

The Guardian

The Newsletter of the Alabama Criminal Defense Lawyers Association

April/May/June 2007

PINALES TO KEYNOTE SUMMER SEMINAR

ACDLA is pleased to announce Martin S. Pinales will be the keynote speaker for the 2007 "Justice Must Be Won XV" Seminar and Annual Meeting set for June 21-23, 2007 in



Martin Pinales

Pensacola. He will speak at 8:15 a.m. on Saturday, June 23.

Martin S. Pinales, a partner in the Cincinnati firm Sirkin Pinales & Schwartz LLP, is the current President of the National Association of Criminal Defense Lawyers and has served for over 20 years as co-chair of its Lawyers Assistance Committee. Since 1974, he has taught as an Adjunct Professor at the Northern Kentucky University Salmon P.

Chase College of Law and also teaches at the University of Cincinnati. In addition, he has lectured at the National College for Criminal Defense at Mercer University Law School; the Commonwealth of Kentucky Department of Public Advocacy Trial Practice Institute; the Public Defender Academy in Riverside and Orange Counties, California; and the Institute for Criminal Defense Advocacy at California Western School of Law. Mr. Pinales has also served as a CJA Panel Advisor to U.S. Judicial Conference Defender Services Committee and was a member of the Advisory Group for the Southern District of Ohio; the United States District Court for the Civil Justice Reform Act group; and the Practitioners Advisory Committee of the U.S. Sentencing Committee. He was special counsel to the Sixth Circuit Court of Appeals for Judicial Ethics and Discipline and also serves on the Cincinnati Bar Association Ethics Committee. He is listed in the *National Directory of Criminal Lawyers, Tarlow* and has been listed numerous times in *The Best Lawyers of America (Criminal Defense)*.

Other distinguished speakers include:

■ **Arthur J. Madden**, Attorney, Mobile, AL
"District Court Criminal Practice"

The list of cases that Arthur Madden has tried is truly impressive. Among the major cases in which he has been involved are included the "St. Paul" and "19th Hole" cases, *United States v. Young*, *United States v. Ly*, and numerous others. The St. Paul case involves a case of major impression for the criminal defense community as it seeks to make a corporate entity criminally liable. The St. Paul Fire and Marine Insurance Company, along with its national director of litigation, claims representatives, and local counsel were indicted on state perjury charges. While the case is still pending, charges against the corporation have been dismissed.



Summer Seminar Site – A New Look!

The Pensacola Hilton (formerly the Hilton Garden Inn) will be the site of the 2007 "Justice Must Be Won XV" Summer Seminar and Annual Meeting. The hotel officially became a Hilton on May 1, 2007. The hotel has been remodeled to include an adjoining tower of condos. Seminar participants will have a choice in accommodations of either a standard hotel room or one, two or three bedroom condos. See this issue of *The Guardian* for reservations details. All room discounts will be dropped by June 1.

■ **Dr. Gregory Davis**, Associate Coroner and Medical Examiner, Jefferson County, Birmingham, AL
"How to Read An Autopsy/Medical Report"
Dr. Davis took his training in pathology at Vanderbilt University Medical Center, Nashville, TN, followed by a fellowship in forensic pathology at the San Diego County Medical Examiner Office in San Diego, CA. He then joined the faculty at the University of Alabama at Birmingham, where he currently serves as an Associate Professor of Pathology. He also serves as Associate Coroner/Medical Examiner for

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President's Column

By Melinda Morgan Austin, Florence, AL



ACDLA President
Melinda
Morgan Austin

It is hard for me to believe that I am writing my last President's column. As we enter into the Spring and Summer, ACDLA continues to work diligently for you.

Our Legislative Committee is working full speed this session to pass important legislation. Chief Justice Cobb visited the committee at its last meeting. She called on the group to support her efforts on juvenile justice reform this session. Following her visit, it then voted to support the bill revising the Juvenile Code. Chief Justice Cobb and other advocates for juvenile justice have been working on the bill for over a year. Watch for news on HB 227(Sub) on the listserv as it reaches the calendar in the House. We urge you to contact your lawmakers about supporting this important legislation when it comes up for a vote.

ACDLA has joined forces with Rep. James Gordon of Mobile, in an attempt to pass an expungement bill, something members of our committee have been working on for the last two years. ACDLA is beginning to recognize the important goal we set to become a major voice in the legislative arena. Watch for listserv legislative alerts on HB 583(Sub), the expungement bill. We ask you to contact your lawmakers about supporting this legislation as well when a vote comes up in the House.

Our legislative work is made possible in large part due to the countless hours of time donated by the dedicated members of the Legislative Committee and due to the generous financial support of our members along with the support of the Southern Poverty Law Center. The Southern Poverty Law Center raised their pledge and actually donated a total of \$12,500.00 to help us meet our goal this year. Ann advises that we are still approximately \$1,350.00 short and we must raise this money before the end of the session. Please contact Ann if you can help in any way.

Other committees have continued to work on Association projects this Spring. In this issue you will find the finalized agenda for the Summer Seminar. Amber Ladner, working as chair of the Summer Seminar Committee, has put together an agenda that promises to be an entertaining and informative CLE. If you have not done so already, please book your room

now at the Hilton (formerly Hilton Garden Inn) and register to attend this year's Summer Seminar in beautiful Pensacola Beach June 21 - 23, 2007, as time is running out to take advantage of ACDLA's special room rate.

Kathryn King just concluded *amicus* argument at the Court of Criminal Appeals in State v. Clemons, assisting Ken Nixon, for the Defendant. Both did an excellent job presenting persuasive and well-reasoned argument regarding the meaning of the amendment to the felony DUI statute. Their arguments seemed well received by the Court.

In other news, I am pleased to announce that Jim Roberts has been appointed as ACDLA's representative on the Chief Justice's newly established Drug Court Task Force. The task force will be working to develop methods to establish working drug courts in every judicial circuit in the state.

ACDLA has achieved many of goals we set for the 2006-2007 year. However, there is much work still to be done. The Membership Committee continues to work to secure renewals from lapsed members and to recruit new members. I continue to urge each and every member of ACDLA to assist in our membership drive and reach out to every attorney practicing criminal defense in your county. Many times, the work of a committee is not enough. Often it takes personal contact from someone a potential member knows and works with to convince that potential member to join. Please help us reach the goal of building membership for 2007-2008.

Finally support is needed for every ACDLA committee. Often times we find that the work needed on any given committee exceeds the time available from our limited volunteers. Please volunteer for the committee in which you are most interested. Ann Cooper has supplied a list of the working committees in this issue. Please take time to look at the list and contact Ann to volunteer your assistance.

I have enjoyed my year working for ACDLA and look forward to continuing to serve the organization as Immediate Past President. I encourage each of you to contact me with your suggestions and concerns.

Melinda Morgan Austin
melindaM@hiwaay.net

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The ACDLA welcomes articles of interest from qualified professionals. Submit articles by email to:

annscooper@bellsouth.net or on 3.5" diskettes. Typewritten double-spaced hard-copy should accompany any submission on disk. ACDLA will also consider for publication articles which have appeared elsewhere. ACDLA reserves the right to select and edit material for publication.

The views expressed by authors are not necessarily the views of the ACDLA nor is the printing of advertising meant to imply an endorsement of those services or products.

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Guardian Deadlines

January 15, 2007
March 15, 2007
May 15, 2007
July 15, 2007
September 15, 2007
November 15, 2007

Send camera-ready copy with payment to the ACDLA office.

To order resources, send a note on your letterhead describing the specific item you would like to order with your check to:

ACDLA
PO Box 1147
Montgomery, AL 36101

Please notify the ACDLA office immediately of any changes in your contact information.

If you are not on the ACDLA email discussion group and you would like to be, please send your name and email address to
annscooper@bellsouth.net

FROM MY PERSPECTIVE

By Ann S. Cooper, Executive Director

SUMMER SEMINAR – JUNE 21-23, 2007

Don't forget to register by June 1 and save \$50 on your seminar registration fee. Pre-registration is advised as this is one of ACDLA's biggest events each year. Complete registration details are in this issue of *The Guardian*. Early bird registration is \$300 for ACDLA members or \$350 for all at the door, with the usual exceptions for Presidents Club and Lifetime members.

The seminar will award 12 CLEs (including one hour of Ethics). Outstanding speakers from around the U.S. are expected to make this one of our best programs yet. NACDL President Martin Pinales of Cincinnati, Ohio will be the featured keynote. See the cover story in this issue of *The Guardian* for more details on speakers, the agenda and registration.

The Hilton Garden Inn will have a new look this year. On May 1, the hotel officially becomes the Pensacola Beach Hilton. The Hilton's new tower edition houses one, two and three bedroom condos for families interested in vacation stays with the amenities of kitchens and multiple rooms. Special discounts have been arranged for both the hotel and condos. Consider sharing accommodations with other ACDLA members attending the seminar and save even more.

**For Hotel reservations, call by June 1
for discounts – 1-866-916-2999**

\$212 Standard Run of House
\$234 Gulf Front Room
\$315 Gulf Front Suite

**For Condo reservations, call by June 1
for discounts – 1-850-393-7719**

1 BR - \$370 daily - \$2,201.50 weekly
2 BR - \$424 daily - \$2,500 weekly
3 BR - \$636 daily - \$3,784 weekly

PRESIDENT'S RECEPTION

All ACDLA members registered for the Summer Seminar are cordially invited to attend the annual President's Reception at the Hilton on Thursday, June 21 at 5:30. Everyone will enjoy a feast of heavy hors'doerves. A cash bar will be provided.

ANNUAL MEETING SET

ACDLA's 2007 Annual Membership Meeting will be held on Friday, June 22 at 9:30 a.m. Here members will elect new directors for the 2007-2008 year and receive updates on ACDLA programs for the past year from President Melinda Morgan Austin.

2007 AWARDS LUNCHEON SET

The annual Awards Luncheon will be held on June 22 at 1:00 p.m. at the Hilton. Don't miss this opportunity to break bread with your peers and recognize those who have made significant contributions of their time and effort this past year to improve the practice of criminal defense in this state. Be sure to keep the luncheon tradition going – wear your Hawaiian shirt!

ALABAMA LAWMAKERS STILL IN SESSION – WATCH THE LISTSERV!

As of the writing of this issue of *The Guardian*, several key pieces of legislation are awaiting movement. The long-awaited Juvenile Justice Reform package, supported by Chief Justice Sue Bell Cobb, ACDLA and other organizations, awaits action by state lawmakers. Watch for listserv alerts to action for HB227(Sub). In addition, ACDLA's efforts to work with Rep. Gordon (Mobile) on an expungement bill is coming to fruition. HB583(Sub) should be on the calendar soon for a vote. Watch the listserv for calls to action on this important legislation too. The session is officially half over. There are many, many bills still in limbo due to problems in the Senate. ACDLA will make every effort to keep you posted on key issues as they arise for votes.

WRIGHT V. CHILDREE UPDATE – HOBBS RULING OUT

As of press time for this issue of *The Guardian*, Montgomery County Circuit Judge Truman Hobbs has issued a final order concerning the overhead case. The court has warranted seven percent in attorneys fees be paid to Attorney George Douglas in the case, as well as special consideration was given to interest. For a look at the final order, go to www.acdla.org and click on "Member Log-in." You will need your username and password to access the document found in the "document library."

In the meantime, I look forward to seeing you all at the 2007 "Justice Must Be Won" Annual Meeting and Summer Seminar in Pensacola.

Ann S. Cooper
annscooper@bellsouth.net

THE ALABAMA CRIMINAL DEFENSE LAWYERS ASSOCIATION PRESENTS...

"Justice Must Be Won XV"

2007 SUMMER SEMINAR AND ANNUAL MEETING

June 21-23, 2007

Pensacola Hilton (Formerly Hilton Garden Inn)
Pensacola Beach, Florida

Conference Registration

334-272-0064 or on-line at
www.acdla.org "Seminars"

Early Bird Discount by June 1, 2007

Hotel Registration

1-866-916-2999

Tower Condo Registration

1-850-393-7719

Room Block Dropped by Hotel
June 1, 2007

12 CLEs have been applied
for through the Mandatory
Continuing Legal Education
Commission of Alabama.

This includes 1 (one) hour CLE
in Ethics and 11 hours General CLE



"JUSTICE MUST BE WON XV"

(Order of Speakers Subject to Change)

THURSDAY, JUNE 21, 2007

- Noon – 1:00 p.m. Registration – Lobby Area
- 1:00 p.m.- 2:00 p.m. "Preserving the Record" – *Speaker TBA*
- 2:00 p.m. – 3:00 p.m. "Use of Experts" – *Brett Bloomston, Attorney at Law, Birmingham, AL*
- 3:00 p.m. – 3:15 p.m. Break
- 3:15 p.m. – 4:15 p.m. "The Defense of Self Defense" – *Rick Sandefer, Attorney at Law, Pinson, AL*
- 4:15 p.m. – 5:15 p.m. "Rainmaking" – *Jody Bicking, The Moser Group, Birmingham, AL*
- 5:30 p.m. – 7:00 p.m. President's Reception

FRIDAY, JUNE 22, 2007

- 8:00 a.m. – 8:30 a.m. Registration – Lobby Area
- 8:30 a.m. – 9:30 a.m. "District Court Criminal Practice" – *Arthur Madden, Attorney at Law, Mobile, AL*
- 9:30 a.m. – 10:30 a.m. ACDLA Annual Meeting
- 10:30 a.m. – 10:45 a.m. Break
- 10:45 a.m. – 11:45 a.m. "Update on Case Law" – *Tommy Goggans, Attorney at Law, Montgomery, AL*
- 11:45 a.m.- 12:45 p.m. "Creative Motions Practice" – *Sam D. Dennis, Attorney at Law, Valdosta, GA and John Lentine, Attorney at Law, Birmingham, AL*
- 1:00 p.m.– 2:30 p.m. 2007 Awards Luncheon – Wear Your Hawaiian Shirt!
- 2:30 p.m. – 3:30 p.m. "Ethics: Dis'Grace'ing Our Profession" – *Christine Koehler, Attorney at Law, Atlanta, GA*
- 3:30 p.m. Seminar Adjourns for the Day
- 3:45 p.m. ACDLA Board of Directors Meeting

SATURDAY, JUNE 23, 2007

- 8:15 a.m. – 9:15 a.m. "Keynote" – *Martin S. Pinales, President, National Association of Criminal Defense Lawyers (NACDL), Cincinnati, OH*
- 9:15 a.m. – 10:15 a.m. "Federal Court, White Collar Crime, Honest Service, Mail Fraud" – *T. Jefferson Deen, III, Attorney at Law, Mobile and Michel Nicrosi, Attorney at Law, Mobile*
- 10:15 a.m. – 10:30 a.m. Break
- 10:30 a.m. – 11:30 a.m. "How to Read an Autopsy/Medical Report" – *Dr. Gregory Davis, Associate Coroner/Medical Examiner, Jefferson County, Birmingham, AL*
- 11:30 a.m. – 12:30 p.m. "Diversity/Race Issues" – *Cynthia Roseberry, Attorney at Law, Fayetteville, GA*
- 12:30 p.m. Seminar Concludes

NOTIFICATION OF PROPOSED BYLAWS CHANGE

The Board of Directors has voted to recommend an amendment to the By-laws to create a new category of membership for the purpose of allowing an avenue by which other associations, organizations and institutions can join ACDLA as non-voting members. The new membership category will be called the Institutional Membership. The amendment reads as follows:

"Institutional Membership. Upon approval by the Board of Directors, an association, organization or institution may be allowed "Institutional Membership" in the Association. The Board of Directors shall determine those associations, organizations and institutions eligible for such membership by promulgating criteria for the Institutional Membership at the Board's discretion. The Board of Directors shall determine the membership fees for those associations, organizations and institutions at the Board's discretion. Those associations, organizations and institutions joining the Association as Institutional Members shall not have voting rights in the Association."

This proposed bylaw change will be voted upon by members present at the 2007 ACDLA Annual Meeting set for Friday, June 22, 2007 at 9:30 a.m. at the Pensacola Beach Hilton, Pensacola Beach, FL.

REGISTRATION FORM

ACDLA 2007 SUMMER SEMINAR
ANNUAL MEETING

Please sign me up!

Name(s): _____

Firm/Agency: _____

Address: _____

City: _____

State: _____ Zip: _____

Phone: _____

Email: _____

Fax: _____

Method of Payment:

_____ Check (Payable to ACDLA)

_____ Amount Enclosed

Billing Address: _____

_____ Mastercard _____ Visa

Name on Credit Card: _____

Expiration Date: _____

Credit Card# _____

Signature: _____

*All materials will be in CD Rom format.**Print materials may be ordered for \$75 additional.*

Return this form to:

ACDLA, P.O. Box 1147, Montgomery, AL 36101

For questions, contact Ann Cooper at

334/272-0064 or annscooper@bellsouth.net

Fax to: 1-866-665-7522

REGISTRATION:

\$300.00 ACDLA Members (by June 1)

\$350.00 after June 1

\$350.00 Non Members

Free President's Club Members

Free Lifetime Members

PINALES TO KEYNOTE SUMMER SEMINAR

(Continued from page 1)

Jefferson County, Alabama. While serving in these capacities, Dr. Davis earned a Master's of Science in Public Health degree with study of biostatistics and epidemiology.

■ **Christine Koehler**, Attorney, Atlanta, GA

"Ethics: Dis-Grace-ing Our Profession"

Christine's favorable verdict in Gwinnett County Georgia's longest trial in history, a high profile, death penalty case, demonstrates her tenacity and commitment. She successfully challenged Gwinnett's court system, halting jury trials for three months. Christine is a graduate of the National Criminal Defense College and the National College of DUI Defense. Christine is an AV rated attorney who was recognized as one of *Georgia Trend Magazine's* "Legal Elite" in 2004 and 2005. *Gwinnett Magazine* named Koehler & Riddick "Best Law Firm" 2003, 2004, 2005 and 2006. This is the fourth year in a row that her peers have recognized Christine as a Georgia "Super Lawyer." Christine is on the Investigative Panel of the State Bar of Georgia and is a founding member of the Georgia Innocence Project. Her courtroom successes make her a sought after instructor at Georgia's leading trial skills programs, including the National Criminal Defense College. She is also a frequent lecturer at criminal defense seminars throughout the country.

■ **Saleem D. "Sam" Dennis**, Attorney, Valdosta, GA and **John Lentine**, Attorney, Birmingham, AL

"Creative Motions Practice"

Sam and John team up for this insightful look at motions and how to use them to your client's best advantage. Sam Dennis focuses his practice on Tractor/Trailer Crashes, Personal Injury, Wrongful Death, Medical Malpractice, Product Liability, Criminal Defense and Domestic Relations. He is a partner in the firm of Maniklal and Dennis, LLP with offices in Valdosta, Cordele and Atlanta, Georgia. ACDLA member John Lentine is a partner in the Birmingham firm of Sheffield, Sheffield and Lentine. As an early organization leader, John has dedicated his career to raising the quality of criminal defense representation. He and Sam are both presenters at numerous trial colleges around the country.

■ **Cynthia Roseberry**, Attorney, Fayetteville, GA

"Race/Diversity Issues"

Cynthia is a sole practitioner primarily in federal criminal defense and state felony defense. She is a former vice president and current board member of the Georgia Association of Criminal Defense Lawyers and is on the faculty of the William Daniels Trial Advocacy Program and the National Criminal Defense College.

■ **PLUS OTHERS:**

T. Jefferson Deen, III and **Michel Nicrosi**, Attorneys at Law, Mobile AL

"Federal Court: White Collar Crime, Honest Service, Mail Fraud"

Jody Bicking, The Moser Group, Birmingham, AL

"Rainmaking"

Rick Sandefer, Attorney, Pinson, AL

"The Defense of Self Defense"

Brett Bloomston, Attorney, Birmingham, AL

"Use of Experts"

Tommy Goggans, Attorney, Montgomery, AL

"Case Law Update" ●

Interested in an informal round of golf in Pensacola?

Contact Tom DiGiulian at 256-353-4850

no later than June 1 for date and details.

CAPITAL CORNER

By John E. Mays, Decatur, Alabama

“Heinous, Atrocious and Cruel” As It Relates to Death by Beating and A Victim Placed in Fear

Fifteen years ago capital litigation was a little more stable and the applicable law was a little easier to define. Those of us who do capital litigation fondly recall Lawhorn v. State 581 So.2d 1159, 1174 (1990) and Ex parte Whisenant 555 So.2d 235, 3244 (1989) when “heinous, atrocious and cruel” under 13A-5-49 (8) was defined as “conscienceless or pitiless and unnecessarily tortuous to the victim”. In other words, to prove this aggravating circumstance the defendant had to prolong the victims suffering before intentionally causing death. After all, there is not much debate in legal circles as to what “torture” means. More fondly remembered are the days when our appellate courts castigated prosecutors and reversed cases wherein none of the explicit aggravating circumstances of 13A-5-49 applied and the prosecutor relied on that aggravator simply because the facts of the case couldn’t fit the other nine.

The law changes and courts often change it. This has certainly come to pass with the definition of “heinous, atrocious and cruel”. Its now as difficult to define as reasonable doubt and probable cause. Take as an example the case of Ex parte Walker 2007 WL 945068. An 87-year old woman was brutally beaten prior to being shot in the head at close range. A physician Dr. Parades, testified as to two crucial points triggering this aggravating circumstance:

He established that the injuries were painful and preceded death. This type of cruelty was unnecessary given the age and physical infirmities experienced by the victim.

These were his conclusions but they were based on indispensable facts. An examination of the facts of the case demonstrates that absent these specific facts, the conclusions alone may well not have established this aggravating circumstance:

(1) He testified “unequivocally” that the blunt-force- trauma injuries were inflicted while Walker was alive.

- (2) The wounds indicated that they were not inflicted at once, but over a period of time, and that she was alive during the beating.
- (3) The assault upon the victim “was beyond that necessary to cause death.”
- (4) All of the injuries were independent of each other. There was no confluent injury.
- (5) She “must have been in some pain for all of the injuries to develop and be produced”.
- (6) “NOTHING IN THE CONDITION OF HER BODY INDICATED THAT SHE HAD SLIPPED INTO UNCONCIOUSNESS AT ANY TIME BEFORE SHE WAS FATALLY SHOT.”

Added to the six factors listed above the appellate court listed “fear” as contributing to this aggravating circumstance:

... Thweatt experienced fear before the fatal gunshot wound. Evidence was presented indicating that Thweatt attempted to evade the attack by closing a door, but the door had been kicked off its hinges. Additionally, the evidence that she was beaten before she was shot and that she was alive until the fatal gunshot wound suggests that she experienced fear.

The way that the element of “fear” is discussed in this case indicates that in the scenario at hand fear contributed to this aggravating circumstance and that the “fear” element alone would not have risen to the level of heinous, atrocious and cruel in and of itself.

Ex parte Walker, supra cited Ex parte Rieber 663 So.2d 999, 1003 (1995) as the controlling law on how “fear” contributes to this aggravating circumstance. In Rieber “fear” was clearly “a significant factor in determining the existence of the aggravating circumstance...” Only in rare and extreme cases will it support this aggravating circumstance in and of itself. In Rieber the victim knew for several days that the defendant was “stalking” him and he expressed great fear of the defendant to others.

At first blush Ex parte Walker, supra looks like a bad case that further muddles the definition of “heinous, atrocious and cruel”. Its not

so bad if future courts require the specific facts that supported Dr. Parades’ conclusions to be admitted into evidence before the conclusions are accepted. Also, if Walker states that Rieber is controlling law, “fear” is a factor in this aggravating circumstance and will not support that circumstance alone except in extreme situations (the scenario of killing a child in front of a parent before killing the parent).

There is one more light at the end of the tunnel in Ex parte Walker, supra. Although it did not result in a reversal, the tactics of a prosecutor making an opening statement in the guilt/innocence phase of a capital case wherein they outline for the jury (a) the victim’s loving family who greatly miss them (b) the contributions by the victim to their family, church and community (c) the victim’s good character and reputation (d) the victim’s family history was condemned as improper victim – impact evidence and in violation of the dictates of Payne v. Tennessee 501 US 808, 838 (1991).

CASE CONFERENCING AVAILABLE AT SUMMER SEMINAR

This year we will offer case conferencing for any attorney having a pending capital case. If you want this service please contact Ann Cooper at the address below. All persons requesting that assistance will receive it but we need to know how many persons to plan for.

Any lawyer requesting case conferencing will receive it from two members of ACDLA’s Death Penalty Assistance Committee. All members of that committee are highly experienced in the trial of capital cases.

If you would like case conferencing bring your case files, notify Ann at ACDLA and give her a date and time preference.

To request case conferencing, contact:
Ann Cooper, ACDLA
P.O. Box 1147
Montgomery, AL 36101
(334) 272-0064
annscooper@bellsouth.net

Utilizing Multiple-Needs Team to the Advantage of Your Juvenile Client

By Julia Lee and Marion Chartoff, Southern Juvenile Defender Center, Montgomery, AL

One difference between handling delinquency cases and criminal cases in Alabama is the range of treatment resources available to deal with the delinquency client's mental health issues. A key method of obtaining specialized treatment is through the county and state Multiple Needs Teams. While these teams are no panacea, and in many parts of the state require prodding to provide appropriate services, all lawyers who represent children in delinquency proceedings should familiarize themselves with the teams, what they can do, their pitfalls and dangers for the client, and how to work with them to get appropriate services for the child client.

Background

Authorized by the Alabama Legislature in 1993, the Alabama State Multiple Needs Child Office was created to improve inter-agency cooperation and service-delivery for children whose needs could not be met by one agency, and who as a result, were committed to unnecessary and expensive residential placements. The overarching goal of the multiple needs program is to provide services in the least restrictive environment to children who are at imminent risk of removal.¹

Multiple Needs is organized on the state and county levels and, at both levels, operates as a team of representatives from the five relevant child-service agencies in the state: the Department of Human Resources (DHR), Department of Youth Services (DYS), Department of Education, (DOE), Department of Mental Health & Mental Retardation (DMH/MR), and the Department of Public Health (DPH).

Each county has a county Children's Services Facilitation Team ("county team"), which is responsible for developing a recommendation or an individualized service plan for each child referred to the team. This process of reviewing a child's case and recommending a service plan is commonly referred to as "staffing." At its best, the multiple needs process draws from the expertise of the team members and resources are creatively pooled to develop an individualized treatment plan that addresses the child's needs and avoids an out-of-home placement. In reality, member agencies sometimes try to pass the buck to avoid having to pay for services.

In addition to the representatives of the five core agencies, other members can be added at the discretion of each team. The county team can allow attendance by other agencies, program representatives, family members, and attorneys.²

Involving individuals familiar with the child in the county team meetings should be encouraged when appropriate, but the county team has the authority to exclude anyone who is not a core agency representative. The child's attorney should insist on his/her and, if helpful, the family's attendance at the county team meeting. Soliciting and incorporating the family's input usually is critical to forming an effective treatment plan, as they know the child best and will have to cooperate if the child is to attend appointments and meetings. If the attorney and family are excluded, the attorney should make every effort to talk with the county team members about the child's needs and potential treatment plan.

On the state level, there is a State Children's Services Facilitation Team Case Review Committee ("state team").³ This team, which is comprised of representatives from the same agencies, acts as a sort of appellate court for the county teams. When the county team is unwilling or unable to provide services, the state team can be asked to step in. The state team can develop a plan for a child when the county team reaches an impasse. The state team also pays for treatment when the county agencies cannot afford to pay for a child's treatment plan. While the county teams often view the state team as a source of funds for expensive residential place-

(Continued on page 8)

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**Alabama DUI Handbook
P.O. Box 242324
Montgomery, AL 36124**

(334) 264-5054

¹Code of Ala. §§ 12-15-171, 12-15-172.

²Code of Ala. § 12-15-172.

³See Code of Ala. §§ 12-15-170, 12-15-171.

Utilizing Multiple-Needs Team to the Advantage of Your Juvenile Client

(Continued from page 7)

ments, the state team also can pay for community-based treatment options when the county agencies run out of money. According to State Multiple Needs Office Director Donna Glass, the state team strives to provide treatment in the least restrictive environment at all times.

Defining a “multiple needs” child

A child must meet the following conditions in order to be considered multiple needs:

1. Be involved with the court or with one of the following member agencies: DYS, DHR, the Department of Education, Department of Public Health, juvenile court probation services, or the Department of Mental Health and Mental Retardation;
2. Is at imminent risk of an out-of-home placement or at imminent risk of a commitment to a more restrictive environment than the current placement;
3. Has needs requiring the services of two or more of the above mentioned agencies; and
4. Is at imminent risk as a result of one or more of the following conditions: emotional disturbance, behavior disorder, mental retardation, mental illness, dependency, chemical dependency, educational deficit, lack of supervision, delinquency, or physical illness or disability, or any combination thereof.⁴

Since a large number of youth in the juvenile justice system are involved with both DYS and DHR, have one or more mental health needs, and are eligible for special education services, multiple needs is a category with potentially broad application. In practice, however, not all children are accepted for staffing by the multiple needs teams and depending on the county, referrals can be inconsistent and unpredictable. The county team also has discretion to reject cases they feel fit more appropriately with an agency or the courts.

Referral to multiple needs

Whether to push for referral to multiple needs at all is an important strategic decision that should be carefully weighed. As mentioned above, adjudication as a multiple-needs child sometimes can open doors to treatment options that would not otherwise be available to the client. *However, labeling a child who has minimal involvement in the juvenile justice system as a multi-needs child may not be to the child's advan-*

tage. For instance, a child could be in juvenile court on a relatively minor charge, such as harassment, which would ordinarily be dealt by consent decree or non-reporting probation. In such a circumstance, if the lawyer brings the child's mental health problems to the court's attention, the result could be that—instead of receiving a slap on the wrist—the child is put under intensive supervision or a residential program, when he could have received sufficient treatment for his problems in the community without court involvement.

The multiple needs program is only intended for youth who are at imminent risk of removal to a more restrictive placement. The county and state teams also avoid accepting children whose needs are already being serviced by or is the clear responsibility of an agency's (or agencies) such as DHR, DYS, or DMH/MR. Thus, the fact that a child receives special education services from the public school system and out-patient counseling from the community mental health center will not always result in a referral to the county-team. Likewise, even if a child meets the definitional criteria, he or she may not be staffed as multiple needs if the county or state team deems the child to fall within another agency's mandate. As a result, although every child should benefit from services in the least restrictive environment, staffing by the county team is not an option available to all court-involved youth. A number of other factors including county funding, the level of attorney advocacy, county team competency, and the judge's attitude towards the program can create considerable variability in the use of multiple needs teams by counties.

A child can be referred to multiple needs in two ways: through the court system or through a member agency representative on the team. The court can on its own or by motion of a party refer a child to the county team for staffing at any point after the filing of a petition. There is, however, no specific multiple needs petition for a child to receive services through the court; the referral comes in the course of a dependency, delinquency, or a CHINS case.⁵ A court case is not necessary for the county team to staff a child's case. An agency involved with a child can also request multiple needs staffing and services through its county team representative. This approach allows the child and his or her family to obtain services without potentially risky court-involvement.

Once the court adjudicates a child as multiple needs, the county team must staff the child's case. Having a child adjudicated multiple needs can yield the benefit of avoiding a DYS commitment. Because of the program's requirements of exhaustion of local resources and least restrictive placement, the attorney has

greater flexibility to argue for a more favorable consent decree, suspension of adjudication, or disposition for the child. Referral to the county team, however, is often not the court's first response. Multiple needs generally deals with the most troubled youth who clearly need services from multiple agencies or who have hit a road block with prior services and are in need of treatment other than the standard commitment to DYS or DHR. It is not necessary, however, for a child to wait until such restrictive placements are exhausted before requesting referral to the county multiple needs team.

Some county teams will not recommend a service plan for children who still have legal charges pending before the court, but wait until after adjudication. Likewise, because the team cannot fairly consider mere allegations of delinquency or other acts in evaluating the child's needs, state team does not staff cases and provide the court with a recommendation unless all such charges have been resolved. Many courts, however, will refer children to the county multiple needs team before adjudication of the charge.

It can be useful to obtain a referral to multi-needs in advance of adjudication, as it may help to frame the child's charges as the result of a medical problem rather than just bad behavior. However, in such a scenario, the child's attorney should try to ensure that the team does not factor the alleged act into their considerations for treatment, unless the attorney believes that the team's considering the alleged act will help in obtaining the desired outcome. On the other hand, if a child has a chance of emerging from juvenile court without a delinquency or CHINS adjudication or with a relatively minor disposition, it may be best to avoid involving the multiple needs team until those possibilities are eliminated. Once the court and team are aware of the child's mental health, school, or other problems, there will be a strong tendency to try to address the child's problems with more court involvement and intrusive programs—a treatment which may hurt more than help. The judge may be more inclined to adjudicate the child delinquent, and the prosecutor may be less willing to work out a reasonable plea bargain, if they believe that the child really “needs help” from the juvenile justice system.

Review and recommendation by the county team

Once the county team agrees to staff a case, their primary objective is to develop an individualized service plan for the child. This plan should be the result of an exhaustive review of all the child's records and documents, and accurately reflect the child's needs. In addition, Alabama law requires that the county team develop a service plan that provides the appropriate treatment *in the least restrictive environment.*⁶ At a minimum, team members must

⁴Code of Ala. § 12-15-1(19).

⁵Code of Ala. § 12-15-65(b).

⁶Code of Ala. § 12-15-171(e)(4).

participate in the staffing of cases, participate in meetings and in the development of service plans, and offer services within the scope of their agency's responsibilities.

Staffing of a child's case by the county team is often the first time all of the child's paperwork is collected and reviewed in one place. The member-agencies are authorized to share their records, including psychological reports and the child's legal and social histories, with others on the county team.⁷

Before the staffing, the child's attorney should obtain all the documents that the team will review and review them before the county team meeting. Familiarity with all of the child's records before the county team meeting can help an attorney take a prominent role in the review process. The attorney can suggest an organizational structure of the documents, signal places of overlap, and identify weaknesses or gaps in the child's paperwork. The file may contain, for instance, multiple IQ tests and psychological examinations, some of which may be inaccurate or conducted under questionable circumstances. Assisting the team to sort through the records can help ensure that the team's attention is directed to the most appropriate documents.

A child's paperwork can tell a lot about the child but does not capture the full story. The amount of documentation can vary widely, and some of the evaluations or tests in the file may be outdated, biased, or missing. An alarming psychological evaluation or DHR home study, for instance, may initially point to a residential facility as the most reasonable placement, when a more searching inquiry could reveal less restrictive and more appropriate options. To avoid jumping to rash conclusions, determinations about a child's placement or service plan should only be made after a thorough discussion with the child, the child's family, and if possible, after an independent evaluation of the child's condition. Asking the right questions is critical to this process. As a result of a DHR report that suggests the mother is unwilling to support or care for her child, the county team may lean towards an out-of-home placement, when in fact the mother wants her child home but needs respite care or other support from the community. An attorney can better represent the "whole child" to the county team and to the court if he or she has accurate information about the needs, strengths, and background of the child.

The attorney's role in advocating for the child's service plan

The members of the county team may be familiar with the specialized services available

through their agency, but this does not mean they are aware of all the services, programs, and dispositional alternatives offered in the community. The attorney can help educate the county team of such options by introducing and advocating for community-based programs for the child's service plan. Even if the child has a history of poor performance in some of the community programs, the attorney should talk with various program administrators in an effort to develop a new combination of services that are tailored to better meet the child's present needs. Insufficient resources and treatment resources are a pervasive and chronic problem faced by all counties. Some counties have access to several diversion programs and in-home treatment teams through the community mental health center, but many do not. As a result, a child's service or dispositional plan may not be ideal, but working with multiple needs can open the door to creative and less-conventional service options for the child.

Unless the client is so impaired as to be unable to have a rational conversation with counsel about his options, the attorney should talk with the client about the treatment options available and determine what the client's preferences are in advance of the meeting. Often the child will want to stay with his family rather than go into residential placement. The attorney should also talk with the client's family or guardian to get their buy-in for any options that would require their cooperation to succeed.

The county team's determination of a child's service plan is dictated by their assessment of what is best and most appropriate for the child, regardless of the child's expressed wishes. When the child's expressed interests differ from the county team's position, the attorney should try to frame the client's expressed interests in "best interests"-compatible language. By taking such a non-adversarial approach, the child's attorney can facilitate the development of a cooperative relationship with the county team and convey the sense that everyone shares the same objective. In addition, the attorney can rely on the "least restrictive" placement mandate of the multi-needs statute and the juvenile code⁹ to press for a service plan in the home or community if that is what the client seeks.

Although it is generally preferable to avoid taking an adversarial approach with the county team, sometimes a certain amount of confrontation is necessary. The performance of a county team is only as good as its members. The level of participation and dedication of team members varies widely with each team and within the membership of the team. Working with less active teams can be challenging but the attorney should try to identify the leading voices on the team and see if they can be supportive in mobilizing the other team members. Some options

include contacting the team chairperson, requesting an emergency meeting (team usually meets monthly), and talking with each member individually. Some members may voice support of the attorney's suggested dispositional plan but express reluctance to take the lead either in the county team or in the courtroom. In such situations, the attorney may end up doing the bulk of the work for the team.

The attorney can also appeal to the member's supervisor on the state level and the State Multiple Needs Office. The county team must exhaust all local resources before requesting funding from the state team. When the county team is unwilling to recommend a community-based program the attorney believes is appropriate, the attorney can alert the state team to the availability of the program. The state team may require that the community-based program be tried before state funding is used for something more restrictive. This strategy may be the attorney's only option when a judge or prosecutor is the driving force behind the county team's request to the state for residential placement. The state team's decision is binding on the county team. However, the recommendation is not binding on the judge, so it helps to have a backup alternative to DYS commitment, in case the judge rejects the team's least restrictive recommendation.

Conclusion

For the reasons discussed above, attorneys should not request multiple needs team involvement in the run-of-the-mill juvenile case and should carefully consider whether involving the team in a particular case will help or harm the client's case. Obtaining helpful treatment plans from multiple needs teams may be time-intensive and difficult. However, for juvenile clients with serious health needs who are in danger of placement in DYS custody or transfer to the adult system, bringing the multiple needs team into a case can be a useful tool for getting the child necessary, hard-to-obtain services and help the child obtain the best possible resolution to his case. ●

For more information, contact:
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⁷Code of Ala. § 12-15-172(e)(3).

⁸For a fact sheet on some dispositional options in your county, see http://www.njnjn.org/members_public_state_AL.html and scroll for your county.

⁹Ala. Code. § 12-15-1.1.

Getting Around the Rape-Shield Statute...Sometimes

By Joseph P. Van Heest, Montgomery, AL

Ala. R. Evid. 412 is commonly referred to as the “rape-shield statute.” As you set out to prepare your cross examinations (which can not be done for the first time on the eve of trial) you need to be familiar with Ala. R. Evid. 412, and case law. This way you will know what has to be filed in advance and what objections may or may not be coming.

Ala. R. Evid. 412(b) states “In any prosecution for criminal sexual conduct or for assault with intent to commit, attempt to commit or conspiracy to commit criminal sexual conduct, evidence relating to past sexual behavior of the complaining witness, as defined in section (a) of the rule, shall not be admissible, either as direct evidence or on cross-examination of the complaining witness or of other witnesses, except as otherwise provided in this rule.” Ala. R. Evid. 412(c) states “In any prosecution for criminal sexual conduct, evidence relating to past sexual behavior of the complaining witness shall be introduced if the court, following the procedure described in section (d) of this rule, finds that such past sexual behavior directly involved the participation of the accused.” Prosecutors will argue that the rule is clear and that the only permissible exception is that which is set out in subsection (d). However, such a broad exclusion of evidence may violate a client’s constitutional rights. Where this is the case, the rule must give way to the Constitution.

The Alabama Supreme Court has expressly rejected the overly broad application of Ala. R. Evid. 412 to the extent it forecloses completely the introduction of evidence of a complaining witness’s past sexual experience in all cases except in the instance of a past sexual experience with the accused. See *Ex parte D.L.H.*, 806 So.2d 1190, 1193 (Ala. 2001), citing *Ex parte Dennis*, 730 So.2d 138, 140 (Ala. 1999) (“to read Rule 412 as requiring an absolute exclusion of all evidence of past sexual activity between the victim and third persons could, in some cases, violate a criminal defendant’s constitutional rights.” See Charles W. Gamble, *McElroy’s Alabama Evidence*, § 32.01, p. 143 (5th ed. 1996) (“It would appear, however, that such an absolute exclusion would be inapplicable when to enforce it would violate a criminal defendant’s constitutional rights.”). Therefore, when Rule 412 is applied to preclude the admission of particular exculpatory evidence, the constitutionality of its application is to be determined on a case-by-case basis). In *Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480 (1988), the United States Supreme Court held that an appellant in a rape case should have been permitted to question the complaining witness in the alleged rape as to whether she was living with a man at the time of the trial in order to show that she may have had a motive to lie about the rape in order to protect that relationship. *Id.* at 233, 109 S.Ct. at 484. There, the evidence was clearly probative with respect to the victim’s credibility. *Id.* The Supreme Court noted, “In the instant case, petitioner has consistently asserted that he and Matthews engaged in consensual sexual acts and that Matthews – out of fear of jeopardizing her relationship with Russell – lied when she told Russell she had been raped and has

continued to lie since. It is plain to us that [a] reasonable jury might have received a significantly different impression of [the witness’s] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.” *Olden*, 488 U.S. at 232, 109 S.Ct. at 483. Additionally, in *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974), the United States Supreme Court performed a balancing test between the criminal defendant’s constitutional right to confrontation (and cross-examination) against the State of Alaska’s policy of protecting a juvenile offender. *Davis*, 415 U.S. at 318, 94 S.Ct. at 1111. In *Davis*, the witness’s juvenile record was undisputed and clearly probative with respect to the witness’s possible bias against the petitioner. There, the Supreme Court struck the balance in the criminal defendant’s favor stating: “Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record – if the prosecution insisted on using him to make its case – is outweighed by the [criminal defendant’s] right to probe into the influence of possible bias in the testimony of a crucial identification witness.” *Davis*, 415 U.S. at 319, 94 S.Ct. at 1105. In *O.A.C. v. State*, 851 So.2d 146 (Ala. Crim. App. 2002), the Alabama Court of Criminal Appeals recognized the holdings of *Olden*, and *Davis, supra*, but distinguished the facts from those cases due to the lack of strength of the proffer and the purposes for which the evidence was being offered. *O.A.C.*, 851 So.2d at 153. Nevertheless, the case law exists which may support your argument if you can frame it in a compelling manner.

You may seek to cross examine regarding the complaining witness’s sexual history either to contradict or explain the physical evidence which the State offers to prove sexual activity or trauma (i.e., rape kit, nurse or physician testimony); or, in a case defended under a consent theory, to impeach the witness as biased, or seeking a motive to claim a consensual tryst was forcible. Many times a prosecutor will not argue about the first issue because s/he can avoid sexual history evidence or testimony by not putting the rape kit into evidence and not offering expert medical testimony which would open the door to sexual history evidence. Also, most courts will recognize the need to be able to challenge the physical evidence or expert testimony as being a proper area for cross-examination. Since the prosecution may avoid the expert testimony, and not introduce the rape kit, it becomes imperative for the State to protect the complaining witness from a probing cross-examination. Courts may be more likely to limit the scope of cross-examination about bias or motive under a rationale that such evidence is cumulative (if other evidence of bias or motive exists). An experienced criminal defense lawyer can often justify a broad range of cross-examination topics on these grounds. Fortunately, the case law set forth above provides the framework for getting around rape-shield where appropriate.

The proper method for getting the issue before the court starts with a reading of the rule. Ala. R. Evid. 412 states “the procedure for introducing evidence, as described in subsection (c) of

this rule, shall be as follows: (1) At any time before the defense shall seek to introduce evidence which would be covered by section (c) of this rule, the defense shall notify the court of such intent, whereupon the court shall conduct an *in camera* hearing to examine into the defendant's offer of proof. All *in camera* proceedings shall be included in their entirety in the transcript and record of the trial and the case; (2) At the conclusion of the hearing, if the court finds that any evidence introduced at the hearing is admissible under section (b) of this rule, the court shall by order state what evidence may be introduced by the defense at the trial of the case and in what manner the evidence may be introduced; and (3) The defense may then introduce evidence pursuant to the order of the court." Ala. R. Evid. 412(d). Therefore, you should file a pre-trial motion and request a hearing. I suggest preparing a proposed Order granting the defense motion and stating the reasons for which the defense seeks to introduce the evidence. Without a proposed Order, the court is more likely to deny the motion and avoid having to prepare an Order on its own. You must also ensure that the hearing is placed on the record. The Rule states that the transcript of the hearing and offer of proof shall be made part of the record for appeal if necessary. If you don't insure the hearing is recorded, your record may not be preserved.

Be sure your motion is filed under seal. This permits you to include exhibits, which provide evidence in support of the questions you intend to ask in cross-examination. It also preserves a more complete record, enhances your credibility with the court, and educates the judge before trial as to areas for which he or she should be watching. If the motion is denied, be sure to object timely and again at the point you wish to cover the specified grounds with each particular witness. The objections should be made with specificity as to the grounds covered. Frame the objections on (U.S. and Alabama) constitutional grounds: i.e., confrontation clause and right to cross examination, (and perhaps due process of law, and effective assistance of counsel as well). While you may not be permitted to cross examine the witness in front of the jury, the issue will be preserved for appeal. ●

2007-2008 ACDLA WORKING COMMITTEES FIND ONE FOR YOU!

Volunteers are needed to work on the following committees in the coming year. If you are interested, please contact Ann Cooper at annscooper@bellsouth.net. Each committee requires varying amounts of time and effort.

Amicus – This committee works year round and files briefs with the court when issues arise which could significantly impact law. Time commitments are needed. The committee Chairperson is Kathryn King of Cullman.

CLE – This committee works year round in tandem with the Executive Director and Chairperson(s) planning ACDLA's continuing education seminars. It is divided into two groups: CLE for Summer Seminar and Four Corners – Amber Ladner, Birmingham, Chairperson and Death Penalty Committee – Richard Jaffe, Birmingham and John Mays, Decatur, Chairpersons. These groups select various speakers for the CLEs and are involved in all aspects of planning.

Information Technology (IT) – This group looks at listserv issues (i.e. protocol, etc.) and makes recommendations to the Board regarding information technology. The Chairperson is Brent Gourley of Dothan.

Legislative – This committee works throughout the year to develop and implement legislation impacting criminal defense law, with heavier time commitments during legislative sessions. The committee often meets monthly during the sessions. The committee chairman is Bill Blanchard of Montgomery.

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If you would like to volunteer to work on any of these committees, please select one and contact Ann Cooper at 334/272-0064 or by email to annscooper@bellsouth.net

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