

# News & Views



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## Events

### Council Meeting January 18, 2011 University Club - Lansing

The Council's monthly meetings will now convene at a new location - the University Club of Michigan State University. The University Club is located at 3435 Forest Road, on the southwest corner of campus, and adjacent to the James B. Henry Center for Executive Development, Candlewood Suites Hotel, and Forest Akers Golf Courses. From I-496/US-127, take the exit for Jolly Road. Social hour begins at 6:00 p.m., with dinner and the meeting starting at 6:30 p.m.

### 34th Mid-Winter Ski Conference President's Day Weekend: February 19-21, 2011 Shanty Creek Resort - Bellaire

**Timothy Baughman** opens the conference with a review of last year's high-impact court decisions. Saturday concludes with a welcome reception for all conference participants.

On Sunday, the conference continues with a morning presentation on the new "super drunk" law by **Patrick Barone**. Later that afternoon, **Steve Fishman** will teach us how to cross-examine the difficult police witness.

The program provides several long breaks for cross-country and downhill skiing and other winter activities, like snowshoeing, sledding, snowboarding and sleigh rides. The complete agenda is included on the next page of this newsletter.

The hotel offers ski and non-ski packages that include most meals (two breakfasts, one lunch, one dinner, and reception). The package prices are listed on the enclosed registration form. To reserve your room and register for the conference, fax the form directly to the hotel. Room rates are guaranteed only until January 19, 2011. You do **not** have to stay at the hotel to attend the conference.

## Mid-Winter Ski Conference Details

### Saturday, February 19, 2011:

12 pm – 6 pm	Unload luggage at Fireside Parlor	Lakeview Hotel - Lobby
5 pm – 10 pm	Ski at Schuss & Summit Mountain Slopes	Schuss & Summit Village
6 pm	Check In Begins	Lakeview Hotel - Front Desk
6 pm – 7:30 pm	Conference Session <b>Timothy Baughman: 2010 High Impact Cases</b>	Grand Ballroom – Parlor A
7:30 pm – 9 pm	Welcome Reception	Grand Ballroom – Parlor B

### Sunday, February 20, 2011:

8 am – 9 am	Breakfast on Own	Lakeview Restaurant
9 am – 10:30 am	Conference Session <b>Patrick Barone: “Super Drunk” Law</b>	Grand Ballroom – Parlor A
9 am – 4:30 pm	Ski at Summit Mountain Slopes	Summit Village
9 am – 10 pm	Ski at Schuss Mountain Slopes	Schuss Village
11 am – 2 pm	Lunch on Own	Lakeview Restaurant
4:30 pm – 6 pm	Conference Session <b>Steve Fishman: Cross-Examining the Difficult Police Witness</b>	Grand Ballroom – Parlor A
6 pm – 9 pm	Dinner on Own	Lakeview Restaurant

### Monday, February 21, 2011

8 am – 9 am	Breakfast on Own	Lakeview Restaurant
9 am – 9 pm	Ski at Schuss Mountain Slopes	Schuss Village
12 pm	Check Out	Lakeview Hotel - Front Desk

For more information on the program, please contact Steve Taratuta at [smtaratuta@gmail.com](mailto:smtaratuta@gmail.com) or 313-224-5770.

## Member Solicitation

The Criminal Law Section Council would like to solicit views and anecdotes from members regarding current policy and practice of providing the criminal history of witnesses in a criminal case. The Council is concerned that failing to provide this information violates the constitutional duty to provide evidence favorable to a criminal defendant and, specifically, to disclose information to impeach government witnesses. **Brady v Maryland**, 373 US 83 (1963); **Giglio v United States**, 405 US 150 (1972). The Council is considering submission of a proposed amendment to MCL 28.214, which currently prohibits disclosure of material from the Law Enforcement Information Network (LEIN), except in limited circumstances.

In **People v Elkhoja**, 467 Mich 916 (2003), the Michigan Supreme Court vacated the portion of a Court of Appeals' opinion holding that LEIN information was discoverable, citing but not adopting the dissenting opinion. The Court of Appeals' dissent argued both that MCL 28.214 prohibited disclosure of LEIN information to defense counsel, and that the prosecutor could avoid disclosing exculpatory information simply by not looking for it, even in the face of a specific request. Although this analysis is not law in Michigan, the Council is concerned that it has established a practice whereby the prosecution does not provide the material to the defense.

Prior to submission of any amendment to MCL 28.214, which would require provision of relevant and exculpatory criminal history information to defense counsel in a criminal case, the Council requests comments and opinions from membership. Please submit all comments, opinions and anecdotes about this practice to [criminallawsection@gmail.com](mailto:criminallawsection@gmail.com).

## Proposed Amendment to Court Rule

Comments on the following proposed amendment are due by April 1, 2011:

**Rule 6.005** (Right to Assistance of Lawyer; Advice; Appointment for Indigents; Waiver; Joint Representation; Grand Jury Proceedings):

The proposed amendment to the rule would revise MCR 6.005(H) to clarify that appointed defense counsel in a criminal proceeding either must file a substantive response to a prosecutor's application for interlocutory appeal or notify the Court of Appeals that the lawyer intends not to submit a pleading. (ADM File No. 2008-28; December 21, 2010).

To send your comment electronically, please submit it to: [MSC\\_Clerk@courts.mi.gov](mailto:MSC_Clerk@courts.mi.gov). To send your comment via mail, please write to:

Michigan Supreme Court  
Clerk's Office  
P.O. Box 30052  
Lansing, MI 48909

When submitting a comment, please reference the relevant administrative file number.

## Michigan Public Defense Update

*Editor's Note: The Criminal Law Section has long advocated for reform of our system for appointing counsel to indigent defendants.*

The Michigan Supreme Court once again reversed in **Duncan v Michigan**, a case that challenged the state's indigent defense system, thereby reinstating its earlier unanimous decision that the lawsuit could proceed.

In their complaint, the plaintiffs alleged that the state failed to fulfill its constitutional obligation to provide adequate legal assistance to criminal defendants who could not afford their own attorney. The state unsuccessfully sought summary dismissal in circuit court, a result that was affirmed by a divided Court of Appeals (Nos. 278652; 27885; 278860; June 11, 2009). The Michigan Supreme Court, in its original order, unanimously agreed that the class-action lawsuit could go forward (Nos. 139345-7; April 30, 2010). In a surprising reversal, the motion for reconsideration was granted and the previous order vacated. The Michigan Supreme Court, reversing the judgment of the Court of Appeals, ruled that the defendants were entitled to summary disposition because the plaintiffs' claims were not justiciable and remanded for entry of summary disposition in favor of the defendants. Justice Markman filed a concurrence joined by Justices Corrigan and Young. Chief Justice Kelly dissented, joined by Justices Cavanagh and Hathaway (Nos. 139345-7; July 16, 2010).

On November 30, 2010, on a motion for reconsideration, the Michigan Supreme Court vacated the order and reinstated its original order that the class-action lawsuit could go forward. The court noted that reconsideration of the court's original order was improperly granted. Justice Davis filed a concurring opinion, which was joined by Justice Hathaway. Justice Markman dissented, joined by Justices Corrigan and Young. Justice Corrigan objected to the release of the order without her dissenting statement.

On December 22, 2010, an order was issued that the court's previous "order of November 30, 2010, will be published with the following statements." In the order, Chief Justice Kelly concurred, and Justices Corrigan and Markman separately dissented.

On December 29, 2010, the Michigan Supreme Court denied the state's motion for reconsideration, noting that it did not appear that the previous order was entered erroneously. Justice Corrigan dissented. Justice Markman filed a separate dissent, which was joined by Justice Young. The court also denied the state's motion to deem as a final order statements previously released by Chief Justice Kelly and Justices Corrigan and Markman. The court noted that the motion was untimely, and the justices' statements did not constitute an order and did not modify the substance of the previous order. Justice Markman dissented, joined by Justice Young.

## Legislative Update

In the waning days of her term, Governor Jennifer Granholm signed into law several bills affecting criminal cases. Following are highlights of the recently-enacted legislation:

**Controlled Substances:\*** The signing into law of HB 4919 -- designed to cover the prosecutions in process when the mandatory minimum penalties were eliminated for major controlled substance offenses and make those offenders eligible for parole after certain conditions are satisfied -- erased the

recently-enacted penalties for possession of synthetic marihuana under HB 6226. See 2010 PA 352 (eff. December 22, 2010); 2010 PA 169 (eff. October 1, 2010).

The oversight does not mean that it is now legal to possess a marijuana-like drug such as “spice” and K2. Under Public Act 171 (HB 6038), the Public Health Code was amended to add synthetic cannabinoids and other substances to Schedule I. Default penalties for controlled substances are in place unless there are specific exceptions created for specific drugs. HB 6226 created such an exception. The Senate Substitute (S-2) for HB 4919, however, did not include the exception.

The penalties for use are in a section that was amended only by 2010 PA 169 (HB 6226), and not by 2010 PA 352 (HB 4919). The penalties for use are not affected and, thus, remain the same - a maximum of ninety days in jail and a \$100 fine. Only the penalties for possession were affected and, ironically, the the default penalties are higher. The default penalties make possession a felony punishable by a two-year maximum. Under 2010 PA 169 (HB 6226), possession was only a misdemeanor punishable by a one-year maximum.

Effective December 22, 2010. MCL 333.7401; MCL 333.7403; MCL 333.7413.

**Crime Victim Assessment:** Three public acts recently signed into law - 2010 PA 280 (SB 1003), 2010 PA 281 (HB 5661) and 2010 PA 282 (HB 5667) - affect the crime victim assessment and the Crime Victim Rights Fund. Under the new legislation, the crime victim assessment is increased:

Adults, including juvenile waivers and designated cases (one assessment per case):

<b>Offense Type</b>	<b>Previous Crime Assessment</b>	<b>New Crime Assessment</b>
Felony	\$ 60.00	\$ 130.00
Felony Reduced to Misdemeanor	\$ 60.00	\$ 130.00
Serious or Specified Misdemeanor	\$ 50.00	\$ 75.00
Serious or Specified Misdemeanor Reduced to Misdemeanor	\$ 50.00	\$ 75.00

Juvenile delinquency cases (one assessment per dispositional order):

<b>Offense Type</b>	<b>Previous Crime Assessment</b>	<b>New Crime Assessment</b>
Felony	\$ 20.00	\$ 25.00
Felony Reduced to Misdemeanor	\$ 20.00	\$ 25.00
Serious or Specified Misdemeanor	\$ 20.00	\$ 25.00
Serious or Specified Misdemeanor Reduced to Misdemeanor	\$ 20.00	\$ 25.00

The assessment is based on the most serious offense charged in the original complaint or juvenile petition and is assessed at disposition, including time of deferral or delay, as well as sentencing.

Effective December 16, 2010. MCL 18.361; MCL 780.904; MCL 780.905.

**Pre-Sentence Investigation Reports:** The Michigan Supreme Court previously adopted various amendments of the court rules that required prosecutors and defendants to have access to the pre-sentence investigation report at least two days before sentencing and allow adjournment if the parties did not receive the report in that time, to ensure the confidentiality of the report, and to limit the victim or witness information that may be included in a report. Following entry of the order and shortly after its effective date, the Michigan Supreme Court considered the matter further, specifically with regard to mandatory confidentiality provisions. The provisions not only represented a significant change in current practice, but also underscored a fundamental tension between the explicit provisions of MCL 791.229, which describe who may have a copy of the report and for what purposes, and subsequent caselaw, which expanded access of pre-sentence investigation reports in certain circumstances. The Court invited interested associations that opposed the language as adopted to approach the legislature to resolve the conflict. The Court noted that, if legislation on this subject was not enacted and effective by the end of the last calendar year, an amendment to allow prosecutors, defense counsel, and defendants to retain a copy of the pre-sentence investigation report would automatically go into effect on January 1, 2011. (ADM File No. 2008-39).

The legislature responded with a set of bills that were recently signed into law by former Governor Jennifer Granholm. Under Public Act 247 (HB 6389), the Code of Criminal Procedure was amended to prohibit a pre-sentence investigation report from including a victim's or witness's address or telephone number, except under certain circumstances, and to require a copy of a pre-sentence investigation report to be given to the prosecution and the defendant or defense attorney. Specifically, a pre-sentence investigation report cannot include any address or telephone number for the home, workplace, school, or place of worship of any victim or witness, or a family member of any victim or witness, unless an address were used to identify the place of the crime or to impose conditions of release from custody that were necessary for the protection of a named individual. Upon request, any other address or telephone number that would reveal the location of a victim or witness, or a family member of a victim or witness, would be exempt from disclosure.

The new legislation also requires that a copy of the pre-sentence report be given to the prosecutor and the defendant's attorney, or the defendant if he or she was not represented by an attorney, at least two business days before sentencing. The defendant, however, may waive that period. The prosecutor and the defendant's attorney, or the unrepresented defendant, has the right to retain a copy of the report.

HB 6389 was tie-barred to SB 1491. Under Public Act 248 (SB 1491), the Code of Corrections was amended to specify that a provision making probation officers' records and reports confidential would apply, except as otherwise provided by law.

Effective December 14, 2010. MCL 771.14; MCL 791.229.

*\*Special thanks to Bruce A. Timmons for sharing his knowledge about HB 4919, from which the update on the new controlled substance legislation was derived. Mr. Timmons is Legal Counsel for the House Republican Policy Office and is the Criminal Law Section's Legislative Liaison.*

## Recent State Cases\*

The Michigan Supreme Court recently granted leave to appeal in two criminal cases, leaving open the possibility of defenses previously unavailable to criminal defendants:

**People v Harris**, No. 141513 (November 30, 2010): The Michigan Supreme Court granted leave to appeal to address the availability, in a felony non-support matter, of the defense of inability to pay. The parties were requested to address the following issues: (1) whether the prior decision of **People v Adams**, 262 Mich App 89 (2004) - holding that inability to pay is not a defense to the crime of felony non-support under MCL 750.165 - is an incorrect reading of the statute or unconstitutional; (2) whether the trial court abused its discretion when it denied the defendant's post-sentencing motion to withdraw his plea; and (3) whether the trial court erred when it adopted the child support arrearage amount that had been determined by family court as the restitution to be imposed in this criminal case, or whether the defendant waived that issue.

**People v Moreno**, No. 141837 (December 29, 2010): The Michigan Supreme Court granted leave to appeal to address a defendant's right to resist an illegal arrest in his or her home and the availability of self defense. The parties were requested to address the following issues: (1) whether a person present in his or her own home can lawfully resist a police officer who unlawfully and forcibly enters the home, without violating MCL 750.81d; (2) if not, whether, so interpreted, MCL 750.81d is unconstitutional; and (3) whether a defendant prosecuted under MCL 750.81d for resisting a police officer who unlawfully and forcibly enters the defendant's home may claim self-defense.

The Michigan Court of Appeals recently released the following unpublished decisions:

**People v Amine**, No. 294345 (December 21, 2010): In an unpublished decision, the Michigan Court of Appeals affirmed the defendant's jury trial conviction for OWI3d, denying his argument that the trial court improperly admitted other acts evidence of a prior operating while intoxicated arrest under MRE 404(b). In the prior bad act and existing charge, Defendant Amine was intoxicated and sitting in the driver's seat of a car when the police arrived. Both times he denied that he had been driving the car, stating that the driver was someone close to him, and that person confirmed his explanation. Though there were slight differences, defendant's behavior in both incidents otherwise was substantially similar. He reacted to each situation - which was functionally the same because he was faced with the possibility of an arrest for OWI - with the same defense. From the incidents' similarities, the jury was able to infer that his present defense was another manifestation of the common pattern defendant employs when discovered drunk behind the wheel of a car. Such an inference does not rely on character evidence and, thus, the trial court did not abuse its discretion in admitting the evidence under MRE 404(b). Under the three step test in **People v Vandervliet**, 444 Mich 52, 74 (1993), the evidence must be relevant to an issue other than propensity, relevant to a fact at issue at trial under MRE 402, and it must survive a balancing process determining if the danger of undue prejudice substantially outweighs the evidence's probative value under MRE 403. If, however, the only relevance is to character or the defendant's propensity to commit the crime, the evidence must be excluded. In addition, "the trial court, upon request, may provide a limiting instruction under Rule 105." The Court of Appeals further, weighing in favor of admitting such testimony, reiterated that "it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place."

**People v Owens**, No. 288074 (November 2, 2010): Defendant was charged with criminal sexual conduct. The prosecutor argued victim credibility based on the 'forensic interview' of the victim. During an evidentiary hearing on the defendant's motion alleging ineffective assistance of counsel,

defense counsel stated that he did not do any research on sexual abusers' behavior patterns or consult an expert because he believed that "it was obvious that this [offense] wouldn't happen . . . under these circumstances." The court concluded that had defense counsel engaged in proper investigation, he would have learned that adults who sexually abuse children often engage in specific acts to "groom" their victims. Since there was no evidence that defendant ever engaged in grooming behavior with the alleged victim or any other child, defense counsel could have used an expert's testimony "to provide context for the allegations and to highlight the improbable nature" of the victim's description of events. The Michigan Court of Appeals, in an unpublished opinion, held that reasonable trial counsel presented with these facts would have investigated the limitations on the forensic interview process and would have called an expert to testify about those limits as well as about the common behaviors of adults who sexually abuse children. For that reason, defendant's trial counsel's decision not to investigate and call an expert in this area fell below an objective standard of reasonableness under prevailing professional norms. Further, because this case involved a close credibility contest, the court could not conclude that the error was harmless.

*\*Special thanks to Judge David A. Hoort for providing the discussion of the recent cases. Judge Hoort is a former district court judge and current circuit court judge in Ionia and Montcalm Counties and is the newly-selected Treasurer of the Criminal Law Section.*