



COURT NEWS

NEWSLETTER OF THE ALABAMA JUDICIAL SYSTEM

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Torbert Appoints Committee To Develop Guidelines For Indigent Defense Claims

In a recent speech to the Alabama Criminal Defense Lawyers Association, Chief Justice C. C. Torbert Jr. announced that he had appointed a committee on indigent defense claims and procedures which will be chaired by Circuit Judge Bill Gordon, Montgomery County. "As a result of the concern expressed to me by defense attorneys and trial judges regarding procedural problems and difficulties relating to the filing of claims in indigent defense cases, I have appointed a committee to look into this matter. The purpose of this committee is to review all procedures relative to the filing of claims and to develop materials and perhaps CLE programs on this topic which would assist in the more efficient management of the State Fair Trial Tax Fund," said Torbert to the Association members.

"The history of the Fair Trial Tax Fund has been one of continual depletion," said Torbert. In FY 1976-77, the beginning balance of the Fair Trial Tax Fund was \$307,000. In FY 1979-80, the balance had been reduced to \$62,000, and in FY 1980-81, the beginning balance had dwindled to \$960. According to Torbert, this sharp reduction in the beginning balance occurred despite the \$100,000 annually

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COMMITTEE ON INDIGENT DEFENSE CLAIMS

Bill Gordon - Chairman
Circuit Judge, Montgomery Co.

Joseph Jasper
Circuit Judge, Jefferson Co.

Ferrill McRae
Circuit Judge, Mobile Co.

Riley Green
Circuit Judge, Pike Co.

Aubrey Ford
District Judge, Macon Co.

Harold Crow
District Judge, Clarke Co.

Joel Holley
District Judge, Chambers Co.

Tom Brassell
State Comptroller

Jim Solomon
Deputy Attorney General

Bill Clark, Esquire
Birmingham

Tom King, Jr., Esquire
Birmingham

Doug Ghee, Esquire
Anniston

Jeff Duffey, Esquire
Montgomery

Reynolds Alonzo, Jr., Esquire
Mobile

B. F. Lovelace, Public Defender
Escambia County

Bobby Branum, Circuit Clerk
Butler County

Dennis Balske, President
Alabama Defense Lawyers Assoc.

Allen Tapley
Administrative Director of Courts

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appropriated to the Fair Trial Tax Fund by the legislature. "In order to forestall the bankrupting of the Fair Trial Tax Fund, the Governor authorized additional releases from the State General Fund of \$200 thousand in FY 77-78 and \$100 thousand in FY 79-80," said Torbert.

The State Comptroller reports that through July 31, FY 1982 receipts to the Fair Trial Tax Fund totalled \$3.73 million with expenditures of \$3.70 million. Fair Trial Tax Fund revenues increased from \$1.4 million in FY 1979-80 to \$3.73 million as a result of Act 81-716, Regular Session, which provided a \$5.00 increase in the docket fees of most cases. Correspondingly, expenditures rose as a result of the increase in fees paid to appointed counsel in accordance with Act 81-717, Regular Session.

"Though the system is currently operating in the black, the surplus is minimal and any inattention or mismanagement could result in the bankrupting of the fund," said Torbert. "The work of the committee is, therefore, extremely important to the preservation of the Fair Trial Tax Fund and our indigent defense system," concluded Torbert.

Mobile County -

First Claims Review System in State

The indigent defense claims review system implemented in Mobile five years ago was the first such system in the state. Operating on the premise that "Judges are trustees of the taxpayers' money" Judge Ferrill McRae, circuit judge, 13th Judicial Circuit, instituted the system for Mobile County. "Since the implementation of the review procedure, the Fair Trial Tax Fund in Mobile County has operated in the black which has ensured that our attorneys are promptly paid for their services," said Judge McRae.

Mobile's indigent defense claims review system has won the applause of the State Comptroller's Office. "Because indigent defense claims for Mobile County are thoroughly reviewed before reaching our office, we can process them much more quickly," said State Comptroller Tom Brassell. "I often recommend the Mobile claims review system to other circuits who call my office regarding the Fair Trial Tax Fund in their counties," continued Brassell.

Under the Mobile System, one judge is

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FAIR TRIAL TAX FUND

| Fiscal Year | Beginning Balance | General Fund Transfer | Court Cost Revenues | Total Fund Available | Expenditures |
|-------------|-------------------|-----------------------|--|----------------------|---|
| | | | +(32 docket fee, \$10 jury demand fee in civil cases) | | |
| 1976-77 | 307,000 | 100,000* | 1,210,000 | 1,617,000 | 1,471,000 |
| 1977-78 | 146,000 | 300,000** | 1,580,000 | 1,726,000 | 2,534,000 |
| 1978-79 | 192,000 | 100,000 | 1,230,000 | 1,522,000 | 1,459,000 |
| 1979-80 | 62,636 | 200,000*** | 1,409,350 | 1,671,986 | 1,532,254 (Attorney Fees) 138,773 (Court Reporter Fees) 1,671,027 |
| ++ 1980-81 | 960 | 75,000 | 859,666 | 935,616 | |

*100,000 is normal annual transfer from State General Fund; appropriated annually by Legislature in the General Fund Budget

**200,000 Additional was authorized released from the General Fund by the Governor

***100,000 Additional was authorized released from the General Fund by the Governor + \$2.00 fee increased to \$7.00 by provisions of Act No. 81-716

++ These figures reflect individual categories for three-quarters of fiscal year

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assigned as judge in charge of the indigent defense claims review system. Judge Ferrill McRae first served as judge in charge, but Circuit Judge Michael Zoghby now holds the position. One of the responsibilities of the judge in charge is to appoint three experienced criminal defense lawyers to serve as indigent defense claims reviewers. All claims are initially submitted to the judge in charge who in turn submits them to a member of the review committee on a rotating basis. "In large counties, at least three attorneys are needed to serve on the review committee so that the workload can be spread out and so that an attorney who may have an indigent defense claim would not be able to review his own claim," stated McRae. Attorneys are not appointed fixed terms on the committee, but generally serve between one and two years. "During the five years that the system has been in operation, we have had about 12 lawyers to serve on the committee," said McRae.

Following a review of the claim, the attorney submits the claim to the judge in charge for final review and submission to the comptroller. Occasionally, the reviewing attorney may reduce the fees claimed. If the amount is reduced significantly, the claimant is notified and given an opportunity to challenge the reduction. If the reviewing attorney upholds the reduction after meeting with

the claimant, the claim is submitted to the judge in charge for final determination. "In making determinations on claims which have significantly been reduced, I always try to discuss the claim with the judge who tried the case. Based on his estimation and that of the reviewing attorney, I can then make a fair decision as to the amount of the claim," stated Zoghby.

As an integral part of the review procedure, a monthly report is prepared which lists the total amount of claims awarded in each judge's court and the circuit. "The report assists each judge in monitoring the claims in his court as compared to the other judges. In this way, all of us have a yardstick by which to gauge our approval of appointed counsel and the amount of claims," said Zoghby.

In Mobile, the judge in charge is the only judge who can submit indigent defense claims to the comptroller. The comptroller's office is notified of any change in the judge in charge and will return all claims not so approved. "Having one judge in charge ensures some uniformity in the monies paid to attorneys who serve as indigent defense counsel," said McRae.

"With the constant threat of bankrupting the Fair Trial Tax Fund, it is imperative that the fund be well managed at the circuit level," concluded McRae.

Lee County Implements New Claims System

After reviewing the indigent defense system in the 37th Judicial Circuit, Presiding Circuit Judge George H. Wright Jr. and Circuit Judge James T. Gullage decided it was time to make some changes. The Fair Trial Tax Fund revenues generated in Lee County, like most other counties in Alabama, historically had not been sufficient to cover the amount claimed in indigent defense cases.

Following meetings with local bar members, Judges Wright and Gullage implemented an indigent defense claims review system patterned after the Mobile system. As in Mobile, the Lee County review committee is composed of three attorneys, appointed by the judges, who are active in criminal defense work. All claims are submitted to the court administrator, Ruth Henry, who records them in a log book and sends them to the review committee. Once several claims have been filed, the review committee meets to determine the appropriateness of the amounts claimed. Review committee member Thomas S. Melton says, "In making recommendations, we handle each claim individually, considering the seriousness of the charge and the complexity of the case." Unlike the Mobile system,

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all claims in Lee County are reviewed by the entire committee. Following the committee's recommendation, the claim is then submitted to the judge who tried the case for final determination.

"The purpose of this procedure is not to arbitrarily cut legitimate fees claimed by the attorneys, as Judge Gullage and I both deeply appreciate the willingness of the attorneys to represent indigents in this county. The purpose of this practice is to ensure that all attorneys are fairly paid in accordance with the legislation passed and within the limits of the funds available," said Judge Wright.

Since the implementation of the review system in October 1981, Lee County has turned its Fair Trial Tax Fund deficit into a surplus. "The cooperation of the Lee County Bar has been the determining factor in the success of the indigent defense review system in our circuit," said Judge Gullage.

INCLUDING CRIME PACKAGE

Constitutional Question Raised Over Delivery of Special Session Bills

The following article, written by reporter Ralph Holmes, was published in The Birmingham News and is reprinted here in part.

A 48-hour delay in delivery from one office to another of 60 bills, including 20 anti-crime measures, passed during the special legislative session earlier this month has raised questions about their constitutionality.

A court decision may be required to determine whether the bills have become law. If they were not handled properly, the Legislature will have to pass them again.

The question stems from the way Jimmy Samford, Gov. Fob James' legal advisor, interprets Section 125 of Article 5 of the Alabama Constitution.

Even though the Legislature adjourned Aug. 13, the governor's recording secretary did not take the bills across the hall to the secretary of state's office until Wednesday, Aug. 25.

The Constitution requires deposit with the

secretary of state no later than midnight Monday, Aug. 23.

Section 125, Article 5, says in part: "... but bills presented to the governor within five days before the final adjournment of the Legislature may be approved by the governor at any time within ten days after such adjournment, and if approved and deposited with the secretary of state within that time shall become law."

Lou Greene, director of the Legislative Reference Service (LRS) and legal advisor to the Legislature, said, "I think that under attack in court they would be declared invalid. I haven't checked every stamp, but if they were not stamped by the secretary of state by the proper time, they would be invalid."

Legal Advisor Samford said he thinks the bills were in the hands of the secretary of state in plenty of time. His opinion is based on the way he counts days.

"We take the position

that it is two or three days after adjournment before we (the governor's office) actually get the bills. The Constitution gives the governor 10 days to study the bills.

"We don't think there is a problem."

The delay in bills being delivered to the governor's office is because of the time needed for the bills passed on the final day of a session to be retyped in proper form and proofread.

A pocket veto occurs when the governor doesn't act on a bill within 10 days of the Legislature's adjournment.

James had signed all the bills on Aug. 22 - 24 hours before the deadline for either signing bills or letting them die by pocket veto. But the bills were not carried across the hall to Edna Young, the recording clerk in the secretary of state's office.

Mrs. Young's job is to record the fact that the duly signed bills have been presented to the secretary of state.

NEWS FROM THE JUDICIAL COLLEGE



SCHOOL BELLS RING FOR JUDGES

The Alabama Judicial College has scheduled fall courses for circuit and district judges on Oct. 12-14, at Farrah Hall in Tuscaloosa. Planned by the Long-Range Curriculum Committees of the two groups, the fall courses offer seminars in substantive and procedural law as well as courses for professional growth.

The sessions include Rehabilitation of Juvenile Delinquents taught by Dr. Vicki Agee of Denver, Colorado; New Directions in Domestic Relations with Judge Donald B. King of San Francisco; further discussion of the Uniform Commercial Code with Professor Nat Hansford of the University of Alabama Law School; and the New Administrative Procedures Act with John Wilkerson, clerk of the Court of Civil Appeals, and Alvin Prestwood, a Montgomery attorney.

Judge Josh Mullins of the 10th Judicial Circuit in Birmingham will chair a session on Structured Settlements with Leon Ashford and Sam Franklin, two Birmingham attorneys, and Jim Barton of Birmingham will present a discussion of Libel and Slander. Judge Joe Colquitt of the 6th Judicial Circuit will present an Update on Death Penalty Cases.

Search and Seizure will be the subject of an extended session with J. Shane Creamer of Carroll, Creamer, Carroll & Duffy of Philadelphia as presenter.

Other courses include Stress: Physiology and Prevention with Drs. Riley Lumpkin, Robert Northrup and Ralph Jones of the University's College of Community Health Sciences; Investing in Tax Shelters with John Cooper of Birmingham; and Tax Planning with David Wooldridge of Birmingham.

With new legislation relating to DUI cases, one session will be directed to a discussion of the new law, the Psychological Aspects of the DUI Offender, with Dr. Al Peyman of Mississippi State, and a discussion of programs of treatment will also be available.

The fall courses will culminate with a panel discussion of Relationships of Federal and State Courts. Chief Justice C. C. Torbert will serve as moderator for

the panel composed of the Chief Judges of the Federal District Courts: Sam Pointer of the Northern District, Robert Varner of the Middle District and W. B. Hand of the Southern District, and state judges John Bryan of the 10th Judicial Circuit and James Gullage of the 37th Circuit.

SPECIALTY COURSES SET

Problem Areas of the Law to be Discussed

Fall and spring specialty courses for clerks, registers and their employees will be devoted to troublesome areas of the law. Fall topics will be selected from Civil and Domestic Relations Law and the spring topics will come from Criminal Law.

The fall specialty courses will be held Oct. 28-29 in Birmingham. Topics in the civil area will include Detinue/Attachments/Writs of Seizure; Evictions and Unlawful Detainer; Pro Ami; Error Coram Nobis; Garnishments; and Bonds for Surety. In the Domestic Relations area, the topics will include Procedures for Divorce Modification; Guardian Ad Litem; ADC cases; and Reciprocal Support. Other topics will include Sales for Division; Land Condemnation; Land Line Disputes and Special Masters. A short discussion on Appeals of Civil Cases will conclude the program.

The spring specialty courses are scheduled in Montgomery on March 24-25. The first portion of the program will be directed to legal references and how to use them. This will include sessions on how to use the Code of Alabama and other documents which set forth procedures such as rules adopted by the Supreme Court, court decisions, attorney general's opinions, clerk of the Supreme Court's opinions and AOC directives. In the area of criminal law, the topics will include Bonds; Bond Forfeitures; Withdrawn and Filed Cases; Habeas Corpus; Restitution; and Minute Entries. This session will conclude with a discussion of Appeals of Criminal Cases.

Clerks and registers are urged to include employees who work in these areas in the workshops.

ADMINISTRATIVE ANNOUNCEMENTS

CHANGE IN SICK LEAVE RESTORATION POLICY

The State Personnel Department recently announced a new policy which permits acceptance of unused sick leave balances from county or city Boards of Education and state-supported, post secondary schools in Alabama, by individual state departments and agencies under the limitations described below.

Any such sick leave balance accepted by the departments will be placed in a sick leave reserve account of the individual employee involved. Sick leave reserve is explained in paragraph 8 on page V-9 in the chapter on "Attendance and Leave" of the UJS Personnel Procedures Manual. Normally, sick leave reserves are those hours earned in excess of the maximum (1200) hours an employee is allowed to earn and carry forward from one year to the next. Sick leave reserves can be used, however, after depletion of current sick leave balances, due to extended illness. For example, if an employee exhausts all accumulated sick leave with the State, he may then use leave in the sick leave reserve account (or any portion of it) to cover days missed from work due to illness. In essence, the balance from a local school system or state-supported college will serve as "insurance" only for the employee's use in case of an extended illness.

Any such balance accepted from local school systems and/or state-supported colleges will not be used in computing payment for sick leave upon retirement.

The above policy will be adopted by the Unified Judicial System, and paragraph 12, subject "Restoration of Sick Leave of Former Employees of Other State Agencies or Departments," on page V-10 of the UJS Personnel Procedures Manual will be revised accordingly. In the meantime, any current and future Unified Judicial System employee who was separated in good standing from a local school system or state-supported college and who was or is employed by the UJS within four years from the date of separation from such a school or college may have his accumulated and unused sick leave balance placed in a sick leave reserve account by the Administrative Director of Courts, provided that the employee obtains a certification of his sick leave balance upon separation from the appropriate school system and furnishes a copy to the Personnel Division of the Administrative Office of Courts.

RATES INCREASE FOR HEALTH COVERAGE

The State Employees' Insurance Board recently announced that rates for the Alabama State Employees' Health Insurance Plan will increase effective Oct. 1, 1982.

The new monthly rates are as follows:

| | |
|------------------------------|---------|
| Employee coverage, paid by | |
| the State | \$75.00 |
| Dependent coverage | 65.00 |
| Coverage for employee/ | |
| dependent over 65 | 28.00 |
| (medicare recipient) | |

For those employees with dependent coverage, the increased premium will be deducted in Sept. since that deduction is prepayment for Oct. coverage.

Eye and dental coverage will not be added to the state plan during this coming fiscal year (Oct. 1982 through Sept. 1983).

The Board is currently conducting a cost survey to determine whether the extra coverage might be added at some future date, which would be Oct. 1983 at the earliest.

OPEN ENROLLMENT FOR FAMILY HEALTH COVERAGE

UJS employees who wish to add dependent coverage to their State Health Plan policy may do so effective the first of October or November 1982.

To begin coverage Oct. 1, 1982, an enrollment form accompanied by a personal check or money order, made payable to the State Employees Insurance Board, in the amount of \$65.00, must reach the Personnel

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PEOPLE * PEOPLE

Colbert County Circuit Judge *Inge Johnson* was recently elected to the executive board of the National Conference of State Trial Judges. She was elected to the position during the annual conference in San Francisco.

The conference for state trial judges under the judicial administration division of the American Bar Association was created to gather information, study and disseminate findings to state trial judges across the United States concerning trial and litigation problems.

Judge Johnson represents Region 11, which includes Alabama, Florida and Georgia. There are 14 regions nationwide.

John H. Wilkerson Jr., clerk of the Alabama Court of Civil Appeals, has been chosen president-elect of the National Conference of Appellate Court Clerks. He was elected during the recent ninth annual meeting of the conference in Boston.

Bob Merrill, court administrator, 15th Judicial Circuit, married Barbara Stansell July 17. The ceremony was held at Frazer Memorial Methodist Church in Montgomery.

Karen Trussell, chief probation officer for Lee County, was recently nominated for Outstanding Young Women of America.

Ms. Trussell has been with the Alabama Court System since 1969. She has been a probation officer with Lee County since 1973 and chief probation officer since 1979.

Elizabeth Earwood was employed as court reporter to Circuit Judge Inge P. Johnson of Colbert County on Aug. 11.



Chief Justice Torbert makes presentation to Judge McKelvey

Anne Farrell McKelvey, district judge of Wilcox County, was the recent winner of one of the Annual Governor's Awards. She was named the Wildlife Conservationist of the Year. At the banquet of the Alabama Wildlife Federation, held in Anniston, Chief Justice C. C. Torbert Jr. presented Judge McKelvey with her award.

THIRD SPECIAL SESSION

Changes Made in DUI Law

Editor's Note: See article, "Constitutional Question Raised Over Delivery of Special Session Bills," page 4, regarding the legality of this new DUI law.

Governor Fob James signed into law an act amending Section 32-5A-191, Code of Alabama 1975 which became effective on August 22, 1982.

On a first offense there are two changes. First, the minimum fine is raised from \$100 to \$200. The second change requires the court to inform each defendant, in writing, of the sanctions which may be imposed upon subsequent convictions within a 5 year period. To prove compliance with this notice requirement, the defendant must sign the notice form and keep one copy, with one being retained by the court.

On a second offense the minimum fine was raised from \$200 to \$500 and the maximum from \$1,500 to \$2,500, with a minimum jail sentence of 15 days and a maximum jail sentence of 11 months and 29 days. The act also provides that any jail sentence imposed must be served at a time that does not interfere with the regular employment of the defendant.

For a third or subsequent offense, the minimum fine is \$1,000 and the maximum is \$5,000, with a minimum jail sentence of

120 days and a maximum sentence of eleven (11) months and 29 days. There is currently a request before the attorney general asking for clarification on this section inasmuch as the mandatory minimum fine exceeds the jurisdictional limits of municipal courts.

The mandatory six months revocation of licenses on second offenses remains (32-5A-195); however, on a third or subsequent offense, judges are charged to suspend or revoke licenses from 2 to 10 years.

For purposes of the multiple offender sections, five years remains the governing timeframe.

UTC's Not Affected By New DUI Law

Act No. 82-844 signed by Governor Fob James on Aug. 22, 1982, increases the penalties for driving while under the influence. The provisions of this act provide that a person whose convictions occur more than five years apart shall not be considered a multiple offender. For this reason, the new law will in no way affect the destruction of UTC's as established in the Record Retention Schedule adopted pursuant to Rule 47 of the Alabama Rules of Judicial Administration.

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Division at the Administrative Office of Courts no later than Sept. 30. Direct payment will be necessary for Oct. only since it is too late for a payroll deduction to be made.

If coverage is to be effective Nov. 1, the form is due no later than Oct. 15, for deduction from the Oct. 29 warrant.

If enrollment forms are received too

late for a payroll deduction for Nov. coverage, employees must pay the premium by personal check or money order, to be received by the Personnel Division no later than the last working day of the month.

This will be the last open enrollment period until Oct./Nov. of 1983.

For further information, or for enrollment forms, contact Marie Porter at 1-800-392-8077, Ext. 253.

Senator Heflin Sponsors Bills

New Justice Assistance Bill

Legislation which would amend and reauthorize the Justice System Improvement Act is awaiting action by the full Senate Judiciary Committee.

The bill, S. 2411, would reauthorize the National Institute of Justice and the Bureau of Justice Statistics with annual funding authority of \$25 million each. But it also proposes \$40 million annually for a new Office of Justice Assistance.

The OJA would administer (1) a national priority program to help communities implement anti-crime programs of proven effectiveness; and (2) a national discretionary program to support training, technical assistance and demonstration programs at the state and local levels.

The bill also would authorize \$20 million in emergency assistance for areas with a criminal justice crisis, and \$10 million for a new training and manpower development program.

Judicial Programs - Programs eligible for priority funding would include those designed "to speed the trial of criminal cases, reform sentencing practices and procedures, improve the efficiency of the jury system, and improve the processing of cases involving the mentally incompetent and pleas of mental incapacity." Priority funding also could go to the "development and operation of justice information systems, including management information systems."

The bill was drafted by the Judiciary Subcommittee on Juvenile Justice under the chairmanship of Arlen Specter (R-Pa). Sen. Howell Heflin is a co-sponsor.

If the Senate completes action on the measure, it will go to conference with the House which has passed a \$170 million grant-in-aid bill (H.R. 4481) for state and local criminal justice agencies.

The administration has drafted its own bill to reauthorize NIJ and BJS and is opposed to both S. 2411 and H.R. 4481.

State Justice Institute Act

During the second week in Aug., the Senate passed the State Justice Institute Act (S. 537) and sent the bill to the House where a companion measure is pending in the Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice.

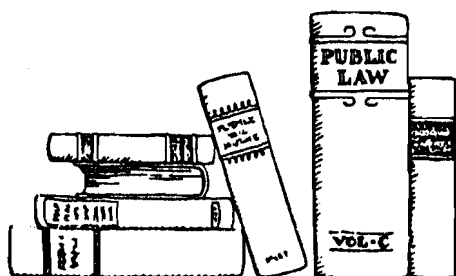
Robert W. Kastenmeier (D-Wis), the subcommittee chairman and principal sponsor of the House bill (H.R. 2407), said the subcommittee would meet soon to consider action on the measure.

S. 537 was brought to the Senate floor by its principal sponsor, Howell Heflin, who said the need for the Institute "was established during extensive hearings in this Congress as well as in the 96th Congress." He agreed to the only amendment offered on the floor and the measure passed without a dissenting vote. The amendment, offered by Sen. Charles E. Grassley (R-Iowa), reduced the funding authority by 18 percent. As passed, the bill authorizes a total of \$70 million for the Institute, beginning with \$20 million in fiscal 1983 and increasing to \$25 million in fiscal 1984 and 1985.

The SJI Act, originally drafted by a task force of the Conference of Chief Justices and the Conference of State Court Administrators, passed the Senate under Sen. Heflin's leadership in the last Congress but was not approved above the subcommittee level in the House.

The Institute would administer a program of national discretionary grants providing research, technical assistance, demonstration, and training programs for the improvement of state court systems. It would be governed by an 11 member board appointed by the President. A majority of the board would be state judicial officials.

LEGAL NOTES



ATTORNEY GENERAL OPINIONS

District Attorneys-Municipal Courts

In an opinion issued July 16, 1982 the Attorney General stated that a district attorney may prosecute criminal cases in municipal court located within his district but is under no obligation to do so. After reviewing Code Sections 12-14-2(b), 12-17-184 and 12-17-186(a), the Attorney General reached the following conclusion:

"(a) district attorney may if he wishes, prosecute cases in municipal court and handle the appeals therefrom. This is not to say, however, that a district attorney is under an obligation to offer his services as prosecutor to any city in his district. Clearly, the responsibility of providing prosecutorial services (sic) falls on the municipality itself... . Rather, it is our opinion that the decision to serve as prosecutor in municipal cases is within the sound discretion of the district attorney."

This is a reiteration of the position adopted earlier by the Attorney General in an opinion issued July 8, 1980 to Mayor J. H. Millwood (Blountsville) and an opinion issued March 1, 1976 to Mayor H.G. Jordan (Daphne).

Act Authorizing Hazardous Duty PayFor City Police Is Constitutional

In an opinion issued July 16, 1982, the Attorney General held that Act 81-915, providing hazardous duty pay for policemen of the City of Fort Payne, was constitutional. This question had been addressed earlier by the Attorney General in an opinion issued May 11, 1982 to Representative David Stout. In that opinion, the Attorney General held that the Act was not in violation of Section 104(24) of the Constitution of Alabama since a policeman does not hold a "public office," nor did it contravene Amendment No. 92 of the Constitution because that provision only applies to state and county officers. The Attorney General concluded further that Act 81-915 did not violate any other statutory or constitutional provisions.

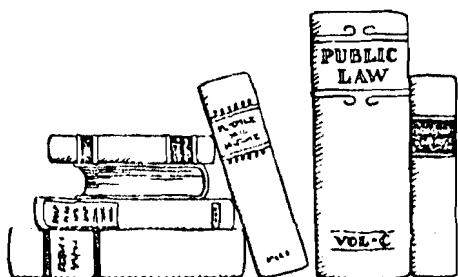
Constables - May Serve ExecutionOn Judgment Obtained In District Court

The Attorney General issued an opinion on July 16, 1982, stating that a constable would have the authority and responsibility to serve executions on judgments obtained in the District Court of Etowah County, Alabama when such executions are directed to him as constable as provided in Section 36-23-6, Code of Alabama 1975. A constable would have the authority to sell property executed against as provided in Chapter 9 of Title 6 of the Code of Alabama 1975. The fees due a constable for such services can be found in Section 12-19-92 as amended. (Noted again in an Opinion dated July 26, 1982, to Annette Bozeman.)

Form C-20, Rev. 2/79, Execution of the Standardized Court Forms is issued to any lawful officer of the State of Alabama to perform the appropriate action, which includes constables.

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LEGAL NOTES



ATTORNEY GENERAL OPINIONS

(Continued From Page 10)

Legislators-Immunity

The Attorney General was recently requested to interpret Article IV, Section 56 of the Alabama Constitution and Section 29-1-7(a), Code of Alabama 1975 which provide for legislative immunity from arrest. Specifically, the question posed was whether the offense of driving under the influence of alcohol or controlled substances is a "breach of the peace" for which immunity would not apply.

Since there appears to be no judicial decisions in this state which delineate the breadth and scope of the Alabama immunity provisions of Article IV, Section 56 and Section 29-1-7, the Attorney General was careful to point out that this question is one which must ultimately be decided by the courts.

Researching federal cases and decisions rendered in other states construing similar constitutional and statutory provisions, the Attorney General found that most courts have held that legislative immunity was not intended to extend to violations of the criminal law.

Ethics Commission

Investigations - Complaints

The Attorney General issued an opinion

on July 16, 1982, to the State Ethics Commission concerning the appropriate manner of handling anonymous complaints.

"It is the opinion of this office that the legislature has clearly spoken on this subject by enacting Section 36-25-4(14), Code of Alabama 1975 which provides:

The commission shall not take any investigatory action on a telephonic or written complaint against a public official so long as the complainant remains anonymous. Investigatory action on a complaint from an identifiable source shall not be initiated until the true identity of the source has been ascertained and written verification of such ascertainment is in the commission's files. In all matters that come before the commission concerning a complaint on an individual, the laws of due process shall be strictly adhered to.

By the clear words of the statute, the legislature has provided that "the commission shall not take any investigatory action..." on an anonymous complaint.

The opinion also states that due to Section 36-25-25(a), a commission member cannot serve as the complainant where an anonymous complaint has been received. "A commission member who substitutes himself for an anonymous complainant without full knowledge concerning the facts complained of could easily be held to have violated Section 36-25-25(a), Code of Alabama 1975."

Does Prohibition Against Participation

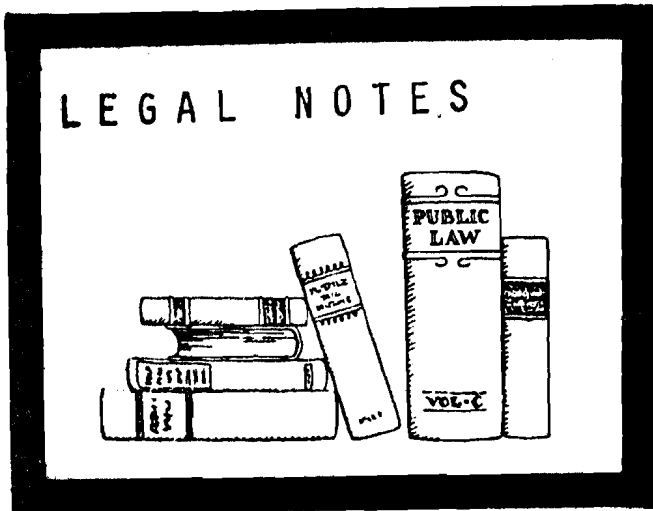
In Retirement System By Those Who Become

State Employees After Age 61 Violate

Age Discrimination Act?

In an opinion dated July 16, 1982, the Attorney General discussed whether Section 36-27-4(a)(1) of the Code of Alabama 1975, unlawfully discriminates against certain persons on the basis of age. Section 36-27-4(a)(1) provides that:

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ATTORNEY GENERAL OPINIONS

(Continued From Page 11)

"All persons who shall become employees after October 1, 1945, shall become members of the retirement system as a condition of their employment; except, that on and after October 1, 1963, no person who has attained age 61 shall previously have been a member of this system or of the teachers' retirement system of Alabama. (Emphasis supplied).

The Age Discrimination in Employment Act of 1967, (ADEA) 29 U.S.C., Section 623 (1976), prohibits certain actions by "employers" which discriminate against persons on the basis of their age.

The Attorney General did state that there could possibly (emphasis) be problems with Alabama's statute, supra, since the ADEA applies to states through its definition of "employer". However, no opinion was rendered due to the fact the issue of whether the ADEA is unconstitutional in its application to the states is presently pending before the United States Supreme Court in the case of E.E.O.C. v. Wyoming, 514 F.Supp. 595 (D. Wy. 1981) appeal docketed, No. 81-554 (U. S. Sup. Ct. Sept. 17, 1981).

"Reasonable" Force To Be Used By

Sheriff With Persons Of Unsound Mind

In a request submitted by the sheriff

of Jefferson County, the Attorney General was asked to address the questions of what force, if any, may be used by a deputy sheriff in attempting to take into custody a person alleged to be of unsound mind under Sections 22-52-7(c) and 26-2-43, Code of Alabama 1975. The Attorney General, on July 19, 1982, replied that the force that may be used is that which is "reasonable" under the facts of each individual case or situation. The above cited Code sections require the probate court to order the sheriff to compel attendance of a person alleged to be of unsound mind before the court.

Attorneys Fees In Indigent Cases -

Proper Procedures

In an opinion dated July 23, 1982, the Attorney General addressed three specific questions posed by Dr. Rex Rainer, Finance Director, regarding the appointment of counsel in these cases. The questions and the Attorney General's responses are summarized here:

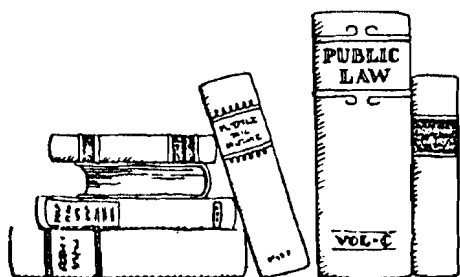
- (1) Question - May a trial judge appoint more than one attorney to represent an indigent defendant?

Answer - The Attorney General's office is of the opinion that the procedure of appointing counsel to represent indigent defendants is properly left to the discretion of the trial judge. Some cases involving indigent defendants may involve complex legal issues and be litigation of such an intricate nature, that the judge may believe it is in the best interest of the defendant to appoint more than one attorney.

- (2) Question - Do offenses such as traffic offenses appealed to circuit court, or other minor charges which usually result in a fine smaller than an attorney's fee qualify for appointment of counsel?

Answer - The United States Supreme Court has determined an indigent's
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LEGAL NOTES



ATTORNEY GENERAL OPINIONS

(Continued From Page 12)

right to appointed counsel exists when the litigant may lose his personal liberty if he loses the litigation (citations omitted). The right to counsel is applicable for any offense, whether classified as petty, misdemeanor or felony where conviction may result in the loss of liberty. However, in most minor misdemeanors, counsel for the accused is not necessary if there is an understanding that a jail sentence will not be imposed. Here, too, appointment of counsel is within the discretion of the judges and should be determined on a case-by-case basis.

- (3) Question - May sentencing be considered a post-conviction proceeding for which a separate attorney's fee is authorized under Section 15-12-23, Code of Alabama 1975?

Answer - Post-conviction proceedings means a habeas corpus or coram nobis proceeding. An attorney appointed as counsel for an indigent defendant cannot receive post-conviction proceeding fees for the sentencing proceeding. However, an exception to this rule exists in capital cases. Therefore, it is the opinion of the Attorney General that sentence proceedings in non-

capital felonies, including habitual offender cases, should not be considered "post-conviction proceedings" for purposes of additional compensation under Section 15-12-23, supra, the sentencing proceedings in capital cases should be treated as separate proceedings for fee purposes.

Witness Subpoena Fees And Additional

Defendant Fees Considered "Service" Fees

In an opinion to Allen L. Tapley dated June 11, 1982, the Attorney General stated that witness subpoena fees in civil and criminal cases collected pursuant to Section 12-19-74(a) and Section 12-19-171(c) respectively, are issuance fees rather than execution fees. Based on the fact that these fees are assessed to defray the administrative expense incurred in processing the subpoena, the Attorney General stated that these fees should be paid upon issuance, even when the party requesting the subpoenas or his attorney intends to make service. The sole exception where payment of these fees would be deferred, being in cases involving indigency.

In addition, the Attorney General held that the \$5.00 multiple defendant service fee authorized under Section 12-19-73 should be collected for each additional defendant "even in those instances in which a party's attorney or someone he requests is designated by the court to serve process".

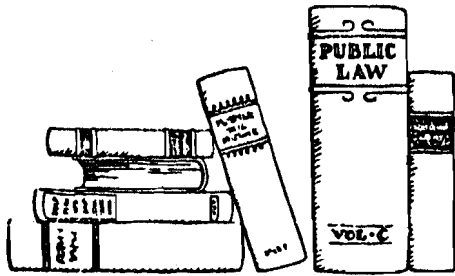
Child Support - Garnishment Of

State Employee's Salary

In an opinion issued to Dr. Rex K. Rainer, Director of the Finance Department, the Attorney General has again stated that Sections 6-6-490 through 6-6-493, Code of Alabama 1975, do not expand the scope of garnishment to include child support payments which are not yet in arrears. This opinion is in keeping with an earlier one of November 25, 1981. Of course, earlier, in an opinion dated March 3, 1982, the Attorney General opined that the above cited Code sections permit a state employee's wages to be garnished for child support payments which are in arrears, and for the attorney's fees, if

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LEGAL NOTES



ATTORNEY GENERAL OPINIONS

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awarded by the court, where the obligor has been found to be in contempt of court. See May, 1982, Court News, Page 14. This latest opinion is dated July 30, 1982.

Juvenile Probation Officers/

Deputy Sheriffs

In an opinion dated July 30, 1982, the Attorney General has determined that the Deputy Sheriff and juvenile probation officer of Dale County who are both seeking election to a county office, must resign or take leaves of absence during their candidacy.

Act No. 698, Acts of Alabama 1973, page 1047, prohibits employees of Dale County from being candidates "for nomination or election to any public office...". The Attorney General determined that both the Deputy Sheriff and the juvenile probation officer fall within the definition of "employee" under the Act and are therefore subject to the prohibition of the Act. However, the opinion cites a prior opinion dated April 26, 1979 to Sheriff Beasor B. Walker, Tuscaloosa County, that stated when a local act prohibits county employees from seeking public office, such employees may be granted a leave of absence for the purpose of seeking election. If such a leave of absence is not granted, the employee must terminate his or her

employment to seek county office.

This opinion further determined that both the Deputy Sheriff and juvenile probation officer are entitled to receive overtime pay or compensatory leave under Section 36-21-4.1, Code of Alabama 1975. Pursuant to this section, if either employee decides to receive overtime pay, the county must pay him a lump sum payment with his compensation for the next succeeding pay period. If either elects to take compensatory time, he must take that time after his leave of absence has expired. He may not take that time during his leave of absence.

Contempt Proceedings

Under Rule 37, ARCP

In an opinion dated September 1, 1982, the Attorney General reversed an opinion issued May 10, 1982, which had held that an additional filing fee is required when a judgment creditor files a motion requesting a defendant be held in contempt of court for failure to answer post-judgment interrogatories or for failing to appear at a post-judgment deposition.

The prior opinion was based upon Opinion No. 28 of the Clerk of the Supreme Court, but shortly after this opinion was released, Opinion No. 28 was overruled by the Clerk in Opinion No. 39. The Attorney General, following this latter opinion of the Clerk, now concludes that there is no filing fee for post-judgment contempt proceedings pursuant to Rule 38, Alabama Rules of Civil Procedure.

MISCELLANEOUS LEGAL NOTES

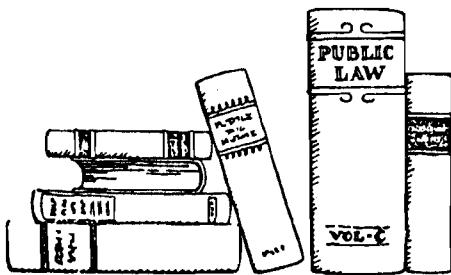
Posting Notice In Eviction

Proceedings Unconstitutional

In a 6-3 opinion, the United States Supreme Court has held that posting notice of eviction on the premises after attempting and failing to complete personal and substituted service is inadequate to meet the

(Continued On Page 15)

LEGAL NOTES



MISCELLANEOUS LEGAL NOTES

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minimum standards of due process required by the Constitution, "where an inexpensive and efficient mechanism such as mail service is available to enhance the reliability of an otherwise unreliable notice procedure," Greene v. Lindsey, No. 81-341, 50 U.S.L.W. 4483 (U.S. Sup.Ct., May 17, 1982).

The majority opinion starts with the premise that the primary mandate of due process is the right to be heard and the, "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or consent," Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950), cited in Greene 4484. The Court then tests posting against the constitutional standard as set forth in Mullane: "Notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," Mullane, *id.*, cited in Greene, *id.*

The Court disposed of the argument that since an eviction action is an *in rem* proceeding and not an *in personam* proceeding process may be served by posting, by stating that defendants had been deprived of a significant interest in property and in light of this deprivation it is not sufficient to recite that notice served "upon

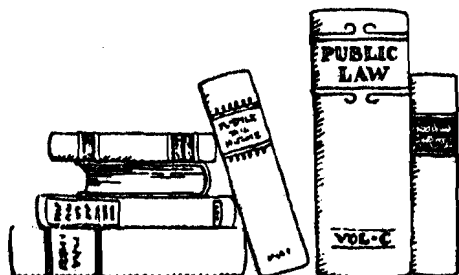
the thing itself is sufficient." "Sufficiency of notice," said the Court, "must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests... . Merely posting notice on an apartment door does not satisfy minimum standards of due process. In a significant number of instances, reliance on posting...results in a failure to provide actual notice to the tenant concerned..."

Additionally, the Court rejected an argument that the particular statute involved (a Kentucky statute) is not offensive in its ultimate reliance on posting because posting is used (under the statute) as a method of service, "...only as a last resort." Noting that often times tenants are not at home the Court stated, "...The failure to effect personal service on the first visit hardly suggests that the tenant has abandoned his interest...Notice by mail in the circumstances of this case would surely go a long way toward providing the constitutionally required assurance that the state has not allowed its power to be invoked against a person who has had no opportunity to present a defense despite a continuing interest in the resolution of the controversy." Greene at 4485-86.

Thus, it would appear that the holding in this case directly invalidates provisions of Alabama statutes found in Sections 6-6-332 and 35-9-82, Code of Alabama 1975. Section 6-6-332, *supra*, specifically provides that it is sufficient to leave a copy of the court's notice of an unlawful detainer complaint and proceeding at the defendant's, "...usual place of abode." Section 35-9-82, *supra*, (Sanderson Act proceedings) also provides for serving that writ of possession by leaving it at the defendant's usual place of abode. It is therefore recommended that the courts notify the sheriff's departments or other authorized process servers that notices of eviction under the regular unlawful detainer provisions or those commonly known as "Sanderson" proceedings should be personally served on the defendant(s) as provided in Rule 4(c)(1), A.R.C.P., or returned "not found". Of course, service by certified mail may be initially requested in these actions as pro-

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MISCELLANEOUS LEGAL NOTES

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vided in Rule 4.1(c)(1), A.R.C.P., or they may be served by certified mail if personal service is not effected initially. Please note that forms C-59 and C-61, the complaint and summons, used in these proceedings, respectively, contain the standard instructions for personal service or service by certified mail. Since no reference is made to effecting service by merely leaving at the place of residence, no changes are contemplated in these forms at this time.

ALABAMA JUDICIAL INQUIRY COMMISSION
SYNOPSIS OF ADVISORY OPINIONS

Below are synopses 82-158 and 82-159 recently issued by the Judicial Inquiry Commission:

SYNOPSIS 82-158--May a judge serve on a church "bond committee" for the purpose of receiving proceeds of bond sales and depositing said proceeds in a church bond account? The judge did not and will not participate in any bond sale or solicitation of the money.

OPINION--Under Canon 5B of the Alabama

Canons of Judicial Ethics, a judge is permitted to participate in certain civic, charitable and religious activities. It is the opinion of the Commission that a judge may serve on a church committee which receives and deposits funds as long as the committee does not in any way participate in the solicitation of those funds.

SYNOPSIS 82-195--It is permissible for a district court judge, who is a candidate for circuit court judge, to accept campaign contributions from a bonding company or a major stockholder in a bonding company which does business in the circuit and district courts?

OPINION--It is the opinion of the Commission that the Alabama Canons of Judicial Ethics do not prohibit such campaign contributions; however, a candidate for judicial office should be ever mindful of Canons 7B(1)(c), 1, 2A and 2C.

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**COURT NEWS**

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