



HINDS COUNTY BAR ASSOCIATION

MAKING OUR CASE FOR A BETTER COMMUNITY

APRIL 2007



President's Column

by John C. Henegan

*"It Works In Practice,
But Not In Theory"*

Once again, we had two outstanding speakers at our most recent Hinds County Bar Association membership meeting in February. United States Magistrate Judge Linda Anderson of the Southern District addressed the subject of citizen leaders. For those of you who missed her, here are a couple of excerpts from her remarks, which began with her telling us about a conversation she had with some immigrants who attended the first naturalization examination and swearing-in ceremony that she conducted:

I shared with them the fact that my ancestors came from distant shores, as did all of our ancestors. I'd heard it said that while we may have come over on different ships, we're all in the same boat now. We sink or swim together. As U.S. citizens, we're all crewmen and it is incumbent on each of us to contribute to the strength and well-being of our vessel. A citizen rises and falls with his country.

Judge Anderson then explained that her presiding over the naturalization ceremony had made her think about her "own status as a citizen with my [own] rights and responsibilities" and she challenged us "to think about your status, not just as a citizen, but as a leader here in your community", noting:

We are all Citizen Leaders -- everyone in this room -- some by virtue of your character and personality, but all by virtue of your profession as lawyers -- like it or not. Abraham Lincoln once said, "Almost any man can stand adversity, but if you want to test his true character, give him power." You have power, and you have position. How will you use it for the common good, remembering that "to whom much is given, much will be expected"?

With so much turmoil in our community and our nation and our world, there is a dire need for us to make

positive contributions: bar projects, pro bono services, mentoring programs and countless other ways to render meaningful services and engage in social reforms. These grateful immigrants reminded me that my existence here in this community and this country is not just "all about me."

Appropriately, James Keith, a partner at Adams & Reese, then spoke about an important topic, with which most of us have little knowledge and even less direct experience: the educational legal rights of the disabled as afforded by the Federal Individuals With Disabilities Education Act. Keith gave a multi-dimensional talk, beginning with an explanation of the wide range of disabilities covered by the Act, which are much more encompassing than one might expect. He then described the practical difficulties of getting parents and school administrators to reach an agreement about what a school should be doing to accommodate an individual student's disabilities. Keith concluded by saying that there is a dire need for attorneys who have the expertise to mediate pre-litigation disputes that arise between parents of disabled children and public schools under the Act and that this need will only grow as members of the public becomes more aware about their rights under this Act.

Our April HCBA membership meeting will be at its usual spot - the Capital Club - but on a different day - the second Tuesday of the month, April 10, from 12:00 noon to 1:15 p.m. We moved this meeting from its regular time to fit the schedules of our guest speakers, George Penick and William Bynum. Penick is Director of the Rand Gulf States Policy Institute, which is affiliated with the Rand Corporation, a world-renowned "think tank", which established this institute in Jackson with little fanfare about a year ago. Bynum is the Chief Executive Officer of Enterprise Corporation of the Delta, a local non-profit, and the Hope Community Credit Union, which provides financial services for lower income groups and is supported by larger local national banks and other financial institutions with referrals and as depositors.

Both these gentlemen work full time on a full range of economic-based community development programs for lower income groups. Their programs are aimed at making the

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HCBA LUNCHEON MEETING

Tuesday, April 10, 2007 Capital Club Noon Cost \$15.00

Speakers: George Penick and William Bynum

HCBA Calendar of Events

April 10, 2007

HCBA Membership Meeting.
Noon. Capital Club

May 22, 2007

HCBA/JYL Evening Honoring the Judiciary
6:00 Old Capitol Inn

May 24, 2007

HCBA Annual Golf Tournament.
Noon. Annandale Golf Club

June 19, 2007

HCBA Membership Meeting.
Noon. Capital Club

August 21, 2007

**HCBA Membership Meeting/One Hour
Ethics CLE**
Noon Capital Club.

*The Hinds County Bar Association and
the Jackson Young Lawyers Association
invite you to join us for an*

Evening Honoring the Judiciary

Reverend Ross Oliver as Speaker

Tuesday, May 22, 2007

at The Old Capitol Inn

226 North State Street

Reception at 6:00 p.m.

Dinner at 7:00 p.m.

*Special Guests: Hinds, Madison and
Rankin County State and Federal Judges*

April 10th Meeting to Feature Community and Economic Development

Expanding on the 2006-07 theme of diversity, the HCBA's April 10 meeting will feature a joint presentation on community and economic development by Bill Bynum, President and Chief Executive Officer of Enterprise Corporation of the Delta and Hope Community Credit Union (ECD/HOPE); and DR. George Penick, Director of the RAND Gulf States Policy Institute (RGSPI). In addition to members of HCBA, invited guests at the meeting will include area business and civic leaders.

One of the nation's leading community development financial institutions, ECD/HOPE has generated more than \$300 million in financing for entrepreneurs, homebuyers and community development projects, and has directly benefited more than 30,000 individuals. ECD/HOPE leverages private, public and philanthropic resources to address development hurdles that face low-wealth communities in areas such as job creation, housing, child care, and health care. In the aftermath of Hurricane Katrina, ECD/HOPE has extended its services to help those affected by the storm, and is now working with the State of Mississippi to provide financial counseling to approximately 10,000 persons whose homes were damaged by the storm.

Prior to joining ECD/HOPE, Mr. Bynum helped establish Self-Help, a pioneer in the development banking industry. He also managed financing and community development initiatives at the North Carolina Rural Economic Development Center. A graduate of the University of North Carolina, Mr. Bynum is a Henry Crown Fellow of the Aspen Institute and was named 2002 National Supporter of Entrepreneurship by Ernst & Young and the Kauffman Foundation. He serves on the boards of AmSouth Bank

Community Development Corporation, the Foundation for the Mid South, the Mississippi Children's Museum, Partners for the Common Good, and the Winthrop Rockefeller Foundation. He is also a member of the Mississippi Access to Justice Commission, and is Chairman of the President's Community Development Advisory Board.

RAND Corporation is one of the world's leading nonprofit institutions. For more than 60 years, it has sought to improve policy and decisionmaking through informed research and analysis. RAND established its Gulf States Policy Institute after Hurricane Katrina devastated the Gulf Coast. RGSPI is a collaboration among RAND and seven Gulf states universities. Its mission is to assist in long-term recovery efforts by providing evidence-based policy guidance to facilitate and speed regional recovery and growth, re-establish services and guide wise investments in infrastructure.

Dr. Penick became RGSPI's first director in March 2006. Previously, he had served as the president of the Foundation for the Mid South since its creation in 1990. The Foundation for the Mid South supports education, economic development and children's programs throughout Arkansas, Louisiana and Mississippi.

A graduate of Davidson College with master's and doctorate degrees from Harvard, Dr. Penick has served in a variety of leadership roles in the field of education, nonprofits and foundations, including serving on the boards of the Council on Foundations, the Southeastern Council of Foundations, the Foundation Center, the Carpathian Foundation, the Community Foundation of Greater Jackson, Davidson College and the Hope Community Credit Union.

Practice Before Federal Magistrates

by Terry K. Rushing

In 1997, I left a dissolving firm to become a law clerk for now-retired Magistrate Judge Alfred Nicols. Having experienced the uncertainties of law practice, but still possessed of a litigator's self-esteem, I had two requests of the Judge - one, to be paid on a regular basis, and, two, to be called something other than "law clerk." The Government took care of the first request, and Judge Nicols indulged the second. Anna (Furr) and I got name plates for our doors that said "staff attorney." At the time, I didn't realize that I sat in such an obscure spot in the federal courthouse that the only people who read the sign on my door were looking for the men's room.

Since then, I've come to appreciate working in relative obscurity. When Barry Powell asked me to write this article for the Bench and Bar Committee, I feared blowing my cover. Too many lawyers already have me on speed dial - an issue that will be discussed later. Reluctantly, I agreed to write this piece, principally because I used to work for Barry and am accustomed to doing what he asks. Also, I realize some problems arise repeatedly, and they can be avoided by attorneys who understand court policy. Finally, because I will soon take another position with the court, I hope to sink back into undisturbed anonymity.

Since Judge Nicols retired in February of last year, I have worked for Judge Roper, Judge Sumner, and now Magistrate Judge Linda Anderson, who was appointed to take Judge Nicols's place. Having done so, I can say that, while the judicial philosophies of these magistrates vary in some details, their general application of the Federal Rules of Civil Procedure and the Uniform Local Rules is the same. Since this article is for attorneys based in Hinds County, I have focused on practice before Judge Sumner and Judge Anderson.

In enacting and revising the Magistrate's Act, 28 U.S.C. § 636, Congress intended to authorize greater use of magistrates to assist federal judges in handling their burgeoning caseloads. *McCarthy v. Bronson*, 500 U.S. 136, 142 (1991). In this District, that assistance is provided by pairing the magistrates with specific district judges; Judge Sumner handles civil cases assigned to Judge Jordan, as well as the Jackson Division cases assigned to Judge Lee. Judge Anderson handles civil cases assigned to Judge Wingate and Judge Barbour, as well Judge Lee's Eastern Division cases. Judge Sumner and Judge Anderson share the felony criminal docket for the Eastern, Western, and Jackson Divisions, and Judge Anderson handles the misdemeanor docket for those Divisions. To most of the Bar's civil practitioners, the magistrate judges assist by ruling on discovery motions; to attorneys in criminal practice, they assist by holding preliminary hearings in criminal cases. A great part of the magistrates' workload is unknown to the average lawyer, as it consists of matters largely unfamiliar to them - habeas corpus cases, prisoner civil rights actions, and social security appeals. At the end of 2006, the Southern Division ranked fourteenth in the federal system in civil filings per judge. The combined caseload of all of the magistrates in the

Division included 2,653 civil cases, of which 547 were filed by prisoners (including both habeas petitions and prisoner civil rights cases) and thirty-three of which were social security appeals. The nature of these cases affects the magistrates' workload, as both the prisoner and social security cases are largely handled by the magistrate judges. Those cases require review of the administrative or trial records, hearings, and preparation of reports and recommendations for the district judges.

In *Peretz v. United States*, 501 U.S. 923, 929 n. 5 (1991), the United States Supreme Court recognized that workload, noting that the system created by the Magistrate's Act "has exceeded the highest expectations of the legislators who conceived it. In modern federal practice, federal magistrates account for a staggering volume of judicial work." *Id.*, quoting *Government of the Virgin Islands v. Williams*, 892 F.2d 305, 308 (3rd Cir. 1989). In a sense, the magistrate judges have become victims of their own success, making it critical that the attorneys who appear before them handle their business as efficiently as possible. Here are some suggestions to help that happen:

Letters. Several years ago, the Local Rules were revised to include this provision in Rule 7.2: "A written communication with the court that is intended to be an application for relief or other action by the court shall be presented by a motion in the form prescribed by this Rule." The Rule was revised to discourage attorneys from seeking relief by way of letters, a practice that most judges hate, for several reasons. (Incidentally, the publication of the email address of their chambers is not intended as an invitation to informal correspondence.) Letters lack structure and are often little more than a laundry list of complaints about opposing counsel. The Rules do not provide for the consideration of letters, and there is no provision for a response. Finally, a letter neither appears on the docket nor becomes part of the record, making it less likely to come to the judge's attention. For all these reasons, letter-writing should be avoided.

In this vein, many attorneys send proposed orders via email without having first filed a motion, particularly when requesting an extension of time. This practice is also discouraged, as it compels the court to "create" an ore tenus motion on the docket. Additionally, all but the most routine requests for extensions must show good cause - a showing that cannot be made by simply presenting an order. Again, a request for relief that is not on the court's docket has a better chance of being overlooked or mis-directed. Thus, it benefits both the court and the parties when a motion is filed.

Amending deadlines in the CMPO. One of the most common phrases in a request to amend the Case Management Plan Order is that the extension "will not affect the trial date." The real issue, however, is whether the motion deadline is sufficiently in advance of the pretrial

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Son of "What Makes A Good Lawyer"

by John Griffin Jones

An article appeared recently in The MDLA Quarterly, a publication of the Mississippi Defense Lawyers Association, consisting of four triple-columned pages of single-spaced sturm and drang from the trickling stream of consciousness of an older "plaintiff lawyer." I think I wrote it, but I can't recognize the person in the color photo accompanying the article. I know that since I turned 50 I look more and more like my paternal grandmother (that's grandmother, not father). Nonetheless, the Hinds County Bar Newsletter asked me to re-write "the last part" of the article, and since my views on the cosmic subjects addressed - integrity, fairness, objectivity and dedication to the truth in all we do as lawyers - have been brought into sharper focus thanks to a few intervening, defining moments, I don't think I said enough. Besides, who else is sufficiently self-centered enough to quote himself?

I was writing to young lawyers about the indispensable nature of personal integrity in law practice. I argued that without it, a lawyer can be successful in the short run and perhaps please a tough client, but in the long run our justice system exposes and "outs" the cheater, the charlatan, the greedy, and (above all) the liar, and does so in as sure as fashion as can be done in any profession. The simple reality is that lawyers have to trust each other in the litigation process. Law practice is not, alas, a private enterprise. We simply must throw ourselves out there in every way to become good at it. We can mistrust, really dislike, even hate the opposing lawyer, but if the case is significant we are just going to have to rely on the integrity of opposing counsel on huge issues. And because the connections based on trust between opposing counsel are so subtle, no one knows what lies will fly and which will call down thunder.

In litigation and trial, weaknesses in matters of integrity just appear out of nowhere - like the first blisters of the bubonic plague and are just as incurable. There really is no going back, no "intervention", no rehab or even cute little euphemisms for the problem. The liar is eventually outed because the litigation process drills deeply, below the postured blustering, into what we are, and what we owe, as humans. I add that one of the great things about our litigation system is that it promises the client that a well-respected and accomplished lawyer is also an honest lawyer. I know of no exceptions. The crucible of heavy litigation weeds out the unworthy. Unlike politics, entertainment or business (to name but three fields where dazzle, bluff and bluster are enough), the lawyer has to earn it. He must bring substance to the audience. How cool is that?

My intervening, defining moments since the first article have confirmed this and shown me something else important about the process: we don't have to expose the liar or "out" anybody: he does that all by himself. Nobody else can earn or lose integrity for another, and there is no "original sin" doctrine that taints us all. The liar ultimately falls under the weight of his own greed, perfidy, overreaching, spoliation or dissembling. He can stuff it down for a while, keep it quiet, even become somewhat successful early, but he can't bear it long.

As a consequence of our profession's commitment to and

demand for personal integrity in advocacy, I argue this: the truth should determine the outcome of any litigation.

We think of trial work as competition. It is that. I don't know anybody good at litigation that isn't going to try just as hard in ping pong, or cards or Trivial Pursuit. I believe that all advocates worthy of the calling enjoy the competition as much as anything else. It really is what we're left with after our 15-foot jumper has lost its Rick Mount precision-?-okay, when it can no longer legitimately be called a "jump" shot.

I don't know the sources of female competitiveness but, they worry me. I would have thought that evolution (in the Darwin/natural selection sense) in the motherhood role isn't good for the female's competitive instincts. But there has been another process of evolution at work with women which turns their competitive instincts from mindless tests of strength to something hidden, unknowable, lethal and real, especially in the female trial advocate. If you see it, run. In the final analysis, however, and regardless of sex or ancestry, I do know that if you don't get that pleasant tingle as you hit the next gear during trials or heavy litigation, you won't like it and won't do it for long. It is not for everyone.

Competing fairly means learning how it feels to have your brains bashed in; in fact, I don't know if "integrity" of the type discussed here can even come until you've experienced that terrible rush of blood to your head and face. But if we're committed to honoring our oath and telling the truth when it hurts - especially when it hurts - should the end game be limited to who wins and who loses? Surely not; otherwise integrity would be a function of winning, and it is profoundly not that.

If we believe in our system, shouldn't the competition between opposing counsel be to expose the truth? I'm not talking about what the law was, is, or should be - a question increasingly contaminated by politics. I mean how we develop and discover the facts and perform the other tasks that only lawyers can do. All of our procedural and evidentiary rules exist to facilitate the search for the truth, which we dumb down by calling "the facts," and to ensure that both sides have an equal chance, not so much at prevailing but in finding and proving the truth. But process is not enough. I respectfully and naively submit that among any real advocate's obligations should be not only to uncover the truth but to do all we can to reach a result consistent with the truth.

We all have mammoth responsibilities to our clients' interests which we seek to vindicate in the discovery and trial process. I would not suggest that we do anything but applaud and utilize all fair competitive measures to beat the other side's brains in. If a legitimate dispute arises over whether our client has a right to withhold the truth, or at least not serve it up to the other side (e.g., the darkness and odor emanating from the swamps of "privilege"), then by all means take it to the judge. But a concomitant of personal integrity in advocacy is the integrity of the results we achieve through advocacy.

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