Lucy McGough Panel on Battered Children and the Legal Process

(Editor's Comment: To deal with the practical aspects of getting child abuse cases into court and deciding them in court, Professor Lucy McGough of the Emory Law School, an authority on juvenile law, organized a panel consisting of a juvenile court solicitor who handles deprivation cases, an attorney who has represented the Department of Family and Children Services in their abuse cases, and a juvenile court judge. Their comments added another dimension to Major Tartler's consideration of the dynamics and treatment of abusing families. J.R.)

Panel participants:

Lucy McGough, J.D., Professor, Emory School of Law; consultant, Georgia Indigents Legal Services and Georgia Department of Family and Children Services.

Anne Workman, J.D., Emory School of Law; Solicitor, DeKalb County Juvenile Court.

John L. Kennedy, J.D., Harvard; Attorney, Kennedy and Sampson, P.C.; Community Relations Commission, Chairman, Crisis Task Force; specialty, Juvenile Court Law.

Judge Rex Ruff, Cobb County Juvenile Court; President of the Georgia Council of Juvenile Court Judges.

McGough: Last summer the *Atlanta Journal* carried an article which was headed "Child Abuse: It's Not Very Nice and It's Everybody's Problem." Child abuse *is* everybody's problem, but it is particularly the problem confronted by the persons on this panel for a substantial part of their professional lives as lawyers and, in the case of Rex Ruff, as a juvenile court judge.

Legal intervention to protect battered or abused children is a relatively modern development – modern when viewed against 20 or so centuries of evolving laws which govern social interaction. Even at the most enlightened height of the Roman Empire, a parent was free to sell his child into slavery or even to kill his child. The parent was free in the sense that society as a collective whole would impose no penalty upon him for his child's death or servitude. It was not murder to kill one's own offspring or to let him die by failure to protect him or to feed him.

It was only in the late 19th century that we as a collective society formally recognized the phenomenon of child abuse and made it a crime. Most experts agree that the impetus to the enactment of child abuse laws was the famous Mary Ellen case in New York, in which a malnourished child was found bound to her bed with only bread and water for sustenance. The

prosecutors in that case, relying upon a state law which prohibited cruelty to animals, were forced to argue that Mary Ellen was in need of protection as a member of the animal kingdom and that her parents could be prosecuted for their abuse of her. All states quickly followed up on this celebrated case by enacting criminal statutes aimed at proscribing parental cruelty toward their children. The creation of the juvenile court of Cook County, Illinois, in 1898 served as the second stimulus to the legal system. By 1915 all states in this country had provided for similar specialized courts for the protection of children – both those accused of criminal offenses, the delinquent children, and the neglected or abused children. But even though the law recognized mistreatment of children as a crime or as a basis for removal of the child from the abusing parents' custody in the juvenile courts, by the 1950's there were still few legal actions alleging child abuse. The incidence of child abuse was not well publicized and if suspected, rarely reported. And it was difficult to prove a case in court against the parent or caretaker of the child who, it was thought, had inflicted the abuse.

The identification and publication of the Battered Child Syndrome by Dr. Kempe and others in the 1950's spurred states to enact child-abuse-reporting laws requiring all individuals having grounds to believe a child was being abused to report such abuse to the appropriate authority, police or protective service agencies. In addition, the battered child syndrome has opened up the possibility that the proof of child abuse might be made out even in cases where, as usually happens, there is no non-family-member eyewitness to the episodes of abuse. In 1971 Georgia enacted a comprehensive revision of her Juvenile Court Code and in the process adopted the most liberal definition of deprivation, that which has been recommended in the model juvenile court code. In this state a juvenile court has jurisdiction over a child who is "without proper parental care or control, subsistence, education as required by law or other care or control necessary for his physical, mental, or emotional health or morals." This definition is broad enough to encompass not only the physically battered child but the emotionally or mentally abused child as well. That is the law in a nutshell for purposes of our establishing a commonality of information about the legal system and its response to the syndrome of battered children.

I will now introduce our panelists: Anne Workman is a lawyer, a graduate of Emory Law School who has served for the last four years as the Solicitor in the DeKalb County Juvenile Court. She has a specialized case load of undertaking to represent the state's interest, the child's interest in deprivation proceedings. It is the only court in the state to my knowledge that has such specialized representation. Anne will be followed by John Kennedy, who is in private practice with the firm of Kennedy and Sampson. His law degree is from Harvard. John is formerly a deputy assistant attorney general of this state with experience in representing the Fulton County Department of Family and Children Services in their abuse cases in juvenile court. Finally we have with us the Honorable Rex Ruff, Judge of the Cobb County Juvenile Court and President of the Georgia Council of Juvenile Court Judges.

Workman: Let me please emphasize at the beginning of whatever remarks I have to make that I am taking a legalistic approach. I have no training or

background in the social sciences as a professional. I am strictly a lawyer. This is strictly a legal approach. I do not deal with why a child is battered. I deal with how he is battered and how you prove he was battered when you get to the hearing in court. As Ms. McGough said, I have been at the Juvenile Court in DeKalb for almost four years. During that time I have handled the deprivation cases on a general basis and I have seen many, far too many battered children come through the Juvenile Court. I have been in charge of the prosecution of the cases. For the first three years I was solely in charge; in the last year the DeKalb Department of Family and Children Services sometimes has counseled.

My job is very limited in relation to the battered child. My responsibility is to get the case to court on time and to prove that the child is a deprived child, that the child has been physically abused. I am not involved in the criminal prosecution of the adult parent or whatever adult did the battering or did the injury to the child. That is handled by the Superior Court. Although under Georgia law it is possible for the Juvenile Court to act as a court of inquiry and to have a committal or preliminary hearing to bind the person over for trial as an adult on cruelty to children or some similar charge, we have only used that power once in my term at the Juvenile Court. I merely provide the vehicle to have the child adjudicated deprived and either removed from the home or at that point given some sort of protective supervision. I have been asked to speak on the practical problems of prosecution – the critical aspects of whether you can win a case or get a child adjudicated deprived.

As I sometimes explain to many people who come to the Juvenile Court, what you know and what you can prove are two different things. In almost every instance we know that the child has been battered. Proving legally that the child has been battered is another situation, and a much harder thing to do. One of the first problems that we have is getting the case to court within the time required by law. In most situations, the battered child has been removed from the home, either placed with a relative or in the hospital or with the appropriate Department of Family and Children Services agency. A holding order is granted by the court removing custody from the parents temporarily until a hearing is held. Since that is true, the child is considered in foster care or shelter care, and a hearing must be held within 10 days from the date that the petition is filed in the Juvenile Court. If a case comes in on Monday, I have to get it to trial by the following Wednesday week. Now that may sound like an awful lot of time. Ten days to get a case to court, and if that were the only case I had it might be a lot of time. However, in that ten-day period I have to initially receive the case, it has to be assigned to my investigators, and they have to go out and investigate it from the prosecution's standpoint of what we need to prove in court. If the Department of Family and Children Services is involved, it of course is doing its own investigation for purposes of disposition, and while some of the information that each of us gathers is useful to the other, since we have a different slant on it I cannot depend on them for my investigation and they cannot depend on me for theirs. We interview witnesses, prepare the final petition that has to go to court, subpoena and summon the parties and witnesses involved. These usually have to be hand-served on people to get

them there in that short amount of time, and then you have to try the case in court, all within 10 days. So you can see that this can be and often is a tight schedule.

One case has come down recently from the Court of Appeals in the last two weeks, however, which offers some help in the event that the case is not brought to trial within ten days. The case *YTM v. The State* went up on appeal from our Juvenile Court where we had not tried the case – a deprived case in which the child was in foster care for ten days – when a motion was made by the defense attorney or the parents' attorney to dismiss the petition for failure to bring the court within ten days. It was granted, but the judge allowed us to refile on the same day an identical petition, which we did get to court within ten days. That was taken up on appeal about four months ago on the ground that we could not try it again – it was double jeopardy – and that once we failed to get it to court one time we could not go back up again on the same facts. The Court of Appeals ruled two weeks ago that we do have the right to refile and sustained the ruling we made on the second petition. It currently has a motion for rehearing filed with it, but the decision was unanimous and we feel pretty strongly that it will remain so.

The second problem we have is that usually there are not very many witnesses to the incident of child abuse. As with other crimes, it is not something that people do in a parking lot in full view of a lot of eyewitnesses. You have to depend on people who normally have some relationship to the child. Depending on the situation and the circumstances, evidence in abuse cases comes primarily from the child himself or herself, from family members, from teachers of the child or child-care personnel such as in a day-care nursery or babysitters, from doctors, from mental health counselors and from other protective service agencies. One can run into problems with any of these groups of witnesses in trying to get their testimony into court. In many instances the child himself is too young to testify. You have to be able to qualify a child to make sure that he understands the nature of an oath. If you are unable to do that because the child is too young to really understand the difference between telling the truth when on the stand and not telling the truth, you are unable to use that child. The youngest child I have ever been able to get qualified was six, and that was this week. This is not to say that the child is not a good witness. As a matter of fact the six-year old I had this week was certainly the smartest one I have had all week, although he was the youngest. But if you can't get the child qualified, then you have to look elsewhere. In many instances the child may be your only witness besides the abusing parents. If you are able to get the child qualified, you have the additional problem of the child having to testify in front of his parents, who are sitting there. This is extremely difficult for a child to do, sometimes impossible. They just clam up and they will not go on and there is nothing to do but just to take them off the stand. We try to prevent having to call the child into that situation if we can. If he or she is all we have, then we have to try that route, although sometimes it is not successful.

Family members are usual witnesses to child abuse if they are outside the home. They may have been the first ones to report the abuse, the first ones to want the child removed from the situation and everything in the world

done to the relative who actually did the abusing. But once the child is removed from the family and put in foster care, you have this magical coalescence of the family unit back together. You get aunts and uncles, cousins, mothers, fathers who at that point will not testify. They suddenly realize that the child may be taken out of the family unit altogether, and they revert to the normal reluctance to testify against a family member, and in many instances we have great difficulty in getting them on the stand and getting any information out of them. There is a section in the Georgia Evidence Code which provides that members of a family do not have to testify against one another if it would tend to bring disrepute or infamy upon the other. We get caught under that a lot.

In the past we have often found witnesses who did not want to get involved. I know one particular situation in which a DeKalb County school teacher had to come to the court anonymously and explain to us that there was a child in her class that she felt was being abused. She had related the facts to her supervisor and the principal of the school but was told at that point that they would not get involved. She had to call us up on the sly and give us the information, and had her name been used, she was fearful that her job would be in jeopardy. So even the people who are supposed to report have not, at least in the past, been the ones most willing to do so. It is also difficult to get neighbors to testify. They of course have to live there and remain in the community with the people they are testifying against. I can understand that problem – but it doesn't gel when you have a child who is severely beaten and you desperately need a witness.

Many of you will be caught in this position, I am sure. We have witnesses who are in counseling positions either with mental health agencies or with the protective services agencies. If they are involved with the parent, we get the child in, and I subpoena the counselors as witnesses because the parent has related to them admissions of abuse to the child. I've had so many such witnesses say to me that what they know is privileged information. It is *not* privileged information. The only privilege that the law in Georgia allows is the privilege between a patient and a licensed psychologist and a psychiatrist. I know that it is difficult for those of you who are trying to counsel the parents to get on the stand and in essence testify to things that hurt their side of the case, but it is something that the law requires you to do. Please try to understand that we realize your position, but you also must realize the legal position we are in of having to have all the evidence that we possibly can to sustain the petition.

In terms of medical witnesses, we have had many doctors who come to the court willingly. However, I have been appalled in some situations at how some doctors have to be dragged in kicking and screaming. There are numbers of doctors who resist court appearances. I understand that they are busy, and we try not to call them except when it is critical. I had one doctor in a case over a two-year period. We had two children who had been taken at separate times to the hospital with drug overdoses, allegedly having scooped up the Valium pills off the floor that fell out of the mother's purse. One child was dead of an overdose of chloral hydrate and the father had just died suspiciously of what was thought to be arsenic poisoning two months before. There were only two remaining children. One of them, who was three years

old at the time, was taken to the hospital in some sort of coma and was discovered to have three separate types of drugs in his system. I desperately needed this doctor, one who had seen the family over the two years, for this hearing, so we subpoenaed him. I got a call 24 hours later when he explained to me that he could not come, that he had read the subpoena that indicated he would have to pay $300 if he did not show up. Since he was going to make an excess of $800 that afternoon in his office, he was putting a check in the mail to me for $300. A true story. I can document it. He eventually came when we asked him if he could afford the 20 days in jail that went along with the $300, but I honestly think that was the only thing that made him come. He was a superb witness for me once I got him there.

But the medical profession is not alone in wishing to avoid coming to court. I find the same thing among members of the family. All of a sudden you get a call and they are in the hospital; when you check it out they have gone to the emergency room to get a shot, but they are letting you think that they are in intensive care. You have other witnesses who don't want to come. Anyone who is involved, day-care people, school teachers, it doesn't matter, just your average non-related witness doesn't particularly want to get involved in some instances. The police do not show up on occasion. Going on to another problem of witnesses, those whose testimony in the witness room before you put them on the stand would cinch the case. It is as if there is something to the magic of taking an oath, because all of a sudden their testimony takes on a totally different slant. It's not that I am encouraging them to not tell the truth under oath. What I am encouraging them to do is to tell me the exact same testimony before I put them on the stand that they will tell me after they get on. For example, a burn case that I had involved someone who was telling me there was no doubt that the child was intentionally held in hot water. This was abuse, the worst he had ever seen, so the witness was to testify. But when we put him on the stand he backed up and at the end of five minutes said it could have been accidental. It can grossly affect the outcome of the case when you get testimony that you are not expecting.

Let me say one positive thing, however, about prosecuting or trying to adjudicate children deprived when they have been abused. You do not have to prove who abused the child, and that is one thing a lot of people don't realize. Although it is certainly helpful in disposition to know who did the abusing, legally to get the child adjudicated or proven deprived you do not have to prove who did it, you just have to prove that the child has received these injuries while in the parent's (or whoever's) custody and that the parent did not protect them from receiving these injuries. That's your basic, bottom standard of proof. And in many instances it is the thing that saves the case. It is not that you can prove who did it but that you can just prove that it happened. The existence of battered children, I think, is becoming more widely recognized, and we find now there is more of a willingness to report the incidents and to follow through and testify in court. I hope that this remains true. The cases where the child has been severely and badly abused are the ones I feel I cannot lose in court. There is some sort of moral imperative that you've got to win such a case because the alternative is of possibly returning the child to a home without supervision where the same

incident could happen again, and it could be a fatal incident. That is something that makes you take your job very seriously.

Kennedy: First of all it is important, as Anne has just said, that you remember that these are no-fault proceedings. All we have to show basically is that a child has been battered, a child has been abused, not who did it. That is very important to remember. The second thing that I think you have to remember is that these cases are not the judge's cases – whether you might go in with some supposition that it's his case or he may come in with the thought that it is his case, it is not. This is the child's case. It is a case that is put on and prosecuted by those who are representing the interests of the child. The judge, in my opinion, has no place other than to referee.

For years juvenile courts in Georgia, and I imagine in most other jurisdictions, have been arenas in which social work was practiced. I don't say that sarcastically. As a result of the fact that juvenile cases at the trial level are not reported, there are no rules, there are no precedents, the limited precedents you have come from appellate cases. Lawyers who go into juvenile court at this point in time, according to my experience, do not have the faintest idea of what the judge is looking for to determine whether or not he is dealing with an abused child. Typically all proof in an abused child case comes from medical testimony. It is not based on any standard that has been decided through the years in case law which lawyers can go to to determine what they have to prove. It is decided on what the judge hears and how the judge happens to interpret the facts. There are no procedural rules in juvenile court. My understanding of the law is that a juvenile judge in the state of Georgia can choose to use the Civil Practice Act if he wants to. He can disregard the rules of evidence if he wants to, and therefore lawyers who represent children can get away with a lot of things that they cannot get away with in other courts simply because they are in the interest of the child.

Probably the most important thing that has to be remembered in abuse cases is that you must take yourself out of the case. We have had numerous problems with caseworkers who for example were concerned about how they were going to work with a parent and with a family after we finished an abuse case or workers who had concerns about the reasons for abuse. When we were in a recession, abuse cases rose tremendously. Our case load on abuse cases and to other matters in juvenile court doubled and tripled during that time. When things got a little bit better, abuse cases took a dramatic fall. Caseworkers tend to get too involved from my vantage point – from the legal vantage point – in family situations when in fact their job is to protect a child. Many problems are created, including a problem that Anne referred to about witnesses who soften on the stand. We have had caseworkers who will investigate and they will tell us a set of facts. Then we will attempt to verify those facts but we can't because the caseworker is sometimes the only one who knows them; and yet when you get the caseworker on the stand, he or she may show a little more sympathy in the case, and the reason for that is that the caseworker has become too involved.

I think it is almost impossible to take a legalistic approach when juvenile cases, particularly child abuse, have been ignored for so long and are just now at a point where public concern is building. I think that we are entering

into a time when – within the next four or five years – juvenile courts will become much more law oriented and much less social work oriented, which means that the burden on those who are bringing child abuse cases becomes much greater.

Judge Ruff: John said he really didn't see courts following the legalistic approach, that it has been his experience in juvenile courts in which he has practiced for there to be a rather relaxed adherence to the rules of evidence, and that the judge can allow just about whatever he wants to. Essentially that is so in just about every court, not just in juvenile courts. But I would also invite Mr. Kennedy to come to our court and would advise him to study the rules of evidence, because we do indeed take a very legalistic approach, especially in this area of child abuse. Even though the juvenile court exists to represent and serve the best interests of the child, don't fall into the trap of believing that because the court is a government agency, and because you and I are a part of that government, we are on the side of right and those parents over there are on the wrong side. Let me disabuse you of that notion. That's not so. Courts don't exist for that purpose. Courts exist to referee. Courts exist to present a forum for evidence to be presented and for the court to sift through this evidence and seek the truth. That's the sole purpose for the existence of a court. Practice has shown that the legalistic approach, through the advocacy system, for the most part develops the truth. It's been said that it's not so necessary in this state for these prosecutors to find out who did it, only that it was done. Then their job ends. That's when mine really begins. Of course once they have established through the presentation of evidence that there is deprivation, that this child fits the definition as provided in the Georgia Juvenile Court, I must proceed to a proper disposition. Listen to the broad definition: Deprived child means a child who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health or morals. From the standpoint of presenting a case, that's a pretty good definition for a prosecutor to have with him going into a courtroom, because it is so broad that practically any of us with children could probably at one time or another fit somebody's interpretation of that definition of deprivation.

Deprivation is a term of art in this state and it encompasses those definitions used in many other states such as the abused child, the neglected child, the dependent child. Our definition of deprivation covers all of those. But before the court can act, certain things must exist. First of all, you must have a deprived child. Second, you must have someone to discover that deprived child. We are talking about the battered child; I suppose we should limit our remarks only to that child who is physically injured by a guardian or parent or caretaker. First, there must be the battering, then there must be the recognition of that battering by some person. Once the discovery is made, what must then be done? In this state there is a mandatory reporting law and it requires about eleven different categories of people to report suspected child abuse. This year the legislature even expanded upon this law to include child-care personnel, day-care personnel, and psychologists. Those persons now included as those who are required to report are physicians, osteopathic interns and residents, dentists, psychologists, podiatrists, public

health nurses, social workers, teachers, school administrators, child-care personnel, day-care personnel, and law enforcement personnel. Those persons are mandated to report to the agency designated by the Department of Human Resources (generally your local Department of Family and Children Services Protective Services Unit) suspected child abuse. But these people who are mandated to report do so upon having cause to believe that a child under the age of 18 has had physical injury or injuries inflicted, other than by accidental means, by a parent or caretaker, or has been neglected or exploited by a parent or caretaker, or has been sexually assaulted.

The law now makes it a crime for those persons who are mandated by the law to report, not to report. Until this year, the law required reporting but it had no sanctions for those who fell into the mandate category and did not report. Now it says that any person who does make such a report, whether they are mandated to do it or not, must make it in good faith. The person reporting is immune from civil or criminal liability if the reporting is done in good faith. The mandated person who is supposed to make this report and doesn't could be punished as for a misdemeanor, that is put into jail for a year and fined $1000.

Where do we run into a conflict, if we run into a conflict at all, with this need to discover child abuse and a right to privacy? Where do we get "big brotherism" creeping in? When do we have too much mandated reporting? When do we say that *any* person who has cause to believe that one of these things exists must report? What kind of cause? Probable cause, reasonable cause, just cause? And if they don't report it, should they be subject to criminal sanctions? The safe thing for those who are in the categories mandated to report, if they have good faith suspicions that either of these things exists, is to report. But at what point does this need to discover child abuse run headlong into the right of a parent, recognized throughout the years, to discipline a child reasonably, to make plans for the care of that child?

There is the act of deprivation or abuse, there is the discovery. After discovery, what right is there for government intervention? – intervention by a social service agency and perhaps ultimate intervention by a court as a representative of the people, the government? How do you get the case to court if it needs to go to court? Why should it go to court? What are you asking the court to do in the first place?

Juvenile courts in this state serve a dual function whenever deprivation is alleged and when that deprivation is more specifically child abuse. The court convenes to hear evidence with respect to the allegations of deprivation, to find out if indeed it does exist. The standard that is required is clear and convincing. It is not proof beyond a reasonable doubt as it is in criminal cases. The court must find that the evidence is indeed clear and convincing, that this child falls within this very broad definition of deprived. Upon so finding, the prosecutor's job is done. The court says, "Okay, the child's deprived. I've got to make a disposition. I've either got to return the child home under conditions, I've got to place the child in foster care, I've got to find a relative placement, I've got to find perhaps a group home, the best place available for this child." And the court is going to need some information about who did the abusing, even if it is not clear and convincing.

The court also serves as a court of inquiry. The juvenile court in Georgia in a case such as this may, while inquiring into allegations of deprivation, find that someone 17 years of age or older has committed a criminal offense against the laws of this state, and upon so finding, issue a warrant for the arrest of that adult, set bond, and bind the adult over to the appropriate court for prosecution. The person may be bound over for any number of offenses. The charge may be cruelty to children, simple assault, simple battery, aggravated assault, aggravated battery, fornication, some sort of sexual assault whether it is rape, aggravated sodomy, or any of these things. At this point, the adult court becomes involved and the primary focus then is on the defendant. Did he or she do that with which he or she is charged?

The juvenile court, however, must make its decision, after a finding of deprivation, as to the placement of this child. What evidence do we call upon to aid us, to assist us in making the best possible disposition? Much of that which has been presented on the issue of deprivation itself is also useful in determining an appropriate disposition for the child. The psychologist or psychiatrist who may have been involved with the case, or who may become involved after the court has made its initial finding of deprivation, offers invaluable information in trying to assist the court in making that Solomon-like decision.