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Legal Ethics

by Roy M. Sobelson*

I. INTRODUCTION

This Article covers the rules, cases, ethics opinions, and other matters decided by the Georgia Supreme Court, the Georgia Court of Appeals, and a federal district court between June 1, 1998, and May 31, 1999, that have most affected, or may affect, Georgia lawyers. Many eye-popping headlines about lawyers and their profession filled the survey period. Although very few of the underlying cases made or changed any substantive law, they may well have substantially altered the landscape of lawyering, creating or illuminating various pitfalls and land mines.

One Georgia lawyer, disbarred for murdering his landlord, avoided the death penalty only after he finally admitted his guilt.1 Moreton Rolleston, considered by many to be something of a legend in Atlanta legal circles, continued his assault on the record for the longest time and most motions filed to avoid paying a malpractice judgment against him.2 A judge in north Georgia, a convicted felon before he took the bench, was removed, at least in part, for improper actions in office.3 Two lawyers generated both local and national controversy when they collected a huge fee in a personal injury case, leaving their deceased client's family with virtually nothing. At least one of them found it impossible to comply with a judge's order to place the large sum in the court registry because he had already spent it.4 In another case, the Supreme Court noted

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3. See infra notes 176-84 and accompanying text.

4. See infra notes 82-96 and accompanying text.
with disapproval a district attorney's hiring of a capital murder defendant's lawyer during the criminal trial, but the court refused to reverse based on that conflict alone.\(^5\) Finally, in a criminal contempt matter arising out of discovery in a products liability case, a federal judge entered a consent judgment assessing a large monetary penalty against a litigant and its law firm and ordering the money to be used in a way that is probably unique in American legal history.\(^6\)

### II. RULES CHANGES

While there are some cases and developments of more immediate influence and interest, the most important development has not yet come to fruition. In the April 1999 issue of the *Georgia Bar Journal*, the State Bar of Georgia published notice of its intent to move to amend the lawyer discipline rules.\(^7\) In essence, the proposal would repeal Georgia's disciplinary rules, which are based on the ABA Model Code of Professional Responsibility ("Model Code"),\(^8\) and replace them with a modified version of the ABA Model Rules of Professional Conduct ("Model Rules").\(^9\) The proposed rules differ from the Model Rules, however, in several material respects. If these rules are adopted as proposed, they could cause some substantial changes in the way Georgia lawyers practice.

The Scope section of the proposed rules makes clear that their purpose "is not to give rise to a cause of action nor to create a presumption that a legal duty has been breached . . . . They are not designed to be a basis

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5. *See infra* notes 247-57 and accompanying text.
6. *See infra* notes 97-110 and accompanying text.
7. *See Notice of Motion to Amend State Bar Rules, Ga. Bar J., Apr. 1999, at 99.* This notice contains the text of the proposed rules discussed in this Article. As of August 30, 1999, the proposal was still before the supreme court, but no official action has been announced. Telephone Interview with William P. Smith, III, General Counsel, State Bar of Georgia (Aug. 30, 1999). If approved, the proposed rules would be denominated the Georgia Rules of Professional Conduct.
8. Approved by the ABA in 1966, most states, including Georgia, quickly adopted the Model Code in whole or in part. Georgia's version is unique because it includes Standards of Conduct ("Standards"), which the supreme court adopted in 1976, and because it denominates the ABA Disciplinary Rules as Directory Rules ("DRs"). The DRs are aspirational only.
for civil liability. However, many courts have all but ignored this in recent years.

Proposed Rule 1.1 requires lawyers to provide competent representation. Oddly, after stating that obligation, the proposed rule incorporates the Model Code's admonition that lawyers should not handle matters beyond their competence without associating another lawyer who is competent to handle it, a toothless tiger if there ever was one. The proposed rule also appears to apply to lawyers who take cases that they are competent to handle but who handle them in a sloppy manner. The rule specifically requires that lawyers handle all matters with "the legal knowledge, skill, thoroughness and preparation reasonably necessary," thereby creating the possibility that a lawyer could be disbarred for handling a matter incompetently.

Proposed Rule 1.5(e) is significant mostly because it would bring the rules into conformity with what may already be a widespread practice. The existing rules provide that a lawyer may share a fee with a nonpartner only if the two lawyers' shares of the fees reflect the amount of work each performed. Under the proposed rule, lawyers may agree to share fees either in proportion to their share of the work or by written agreement, as long as each lawyer assumes joint responsibility, the client is advised that the fees are being shared, and the total fee is reasonable.

10. PROPOSED GA. RULES OF PROFESSIONAL CONDUCT Scope.
11. See, e.g., Allen v. Lefkoff, Duncan, Grimes & Dermer, 265 Ga. 374, 374-77, 453 S.E.2d 719, 719-22 (1995) (holding that, although the Georgia Bar Rules cannot provide the sole basis for legal malpractice liability, they are relevant to the standard of care to the extent that they are intended to protect people in a position similar to the plaintiff's or are addressed to the kind of injury that the plaintiff suffered); see also CENTER FOR PROF'L RESPONSIBILITY, AMERICAN BAR ASS'N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT xix-xxiii (3d ed. 1996) (discussing some of the uses ethics rules have in litigation in various jurisdictions).
12. PROPOSED GA. RULES OF PROFESSIONAL CONDUCT Rule 1.1.
13. Id.
14. Id.
15. Contrast this rule with Proposed Rule 1.3, which requires that lawyers act with reasonable diligence and promptness, a new affirmative requirement for Georgia lawyers. PROPOSED GA. RULES OF PROFESSIONAL CONDUCT Rule 1.3. Immediately after stating that obligation, however, the rule equates the lack of diligence with abandonment of a matter, which is a much more serious matter and is much more difficult for a prosecutor to prove. Id. This virtually eliminates the possibility that a lawyer could be found to have violated the rule in normal circumstances.
16. PROPOSED GA. RULES OF PROFESSIONAL CONDUCT Rule 1.5(e).
17. RULES & REGS. FOR THE ORG. & GOV'T OF THE ST. BAR OF GA. DR 2-107(A)(2) [hereinafter GA. BAR RULES].
18. PROPOSED GA. RULES OF PROFESSIONAL CONDUCT Rule 1.5(e).
Proposed Rule 1.6 deals with confidentiality, which is one of the most important issues regarding lawyer behavior. The proposed rule is an interesting hodgepodge of old and new rules. It defines confidential information as “all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client." This definition departs from the existing rule by adding the word “including,” which suggests that there are other types of information protected as well, but the proposed rule does not make that clear. Additionally, the existing rule explicitly protects confidences, which are defined as “information [protected] by the attorney-client privilege.”

When the ABA adopted the Model Rules in 1983, it deliberately omitted the distinction between a “confidence” and a “secret” in part because it was confusing to have two different categories of information, especially when one of them merely referred to the local law of attorney-client privilege. In their place, the Model Rules extended protection to “information relating to representation of a client.” The 1983 change had two main effects other than reducing the confusion created by the multiple categories. First, by covering all information relating to the representation, the Model Rules eliminated the need for a lawyer to determine whether disclosure of certain information would be detrimental or embarrassing or whether the client had requested that it be kept confidential. Second, and perhaps more important, it broadened the scope of protected information. The Model Code's phrase “information gained in the professional relationship” in Disciplinary Rule 4-101(A) could be read to include either a temporal limitation (i.e., only covering information gained during the representation) or a causal limitation (i.e., only covering information gained because of the representation). The use of the broader phrase “relating to the representation” eliminated any need to resolve that dilemma, to consult the law of attorney-client privilege, or to figure out any potential distinctions between “confidence” and “secret.” However, adoption of the proposed rule would continue the

20. Proposed Ga. Rules of Professional Conduct Rule 1.6(a); cf. Ga. Bar Rules DR 4-101(A) (“[Secret’ refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client.”); Ga. Bar Rules Rule 4-102(d), Standard 28 (same).
23. Model Rules of Professional Conduct Rule 1.6(a).
existing ambiguities and create a new one—clarifying the significance of the word “including.”

In at least one way, the proposed rule is superior to Model Rule 1.6. The proposed rule explicitly allows lawyers to disclose information when “required by these rules or other law, or by order of the Court,”24 an exception only implied in the Model Rules.25 In addition, the proposed rule differs radically from Model Rule 1.6, although there will undoubtedly be disagreement about whether the difference is good or bad. The proposed rule would allow disclosure “to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct,”26 whereas Model Rule 1.6 allows disclosure that is necessary “to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.”27 The proposed rule also makes one excellent addition to the Model Rule by specifying that “the lawyer must make a good faith effort to persuade the client not to act or, if the client has already acted, to warn the victim.”28

Conflicts of interest are very difficult for lawyers, and the rules have always been woefully vague in defining them, thus leaving even the most conscientious lawyer at risk of unwittingly violating the rules. On this count, Proposed Rule 1.7, while not making any radical change, does make one substantial improvement by explicitly stating that there are some situations in which conflicts may not be waived.29 Perhaps the most serious of these situations is addressed in section (c)(2), which provides that a client cannot consent to representation that “includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding.”30 Presumably, this rule would prohibit the oft-used, but criticized, practice of representing both husband and wife in a divorce.

Proposed Rule 1.9, which deals with representation of a client whose interests are materially adverse to a former client’s interests, states the traditional “substantially related” principle.31 It does not, however,

24. PROPOSED GA. RULES OF PROFESSIONAL CONDUCT Rule 1.6(a).
26. PROPOSED GA. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1)(i).
27. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1). Relatively few states have adopted the ABA’s rule verbatim, and some have substantially broadened the exceptions. GILLERS & SIMON, supra note 9, at 75-79.
28. PROPOSED GA. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(3).
29. PROPOSED GA. RULES OF PROFESSIONAL CONDUCT Rule 1.7(c).
30. PROPOSED GA. RULES OF PROFESSIONAL CONDUCT Rule 1.7(c)(2).
31. PROPOSED GA. RULES OF PROFESSIONAL CONDUCT Rule 1.9.
appear to incorporate the Yerby test, which broadens the disqualification by prohibiting the representation of a client against a former client in a matter of the same general subject matter and which arose while the lawyer represented the former client. Because Yerby was decided by the supreme court and has never been overruled, the court's adoption of Proposed Rule 1.9 would surely draw the vitality of that principle into question.

Proposed Rule 1.10, which imputes disqualification of a lawyer to other lawyers in the firm, would put a reasonable limitation on the effects of disqualification, basically opening the door to a limited form of screening. Specifically, it would provide that if a lawyer in a firm was disqualified from handling a matter, that lawyer's departure from the firm would eliminate the remaining lawyers' imputed disqualification, as long as no other lawyer in the firm had gained confidential information about the matter. The current rule has never been clear as to whether a disqualification, once applied to any lawyer in a firm, applies to all other lawyers in the firm, regardless of whether they had access to information or whether the disqualified lawyer left the firm.

Proposed Rule 3.3 would, for the first time, raise the possibility of sanctioning a lawyer for failing to take appropriate remedial measures, including notifying the court or the potentially affected person, after unknowingly presenting false evidence. While Georgia's Directory Rules currently require a lawyer whose client commits perjury or fraud on the tribunal to report the matter to "the affected person or tribunal," the rule has never been made the subject of a Standard, thus making the admonition aspirational only.

The adoption of Proposed Rule 3.7 would also end one of Georgia's disciplinary rules' enduring mysteries—why Georgia has retained Canon 19 of the 1908 ABA Canons of Professional Ethics as the model for its advocate-witness rule. This rule is odd in many respects, not the least

33. Id. at 721-22, 373 S.E.2d at 751.
34. PROPOSED GA. RULES OF PROFESSIONAL CONDUCT Rule 1.10.
35. PROPOSED GA. RULES OF PROFESSIONAL CONDUCT Rule 1.10(b).
36. PROPOSED GA. RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4).
37. GA. BAR RULES DR 7-102(B)(1). Georgia did not adopt the 1974 amendment to ABA Disciplinary Rule 7-102(B)(1), which limited the duty to make such disclosures by adding the phrase, "except when the information is protected as a privileged communication." The ABA ethics committee interpreted this phrase to include both privileged and secret information. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975). This interpretation might effectively vitiate any duty to report perjury. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 658 (student ed. 1986).
38. PROPOSED GA. RULES OF PROFESSIONAL CONDUCT Rule 3.7.
of which is that it has never become part of the Standards.\footnote{Because virtually all local court rules address the advocate-witness dilemma, it may be a moot point to address it in a code of ethics anyway. See, e.g., N.D. Ga. R. 39.3(B)(3); S.D. Ga. R. 83.6(g).} The proposed rule would also eliminate two other questions about the rule, although it will not resolve the debate over the reason for the rule's very existence.\footnote{For an illuminating discussion about the inconsistency of the Model Code's justifications for the advocate-witness rule, see Wolfram, supra note 37, at 377-78.} Under Georgia's current advocate-witness rule,\footnote{See Ga. Bar Rules DR 5-102.} two things have always been unclear. The first is whether a lawyer's disqualification under the rule should be imputed to all other lawyers in the firm.\footnote{The current rules suggest not. Georgia's advocate-witness rule provides that "when a lawyer is a witness for his client . . . he should leave the trial of the case to other counsel," but it does not make clear whether the other counsel must be from another firm. Ga. Bar Rules DR 5-102. Georgia's imputed disqualification rule applies only to disqualification under DR 5-105, which does not include a prohibition on lawyers appearing as witnesses on behalf of their clients. Ga. Bar Rules DR 5-105(d).} The proposed rule would severely limit the instances in which an entire firm would be disqualified. Second, it would eliminate the current rule's language that oddly suggests that if a lawyer is put in the position of being both advocate and witness, that lawyer should drop the role as witness and continue as advocate.\footnote{Ga. Bar Rules DR 5-102 ("Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.").} The current rule conflicts with the lawyer's fiduciary duty to act in the client's best interests because it is much easier to pick one's lawyer than to pick one's witnesses.

Proposed Rule 8.3 provides that a lawyer should inform the appropriate authority if he has knowledge that "another lawyer has committed a violation . . . that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."\footnote{Proposed Ga. Rules of Professional Conduct Rule 8.3(a).} This proposal is significant in at least two respects. First, it eliminates the circuitous, unenforced, and perhaps unenforceable current rule that a lawyer should inform the authorities of another lawyer's violation of any disciplinary rule.\footnote{Ga. Bar Rules DR 1-103.} This rule seems to encompass so many possible sins that it has been largely disregarded. Second, the proposed rule is not mandatory. Indeed, that point is made twice—first by using the word "should" instead of "shall," and second by explicitly stating that there is no disciplinary penalty for a violation.\footnote{Proposed Ga. Rules of Professional Conduct Rule 8.3.
Finally, Proposed Rule 8.4 makes it a violation, the maximum punishment for which is disbarment, to “be convicted of a misdemeanor involving moral turpitude where the underlying conduct relates to the lawyer’s fitness to practice law.”\(^{47}\) This proposal essentially adopts the rule already established by case law.\(^{48}\) Conversely, any felony conviction is grounds for disbarment, regardless of whether it involves moral turpitude or whether it is related to fitness to practice law.\(^{49}\)

III. FORMAL ADVISORY OPINIONS

In the past couple of years, the supreme court has issued more than the usual number of Formal Advisory Opinions (“FAOs”). This year was no exception, with the court issuing six opinions, and the Formal Advisory Opinion Board filing one with the court and releasing two for comment. FAO 97-1 deals with lawyers working as temporary employees.\(^{50}\) The opinion reads like a primer on professional responsibility by defining the obligations lawyers owe their clients and emphasizing that temporary lawyers are subject to the same duties as other lawyers. It further makes the obvious but helpful point that firms hiring temporary lawyers must be especially sensitive to the potential for conflicts and act accordingly. However, this opinion must be read carefully to avoid getting the wrong impression about one crucial point. On more than one occasion, the opinion suggests that temporary lawyers should be screened from confidential information that is not related to their assignment. Because the purpose of screening is generally to avoid the imputation of conflicts, the opinion could be interpreted as a suggestion that screening would protect the firm from being disqualified in a matter if the temporary employee was disqualified because of prior employment. However, no Georgia case has ever approved such a concept, and this opinion should probably not be taken to suggest otherwise. The purpose of screening temporary employees is merely to fulfill the obligation to limit the disclosure of confidential information as much as possible, which may include keeping temporary employees working on unrelated matters completely “out of the loop.”\(^{51}\)

The question posed in FAO 97-3 was, “Whether it is ethically permissible for a departing attorney to send a communication to clients

\(^{47}\) PROPOSED GA. RULES OF PROFESSIONAL CONDUCT Rule 8.4(a)(3).

\(^{48}\) See In re Williams, 266 Ga. 132, 464 S.E.2d 816 (1996).

\(^{49}\) PROPOSED GA. RULES OF PROFESSIONAL CONDUCT Rule 8.4(a)(2).


\(^{51}\) GA. BAR RULES Rule 4-102(d), Standard 29.
of the former law firm? The opinion immediately makes the correct but often misunderstood point that "[a] client is not the property of a certain attorney." This suggests that no lawyer has a right to expect or demand to provide representation to any client and that lawyers are thus free to offer their services to anybody, even represented parties. However, the opinion then immediately backs away from that suggestion by limiting its holding to clients with whom the departing lawyer "either had significant contact . . . or actively represented." Certainly to the extent the opinion discusses written communications from a lawyer to persons not known to or represented by that lawyer, this qualification comes dangerously close to, if it does not reach, suggesting limits on lawyer communications to potential clients. Such limits have been unconstitutional at least since 1988, when the United States Supreme Court held that written communications, even to unknown nonclients on virtually any matter, are protected speech so long as they are not false or deceptive or do not propose an illegal transaction. Thus, as long as a lawyer does not make "direct personal contact," that lawyer is free to contact any of the firm's clients, regardless of whether there has been any previous contact between them.

FAO 98-1 deals with local counsel's responsibilities for the sanctionable discovery abuses of in-house or other out-of-state counsel not admitted to the State Bar. For the most part, this opinion tracks Standard 71 and acknowledges responsibility when local counsel knows of and ratifies the other counsel's actions or when one lawyer has direct supervisory authority over another lawyer and knows of the other lawyer's abuses. The most important aspect of this opinion is the disapproval of willful blindness, whereby local counsel, "suspicious that

53. Id.
54. This is an outgrowth of the oft-stated principle that a client always has the right to fire an attorney for any reason or no reason at all.
56. See Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 473 (1988); see also Florida Bar v. Went For It, Inc., 515 U.S. 618, 624 (1995) ("Commercial speech . . . may be regulated if the government satisfies a test consisting of three related prongs: First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be narrowly drawn.") (internal quotation marks omitted); cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3; PROPOSED GA. RULES OF PROFESSIONAL CONDUCT Rule 7.3.
57. GA. BAR RULES Rule 4-102(d), Standard 12.
lead counsel [is] engaging in or [is] about to engage in a violation of ethical requirements, [seeks] to avoid acquiring actual knowledge of the conduct. Equating local counsel's avoidance of knowledge with the other attorney's misconduct for the purpose of culpability, the opinion states that "a prudent attorney should treat any reasonable suspicion as sufficient to prompt inquiry."

FAO 98-2 is also rather simple, but it clarifies a substantial dilemma encountered by many attorneys. The issue it deals with is how a lawyer should handle unclaimed client funds left in a trust account. The answer is found in the Disposition of Unclaimed Property Act, which provides that abandoned funds may be delivered to the state. The lawyer's responsibility consists of

exhaust[ing] all reasonable efforts to locate the rightful recipient. After exhausting all reasonable efforts and the expiration of the five year period discussed in the Act, if the lawyer is still unable to locate the rightful recipient and the rightful recipient fails to claim the funds, the funds . . . are presumed to be abandoned . . ., and the lawyer may then deliver the unclaimed funds to the State of Georgia in accordance with [the Act].

FAO 98-3 arose from a long-brewing controversy involving lawyers who were contacting state prison wardens to complain about the treatment of inmates who were not their clients. After the practice had gone on for several years, the Georgia Attorney General took the controversial and somewhat surprising position that such contacts were prohibited by Standard 47 because they constituted unsolicited legal advice to the state's client (i.e., the warden) without prior permission from the state's lawyers. The Court reached the right result, but it may have been for the wrong reason. According to the opinion, the crucial questions are (1) whether the government is an adverse party, and (2) whether the communication is authorized by law, which is an explicit exception to the prior consent provision of Standard 47. The opinion concludes that the government is not an adverse party because both the client's lawyer and the government have the same interest (i.e.,

59. Id.
60. Id.
protecting the inmates); therefore, Standard 47 is not applicable. It also justifies the communication on First Amendment grounds.

Putting aside the First Amendment concerns, this conclusion cannot possibly be right. Under the rationale used in the opinion, because the government's primary purpose is to serve the interests of the people, any time a client claims that his rights are coextensive with those of the people (of which he is necessarily one), then his interests and those of the government are the same, not adverse. Moreover, this rationale ignores the fact that the state's citizens in prison have different interests from those not in prison. If nothing else, the state seeks to protect those on the outside from those on the inside by incarceration. This opinion could completely, or almost completely, eviscerate the rule in litigation with the government and therefore set a potentially troubling precedent.

The better, and less dangerous, reason for this conclusion is that this scenario simply does not fall within Standard 47's description of a situation in which the government "is represented by a lawyer in that matter." Of course, the government, acting through the warden, is represented by the state's lawyers, as it always is at some level. More to the point of the rule's prohibition is that at the time of the communication, there was no existing "matter." The point of Standard 47 is not to prevent lawyers and other persons from ever speaking, but rather it is to prevent them from speaking on the issues in a genuine controversy. The reason for this is that "Standard 47 contemplates a situation where a party might take advantage of another ... through unauthorized communication." Here, the scenario indicates that the inmate's lawyer was merely informing the warden of a problem and possibly making a demand upon him, which is no different than a situation in which a lawyer sends a demand letter on an unpaid note or an automobile accident claim not yet the subject of litigation. Any legal advice the lawyer may include in one of these communications must be limited to the suggestion that the recipient obtain counsel. Unless and until the recipient responds (or refuses to respond) to any communication, it is not clear that there will ever be a real controversy between the lawyer's client and the recipient of the communication. Thus, such initial communications should be perfectly permissible.

FAO 98-4 deals with the significance of the descriptive term "of counsel," and is itself noncontroversial. However, it does raise

66. GA. BAR RULES Rule 4-102(d), Standard 47.
68. GA. BAR RULES Rule 4-102(d), Standard 48.
questions about how much control the supreme court exercises over FAOs. The opinion twice refers to “the Board” as if the Formal Advisory Opinion Board issued the opinion. While it is obvious that the Board initially writes FAOs, the supreme court issues them.

Also, the June 1999 issue of the Georgia Bar Journal contains notice of three proposed FAOs. Proposed FAQ 94-R11 deals with the practices of in-house counsel for real estate lending institutions and asks whether conflicts of interest provisions prohibit the lawyer from providing legal services to the customer regarding the closing and charging a fee for it.\textsuperscript{70} The opinion concludes that such representation would “constitute an impermissible conflict of interest under Standards 35 and 36.”\textsuperscript{71} It further concludes that while the lender may seek reimbursement for expenses incurred in the transaction, it may not be denominated or directly billed to the customer as a legal or attorney fee, largely because of the risk of confusing the customer about whose interests the lawyer really represents.\textsuperscript{72}

The intent of the proposed FAQ is obvious, even if its language is not perfectly clear. Obviously, the drafters are concerned about the degree to which consumers may be misinformed or misled by the appearance of the lender’s lawyer at a real estate closing. What the customer knows, of course, is that he is buying real estate and borrowing money from the lender, pursuant to which he must read and sign numerous papers. Generally, the papers are largely or totally formulaic, with little or no negotiation over their contents. These papers are presented at the closing by the in-house counsel for the lender, and the buyer may or may not be represented by counsel. In addition, the lender’s costs that are passed on to the customer undoubtedly take into account the legal work of the attorney, no matter how they are described or named. Under those circumstances, many customers may conclude that the lender is providing a lawyer to them as part of the services and that the lawyer is there to protect their interests, either exclusively or at least in addition to the lender’s interests. The point of the proposed FAQ, then, is to eliminate at least one practice that may lead a borrower to this

\textsuperscript{70} Proposed Formal Advisory Op. No. 94-R11, available in Notice of Filing of Proposed Formal Advisory Opinions in Supreme Court, GA. BAR J., June 1999, at 98. If approved by the supreme court, this would appear to be the first FAQ ever to cite the ABA Model Rules of Professional Conduct as controlling precedent rather than just for comparative purposes.

\textsuperscript{71} Id.

\textsuperscript{72} A less significant aspect of this opinion is its conclusion that, because the in-house counsel is an employee of the lending institution, the institution’s provision of legal services to its customers would constitute the unauthorized practice of law by a nonlawyer (i.e., the institution).
dangerously erroneous conclusion or that may even lead to the unwitting creation of an attorney-client relationship, which is a danger to both lawyer and customer. Thus, the lender is prohibited from providing or describing what it provides as "legal services."

Finally, the Formal Advisory Opinion Board released two proposed FAOs for comment. Proposed FAO 97-R6 deals with whether a lawyer who allows a nonlawyer to threaten legal action or provide legal advice in correspondence signed by the nonlawyer has aided in the unauthorized practice of law.\textsuperscript{73} The Board proposes to answer this question affirmatively. Proposed FAO 98-R6 deals with whether a member of a city council, who is a lawyer and who controls the salary and benefits of police officers in his official capacity, may represent a criminal defendant in a case in which the charges are a matter of police discretion.\textsuperscript{74} The Board proposes to answer this question affirmatively as well.

\section*{IV. Disciplinary Cases}

There are three systems for disciplining lawyers, each with slightly different emphases, strengths, weaknesses, and levels of effectiveness and efficiency. Some may view these systems as parallel, each moving toward the same goal; however, they are actually asymptotically parallel systems, occasionally meeting and bumping into each other at unpredictable distant points.

Perhaps the most effective system operates through the trial courts,\textsuperscript{75} which have inherent and rule-based authority to sanction lawyers for litigation-related behavior. The most common means of disciplining lawyers are civil or criminal contempt citations or other sanctions specifically authorized by the rules of procedure.\textsuperscript{76} This appears to be the system most likely to deal with big cases or big law firms and their lawyers. Here, the discipline often comes in the form of monetary sanctions for litigation-related abuses, and the sanctions are occasionally

\textsuperscript{75} Actually, the most powerful and pervasive system, the culture in which lawyers live and work, is nearly invisible, especially to those outside the profession. Some actions a lawyer could take are shunned simply because of the social disapproval that would accompany them.
\textsuperscript{76} The most obvious means of disciplining lawyers in Georgia are sanctions for discovery abuse under O.C.G.A. § 9-11-37(b) (1993), and sanctions for abusive litigation under O.C.G.A. § 9-15-14 (Supp. 1999).
Although the courts occasionally refer these matters to disciplinary authorities, it is almost unheard of for discipline to be formally pursued or imposed by such bodies.

The second system operates through malpractice suits, which have become more common in the past ten years or so. These cases also sometimes focus on big law firms and their lawyers. Malpractice suits may be the most visible form of discipline, at least if they are filed and not settled before filing. The reason is that bar disciplinary proceedings are conducted largely in private, and only a limited number of disciplinary sanctions are a matter of public record. Additionally, trial courts may impose the sanctions described above in unpublished opinions or in opinions in which the lawyers are not named.

It would hardly be surprising if the likelihood of being sued for malpractice was directly related to the size of the case, the size of the lawyer's firm, and the presence of malpractice insurance. However, because malpractice insurance is neither cheap nor mandatory in Georgia, it may well be that there is a perceptible dividing line between those lawyers and firms who are likely to be sued for malpractice and those who are not.

The third system, established by the supreme court and administered by the State Bar through its State Disciplinary Board and Consumer Assistance Program, was designed for the specific purpose of sanctioning and deterring lawyer misbehavior. However, it may be the least significant largely because it deals primarily with lawyers who misuse or steal clients' money or commit crimes, which are surely uncommon occurrences. This system rarely involves lawyers from large firms or conduct that arises out of litigation. It is not difficult to make educated guesses about the reasons for this. Larger firms are more likely than smaller firms to provide adequate training, supervision, and monitoring of their lawyers. Also, they are better positioned to settle disputes with disgruntled clients before those clients report any wrongdoing to the bar.

As for any litigation-related misbehavior by the more accomplished lawyers in these firms, most disciplinary authorities seem quite reluctant to get involved in the midst of litigation. Because all courts have the inherent or rule-based authority discussed above, leaving such matters to the trial courts may be the best use of limited resources.

77. For an example, see the discussion of the Benlate litigation, infra notes 97-110 and accompanying text.
78. For an example, see infra notes 127-35 and accompanying text.
79. See GA. BAR RULES Rules 4-205 to -207.
80. See GA. BAR RULES Rule 4-221(d).
81. See GA. BAR RULES Rules 4-101, -201.
Gnann v. Woodall\textsuperscript{82} may yet turn out to be one of those rare cases in which lawyers are disciplined by a court before which they appeared, by the supreme court, and perhaps by a malpractice suit. Only time will tell, but it is ironic that the lawyers' actions which are at the center of this controversy do not clearly violate any particular rule of conduct.

The salient points of this remarkable tale are as follows. Julia Mae Shiggs entered Savannah's Memorial Medical Center in 1994 to give birth. Complications developed from a caesarean section, and she slipped into a coma from which she never recovered. She died on December 30, 1996.\textsuperscript{83}

Shiggs's common-law husband, Michael Mydell, was appointed guardian of her person and property in October 1994. Prior to Shiggs's death, Mydell hired David Roberson, a Savannah lawyer and minister, to sue for malpractice and loss of consortium. Roberson and Mydell agreed on a fifty percent contingency fee, and Roberson retained John Woodall to help him litigate the case.\textsuperscript{84} The case went to trial, albeit without Mydell's loss of consortium claim. The parties settled after several days, with defendants agreeing to pay $3.325 million in cash and to provide Shiggs with continuing medical care.\textsuperscript{85}

Defendants paid the cash settlement to Roberson and Woodall almost immediately. A disbursement statement indicated that the lawyers kept $102,295.24 to pay for their expenses and that they paid $151,359.33 to Mydell, apparently in his individual capacity despite the fact that his loss of consortium claim had been dismissed. More significantly, Roberson received $1.3 million and Woodall received $1.1 million, which accounted for more than seventy percent of the $3.325 million cash payment from defendants. The lawyers based their calculation of their fifty percent contingency fee, not on the $3.325 million cash payment, but rather on the cash plus the $1.425 million projected value of the medical care defendants agreed to provide Shiggs for the rest of her life.\textsuperscript{86}

\textsuperscript{83} 231 Ga. App. at 391, 499 S.E.2d at 151-52.
\textsuperscript{84} As a result of this arrangement, Woodall argued that he was an independent contractor and that he had no direct relationship with Mydell or Shiggs's estate, thus relieving him of any direct responsibility to them. The court of appeals rejected this argument because an "attorney cannot avoid legal or ethical considerations by asserting an independent contractor defense." Id. at 396, 499 S.E.2d at 155.
\textsuperscript{85} Id. at 391-92, 499 S.E.2d at 152.
\textsuperscript{86} Id. at 392-93, 499 S.E.2d at 152-53. As the court of appeals noted, Roberson and Woodall apparently miscalculated their fees because the amount they took was more than fifty percent of the sum of the cash payment and the valuation of future medical care for
However, there were three problems with this calculation. First, the extra value of the medical care did not actually exist. The hospital agreed to provide medical care for Shiggs, regardless of the cost, but no money was actually being paid to anyone. Second, Roberson and Woodall based their valuation of future medical care for Shiggs on the assumption that she would live at least seven more years. This assumption seems, at least in hindsight, to be grossly at odds with the likely prospects for Shiggs's continued survival. Finally, because Shiggs died before the year ended, the total value of the medical care she received was considerably less than the $1.425 million valuation.

When this information became public, Probate Court Judge Lewis became concerned and ordered Roberson and Woodall to pay the money into the state court registry until the matter was reviewed. After they failed to comply with this order, Judge Lewis held them in contempt. They claimed that the probate court had no jurisdiction to order them to repay their fees and that, in any event, they had done nothing improper. The court of appeals held that the probate court exceeded its jurisdiction, but the supreme court reversed. Woodall eventually repaid Shiggs. In addition, the future medical care for Shiggs appeared to have been overvalued. The controversy surrounding the manner in which Roberson and Woodall calculated their fees culminated in at least one lawsuit regarding the medical care to which Shiggs was entitled under the agreement.

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Shiggs. Id. at 392, 499 S.E.2d at 152. In addition, the future medical care for Shiggs appeared to have been overvalued. Id. at 393, 499 S.E.2d at 152-53. The controversy surrounding the manner in which Roberson and Woodall calculated their fees culminated in at least one lawsuit regarding the medical care to which Shiggs was entitled under the agreement. Id. at 394 & n.4, 499 S.E.2d at 153 & n.4.

87. Id. at 393, 499 S.E.2d at 153.
89. Id.
90. 270 Ga. at 516, 511 S.E.2d at 188-89. This chain of events caused more lawsuits to ensue. For example, Shiggs's estate moved to intervene in an unrelated wrongful death case in which Roberson was involved and petitioned the judge to order Robinson to pay part of his fees from that case to satisfy his debt to Shiggs's estate. Terry Dickson, Jury Awards Family $5M in Fatal Crash, FLA. TIMES-UNION (Jacksonville), Apr. 25, 1997, at B1. Also, the administrator of Shiggs's estate sued Roberson for malpractice, and when Roberson failed to respond timely, the trial court entered a default judgment against him. Roberson v. Gnann, 235 Ga. App. 112, 113, 508 S.E.2d 480, 481 (1998). The court of appeals affirmed the trial court's grant of default judgment. Id.
Roberson, who later admitted that his fee was too large, eventually filed for bankruptcy.

This case provided at least three interesting, if not precedential, developments that are related to legal ethics. First, the court of appeals found that Woodall had obligations to Shiggs even though he never had a direct relationship with her and even though he claimed to be an independent contractor. This is a clear signal that lawyers who merely act as consultants might face significant liability for malpractice or improper behavior. Second, the State Bar brought disciplinary proceedings against both lawyers. Finally, the Bar took the apparently unprecedented position of seeking disgorgement of Roberson's and Woodall's fees.


92. Woolner, supra note 88. In addition, Roberson now acknowledges that he and Woodall overvalued the future medical care. Trisha Renaud, Checks Flew, but Not to Client; Savannah Lawyers Fight Order to Post Fees with Court, FULTON COUNTY DAILY REP., Jan. 24, 1997, at 1.


94. 231 Ga. App. at 396, 499 S.E.2d at 155. Although the supreme court reversed the court of appeals decision, it did not disturb this portion of the court of appeals opinion.

95. The disciplinary hearing focused on whether Roberson and Woodall charged an excessive fee in violation of Standard 31(a) and whether they committed fraud by submitting a false affidavit to support their valuation of the future medical care in violation of Standard 4. Schmitt, supra note 91. Other Standards of Conduct they were charged with violating include Standard 30 (prohibiting lawyers from accepting employment if their judgment might be affected by personal interests), Standard 31(d)(2) (requiring a written accounting of the distribution of money recovered in a contingent fee representation), Standard 36 (prohibiting representation of multiple clients with conflicting interests), Standard 44 (prohibiting lawyers from abandoning or wilfully disregarding a matter without just cause), Standard 61 (requiring prompt notification to a client of the receipt of funds belonging to the client and prompt delivery to the client of the funds), Standard 63 (requiring maintenance of complete records of a client's funds and a prompt accounting to the client of the funds), and Standard 65(a) (prohibiting the commingling of a client's funds with the lawyer's funds and requiring an accounting of funds held in trust). Trisha Renaud, Bar Goes After Savannah Duo's Fee and Maybe Their Licenses, FULTON COUNTY DAILY REP., Jan. 5, 1998, at 1.

96. Renaud, supra note 95.
A. The Trial Courts

During the survey period, one federal district court in Georgia delivered a stinging indictment of lawyers' behavior that resulted in a windfall to the state's law schools. In re E.I. DuPont de Nemours & Co. arise from claims by fourteen nurserymen that DuPont's fungicide Benlate contaminated their plants and soils. While these claims were being litigated, it became clear to Judge Robert Elliott that DuPont's lawyers failed to produce adverse findings about their client's product during discovery. In an order detailing his findings from no fewer than five hearings, Judge Elliott found the lawyers' and DuPont's behavior to be flagrant and deliberate. He also found that they engaged in a "deliberate effort . . . to impede, delay, and otherwise restrict legitimate discovery," that they engaged in "a scheme . . . of hiding and concealing . . . critical and pivotal evidence," and that they "falsely present[ed] the results and conclusions of [certain] tests through a[n unqualified] witness." In sum, Judge Elliott found that they "made [the] trial . . . a farce." As punishment for this conduct, Judge Elliott imposed various sanctions on DuPont, including a monetary sanction of over $13 million for abusing discovery and wasting judicial resources and a monetary sanction of $100 million for civil contempt. DuPont appealed the contempt order, and the circuit court reversed that aspect of Judge Elliott's order because it was "overwhelmingly punitive—and thus criminal—in nature" and because it was imposed without "the procedural protections the Constitution requires for the imposition of criminal contempt sanctions."

On remand Judge Hugh Lawson ordered the matter to "go forward as a criminal contempt proceeding." However, the matter was eventually resolved by a consent order that was probably unique in American

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98. Id. at 1528.
99. Id. at 1529.
100. Id. at 1530.
101. Id. at 1533.
102. Id. at 1535.
103. Id.
104. Id. at 1556.
105. Id. at 1557.
legal history.\textsuperscript{108} DuPont agreed to a fine of $11 million, $10 million of which was to be distributed equally to Georgia's four accredited law schools to establish chairs in professionalism and ethics, and $1 million of which was to be used to endow an annual symposium on professionalism and ethics.\textsuperscript{109} Acknowledging "a fundamental misunderstanding of the intent of the Court's discovery requirements . . . and that such misunderstanding provided sufficient grounds for the investigation by the court," Alston & Bird agreed to pay $250,000 to the Chief Justice's Commission on Professionalism.\textsuperscript{110} As of this writing, the Commission's and law schools' plans are not complete, but it seems safe to predict that the combination of Georgia's pioneering efforts in professionalism and this windfall for the schools could make our state the focal point of significant ethics writing, research and teaching for years to come.

B. Legal Malpractice Actions

1. Substantive Elements. In \textit{Hunter, Maclean, Exley & Dunn, P.C. v. Frame},\textsuperscript{111} Mr. and Mrs. Frame were represented by their long-time attorneys at Hunter Maclean in selling their business to Golden Isles Petroleum. Apparently, the firm made several substantial errors at the April 1989 closing. Fifteen months later,\textsuperscript{112} Golden Isles sued the Frames for securities fraud and breach of contract, alleging that they failed to reveal several material items at the closing. Maintaining that it had not exposed the Frames to liability, Hunter Maclean withdrew from representation of the Frames in that case only because it was likely to be a witness in the case. Despite the firm's assurances, the Frames were found liable for damages of $585,000, and the judgment was affirmed by the Eleventh Circuit.\textsuperscript{113}

The Frames did not immediately sue Hunter Maclean for malpractice because a tolling agreement gave them until April 24, 1994, to file. They did not file until September 26, 1994, which was still five months late.

\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} 269 Ga. 844, 507 S.E.2d 411 (1998).
\textsuperscript{112} There is some ambiguity on this point. At the beginning of the opinion, the court stated that the closing occurred in April 1989 and that Golden Isles filed suit in federal court in July 1989. \textit{Id.} at 845, 507 S.E.2d at 412. Later in the opinion, the court stated that Golden Isles filed the federal action fifteen months after the closing, which is apparently the accurate date. \textit{Id.} at 850, 507 S.E.2d at 415.
\textsuperscript{113} \textit{Id.} at 845, 850, 507 S.E.2d at 412, 415-16.
In response, Hunter Maclean moved for summary judgment on the ground that the statute of limitations had passed. The court of appeals held that the continuing confidential relationship between Hunter Maclean and the Frames tolled the statute of limitations.

The supreme court reversed, finding that the firm did not intentionally mislead the Frames or deter them from filing suit within the statutory time period. The court's reasoning was quite logical. All plaintiffs, even those who allege fraud, have a duty to discover the harm done to them and to act within a reasonable time to redress it. Plaintiffs who charge fraud have until they discover, or through the exercise of ordinary care, should have discovered the fraud.

That requirement (using ordinary care to discover fraud) certainly is not eliminated merely because the underlying action does not sound in fraud, but rather in professional negligence. It follows that the existence between the parties of a confidential relationship is not a separate and independent basis for tolling, but rather it is an important factor affecting the duty to disclose and the duty of ordinary diligence to be considered in the fraud analysis itself.

... A confidential relationship between the parties imposes a greater duty on a defendant to reveal what should be revealed, and a lessened duty on the part of the plaintiff to discover what should be discoverable through the exercise of ordinary care.

That principle having been established, the result was easy to reach, or so it would seem from the opinion. After all, Mr. Frame admitted that no Hunter Maclean lawyer had in any way misled the Frames about the facts. Because "the Frames knew about most of the errors within six months of the closing[, they] could not have been deterred from bringing suit as early as October 1988."
In rejecting the rationale of the court of appeals, the supreme court held that the existence of a confidential relationship does not toll the statute of limitations by negating the requirement of showing intentional concealment and actual deterrence. The court explained that "[b]ecause the existence of a confidential relationship between the parties, such as existed here, does not affect the existence of fraud—that is, the intention to conceal or deceive—a confidential relationship cannot, standing alone, toll the running of the statute." Instead, a confidential relationship merely entitles a client to rely on, and place faith in, a lawyer. Thus, the existence of a confidential relationship affects the extent of the client's duty to discover the fraud and the lawyer's duty to reveal the fraud, but it does not relieve the client of proving the fraud itself or the deterrence. The court, therefore, overruled the portion of Sutlive v. Hackney that negated the requirement of showing fraud in tolling situations when a confidential relationship exists.

Dow Chemical Co. v. Ogletree, Deakins, Nash, Smoak & Stewart raised a question that has been litigated many times—what elements must a plaintiff prove to make out a prima facie case of attorney malpractice? The answer in Georgia is clear. A plaintiff must show employment of the lawyer, the lawyer's failure to exercise ordinary care, and damages proximately caused by the lawyer's negligence. While the first two elements are difficult enough to prove, it is often most difficult to prove causative damages, especially when the malpractice is failure to prosecute an appeal properly. Dow Chemical Co. involved just such a failure.

In the case underlying this malpractice action, a jury found Dow Chemical Co. liable for damages after it determined that toxins from one of Dow's unlined coagulation ponds seeped into plaintiff's soil and groundwater. After the trial court entered judgment on the verdict, it granted Dow's motion for an extension of time for filing post-trial motions. Dow then filed a motion for judgment notwithstanding the verdict, and when the trial court denied the motion, Dow appealed. The Eleventh Circuit dismissed the appeal, holding that the trial court was not authorized to extend the time for filing posttrial motions and that,

121. Id. at 847, 507 S.E.2d at 414.
122. Id.
123. Id. at 848, 507 S.E.2d at 414.
124. Id.
126. 269 Ga. at 849, 507 S.E.2d at 415.
128. See, e.g., Huntington v. Fishman, 212 Ga. App. 27, 29, 441 S.E.2d 444, 446.
therefore, Dow’s motion was not timely. Dow then sued its attorneys for malpractice.

Dow argued that it was damaged by losing the ability to appeal, which also caused it to lose some negotiation leverage. Essentially, Dow asked the court to relax the standard for proving a malpractice claim by adopting a lost opportunity standard, under which a plaintiff could prove the damages element by showing that the lawyer caused the plaintiff to lose the opportunity to appeal. The theory behind this standard is that merely filing an appeal may induce a settlement and that the failure to appeal deprives the appellant of this opportunity. However, the court found that “it is highly questionable whether such speculative damages can properly serve as the basis for a malpractice action.”

The Court may well be right that lost opportunity damages are too speculative to sustain a malpractice claim. Nevertheless, the court of appeals allowed just that at least once before, in Freeman v. Pittman, which the court did not cite in Dow Chemical Co. What makes the court’s failure to address Freeman more unsettling is that the same panel of judges participated in both cases. Judge Ruffin wrote the court’s opinion in both cases, and Judges Pope and Beasley concurred.

In fairness, it should be pointed out that Freeman is not precisely on point. In Freeman the lawyer represented a client with multiple mortgages on her home. After negotiating with one of the lienholders, he incorrectly believed and informed his client that the property was otherwise unencumbered. When one of the remaining lienholders later initiated foreclosure proceedings, Freeman had to pay a high price to keep the property. She sued Pittman for malpractice, arguing what Dow argued—that her lawyer’s negligence deprived her of an “opportunity.” In other words, her negotiating position had been substantially weakened by the attorney’s actions.

It is possible to distinguish Dow Chemical Co. and Freeman on the ground that the award in Dow Chemical Co. included $2 million in punitive damages, an inherently subjective (i.e., “speculative”) amount, while the amounts of the liens in Freeman were determinate. However, there are two problems with that distinction. First, the court in Freeman made it clear that it understood how the different lienholders’ relative negotiating positions were hurt or helped merely by their position in line, recognizing that the amount any

131. Id. at 30, 514 S.E.2d at 839.
133. Id. at 672-73, 469 S.E.2d at 544-45.
one of them could expect to recover was not solely a function of calculating the amount due under the promissory note.\textsuperscript{134} Second, the court in Freeman noted that "the rule against the recovery of speculative damages relates primarily to speculation regarding proximate cause rather than extent. Once a plaintiff establishes that damages proximately flow from the defendant's alleged conduct, 'mere difficulty in fixing their exact amount' should not be a legal obstacle to recovery."\textsuperscript{135} Thus, it seems that the real problem the court had in Dow Chemical Co. was one that it overlooked in Freeman. Just what makes these cases so different on this count is really not clear.

2. Malpractice Affidavits. The Georgia Civil Practice Act requires all complaints alleging professional malpractice to be accompanied by an affidavit of an expert that specifies the negligence that is the subject of the complaint.\textsuperscript{136} While the majority of cases construing this requirement are medical malpractice suits, the requirements are the same for lawyers. The significant cases decided by the appellate courts during the survey period answered such weighty questions as (1) whether an affidavit is valid if the notary does not formally swear the witness; (2) whether an affiant's swearing to the correctness of an affidavit via a long distance telephone call complies with the statute; (3) whether an affiant's inability to confirm the facts of the affidavit at a later deposition effectively voids the affidavit; and (4) whether one can file an amendment to an affidavit that was not originally signed before a notary.

In Harris v. Murray,\textsuperscript{137} defendant challenged plaintiff's expert affidavit because the affiant admitted at a deposition that the notary failed to administer an oath before he signed the affidavit. The trial court granted summary judgment for defendant because an affidavit not accompanied by an oath is not an affidavit under O.C.G.A. section 9-11-9.1.\textsuperscript{138} Judge Pope wrote for the majority and reversed the trial court.\textsuperscript{139} The court held that the affidavit was valid because "although the affiant did not hold up his hand and swear before signing the affidavit, both he and the notary public understood that his actions and signing of the affidavit in the notary public's presence were all that was

\textsuperscript{134} Id. at 674, 469 S.E.2d at 545.
\textsuperscript{135} Id. (quoting Georgia Ports Auth. v. Servac Int'l, 202 Ga. App. 777, 780, 415 S.E.2d 516, 519 (1992)) (citation omitted).
\textsuperscript{136} O.C.G.A. § 9-11-9.1(a) (Supp. 1999). There is, of course, an exception to this general rule. See O.C.G.A. § 9-11-9.1(b) (Supp. 1999).
\textsuperscript{138} Id. at 661, 504 S.E.2d at 738.
\textsuperscript{139} Id. at 667, 504 S.E.2d at 741.
necessary to complete the act of swearing."\textsuperscript{140} The court thus rejected the notion that affidavits must conform with strict formalities to be valid.\textsuperscript{141} Chief Judge Andrews dissented, arguing that the affidavit did not comply with the statute's requirements.\textsuperscript{142} He further contended that the statute requires a formal oath and that the evidence did not support the majority's informal oath theory.\textsuperscript{143}

The court of appeals decision in \textit{Harris} is difficult to square with the supreme court's holding in \textit{Sambor v. Kelley}.\textsuperscript{144} In \textit{Sambor} the expert signed the affidavit in Michigan after a notary in Georgia administered the oath during a telephone conversation. The trial court granted summary judgment for defendant because the expert did not sign the affidavit in the notary's physical presence.\textsuperscript{145} The supreme court affirmed the trial court's interpretation of O.C.G.A. section 9-11-9.1, holding that "notarization occurs only when the affiant or person acknowledging execution personally appears before the notary."\textsuperscript{146}

Frankly, it is not obvious why the \textit{Sambor} principle should be the rule. Assuming that the notary takes the necessary steps to ensure that the caller is who the caller purports to be and that the caller and the notary are looking at the same affidavit, it is not obvious why physical proximity is required. Surely it is not because the notary is unable accurately to gauge the affiant's sincerity; determining the verity of the affidavit is not the notary's job. Why one's presence in this context should not encompass contemporaneous discussion over an instrument as reliable as a telephone is not obvious either. Would an affidavit notarized by a blind notary be invalid merely because the notary could

\textsuperscript{140} \textit{Id.} at 665, 504 S.E.2d at 740.
\textsuperscript{141} \textit{Id.} at 664-65, 504 S.E.2d at 740 (citing Carnes v. Carnes, 138 Ga. 1, 6, 74 S.E. 785, 788 (1912); Britt v. Davis, 130 Ga. 74, 77, 60 S.E. 180, 180-81 (1908); McCain v. Bonner, 122 Ga. 842, 846, 51 S.E. 36, 38 (1905)).
\textsuperscript{143} \textit{Id.} at 669-73, 504 S.E.2d at 743-46 (Andrews, C.J., dissenting).
\textsuperscript{144} \textit{Id.} at 133, 518 S.E.2d 120 (1999).
\textsuperscript{145} \textit{Id.} at 133, 518 S.E.2d at 121.
\textsuperscript{146} \textit{Id.} at 134, 518 S.E.2d at 121.
not see and identify the person before him? If the point of physical proximity is not gauging sincerity, then what is it? It seems that the only way to execute a valid affidavit is to administer the oath formally in a ceremony accompanying the signing of the affidavit, which is the very thing that the court of appeals in Harris did not demand. This does not bode well for Harris as precedent.

In Sawyer v. DeKalb Medical Center, Inc., defendant deposed plaintiff's expert, whose affidavit plaintiff attached to the complaint as required by O.C.G.A. section 9-11-9.1, one year after plaintiff filed the action. At the deposition, the expert was unable to confirm the negligent acts described in the affidavit. Plaintiff then dismissed the complaint but refiled it six months later with an affidavit from another expert. Defendant moved for summary judgment on the ground that the first expert's deposition testimony vitiated his affidavit, which then voided plaintiff's action, and that a voided action could not be renewed. Thus, defendant argued that because the statute of limitations expired before plaintiff refiled, summary judgment was required. The trial court agreed with defendant and granted summary judgment. The court of appeals reversed, holding that defendant was not entitled to summary judgment because it failed to argue in its initial responsive pleading in the first action that the affidavit was improper. The court further explained that even if defendant had done so, summary judgment still would have been inappropriate because "[t]he question is whether the affidavit as filed is sufficient under OCGA § 9-11-9.1, not whether the affiant will repeat that testimony a year later in a deposition." The court reasoned that "[t]he validity of an affidavit for OCGA § 9-11-9.1 purposes is not a summary judgment question; it is a motion to dismiss question;" thus, the statute imposes only an initial pleading requirement, not an evidentiary requirement.

In Phoebe Putney Memorial Hospital v. Skipper, the court of appeals reconsidered its earlier decision in the same case that an affidavit was invalid under O.C.G.A. section 9-11-9.1 because the affiant did not sign the affidavit in the notary's presence and that a second affidavit did not supplement the pleading. First, the court noted that O.C.G.A. section 9-11-9.1 should be liberally construed to allow "a
plaintiff [to] amend an affidavit when its sufficiency or the expert's competency is challenged," provided that the statute's purpose of reducing frivolous malpractice actions is not frustrated. Because plaintiff's original affidavit was facially valid, it was only voidable, not void. Although defendant showed that plaintiff's original affidavit was defective, plaintiff cured the defect by substituting a valid affidavit for the defective one prior to the trial court's ruling on defendant's motion to dismiss. Accordingly, the trial court properly denied defendant's motion to dismiss.

Judge Smith, joined by Chief Judge Andrews, dissented, arguing that the original affidavit could not be cured because it "was not an affidavit at all; [plaintiff] in essence filed no affidavit to amend." As shown by these cases, the law of malpractice affidavits presents apparently conflicting and inconsistent results. It is very easy and usually inexpensive to obtain a malpractice affidavit. Nevertheless, the statute wastes more time and paper than it is worth because it causes lawyers, clients, and the judicial system to expend huge amounts of resources that could be better spent elsewhere.

C. The Disciplinary System

As for grievance forms filed by complainants, it is interesting to note that the number filed has remained relatively stable in the past:

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155. Id.
156. Id. at 535-36, 510 S.E.2d at 103-04.
157. Id. at 537, 510 S.E.2d at 104.
158. Id. at 538, 510 S.E.2d at 105 (Smith, J., dissenting). Judge Smith argued that the affidavit "was wholly invalid, because the notary was not present when [the affiant] signed it." Id. at 537, 510 S.E.2d at 105.
160. The prosecution of grievances is a rather selective, as well as lengthy process, and often does little to satisfy consumers' real needs. In recent years, the State Bar has taken some creative steps to better meet consumers' needs and to educate lawyers. One example is the Overdraft Notification Program, under which the Bar receives notices from banks that have returned lawyers' trust account checks for insufficient funds. While many worried that this would subject dozens of lawyers to draconian disciplinary measures, the numbers do not bear out that fear. For example, during the State Bar's 1998-1999 operational year, the Bar received 311 notices of overdrafts. OFFICE OF THE GENERAL COUNSEL, STATE BAR OF GA., REPORT OF THE GENERAL COUNSEL'S OFFICE 15 (1999). Of those, 194 were dismissed, 11 were referred to Law Practice Management, and only 19 were referred to the Investigative Panel. Id.
several years despite the creation of the Consumer Assistance Program. This could mean a number of things—it could mean that complaints from clients are rising overall, but are being winnowed out of the system by the program, or it could mean that the number of complaints is unaffected by the program's existence. Of course, it is also possible that there is no statistical relationship between the number of matters that are informally settled by the program (which was designed to deal with minor violations of disciplinary standards) and the number of formal complaints of a disciplinary nature. Perhaps further study will make this more clear. As for public discipline imposed by the supreme court between May 1, 1998, and April 30, 1999, there were twenty-seven disbarments, forty-five suspensions, seven public reprimands, four Review Panel reprimands, and three letters of admonition.\textsuperscript{163} totals which are not that different from the statistics in most recent years.\textsuperscript{164} Most of these cases do not raise novel questions or make new law, but at least two are worthy of special attention.

\textit{In re Freeman}\textsuperscript{165} was one of the few cases in which a lawyer who admitted to taking money from his clients' trust accounts was not disbarred, although Justice Hunstein argued in dissent that disbarment was the only appropriate sanction.\textsuperscript{166} This case arose when Freeman mishandled funds in two estate accounts. From one account, Freeman wrote two checks for cash totaling $935.13 and then loaned the money to his brother. Freeman falsified the check register to hide his misconduct. On two other occasions, Freeman wrote checks for $1000 and $3800.91 from another account and failed to record these withdrawals in the check register. When Freeman's partner noticed that something was amiss, Freeman immediately did three things, all of which are unfortunately rare in this kind of disciplinary case. First, he immediately confessed to his partner and to the probate court. Second, he made full restitution to the concerned parties.


\textsuperscript{165} 269 Ga. 906, 506 S.E.2d 872 (1998) (per curiam).

\textsuperscript{166} \textit{Id.} at 909 (Hunstein, J., dissenting).
Finally, he reported his misdeeds to the State Bar. Nevertheless, Bar counsel sought disbarment. Making special note of these three facts and the testimony of Freeman’s psychiatrist, psychologist, and several character witnesses, the supreme court ordered a ninety-day suspension and a minimum of one year of continued psychotherapy.

Justice Hunstein dissented because Freeman “engaged in professional conduct involving dishonesty . . . [and] there were no persuasive mitigating circumstances.” While Justice Hunstein may be right that Freeman’s conduct warranted disbarment, her argument is not entirely convincing because the cases she cited for support seem to be very different from Freeman’s case.

There are some powerful lessons to be drawn from this case. First, this case puts to rest the notion that a lawyer’s trust account indiscretions will inevitably lead to disbarment. Second, it makes a good case for doing the right thing even after committing improprieties. The fact that Freeman admitted his misconduct to his partner and to the Bar, paid the money back, and sought professional help should not go unnoticed or unrecognized by all members of the Bar.

In re Zaleon was the supreme court’s second opinion in the disciplinary case against Ruth Zaleon. The case presented the court with an opportunity both to educate the public and bar and to expressly disapprove of specific unethical conduct, but the court did not take advantage of either opportunity. Instead, many lawyers are left scratching their heads and wondering how to avoid the same fate as Zaleon.

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167. 269 Ga. at 906-07, 506 S.E.2d at 872.
168. Id. at 907-09, 506 S.E.2d at 872.
170. See In re Carlson, 268 Ga. 335, 489 S.E.2d 834 (1997) (involving a lawyer’s failure to pay child support, which removes the lawyer from good standing under Georgia Bar Rule 1-209); In re Washburn, 266 Ga. 50, 464 S.E.2d 192 (1995) (involving a lawyer who pleaded guilty to criminal fraud and an abundance of aggravating factors).
172. In its first opinion involving Zaleon, the court remanded the action to the Investigative Panel for further proceedings because the court held that a public reprimand was an inadequate sanction. In re Zaleon, 269 Ga. 900, 900, 494 S.E.2d 669, 670 (1998).
173. Unfortunately, the court often fails to include enough names, places, facts, and reasons in its disciplinary opinions.
Zaleon was a real estate lawyer who represented lenders in a large number of residential closings. For these closings, Zaleon filed settlement statements, which detailed the recording fees for each closing. Over the years, Zaleon's firm developed the practice of collecting fees that were usually larger than the fees actually paid, partly because she sometimes had to pay additional fees associated with re-recording documents. The firm collected these fees and deposited them in recording accounts, from which the fees would be paid. When the amount collected from a client exceeded the amount paid on that client's behalf, Zaleon either left the excess in the recording account or used it to pay for unrelated expenses. Zaleon did not refund any excesses to her clients. In the transaction that gave rise to the grievance against Zaleon, Zaleon refused a client's request to refund any overage and transferred money from the firm's recording account to its operating account.\footnote{269 Ga. at 836-37, 504 S.E.2d at 702-03.} After balancing the aggravating and mitigating factors, the court suspended Zaleon for six months and ordered her to make restitution to her clients.\footnote{Id. at 837, 504 S.E.2d at 703.}

However, the court provided no guidance to lawyers because it failed to cite the Standards Zaleon violated in either of its opinions. Furthermore, the court failed to clarify which of Zaleon's acts was the basis for the discipline it imposed. This virtually eliminates any chance that lawyers will appreciate the precise point of the case and the ostensible error of Zaleon's ways.

V. REMOVAL OF JUDGES

In addition to the three disciplinary system discussed in Part IV, there is a fourth disciplinary system that is reserved for lawyers who are also judicial officers. While removal of judicial officers is rare, it does happen, and one case decided by the supreme court during the survey period was unique, to say the least. In\textit{ In re Inquiry Concerning a Judge},\footnote{270 Ga. 1, 508 S.E.2d 383 (1998).} the court permanently barred Judge Maylon London from holding any judicial office in Georgia.\footnote{Id. at 1, 508 S.E.2d at 383.} As a result of a consent agreement with the Judicial Qualifications Commissions, London had already resigned his positions as Chief Magistrate of White County and Municipal Court Judge of Cleveland, Georgia.\footnote{Id.} Much like the court's opinion in\textit{ In re Zaleon}, its opinion in London's case does not make clear exactly what London did. The attachment to the court's opinion alludes

\footnotesize{174. 269 Ga. at 836-37, 504 S.E.2d at 702-03.  
175. Id. at 837, 504 S.E.2d at 703.  
177. Id. at 1, 508 S.E.2d at 383.  
178. Id.}
to both a personal impropriety and official improprieties. In the personal matter, he was accused of fabricating a document and forging a signature in a civil case; in his judicial capacity, he summarily dismissed cases without allowing police testimony, thereby allegedly using the power of his office to promote personal interests. Because the consent agreement ended the matter without a full disclosure of London's alleged misconduct, the facts are difficult to determine, especially because London later claimed that he voluntarily resigned his judicial offices, rather than being forced out, and that his resignation had nothing to do with either the Judicial Qualifications Commission or the supreme court. Perhaps the most amazing part of this story, however, is not that London received his license to practice without graduating from law school, but that he became a judge after being disbarred in 1982, following his conviction for forgery.

VI. ENFORCEMENT OF SETTLEMENTS AND SETTLEMENT AUTHORITY

Clark v. Perino is one of a seemingly endless series of cases in which defendants seek to enforce a settlement entered into by a plaintiff's attorney, allegedly without the client's authority to do so. In 1990 Clark hired a lawyer, Parker, to sue Perino and Perino's employer, IBM, for injuries she suffered in a traffic accident. During the pendency of her suit, she filed a pro se bankruptcy petition, for which she was granted a discharge in August 1994. Nowhere in her bankruptcy papers did Clark mention the lawsuit against Perino and IBM. Meanwhile, in May 1994 Parker settled the accident case with counsel for defendants. Parker claimed that Clark agreed to the settlement on May 19. However, Clark claimed not only that she refused to settle for the amount Parker suggested, but also that she fired Parker on May 10. After Clark received the settlement documents for execution, she wrote

179. Id. at 2, 4, 508 S.E.2d at 383, 384.
181. Id.
182. Id.
183. Technically, the supreme court accepted his voluntary surrender of his license to practice law, but it did so with "the express stipulation that the effect thereof is tantamount to disbarment." In re London, 249 Ga. 790, 790, 294 S.E.2d 524, 525 (1982).
Perino a letter stating that the $25,000 settlement was unacceptable and threatening to fire Perino if certain conditions were not satisfied.\textsuperscript{186} The court of appeals dealt with the simple question of whether the settlement agreement entered into by Clark's attorney of record was enforceable against Clark if Clark did not authorize such a settlement. The court held that Clark was bound by the agreement because precedent and general principles of agency law allowed opposing counsel to rely on Perino's apparent authority.\textsuperscript{187} Therefore, even if Clark fired Perino on May 10, as she claimed, the agreement was still enforceable because opposing counsel had no notice of Perino's termination.\textsuperscript{188} The only way a client can avoid being bound by an unauthorized settlement agreement is to demonstrate that the apparent authority presumptively possessed by the attorney did not exist at the time of settlement.\textsuperscript{189} This can be done in one of two ways. One way is that the client can expressly and directly communicate the lack of authority to opposing counsel. The other way is that opposing counsel can have notice of the lack of authority.

Direct communication with opposing counsel presents a difficult dilemma for that attorney. If the client calls opposing counsel, opposing counsel should be very reluctant to speak with the client, given the possibilities that this communication could be misinterpreted.\textsuperscript{190} Although the court suggested that opposing counsel's awareness that the lawyer has no authority to settle might relieve the client from being bound by an agreement, the court found insufficient awareness in this case.\textsuperscript{191} Clark argued that opposing counsel was sufficiently surprised at Parker's acceptance of the defense offer to vitiate any apparent authority he had to settle.\textsuperscript{192} The court rejected this argument, holding that

\begin{quote}
(\text{E}ven if Scott [the opposing counsel] were "surprised" . . . that Parker accepted the previously rejected offer . . . , this surprise did not prevent him from relying upon Parker's apparent authority . . . . The fact that this acceptance represented a change in a party's prior position on
\end{quote}

\begin{itemize}
\item \textsuperscript{186} Id. at 444, 447, 509 S.E.2d at 709, 711.
\item \textsuperscript{187} Id. at 448-49, 509 S.E.2d at 712 (citing Brumbelow v. Northern Propane Gas Co., 251 Ga. 674, 675-77, 308 S.E.2d 544, 547 (1983)).
\item \textsuperscript{188} Id. at 449, 509 S.E.2d at 712.
\item \textsuperscript{189} Id.
\item \textsuperscript{190} See GA. BAR RULES Rule 4-102(d), Standard 47 ("During the course of his representation of a client, a lawyer shall not communicate . . . on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior written consent of the lawyer representing such other party . . . .").
\item \textsuperscript{191} 235 Ga. App. at 450, 509 S.E.2d at 713.
\item \textsuperscript{192} Id.
\end{itemize}
settlement . . . is insufficient to support such a finding. Any number of reasons could explain such a change of heart.

. . . Scott was entitled to rely upon Parker's status as Clark's attorney of record . . . , unless and until any limitation on that authority was communicated to him.193

_Tekin v. Whiddon_194 raised a question about the enforceability of a litigation settlement agreement. The Whiddons filed a medical malpractice claim against Tekin, Metropolitan Anesthesiology Associates, and a nurse anesthetist, all of whom St. Paul Fire & Marine Insurance Co. insured under two policies, the “D” and “E” policies. Although St. Paul did not produce the policies as plaintiffs requested, it agreed to make them available for inspection, but plaintiffs never inspected them prior to trial. On the last day of trial, a St. Paul representative told plaintiffs of the “D” policy’s existence but made no mention of the “E” policy. This representation clearly understated the amount of coverage available for defendants under all policies. Shortly thereafter, counsel for the parties reached an oral “high/low” agreement, using $1,600,000 and $600,000 as the high and low limits. However, counsel for plaintiffs insisted that the agreement was conditioned on St. Paul’s certification that the coverage limit disclosed was the full amount of coverage for all defendants. After announcing the settlement agreement to the judge, the jury returned a verdict for plaintiffs for more than $5 million. Several days later, when plaintiffs’ counsel learned the whole truth about the insurance policies, he renounced the settlement, arguing that its condition precedent had not been met. The trial court entered judgment on the verdict and denied defendants’ motion to enforce the settlement agreement because it found that there was no enforceable written agreement.195

The court of appeals opinion, which affirmed the judgment of the trial court, turned on the terms of the agreement—specifically, whether certification of the insurance coverage was a condition precedent.196 The court noted that because the parties disputed this fact, defendants had the burden of proving the existence of a writing because they were the proponents of the agreement.197 The court rejected defendants’ argument that their lawyer’s handwritten notes satisfied this writing requirement, holding that they “did not memorialize all the essential terms of the settlement and [that] the trial court was authorized to

193. _Id._ at 450-51, 509 S.E.2d at 713 (citations omitted) (emphasis added).
195. _Id._ at 645-46, 504 S.E.2d at 723-24.
196. _Id._ at 646-47, 504 S.E.2d at 724.
197. _Id._ at 647, 504 S.E.2d at 724.
conclude that the notes did not constitute a valid and enforceable agreement." This suggests that a court would have been authorized to find that a complete memorialization of the terms solely in the handwritten private notes of one party’s counsel would constitute an enforceable written agreement, which is surely a curious result.

The court dispelled this notion in the second part of the opinion, which makes it clear that settlement agreements do not have to be written to be enforceable. The court held that “[t]he trial court was also authorized to find that there was no enforceable oral settlement agreement” because “the minds of the parties did not meet at the same time, upon the same subject matter, and in the same sense concerning the certification of the amount of insurance coverage.” Plaintiffs always insisted that the agreement was enforceable if and only if defendants certified the existence of insurance coverage, which they did not do according to plaintiffs’ understanding of the agreement. Thus, the whole case seemed to turn, not on whether the agreement was in writing, but rather on whether defendants met their part of the bargain, in the absence of which the settlement agreement was no agreement at all.

VII. ATTORNEYS’ LIENS

In Ellis, Funk, Goldberg, Labovitz & Dokson, P.C. v. Kleinberger, the court of appeals affirmed the trial court’s judgment declaring the attorneys’ lien cancelled and forfeited. Ellis, Funk, Goldberg, Labovitz & Dotson (“EFGL&D”) represented a businessman, Kleinberger, in the sale of his business. A dispute that arose after the sale was resolved in arbitration, the result being that the contract was slightly modified. Following the arbitration, the buyer was to make monthly installment payments to Kleinberger for some time. In May 1997, after paying EFGL&D over $95,000 in attorney fees, Kleinberger informed EFGL&D that he was not satisfied with the firm’s services and fees. In response, the firm filed an attorneys’ lien, claiming that Kleinberger

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198. Id., 504 S.E.2d at 725.
199. Id. at 648, 504 S.E.2d at 725.
200. Id.
202. Id. at 361-62, 509 S.E.2d at 662.
203. According to the court, EFGL&D asserted its lien under O.C.G.A. section 15-19-14(b), which gives attorneys what is generally known as a “charging lien.” Specifically, this section gives attorneys liens “[u]pon actions, judgments, and decrees for money.” O.C.G.A. § 15-19-14(b) (1999). Although the court did not say so, the underlying decree must have been the arbitration award.
stilled owed over $60,000 in attorney fees, and gave notice thereof to Kleinberger and the purchaser of his business, who was to make several more monthly installment payments to Kleinberger. When Kleinberger filed a traverse, the firm continued to receive and hold the buyer's installment checks, which were made jointly payable to Kleinberger and to the firm, but it made no attempt to foreclose the lien judicially. The trial court held an untranscribed hearing, presumably on the traverse, after which it cancelled the lien because it found no evidence supporting the firm's claim for further attorney fees and because the firm did not enforce its lien in compliance with O.C.G.A. section 15-19-15 as O.C.G.A. section 44-14-550 requires. The court of appeals affirmed, holding that "lien laws, including the attorneys' lien statute, must be strictly construed" because they are "in derogation of the common law."

However, EFGL&D's argument that O.C.G.A. sections 15-19-15 and 44-14-550 were inapplicable appears to have merit. The firm filed a lien, expressly relying upon O.C.G.A. section 15-19-14(b), which applies only to "actions, judgments, and decrees for money." It did not rely upon O.C.G.A. section 15-19-14(a), which gives attorneys a lien on "all papers and money of their clients in their possession for services rendered." O.C.G.A. section 15-19-14 is silent about methods of foreclosing or enforcing liens. Only O.C.G.A. section 15-19-15 addresses that subject, and it provides that "[l]iens of attorneys at law in possession of personal property under a lien for fees shall be satisfied according to Code Section 44-14-550." O.C.G.A. section 44-14-550 provides that the lienholder must institute foreclosure proceedings within ten days of the client's demand. Thus, a comparison of subsections (a) and (b) of O.C.G.A. section 15-19-14 shows that only subsection (a) refers to a client's property in the attorney's possession. Similarly, O.C.G.A. section 44-14-550, through O.C.G.A. section 15-19-15, applies only to liens of attorneys

204. [F]unds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited [in the lawyer's or law firm's trust account], but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

GA. BAR RULES DR 9-102(A)(2).

205. 235 Ga. App. at 360-61, 509 S.E.2d at 661.

206. Id. at 361, 509 S.E.2d at 661.


208. Id. § 15-19-14(a).


210. Id. § 44-14-550(1) (1982).
who are “in possession of personal property under a lien for fees.”

The similarity between the phrases “personal property” (in O.C.G.A. section 15-19-15) and “papers and money of their clients in their possession” (in O.C.G.A. section 15-19-14(a)), coupled with the disparity between the phrases “personal property” (in O.C.G.A. section 15-19-15) and “actions, judgments, and decrees” (in O.C.G.A. section 15-19-14(b)), logically leads to the conclusion that because EFGL&D expressly filed its lien under O.C.G.A. section 15-19-14(b), the foreclosure requirements of O.C.G.A. section 44-14-550 did not apply.

The court's contrary conclusion is curious given that it was required to construe the statute strictly. Indeed, the court's conclusion seems to contradict its holding in Hester v. Chalker. In Hester the court of appeals held that O.C.G.A. section 15-19-14 "permits but does not require enforcement of attorney liens by means of mortgage and foreclosure." The court rejected EFGL&D's argument based on Hester, however, because Hester involved real property. Why that distinction should affect the result, however, is not explained.

VIII. INEFFECTIVE ASSISTANCE OF COUNSEL

Every year dozens of convicts appeal their convictions, alleging that the convictions should be set aside because of the ineffective assistance of their counsel. The vast majority of these claims continue to be rejected, usually on the ground that the lawyer's actions were matters of strategy immune from attack or that there was no discernible prejudice from the lawyer's conduct that deprived the defendant of a fair trial. This survey period included four cases that stand out, the first of which could have radically changed criminal practice in Georgia had the supreme court not reversed the court of appeals.

In Fogarty v. State, Mark Fogarty was charged with twelve counts of kidnapping, aggravated assault, and various other charges against nine women in Gwinnett County. Fogarty, who was represented by Don Hudson, was acquitted of six charges and convicted on six. Fogarty moved for a new trial, in part based on ineffective assistance of counsel. Specifically, Fogarty argued that Hudson charged him an illegal

211. Id. § 15-19-15.
213. Id. at 784, 476 S.E.2d at 81.
contingent fee, which created an unacceptable conflict between Fogarty's interest (receiving competent representation by a lawyer who pursues all leads to gain an acquittal) and Hudson's interest (collecting the highest fee possible). Fogarty's argument was based on the contract his wife signed in retaining Hudson. It provided that Fogarty would pay $25,000 for the representation in advance, but that $15,000 would be refunded if all charges against him were dismissed and another suspect was identified.216

The court of appeals agreed that the fee arrangement was an improper contingent fee, but the court did not reverse Fogarty's conviction.217 Citing no authority, the court stated:

Clearly defendant is correct that such an agreement constitutes a contingency fee contract in a criminal case and is improper. Defendant also is correct in his assertion that the fee agreement created an actual conflict of interest for his trial counsel in that it made it more lucrative for trial counsel not to pursue avenues that might lead to dismissal of the charges against defendant and the identification of a new suspect.218

This statement has an appealing logic. After all, the client wants the lawyer to work as long and hard as possible, to charge as little as possible, and to obtain the best result possible. On the other hand, the lawyer wants to work as little as possible, to charge as much as possible, and to obtain the best result possible. Thus, on two out of three counts, the lawyer's and the client's interests directly conflict—so much so that it is impossible to maximize each of their goals at the same time. However, it should be obvious that this is always true. Unless lawyers quit charging their clients, a conflict of interest will always exist in all fee arrangements, including contingent fee agreements in civil cases, because of conflicting incentives. The more work the lawyer does, the more of a chance there is that he can exploit a hole in the prosecution's case and win. At the same time, the more work the lawyer does for one client, the less time he has to pursue other clients, other cases, and other fees. The dilemma is insoluble.

In addition, there is no meaningful difference between the contract in Fogarty and the typical fee arrangement that criminal defense lawyers make with their client. Criminal defense lawyers typically charge a "step-up fee," under which they charge a certain amount for representa-

217. Id. at 59, 497 S.E.2d at 630.
218. Id. (emphasis added). Despite this finding, the court affirmed the trial court's denial of Fogarty's motion for a new trial because Hudson's performance was not adversely affected by this conflict. Id.
tion up to or through a certain part of the process (such as indictment), an additional amount if the case goes to trial, and another amount if the case is appealed. Under this fee arrangement, a client who goes through two stages will owe less than a client who goes through three. Indeed, that is the way it should be because the more stages there are, the more work the lawyer does, and the more the lawyer is justified in charging.

On appeal the supreme court clearly recognized this principle. Although the supreme court affirmed the court of appeals judgment, it rejected the court of appeals reasoning. The court agreed that "[A]n agreement for payment of one amount if the case is disposed of without trial and a larger amount if it proceeds to trial is not a contingent fee but merely an attempt to relate the fee to the time and service involved." That being so, if a step-up fee is acceptable, there is no logical reason why a "step-down fee" (i.e., refunding what is not earned) should be treated any differently.

Georgia's Standards seem to endorse the same approach. A lawyer may not collect a clearly excessive fee. If the amount of work done and the fee charged are grossly disproportional, the fee collected would violate Standard 31, regardless of what the contract provides. In addition, a lawyer must "refund promptly any part of a fee paid in advance that has not been earned."

The difficulty here seems to revolve around the use of the word "contingent." Justice Sears seized on that point in her concurring opinion, which emphasized the uncertainty of the event in question.

219. Ironically, this may be closer to what actually happened than what the contract indicated. Hudson claims that, despite the contract's language, "the defendant's family paid $15,000 before the indictment and then an additional $10,000." June D. Bell, Justices OK Fee-Rebate Deal in Criminal Case, Fulton County Daily Rep., Mar. 26, 1999, at 1.

220. 270 Ga. at 610, 513 S.E.2d at 497.

221. Id. at 611-12, 513 S.E.2d at 496 (quoting Standards for Criminal Justice Standard 4-3.3 commentary at 4-37 (2d ed. 1980)) (alteration by court).


223. Ga. Bar Rules Rule 4-102(d), Standard 23. Literally, Standard 23 applies only to a lawyer who withdraws from employment. However, because a client has no need for the lawyer's services after the case ends, and because a lawyer must withdraw if a client discharges him, this distinction seems insignificant. Justice Fletcher seems to agree with this point. See Greer, Klosik & Daugherty v. Yetman, 269 Ga. 271, 275, 496 S.E.2d 693, 696 (1998) (Fletcher, P.J., concurring) (contemplating situations in which "both professional and ethical obligations [may] require reconsideration of the fee arrangement"). What application this principle has to a nonrefundable retainer is a question the Georgia courts have never really addressed.

224. 270 Ga. at 614, 513 S.E.2d at 497-98 (Sears, J., concurring specially) (citing Black's Law Dictionary 290 (5th ed. 1979)).
Thus, because the fee actually earned is not initially assured or certain, it must be literally contingent.\textsuperscript{225}

The majority never tackled this point directly, shunning the hair-splitting definitions and trying to focus on the inherent nature of the prohibited fees we call “contingent.”\textsuperscript{228} The majority noted that “[t]he ‘critical element’ in a contingency fee contract ‘is that there be some chance that the lawyer will not receive the fee because the representation ends with an unwanted result for the lawyer’s client.’”\textsuperscript{227} Because “the agreement did not provide that counsel would be paid only in the event that the case against Fogarty was dismissed or he was acquitted,” the contract was not in violation of the rule.\textsuperscript{228}

What is truly fascinating to consider about this case, however, is not the argument over definitions, but rather the policy that underlies the prohibition. If the contract clearly violated the policy, the precise contours of the definition of the word could be ignored. According to Justice Sears, the real point of the rule is the lack of the res out of which a fee could be paid,\textsuperscript{229} which is often trumpeted as a justification for the rule.\textsuperscript{230} However, it is difficult to see why that would require such a rule. After all, reverse contingent fee arrangements, under which a defendant pays the lawyer according to how much the lawyer saves, are not universally condemned even though there is no res in such cases either. Interestingly, while the Model Rules and Georgia’s Proposed Rule 1.5 both continue the prohibition, neither offers any explanation of its purpose.

In Williams v. Duffy,\textsuperscript{231} defendant raised a claim that went to the heart of his lawyer’s competence, or at least to the quality of advice he gave Duffy. Charged with armed robbery and other offenses, Duffy hired counsel, who negotiated a plea bargain whereby the state would recommend a fifteen-year sentence. Under a recently adopted law,\textsuperscript{232} Duffy was ineligible for parole for any of the sentence. Duffy claimed that he did not learn of this law until after his plea was accepted and he was sentenced. He filed a habeas corpus petition claiming ineffective assistance of counsel.\textsuperscript{233}

\begin{itemize}
\item \textsuperscript{225} \textit{Id.} at 614-15, 513 S.E.2d at 498.
\item \textsuperscript{226} 270 Ga. at 611-13, 513 S.E.2d at 496-97.
\item \textsuperscript{227} \textit{Id.} at 611, 513 S.E.2d at 496 (quoting WOLFRAM, supra note 37, at 526).
\item \textsuperscript{228} \textit{Id.} at 612, 513 S.E.2d at 496.
\item \textsuperscript{229} \textit{Id.} at 614-15, 513 S.E.2d at 498 (Sears, J., concurring specially).
\item \textsuperscript{230} See GA. BAR RULES EC 2-20.
\item \textsuperscript{231} 270 Ga. 580, 513 S.E.2d 212 (1999).
\item \textsuperscript{232} O.C.G.A. § 17-10-6.1(c)(3) (Supp. 1999).
\item \textsuperscript{233} 270 Ga. at 580, 513 S.E.2d at 213.
\end{itemize}
The supreme court rejected Duffy's argument, noting that he was required to show both attorney error and a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Calling his ineligibility for parole a collateral consequence of his sentence, the court reversed the habeas court's grant of Duffy's petition to set aside his conviction. In so holding, the court overruled *Hutchison v. State* because it was "clearly contrary to the weight of authority." In overruling *Hutchison*, the court cited nine cases as evidence of the weight of authority, but none of them was decided by a Georgia court. Moreover, the court did not mention one factor that was apparently important to the court of appeals when it decided *Hutchison*. In *Hutchison* the lawyer not only failed to inform his client of the parole rule changes but also was unaware of them altogether. Even if the lawyer's failure to inform the client of the information was excusable on the ground that the lawyer thought it was an insignificant factor in deciding whether to accept or reject the plea, it seems that such a decision would have to be deliberate. In other words, the lawyer would have to know the information to decide what to do with it.

Given that the vast majority of criminal convictions are obtained by plea bargain rather than by trial, it seems that a complete understanding of the sentencing implications of a client's case would be one of a defense lawyer's most significant assets. To suggest that a lawyer who has such information need not communicate it to the client would, of course, be ridiculous. Indeed, this is one area that the proposed Georgia Rules of Professional Conduct cover. Proposed Rule 1.4 provides that a lawyer is required to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Comment 2 to the proposed rule states that "[a]
lawyer who receives from opposing counsel . . . a proffered plea bargain in a criminal case should promptly inform the client of its sub-
stance."243 Comment 3 further states that "[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representa-
tion."243

The ABA Standards for Criminal Justice go even further, providing that "[u]nder no circumstances should a lawyer recommend to a defendant acceptance of a plea unless full investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial."244 All professional conduct rules make it clear beyond peradventure that the decisions on what plea the client should enter and what plea agreement the client should accept are decisions to be made by the client in consultation with the law-

Actually, the responsibility for making sure that the defendant understands what he is agreeing to is not limited to the defense attorney. Georgia superior court judges are admonished to inform any defendant wishing to enter a plea of "the maximum possible sentence on the charge, including that possible from consecutive sentences and enhanced sentences where provided by law; and/or of the mandatory minimum sentence, if any, on the charge."246 Furthermore, as Justice Fletcher points out in his dissent in Duffy, it is not obvious that the minimal requirements a judge must meet to determine that a plea is voluntary are the same as the minimal responsibilities counsel must meet to fulfill his obligations to the client.247

Even if the law does not impose a specific enforceable duty on counsel to fully advise clients of information regarding the possibility of parole, the court's assumption that such information simply is not all that important to a defendant seems cavalier at best. This is particularly true in a case like Duffy, in which defendant's plea "required [him] to serve one year more than if he had been tried, found guilty, and sentenced to life imprisonment."248

242. PROPOSED GA. RULES OF PROFESSIONAL CONDUCT Rule 1.4 cmt. 2.
243. PROPOSED GA. RULES OF PROFESSIONAL CONDUCT Rule 1.4 cmt. 3.
244. STANDARDS FOR CRIMINAL JUSTICE Standard 4-6.1.
245. See, e.g., STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2(a); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7.
246. GA. UNIF. R. SUPER. CT. 33.8(C)(2)-(3).
247. 270 Ga. at 583, 513 S.E.2d at 215 (Fletcher, P.J., dissenting).
248. Id.
Pruitt v. State involved an ineffective assistance of counsel claim in what has to be fairly unusual circumstances. Pruitt was charged with murder, rape, child molestation, and several other violent and sex-related offenses. The police arrested Pruitt on April 10, 1992, and he remained incarcerated for more than four years before the trial occurred. A jury found Pruitt guilty of all charges, and he was sentenced to death. During most of the time between Pruitt's arrest and trial, he was represented by lead counsel Robert Chandler.

In July 1995 the District Attorney hired Chandler to represent him in an unrelated personal matter. After the trial court found out about this in August, it held a hearing in October to determine whether Pruitt was willing to waive his right to conflict-free counsel and continue with Chandler as his attorney. Although he initially consented, he changed his mind in January 1996, and in March 1996 the court removed Chandler and appointed a new lawyer.

After Pruitt was convicted and sentenced to death, he challenged his conviction on several grounds, including an allegation that Chandler's concurrent representation of him and the District Attorney during his case was a conflict of interest that constituted reversible error. The Court rejected Pruitt's challenge, however, concluding the following:

The concurrent representation of a defendant in a capital case and the district attorney seeking the death penalty against the defendant is an obvious conflict. However, without addressing the issue of waiver, we conclude that Pruitt does not show any harm resulting from this simultaneous representation. In order to prevail on his claim, Pruitt must show... the existence of an actual conflict of interest that adversely affected his lawyer's performance.

... [T]his is not a situation where the prosecutor previously represented the defendant, and there is no evidence that the district attorney gained any information about Pruitt's defense through his personal retention of one of Pruitt's attorneys. In fact, Pruitt does not allege that Chandler divulged any information acquired in the representation of Pruitt to the district attorney, or that Chandler assisted the prosecution in any way.

250. Id. at 745 & n.2, 514 S.E.2d at 643 & n.2.
251. Id. at 748, 514 S.E.2d at 645.
252. Id. at 745 & n.2, 514 S.E.2d at 643 & n.2.
253. Id. at 752, 514 S.E.2d at 648.
254. Id.
255. Id. at 752-53, 514 S.E.2d at 648.
256. Id. at 753, 514 S.E.2d at 648-49 (emphasis added) (footnotes omitted).
Thus, the court rejected Pruitt's claim even though Chandler's concurrent representation was an obvious conflict. It appears that the court focused on two concerns. The first was whether the prosecutor had any special knowledge about Pruitt from previously representing him. The court concluded that the prosecutor did not have such knowledge. The other was whether the District Attorney gained any unfair advantage through his retention of Chandler. Certainly, there was no evidence of that either.

While these are valid concerns, they are not the only concerns. Indeed, they may not even be the most important concerns because both possibilities seem rather remote. Rather, the most serious concern should have been about loyalty and the zealous representation of Pruitt by a lawyer who had a financial incentive (no matter how insignificant) to please another client, the District Attorney. In other words, the question is not so much whether the District Attorney improperly got any information from Chandler, but rather whether "the exercise of [Chandler's] professional judgment on behalf of [Pruitt was] affected by his own financial, business, property or personal interests." This has to be the primary concern in a case like this because human nature is such that a lawyer cannot independently consider the interests of a client when the disposition of the client's interests affects the lawyer's interests. Although Pruitt filed several motions that the court denied, including a motion to dismiss that claimed he was denied the right to a speedy trial, there is no indication how the District Attorney responded to them. As to Pruitt's claim that he was denied the right to a speedy trial, which he made after Chandler was removed from the case, the court denied the motion partly because Pruitt filed it so late. However, this does not prove that Chandler maneuvered to retain the District Attorney as his client. While there was no evidence that Chandler or the District Attorney had done anything that affected Pruitt's case, the point of the conflicts rules is not just to reprimand those who engage in conduct that is shown to have a negative effect on the client's rights. Rather, the rules are intended to protect the integrity of the judicial process, something the court seemed to forget in Pruitt.

Cornwell v. Dodd seems to be the easiest and least controversial of the four cases. Cornwell pleaded guilty to theft by taking but later

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257. Id.
258. Id.
259. GA. BAR RULES Rule 4-102(d), Standard 30.
260. 270 Ga. at 748-56, 514 S.E.2d at 645-50.
261. Id. at 748-59, 514 S.E.2d at 645.
petitioned for habeas corpus relief on the ground that he received ineffective assistance of counsel because his lawyer, Jerry Drayton, was suspended from the practice of law while he represented Cornwell. The basis for Drayton's suspension was his failure to comply with continuing legal education requirements and his failure to pay the licensing fee. Following the majority of state and federal courts, the supreme court held that a lawyer does not cease to be a lawyer for Sixth Amendment purposes merely because he has been suspended for not paying dues or attending continuing legal education classes. The court reasoned that violating a technical bar rule does not render a lawyer suddenly incompetent. Thus, the court held that "failure to comply with state bar administrative regulations" does not itself render assistance of counsel ineffective under the United States Constitution or the Georgia Constitution.

This decision seems correct and sensible, but the court, in refusing to adopt a per se rule, left open the possibility that this may not always be the result when a defendant's lawyer has been suspended. Indeed, it is difficult to see any connection between a lawyer's competence and the failure to make timely payments of dues or to comply with some other purely administrative obligation. However, the failure to attend CLE classes, especially over an extended period of time, could raise such a problem. The purpose of CLE classes is to keep lawyers current, thereby reducing the chances of incompetent practice. At some point, then, failure to keep current by attending CLE classes may result in a lawyer falling far enough behind to be considered incompetent. However, because CLE requirements are checked annually, it should be nearly impossible for a lawyer to fall too far behind in CLE obligations without being suspended for failure to comply with the requirements.

IX. CONCLUSION

Compared to many years, this survey period was relatively quiet in the field of legal ethics. There were very few bold, new pronouncements, and with the exception of Hutchison, no major decisions were overruled. The next survey period, however, could prove to be a watershed year. Perhaps the next issue will begin with the phrase, "This year, Georgia finally joined the more than forty states who have adopted the ABA Model Rules of Professional Conduct." Or maybe it will say, "Thousands

263. Id. at 411, 509 S.E.2d at 920.
264. Id.
265. Id. at 412, 509 S.E.2d at 920.
266. Id., 509 S.E.2d at 921.
267. Id., 509 S.E.2d at 920.
of trees throughout Georgia breathed a collective sigh of relief this year when the Georgia General Assembly finally repealed the malpractice affidavit rule. Almost immediately, the court of appeals caseload dropped significantly for the first time in years."