This Self-Assessment of Municipal Court Best Practices was developed by Georgia Municipal Association, Inc. as an informational tool for cities, and does not contain legal guidance. Please consult your city attorney for legal advice about the proper use of this self-assessment.

CITY SELF-ASSESSMENT OF MUNICIPAL COURT BEST PRACTICES			
City's Affirmation	*Examples* of Supporting Documentation (City Keeps in its regular records)	Initials	Reason Code
Independence and Professionalism of Court			
The city's elected and appointed officials have received training on the independence of the court.	Proof of training		1
The municipal court's funding for the upcoming year is independent of the fines/fees projected to be imposed by the municipal court for the upcoming year. Budget should include a footnote affirming this.	Budget with footnote		1
The judge and municipal court clerk are not employees of or under the direction or supervision of the police department.	Job descriptions, organization charts		1
Court Operations			
All court proceedings are recorded (either by audio-recording, video-recording or court reporting) and recordings are maintained in accordance with record retention schedule. Recordings show that: • Each defendant is individually read his rights regarding self-incrimination, right to jury trial (for misdemeanor offense or higher), right to counsel, etc., as well as waiver of those rights and an individual affirmative determination is made that the defendant understands those rights before the defendant is allowed to enter a plea. Signature on a rights waiver form occurs only after that individual determination has been completed. • During the process of taking a plea of guilty or nolo contendre, the Judge questions the defendant individually as to his understanding of his rights, his understanding of the charges against him, and the voluntariness of his decision to plead.	Log of audio-recordings, affirmation of court clerk		1
Copies of any Notice of Appeal, Petition for Certiorari, or Application for Discretionary Review are forwarded immediately to the judge and solicitor (or, if none, to the city attorney).	Procedure, affirmation of court clerk		1A
Discovery requests are immediately forwarded to the solicitor (or, if none, to the city attorney) for handling.	Procedure, affirmation of court clerk		1A
A system exists for mail addressed to the judge, solicitor and/or public defender to be promptly forwarded or otherwise made available in a timely manner to those persons. In the case of the public defender, the system maintains the confidentiality of the communication between the public defender and any defendant he or she may represent or be called upon to represent.	Procedure, affirmation of court clerk		1A

Judge			
The city has a written agreement, ordinance provision, or charter provision setting the term of the municipal court judge (of at least one year), and the agreement, ordinance provision or charter provision has been approved by the city attorney as accurately describing the obligations of the judge and the independence of the court.	Contract, ordinance or charter provision, signature or affirmation of city attorney.		2
The city pays for required training of the judge, and maintains a copy of training certification as proof that training is up to date.	Receipts, training certifications		3
Prosecuting Attorney (Solicitor)			
A. The city retains an attorney who acts as prosecutor (often called a solicitor) and is present at all court sessions and pre-trial matters and is registered with the State OR	Copy of resolution or ordinance creating officer of the prosecuting attorney; contract with solicitor or job description if employee; proof of up to date, accurate information about prosecuting attorney that was submitted to Prosecuting Attorneys' Council		4
B. The city has considered the cost of retaining a prosecuting attorney, and, after input of the city attorney, decided not to retain one. To ensure consistent treatment of defendants, the city has: • Adopted a policy or provided in the judge's contract or in the charter that the judge shall not engage in plea deals or act as a prosecutor in any case before the court; • Adopted a policy that police officers and code enforcement officers may only entertain plea arrangements with defendants in pre-trial matters and shall only act as a witness during trial, and provided training to officers on the policy; • Adopted a policy to retain the city attorney or other attorney to serve as solicitor on a case-by-case basis where there are pre-trial legal issues or complex facts beyond the police officer's knowledge; • In conjunction with the city attorney, an outside attorney, or POST training entities, provided training to police officers about changing charges or conducting pre-trial negotiations that are usually performed by a prosecuting attorney.	Documentation of the cost of retaining a prosecuting attorney and the decision not to do so; policies, training materials; identification of the attorney who will be retained on a case-by-case basis when needed.		5

Court Clerk			
The city pays for all required training of the municipal court clerk, and maintains a copy of the municipal court clerk's certification of training completion.	Receipts, training certifications		6
The city authorizes the municipal court clerk to seek guidance directly from the city attorney when he or she has questions or concerns about court operations, procedures, and matters related to private probation companies.	Job description or correspondence or training materials or policy		6
Public Defender			
A. A public defender retained by the city is present at every court session OR	Contract or job description (if employee); budget		7
B. When the judge determines that a defendant is entitled to a public defender, he or she reschedules the defendant's case, ensures that a public defender will be present on the rescheduled date, and provides the defendant information necessary to contact the public defender.	Contract with public defender; documentation of re-scheduling when public defender needed but not present; copy of communication showing defendant is provided contact information for the public defender.		7
The court follows a process for determining eligibility for appointment of counsel due to indigency that meets legal standards.	Forms and other documents of the process, affirmation of judge.		7
Interpreter			
When the judge determines that a defendant is entitled to an interpreter, a qualified and certified interpreter present on that date is made available to the defendant at no cost OR the judge reschedules the defendant's case and ensures that a qualified and certified interpreter will be present on the rescheduled date at no cost to the defendant.	Budget (shows projected costs for interpreters); Proof of rescheduling; proof of qualification/certification of interpreter; affirmation of judge; affirmation of court clerk		8
The judge follows the guidelines of the Bench Cards entitled **"Working with Limited English Proficient Persons and Foreign-Language Interpreters in the Courtroom"** and **"Working with Deaf or Hard of Hearing Persons and Sign Language Interpreters in the Courtroom,"** attached as **Exhibits A.1** and **A.2.**	Contracts with interpreters, job description if interpreter is city employee, proof of certification of interpreters, affirmation of judge, affirmation of court clerk		8
Fines/Fees/Alternatives			
The city has a procedure in place to ensure that the judge is notified immediately when a defendant is incarcerated, so a first appearance hearing (which includes determination of indigent status and setting of appropriate bail) may be arranged ASAP and no later than 48 hours after arrest. The city enforces this procedure.	Procedure, proof of enforcement.		9
The city has an established method for defendants to complete community service as an alternative to paying fines and fees.	Description of community service options provided to defendants; contract or letter		10

	agreement with community service partners		
If a judge has determined that a fine, fee or bail amount is due, the judge routinely and consistently inquires whether payment of any fine, fee or bail amount presents a significant financial hardship to the defendant. If the defendant answers yes, the judge either offers community service or follows the guidelines of the Bench Card attached as **Exhibit A.3** entitled **"Georgia and U.S. Constitutional Law Regarding Misdemeanor Probation"** to determine whether it is necessary to waive or reduce the fines/fees or impose community service as an alternative.	Affirmation of judge and affirmation of court clerk		10
Personnel handling fine money and recording payments follow a written procedure designed to ensure proper handling of payments and to prevent issuance of erroneous warrants, and receive periodic training on the procedure.	Procedure, proof of training.		10A
Private Probation Company (Complete if City Uses a Private Probation Company)			
The probation provider follows the guidelines of the Bench Card **"Georgia and U.S. Constitutional Law Regarding Misdemeanor Probation"** attached as **Exhibit A.3**.	Affirmation of probation provider		11
Contract with private probation company is between the city and the private probation company, meets the requirements of Georgia law, and includes the provisions attached as **Exhibit B,** or equivalent provisions.	Contract, affirmation of city attorney		11, 12
The city has designated a "business owner" for the contract with the private probation company who is responsible for reviewing complaints about the private probation company and advising the city council about whether the private probation company is complying with the terms of the contract.	Document identifying business owner, correspondence		11, 12
The city attorney approves the contract with the private probation company and all changes to the contract prior to execution of the contract or changes.	Contract or amendment signature page with dated city attorney signature		11, 12
The chief judge reviews all quarterly and annual reports provided by the private probation company and 1) notifies the city that review is complete and there is no indication that the private probation company has provided unauthorized services or 2) notifies the city and the city attorney of any concerns arising from the reports.	Correspondence		12
The city council reviews the annual report provided by the private probation company and a report from the business owner of the private probation contract and makes a determination of whether to continue the contract.	Minutes		12

Reasons for Affirmations in Self-Assessment

1. If the mayor or council members attend court or try to influence the judge, this leads to a perception that the court is not independent. If the court's operating costs are paid from fines and fees, this leads to a perception that the court's procedures and the judge's determinations are designed not to promote justice, but instead to bring in revenue. When the court staff are police department employees or under the supervision of the police department, this leads to a perception that the "deck is stacked" against the defendant and in favor of the police officer. If the process is fair, defendants are more likely to accept negative outcomes. See Ferguson Report, p. 42 ("The Ferguson municipal court handles most charges brought by FPD, and does so not with the primary goal of administering justice or protecting the rights of the accused, but of maximizing revenue. The impact that revenue concerns have on court operations undermines the court's role as a fair and impartial judicial body.")

   See also Burke, K. & Legen, S., Procedural Fairness: A Key Ingredient in Public Satisfaction (2007); a White Paper of the American Judges Association; http://aja.ncsc.dni.us/courtrv/cr44-1/CR44-1-2BurkeLeben.pdf as visited 12/5/2016, p. 6. ("People are in fact more willing to accept a negative outcome in their case if they feel that the decision was arrived at through a fair method. Significantly, even a judge who scrupulously respects the rights of litigants may nonetheless be perceived as unfair if he or she does not meet these expectations for procedural fairness."

   Making and keeping an audio recording of every court proceeding demonstrates transparency and promotes a perception of fairness. Uniform Municipal Court Rule 26 requires "a verbatim mechanical recording" or a "contemporaneous paper record" or both of proceedings at which defendants enter pleas. However, it is best practice to require at least an audio recording of all proceedings coming before the court, not just pleas. This means proceedings involving probation revocation hearings, indigence hearings, etc. should be recorded as well. The reasons best practice dictates that all proceedings before the municipal court be recorded is that such recordings help prevent holes in the record which could be exploited in litigation against a city. By maintaining such records, no holes would exist, and the actual facts of all proceedings will be held out as fact in litigation.

1A. Failure to promptly forward these documents to the correct party can result in failure to meet deadlines and other negative consequences for the city.

2. Revisions to O.C.G.A. Section 36-32-2 and 36-32-2.1 in 2016 removed a statement that said the judge "shall serve at the pleasure of the governing authority," proscribed minimum one year terms, grounds for termination mid-year, and process for termination. ("Any individual appointed as a judge under this Code section shall serve for a minimum term of one year and until a successor is appointed or if the judge is removed from office as provided in Code

Section 36-32-2.1. Such term shall be memorialized in a written agreement between such individual and the governing authority of the municipal corporation or in an ordinance or a charter.") It is common practice to document the responsibilities of the judge in a contract. The contract can serve as an important memorialization of the judge's independence and responsibilities, and as documentation of the limited role played by the city.

O.C.G.A. Section 15-1-3 provides that the court has the power "to control, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto." In March, 2016, the U.S. Department of Justice issued a letter emphasizing the judge's responsibility to oversee court staff and probation officers: "Courts must safeguard against unconstitutional practices by court staff and private contractors. In many courts, especially those adjudicating strictly minor or local offenses, the judge or magistrate may preside for only a few hours or days per week, while most of the business of the court is conducted by clerks or probation officers outside of court sessions. As a result, clerks and other court staff are sometimes tasked with conducting indigency inquiries, determining bond amounts, issuing arrest warrants, and other critical functions—often with only perfunctory review by a judicial officer, or no review at all. Without adequate judicial oversight, there is no reliable means of ensuring that these tasks are performed consistent with due process and equal protection. Regardless of the size of the docket or the limited hours of the court, judges must ensure that the law is followed . . ."

3. O.C.G.A. Section 36-32-11(d)("The reasonable costs and expenses of such training shall be paid by the governing authority of the jurisdiction where the judge presides.")

4. O.C.G.A. Section 15-18-91("(a) Subject to the provisions of this article, the governing authority of a municipality shall be authorized to create the office of prosecuting attorney of the municipal court. A copy of the resolution or ordinance creating the office of prosecuting attorney of the municipal court shall be provided to the Prosecuting Attorneys' Council of the State of Georgia. (b) It shall be the duty of the municipal court clerk, or such other person designated by the governing authority of a municipality, to notify the Prosecuting Attorneys' Council of the State of Georgia of the name of any person appointed to be the prosecuting attorney of a municipal court within 30 days of such appointment."

5. Cities are not required by law to have a prosecuting attorney. Judges are prohibited from engaging in plea discussions. Uniform Municipal Court Rules 25 (a) "The trial judge shall not participate in plea discussions." Usually, plea negotiations are handled by the city's prosecuting attorney. If the city does not have one, it appears that law enforcement officers may be authorized to act in the capacity of a prosecutor for pre-trial matters and plea negotiations. Preamble to Uniform Municipal Court Rules: "It is not the intent of these rules, nor shall these rules be construed, to require any municipal, recorders or any other court deemed a municipal court, to become or remain a court of record or to employ the services of any personnel, including solicitors or prosecuting attorneys, unless otherwise provided by general law, charter or ordinance."

Rule 20.2(c) of the Uniform Municipal Court Rules provides that law enforcement officers may serve as prosecutors at commitment hearings, and suggests that they may serve as prosecutors in other pre-trial matters: "At the commitment hearing, the following procedures shall be utilized: (1) The rules of evidence shall apply except that hearsay may be allowed; (2) **The prosecuting entity** shall have the burden of proving probable cause; and **may be represented by a law enforcement officer**, a district attorney, a solicitor, or otherwise **as is customary in that court**; (3) The accused may be represented by an attorney or may appear pro se; and (4) The accused shall be permitted to introduce evidence." (emphasis supplied)

However, the practice of using law enforcement officers to engage in plea deals creates exposure to the city due to conflicts of interest, the appearance of unfairness, and the risk of inconsistency in how plea deals are handled.

6. Georgia law requires municipal court clerks to receive minimum training that this paid for by the city. O.C.G.A. Section 36-32-13(b)(3) "The reasonable costs and expense of training required by this Code section shall be paid by the governing authority of the municipality from municipal funds." Training designed for all clerks cannot address all questions associated with a particular court. Permitting the clerk to seek counsel from the city attorney promotes ongoing compliance with legal obligations.

7. Georgia statutes require every municipal court to provide a free public defender to any defendant who is determined by the judge to be indigent. O.C.G.A. Section 36-32-1 (f); ("Any municipal court . . . shall not impose any punishment of confinement, probation, or other loss of liberty, or impose any fine, fee, or cost enforceable by confinement, probation, or other loss of liberty . . . unless the court provides to the accused the right to representation by a lawyer, and provides to those accused who are indigent the right to counsel at no cost to the accused. Such representation shall be subject to all applicable standards adopted by the Georgia Public Defender Council for representation of indigent persons in this state" O.C.G.A. Section 36-32-1 (g) "Any municipal court . . . that has jurisdiction over the violation of municipal or county ordinances or such other statutes as are by specific or general law made subject to the jurisdiction of municipal courts, and that holds committal hearings in regard to such alleged violations, must provide to the accused the right to representation by a lawyer, and must provide to those accused who are indigent the right to counsel at no cost to the accused. Such representation shall be subject to all applicable standards adopted by the Georgia Public Defender Council for representation of indigent persons in this state.)

Uniform Municipal Court Rules Rule 21, Appointment of Counsel for Indigent Defendants states: "The municipal court shall have a procedure and forms consistent with state law in order to determine indigence and to appoint counsel to defendants who apply and qualify for appointed counsel. The applications shall be available through the clerk of the municipal court. The rules of municipal courts shall embrace and include OCGA § 17-12-1 et seq. The

Georgia Public Defender Standards, as amended, are incorporated by reference to the extent that they are applicable to municipal courts."

The judge must make the final decision about whether the defendant is indigent. See O.C.G.A Section 17-12-2(6)(A); Thomas v. State, 677 S.E.2d 433, 437 ("the determination of whether a defendant is indigent . . . lies within the discretion of the trial court, and this determination is not subject to review.")

8. State Court Rules, Rules for Use of Interpreters Appendix A (A) (Attached)
Excerpts:
II."An interpreter is needed and an interpreter shall be appointed when the decision maker, which would include the judge, magistrate, special master, commissioner, hearing officer, arbitrator, neutral, or mediator, determines, after an examination of a party or witness, that: (1) the party cannot understand and speak English well enough to participate fully in the proceedings and to assist counsel; or (2) the witness cannot speak English so as to be understood directly by counsel, the decision maker, and/or the jury.
(B) The decision maker should examine a party or witness on the record to determine whether an interpreter is needed if: (1) a party or counsel requests such an examination; or (2) it appears to the decision maker that the party or witness may not understand and speak English well enough to participate fully in the proceedings, or (3) if the party or witness requests an interpreter. The fact that a person for whom English is a second language knows some English should not prohibit that individual from being allowed to have an interpreter.
(C) To determine if an interpreter is needed the decision maker should normally include questions on the following:
    1. Identification (for example: name, address, birth date, age, place of birth);
    2. Active vocabulary in vernacular English (for example: "How did you come to the proceeding today?", "What kind of work do you do?", "Where did you go to school?", "What was the highest grade you completed?", "Describe what you see in the room", "What have you eaten today?"). Questions should be phrased to avoid "yes or no" replies;
    3. The criminal or civil proceedings (for example: the nature of the charge or the type of proceeding, the purpose of the proceedings and function of the decision maker, the rights of a party or criminal defendant, and the responsibilities of a witness).
(D) After the examination, the decision maker should state its conclusion on the record, and the file in the case should be clearly marked and data entered electronically when appropriate by personnel to ensure that an interpreter will be present when needed in any subsequent proceeding."
. . .

(F) When a Certified, Conditionally Approved, or Registered interpreter is not being used, the decision maker or the decision maker's designee should give instructions to interpreters, either orally or in writing, that substantially conform to the following . . .

VII. Interpreter's Fees and Expenses: Foreign language interpreters.
(A) Any interpreter providing service under this rule shall be compensated as directed by the local court or appropriate governing body.
(B) The expenses of providing an interpreter in any legal proceeding will be borne by the local court or appropriate governing body.

9. Municipal court judges surveyed by GMA in July, 2016 reported that the greatest barrier to complying with the requirement of a first appearance hearing within 48 hours of a defendant's arrest was the city's failure to notify the judge of the incarceration. A procedure designed to ensure prompt notification can be as simple as requiring the arresting officer to affirm that he or she has notified the judge before placing the defendant in custody. Uniform Municipal Court Rules Initial Appearance Hearing. " As soon as is reasonably practicable following any arrest but no later than forty-eight (48) hours if the arrest was without a warrant, or seventy-two (72) hours following an arrest with a warrant, unless the accused has made bond in the meantime, the arresting officer or other law enforcement officer having custody of the accused shall present the accused in person before a municipal judge or other judicial officer for first appearance." "At the first appearance, the municipal judge or judicial officer shall . . . Determine whether or not the accused desires and is in need of an appointed attorney and, if appropriate, advise the accused of the necessity for filing a written application. . . ."

   Currently, the question of whether 48 hours is too long of a time period to have arrestees incarcerated before receiving their first appearance is being litigated in Georgia and in other jurisdictions throughout the country. It is entirely possible that the courts may hold that incarcerating arrestees for a maximum of 48 hours before their first appearance to determine indigency is too much time. In such event, the courts may determine that a first appearance for misdemeanor arrestees must take place immediately upon arrest and if this is not possible such persons may be required to be released immediately. The City of Calhoun, which is the defendant in the aforementioned litigation, currently has undertaken this practice due to a court decision and is not holding misdemeanor arrestees for first appearances. Some jurisdictions have a policy of automatically releasing misdemeanor arrestees on their own recognizance if the first appearance hearing is not held within 48 hours.

10. National law firms and civil rights groups have been joining forces to bring class actions against cities across the country for failure to properly determine financial hardship and waive fines and fees accordingly. These cases result in damage to the city's brand, attorneys' fees, forced adoption of new policies and procedures, forced training, and ongoing monitoring. The costs of being "forced" into compliance far outweigh the cost of proactively developing appropriate procedures and implementing necessary training. Examples of settlement agreements are attached.

- Cleveland v. City of Montgomery, No. 2:13CV732-MHT, 2014 WL 6461900, at *1 (M.D. Ala. Nov. 17, 2014) (plaintiffs brought suit against city and two municipal court judges claiming they were put in jail because they couldn't afford to pay parking tickets and the city eventually settled agreeing to conduct constitutionally required hearings and provide public defenders);
- State v. Blazina, 344 P.3d 680, 685 (Wash. 2015) (individualized inquiries into defendants' ability to pay fines was required before the court imposed debt);
- Bell et al. v. City of Jackson, Mississippi, No. 3:15-cv-732-TSL-RHW (S.D. Miss. October 9, 2015)(A group of plaintiffs sued the city for being forced to sit out debts in jail, even for those who were disabled and unable to work);
- Thompson v. Dekalb County (ACLU, Southern Center for Human Rights, and Rogers & Hardin LLP represented plaintiff who was jailed for five days for failure to pay; settled for $70,000 and judge's agreement to follow bench card), press release and bench card attached);
- Fuentes v. Benton County, ACLU and Terrell Marshall Law Group filed class action (Sup. Ct. Wash. Yakima County Oct. 6, 2015) claiming that Benton County routinely assesses fines and fees in an amount upwards of $1,000 without considering a person's ability to pay, and indigent people who are unable to pay these charges are sentenced to incarceration in jail or to toil on a work crew. Settlement agreement requires city to pay $3,000 to individuals, reasonable attorneys' fees, and to do the following: provide training on new procedures for indigence inquiries to prosecutors, public defenders and court staff, amend contracts with public defenders to address training requirements, collect data annually on public defender appointment, charges, jail visits, provide information to Plaintiff's counsel every six months for five years;
- Kennedy v. City of Biloxi (S.D. Miss. Oct. 21, 2015)(plaintiffs incarcerated for failure to pay fines and fees imposed by the court, but were allegedly not afforded ability-to-pay hearings or informed of right to request counsel prior to being jailed. City increased budget for court by $253,000 for fiscal year 2016 and $344,024 for subsequent fiscal years to pay for additional city duties set forth in the settlement agreement. City paid $75,000 in damages and attorneys' fees. Agreement requires: audio recording of all hearings of inability to pay, procedures for inability to pay hearings, judge must follow a bench card. City must no longer use any private probation company after June 1, 2016. Secured money bonds will not be used to detain persons arrested unless the court determines that it is the only pretrial release option that will adequately assure presence at trial. City must place a notice on its website about individual rights to hearing on ability to pay. Required training on inability to pay hearings for judges, required training for police on inability to pay hearings and right to representation by public defender. Required training of probation company staff and city probation staff. Required training of public

defenders on ability to pay hearings. Required training of prosecutors on ability to pay hearings. Required Public defender contract language provisions. Required city to provide information to Plaintiffs' Counsel every six months for two years.

10A. If fines or fees are not properly recorded, bench warrants for failure to appear may be erroneously issued. This can result in exposure to lawsuits for unlawful arrest. Moreover, failure to properly handle certain fines and fees can result in loss of federal highway funds and other penalties, and in some case may warrant criminal charges.

11. O.C.G.A. Section 42-8-107 requires the contract to include certain provisions and describe certain requirements. The city can protect itself by including additional provisions that protect the city. For example, when a private probation company violates the constitutional rights of defendants by failing to identify the need for financial hardship hearings or threatening incarceration for failure to pay, the city is at risk of exposure. The city can protect itself by ensuring that the contract includes indemnification language.

- Georgia Department of Audits and Accounts Performance Audit Report No. 12-06, April, 2014 (audit found that "courts provided limited oversight of providers, with contracts that often lack the detail needed to guide provider actions and periodic reports from providers that tell little about their own or their probationers' performance.")
- Reynolds, et al. v. Judicial Correction Services, Inc., et al., 2:15-cv-00161-MHT-CSC (M.D. Ala., June 16, 2015) (Assisted by the Southern Poverty Law Center, a group of plaintiffs filed suit against the City of Clanton, Alabama and its private probation provider for threatening to jail them when they fell behind on paying fines for traffic violations. Particularly, the lawsuit accused the probation provider with extorting monthly payments from probationers which included an additional fee for the provider and accused the city of formalizing the relationship through an illegal contract with the probation provider. The probation company settled with the plaintiffs. The Southern Poverty Law Center sent letters to 100 cities in Alabama working with the probation company and all of them severed ties with the company.)

12. O.C.G.A. Section 42-8-108 requires probation providers to deliver detailed quarterly reports to the court and annual reports to the governing authority of the city. O.C.G.A. Section 42-8-101 authorizes the governing authority of the city to enter into or terminate a contract with a private probation company at the request of the chief judge and with his or her written consent. Formerly, the chief judge entered into the contract with the consent of the governing authority. This reporting is designed to address the lack of oversight identified in the audit described in Note 11. By ensuring the reports meet the legal requirements and reviewing the reports, the city demonstrates its compliance with oversight obligations.

Supreme Court of Georgia Commission on Interpreters

WORKING WITH LIMITED ENGLISH PROFICIENT PERSONS AND FOREIGN-LANGUAGE INTERPRETERS IN THE COURTROOM

— A Bench Card for Judges —

The Law on Foreign-Language Interpreters for Participants in Court Proceedings

Under Federal law, including Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Georgia statutory law, case law, and Supreme Court rules, Georgia courts are required to provide qualified foreign-language interpreters to participants in court proceedings who are limited English proficient (LEP). They must provide these services when necessary to ensure effective communication by and with LEP participants. LEP participants can include litigants, witnesses, and spectators. Court proceedings include all court services, programs, and activities. LEP participants:

- Cannot be required to arrange or pay for their own interpreters, nor can their attorneys be required to do so;
- Must be provided an interpreter for any criminal or civil proceeding;
- Can waive their right to an appointed interpreter if the waiver is in writing and is approved by the court, and can revoke that waiver at any time;
- Do not waive their right to an appointed interpreter simply because they do not request one;
- Do not lose the right to an appointed interpreter because they speak or understand some English.

Identifying the Language of LEP Participants

LEP participants in court proceedings can self-identify their preferred language by using a Language Identification Guide: coi.georgiacourts.gov/content/language-identification-guide.

Determining the Need for a Foreign-Language Interpreter

An interpreter shall be appointed when the decision maker, which would include the judge, magistrate, special master, commissioner, hearing officer, arbitrator, neutral, or mediator, determines, after an examination of the participant in the court proceeding, that:

- The party cannot understand and speak English well enough to participate fully in the proceedings and to assist counsel; or
- The witness cannot speak English so as to be understood directly by counsel, the decision maker, and/or the jury.

Sample Questions to Assess the English Proficiency of a Participant

- How did you learn English?
- Please tell me about your native country.
- Describe some of the things you see in this courtroom.

After examination, the decision maker should state his or her conclusion on the record, and the case file should be clearly marked and data entered electronically to ensure that an interpreter will be present when needed in any subsequent proceeding.

In some instances, the decision maker may appoint an interpreter based solely on a participant's written or verbal request.

Courts should encourage participants to alert the court to their need for an interpreter and the language needed as soon as possible so the court has adequate time to locate a qualified interpreter. Participants should not be required to wait to make their first request for an interpreter in person in court.

Finding a Qualified Foreign-Language Interpreter

The Supreme Court Commission on Interpreters (Commission) maintains an online database of state-licensed interpreters that can be searched by language and by county, at coi.georgiacourts.gov.

Interpreters licensed through the Commission have fully satisfied rigorous examinations, training, and court observation, and have undergone background checks.

If there is no interpreter on the registry for the language you need, contact the Commission at 404-463-3808 or gcr.interpreters@georgiacourts.gov.

Credentials of Foreign-Language Interpreters

Courts should make a diligent effort to appoint a "Certified" interpreter. If a Certified interpreter is unavailable, a "Conditionally Approved" or "Registered" interpreter should be given preference. If the court is unsure of an interpreter's qualifications, the court should *voir dire* the interpreter:

Sample *Voir Dire* to Assess an Interpreter's Qualifications

- "What training/credentials do you have?"
- "What is your native language?"
- "State some canons from the Code of Professional Responsibility for Interpreters."
- "How many times have you interpreted in court?"
- "What types of cases have you interpreted?"

If, after a diligent search by the court, a Certified or other licensed interpreter is unavailable, the court should weigh the need for immediacy in conducting a hearing without a licensed interpreter or with an unlicensed interpreter or telephonic interpreter, against the potential compromise of due process, or the potential of substantive injustice, if the quality of interpreting is inadequate. Failure to appoint a qualified interpreter or no interpreter at all can result in reversible error on appeal.

If the court determines that the use of a non-licensed interpreter is warranted, refer to the Commission's Instructions for Use of a Non-Licensed Interpreter: coi.georgiacourts.gov/content/forms-brochures. When a non-professional interpreter is used, the court should personally verify the interpreter's basic understanding of his or her role, on the record.

Additional Considerations When Selecting Foreign-Language Interpreters

Courts should consider other factors to determine whether an interpreter is suited to work in court. For example:

- The interpreter's prior professional and/or social contact or association with the LEP participants;
- Education, professional training, and formal legal training completed by the interpreter; and
- The types of court proceedings in which the interpreter has experience.

Courts should also consider that:

- The ability to speak a foreign language does not equal the ability to interpret nor qualify a person to interpret;
- Relatives or friends of LEP parties, witness, judges, or attorneys should not interpret court proceedings. Minor children should never be used to interpret;
- Court personnel or bilingual staff should not function as interpreters unless they are Certified and employed as staff interpreters;
- Court interpreting is strenuous, so it advisable to schedule regular breaks. Sometimes, appointing more than one interpreter may be necessary for proceedings expected to last more than two hours;
- The interpreter is a neutral party whose sole job is to facilitate communication by interpreting everything said during the proceedings;
- The interpreter cannot participate in any capacity other than as the interpreter;
- The interpreter may not provide advice or explanations about what was said or done in court;
- The interpreter is a conduit for information exchange, and not a direct participant in the proceeding.

Recording the Proceedings

Where a Certified interpreter is used, no audio or audio-visual record of the non-English testimony is required, but the court may authorize the making of a recording.

Where a non-Certified (e.g., Conditionally Approved, Registered, or unlicensed) interpreter is used, the court shall make an audio or audiovisual recording of any non-English testimony. This recording shall become part of the record of the proceeding: coi.georgiacourts.gov/content/supreme-court-rules.

Foreign-Language Interpreter's Ethics

All Georgia-licensed court interpreters are subject to the Code of Professional Responsibility for Interpreters: coi.georgiacourts.gov/content/supreme-court-rules.

Foreign-Language Interpreter's Oath

The court should administer an oath prior to the start of court proceedings. Below is an example:

"Do you solemnly swear or affirm that you will faithfully interpret from (the foreign language) into English and from English into (the foreign language) the proceedings before this court in an accurate manner to the best of your skill and knowledge?"

Resources

Georgia Supreme Court Rule on Interpreters
coi.georgiacourts.gov/content/supreme-court-rules

"Is It Reversible Error?" *Georgia Courts Journal* (March 2015)
w2.georgiacourts.gov/journal/index.php/march-2015/322-is-it-reversible-error

Georgia Council of State Court Judges 2016 Benchbook, Chapter on Appointing Qualified Interpreters (appropriate for all trial courts)
statecourt.georgiacourts.gov/content/chapter-11-appointing-qualified-interpreters

National Association of Judiciary Interpreters & Translators Code of Ethics and Professional Responsibilities
www.najit.org/about/NAJITCodeofEthicsFINAL.pdf

Federal Interagency Website on Limited English Proficiency
www.lep.gov/

Produced with the assistance of the Judicial Council/Administrative Office of the Courts.

Supreme Court of Georgia Commission on Interpreters

WORKING WITH DEAF OR HARD OF HEARING PERSONS AND SIGN LANGUAGE INTERPRETERS IN THE COURTROOM

— A Bench Card for Judges —

The Law on Sign Language Interpreters for Participants in Court Proceedings

Under the Americans with Disabilities Act (ADA) and state law (O.C.G.A. § 24-6-650 to 658), Georgia courts must provide auxiliary aids or services – such as qualified sign language interpreters – to participants in court proceedings who are deaf or hard of hearing (DHH). They must provide these aids or services when necessary to ensure effective communication by and with DHH participants. DHH participants can include litigants, witnesses, and spectators. Court proceedings include all court services, programs, and activities. DHH participants:

- Cannot be required to arrange or pay for their own interpreters;
- Must be provided an interpreter for any criminal or civil proceeding;
- Can waive their right to an interpreter if the waiver is in writing and it is approved by the court;
- Do not waive their right to an interpreter simply because they do not request an interpreter.

Establishing the Communication Preference of the Participants

The court must ask DHH participants to identify the type of reasonable accommodation needed.[1] If a request for an interpreter is not made, but the participants could benefit from the services of an interpreter, the judge should address the need on the record:

- "Please tell the court your name."
- "You have the right to participate and understand these proceedings. Tell the court the best way to communicate with you, so you know what is being said."
- "Do you need an interpreter?"
- Do not waive their right to an interpreter simply because they do not request an interpreter.

Finding a Qualified Foreign-Language Interpreter

The Registry for Interpreters for the Deaf (RID), the national certification organization for all sign language interpreters, has a searchable database of certified members on its website, www.rid.org

Credentials of Sign Language Interpreters

An ability to sign does not equate to being able to interpret. To effectively communicate, the interpreter must possess the necessary skills to process spoken language into equivalent sign language and to process sign language into equivalent spoken language. Family members or friends of DHH participants should never be called upon to interpret court proceedings. Court personnel should not function as interpreters unless they are certified and employed as staff interpreters.

A court official or designee should assess an interpreter's qualifications prior to scheduling the interpreter's appearance in court. To be recognized as qualified in Georgia, an interpreter must hold a current certification from the Registry of Interpreters for the Deaf (RID). For legal proceedings, courts should first try to use certified sign language interpreters who hold this credential:

- SC:L (Specialist Certificate: Legal) *Preferred and recommended credential based on demonstrated specialized knowlege of legal system, language, and settings.*

If an SC:L interpreter cannot be located, interpreters with these RID certifications may also be used. However, it is recommended that they have additional specialized training in legal interpreting:

- NIC (National Interpreter Certification), Master
- NAD V (National Association of the Deaf: Certification –Master)
- CI and CT (Certificate of Interpretation and Certificate of Transliteration)
- CDI (Certified Deaf Interpreter)
- CSC (Comprehensive Skills Certificate)

If the court is unsure of an interpreter's qualifications, the court should *voir dire* the interpreter:

Sample *Voir Dire* to Assess an Interpreter's Qualifications

- "Are you certified by RID?"
- "What specialized training have you completed?"
- "How long have you been an interpreter?"
- "How many times have you interpreted in court?"
- "Describe the Code of Ethics as it applies to legal interpreters."
- "How did you learn American Sign Language?"

Additional Considerations When Selecting Sign Language Interpreters

Courts should take additional steps to determine whether a particular interpreter is suited to work in a court setting. Some considerations could include:

- Prior professional and/or social contact or association with the DHH participants.
- Education, professional training, and formal legal training completed by the interpreter.
- The types of court proceedings in which the interpreter has experience.

(A full list of suggested *voir dire* questions, considerations, and acceptable answers may be requested from the Judicial Council/Administrative Office of the Courts.)

Sign Language Interpreter's Ethics

The Registry of Interpreters for the Deaf and the National Association of the Deaf (NAD) together have enacted a Code of Professional Conduct for interpreters that com-prises seven ethical tenets:

1. Adhere to standards of confidential communication.
2. Possess the professional skills and knowledge required for the specific interpreting situation.
3. Conduct themselves in a manner appropriate to the specific interpreting situation.
4. Demonstrate respect for consumers.
5. Demonstrate respect for colleagues, interns, and students of the profession.
6. Maintain ethical business practices.
7. Engage in professional development.

The Code applies to RID's certified and associate members and NAD's certified members; is superseded by any local, state, or federal laws and regulations; and applies to both face-to-face and remote interpretations.

Sign Language Interpreter's Oath

The court should administer an oath prior to the start of court proceedings. Below is an example:

"Do you solemnly swear or affirm that you will interpret accurately, completely and impartially, using your best skill and judgment in accordance with the standards prescribed by law, follow all official guidelines established by this court for legal interpreting, and discharge all of the solemn duties and obligations of legal interpretation?"

Best Practices for Interacting with DHH Persons[2]

- DHH persons experience differing levels of hearing loss and may prefer varying methods of communication. Ask DHH persons which method they prefer.
- When speaking with DHH persons, whether through a sign language interpreter or not, speak directly to them, look directly at them, and maintain eye contact. Natural facial expressions and gestures will be helpful in facilitating your conversation.
- The role of a sign language interpreter is only to facilitate communication between DHH and hearing people. Therefore, the interpreter should never be asked to participate in any activity other than interpreter for the DHH individual.

Resources

Georgia Supreme Court Rule on Interpreters
coi.georgiacourts.gov/content/supreme-court-rules

State of Georgia ADA Coordinator's Office
http://ada.ga.gov

Georgia Registry of Interpreters for the Deaf
www.garid.org

Georgia Council for the Hearing Impaired
www.gachi.org

National Association of the Deaf
www.nad.org

Registry of Interpreters for the Deaf/National Assoc. for the Deaf Code of Professional Conduct
http://coi.georgiacourts.gov/sites/default/files/coi/NAD_RID_ETHICS.pdf

National Association of Judiciary Interpreters & Translators Code of Ethics and Professional Responsibilities
http://www.najit.org/about/NAJITCodeofEthicsFINAL.pdf

Working with Sign Language Interpreters in Texas: A Bench Card for Judges
http://www.najit.org/asl/benchcardtexas.pdf

U.S. Dept. of Justice/Americans with Disabilities Act
www.ada.gov

[1] As set out in the final ADA Title II rule, "[t]he type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communi-cation used by the individual, the nature, length, and complexity of the communication involved, and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities." 28 C.F.R. 35.160(b)(2) (analysis).

[2]Best Practices when Interacting with Persons with Disabilities: A Customer Service Guide for State Government Agencies – Georgia State Financing and Investment Commission, State ADA Coordinator's Office.
http://ada.georgia.gov/sites/ada.georgia.gov/files/related_files/document/BestPractices%20Handbook%20final%20copy%20with%20Corrina%20M%20foreward.pdf

Produced with the assistance of the Judicial Council/Administrative Office of the Courts.

Judicial Council of Georgia • Policy and Legislative Committee

GEORGIA AND U.S. CONSTITUTIONAL LAW REGARDING MISDEMEANOR PROBATION

— A Bench Card for Judges —

This bench card is designed to provide judges with guidance on the relevant legal principles regarding misdemeanor probation, including first offenders placed on misdemeanor probation under Article 6 of Title 42, Chapter 8. It focuses in particular on how to address the situation of indigent misdemeanor defendants and probationers and contains information about recent changes to Georgia law under S.B. 367 (2016) and H.B. 310 (2015).

KEY CONSIDERATIONS

CONSTITUTIONAL REQUIREMENTS BEFORE IMPOSING OR REVOKING PROBATION

- Before being placed on probation, a defendant is entitled to the assistance of counsel absent a proper waiver. *Alabama v. Shelton*, 535 U.S. 654, 658 (2002).
- When revoking probation, a court **must** find that the probationer has willfully violated probation conditions. Failure to comply is not willful if the probationer lacks notice of a condition. *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (per curiam).
- Failure to comply is not willful if the probationer lacks the ability to comply. *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983). A probationer may not be imprisoned for failing to pay fines, fees, or restitution if the court has not inquired into the reasons for failure to pay. If the failure to pay is not willful, the court must consider alternative conditions rather than imprisonment. *Id*.
- In revocation proceedings, the probationer must be informed of the right to request counsel. *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). If counsel is denied, the reasons **must** be stated in the record. *Id*.

GEORGIA LAW REGARDING INDIGENT DEFENDANTS AND DEFENDANTS WITH A "SIGNIFICANT FINANCIAL HARDSHIP"

- If the defendant is unable to pay or demonstrates a significant financial hardship, either before or after sentencing, the court must:
  - o **Waive** the fine, surcharges, or fees;
  - o **Reduce** the fine, surcharges, or fees to an amount that the defendant can pay; and/or
  - o **Convert** the fine, surcharges, or fees to community service. O.C.G.A. § 42-8-102(e).
- Notably, Georgia law now defines significant financial hardship as occurring where there is *a reasonable probability that the defendant will be unable to satisfy his or her financial obligations for two or more consecutive months.* O.C.G.A. § 42-8-102(e)(1)(c). A significant financial hardship is presumed where the defendant:
  - o Has a developmental disability under O.C.G.A. § 37-1-1;
  - o Is totally and permanently disabled under O.C.G.A. § 49-4-80;
  - o Earns less than 100% of the Federal Poverty Guidelines;
  - o Has been released from confinement within the past 12 months and was incarcerated for more than 30 days before release.

SETTING FINES AND FEES IN MISDEMEANOR PROBATION CASES

INQUIRING INTO ABILITY TO PAY AND SIGNIFICANT FINANCIAL HARDSHIP, O.C.G.A. § 42-8-102(e)

At sentencing, the court must determine whether fines, surcharges, or probation supervision fees that the court would otherwise impose would be impossible for the defendant to pay or would create a significant financial hardship. *See above.*

CONVERTING FINES & FEES TO COMMUNITY SERVICE, O.C.G.A. §§ 17-10-1(d), 42-8-102(d)

The court may convert fines, surcharges, or probation supervision fees to community service. The number of service hours is determined by dividing the fine, surcharges, or fees by an appropriate hourly wage, which must be at least the minimum wage under the federal Fair Labor Standards Act of 1938, 29 U.S.C. § 206 (currently $7.25), but may be higher at the court's discretion.

SETTING FINES, FEES, AND RESTITUTION, O.C.G.A. §§ 17-14-10(a), 17-14-7, 42-8-102(c)

If fines, restitution, or probation supervision fees are imposed, the amount should be adjusted to the defendant's circumstances, including:

- The defendant's financial resources and income;
- The defendant's financial obligations and dependents;
- The length of the defendant's probation sentence;
- The goals of deterrence, retribution, and rehabilitation;
- Any other factor the court deems appropriate to consider. If restitution is imposed, the court **must** consider, in addition to the above factors, the amount of damages and any restitution previously made. If the amount of restitution is contested, the court **must** hold a hearing at which the burden is on the State to establish the amount of the victim's loss, and the burden is on the defendant to establish hardships justifying a reduction in the restitution amount.

WHAT THE COURT SHOULD TELL MISDEMEANOR DEFENDANTS OR PROBATIONERS

When a misdemeanor defendant or probationer appears before the court for any reason, the court should advise the person that he or she:

- **May request counsel at sentencing or revocation** (*Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (sentencing); *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (revocation));
- **May request community service or other probation modifications to avoid hardships** (O.C.G.A. § 42-8-102(d)-(e));
- **Must continue to report even if unable to pay** (O.C.G.A. § 42-8-102(f)(4)(A));
- **Will be subject to tolling if he or she fails to report** (O.C.G.A. § 42-8-105(b)).

SPECIAL REQUIREMENTS FOR PAY-ONLY PROBATION

LIMITS ON PAY-ONLY PROBATION, O.C.G.A. § 42-8-103(a), (c)

If a defendant is placed on supervised probation solely due to inability to immediately pay fines and surcharges, total probation supervision fees may not exceed three months' worth of the fees ordinarily collected. The collection of probation supervision fees must end when fines and surcharges are paid in full. If fines and surcharges are converted to community service, a probation officer may petition for probation fees under O.C.G.A. § 42-8-103(c).

EARLY TERMINATION BY PROBATION OFFICER'S MOTION, O.C.G.A. § 42-8-103(b)

When all fines and surcharges are paid, the probation officer shall submit an order terminating probation within thirty days. The court shall terminate the probated sentence or issue an order stating why the sentence shall continue.

EARLY TERMINATION BY DEFENDANT'S MOTION, O.C.G.A. § 42-8-103(d)

The court may terminate supervision upon the defendant's motion when "it is satisfied that its action would be in the best interest of justice and the welfare of society."

PROBATION REVOCATION

APPOINTMENT OF COUNSEL

• Prior to revocation hearing, the court should make the probationer aware of the opportunity to request appointed counsel; however, there is no categorical Sixth Amendment right to appointment of counsel in probation revocation proceedings, only a more limited due process right, determined on a case-by-case basis where fundamental fairness requires it. *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

• In determining whether due process demands the appointment of counsel, the court should consider whether "the probationer makes such a request based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present." The court "also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself." *Gagnon v. Scarpelli*, 411 U.S. 778, 790-791 (1973).

• In every case in which a request for counsel is refused, the grounds for refusal should be stated in the record. *Gagnon v. Scarpelli*, 411 U.S. 778, 791 (1973).

REVOCATION GENERALLY, O.C.G.A. § 42-8-102(f)(4)

If the court determines that the probationer has violated probation by failing to report, make court-imposed payments, or comply with any general probation condition, the court must consider alternatives to confinement, including:

- Community service;
- Modification of probation conditions to facilitate the probationer's good-faith efforts to comply (in the case of failure to report or failure to pay);
- Any other alternative deemed appropriate.

NOTE: Different penalties and notice requirements may apply to the imposition and revocation of special conditions of probation. See *Hill v. State,* 270 Ga. App. 114 (2004); O.C.G.A. § 42-8-34.1(e).

CONCURRENT VS. CONSECUTIVE SENTENCES

When a probationer is before the court on multiple sentences, the court must consider those sentences to run concurrently unless it is expressly indicated that the sentences are to be served consecutively. OCGA 17-10-10(a); *Rooney v. State* 287 GA. 1 (2010)

PROBATION REVOCATION cont.

NEGATING FINES, SURCHARGES, AND FEES, O.C.G.A. § 42-8-105(f)

If the entire balance of probation is revoked, all the conditions of probation, including moneys owed, shall be negated by a defendant's imprisonment. If only part of the balance is revoked, the court shall determine the probationer's responsibility for the amount of unpaid sums and may reduce arrearages considering probationer's ability to pay.

REVOKING FOR FAILURE TO PAY, O.C.G.A. § 42-8-102(f)(2)(A)

If the sole basis for a probation revocation is failure to pay fines, surcharges, or probation supervision fees, the court shall not issue a prehearing arrest warrant and shall schedule an appearance on the next available court calendar for a hearing. A warrant may be issued if the probationer fails to appear for this hearing.

In cases of failure to pay, the court must inquire into the probationer's ability to pay, and make express written findings that:

- The failure to pay was willful and the probationer has not made sufficient efforts to pay; or
- Adequate alternative punishments do not exist.

If the court determines that imprisonment is necessary and permissible, it may revoke the balance of probation or up to 120 days, whichever is less.

REVOKING FOR FAILURE TO REPORT TO PROBATION, O.C.G.A. § 42-8-102(f)(3)(A)

If the sole basis for revocation is failure to report to probation, the probation officer must submit an affidavit describing efforts to contact the probationer and swearing that the probationer has failed to report. The affidavit must show that:

- The probationer has failed to report twice;
- The officer has tried to contact the probationer twice at a last-known telephone number or e-mail address shown in the affidavit;
- The officer has checked local jails and determined that the probationer is not incarcerated;
- The officer has sent a letter by first-class mail to a last-known address shown in the affidavit, warning the probationer that a tolling order would be sought if the probationer failed to report in person within ten days. (If a probationer reports within the ten day period, the probationer may be scheduled to appear on the next available court calendar for a revocation hearing.); and
- The probationer failed to report as directed in the letter.

The probation officer may submit this affidavit along with a request for prehearing arrest warrant, although the court has discretion to issue the prehearing arrest warrant or decline to do so.

If the court determines that imprisonment is necessary and permissible, it may revoke the balance of probation or up to 120 days, whichever is less.

TOLLING

TOLLING PROBATION SENTENCES, O.C.G.A. § 42-8-105(b)

Before a sentence is tolled, the probation officer must submit an affidavit describing efforts to contact the probationer and swearing that the probationer has failed to appear in court for a revocation hearing or failed to report to the assigned probation officer. If tolling is based solely on failure to report to probation, the affidavit must show that:

- The probationer has failed to report twice;
- The officer has tried to contact the probationer twice at a last-known telephone number or e-mail address shown in the affidavit;
- The officer has checked local jails and determined that the probationer is not incarcerated; and
- The officer has sent a letter by first-class mail to a last-known address shown in the affidavit, warning the probationer that a tolling order would be sought if the probationer failed to report in person within ten days, and the probationer failed to report as directed in the letter.

CALCULATING THE TOLLING PERIOD, O.C.G.A. § 42-8-105(b), (d)

The tolling period begins when the court enters a tolling order supported by a valid affidavit. The clerk of court must send a copy of the tolling order to the Georgia Crime Information Center within thirty days of when the order is filed. Tolling ends, and the sentence begins to run again, when the probationer reports to the probation officer, is taken into custody in this state, or is otherwise available to the court.

NOTE REGARDING PROBATION SENTENCES IMPOSED PRIOR TO JULY 1, 2015:

Statutory authority to toll misdemeanor probation sentences did not exist prior to this date, but common law principles authorized tolling in some situations. For probation sentences imposed prior to that date, the Supreme Court of Georgia has found that under the common law "mere failure of a defendant to abide by the terms of a misdemeanor sentence will not alone toll that sentence; instead, tolling requires a judicial determination of a violation sufficiently serious that the defendant was not serving the sentence imposed and of the time when that violation occurred." *Anderson v. Sentinel Offender Services*, 298 Ga. 854, 857 n. 3 (2016).

TERMINATING AND MODIFYING PROBATION SUPERVISION

TERMINATING OR REDUCING PROBATION SENTENCES, O.C.G.A. §§ 17-10-1(a)(5)(A); 42-8-102(f)(1), (3)

The court may reduce or terminate the sentence at any time if it finds that probation is no longer appropriate for the ends of justice, protection of society, and rehabilitation of the probationer. A probationer who is eligible for modification or termination of probation does not become ineligible solely due to failure to pay fines, surcharges, or supervision fees.

EARLY TERMINATION OF CONSECUTIVE SENTENCES BY DEFENDANT'S MOTION, O.C.G.A. §§ 42-8-103.1(a); 42-8-60(e)(2)

If a defendant is serving consecutive misdemeanor probation sentences, the court may terminate supervision upon the defendant's motion when "it is satisfied that its action would be in the best interest of justice and the welfare of society." The defendant may file the motion 12 months after sentencing and every four months thereafter. This provision also applies to defendants placed on first offender probation.

EARLY TERMINATION OF CONSECUTIVE SENTENCES BY PROBATION OFFICER'S MOTION, O.C.G.A. §§ 42-8-103.1(b); 42-8-60(e)(2)

If a defendant is serving consecutive misdemeanor probation sentences, the probation officer is required to review the case after 12 months of supervision. If the defendant has paid court-ordered fines, surcharges, and restitution, and completed court-ordered testing, evaluation, or rehabilitation, the probation officer may submit an order for early termination. After 12 months of supervision, the officer shall review the file every four months to determine if early termination is warranted. This provision also applies to defendants placed on first offender probation.

TERMINATING FIRST OFFENDER PROBATION, O.C.G.A. § 42-8-60(e)(1)

A defendant sentenced to first offender probation pursuant to the First Offender Act "shall be exonerated of guilt and shall stand discharged as a matter of law," when the defendant completes the terms of his or her probation, including the time of the probation sentence as long as it is not tolled or suspended.

MODIFYING TERMS OF A PROBATION SENTENCE, O.C.G.A. § 42-8-34(g); 17-10-1(a)(5)(A)

At any time during a probation sentence, "[t]he judge is empowered to…in any manner deemed advisable by the judge, modify or change the probated sentence," as long as the modification is not punishment. *Stephens v. State* 289 Ga. 758 (2011). Examples of permissible modifications include, but are not limited to:

- Making the probation non-reporting;
- Modifying a probation requirement for "no violent contact" with victim to "no contact." *Bell v. State* 323 Ga. App. 751 (2013);
- Adding requirement to stay away from victims' neighborhood. *Tyson v. State*, 301 Ga. App. 295 (2009);
- Require appropriate counseling for the defendant. *Gould v. Patterson*, 253 Ga.App. 603 (2002).

Special thanks to the Criminal Justice Policy Program at Harvard Law School.

In accordance with O.C.G.A. Section 42-8-101(b)(1), this Agreement shall be attached as an exhibit to documentation of the Governing Authority's approval to privatize probation services and the judge's express written consent to privatize probation services.

Sample Probation Services Agreement

This Agreement is made by and between _____, a [insert corporation, LLC, etc.] organized under the laws of the State of _____, with its principal place of business at _____ hereinafter called "Contractor" and the City of _____, Georgia hereinafter called the "City" on behalf of its municipal court hereinafter called the "Court". This Agreement is governed by Article 6 of Chapter 8 of Title 42 of the Official Code of Georgia, Annotated. The parties enter into the Agreement under the specific authority of 42-8-101.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties agree as follows:

SCOPE OF SERVICES AND RESPONSIBILITIES OF CONTRACTOR

In consideration of the obligations of the Court or the City, Contractor shall provide the following services.

A. Responsibilities of Probation Services Contractor

1. Compliance with Statutes and Rules. Contractor shall be registered with the Department of Community Supervision and shall comply with all laws that apply to probation companies in Georgia and all standards, rules and regulations promulgated by the Department of Community Supervision. Any and all probation management activities and/or reporting activities performed by Contractor pursuant to this Agreement must be accomplished in strict compliance with any and all applicable Federal and Georgia laws, as are now in effect or hereafter may be amended. If a contradiction or conflict exists between any and all applicable Federal or Georgia laws and any terms, conditions, stipulations, etc., listed herein, the term, condition, stipulation, etc., listed herein shall not be applicable and the City shall, upon notification of a contradiction or conflict, issue an amendment to bring the term, condition, stipulation, etc., into compliance with the law.

2. Records and Confidentiality. Contractor shall keep all reports, files, records and papers in a centralized location convenient to the City. Such reports, files, records and papers are and shall remain the property of the City, and shall be maintained in accordance with the Open Records Act. Contractor shall create and maintain individual files for each offender receiving services from Contractor in accordance with this Agreement. Contractor shall maintain the confidentiality of all files, records and papers relative to supervision of probationers under this Agreement in accordance with applicable law. These records, files and papers shall be available only to , the City, an auditor appointed by the City, the judge handling the case, the Department of Audits and Accounts, the Department of Corrections, the Department of Community Supervision,

In accordance with O.C.G.A. Section 42-8-101(b)(1), this Agreement shall be attached as an exhibit to documentation of the Governing Authority's approval to privatize probation services and the judge's express written consent to privatize probation services.

~~Sample~~ Probation Services Agreement

This Agreement is made by and between _____, a [insert corporation, LLC, etc.] organized under the laws of the State of _____, with its principal place of business at _____ hereinafter called "Contractor" and the City of _____, Georgia hereinafter called the "City" on behalf of its municipal court ~~Court of _____, Georgia~~ hereinafter called the "Court".
This Agreement is governed by Article 6 of Chapter 8 of Title 42 of the Official Code of Georgia, Annotated. The parties enter into the Agreement under the specific authority of 42-8-101.

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In consideration of the obligations of the Court or the City~~governing authority~~, Contractor shall provide the following services.

A. Responsibilities of Probation Services Contractor

1. Compliance with Statutes and Rules. Contractor shall be registered with the Department of Community Supervision and shall comply with all laws that apply to probation companies in Georgia~~Article 6 of Title 42 Chapter 8 of the Official Code of Georgia~~ and all standards, rules and regulations promulgated by the Department of Community Supervision. Any and all probation management activities and/or reporting activities performed by Contractor pursuant to this Agreement must be accomplished in strict compliance with any and all applicable Federal and Georgia laws, as are now in effect or hereafter may be amended. If a contradiction or conflict exists between any and all applicable Federal or Georgia laws and any terms, conditions, stipulations, etc., listed herein, the term, condition, stipulation, etc., listed herein shall not be applicable and the City shall, upon notification of a contradiction or conflict, issue an amendment to bring the term, condition, stipulation, etc., into compliance with the law.

2. Records and Confidentiality. Contractor shall keep all reports, files, records and papers in a centralized location convenient to the City. Such reports, files, records and papers are and shall remain the property of the City, and shall be maintained in accordance with the Open Records Act. Contractor shall create and maintain individual files for each offender receiving services from Contractor in accordance with this Agreement. Contractor shall maintain the confidentiality of all files, records and papers

Comment [a1]: This agreement should not be used "as is." It should be discussed with the city attorney and tailored to reflect the City's needs. This sample agreement reflects changes made to the sample contract currently posted on the website for the Department of Community Supervision. Where changes were made to reflect updates to laws, the law is cited. Some additions are from Proposed New Uniform State Court Rule 48 – Contracts and Standing Orders for Probation Supervision Services – Required Provisions (2014). Some provisions are from a sample contract published by the DCS's predecessor. Those provisions are identified as "CMAC Model Agreement." Some provisions are recommended by GMA legal staff for consideration.

Comment [a2]: Updated to reflect revisions to O.C.G.A. Section 42-8-101 "the governing authority of such municipality . . .shall be authorized to enter into written contracts with private corporations . . . to provide probation supervision . . ."

Comment [a3]: Updated to reflect O.C.G.A. Section 42-8-109.4(a)(1).

Comment [a4]: Recommended.

Comment [a5]: Recommended

Settlement of ACLU Lawsuit Alleging Improper Jailing for Inability to Pay Traffic Fines

FOR IMMEDIATE RELEASE
March 18, 2015

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ATLANTA – The American Civil Liberties Union and DeKalb County, Georgia, announced a settlement in a federal lawsuit that alleged that practices resulted in the jailing of people unable to pay court-ordered fines in traffic cases. The agreement includes policy changes that could serve as a model in Georgia and across the country.

The lawsuit was filed in January on behalf of Kevin Thompson, a teenager who claims he was jailed in DeKalb County because he could not afford to pay court fines and probation fees stemming from a traffic ticket. The ACLU charged that Thompson's constitutional rights to counsel and an indigency hearing were violated.

Under the settlement, DeKalb County and the other defendants denied liability to Thompson, but the Chief Judge of the DeKalb County Recorder's Court agreed to take measures to protect the rights of people who cannot afford to make fine and fee payments required as a condition of probation for traffic and other misdemeanor offenses. The measures include:

- Adoption of a "bench card" that provides judges instructions to avoid sending people to jail because they owe court fines and are unable to pay. The card lists the legal alternatives to jail and outlines the procedure for determining someone's ability to pay. It also instructs judges on how to protect people's right to counsel in probation revocation proceedings.

- Training and guidance to Recorder's Court personnel involved in misdemeanor probation on probationers' right to counsel in revocation proceedings and right to an indigency hearing before jailing for failure to pay fines and fees.

- Revision of forms to let people charged with probation violation know of their right to court-appointed counsel in probation revocation proceedings, and their right to request a waiver of any public defender fees they cannot afford.

The settlement also provides for a monetary payment to Mr. Thompson and his legal counsel.

"Being poor is not a crime, and these measures will help ensure that people's freedom will not rest on their ability to pay traffic fines and fees they cannot afford," said ACLU attorney Nusrat Choudhury. "These measures also serve as a model for courts across Georgia and in other states to help ensure that our poorest and richest citizens are treated equally and fairly."

"Before the filing of this lawsuit, the DeKalb County Recorder's Court began to develop a plan for a different private probation model. A new provider was selected under a contract which cut supervisory fees dramatically, allowed for little or no reporting, telephone reporting, and the conversion of fines to civil obligations at the request of the defendant. This civil payment model, which has been in place at the court for years on county ordinance violations, should not result in revocations with the possibility of incarceration. Both the Recorder's Court and the DeKalb

County governing authority supported this change," said Chief Judge Nelly Withers of the DeKalb County Recorder's Court.

The U.S. Supreme Court ruled more than 30 years ago that locking people up merely because they cannot afford to pay court fines is contrary to American values of fairness and equality embedded in the 14th Amendment to the U.S. Constitution. The court made clear that judges cannot jail someone for failure to pay without first considering their ability to pay, efforts to acquire money, and alternatives to incarceration. Thompson alleges that he was jailed for five days because he could not afford to pay $838 in traffic fines and fees, despite the fact that he tried his best to make payments.

The case, *Thompson v. DeKalb County*, was filed in U.S. District Court in Atlanta. Rogers & Hardin LLP, the ACLU of Georgia, and Southern Center for Human Rights are co-counsel for the plaintiff.

DEKALB COUNTY
COLLECTION OF FINES AND COURT COSTS

All DeKalb County Recorder's Court judges adjudicating misdemeanor probation revocation proceedings shall abide by the described procedures:

RIGHT TO COUNSEL

All probationers have a right to counsel (which may include a public defender or court-appointed attorney) in probation revocation proceedings.

The court MAY NOT accept a written or oral waiver of the right to counsel without FIRST informing the probationer of the dangers of proceeding without counsel and ensuring that any waiver of the right to counsel is knowing, intelligent, and voluntary.

If a probationer seeks to waive his right to counsel, the court must conduct a colloquy on the record to inform the probationer:

- **That the probationer has a right to a court-appointed attorney or public defender at no cost,** if he cannot afford to retain an attorney;
- **That the $50 fee normally charged for representation by the DeKalb County Public Defender may be waived** for those who cannot afford to pay;
- **Of the risks and dangers of proceeding without counsel,** including the risk of incarceration and the maximum jail time that may be imposed if the probationer is determined to have violated probation; and
- **Of the benefits of representation by counsel,** including assistance with asserting constitutional rights,

ENFORCING FINES BY IMPOSING JAIL

A probationer charged with failure to pay may be jailed only if (s)he has willfully failed to pay or failed to make reasonable efforts to acquire the resources to pay, AND no adequate alternative to incarceration exists.

Prior to revoking probation and committing a probationer to jail for nonpayment of fines, the court must conduct an economic ability-to-pay hearing.

To conduct such a hearing, the court shall

- **Inquire and make a determination of a probationer's ability to pay a fine,** which shall address the probationer's ability to pay and the income, assets, debts, and financial responsibilities presented by the probationer;
- **Inquire and make a determination of the reasonableness of a probationer's efforts to acquire resources to pay a fine,** which shall take into account efforts to secure employment and borrow money, as well as limitations to the probationer's ability to secure employment and borrow money;
- **Consider and make a determination of the adequacy of alternatives to incarceration,** including a reduction or waiver of fines and fees, an extension of time to pay, and community service, in the event that a probationer is determined to lack ability to pay despite having made reasonable efforts to acquire resources.

preparing and presenting financial hardship documentation to the court, arguing in favor of alternatives to incarceration, and vigorous advocacy against the imposition of jail as punishment for probation violation. If, after being so informed, a probationer states a desire to waive his right to counsel, the court must engage in a colloquy and make a determination, supported by findings of fact on the record and set forth in an order, that waiver is knowing, intelligent, and voluntary. Written waiver of the right to counsel on a probation revocation petition or other document is NOT ACCEPTABLE without such a colloquy and findings of fact made on the record.	Each of these determinations shall be supported by findings of fact on the record and set forth in a written order.