

# Mercer Law Review

---

Volume 71  
Number 1 *Annual Survey of Georgia Law*

Article 12

---

1-2020

## Legal Ethics

Patrick Emery Longan  
*Mercer University School of Law*, LONGAN\_P@law.mercer.edu

Follow this and additional works at: [https://digitalcommons.law.mercer.edu/jour\\_mlr](https://digitalcommons.law.mercer.edu/jour_mlr)



Part of the [Legal Ethics and Professional Responsibility Commons](#)

---

### Recommended Citation

Patrick Emery Longan, *Legal Ethics*, *Annual Survey of Georgia Law*, 71 Mercer L. Rev. 157 (20219).  
Available at: [https://digitalcommons.law.mercer.edu/jour\\_mlr/vol71/iss1/12](https://digitalcommons.law.mercer.edu/jour_mlr/vol71/iss1/12)

This Survey Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact [repository@law.mercer.edu](mailto:repository@law.mercer.edu).

# Legal Ethics

by Patrick Emery Longan\*

## I. INTRODUCTION

This Survey covers the period from June 1, 2018–May 31, 2019.<sup>1</sup> The Article discusses attorney discipline, ineffective assistance of counsel, bar admission, judicial ethics, malpractice, several miscellaneous cases involving legal ethics, and actions of the Formal Advisory Opinion Board.

## II. LAWYER DISCIPLINE<sup>2</sup>

### A. *Disbarments*<sup>3</sup>

#### 1. Trust Account and Other Financial Issues

The Georgia Supreme Court disbarred four attorneys during the survey period for misconduct that primarily related to their trust accounts or other financial issues.

---

\*William Augustus Bootle Chair in Ethics and Professionalism in the Practice of Law, Mercer University School of Law. Washington University (A.B., 1979); University of Sussex (M.A., 1980); University of Chicago (J.D., 1983). Member, State Bars of Georgia and Texas.

1. For an analysis of Georgia legal ethics during the June 1, 2017 to May 31, 2018 survey period, see Patrick Emery Longan, *Legal Ethics, Annual Survey of Georgia Law*, 70 MERCER L. REV. 141 (2018).

2. In addition to the matters recited in the text, the State Disciplinary Board imposed confidential discipline in the form of Letters of Formal Admonition in sixteen cases and Confidential Reprimands in fifteen cases between May 1, 2018 and April 30, 2019 (a slightly different time period than this survey). See Melody A. Glouton, *State Disciplinary Board*, 2019 REP. OF THE OFF. OF GEN. COUNS. OF THE ST. B. OF GA. at 6. ([https://www.gabar.org/barrules/ethicsandprofessionalism/upload/19\\_OGC\\_Report.pdf](https://www.gabar.org/barrules/ethicsandprofessionalism/upload/19_OGC_Report.pdf)). The State Disciplinary Board also dismissed 26 cases with Letters of Instruction. *Id.*

3. Lawyers in Georgia can submit petitions for voluntary discipline. GA. RULES OF PROF'L CONDUCT r. 4-227 (2019). The acceptance of a petition for voluntary discipline of disbarment (sometimes described as a voluntary surrender of the lawyer's license) is tantamount to disbarment by the court and is treated as such in this Article.

Anthony Eugene Cheatham was already suspended from the practice of law for failure to complete his continuing legal education requirements when he agreed to close a real estate transaction.<sup>4</sup> Mr. Cheatham received \$140,600 as the purchase money and \$1,000 in earnest money, but instead of disbursing the proceeds of the sale to the seller, Mr. Cheatham converted all the funds to his own use. After he closed the sale, Mr. Cheatham made some partial payments and misled the seller and the purchasers about the reasons why he did so.<sup>5</sup> Mr. Cheatham also “failed to timely prepare and record the warranty deed . . .; failed to communicate with the seller and purchasers regarding the deed; failed to account for the proceeds of the sale . . .; and abandoned the completion of the sale to the detriment of the seller and purchasers.”<sup>6</sup> Mr. Cheatham defaulted in the disciplinary process, and the supreme court disbarred him.<sup>7</sup>

George W. Snipes lost his license because he settled a client’s case without permission, converted most of the settlement funds, and defaulted in the disciplinary process.<sup>8</sup> After Mr. Snipes settled the case for \$300,000, the insurance company sent the settlement checks to his client who, on Mr. Snipes’s instruction, endorsed the checks and sent them to Mr. Snipes. Mr. Snipes sent the client \$170,000 and promised to pay the client’s outstanding medical bills and pay himself his attorney’s fees from the remaining funds, but instead Mr. Snipes converted all of the remaining money for himself.<sup>9</sup>

Richard Allen Hunt was disbarred for removing client funds from a trust account and using them for personal and business expenses.<sup>10</sup> Mr. Hunt took possession of approximately \$60,000 that belonged to a client’s two sons and then, according to his own testimony, withdrew the money from his trust account gradually and used it to fund a personal injury case he had filed, making a bet that the case would settle before he needed to repay the funds.<sup>11</sup> Mr. Hunt lost that bet.<sup>12</sup> The supreme court noted that the presumptive sanction for such intentional, harmful criminal conduct was disbarment.<sup>13</sup> There were

---

4. *In re Cheatham*, 304 Ga. 645, 645, 820 S.E.2d 668, 669–70 (2018).

5. *Id.*

6. *Id.* at 645–46, 820 S.E.2d at 670.

7. *Id.* at 645–47, 820 S.E.2d at 669–70.

8. *In re Snipes*, 303 Ga. 800, 800–01, 815 S.E.2d 54, 54–55 (2018).

9. *Id.* at 801, 815 S.E.2d at 55.

10. *In re Hunt*, 304 Ga. 635, 635–44, 820 S.E.2d 716, 716–23 (2018).

11. *Id.* at 637, 639–40, 820 S.E.2d at 718, 719–20.

12. *Id.* at 640 n.8, 820 S.E.2d at 720 n.8.

13. *Id.* at 641, 820 S.E.2d at 720.

numerous aggravating factors in the case, including a long prior disciplinary history, intentional misconduct, multiple violations (including numerous withdrawals of the money and lying to the client about what he was going to do with it), selfish and dishonest motive, failure to make restitution until compelled to do so, refusal to acknowledge the wrongful nature of his conduct, lack of remorse, vulnerability of the victims, and substantial experience in the practice of law.<sup>14</sup> The special master rejected Mr. Hunt's arguments that there were mitigating circumstances, and the supreme court agreed that Mr. Hunt should be disbarred.<sup>15</sup>

The supreme court rejected the special master's recommendation of a four-year suspension and disbarred Gary Lanier Coulter.<sup>16</sup> Mr. Coulter "administered very large sums of client-money for years, over \$1 million in 2011 alone, using 12 different bank accounts, none of which were trust accounts . . ." <sup>17</sup> He failed to keep accurate records of the funds and did not accurately account for money that was transferred from these accounts to his operating accounts, ostensibly as payment of hundreds of thousands of dollars of attorney's fees.<sup>18</sup> The special master found that there were three mitigating factors—remorse, good reputation, and interim rehabilitation—but the special master also found in aggravation that Mr. Coulter had substantial experience in the practice of law, a prior disciplinary history, and a dishonest or selfish motive. The special master also found that Mr. Coulter's conduct included multiple violations of the rules.<sup>19</sup> The supreme court concluded that disbarment was appropriate because of "the serious nature of the violations at issue here, the number of aggravating factors, including Coulter's prior disciplinary history," and because "the record facts demonstrate that Coulter did intend to violate the trust account rules."<sup>20</sup>

---

14. *Id.* at 642–43, 820 S.E.2d at 721–22.

15. *Id.* at 643–44, 820 S.E.2d at 722–23.

16. *In re Coulter*, 304 Ga. 81, 85, 816 S.E.2d 1, 4 (2018).

17. *Id.* at 83, 816 S.E.2d at 2.

18. *Id.* at 82–83, 816 S.E.2d at 2.

19. *Id.* at 85, 816 S.E.2d at 3.

20. *Id.* at 85, 816 S.E.2d at 4.

## 2. Client Abandonment or Lack of Communication

The supreme court disbarred three attorneys for misconduct that included client abandonment or failure to communicate.<sup>21</sup>

Jack S. Jennings lost his license because he abandoned a matter and then engaged in a course of misconduct following abandonment.<sup>22</sup> Mr. Jennings initially failed to answer requests for admission. When the client fired Mr. Jennings and new counsel sought the file, Mr. Jennings sent a partial file that omitted the evidence that Mr. Jennings had failed to answer the requests for admission in order to conceal that fact. Mr. Jennings did not appear at a hearing about turning over the entire file and still refused to do so after being ordered by the court to do so and being assessed attorney's fees (which he refused to pay). Mr. Jennings did not respond to the bar's formal complaint.<sup>23</sup> The supreme court considered aggravating factors, including intentionally concealing the misconduct (to the detriment of his client), ignoring the trial court's order to pay attorney's fees, substantial experience in the practice of law, multiple rule violations, failure to cooperate in the disciplinary process, refusal to acknowledge the wrongfulness of his conduct, and indifference to making restitution.<sup>24</sup>

Shannon Briley-Holmes was disbarred for misconduct in connection with the representation of eleven clients.<sup>25</sup> Her misconduct included client abandonment in seven cases (violations of Rule 1.3),<sup>26</sup> failure to communicate in three cases (violations of Rule 1.4),<sup>27</sup> failure to refund unearned fees and/or failure to forward a client's file to a new attorney (violations of Rule 1.16),<sup>28</sup> and filing a civil suit against a client without a valid factual basis (violation of Rule 3.1).<sup>29</sup> The special master recommended a five-year suspension, but the supreme court noted that it had never imposed such a long suspension other than for reciprocal discipline.<sup>30</sup> Although Ms. Briley-Holmes had presented evidence of personal or emotional problems, efforts to make restitution (in one

---

21. See *In re Larson*, 305 Ga. 522, 826 S.E.2d 99 (2019); *In re Jennings*, 305 Ga. 133, 823 S.E.2d 811 (2019); *In re Briley-Holmes*, 304 Ga. 199, 815 S.E.2d 59 (2018).

22. *In re Jennings*, 305 Ga. 133, 823 S.E.2d 811 (2019).

23. *Id.* at 134, 823 S.E.2d at 812–13.

24. *Id.* at 134–35, 823 S.E.2d at 813.

25. *In re Briley-Holmes*, 304 Ga. 199, 815 S.E.2d 59 (2019).

26. GA. RULES OF PROF'L CONDUCT r. 1.3 (2019).

27. GA. RULES OF PROF'L CONDUCT r. 1.4 (2019).

28. GA. RULES OF PROF'L CONDUCT r. 1.16 (2018).

29. GA. RULES OF PROF'L CONDUCT r. 3.1 (2018); *In re Briley-Holmes*, 304 Ga. at 199–205, 208–209, 815 S.E.2d at 60–63, 65.

30. *In re Briley-Holmes*, 304 Ga. at 207, 815 S.E.2d at 65.

case), inexperience in the practice of law, and cooperation (in six of the eleven cases), the court determined that she should be disbarred, because she knowingly engaged in a pattern of misconduct that caused serious injury to vulnerable clients and displayed indifference to making restitution to all but one of the clients.<sup>31</sup>

The supreme court disbarred Neil Larson after he defaulted with respect to four notices of discipline.<sup>32</sup> Mr. Larson had accepted payment in advance to represent four criminal defendants and abandoned all four. He also had made misrepresentations to one client's family about the status of the matter. There were no mitigating factors, and the aggravating factors included a dishonest motive in collecting fees and then abandoning the clients, substantial experience in the practice of law, multiple offenses, and a prior disciplinary history.<sup>33</sup>

### 3. Criminal Activity

Three Georgia lawyers lost their licenses during the survey period as a result of criminal conduct.<sup>34</sup>

The supreme court accepted Shannon DeWayne Patterson's petition for voluntary surrender of his license after he pled guilty in federal court to one count of aiding and assisting in the preparation and presentation of a false tax return.<sup>35</sup> The supreme court accepted the voluntary surrender of the license of Richard Scott Thompson after he was convicted of the felony of aggravated stalking.<sup>36</sup> David P. Rachel was disbarred following the exhaustion of his appeals from conviction in federal court for conspiracy and money laundering.<sup>37</sup>

### 4. Miscellaneous Disbarment

The supreme court disbarred one attorney for reasons other than financial misdeeds, client abandonment, or criminal activity.<sup>38</sup> Prince A. Brumfield, Jr. voluntarily surrendered his license and admitted that he

---

31. *Id.* at 206–09, 815 S.E.2d at 64–66.

32. *In re Larson*, 305 Ga. 522, 826 S.E.2d 99 (2019).

33. *Id.* at 522–23, 826 S.E.2d at 99–100.

34. See *In re Patterson*, 305 Ga. 38, 823 S.E.2d 264 (2019); *In re Thompson*, 305 Ga. 888, 828 S.E.2d 294 (2019); *In re Rachel*, 304 Ga. 826, 822 S.E.2d 195 (2018).

35. *In re Patterson*, 305 Ga. at 38, 823 S.E.2d at 264.

36. *In re Thompson*, 305 Ga. at 888, 828 S.E.2d at 294.

37. *In re Rachel*, 304 Ga. at 826, 822 S.E.2d at 195.

38. See *In re Brumfield*, 303 Ga. 803, 815 S.E.2d 52 (2018).

engaged in deceitful conduct by knowingly filing a deed that falsely purported to contain the signature of an individual.<sup>39</sup>

## B. Suspensions<sup>40</sup>

### 1. Six-month Suspensions

The supreme court suspended two lawyers for six months.<sup>41</sup> Ricardo L. Polk was suspended for six months (consecutive to a thirty-month suspension he was already serving) for failure to return unearned fees to a client after Mr. Polk was required to withdraw from the representation of the client due to the suspension related to other grievances.<sup>42</sup> The court determined Mr. Polk's disciplinary history was a factor in aggravation, while mitigation evidence included a lack of selfish or dishonest motive, remorse, cooperation with the bar, and acknowledgement of the wrongful nature of his conduct.<sup>43</sup>

S. Quinn Johnson received a six-month suspension because he committed multiple violations of his duties of diligence and communication and also failed to return unearned fees, filed pleadings while he was suspended from practice, and violated Rule 1.15(I)<sup>44</sup> (relating to trust accounts).<sup>45</sup> Mr. Johnson had been the subject of prior discipline and had substantial experience in the practice of law, but he presented significant mitigation evidence. The mitigating factors included personal and emotional problems at the time of the offenses, lack of a selfish or dishonest motive, restitution, cooperation with the bar, good reputation, and remorse. He also presented evidence that he had taken steps of interim rehabilitation such as consulting with the Law Practice Management Program of the state bar, continuing legal education regarding attorney–client relations and office procedures, and counseling for his personal problems.<sup>46</sup>

---

39. *In re Brumfield*, 303 Ga. at 803, 815 S.E.2d at 52.

40. This Article discusses only those suspensions that constitute final discipline and does not discuss interim suspensions.

41. See *In re Polk*, 304 Ga. 326, 818 S.E.2d 495 (2018); *In re Johnson*, 303 Ga. 795, 815 S.E.2d 55 (2018).

42. *In re Polk*, 304 Ga. at 326, 818 S.E.2d at 495.

43. *Id.* at 328, 818 S.E.2d at 496.

44. GA. RULES OF PROF'L CONDUCT r. 1.15(I) (2019).

45. *In re Johnson*, 303 Ga. at 795, 815 S.E.2d at 55.

46. *Id.* at 798–99, 815 S.E.2d at 58.

## 2. Suspensions Longer Than Six Months

The supreme court suspended five lawyers for longer than six months during the survey period.<sup>47</sup>

The supreme court accepted the fourth voluntary petition for discipline from Samuel Williams, who had pled guilty to a felony charge for selling unregistered securities in Alabama, and suspended Mr. Williams for twenty months, *nunc pro tunc* to the date he voluntarily ceased practicing law.<sup>48</sup> The court noted the following mitigating circumstances that justified the suspension rather than disbarment (the most common discipline for a felony conviction):

[Mr. Williams] was under considerable mental and emotional stress because of the near-concurrent bankruptcy of his law firm and diagnosis of his wife with metastatic breast cancer in the fall of 2009; that he has no prior disciplinary history or criminal record; that he served honorably in the military for 20 years; that he self-reported his conviction to the disciplinary authorities and has been cooperative; that his failure to register the securities was negligent and unintentional; that his failure to reject or secure the \$380,000 was negligent and without a selfish motive; that he is sincerely remorseful; that he has attempted to improve his own understanding of the law and to help others avoid the mistakes he made; and that he has complied with all of the terms of his probation. Williams also asserts that the nearly four-year delay between his self-reporting of the violation and the petition for appointment of a special master should be considered in mitigation. Additionally, the Alabama prosecutor sent a letter to the Bar saying that Williams was inexperienced, distressed because of his wife's illness, and extremely remorseful, and that the trial judge concluded that Williams's involvement in the criminal scheme was minimal.<sup>49</sup>

The court noted that generally a lawyer will not be reinstated while the lawyer is on probation for a crime because that would undermine respect for the legal system.<sup>50</sup> In Mr. Williams's case, however, the only thing that kept him subject to the continuing jurisdiction of the court in Alabama was his ongoing restitution obligation.<sup>51</sup> The supreme court

---

47. See *In re Williams*, 304 Ga. 832, 822 S.E.2d 827 (2019); *In re Saunders*, 304 Ga. 824, 822 S.E.2d 235 (2018); *In re Barnes*, 304 Ga. 324, 818 S.E.2d 497 (2018); *In re Podvin*, 304 Ga. 378, 818 S.E.2d 651 (2018); *In re Dale*, 304 Ga. 446, 819 S.E.2d 5 (2018).

48. *In re Williams*, 304 Ga. at 833, 822 S.E.2d at 827–28.

49. *Id.* at 833–34, 822 S.E.2d at 828.

50. *Id.* at 835 n.4, 822 S.E.2d at 829 n.4.

51. *Id.* at 834–35, 822 S.E.2d at 828–29.



decided that suspension was appropriate given that it was likely that Mr. Williams would never be able to make full restitution and therefore waiting for that condition to be fulfilled and for complete release from the jurisdiction of the Alabama court would result, in effect, with an “endless suspension.”<sup>52</sup>

The court also accepted a voluntary petition for discipline in the form of a twelve-month suspension from Amber Cecile Saunders.<sup>53</sup> Ms. Saunders converted over \$26,000 in client funds to her own use at a time when she was suffering extreme emotional distress and financial difficulties stemming from being the victim of domestic violence.<sup>54</sup> The supreme court imposed a twelve-month suspension in light of the circumstances and other mitigating factors, including full restitution to the client, cooperation with the disciplinary process, good character, and remorse.<sup>55</sup> The court rejected the suggestion that Ms. Saunders’s inexperience in the practice of law should be a mitigating factor, noting that “even a first-year law student should understand that conversion of client funds for personal use is impermissible.”<sup>56</sup>

The supreme court accepted a petition for voluntary discipline and suspended Nathaniel Antonio Barnes, Jr. for twenty-one months after he pled guilty to felony possession of cocaine and misdemeanor disorderly conduct.<sup>57</sup> Mr. Barnes was found walking around the common area of his condominium complex in his underwear and holding a knife, in the midst of a delusional episode caused by three days of cocaine use and lack of sleep. Although conviction of a felony often results in disbarment, Mr. Barnes presented significant mitigating evidence: lack of a prior disciplinary record or dishonest motive, depression, addiction, acceptance of responsibility, cooperation with the bar, good professional reputation, and remorse.<sup>58</sup> The court issued a slightly longer suspension than an otherwise similarly-situated lawyer received because of the knife that Mr. Barnes was wielding during the episode that led to his arrest.<sup>59</sup> Mr. Barnes entered a drug court program, upon completion of which the prosecution would dismiss

---

52. *Id.* at 835, 822 S.E.2d at 829.

53. *In re Saunders*, 304 Ga. at 824, 822 S.E.2d at 236.

54. *Id.* at 824–25, 822 S.E.2d at 236.

55. *Id.* at 825, S.E.2d at 236–37.

56. *Id.* at 825 n.2, 822 S.E.2d at 236 n.2.

57. *In re Barnes*, 304 Ga. at 324, 818 S.E.2d at 498.

58. *Id.* at 324–25, 818 S.E.2d at 498.

59. *Id.* at 325, 818 S.E.2d at 499.

the charges, and Mr. Barnes's reinstatement was conditioned upon successful completion of the drug court program.<sup>60</sup>

Scott L. Podvin was suspended for eighteen months as reciprocal discipline.<sup>61</sup> Mr. Podvin had been suspended in Florida for misconduct in connection with lack of diligence, failure to communicate with clients, submission of "an agreed order" to a court that in fact had not been agreed upon, and *ex parte* communications with a court.<sup>62</sup>

Matthew Thomas Dale successfully petitioned for voluntary discipline in the form of an eighteen-month suspension.<sup>63</sup> Mr. Dale pled guilty to the felony of being a Peeping Tom and was sentenced as a first offender to four years of probation. Mr. Dale's offense was mitigated by lack of prior discipline, evidence of personal and emotional problems at the time, cooperation in the disciplinary process, remorse, good character, acknowledgement of the nature of his wrongdoing, and the lack of any relationship between his conduct and the practice of law.<sup>64</sup>

### C. Public Reprimands

The supreme court ordered two public reprimands during the survey period.<sup>65</sup>

The court imposed a public reprimand on Heather E. Jordan, a relatively inexperienced lawyer who had no prior disciplinary record.<sup>66</sup> Ms. Jordan failed to communicate with a client about a matter, did not do the necessary work, provided incorrect responses in discovery, and eventually stopped working on the case and communicating with the client entirely. The client obtained another attorney, but Ms. Jordan initially did not send the file to her successor.<sup>67</sup> The supreme court determined that Ms. Jordan had violated her duties of consultation with the client (Rule 1.2),<sup>68</sup> diligence (Rule 1.3), communication (Rule 1.4), and duties upon withdrawal (Rule 1.16).<sup>69</sup>

The supreme court also accepted a petition for voluntary discipline in the form of a public reprimand to resolve two disciplinary matters

---

60. *Id.* at 326, 818 S.E.2d at 499.

61. *In re Podvin*, 304 Ga. at 378, 818 S.E.2d at 651.

62. *Id.* at 379, 818 S.E.2d at 652.

63. *In re Dale*, 304 Ga. at 447, 819 S.E.2d at 6.

64. *Id.* at 446–47, 819 S.E.2d at 6.

65. See *In re Jordan*, 305 Ga. 35, 823 S.E.2d 257 (2019); *In re Cherry*, 305 Ga. 667, 827 S.E.2d 239 (2019).

66. *In re Jordan*, 305 Ga. at 35, 823 S.E.2d at 257.

67. *Id.* at 35–36, 823 S.E.2d at 257–58.

68. GA. RULES OF PROF'L CONDUCT r. 1.2 (2018).

69. *In re Jordan*, 305 Ga. at 36, 823 S.E.2d at 258.

involving Melody Yvonne Cherry.<sup>70</sup> One of the matters involved her violation of Rule 1.15 (I)(b)<sup>71</sup> by disbursing settlement funds to a client without satisfying the bill of a chiropractor who had provided services to the client based upon Ms. Cherry's representation that the bill would be paid from the settlement. In the other matter, Ms. Cherry was contacted by a prospective client in connection with an automobile accident. Even though the prospective client did not hire her, Ms. Cherry sent a letter to the other driver's insurance company supposedly from the prospective client. The letter falsely purported to have the prospective client's signature on it, and Ms. Cherry's employee notarized the forged signature at Ms. Cherry's direction.<sup>72</sup> The supreme court took note of mitigating circumstances but denied the earlier petition because Ms. Cherry did not demonstrate that she had satisfied the chiropractor's outstanding bill.<sup>73</sup> The court accepted the second petition when Ms. Cherry provided evidence that she had done so.<sup>74</sup>

#### *D. Review Board Reprimands*

The supreme court accepted a voluntary petition for discipline in the form of a review board reprimand from Lakeisha Tennille Gantt.<sup>75</sup> Ms. Gantt accepted a fee to represent a client in connection with an adoption. Ms. Gantt then neglected to complete the necessary paperwork over the ensuing three years, and during that time she failed to communicate with the client as required by Rule 1.4.<sup>76</sup> The supreme court accepted the voluntary petition, despite the fact that Ms. Gantt had been disciplined before, in light of mitigating factors.<sup>77</sup> The mitigation included that Ms. Gantt had experienced personal and emotional problems that required treatment and counseling during the relevant time period. Ms. Gantt also apologized to the client, offered to refund the fee, lacked a dishonest or selfish motive, and cooperated with the disciplinary process.<sup>78</sup>

---

70. *In re Cherry*, 305 Ga. at 667, 827 S.E.2d at 239.

71. GA. RULES OF PROF'L CONDUCT r. 1.15(I) (2019).

72. *In re Cherry*, 305 Ga. at 668–69, 827 S.E.2d at 240.

73. *In re Cherry*, 304 Ga. 836, 840, 822 S.E.2d 823, 826 (2019).

74. *In re Cherry*, 305 Ga. at 670–71, 827 S.E.2d at 241.

75. *In re Gantt*, 305 Ga. 722, 827 S.E.2d 683 (2019).

76. *Id.* at 722–23, 827 S.E.2d at 684.

77. *Id.*

78. *Id.* at 723, 827 S.E.2d at 684.

*E. Petition for Reinstatement Rejected*

The supreme court accepted the recommendation of the state disciplinary review board and rejected a suspended attorney's petition for reinstatement.<sup>79</sup> The court suspended Alvis Melvin Moore in 2016 and imposed as a condition of reinstatement that Mr. Moore had to provide a "detailed, written evaluation by a licensed psychologist or psychiatrist that Moore was mentally competent to practice law . . . ."<sup>80</sup> The review board found that the attorney's petition for reinstatement should be rejected because the lawyer's psychological evaluation

[D]id not address Moore's mental fitness to practice law and that the psychologist did not describe any familiarity with the rigors and demands of the practice of law, did not have a clear understanding of the facts, and appeared to be unaware of the specific request from this Court for a written evaluation certifying that Moore was "mentally competent to practice law."<sup>81</sup>

The supreme court agreed and rejected the petition for reinstatement.<sup>82</sup>

*F. Petitions for Voluntary Discipline Rejected<sup>83</sup>*

The supreme court rejected a petition for voluntary discipline in the form of a public reprimand from Denise F. Hemmann, an attorney with an extensive disciplinary history who sought to resolve charges that she abandoned and failed to communicate with a client and that she withdrew from representing the client without taking steps to protect the client's interests.<sup>84</sup> The court was particularly concerned about the possibility that Ms. Hemmann's most recent offenses involved conduct similar to what led to the prior discipline and that the most recent violations were a continuation of a pattern of client abandonment.<sup>85</sup> The record was silent on these questions, and in the absence of such evidence, the court declined to accept the petition.<sup>86</sup>

---

79. *In re Moore*, 305 Ga. 419, 825 S.E.2d 225 (2019).

80. *Id.* at 420, 825 S.E.2d at 226.

81. *Id.*

82. *Id.* at 421, 305 S.E.2d at 227.

83. In addition to the cases described in this section, as noted above the supreme court rejected a petition for voluntary discipline from Melody Yvonne Cherry before accepting a later one. *In re Cherry*, 304 Ga. 836, 822 S.E.2d 823 (2019).

84. *In re Hemmann*, 304 Ga. 632, 820 S.E.2d 671 (2018).

85. *Id.* at 635, 820 S.E.2d at 673.

86. *Id.*

The court also rejected a petition from David Thomas Dorer, a lawyer who signed a client's name to a document and noted on the document that he had done so with the client's permission.<sup>87</sup> Mr. Dorer's assistant then notarized the signature. Mr. Dorer was later indicted for two felonies, filing a false statement with a government agency and filing a false document in court. Mr. Dorer negotiated a guilty plea to a misdemeanor. He then sought voluntary discipline from the supreme court for having engaged in deceitful or dishonest conduct,<sup>88</sup> but the court rejected the petition because it did not contain enough facts to inform the court what actually happened and to show such a violation.<sup>89</sup> Mr. Dorer's notation that he had express permission to sign his client's name would negate any deceit if he actually had such permission, and the petition did not state otherwise.<sup>90</sup> The court followed a line of previous cases in which it rejected voluntary petitions when they "lacked sufficient detail for us to determine that a violation actually occurred or for us to understand the nature of the conduct amounting to the violation."<sup>91</sup> Chief Justice Melton dissented and would have accepted the petition.<sup>92</sup>

The supreme court also rejected a petition for voluntary discipline in the form of a state disciplinary review board reprimand for William Leslie Kirby III, who had neglected four matters for clients, failed to communicate with them, did not fulfill his obligations upon withdrawal, and who had a prior disciplinary history.<sup>93</sup> Although Mr. Kirby presented some mitigating evidence, including a psychologist's report that Mr. Kirby had been experiencing personal or emotional problems, that report also expressed concerns regarding whether Mr. Kirby would follow through with plans for improvement. Mr. Kirby's petition for voluntary discipline did not indicate that he was following the psychologists' recommendations.<sup>94</sup> Even though the state bar supported the petition, the court rejected it because the requested sanction was insufficient under these circumstances, given that the case included "neglect of multiple clients over a period of several years, a prior

---

87. *In re Dorer*, 304 Ga. 442, 442, 819 S.E.2d 7, 8 (2018).

88. *Id.*

89. *Id.* at 444–45, 819 S.E.2d at 9.

90. *Id.* at 444, 819 S.E.2d at 9.

91. *Id.* at 444–45, 819 S.E.2d at 9.

92. *Id.* at 445–46, 819 S.E.2d at 10 (Melton, C.J., dissenting).

93. *In re Kirby*, 304 Ga. 628, 628, 820 S.E.2d 729, 729 (2018).

94. *Id.* at 630, 820 S.E.2d at 731.

disciplinary history, and questions about the lawyer's ongoing ability to comply with his professional obligations . . . ."<sup>95</sup>

### III. INEFFECTIVE ASSISTANCE OF COUNSEL

#### *A. A Case in Which a Claim of Ineffective Assistance Succeeded*

In *Mims v. State*,<sup>96</sup> the defendant was convicted of malice murder and other crimes connected to an armed robbery and also of theft of a vehicle that had been stolen a month earlier in Michigan.<sup>97</sup> The supreme court rejected several claims of ineffective assistance but held that defense counsel rendered ineffective assistance by not seeking to sever the trial of theft charges from the other charges.<sup>98</sup> Trial counsel's failure to move to sever was deficient performance because the joinder of multiple charges is appropriate only when the offenses "(a) are of the same or similar character, even if not part of a single scheme or plan; or (b) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan."<sup>99</sup> The theft charge and the charges relating to the murder bore no such relationships. The harder issues involved whether the defendant suffered any prejudice from the joinder of the charges.<sup>100</sup> The court determined that there was no prejudice as to the murder charge because there was overwhelming evidence of guilt.<sup>101</sup> With respect to the theft charge, the court held that there was prejudice because the evidence of guilt was not overwhelming and because evidence of the defendant's "participation in a gruesome murder was very prejudicial to the jury's consideration of the theft offense."<sup>102</sup> The court reversed the theft conviction.<sup>103</sup>

#### *B. Cases in Which Orders Finding Ineffective Assistance Were Reversed or Vacated*

The supreme court reversed two murder cases in which trial courts had ordered new trials based upon ineffective assistance of counsel; in

---

95. *Id.* at 632, 820 S.E.2d at 732.

96. 304 Ga. 851, 823 S.E.2d 325 (2019).

97. *Id.* at 851, 823 S.E.2d at 328–29.

98. *Id.* at 854–60, 823 S.E.2d at 331–35.

99. *Id.* at 857, 823 S.E.2d at 333 (quoting *Harrell v. State*, 297 Ga. 884, 889, 778 S.E.2d 196, 201 (2015)).

100. *Id.* at 857–58, 823 S.E.2d at 333.

101. *Id.*

102. *Id.* at 858, 823 S.E.2d at 333.

103. *Id.*

another case, it vacated an order granting a new trial to the defendant and remanded the case for further findings.<sup>104</sup>

In *State v. Spratlin*,<sup>105</sup> the supreme court reversed a trial court's findings that trial counsel in a murder case had rendered ineffective assistance of counsel.<sup>106</sup> The prosecution had offered three witnesses who testified about the defendant's pretrial silence, and defendant's trial counsel did not object to any of the testimony. Also, the prosecutor referred in closing argument to the defendant's silence and the defendant's failure to make a statement to the police. The defendant's trial counsel objected to that argument and asked for a mistrial.<sup>107</sup> The trial judge sustained the objection but, instead of ordering a mistrial, gave the jury a curative instruction.<sup>108</sup> In granting a motion for new trial, the trial court found that there was no ineffective assistance with respect to the failure to object to the first witness but that the failure to object to the testimony of the other two, and to prevent the improper closing argument, was ineffective assistance that warranted a new trial.<sup>109</sup>

The supreme court reversed.<sup>110</sup> The court noted that the failure to object to the first witness was not an issue on appeal.<sup>111</sup> As to the second witness, the court determined that it concerned testimony about a colloquy between the defendant and an arresting officer "post-arrest, pre-*Miranda* warnings, without interrogation or an affirmative invocation of the right to silence . . . offered in the State's case rather than only for impeachment."<sup>112</sup> The court concluded that the question whether such testimony was constitutionally prohibited was not settled, and therefore a failure to object could not be ineffective assistance.<sup>113</sup> With respect to the third witness, the court held that the testimony was clearly objectionable, but that it would have been a reasonable trial strategy not to object to it in order not to call attention to it and in order to avoid the exclusion of other testimony—theoretically helpful to the

---

104. See *State v. Spratlin*, 305 Ga. 585, 826 S.E.2d 36 (2019); *State v. Tedder*, 305 Ga. 577, 826 S.E.2d 30 (2019); *Gramiak v. Beasley*, 304 Ga. 512, 820 S.E. 2d 50 (2018).

105. 305 Ga. 585, 826 S.E.2d 36 (2019).

106. *Id.* at 585, 826 S.E.2d at 38.

107. *Id.* at 587–88, 826 S.E.2d at 39–40.

108. *Id.* at 588–89, 826 S.E.2d at 40.

109. *Id.* at 590–91, 826 S.E.2d at 41.

110. *Id.* at 585, 826 S.E.2d at 38.

111. *Id.* at 590, 826 S.E.2d at 41.

112. *Id.* at 593, 826 S.E.2d at 43.

113. *Id.*

defendant—given as part of the same exchange with the prosecutor.<sup>114</sup> The failure to object, therefore, was not deficient performance.<sup>115</sup>

The supreme court did determine that the defendant's trial counsel rendered ineffective assistance by not raising an objection before closing arguments to references to the defendant's silence and by not objecting immediately when the prosecutor made such references.<sup>116</sup> The court also found, however, that there was no reasonable probability that the result of the trial would have been different if defendant's trial counsel had made timely objections.<sup>117</sup> The court characterized the references in closing argument to the defendant's silence as "cumulative" because the jury had already heard the testimony.<sup>118</sup> In deciding that the defendant suffered no prejudice from the ineffective assistance of his trial counsel, the supreme court also noted that the trial judge gave a curative instruction and that the evidence against the defendant was "not weak."<sup>119</sup>

In *State v. Tedder*,<sup>120</sup> the supreme court reversed a trial court's grant of a new trial to a murder defendant based upon ineffective assistance of counsel.<sup>121</sup> The victim died from a gunshot wound to the back of his head that he suffered in a shootout between people in a car and people outside the car. The victim was in the front seat of the car at the time of the shooting, and the defendant was seated directly behind him.<sup>122</sup> The state's theory was that the defendant shot the victim in the car.<sup>123</sup> The theory of the defense was that another passenger in the car fired the fatal shot. The defendant was convicted.<sup>124</sup>

The defendant filed a motion for new trial and claimed that he received ineffective assistance of counsel because his trial counsel did not call a crime scene expert to testify. At the hearing on the motion for new trial, the defendant presented evidence from such an expert that, in light of several pieces of physical evidence (including the victim's wounds and the blood splatter inside the car), the crime could have not occurred as theorized by the state, but instead the fatal shot must have

---

114. *Id.* at 593–94, 826 S.E.2d at 43.

115. *Id.* at 594, 826 S.E.2d at 43.

116. *Id.* at 594, 826 S.E.2d at 43–44.

117. *Id.* at 594–97, 826 S.E.2d at 44–45.

118. *Id.* at 595, 826 S.E.2d at 44.

119. *Id.*

120. 305 Ga. 577, 826 S.E.2d 30 (2019).

121. *Id.* at 577, 826 S.E.2d at 31.

122. *Id.* at 578, 826 S.E.2d at 32.

123. *Id.* at 581, 826 S.E.2d at 34.

124. *Id.*



come from outside the car.<sup>125</sup> Trial counsel represented to the court that it never occurred to him to consider calling a crime scene expert. The trial court found this to be deficient performance and found that this conduct was not reasonable.<sup>126</sup>

The supreme court reversed and added this to a line of cases in which it has held that it will assess the reasonableness of trial counsel's strategic "conduct" regardless of whether the attorney actually made any decision at all.<sup>127</sup> Here, the lawyer did not make a strategic decision not to call a crime scene expert; as noted, it never occurred to the lawyer to do so.<sup>128</sup> Nevertheless, the court held that counsel's choice to argue that another passenger shot the victim "was not so unreasonable that no competent attorney would have pursued that strategy. Trial counsel could reasonably have made that decision even if he had known at the time of trial that expert testimony was available pointing to the fatal shot coming from outside [the] vehicle."<sup>129</sup>

In *Gramiak v. Beasley*,<sup>130</sup> the supreme court vacated an order granting relief on habeas corpus for ineffective assistance of both trial and appellate counsel.<sup>131</sup> The supreme court found that trial counsel's performance was deficient when counsel failed to advise the defendant that, if the defendant rejected a plea offer and was convicted of kidnapping with bodily injury, the defendant faced a mandatory life sentence.<sup>132</sup> The court remanded the case, however, for factual determinations regarding whether the defendant would have accepted the plea if he had been properly advised, whether the trial court would have accepted the plea arrangement, and, if those conditions were satisfied, whether the defendant's appellate counsel provided ineffective assistance by not raising on direct appeal the trial counsel's ineffectiveness with respect to the plea advice.<sup>133</sup> The supreme court also instructed the habeas court to consider the proper remedy if it found that both trial and appellate counsel were ineffective.<sup>134</sup>

---

125. *Id.*

126. *Id.* at 582–83, 826 S.E.2d at 35.

127. *Id.* at 583, 826 S.E.2d at 35.

128. *Id.*

129. *Id.*

130. 304 Ga. 512, 820 S.E.2d 50 (2018).

131. *Id.* at 523–24, 820 S.E.2d at 60.

132. *Id.* at 514, 820 S.E.2d at 54.

133. *Id.* at 514–24, 820 S.E.2d at 54–60.

134. *Id.* at 524, 820 S.E.2d at 60.

*C. One Miscellaneous Ineffective Assistance Case*

In *Chamberlain v. State*,<sup>135</sup> the defendant was convicted of molesting his ten-year-old niece. There was no physical evidence and no eyewitness to the molestation other than the alleged victim.<sup>136</sup> The jury was allowed to see a recorded forensic interview in which the victim described her uncle's actions.<sup>137</sup> The defense did not call an expert on forensic interviewing in an attempt to undermine the credibility of the evidence the child gave to the interviewer. On a motion for new trial, the defendant unsuccessfully claimed that this failure to call an expert witness constituted ineffective assistance of counsel.<sup>138</sup> The court of appeals affirmed, determining that the failure to call the expert was a matter of trial strategy.<sup>139</sup>

Judge McFadden dissented.<sup>140</sup> He noted that the defendant had produced an expert at the hearing on the motion for new trial, and the expert testified about numerous deficiencies in the victim's forensic interview about which the expert could have testified.<sup>141</sup> Judge McFadden noted that defense counsel did not even consider whether to call an expert in forensic interviewing for the purpose of undermining the credibility of the recorded interview (as opposed to using one to dispute the admissibility of the recording), and therefore, Judge McFadden characterized the failure to call an expert as a result of a failure to investigate rather than trial strategy.<sup>142</sup> The dissent concluded that counsel's conduct was unreasonable and that there was a reasonable probability that the defendant would have been acquitted if the expert had been called, given the lack of evidence other than the evidence that came from the alleged victim.<sup>143</sup>

---

135. 347 Ga. App. 775, 819 S.E.2d 303 (2018).

136. *Id.* at 789, 819 S.E.2d at 315 (McFadden, P.J., dissenting).

137. *Id.* at 776, 819 S.E.2d at 307 (majority opinion).

138. *Id.* at 781, 819 S.E.2d at 309.

139. *Id.* at 781, 819 S.E.2d at 309–10.

140. *Id.* at 786–90, 819 S.E.2d at 312–15 (McFadden, P.J., dissenting). Because Judge McFadden dissented, the opinion is physical precedent only. *Id.* at 786, 819 S.E.2d at 312.

141. *Id.* at 788–89, 819 S.E.2d at 314 (McFadden, P.J., dissenting).

142. *Id.* at 787–89, 819 S.E.2d at 313–14 (McFadden, P.J., dissenting).

143. *Id.* at 786, 819 S.E.2d at 312 (McFadden, P.J., dissenting).

## IV. BAR ADMISSION

The supreme court decided four cases related to bar admission during the survey period.<sup>144</sup>

The court upheld the decision of the board to determine fitness of bar applicants to deny LaJuan Miguel Certion a certificate of fitness.<sup>145</sup> The applicant had been arrested for assault and false imprisonment in connection with an incident in which the victim claimed he grabbed her, threw her down, punched her, dragged her by the hair, and choked her.<sup>146</sup> Mr. Certion's fitness application contained none of these details but rather stated that he and the victim had a discussion about their relationship and then engaged in "play wrestling/fight[ing] like [they] always did."<sup>147</sup> The board held an informal conference at which Mr. Certion admitted there was "some truth" to the victim's description but denied many of the details, accused the victim of lying to the police, and described the lessons he learned from the experience as the need to be careful in choosing whom to become involved with and to "end relationships by just walking away."<sup>148</sup> After the board issued an order tentatively denying certification, a special master held a formal hearing at which the applicant admitted that the victim had told police the truth about what happened and that he had not been candid at the informal interview.<sup>149</sup> The special master found that the applicant had not understood the purpose and importance of the informal interview and that he had answered questions "defensively, out of shame, not in an attempt to deceive anyone . . ."<sup>150</sup> The special master found that the applicant had demonstrated rehabilitation by his candor and expressions of remorse at the formal hearing and by evidence of community service and completion of a batterers' intervention program, and the special master recommended that the applicant be certified as fit.<sup>151</sup> The board rejected the special master's findings and denied the certificate of fitness, finding that the applicant's "conscious decision to make untruthful statements during the informal conference reflected deficiencies in the honesty, trustworthiness, and judgment required for

---

144. See *In re Certion*, 305 Ga. 504, 504, 826 S.E.2d 52, 53 (2019); *In re O'Neal*, 304 Ga. 449, 819 S.E.2d 1 (2018); *In re Montesanti*, 304 Ga. 380, 380, 818 S.E.2d 585, 586 (2018); *In re Harrell*, 304 Ga. 663, 821 S.E.2d 344 (2018).

145. *In re Certion*, 305 Ga. at 504, 826 S.E.2d at 53.

146. *Id.*

147. *Id.*

148. *Id.* at 504–05, 826 S.E.2d at 53–54.

149. *Id.*

150. *Id.* at 505–06, 826 S.E.2d at 54.

151. *Id.* at 506, 826 S.E.2d at 54–55.

admission to the Bar.”<sup>152</sup> The supreme court affirmed the denial of the fitness certification, noting that it is deferential to decisions of the board and will uphold decisions for which there is any evidence.<sup>153</sup>

The Georgia board of bar examiners rejected a petition by Harriet O’Neal, a military spouse who was licensed in Louisiana and who sought a waiver of the admission requirements while her spouse was stationed in Georgia.<sup>154</sup> The board denied the request without explanation.<sup>155</sup> The supreme court described the policies that govern military waivers and expressed concern that it is difficult to ascertain exactly what criteria apply because the waiver policy cross-references other requirements and standards.<sup>156</sup> The court also noted that as a matter of policy the applicant should receive a written statement of the reasons for denial.<sup>157</sup> The court vacated the denial and remanded the matter to the board “to clearly apply the military waiver policy and explain why O’Neal has or has not met the waiver requirements.”<sup>158</sup>

The Georgia board to determine fitness of bar applicants denied the application of John Anthony Montesanti for a certification of fitness, and the Supreme Court of Georgia affirmed.<sup>159</sup> The applicant had initially begun the process of seeking a character certification in Florida but eventually abandoned that effort.<sup>160</sup> The court found that the applicant had engaged in “a pattern of failing to disclose relevant information to the Board and providing inconsistent statements to both the Board and the Florida Bar.”<sup>161</sup> There was testimony at the formal hearing on the application that the applicant had admitted to a law professor that he had intentionally withheld information sought by the Florida Bar because he did not believe that the Florida Bar was entitled to the information.<sup>162</sup> The court rejected an argument that it should “accommoda[te]” his “inability to be truthful, accurate, and forthcoming in his bar application disclosures and his professional dealings” because the applicant had sleep apnea that caused cognitive deficits and increased the chances of errors.<sup>163</sup> The court stated that if he was

---

152. *Id.* at 506–07, 826 S.E.2d at 55.

153. *Id.* at 507–08, 826 S.E.2d at 55–56.

154. *In re O’Neal*, 304 Ga. at 449, 819 S.E.2d at 1.

155. *Id.* at 451–52, 819 S.E.2d at 3.

156. *Id.* at 453, 819 S.E.2d at 4.

157. *Id.* at 453–54, 819 S.E.2d at 4.

158. *Id.* at 454, 819 S.E.2d at 5.

159. *In re Montesanti*, 304 Ga. at 380, 818 S.E.2d at 586.

160. *Id.* at 380, 818 S.E.2d at 586–87.

161. *Id.* at 381, 818 S.E.2d at 587.

162. *Id.* at 382, 818 S.E.2d at 588.

163. *Id.* at 384, 818 S.E.2d at 589.

confused he should have sought clarification or followed the principle of “when one is in doubt, he or she should disclose.”<sup>164</sup>

Finally, Freddie Darnell Harrell, who had been disbarred in 1995, applied for a certification of fitness to practice law.<sup>165</sup> The supreme court found that Mr. Harrell had demonstrated his rehabilitation by clear and convincing evidence and granted the certification.<sup>166</sup>

#### V. JUDICIAL CONDUCT

The supreme court decided two cases during the survey period regarding judicial conduct, and the court of appeals decided one.<sup>167</sup>

In *Mondy v. Magnolia Advanced Materials, Inc.*, a trial judge orally held a lawyer in contempt and asked for submission of a proposed written order within ten days.<sup>168</sup> Five days later, the lawyer filed a motion to recuse the trial judge because the judge’s rulings on the contempt motion were wrong and because the judge employed “condescending’ and ‘angry’ facial expressions and tone” in the contempt hearing and in other unrelated cases.<sup>169</sup> The record showed that the lawyer filed the motion to recuse, but there was no direct evidence that he “presented” it to the trial judge, as required by the uniform superior court rules.<sup>170</sup> Two weeks later, the trial judge entered a written order on the contempt issue and then recused himself.<sup>171</sup> The supreme court held that the trial judge should not have proceeded with the contempt order until the recusal motion was decided because such an order must be considered to be “on the merits” of a matter, even though it did not relate to the underlying dispute between the parties.<sup>172</sup> However, the court found the error was harmless because the recusal motion was insufficient on its face.<sup>173</sup> The majority did not find it necessary or prudent to decide whether the recusal motion had been properly “presented” to the trial judge, especially since the parties did

---

164. *Id.*

165. *In re Harrell*, 304 Ga. at 663, 821 S.E.2d at 344.

166. *Id.* at 664, 821 S.E.2d at 346.

167. *See Mondy v. Magnolia Advanced Materials, Inc.*, 303 Ga. 764, 815 S.E.2d 70 (2018); *In re Anderson*, 304 Ga. 165, 816 S.E. 2d 676 (2018); *Csehy v. State*, 346 Ga. App. 747, 816 S.E.2d 833 (2018).

168. *Mondy*, 303 Ga. at 764, 815 S.E.2d at 72.

169. *Id.* at 765, 815 S.E.2d at 73.

170. *Id.* at 769, 815 S.E.2d at 76.

171. *Id.* at 765, 815 S.E.2d at 73.

172. *Id.* at 770–73, 815 S.E.2d at 77–79.

173. *Id.* at 779, 815 S.E.2d at 82.

not raise the issue or brief it.<sup>174</sup> Justice Hunstein concurred specially and would have concluded that the recusal motion need not have been addressed by the trial court because it was not “presented” to the court in addition to being filed with the clerk.<sup>175</sup>

In *In re Anderson*, the supreme court imposed a public reprimand on a magistrate judge with the judge’s consent.<sup>176</sup> A woman had her car repossessed by the owner of a car dealership for failure to make payments that were due and for failure to have insurance on the car. Judge Anderson called the owner of the dealership and demanded that he either return the vehicle to the woman or reimburse her for what she had paid to the dealership and to her insurance company related to the car. When the owner refused, Judge Anderson told the woman to file a case against the owner of the dealership in his court, and she did so.<sup>177</sup> Judge Anderson also did not properly supervise the associate magistrate judge to whom that case was assigned.<sup>178</sup> Judge Anderson agreed to a public reprimand because these acts violated numerous provisions of the Georgia Code of Judicial Conduct.<sup>179</sup> The supreme court of Georgia agreed and ordered the public reprimand.<sup>180</sup>

The court of appeals faced a question about the limits of inherent judicial authority in *Csehy v. State*.<sup>181</sup> A trial judge was about to begin a criminal trial but observed that defense counsel was behaving oddly, was sweating profusely, and had bloodshot eyes.<sup>182</sup> After a bench conference with the defendant and defense counsel, during which the defendant reaffirmed that he wanted his lawyer to represent him, the trial judge ordered the lawyer to take a drug test.<sup>183</sup> The judge later testified that she ordered the drug test because “[she has] a duty as a judge, a sworn duty as a judge, to preserve the integrity of [her] courtroom and to make sure the defendant [is] adequately defended.”<sup>184</sup> Several hours later, the defense counsel announced ready for trial, but the trial judge noted that the lawyer’s urine tested positive for cocaine and methamphetamine. The judge held the lawyer in contempt.<sup>185</sup> The

---

174. *Id.* at 769–70, 815 S.E.2d at 76.

175. *Id.* at 780–86, 815 S.E.2d at 83–87 (Hunstein, J., concurring).

176. *In re Anderson*, 304 Ga. at 165, 816 S.E.2d at 677.

177. *Id.*

178. *Id.* at 167, 816 S.E.2d at 678.

179. *Id.* at 165–67, 816 S.E.2d at 677–78.

180. *Id.* at 168, 816 S.E.2d at 678–79.

181. 346 Ga. App. 747, 816 S.E.2d 833.

182. *Id.* at 748, 816 S.E.2d at 836.

183. *Id.*

184. *Id.* at 750, 816 S.E.2d at 837.

185. *Id.* at 748–49, 816 S.E.2d at 836–37.

next day, based upon these events, the district attorney obtained a search warrant to draw blood from the attorney, and on the basis of that search the lawyer was charged with drug possession. After he was convicted, the lawyer appealed the denial of his motion to suppress, arguing that the blood test (and later blood tests that were required as a condition of his release on bond) resulted from the urine test, which was an illegal warrantless search.<sup>186</sup> The court of appeals rejected the argument that the trial judge had the inherent or statutory power to order a warrantless drug test of an apparently impaired attorney and thus found the urine test to have been unlawful.<sup>187</sup> The court nevertheless upheld the convictions on the basis that there was probable cause for the blood tests without taking the illegal urine test into account.<sup>188</sup>

## VI. MALPRACTICE

The court of appeals decided three legal malpractice cases during the survey period.<sup>189</sup>

In *Lalonde v. Taylor English Duma, LLP*,<sup>190</sup> the court of appeals affirmed a trial court's grant of summary judgment to a lawyer and his law firm.<sup>191</sup> Lalonde invented a portable continuous positive airway pressure device (commonly known as a CPAP) to treat sleep apnea. Lalonde contributed his invention (and the related intellectual property rights) to a new entity known as Deshum Medical, LLC in exchange for a one-third ownership interest in the entity. The other member of Deshum Medical, LLC was an entity known as PBM, which agreed to contribute \$5 million for the development of the CPAP invention in exchange for a two-thirds ownership stake. Lalonde hired the Taylor English Duma firm to represent him in connection with the drafting and negotiation of the operating agreement for Deshum Medical, LLC.<sup>192</sup> PBM had separate counsel to represent its interests in that process.<sup>193</sup>

---

186. *Id.* at 749–50, 816 S.E.2d at 837.

187. *Id.* at 754, 816 S.E.2d at 840.

188. *Id.* at 754–58, 816 S.E.2d at 840–43.

189. *See Lalonde v. Taylor English Duma, LLP*, 349 Ga. App. 853, 825 S.E.2d 237 (2019); *McNeill v. SD & D Greenbuilt, LLC*, 349 Ga. App. 140, 825 S.E.2d 521 (2019); *Stewart v. McDonald*, 347 Ga. App. 40, 815 S.E.2d 665 (2018).

190. 349 Ga. App. 853, 825 S.E.2d 237 (2019). Judge Hodges concurred only in the judgment and Judge Brown dissented in part. Therefore, the opinion is physical precedent only. *Id.* at 863, 825 S.E.2d at 245 (Brown, J., concurring in part and dissenting in part).

191. *Id.* at 853, 825 S.E.2d at 238–39 (majority opinion).

192. *Id.* at 853–54, 825 S.E.2d at 239.

193. *Id.* at 862, 825 S.E.2d at 244.

The final operating agreement to which the parties agreed included a provision that enabled PBM to dissolve Deshum Medical, LLC without Lalonde's permission. PBM eventually exercised this right and dissolved Deshum Medical, LLC over Lalonde's objection, and Deshum Medical, LLC's assets, including Lalonde's invention, were transferred to a new entity controlled by PBM and a related entity. Lalonde claimed that his lawyers committed malpractice by drafting an operating agreement that gave PPM this power.<sup>194</sup> When Lalonde's lawyers sought summary judgment, the trial court did not find, one way or the other, whether the lawyers breached the standard of care; rather, the court granted summary judgment to the lawyers because Lalonde would not be able to prove that the lawyers' malpractice, if any, caused him any damage.<sup>195</sup>

One way in which a client can attempt to prove damages from a lawyer's malpractice in the context of a transaction is by showing that, but for the lawyer's malpractice, the client would have obtained a better deal. In Lalonde's case, this would mean that, if his lawyers had not breached the standard of care, he would have been able to sign an operating agreement for Deshum Medical, LLC that protected him from dissolution of the LLC without his permission.<sup>196</sup> The court of appeals rejected this argument because Lalonde provided no evidence that PBM ever would have signed an operating agreement that did not give it the right to dissolve Deshum Medical, LLC without Lalonde's agreement.<sup>197</sup>

Another way for a client to prove damages from a lawyer's malpractice in a transaction is to prove that the client would not have entered into the transaction at all if the lawyer had not breached the standard of care and that the client would have been better off as a result.<sup>198</sup> Lalonde testified that, if his lawyers had alerted him to the dangers associated with the dissolution provisions of the Deshum Medical, LLC operating agreement, he would not have become a member of the LLC, would have retained control over his device, and would have pursued another opportunity. Judge Brown, in dissent, argued that Lalonde had presented sufficient evidence to create a fact issue with respect to the "no deal" theory of causation.<sup>199</sup>

---

194. *Id.* at 854–55, 825 S.E.2d at 239–40.

195. *Id.* at 855–56, 825 S.E.2d at 240.

196. *Id.* at 861–62, 825 S.E.2d at 244.

197. *Id.* at 862–63, 825 S.E.2d at 244–45.

198. *Id.* at 864, 825 S.E.2d at 246 (Brown, J., concurring in part and dissenting in part).

199. *Id.* at 863 n.11, 864–65, 825 S.E.2d at 245 n.11, 245–46 (Brown, J., concurring in part and dissenting in part).



The majority concluded instead that Lalonde had “severed the proximate causation between his claimed damages and any negligence on the part of his lawyers . . . .”<sup>200</sup> This “severance” of causation arose, according to the majority, from the following sequence of events.<sup>201</sup> In the midst of PBM’s attempts to dissolve Deshum Medical, LLC, Lalonde sued PBM and Deshum Medical, LLC in Delaware to force a judicial dissolution rather than the dissolution that PBM was attempting to effect on its own.<sup>202</sup> Presumably, success in the Delaware suit would have enabled Lalonde to retrieve or be compensated for his invention, in which case his lawyers’ failures to protect his ownership rights in the Deshum Medical, LLC operating agreement would not have harmed him. However, rather than prosecute the Delaware case to judgment, Lalonde settled the case and received \$310,000 in exchange for a release and an unrestricted license to his invention.<sup>203</sup> The court of appeals concluded that the settlement severed any chance of showing proximate cause between the alleged malpractice and the harm to Lalonde because, after all, “[i]f Lalonde had chosen to litigate, rather than to settle, and if he had won,” then indisputably his lawyers’ alleged malpractice would not have harmed him.<sup>204</sup>

The court of appeals analogized Lalonde’s situation to one in which a lawyer commits malpractice in connection with a lawsuit rather than a transaction. If a lawyer commits malpractice in a litigated matter, but the client might nevertheless prevail and negate any harm from the malpractice, the client may not settle the case without severing proximate cause between the lawyer’s malpractice and the outcome.<sup>205</sup> Because the claim might have terminated favorably to the client absent the settlement, the client who settles waives any claim that the lawyer’s malpractice caused any damage.<sup>206</sup> In Lalonde’s case, the court concluded, he waived any right to recover for his lawyers’ alleged malpractice when he settled the Delaware case that might have negated any harm his lawyers otherwise may have caused him.<sup>207</sup>

---

200. *Id.* at 857, 825 S.E.2d at 241 (majority opinion).

201. *Id.* at 855–60, 825 S.E.2d at 240–43.

202. *Id.* at 856, 825 S.E.2d at 240–41.

203. *Id.* at 857, 825 S.E.2d at 241.

204. *Id.* at 860, 825 S.E.2d at 243.

205. *Id.* at 857, 825 S.E.2d at 241.

206. *Id.*

207. *Id.* at 860, 825 S.E.2d at 243. The court of appeals also declined to allow Lalonde to proceed with a claim to recover the \$58,000 in legal fees that he paid his lawyers in connection with the operating agreement. It is worth noting that Lalonde may have had a valid claim for forfeiture of those fees as a remedy for his lawyers’ breaches of fiduciary duty to him, even if he could not prove actual damages that resulted from the lawyers’

In *McNeill v. SD & D Greenbuilt, LLC*,<sup>208</sup> the Georgia Court of Appeals affirmed the denial of summary judgment to a lawyer and a law firm in a legal malpractice case.<sup>209</sup> The plaintiff lost \$150,000 in earnest money in connection with a real estate transaction.<sup>210</sup> The Purchase and Sale Agreement set forth two dates by which the plaintiff could have required return of the earnest money. One date permitted the plaintiff to obtain a refund for any reason. The second allowed the plaintiff to obtain a refund only under specific conditions relating to environmental testing of the land being sold.<sup>211</sup> The plaintiff demanded a refund after the first date and before the expiration of the second date, but for reasons unrelated to the environmental testing. The seller refused to refund the earnest money.<sup>212</sup>

The plaintiff filed a legal malpractice action against its lawyers and claimed that the lawyers had led it to believe that the deadline for obtaining a refund for any reason had been extended beyond the date listed in the written contract.<sup>213</sup> The lawyers defended on the basis of *Berman v. Rubin*.<sup>214</sup> That case stands for the proposition that generally a client may not recover for professional negligence based upon counsel's misrepresentation of the meaning of a document that a well-educated client, who has no disability, reads, if the meaning of the document is plain, obvious, and requires no legal explanation.<sup>215</sup> The court of appeals agreed with the trial court, however, that *Berman* did not apply to his case because the alleged negligence was not about the draftsmanship of the contract itself but rather concerned statements that the lawyer made after the contract was executed about the "legal effect" of potential changes to its terms—in particular an extension of the right to terminate the contract and require return of the earnest money.<sup>216</sup> The court concluded that there was a jury question whether the client was entitled to rely on their communications with the lawyer

---

conduct. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (AM. LAW INST. 2000). See also *Burrow v. Arce*, 997 S.W.2d 229, 237–40 (Tex. 1999) (holding clients need not prove any actual damages in order to obtain forfeiture of an attorney's fee for breach of duty to the client).

208. 349 Ga. App. 140, 825 S.E.2d 521 (2019).

209. *Id.*

210. *Id.*

211. *Id.* at 142, 825 S.E.2d at 522.

212. *Id.* at 144, 825 S.E.2d at 523.

213. *Id.*

214. 138 Ga. App. 849, 227 S.E.2d 802 (1976).

215. *Id.* at 855, 227 S.E.2d at 806.

216. *McNeill*, 349 Ga. App. at 146, 825 S.E.2d at 524.

“after the signing of the contract, as opposed to the language contained therein.”<sup>217</sup>

In *Stewart v. McDonald*,<sup>218</sup> a jury returned a verdict that an attorney was liable to his former client for \$392,000 as a result of malpractice in connection with a business transaction.<sup>219</sup> The trial court entered judgment notwithstanding the verdict for the defense.<sup>220</sup> The court of appeals reversed that judgment and determined that the plaintiff had introduced sufficient evidence of an implied attorney–client relationship because there was enough evidence of a reasonable belief by the plaintiff that the attorney was representing the plaintiff.<sup>221</sup> The lawyer had helped the would-be client try to obtain equity in the transaction and helped negotiate the would-be client’s employment contract.<sup>222</sup> The court of appeals further held that there was sufficient evidence of a breach of duty because the attorney admitted that he did not look out for the plaintiff’s interests (under the mistaken belief that they did not have an attorney–client relationship).<sup>223</sup> The court of appeals also held that there was enough evidence of damages because there was evidence that the plaintiff could have obtained a better deal in the underlying transaction.<sup>224</sup> Judge Ellington dissented on the basis that the proof of damages—that the plaintiff could have obtained a better deal with the lawyer’s help—was too speculative.<sup>225</sup>

## VII. MISCELLANEOUS CASES

The Georgia Court of Appeals decided seven miscellaneous legal ethics cases during the survey period.<sup>226</sup>

---

217. *Id.* at 147, 825 S.E.2d at 525.

218. 347 Ga. App. 40, 815 S.E.2d 665 (2018).

219. *Id.* at 40–41, 815 S.E.2d at 667.

220. *Id.* at 41, 815 S.E.2d at 667.

221. *Id.* at 47–48, 815 S.E.2d at 671–72. Judge Ray concurred only in the judgment and Judge Ellington dissented in part. Therefore, the opinion is physical precedent only. *Id.* at 52, 815 S.E.2d 674 (Ellington, J., concurring in part and dissenting in part).

222. *Id.* at 46–47, 815 S.E.2d at 671 (majority opinion).

223. *Id.* at 49, 815 S.E.2d at 672–73.

224. *Id.* at 50, 815 S.E.2d at 673.

225. *Id.* at 52–55, 815 S.E.2d at 674–76 (Ellington, J., concurring in part and dissenting in part).

226. See *Phillips v. Adams, Jordan & Herrington, P.C.*, 350 Ga. App. 184, 828 S.E.2d 414 (2019); *Summerville v. Innovative Images, LLC*, 349 Ga. App. 592, 826 S.E.2d 391 (2019); *Hillman v. ALDI, Inc.*, 349 Ga. App. 432, 825 S.E.2d 870 (2019); *Lynch v. State*, 347 Ga. App. 260, 819 S.E.2d 54 (2018); *Edward N. Davis, P.C. v. Watson*, 346 Ga. App. 729, 814 S.E.2d 826 (2018); *Coen v. Apteian, Inc.*, 346 Ga. App. 815, 816 S.E.2d 64 (2018); *McClendon v. State*, 347 Ga. App. 542, 820 S.E.2d 167 (2018).

In *Phillips v. Adams, Jordan & Herrington, P.C.*,<sup>227</sup> the court of appeals affirmed in part and reversed in part a trial court's decision to grant summary judgment to a law firm on a former associate's claim for compensation.<sup>228</sup> The associate worked for the firm initially under the terms of a letter agreement that provided that he would be compensated for his work on medical malpractice cases "upon successful resolution" of a case by payment of a "portion of the fee," "on a case by case basis," based upon "the extent" of his work.<sup>229</sup> Approximately one year later, the firm began paying the associate a set amount each month, which the associate claimed merely advanced fees to be earned upon completion of medical malpractice cases he worked on but which the firm claimed was a salary that it paid under an agreement that superseded the original letter agreement.<sup>230</sup> When several medical malpractice cases that the associate had worked on settled, he demanded to be paid under the letter agreement and then resigned when he was not satisfied with the firm's response. The associate sued the firm and sought compensation under the letter agreement and under the doctrine of *quantum meruit*. The trial court granted summary judgment for the firm because it concluded that the letter agreement was too indefinite to be enforced and that the associate was not entitled to *quantum meruit* compensation, because the parties had a written contract.<sup>231</sup>

The court of appeals affirmed with respect to the contract claim.<sup>232</sup> The letter agreement did not contain sufficient specificity to make it possible to calculate the associate's compensation for any particular case. For example, there was no agreement as to the "portion of the fee" he would receive, nor was there any agreement about how to measure "the extent" of the associate's involvement. The law firm retained discretion to calculate the compensation "on a case by case basis."<sup>233</sup> The court of appeals reversed with respect to the *quantum meruit* claim.<sup>234</sup> The court noted that there was evidence that the associate provided valuable services on the medical malpractice cases and that, when a contract is found to be void for vagueness (as the letter

---

227. 350 Ga. App. 184, 828 S.E.2d 414 (2019).

228. *Id.* at 184, 828 S.E.2d at 415.

229. *Id.* at 187, 828 S.E.2d at 417.

230. *Id.* at 185–86, 828 S.E.2d at 416.

231. *Id.* at 186, 828 S.E.2d at 416.

232. *Id.* at 187, 828 S.E.2d at 417.

233. *Id.* at 188, 828 S.E.2d at 417.

234. *Id.* at 188, 828 S.E.2d at 417–18.

agreement was found to be), a claim for *quantum meruit* is appropriate.<sup>235</sup> The court remanded the case for further proceedings.<sup>236</sup>

The court of appeals enforced an arbitration clause in a lawyer's fee agreement with a client in *Summerville v. Innovative Images, LLC*.<sup>237</sup> When a former client sued a law firm for legal malpractice, the firm sought to enforce the fee agreement's mandatory arbitration clause, but the trial court refused to enforce that provision because it was unconscionable.<sup>238</sup> The trial court's reasoning was that Georgia Rule of Professional Conduct 1.4(b),<sup>239</sup> which is identical to Model Rule of Professional Conduct 1.4(b),<sup>240</sup> requires lawyers to explain matters to their clients "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>241</sup> Model Rule 1.4 had been interpreted by the American Bar Association to require lawyers who include arbitration clauses in their fee contracts to explain the advantages and disadvantages of such clauses.<sup>242</sup> Because there was no evidence that the lawyers had given these explanations, the trial court held the clause to be unconscionable and therefore unenforceable.<sup>243</sup> On interlocutory review, the court of appeals reversed the trial court and enforced the arbitration clause.<sup>244</sup> The court applied the general contract law doctrine of unconscionability and found that this fee contract was not unconscionable.<sup>245</sup> The court also noted that the Georgia Arbitration Code expressed a strong policy preference for arbitration and declined to engraft on its provisions the requirement that lawyers make the disclosures required by the American Bar Association's interpretation of Model Rule 1.4(b), particularly when the Georgia Supreme Court has not decided whether Georgia Rule 1.4(b) requires those disclosures.<sup>246</sup>

In *Hillman v. ALDI, Inc.*,<sup>247</sup> the court of appeals vacated and remanded for reconsideration a trial court's summary finding that a lawyer was in criminal contempt of court for statements the lawyer

---

235. *Id.*

236. *Id.* at 188, 828 S.E.2d at 418.

237. 349 Ga. App. 592, 826 S.E.2d 391 (2019).

238. *Id.* at 592, 826 S.E.2d at 394.

239. GA. RULES OF PROF'L CONDUCT r. 1.4(b) (2019).

240. MODEL RULES OF PROF'L CONDUCT r. 1.4(b) (AM. BAR ASS'N 2019).

241. *Summerville*, 349 Ga. App. at 594 n.2, 826 S.E.2d 395 n.2.

242. *Id.* at 594 n.3, 826 S.E.2d at 395 n.3.

243. *Id.* at 594–95, 826 S.E.2d at 395.

244. *Id.*

245. *Id.* at 595–96, 826 S.E.2d at 396.

246. *Id.* at 598, 826 S.E.2d at 397.

247. 349 Ga. App. 432, 825 S.E.2d 870 (2019).

made during closing argument.<sup>248</sup> The lawyer had been warned not to refer in closing argument to any allegations that the defendant had destroyed evidence.<sup>249</sup> The lawyer nevertheless argued, and displayed a PowerPoint slide to the jury that said, that the defendant “had a videotape that they would have . . . preserved had it shown that [the defendant] was not at fault.”<sup>250</sup> The court of appeals vacated the contempt order because the trial judge had not made the necessary findings that the lawyer’s conduct “interfered with or posed a threat” to the administration of justice and that the lawyer “was on notice that his comments ‘exceeded the outermost bounds of permissible advocacy.’”<sup>251</sup> The trial court also had not applied the correct standard—proof beyond a reasonable doubt—but instead had ruled that the court “was not required to apply ‘any evidentiary standard of proof.’”<sup>252</sup>

In *Lynch v. State*,<sup>253</sup> the court of appeals reversed the trial court’s denial of the defendant’s motion to withdraw a guilty plea.<sup>254</sup> The defendant accepted the plea offer after the defendant sought unsuccessfully to fire his retained counsel and after defendant’s counsel recited at length in open court all the reasons why the defendant should plead guilty.<sup>255</sup> The court of appeals held that denial of the motion to withdraw the guilty plea resulted in manifest injustice because the defendant accepted the plea only after the trial court’s improper handling of the defendant’s motion to fire his own retained counsel.<sup>256</sup> The trial court had declined to allow the defendant to fire his counsel because the trial court found that the lawyer was providing effective assistance, but that is the standard only for discharging appointed counsel and not retained counsel.<sup>257</sup> The trial court also failed to engage in an appropriate balancing of the right to fire counsel and the need for orderly administration of the courts because the court did not explain to the defendant that he had choices to proceed with retained counsel, to proceed with new counsel without delay, or to represent himself.<sup>258</sup>

---

248. *Id.* at 444–46, 825 S.E.2d at 880–81.

249. *Id.* at 438–39, 825 S.E.2d at 877.

250. *Id.* at 439, 825 S.E.2d at 877.

251. *Id.* at 445, 825 S.E.2d at 881.

252. *Id.*

253. 347 Ga. App. 260, 819 S.E.2d 54 (2018).

254. *Id.* at 261, 819 S.E.2d at 56.

255. *Id.* at 260–62, 819 S.E.2d at 55–56.

256. *Id.* at 265, 819 S.E.2d at 58.

257. *Id.* at 264–65, 819 S.E.2d at 58.

258. *Id.* at 264, 819 S.E.2d at 58.

In *Edward N. Davis, P.C. v Watson*,<sup>259</sup> an attorney claimed an attorney's lien on real property that was recovered for a client as a result of the lawyer's legal services.<sup>260</sup> The lawyer did not, however, record the lien, and the court of appeals held that the attorney's lien was subordinate to parties who became creditors of the client and perfected their liens after the attorney had recovered the property.<sup>261</sup>

In *Coen v. Aptean, Inc.*,<sup>262</sup> the plaintiff had been a party to an earlier case against his former employer in which the trial court had found that the employer and its law firm had engaged in bad faith tactics.<sup>263</sup> The plaintiff then sued the employer, the employer's law firm, and two of the employer's lawyers under the abusive litigation statute, O.C.G.A. § 51-7-80,<sup>264</sup> and sought general damages for mental distress and punitive damages.<sup>265</sup> The trial court held that the plaintiff's claim could not survive unless he pled special damages and that punitive damages were not available for statutory abusive litigation claims, and the trial court therefore dismissed the plaintiff's complaint for failure to state a claim upon which relief could be granted.<sup>266</sup> The court of appeals reversed in part and held that, although the plaintiff could not recover punitive damages, he could recover general damages in a statutory claim for abusive litigation.<sup>267</sup>

The court of appeals dealt with the issue of a prosecutor's duty to disclose exculpatory evidence to the defense in *McClendon v. State*.<sup>268</sup> Two defendants were convicted of criminal street gang activity, based in part upon the testimony of Taliah Knox.<sup>269</sup> Unbeknownst to the defense, Ms. Knox was a paid informant for the Atlanta Police Department and received financial assistance from the district attorney's office during the trial. The prosecution did not disclose this impeachment evidence to the defense, and the court of appeals held that their failure to do so violated the prosecution's disclosure obligations because the evidence

---

259. 346 Ga. App. 729, 814 S.E.2d 826 (2018).

260. *Id.* at 730, 814 S.E.2d at 828.

261. *Id.* at 730–33, 814 S.E.2d 827–29.

262. 346 Ga. App. 815, 816 S.E.2d 64 (2018).

263. *Id.* at 816, 816 S.E.2d at 68.

264. O.C.G.A. § 51-7-80 (2019).

265. *Id.* at 815, 816 S.E.2d at 67.

266. *Id.* On April 1, 2019, the Georgia Supreme Court granted certiorari in this case to address this issue: “Does the language ‘all damages allowed by law’ in O.C.G.A. § 51-7-83 (a) authorize an award of punitive damages in a statutory claim for abusive litigation?” (order available at <https://www.gasupreme.us/wp-content/uploads/2019/04/s18c1638.pdf>).

267. *Id.* at 819–24, 816 S.E.2d at 70–73.

268. 347 Ga. App. 542, 820 S.E.2d 167 (2018).

269. *Id.* at 543, 820 S.E.2d at 170.

was material and therefore its unavailability to the defense undermined confidence in the outcome of the trial.<sup>270</sup> Accordingly, the court of appeals reversed the convictions and remanded the cases for new trials.<sup>271</sup>

#### VIII. FORMAL ADVISORY OPINIONS<sup>272</sup>

The formal advisory opinion board received one request for an opinion during the survey year.<sup>273</sup> The request had two parts. The first was for an opinion regarding whether the confidentiality requirements of Rule 1.6 apply to unsolicited comments made to a lawyer by a potential client with whom there is no pre-existing relationship.<sup>274</sup> The board determined that no Georgia rule of professional conduct answers this question, although Model Rule of Professional Conduct 1.18<sup>275</sup> and ABA Formal Advisory Opinion 10-457<sup>276</sup> (which interprets Model Rule 1.18) do.<sup>277</sup> The board referred the issue to the disciplinary rules and procedures committee for consideration whether the Georgia Rules of Professional Conduct should be amended to add a version of Model Rule 1.18.<sup>278</sup> The committee adopted a proposed rule based largely upon Model Rule 1.18, and the Georgia Supreme Court was considering at the close of the survey period whether to adopt the proposed rule.<sup>279</sup>

The second part of the request asked whether a lawyer could reveal communications from a potential client if those communications indicated that the potential client may be engaged in ongoing inappropriate behavior if revealing the communication could prevent death or serious bodily injury.<sup>280</sup> The board declined to address this part of the request because the board determined that the existing rules of conduct adequately answer the question.<sup>281</sup>

---

270. *Id.* at 544, 820 S.E.2d at 170.

271. *Id.* at 549, 555, 820 S.E.2d at 173, 177.

272. The Author is a member of the State Bar of Georgia Formal Advisory Opinion Board. This discussion is the Author's alone and does not reflect any opinion or policy of the Board or any of its members.

273. See Jeffrey Hobart Schneider, *Formal Advisory Opinion Board*, 2019 REP. OF THE OFF. OF GEN. COUNS. OF THE ST. B. OF GA. at 11. ([https://www.gabar.org/barrules/ethicsandprofessionalism/upload/19\\_OGC\\_Report.pdf](https://www.gabar.org/barrules/ethicsandprofessionalism/upload/19_OGC_Report.pdf)).

274. *Id.*

275. MODEL RULES OF PROF'L CONDUCT r. 1.18 (AM. BAR ASS'N 2019).

276. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010).

277. Schneider, *supra* note 273, at 11.

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*



The formal advisory opinion board also considered during the survey period whether to revise or withdraw Formal Advisory Opinion 87-6<sup>282</sup> regarding the circumstances under which a lawyer may communicate directly with a represented entity about a matter.<sup>283</sup> Since that opinion was issued, the supreme court adopted the Georgia Rules of Professional Conduct.<sup>284</sup> The board determined that Georgia Rule 4.2<sup>285</sup> answers the question posed by the opinion and that the opinion no longer accurately reflects Georgia law.<sup>286</sup> Accordingly, the board asked the supreme court to withdraw the opinion, and it did so.<sup>287</sup>

## IX. CONCLUSION

This Article surveys recent developments in Georgia legal ethics through May 31, 2019. For updates on developments after that date, you may visit the web site of the Mercer Center for Legal Ethics and Professionalism.<sup>288</sup>

---

282. Ga. Formal Advisory Op. Bd., Formal Op. 87-6 (1987).

283. Schneider, *supra* note 273, at 11.

284. *Id.*

285. GA. RULES OF PROF'L CONDUCT r. 4.2 (2019).

286. Schneider, *supra* note 273, at 11.

287. *Id.* at 11–12.

288. As a service to the Georgia bench and bar, the Mercer Center for Legal Ethics and Professionalism provides monthly updates and other resources on recent developments in Georgia legal ethics. Visit <http://law.mercer.edu/academics/centers/clep/updates-legal-ethics/>.