

CRIMINAL LAW SECTION COUNCIL MEETING  
STATE BAR OF MICHIGAN  
November 15, 2011

Members Present: David Gilbert, Sherrie Guess, Charles Marr, Jonathan Sacks, Kiana Evelina Lee Franulic, Barbara Levine, Stephen Taratuta, Kenneth Malkin, Hon. Paula Manderfield, Hon. William Caprathe, Hon. David Hoort, Michael Marutiak, Opolla Brown, Jon Posner, Martin Krohner, David Leyton, Stephen Gobbo, Matthew Smith, Ward McDonough, Heather Garretson.

Also Present: Bruce Timmons, Thomas Rombach

- I. Call to Order by Stephen Tarauta, Chair, 6:30 p.m.
  - a. Absence w/ notice: Jon Posner, David Leyton, Lynn D’Orio, Elaine Spiliopoulos, Dan Levy
  - b. Absent without notice: None
  - c. Guests: Sadie Griffin

- II. October 18, 2011 Minutes; David Hoort, Secretary.

Amendments: Ken Malkin states his motion was the Chair to receive compensation for room and board, not just lodging. Chair states he has offered his and the Committees service on the Eye Witness Identification Task Force.

Martin Krohner moves, Judge Manderfield second, to approve October 18, 2011 minutes, as amended. Motion carried by acclimation.

- III. Treasurer's Report; Charles Marr, Treasurer  
Chair moves, Matthew Smith second, to accept Treasurer’s Report. Motion carried by acclimation.

- IV. Committee Assignments / Report

- a. By-Laws Report, Charles Marr, Chair

The Board of Commissioners is meeting on Friday with the By-laws expected to be approved as part of the consent agenda. Chair Marr will then be posting the same on the State Bar CLS website.

- b. Shanty Creek Report—February 18-20, 2012

Opolla Brown reports that the program will include Tim Baughman with a Criminal Law Update and a three person panel discussing the new jury instruction court rule. The panel will include Judge Caprathe representing judges and a to be named prosecutor and defense attorney. The Young Lawyer program will include a presentation on computer/IPad technology in the courtroom and possibly a judge/prosecutor/defense best practices panel. Ward McDonough suggested including the Driver Responsibility Law and the need to be proactive; Bruce Timmons commented on related Driver Responsibility Law legislation, SB 166.

- c. Frankenmuth Report—June 8-9, 2012

Ken Malkin reported that the Frankenmuth Conference will be Friday, June 8, 2012 through Saturday, June 9, 2012 at the Frankenmuth Bavarian Lodge during the Bavarian Festival. The committee is still looking for possible topics. For the Young Lawyer program, attorney Thomas Loeb will be presenting a ‘nuts and bolts’ session for new lawyers.

- d. Annual Meeting Report

No report.

- e. Young Lawyer Report

The Young Lawyers subcommittee will be presenting sessions at each conference for new lawyers, at low cost and minimal time away from work for the newer attorney. Stephen Gobbo suggested giving away the older edition of the Kolenda books as an added inducement.

- V. Kolenda Books

- a. Flash Drives-64MB \$4; 128MB \$4.25; 256MB \$4.50; 512MB \$5; 1GB \$5.50

b. Pre-Orders – 21

Council discussed using flash drives to sell the Kolenda books, at the same price (\$25.00); space needed; pre-orders received (21); selling opportunities. Chair moves, Charles Marr second, to authorize the chair to purchase 250 flash drives with up to 1GB. Motion passed by acclimation.

VI. Legislation / Court Rules

a. Legislative Report

Bruce Timmons reported that Medical Marijuana related legislation will be coming up after the first of the year. No movement surprisingly on any 'Juvenile Lifer' related legislation, but there may be some inclination to wait and see what happens in a related civil action filed in the federal court and two criminal cases pending in the United States Supreme Court.

b. Proposed Amendment to Rule 7.210

Proposed MCR 7.210 would place certain requirements on the trial court to retain exhibits offered into evidence. Judge Caprathe reports that MJA has indicated opposition to the propose court rule, but tabled any vote to allow for further information. Jonathan Sacks explained the appeal related problems and loss of evidence with the existing court rule. Further comments by the Chair and experienced problems in Wayne County. Bruce Timmons expressed a concern with existing and expected closing of MSP posts and thereby related evidence storage problems. The consensus of the Council is that there is a problem in need of corrective action. Martin Krohner moves to support the proposed amendment in principle. Thomas Rombach suggests the Council may want to defer action to allow for possible other alternatives or further information. Martin Krohner withdraws his motion. Matthew Smith moves, Kiana Franulic second, that the proposed amendment be tabled to the December meeting. Motion passed by acclimation.

c. Proposed Amendment to Rule 6.302

Proposed MCR 6.302 would reinsert a requirement that a court advise a defendant who pleads guilty of the possible consequences if a habitual offender notice is filed within the 21 days allowed by statute after arraignment. Jonathan Sacks stated that the proposed amendment was in response to a possible, albeit atypical, circumstance with the filing of the habitual offender notice post plea. Ken Malkin stated that a defendant should then be allowed to withdraw his plea. Judge Hoort stated the Criminal Jurisprudence support of the proposed amendment and proposed alternative language. Discussion continued with regards to the existing court rule, plea procedures in familiar courts, the existing difference in ability to ascertain a defendant's prior criminal record, maximum and mandatory penalties, and the need to allow a defendant to withdraw a plea if (s)he was not accurately informed of the possible maximum penalty. Judge Caprathe moves, Barbara Levine second, to oppose the proposed court rule and that instead MCR 6.310(B) be amended to allow a plea to be withdrawn before sentencing if there is a subsequent sentence enhancement.

Motion passed by show of hands. Voting members-18; Ayes-17, Nays-1, Abstain-0.

Explanation of the Position, including any recommended amendments:

The concerns expressed by the Section were that in fairness a defendant should be allowed to withdraw his/her plea if (s)he was not accurately informed of any mandatory minimum or maximum penalty at the time of the plea. The objection is that Section's recommendation allows a defendant, with prior convictions unknown to the prosecutor, to knowingly and voluntarily enter a plea, and then have the ability to withdraw the plea if the prosecutor discovers the prior convictions within the statutorily allowed 21 day period.

d. Proposed Amendment to Rule 6.005

Proposed MCR 6.005 would require that trial counsel to make a defendant's file available to an appellate lawyer, and would be required to retain the file for at least five years. Jonathan Sacks explained the reasons for the proposed amendment. Discussion of the obligation and cost to trial counsel, one's already existing ethical obligation, applicability to appellate counsel, and best practice

requirements. CjaP supports the proposed amendment. Charles Marr moves, Martin Krohner second, to support the proposed court rule.

Motion passed by show of hands. Voting members-18; Ayes-16, Nays-0, Abstain-2.

## VII. Old Business

### a. Trip to Cuba

Chair reports continued discussion of a SBM authorized 5-6 day, or longer, trip to Cuba in March or April of next year for 20-30 people at \$2,500.00 per person, including airfare. Each day would include a five to six hour itinerary interacting with related entities for all attending participants. Council members expressed an interest in participating and authorized the Chair to continue discussions.

### b. Mackinac Island Policy Statement

Charles Marr and Thomas Rombach report the SBM does not plan to be involved and the CLS on its own may move forward with the Mackinac Island Medical Marijuana Policy Statement. Stephen Gobbo suggests including other sections in any advocacy of the CLS Medical Marijuana Policy Statement, and including the same in our newsletter.

## VIII. New Business

### a. Criminal Law Profile

Chair discusses 2010 SBM data as it applies to the Criminal Law Section. Discussion continues as to the need to expand our outreach to African Americans and women. Kiana Franulic states the Section needs to be more vocal in what CLS has to offer to new attorneys in contrast with CDAM or other defense orientated entities. Suggestions include the existing two year no cost membership for new lawyers and Young Lawyer programs at conferences, giving away prior editions of the Kolenda books and more fully utilizing judge, prosecutor and defense members of the Section.

### b. Indigent Defense Commission

Ward McDonough, Ken Malkin and Barbara Levine report on the Indigent Defense Commission and the need for the Section to continue their support. Ward McDonough recommends a CLS person attend the meetings which are open to the public. Barbara Levin advised of the stated Agenda items for upcoming Commission meetings and their hope to have a recommendation by March of 2012. The Chair directs the Secretary to draft a letter to Judge Fisher, Chair of the Commission; enclosing a copy of our 2003 Mackinac Island Policy Statement, and offering our continued support and willingness to testify or otherwise assist the Commission. In the past the Section has contributed financially and was the catalyst in the subsequent adoption by the State Bar of proposed minimum standards for indigent defense in Michigan.

### c. Placards

In recognition of our new members and the number of persons serving on the Council, motion by Matthew Smith, Ken Malkin second, to authorize the Chair to acquire placards for Council members. Motion carried by acclamation.

## IX. Good and Welfare

### a. New Meeting Location – Troppo

The Chair advises that Troppo, 111 E. Michigan Ave., Lansing is a possible alternative location for Council meetings. Troppo has an excellent food, similar pricing, but is not as convenient a location as the Lexington and does not have free parking. We may try Troppo for the December meeting or the Council meeting may be electronic, depending on the weather.

## X. Adjourn

Motion by Opolla Brown, David Gilbert second, to adjourn. Motion carried by acclamation. Meeting adjourned at 8:57 p.m.

Approved: 12.20.2011

Respectfully submitted  
David Hoort, Secretary  
Criminal Law Section