

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
October 15, 2013 (Copper Restaurant, E. Lansing)

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

- a. Absence with notice: Joshua Blanchard, Hon. William Caprathe, David Gilbert, Ward McDonough, Jr., Matthew Smith, Stephen Taratuta
- b. Absent without notice: None
- c. Present: Hoort, Marr, Gobbo, Brady, Brown, Guess, Farkas, Posner, Sacks, Teall, Winters, Thompson (delayed), Malkin, Garretson, Timmons, Manderfield, Marutiak, Sherman. Non-voting: Cunningham, Spiliopoulos
- d. Introduction of new Council members: Richard Cunningham, Board of Commissioners. Kimberley Reed Thompson deferred until arrival.

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. May 21, 2013: Approved on a voice vote.
- c. September 20, 2013: Gobbo to submit minutes of the Annual Meeting for Council review at an upcoming meeting.

3. Treasurer's Report

Report presented by former Treasurer Gobbo in the absence of Judge Caprathe, Treasurer. Financial status and fund balance reports for the SBM fiscal year ending September 30, 2013 were distributed to the Council by e-mail. The ending fund balance is \$25,721.87. (See attached Fund Balance Report as of 9/30/2013). This is significantly greater than last year (balance of \$12,799.92), and in a year when the Mackinac Island policy event was held. This is attributed to cost-savings related to electronic distribution of the section newsletter and a modest dues increase.

Gobbo inquired about any pending expenses for which reimbursement has not yet been submitted. The information is requested by the SBM by Friday, 10/18/2013. All requests have been submitted. Elaine Spiliopoulos recently submitted a request related to a meeting at Mike Brady's home that may not have yet posted to the section's accounts.

Teall started a discussion about preparation of a 2-year budget cycle since there are more resources to work with; Chair Hoort has already asked Treasurer Caprathe to work on this. Timmons as a long-term member, and former Chair recalls when only \$600 was left as a balance.

Motion to accept the Treasurer's report: Posner; seconded by Marr. Motion unanimously approved on a voice vote.

4. Committee Reports

a. Shanty Creek Conference:

In the absence of Conference Chair Taratuta, report provided by Posner who indicated committee members (Taratuta, Brown, Posner) met about topics and the conference, which will be held over President's weekend, starting Friday, 2/14/2014 and ending Sunday, 2/16/2014. The main program is being planned for Saturday, 2/15/2014, so individuals who do not have the Monday holiday off can participate and more easily travel. One proposed topic is forfeiture. Brown mentioned the Wayne County Prosecutor office's chief of forfeiture may be a potential speaker. Chair Hoort commented that Chris Yates might also be considered as he appreciated Mr. Yates' work during a past traveling road show event.

Timmons commented that most forfeiture actions occur under the controlled substances act; in Michigan seizures can take place without benefit of conviction; there is a pending US Supreme Court case challenging the practice in another jurisdiction. (*See Kaley v. United States*, USSC docket no. 12-464, oral argument held October 16, 2013. *Also see, United States v. Kaley*, 579 F.3d 1246 (11th Cir. 2009) ("*Kaley I*").

Chair Hoort asked the conference committee to keep young lawyers in mind with planning and to confer with council member Farkas, who is affiliated with the Young Lawyers Section.

Posner commented about the annual meeting program and positive impact of section programs. The annual meeting program was related to *Problem Solving Courts: Mental Health Care Needs Assessment*. He believes as a result of the program Macomb County is moving towards use of a mental health court.

Farkas mentioned use of reduced or free section memberships to attract members, and a recent prisons and correction section event was used as an example. Brown expressed her thought that a free membership was already offered for two years for new attorneys. This stimulated further discussion about a broad section policy or something specific for the Shanty Creek event. A recent decision by the Board of Commissioners concerning the manner of soliciting section membership, whereby "opt-out" arrangements caused complaints to the SBM and can no longer be used by sections, was explained by Marr and Commissioner Liaison Cunningham. Farkas pointed out the prisons and corrections event she cited used an "opt-in," where potential members voluntarily and unequivocally agree to become members. Teall pointed out there are two issues with reduced membership. The Council decided to defer action until the November Council meeting.

b. Frankenmuth Conference: Committee Chair Malkin reported that the conference would take place August 7-8th, 2014, and will occur during the Bavarian Festival. Committee members (Farkas, Marutiak, and Malkin) have discussed possible topics. Marutiak mentioned: OUIL, forensic science/computer science, DNA.

Saks suggested consideration of including assessment instruments, e.g., COMPASS. Brown mentioned that risk assessment tools were being used for bonds in Wayne County. Garretson mentioned that tied to assessment was "swift and sure" punishment. Marr raised the question

of the event being used as a policy conference. If the conference was geared towards education, Garretson thought the “pay or stay” issue may also be a possibility.

Chair Hoort asked that Malkin work with the other event committee chairs (Tartuta and Marr) concerning a proposal for reduced fees. Malkin’s view is that if a fee is charged, less than 10% of those planning to attend are no shows; 50% if no fee is charged. Malkin and Marr suggested waiting until next year to decide on using the Frankemuth venue as a policy conference since this would fit into the usual cycle. Gobbo suggested a policy conference might be held if a key issue of interest to the section comes up. Teall added the specific example of the Indigent Defense Commission’s work, which will be evolving once appointments are made by Governor Snyder and commission staffing is in place. This stimulated further discussion about how the section can contribute on policy matters.

Teall talked about revisiting former Chair Gary Gabry’s concept of looking at “pressure points” in the criminal justice system and getting input from the constituency of the section. Garretson stated counties are setting up indigent defense programs and, perhaps, the section can weigh-in and assist in some manner. Chair Hoort noted there are many pending issues and maybe a new committee can be established to track the issues. For example, a committee to stay informed on the Governor’s Mental Health Commission (chaired by Lt. Governor Calley) and the Indigent Defense Commission. Malkin thought there was more potential to influence outcomes by corresponding to the commissions, rather than addressing the Legislature. Teall agreed this may be a way to get a direct, informal “seat at the table.” He further suggested section members should be surveyed to input on issues of interest to the membership. It was noted some members and groups were opposed to the Indigent Defense legislation.

After discussion, a motion was made by Marr, seconded by Guess for the establishment of an Indigent Defense Committee. Winters will be the chair, and there was a recommendation that committee members include Brady and Sacks. Chair Hoort expressed his thought that the committee chair should select members.

- c. Policy Conference: Committee chair Marr reported on the Mackinac Island event, and the topic of gun control that resulted in a written policy position of the section. The event was not well attended, and there is a need to look at other event venues; possibly in the Detroit region next year. Teall stated that panel members who traveled to Mackinac Island, including State Senator Warren, were very complimentary although attendance was sparse. Farkas suggested looking at the Suburban Collection location in Novi as an event venue because a new hotel is being built on the premises.
- d. CLS Journal: Committee chair Garretson acknowledged Kimberley Thompson’s prior experience with the last published section journal; format will be in electronic medium; questions asked of the Council is its preference for: purpose, content (e.g., scholarly writing, position discussion, law updates, amicus, etc.), frequency.

Question to answer by e-mail from Council members to Heather Garretson: How best to serve the section? (Consider preferences above.)

Some discussion took place about e-mail transmission/receipt issues of notifications of the current newsletter. Editor Spiliopoulos mentioned that very soon the SBM will require

members of the SBM to sign-in to various website functions using his or her personal user ID and password, rather than use of a generic passcode currently in use for newsletter access.

- e. Advertising: Committee chair Marutiak (other committee members Guess and Spiliopoulos) plan to get together with other committee chairs to market the various event, within and external to the section. Marutiak indicated it is important to decide who is the desired target audience at events.
- f. Annual Meeting: Committee chair Gilbert (absent); Brown mentioned a topic is needed for the meeting. Discussion will take place with Chair Gilbert and other committee member Smith.
- g. Nominating Committee: Committee chair Gobbo indicated it is too early to provide a report on activities (this committee's work is associated with the annual meeting). Marutiak asked for clarification as to whether ballots from the election at the annual meeting (September 2013) can be destroyed now. A motion was approved at the annual meeting, but the time of destruction was not specified. By consensus, the Council approved the recommendation that the ballots be destroyed 30 days from the annual meeting date.

Chair Hoort recognized Kimberley Reed Thompson's election to the Council, as well as noting Steve Taratuta, Matt Smith, Ward McDonough, and Joshua Blanchard were also reelected at the annual meeting.

- h. Young Lawyer: Committee chair Farkas stated the Young Lawyers' Section (YLS) were meeting this weekend, and she may be able to add any planned events to the YLS budget. YLS members have limited involvement in the Criminal Law section. Teall thought a goal of the section may be to provide mentoring opportunities.
- i. Briefs Amicus Curiae: Editor Spiliopoulos reported on the behalf of Committee chair Nichols, who was absent. There is a desire for a policy on Amicus. Possible immediate subjects discussed for an Amicus included:

Shaver concerning deferred sentencing and jurisdiction after a year passes. Sacks indicated a rape shield case is still developing. Sherman thought the issue of delayed sentences would be a good subject because of possible consensus between prosecution and defense bars. Further discussion is to take place.

- j. Traveling Roadshow: Chair Hoort reported that an event will occur in Battle Creek, Calhoun County (on December 7, 2013) hosted with Council member and County Prosecutor Gilbert. Presenters are being lined up.

Another event will be planned for April/May, 2014.

Discussion transitioned to two subjects: fees for events and speaker reimbursement. After much discussion and attempted motions, and amendments, trying to establish a workable way to incorporate a policy for conferences and the traveling road show, and reimbursement policy for speakers, the following motions occurred:

Conferences: Motion by Marr, seconded by Malkin to table to the November meeting the question of fees for conferences, i.e., policy, Frankenmuth, etc. Motion passed on a voice vote.

Travelling Road Show: Motion by Brady, seconded by Malkin that attendance is free to non-members who show up at (attend) the event; section membership is free for the rest of the SBM year if the individual signs up to join the section. Attendance is free for section members. Motion passed on a vote of 11 in favor, 6 opposed, 0 abstained.

Speaker reimbursement: Motion by Marr, seconded by Timmons that reimbursement to speakers (including Council members) occur for mileage at the SBM/IRS rate for any miles over 150 miles (calculated each way) and any photocopy costs supported by receipts. Motion passed on a 2/3rds vote of 12 in favor, 6 opposed.

5. Other discussion and recognition:

Motion by Marutiak, seconded by Marr to recognize Barbara Levine for her years of service to the Section and Council. A resolution will be drafted and she will also be presented with a plaque. Motion passed on a unanimous vote.

Council member Guess' name was submitted for possible appointment to the indigent defense commission as a representative of a minority bar association. Chair Hoort planned to submit a personal letter of recommendation. After discussion, a motion was made by Sherman, seconded by Marr to authorize Chair Hoort to write an endorsement letter on behalf of the Section Council. Motion passed on a unanimous vote.

6. Legislation:

Committee chair Charles Marr commented on the SBM new leadership orientation and he thought it was very good. He pointed out he learned quite a bit about SBM services that were not fully known before. Timmons provided the Council with insight about pending legislation, including recent introduction of HB 5078 that would recreate a sentencing guidelines commission.

- a. **SB 318-Juvenile life sentencing:** <http://legislature.mi.gov/doc.aspx?2013-SB-0318>
SB 318 was taken up with SB 319. The legislation is prospective and does not have retroactive application; a remedy of sliding discretionary sentences between 25-40 years, if life without parole is not imposed is provided. The Bills are tied to *Miller* factors. Sacks mentioned there was a defense workgroup and that the group was discussing a remedy of a term of 25-40 years for 16-17 year olds and 20-40 years for 14-15 year olds. The remedy is not perfect concerning juveniles, but the approach is a compromise that different sides can agree to, except for overall length of sentence. Originally discussion was about 25-60 years or life without parole. Timmons discussed the impact if *Miller* becomes effective. The Senate Bills passed in committee, and House Bill(s) when introduced may include retroactive application. Sherman mentioned the scheme of the Bills concern factors but there are no standard of proof included. Sacks recommended to take a position "any legislative solution be retroactive"; oppose the Bills unless retroactive. After further discussion Sacks made a formal Motion on SB 318 and SB 319, seconded by Posner to support the Bills if retroactive application was included. The reason is for "fundamental fairness." The motion passed on a vote of 12 in favor, 5 opposed, and 1 abstained (Hoort).

- b. **SB 319-Juvenile lifer sentencing:** <http://legislature.mi.gov/doc.aspx?2013-SB-0319>
See motion and vote result in 6.a., *supra*.
- c. **SB 0558** (Schuitmaker) **Mental Health Programs;** program to divert persons with serious mental illness from justice system to treatment; establish. Amends 1974 PA 258 (MCL 330.1001 - 330.2106) by adding sec. 207a & repeals sec. 207 of 1974 PA 258 (MCL 330.1207). Status: 09/26/13 Referred to Senate Judiciary.

Timmons has talked with Senate staff; the Bill is going through discussion and is supported by Mental Health groups. It is not expected to come up for a vote in the Legislature as yet. There are some issues with the Bill that need to be resolved. Consensus was to table a decision on this Bill until the November meeting, as there may be more developments to assess.

- d. **SB 0591**(Proos) **Human Trafficking,** expunction; setting aside criminal conviction on grounds of being a victim of human trafficking; allow under certain circumstances. Amends secs. 1, 2 & 4 of 1965 PA 213 (MCL 780.621 et seq.). Status: 10/03/13 Referred to Senate Committee on Families, Seniors & Human Services.

Information was discussed about active situations in the State and that the Bill was one of a package of Bills stemming from a task force geared towards the issue of sex slavery. More information is likely to come from the task force. Consensus was to table a decision on this Bill until the November meeting.

- e. **HB 5018** (Leonard) **Criminal Procedure,** expunction; requirement for attorney general review of a set-aside application; eliminate. Amends sec. 1 of 1965 PA 213 (MCL 780.621). Status: 09/26/13 Referred to House Criminal Justice.

HB 5018 was taken up with HB 5019. The Bills remove the requirement of AG review. There is a concern by prosecutors and others are not comfortable about removal of this review requirement, particularly in smaller counties because the review helps with appeal issues. A member of the AG's office, under current practice, determines whether an individual is legally not eligible for expunction. A letter of opinion is provided to the judge who is currently prohibited from making a decision without the letter. Motion by Sherman, seconded by Brown to oppose both HB 5018 and HB 5019. The motion passed on a vote of 12 in favor, 5 opposed, and 1 abstained (Gobbo).

- f. **HB 5019** (Johnson, J.) **Juveniles,** expunction; criminal procedure; requirement for attorney general review of a set-aside application; eliminate. Amends sec. 18e, ch. XIIA of 1939 PA 288 (MCL 712A.18e). Status: 09/26/13 Referred to House Criminal Justice.
See motion and vote result in 6.e., *supra*.

- g. **HB 5020**(Jenkins) **Sobriety Courts,** DWI/sobriety court interlock pilot project; eliminate sunset. Amends sec. 304 of 1949 PA 300 (MCL 257.304). Status: 10/01/13 Referred to House Judiciary.

HB 5020 was taken up together with HB 5021. Timmons mentioned the sunset in the statute and the concern about its removal impacting pilot projects. Marr moved to support the Bills, seconded by Brady. Sherman discussed how licensure restrictions are imposed because of the

pilot projects and this was not equitable county to county. The motion was restated to support the Bills but to include Sherman's concerns of equity. The motion passed on a vote of 13 in favor, 4 opposed, and I abstained.

- h. [HB 5021](#)(Lauwers) **Sobriety Courts**, DWI/sobriety court interlock pilot project; eliminate sunset. Amends sec. 1084 of 1961 PA 236 (MCL 600.1084). Status: 10/01/13 Referred to House Judiciary.
See motion and vote result in 6.g., *supra*.
- i. [HB 5026](#)(Heise) **Juveniles**, court jurisdiction over dependent juveniles in danger of substantial physical or psychological harm; allow. Amends sec. 2, ch. XIIA of 1939 PA 288 (MCL 712A.2). Status: 10/01/13 Referred to House Committee on Criminal Justice.

After discussion the consensus was to take no position.

- j. [HB 5049](#) (Singh) **Criminal Procedure**, certain records regarding participation in the veterans treatment court; modify. Amends sec. 1209 of 1961 PA 236 (MCL 600.1209). Status: 10/03/13 Referred to Second Reading (House).

After discussion the consensus was to take no position.

- k. [HB 5055](#)(Johnson, J.) **Bench Warrant Costs**, defraying of costs incurred by local unit of government in executing bench warrants; allow. Amends sec. 1f, ch. IX of 1927 PA 175 (MCL 769.1f). Status: 10/03/13 Referred to House Judiciary.

After discussion, including that the subject matter may already otherwise be covered by law, consideration of a position was tabled until the November meeting.

- 7. **Court Rules:** Committee chair Sacks indicated there was nothing significant to report. There is one active Court Rule due in January that his committee (Judge Caprathe, Ward McDonough, and he) will be discussing. As an afterthought, there was a change in a Court Rule over the Summer months concerning caseload management. The % of cases moved within 91 days went from 90% down to 70%. This applies statewide.
- 8. **Projects:** Judge Caprathe asked to hold off on the projects concerning a program for community response to sexual assault cases. Thus, the matter was not taken up by the Council.
- 9. **Old Business**
Judge Kolenda's book/hard copies: Editor Spiliopoulos updated the Council on the status of this successful publication. The publication format was changed to an electronic version, and now a number of persons want printed copies. Six quotes for printed copies were sought, and Kinko's was the most competitive with a price of \$578 for 100 copies. Last year \$8,000 was spent on book publication costs. The book sells for \$25. Marr made a motion, seconded by Posner to approve the expense of \$578 for the copies. The motion passed on a vote of 17 in favor, 0 opposed, 0 abstained (one person was out of the room).
- 10. **New Business**
Full disclosure of Judicial campaign funds- State Bar letter to Secretary of State.

Judge Caprathe asked to defer discussion on this issue. Thus, the matter was not taken up the Council.

11. Good and Welfare

- a. Prisons & Corrections section meeting on Saturday, November 2, 2013 at 10 a.m. at the SBM bldg in Lansing re: Michigan's sentencing and corrections practices.
- b. Prisoner Rights Civil Litigation Training for Pro Bono Attorneys on Wednesday, October 30, 2013 at 8:30 a.m., T. Levin Courthouse, 231 W. Lafayette Blvd, Detroit, MI 48226

12. Adjourn: Meeting adjourned at 9:10pm.

Respectfully submitted,

/s/

Stephen J. Gobbo
Secretary

Approved: November 19, 2013

**CRIMINAL LAW SECTION MINUTES
ADDENDUM**

On October 29, 2013, Section Chair, Judge David Hoort submitted to the Council by e-mail a proposition that Mike Nichols be elected to fill a vacancy on the Council created by the resignation of Judge William Caprathe, who was elected Treasurer at the Section's Annual Meeting in September 2013.

The Section Bylaws permits the Council to fill a vacancy in its membership, and the Chairperson to submit 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 sections are reproduced below:

ARTICLE VI, SECTION 4. The Council, during the interim between annual meetings of the Section, may fill vacancies in its own membership Members of the Council so selected shall serve until the close of the next annual meeting of the Section, at which time the vacancies shall be filled for the remainder of their respective terms by a special election conducted concurrently with the regular elections as provided in Article III

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-three (23) affirmative votes of the following Council members: Hoort, Marr, Gobbo, Caprathe, Gilbert, Malkin, Smith, Winters, Farkas, Manderfield, Blanchard, Garretson, Sherman, Brown, Posner, McDonough, Marutiak, Guess, Taratuta, Sacks, Brady, Thompson, and Timmons.

There was no recorded vote for Teall.

The Council membership now totals twenty-five (25) voting members.

Respectfully submitted,

/s/
Stephen J. Gobbo
Secretary

Approved: November 19, 2013