

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
November 19, 2013 (Copper Restaurant, E. Lansing)

- 1. Call to Order by Chair Hoort at 6:32pm.**
 - a. Absence with notice: Marr, Brown, Guess, McDonough, Thompson, Cunningham (commissioner)
 - b. Absent without notice: None
 - c. Present: Hoort, Gobbo, Caprathe, Brady, Nichols, Gilbert, Farkas, Posner, Sacks, Teall, Winters (delayed), Blanchard, Smith, Taratuta, Malkin, Garretson, Timmons, Manderfield, Marutiak, Sherman. Non-voting: Spiliopoulos
 - d. Chair Hoort added the “dark money” issue to the proposed agenda.

- 2. Secretary’s Report/Meeting Minutes-Stephen Gobbo**
 - a. April 16, 2013: Former Secretary Marr to submit minutes for Council review at an upcoming meeting.
 - b. September 20, 2013: Annual meeting minutes approved on a voice vote after a motion and support of the motion.
 - c. October 15, 2013: Council meeting minutes approved on a voice vote after a motion and support of the motion. Also approved were the minutes addendum for the October 26, 2013 e-mail vote that appointed Nichols to fill an open Council seat until the end of the next annual meeting. The open seat resulted from Judge Caprathe’s resignation from his elected position now that he is Section Treasurer.

- 3. Treasurer’s Report**

Due to the SBM’s year end closing process, including external annual audit, an updated report was not available. No further action taken.

- 4. Committee Reports (Chair requested abbreviated reports to allow time for policy positions)**
 - 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.
 - b. Frankenmuth Conference: Malkin reported that the committee was considering the following for the conference program: forensics/DNA/Arson investigations (What is science and what is subjective?), CSC interviews, confessions, and eye witness testimony. As an aside, he reported that he expected CDAM to issue a letter to Chair Hoort notifying that Malkin will be appointed as CDAM’s representative on the council for a three-year period.
 - c. Policy Conference: No need to 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: No need to report at this time.
- g. Nominating Committee: No need to report at this time.
- h. Young Lawyer: Farkas briefly mentioned the council should consider the possibility of a scholarship for new attorneys at conferences.
- i. Briefs/ Amicus Curiae: Committee chair Nichols and Ken Malkin provided updates and initiated discussion as follows:

People v Smith, 836 NW2d 497 (2013): Concerns a delay of sentencing agreed to by the prosecutor, who asked for an adjournment going over a one year period, with possible loss of jurisdiction by the Court for sentencing purposes. Question: Can a waiver of the one year period occur?

Lengthy discussion took place amongst the Council about whether an *Amicus* policy should be developed and what it would include. Also, discussion about whether payment should occur for drafting and preparation.

People v Shaver (COA docket 146521): Sacks led discussion about how the Council may reach middle ground and possible consensus on this case by using a statutory interpretation approach. For example: Here's what we think about the evidence standard used. A constitutional approach concerning the confrontation clause would be more problematic.

Motion by Sacks, support by Brady to explore the possibility of an *Amicus*. Motion passed on a voice vote (a count not needed as this was not a vote on an actual policy position).

Related to the question and discussion of whether funds should be allocated for *Amicus* work, a motion was made by Manderfield to approve an expenditure of up to \$1,500; supported by Caprathe. The motion passed with 12 in favor, 5 opposed, and 2 abstentions.

People v Bynum (COA docket 307028) concerns expert testimony about gang activity. No action taken.

Further discussion is to take place at next meeting.

- 5. **Representatives to the Council and other reports or discussion:** Beyond Malkin's report of information under the Frankenmuth conference above, Sherman reported the Prosecutors Association (PAAM) legislative committee met earlier today and took positions different from the Criminal Law Section Council; Manderfield reported the Judges Association (MJA) also met but she was unable to attend; Caprathe asked to defer discussion on Jury Instructions to a future meeting.

6. **Traveling Road show:** Chair Hoort provided an update on the event scheduled in Battle Creek, Calhoun County on December 7, 2013 at Kellogg Community College.
7. **Legislation:**
- a. Chair Hoort discussed the possibility of the Council taking a position on HJR V (Singh) concerning marriage, divorce, and the constitutional prohibition of same-sex marriage and civil unions. HJR V would repeal section 25, article I of the State Constitution. The context of discussion was equity within the justice system and difficulties posed, particularly in the treatment of individuals who are victims of domestic violence that may of the same gender as the offender. Some Council members expressed concern with the appropriateness of the Council taking a position. Civil unions were mentioned as a possible alternative approach. After considerable discussion, a motion was made by Teall, supported by Brady, to support the resolution. The motion passed with 15 in favor, 3 opposed, and 2 abstentions. The Council vote was grounded in a need for the equitable treatment of all persons under state law and within the justice system. Link to HJR V: <http://legislature.mi.gov/doc.aspx?2013-HJR-V>
- b. Timmons discussed pending legislation: SB 591 (expunction) is still a work in progress. No recommendation and no motion was presented. Link: <http://legislature.mi.gov/doc.aspx?2013-SB-0591>
- A series of Bills relate to human trafficking and minor victims. HB 5025 and 5026 are moving through the Legislature. SB 591 covers related concerns. Links to HB 5025: <http://legislature.mi.gov/doc.aspx?2013-HB-5025> and HB 5026: <http://legislature.mi.gov/doc.aspx?2013-HB-5026>
- After discussion, given issues with the Bills at this time a motion to table was made by Smith, supported by Sacks; motion passed on a voice vote.
- c. SB 633 (driver responsibility fees). Bill creates a new program to support community service; Timmons suggests that elimination of the fees makes better sense rather than creating a new program, which would be difficult to administer. Also, fees may operate as an impediment to the objectives of a community service program. Sherman mentioned PAAM had concerns with the Bill as well. A motion was made by Malkin, supported by Sherman, to support the Bill but with a recommendation that fees be eliminated. The motion passed on a vote of 15 in favor, 4 opposed, and 1 abstention. Link: <http://legislature.mi.gov/doc.aspx?2013-SB-0633>
- Timmons made a specific motion the Council adopt a position encouraging the Legislature to generally eliminate driver responsibility fees; supported by Taratuta. Fees have been used to fill budget gaps (circa \$120 Million in a fiscal year), and conceptually this is not good public policy. Individuals end up with license suspensions that may lead to criminal violations simply because of an inability or failure to pay the onerous amounts of the assessments. Some range assessments are \$2,000. The motion passed on a vote of 18 in favor, and zero opposed. Teall asked that the chair write a letter to legislators in consultation with Timmons, if appropriate.
- d. SB 35 (administrative hearings; housing; blight ordinance enforcement). No recommendation or motion made due to limited scope of the legislation. Link: <http://legislature.mi.gov/doc.aspx?2013-SB-0035>

- e. SB 652 (Court of Claims). Discussion about the Bill that was already passed through the Legislature. A “trailer” Bill is anticipated to be taken up to cure some problems. Motion made to take “No position” by Sherman, supported by Gobbo. Motion defeated on a vote of 8 in favor, 9 opposed, and 2 abstentions.

Motion made by Manderfield, supported by Brady, to oppose the Bill. The concern expressed was that the Bill moved too quickly to allow informed debate, causing the need for a “trailer” Bill that will not address all ills, and the change with the Court of Claims has impact on criminal cases because time will be taken away from Court of Appeal judges who would otherwise hear appeals of criminal cases. The motion passed on a vote of 14 in favor, 3 opposed, and 2 abstentions. Link: <http://legislature.mi.gov/doc.aspx?2013-SB-0652>

- f. HB 5055 (Bench warrant fees). Motion by Sacks, supported by Garretson, to oppose the Bill. The motion passed on a vote of 13 in favor, 5 opposed, and 1 abstention. The position reflects a concern with imposition of fees on those individuals who may be least able to pay, and this can result in a criminal arrest. Link: <http://legislature.mi.gov/doc.aspx?2013-HB-5055>

- g. HB 5026 (court jurisdiction over juveniles in danger of harm). After discussion no motion was offered and Timmons recommended the Council defer action for now. Link: <http://legislature.mi.gov/doc.aspx?2013-HB-5026>

- h. HB 5153 (judicial salary formula amendment). A number of persons expressed various views on the Bill. After extensive discussion the Council elected to take no position. Link: <http://legislature.mi.gov/doc.aspx?2013-HB-5153>

- i. HB 5154 (preliminary examination; probable cause conference). After extensive discussion and an initial motion was made by Farkas and seconded by Blanchard, a motion to table the matter was made by Smith, supported by Teall. The motion to table passed on a vote of 11 in favor and 8 opposed.

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

Related legislation is HB 5155. Link: <http://legislature.mi.gov/doc.aspx?2013-HB-5155>

- j. HB 5156 (“trailer” Bill to Court of Claims changes; exception to Court of Claims for right to a jury trial). After discussion no motion was offered, so no action was taken. Link: <http://legislature.mi.gov/doc.aspx?2013-HB-5056>

- k. HB 5078 (reconstitute sentencing guidelines commission). Discussion took place regarding the positions taken by other entities, including PAAM. Recommendations to the Michigan Law Revision Commission by the Council for State Government are pending about the statutory scheme in Michigan and the criminal justice system, which may affect sentencing. After discussion concluded, Blanchard made a motion in favor of the Bill; supported by Farkas. The motion passed on a vote of 16 in favor and 3 opposed.

Link: <http://legislature.mi.gov/doc.aspx?2013-HB-5078>

- l. HB 5127 (\$1 assessment fee and earmark for safe and secure schools fund). Motion made by Sacks to oppose the Bill, supported by Taratuta. The motion in opposition of the Bill passed on a vote of 18 in favor and 1 opposed. Link: <http://legislature.mi.gov/doc.aspx?2013-HB-5127>
- m. SB 661 (campaign finance amendments and “dark money”). Discussion about campaign contributions that do not have to be reported, particular concern was expressed related to judicial elections. A motion to oppose the Bill was made by Taratuta, supported by Farkas. The motion in opposition of the Bill passed on a vote of 16 in favor, 1 opposed, and 2 abstentions. Link: <http://legislature.mi.gov/doc.aspx?2013-SB-0661>

Further discussion took place about the MJA (retired) position to require full disclosure of campaign contributions in judicial races. A motion to adopt the MJA position and to authorize the chair to write a letter to the Secretary of State was made by Caprathe, supported by Manderfield. The motion passed on a vote of 17 in favor.

- n. Court Rule ADM File No. 2012-11 (Proposed Amendment of MCR 6.302). Sacks expressed concern with plea bargaining errors and indigent defense issues. The addition of a harmless error provision can add to issues. A motion in opposition to the revisions to the Rule was made by Brady, supported by Malkin. The motion opposing the rule passed on a vote of 16 in favor, 1 opposed, and 2 abstentions.

The Section Council voted to oppose the proposed change to MCR 6.302 because the rule would: (1) allow a potential retreat from important protections in the plea bargaining stage; (2) adopt a federal rule that did not apply well in a system with very different procedures in different counties and with a troubled indigent defense system; (3) adopt a federal rule when the federal system allows appeals by right for pleas whereas the state system only allows applications for leave to appeal.

Link: http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2012-11_2013-11-06_formatted%20order.pdf

*Voting numbers above varied based on who was present in the room at the time.

- 8. **PTSD and Veteran’s Court presentation:** Support of the presentation was discussed. An amount of \$2,000 was discussed by the Council. No motion; no action taken.
- 9. **Adjourn:** Meeting adjourned at 9:20pm.

Respectfully submitted,
/s/
Stephen J. Gobbo
Secretary

Approved: March 18, 2014

**CRIMINAL LAW SECTION MINUTES
ADDENDUM**

On November 21, 2013, Section Chair, Judge David Hoort submitted to the Council by e-mail a proposition to the Council that approval be granted for the payment of the required \$400.00 deposit for the Frankenmuth conference.

The Section Bylaws permit the Council to vote by e-mail after the Chairperson submits a proposition to the Council by electronic mail, when an issue arises for a determination within in a limited period of time so that the calling of a formal meeting is not practical. The pertinent Bylaw section is reproduced below:

ARTICLE VI, SECTION 7. When an issue arises which must be determined within a limited period of time so that the calling of a formal council meeting is not practical, the Chairperson of the Section may . . . submit . . . by . . . electronic mail to each of the members of the Council, any proposition . . . so submitted, by communicating their vote thereon, by any of the aforementioned means to the Secretary, who shall record upon the minutes each proposition so submitted, when, how, at whose request same was submitted, and the vote of each member of the Council thereon, and keep on file such votes. If a majority of the members of the Council shall be in favor of such proposition, or if such majority shall be against such proposition, such majority vote shall constitute the binding action of the Council. With prior Council approval, a meeting may be conducted by means of conference call.

Upon a tally of the responses to the proposition, the proposition passed with twenty-two (22) affirmative votes tallied as of November 27, 2013, including the vote of the following Council members: Hoort, Marr, Gobbo, Caprathe, Gilbert, Malkin, Smith, Winters, Farkas, Garretson, Sherman, Brown, Posner, Marutiak, Nichols, Guess, Taratuta, Sacks, Brady, Thompson, Teall, and Timmons.

There was no recorded vote as of November 27, 2013 for Manderfield, Blanchard, and McDonough.

Respectfully submitted,

/s/
Stephen J. Gobbo
Secretary

Approved: March 18, 2014