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Legal Ethics

by J. Randolph Evans* and Anthony W. Morris**

In 1989, the Supreme Court of Georgia and the State Bar of Georgia embarked upon what they considered a long-range project—to raise the level of professionalism of lawyers in the state. Accordingly, the Georgia Supreme Court established the Chief Justice's Commission on Professionalism, the first such body of its kind in the entire nation. Its primary mission is to ensure that the practice of law is engaged in the service not only of the client, but also of the public at large.1

During the past year,2 the Georgia appellate courts have focused their attention on professionalism. The courts issued significant decisions regarding the appropriate standard of care, including the role legal ethics will play in establishing the standard of care in legal malpractice cases. Also, the courts have analyzed the ethical propriety of certain types of fee arrangements with clients and others, including the validity of liquidated damages clauses in retainer agreements and the propriety of splitting fees with referral services. In addition, the courts have opened the door for broader solicitation of clients by attorneys and issued guidelines for attorneys who wish to contact former employees of organizations that are opposing parties in litigation. Finally, the courts have further defined statute of limitations issues in malpractice actions.

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2. The surveyed period of this article is June 1, 1994 through May 31, 1995. When used in this article, "the past year" refers to the surveyed period.
I. THE INCREASING ROLE OF ETHICS IN LEGAL MALPRACTICE CASES

During the past year, the appellate courts have altered the legal role that ethical standards play in the legal profession in Georgia. The courts have long felt that the professional nature of the practice of law and its obligations to the public interest require that lawyers be civilly responsible for their professional acts. In *First Bank & Trust Co. v. Zagoria*, the Georgia Supreme Court held that an attorney who is a shareholder in a professional corporation engaged in the practice of law is liable for the professional misdeeds of the other members of his firm when he holds himself out as a member of the law firm. In *Zagoria* an attorney who was a member of a professional corporation issued checks to clients in connection with real estate and other loan closings; the checks were dishonored because withdrawals from the law firm's checking account on which they were drawn left insufficient funds in the account. The court found that another attorney, who was also a shareholder in the professional corporation, but who was not personally involved in the loan closings or account withdrawals, was personally liable for the dishonored checks. In so ruling, the court focused on the professional nature of the practice of law and stated that “it is inappropriate for a lawyer to be able to play hide-and-seek in the shadows and folds of the corporate veil and thus escape the responsibilities of professionalism.”

In *Evanoff v. Evanoff*, the Georgia Supreme Court again addressed the professionalism issue. In that case, the court dismissed an appeal of a final judgment in a divorce action. In the trial court, the husband filed a petition for divorce. Although the wife's attorney filed a notice of appearance, he did not file a timely answer. The attorneys for both sides held several conversations toward negotiating a settlement, and the wife's attorney sent the opposing counsel a letter confirming the anticipated resolution. However, notwithstanding the discussions and prior to the date that the court had set for a final hearing, the husband's attorney proceeded ex parte before the presiding judge and presented evidence for a final decree, which the court granted.

5. *Id.* at 845, 302 S.E.2d at 675.
6. *Id.*
7. *Id.* at 846, 302 S.E.2d at 675.
9. *Id.* at 303, 418 S.E.2d at 62.
10. *Id.*
The trial court subsequently denied a motion to vacate the decree by the wife's attorney. The Georgia Supreme Court agreed with the trial court that the case did not fall within the precise bounds of the Official Code of Georgia Annotated ("O.C.G.A") section 9-11-60(d) because the husband's attorney took no action that could be characterized as actual fraud. However, concerned with the professionalism of the husband's attorney, or lack thereof, Justice Benham issued a concurring opinion dealing with professionalism.

Justice Benham opined that the husband's attorney's actions in proceeding to the final decree "exceeded the bounds of professionalism and ethical conduct governing attorneys." Specifically, Justice Benham noted Ethical Consideration 7-10, which recognizes a concurrent obligation of an attorney to treat with consideration all persons involved in a legal process and to avoid the infliction of needless harm; Ethical Consideration 7-38, states that a lawyer should be courteous to opposing counsel and should follow local customs of courtesy or practice, unless timely notice to the contrary is given to opposing counsel; Directory Rule 7-106(c)(6), states that a lawyer shall not engage in undignified or discourteous conduct which is degrading to a tribunal. Although the conduct was deemed by Justice Benham to be unprofessional and unethical, it did not, according to the court, violate any legal requirement. Therefore, the Georgia Supreme Court vacated the grant of application for discretionary appeal.

11. Id.
12. O.C.G.A. § 9-11-60(d)(2) (1993) provides that a judgment may be set aside for "fraud, accident, or mistake, or the acts of the adverse party unmixed with the negligence or fault of the movant." Id.
13. 262 Ga. at 303, 418 S.E.2d at 62.
14. Id. (Benham, J., concurring).
15. Id. at 304, 418 S.E.2d at 62.
16. HANDBOOK, supra note 1, at 34-H. Ethical Consideration [(EC) 7-10] State Bar of Georgia Rules and Regulations provides that "[t]he duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid infliction of needless harm." Id.
17. HANDBOOK, supra note 1, at 36-H. EC 7-38 states, in material part, that a "lawyer should be courteous to opposing counsel and should accede to reasonable requests . . . that do not prejudice the rights of his client. He should follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so . . ." Id.
18. HANDBOOK, supra note 1, at 37-H. State Bar of Georgia Rules and Regulations Directory Rule ["DR"] 7-106(C)(6) provides, in part, that a lawyer shall not engage in undignified or discourteous conduct which is degrading to a tribunal.
19. 262 Ga. at 304 n.2, 418 S.E.2d at 62 n.2.
20. Id. at 304, 418 S.E.2d at 62.
The Georgia Supreme Court seemed to retreat from this position in Green v. Green. In that case, the appellant filed a divorce action and subsequently moved to Ohio. Her attorney then properly withdrew from the case. Subsequently, the case appeared as the fifteenth case on a trial calendar. The notice, published in the legal newspaper of the county, specified that all but the first ten cases would be "on call." The appellee's counsel did not attempt to give notice of the trial to the appellant. The appellee and his counsel appeared and answered ready.

When the trial court indicated that it would continue the case because it could not locate the file, appellee's counsel located the file in another judge's office and presented it to the trial court. The court then heard the case and entered an order awarding appellee custody and child support. Appellant moved to set aside the order, but the trial court denied the motion. The Georgia Supreme Court granted appellant's application for discretionary review.

Initially, the court held that only the first ten cases on the published calendar were required to be present under the rule in effect at the time. Since judgment was entered against a party who was not required by the rule to be present, the judgment should have been set aside.

The court then addressed the professionalism issue. Distinguishing Evanoff, the court stated that in Green there was case law permit-

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23. Id. at 551, 437 S.E.2d at 458.
24. Id., 437 S.E.2d at 457.
25. Id., 437 S.E.2d at 458.
26. Id. at 552, 437 S.E.2d at 458.
27. Id.
28. Id. In so ruling, the court relied on the holding in Fulton v. State of Georgia, 183 Ga. App. 570, 359 S.E.2d 726 (1987). There, the court of appeals held that only the first five cases on the published calendar were required to be present. The rule was amended in 1989 to raise the number of cases for which parties and counsel must be present from five to ten. Uniform Superior Court Rule 8.4 provides that parties and counsel in the first ten actions on the published trial calendar shall appear ready for trial on the date specified unless otherwise directed by the assigned judge. Parties in all other actions on the calendar are expected to be ready for trial but may contact the calendar clerk to obtain: (A) A specific date and time for trial during the trial term specified in the calendar; or (B) Permission to await the call by the calendar clerk of the action for trial upon reasonable notice to counsel.

29. 263 Ga. at 555, 437 S.E.2d at 460.
ting the setting aside of the judgment as an exercise of discretion.\textsuperscript{32} The court then noted, "[T]here is the caution in \textit{Evanoff} that the courts will not condone a refusal 'to act out of a spirit of cooperation and civility and not wholly out of a sense of blind and unbridled advocacy.'\textsuperscript{33}

The court summarized attorneys' professional duties as follows:

\begin{quote}
That spirit of cooperation and civility, when taken together with the notions of fundamental fairness that lie at the heart of the principle of due process of law, requires that attorneys, as officers of the court, make a good faith effort to ensure that all parties to a controversy have a full and fair opportunity to be heard. Such an effort may entail, as is already the customary practice of many attorneys, counsel assuming the burden of notifying by mail any unrepresented opposing party when their case appears on a trial calendar.\textsuperscript{34}
\end{quote}

The court observed that appellee's counsel acted unprofessionally and noted that professionalism encompasses not only those things an attorney must do, but also those things an attorney ought to do.\textsuperscript{35}

In a special concurring opinion, Justice Sears-Collins rejected an absence of professionalism as a basis to set aside a judgment.\textsuperscript{36} Her opinion stated as follows:

\begin{quote}
Moreover, the State Bar Rules provide that professionalism standards are "non-mandatory" and "aspirational." State Bar Rule 9-101. That being so, it can hardly be concluded that a litigant has notice that non-mandatory and aspirational standards will be made mandatory and used to set aside his or her judgment.\textsuperscript{37}
\end{quote}

Justice Sears-Collins reasoned that the majority's reliance on professionalism to vacate a judgment infringes upon, if not violates, both the appellee and the appellee's lawyer's rights to due process.\textsuperscript{38} Interestingly, Justice Sears-Collins foresaw the future when she wrote:

\begin{quote}
[T]he majority has begun the descent of the slippery slope of legislating civility and courtesy. In the future, this Court no doubt will have to classify some professionalism standards as more important than others,
\end{quote}

\begin{thebibliography}{9}
\bibitem{33} 263 Ga. at 554, 437 S.E.2d at 459 (quoting \textit{Evanoff}, 262 Ga. 304, 418 S.E.2d 62 (1992)).
\bibitem{34} \textit{Id.} at 554-55, 437 S.E.2d at 459-60.
\bibitem{35} \textit{Id.}
\bibitem{36} \textit{Id.} at 556, 437 S.E.2d at 461 (Sears-Collins, J., concurring).
\bibitem{37} \textit{Id.} at 557, 437 S.E.2d at 461.
\bibitem{38} \textit{Id.} at 556-57, 437 S.E.2d at 461.
\end{thebibliography}
some transgressions as more unprofessional than others, and some standards as appropriate weapons in the litigation arena and others only as guides for regulating conduct through our attorney disciplinary agencies. These problems illustrate why this Court should not permit its distaste for lawyers who may not be exercising common sense, maturity, and civility to blind it to the problems of legislating such conduct.39

Indeed, this appears to be exactly what has happened during the past year. Over the years, courts in various jurisdictions have taken different approaches regarding whether codes of ethics of professional responsibility are admissible as evidence of a lawyer's standard of care. Some courts have held that professional ethics standards conclusively establish a duty of care, and violations of the standards constitute negligence per se.40 A minority of courts have found that an ethical rules violation establishes a rebuttable presumption of malpractice.41 The majority of states treat violations of ethical rules as admissible evidence of the lawyer's duty of care.42

In Allen v. Leftkoff, Duncan, Grimes & Dermer,43 the Georgia Supreme Court decided to follow the rule of the majority of states and held that the Georgia Code of Professional Responsibility44 and pertinent bar rules45 may be admissible as evidence of the standard of care in a legal malpractice action.46 In Allen the plaintiff retained the law firm to settle her late husband's estate.47 When she expressed a desire to sell her late husband's business, the law firm introduced her to a buyer. The attorneys represented both parties in the transaction, and they included in the purchase contract an indemnification clause to protect the law
firm from liability. When the buyer defaulted on his obligation to pay the plaintiff the amount due under the purchase agreement, and he liquidated the company, the plaintiff sued the law firm to recover her losses and punitive damages.48

At trial, the plaintiff sought to introduce evidence regarding the attorneys' alleged violation of certain provisions of the Code of Professional Responsibility49 relating to multiple representations.50 The trial court excluded all references to the Code of Professional Responsibility, and the jury returned a verdict for the defendants.51 After the trial court denied a motion for j.n.o.v. and a new trial, the plaintiff appealed.52

Citing Davis v. Findley,53 the court of appeals held that the Code of Professional Responsibility does not establish civil liability for legal malpractice and thus, the trial court properly excluded all references to the Code of Professional Responsibility.54

On appeal, the Georgia Supreme Court held that the Code of Professional Responsibility and pertinent bar rules are relevant to the standard of care in a legal malpractice action.55 The court reasoned that the Code of Professional Responsibility and the Standards of Conduct set forth a "general guide" for the conduct of lawyers.56 Therefore, according to the court, the Code and the Standards of Conduct play a role in shaping the "care and skill" ordinarily exercised by lawyers.57 However, the court refused to go as far as to say that all bar rules are necessarily relevant in every legal malpractice action.58 Instead, the court articulated the following standard:

In order to relate to the standard of care in a particular case, we hold that a Bar Rule must be intended to protect a person in the plaintiff's position or be addressed to the particular harm suffered by the plaintiff . . . . [T]hus, while a Bar Rule is not determinative of the standard of care applicable in a legal malpractice action, it may be "a circumstance that can be considered, along with other facts and circumstances."59

48. Id.
49. GEORGIA STATE BAR RULE 3-101.
50. 212 Ga. App. at 560, 442 S.E.2d at 467.
51. Id., 442 S.E.2d at 466.
52. Id.
54. 212 Ga. App. at 561, 442 S.E.2d at 467.
55. 265 Ga. at 376, 453 S.E.2d at 721.
56. Id.
57. Id.
58. Id. at 377, 453 S.E.2d at 721.
59. Id., 453 S.E.2d at 722.
As a result, in Georgia, an attorney's violation of the Code of Professional Responsibility or the Standards of Conduct is now admissible as evidence of the standard of care in a legal malpractice action against that attorney when the bar rule was intended to protect a person in the plaintiff's position or was addressed to the particular harm suffered by the plaintiff. 60

In a separate concurrence, Justice Benham raised several concerns, including his concern that the holding will "create confusion, erode this court's authority in regulating the practice of law, result in unwarranted prejudice to legal malpractice defendants, foster an avalanche of malpractice complaints, hamper efforts to improve ethical standards and professionalism, and have far reaching adverse effects in other areas of professional malpractice." 61

The general rule that ethical violations, standing alone, cannot be the basis for a malpractice claim remains the law. 62 In Davis v. Findley, 63 the Georgia Supreme Court held that, "while the Code of Professional Responsibility provides specific sanctions for the professional misconduct of attorneys whom it regulates, it does not establish civil liability of attorneys for their professional misconduct, nor does it create remedies in consequence thereof." 64

II. FAILURE OF THE ATTORNEY TO EXERCISE ORDINARY CARE, SKILL, AND DILIGENCE

In Georgia, in order to recover against an attorney for professional malpractice, the plaintiff must establish, among other things, a deviation from the applicable standard of care. 65 This is simply a corollary of the traditional formula for the necessary elements to a cause of action in tort: duty, breach (failure to conform to the required standard), and damage proximately caused by the breach. 66 In Kellos v. Sawilow-

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60. Id., 453 S.E.2d at 721-22.
61. Id. at 378, 453 S.E.2d at 722 (Benham, J., concurring).
64. Id. at 613, 422 S.E.2d at 861.
65. Rogers v. Norvell, 174 Ga. App. 453, 457, 330 S.E.2d 392, 395 (1985). The Court held that, in a legal malpractice action, the client has the burden of establishing (1) employment of the defendant attorney; (2) failure of the attorney to exercise ordinary care, skill, and diligence; and (3) such negligence was the proximate cause of damage to the plaintiff. Id.
the Georgia Supreme Court articulated the standard of care against which an attorney's conduct is to be measured in a legal malpractice action in Georgia. The court held as follows:

Our Courts have held that an attorney's duty is "to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake" and that "[a]n attorney is not bound to extraordinary diligence. He is bound to reasonable skill and diligence, and the skill has reference to the character of the business he undertakes to do . . . ." Thus while the standard of care required of an attorney remains constant, its application may vary.

The court identified two considerations in particularizing the standard of care in a given case: (1) the number of options available to the attorney, and (2) the amount of time which the attorney has to consider them. Quoting Hughes v. Malone, the court noted that the "effectiveness of representation may also be judged by the familiarity of counsel with the case, including counsel's opportunity to investigate and diligence in doing so, in order meaningfully to advise the client of his options."

The court held that the standard of care required of an attorney remains constant whether the attorney is considered a practitioner of a given state or a practitioner of the legal profession generally. While the standard remains the same, the application of the standard of care may, according to the court, vary from jurisdiction to jurisdiction and from situation to situation.

In applying the standard of care in a particular situation, the court of appeals provided the following guidance in Hughes v. Malone:

Although an attorney is not an insurer of the results sought to be obtained by such representation, when, after undertaking to accomplish a specific result, he then willfully or negligently fails to apply commonly known and accepted legal principles and procedures through ignorance of basic, well-established and unambiguous principles of law or through a failure to act reasonably to protect his client's interests, then he has breached his duty toward the client. As the legal profession is at best an inexact science, a breach of duty arises only

68. Id. at 5, 325 S.E.2d at 758.
69. Id.
71. 254 Ga. at 5, 325 S.E.2d at 758.
72. Id.
73. Id.
when the relevant, i.e., legal principles or procedures are well settled and their application clearly demanded, and the failure to apply them apparent; otherwise, an attorney acting in good faith and to the best of his knowledge will be insulated from liability for adverse results.\textsuperscript{74}

The standard of conduct as applied in the legal malpractice context should not be confused with the fiduciary duties arising out of the attorney-client relationship. In \textit{Tante v. Herring},\textsuperscript{75} the attorney successfully prosecuted a claim for social security disability benefits on behalf of his client.\textsuperscript{76} Notwithstanding a successful monetary result, the court of appeals, nonetheless, held that the attorney committed legal malpractice when he induced and engaged in sexual intercourse with his client to his client's detriment.\textsuperscript{77} The court of appeals specifically held that a "successful monetary result on a claim does not mean that a lawyer cannot, per se, otherwise breach his professional responsibilities to his client."\textsuperscript{78}

On appeal, the Georgia Supreme Court reversed the holding as it related to legal malpractice.\textsuperscript{79} The court found that there was no evidence that the attorney's conduct had any effect on this performance of legal services under his agreement with her.\textsuperscript{80} Indeed, the attorney obtained for the wife "precisely the results for which he was retained, the recovery of social security disability benefits."\textsuperscript{81} Under the court's reasoning, the element of breach of duty in a legal malpractice case—the failure to exercise ordinary care, skill, and diligence—must relate directly to the duty of the attorney, that is, the duty to perform the task for which the attorney was hired.\textsuperscript{82} The Georgia Supreme Court held that contrary to the holding of the court of appeals, a satisfactory result under an agreement for legal services, by necessity, precludes a claim for legal malpractice.\textsuperscript{83}

\textsuperscript{74} 146 Ga. App. at 344-45, 247 S.E.2d at 111.
\textsuperscript{76} 211 Ga. App. at 322, 439 S.E.2d at 5.
\textsuperscript{77} Id. at 324, 439 S.E.2d at 8.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 324, 439 S.E.2d at 5.
\textsuperscript{81} Id. at 324, 439 S.E.2d at 8.
\textsuperscript{82} Id. at 695, 453 S.E.2d 686, 687 (1993).
\textsuperscript{83} Id. The Georgia Supreme Court held that Tante violated Standard 28 by engaging in a sexual relationship with his mentally and emotionally impaired client, that he used her secrets to her disadvantage, and that he used the client's psychological evaluations to encourage a sexual relationship for his own satisfaction. As a result, the court suspended Tante from the practice of law for 18 months. \textit{Id.} at 696, 453 S.E.2d at 688.
\textsuperscript{81} Id. at 695, 453 S.E.2d at 687.
\textsuperscript{82} Id.
\textsuperscript{83} Id. Likewise, the court held that there was no basis for the Herrings' breach of contract claim. The court did, however, affirm the denial of summary judgment to Tante,
However, in dicta, the court carved out an exception to its general rule that satisfactory results bar a malpractice claim when it recognized that "[i]t is conceivable that Tante's improper conduct might have affected his performance of legal services in another context, e.g., had he been retained to represent Mrs. Herring in a divorce or child custody action." Thus, in most situations, if an attorney achieves satisfactory results in representing a client that client may not, in turn, state a claim for legal malpractice.

In order to recover in a legal malpractice claim, a plaintiff must establish a deviation from the relevant standard of care. During the past year, the Georgia Court of Appeals focused on professional services rendered when the law is not settled. Relying on the standard articulated in Hughes, the Georgia Court of Appeals held in Jones, Day, Reavis & Pogue v. American EnviRecycle, Inc., that a law firm defendant was insulated from liability arising from a claim of negligent drafting of a sales contract when there were unsettled issues of law involved. The predecessor of the law firm drafted a contract for its client's purchase of real property from a local county development authority in order to construct a biomedical and industrial waste incineration facility. The authority subsequently pulled out of the deal and sued the client claiming fraud in the inducement and ultra vires. The trial court struck down the contract because it lacked a required provision stating the client's intended use of the property. The Georgia Supreme Court affirmed the ruling, and the client filed suit against the law firm for malpractice.

In the appeal of the denial of summary judgment for the law firm in the malpractice action, the court of appeals found that the law regarding the requirement of including a statement of purpose within the body of a contract for sale of land by a development authority was not clearly settled at the time the contract was drafted. Therefore, relying on the holding that the Herrings had a claim for damages arising from a breach of Tante's fiduciary duty in his attorney-client relationship with Mrs. Herring.

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84. Id. at 695 n.1, 453 S.E.2d at 687 n.1.
85. Id. at 695, 453 S.E.2d at 687.
89. Id. at 80, 456 S.E.2d at 264.
90. Id.
91. Id. at 84, 456 S.E.2d at 267.
92. Id. at 80, 456 S.E.2d at 264.
93. Id. at 84, 456 S.E.2d at 267.
standard of care established in *Hughes*\(^94\) and *Berman v. Rubin*,\(^95\) the law firm could not be held responsible for failing to include a statement of intent in the contract.\(^96\) Reversing the trial court, the court of appeals ruled that the law firm was insulated from liability and entitled to summary judgment.\(^97\)

III. THE ROLE OF ETHICS IN OTHER CAUSES OF ACTION AGAINST ATTORNEYS

Legal ethics may also play a role in causes of action against attorneys other than legal malpractice. If an attorney assumes an interest antagonistic to that of the client, the attorney may be liable for breach of fiduciary duty. In *Tante v. Herring*,\(^98\) the client and her husband sued their former attorney for legal malpractice, breach of fiduciary duty, and breach of contract, claiming that the attorney, after reviewing the client's psychological evaluations, took advantage of the client's impaired judgment and difficulty with interpersonal relationships by initiating and maintaining a two-year sexual relationship through which she contracted a venereal disease. The court of appeals agreed with the trial court's finding that the attorney breached his fiduciary duty to his client.\(^99\)

Citing O.C.G.A. section 23-2-58\(^100\) and *Jerry Lipps, Inc. v. Pos-
tell, the court of appeals in *Author v. Georgia Cotton Co.* noted that attorneys are obligated not to put themselves in a position where their interests are antagonistic to those of their clients. According to the court, an attorney can pursue no interest or take any act adverse to the client's interests or incompatible with applying the attorney's best skill, zeal, and diligence in representing the client. Because of this fiduciary relationship, an attorney has a duty to exercise the utmost good faith and loyalty, and act solely for the client's benefit. An attorney occupies a position of trust and confidence, and is not allowed to promote personal interests to the injury of clients. An attorney is not allowed to profit from the attorney-client relationship, or from the sensitive knowledge obtained therein, to the injury of the client.

The court of appeals in *Tante* held that the attorney used sensitive information available to him solely because of his attorney-client relationship to his personal advantage and to the client's disadvantage. Moreover, the attorney engaged in an extramarital affair with one client who was the wife of his other client in the same cause, allegedly infecting the wife with a venereal disease. Thus, the court of appeals held that the attorney assumed an interest antagonistic to his clients and their cause, and contrary to his role as their trusted attorney. Therefore, the clients were entitled to recover for breach of fiduciary relationship.

On appeal, the Georgia Supreme Court affirmed summary judgment as to liability for breach of fiduciary duty. The court found that the evidence indicated the lawyer had misused confidential information regarding the wife's impaired emotional and mental condition to convince her to have an affair with him. The court found that, by using confidential information to his own advantage, and to the wife's

where, from a similar relationship or mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc.

*Id.*

108. *Id.*
109. *Id.*
111. *Id.* at 696, 453 S.E.2d at 688.
disadvantage, the lawyer had breached his fiduciary duty to the clients.\textsuperscript{112}

Interestingly, especially in light of the Georgia Supreme Court's subsequent decision in \textit{Allen},\textsuperscript{113} the court may have given an indication of things to come. The basis for the court's decision that Tante had breached his fiduciary duty was that the Herrings' claim was based on Tante's alleged misuse, to his own advantage, of the confidential information contained in Mrs. Herring's medical and psychological reports obtained by him solely as a result of his representation of Mrs. Tante.\textsuperscript{114} The court noted that Tante's conduct constituted a violation of Directory Rule 4-401(B)(3),\textsuperscript{115} which, standing alone, does not create a private right of action for damages.\textsuperscript{116} The court viewed as merely incidental the fact that the breach was also an ethical violation.\textsuperscript{117} In fact, the court expressly declined to decide whether violations of the code are relevant in a claim against a lawyer for legal malpractice or breach of fiduciary duty.\textsuperscript{118}

Of course, the court decided in \textit{Allen} that violations of the code may be admissible as evidence of the standard of care in legal malpractice actions.\textsuperscript{119} Given the language of the \textit{Tante} decision, it seems safe to assume that the court would likewise rule that violations of ethical rules are admissible in cases against lawyers alleging breach of fiduciary duty.

IV. THE ETHICAL PROPRIETY OF FEE ARRANGEMENTS

During the past year, ethics and professionalism have also played roles in determining the enforceability of fee arrangements with clients and others. In \textit{AFLAC, Inc. v. Williams},\textsuperscript{120} the question presented was: "Whether the Court of Appeals opinion with respect to retainer contracts creates any confusion regarding the ethical conduct expected of an attorney toward a client."\textsuperscript{121} The Georgia Supreme Court concluded that a liquidated damages clause in a retainer agreement was unenforce-

\textsuperscript{112} \textit{Id.}
\textsuperscript{114} 264 Ga. at 696, 453 S.E.2d at 688.
\textsuperscript{115} DR 4-101(B)(3) provides that a lawyer shall not knowingly "use a confidence of secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure." \textit{Id.}
\textsuperscript{117} 264 Ga. at 696 n.5, 453 S.E.2d at 688 n.5.
\textsuperscript{118} \textit{Id.}
\textsuperscript{120} \textit{AFLAC v. Williams,} 264 Ga. 351, 444 S.E.2d 314 (1994).
\textsuperscript{121} \textit{Id.} at 352 n.1, 444 S.E.2d at 315 n.1.
able because it improperly imposed a penalty on the client's implied, absolute right to terminate its representation by an attorney in private practice. 122

In 1987, AFLAC's Chairman and CEO, John Amos, and attorney Peter Williams agreed on a seven-year retainer under an agreement that provided (1) monthly payments to Williams and (2) automatic renewal of the agreement for an additional five years, unless they terminated the agreement within the seven-year window. 123 Williams agreed to work on an "as needed" basis, and the agreement did not require Williams to dedicate all of his time to AFLAC. If AFLAC terminated the agreement at any time other than the end of the seven-year period, even for good cause, it was required to pay fifty percent of the sums due under the remaining term, including the renewal term. AFLAC terminated the agreement in 1991 following Amos' death. It then filed a declaratory judgment to determine the validity of the contract. By counterclaim, Williams sought to recover one million dollars from AFLAC under the termination provision. 124

The trial court granted summary judgment to AFLAC on both its claim and the counterclaim. 125 The court of appeals reversed in part and held that the original seven-year agreement was valid, but further held that the five-year automatic renewal provision was unenforceable. 126

The Georgia Supreme Court granted a writ of certiorari to determine whether a client must pay legal fees to an attorney under a long term retainer contract after terminating the contract. 127 The court excepted from consideration employment relationships between employers and in-house counsel or other full-time employees. 128

Reversing the court of appeals, the Georgia Supreme Court held that "an attorney may not recover damages under a penalty clause when a

122. _Id._ at 354, 444 S.E.2d at 317.
123. _Id._ at 352, 444 S.E.2d at 315-16. The contract provided as follows:
This agreement will automatically renew on the same terms and conditions beginning December 31, 1995, for an additional 5 years, unless terminated for just cause at least ninety (90) days prior to the expiration of the term, in which the Company will pay you as damages an amount equal to 50 percent of the sums due under the remaining terms, plus renewal of this agreement.
_Id._ at 352 n.2, 444 S.E.2d at 315-16 n.2.
124. _Id._ at 352, 444 S.E.2d at 315-16.
125. _Id._
127. 264 Ga. at 351, 444 S.E.2d at 315.
128. _Id._ at 352 n.1, 444 S.E.2d at 315 n.1.
client exercises the legal right to terminate the attorney's retainer contract.\textsuperscript{129}\ The court premised its holding on the unique relationship which exists in the attorney-client contract.\textsuperscript{130}\ A necessary corollary to this particular relationship is the "absolute right to discharge the attorney and terminate the relationship at any time, even without cause."\textsuperscript{131}\ Since "requiring a client to pay damages eviscerates the client's absolute right to terminate,"\textsuperscript{132}\ the court concluded that the provision requiring AFLAC to pay damages equal to half Williams' retainer was unenforceable.\textsuperscript{133}\ Thus, the court held that the right to terminate is implied by public policy in every attorney-client contract because of the peculiar trust relationship between lawyer and client entitling the client to the attorney's fidelity.\textsuperscript{134}\ In so ruling, the court did not address O.C.G.A. section 15-19-11,\textsuperscript{135}\ which provides as follows:

Unless otherwise stipulated, one-half of the fee in any case is a retainer and is due at any time unless the attorney, without sufficient cause, abandons the case before rendering service to that value. In cases where he has rendered such service but cannot render the balance of service due to the act of his client, providential cause, election to office, or removal out of the state, he is entitled to retain such amount or a due proportion thereof if collected, or if not collected, to bring an action to collect it. Where no special contract is made, the attorney may recover for the services actually rendered.\textsuperscript{136}\ Under the statute, Williams would have arguably earned one-half of the entire contractual amount when he agreed to be retained by AFLAC as its lawyer, absent any agreement to the contrary, unless he subsequently withdrew without justification. Moreover in *McNulty, George & Hall v. Pruden*,\textsuperscript{137}\ the court stated that "when the attorney dedicates

\begin{itemize}
  \item 129. *Id.* at 352, 444 S.E.2d at 315.
  \item 130. *Id.* at 353, 444 S.E.2d at 316.
  \item 131. *Id.*
  \item 132. *Id.*, 444 S.E.2d at 317.
  \item 133. *Id.* at 353-54, 444 S.E.2d at 317.
  \item 134. The attorney-client relationship has long been one described as trust. See Ryan v. Thomas, 261 Ga. 661, 662, 409 S.E.2d 507, 507 (1991); Freeman v. Bigham, 65 Ga. 580, 589 (1880). This "unique" relationship is "founded in principle upon the elements of trust and confidence on the part of the client and of undivided loyalty and devotion on the part of the attorney." Demov, Morris, Levin & Shein v. Glantz, 428 N.E.2d 387, 389 (N.Y. 1981).
  \item 136. *Id.*
\end{itemize}
himself by contract to his client's service thereby cutting himself off from employment by the adverse party he earns a general retainer.\footnote{138}

Also during the past year, in Formal Advisory Opinion No. 94-1,\footnote{139} the State Bar of Georgia addressed the ethical propriety of a non-profit lawyer referral service collecting a percentage of the fees in cases referred to participating attorneys by the lawyer referral service. Standard 26 of Bar Rule 4-102\footnote{140} provides, in pertinent part, that a lawyer cannot share legal fees with a nonlawyer.\footnote{141} In addition, under Standard 13(b),\footnote{142} a lawyer cannot give anything of value, including compensation, to anyone for a recommendation of the lawyer to a client that results in employment.\footnote{143} Instead, the lawyer may only pay the customary fees associated with membership in the service.\footnote{144} The supreme court reasoned that, although the membership of the local bar association is composed exclusively of licensed lawyers, the local bar

\begin{footnotes}
\footnote{138}{Id. at 141.}
\footnote{139}{HANDBOOK, supra note 1, at 95-H, Formal Op. 94-1 (1994).}
\footnote{140}{HANDBOOK, supra note 1, at 42-H. Bar Rule 4-102, Standard 26 provides as follows:}
\footnote{141}{Id.}
\footnote{142}{Id. at Standard 13(b) provides as follows:}
\footnote{143}{Id.}
\footnote{144}{Id.}
\end{footnotes}
association, in and of itself, is not authorized to practice law.\textsuperscript{146} As a result, a lawyer may not split fees or pay a commission to a lawyer referral service for cases referred to him or her.

V. ETHICAL CONSIDERATIONS APPLICABLE TO CLIENT FUNDS

From time to time, cases arise in which lawyers become uncertain as to who is entitled to disputed funds held by the lawyer. During the past year, the Georgia Supreme Court has issued some guidance in this situation with Formal Advisory Opinion No. 94-2.\textsuperscript{146} In every case, the lawyer has a duty to represent the client’s interests. Standard 45\textsuperscript{147} provides in pertinent part, that in the representation of a client, a lawyer shall not settle a legal proceeding or claim without obtaining proper authorization from the client.\textsuperscript{148} In those cases where it is impossible to ascertain who is entitled to the disputed funds, the lawyer may hold the funds in a trust account for a reasonable time while attempting to resolve the dispute.\textsuperscript{149} If no resolution can be reached, the lawyer should interplead the funds into a court of competent jurisdiction.\textsuperscript{150}

VI. ETHICAL CONSIDERATIONS IN ADVERTISING AND SOLICITATION

During the past year, the federal courts appear to have opened the door for broader solicitation of clients by attorneys. In Speer \textit{v. Miller},\textsuperscript{151} a Georgia attorney filed suit against the Governor and the Attorney General of Georgia seeking a permanent injunction against the enforcement of O.C.G.A. section 35-1-9,\textsuperscript{152} which makes it unlawful for

\begin{itemize}
\item \textsuperscript{145} Formal Op. 94-1 (1994).
\item \textsuperscript{146} Formal Op. 94-2 (1994).
\item \textsuperscript{147} Bar Rule 4-102, Standard 45(f).
\item \textsuperscript{148} Formal Op. 94-2 (1994).
\item \textsuperscript{149} \textit{Id}.
\item \textsuperscript{150} \textit{Id}.
\item \textsuperscript{152} O.C.G.A. § 35-1-9 (1993) provides as follows:
\begin{enumerate}
\item It shall be unlawful for any person to inspect or copy any records of a law enforcement agency to which the public has a right of access under paragraph (4) of subsection (a) of Code Section 50-18-72 for the purpose of obtaining the names and addresses of the victims of crimes or persons charged with crimes or persons involved in motor vehicle accidents or other information contained in such records for any commercial solicitation of such individuals or relatives of such individuals.
\item The provisions of subsection (a) of this Code section shall not prohibit the publication of such information by any news media or the use of such information for any other lawful data collection or analysis purpose.
\item Any person who violates any provision of subsection (a) of this Code section shall be guilty of a misdemeanor.
\end{enumerate}
\end{itemize}
any person to inspect or copy public law enforcement records for the purpose of obtaining names and addresses of persons charged with crimes or involved in motor vehicle accidents for commercial solicitation.153

Initially, the district court dismissed the complaint for failure to state a claim.154 The Eleventh Circuit vacated the order.155 On remand, the Georgia defendants argued that the state had a substantial interest in protecting the privacy of those charged with criminal offenses and those involved in accidents, protecting the public against unnecessary insurance abuses, and minimizing the opportunity for fraud and misrepresentation.156 The district court agreed.157 However, the district court did not agree that the state had a substantial interest in protecting the privacy of the individuals whose names appeared on the records at issue, because O.C.G.A. section 35-1-9 did not specifically prohibit the publication of the names and addresses by the news media or the use of such information for any other lawful data collection or analysis purpose.158 According to the court, the law only prohibited the use of the names and addresses for commercial solicitation.159 The district court then determined that O.C.G.A. section 35-1-9 restricted commercial speech under the First Amendment by punishing the access of government records when it was coupled with a certain type of speech.160 The district court opined that the statute's exceedingly narrow scope denied access only to those intending to use the names and addresses to solicit people or their relatives for commercial purposes, making the statute one designed to prevent solicitous practices.161 Therefore, the court held that the statute violated First Amendment rights to commercial speech.162

155. Speer v. Miller, 15 F.3d 1007 (11th Cir. 1994).
156. Speer, 864 F. Supp. at 1300.
157. Id.
158. Id. at 1302.
159. Id.
160. Id. The Tenth Circuit recently concluded that a statute similar to O.C.G.A. § 35-1-9 (1993) implicated the First Amendment. Lanphere & Urbaniak v. Colorado, 21 F.3d 1508 (10th Cir. 1994).
161. Id. The district court used the test established in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980), to determine that the statute's restriction on commercial speech violated the First Amendment. 864 F. Supp. at 1299.
VII. ETHICAL CONSIDERATIONS IN CONTACTING FORMER EMPLOYEES OF ORGANIZATIONS REPRESENTED BY COUNSEL

Standard 47 mandates that a lawyer shall not communicate about the subject of representation with a person represented by another lawyer without the prior consent of that lawyer. The Standard is based on the belief that a lawyer, in order to serve their own self-interest, should not be able to contact and attempt to manipulate the clients of other lawyers. This rationale is reflected in Formal Advisory Opinion No. 87-6, which states that it is unethical for an attorney to interview a current employee of a corporation which is an opposing party in pending litigation without the consent of the corporation or its counsel if the employee is either (1) a director or officer of the corporation with the authority to bind the corporation or (2) an employee whose acts may be imputed to the corporation. However, the opinion did not address the situation where an attorney seeks to interview a former employee of the organization represented by counsel to obtain information relevant to litigation against the organization. During the past year, the Georgia Supreme Court addressed this issue.

In Formal Advisory Opinion No. 94-3, the court stated that a lawyer may properly contact and interview former employees of an organization that is represented by counsel to obtain nonprivileged information relevant to litigation against the organization subject to two conditions. First, the identity of the lawyer's client must be fully disclosed. Full disclosure includes notifying the former employee of the reason for the contact and the purpose of the interview and telling the former employee any other information necessary under the circumstances so the interview is not misleading. Second, the former employee must consent. A refusal of the former employee to grant the interview means that the lawyer must resort to the normal
discovery process and witness procedures. Therefore, a lawyer may contact a former employee of an organization for an interview, but, before proceeding with the interview, the lawyer must make full disclosure and obtain the consent of the former employee.

VIII. STATUTE OF LIMITATIONS

During the past year, the appellate courts have attempted to further define what will and will not toll the statute of limitations in a legal malpractice action. In Georgia it has long been held that the applicable statute of limitations for a legal malpractice cause of action based upon a breach of a duty imposed by the attorney-client contract of employment is four years for an oral contract and six years for a written contract. Prior to 1990, it was clear that the statute of limitations for a legal malpractice action based on breach of contract ran from the date of the breach as opposed to the date that any resulting injury was ascertained. In 1990, the Georgia Court of Appeals created an exception to that rule.

In Arnall, Golden & Gregory v. Health Service Centers, Inc., the plaintiff brought a legal malpractice action against the defendant attorneys alleging negligence in the drafting of agreements involving a nursing home. In prior litigation between the parties concerning the meaning of certain documents, the Georgia Supreme Court adopted an interpretation of the documents at issue which was adverse to the plaintiff. Subsequent to the Georgia Supreme Court's ruling, the plaintiff brought an action against the defendant attorneys alleging legal malpractice in drafting the documents. The defendant attorneys contended that the statute of limitations had expired and, as a result, moved to dismiss the complaint. Almost nine years had passed between the drafting and execution of the documents and the commencement of the malpractice action.

Initially, the court held that the legal malpractice claim was subject to a four-year statute of limitations. The court also held that the

174. Id.
175. Id.
179. Id. at 791, 399 S.E.2d at 565.
180. Id., 399 S.E.2d at 565-66.
181. Id. at 792, 399 S.E.2d at 567.
breach occurred on the date of the documents' execution. Thus, unless tolled, the statute of limitations began to run on that date.

Citing *Riddle v. Driebe*, the defendant attorneys contended that the plaintiff did not allege fraud with the sufficiency necessary to toll the statute of limitations. In *Riddle*, the court of appeals held that an attorney's statements that the documents he prepared for the plaintiff were legally sufficient were not actionable as actual fraud or designed to deter or prevent a client from filing a suit, and therefore were not sufficient to toll the statute of limitations.

In distinguishing *Riddle*, the court of appeals in *Health Service Centers* noted that a confidential relationship between the parties lessens, if not negates, the necessity for showing actual fraud for purposes of tolling the statute of limitations. In applying this ruling to the case before it, the court noted that the defendant attorneys had provided several assurances to the plaintiff regarding the documents in question. In fact, according to the court of appeals, the defendant attorneys continued to represent the plaintiff throughout the appeal in the case seeking a determination of the correct interpretation of the documents.

Based on these facts, the court held that there were questions of fact requiring jury resolution concerning the impact of the defendant attorneys' representations about the documents on the statute of limitations. Essentially, the court held that, based on the confidential relationship between the plaintiff and the defendant attorneys, an issue of fact remained as to whether the statute of limitations had been tolled by the representations and conduct of the attorneys. For purposes of the case before it, and apparently other cases involving attorneys who continue representing their clients after a potential claim for malpractice exists, the court adopted the following rule previously enunciated in *Sutlive v. Hackney*:

> "Where a person sustains towards (another) a relation of trust and confidence, his silence when he should...

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182. Id.
183. Id.
188. Id.
189. Id.
190. Id. at 793, 399 S.E.2d at 568.
191. Id. at 792-93, 399 S.E.2d at 567-68.
speak, or his failure to disclose what he ought to disclose, is as much a fraud in law as an actual affirmative false representation.\textsuperscript{193} Although not specifically referring to it, the opinion in this case appears to adopt a modified form of the doctrine of continuing representation which a number of other states have adopted.\textsuperscript{194} Under the doctrine of continuing representation, the statute of limitations is tolled so long as a position of trust and confidence exists between the attorney and the client. The only exception is when the attorney specifically advises a client of the potential malpractice or the client is aware of the potential malpractice.

This theory for tolling the statute of limitations significantly increases an attorney’s exposure. For example, in \textit{Riser v. Livsey},\textsuperscript{195} the sole life-income beneficiary under a trust established by a last will and testament brought an action for legal malpractice against the attorney who drafted the will.\textsuperscript{196} The action alleged that the attorney was negligent in drafting the will and advising the decedent. The will was drafted and executed on March 10, 1970. The suit was filed on September 7, 1974.\textsuperscript{197} The trial court entered summary judgment in favor of the defendant attorney based on the four-year statute of limitations and the court of appeals affirmed.\textsuperscript{198} Under \textit{Health Service Centers}, however, if the attorney continued representing the decedent up to and including his death and made representations regarding the validity and effect of documents, it appears that the statute of limitations could have been tolled.

In \textit{Findley v. Davis},\textsuperscript{199} the court addressed the statute of limitations in a different context. In \textit{Findley} the appellee attorney initially served as legal counsel and executor to the appellant’s mother. Subsequently, the appellant hired the attorney for legal services in connection with the sale of commercial property, services much like those the attorney had provided for the appellant’s mother in a previous transaction. In

\begin{thebibliography}{99}
\bibitem{193} 197 Ga. App. at 793, 399 S.E.2d at 567 (quoting Sutlive v. Hackney, 164 Ga. App. 740, 742, 297 S.E.2d 515, 517 (1982)).
\bibitem{194} The doctrine of continuing representation has been adopted in Alaska, Arizona, California, Colorado, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Nebraska, New York, North Dakota, Ohio, Pennsylvania, South Dakota, Texas and Virginia. See \textsc{Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice} § 18.12 (3d ed. 1989).
\bibitem{196} \textit{Id.} at 615, 227 S.E.2d at 88.
\bibitem{197} \textit{Id.}, 227 S.E.2d at 89.
\bibitem{198} \textit{Id.}
\end{thebibliography}
addition, following the development of a personal relationship, the appellant loaned the attorney money under a loan agreement prepared by another attorney. When their personal relationship became strained, the appellant sued the attorney for legal malpractice, fraud, breach of fiduciary duty, and conflict of interest in connection with the personal loan and the two real estate transactions. The trial court granted summary judgment in favor of the attorney.

The attorney asserted the statute of limitations as a defense. The appellant claimed that the malpractice action was not time barred by the four-year statute of limitations, because the attorney concealed the unreasonableness of the fees charged, and because fraud tolled the statute of limitations until the appellant actually discovered the concealment just prior to filing the complaint. In rejecting these arguments, the court of appeals found that the appellant did not show that any act of the attorney prevented or deterred him from discovering the reasonableness of the fees. In fact, according to the court, there was no indication that the appellant would not have discovered that fact at the time the documents were executed if he had chosen to do so. Moreover, the court noted that the attorney made no representations or assurances with regard to the reasonableness of the fees. Thus, the court found no fraud, and the claims with respect to the fees on the first transaction were time barred. However, the court did note that, had the fraud risen to the level of preventing or deterring the client from discovering the alleged negligence or from bringing the malpractice action, it might have tolled the statute of limitations.

Likewise, in *Hyman v. Jordan*, the appellant hired an attorney to represent him in a breach of contract suit. The attorney's father, who practiced law with his son, executed a dismissal with prejudice of two of the defendants in the lawsuit without authorization from his son or the client. The trial court granted summary judgment in favor of the defendant attorneys because the four-year statute of limitations had expired. The court of appeals held that any fraudulent concealment

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\[200.\ 202 \text{Ga. App. at 332-33, 414 S.E.2d at 317-18.}\]
\[201. \ 202 \text{Id.}\]
\[202. \ 202 \text{Id. at 334-35, 414 S.E.2d at 319.}\]
\[203. \ 203 \text{Id. at 335, 414 S.E.2d at 319.}\]
\[204. \ 204 \text{Id.}\]
\[205. \ 205 \text{Id.}\]
\[206. \ 206 \text{Id.}\]
\[207. \ 207 \text{Id.}\]
\[208. \ 208 \text{201 Ga. App. 852, 412 S.E.2d 615 (1991).}\]
\[209. \ 209 \text{Id. at 852, 412 S.E.2d at 615.}\]
\[210. \ 210 \text{Id. at 853, 412 S.E.2d at 616.}\]
by the attorneys was not the type of fraud that would toll the statute of limitations, since the plaintiff did not show that any act of the defendants prevented or deterred him from discovering their alleged negligence or from bringing his malpractice action.\textsuperscript{211}

In \textit{Foster v. Cohen},\textsuperscript{212} a criminal defendant alleged that the defense attorney who represented him at the time he entered his guilty plea was negligent in not realizing and informing him of the effect that an amended statute regarding drug offenses would have on the outcome of his trafficking case.\textsuperscript{213} The former client filed the legal malpractice action seven days after the four-year statute of limitations had expired. However, the client claimed that the statute of limitations was tolled, pursuant to O.C.G.A. section 9-3-90,\textsuperscript{214} as a result of his alleged mental incapacity. The client claimed that he was mentally incapacitated by neurosis, psychosis, and chronic undifferentiated schizophrenia for which he was treated with thorazine and, therefore, was incompetent to manage his affairs for approximately three and one-half years following his arrest.\textsuperscript{215}

However, the court of appeals noted that the trial judge took the constitutionally and statutorily required measures to insure that the client was sufficiently competent to enter a valid plea.\textsuperscript{216} Moreover, the client admitted that he was not taking medication at the time the plea was tendered.\textsuperscript{217} Because the client held himself out to both his counsel and to the court as being competent and represented that he had the mental capacity to enter his plea, the court held that the client was estopped from claiming mental incapacity pursuant to O.C.G.A. section 9-3-90.\textsuperscript{218} As a result, the court of appeals affirmed the trial court's granting of the attorney's motion to dismiss.\textsuperscript{219}

In \textit{Long v. Wallace},\textsuperscript{220} a criminal defendant sued his attorney for malpractice following the defendant's conviction on statutory rape

\begin{itemize}
\item \textsuperscript{211} \textit{Id.} at 854, 412 S.E.2d at 617.
\item \textsuperscript{212} 203 Ga. App. 434, 417 S.E.2d 61 (1992).
\item \textsuperscript{213} \textit{Id.} at 434-35, 417 S.E.2d at 61.
\item \textsuperscript{214} O.C.G.A. § 9-3-90(a) (Supp. 1995) provides as follows: "Minors and persons who are legally incompetent because of mental retardation or mental illness, who are such when the cause of action accrues, shall be entitled to the same time after their disability is removed to bring an action as is prescribed for other persons." O.C.G.A. § 9-3-90(a).
\item \textsuperscript{215} \textit{Foster}, 203 Ga. App. at 434-36, 417 S.E.2d at 61-63.
\item \textsuperscript{216} \textit{Id.} at 436, 417 S.E.2d at 63.
\item \textsuperscript{217} \textit{Id.}
\item \textsuperscript{218} \textit{Id.} at 437, 417 S.E.2d at 63.
\item \textsuperscript{219} \textit{Id.}
\item \textsuperscript{220} 214 Ga. App. 466, 448 S.E.2d 229 (1994).
\end{itemize}
The defendant retained the attorney on February 18, 1986 to represent him in the felony prosecution. Following a trial, a jury returned a guilty verdict on November 20, 1986. The appellate court affirmed the conviction on November 2, 1988. The attorney continued to represent the defendant throughout the appellate process. Proceeding pro se, the defendant obtained relief by way of habeas corpus on February 9, 1991, predicated upon an ineffective assistance of counsel claim. The habeas court found that the attorney failed to interview key witnesses and failed to object or seek corrective action to prevent coaching of the victim's testimony.

In the malpractice action, the court held that the plaintiff's cause of action accrued, and the statute of limitations began to run, when the attorney committed the unskilful acts during the trial in November 1986. Accordingly, the trial court granted summary judgment in favor of the attorney on the ground that the action was time barred.

The plaintiff contended that the attorney committed separate subsequent acts of malpractice after the trial and during his representation by failing to urge the attorney's own ineffective assistance as a basis for a new trial on direct appeal or in a petition for habeas corpus. In rejecting this contention, the court of appeals found that the allegations of malpractice based upon the subsequent acts were, in fact, based upon the same errors and omissions arising out of the conduct during the original trial. According to the court, in essence, the plaintiff's contention consisted of nothing more than the attorney's failure to correct earlier actions which damaged his client. The court held that the failure to correct earlier malpractice did not constitute a separate breach for which the client had a cause of action. Thus, citing Jankowski v. Taylor, Bishop & Lee, the court held that the failure of the defendant attorney to argue on appeal his own possible ineffective assistance rendered during trial was not a separate act of malpractice for purposes of the statute of limitations.

221. Id. at 466, 448 S.E.2d at 229.
222. Id.
223. Id.
224. Id.
225. Id. at 467, 448 S.E.2d at 230.
226. Id.
227. Id.
228. Id.
229. Id. at 467-68, 448 S.E.2d at 230.
230. Id. at 468, 448 S.E.2d at 230.
Finally, in *Jones, Day, Reavis & Pogue v. American Envirecycle, Inc.*,233 the law firm appellant argued that the plaintiff's underlying malpractice action based upon the negligent drafting of a sales contract was untimely. The law firm completed the drafting of the contract on April 17, 1989. On its face, the contract reflected that the parties executed it on April 24, 1989. The plaintiff filed the legal malpractice action on April 26, 1993.234 The court analyzed the issue of when legal malpractice is alleged to arise from the negligent drafting of a contractual document.235 The law firm contended that the four-year statute of limitations should commence when the drafting of the contract was asserted to have been completed and not when the execution of the contract occurred.236 The Georgia Court of Appeals disagreed.237 The court held that the controlling date giving rise to a cause of action for malpractice and commencing the running of the statute of limitations is the date of contract execution.238

234. *Id.* at 81-83, 456 S.E.2d at 266-67. If contract execution occurred on April 24, 1989, then the four-year statute of limitations would have fallen on Sunday, April 25, 1993, and, pursuant to O.C.G.A. § 1-3-1(d)(3) (1990), appellee/plaintiff would have had through Monday, April 26, 1993 to file suit.
236. *Id.*
237. *Id.*
238. *Id.*