

# **Ethical Considerations for the Condemnor and Condemnee: How to Keep it Professional**

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## **Ethical Considerations for the Condemnor and Condemnee: How to Keep it Professional**

Over the years, the term “professional” has lost some of its esteem as people deemed “professionals” in all different arenas have been in the spotlight for everything from embezzlement to performance-enhancing drugs to murder. As media and society attempt to degrade the idea of professionalism, there is not a more important time as members of a profession, to be reminded of the basic tenants of the legal profession and how to diligently practice law as professionals.

The Georgia Rules of Professional Conduct have for years formed the basis of our ethical and professional rules, goals and standards that get us through the many challenges to fulfilling our responsibilities as lawyers. The Preamble to the Rules is worth re-reading as a reminder to who we are as individual lawyers and who we are together as a profession. The Rules don’t give a hard and fast answer to every question, but they give a road map through the danger zones.

“The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms of “shall” or “shall not.” ... Others, generally cast in the terms of “may” or “should,” are permissive or aspirational and define areas under the Rules in which the lawyer has professional discretion. ... The Rules are thus partly obligatory and disciplinary and partly aspirational and descriptive. Together they define a lawyer’s professional role. Comments do not add obligations to or expand Rules but provide guidance for practicing in compliance with the Rules.”<sup>1</sup>

The permissive or aspirational areas of the Rules are now further defined in what we call Professionalism; what we should do over and beyond what we have to do.

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<sup>1</sup> Preamble, Scope, Section [13].

The Chief Justice’s Commission on Professionalism adopted the Lawyer’s Creed and Aspirational Statement on Professionalism as a public statement to “serve as encouragement, guidance and assistance to individual lawyers, law firms, and bar associations as they recognize the special obligations that attach to their calling and their responsibility to serve others.”<sup>2</sup> The Lawyer’s Creed states:

**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.

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

**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.<sup>3</sup>

The general public loves a good lawyer joke that calls into question the professionalism and ethics of our profession. Unfortunately, the general public’s opinion is hard to change, as our profession reaches directly only those who seek legal assistance. Condemnation, however, is a unique power that pulls members of the general public into our services—requiring land owners, business owners, or home

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<sup>2</sup> <http://www.gabar.org/aboutthebar/lawrelatedorganizations/cjcp/lawyers-creed.cfm>

<sup>3</sup> Id.

owners to become involved in a legal action that they did not bargain for. Therefore, condemnation attorneys have a unique opportunity to promote the legal profession to the general public who might not otherwise come to need the services of the legal profession. In addition, because condemnation is a specialized area of the law, the Georgia section of condemnation attorneys is a relatively small, close-knit group. Because of condemnation clientele and the size of our condemnation section, the Lawyer's Creed and Aspirational Statement on Professionalism are even more important, since attorneys will most likely be working with each other frequently and the Condemnees are members of the public who would not normally be engaging with the legal profession. Condemnation attorneys have a unique position to fulfill the Lawyer's Creed and further the esteem of the legal profession.

## **I. Obligation to Client**

Condemnation is different from other types of civil litigation, and because it is a specialized area, attorneys owe a special obligation to the client to be competent in both condemnation substance and procedure.<sup>4</sup> The Georgia Supreme Court has called the power of eminent domain “perhaps the greatest power vested in the General Assembly.”<sup>5</sup> It is our responsibility as attorneys for Condemnors and Condemnees to insure that this power is exercised fairly. As competent condemnation attorneys, we should remember:

- Engagement Letters

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<sup>4</sup> See Rule 1.1: “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.”

<sup>5</sup> *Department of Transportation v. City of Atlanta*, 255 Ga. 124, 142, 337 S.E.2d 327, 341 (1985).

- Establishing the scope of the engagement
- Declining the Engagement
- If you don't know how to do it, find somebody who does
- Timely Notice of Appeal
  - Protect your Client
- Keep client informed of project progress/concerns<sup>6</sup>
- Recommend experts when necessary
  - Bring the right team to the case
- Protect Confidential Information<sup>7</sup>
  - How ethical is your password?
  - Casual Conversation and Gossip
  - Social Media Use and Abuse
  - Information Stored in or Transmitted by computers, scanners, copiers and mobile devices

## **II. Obligation to Opposing Parties and Counsel**

Striving for fairness, integrity and civility when working with opposing parties and counsel may be the most challenging portion of the Lawyer's Creed. In an

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<sup>6</sup> See Rule 1.4: (a) A lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(h), is required by these Rules; reasonably consult with the client about the means by which the client's objectives are to be accomplished; keep the client reasonably informed about the status of the matter; promptly comply with reasonable requests for information; and consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

<sup>7</sup> See Rule 1.6(a): A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client, unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these Rules or other law, or by order of the Court.

adversarial role, it can be easy to cast the opposing parties and counsel as enemies, and treat them as such. However, professionals understand the importance of cooperating with opposing counsel in a manner consistent with competent representation of all parties and treating opposing counsel with civility.<sup>8</sup> Particularly, in condemnation law, problems could arise in the following areas:

- Depositions
  - o Keep them civil
- Settlement
  - o Keep a courteous timetable
- Discovery
  - o Simple Courtesies
  - o Do you really need to object to every question?
- Keep in Mind: the opposing party and attorney are not the devil.

### **III. Obligation to the Court**

An attorney owes the court honesty, respect, and deference, as well as coming prepared with the knowledge of court rules, procedures, and applicable law. Especially in condemnation cases, the attorney may need to explain the nuances of the law to the Court, who may not be as familiar with this area of litigation. An attorney has a professional and ethical duty to present accurate case law on an issue.<sup>9</sup> Condemnation

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<sup>8</sup> See Aspirational Statement on Professionalism

<sup>9</sup> See The Lawyer's Creed and Aspirational Statement on Professionalism. See also. Rule 3.3(a) Candor Toward the Tribunal, Comment 4: "Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case."

attorneys should also be mindful of and respect the Court's time. When condemnation cases do proceed to trial, they can be long and complicated. It might be best to have the case specially set on the Court's calendar, to avoid clogging the remaining civil trial calendar.

#### **IV. Obligation to Colleagues Practicing Law, the Profession, and the Public**

In order for the legal profession to stand out as professionals in the community, it is important for attorneys to remember their obligations to other attorneys, the profession of law itself, and the general public. Attorneys should offer assistance and guidance to other attorneys when able or refer potential clients to another attorney if it fits the client's best interest. One attorney's actions may be the only interaction a person from the general public has with the legal profession. Therefore, an attorney has an obligation to the profession to stay knowledgeable in the law and maintain a professional reputation. As part of the legal profession, an attorney takes on an additional obligation to the general public, to seek the common good and improve our laws and legal system for all.

#### **V. When Professionalism Gets Hard**

For most attorneys, professionalism comes as second nature and is just the "right way to act." However, professionalism may place an attorney in a difficult position, requiring even the most ethical and professional attorney to question the right course of action, since an attorney is obligated to protect the public from incompetent or wrongful

lawyering by reporting other attorneys of ethical violations.<sup>10</sup> Choosing whether to report a colleague can be difficult. However, making the right decision on how to proceed when another attorney crosses the line of professionalism upholds the Lawyer's Creed and keeps the legal profession professional.

When colleagues can cross the professional line:

- Improper solicitation/contact
- Improper motive in claims and contentions<sup>11</sup>
- Improper Trial Conduct
  - o What You Can Do v. What You Should Do<sup>12</sup>

Representing clients through the eminent domain process that is “perhaps the greatest power vested in the General Assembly” is a responsibility that should be taken

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<sup>10</sup> See Rule 8.3(a): Though there is no penalty for a violation of this rule, “A lawyer having knowledge that another lawyer has committed a violation of the Georgia Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, should inform the appropriate professional authority.”

<sup>11</sup> See Rule 3.1: In the representation of a client, a lawyer shall not: file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another; knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law.

<sup>12</sup> See Rule 3.3 at Footnote 9. See also Rule 3.4: A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; (b) falsify evidence; counsel or assist a witness to testify falsely; or pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of: expenses reasonably incurred by a witness in preparation, attending or testifying; or reasonable compensation to a witness for the loss of time in preparing, attending or testifying; or a reasonable fee for the professional services of an expert witness; (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless: the person is a relative or an employee or other agent of a client; or the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; and the information is not otherwise subject to the assertion of a privilege by the client; and (g) use methods of obtaining evidence that violate the legal rights of the opposing party or counsel; or (h) present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter.

with competence, integrity, and civility.<sup>13</sup> As condemnation attorneys with such responsibility, it is important to actively practice the Lawyer's Creed and commit to being professionals, so that we may further promote the legal profession as one that is committed to improving the legal system and seeking the common good through the representation of our clients. A professional is defined by his or her actions when a challenging moment arises. Litigation creates challenging moments daily for condemnation attorneys, giving us the daily opportunity to keep it professional and diligently practice law as professionals.

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<sup>13</sup> *Department of Transportation v. City of Atlanta*, 255 Ga. 124, 142, 337 S.E.2d 327, 341 (1985).