

JUDICIAL PROFESSIONALISM: REFLECTIONS FROM THE BAR
CLE on July 18, 2024

A CRIMINAL DEFENSE ATTORNEY PERSPECTIVE

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As a criminal defense attorney, the working model of representation is client-centered¹ and client-directed.² While the attorney has control over whether to raise frivolous legal arguments, they cannot fail to argue for what the client may want them to argue in many, if not most, circumstances.³ A criminal defense attorney's advocacy (and in many cases all trial attorneys' advocacy) should always be judged through that lens.

Below are two general examples of judges and/or prosecutors conflating what an attorney advocates for versus what, in the attorney or judge's mind, would be best for the client:

First, often times, criminal defense attorneys may be told they are "wasting the Court's time" when the attorney's client refuses to take a "favorable" plea deal, thus making a trial necessary. In essence, the foregoing statement suggests that either the attorney did not properly counsel the client or that the criminal defense attorney is somehow responsible for a decision that only the client can make. Generally, most criminal defense attorneys comply with the professionalism aspirations regarding fully-informed decision-making by clients and regarding the expeditious achievement of a client's objectives.⁴ Neither a judge nor a prosecutor, however, could ever know or be privy to those discussions between a criminal defense attorney and their client without the attorney violating Georgia's ethics rules or professionalism aspirations regarding confidentiality.⁵ Therefore, if a judge acts unprofessionally and accuses a criminal defense attorney of "wasting the Court's time,"⁶ the criminal defense attorney who acts with professionalism will most likely remain silent in the face of such

criticism.⁷ More fundamentally, no client is wasting the Court's time to insist on exercising their constitutional right to a fair trial.⁸ Notwithstanding the Court's or the criminal defense attorney's cost-benefit analysis of the situation, the decision is the client's and the client's alone and should never be imputed to or imposed upon the attorney by the Court.⁹

To further illustrate this point, a second example is offered. Criminal Defendant was severely mentally ill, incompetent, and in need of both competency restoration and mental health treatment. The Defendant, however, did not want that treatment and would not comply with the doctors at the forensic hospital.

The State made a motion for the client to be forcibly medicated. The criminal defense attorney opposed the motion based on the client's directives, as the criminal defense attorney was ethically bound to do, pursuant to Rule 1.2 of the Georgia Rules of Professional Conduct. The Court held a hearing on the issue in which the criminal defense attorney's advocacy made clear that the State had not met their burden to force medications upon the client based on US Supreme Court and Georgia law.¹⁰ The judge ruled that, notwithstanding prior precedent, since it was in the client's best interest to take this medication and the Court would order the client to do so.

While the criminal defense attorney may have personally agreed that it may likely be in the client's best interest, they explained that ethically it was the role of a criminal defense attorney to advocate for what the client wants.

The criminal defense attorney stated that if the judge were to order forcible medication given the state of the record, they would appeal the decision and file for an emergency stay of the order. At that point the judge said that the attorney was "a terrible person who was trying to keep the client sick just to win an argument." The Court thereafter continued berating the criminal defense attorney in the presence of opposing counsel, an Assistant District Attorney (ADA).¹¹ The opposing counsel remained silent while the judge yelled at and belittled the criminal defense attorney, then, when the hearing was over, the ADA left the courtroom without a word of comfort to the defense attorney, even though it was clear the criminal defense attorney was visibly affected. In following suggested judicial professionalism practices that have been published by the Supreme Court of Ohio Commission on Professionalism, the judge should not have held the criminal defense attorney accountable for a position taken by the client that was beyond the criminal defense attorney's control.¹² Equally important, the Ohio judicial professionalism aspirations clearly state that a judge should not "chastise, correct, or question attorneys in a demeaning manner . . ."¹³

Based on Georgia's aspirational ideals, the ADA should have treated the criminal defense attorney "in a manner consistent with his or her professional obligations and consistent with the dignity of the search for justice."¹⁴

As Georgia lawyers, we should always aspire to a professionalism that seeks to offer concern for the welfare of our colleagues and strive to make our professional association a professional friendship.¹⁵ This begins with being courteous and civil in ALL communications, and especially during and after heated moments of contested litigation.¹⁶ Although *A Lawyer's Creed and the Aspirational Statement on Professionalism* were written with lawyers in mind, the tenets of courtesy, civility and treating parties with dignity in the search for justice should hold true for judges also. In the situation described above, if a judge is berating an opposing counsel, consider taking these steps, as the attorney observing the situation, to infuse professionalism in the situation:

- 1) asking the judge for a break and then offering words of support to the other side such as, I understand you are simply advocating for your client's position – hang in there;
- 2) asking the judge for a break and then stating on the record before the court that you [the attorney who is not being berated] understand that your colleague has an ethical obligation to advocate before the court the client's position, and if that position is then on the record saying that both counsel agree that the Court may move on to other matters;

No matter what is best for the client, the client gets to decide whether he wants to subject himself to psychotropic medications, absent a proper showing by the State or exigent circumstances.¹⁷ No criminal defense attorney makes those decisions for a client, even if the client is profoundly ill.¹⁸

Judges and prosecutors should remain aware that a criminal defense attorney advocates for their client and that advocacy does not always align with the attorney's personal feelings or beliefs. A criminal defense attorney's personal beliefs are irrelevant to effective advocacy. Imputing the advocacy of an attorney

to their personal beliefs is fundamentally unprofessional, unfair, and injudicious, and lacks the professionalism to which we aspire as Georgia lawyers and judges.

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¹ See e.g. James M. Anderson, Maya Buenaventura & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 Harv. L. Rev. 819 (Jan. 2019) (assessing the benefits of a client-centered defense model in reducing the length of sentences).

² See *A Lawyer's Creed and the Aspirational Statement on Professionalism* at Lines 73, 75, 82-83, 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 07-10-24).

³ *Id.*

⁴ See generally *A Lawyer's Creed and the Aspirational Statement on Professionalism* at Lines 73-83, 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 07-10-24).

⁵ See Rule 1.6 of the Georgia Rules of Professional Conduct, State Bar of Georgia, <https://www.gabar.org/barrules/georgia-rules-of-professional-conduct.cfm> (Last visited 07-10-24).

⁶ See Rule 2.6 (A) of the Georgia Code of Judicial Conduct, The Georgia Judicial Qualifications Commission, Governing Provisions, <https://gajqc.gov/wp-content/uploads/2024/02/CJC-2.1.2464.pdf> (Last visited 07-10-24)

⁷ See *A Lawyer's Creed and the Aspirational Statement on Professionalism* at Lines 93-95, 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 07-10-24).

⁸ See U.S. Const. amend. VI; Ga. Const. art. I, § 1, ¶¶ XI; XIV.

⁹ See *Judicial Professionalism*, The Supreme Court of Ohio Commission on Professionalism, Commission Publications, Professionalism Dos and Don'ts: Judicial Professionalism ("DON'T hold attorneys or litigants accountable for events beyond their control" and DON'T chastise, correct, or question, attorneys in a demeaning manner, especially in front of their clients or the jury)(Emphasis in the original.), <https://www.supremecourt.ohio.gov/docs/Publications/AttySvc/s/judProfessionalism.pdf>

(Last visited 07-10-24). See also Rule 1.2 of the Georgia Rules of Professional Conduct, State Bar of Georgia, <https://www.gabar.org/barrules/georgia-rules-of-professional-conduct.cfm> (Last visited 07-10-24)(In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.) See also Comment 2 to Rule 1.2 of the Georgia Rules of Professional Conduct, State Bar of Georgia, <https://www.gabar.org/barrules/georgia-rules-of-professional-conduct.cfm> (Last visited 07-10-24). ([L]awyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.) See also Comment 2 to Rule 1.2 of the Georgia Rules of Professional Conduct, State Bar of Georgia, <https://www.gabar.org/barrules/georgia-rules-of-professional-conduct.cfm> (Last visited 07-10-24). (Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.)

¹⁰ See *Sell v. United States*, 539 U.S. 166, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003); *Warren v. State*, 297 Ga. 810, 778 S.E.2d 749 (2015); *Johnson v. State*, 341 Ga. App. 384, 801 S.E.2d 82 (2017).

¹¹ See e.g. *In re Shea*, 110 So. 3d 414 (Fla. 2013)(Judge disciplined for making demeaning comments to counsel in open court).

¹² See *Judicial Professionalism*, The Supreme Court of Ohio Commission on Professionalism, Commission Publications, Professionalism Dos and Don'ts: Judicial Professionalism ("DON'T hold attorneys or litigants accountable for events beyond their control" and "DON'T chastise, correct, or question, attorneys in a demeaning manner, especially in front of their clients or the jury.")(Emphasis in the original.), <https://www.supremecourt.ohio.gov/docs/Publications/AttySvcs/judProfessionalism.pdf> (Last visited 07-10-24). See also Rule 1.2 of the Georgia Rules of Professional Conduct, State Bar of Georgia, <https://www.gabar.org/barrules/georgia-rules-of-professional-conduct.cfm> (Last visited 07-10-24)(In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.) See also Comment 2 to Rule 1.2 of the Georgia Rules of Professional Conduct, State Bar of Georgia, <https://www.gabar.org/barrules/georgia-rules-of-professional-conduct.cfm> (Last visited 07-10-24). ([L]awyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.) See also Comment 2 to Rule 1.2 of the Georgia Rules of Professional Conduct, State Bar of Georgia, <https://www.gabar.org/barrules/georgia-rules-of-professional-conduct.cfm> (Last visited 07-10-24). (Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.)

¹³ *Judicial Professionalism*, The Supreme Court of Ohio Commission on Professionalism, Commission Publications, Professionalism Dos and Don'ts: Judicial Professionalism ("DON'T

chastise, correct, or question, attorneys in a demeaning manner, especially in front of their clients or the jury.”)(Emphasis in the original.),

¹⁴ See *A Lawyer’s Creed and the Aspirational Statement on Professionalism* at Lines 103-104, 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 07-10-24).

¹⁵ See *A Lawyer’s Creed and the Aspirational Statement on Professionalism* at Lines 13-15, 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 07-10-24).

¹⁶ See *A Lawyer’s Creed and the Aspirational Statement on Professionalism* at Line 108, 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 07-10-24).

¹⁷ See Rule 1.2 of the Georgia Rules of Professional Conduct, State Bar of Georgia, <https://www.gabar.org/barrules/georgia-rules-of-professional-conduct.cfm> (Last visited 07-10-24). See also *Sell*.

¹⁸ The ethical guidelines about client decision making in a criminal setting are distinct from Rule 1.14 of the Georgia Rules of Professional Conduct, State Bar of Georgia, <https://www.gabar.org/barrules/georgia-rules-of-professional-conduct.cfm> (Last visited 07-10-24). In relation to involuntary medication, “[The United States Supreme] Court repeated that an individual has a constitutionally protected liberty interest in avoiding involuntary administration of antipsychotic drugs” *Sell*, 539 U.S. at 178–79 (cleaned up). This right must therefore be vindicated through advocacy on behalf of the Defendant by his or her attorney.