prosecutors to work with the district court judges to arrive at a compromise Bill, and the substitute proposed by the SBM workgroup would water down benefits that the prosecutors saw in the Bill. Details of the potential substitute Bills were discussed. This included severance of co-defendants (as opposed to adjournment); video testimony admissibility; admissibility of lab reports (whereby defense counsel can still demand the presence of the technical witness at a probable cause

hearing); etc. Sherman indicated a new substitute would be opposed by prosecutors. Also Timmons and others discussed current differences with processes in counties. Timmons stated there is no coordinated information about how each county handle conferences. The defense bar's concern surrounds ineffective assistance of counsel, if there is not an opportunity to speak with all witnesses. Prosecutors have a concern related to wasted resources when many conferences are waived at the last minute, and scheduling/commitment of police and other resources. There is agreement between defense and prosecutors that certain witnesses or reports do not carry the same weight due to potential veracity issues, e.g., security guards/loss prevention, arson, etc. Chair Hoort stated he believes the new draft addresses many concerns and urged the Council to vote affirmatively on the motion. Motion passed on a vote of 12 in favor, 3 opposed, and 1 abstention.

<http://legislature.mi.gov/doc.aspx?2013-HB-5154>

- b. HB 5155: Discussion took place concerning district court taking felony pleas. Current statutes allow a circuit court to grant authority to the district court. The legislation will provide the authority even if the circuit court does not. Concern expressed about magistrates taking pleas. A motion was made by Judge Caprathe, seconded by Timmons, to support the Bill with the recommendation that a magistrate cannot handle preliminary examinations/conferences or plea agreements. Motion passed on a vote of 15 in favor, zero opposed, and 1 abstention.
 - c. SB 557 and 558: Passed the Senate. There is a question of funding for mental health programs. Also, discussion occurred about "serious mental illness" treatment versus coverage for less serious. Treatment options are limited in community settings. The impact on the criminal justice system for individuals with mental illness, and percent who are probation violators, cannot be determined because of the way data is aggregated by the Michigan Department of Corrections. No action taken on the Bills.
 - d. HB 5190: Discussion of habitual offenders and enhancement for juvenile convictions. Council of State Government project with the Michigan Law Revision Commission likely will discuss impact of habitual offender provisions. No action taken on the Bill.
 - e. Smith mentioned pending Marihuana Bills that may overhaul the citizen Initiated Law. This stimulated discussion about SB 660 for dispensaries if changes occur with federal drug scheduling; HB 5104 concerning redefining usable marihuana (medibles); HB 4271 allowing for provisioning centers. No action taken on the Bills.
 - f. Smith mentioned he is concerned with scrap metal Bills. (Note: HB 4595 of 2013 was enacted as 2013 PA 217, effective if HB 4593 is enacted. HB 4593 was returned to the House from the Senate with a Substitute in December, and has not yet been acted on. HB 4594 is a related Bill.)
9. **Adjourn:** Meeting adjourned at 9:20pm.

Respectfully submitted,

/s/

Stephen J. Gobbo
Secretary

Approved: March 18, 2014