

# Criminal Law



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## Oregon State Bar Criminal Law Section's Executive Committee

Timothy A. Sylwester, *Chair*  
Cynthia L. Easterday, *Secretary*  
Kenneth C. Bauman, *Treasurer*  
Jesse Wm. Barton, *Past Chair*  
Walter M. Beglau, *Member*  
Whitney Patrick Boise, *Member*  
Timothy M. Bowman, *Member*  
Angela Therese Lee, *Member*  
Daniel Ousley, *Member*  
Lindsay R. Partridge, *Member*  
Gregory B. Scholl, *Member*  
John J. Tyner, *BOG Contact*  
Kateri Walsh, *Staff Liaison*

## Coming Soon, A Criminal Law Section Web Page

by Jesse Wm. Barton, Past Chairman

With the help of the bar's highly competent design center staff—in particular Lara Plake and Anne Lettin—the Criminal Law Section soon will be launching a web page that should be of particular use to its members. The page will be completed by April 21, 2001.

Actually, the page is presently available (see [www.osbcrimlaw.homestead.com](http://www.osbcrimlaw.homestead.com)). But because it is still under construction, it is incomplete and contains some outdated information. When it is finally complete, it will include the following features:

- Basic information about the Section, including the current Executive Committee roster and the means for contacting committee members (including by broadcast e-mails to the entire committee).
- Means for broadcasting e-mails to all on-line Section members.
- Downloadable forms for criminal practitioners, including plea petition and waiver-of-counsel forms (and also possibly a judgment of conviction and sentence form).
- Information on the Section's upcoming CLEs.
- The text of the most recent annual report on the Section.
- Copies of the Section's past newsletters (including the one you are reading now).

For further information or suggestions on the web page, please contact Jesse Barton at [jbarton@opd.state.or.us](mailto:jbarton@opd.state.or.us), or at (503) 378-3349 ext. 227.

The screenshot shows a website interface for the Criminal Law Section of the Oregon State Bar. On the left is a vertical navigation menu with buttons for Home, Forum, Section CLEs, Email, Annual Report, Newsletter, Links, Special Section Projects, and OSB Web Site. The main content area features the Oregon State Bar logo and the title 'Criminal Law Section'. Below this, there is a 'Section Information' section with the following details: Members: 552, Dues: \$20. A 'Function and Makeup' section describes the section's composition and goals. At the bottom, there is a 'Contact Information for Executive Committee Members' section listing Timothy A. Sylwester as Chairperson at the DOJ Appellate Division, 1100 Court St. NE.

Here is the way the opening page will appear in your browser.

## Appellate Update

by Timothy A. Sylvester

At the CLE on Saturday, April 21, Jesse Barton and I will spend two hours discussing the most interesting and important cases that have been decided over the past year by the Oregon and federal appellate courts. The purpose of this article is to advise you of some recent "sleeper" decisions that you might have overlooked.

In **State v. Spring**, 172 Or App 508 (2001), the defendant was convicted on separate charges of rape and sexual abuse arising out of a single incident, and he contended on appeal that the sentencing court erred by denying his request to merge those convictions. In affirming the judgment, the Court of Appeals disavowed its prior decision in *State v. Dilts*, 28 Or App 393 (1977), and held that, as those offenses currently are defined, sexual abuse is not a lesser-included offense to rape and that, consequently, those convictions do not merge under ORS 161.067(1). *Note:* The corollary to that holding is that if the accusatory instrument charges only rape (or sodomy), sexual abuse is not available as a lesser-included offense.

In a split *en banc* decision, the Court of Appeals held in **State v. Durbin**, 172 Or App 515 (2001), that a police officer is not obliged to afford a DUII arrestee a private communication with his lawyer unless the arrestee or his lawyer specifically so requests. In that case, the officer, in order to comply with the 15-minute observation requirement, stayed within earshot of the defendant while he talked on the telephone with his lawyer. The Court of Appeals agreed with the trial court that the officer did not violate the defendant's constitutional right to consult with a lawyer before submitting to the breath test.

In **Petersen v. Palmateer**, 172 Or App 537 (2001), petitioner was convicted of aggravated murder based on his plea of guilty. He filed a petition for post-conviction relief alleging that his trial counsel failed to provide constitutionally adequate assistance of counsel in a variety of respects. At trial, the state called his counsel as a witness to question him regarding petitioner's claims. Counsel refused to answer, claiming attorney/client privilege, and petitioner refused to waive the privilege. The post-conviction court overruled the objection, and counsel eventually executed an affidavit responding to petitioner's allegations. On appeal, petitioner contended that the post-conviction court erred when it overruled his objection based on the attorney/client privilege. The Court of Appeals affirmed based on OEC 503(4)(c), concluding that petitioner effectively waived the attorney/client privilege as to those claims of inadequate assistance that he alleged in his petition.

In **State v. Weber**, 172 Or App 704 (2001), the defendant was convicted for speeding based on the photo-radar statute, ORS 810.438 *et seq.* The Court of Appeals affirmed, rejecting defendant's various challenges to the statute. In addition, the court rejected defendant's "hearsay" and "chain of custody" objections to admission of the photographic evidence. Regarding the hearsay objection, the court held that a "statement" generated by a machine, rather than a person, is not "hearsay" subject to OEC 801. The court also held that it was not necessary for the state to establish an unbroken chain of custody for the film and resulting print, which were processed by a private lab, because defendant provided no basis to believe that the film had been tampered with, altered, or substituted during processing.

## CLE: Contemporary Issues in Criminal Justice

Saturday, April 21, 2001

The Criminal Law Section will be providing an all-day CLE next Saturday and present extremely knowledgeable speakers on a wide variety of topics related to criminal law. The agenda includes: **Appellate Update** with Timothy Sylvester and Jesse Barton (2 hours); **Immigration Consequences of Criminal Convictions** with Linda Friedman Ramirez and Dick Ginsburg (1 hour); **2001 Legislative Update** with Dale Penn and Ingrid Swenson (1 hour over lunch); **Expunction and Setting Aside of Criminal Convictions** with Steven A. Todd (30 minutes); **Preserving Claims for Federal Habeas Corpus** with Wendy Willis (1 hour); and **Legal Ethics** with Lawrence Matasar, Joshua Marquis, and Martha Hicks (2 hours). The CLE will be at the DoubleTree Hotel at 1000 N.E. Multnomah in Portland, from 9 a.m. to 5 p.m. The cost, including lunch, is \$160 for section members, \$100 for new lawyers (and paralegals and law students), and \$185 for all others. If you have not already registered, please call the CLE Registration and Order Desk at: (503) 684-7413, or call toll-free in Oregon at: 1-800-452-8260, ext. 413.

One of the topics that will be addressed at the CLE is whether the section's executive board should continue its current effort to obtain a procedure by which frivolous bar complaints may be either expunged or labeled as such. We have drafted a member initiative petition and will be asking those in attendance to vote on whether the petition should be circulated. If you are not able to attend the CLE but wish to voice your opinion on the proposal, please contact one of the members of the executive board as soon as possible to have your vote counted. That draft petition is set forth on the following page:

*Continued on Page 3*

Continued from Page 2

**Member Initiative Petition**

**REQUIRES THE OREGON STATE BAR ASSOCIATION TO EXPUNGE FRIVOLOUS COMPLAINTS FROM THE ATTORNEY'S DISCIPLINARY RECORD; PRECLUDES PUBLIC DISCLOSURE OF FRIVOLOUS COMPLAINTS; DEFINES "FRIVOLOUS COMPLAINTS"**

It is the goal of the Criminal Law Section, through its executive committee, to require the Oregon State Bar to expunge frivolous complaints from the disciplinary records of its members. We also would require the Bar to seek legislation that would exempt frivolous complaints from public disclosure. A "frivolous complaint" is defined as "a complaint made to the Oregon State Bar that the disciplinary counsel determines is without merit and, therefore, does not pass on to the Local Professional Responsibility Committee or the State Professional Responsibility Board for further consideration."

**SUMMARY:** Current rules and policies of the Oregon State Bar Association require that any complaint registered against a member shall be made part of the member's permanent record. There are no exceptions to this rule, even for complaints that are frivolous. A "frivolous complaint" is defined as "a complaint made to the Oregon State Bar that the disciplinary counsel determines is without merit and, therefore, does not pass on to the Local Professional Responsibility Committee or the State Professional Responsibility Board for further consideration." Although the complaint is frivolous and no action is taken, it remains indefinitely in the lawyer's disciplinary record. If an inquiry is made regarding how many complaints have been registered against a lawyer, the number of complaints provided includes frivolous complaints, and no distinction is made between frivolous and non-frivolous complaints. This initiative petition would require the Bar to expunge all frivolous complaints from the records of all members and would preclude public disclosure of complaints that have been determined to be frivolous.

*Note: The Executive Committee of the Criminal Law Section would like to pursue this initiative petition, but is very interested in taking into consideration the thoughts and opinions of section members. Please indicate below whether you would like the committee to continue to pursue this petition to require the Bar to expunge frivolous complaints.*

Yes: \_\_\_ No: \_\_\_

Comments: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

For the past two years, the Oregon State Bar has been developing a strategic approach to working with the statewide media. The idea is to create a true partnership with the media that will ultimately enhance the depth and quality of reporting on legal issues, increase the volume of trend and issue-based reporting, and help educate the public about the law, the legal profession and the justice system.

A major new element to this program is underway, and to be successful, will require the help of as many criminal lawyers as possible. This year, the bar will launch a new Media Web Site, housed on the larger bar web site. It is targeted specifically for journalists, and will include exactly the kinds of materials journalists are asking for. The long-term goal is to have this help desk become the number one "go to" spot for reporters as they research their stories, seek analysis and background, and look for relevant materials.

The site has a long list of materials it will house. But for criminal lawyers, I'm most interested in inviting your help on the White Papers section. This section will house White Papers on specific points of law, which journalists can consult as they craft their stories.

For instance, if a reporter is covering a case where a juvenile may be tried as an adult, they could look up the White Paper on that topic. They would find a 500-word explanation, written in journalistic style, about Oregon law regarding trying juveniles as adults. And if we can achieve it in a balanced manner, perhaps some minimal analysis on strategic considerations for the defense and the prosecution. The information could add depth to the reporter's story as background material. In some cases, the White Papers could even be cut and pasted as an educational sidebar to a story.

Here's the challenge: I have a system in place for drafting these pieces, but I will need each White Paper reviewed by both a prosecutor and defense attorney. So as not to overwhelm any volunteers, I'd like to have lots of editors on board for reviews. My hope is that your time input would be extremely small: just enough time to occasionally review and edit a 500 word White Paper.

The Executive Committee of the Criminal Law Section has graciously offered to start the ball rolling, but I need more volunteers to make it work. I'm also open to suggestions for additional materials to place on the web. And, I'm happy to provide you with information on the other elements of our growing media relations program, including training opportunities, networks of lawyers who want to assist reporters, media consulting, our Media and the Courts Seminar, and more.

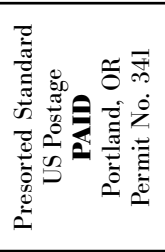
Interested? Call or email me ASAP. Thank you in advance.

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# Upcoming OCDLA CLEs

The OCDLA has the following CLEs scheduled during 2001:

- April 27-28  
Technology: The New Trump Card for  
Better Investigation and Lawyering  
Holiday Inn, Newport
- June 21-23  
Annual Conference  
Inn of the Seventh Mountain, Bend
- July 20-22  
Board Retreat  
Mt. Bachelor Village, Bend
- September 14-15  
DUII/New Legislation Seminar  
Holiday Inn, Newport
- October 18-19  
Indigent Defense  
Management Seminar  
Mt. Bachelor Village, Bend
- October 19-20  
Death Penalty Seminar  
Mt. Bachelor Village, Bend
- November 2  
Civil Commitment  
University of Oregon Law School  
Co-sponsored by OSB and others.
- November 10-14  
(November 10-17 extended stay)  
Sunny Climate Seminar  
Location to be announced
- December 7-8  
Winter Conference  
The Benson Hotel, Portland



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