PRACTITIONERS PANEL

WRITTEN MATERIAL FOR PROFESSIONALISM AFTER THE STATEWIDE JUDICIAL EMERGENCY

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In thinking about the topic of professionalism as it relates to the practice of law after the statewide Judicial Emergency Order, I realize that I had a unique opportunity to focus on this important issue given my, perhaps unfortunate, role as President of the Georgia Trial Lawyers Association during the "Covid years" (2020-2021 term). It was a crazy time to lead any organization, but the pandemic affected our profession in some ways that truly put to the test lawyers' ability to stay positive about our profession and our dealings with each other. Two significant things happened during the year that directly invoked principles of professionalism.

First, there was the question of whether we were going to be able to try our cases. Immediately upon taking office in April 2020, I knew that our members were going to be looking to the GTLA leadership for solutions to how we could get back to jury trials, or at a minimum, continue to move civil cases forward given the restrictions in place. We obviously had to figure out how best to "get along" with our colleagues on the other side of the bar to ensure that we could collectively continue to pursue discovery, engage in motions practice, consider alternate forms of resolution and do whatever we could to move cases toward resolution short of trial.

The first thing I did as President was to establish a COVID-19 Task Force that looked into these issues and formulated some recommendations, that were later considered by the Chief Justice's COVID-19 Task Force and formed some of the recommendations for civil matters that came out of that larger group. While many within the plaintiffs' bar were concerned that some defense counsel might take advantage of the judicial emergency to delay progress on cases, with few exceptions I have been impressed by the efforts that both sides have taken to accommodate requests to conduct depositions and other proceedings remotely, and to think outside the box for creative ways to resolve cases short of trial. This "we're all in this together" mentality has served all of us, our clients and the judiciary well.

But this didn't answer the primary concern about how to physically get back into court. Because the pandemic was not likely to end any time soon, we recognized that it was going to be necessary for court participants and staff to have sufficient personal protective equipment if courthouses were ever to reopen. We immediately put together a committee, and started working on a process for securing masks and finding out who needed them and how to distribute them quickly. Since the court system involved both sides of the "v," it seemed logical to team up with our friends on the other side to pursue this effort. In September 2020, GTLA and Georgia Defense Lawyers Association set aside their differences, crossed party lines, and joined forces to establish Mask UP For Justice! This charitable effort, which works through the State Bar of Georgia Foundation for fundraising purposes, has raised significant funds to provide supplies – primarily masks – for Georgia's courthouses so that they could safely open and conduct trials during the pandemic. To date we have distributed over 42,000 masks and PPE items in Georgia, and even sent some of the surplus supply to assist victims of the recent earthquake in Haiti.

The response has been overwhelming, and the appreciation from judges and court staff across the state heartwarming. Many have reached out to thank us for the supplies, and have specifically

lauded the organizations' joint effort. For example, Judge Currie M. Mingledorff, II, of the Piedmont Judicial Circuit, wrote: "Your joint collaboration only further confirms the good we all know lawyers can accomplish when we apply ourselves to a problem, especially when we do so cooperatively." And Judge W. Kendall Wynne, Jr., of the Alcovy Judicial Circuit noted: "In a time when our nation is more divided than ever, it is gratifying to see courtroom opponents work together to achieve a common goal."

The second thing that occurred during the year that raised professionalism issues was the unrest following the killing of George Floyd. The questions this tragedy raised concerning the inequality in the criminal justice system quickly spread well beyond to issues of equity and inclusion in all aspects of life, including the civil practice of law. In light of the current social climate in our country, GTLA strongly believes that we as an organization need to ensure that we have a more diverse and inclusive environment within our own membership.

Thus, GTLA as an organization took a hard look at ourselves, and faced the fact that we could do better. To know what "better" meant, we had to talk to each other and open ourselves up to criticism. What was borne out of this analysis was the formation of GTLA's first minority caucus and the long overdue diversity and inclusion committee.

As lawyers, we are often the conscience of the community, or at least we need to speak for the conscience of the community. It is important that we lead on the issues of racial inequity and bias, and ensure that our organizations, as well as our member firms, reflect the communities we serve.

I believe that both of these projects that GTLA undertook this past year, among others, bring to mind the Mission of the Chief Justice's Commission on Professionalism, which seeks for us to "focus on conduct that preserves, and strengthens the dignity, honor and integrity of the legal system." Further, they adhere to the Commission's "Calling to Task," which states:

The Commission seeks to foster among lawyers an active awareness of its mission by calling lawyers to the following tasks, in the words of former Chief Justice Harold Clarke:

1. To recognize that the reason for the existence of lawyers is to act as problem solvers performing their service on behalf of the client while adhering at all times to the public interest;
2. To utilize their special training and natural talents in positions of leadership for societal betterment;
3. To adhere to the proposition that a social conscience and devotion to the public interest stand as essential elements of lawyer professionalism.

I am proud to be a lawyer. I am raising a daughter who will join the ranks in less than a year. I hope that we can continue to strive for "an association of professional friendship," in order to seek the common good for all.

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THOUGHTS ON PROFESSIONALISM POST-SJEO

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During the past year and a half, lawyers have been practicing in a pandemic. Many complications and distractions have been imposed upon us – personal or family illness, children remote learning at home, practicing law at the home office . . . Perhaps more than ever, professionalism is paramount, and lawyers should accommodate reasonable requests and resolve issues amicably with opposing counsel, and if possible without extensive court intervention.[1]

Discovering and litigating the merits, narrowing the legal issues, all in a good faith effort to reasonably resolve a legal case. Every lawyer's goal, right? Often, however, we lawyers fight about technical and procedural issues, which frustrates resolution for our clients and undermines our professional aspirations.

Maybe someone didn't receive or notice service of a document or didn't properly calendar a deadline. Is it time to take advantage? Is it ever? If the judge can exercise discretion to resolve the issue, shouldn't the lawyers work it out themselves? Isn't it more important to litigate on the merits?

What is wrong with notifying an opposing lawyer when Rule 36 RFAs go unanswered? "Hello Susan, I show that I sent you RFAs over 33 days ago, but I don't see your responses – did you need another week to respond?" Although the purpose of Rule 36 is to narrow issues of law and fact,[2] it is often used to *try* for a technical win. Most of the time, this results in failure for everyone, including the trial judge who wastes time hearing unnecessary motions seeking to deem unanswered requests admitted.[3] If a reasonable request for an extension to respond is made, it should be granted in most circumstances. If an opposing party has missed the deadline to respond and the delay is not unreasonable, perhaps the attorney serving the requests should think carefully before filing a motion to enforce the unanswered admissions.

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[1] '[T]he ultimate purpose of litigation is to see the controversies are decided on their merits, and that the purpose of the rules of law is to promote justice rather than reward technical proficiency.'" ABA 241 Peachtree, LLC, 302 Ga. App. 208, 211 (2010) (quoting Moore Ventures Ltd. Partnership v. Stack, 153 Ga. App. 215, 218 (1980).

[2] "[T]he purpose of requests for admissions is to expedite trial and clarify the issues in a case, not gain tactical advantage over an opponent." Brankovic v. Snyder, 259 Ga. App. 579, 582 (2003).

[3] A trial judge has broad discretion to allow a party to withdraw an admission due to a tardy response. See O.C.G.A. § 9-11-36(b); Porter v. Urban Residential Dev., 294 Ga. App. 828 (2008).

Is there a significant problem when a Zoom deposition is requested? "Hello Bob, I understand that you prefer to secure the witness deposition on zoom – why don't we talk about this and work it out reasonably so everyone's concerns are addressed?"

Why should we not send the discoverable Rule 26 expert materials to the opposing lawyer, prior to the deposition of the expert? "Hello Robin – why don't we agree that we will exchange the discoverable expert files of our experts a week prior to their scheduled depositions?"

Is it necessary to move for a protective order upon receipt of a 30b6 deposition notice of our client because we feel certain denominated topics are improper or objectionable? "Hello Steve – I received your 30b6 deposition notice and have some concerns about topics 3, 8, 10 . . . when are you available to discuss in an effort to resolve any issue?"[4]

No matter what the circumstances this new normal encourages and rewards professional courtesies and respectful discourse while narrowing civil litigation to the non-trivial merits of each case.

A professional relationship between opposing lawyers with fairness, integrity, and civility results in the greatest likelihood of the legal system working for the litigants and the public. This relationship involves working together professionally through the discovery process and of course during a trial. Conferring more often and working towards compromise – being reasonable. And if impasse results, perhaps seeking court involvement in the best way for the court – "Hello staff counsel, we lawyers have attempted to resolve a discovery dispute in good faith but are at impasse, would our judge prefer a short phone conference to provide direction or otherwise prefer us to engage in motion practice?"

Professionalism is our calling. Remember the words of Abraham Lincoln: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser---in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good (person). There will still be business enough."

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[4] The 2020 amendments to Federal Rule of Civil Procedure Rule 30(b)(6) now require the parties to confer before or promptly after serving a corporate deposition notice to address ambiguity in deposition topics and to clarify and narrow the purpose of the deposition. The goal is to "facilitate[] collaborative efforts to achieve the proportionality goals of the 2015 amendments to Rules 1 and 26(b)(1)." Advisory Comm. Notes, 2020 Amend.

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View from the Task Force

Criminal Law Perspectives

Don Samuel
Sheila Ross

The Covid Judicial Task Force was created in the spring of 2020, responding to the need to provide guidance to the courts in the midst of the pandemic crisis. At its inception, the task force did not know whether the crisis would last a few weeks, a few months, or perhaps longer. Few people envisioned that 18 months later, the task force would still be meeting, contemplating recommendations that it could make to judges, court clerks, and legislators.

The Task Force was comprised of various stakeholders in the judicial process: judges from all courts: magistrates, probate, state court, superior court, Court of Appeals and Supreme Court. Representatives from the Prosecuting Attorneys' Council, the Georgia Association of Criminal Defense Lawyers, the Georgia Trial Lawyers' Association, Atlanta Legal Aid, and designees from the State Bar, the clerk's association and representatives from law enforcement agencies. Advising the task force at virtually every meeting was a public health doctor from the Fulton County Board of Health.

Most – if not all – members of the task force had no experience in the field of public health. Nobody had any experience, of course, with a pandemic. Many members had served on various advisory boards that offered help to legislators, judges and the state bar about matters of public concern, such as pending legislation, adoption of local or uniform rules, and ethics advisory boards.

The Covid task force initially tackled the immediate needs of the legal community: providing advice to the courts throughout the state about best practices that required immediate attention: avoiding all in-court proceedings and jury trials, while simultaneously assuring that people who were arrested were not left without the ability to petition the court for bond. The emerging availability of "zoom court," as we all now know, was the means of achieving this goal. Nevertheless, there were too many judges who were slow to eliminate mass calendar calls and the task force was adamant that this was a necessity. The task

force communicated its concerns to both the JQC and the Supreme Court and both the JQC and the Supreme Court acted promptly (often through informal contacts) to let judges know that ignoring the crisis and demanding that lawyers and parties come to court for calendar calls, would not be tolerated.

By the fall of 2020, with most courts having essentially suspended all jury trials (civil and criminal) the task force turned its attention to legislation that could be adopted quickly that would simultaneously protect defendants' rights (particularly for pretrial release) and the problems that the prosecutors were facing with various existing statutory provisions that required the prosecution to proceed quicker than the "best safe practices" would permit. For example, the requirement that any defendant who is incarcerated without having been indicted for 90 days must be granted bond was nearly impossible to accomplish, because grand juries were not being assembled. Solution: eliminate the need for indictment in most felony cases and permit the prosecution to proceed by way of accusation, thus eliminating the 90-day deadline to indict, in all but the most serious cases.

The next statutory revision that was necessary focused on the statutory demand for a speedy trial which under existing law required that a criminal case be tried within the next two terms of court following arraignment if demanded by the defense. The Task Force recognized that when the pandemic evaporated (wishful thinking, perhaps), there would be an enormous backlog of cases and if defendants sought to exploit this backlog by filing demands for speedy trial, the prosecutors would be unable to try the cases fast enough, particularly if only limited space was available for trials as the pandemic waned. Ultimately, the Task Force voted to approve a statute that authorized local Circuits to temporarily suspend the requirements for a speedy trial (while not eliminating the constitutional right to a speedy trial, which is considerably more lenient).

The third statute provided that a defendant can request a bench trial (thus expediting the process) and the prosecution may not veto this request.

Each of these provisions was enacted by the legislature.

Several more proposals were advocated by the defense advocates and the prosecution advocates, though they appeared to be less urgent and in some cases

probably reflected efforts – all in good faith – to improve processes which in some respects have been on their wish lists before the pandemic arrived on the scene.

Throughout the course of the Task Force work, there were several re-occurring issues:

1. How can we promulgate rules that apply equally to a large busy Circuit, such as one of the metro counties, as well as the Circuits that have one courtroom per county and four trial terms per year? Can one size fit all?
2. How can we urge judges to abide by best practices when best practices may be different in a crowded courthouse and a courthouse that is virtually empty?
3. How can we convince judges that the pandemic safety measures are equally important as "moving the docket?"
4. How can we deal with the public that has various rights, even in a criminal case (right to watch the proceedings, right to speedy disposition, victims' rights, defendants' family members' rights), when as we all know from the news there are anti-vaxers, anti-mask wearers, and other people who won't come near a non-mask-wearing person?
5. What do we do with potential juror irregularities, including the absence of a fair cross-section of jurors including those over the age of 65 (who fear being in public), or parents of school-age children who are being home-schooled, or jurors who won't participate in a room for deliberation?
6. And, perhaps most difficult, how do prosecutors and defense lawyers elevate the public good over the good of their clients? How does a criminal defense attorney *not* try to exploit the existence of the pandemic if it will benefit the attorney's client? How can a prosecutor fail to use available tools to pursue a prosecution, investigate an offense, or successfully prosecute a defendant, even if there is some deviation from Covid safety protocols in this endeavor?

Many of these issues can be debated by legislators and public health officials. Perhaps it is fitting, however, that we discuss some of these issues in a conference dedicated to Professionalism, because the problems we addressed over the past 18 months tested what Professionalism requires between adversaries and what our duty of zealous representation requires. On this Task Force we have been

grappling with this challenge weekly: how do advocates balance their duties to their clients with their duties to the justice system?