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Legal Ethics

L. Ray Patterson

William P. Smith III

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by L. Ray Patterson*
and
William P. Smith, III**

I. INTRODUCTION

Two events of particular importance to Georgia lawyers occurred during the survey period. First, the Supreme Court of Georgia adopted The Georgia Rules of Professional Conduct on June 12, 2000 to become effective January 1, 2001. The basis for the new rules is the American Bar Association ("ABA") Model Rules of Professional Conduct, adopted by the ABA in 1983 to supersede the ABA Model Code of Professional Responsibility. The new code will replace both the Georgia Code of Professional Responsibility and the Standards of the State Bar Rules. Second, the American Law Institute adopted the Restatement of the Law Governing Lawyers ("Restatement"). While the Restatement will not be binding on lawyers, it undoubtedly will be a document of immense influence on courts and lawyers. It is the first document in which lawyer's law has been collected and integrated as a separate body of law. Georgia lawyers would be well advised to familiarize themselves with the Restatement.

II. LIABILITY TO THIRD PARTIES

The term "legal ethics" has a long history in American jurisprudence,[1] but as the Restatement proves, it is in the process of being superseded by the more meaningful term "lawyer's law." The difference in terminology can make a difference in the perspective of lawyers and

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* Pope Brock Professor of Law, University of Georgia. Mercer University (A.B., 1949); Walter F. George School of Law, Mercer University (LL.B., 1957).

** General Counsel, State Bar of Georgia. Emory University (B.A.); Emory University School of Law (LL.B.).

1. The term dates back at least to the Code of Ethics of the Alabama State Bar Association adopted in 1887. *See* 118 Ala. XXIII-XXXIV (1899).

courts. Most lawyers and judges view legal ethics as governing the lawyer's duties to, and relationship with, the client. The term "lawyer's law" recognizes that the lawyer has duties to others as well. Thus, it is interesting to note that in regard to one case, *Bowen v. Hunter, Maclean, Exley & Dunn*,[2] had the Georgia Court of Appeals followed the Restatement, it would almost surely have reached a different result as to the liability of the lawyer defendant to third parties.

The relevant section of the Restatement is as follows:

> § 73. Duty of Care to Certain Non-Clients
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> For purpose of liability under § 71, a lawyer owes a duty to use care within the meaning of § 74:
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> . . . .
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> (4) to a non-client when and to the extent that:
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> (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the non-client;
>
> (b) circumstances known to the lawyer make it clear that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the non-client, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;
>
> (c) the non-client is not reasonably able to protect its rights; and
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> (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.[3]

Note the Restatement provides that a lawyer owes a duty of care when the client is an administratrix and the lawyer knows appropriate action is necessary to prevent or rectify the breach of a fiduciary duty the client owes to the nonclient when the breach is a fraud or the lawyer assists in the breach.[4] This circumstance is essentially the fact pattern in *Bowen*.[5]

Plaintiffs were the mother and sister of an intestate decedent, and the lawyer represented the decedent's widow, who was the administratrix of the estate. The widow had signed a prenuptial agreement that barred her from inheriting any portion of her husband's estate. The mother and sister asked the widow's lawyer if there was a prenuptial agreement.[6] The lawyer acknowledged there was "such a contract (he did not draft

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2. 241 Ga. App. 204, 525 S.E.2d 744 (1999).

3. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 (Tentative Draft No. 8, 1997).

4. RESTATEMENT § 73(4)(a)-(b).

5. 241 Ga. App. at 204-08, 525 S.E.2d at 746-49.

6. *Id.* at 204-05, 525 S.E.2d at 746-47.

it), but could not deliver a copy to them without his client's permission, which [she] declined to give."[7] In an earlier stage of the proceedings, the trial court had ruled the mother and sister had standing to enforce the prenuptial agreement.[8] The Georgia Supreme Court affirmed the ruling in *Sieg v. Sieg*.[9] The parties eventually settled that case, and nine months later, the mother and sister sued the lawyer and his law firm for malpractice and breach of fiduciary duty. The trial court bifurcated the trial, separating the issue of the validity of the agreement from the liability of the lawyer. The jury determined the prenuptial agreement was invalid, and the court granted summary judgment to defendants on the breach of fiduciary duty claim.[10]

The trial court relied on the fact that "Georgia has not addressed the issue of whether the attorney of a fiduciary–such as the administrator of an estate–owes a fiduciary duty in turn to heirs at law"[11] and concluded there was no fiduciary or confidential relationship between plaintiffs and the lawyer.[12] The duty a lawyer owes to a client and the fiduciary relationship a client maintains with a nonclient, however, are two different issues, as the four conditions of Restatement section 73(4) make clear. The client was an administratrix; appropriate action by the lawyer was necessary to rectify the breach of a fiduciary duty owed by the client; the nonclient was not reasonably able to protect its rights; and the duty did not impair the performance of the lawyer's obligation to the client unless the lawyer was to act as a shield for the client's conduct if inconsistent with her obligations as administratrix.[13]

As indicated in Restatement section 73(4)(b), the basic issue in *Bowen* was not the lawyer's duty but instead the widow's duty as administratrix. Did she have a duty to show the agreement to the mother and sister, and was there a duty to reveal the agreement to the probate court? The court of appeals made no mention of this point. Presumably, the administratix did owe a duty to the probate court to provide it with all relevant documents, and the document in issue was clearly relevant to the administration of the estate. Had the agreement been filed with the court, it probably would have been a matter of public record available to the mother and sister.

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7. *Id.* at 205, 525 S.E.2d at 747.
8. *Id.*
9. 265 Ga. 384, 386, 455 S.E.2d 830, 833 (1995).
10. 241 Ga. App. at 205, 525 S.E.2d at 747-48.
11. *Id.* at 206, 525 S.E.2d at 748.
12. *Id.* at 206-07, 525 S.E.2d at 748-49.
13. *Id.*

Bowen is, thus, a classic example of faulty analysis. The issue was not the lawyer's duty but the client's duty. Consider the widow's duty as a widow and as an administratrix. As widow she presumably had no legal duty to show the mother and sister the agreement; as administratrix she clearly did. The point the court overlooked is that the lawyer was representing the widow as administratrix, and the lawyer's duty in acting for a client is determined by the client's duty. This duty follows from the fact that the client is the principal and the lawyer is the agent: The principal's duty determines the agent's duty. Lawyers selectively use this idea, and seldom is it articulated. Indeed, the lawyer used it in *Bowen* when he said he could not deliver the document without the client's permission. Thus, he relied on the client's decision not to deliver the contract as the reason for not delivering it himself.[14]

However, another proposition about the nature of the client is relevant. There are two kinds of clients: a client in an individual capacity and a client in a representative capacity. Here, the widow as administratrix was a client in a representative capacity, but the lawyer treated her as a client in an individual or personal capacity. Presumably this was because the legal culture emphasizes the duty of loyalty to the client above all else due to the influence of codes of ethics. These codes emphasize the lawyer's duties to the client: the duty of competence, the duty of communication (keeping the client informed), the duty to avoid conflicts of interest, and the duty of confidentiality. These duties correlate to the client's rights. But the lawyer also acts for the client in relation to others, and the source of these duties is the client's duties. The client's duties, in turn, are determined by the law, and insofar as the lawyer is concerned, they are derivative duties. Thus, because the widow as administratrix had a duty to the potential heirs, the lawyer also had that duty.

This analysis explains the Restatement provision quoted above, and it is unfortunate that the ruling in *Bowen* is contrary to that provision. There is, however, another reason to regret the case. It sends the wrong message to lawyers, which is that the lawyer's duty of loyalty to the client gives the lawyer license to serve as the client's agent in disregarding both the law and the client's duty to the court.

III. THE DUTY TO THE COURT

The court in *Bowen* did not apply the proposition that the client's duties determine the lawyer's duties when the lawyer acts for the client. The same court, however, applied this proposition in another case,

14. *Id.* at 205, 525 S.E.2d at 747.

although under a different rule, which concerned the duty to inform the court of adverse authority. *Georgia Receivables, Inc. v. Kirk*[15] involved an assignee of a health spa contract who brought an action to enforce the contract. The trial court granted defendant summary judgment under the applicable statute in accord with three decisions involving the same plaintiff.[16] In the words of the court: "With regard to the matter at hand, the same issues which were dispositive herein were raised by the same attorneys [for the same plaintiff] in the same manner in at least three appeals previously decided by this Court," all of which were decided adversely to plaintiff.[17]

The court denied plaintiff's motion to withdraw the appeal and considered whether it should impose sanctions for a frivolous appeal against plaintiff and its counsel.[18] Because of the motion to dismiss, the court decided not to impose penalties, but it took "[the] opportunity to remind counsel of their obligations to supplement the pleadings before this Court upon receipt of notice of legal authority directly adverse to their position or to withdraw their appeal."[19] The court also noted the lawyers violated several other rules by making arguments that were without merit and by breaching their duty to the court to give "notice of the pendency of the several cases involving the same issue, the same appellant, and the same attorney at the time they filed the later appeals."[20] Even so, the court concluded that "Georgia Receivables has now met its professional obligations and moved to correct its deficiencies, however, and, therefore, we no longer deem a penalty warranted."[21]

When the violated rules are analyzed, they reflect the fundamental proposition that the client's rights and duties determine the lawyer's rights and duties in acting for the client. Thus, the lawyer had no right to file the appeal, to make frivolous arguments, and to fail to inform the court of related pending cases because his client, Georgia Receivables, as principal had no right to do so. Therefore, Georgia Receivables could not give the lawyer as its agent the authority to do so. The court recognized this point when it said the corrective action was that of the client, not the lawyer: "Georgia Receivables has now met its professional obligations and moved to correct its deficiencies, . . . and . . . we no

15. 242 Ga. App. 801, 531 S.E.2d 393 (2000).
16. *Id.* at 801-03, 531 S.E.2d at 394-96.
17. *Id.* at 803, 531 S.E.2d at 395.
18. *Id.* at 801, 803, 531 S.E.2d at 395-96.
19. *Id.* at 802, 531 S.E.2d at 395.
20. *Id.* at 803, 531 S.E.2d at 396.
21. *Id.*

longer deem a penalty warranted."[22] Why would the court exonerate the client unless it was the client's duty, acting through the lawyer, to fulfill the obligations?

This decision again sends the wrong message to the bar. It suggests lawyers can take chances, ignore the rules, and avoid the penalty by recanting if caught. The basic point is that courts are ultimately responsible for the unethical conduct of lawyers for one simple reason: If the courts imposed sanctions for this conduct, lawyers would not engage in it.

IV. MALPRACTICE

In *Szurovy v. Olderman*,[23] plaintiff sued the lawyer who represented her in a divorce action for malpractice, alleging the lawyer failed to negotiate an award of alimony and failed to preserve her right to seek future alimony. The parties entered into a settlement that did not provide for alimony, and plaintiff testified she did not realize she waived her alimony rights by agreeing to the settlement. The trial court granted summary judgment for defendant lawyer.[24] The court of appeals affirmed on the grounds that plaintiff failed to establish damages and proximate cause.[25] The court noted that the husband owed $13,000 for child support, that the husband's lawyer insisted he would not pay alimony, and that to satisfy the burden of proof on summary judgment, defendant was required to point out by reference to the record an absence of proof by the wife on the issue of proximate cause.[26] The court concluded defendant had fulfilled his burden.[27]

The court's ruling is consistent with tort law, but it should be noted that proximate cause, a nebulous concept at best, can be viewed as an aspect of standing, by reason of which a person must prove the defendant's conduct has damaged him in order to sue.[28] A drunk person driving ninety miles an hour down a busy highway is not subject to a lawsuit by a person unless he damages that person. Otherwise, any witness could sue the driver, and it seems clear the matter is best left to the police and criminal prosecution.

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22. *Id.*
23. 243 Ga. App. 449, 530 S.E.2d 783 (2000).
24. *Id.* at 449-50, 530 S.E.2d at 784-85.
25. *Id.* at 453, 530 S.E.2d at 786.
26. *Id.* at 451-52, 530 S.E.2d at 786.
27. *Id.* at 452, 530 S.E.2d at 786.
28. See 13 Ga. Jur. *Personal Injury and Torts* § 21:20 (1995 & Supp. 1999), for a discussion of the actual injury requirement for standing.

In the case of a malpractice action against an attorney, however, personal damage is not necessary to give the client standing, which exists by virtue of the attorney-client relationship.[29] Thus, in determining whether to file a malpractice action, lawyers should be careful to distinguish proximate cause from standing. A client has standing to bring a malpractice suit against his lawyer under the theory of negligence by reason of the attorney-client relationship. However, there is no reason to file the action if there is no proximate cause, that is, if the client has suffered no harm due to the lawyer's actions. Moreover, the absence of harm will usually be independent of the lawyer's alleged negligence. Thus, while the lawyer's conduct may be negligent in the abstract, courts deal with concrete, not theoretical, problems.

Related to the problem of standing in legal malpractice actions is the requirement of an expert's affidavit under the Official Code of Georgia Annotated ("O.C.G.A.") section 9-11-9.1.[30] Because a client or former client automatically has standing by reason of the attorney-client relationship, the expert affidavit is a standing hurdle, the purpose of which is "to reduce the number of *frivolous* malpractice suits being filed."[31] One may wonder why the protections against frivolous lawsuits available to all defendants, Rule 11 of the Federal Rules of Civil Procedure and its progeny in state courts, as well as the tort of abusive litigation in Georgia, are not sufficient for lawyers, but that topic is for another day.

Labovitz v. Hopkinson[32] dealt with the scope of the expert affidavit requirement. The defendant lawyers had represented plaintiff in a divorce proceeding. Plaintiff, acting pro se, alleged that her attorneys failed to obtain accurate information about her husband's income and financial circumstances; represented to her that they had obtained such information when they had not; failed to advise her of, or affirmatively misrepresented to her about, her husband's income and finances; and pressured her to accept a settlement below the amount to which she was entitled. Plaintiff failed to file an expert affidavit, and after the period for doing so expired, she amended her complaint to seek damages for fraud and misrepresentation by defendants during the divorce proceedings. The trial court dismissed both the legal malpractice claim and the amended complaint for failure to state an action. The court of appeals

29. *See* 14 Ga. Jur. *Personal Injury and Torts* § 36:136 (1995 & Supp. 1999).

30. O.C.G.A. § 9-11-9.1 (Supp. 2000).

31. Labovitz v. Hopkinson, 271 Ga. 330, 336, 519 S.E.2d 672, 678 (1999) (quoting Housing Auth. of Savannah v. Greene, 259 Ga. 435, 439, 383 S.E.2d 867, 870 (1989)) (emphasis added).

32. 271 Ga. 330, 519 S.E.2d 672 (1999).

affirmed the dismissal of the malpractice claim because of the lack of an expert affidavit, but it reversed the dismissal of the amended complaint.[33] The supreme court affirmed.[34]

The issue before the supreme court was the effect of res judicata on a nonmalpractice claim arising out of the same acts as a malpractice claim that had been dismissed for failure to file an expert affidavit.[35] The court ruled the failure to file an expert affidavit did not result in an adjudication on the merits of the professional malpractice claim and could not serve as a basis for dismissing the amended complaint.[36] The court agreed with the reasoning of the court of appeals that O.C.G.A. section 9-11-9.1 applies only to:

> that subset of professional malpractice actions which allege a negligent act or omission or breach of contract for failure to perform professional services in accordance with the professional obligation of care, and appellee's allegations of fraud did not call into question the professional standard of care applicable to attorneys since it is improper for anyone to defraud another person.[37]

The general view seems to be that malpractice actions are negligence actions, and the importance of *Labovitz* is that the Supreme Court of Georgia specifically recognizes that professional malpractice encompasses more than negligence. The supreme court accepted the court of appeals ruling on this point and its definition of "malpractice" adopted from *Webster's Third International Dictionary*, noting that the court of appeals had quoted it in two cases.[38] Thus, the supreme court defines malpractice as:

> "a dereliction from professional duty whether intentional, criminal, or merely negligent by one rendering professional services that results in injury, loss, or damage to the recipient of those services or to those entitled to rely upon them or that affects the public interest adversely; the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services or to those entitled to rely upon them."[39]

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33. *Id.* at 330-31, 519 S.E.2d at 674.
34. *Id.* at 337, 519 S.E.2d at 678.
35. *Id.* at 331, 519 S.E.2d at 674.
36. *Id.* at 332-33, 519 S.E.2d at 675-76.
37. *Id.* at 333-34, 519 S.E.2d at 676.
38. *Id.* at 335, 519 S.E.2d at 677.
39. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1368 (1961)).

The effect of *Labovitz*, arguably, is to say that the term "legal malpractice" is no longer to be defined as a word of art, nor is it a term meaning only negligence in the representation of a client. If so, Georgia courts and lawyers may treat "malpractice" as a generic term, that is, a term meaning bad practice in the representation of a client.

Davis v. Butler[40] is interesting primarily for its facts. Plaintiff lawyer sued his former client and his former client's lawyers for abusive litigation because they sued him for malpractice.[41] The court of appeals affirmed the trial court's grant of summary judgment to the former client's lawyers on two grounds.[42] First, plaintiff had not complied with the condition under O.C.G.A. section 51-7-84(a) that a person give written notice as a condition for filing an abusive litigation claim.[43] Second, the trial court had denied the lawyer's motion for summary judgment in the underlying action:[44]

> Where the trial court finds in the alleged abusive litigation that such action withstands the attack by motion for summary judgment and is entitled to a trial by jury, although the plaintiff may lose at trial, such denial of summary judgment constitutes a legal determination that the action has substantial justification, because it is not groundless or frivolous and can proceed to jury trial.[45]

As for McDonnell, the former client, the court affirmed judgment for him because of lack of service, failure by plaintiff lawyer to appear at the default/no-service calendar, and want of prosecution.[46]

V. FEES

The lawyer practices law as a licensee of the state not only to provide legal services to clients, but also to earn a living. Unfortunately, self-interest and the restrictions on nonlawyer practice provide an opportunity for abuse in charging fees. Presumably, for this reason, the rules of ethics provide that a lawyer shall not charge an illegal or excessive fee, the premise being that the lawyer is a fiduciary of the client and must eschew the morals of the marketplace in making money.

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40. 240 Ga. App. 72, 522 S.E.2d 548 (1999).
41. *Id.* at 72, 522 S.E.2d at 549.
42. *Id.* at 73-74, 522 S.E.2d at 549-50.
43. *Id.*, 522 S.E.2d at 550.
44. *Id.*
45. *Id.* at 74, 522 S.E.2d at 550.
46. *Id.* at 75-76, 522 S.E.2d at 551-52.

An example of fee abuse appears in *In re Woodall*,[47] in which the attorneys collected a $2.4 million fee for a $3,325,000 settlement of a medical malpractice claim. Under the fee contract, they were entitled to fifty percent of the recovery, but they increased that amount to seventy-two percent by adding to the recovery the present value of future medical services, for which the settlement agreement provided. Moreover, they disbursed the fees to themselves without the approval of the probate court, which had jurisdiction because the victim of the malpractice action was incapacitated. The probate court ordered the attorneys to pay their fees into the court registry and held them in contempt for failure to do so.[48]

The earlier court of appeals holding that the probate court lacked jurisdiction to impose a finding of contempt[49] was reversed by the Georgia Supreme Court.[50] The supreme court reasoned that the probate court's jurisdiction "'to approve the settlement . . . and to protect the best interest of the incapacitated ward [gave the court jurisdiction] to require . . . the attorneys'" to pay into court the settlement funds that they disbursed to themselves without court approval.[51] The court of appeals grudgingly adopted the supreme court's holding, noting that the court relied only on Ohio law, "which differs in many ways from our own, in reversing our opinion. The implications of the Supreme Court's ruling as to the application of Ohio law to enlarge the jurisdiction of Georgia probate courts must await future clarification."[52] Chief Judge Johnson, with Judge Pope's concurrence, objected to this reasoning in a special concurring opinion that was critical of the supreme court.[53]

The point the criticism overlooks is that courts, even probate courts, have inherent power to do justice, and to tie the court's hands in this type of situation certainly is to sanction an injustice. Surely, if a probate court has the jurisdiction to approve a settlement, it has the power to approve the disbursement of the funds and the jurisdiction to prevent the funds from being disbursed without its approval.

In another fee case, *Frame v. Booth, Wade & Campbell*,[54] the trial court granted the law firm's motion for summary judgment on a promissory note executed by a former client. The defense was economic

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47. 241 Ga. App. 196, 526 S.E.2d 69 (1999).
48. *Id.* at 196-203, 526 S.E.2d at 71-74.
49. *In re* Woodall, 231 Ga. App. 391, 391, 499 S.E.2d 150, 151 (1998).
50. Gnann v. Woodall, 270 Ga. 516, 518, 511 S.E.2d 188, 190 (1999).
51. 241 Ga. App. at 196, 526 S.E.2d at 71 (quoting *Gnann*, 270 Ga. at 516, 511 S.E.2d at 189).
52. *Id.* at 197, 526 S.E.2d at 71.
53. *Id.* at 203, 526 S.E.2d at 75-76 (Johnson, J., concurring specially).
54. 238 Ga. App. 428, 519 S.E.2d 237 (1999).

duress. The client alleged that the law firm refused to forward his file to his new counsel until he agreed to sign the note despite the approaching trial.[55] The client relied on Standard 22(b) of the State Bar Rules, which provides that "a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including . . . delivering to the client all papers and property to which the client is entitled."[56] The court reasoned this Standard was not violated because under O.C.G.A. section 15-19-14(a), the attorney can retain the client's papers until his fee is paid and the client is not entitled to the papers until he pays the fee.[57] There is no indication the court considered Formal Advisory Opinion No. 87-5, which was issued by the Supreme Court of Georgia on September 26, 1988 and provides in part that "an attorney's ethical obligation not to cause prejudice to his or her client is paramount over rights under the lien statute. Accordingly, an attorney may not to the prejudice of a client withhold the client's papers or properties upon withdrawal as security for unpaid fees."[58]

The client also argued there was a jury issue as to the reasonableness of the fees.[59] The court said the reasonableness of the lawyer's fees was not at issue "because this action was a suit on a note that included a provision authorizing the 15 percent attorney fees permitted under [O.C.G.A. section] 13-1-11(a)."[60]

In *William J. Cooney, P.C. v. Rowland*,[61] the court of appeals confirmed its status as a friend of the lawyer. In an action to foreclose an attorney's lien on settlement checks issued to the client, the trial court, finding the fee agreement unconscionable, entered judgment for Cooney for approximately one-third of the amount requested.[62] The court of appeals disagreed and held the agreement should have been enforced according to its terms, which included "interest [to] accrue on any outstanding balances at the rate of one and one-half percent per month beginning thirty days after the date the bill was presented and continuing until paid."[63]

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55. *Id.* at 428-30, 519 S.E.2d at 238-40.
56. GA. CT. & BAR R. 4-102, STANDARD 22(b) (1983).
57. 238 Ga. App. at 430, 519 S.E.2d at 240 (citing O.C.G.A. § 15-19-4(a) (1999 & Supp. 2000)).
58. Op. State Disciplinary Bd. of the State of Ga. 87-5 (1988).
59. 238 Ga. App. at 432, 519 S.E.2d at 241.
60. *Id.*
61. 240 Ga. App. 703, 524 S.E.2d 730 (1999).
62. *Id.* at 703, 524 S.E.2d at 731-32.
63. *Id.*, 524 S.E.2d at 732.

The interesting point about the case is the court treated the attorney-fee contract as merely a commercial contract.[64] The court said:

> In addition to being authorized by the fee agreement to charge interest at the rate charged, Cooney was authorized by statute to charge interest in the manner in which it was charged. The owner of a commercial account may charge interest on the balance due on the account when the account has been due and payable thirty days or more and may charge as much as one and one-half percent interest per month on the balance . . .; an account is "commercial" if it involves an obligation to pay money arising out of a transaction to furnish services. Furthermore, when a payment is made upon any debt, the creditor shall apply the payment first to discharge the interest due, then to reduce the principal . . . . At all times, Rowland could have avoided any obligation to pay interest by paying the principal in full each month *as he agreed to do*.[65]

The court of appeals also held the contract was not unconscionable.[66] The court emphasized the freedom of parties to contract without having courts save either side from a bad bargain and stated parties should be permitted to enter into unreasonable contracts even if they lead to hardship.[67] The court summarily rejected the argument that the rules of professional conduct govern attorney-fee contracts.[68] The language of the court speaks for itself. But there is a question: If an attorney-fee contract is just another commercial contract, what happens to the rule that a client, having signed a contract, can dismiss a lawyer at any time for any reason or for no reason without penalty, and has a duty to pay fees only for the work done on quantum meruit basis?[69]

One may also ask if eighteen percent interest on the unpaid balance of attorney fees is against public policy. The question is relevant because in *Brandon v. Newman*,[70] the court of appeals considered State Bar Standards 13 and 26.[71] It concluded that "the State Bar disciplinary provisions establish the public policy disapproving rewards for referrals through fee-sharing agreements with nonlawyers."[72] Thus, the court relied on the Georgia Standards as establishing the public

64. *Id.* at 704, 524 S.E.2d at 732.
65. *Id.* (citations omitted) (emphasis in original).
66. *Id.* at 703, 524 S.E.2d at 732.
67. *Id.* at 705, 524 S.E.2d at 733.
68. *Id.* at 705-06, 524 S.E.2d at 733.
69. AFLAC v. Williams, 264 Ga. 351, 353, 314 S.E.2d 314, 316 (1994).
70. 243 Ga. App. 183, 532 S.E.2d 743 (2000).
71. *Id.* at 187, 532 S.E.2d at 747.
72. *Id.*

policy against fee splitting and voided an attorney's lien because the lawyer had engaged in that practice.[73]

VI. RECUSAL AND DISQUALIFICATION

A. *Judges and Public Officials*

Recusal, or disqualification of a judge, is a concept used to protect the integrity of a trial. It is used when there is a factor present that will bring the judge's impartiality into issue. It also provides criminal defendants with a basis for overturning a conviction, as in *Kelly v. State*.[74] In *Kelly* defendant alleged the trial judge should recuse himself because the victim's husband was on the county commission, which pays the supplemental salary of all judges in the circuit and approximately half of the judges' operating budget. The judge denied the motion for recusal.[75] The court of appeals affirmed.[76]

Defendant's motion appeared to be soundly based in theory, but it was not. To grant it, the court had to assume a judge would not be impartial because the husband of the victim would demand vengeance and would blame the judge if defendant were found not guilty. The motion was based on the assumption that two public officials, the county commissioner and the judge, would breach their oaths of office for the purpose of revenge. Moreover, the motion sought disqualification of all judges in the circuit. The court of appeals was clearly correct in affirming the denial of the motion.

A more interesting case on disqualification is *Outdoor Advertising Ass'n of Georgia v. Garden Club of Georgia*,[77] in which defendant moved to disqualify former Attorney General Michael Bowers from representing the Garden Club because the Attorney General's Office had represented the Department of Transportation and issued opinions in related matters during Mr. Bowers' tenure.[78] The supreme court determined Mr. Bowers had not been personally involved in transactions relating to the issues in the case, which had been handled by his staff, and affirmed the trial court's denial of the motion to disqualify.[79] Had Mr. Bowers been personally involved in handling the matter as attorney general, presumably the result would have been different. The court, by

73. *Id.*
74. 238 Ga. App. 691, 520 S.E.2d 32 (1999).
75. *Id.* at 691, 520 S.E.2d at 34.
76. *Id.* at 696, 520 S.E.2d at 37.
77. 272 Ga. 146, 527 S.E.2d 856 (2000).
78. *Id.* at 146, 527 S.E.2d at 859-60.
79. *Id.* at 147-51, 527 S.E.2d at 861-62.

implication, made a useful distinction between official and personal conduct for dealing with the disqualification of former public officials. The distinction is that official conduct is pro forma, whereas personal conduct involves actual knowledge. Thus, the court was unwilling to penalize former public officials when the basis for disqualification of lawyers in the private sector—the possible misuse of client information—is not present.[80]

B. Private Attorneys

Disqualification is a conflict of interest by reason of status. Thus, a judge or other public official is disqualified for lack of impartiality. The private lawyer is disqualified for conflict of interest, which means the presence of a factor that prevents the lawyer from exercising independent professional judgment on behalf of a client. During the survey period, six cases—all criminal cases—involved conflicts of interest.

In *Gray v. State*,[81] defendants alleged that "their trial lawyers had a conflict of interest and were ineffective per se" because both were public defenders from the same office.[82] The court rejected the claim.[83] Only counsel with an actual conflict that adversely affects his performance is ineffective.[84] Because defendants relied solely on their per se argument, they did not show an actual conflict or ineffectiveness of counsel.[85]

In *Abney v. State*,[86] defendant alleged ineffective assistance of counsel because his court-appointed attorney was married to a prosecutor who had prosecuted defendant in an unrelated case. The trial lawyer testified there was no involvement in, nor discussion of, the case with his wife.[87] To succeed on a claim of ineffective assistance of counsel because of a conflict of interest, a defendant must prove an actual conflict that adversely affected the counsel's performance.[88]

To the same effect is *Jones v. State*,[89] in which the conflict was alleged to be the lawyer's representation of defendant and his brother. The brother was willing to testify the methamphetamine drugs found in defendant's garage were his. The lawyer declined to use the brother's

80. *Id.* at 150, 527 S.E.2d at 861.
81. 240 Ga. App. 716, 523 S.E.2d 626 (1999).
82. *Id.* at 718, 523 S.E.2d at 629.
83. *Id.*
84. *Id.*
85. *Id.*
86. 240 Ga. App. 280, 523 S.E.2d 362 (1999).
87. *Id.* at 282, 523 S.E.2d at 365.
88. *Id.* at 282-83, 523 S.E.2d at 365-66.
89. 239 Ga. App. 832, 521 S.E.2d 614 (1999).

testimony, and defendant contended the refusal resulted from the active representation of the brother.[90] The court tersely noted that "ineffective assistance of counsel does not result from the refusal of counsel to use possibly perjured testimony."[91]

In *Williams v. State*,[92] defendant alleged a conflict of interest by his lawyer because the lawyer had formerly represented the confidential informant and had animosity toward him that precluded the lawyer from calling the informant as a witness.[93] The court determined there was animosity, but the failure to call the informant was a decision of trial strategy because the lawyer viewed the informant as an unpredictable witness who might harm defendant's case.[94]

The Georgia Supreme Court dealt with the issue of ineffective assistance of counsel because of a conflict of interest in two felony-murder cases, but the claim was rejected in both instances. In *Wilson v. State*,[95] defendant claimed error because counsel's wife worked for the Department of Corrections, and casually knew the victim and people acquainted with the victim.[96] The court considered the relationship to be both minimal and indirect and concluded there was no evidence it affected counsel's performance.[97] In *Lyons v. State*,[98] two attorneys appointed to represent defendant withdrew when the district attorney hired them. The attorneys had represented defendant for only a few months; neither had improper communications about the case while employed by the district attorney; and defendant continued to be represented by the same lead counsel.[99] Based on these facts, the court rejected the claim.[100]

VII. DISCIPLINARY MATTERS

In *In re Gaff*,[101] a lawyer was suspended for one year because he hired a disbarred lawyer and allowed him to have contact with the office clients in violation of Standard 73.[102] Standard 73 provides:

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90. *Id.* at 836, 521 S.E.2d at 618.
91. *Id.*
92. 242 Ga. App. 1, 528 S.E.2d 521 (2000).
93. *Id.* at 1, 528 S.E.2d at 523.
94. *Id.* at 2, 528 S.E.2d at 523.
95. 271 Ga. 811, 525 S.E.2d 339 (1999).
96. *Id.* at 823, 525 S.E.2d at 350.
97. *Id.*
98. 271 Ga. 639, 522 S.E.2d 225 (1999).
99. *Id.* at 640, 522 S.E.2d at 227.
100. *Id.*, 522 S.E.2d at 227-28.
101. 272 Ga. 7, 524 S.E.2d 728 (2000).
102. *Id.* at 8, 524 S.E.2d at 728.

> A lawyer shall not allow a person who has been suspended or disbarred and who maintains a presence in an office where the practice of law is conducted by the lawyer, to represent himself or herself as a lawyer, or to have contact with persons who have legal dealings with the office either in person, by telephone, or in writing.[103]

Defendant had a law office in Canton, Georgia, and opened another law office in Fitzgerald, Georgia, and he hired a disbarred lawyer to work as a paralegal.[104] The court found that "although [Gaff] received a warning from the State Bar about potential violations of Standard 73," he allowed the disbarred lawyer to work in his office unsupervised.[105]

In *In re Henley*,[106] the lawyer was disbarred for representing persons falsely claiming to have been in automobile accidents and who were seeking insurance payments for nonexistent personal injuries and property damage.[107] Henley contended the Bar had "improperly used the documents subpoenaed to expand the scope of the investigation against him" and thereby violated his constitutional rights.[108] The court concluded that inasmuch as the documents were subpoenaed during the investigative phase and prior to the filing of formal charges, "the full protection of constitutional due process did not attach."[109] Because Henley was given ample notice and opportunity to present his defense, no new charges were added after the filing of the formal complaint.[110]

In re D.K.M.[111] was an appeal from a denial for certification of fitness to practice law. The certification had been granted, but it was suspended when the Board to Determine Fitness of Bar Applicants received a letter from an administrative law judge who had presided over D.K.M.'s pro se workers' compensation case.[112] The court affirmed the Board's denial of certification, stating that "[a]s properly characterized by the hearing officer, [D.K.M.'s] conduct throughout his workers' compensation case constituted an abuse of the legal process and his

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103. *Id.* (citing GA. CT. & BAR R. 4-102(d), STANDARD 73 (1998)).
104. *Id.*
105. *Id.*
106. 271 Ga. 21, 518 S.E.2d 418 (1999).
107. *Id.* at 21, 518 S.E.2d at 419.
108. *Id.* at 21-22, 518 S.E.2d at 419-20.
109. *Id.* at 22, 518 S.E.2d at 420.
110. *Id.*
111. 271 Ga. 473, 520 S.E.2d 216 (1999).
112. *Id.* at 473-74, 520 S.E.2d at 216-17.

filing of admittedly frivolous complaints showed a complete lack of both personal and professional integrity."[113]

VIII. CONCLUSION

The occurrences and cases during the survey period reveal vision, conflict, resolve, and resolution. The adoption by the supreme court of the Georgia Rules of Professional Conduct coupled with the release of the Restatement of the Law Governing Lawyers shows a shift from the narrow concept of "legal ethics" to the more inclusive concept of "lawyer's law." Consistent with this adjustment is the expanded use of the term "malpractice" as seen in *Labovitz*.[114] This vision of the realities of the 21st century should help the profession as it seeks its proper place in today's community.

There are, however, always a few bumps in the road. These obstacles are to be expected as the profession seeks to modernize itself. Thus, the application of the concept that the lawyer's duties are derivative of the client's duties is accepted in the Restatement, rejected in *Bowen*, and applied in *Georgia Receivables, Inc.*[115] Inconsistency is also revealed as the courts in *Frame* and *Brandon* considered the unsettled question of whether disciplinary rules constitute statements of public policy.[116]

One group of cases reveals the resolve of the courts to exercise authority over the practice. *Woodall* is an example of the supreme court's upholding of the authority of the probate courts over the actions of attorneys practicing in that court.[117] Another example is the position taken by the court on an issue of personal and professional integrity in *D.M.K.*[118]

The period produced the resolution of several important issues. The courts took what might be considered a strict construction position in several disqualification and conflicts of interest cases. Disqualification of present and former public officials must be based on more than speculation, as shown by *Kelly* and *Outdoor Advertising Ass'n of Georgia*.[119] Conflicts of interest must be based on an actual conflict that renders counsel ineffective, as shown in *Gray, Abney, Jones, Williams,* and *Lyons*.[120] In *Gaff* the court considered the issue of

113. *Id.* at 474, 520 S.E.2d at 217.
114. *See supra* text accompanying notes 31-39.
115. *See supra* text accompanying notes 2-22.
116. *See supra* text accompanying notes 54-60, 70-73.
117. *See supra* text accompanying notes 47-53.
118. *See supra* text accompanying notes 111-13.
119. *See supra* text accompanying notes 74-80.
120. *See supra* text accompanying notes 81-94, 98-100.

constitutional due process and concluded that in disciplinary cases it does not fully attach until after the filing of formal charges.[121] In *Henley* it considered the application of the no contact rule as applied to disbarred or suspended lawyers.[122]

It was a busy time for the courts, and with the advent of the new rules, the next survery period should be even busier. This activity is, however, as it should be because "lawyer's law" is no more static than any other part of our discipline.

121. *See supra* text accompanying notes 101-05.
122. *See supra* text accompanying notes 106-10.