

HYPOTHETICAL PROBLEMS
and
PROFESSIONALISM CONSIDERATIONS
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CRIMINAL JUSTICE
PROFESSIONALISM AND CORONAVIRUS CLE

Hypothetical Problems

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Professionalism Considerations

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BRIEF BIOGRAPHIES (Complete Biographies are available at <http://cjcpga.org/criminal-justice/>)

Trish McCann Bertram is the professional development director with the Georgia Public Defender Council where she is responsible for developing and executing a comprehensive training program for all attorneys, investigators and non-lawyer staff. Trish has worked with the agency for most of the years since its inception in 2005, beginning her career as the staff attorney in the Juvenile Advocacy Division of the Council's predecessor, the Georgia Indigent Defense Council. During a four-year hiatus from her work with the Council, Trish worked with Mayor Brown LLP in Chicago in its firm-wide Attorney Development and Pro Bono Divisions. Trish is a graduate of the University of Florida and Rutgers University School of Law.

Todd Hayes is an Atlanta native, and a graduate of Marietta's Lassiter High School. Todd attended the University of Georgia in Athens, where he obtained his undergraduate degree in history (1998), his M.B.A. (1999), and his law degree (2002). In November 2015, Todd accepted the opportunity to serve the community in which he lives by returning to front-line prosecution as the Chief Assistant Solicitor-General for Cherokee County. Since that time, Todd has again been recognized by MADD as the 2016 DUI Prosecutor of the Year and named as a "Top 10 in 10" Young Professional by the Cherokee County Chamber of Commerce. In November 2018, Todd was elected as Cherokee's Solicitor-General and has served in that capacity since January 2019. In June of 2019, he was awarded the Thompson-Jones Outstanding Faculty award by the Prosecuting Attorneys' Council for his continued dedication to the Council's Basic Litigation program. He lives in Canton with his wife, Sara, and his five children.

Karlise Yvette Grier became the Executive Director of the Chief Justice's Commission on Professionalism in September 2017. Prior to assuming her current position, Karlise worked for over 17 years as the Managing Attorney of Grier Law Office, P.C., a law firm that concentrated in the areas of adoption, divorce, and child custody. Karlise was appointed to serve as a part-time Magistrate Court judge in Fulton County and served as a Judicial Officer in the Fulton County Superior Court Family Division from May 2006 through December 2008. From March 2000 until June 2005, she served as a Judge Pro Hac Vice in the former City Court of Atlanta ("Traffic Court"). Karlise received her B.A. in Computer Science from Dartmouth College and her J.D. from Emory University School of Law. Karlise is a native of Atlanta, and a proud APS alum, having been graduated from Frederick Douglass High School. She is a member of Ben Hill United Methodist Church.

PROFESSIONALISM CONSIDERATIONS

As you read the hypotheticals on the following pages, please consider these selected aspirational ideals from [A Lawyer's Creed and the Aspirational Statement on Professionalism](#) and reflect on the meaning and possible application of the selected aspirational ideals in each of the hypothetical problems presented. What other aspirational ideals might apply? Why?

- To my colleagues in the practice of law, I offer concern for your welfare. I will strive to make our association a professional friendship. (Lines 13 – 15)
- To the public and our systems of justice, I offer service. I will strive to improve the law and our legal system, to make the law and our legal system available to all, and to seek the common good through the representation of my clients. (Lines 19 – 23)
- To achieve the excellence of our craft, especially those that permit me to be the moral voice of clients to the public in advocacy while being the moral voice of the public to clients in counseling. Good lawyering should be a moral achievement for both the lawyer and the client. (Lines 67 – 70)
- As to clients, I will aspire: To fully informed client decision-making. (Lines 73, 75)
- As to clients, I will aspire: To the avoidance of conflicting loyalties in a manner designed to achieve the fidelity to clients that is the purpose of these obligations. (Lines 73, 93 - 95)
- As to opposing parties and their counsel, I will aspire: To cooperate with opposing counsel in a manner consistent with the competent representation of all parties. (Lines 96, 97)
- As to opposing parties and their counsel, I will aspire: Grant reasonable requests for extensions or scheduling changes . . . (Lines 96, 100)
- As to opposing parties and their counsel, I will aspire: Consult with opposing counsel in the scheduling of appearances, meetings, and depositions. . . (Lines 96, 101)
- As to our profession, I will aspire: To protect the public from incompetent or other wrongful lawyering (Lines 144, 149)
- As a professional, I should: Assist in the enforcement of the legal and ethical standards imposed upon all lawyers. (Lines 149, 153-154)
- As to the public and our systems of justice, I will aspire: To improve our laws and legal system by, for example: Assisting in the education of the public concerning our laws and legal system. . . (Lines 155, 172)
- As to the public and our systems of justice, I will aspire: To improve our laws and legal system by, for example: Commenting publicly upon our laws. . . (Lines 155, 173)
- As to the public and our systems of justice, I will aspire: To improve our laws and legal system by, for example: Using other appropriate methods of effecting positive change in our laws and legal system. . . (Lines 155, 174-175)

Domestic Violence Case—Bond Hearing

Jim is a 43-year old man recently arrested for Family Violence Battery, Cruelty to Children—3rd Degree, and Criminal Trespass. The charges grow out of an incident in which he is alleged to have gotten into a physical altercation with his wife of 14 years. According to the police, the dispute started over finances and escalated until Jim smashed his wife's cell phone and struck her with a closed fist in front of their 11 year-old son.

After his arrest, Jim quickly posted bond and was released from custody. At the time of his release, several special conditions were placed on his bond, including that he not have any contact with his wife and that he not return to their marital home. Jim was allowed to return home one time, accompanied by law enforcement, to retrieve his personal effects and some clothes, before making arrangements to stay with his brother for the time being. Jim retained counsel soon after settling in with his brother.

Within a week of his release, Jim's wife contacted his attorney to say that she wants him to come home so that they can begin the process of reconciliation. Accordingly, and in consultation with Jim, the attorney filed a motion with the appropriate State Court to modify the bond to allow contact. The prosecutor opposes the modification based on the nature of the injuries inflicted and the fact that a child was involved. The Court has agreed to set the motion for a hearing.

- 1) If Jim is willing to waive his rights to be physically present and under the 6th Amendment, what are the Court's responsibilities regarding using a platform like Zoom to conduct the hearing? Do these responsibilities change if Jim and his attorney, for whatever reason, do not have access to technology that would support such an online platform?
 - a. What if the prosecutor assigned to Jim's case is a 69 year-old female with asthma, whose 14 year-old grandson is living in her home full time?
- 2) If Jim's attorney filed the motion, but his wife was opposed to the modification, how would that change the Court's considerations?
- 3) Assume that Jim had NOT had any conditions placed on his bond, and that the State has filed to impose a no contact provision at the request of his wife. What are the court's responsibilities if Jim will not consent to the provision?
- 4) What parties are potentially impacted if the Court decides to hold the hearing in a courtroom using traditional court procedures?
- 5) Which of those parties are most and least vulnerable, and what practices could be implemented to reduce their risk of accidental exposure to COVID-19?

Armed Robbery Case – Jury Trial

Your Circuit has established protocols in compliance with the Chief Justice’s Emergency Order and is going to resume jury trials in the courthouse. An armed robbery case has been set for trial.

- 1) Defense counsel has filed an anticipatory Fair Cross Section Challenge to the jury, alleging that the trial should be postponed until the economy is back in swing and a vaccine and treatment for COVID-19 has been found. Counsel alleges that trying the case now would disparately impact minorities, jurors of lower socioeconomic status, the elderly, and people with underlying health conditions who would otherwise be eligible to serve on the jury, and that his client will be denied a fair cross-section of the community in the jury pool. After 3 days of voir dire, it has become apparent that senior citizen jurors are claiming hardships in record numbers due to health concerns for COVID-19, large numbers of wage earners are claiming hardships as a result of the economic impact of COVID-19, many younger healthy jurors have claimed hardship because of concerns for medically fragile persons living in their home, and the numbers of minority jurors that have been excused for COVID-19 related issues have reduced the number of eligible minority jurors to at least 20% fewer than the minority population of the county as shown by Census data. The judge has asked both sides to come up with some solutions that would allow the trial to proceed, but still address the defendant’s Fair Cross Section concerns.
- 2) Mary is married with children ages 7 and 9 and is summoned for jury service. Both she and her spouse work, but they have staggered their work hours to take care of the children whose school and daycare is closed for COVID-19 reasons. Her husband takes the children to school in the morning, and she gets off work at 4 to pick them up from day care. His work shift starts at 3 in the afternoon and he works until midnight. Neither has family who live in the area. She would like to serve on the jury but worries that there will be no one to pick up and watch after her children if court runs past 4.
 - a. The parties have suggested to the Court that they should accommodate the juror by agreeing to stop proceedings at 3:45 each day, but the Court is concerned that it will prolong the trial by several days.
 - b. Does this situation change if one of the trial lawyers has COVID-19 childcare restrictions?
- 3) On the second day of trial, the second chair defense counsel/prosecutor discloses to lead counsel that the security staff did not check his temperature at the door pursuant to the local reopening protocol, but when he left his house he was running 101 fever. Attributing the fever to being worn down, the attorney decided to come in anyway. Lead counsel notes that the second chair has developed a dry, hacking cough and seems overly fatigued. The attorney has asked lead counsel not to disclose his current health condition to anyone in the courtroom, for fear of upsetting the judge or getting himself or the security staff in trouble. What is the lead counsel’s professional responsibility considering Covid-19?

- 4) The jury has been seated and the trial has started, but the prosecution, the defense, and the jurors seated in the box notice that juror #9 is coughing and sweating. Juror #9 insists that she just has bad allergies and can press on. The issue is raised to the judge by both sides.
- 5) The Court has imposed strict social distancing in the audience of the courtroom. As the trial gets underway the victim's family and extended family as well as the defendant's family and extended family cannot both fit in the audience with households sitting six feet apart. The prosecutor argues that under Marcy's Law the victims have the right to be in the courtroom so the defendant's family must be excluded unless it is immediate family. Defense counsel objects and expresses concern that the jury could get the impression that only a few people are concerned with what happens to the defendant, when in fact there are a significant number of people who have shown up to court.
- 6) Prior to the trial, the Court held a suppression motion hearing by zoom. After addressing concerns about client communication, competency, and a full and fair cross examination, the Court proceeds and the issues below arise. What is the remedy? How could these be avoided?
 - a. The prosecution, defense counsel, and judge are in their respective offices. The defendant is at the jail in a video conference room. The officer testifies that the defendant was located outside the co-defendant's house, parked in the defendant's mother's dark green car which matched the description of the green car at the shooting. As a result, the officer approached the car and ordered the defendant out. Certain information about the car was not in the police report disclosed in discovery. The defendant who has been muted during the proceeding would like to tell counsel that his mother's car is (1) not green but black and (2) was a different model than the car at the scene of the shooting.
 - b. The defendant has been previously diagnosed as having schizophrenia and appeared fine at the beginning of the hearing. As the hearing progresses, the defendant becomes increasingly disoriented by the multitude of faces on the screen which seem disconnected from the voices coming from the speakers. He wants to talk to his lawyer but the secure line for him to talk to his lawyer requires a separate call to be placed for that to happen. When the officers at the jail tell the defendant that he cannot talk to his lawyer, defendant becomes confused and agitated.
 - c. During the hearing, there is a technical interruption during the testimony of the officer. During the interruption, the officer calls the prosecutor to ask about some facts in the case.
 - d. During the hearing, the officer has her casefile spread out in front of her. When asked if she is referring to case paperwork, she says she is looking at "the case file" and because of the remote conferencing, is unable to show what material she is using during her testimony.
- 7) Defense counsel is preparing for motions hearings. The jail policy has limited the defendant's access to counsel to video/phone visitation which may be monitored by jail staff. Defense counsel asserts that she cannot fairly represent the defendant in these

hearings without discussing this sensitive information confidentially. How should the Court proceed in the absence of full consultation between counsel and the defendant?

- a. Suppose the hearing is in person but jail visits are still restricted. Does it resolve the issue if the judge allows defense counsel to talk to the defendant for an hour before Court starts in a non-recorded jury room that has been sanitized?

Juvenile Delinquency Bench Trial

Tiffany, age 15, has consistently run away from her mom's house. She was eventually put on an electronic monitor after she was adjudicated delinquent for shoplifting more than \$1,500 worth of clothes and shoes at a department store. She is now charged with tampering with her electronic monitor, a felony. At her preliminary hearing after she cut her monitor off, her probation officer raised the possibility that she is being sexually trafficked by a 28-year-old gang member in the neighborhood, named Tuco.

Tiffany is deeply ashamed of what has happened and fears the gang member in the neighborhood. There have been social media threats to her and her family because of the arrest of the gang member. Because of a #FreeTuco social media campaign, many Facebook posters from Tiffany's school have vowed to be present for court and have bombarded the clerk's office with calls trying to find out a court date. Tuco's attorney has filed a motion demanding to be present since his client is charged, and the case could be relevant to any future hearings for him.

To top it off, you learn from the RYDC that Tiffany tested positive for HIV and pregnancy. Potentially exposing her to COVID-19 could be a disaster.

The Court wants the adjudication to take place via Zoom.

- 1) There is concern about the impact a Zoom hearing will have on Tiffany's Due Process and Confrontation rights. On the other hand, Tiffany does not want to delay the case because she will remain at the RYDC longer. What are the Court's and parties' responsibilities when conducting a remote hearing via videoconferencing?
- 2) How do you prevent Tiffany from being exposed to social media shaming or worse due to attempts by spectators to record on cellphones what is being livestreamed from another device, if they are admitted by Zoom?
- 3) Tiffany gets antsy and always has a lot of questions. Defense counsel can calm her and answer questions when with her, but attorneys are not permitted in the RYDC due to Covid-19. How can the Court and defense counsel make sure that she understands the proceeding via videoconferencing? What if Tiffany wants to do a plea in absentia? What if Tiffany wants to plea, but does not want to waive her right to appear in person?

Speedy Trial Demand—Defendant In Custody

Bill has been arrested for simple possession of methamphetamine. At the time of his arrest, he was carrying a handgun for which he had a valid concealed carry permit. Because of that, the magistrate that heard the preliminary hearing in his case determined that he was a threat to commit additional felonies if released and denied him bond. Within days, Bill was determined to be indigent and appointed an attorney by the court.

Bill is insistent that the drugs found in his car did not belong to him and wants a trial as soon as possible. Consequently, while the Chief Justice's Judicial Emergency order was in effect, Bill's attorney filed a demand for speedy trial. Bill has one witness—his father-in-law, who is willing to testify that he left the drugs in Bill's car. Bill's father in law has three prior convictions for drug possession—one of which is a felony. He is also 79 years old, a COPD sufferer, and has been sheltering in-place alone in his home since he was dropped off there by Bill two days prior to Bill's arrest.

- 1) Is Bill's speedy trial demand effective during the Judicial Emergency? When does it become effective?
- 2) From a strategic standpoint, what are the pros and cons of filing a speedy trial demand during a global pandemic? How do professionalism issues affect the decision to file a demand at this point in time?
- 3) Must the defense reveal the health concerns facing Bill's father-in-law to the Court if they request that the trial—whenever it is scheduled by the Court—be held on a platform similar to Zoom? To the prosecution? What if Bill's father-in-law objects?
- 4) If the parties determine that a trial is the only way to resolve the case, what are the Court's responsibilities regarding:
 - a. Selecting and seating a jury;
 - b. Witness sequestration;
 - c. Placing physical items (i.e., the drugs; the gun; photographs) into evidence;
 - d. Court staff health considerations (bailiffs, court reporters, clerks, judicial assistants, etc.);
 - e. Constitutional considerations (primarily confrontation and due process);
 - f. Jury deliberations;
- 5) Is Bill's father-in-law entitled to heightened medical deference in terms of how his testimony is presented? What does that look like practically?
- 6) If the prosecutor assigned to the case is in a group that is at increased risk from COVID-19, and her trial partner is NOT, does the elected prosecutor have the responsibility to reassign the case EVEN IF the at-risk prosecutor does not ask for reassignment?
- 7) Do any of these considerations change if Bill was released from custody soon after his arrest? What if the local jail has suffered a COVID-19 exposure during that time?