



MUNICIPAL COURT Judges Bulletin

Spring 2006 • The Georgia Council of Municipal Court Judges Newsletter • Vol. 7, No. 1

TABLE OF CONTENTS

Executive Committee	2
Minutes of Winter Meeting	4
Financial Report	6
Case Law Update	7
New Indigency Standards	8
The Worst Judges?	9
Can I Get Some Privacy?	10
Photo Gallery	12
Legislative Wrap up	14
Notification of Change in Municipal Personnel	18
A Law Well Needed	20

President's Corner

John K. Edwards, Jr.
City of Valdosta

The Council of Municipal Court Judges has accomplished great things in the past months and it is a pleasure to report them to you. Our Seventh Annual Breakfast for Legislators held February 23, 2006, was a great success and had our strongest attendance to date! In addition to legislators from around the State, guests in attendance included Justice Harris Hines, Justice Hugh Thompson and Chief Justice Leah Ward-Sears. Special thanks go to those in attendance as well as the hard work of LaShawn Murphy, Marla Moore, Chris Patterson and all the staff at the Administrative Office of the Courts (AOC) for helping us to make this breakfast the growing opportunity that it represents for the Council.

Our winter meeting of the Executive Committee of the Council of Municipal Court Judges followed the Legislative Breakfast. Ted Baggett, Associate Counsel for the Georgia Municipal Association (GMA) spoke to the Committee regarding: GMA's support of SB203 (regarding the reduction of penalties that may be assessed against clerks failing to comply with HBEX1); HB1288 (regarding mandatory training of municipal court clerks); and HB718 (regarding a pretrial diversion

program for municipal courts). Ted also addressed several other pieces of pending legislation: HB1221 (a fine add-on for trauma victims); HB1209 (specialized fine collections for a created GSP motorcycle patrol until on I-285); HB1044 (regarding allowing part-time municipal and magistrate court judges to carry firearms); and HB719 (regarding increasing the maximum ordinance violation fine to \$2,500). I encourage each of you to remain aware of each bill's current status.

The Committee also received reports of special note from Judge Rashida Oliver, who attended the Vital Records Protection Summit in November on behalf of our Council and returned with truly pertinent information to all courts regarding document safe-guarding in the event of a major disaster; Judge Charles Barrett who reported that the Georgia Public Defenders Standards Council had lowered the Indigency Determination Standards for misdemeanors from 150% to 125% of the Federal Poverty Guidelines; and Judge Tommy Bobbitt who advised that he had testified before the House in support of HB 1288 and encouraged all members to remain watchful of SB383 (regarding the requirement of a superior court clerk to serve as clerk of state, magistrate and juvenile courts) as well as SB421 (regarding criminal procedure

continued on page 4

Farewell...

The time has come for me to say goodbye after three years of service. Thank you for allowing me to experience the Council of Municipal Court Judges. You will be truly missed and never forgotten.



*Kindest regards,
Bernadette "Bernie" Smith*

EXECUTIVE COMMITTEE

Judge John Kinsley Edwards, Jr.
President
PO Box 1083
Valdosta, GA 31603-1083
229-293-3171/F 333-1803
jedwards@valdostacity.com

Judge Michael P. Cielinski
President-Elect
PO Box 1882
Columbus, GA 31902-1882
706-653-0354/F 323-1722

Judge Bill Clifton
Vice President
577 Mulberry Street, Suite 710
Macon, GA 31201
478-750-8600/F 750-8686
bclifton@constangy.com

Judge Kathryn Gerhardt
Secretary
PO Box 4866
Macon, GA 31208-4866
478-745-9661/F 745-9824
kgerhardt@harrisjames.com

Judge A. Frost Ward
Treasurer
1500 Morrow Road
Morrow, GA 30260
770-960-3012/F 678-422-5031
frostw@bellsouth.net

Judge Charles L. Barrett, III
Immediate Past President
3276 Buford Highway
Duluth, GA 30096
678-512-3733/F 770-814-3005
cbarrett@duluthpd.com

District 1
Judge Kevin J. Street
Thunderbolt
2821 River Drive
Thunderbolt, GA 31404
912-629-4669/F 629-4668
streetlaw1@aol.com

Judge Willie Titus Yancey, II
Thunderbolt
2821 River Drive
Thunderbolt, GA 31404
912-629-4669/F 629-4668
tmctbolt@aol.com

District 2
Judge Willie C. Weaver, Sr.
Albany
225 Pine Avenue
PO Box 447
Albany, GA 31702-0447
229-438-9455/F 438-0674
wweaverlaw@aol.com

Judge Herbert W. Benson
Ashburn
PO Box 1165
Tifton, GA 31793-1165
229-386-0964/F 386-1452
hbenson@sfbpc.com

District 3
Judge Michael P. Cielinski
Recorder's Court of
Columbus-Muscogee County
PO Box 1882
Columbus, GA 31902-1882
706-653-0354/F 323-1722
Jwaters44@mindspring.com

Judge David M. Pierce
Perry
89 Cohen Walker Drive
Warner Robins, GA 31088
478-987-4695/F 987-5249
dpierce@houstoncountyga.org

District 4
Judge Angela T. Butts
Recorder's Court of DeKalb County
3630 Camp Circle
Decatur, GA 30032-1394
404-294-2635/F 294-2148

Judge Warren W. Hoffman
Stone Mountain
922 Main Street
Stone Mountain, GA 30083
404-377-0410 or 770-879-4981
F 404-377-3016 or 770-879-4976

District 5
Judge Elaine Lynn Carlisle
Atlanta
150 Garnett Street, SW
Atlanta, GA 30303
404-865-8103/F 658-7053
elcarlisle@atlantaga.gov

Judge Calvin S. Graves
Atlanta
150 Garnett Street, SW
Atlanta, GA 30303
404-658-7049/F 658-7125
cgraves@atlantaga.gov

District 6
Judge John Clayton Davis
Forest Park
2670 Emerald Drive
Jonesboro, GA 30236
770-715-5912/F 957-3257
claydavis@charter.net

Judge David J. Turner, Jr.
Manchester
PO Drawer 450
Manchester, GA 31816-0450
706-846-8427/F 846-5241

District 7
Judge Robert L. Whatley
Austell
3959 Janet Street
Lithia Springs, GA 30122
770-941-5833

Judge Diane M. Busch
Marietta
800 Kennesaw Ave., Suite 400
Marietta, GA 30060
770-424-4343/F 424-1892
dianebusch@mindspring.com

District 8
Judge Thomas C. Bobbitt, III
Jeffersonville
101 N. Jefferson Street, C55
PO Box 1676
Dublin, GA 31040-1676
478-272-5010/F 275-0035
tboobbitt@nlamerica.com

Judge Charles W. Merritt, Jr.
Madison
155 S. Main Street
Madison, GA 30650
706-342-9668/F 342-9843

District 9
Vacant

Judge William F. Brogdon
Lawrenceville
PO Box 390997
Snellville, GA 30039
770-978-1181/F 978-1145
brogdon77@yahoo.com

District 10
Judge Chip Hardin
Tignall
105 Andrew Drive
Washington, GA 30673
706-678-4404/F 678-4404

Judge C. David Strickland
Porterdale
PO Box 70
Covington, GA 30015-0070
770-786-5460/F 786-5499
david.strickland@strickland-law.com

Chief Judge Margaret Gettle Washburn
Bulletin Editor
303 Scenic Highway
Lawrenceville, GA 30045
770-963-1105/F 963-2828
washburnlaw@bellsouth.net

President's Corner *continued*

and non-traffic misdemeanor citations).

Our Executive Committee met again on Friday, April 21, 2006, in Macon. In addition to finalizing plans for our Survey Update Seminar and committee meetings, the Committee heard a final report from George Nolan, Executive Director of the Georgia Courts Automation Commission (GCAC), who provided Committee members present with color copies of the final draft of the Data Definitions Summary Report for Municipal Courts and the Strategic Plan for Information Technology for Municipal Courts. These amazing and comprehensive reports will now be scrutinized by the Committee members prior to final publication. Only a limited number of additional draft copies (which will not be reproduced prior to the final reports) remain and are available from the Administrative

Office of the Courts.

As the Georgia General Assembly wrapped up the 2006 Legislative Session on March 30, 2006, Debra Nesbit, Associate Director for Legislative & Governmental Affairs, AOC reported at great length to the committee pertinent bills passing in this session. These bills included: HB1321, HB1366, HB1470, SB552, SB553, HB276, HB1193, HB1209, HB1236, HB1253, HB1275, HB 1392, HB1436, SB64, SB531, HB718, HB804, HB912, HB1020, HB1044, HB1288, HB1302, HB1320, HB1501, SB44, SB77, SB203, SB503, SB606, and SB637. Deborah also addressed SR793, SR954, and SR1027 while reminding the Committee that all Council members may view bills online by going to www.georgiacourts.org and clicking on "Legislative Tracking," and either entering a specific bill number

or by clicking on "Municipal Courts" to view all bills that affect our class of courts. More comprehensive information regarding these bills is included in this issue of the newsletter.

The Executive Committee also decided to create a Long-Range Planning Committee to study the major issues that will likely be confronting municipal courts in the coming years. This Committee will also research the feasibility of professional representation on behalf of the Council of Municipal Court Judges in the Legislature as well as programs or committees to address related issues. The committee members are: Judge Thomas Bobbitt, Judge Diane M. Busch, Judge Michael P. Cielinski, Judge John Clayton Davis and Judge Calvin S. Graves.

Our next meeting of the Executive Committee of the Council of Municipal Court Judges will be Wednesday, June 28, 2006 from 12:00 to 1:00 p.m. at the Hyatt Regency in Savannah with lunch provided. As always, I urge all Executive Committee officers, District representatives and our membership at large to please make plans to attend. Our annual business meeting will follow the next day, Thursday, June 29, 2006, from 10:00 to 11:00 a.m. (between sessions of the Survey Update for Municipal Court Judges) at the Hyatt Regency in Savannah. Annual elections will take place during the Business meeting.

I hope that any of you with questions, suggestions or concerns will contact me at (229) 293-3171 or jedwards@valdostacity.com

Notice of Annual Election of Officers/Executive Committee and Training Council Members

The Election of Officers, Executive Committee members, and Training Council members will take place on Thursday, June 29, 2006, during the Annual Meeting at the Savannah Hyatt, Savannah, Georgia.

All Council members are urged to notify the Nomination Committee of their interest in serving in any elected capacity, or of persons whom they feel should be considered as candidates for office. The deadline for notification is April 30, 2006.

Judge David M. Pierce
Nominations Committee
89 Cohen Walker Drive
Warner Robins, GA 31088
478-987-4695/F 478-987-5249
dpierce@houstoncountyga.org

Minutes of the Winter Meeting

The winter meeting of the Executive Committee of the Georgia Council of Municipal Court Judges was held on February 23, 2006, at the Sloppy Floyd Towers in Atlanta, Georgia, following the legislative breakfast sponsored by the Council. Judge Edwards called the meeting to order at 9:00 a.m.

Judge Edwards introduced several guests who were present at the meeting. Ashley Garner, Staff Director for the Probation Advisory Council, Ted Baggett, Associate Counsel for the Georgia Municipal Association (GMA), and George Nolan, Director for the Georgia Courts Automation Commission (GCAC) were welcomed to the meeting as was Judge Kim Warden, municipal court judge and President-Elect of the Georgia Magistrate Court Judges Council.

The first item of business was the consideration of the minutes from the fall meeting held in Macon on October 21, 2005. Upon motion duly made and seconded, the minutes were approved as submitted.

Judge Edwards then called for the financial reports. Marla Moore, reporting for Chris Patterson, noted as of December 31, 2005, \$3,908.69 of the State appropriated funds for fiscal year 2006 had been spent, leaving a balance of \$15,625.31. Judge Ward reported the balance on the Council's private funds was \$50,871.03.

Judge Edwards advised he was not going to give a president's report and instead called upon Mr. Ted Baggett of the GMA to report on pending legislation of interest to municipal courts. Mr. Baggett addressed three bills that GMA was supporting. The first being SB203, which would reduce the penalties currently imposed upon clerks of court who do not comply with all requirements set forth in the court fines and

fees legislation passed last year. The second, HB 1288, would require mandatory training for municipal court clerks - mandating sixteen hours for new clerks and eight hours annual training thereafter. The third, HB 718, authorizes the establishment of pretrial intervention and diversion programs. According to Mr. Baggett, all three had a good chance of making it through the legislature this year.

Mr. Baggett also mentioned several other pending bills, including HB 1221, which would create a fine add-on for trauma victims; HB1209, which passed out of Committee will provide 10 motorcycle officers for I-285, with base fines forwarded to the Department of Safety; and HB1044, would allow part-time municipal and magistrate judges to carry guns. He expressed no opinion as to the likelihood of passage of these bills. In closing, he did report HB 719, which would increase the maximum ordinance violation fine to \$2500, had been voted down.

Judge Bobbitt added the Council should also keep an eye on SB383 which provides for the superior court clerk to serve as state, magistrate and juvenile court clerk and SB421 relating to criminal procedure and non-traffic misdemeanor citations. Next, he advised the Committee he had testified in support of HB1288 and encouraged all municipal court judges to likewise support the bill. Judge Bobbitt reported Mr. Rich Reaves of the Institute of Continuing Judicial Education (ICJE) had also expressed support of this legislation.

Chris Patterson then gave the report from the Administrative Office of the Courts (AOC). He thanked the Council for their collective and individual efforts in support of the AOC. He then announced that a software system developed by the AOC is available at no cost to all classes of

courts. The Traffic Information Processing System (T.I.P.S.) program can be used to calculate fines and fees and manage and report all information with respect to traffic citations. Kelly McQueen administers the program and can be contacted for additional information. Next, Mr. Patterson advised that a brochure entitled "Interacting with Persons with Disabilities" had been produced by the Georgia Commission on Access and Fairness in the Courts for use by the courts. Copies are available from the AOC. In closing, Mr. Patterson introduced AOC staff present at the meeting: Marla Moore, LaShawn Murphy, Tonya Griesbach, Ashley Garner as well as legislative intern, Bryon Vann.

Next on the agenda was a report from the Municipal Court Judges Training Council. Judge Bobbitt noted registrations for training were down from the previous year and that this has had an impact on the training budget. Consequently, it may become necessary to increase the tuition for training classes. It was also reported the Georgia General Assembly was considering a \$100,000.00 budget cut to ICJE.

The following committee reports were then given:

(1) Benchbook. LaShawn Murphy, reporting for Judge Ashman, informed the Committee the Benchbook updates are complete and have been sent out. Anyone who has not received a copy of the updates should contact Ms. Murphy.

(2) Legislative. Judge Barrett indicated the items contained in his report had been covered during Ted Baggett's comprehensive report on pending legislation.

continued on page 5

Minutes continued

(3) Newsletter. LaShawn Murphy reported for Judge Washburn that the next edition of the newsletter would be issued in April. Anyone interested in having an article published in the newsletter should promptly submit it to Judge Washburn.

(4) Nominations. Judge Pierce deferred his report, indicating that it would be addressed as an item of Old Business.

(5) Uniform Rules. Judge Edwards reported nothing further had been done towards finalizing the Uniform Rules. He stated he would like to see this project completed and volunteered to assume a lead role upon the expiration of his term as Council President.

After committee reports, Judge Edwards called for reports on liaisons with other agencies. The following reports were given:

(1) Judicial Council. Judge Edwards and Judge Cielinski attended the Judicial Council meeting held December 7, 2005. Judge Edwards reported the issue of court fines and fees was addressed and the Council was supportive of a uniform add-on to fines, rather than the present system. The Council voted to support legislation which would bring uniformity to the court fines and fees. With regards to the issue of Council of Municipal Court Judges representation on the Judicial Council, Judge Edwards expressed the opinion that it is getting closer to becoming a reality. He noted some of the Supreme Court Justices are in favor of such representation.

(2) Probation Advisory Council. Judge Ward reported the Council met

Thursday, February 21, 2006 in Washington, Georgia. He introduced Ms. Ashley Garner, Program Director of the PAC, and deferred to her. Ms. Garner's report is attached to these minutes.

(3) Georgia Courts Automation Commission. Judge Strickland deferred his report to George Nolan, Executive Director of GCAC. Mr. Nolan reported both the data definition session and the strategic technology planning session for municipal courts had been completed. A 45 page draft of the strategic technology plan had been completed, and contained information derived from judges and clerks alike. Once finalized, a copy of the plan will be provided to each judge to assist in the technology planning with local governing officials. In the interim, a copy of the strategic plan will be provided to Executive Committee members for review and discussion at the next meeting. The strategic plan will also be posted to the GCAC web site.

(4) Georgia Municipal Association. Judge Bobbitt attended GMA Mayor's Day on January 22, 2006, where he attended several committee meetings, discussing a number of issues including: Eminent Domain, Tax Fi Fa's, and the Indigent Defense Fund. Judge Bobbitt reported that an issue of major concern to GMA is the possible decriminalization of traffic offenses. The legislature is considering a study committee (HR 515) to investigate the matter further.

(5) Georgia Public Defenders Standards Council. Judge Barrett passed out copies of the revised Indigency Determination Standard to the members. He reported the Standards Council had lowered the

criterion for determining indigence to 150% to 125% of the Federal Poverty Guidelines for misdemeanor offenses. Municipal courts must now adopt this standard. Judge Barrett suggested notice be sent or placed in the newsletter informing the courts of this change.

Under the heading of Old Business, Judge Edwards called upon Judge Pierce as chair of the Nominating Committee to conduct an election to fill the vacancy on the Training Council and Executive Committee, respectively. Judge Pierce advised that the required notice had been sent to the membership with respect to the Training Council vacancy so that it would be appropriate now to hold the election. A vote was taken and Judge Margaret Washburn was elected to fill the unexpired term of Judge Charles Merritt. With respect to the Executive Committee vacancy, nominations were taken from the floor and after a vote Judge Kenneth Wickham of Norcross was elected as District Nine Representative.

As an item of new business, Judge Edwards noted in the wake of Hurricane Katrina, the Georgia Secretary of State called for a Vital Records Protection Summit to address how the State could better prepare to protect its vital records in the event of a major disaster. Judge Rashida Oliver attended the summit in November on behalf of the Council. She reported discussions had been held regarding the lessons learned from the recent disaster - most especially the need to have backup storage offsite with a system in place for the retrieval of data in the event of a disaster. Judge Oliver concluded this ultimately would become

continued on page 7

Financial Report

JULY 1, 1999 THROUGH DECEMBER 31, 2005

<u>TOTAL MUNICIPAL BANK DEPOSIT</u>	\$60,598.99
Dues, Golf, Coffee Mugs Sales and Judge Association Dues	
<u>REFUNDED AMOUNT</u>	- \$210.00
Seven \$30.00 checks for overpayment of dues.1001,1002,1004,1005,1006 1007,1008. Check #1016 Voided.	
<u>TOTAL COUNCIL DEPOSIT</u>	\$60,388.99
<u>EXPENSES</u>	
Bank Charges checks and deposit slips	-\$104.50
Coffee Mugs	-\$557.69
Legislative Breakfast (ck.#1003 dated 02-09-01)	-\$1014.88
Legislative Breakfast (ck.#1009 dated 01-10-02)	-\$710.54
Legal Fees (ck.#1010 dated 05-13-02)	- \$ 65.92
Benchmark Trophy Center (ck.#1011 dated 07-10-02)	-\$774.44
Legislative Breakfast (ck.#1012 dated 01-31-03)	-\$821.25
President's Plaque (ck.#1013 dated 10-03-03)	-\$ 43.00
Judge Cielinski (ck.#1014 dated 10-03-03)	-\$ 58.32
Legislative Reception Deposit (ck.#1015 dated 10-28-03)	-\$625.00
Legislative Reception Final (ck.#1017 dated 03-05-04)	-\$1922.00
Judicial Council Reception (ck.#1018 dated 08-19-04)	-\$564.57
American Heart Association (ck.#1019 dated 11-03 -04)	-\$100.00
Legislative Breakfast (ck.#1020 dated 01-26-05)	-\$637.50
Legislative Breakfast (ck.#1021 dated 02-03-05)	-\$468.35
State Bar Donation (ck# 1022 dated 05-16-05)	-\$1000.00
<u>PETTY CASH</u>	\$50.00
<u>PETTY CASH PAYMENT</u>	
Long Distance Calls	\$15.50
Office Supplies	\$34.50
<u>TOTAL EXPENSES</u>	-\$9,517.96
<u>BANK BALANCE AS OF DECEMBER 31, 2005</u>	\$50,871.03
<u>BANK BALANCE AT LAST REPORT MAY 31, 2005</u>	\$42,981.03
<u>CHANGE SINCE LAST REPORT</u>	\$7,890.00

Case Law Update - DUI

by: Mickey Roberts, Esq., Duluth

There are two recent cases of significance in the DUI area.

Webb v. St A05A2335 1/24/06: Webb was charged with a less safe DUI; Webb objected to the trial court allowing arresting officer to testify that based on the results of the HGN, he felt Webb's blood alcohol was above a .10.

HELD: An officer may testify that the results of a HGN evaluation enabled him to form an opinion that the person's BAC was above a .10.

Pitts v. State, S05G1156 2/27/06 which holds: " We granted certiorari in this case to determine whether the Confrontation Clause of the United States Constitution is violated by the admission, during a criminal trial, of a tape-recording of a 911 emergency telephone call when the caller does not testify at trial. We hold that the Confrontation Clause is not violated where, as here, the caller's primary purpose is not to provide evidence against the accused, but rather, to thwart an ongoing crime or seek rescue from immediate peril"

Of interest with regard to the current legislative session:

The "Homeland Security" Committee, made up of a majority of non-lawyers, has proposed massive changes to the DUI law; whether the law as written actually passes, time will tell. Some of the major provisions of the law are:

- The CDL per se limit is set at .02;
- BAC above a .08 creates an inference of impairment;
- No full information is required concerning the chemical test;
- No arrest for DUI is required prior to chemical test;
- Search warrants and forced blood draws are allowed;
- No right to an attorney;
- There will be one standard implied consent for all DUI suspects;
- There is no mention of any license suspension or BAC level in the new implied consent warning.

Hopefully the new law will not pass. However, I am sure that if these changes are made we will find other defenses and challenges to the law just as we have in the past.

Examples of where the Defense has prevailed:

Defendant is in one car accident; she hit some ice and skidded into a brick wall; officer had contact with Defendant at scene, but did not observe any physical manifestations of impairment; at the hospital, however, officer smelled alcohol on defendant's breath and requested a blood test; the results came back .14; at trial, the blood drawer was unable to identify my client and there was no written evidence that she drew defendant's blood; case dismissed.

Defendant stopped because he turned into a new, unoccupied subdivision; no traffic violations; motions were set, but before the hearing, prosecutor agreed that the stop was illegal and case was dismissed. By the way, the defendant registered above a .15 on the breath test.

Minutes continued

an economic issue because the type of backup system implemented will largely depend upon the amount of funding allocated.

The final order of new business was to address a potential vacancy on the Training Council. Judge Clayton Davis, who is a Training Council member, announced his appointment with the City of Forest Park had been discontinued. He has since sat for the City of Morrow (Pro Hac) and is seeking a permanent Associate Judge

position. Judge Davis indicated he would like to continue to serve on the Training Council and reminded the Committee his certification is good through the end of the year. Judge Davis was advised he must be a sitting judge in order to continue to serve on the Training Council. After a brief discussion, Judge Bobbitt moved that Judge Davis present the Council with confirmation of an appointment within 60 days or the Training Council position will be

declared vacant. The motion was properly seconded and passed with all in favor.

Judge Edwards then announced that the next meeting of the Executive Committee will be held in Macon in April. There being no further business, the meeting was adjourned.

Respectfully submitted,
Kathryn Gerhardt, Secretary

Public Defender Standards Council Establishes New Indigency Standard

Charles L. Barrett III, Immediate Past President, Council of Municipal Court Judges

The Georgia Public Defender Standards Council, at its meeting on February 3, 2006, voted to revise the Standards on Determining Indigence. Specifically, and most notably, the Standards Council lowered the percentages for determining indigence from 200% to 150% for felony offenses and from

150% to 125% for misdemeanor offenses. A person who earns less than 125% of the Federal Poverty Guidelines is presumed to be indigent for all cases, unless there is evidence showing that the person has other resources that might be reasonably used to hire an attorney. The remainder of the Standards was not

changed. The revised indigency chart is below.

Please be aware of this revision of the indigency standard and apply it accordingly in cases involving requests for appointments of counsel.

2006 Poverty Guidelines and Standards for Determining Indigence

<i>Size of Family Unit</i>	<i>48 Contiguous States</i>	<i>125% or Less (All types of Cases Qualify)</i>	<i>125 %plus (Misd., VOP, or Juvenile Offense punishable by imprisonment (Parents Income) do not qualify unless person earns under 150% and can demonstrate undue hardship)</i>	<i>150% or Less (All Felonies and Juveniles Charged with Felonies [Parents Income])</i>	<i>People over 150% but less than 250% (eligibility determined by extraordinary cost of case vs. disposable income)</i>
1	\$9,800	\$12,250	—	\$14,700	\$24,500
2	13,200	16,500	—	19,800	33,000
3	16,600	20,750	—	24,900	41,500
4	20,000	25,000	—	30,000	50,000
5	23,400	29,250	—	35,100	58,500
6	26,800	33,500	—	40,200	67,000
7	30,200	37,750	—	45,300	75,500
8	33,600	42,000	—	50,400	84,000
<i>For each additional person, add:</i>	3,400	4,250	—	5,100	8,500

The Worst Judges in Georgia?

By: William C. Head, Esq.

Editor's Note: Articles expressing platitudes are wonderful but not very thought provoking. This has been included in the hopes of sparking healthy debate. The opinions expressed are those of the author and do not reflect the opinions of the editor, the Council of Municipal Court Judges or the Administrative Office of the Courts

About 4 years ago, I was asked to speak in Augusta for an ICJE program for Municipal and Probate judges. That was the last time I have been asked to give a talk in Georgia to either of these groups, probably due to what occurred on the last day of the conference. Those who were in attendance will vividly recall what happened.

After the first day of "point-counterpoint" about DUI cases with Prosecutor Joe Loiselle (formerly of the Gwinnett State Court Solicitor's office) I joined a group of judges at the bar around dinner time for a few drinks and conversation. During the chatter and kidding by several judges about interesting "Bubba trials" they had presided over, one of the Municipal judges from metro Atlanta commented that I had never tried any cases in his court room. An awkward, pregnant pause and silence followed this remark, before I said, "Judge, frankly, my clients hire me to try to WIN their cases."

The silence turned to raucous laughter by the other judges, both from observing the shocked look on the inquiring judge's face and due to the bluntness of my comment. I then stated that it had been my observation in criss-crossing the state handling DUI trials that many judges did not seem to have a grasp on "proof beyond a reasonable doubt", and that

I blamed that upon these judges only handling civil matters and never having had a person's freedom, life and job in their hands as a criminal defense attorney.

I then commented that all I asked for at a bench trial was "a level playing field". Judge Maurice Hilliard of Roswell immediately admonished me that if I was only expecting a level field as my standard, I was selling my clients short by applying the wrong legal standard. He said that the prosecution must climb a steep and difficult UPHILL path to win in a criminal case, if the correct standard was being applied by the judge sitting without a jury.

That night in my room, I pondered my initial statement and the sage words of Judge Hilliard. He was right. More importantly, I had let my desperation for finding a decent judge for a bench trial alter my own perception of what I should be satisfied with, if I was trusting the resolution of my client's case to any judge sitting without a jury.

The more I thought about it, the more bothered I became. I had trouble getting to sleep. Then, around 3 A.M., a fantastic idea dawned on me: I wanted to do an impromptu written survey of the judges the next day, to see if a theory I had developed would be found to be true.

I woke up very early and went to the front desk to ask if there was a business services office where I could type up a one-page questionnaire. There was none at this small hotel, so I went to the business office. There, I sweet talked my way into sending one of the secretaries out to buy \$20 worth of goodies for the secretarial staff, and quickly used her computer to produce my questionnaire. I made 125 copies and went to Day 2 of the ICJE meeting.

Five questions were listed on the sheet in order to not be too transparent in my search for the important information. Question number 3, however, had a multiple choice question that basically asked the judges to circle which of the five alternative answers for that question BEST IDENTIFIED their personal frame of mind when they heard a non-jury criminal trial in their court. Without using the "terms of art" such as "preponderance of evidence" and "proof beyond a reasonable doubt", there was only ONE possible answer that matched up to the proper legal standard for criminal cases - answer number (c).

In over 100 anonymous replies, over 59% of the judges MISSED the proper standard for criminal trials! The largest number of incorrect answers chose the CIVIL standard (whoever produces the greater weight of evidence) and did not select the right standard. When the results were tallied and reported, the outcries of shock and disbelief from many judges echoed around the room. This number did not shock me. In fact, it seemed low to me. The high percentage seemed to shatter the perceptions of many of the judges present, however.

The inferior courts of this state (municipal, probate, recorder's) that are the entry level courts for many overburdened county state and superior courts MUST act as a filtration system for as many cases as possible. Otherwise, the present system of adjudicating criminal cases will ultimately be turned over to jury trial courts, as is done in Florida and many other states.

A municipality that hires either a "rubber stamp" judge to issue con-

continued on page 11

Can I Get Some Privacy Here?

by Dave Clark, Clark and Towne, P.C. (770)338-2338

The police are at the door of the hospital with a search warrant for a suspected drunk driver's private hospital test records. If you represent the driver or the hospital, you'd better be holding two kings, and prepare to argue about Rush Limbaugh and a hippo.

The first "king" is a 2000 Supreme Court of Georgia case involving Rebecca King, who ran her car off the road somewhere in Barrow County about 7 years ago. EMTs found her and brought her to the hospital, where, as part of her medical treatment, they tested her blood for alcohol. An hour later, police came by and asked her for consent to take another blood sample under the DUI implied consent law. She agreed, and they ended up charging her with DUI.

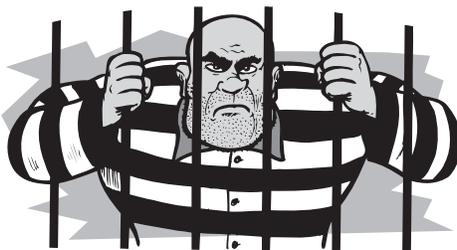
At trial, the judge threw out the police blood test on a technicality, so the prosecutor got a subpoena and went to the hospital to get a copy of Rebecca's first blood test result, the one done as part of her medical treatment. It was offered into evidence, the judge admitted it over objection, and she was convicted.

On appeal, the Court reversed, initially holding that Rebecca's constitutional rights were violated by allowing her private records into evidence. Then it issued a revised opinion avoiding the substantive privacy issue and reversing on purely procedural grounds. The final holding was that the Constitution requires notice to the patient/defendant and the opportunity to object and be heard before a prosecutor may be issued a subpoena for private hospital records, including blood alcohol test results. *King v. State*, 272 Ga. 788 (2000)

Even in the second opinion, the

court said "Permitting the State unlimited access to medical records for the purposes of prosecuting the patient would have the highly oppressive effect of chilling the decision of any and all Georgians to seek medical treatment." 272 Ga. at 792. So privacy is still supreme - or is it?

Shortly after the resolution of Rebecca King's case, Michael King (no relation) had about the same thing happen to him. He, too, drove his car into a ditch and was rescued



by EMTs (Gwinnett's bravest this time). His blood was drawn at the hospital by doctors, and then by police under the implied consent law. At trial, the test was again thrown out on a technicality. This time, the prosecutor, instead of seeking a subpoena, obtained a search warrant for the private hospital blood test. The trial judge let the test result in and Michael was convicted of DUI.

In "King II," the Supreme Court of Georgia affirmed the conviction; however, this, too, was a purely procedural holding. On interlocutory review, the Court chose only to address the fact that King was not given notice and an opportunity to object prior to the issuance of the search warrant. This was the argument that succeeded in reversing Rebecca King's DUI case three years earlier where a subpoena had been used to obtain the evidence.

The Court ruled that a subpoena and a search warrant were two different creatures, because a search warrant can be issued only by a magistrate upon a showing of probable cause, making a pre-warrant hearing unnecessary. The actual invasion of privacy issue was not before the court. Michael King did argue that letting the fruits of the search warrant into evidence violated his right to medical privacy, but the Court never reached the issue.

Had they ruled on substantive privacy, Michael might have won. In *Doe v. State*, 185 Ga.App. 347 (1987), the Court of Appeals of Georgia expressed grave concern about the use of search warrants to obtain medical test results. Rockdale County police had obtained a search warrant to seize blood and urine specimens from the county hospital. The appeal was dismissed as procedurally improper, but in a concurring opinion joined by three others, Justice Banke wrote that the "issuance of the search warrant under consideration in this case was totally inappropriate. What could be more outrageous than the prospect of law enforcement officers rummaging through the confines of a legitimately run hospital in an attempt to locate a blood, urine or tissue sample left behind by a suspect who was once treated there?" 185 Ga.App. at 348

Which brings us to Rush Limbaugh, who argued in a 2004 Florida case that the idea of even issuing a search warrant for private medical records was unconstitutional. Rush's attorney, Roy Black, said, "Mr. Limbaugh's privacy rights should not be sacrificed to prove his innocence." The court disagreed that any special pre-warrant notice or

continued on page 11

Worst Judges in Georgia? cont.

victions in all DUI cases (and other serious traffic offense cases), or a prosecutor who is unwilling to litigate contested cases with competent counsel within the non-jury inferior court is not doing its voters any favor at all. The case (and the valuable potential revenue) is being bound over for a jury trial by knowledgeable legal counsel to the state or superior courts. This generates nothing for the entry level court. A “bindover” for trial by jury leaves the municipal jurisdiction with zero dollars for its trouble and time in originally booking and processing the case.

The purpose of this article is not

to embarrass any particular judge or judges. The purpose is not to create animosity toward me. The purpose is to point out the extreme importance of competent criminal defense attorneys having enough faith in your Court's FAIRNESS and adherence to the rule of law to trust you to do what the Constitution of Georgia and the Constitution of the United States mandates that you do. The legal system suffers when you don't (or won't) apply the proper legal standard. In addition, you employer (your municipality) also suffers from lost revenue when a large percentage of the attorneys handling DUI and other serious cases that seek a fair

trial avoid you in favor of having the decision made by 6 unknown jurists at another tribunal.

I was recently sent a link to a Texas article called “The Worst Judges in Texas”. See article: <http://www.texasobserver.org/showArticle.asp?ArticleID=2132>

That article, featuring only 10 Texas jurists, reminded me of my “survey” and the dismal results obtained in Georgia. With 3 of 5 inferior court judges in Georgia not understanding or applying the correct legal standard in this state, perhaps one day I can write a BOOK about the Georgia counterparts to this Texas article.

Can I Get Some Privacy? cont.

hearing was required in the case of medical records. More recently, police were given permission by the local judge to subpoena Rush's doctors, but not to ask them anything about Limbaugh's medical treatment (See “What the Judge's Ruling Means” 12/14/05 rushlimbaugh.com) As of this writing, Rush has not been charged with any crime, but the mere seizure of his medical records seems to have most of the world convinced of his guilt.

The conflict involves two dearly held American values: law enforcement and patient privacy. Police cannot be required to give their suspects advance notice of a search. If they did, the suspect would hide everything. On the other hand, your doctor can't do her job if you are afraid she will blab to the police about the alcohol or cocaine in your blood.

The Hippocratic Oath itself states, in part, “What I may see or

hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account ought to be spread abroad, I will keep to myself, holding such things shameful to speak about.” (Hippocrates, Physician's Oath, Steadman's Medical Dictionary p. 579) Georgia Doctors are in fact prohibited under state law from disclosing patient information without consent, except under “appropriate court order or subpoena.” OCGA 24-9-40. (Did someone just say “ditto?”)

Which brings up the hippo. OK, technically it's HIPAA. The federal Health Insurance Portability and Accountability Act (HIPAA), 42 USC 210 et seq., specifically prohibits hospitals from disclosing patient records without consent or a “court order,” and a search warrant is not a court order requiring the hospital to turn over anything. Hospitals can be held liable for damages for

invasion of privacy stemming from HIPAA violations.

There appears to be no procedural check on the ability of police to obtain a search warrant for sensitive medical records, other than the discretion of the issuing magistrate. However, the subsequent disclosure and use of the seized information has been, and will continue to be, highly regulated. Attorneys for health care providers and criminal suspects will have to be vigilant and file appropriate motions to seal, limit, and suppress this evidence. It sure would be nice to have a statutory procedure that carefully addressed the rights of patients at all stages of a criminal investigation . . . Somebody call a doctor!

PHOTO GALLERY FROM LEGISLATIVE BREAKFAST

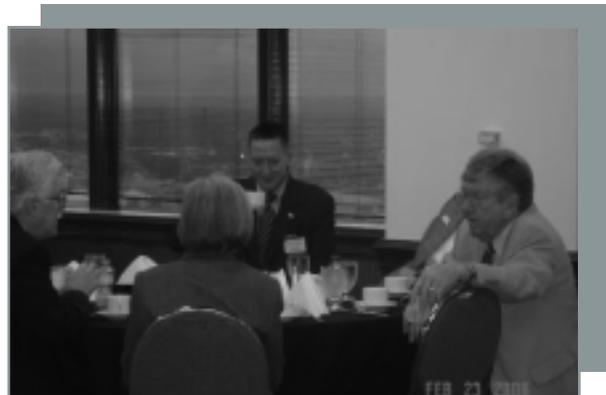
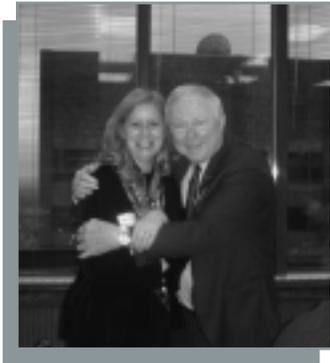
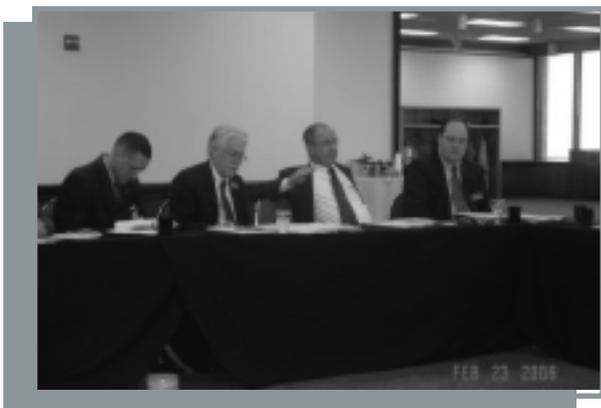


PHOTO GALLERY FROM LEGISLATIVE BREAKFAST



Municipal Court Legislative Wrap Up

Administrative Office of the Courts Legislative and Governmental Affairs Division

The Georgia General Assembly wrapped up the 2006 Legislative Session on Thursday, March 30. Among the hundreds of bills that successfully moved their way through the House and Senate and now await action by the Governor are several that impact the Municipal Courts. The following are some of the important legislation affecting the Municipal Courts that passed this session. You can view all bills in full online. Go to www.georgiacourts.org and click on "Legislative Tracking." From there, you may enter a specific bill number or click on "Municipal Court" to view all bills that affect the Municipal Courts.

LOCAL

HB 1321 - Johns Creek, City of; incorporate

This bill incorporates the city of Johns Creek in Fulton County. It also creates the Municipal Court of Johns Creek.

Effective date: July 1, 2006

HB 1366 - Leesburg, City of; municipal court; provide

This bill creates a municipal court for the city of Leesburg.

Effective date: upon signature of Governor

HB 1470 - Milton, City of; provide charter

This bill calls for the creation of the city of Milton in Fulton County. It also creates a municipal court of Milton.

Effective date: July 1, 2006

SB 552 - South Fulton, City; incorporate; provide for a charter

This bill provides for the incorporation of the city of South Fulton in Fulton County. It also creates a municipal court for the city of South Fulton.

Effective date: July 1, 2006

SB 553 - Chattahoochee Hill Country, City; incorporate; provide for a charter

This bill provides for the incorporation of the city of Chattahoochee Hill Country in Fulton County. It also creates a municipal court for the city of Chattahoochee Hill Country.

Effective date: July 1, 2006

TRAFFIC

HB 276 - Motor vehicles; licensing of ignition interlock device providers

This bill allows the Department of Driver Services to regulate companies that install ignition interlock devices on cars. These devices prevent the car from starting if the driver's BAC is over .02 or if the driver does not submit to the test. This bill establishes the conditions under which a company may receive a license to become a provider center and conditions under which that license may be suspended or revoked.

Effective date: January 1, 2007

HB 1193 - Vehicles; false or secret compartments; prohibit owning or operating

This bill makes it a crime to create a secret or hidden compartment in any vehicle for the purpose of hiding drugs or other contraband from law enforcement. It is also a crime to operate a vehicle with such compartment attached. The penalty is between one and two years in prison and a fine of up to \$10,000.

Effective date: Signed by Governor on April 18, 2006

HB 1209 - Dept. of Public Safety; motorcycle enforcement program; provisions for payment

This bill requires that all fines paid for traffic violations written by the newly-created motor cycle enforcement unit of the Department of Public Safety be remitted to the Department for the purpose of maintaining the motor cycle enforcement program. This requirement does not apply to any fees or costs associated with the payment of a fine and only apply to violations that occurred on an "urban interstate system." For the purposes of this bill, "urban interstate system" means any portion of I-285 and the portions of I-75, I-85, and I-20 that are within the Perimeter.

Effective date: July 1, 2006

HB 1236 - Motor vehicles; registration; place of return; amend

This bill allows residents to register their motor vehicle in the county in which it is "functionally located",

continued on page 15

Municipal Court Legislative Round Up *cont.*

which is defined as the county in which a vehicle spends 184 days or more.

Effective date: July 1, 2006

HB 1253 - Drivers' licenses; certain provisions; clarify

This bill makes modifications regarding the suspension of personal and commercial drivers' licenses and also prohibits the use of social security numbers as driver's license numbers.

Effective date: July 1, 2006

HB 1275 - Commercial driver's license; violation; provide for revocation

This bill amends 16-8-12 relating to punishment for theft by calling for the revocation of a person's commercial driver's license for no less than one year if the theft involves a commercial vehicle. This bill also makes an addition to the Georgia DUI implied consent law stating that nothing in the code shall be deemed to exclude evidence of a DUI violation taken voluntarily or through a properly-obtained search warrant.

Effective date: July 1, 2006

HB 1392 - Drivers; right of way violation; collision; provide penalties

This bill adds farm vehicles to class C vehicles as long as those vehicles are less than 26,000 pounds and are used for farming reasons, not for contract carriers. This bill also creates a misdemeanor offense punishable by at least a \$250 fine for any motorist who injures a person while that motorist is committing a right-of-way violation.

Effective date: July 1, 2006

HB 1436 - Wine; restaurant patrons; reseal partially consumed bottle; authorize

This bill allows a restaurant patron to remove a partially consumed bottle of wine that had been purchased along with a meal. The restaurant will reseal the bottle in a bag, and the patron must put the bottle in the glove compartment or trunk of the car when leaving. As long as these conditions are met, possession of this open bottle will not constitute an open container violation.

Effective date: July 1, 2006

SB 64 - Law Enforcement Motor Vehicles; blue lights on roof; enforce requirement

This bill has three major parts:

- It allows a motorist who is directed to stop by a law enforcement officer in a marked police vehicle to continue to drive to a reasonably safe location before stopping. The motorist must indicate his or her intent by turning on the hazard lights or turn signal of the vehicle.
- It allows the Georgia State Patrol to have up to two police vehicles per post that are not equipped with exterior mounted lights. These vehicles are required to have an agency identifier in the front windshield.
- It changes the maximum fine for a violation of not making a lane change when passing a stationary emergency or maintenance vehicle to \$500.

Effective date: upon signature of Governor

SB 531 - Motor Vehicle Liability Policies; uninsured motorist coverage; change certain provisions

This bill changes provisions in automobile liability policies relating to uninsured motorist coverage, requiring that all liability policies insure for bodily injury, loss of consortium, and death as part of the uninsured motorist coverage. It makes updates to the definition of "insured" in the case of insurance to include under the policy foster children of the named insured. It also requires that plaintiffs in motor vehicle injury cases exercise diligence to locate the driver whom the claim is against if that driver does not reply to a court summons.

Effective date: July 1, 2006

OTHER

HB 718 - Pretrial intervention and diversion programs; authorize certain courts to administer

This bill allows prosecuting attorneys for state courts, probate courts, magistrate courts, and municipal courts to create and administer Pretrial Diversion Programs.

Effective date: July 1, 2006

HB 804 - Barratry; Code section; repeal

This bill repeals the crime of barratry, which is an antiquated law against inciting groundless action in court.

Effective date: July 1, 2006

Signed by Governor on April 17, 2006

continued on page 16

Municipal Court Legislative Round Up cont.

HB 912 - Civil practice; production of documents; amend

The major provisions of this bill include the following:

- Grants legislators a continuance from trial for duties relating to his position with the General Assembly, regardless of whether the legislature is in session or not;
- Makes changes in 9-11-34 relating to the production of documents by nonparties and confidentiality;
- Details who are allowed to request the release of a deceased person's medical records.

Effective date: July 1, 2006

HB 1020 - Retirement; allowances; withdrawal of contributions; amend provisions

This bill provides clean up language for Georgia public retirement systems with respect to gender neutrality. It also allows the board of trustees of the Georgia Defined Contribution Plan to determine the minimum amount a member who ceases employment with the state may have to allow the board to require the member to withdraw all money and close the account. The bill further establishes the effective date of retirement as the first day of the month in which the application is received by the board, provided that date is not prior to the applicants last day of employment. This date change applies to discharge from the National Guard as well.

Effective date: July 1, 2006

HB 1044 - Firearms; carrying and possession; municipal and city court judges; amend provisions

This bill allows permanent part-time municipal court judges to carry firearms.

Effective date: July 1, 2006

HB 1288 - Municipal court clerks; required training; provide

This bill requires municipal court clerks to complete at least 16 hours of training in their first year of employment and a minimum of 8 hours per year after that.

Effective date: July 1, 2006

HB 1302 - Georgia Street Gang Terrorism and Prevention Act; change certain provisions

This bill changes some definitions in the "Street Gang Terrorism and Prevention Act" (16-15-3) with relation to gangs and criminal gang activity. It adds criminal trespass and damage resulting from graffiti and any criminal offense involving violence or a weapon. It makes it a crime to be associated with any group that engages in these activities, as well as the others already enumerated in the Code section, and increases the penalties for these crimes to a minimum of 5 years in prison and a fine of between \$10,000 and \$15,000. In addition, this bill creates a misdemeanor offense of a high and aggravated nature if a person who is not a student or employee fails to check in at a designated location upon entering a school building. It further clarifies language relating to rewards that the Governor or local governing authority may offer for the apprehension of perpetrators.

Effective date: Section 6 (rewards) - upon signature of Governor

All other Sections - July 1, 2006

HB 1320 - Environmental offenses; littering; revise provisions

This bill revises the OCGA relating to litter and littering offenses in an attempt to make the definition of "litter" more coherent. It also establishes a new term "egregious litter" which refers to hazardous waste and waste over a certain amount. The bill establishes punishment levels for crimes of "egregious littering" from aggravated misdemeanor for first time offenders to a felony for repeat offenses. It also adds a "shame provision" which would require that the local newspaper post the name and address of a littering offender.

Effective date: upon signature of Governor for the purposes of adopting local ordinances and July 1, 2006 for all other purposes

HB 1501 - County ordinance violations; maximum fines; change provisions

This bill increases the maximum fine for alcoholic beverage license violations to \$2500. It only applies to counties or municipalities that issue more than 300 such licenses (currently Fulton County only).

Effective date: July 1, 2006

SB 44 - Corrections; contracts with private detention/diversion centers; regulations

This bill allows for the Board of Corrections to enter into contracts with private probation companies. This bill provides for county and city operated probation departments to be registered and regulated by the County and Municipal Probation

continued on page 17

Municipal Court Legislative Round Up cont.

Advisory Council under the same terms the private probation companies are regulated.

Effective date: July 1, 2006

SB 77 - Feticide; parental notification; define/eliminate terms; provide reports

This bill makes it a misdemeanor of a high and aggravated nature to commit simple assault against a female who is pregnant. This bill also creates two new misdemeanor crimes against unborn children:

- Assault of an unborn child - attempting to inflict violent injury to an unborn child
- Battery of an unborn child - intentionally inflicts physical harm to an unborn child

Additionally, this bill changes the definition of feticide to remove the requirement that an unborn child be developed to the extent known as “quick” and to include causing the death of an unborn child in the commission of a felony. It also creates the crime of voluntary manslaughter of an unborn child, which is a felony punishable by one to 20 years in prison.

Effective date: July 1, 2006

SB 203 - Public Defenders; indigent defense services; attorney's fees/cost recovered

This bill allows local court officers to collect the fees for victim's assistance programs, which may be distributed directly to the programs (if qualified) instead of the money going through the Superior Court Clerks Cooperative Authority. This bill also clarifies the fee collection for Probate Courts, gives Superior Court

Clerks Cooperative Authority auditing authority over judges and courts, allows for a county or municipality to recover payment of indigent defense that was given to a defendant who was not indigent, and allows for work release programs to be a condition of probation.

Effective date: July 1, 2006

SB 503 - Ga. Public Defender Standards Council; legal services to indigent persons; change provisions

This bill redefines an “indigent person” to mean any person whose maximum income is less than 125% of the Federal poverty level in the case of a misdemeanor and 150% of the Federal poverty level in the case of a felony. In no cases will a person with a maximum income level exceeding 150% of the Federal poverty level be considered an indigent person. The bill also makes changes to the Public Defender Standards Council, removing the requirement that they establish the guidelines for determining whether or not a person can claim to be indigent, leaving that responsibility to the circuit public defender. It also requires that the \$50 fee for obtaining legal service be imposed as a condition of parole if it has not been paid or waived at the time of sentencing.

Effective date: upon signature of Governor

SB 606 - Funerals; prohibit disruptive conduct; elements of such offense; provide criminal penalty

This bill makes it a crime to engage in disorderly or disruptive conduct with the intent to impede or interfere with a funeral or memorial service.

People who engage in such activity within 500 feet of a funeral or memorial service will be guilty of a misdemeanor.

Effective date: July 1, 2006

SB 637 - Georgia Driver's Education Commission; change membership; distribution of fines/forfeitures; definition

This bill makes revisions to SB 226 (“Joshua's Law”), which passed last year. It changes the number of members on the Driver's Education Commission from 9 to 8 and provides a definition for the term “approved driver's education course.” It also repeals section 1 of SB 226, which gave the Commission top priority on receiving money from court fees pursuant to 15-6-95. The new bill places the commission at the lowest priority.

Effective date: upon signature of Governor

SR 793 - Ga. Public Defender Standards Council; ratifying the initial minimum standard; Standard for Removal for Cause

This resolution ratifies and approves the Standard for Removal for Cause that was created by the Public Defender Standards Council. That document outlines the standards for removing a circuit public defender.

Effective date: upon signature of Governor

continued on page 19

Daubert and Georgia's New Expert Witness Rule

Gregory T. Presmanes, BOVIS, KYLE & BURCH, LLC

The tort reform package passed by the Georgia Legislature in 2005 included a new expert witness rule loosely based on the federal *Daubert* rule.¹ The *Daubert* rule is actually a compilation of rulings from four U.S. Supreme Court decisions: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,² *General Electric Co. v. Joiner*,³ *Kumho Tire Company v. Carmichael*⁴ and *Weisgram v. Marley Company*.⁵ The *Daubert* rule, created by these four U.S. Supreme Court decisions, is the basis for admitting expert testimony in the Federal Courts.

Let us take a look at how those cases developed the *Daubert* rule. The *Daubert* case involved the question of whether Benedectin, an anti-nausea drug, ingested during pregnancy, caused birth defects. The trial court and the Ninth Circuit United State Court of Appeals excluded the plaintiff's expert causation evidence on the grounds that it was not "sufficiently established to have general acceptance."⁶ In federal trials, the rule for novel scientific evidence was controlled in many federal courts by the decision in the case of *Frye v. United States*.⁷ The famous *Frye* test was simple. It created what came to be known as the "general acceptance" test as the standard for determining the admissibility of scientific opinion evidence. That test stated that, if the scientific community which studied the scientific evidence in question had accepted the principles or methods involved, the evidence could be admitted. The rule was based on the premise that the pertinent scientific community was in a far better position than a trial court to evaluate whether a novel theory or technique was valid and reliable. If the pertinent scientific community was still testing or arguing over the new theory or technique, it was not yet ready for the law courts.

Georgia, like many other jurisdictions, found the *Frye* rule too restrictive, because it was totally dependent upon scientific orthodoxy which made it inflexible when it came to novel theories and techniques that might have a following in the scientific community, but had not yet achieved the "general acceptance" that *Frye* required. Furthermore, there were disputes as to which "scientific community" should have the right to say whether the principles or methods

involved were "generally accepted." Therefore, like many other jurisdictions, Georgia modified the *Frye* test to give the trial judge a larger role in evaluating the validity and reliability of novel scientific evidence. In the case *Harper v. State*,⁸ the Georgia Supreme Court stated that:

The *Frye* rule of "counting heads" in the scientific community is not an appropriate way to determine the admissibility of a scientific procedure in evidence. We hold that it is proper for the trial judge to decide whether the procedure or technique in question has reached a scientific stage or verifiable certainty, or whether the procedure rests upon the laws of nature. The significant point is that the trial court makes this determination based upon the evidence available to him rather than by simply calculating the consensus in the scientific community.

The United States Supreme Court granted certiorari in the *Daubert* case, in order to resolve a split in the circuits as to what standard to use to determine the admissibility of scientific opinion evidence. The United States Supreme Court held that, because the Federal Rules of Evidence had been adopted, the standard for determining the admissibility of scientific opinion evidence could no longer be the "general acceptance" test that originated in the *Frye* case, because Federal Rule of Evidence 702 replaced the "general acceptance" test with a more flexible approach. The more flexible approach has often been called the "scientific reliability" test. The *Daubert* decision assigns a "gatekeeping" role to the trial judge that involves more than simply "counting heads" in the scientific community to determine whether a scientific opinion or methodology has gained "general acceptance." The *Daubert* decision requires that the trial judge be satisfied that the offered evidence is scientifically reliable before admitting it and allows the judge to use any sources that help in making that determination. The United States Supreme Court's holding in the *Daubert* case was codified in 2000 by an amendment to Rule 702 of the Federal Rules of Evidence.

Daubert requires the trial court to

act as a gatekeeper and to ensure that speculative and unreliable expert opinions do not reach the jury.⁹ Even though a jury is not involved in workers' compensation cases, the *Daubert* rule nonetheless applies. As the gatekeeper, the Court must do a preliminary assessment as to whether the reasoning or methodology underlying the testimony is "scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."¹⁰ The Court must consider the testimony with the understanding that "the burden of establishing qualification, reliability, and helpfulness rests on the proponent of the expert opinion."¹¹

Under the *Daubert* rule, the trial judges act as "gatekeepers" of scientific and other expert evidence. They are required to examine the data and methodology on which each expert's opinion is based, and they have the authority to exclude unreliable expert opinions.¹² In conducting this assessment, the trial court should give the parties an adequate opportunity to present their factual and legal contentions and should state the reasons for its ruling on the record.¹³ The proponent of the expert opinion has the burden of producing evidence from which the Court can determine that the proffered testimony is admissible.¹⁴

Under *Daubert*, the trial court has considerable latitude both in deciding how to test an expert's reliability and in deciding whether that expert's testimony is reliable. This latitude allows the Court to decide what proceedings, if any, are needed to investigate reliability.¹⁵ Courts generally have not required that a *Daubert* hearing take any specific form. Moreover, the trial judge may make a decision on admissibility without a hearing if the parties have presented a sufficient basis for the decision.¹⁶ The trial court's latitude also extends to its decision about which factors should be considered in assessing the reliability of particular offered expert testimony.¹⁷

Under *Daubert*, the trial court has two separate and distinct functions, the first of which is to determine the testimony given by the expert is reliable, and the second is to determine whether the

continued on page 19

Daubert cont.

expert's reasoning or methodology can properly be applied to the individual facts of the case.¹⁸ As to the first function, determining whether the testimony given by the expert is reliable, the assessment of the reliability of the expert's testimony turns on whether the individual is qualified to express an opinion in that particular field, inasmuch as a witness may be qualified as an expert by virtue of "knowledge, skill, experience, training, or education."¹⁹ Failure to possess the requisite experience or education to testify can result in the exclusion of the expert from the case.²⁰ Similarly, Georgia courts have issued decisions concerning the analysis required to determine the reliability of expert testimony. The Georgia Supreme Court has held that, where an expert lacks expertise in a particular area in which he is being asked to testify, he is not properly qualified to render an opinion.²¹

The second gatekeeping function is to determine whether the expert's reasoning or methodology can properly be applied to the individual facts of the case. Rule 702 requires the trial judge to exclude offered expert testimony if it is not relevant and reliable.²² However, the Court should not exclude evidence that is more weak than unreliable.²³

Besides the relevancy requirement of Rule 702 of the Federal Rules of Evidence, Rule 402 provides generally that irrelevant evidence is not admissible. The U.S. Supreme Court describes relevance in the context of scientific expert evidence as requiring a "valid scientific connection to the pertinent inquiry."²⁴

Thus, the first prong of the *Daubert*

rule is establishing relevance, and the second prong is establishing reliability. In *Daubert*, the U.S. Supreme Court offered the following factors as suggestions that may be considered in determining evidentiary reliability, but cautioned that the list is not definitive:²⁵ (1) whether the theory or technique has been and can be reliably tested; (2) whether it has been or can be subjected to peer review; (3) the known or potential rate of error of the technique; and, (4) the "general acceptance" of the technique, i.e., the old *Frye* test.

On remand of the *Daubert* case to the 9th Circuit, the 9th Circuit added another factor: "whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for the purpose of testifying."²⁶ In other words, is there a litigation taint in the research?

These factors do not function as a "definitive check list or test." Instead, they form the basis for a flexible inquiry into the overall reliability of a proffered expert's methodology.²⁷ The trial court has "considerable leeway" in deciding in each case "how to go about determining whether particular expert testimony is reliable." The court "should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability" of the proffered expert testimony.²⁸

The reliability requirement, which is the second prong of the *Daubert* rule, is designed to exclude so called "junk science." At the very least, scientific opinions offered under Rule 702 must be based on sound scientific methods and

valid procedures.²⁹

The primary focus must be on the principles and methods used, not on the conclusions generated.³⁰ But conclusions and methodology are "not entirely distinct from one another." A court may conclude that there is simply too great an analytical gap between the data and the opinion offered.³¹

The U.S. Supreme Court has issued three more opinions, fleshing out the *Daubert* decision. In *Kumho Tire*, the Court broadened the *Daubert* rule to apply to all expert testimony, and not merely to the "scientific" evidence that was at issue in the *Daubert* case.³² In *Weisgram*, the U.S. Supreme Court ruled that federal appellate courts that reverse a trial court's admission of expert evidence can reverse and render judgment if, without the rejected evidence, the remaining evidence in the record is not sufficient to sustain the verdict, which means that, basically, the litigants get only one bite at the apple.³³ In the *Joiner* case, the U.S. Supreme Court ruled that review of a trial judge's rulings on expert evidence is limited to an abuse of discretion standard.³⁴

Paper to be continued in next issue of The Bulletin.

NOTE: This writer would like to acknowledge and thank Robert E. Shields and Leslie J. Bryan for their excellent article in the October 2005 issue of the Georgia Bar Journal entitled A Georgia's New Expert Witness Rule: Daubert and More. @

¹Senate Bill 3, Section 7 (striking O.C.G.A. § 24-9-67 and enacting a new O.C.G.A. § 24-9-67, and enacting O.C.G.A. § 24-9-67.1).

²509 U.S. 579 (1993).

³522 U.S. 136 (1997).

⁴526 U.S. 137 (1999).

⁵528 U.S. 440 (2000).

⁶*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 727 F. Supp. 570, 572 (S.D.Cal. 1989), affirmed, 951F.2d 1128 (Ninth Circuit 1991), vacated and remanded, 509 U.S. 579 (1993).

⁷293 F.1013 (D.C. Cir. 1923).

⁸249 Ga. 519, 525-26, 292 S.E.2d 389, 395-96 (1982).

⁹*McLean v. Metabolife International, Inc.*, 401 F.3d 1233 (11th Circuit 2005), citing *Daubert* 509 U.S. at 593.

¹⁰*Id.* at 1237.

¹¹*Id.* at 1238; *U.S. v. Frazier*, 387 F.3d 1244, 1260 (11th Circuit 2004).

¹²*Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

¹³In re: Paoli RR Yard PCB litigation, 916 F.2d 829, 835-836 (3rd Circuit 1990), cert. denied, 499 U.S. 961 (1991).

¹⁴*Maryland Casualty Co. v. Therm-o-disc, Inc.*, 137 F.3d 780, 783 (4th Circuit 1998), cert. denied, 119 S.Ct. 74 (1998).

¹⁵*Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999).

¹⁶*Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999).

¹⁷*Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999).

¹⁸*Daubert*, 509 U.S. at 591-593.

¹⁹*Quiet Technology DC-8, Inc. v. Hurel-Dubois UK Limited*, 326 F.3d 1333, 1342 (11th Circuit 2003).

²⁰*Montgomery v. Noga*, 168 F.3d 1282 (11th Circuit 1999).

²¹*Cromer v. Mulkey Enterprises, Inc.*, 254 Ga.App. 388, 392, 562 S.E.2d 783, 787 (Ga.App. 2002) citing *Johnson v. Knebel*, 267 Ga. 853, 485 S.E.2d 451 (1997).

²²*Kumho Tire Company Ltd. v. Carmichael*, 526 U.S. 137 (1999).

²³*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588-589, 595-596 (1993).

²⁴*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591-592 (1993).

²⁵*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-594 (1993).

²⁶*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317-1319 (9th Circuit), cert. denied, 516 U.S. 869 (1995).

²⁷*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993).

²⁸*Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999).

²⁹*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (remanding case for a finding on whether plaintiff's theories linking drug to birth defects were reliable).

³⁰*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594 (1993).

³¹*General Electric Co. v. Joiner*, 522 U.S. 136 (1997)

(District Court acted within its discretion in concluding that animal studies and epidemiological studies, individually or in combination, were insufficient to support witness's opinion about causation of plaintiff's lung cancer.)

³²*Kumho Tire*, 526 U.S. 137 (1999).

³³*Weisgram*, 528 U.S. 440 (2000).

³⁴*Joiner*, 522 U.S. 136 (1997).

Notification of Change in Municipal Personnel

THE ADMINISTRATIVE OFFICE OF THE COURTS

SUITE 300

244 WASHINGTON STREET, S.W.

ATLANTA, GEORGIA 30334-5900

404-656-5171

FAX: 404-651-6449

CHIEF JUDGE

JUDGE

JUDGE PRO TEM

PRO HAC

CHIEF CLERK

CLERK

DEPUTY CLERK

CITY(list all) _____

NAME _____

ADDRESS _____

PHONE () _____ FAX () _____

EMAIL _____

GENDER: Female Male

ATTORNEY: Yes No

ELECTION/APPOINTMENT DATE: _____ TERM from _____ to _____

REAPPOINTMENT: Yes No TERM from _____ to _____

Replacing someone? _____ If So, Who? _____

Has this person ever served as a magistrate? If so, when and in what county? _____

RACE (optional): African American (Black) Asian \ Pacific
Euro American (White) Native American
Hispanic Multi Racial

Fax or mail this form to the Administrative Office of the Courts at the contact information above.

Submitted by: NAME _____

ADDRESS _____

PHONE # _____

The Listserv ... Is Ready to Serve You!

If you have not joined, do so now. For those of you who are not aware here are a few reasons to join listserv.

Listserv's purpose is to automatically send information out as well as provide interaction between all Traffic Court and Municipal Judge Subscribers.

1) Its an inexpensive way to interact with fellow City Judges and discuss issues concerning your class of court,

2) Great way to seek out advice on unusual cases or cases you may have not experienced before and,

3) It's a quick way to send urgent notices that may other wise require sending postcards, making long distance calls (faxes) and playing phone tag (remember the cost buildup).

The Council encourages you to subscribe to this list. It is convenient, informative, and not to mention, it can be used as a great reference in referring to past events. Subscribing takes one call or e-mail. Once you

have subscribed, you will receive a welcome message, providing a pass code and instructions on using the service. If you have any questions about this service, please contact AOC Webmaster Brian Collins at (404) 463-3804 or collinsb@gaaoc.us To subscribe to the Traffic Court Listserv, please contact LaShawn Murphy, AOC, at (404) 651-6325 or via email at murphyla@gaaoc.us

Welcome aboard to all new subscribers!

Municipal Court Legislative Round Up cont.

SR 954 - Performance Standards; ratifying the initial minimum standard; fiscal impact

This resolution ratifies and approves the Performance Standard that was created by the Public Defender Standards Council. That document outlines the performance standards for all public defenders.

Effective date: upon signature of Governor

SR 1027 - Court Surcharges and Additional Fines, Senate Study Committee; create

This bill creates a Senate study committee to study the issues surrounding the collection of court fees and fines. It will be comprised of 5 members of the Senate.

Effective date: March 14, 2006

Date passed by the Senate: March 14, 2006

Report to be made December 31, 2006.



T.I.P.S.
Traffic Information Processing System

TIPS is a NO COST software program that allows courts to transmit traffic citations to the Department of Driver Services electronically. TIPS was developed by the Governor's Office of Highway Safety and the Administrative Office of the Courts.

Contact us for more information:
Kelly McQueen
System Placement and Program Planner
404.463.5420 • mcqueenk@gaaoc.us

www.georgiacourts.org/aoc/tips

A Law Well Needed

By: Judge Robert L. Whatley

Maryland has it right. Six other states are trying to get it right. Georgia has a half-hearted effort already in place in an effort to get it right. What is this “right” all about? Frequently, the officer on the beat or an angry spite “victim” will prefer or press charges that a prosecuting attorney or municipal court solicitor will choose not to proceed. The file will simply be closed without the parties ever hearing about the disposition of the case. But the fact of an arrest will usually stay on the person's criminal record forever. A simple background check later will deem a person unworthy even though no accusations, indict-

ments, copy of charges, or other charging instruments were ever brought.

Maryland has a new law that provides that expungement will occur within 30 days under most conditions if the matter is terminated without prosecution. This happens automatically. Other states have varying methods and time frames. Some make one wait for five years before expungement. While others have a court procedure before the record goes off the database. During the waiting time however, records will be checked and jobs denied. To some an arrest implicates guilt.

What does Georgia say about the

matter? We have a law that provides for expungement if you petition and ask the arresting agency to do so. But many forget about the matter if no court notice ever arrives or lack the sophistication or initiative to do so. A municipal court shoplifting, marijuana, eluding, or DUI charge could have devastating effects far down the road. Or the effect could arise immediately.

The eight states that have automatically sealed conviction less records, which Maryland has just enacted, are on the right track. Georgia needs some similar legislation before any more lives are derailed.

Council of Municipal Court Judges

Administrative Office of the Courts
244 Washington Street, SW • Suite 300
Atlanta, Georgia 30334

MARGARET GETTLE WASHBURN
*Chief Judge, Sugar Hill & Buford
Editor*

DAVID L. RATLEY
Director

MARLA MOORE
*Associate Director for
Court Services*

ASHLEY G. STOLLAR
Graphic Design