

# HYPOTHETICAL PROBLEMS

FOR THE

CHIEF JUSTICE'S COMMISSION ON  
PROFESSIONALISM

## THE LAWYER AS WITNESS IN CRIMINAL LAW CASES

prepared by

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## **PROFESSOR PATRICK LONGAN**

Professor Patrick Longan is the William Augustus Bootle Chair in Professionalism and Ethics at the Mercer University School of Law. He is a nationally recognized leader in the field of legal ethics and professionalism. Among other positions he holds, Professor Longan is the director of the [Mercer Center for Legal Ethics and Professionalism](#) and a member of the Georgia Chief Justice's Commission on Professionalism. He also serves on the State Bar of Georgia's Formal Advisory Opinion Board and its Disciplinary Rules and Procedures

Committee. In 2018, the Supreme Court of Georgia appointed Professor Longan as one of twenty special masters who hear disciplinary cases involving lawyers in Georgia.

Professor Longan teaches Mercer's first year course on professionalism, the upper-level Law of Lawyering course, Jurisdiction and Judgments, and Judicial Field Placement. He received the 2005 National Award for Innovation and Excellence in Teaching Professionalism from the Conference of Chief Justices, the ABA Standing Committee on Professionalism, and the Burge Endowment for Legal Ethics. In his academic career, Professor Longan has also taught at Stetson University, the University of Florida, Southern Methodist University, the Charleston School of Law, John Marshall (Atlanta) Law School, and Georgia State University School of Law. Before entering law teaching, Professor Longan served as a law clerk to Senior United States District Judge Bernard M. Decker in Chicago and practiced law with the firm of Andrews & Kurth in Dallas, Texas.



## **MEAGAN HURLEY**

Meagan Hurley joined the Mercer Law faculty as an Assistant Professor of Law in August 2023. Her teaching and research focus on criminal law and procedure, with particular expertise on post-conviction litigation and wrongful convictions.

Professor Hurley instructs courses on Criminal Law, Post-conviction Practice & Remedies, and Client Counseling, in addition to leading The Habeas Project, Mercer Law's nationally recognized post-conviction defense clinic. In

the Habeas Project, Professor Hurley supervises third-year students who provide pro bono representation for convicted persons without the right to appointed counsel whose constitutional rights have been violated. Her scholarly work focuses on conviction integrity, official misconduct and accountability, and access to justice.

Before joining the faculty, Professor Hurley's previous legal experience involved indigent criminal defense advocacy in the Deep South. She represented wrongfully convicted individuals with the Georgia Innocence Project, serving first as its Alabama Fellow and later as its Accountability Counsel, specializing in innocence cases involving official misconduct. While working in Alabama, Professor Hurley helped create and co-instructed the Cumberland Innocence Clinic at Samford University's Cumberland School of Law, one of the school's two inaugural clinical programs.

A proud alumna of Mercer Law, Professor Hurley worked as a student public defender in Houston County and as a clerk for the Office of the Georgia Capital Defender during law school, in addition to serving as a member of the Habeas Project and as an intern at Georgia Innocence Project. Professor Hurley has worked on teams that have helped free or exonerate four men who served a combined 115 years in prison for crimes they did not commit. She remains active in several bar associations and committees and is licensed to practice law in Georgia, Alabama, and South Carolina.

Professor Hurley earned her B.A. in Communication Arts from Reinhardt University and her J.D. from Mercer University School of Law. She was the recipient of Mercer Law's Clover Award for Indigent Defense Advocacy and Social Justice Lawyering in 2019, and was named the Reinhardt University Distinguished Alumna of the Year in 2024.

### **Scenario #1**

Marsha Adams is serving as appellate counsel for Bob Smith, who was convicted of aggravated assault. After Adams read the trial transcript, she tried to contact Stephen Nash, who had been trial defense counsel, to see the discovery Nash received from the prosecutor. Because Nash was out of town, the State kindly allowed Adams to bring an external hard drive to the DA's office, where an ADA put the discovery for the case on it.

On the hard drive, Adams found a statement of the complaining witness (labeled "Witness Statement 4 of 4") that would have tended to negate Smith's guilt. Nash, the defense counsel at the trial, did not use the statement. Adams wrote a first draft of a Motion for New Trial claiming ineffective assistance of counsel, but she waited to file it so that she could first speak to Nash.

When Adams and Nash eventually talked, Nash was irate and claimed he never received "Witness Statement 4 of 4" and that he would have used it if he had. Nash invited Adams and her investigator to his office to show them the discovery he received on an external hard drive from the DA's office before trial. In that external hard drive, there were files labeled "Witness Statement 1 of 4," "Witness Statement 2 of 4," and "Witness Statement 3 of 4." There was no file labeled "Witness Statement 4 of 4" in the discovery given to Nash before trial.

Adams, now not knowing if this was a Brady issue or an ineffective assistance of counsel issue, raised it as both in the Motion for New Trial. John Brock, the ADA who handled the trial, doubts that Nash did not receive the exculpatory document. Even if for some reason "Witness Statement 4 of 4" was not provided to Nash, Brock is offended by the suggestion that he purposefully withheld it. Evelyn Robertson is the ADA who will represent the State at the hearing on the Motion for New Trial. Robertson firmly believes that there is no likelihood that the statement would have led to any different result at trial. Nash, on the other hand, is livid that Brock withheld the statement from him. Nash refuses to accept any responsibility for not realizing that there should have been a fourth statement from the witness in the discovery he received.

Adams subpoenas Brock and his assistant for the hearing on the motion for new trial. Adams also subpoenas Nash and his assistant. Adams does not care how she wins the Motion for New Trial. But she fears that the court will doubt Nash's credibility and find that Nash actually had the statement and strategically chose not to use it.

## Questions

1. The scenario says that the “missing” statement would have “tended to negate the guilt” of the defendant. Is it a violation of the Brady obligation not to turn over every document that “tends to negate the guilt” of the accused? Is the failure to do so misconduct under Georgia Rule of Professional Conduct 3.8(d)? Which standard should control Brock’s conduct?

**Brady materiality standard: Is there a reasonable likelihood that the result of the trial would have been different?**

**Georgia Rule 3.8(d): “A prosecutor in a criminal case shall ... (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense....”**

2. Assume that Nash, the trial defense counsel, did not notice that he only had three of the four witness statements. Would that failure potentially be a basis for a finding of ineffective assistance of counsel? Would it constitute misconduct under Georgia Rules of Professional Conduct 1.1 and/or 1.3? What habits, routines, or processes could Nash develop to prevent another such mistake in the future?

**Ineffective assistance of counsel standard: Was the lawyer’s performance professionally deficient, and if so, did the deficiency prejudice the defendant? Strickland v. Washington.**

**Georgia Rule 1.1: “A lawyer shall provide competent representation to a client. ... Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.**

**Georgia Rule 1.3: “A lawyer shall act with reasonable diligence and promptness in representing a client. Reasonable diligence as used in this rule means that a lawyer shall not without just cause to the detriment of the client in effect willfully abandon or willfully disregard a legal matter entrusted to the lawyer.”**

3. Assume instead that Brock did not provide Nash “Witness Statement 4 of 4” in discovery. In each of the following variations, did Brock violate the Georgia Rules of Professional Conduct?

(a) Suppose Brock negligently omitted the statement (perhaps by not noticing that his assistant had omitted it). Also: What habits, routines, or processes could Brock develop to prevent another such mistake in the future?

**See Rule 5.3(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.**

(b) Suppose Brock noticed that his assistant had omitted the statement and chose not to correct the error before delivering the discovery to Nash.

**Rule 5.3(c): “a lawyer shall be responsible for conduct of such a person that would be a violation of the Georgia Rules of Professional Conduct if engaged in by a lawyer if:**

- 1. the lawyer ... with the knowledge of the specific conduct, ratifies the conduct involved; or**
- 2. the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action....**

(c) Suppose Nash instructed his assistant to omit the statement in the discovery delivered to Nash.

**Rule 5.3(c): “a lawyer shall be responsible for conduct of such a person that would be a violation of the Georgia Rules of Professional Conduct if engaged in by a lawyer if:**

- 1. the lawyer orders ... the conduct involved;**

**Rule 8.4(a): “It shall be a violation of the Georgia Rules of Professional Conduct for a lawyer to: (a) violate or knowingly attempt to violate the Georgia Rules of Professional Conduct ... through the acts of another....”**

4. At the hearing on the Motion for New Trial, Adams will question Nash, Brock, and their assistants. So will Robertson. The Georgia Aspirational Statement on Professionalism gives Georgia lawyers several aspirations that might conflict with each other at the hearing. How should Adams and Robertson balance the following competing aspirations:

- (a) A lawyer should aspire to put fidelity to the client above selfish interests.
- (b) A lawyer should model for others the regard due to all participants in our dispute resolution processes.
- (c) A lawyer should preserve the dignity and the integrity of our profession.

(d) A lawyer should aspire to treat opposing counsel in a manner consistent with his or her professional obligations and consistent with the dignity of the search for justice.

(e) A lawyer should avoid rudeness and other acts of disrespect.

(f) A lawyer should assist his or her colleagues to become better people in the practice of law.

(g) A lawyer should protect the public from incompetent or other wrongful lawyering and assist in the enforcement of the legal and ethical standards imposed on all lawyers.

## **Scenario #2**

Elizabeth Lynch is an appellate defense attorney who is handling a hearing on a motion for new trial for Buck Slater, who was convicted of armed robbery after a jury trial. Lynch alleges that Slater received ineffective assistance of counsel from his trial attorney, Jerry Riverton.

Lynch's review of the transcript revealed the following. Early in the trial, Riverton made numerous objections. The ADA often responded with speeches about how "ridiculous" the objections were. The judge frequently admonished Riverton for his objections and stated in front of the jury that many of them were "frivolous."

At several points, Riverton made objections that Lynch believes should have been sustained. But rather than rule on those objections, the judge told the ADA to "move on" or "ask your next question." The first few times this happened, Riverton asked for rulings, but eventually he stopped doing so. As the trial ground on, Riverton ceased objecting at all, even when there was clearly a basis for doing so.

Lynch interviewed Riverton about his performance at trial, especially his failure to obtain rulings for objections he made and his failure to object at all to some improper evidence. Riverton responded with annoyance: "I did the best I could under the circumstances. Reading that transcript does not convey the hostile tenor of the judge's voice and body language. I would have just invited more adverse rulings and even contempt if I had been my usual jack-in-the-box objector."

Lynch asked Riverton, "Was it a strategy not to get rulings on objections or not to object at all sometimes?" Riverton responds, "I was worried that, with this judge, there would have been repercussions against me and against my client in sentencing if he was convicted."

Lynch followed up: "Why didn't you put those fears on the record or ask the court to let you perfect your objections outside the presence of the jury?" Riverton responded angrily, "You appellate attorneys sit up in the replay booth and have time to nitpick what we do out there in the trenches, in real time. Unlike you, we have to make snap decisions on the spot in hostile environments. I'd like to see you try to do that."

Lynch decides that her only chance of obtaining a new trial is to allege and prove that Riverton rendered ineffective assistance of counsel.

## **Questions**

1. In this scenario, one of the issues for ineffective assistance is what a reasonable attorney would do when the trial judge is being abusive. Under the Georgia Rules of Professional

Conduct, what guidance is there for lawyers who find themselves in such a situation?

**See Rule 3.5(d) “A lawyer shall not ... engage in conduct intended to disrupt a tribunal.”**  
**Comment 8 to Rule 3.5 states: “While a lawyer may stand firm against abuse by a judge, the lawyer's actions should avoid reciprocation. Fairness and impartiality of the trial process is strengthened by the lawyer's protection of the record for subsequent review and this preserves the professional integrity of the legal profession by patient firmness.”**

2. In the scenario, the trial judge ridiculed the defense attorney’s objections, allowed the prosecutor to make lengthy statements about the objections and failed to rule on many of them. Did the judge violate the Georgia Code of Judicial Conduct?

**Rule 2.8(B): “Judges shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom they deal in their official capacity, and shall require similar conduct of all persons subject to their direction and control.”**

3. At the hearing on the Motion for New Trial, Riverton will be asked whether he thinks he made any mistakes in his representation of Slater. What are Riverton’s professional obligations with respect to that testimony? More generally, what is a lawyer’s responsibility when the lawyer realizes that the lawyer has made a material error in representing a client?

**On the need to testify truthfully, even if doing so is embarrassing:**

- **Rule 8.4(a)(4): “A lawyer shall not ... engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation....”**
- **O.C.G.A. 16-10-70(a): “A person to whom a lawful oath or affirmation has been administered commits the offense of perjury when, in a judicial proceeding, he knowingly and willfully makes a false statement material to the issue or point in question.”**

**On the more general duty to admit mistakes, see ABA Formal Op. 481 (2018): “Model Rule of Professional Conduct 1.4 requires a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client’s representation.”**

4. At the hearing on the Motion for New Trial, Lynch will question Riverton. The Georgia Aspirational Statement on Professionalism gives Georgia lawyers several aspirations that might conflict with each other at the hearing. How should Lynch balance the following competing aspirations:

- (a) A lawyer should aspire to put fidelity to the client above selfish interests.

(b) A lawyer should model for others the regard due to all participants in our dispute resolution processes.

(c) A lawyer should preserve the dignity and the integrity of our profession.

(d) A lawyer should avoid rudeness and other acts of disrespect.

(e) A lawyer should protect the public from incompetent or other wrongful lawyering and assist in the enforcement of the legal and ethical standards imposed on all lawyers.

### **Scenario #3**

Leo Bowman was a personal trainer employed by the Stockbridge, Georgia franchise of Get Real Fit,<sup>™</sup> (GRF), a nationwide chain of gyms. Members of GRF are entitled to book one-on-one training sessions with GRF personal trainers in a private mini-gym for additional modest hourly rate. Kellie Ferguson was a GRF member and booked a private session with Leo. Kellie and Leo agree that their private session ended in sexual intercourse. Leo claims it was consensual. Kellie accused Leo of rape. There is no evidence of the circumstances under which the intercourse occurred other than what Leo and Kellie say.

Leo is convicted of rape by a jury that deliberated for over twelve hours. He is sentenced to life in prison.

Luke Dantzler is an appellate defense attorney who begins investigating Leo's case. Luke soon learns that Kellie has sued GRF and is seeking millions of dollars in damages for the actions that Leo took while Leo was an employee of GRF. The suit was pending at the time of Leo's criminal trial but had not yet been served on GRF. Luke contacts GRF's attorneys in the civil case and reviews the deposition that Kellie gave in that case.

Kellie testified that she told the police right after the alleged rape that she was going to sue GRF "for what that monster did to me." This statement does not appear in any police report. Kellie also testified that she had told the victim advocate in the DA's office that she planned to sue GRF, and the victim advocate gave Kellie the names of several civil lawyers. Kellie hired one of the recommended lawyers.

As far as Luke can tell, no attorney in the DA's office, including David Withrow, the ADA who tried Leo's case, knew anything about Kellie's plans to file a civil case. Leo's trial counsel, Caroline Harris, also says that she did not know about the civil case. Caroline admits that she did not think to research that possibility and so did not search any civil dockets to look for such a case.

Luke files a Motion for New Trial and raises both a Brady/Giglio argument and an ineffective assistance claim. Luke argues that Withrow, the ADA who tried Leo's case, had imputed knowledge of the civil case because the police and the victim advocate had been told about it. Luke asserts that Caroline Harris rendered ineffective assistance in Leo's trial because she did not conduct any investigation about the possibility of a civil suit.

Withrow is livid that Luke is questioning his ethics over something he did not know and claims he could not have known. Withrow believes the civil suit is not material under the Brady/Giglio line of cases or Strickland. Caroline Harris, Leo's trial counsel, does not believe her representation was

unreasonable but is willing to testify that it was in order to protect Leo from what Harris believes is a gross injustice.

At the hearing on the Motion for New Trial, Luke intends to call to the stand: (1) Withrow, the ADA; (2) Harris, trial defense counsel; (3) the police officer to whom Kellie made the comment about suing GRF; (4) the victim advocate; (5) Kellie, the alleged victim; (6) Kellie's civil attorney; and (7) GRF's civil attorney.

### Questions

1. In the scenario, the ADA did not know about the existence of the civil suit. Is the failure to turn over the information a violation of Brady, as refined by Giglio? What habits, routines, or processes could the ADA's office develop to prevent another such situation in the future?

**Yes – duty to investigate – Kyles v. Whitley; prosecutor should make routine inquiry of all members of the prosecution team about Brady and Giglio information.**

**Also – knowledge by a member of the prosecution team (such as an officer or victim advocate) is imputed onto the prosecutor. Strickler v. Greene.**

2. Would the unknowing failure to turn over the information violate Georgia Rule of Professional Conduct 3.8(d)? If not, which standard should guide the prosecutor's conduct?

**3.8(d) The prosecutor in a criminal case shall ... make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense;**

**The stricter Brady/Giglio requirements should guide the prosecutor.**

3. How should Luke question the witnesses? Specifically:

- How should Luke question Kellie, the complaining witness, in a post-trial setting?
- How should Luke question Harris, especially given that Harris is willing to testify that her actions were unreasonable (even though she does not believe they were) in order to save Leo from a perceived injustice? **See GRPC 3.3(a)(4) (A lawyer shall not offer evidence that the lawyer knows to be false) and GRPC 3.4(b)(2) (A lawyer shall not counsel or assist a witness to testify falsely).**
- How should Luke question Withrow, the ADA who tried the case? (and how should Withrow testify in a professional way, despite his anger?)

4. The Georgia Aspirational Statement on Professionalism gives Georgia lawyers several aspirations that might conflict with each other at the hearing. How should Luke balance the following competing aspirations:

- (a) A lawyer should aspire to put fidelity to the client above selfish interests.
- (b) A lawyer should model for others the regard due to all participants in our dispute resolution processes.
- (c) A lawyer should preserve the dignity and the integrity of our profession.
- (d) A lawyer should avoid rudeness and other acts of disrespect.
- (e) A lawyer should protect the public from incompetent or other wrongful lawyering and assist in the enforcement of the legal and ethical standards imposed on all lawyers.
- (f) A lawyer should model for others the respect due to our courts and act with complete honesty.

## **Scenario #4**

Marvin County, Georgia has less than 20,000 residents and is part of a 4-county judicial circuit. It has less than 12 lawyers with offices in Marvinton. The small, rural community was rocked four years ago when Carl's Corner Store was robbed near closing time. Carl, an 80-year-old African-American Army veteran, was confronted by a slender, fair-skinned (but not white) man with a gun and wearing a "COVID-19 mask." The assailant demanded the cash from the register and as many packages of cigarettes and scratch-off lottery tickets as Carl could put in a bag. The only camera Carl has at his store was behind the counter and did not produce a digital or color image. Based on angles and the marks on the door frame, investigators believed that the assailant was 5'7" and held the gun in his left hand.

At the scene, Carl told the responding officers that he remembered hearing a very loud exhaust and seeing a strange green color when the car the robber was driving pulled into the parking lot. A week later, Ethan Perez was arrested at a QuikTrip in Morrow, Georgia as he attempted to redeem winning scratch off lottery tickets that were stolen as part of the robbery. Ethan's mom is Vietnamese, and his dad is Guatemalan. He is left-handed. When he was arrested, the police impounded his car, a Nissan 350Z with modified exhaust, and green instead of orange turn signals.

Morrow PD detained Ethan and notified Marvin County. An investigator drove up and interviewed Ethan. During the interview, the investigator advised Ethan of his rights but did not ask any further questions because Ethan invoked his right to counsel. Ethan was arrested and transported to the Marvin County Sheriff's Office and was charged with armed robbery and possession of stolen property.

The local community was outraged that someone from "the Big City" had come to the community and preyed upon one of its local merchants. Stories were recounted of Carl donating money to the local Scout troop for a project and how he had kept his gas prices low when other stores closer to the interstate popped up. Ethan was deemed indigent at his first appearance and a public defender was appointed to represent him. However, the public defender had a conflict and a local lawyer, Joseph Jenkins, Jr. was appointed as the conflict defender. Joey had an office across from the courthouse and had always expected to follow his father's path and become judge in the town. Nearing his 40<sup>th</sup> year practicing law, Joey knew there would be no further opportunities for such an appointment, and he was envisioning retirement. However, Joey was the first choice of most folks in town with a legal problem.

Joey entered the case and received the discovery. The case proceeded to trial, and the jury returned a guilty verdict in less than 30 minutes. The strongest part of the State's case was Carl's emphatic identification of Ethan as the robber.

Three years have now passed. The judge's court reporter at the time of the trial had to take leave to attend to her husband as he struggled with cancer. Now the transcript has been prepared and the Motion for New Trial is scheduled for a hearing. Carl passed away last year.

When the Appellate Public Defender started reviewing the case, he noticed that there was no plea offer in the file and that Joey's notes did not indicate that one was ever offered or extended. Ethan denies that he knew of a plea. His mom remembers Joey several times assuring her that Ethan was in good hands and that he would take care of Ethan no matter what. The trial prosecutor left shortly after the conviction to take a job at a law firm in Atlanta. She had been hired the week after the robbery right out of law school and lived the case with her colleagues. Her saved emails show a plea offer to robbery (10 serve 5) being sent to Joey and a response from him reading "Client has been attending community college, no need for GED probation requirement."

The Appellate Public Defender filed an open records request on the Sheriff's Office and the District Attorney's Office. Body camera footage was turned over to Joey. In speaking with his secretary, she explained that Joey watched parts of it, but because he didn't have a full license for the special software required to watch the videos, Joey hadn't seen all of the hours of footage. She also pointed out that every officer who testified and was on the witness list had actually come into Joey's office prior to trial for a sit-down interview. Joey has been less than helpful as more details come out about how he conducted the investigation and trial. The magistrate judge died recently, and Joey is one of two candidates being considered by the Superior Court Judges as the replacement.

On the night of the robbery, one of the responding deputies was speaking with Carl after the other deputies and investigators had left and the scene had been cleared and returned to Carl. Carl, who still visibly shaken, has a bottle of beer in his hand and his words are slightly slurred. The deputy asked Carl if he was ok to drive home. Carl assured the deputy that he was ok, just upset because he knew that they never would catch the guy who robbed him. The Deputy asked why, and Carl tells him "When I saw that gun, all I could focus was on the gun. I froze. I never really got a good look at his face."

Carl was never cross-examined on this statement. It was never written down and served separately by the State.

### Questions

1. In the scenario, the prosecutor conveyed a plea offer to defense counsel pre-trial, which trial counsel did not convey to the defendant. Does trial counsel's failure constitute evidence of ineffective assistance, and does it separately violate the Georgia Rules of Professional Conduct, even if the failure was inadvertent?

**IAC: Trial counsel's failure to convey a plea offer may satisfy first portion of Strickland test (professional deficiency) under *Missouri v. Frye*. Prejudice? Would the outcome of the proceeding been different, but for trial counsel's error? More information likely needed.**

**RPC 1.2(a): 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.**

**RPC 1.4: A lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent. Comment 2: If these rules require that a particular decision about the representation be made by the client, paragraph (a) (1) requires that the lawyer promptly consult with and secure the client's informed consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2 (a).**

**RPC 1.3: A lawyer shall act with reasonable diligence and promptness in representing a client. Reasonable diligence as used in this rule means that a lawyer shall not without just cause to the detriment of the client in effect willfully abandon or willfully disregard a legal matter entrusted to the lawyer.**

2. How should appellate counsel go about questioning trial counsel concerning his failure to convey the plea offer, given trial counsel's reluctance to testify, likely motivated by his judicial nomination? How should trial counsel testify, in light of the case's potential impact on his judicial prospects?

**As to appellate counsel –**

**The Georgia Aspirational Statement on Professionalism:**

**(b) A lawyer should model for others the regard due to all participants in our dispute resolution processes.**

- (c) A lawyer should preserve the dignity and the integrity of our profession.**
- (d) A lawyer should avoid rudeness and other acts of disrespect.**
- (e) A lawyer should protect the public from incompetent or other wrongful lawyering and assist in the enforcement of the legal and ethical standards imposed on all lawyers.**
- (f) A lawyer should model for others the respect due to our courts and act with complete honesty.**

**As to trial counsel –**

**RPC 8.4(a)(4): “A lawyer shall not ... engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation....”**

**O.C.G.A. 16-10-70(a): “A person to whom a lawful oath or affirmation has been administered commits the offense of perjury when, in a judicial proceeding, he knowingly and willfully makes a false statement material to the issue or point in question.”**

**On the more general duty to admit mistakes, see ABA Formal Op. 481 (2018): “Model Rule of Professional Conduct 1.4 requires a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client’s representation.”**

**The Georgia Aspirational Statement on Professionalism:**

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**(f) A lawyer should model for others the respect due to our courts and act with complete honesty.**

3. In the scenario, the State's case turned on Carl's identification of the defendant. Carl's statement to police that he did not get a good look at his attacker's face was not reduced to writing or separately served on trial counsel by the State; however, the statement was made on video via body camera footage, which was provided to trial counsel.

- (a) If trial counsel had access to the statement but did not utilize it because he failed to discover it as a result of his failure to watch the body camera footage in its entirety, may an ineffective assistance of counsel claim be properly brought against him? Would his conduct also support a violation of the Georgia Rules of Professional Conduct? What habits, routines, or processes could trial counsel's office develop to prevent another such situation in the future?

IAC: (1) professionally deficient performance; (2) prejudice. *Strickland v. Washington*. But what about the fact that trial counsel did speak with all law enforcement officers on the witness list? Does that change anything?

RPC 1.1: A lawyer shall provide competent representation to a client... Competence requires the legal knowledge, skill, **thoroughness and preparation** reasonably necessary for the representation.

RPC 1.3: A lawyer shall act with reasonable diligence and promptness in representing a client. Reasonable diligence as used in this rule means that a lawyer shall not without just cause to the detriment of the client in effect willfully abandon or willfully disregard a legal matter entrusted to the lawyer.

- (b) Did the prosecution have an obligation to independently inform trial counsel of Carl's statement, pursuant to *Brady* and its progeny and the Georgia Rules of Professional Conduct?

*Brady*: State has obligation to disclose favorable, material evidence in its possession that is not possessed by the defense. Defense had access to statement via body camera footage, but footage consisted of hours of material and was provided to defense in a format requiring special software licensure. So, was it reasonably accessible?

RPC 3.8(d): The prosecutor in a criminal case shall: make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense.

RPC 3.4(a): A lawyer shall not: unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. Comment 1: The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

- (c) Alternatively, if trial counsel did discover Carl's statement by watching the relevant portions of the body camera footage or by virtue of interviewing the law enforcement officers on the prosecution's witness list, and still failed to cross-examine Carl on the statement, would his conduct support an ineffective assistance of counsel claim? Would it constitute a violation of the Georgia Rules of Professional Conduct?

IAC: (1) professionally deficient performance; (2) prejudice. *Strickland v. Washington*.

RPC 1.1: A lawyer shall provide competent representation to a client... Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

RPC 1.3: A lawyer shall act with reasonable diligence and promptness in representing a client. Reasonable diligence as used in this rule means that a lawyer shall not without just cause to the detriment of the client in effect willfully abandon or willfully disregard a legal matter entrusted to the lawyer.

4. The Georgia Aspirational Statement on Professionalism gives Georgia lawyers several aspirations that might conflict with each other. At an evidentiary hearing on the potential *Brady* / ineffective assistance of counsel claims, how should each of the following actors balance the competing aspirations set forth below: appellate counsel, trial counsel, the trial prosecutor.

(a) A lawyer should aspire to put fidelity to the client above selfish interests.

(b) A lawyer should model for others the regard due to all participants in our dispute resolution processes.

- (c) A lawyer should preserve the dignity and the integrity of our profession.
- (d) A lawyer should avoid rudeness and other acts of disrespect.
- (e) A lawyer should protect the public from incompetent or other wrongful lawyering and assist in the enforcement of the legal and ethical standards imposed on all lawyers.
- (f) A lawyer should model for others the respect due to our courts and act with complete honesty.