

News & Views



2010-2011 OFFICERS

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Events

Council Meeting October 19, 2010 Lexington Hotel - Lansing

It's back to business! The Council's first monthly meeting of the new term will be held in the Hemingway Room of Christie's Bistro, the hotel restaurant. The hotel is located at 925 South Creyts Road, immediately off I-496. Social hour begins at 6:00 p.m., with dinner and the meeting starting at 6:30 p.m.

The tentative meeting schedule for the term is:

November 16
December 21
January 18, 2011
February 15
March 15
April 19
May 17
June 21

Please check for date confirmations in future newsletters and on our website. Council members will also receive email notices.

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

Save the date! Unlike previous years, next year's conference will begin on **Saturday**. Please join us for fun in the snow - and a little legal business - over the President's Day Weekend. The annual conference will again be held at the recently-renovated Shanty Creek Resort. This popular event offers several long breaks for skiing and other winter activities, such as snowshoeing and sleigh rides. The conference is still in the planning stages, but more information will be included in future newsletters, emailed to section members, and posted on our website: <http://www.michbar.org/criminal/news.cfm>.

Statement from the Chair

Each year, a different council member takes over the responsibilities as the Chair of the Criminal Law Section. By custom, the person has first served as Treasurer, Secretary, and Chair-Elect. The Criminal Law Section is made up of a mix of judges, prosecutors, defense attorneys, and others with an interest in criminal law. The Chair position alternates so that persons from one side, such as defense attorneys or prosecutors, are not appointed in successive years. Last year, Wayne County Assistant Prosecuting Attorney Opolla Brown was Chair. This year, I have the privilege of serving in that capacity. I have been a trial-level public defender for over twenty-five years for Bay County, and currently am the representative for the Criminal Defense Attorneys of Michigan. I look forward to serving as Chair.

The Criminal Law Section has provided some excellent services and programs to our members in the past, such as our newsletter, our annual winter seminar at Shanty Creek, and our policy conference on Mackinac Island. The Criminal Law Section will continue to provide these services, and is looking for new ways to serve you, our members. I would welcome any suggestions from our membership that would help us improve our service to you.

Kenneth M. Malkin
Criminal Law Section Chair

Annual Meeting & Program

During the Annual Meeting in Grand Rapids, outgoing Chair Opolla Brown passed the gavel to incoming Chair Kenneth M. Malkin. Stephen M. Taratuta and David E. Gilbert moved into their new positions, Chair-Elect and Secretary, respectively. The Honorable David A. Hoort was selected as Treasurer.

In addition to the induction of new officers, five new members were elected or re-elected to a three-year term on the Council. Kiana E. Franulic and Ward F. McDonough, Jr. were elected to their first term on the Council. Following a short hiatus, Matthew P. Smith was elected back onto the Council. Stephen M. Taratuta and Barbara R. Levine were re-elected to their second term on the Council. The biographies for the officers and new council members are on the next page of this newsletter.

The Criminal Law Section's Annual Program - Medical Marihuana -- Everything You Wanted to Know But Were Afraid to Ask -- began immediately after the business meeting. The panel program was attended by more than sixty people, including prosecutors, defense attorneys, retired and sitting judges, probation agents and law professors. The two-hour program began with presentations by our speakers:

Matthew Abel, Founding Partner, Cannabis Counsel, PLC

Celeste Clarkson, Compliance Section Manager, Michigan Department of Community Health

Kenneth Stecker, Traffic Safety Resource Prosecutor, Prosecuting Attorneys Association of Michigan

Following presentations, the floor was opened for questions and comments from the audience. The controversial new law made for a lively discussion.

Materials from the program will soon be posted to our website: <http://www.michbar.org/criminal/publications.cfm>.

Meet the Council

Congratulations to the following elected individuals who will be serving you this term:

Kenneth M. Malkin, Chair: Kenneth Malkin has been an attorney for twenty-five years with the Bay County Office of Criminal Defense. Mr. Malkin has served the section as the representative from the Criminal Defense Attorneys of Michigan (CDAM). For twelve years he served on the Bay City School Board, and is currently a Monitor Township Trustee.

Stephen M. Taratuta, Chair-Elect: Stephen Taratuta has been an assistant prosecutor for six years in Wayne County. Mr. Taratuta is an elected member of the Representative Assembly, is Chair of the District H Character and Fitness Committee, and sits on the Criminal Jury Instructions Committee. He is also on the Executive Board of the Wayne County Government Bar Association.

David E. Gilbert, Secretary: David Gilbert is currently a sole practitioner, dedicating approximately half of his practice to criminal law. Mr. Gilbert is a former Assistant Prosecuting Attorney, and Chief Assistant Prosecuting Attorney. He has several years' experience handling court-appointed contracts, and is an adjunct professor of Criminal Justice at Kellogg Community College.

Honorable David A. Hoort, Treasurer: Judge David Hoort is a former district court judge and current circuit court judge in Ionia and Montcalm Counties. Judge Hoort established a state-acclaimed day reporting program for alcohol offenders, and initiated the state's first mental health court for felony probationers. He is the current Co-Chair of the Criminal Jurisprudence and Practice Committee.

The following individuals were elected to a three-year term on the Council:

Kiana E. Franulic: Kiana Franulic is in private practice, and is also of counsel to Conti-Legal, PLLC. Ms. Franulic co-authored the "Law School for Legislators: Employment Law Section of the State Bar" Seminar, and is currently working on a chapter for the ABA's Guide to Collateral Consequences for Juvenile Offenders. She co-chairs the Washtenaw County Bar Association's Criminal Law Section.

Barbara R. Levine: Barbara Levine is the Executive Director of the Citizens Alliance on Prisons and Public Spending (CAPPS). Ms. Levine began her legal career thirty-five years ago as an attorney for the State Appellate Defender Office. She is a past chair and long-standing member of the Prisons and Corrections Section Council, and served on the State Bar Character and Fitness Committee.

Ward F. McDonough, Jr.: Ward McDonough has been a member of the bar for forty-one years. For almost two decades he practiced in Detroit, and spent several years with the Defender's Office. Mr. McDonough was the Executive Director of the Legal Aid Bureau of Southwest Michigan for twelve years. He currently has a general law practice in criminal defense, family law and estate planning.

Matthew P. Smith: Matthew Smith has been in practice for over twenty years and has worked as both a prosecutor and defense attorney. He currently has his own practice. More than fifteen years ago, he joined the Criminal Law Section, and is a former Chair. Mr. Smith has taught at a number of colleges and universities, and has taught some or all of the Grand Valley Police Academy.

Stephen M. Taratuta: Mr. Taratuta's biography is contained above.

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 Campaign for Justice provided us with the following:

Cultural Competence & Effective Public Defense Representation: A FREE Mini-Training Session and Dialogue

Friday, October 29, 2010

9-11 a.m.

Cooley Law School - Room 513
111 Commerce Avenue SW, Grand Rapids, MI 49503

&

3:30-5:30 p.m.

C.A.Y.M.C. Auditorium
2 Woodward Avenue, Detroit, MI 48226

Trainers:

Catherine Beane, Beane Consulting
Edwin Burnette, National Legal Aid & Defender Association

Please RSVP to info@mijjustice.org, (517) 372-3050 or (313) 965-3320.

- What does cultural competence have to do with public defense reform?
- How does a person's culture impact what they tell you as the defense attorney, how they communicate, or what defenses can be raised in court?
- How do different communities perceive the criminal justice system?

The American Bar Association's Criminal Justice Section's model curriculum - "Building Community Trust: Improving Cross-Cultural Communication in the Criminal Justice System" - will be introduced during the training. Learn about cultural competence, engage in dialogue about what it means for reform, and provide feedback on the training. This event is free of charge, and food will be provided.

The events are hosted by the Campaign for Justice, State Bar of Michigan, Criminal Defense Attorneys of Michigan, State Appellate Defender Office, Wayne County Criminal Defense Bar Association, Wolverine Bar Association, Michigan Asian Pacific American Bar Association, and National Conference of Black Lawyers - Detroit Chapter. The Detroit event will take place directly following CAP.

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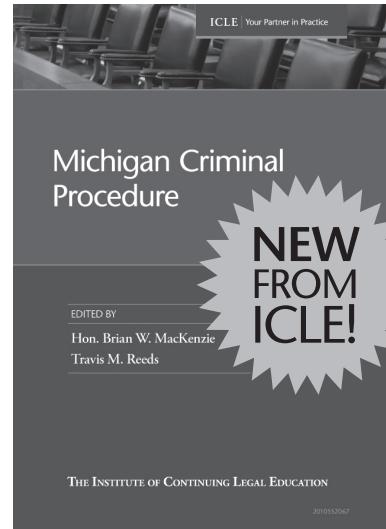
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Recent Amendments to Court Rules

The following amendment was recently adopted by the Michigan Supreme Court:

Rule 6.201:

The amendment specifically incorporates electronically recorded statements into the materials that must be provided to other parties in a criminal proceeding, although the judge may specify the conditions for discovery as allowed under MCR 2.302(B)(6) (General Rules Governing Discovery - Limitation of Discovery of Electronic Materials). Effective January 1, 2011.

Legislative Update

Controlled Substances: It is now a misdemeanor to knowingly use or possess synthetic marijuana commonly known as K2 and Spice. Governor Jennifer Granholm recently signed into law a pair of bills concerning the substances. Under Public Act 171 (HB 6038), the Public Health Code was amended to add several synthetic cannabinoids and other substances to Schedule I. Other Schedule I drugs include marijuana, heroin, and Ecstasy. The law also included Cathine, also known as D-Norpseudoephedrine, in Schedule 4.

Under Public Act 169 (HB 6226), the Public Health Code was amended to extend the penalties for possession and use of marijuana to the possession and use of the synthetic substances listed in HB 6038. Simple possession of a synthetic cannabinoid is subject to a maximum penalty of one year in jail and a \$2,000 fine. Use is subject to a maximum penalty of ninety days in jail and a \$100 fine.

The law also prohibits the possession and use of a synthetic Ecstasy, N-Benzylpiperazine, or BZP. Knowingly or intentionally possessing the synthetic drug is a felony, punishable by up to ten years' imprisonment and a maximum fine of \$15,000. Using the synthetic drug is a misdemeanor, punishable by up to one year imprisonment and a maximum fine of \$2,000.

The legislation passed both chambers by an overwhelming bipartisan majority, with unanimous support in the Senate, and only one opposing vote in the House. Michigan is one of many states to recently ban the synthetic drugs.

Effective October 1, 2010. MCL 333.7212; MCL 333.7218; MCL 333.7403; MCL 333.7404.

Domestic Violence: Tenants who face imminent danger of stalking, domestic violence, or sexual assault may now break their lease if certain conditions are met. Governor Granholm recently signed into law SB 0185, which had passed both chambers with unanimous support. Public Act 199 amended the Landlord-Tenant Act, allowing victims of domestic violence, stalking, or sexual assault to be released from their rental obligations upon submission of written notice of their intent to seek a release and written documentation that they had a reasonable apprehension of such danger.

The tenant's written notice must be made by certified mail. The written documentation requirement is satisfied by the tenant's submission of one or more of the following:

- A court-issued valid personal protection order or foreign protection order, or a court order removing an abusive person from a home, that remained in effect on the date it was submitted.
- A valid probation order, conditional release order, or parole order that was still in effect on the date of submittal, if the order indicated that the person subject

to it was subject to conditions reasonably necessary to protect the tenant or his or her child, including a condition that the person was to have no contact with the tenant or child.

- A police report that resulted in the filing of charges not more than fourteen days before the written notice and documentation were submitted.
- A police report that resulted in the filing of charges more than fourteen days before the submittal of the notice and documentation demonstrating a verifiable threat of present danger from domestic violence, sexual assault, or stalking.
- A report verified by a qualified third party that was substantially in the form set forth in SB 0185.

Upon providing notice with supporting documentation, the tenant would be released from the rent payment obligation on the first day of the second month that rent is due. However, the release is not effective unless the tenant actually vacates.

The release would not apply to prepaid amounts and would not prevent the landlord from withholding security deposits. In addition, other tenants who were parties to a rental agreement would remain subject to that agreement. The new law applies only to leases entered into, renewed, or renegotiated after the effective date of the new law.

Effective October 5, 2010. MCL 554.601b.

United States Supreme Court - Cert Granted

Alford v Greene, No. 09-1478* (October 12, 2010): Review was granted to determine whether the Fourth Amendment requires a warrant, a court order, parental consent, or exigent circumstances before law enforcement and child welfare officials may conduct a temporary seizure and interview at a public school of a child whom they reasonably suspect was being sexually abused.

Bond v United States, No. 09-1227 (October 12, 2010): Review was granted to determine whether a criminal defendant convicted under a federal statute has standing to challenge her conviction on grounds that, as applied to her, the statute is beyond the federal government's enumerated powers and inconsistent with the Tenth Amendment.

Bullcoming v New Mexico, No. 09-10876 (September 28, 2010): Review was granted to determine whether the prosecution is constitutionally-permitted to introduce testimonial statements of a non-testifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements.

Camreta v Greene, No. 09-1454* (October 12, 2010): Review was granted to determine whether: (1) the traditional warrant and warrant exception requirements that apply to seizures of suspected criminals should apply to an interview of the child in light of reports of child abuse, or whether instead a balancing standard should apply; and, (2) the Ninth Circuit's constitutional ruling is reviewable notwithstanding that it ruled in the petitioner's favor on qualified immunity grounds.

DePierre v United States, No. 09-1533 (October 12, 2010): Review was granted to determine whether the term "cocaine base" encompasses every form of cocaine that is classified chemically as a base, or whether the term "cocaine base" is limited to "crack" cocaine.

Freeman v United States, No. 09-10245 (September 28, 2010): Review was granted to determine whether a defendant is ineligible for a sentence reduction under 18 USC 3582(c)(2), which allows a district court to reduce a term of imprisonment after it has been imposed if the defendant was sentenced based on a sentencing range that the U.S. Sentencing Commission subsequently lowered, because the district court accepted a plea agreement pursuant to Rule 11(c)(1)(C), which binds the district court as to sentence once it accepts the plea.

Kentucky v King, No. 09-1272 (September 28, 2010): Review was granted to determine under what circumstances can lawful police action impermissibly “create” exigent circumstances that preclude warrantless entry.

Sykes v United States, No. 09-11311 (September 28, 2010): Review was granted to determine whether using a vehicle while knowingly or intentionally fleeing from a law enforcement officer after being ordered to stop constitutes a “violent felony” under the Armed Career Criminal Act (18 USC 924(e)).

United States v Tinklenberg, No. 09-1498 (September 28, 2010): Review was granted to determine whether the time between the filing of a pretrial motion and its disposition is automatically excluded from the deadline for commencing trial under the Speedy Trial Act of 1974, or is instead excluded only if the motion actually causes a postponement, or the expectation of a postponement, of the trial.

*These cases were consolidated.