

CRIMINAL LAW SECTION COUNCIL MEETING
STATE BAR OF MICHIGAN
October 18, 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, Ward McDonough.

Also Present: Bruce Timmons, Thomas Rombach

I Call to Order by Stephen Taraut, Chair, 6:33 p.m.

- a. Absence with notice: Lynn D'Orio, Matthew Smith, Dan Levy
- b. Absent without notice: None

II Approval of Minutes; David Hoort, Secretary.

- a. May 17, 2011 Council Meeting
- b. September 16, 2011 Annual Meeting

Appreciation expressed to Annual meeting committee members for the outstanding program.

Amendments: One additional correction by the secretary to reflect that at the September 16, 2011 Council meeting, Elaine Spiliopoulos, Michael Brady, Sr, Thomas Rombach, Bruce Timmons were also present, but not as voting members.

Martin Krohner moves, Charles Marr second, to approve May 17, 2011 Council Meeting and September 16, 2011 Annual Meeting minutes. Motion carried by acclamation.

III. Treasurer's Report; Charles Marr, Treasurer.

Amendments: None

Martin Krohner moves, Jon Posner second, to accept Treasurer's Report. Motion carried by acclamation.

IV. Committee Assignments / Reports

Chair appoints Opolla Brown and Kiana Evelina Lee Franulic, Young Lawyers Committee, as honorary members of all conference committees in conjunction with to be included educational segments for young lawyers. Kenneth Malkin moves, Jon Posner second, that the Chair of the CLS be an ex-officio member of all conference committees and receive compensation for room and board. Motion carried by acclamation, Chair abstains.

- a. Election Committee Report; Michael Marutiak, Chair

A hard copy has been filed of the election of council members from the Annual meeting. There were five openings, five candidates, and the same were elected by unanimous consent and motion to waive balloting. A believed first in Criminal Law Section history.

Kiana Evelina Lee Franulic moves, Martin Krohner second, to accept Election Committee Report. Motion carried by acclamation.

- b. By-Laws Committee Report; Charles Marr, Chair

The by-laws have been submitted to the SBM Board of Commissioners for approval and ratification, and are on the agenda for their meeting in November.

Opolla Brown moves, David Gilbert second, to accept By-Laws Committee Report. Motion carried by acclimation.

c. Shanty Creek Conference

Chair appoints Jon Posner, Opolla Brown, Ward McDonough to the Shanty Creek Conference Committee. The program is scheduled for Saturday - Monday, February 18-20, 2012 (Presidents Day weekend). Suggestions for program content for the conference may be submitted to any committee member. A specific segment for young lawyers will be on Monday, February 20, 2012.

d. Frankenmuth Conference

Chair appoints Kenneth Malkin, David Gilbert, Michael Marutiak to the Frankenmuth Conference Committee. The Frankenmuth Conference will be in June of 2012. Suggestions for program content for the conference may be submitted to any committee member.

e. Annual Meeting

Chair appoints Charles Marr, David Gilbert, Michael Marutiak to the Annual Meeting Committee. The CLS Annual meeting will be in Grand Rapids on Friday, September 21, 2012.

f. Young Lawyers

Chair appoints Opolla Brown and Kiana Evelina Lee Franulic, Young Lawyers Committee.

VI. Kolenda Books

a. Flash Drives

Higher than expected printing costs are being paid, plus some additional compensation to the CLS, from sales of Judge Kolenda's books. Plans are underway to sell additional books at upcoming conferences and, with Judge Kolenda's permission, via flash drives.

VII. Introduction of members

VIII. Legislation / Court Rules

a. Eyewitness Identification Task Force

Chair explains background for the recently authorized SBM Eyewitness Identification Task Force. EITF committee chairs are Nancy Diehl and Valerie Newman. Chair Taratuta has volunteered himself and CLS committee members to serve on the task force.

b. E/O 2011-11 Indigent Defense Advisory Committee

Chair discusses recently authorized State Indigent Defense Advisory Committee and appointments by Governor Snyder. Judge James Fisher will be Chairing this Committee. Chair Taratuta to forward to Judge Fisher the CLS policy report, from a past Mackinac Island policy conference, on Indigent Defense Reform.

c. MCR 6.202, Disclosure of Forensic Test results

Jonathan Sacks discusses the MSC proposed Administrative Order 2010-14 and proposed adoption of new rule 6.202 of the Michigan Court Rules; the support and concerns as to the Criminal Jurisprudence & Practice Committee proposed alternative. Stephen Gobbo and Thomas Rombach discuss SBM Executive Committee Concerns. Discussion continues re the need for the court rule; prosecutor's existing obligation to furnish forensic reports to the defense;

the ability to rescind a waiver; possible alternative utilizing video conferencing for testimony by forensic expert witnesses; safeguarding against judges otherwise admitting evidence in violation of the Confrontation Clause; applicability of court rule to district, probate and circuit court trials. Judge Hoort explains CJaP proposed alternative, intended objectives, believed CJaP concurrence with expressed concerns; and offers alternative suggested language.

Jon Posner moves, Martin Krohner second, to support the concept of the proposed rule change and the recommended amendments by the Criminal Jurisprudence & Practice Committee, if the following language is accepted:

Rule 6.202. Disclosure of Forensic Laboratory Report and Certificate; Applicability; Admissibility of Report and Certificate; Extension of Time; Adjournment.

(A) This rule shall apply to trials in the District, Probate and Circuit Court.

(B) (A) Disclosure. Upon receipt of a forensic laboratory report and certificate by the examining expert, the prosecutor shall ~~a party may~~ serve a copy of the laboratory report and certificate on the opposing party's attorney, or party if not represented by an attorney, within 14 days after receipt of the laboratory report and certificate. A proof of service of the report and certificate on the opposing party's attorney, or party if not represented by an attorney, shall be filed with the court.

(C) (B) Notice and Demand.

(1) Notice. If a party intends to offer the report as evidence at trial, the party's attorney or party, if not represented by an attorney, shall provide the opposing party's attorney, or party if not represented by an attorney, with Notice of that fact in writing when the report is served as provided in subrule (B) (A)(1). The analyst who conducts the analysis on the forensic sample and signs the report shall complete a certificate on which the analyst shall state (i) that he or she is qualified by education, training, and experience to perform the analysis, (ii) the name and location of the laboratory where the analysis was performed, (iii) that performing the analysis is part of his or her regular duties, and (iv) that the tests were performed under industry-approved procedures or standards and the report accurately reflects the analyst's findings and opinions regarding the results of those tests or analysis. Except as provided in subrule (C)(2), ~~(B)(2)~~, the report and certification is admissible in evidence to the same effect as if the person who performed the analysis or examination had personally testified.

(2) Demand. Upon receipt of a copy of the laboratory report and certificate, the opposing party's attorney, or party if not represented by an attorney, may file a written objection to the use of the laboratory report and certificate. The written objection shall be filed with the court in which the matter is pending, and shall be served on the opposing party's attorney or party if not represented by an attorney within 14 days of receipt of the Notice. If a written objection is filed, the report and certificate are not admissible ~~except as otherwise allowed by law~~. If no objections is made to the use of the laboratory report and certificate within the time allowed by this section, the report and certificate are admissible in evidence as provided in subrule (C)(1). ~~(B)(1)~~.

(3) For good cause the court shall extend the time period of filing a written objection.

(4) Adjournment. Compliance with this court rule shall be good cause for an adjournment of the trial

Explanation of the Position, including any recommended amendments:

The concerns expressed by the Section were that the proposed court rule should apply to all trials in the district, probate and circuit court and that there should be a good cause exception to allow rescission of the otherwise assumed waiver of a defendant's rights under the Confrontation Clause. The other concerns were that this court rule not circumvent the prosecutor's mandatory obligation to furnish forensic reports to the defense or allow courts to admit evidence in violation of the Confrontation Clause.

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

d. MCR 7.202, Appeal of Suppression Order

Thomas Rombach explained the background for the MSC proposal to adopt Administrative Order No. 2011-XX and amend MCR 7.202. Judge Hoort explained the CJaP objection to the MSC proposed court rule and CJaP suggested alternative language. Kenneth Malkin expressed concerns relating to continued incarceration of defendants post suppression. Further concerns expressed whether the court rule is needed or necessary.

Jonathan Sacks moves, Kenneth Malkin second, to oppose both Alternative A and Alternative B of proposed Administrative Order No. 2011-XX and the MSC proposed amendment of the MCR 7.202 and adopt the position of the State Bar, to-wit:

[N]either alternative is needed. Under Michigan law there is already a procedure in place for the prosecutor to file an application for leave to appeal and request a stay. If the trial court and the Court of Appeals wrongfully deny a stay, the Supreme Court can easily reverse and grant a stay pending the appeal. Alternative A changes Michigan law by its re-definition of a 'final judgment' or 'final order' and affords the prosecutor rights not similarly available to the defense. Alternative B bypasses established appellate rules and also affords to the prosecutor a right not similarly available to the defense. Both alternatives also eliminate the discretion by the trial court and Court of Appeals, as needed, to grant or deny a stay of proceedings.

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

IX. Old Business

a. Medical Marijuana

The Mackinac Island conference policy report on medical marijuana has been submitted to the State Bar Public Policy Committee. Charles Marr offered to supply the SBM committee with related CLS materials and power point from the Mackinac Island conference. Although it was hoped that the SBM would adopt the recommendations from the M.I. policy conference it may instead by appropriate for the SBM to allow the CLS to advocate individually as a section.

X. New Business

XI. Good and Welfare

a. New Meeting Location

The consensus of the section was to continue to meet at the Lexington Hotel.

b. Cuba Exchange

The Chair announced that he has been in discussion for the CLS to travel to Cuba for a bar exchange.

XII. Adjourn

Motion by Stephen Taratuta, second by Jon Posner, to adjourn. Motion carried by acclamation. Meeting adjourned at 9:10 p.m.

Respectfully submitted:
David Hoort, Secretary
Criminal Law Section