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ATTORNEY ETHICAL OBLIGATIONS WHEN TRANSITIONING TO PRIVATE PRACTICE

By

Cathy Hampton

ATTORNEY ETHICAL OBLIGATIONS WHEN TRANSITIONING TO PRIVATE PRACTICE

Whether you are a partner, of counsel or associate at a law firm or in-house counsel looking to leave your current employer and transition to a new law firm (including hanging your own shingle) or another in-house position, such decision entails more than business and marketing plans. There are ethical obligations we have to our clients that must be followed prior to these career transitions. What ethical obligations should be considered by attorneys transitioning from one law firm to another? Are the ethical obligations the same for in-house counsel transitioning to private practice? We will explore both topics and best practices to employ when making these career transitions.

I. ETHICAL CONSIDERATIONS TRANSITIONING FROM ONE LAW FIRM TO ANOTHER, INCLUDING YOUR OWN LAW FIRM

(a) Provide Adequate Notice to the Current Firm

When an attorney seeks to transition from one law firm to another, certain ethical obligations must be considered. Under 8.4(a)(4) of the Georgia Rules of Professional Conduct, "It shall be a violation of the Georgia Rules of Professional Conduct for a lawyer to…engage in professional conduct involving dishonesty, fraud, deceit or willful misrepresentation." Therefore, it is best practice for an attorney to offer advance notice to his/her/their current firm for utmost transparency, professional courtesy, and to allow enough time for the parties to best handle the departure and client communication. It is also important to minimize concerns or threats of tortious interference as well. Of course, there is a potential dispute as to who retains the clients (particularly the more lucrative ones).It is important to remember, however, that the client is the party who ultimately elects whether the departing attorney or the firm will continue to represent the client. This brings us to the next point regarding client communications.

(b) Provide Adequate Notice to Current Clients

When an attorney is in the midst of departing from his/her/their current firm, it is imperative to inform his/her/their clients of the intended departure and allow the client an opportunity to determine who will continue to represent the client's interests. Rule 7.1 of the Georgia Professional Rules of Conduct state that "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services," which include (without limitation), "compar[ing] the lawyer's services with other lawyer's services unless the comparison can be factually substantiated," or providing a communication that is false or misleading that "is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Georgia Rules of Professional Conduct or other law." Whereas Rule 7.3 specifically outlines how attorneys should communicate with *prospective clients,* Formal Advisory Opinion 97-3 provides the following guidance:

> If the departing attorney either had significant contact with or actively represented a client on the client's legal matters, the attorney may communicate with the client in either written or oral form, to advise the client of the attorney's departure from the firm. An appropriate communication may advise the client of the fact of the attorney's departure, the attorney's new location, the attorney's willingness to provide legal services to the client, and the client's right to select who handles the client's future legal representation. Id.

However, even if communicated orally to the client, it is best practice to memorialize the communication to protect the interests of all parties involved.

Whether or not a client chooses to transition with the departing attorney, it is particularly important for departing attorneys to continue to protect the client's interests and take reasonably practicable steps to ensure a smooth transition of the client's matters (i.e. allowing time for engaging other counsel, refunding any unearned fees, alerting the client to any upcoming milestones, deadlines, etc.). The departing attorney must also continue to handle all matters diligently through his/her/their separation date to protect the client. (See Georgia Rules of Professional Conduct 1.3, 1.4, and 1.16).

II. ETHICAL CONSIDERATIONS TRANSITIONING FROM IN-HOUSE TO PRIVATE PRACTICE

Regarding those attorneys who transition from in-house[1] to private practice, the same rules apply as those attorneys transitioning from one law firm to another. However, certain special considerations to address are centered around communications with organizational clients and its employees. For instance, it is one thing to alert the employees of the organizational client of the lawyer's intended departure from the company. Yet it is another thing if an employee/executive is interested in retaining such lawyer's counsel for their own legal matters. Rules regarding conflicts of interest should be considered, particularly in the event such representation may involve any potential disputes against the former organizational client. Rule 1.9 prohibits an attorney from representing a client in the "same or substantially related" matter that may be materially adverse to the interests of the former client, particularly where the lawyer has acquired information generally protected by the rules of confidentiality.

The departing attorney must also consider the rules of confidentiality. Regardless of whether the client-lawyer relationship has been terminated, the information the attorney obtained is still governed by Rule 1.6 (which permits disclosure in very limited circumstances). To resolve any potential conflicts of interest for instance, in the comments of Rule 1.6(b)(1)(v), it is acknowledged that there may be situations where an attorney may need to disclose certain confidential information to detect and resolve conflicts of interest; provided, however, that such disclosure "should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated". See Rule 1.6, Comment [18].

Even if an organizational client or its employees maintain a cordial, professional relationship with the departing attorney and want to refer clients to such lawyer, the abiding lawyer must continue to abide by Rule 7.3(c) regarding the prohibition of referral fees, except in very limited circumstances.

These considerations reflect only a snapshot and are not a substitute for thoroughly reviewing the State Bar of Georgia rules and the protocols governing your specific firm. When in doubt, please contact the Ethics Helpline at (404) 527-8741 or (800) 682-9806 for assistance.

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[1] Public sector positions are not included in this discussion, as they are guided by other special considerations and rules.

ATTORNEYS CHANGING JOBS:

DON'T FORGET THE RULES!

By

Judge Robert McBurney

ATTORNEYS CHANGING JOBS: DON'T FORGET THE RULES!

A career change can be an exciting time: adventure awaits as you embark on a different job with new responsibilities. It is also a complicated time, especially if your transition is from one legal job to another. Lawyers, as part of their trade, carry with them a broad set of ethical obligations both to their clients (former and incoming) and to the courts in which they practice. These obligations, set forth in the Georgia Rules of Professional Conduct (GRPC), can trip a lawyer up if she is not careful as she shifts from one role to the next.

A popular move for many government lawyers is, after several years of public service, to jump to the private sector to enjoy a different level of financial reward for your efforts. While an attorney making such a change does not need to worry about tending to the affairs of former clients -- an office full of prosecutors or regulatory lawyers will take care of that -- the lawyer *does* need to be careful not to become involved in representing a client who was the subject of a government matter or investigation in which the lawyer "participated personally and substantially" or about which she possess "confidential government information." GRPC 1.11(a), (b).[1] The same is true in reverse: a lawyer taking that road less traveled and leaving private practice for government service may not participate in government matters about which she possesses information obtained while serving as private counsel for any former client. GRPC 1.11(c).

More often the transition is simply from one field of private legal practice to another. For example, a civil defense attorney may have had his fill of representing trucking companies following catastrophic accidents (or begun to think about the size of the verdicts when those cases went poorly for his clients…). So he decides to pivot to personal injury plaintiff work. Several Rules of Professional Conduct govern how that lawyer must navigate his job switch. As always, there is the prohibition against representing a client whose interests are "materially adverse to the interests of [a] former client" in the same (or substantially related) matter. GRPC 1.9. If the new client who walks into the office on our lawyer's first day wants to sue Terrible

[1] This is true even for judges! If they choose to continue to practice law after stepping down from the bench, they may not represent any party that had appeared before them in connection with the matter over which the judge had been presiding. Ga. R. of Prof. Conduct 1.12.

Trucking for the wrongful death of his uncle and our newly converted PI lawyer frequently represented Terrible in his prior role, that is probably not a case the lawyer (or his new firm…) can take.

There is also the lawyer's duty to all soon-to-be-former clients to ensure a relatively smooth transition for those clients as they seek out new counsel. GRPC 1.16(d) makes clear the lawyer's obligation, upon termination of representation, to:

- give reasonable notice to the client of the lawyer's termination of the relationship
- allow the client reasonable time to obtain other counsel
- surrender all papers and property to which the client is entitled and
- refund any unearned retainer or advance.

Saying farewell doesn't have to be difficult, but it will not be a quick conversation if the lawyer is conscientious about all these responsibilities (which he should be if he wants to avoid a public reprimand).

A final transition examined in this brief overview occurs when lawyers seek to dip their toes in judicial waters by obtaining a part-time judgeship in a municipal, probate, or magistrate court. These opportunities to serve the public expose lawyers to a different set of roles and responsibilities -- and also a different set of ethical obligations. The Code of Judicial Conduct (CJC) poses its own limitations on what a lawyer transitioning from one role to another can and cannot do. In fact, there is an entire section of the Code that addresses the dynamic of a part-time judge, part-time lawyer. *See* Application, Section A, Code of Judicial Conduct. Section A authorizes part-time judges to maintain their private practice but prohibits that practice from conducting business in the court in which the lawyer serves as a part-time judge. Similarly, when wearing her private lawyer hat, the part-time judge may not become involved in a matter for which she has served as a judge – or any proceeding related thereto. Lastly, part-time judges, unlike full-time judges, may also serve as paid mediators and arbitrators – again provided that the matter for which they are serving as a neutral is not something over which they presided as a part-time judge.

The bottom line is that transitions in the legal field can be healthy and invigorating, but they carry with them certain professional and ethical responsibilities to which all lawyers must attend. Paragraph 3 of the Preamble to the Rules of Professional Conduct tells us that "[i]n all

professional functions a lawyer should be competent, prompt[,] and diligent." We can be all these things when we transition from one legal job to another by being mindful of our responsibilities to former and future clients. The legal field is vast and lawyers should be excited to explore it. But that exploration must comply with our ethical obligations to our clients and our profession.

Ethics and Professionalism During Career Transitions

Presented by: Judge Glenda Hatchett

Topic: **Overview of Ethical Lawyer Advertising in Georgia**

An Overview of Ethical Lawyer Advertising in Georgia

Although lawyers generally may not solicit employment through direct personal contact or phone calls with nonlawyers, lawyers are free to partake in other forms of solicitation commonly considered advertising, such as through public media, outdoor advertising, radio, television, or written communications. *See* Rule 7.2; Rule 7.3. To ensure lawyers uphold their ethical responsibilities, those intending to advertise their services in Georgia should look to the Georgia Rules of Professional Conduct, particularly rules 7.1 through 7.5. Though lawyers should consult the precise language of the Rules, a brief and non-exhaustive overview of the ethics of lawyer advertising is provided here.

The Rules require advertisements to disclose certain information in a manner "clearly legible and capable of being read by the average person." Rule 7.1(c). First, the advertisement must contain the advertising lawyer or firm's name, telephone number, and principal address. *See* Rule 7.2. If the advertisement is a direct written communication to a person the lawyer does not know, the communication must plainly display the word "advertisement" on its envelope and pages. *See* Rule 7.3. Further, an advertisement must disclose if it contains a paid endorsement or if a lawyer or client is being portrayed by someone who is not one. *See* Rule 7.2. An advertisement must also disclose if a lawyer or firm runs a referral practice, and the advertisement must comply with particular provisions regarding referral services contained in Rule 7.3(c). *See* Rule 7.2.

Importantly, the Rules prohibit advertisements that are misleading or communicate false information. *See* Rule 7.1. Accordingly, advertisements must not contain material misrepresentations or omit information that, if omitted, would render the communication misleading. *See id.* For example, in *In the Matter of Palazzola*, the Supreme Court of Georgia

held an attorney violated Rule 7.1 by publishing an ad containing multiple material misrepresentations and omissions. *See* 310 Ga. 634, 693 (2020). There, the ad contained a photograph of the attorney and four other individuals alongside the text "Atlanta ● Miami ● Los Angeles" and "[m]ore than 100 years of experience." *See id.* at 645-36. The court held this was misleading because the advertising attorney "unreasonably exaggerated" his experience, and a reasonable reader would believe the pictured individuals were part of the attorney's firm and that the firm-maintained offices in each of the three named cities, neither of which was true. *See id.* at 639.

Furthermore, an advertisement should not lead a potential client to unjustified expectations about the results a lawyer can achieve. *See id.* For example, an advertisement showcasing a multi-million dollar award secured for a client may create unjustified expectations if the advertisement does not highlight the specific facts leading to that award. *See id.* cmt. 2. To further protect against unjustified expectations, the Rules require specific information to be communicated when lawyers or firms advertise their fees. *See* Rule 7.1. If an advertisement contains language about contingent fees or "no fees unless" the client wins, the advertisement must include a disclaimer to ensure potential clients are informed those fees are not applicable in all cases. *See id.* Additionally, if advertising a fixed fee, a lawyer or firm must have a written statement that is publicly available and clearly explains the scope of activities to which that fee will apply. *See* Rule 7.2.

Notably, lawyers or firms must keep a copy of any advertisement or communication they distribute for two years following its last distribution. The lawyer or firm must also keep for two years a record of when and where the communication was distributed. *See* Rule 7.2. Ultimately, it is the lawyer's responsibility to ensure their advertisements comply with their obligations

regarding ethical advertising under the Rules; those who fail to do so may face punishment ranging from reprimand to disbarment. *See* Rule 7.1. For example, one attorney was reprimanded for a violation of Rule 7.1 when the California firm she contracted with misrepresented the attorney as the firm's local counsel responsible for handling the firm's Georgia cases, but the attorney did not actually handle such cases. *See In the Matter of Boyd*, 317 Ga. 669, 673 (2023). Though it was the California firm that made the misrepresentation, the attorney was reprimanded because she "bore the ultimate responsibility to ensure that [the firm's] communications concerning its services in Georgia complied" with the Georgia Rules, and she had been negligent in doing so. *Id.* at 673.

If a lawyer or firm seeking to advertise their practice has questions about the Rules or how they may apply to a certain advertisement or communication, they should contact the Georgia Bar's disciplinary authorities for guidance. *See id.* cmt. 5. Nevertheless, lawyers should follow the rule of thumb that, when advertising, if a "stream of information flows cleanly, it will be permitted to flow freely." See Rule 7.3 cmt. 3.

Professionalism as a Young Lawyer

By

Samantha Beskin-Schemer

To me, one aspect of professionalism as a young lawyer is learning how to manage competing obligations such as "achieving the excellence of our craft,"[1] developing professional friendships,[2] and "assisting in organized Bar activities and educating law students.[3] Karl N. Llewellyn, jurisprudential scholar who taught at Yale, Columbia, and the University of Chicago Law Schools, often cautioned his students:

> The lawyer is a man of many conflicts. More than anyone else in our society, he must contend with competing claims on his time and loyalty. You must represent your client to the best of your ability, and yet never lose sight of the fact that you are an officer of the court with a special responsibility for the integrity of the legal system. You will often find, brethren and sistern, that those professional duties do not sit easily with one another. You will discover, too, that they get in the way of your other obligations - to your conscience, your God, your family, your partners, your country, and all the other perfectly good claims on your energies and hearts. You will be pulled and tugged in a dozen directions at once. You must learn to handle those conflicts.[4]

After completing law school and the bar exam, many of us are bright eyed and bushy tailed and ready to take on the legal world. As I quickly learned, there is so much about the legal world that is not taught in the classroom. Part of what is not taught is the important role that self-care plays in maintaining balanced involvement in the legal community through professional clubs and organizations. It can be overwhelming to jump into practice and become involved in the profession. Most of us are swamped with discovery, client meetings, court appearances, networking events, mediations, and the list goes on. Not to mention the challenges of getting caught up in our personal lives outside of the office!

With so much going on as a young attorney, it is easy to forget to take care of ourselves and maintain balance between our personal lives and our professional lives. I must take care of my mental, emotional, and physical well-being in order to have time and energy to give back to the profession. Luckily, our profession cares about our well-being and there are

many resources available through the State Bar Attorney Wellness Committee. Anything from running races to free counseling sessions, you name it, the State Bar of Georgia wants lawyers to take care of themselves. [5]

Work related stress looks different to each individual attorney, and what is needed to relieve that stress will differ for each individual as well. Physical activity and service work outside the profession has allowed me to find a healthy balance of getting outside of myself and relieving work-related stress. By going to the gym or going to a yoga class I can give myself that one-to-two-hour time period of not focusing on the stress of the office or the commitments I have, but on releasing that excess energy. Giving back to the community also plays a huge role in my ability to show up for the profession. As Mahatma Ghandi said, "the best way to find yourself is to lose yourself in the service of others." By serving others in the community, I am able to be more focused on my work and commitments to the profession.

As we find balance in our lives and careers, we are better able to contribute to the important work of giving back to our law schools and profession, which are important ideals that apply to all lawyer's – including young lawyers – of *A Lawyer's Creed and the Aspirational Statement on Professionalism* .[6] We all began in similar places as first year law students both eager and nervous for the future. Remember those early days of
the Socratic method and thinking the world was going to end if we breathed incorrectly? We need to support current law students and assure them that there is light at the end of the tunnel. We can do this by assisting with law school orientation programs[7], sitting on student panels, and serving as mentors.

As we practice self-care and can find balance, we can easily become involved in

organized bar activities[8]. By assisting in organized bar activities, we have the opportunity to connect with colleagues, share our experiences, and become better lawyers, which are professionalism aspirations that all lawyers are encouraged to achieve. Together we learn to get outside of ourselves, our offices, and the courtroom in order to personally connect with each other. We must find that balance between work and everything else life hands us, and what better way than connecting with other lawyers and building professional community[9]. I know I have been able to find that balance through professional involvement and giving back to the legal and greater Atlanta community.

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[1] *See* Line 67 of A Lawyer's Creed and the Aspirational Statement on Professionalism
[2] *See* Line 15 of A Lawyer's Creed and the Aspirational Statement on Professionalism
[3] *See* Lines 147-148 of A Lawyer's Creed and the Aspirational Statement on Professionalism
[4] Mary Ann Glendon, A Nation Under Lawyers 17 (1994).
[5] See Georgia Lawyers Living Well, https://www.gabar.org/wellness/
[6] See generally, *A Lawyer's Creed and the Aspirational Statement on Professionalism*, Chief Justice's Commission on Professionalism, https://lj9362.p3cdn1.secureserver.net/wp-content/uploads/2019/07/2-Lawyers-CreedAspStatement-v-2013-Line-Number-with-new-logo-and-seal-v07-25-19.pdf (Last visited March 6, 2024)
[7] *See* 2024 Law School Orientations on Professionalism, https://cjcpga.org/law-school-orientations-on-professionalism-2024/ (Last visited March 6, 2024)
[8] *See, e.g.*, Young Lawyers Division, https://www.gabar.org/committeesprogramssections/younglawyersdivision/ (Last visited March 6, 2024)
[9] *See* Line 36-37, 39-41, 139-143 of A Lawyer's Creed and the Aspirational Statement on Professionalism

COMPETENCE AND PROFESSIONALISM

by

Cathy Hampton

COMPETENCE AND PROFESSIONALISM

What does competence mean in our profession? Is competence the legal knowledge and skill to master the law in our respective areas of practice, or is competence simply the technical skills required to serve our clients? If we look to both the Georgia Professional Rules of Conduct on competence in conjunction with the Georgia *A Lawyer's Creed and Aspirational Statement on Professionalism* ("Lawyer's Creed")[1], the *Lawyer's* Creed reminds us that competence is more than the legal acumen needed to serve clients - it is also a call to action within our respective professional networks to help educate and learn with practicing lawyers, new lawyers and future lawyers.[2]

COMPETENCE FOR OUR CLIENTS

Under Rule 1.1 of the Georgia Professional Rules of Conduct:

> A lawyer shall provide competent representation to a client. Competent representation as used in this rule means that a lawyer shall not handle a matter which the lawyer knows or should know to be beyond the lawyer's level of competence without associating another lawyer who the original lawyer reasonably believes to be competent to handle the matter in question. Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[3]

Too often, lawyers mistake competence for mastery. Lawyers, new and seasoned, can be deemed "competent" to handle a matter, provided they demonstrate the following important legal skills: (i) analysis of precedent; (ii) the evaluation of evidence and legal drafting; (iii) determining what kind of legal problems a situation may involve; and (iv) adequate attention and thoroughness of preparation.[4] The Comments of Rule 1.1 discuss "sufficiency" of representation and *not* mastery. Comment 1[B] of Rule 1.1 states that "in many instances, the required proficiency is that of a general practitioner".[5] There are relevant factors to determine whether a lawyer employs the requisite knowledge and skills in a particular matter, such as "the complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, and preparation of the lawyer's study".[6] So long as the principles in the general practice of law are followed, the threshold of sufficiency is achieved. A *Lawyer's Creed* reminds us, however, that the sufficiency threshold is only the minimum required of lawyers and that we as lawyers should aspire to excellence and not settle for minimum competency.

Sufficiency is the baseline to help assuage any fears in expanding our legal skills and representation into areas of the law that involve novel legal issues or established areas of law that are new to the attorney. Take my own Name, Image and Likeness ("NIL") practice. Three years

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[1] *See generally* Chief Justice's Commission on Professionalism, *A Lawyer's Creed and the Aspirational Statement on Professionalism*, https://tinyurl.com/38rts45t (Last visited March 12, 2004).
[2] *See, e.g.,* Id. at Lines 67, 142 – 148.
[3] Georgia Rules of Professional Conduct, Rule 1.1
[4] Id., Comment 2; Id., Comment 5.
[5] Id., Comment 1[B].
[6] Id., Comment 1[B].

ago, there was no such NIL practice to represent college athletes in paid transactions. After the June 21, 2021, United State Supreme Court ruling in the *NCAA v. Alston*[7] case, collegiate athletes could begin to benefit financially from the use of their NIL across the multi-billion dollar collegiate sports industry. Since then, different states and colleges promulgated their own versions of NIL regulations. Most recently, in *State of Tennessee and Commonwealth of Virginia v. National Collegiate Athletic Association*, a federal judge in the Eastern District of Tennessee granted a preliminary injunction February 23, 2024,[8] finding that the NIL rules which prohibit student-athletes from negotiating for NIL with any third-party entity caused irreparable damage to college athletes. Who knows what can happen by the time this article is published? With such rapidly changing laws, competence in the NIL practice of law reflects more of a lawyer's willingness to study the law, including, regular updates in cases in various jurisdictions, but also the regulations of non-governmental organizations such as the National Collegiate Athletic Association (NCAA) and various athletic sports conferences. Competence in NIL also includes other skills, like creating and maintaining professional relationships with compliance officers at each client's college and the athletic conference in which the college athlete plays.

Thus, competence in areas of the law that involve novel legal issues or established areas of law that are new to the attorney is not at all mastery. Instead, it is a constant and consistent willingness to grow, learn, study and share ongoing results with others as a teacher, mentor, mentee and/or student. There is no "playbook" or precedent in burgeoning areas of the law, so there are no "masters", but rather lawyers who service clients with the level of sufficiency of a general practitioner. With rapidly changing laws in so many areas, why not accept the challenge of learning a new area? Expanding your practice?

There is a reason we "practice" law. It is the same reason many of us love the law. The law expands, morphs and reflects who and where we are and what we value personally and as a community. It is incumbent upon us as lawyers to earn client trust in any area in which we "practice," no matter how many years we have served in that area. We must remain curious to hone our skill set and seek knowledge in real time.

SHARING INFORMATION ABOUT OUR COMPETENCY WITH POTENTIAL CLIENTS OR EMPLOYERS

The opening lines of a *Lawyer's Creed* read: "To my clients, I offer faithfulness, competence, diligence, and good judgement. I will strive to represent you as I would want to be represented and to be worthy of your trust."[9] As noted above, Lawyers can venture into new areas competently while aspiring towards mastery. What information – beyond the lawyer's efforts to achieve

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[7] 594 U.S. ___, 141 S. Ct. 2141 (2021). The case is available at Supreme Court of the United States, Opinions of the Court – 2020, Docket No. 20-512, https://www.supremecourt.gov/opinions/20pdf/594us1r51_7k47.pdf (Last visited March 13, 2024).

[8] *State of Tennessee and Commonwealth of Virginia v. National Collegiate Athletic Association, No. 3:24-cv 33 (E.D.* Tenn. Feb. 23, 2024). The Court's *Memorandum Opinion and Order* are available at Tennessee, Attorney General and Reporter News, https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2024/pr25-18.pdf (Last visited March 13, 2024).

[9] Chief Justice's Commission on Professionalism, *A Lawyer's Creed and the Aspirational Statement on Professionalism*, https://tinyurl.com/38rts45t at Lines 2 - 5 (Last visited March 12, 2024).

competency – that an attorney venturing into a new area of practice can share with his or her clients to be worthy of their trust? Share all updates and answer all questions in language that meets the client's level of comprehension and knowledge. Not only will promptly sharing information and answering questions earn client trust, but also strengthen client engagement.

SHARING COMPETENCE WITH OUR COLLEAGUES AND NEW LAWYERS

One of the Aspirational Statements in the Lawyer's Creed offers the aspiration to improve the practice of law by: (i) assisting in continuing legal education efforts; (ii) assisting in organized bar activities; and (iii) assisting law school in the education of our future lawyers.[10] Comment 6 of Rule 1.1 states that "to maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education".[11]

Law schools are both academic and professional training grounds - a reminder that the *study* of law requires continued academic discipline within our professional careers. Our knowledge of doctrine and ability to apply our skills are the cornerstone of competence.

Learning from other lawyers, including those more experienced, expands one's competency and technical skills. The Georgia Professional Rules of Conduct implicitly addresses this tenet within the competency rule, as it states that "competent representation can also be provided through the association of a lawyer of established competence in the field in question."[12] Interactive, interpersonal exchanges within our legal community should remain intentional with respect to our levels of competence. Consider how our mentees and colleagues can benefit from our ability to think, analyze and extemporaneously negotiate from experience. Imagine your increased knowledge of technology, for example, from working with younger counterparts who are able to gather, sift and synthesize copious amounts of data in a fraction of the time it took us to search through library stacks. The act of teaching and training others entails a sharpening of our educational discipline and application of our knowledge to build professional competence. Mutual teaching and learning from our colleagues and mentees heightens our competency levels as we expand our ways of thinking, analyzing and approaching the law.

While competence may take different forms of skill development from writing and negotiating to teaching others, studying law remains a lifelong pursuit that never ceases to engage and reward the curious and hardworking. In the spirit of the Lawyers Creed, I encourage each of us to challenge ourselves and expand "competence" in our respective practice areas. If a lawyer is ever unsure of whether they meet the standard of competence, our partners at the State Bar of Georgia remain an educational resource for legal questions and learnings, including additional insight on professionalism in the law.

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[10] Chief Justice's Commission on Professionalism, *A Lawyer's Creed and the Aspirational Statement on Professionalism*, https://tinyurl.com/38rts45t at Lines 145 - 148 (Last visited March 12, 2004).
[11] Id., Comment 6.
[12] Georgia Rules of Professional Conduct, Rule 1.1, Comment 2.

A PERSONAL COMMITMENT TO JUDICIAL PROFESSIONALISM

By

Judge Eric Richardson
State Court of Fulton County

A PERSONAL COMMITMENT TO JUDICIAL PROFESSIONALISM

Judge Eric Richardson
Fulton County State Court
Atlanta, Georgia

I became a Fulton County State Court Judge in 2013, following a nearly 20 year career as a lawyer. Almost immediately after taking the bench, I started receiving requests from lawyer groups to speak on professionalism. In at least one instance, a request seemed to be directed to me because I was one of the new judges and this was some sort of rite of passage. In every instance, it was assumed that I was inherently qualified to speak on professionalism simply by virtue of being a newly-appointed judge. Indeed, in my career before taking the bench, I attended numerous professionalism CLE seminars and heard various judges recite horror stories about bad lawyer conduct and give off-the-cuff advice about what lawyers should and should not do in their practices.

The fact that I receive deference and respect as a judge means that lawyers feel bound to at least pretend to listen to me. But there is absolutely nothing about being a judge that qualifies me (or any other judge) to write or speak on professionalism. If you have appeared before judges for any length of time, you have probably encountered many examples of unprofessional judicial conduct. In one recent instance of unprofessional judicial conduct, the Fifth Circuit Court of

Appeals removed a judge from a case for showing anti-prosecutor bias. According to the Fifth Circuit

> [T]he judge packed the record with hostile remarks against the government and its attorneys. He repeatedly indicated that government attorneys, especially those from Washington, are lazy, useless, unintelligent, or arrogant. At times, these same sorts of comments were directed at the particular government attorneys appearing before him. What's more, he compared the government with ISIS, referred to its attorneys as "thugs," and alluded to the Department of Justice as unethical. These sorts of comments do reveal a level of prejudice—not just skepticism—against the government as a party in this case.

United States v. Khan, 997 F.3d 242, 249-50 (5th Cir. 2021). This is an extreme example that resulted in a public reprimand to a judge. But there are numerous examples of unprofessional judicial conduct occurring in courts nationwide every day that go unaddressed. Why is this so?

The reason judicial professionalism is not enforced is rooted in the distinction between ethics and professionalism. Former Georgia Supreme Court Chief Justice Harold Clarke explained the distinction between ethics and professionalism in this manner: ethics is a minimum standard which is *required* of all lawyers while professionalism is a higher standard *expected* of all lawyers.[1]

[1] *Professionalism: Repaying the Debt*, Presiding Justice Harold G. Clarke, Georgia State Bar Journal, Vol. 25 No. 4, p. 170-173, available at https://lj9362.p3cdn1.secureserver.net/wp-content/uploads/2022/02/25-GSBJ-170-1989-Professionalism-Repaying-the-Debt.-Harold-Clarke-ethics-minimum.pdf

The Georgia Code of Judicial Conduct establishes the basic minimum **ethical** requirements governing the behavior of all judges and judicial candidates.[2] The Judicial Qualifications Commission (JQC) conducts investigations and hearings with respect to complaints of ethical misconduct by Georgia judges and issues Advisory Opinions regarding judicial misconduct.[3] There is no such mechanism for enforcement of judicial professionalism. Even if there existed a formal enforcement mechanism for judicial professionalism, many lawyers would be hesitant to use it for fear that it may adversely impact them in that judge's courtroom in the future.

Given that there are numerous examples of judicial unprofessionalism that go unaddressed, what authority do I have as a judge to speak to anyone about professionalism? It is not enough to have **institutional** authority to speak to you. If I desire to deliver an effective message about professionalism, I must have **moral** authority as well. At the very least, to have any implied moral authority, I must know what it really means to exhibit professionalism and I must exhibit professionalism as a judge. Below I will first discuss professionalism for lawyers generally, then turn my attention to judicial professionalism specifically.

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[2] *See* Georgia Code of Judicial Conduct at 2, available at https://gajqc.gov/wp-content/uploads/sites/13/2024/02/CJC-2.1.2464.pdf.

[3] *See* https://gajqc.gov/home.

To address what it viewed as declining professionalism in the field, in 1989 the Georgia Supreme Court created the Chief Justice's Commission on Professionalism, the first body of its kind in the nation. The primary charge of the Commission was and remains to enhance professionalism among Georgia's lawyers. In carrying out its charge, the Commission provides ongoing attention and assistance to the task of assuring that the practice of law remains a high calling, enlisted in the service of client and public good.[4]

Ultimately, the Commission developed the Lawyer's Creed and Aspirational Statement on Professionalism (LCAS). The LCAS were developed to encourage, guide and assist individual lawyers, law firms, and bar associations. They are reproduced below in their entirety.[5] I commend each of you here to read them in full.

I recognize, as the Commission did, that aspirational professional goals cannot be imposed by edict "because moral integrity and unselfish dedication to the welfare of others cannot be legislated."[6] Nevertheless, as the Commission did, I express my hope that judges "will recognize the special obligations that attach to

[4] *See* https://cjcpga.org/.

[5] LCAS are also available at https://lj9362.p3cdn1.secureserver.net/wp-content/uploads/2019/07/2-Lawyers-CreedAspStatement-v-2013-Line-Number-with-new-logo-and-seal-v07-25-19.pdf.

[6] *See* https://cjcpga.org/lawyers-creed/.

their calling and will also recognize their responsibility to serve others and not be limited to the pursuit of self-interest."[7]

Let's look at the Lawyer's Creed and see how it may apply to judges.

> **To my clients**, I offer faithfulness, competence, diligence, and good judgment. I will strive to represent you as I would want to be represented and to be worthy of your trust.
>
> **To the opposing parties and their counsel**, I offer fairness, integrity, and civility. I will seek reconciliation and, if we fail, I will strive to make our dispute a dignified one.
>
> **To the courts**, and other tribunals, and to those who assist them, I offer respect, candor, and courtesy. I will strive to do honor to the search for justice.[8]

As applied to judges, obviously we should exercise "good judgment." But more than that, judges should aspire to be diligent and treat lawyers and all who appear before us as we would want to be treated. This is the golden rule. Former Chief Justice Norman Fletcher was an advocate of this view of professionalism:

> I have concluded that professionalism, in a legal sense, is to a great extent practicing the golden rule. It is not – do my opponent in before my opponent does me in, – but rather, it is do unto your fellow attorneys, the judges and society as you would have them do unto you.[9]

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[7] *Id.*

[8] LCAS ln. 2-12.

[9] *See* http://www.gabar.org/aboutthebar/lawrelatedorganizations/cjcp/professionalism-cle-guidelines.cfm#6.

Following the golden rule is inherently more difficult for judges because our position insulates us from the repercussions of not following the rule. We can demand respect, candor, and courtesy, and sanction lawyers and parties for lack of such respect, candor, or courtesy, but there is no reciprocal sanction for us if we fail to exhibit those qualities. The imbalance of being able to demand respect without being forced to give respect is inherently corrupting.

Some judges succumb to this power imbalance and develop the condition sometimes referred to as "robe-itis." I have often thought of it as "judicial privilege." Regardless of the name we attach to it, it exists to some extent with every judge. I have to acknowledge the privilege, and adjust for it. I must often remind myself that respect is a two way street—it is a relationship. As a lawyer, I have been treated disrespectfully by judges, and I have seen other litigants disrespected by judges. I never showed disrespect in return (lest I or my clients be punished for it), but such conduct never engendered respect for those judges; rather the respect was for the harm those judges could do to me and my clients simply by virtue of their position as judge. The only way to ensure that you are truly respected by others is to be respectful toward others.

> **To my colleagues in the practice of law**, I offer concern for your welfare. I will strive to make our association a professional friendship.[10]

[10] LCAS ln. 13-15.

As a judge, I have sometimes struggled with this concept. I have to decide cases on the facts and the law. If I have or show concern for the welfare of litigants, will that lead to biased decisions or decisions based on emotions? My answer is, "Not necessarily." Concern for the welfare of others and empathy are foundational to professionalism, and as judges we should exhibit these qualities. It does not mean that you ignore or twist the law and facts to achieve a solution that preserves others' feelings or promotes their welfare. Rather, it means placing yourself in their shoes, and acknowledging and understanding the impact that your actions will have on their lives.

Concern for the welfare of others has become paramount in the current pandemic. Even as courts have reopened and judges have attempted to return to court business, the Georgia Supreme Court stressed the importance of judicial professionalism, including sensitivity to the general welfare of persons who engage with the court:

> Judges are also reminded of their obligation to dispose of all judicial matters promptly and efficiently, including by insisting that court officials, litigants, and their lawyers cooperate with the court to achieve that end, although this obligation must not take precedence over the obligation to dispose of matters fairly and with patience, which requires sensitivity to health and other concerns raised by court officials, litigants and their lawyers, witnesses, and others.

Fifteenth Order Extending Declaration of Statewide Judicial Emergency, Section VI (June 7, 2021).[11]

> **To the profession**, I offer assistance. I will strive to keep our business a profession and our profession a calling in the spirit of public service.
>
> **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.[12]

At times, I must "check my judicial privilege," and remind myself that I am a servant of the people and justice. Being a public servant means recognizing that those who you are serving are of utmost importance. Being a servant also should mean striving to deliver better customer service. But what does good customer service and high professionalism look like in practice?

Some states have formally adopted principles of professionalism for judges. In 2014, the Supreme Court of Ohio Commission on Professionalism released the *Professionalism Dos and Don'ts: Judicial Professionalism*, which recommended guidelines for judges in carrying out their professional responsibilities in the courts.[13] It began with a statement on the importance of judicial professionalism:

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[11] Available at https://www.gasupreme.us/wp-content/uploads/2021/06/15th-SJEO_as-issued.pdf.

[12] LCAS ln. 16-23.

[13] *See* https://www.courtnewsohio.gov/happening/2014/judicialProfessionalism_072114.asp#.YPGizxNKh7M.

As the guardians of our legal system, judges are expected to establish and maintain the highest level of professionalism. The way in which judges manage their dockets, interact with counsel, and preside over their courtrooms sets a standard of professionalism for the attorneys who appear before them. Just as significantly, the words and actions of judges also shape the public's perception of the justice system.[14]

Some of the Dos of judicial conduct include:[15]

- Be accessible to parties to resolve discovery disputes.
- Be aware of attorneys' professional and personal schedules before setting a court date or denying a timely motion for continuance.
- Take the bench promptly and begin hearings at the scheduled time.
- Be patient and temperate, especially under trying circumstances.
- Be aware of your mood and take necessary breaks to decompress so that you can render the next decision refreshed.
- Make decisions after the conclusion of proceedings in such a manner as will make the litigants feel that their arguments were fully considered.[16]

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[14] The *Professionalism Do's and Don'ts: Judicial Professionalism* was previously available at https://www.supremecourt.ohio.gov/Publications/AttySvcs/judProfessionalism.pdf.

[15] As its title suggests, the *Professionalism Dos and Don'ts* also included Don'ts of judicial conduct. In the spirit of keeping the discussion positive and exhortatory, examples of Don'ts are omitted here.

[16] Many other states have adopted and published similar principles of judicial professionalism. *See, e.g.*, Hawai'i (available at https://casetext.com/rule/hawaii-court-rules/hawaii-principles-of-professionalism-for-hawaii-judges/rule-principles-of-professionalism-for-hawaii-judges), and New Jersey (available at https://www.njd.uscourts.gov/sites/njd/files/Principles%20of%20Professionalism.pdf). The Seventh Federal Judicial Circuit has included a section on "Courts' Duties to Lawyers" in its published Standards for Judicial Conduct (available at

I agree with all of the Dos and Don'ts set out by the Ohio Commission on Professionalism. And, although the Dos and Don'ts were created before the current pandemic, they are fully applicable in the current post-pandemic environment of masks, social distancing, virtual proceedings, and limited availability of jurors for trials.

For example, the Dos and Don'ts urge that judges be available to resolve discovery disputes. The pandemic forced judges to learn and utilize technology that facilitates more convenient and faster resolution of cases. Video conferencing platforms have made it far more convenient to schedule and conduct hearings on discovery disputes, especially in cases involving numerous participants or out-of-town litigants. Moreover, on video conferences, the lawyers and litigants may access the record, look up case law on demand, and share exhibits and other information on screen where all participants can fully view them. Flexibility in allowing virtual hearings exemplifies good customer service.

The Dos and Don'ts urge judges to be patient and temperate, especially under trying circumstances. The current pandemic is a perfect example of "trying circumstances." Judges, court personnel, lawyers, and litigants are learning new

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https://www.wied.uscourts.gov/sites/wied/files/documents/Standards_Professional_Conduct.pdf). An excellent (although dated) discussion of judicial professionalism initiatives is found in Peter A. Joy, A Professionalism Creed for Judges: Leading by Example, 52 S. C. L. Rev. 667 (2001), available at https://core.ac.uk/download/pdf/347466211.pdf.

technologies and new procedures all at the same time, under heightened personal and professional stress. New technology is great when it actually works as intended, but it often doesn't. Safety protocols are essential, but they are often confusing. Many litigants are experiencing court for the first time, and using new technologies for the first time. As judges, we should apply the golden rule and give everyone else the patience and temperance we would want to receive if the roles were reversed.

My agreement with the Do's and Don'ts is not enough to have the moral authority to speak on professionalism. There must also be accountability. So I now pledge to all of you that I will do my best to abide by the Dos and Don'ts, and I also ask that all of you who appear before me in the future hold me accountable. If you have appeared before me and found that I failed to live up to the standards of the Dos and Don'ts, I invite you to tell me how I can do better. I cannot guarantee that I will take your suggestions or in fact exhibit better professionalism, but I promise to listen respectfully with an open mind and not hold it against you.

Of course, I can only give you my personal commitment. I cannot speak for any other judges whom you might encounter. So what should you do when you encounter a judge whose conduct falls in that gap between minimal judicial ethics and the aspirational ideals of professionalism? I encourage all of you not to stand silent and simply continue to endure unprofessional conduct from judges.

Privately and respectfully, ask your judges how you can have a better relationship with them in the courtroom (or virtually). If the interactions have taken a negative turn, ask your judges if you can have a "reset" and start fresh with more constructive communications. Do not hesitate to examine your own conduct and be receptive to constructive feedback from your judges. With good intentions, constructive feedback, and consistent effort, I and my fellow judges will truly be worthy of the task of speaking on professionalism.