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Legal Ethics

by Jack L. Sammons*

The dominant event during this surveyed period¹ is not an event at all. It is instead a struggle so pervasive that its lurking presence is felt behind every important case and Formal Advisory Opinion ("FAO") decided this year. This struggle is between the two primary functions that the Georgia appellate courts perform in this area of law: the normal judicial function and the regulation of the legal profession.² This second function is a legislative and an interpretative one. Appellate courts in Georgia perform the interpretive function in both an advisory capacity through FAO's and in a judicial capacity through case law in which the courts profess to be relying upon rules, ethical regulations, and other norms applicable only to lawyers.

I have described this dominant event as a "struggle" because these two functions create what one author has described as competing hierarchies.³ The governing norms of the profession are usually shared, Koniak tells us, by which she means that there is little quarrel between the functions over who and what governs lawyers.⁴ But each function orders these shared norms very differently. For example in the regulatory function, appellate courts place the ethical standards of the profession very high in the hierarchy of governing norms, while in the

¹ The surveyed period is June 1, 1993 to May 31, 1994. To avoid the awkward phrase, surveyed period, I will refer to this period as "this year."

² Within the judicial function, the courts tell us how laws of general applicability apply to our profession, for example, whether conduct of an attorney is criminal. This is, in some sense, a regulatory function as well, but it is one the courts perform for all in their ordinary capacity.

³ Susan P. Koniak, The Law Between the Bar and the State, 70 N.C. L. REV. 1389, 1393-95 (1992). Note that for her purposes she is describing the communities in which these competing hierarchies are located as the state and the bar.

⁴ Koniak, supra note 3, at 1394.
judicial function these same standards are typically placed very low. 5
Usually, these functions overlap and when they do, and when the courts
recognize the overlap, each function demands that its particular ordering
be honored. So a struggle ensues.

Even more dramatically, in some contexts this struggle is not just over
the ordering of shared governing norms, but also over whether the
governing norms of the other function are applicable at all. We can find
good examples this year in case law involving the interpretation of
contracts for legal fees, 6 what roles our ethical standards are to perform
in malpractice cases, 7 and in one recent FAO concerning fee waivers by
appointed criminal defense lawyers in plea bargaining. 8 In each of
these opinions, either the judicial function or the regulatory function
seeks to deny the relevance of the governing norms of the other function.
Sometimes the governing norms are not in question and their ordering
is not practically important because the norms each function would
apply to the case produce the same results. We can see several
examples of this as well this year, including one potentially important
case determining whether penalty clauses for terminating an employ-
ment contract with an attorney are permissible. 9 Even in these “more
harmonious” contexts, however, appellate judges argue over which
function is to be credited for the decision.

There is nothing new about this struggle, as courts that have fought
in the long ethical battle with the SEC over disclosure requirements will
confirm, 10 and the recent emergence of its lurking presence from the
shadows into the penumbra, if not the light, is certainly not a local
phenomenon. For example, the nation had this struggle thrust upon it
recently in decisions considering IRS fee-reporting requirements, 11

5. When the norms of the regulatory function do appear in the legal function, their
hierarchy within the former is often ignored completely. For example, it is not at all
unusual to see Georgia courts referring to the Ethical Considerations of the Georgia Code
of Professional Responsibility (the aspirational statements of a Code that was adopted in
Georgia for guidance only) and the Standards of Conduct (our disciplinary rules) as if they
were of equal ranking. Ignoring the hierarchy of the other function is one way of
dismissing its importance.

7. See Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C., 212 Ga. App. 560, 442 S.E.2d
   466 (1994).
   [hereinafter Formal Op.].
11. In many jurisdictions this legal requirement has conflicted with the bar’s efforts to
    prohibit reporting as an ethical matter. The most recent case on this issue is United States
    v. Sindel, 854 F. Supp. 595 (E.D. Mo. 1994). For a recent general analysis see, Tax Focus,
attempts to place ethical restrictions on the issuance of subpoenas against attorneys, the enforcement of ethical regulatory limits on prosecutorial communications with represented defendants, and, somewhat earlier, in two United States Supreme Court cases approving the simultaneous negotiation of attorney fees in civil rights cases and "release/dismissal" plea bargaining. But the extent of this struggle in Georgia, something that may be driven by the Georgia Supreme Court's nationally recognized professionalism efforts and the court's role in issuing FAO's, is certainly noteworthy.

Even a casual reader of opinions could see that the Georgia appellate courts caught in this struggle are confused. As old methods of avoiding the struggle fail, the courts seem to slip from one hierarchy to the other and back again, often without readily discernable reason. Such confusion is not only understandable, but should be expected given the struggle's depth and complexity. For as appellate courts attempt to work out the relationship between their two functions with their competing hierarchies, they necessarily raise foundational questions about both functions.

Of course foundational questions are questions that most courts seek to avoid. For this reason, and for others, the struggle I am referring to is seldom noted explicitly or discussed straightforwardly by any Georgia court. Nevertheless, its lurking presence is now so obvious and growing


16. For example, in the regulatory function performed through FAO's, the attempt to avoid the legal function entirely, and thereby avoid the struggle, by eschewing any interpretation of law is becoming more and more difficult and less and less believable. See infra notes 264-76 and accompanying text. In the judicial function, the attempt to shut off any discussion of regulatory norms with claims of irrelevancy or the like is also becoming more difficult and less believable. See infra notes 105-29 and accompanying text; see also infra notes 221-63 and accompanying text.
so rapidly that I believe it will be the primary force shaping both ethics case law and FAO's over the next decade. If this is true, then I hope the reader will agree with me that I would be remiss in my descriptive task if I did not note this struggle well. I have tried to do so by making it the theme of this survey.

I. Overview

Other than by connection with our theme, many cases and FAO's issued this year are of limited interest because they only apply in limited contexts. But not all are. In the area of legal fees, along with Donohue v. Green, a routine case of contract interpretation finding that the phrase "[a percentage] of whatever amount may be recovered... plus all advances and expenses" in a contract for representation is too ambiguous on the issue of whether "advances and expenses" are due if nothing is recovered, we find AFLAC, Inc. v. Williams, a potentially important case prohibiting contractual penalties for terminating employment contracts with attorneys. The potential importance of this opinion is that it raises serious questions about the increasingly common practice of contracting for nonrefundable fees.

In the legal malpractice area, we see the supreme court poised to reconsider the role of ethical regulatory standards in determining misconduct. This important development should come soon in two certified appeals, one taken from the recent court of appeals decision in Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C., and the other from Tante v. Herring. This year, the court of appeals also offered two more cases in an increasingly long line of opinions determining when a client-lawyer relationship sufficient to support a malpractice claim arises in real estate closings. In this very troubling area, the cases of Richard v. David and Williams v. Fortson, Bentley & Griffin disappoint by doing little other than reaffirming the odd importance of "the seeking or

20. 211 Ga. App. 322, 439 S.E.2d 5 (1993). While this Article was in final editing, the supreme court decided the certified appeal in Tante v. Herring. See Tante v. Herring, 1994 Ga. LEXIS 866 (Oct. 31, 1994). Fortunately for the Article, the decision rendered, while it introduces new complexities and postpones what I see as an emerging conflict between the judicial and regulatory functions of the court, does not significantly change the basic analysis of Tante and its implications as discussed in the text. Accordingly, I have left the textual discussion of Tante unedited. I review the supreme court's decision, noting the difference it does make, at infra note 184.
the giving of advice" as a criteria for determining the existence of the relationship and by reaffirming Georgia's overly rigid enforcement of disclaimers of representation.

In what I have dubbed the "badpractice" area (as opposed to malpractice because the direct harm is not to the client), we find FAO 93-3,23 rightfully denouncing the tactic of a prosecutor asking for waivers of appointed fees as part of the plea bargain in a death penalty case, but raising troubling questions about the effect of FAO's in the process.24 We also find Justice Benham of the supreme court attacking one lawyer's unfair use of notice service in Green v. Green25 and using "professionalism" norms from within the regulatory function to do so; something that prompted Justice Sears-Collins to write a concurring opinion pointing out the dangers involved.26

Readers get a reprieve from the notorious and well-populated area of conflict of interests this year because we had no cases of great significance. The appellate courts did face several allegations of conflicts in ineffective assistance of counsel cases including Redd v. State27 and Pittman v. State,28 both of which considered the effectiveness of defendants' waivers, and Zant v. Hill,29 an opinion refusing, in at least some circumstances, to apply the automatic requirement of separate counsel for death penalty co-defendants to defendants with separate charges arising out of the same incident.30 There were also two appeals from disqualification motions: Chapel v. State,31 disqualifying a criminal defense lawyer for his current and former representation of the county,32 and Billings v. State,33 refusing to disqualify a District Attorney's office for an Assistant DA's prior representation of the co-defendant of a defendant currently prosecuted by the office.34 Other than Zant, these conflict cases add little substance. Chapel and Billings are both problematic, but they are so because they perpetuate the well-reviewed problems of previous conflict of interests opinions. Accordingly, I have not reviewed these opinions here.

24. Id.
27. 264 Ga. 399, 444 S.E.2d 776 (1994).
30. Id. at 816, 425 S.E.2d at 860.
32. Id. at 269, 443 S.E.2d at 273.
34. Id. at 129, 441 S.E.2d at 266.
There were only three FAO's issued during the year as the supreme court and the FAO Board of the Georgia Bar continued to inch along at a snail's pace. Besides FAO 93-3 on plea bargaining, the Board issued one apparently partial opinion that attempts to head off conflicts when a lawyer is in the familiar, but awkward, role of representing the insured and the insurer on a subrogation claim. In the final FAO—one that was seven years in the making—the supreme court tells us that a criminal defense attorney must provide copies of transcripts to indigent clients upon termination of the representation whenever necessary to avoid foreseeable prejudice to the client. The only interesting question about this FAO is why it took seven years.

From this last comment, it should be obvious that the supreme court and the Board do not issue FAO's in a very timely fashion. To assist readers in coping with the problems this creates for research, my research assistant, Ms. Renate Downs, and I, with the pleasant assistance of Ms. Carlene Raynor of the State Bar of Georgia, have tried to provide a reasonably accurate listing of all FAO's issued by the supreme court or proposed by the Formal Advisory Opinion Board since the creation of our current procedures. This listing appears immediately following the conclusion. I offer this listing in lieu of a detailed analysis of the three FAO's issued this year although I do discuss FAO 93-3 briefly to relate it to our theme.

II. LEGAL FEES

A. Penalty Clause for Termination/Nonrefundable Advance Fee Contacts

Sadly, the first advice that recent law school graduates often get is: "Get your fees up-front!" Seldom, however, is this practical warning accompanied by good guidance on what the new lawyer should do with these up-front fees once she has obtained them. Three years ago, the supreme court advised in FAO 91-2 that the lawyer need not deposit

35. The supreme court issues FAO's as orders of the court even though the opinions are prepared by the Formal Advisory Opinion Board. In the past, the court has made it clear that it reviews the opinions prior to issuing them and, on occasion, it has modified opinions or refused to issue them. For these reasons, I think it is correct to describe these opinions as coming from the supreme court and I have done so throughout the survey.

36. Formal Op. 93-2 (1993). I have described this as an apparently partial opinion because it begins as if it were going to explore numerous hypothetical situations that could create conflicts for lawyers handling subrogation claims but then only considers one.

advance fee payments into a trust account.\textsuperscript{38} The court also warned, however, that advance fee payments do not belong to the lawyer until earned and that lawyers must return unearned fees upon termination of the representation.\textsuperscript{39} Is this return of unearned fees required if the client is willing to contract otherwise? Are contracts calling for nonrefundable advance fees ethically permissible and legally enforceable? Recent ethical opinions in other jurisdictions\textsuperscript{40} and at least one very recent appellate level decision in New York\textsuperscript{41} have ruled that they are not.

In \textit{AFLAC, Inc. v. Williams},\textsuperscript{42} the supreme court did not address nonrefundable advance fees directly, but in determining that an attorney may not recover damages under a penalty clause in an employment contract upon termination of the representation by the client, reversing a court of appeals' opinion to the contrary,\textsuperscript{43} the supreme court seemed to approve the arguments normally marshaled against nonrefundable advance fees.\textsuperscript{44} Accordingly, AFLAC may best be understood as only an egregious example of the wrongs associated with nonrefundable advance fees, and if so, then this case calls this practice into question in Georgia as well.

In 1987, John Amos, the Chair and Chief Executive Officer of AFLAC, Inc., and Peter Williams, an attorney in private practice, entered a seven-year employment contract.\textsuperscript{45} By the contract's terms, AFLAC was

\begin{itemize}
  \item 40. See Ethics Commission of the Utah State Bar, Opinion 136, 1001 ABA/BNA Lawyer's Manual on Professional Conduct, 8503 (1994); Pennsylvania Bar Ass'n Comm. on Legal Ethics & Professional Responsibility, Opinion 93-20 (June 30, 1994); \textit{see also In re Gastineau}, 857 P.2d 136, 140 (Or. 1993) (non-refundable advance fee contracts are improper if they result in unreasonable fees when the lawyer does not do the contracted for legal work.)
  \item 42. 264 Ga. 351, 444 S.E.2d 314 (1994). Your author was a co-author with Professors Ray Patterson and Walter Phillips of the University of Georgia of an amicus brief filed in this case arguing that a client's right of termination of a representation renders penalties for termination invalid.
  \item 43. Williams v. AFLAC, Inc., 209 Ga. App. 841, 844-45, 434 S.E.2d 725, 729 (1993) (reversing the trial court's determination that the contract was unenforceable as a matter of law).
  \item 45. 264 Ga. at 351-52, 444 S.E.2d at 315.
\end{itemize}
to pay Williams a monthly amount for legal advice "as needed."\textsuperscript{46} Williams could not charge the company additionally for work done unless some assigned project required an "extraordinary" amount of his time.\textsuperscript{47} The contract also contained an automatic renewal provision, operative in 1995, for an additional five years unless AFLAC terminated the contract for just cause at least ninety days before the expiration of the initial term.\textsuperscript{48} Finally, in the provision that prompted this dispute, Williams was to receive "as damages an amount equal to 50 percent of the sums due under the remaining term, plus renewal of this agreement" if AFLAC terminated the contract.\textsuperscript{49}

In 1991, after the death of John Amos, AFLAC terminated the contract, apparently as part of a process of centralizing its legal services.\textsuperscript{50} Williams demanded payment under the damages provision of the contract.\textsuperscript{51} In response, AFLAC filed a declaratory action to determine the validity of the damages provision and Williams counter-claimed for his payment.\textsuperscript{52} The trial court granted AFLAC summary judgment and held that the damages provision was void and unenforceable.\textsuperscript{53} Williams appealed to the court of appeals.

Writing for the court, Judge Blackburn first discussed the appropriateness of dealing with this issue in a declaratory judgment action (a procedural matter not relevant to this survey), but then went on to find error in the trial court's determination that the damages provision was void and unenforceable.\textsuperscript{54} Judge Blackburn (citing to \textit{Henson v. American Family Corp.}\textsuperscript{55} and an 1878 opinion beautifully written, as always, by Justice Bleckley)\textsuperscript{56} held, unsurprisingly, that contracts for retaining fees are perfectly permissible and enforceable even if the lawyer does not perform the services.\textsuperscript{57} Furthermore, the Judge stated that the damages provisions of the contract did not create a penalty

\textsuperscript{46} Id. at 352, 444 S.E.2d at 316.
\textsuperscript{47} Id.
\textsuperscript{48} A New Jersey court recently struck down a retainer agreement with an automatic renewal provision requiring the client to give six months notice to terminate. The court said this was similar to a non-refundable fee agreement in that the notice requirement was too limiting of the client's right to terminate. Cohen v. Radio-Electronics Officers Union, N.J. Super. Ct., App. Div., No. A-5442-9313 (July 28, 1994).
\textsuperscript{49} Id.
\textsuperscript{50} 209 Ga. App. at 842, 434 S.E.2d at 727.
\textsuperscript{51} Id.
\textsuperscript{52} Id. at 841, 434 S.E.2d at 726.
\textsuperscript{53} Id., 434 S.E.2d at 726-27. The trial court did not announce the basis for its ruling.
\textsuperscript{54} Id. at 843, 434 S.E.2d at 728.
\textsuperscript{56} McNulty, George & Hall v. Pruden, 62 Ga. 135 (1878).
\textsuperscript{57} 209 Ga. App. at 843, 434 S.E.2d at 728.
unenforceable as a matter of public policy, but rather it created enforceable liquidated damages. Judge Blackburn added, however, that AFLAC did not owe the portion of the damages determined by the renewal provision because AFLAC's assent to the renewal was required. He then stated, rather cryptically, that, "[o]rdinarily, a client is free to terminate its employment of an attorney at any time," citing for this proposition White v. Aiken. Evidently, the practical effect of the client's right to terminate was limited under this analysis to gutting that part of the contract calling for damages determined by the renewal provision. None of this, however, is very clear in the opinion. In any event, Judge Blackburn limited the Williams' damages to the portion determined by the term of the initial retainer, that is, 50 percent of whatever had not been paid on the first seven years.

On a writ of certiorari, the supreme court addressed the issue of "whether a client must pay legal fees to an attorney under a long-term retainer contract after terminating the contract." Reversing the court of appeals, the supreme court held that "an attorney may not recover damages under a penalty clause when a client exercises the legal right to terminate the attorney's retainer contract." Before turning to the supreme court's justification for its holding, we should first notice what has not happened here. Ordinarily, we would expect appellate courts to distinguish between general retainers that are agreements to be "on call," and special retainers providing fees, in advance or as billed, for work to be done. Both appellate courts ignored this distinction, yet it is a very important one in this context. Under the usual rules, general retainers are earned (as Justice Bleckley said in the case cited by Judge Blackburn) "when the attorney dedicates himself by contract to his client's service, thereby cutting himself off from employment by the adverse party." Apparently, and this is only surmise, the court of appeals considered the employment contract between AFLAC and Williams to be a general retainer, or so the court's

58. Id. at 844, 434 S.E.2d at 728. Penalties are unenforceable as a matter of public policy.
59. Id., 434 S.E.2d at 729.
60. Id.
61. 197 Ga. 29, 28 S.E.2d 263 (1943).
63. 264 Ga. at 351-52, 444 S.E.2d at 315.
64. Id. at 352, 444 S.E.2d at 315.
choice of citations would lead us to believe. If so, then the court’s willingness to enforce the damages provision is not surprising. Under a statutory provision that the court did not consider, Williams would have been entitled to 50 percent of the entire contractual amount at the moment he agreed to be bound to AFLAC as his client, absent any contractual agreement to the contrary, unless he, and not the client, later withdrew without justification.

But if this is the court’s rationale, it has stretched the definition of general retainer beyond recognition. It seems straightforward from the terms of the agreement that AFLAC was paying Williams for work to be done. Note, for example, that he could only ask for additional compensation if a project would involve an “extraordinary” amount of time. Surely this is a special, and not a general, retainer, and if so, the court of appeals analysis is non apropro.

If the court of appeals was too quick to assume that this was a general retainer, the supreme court was just as quick in assuming it was a special one—again without any discussion of the distinction. Nevertheless, because this is a better assumption, the supreme court’s analysis is directed to the truer issue here: Is a contract that obligates a client to pay to exercise the right to terminate a client-lawyer relationship enforceable? Justice Fletcher, writing for a unanimous supreme court, said no; it is not enforceable as a matter of public policy.

According to Justice Fletcher, termination by the client is not a damage-provoking breach of a contract at all because we read into each contract between a client and a lawyer an “absolute right” of the client to terminate the relationship at will. We read this in, he said, because the relationship between a lawyer and a client is a special one of trust. When the trust is gone, the relationship is over; and clients must be free to make this so. We would be ignoring the fiduciary nature of this relationship, he went on, if we treated the contract between a lawyer and a client as a conventional commercial one. Thus, “[the court’s] obligation to regulate the legal profession in the public’s interest causes us to favor AFLAC’s freedom in ending the

68. Id.
70. 264 Ga. at 353-54, 444 S.E.2d at 317.
71. Id. at 353, 444 S.E.2d at 316.
72. Id.
73. Id.
74. Id.
attorney-client relationship without financial penalty over Williams’ right to enforce the damages provision in his retainer contract.\textsuperscript{76}

Now, as a regulatory function exercise, the opinion could have ended there, but Justice Fletcher continued. This is the same conclusion, he said, that the court would reach under generally applicable contact law.\textsuperscript{76} By applying the standard test for determining whether a contract provision is enforceable as liquidated damages,\textsuperscript{77} Justice Fletcher found that Williams contracted for an unenforceable penalty (and not liquidated damages) because “the damages provision is not a reasonable estimate of Williams’ damages and instead is [intended as] a penalty imposed to punish AFLAC.”\textsuperscript{78} Obviously unable to resist a parting blow, Justice Fletcher also noted that the client would have to pay the attorney under this damage provision even if the client terminated the relationship for embezzlement of client funds!\textsuperscript{79}

It is, I hope, uncommon for a Georgia lawyer to contract for damages upon termination on conditions as demanding as the ones Williams insisted upon, and even more uncommon for a sophisticated client to accept. It is, however, not at all uncommon in Georgia for lawyers to contract with their clients for nonrefundable advance fees, and the practice is increasing, or so I am told. Essentially, these contracts call for advance fees for specified work to be done. The lawyer does not

\textsuperscript{75} Id., 444 S.E.2d at 316-17.
\textsuperscript{76} Id. at 354, 444 S.E.2d at 317.
\textsuperscript{77} The standard test, according to Justice Fletcher, is that three factors must exist for a damages provision to be enforceable. “The injury must be difficult to estimate accurately, the parties must intend to provide damages instead of a penalty, and the sum must be a reasonable estimate of probable loss.” AFLAC v. Williams, 264 Ga. at 354, 444 S.E.2d at 317 (citing Southeastern Land Fund, Inc. v. Real Estate World, Inc., 237 Ga. 227, 230, 227 S.E.2d 340, 343 (1976)). The court in Southeastern, considering whether a stipulation in a real estate sales contract requiring the payment of earnest money was a provision for liquidated damages or a penalty, held that

[Whether a provision represents liquidated damages or a penalty does not depend upon the label the parties place on the payment but rather depends on the effect it was intended to have and whether it was reasonable . . . . Where the parties do not undertake to estimate damages in advance of the breach and instead provide for both a forfeiture (penalty) plus, actual damages, [the agreement] . . . is an unenforceable penalty.

Southeastern Land Fund, 237 Ga. at 228, 227 S.E.2d at 342. In Georgia, when the contract is ambiguous, “the courts favor the construction which holds the stipulated sum to be a penalty, and limits the recovery to the amount of damages actually shown, rather than a liquidation of the damages.” Mayor & Council of Brunswick v. Aetna Indemnity Co., 4 Ga. App. 722, 728, 62 S.E. 474, 478 (1908) (as cited in Southeastern Land Fund, 237 Ga. at 231, 227 S.E.2d at 344).

\textsuperscript{78} 264 Ga. at 354, 444 S.E.2d at 317.
\textsuperscript{79} Id. at 354 n.6, 444 S.E.2d at 317 n.6.
return these fees to the client if the client terminates the relationship without cause. The problems with such contracts are twofold: First, in some circumstances these contracts may have the same effect as the one voided in AFLAC, that is, they may operate as a penalty for a client's exercise of the right to withdraw. Second, the fees that are, in essence, accelerated upon the client's withdrawal may subject the attorney to discipline for violating ethical standards prohibiting either "unreasonable" or "clearly excessive" fees. (They may also be unenforceable in a subsequent action brought by the client to recover the accelerated fees because the fees are not "reasonable.")

The question we are left with in Georgia after AFLAC then is to what extent has the supreme court determined that nonrefundable advance fees are "unethical and unconscionable," as one recent opinion described them, and unenforceable. It seems that if we ignore the portion of the damages to be determined by the renewal term of the contract, something the court of appeals found unenforceable and which seemed unimportant to the supreme court's opinion (other than as

80. The Georgia Standards of Conduct prohibit lawyers from withdrawing from employment without refunding promptly any part of a fee paid in advance that has not been earned. It does not seem to apply when the withdrawing party is the client. GA. RULES OF CT. ANN., Bar Rule 4-102, Standard 23 (1994).

81. See ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1992) and GA. RULES OF CT. ANN., Bar Rule 4-102, Standard 31 (1994). See also Pennsylvania Bar Ass'n Comm. on Legal Ethics & Professional Responsibility, Opinion 93-102 (June 30, 1994). For example, in a recent article in The Wall Street Journal on this issue, James Fox Miller, a Hollywood, Florida, divorce lawyer and former president of the Florida Bar Association, confessed that he had kept nonrefundable advance fee payments of between $10,000 and $15,000 for only a few days of work. Mr. Miller thought he was justified in doing so because the clients had the benefit of his reputation in forcing the opposing spouse to cave in to demands. Now, Mr. Miller may be quite right that his reputation alone is worth something in negotiations, but the original advance fee payments were presumably based upon this reputation and the work he was to do for his client. If the fee remains the same when he does not do the work, Mr. Miller, in order to show that the fee was reasonable, and therefore ethical under Florida's Rules of Professional Conduct (Fla. St. Bar R. 4-1.5(a)), must demonstrate that he grossly undercharged his clients initially and that his reputation alone was worth $10,000 or $15,000 or, in the alternative, that his work is worthless. See Junda Woo, Nonrefundable Lawyers' Fees, Barred by New York State Court As Unethical, WALL ST. J., Jan. 29, 1993, at B10. Of course, disciplinary actions for unreasonable fees are quite rare, but they do happen and they do happen in Florida. See, e.g., Florida State Bar v. Moriber, 314 So. 2d 145 (Fla. 1975). See also In re Gastineau, 857 P.2d 136 (Or. 1993).


additional evidence of the parties' intent\textsuperscript{84\textendash 85}, then we are left with a contractual right to collect fifty percent of all remaining sums due under the contract. At the very beginning of the term, Williams had a contractual right to retain fifty percent of the total fees due under the contract.\textsuperscript{85} There is no legal difference (albeit there is a practical one) between this contractual right and the receipt of a nonrefundable advance of fifty percent of the fees. In fact, collecting one hundred percent of fees in advance as nonrefundable, as is done in some nonrefundable advance fee contracts, could be worse than the conduct condemned in AFLAC. A client bound by such a nonrefundable advance fee arrangement could exercise her "absolute right to discharge the attorney and terminate the relation at any time, even without cause"\textsuperscript{86} only at the expense of forfeiting all fees owed under the contract.\textsuperscript{87}

So after AFLAC, does the court’s "obligation to regulate the legal profession in the public's interests"\textsuperscript{88} mean that the court will favor a client's "freedom in ending the attorney-client relationship without penalty"\textsuperscript{89} over an attorney’s contractual right to retain unearned advance fees? And, if not, can a good distinction from AFLAC be made?

The supreme court’s contract analysis in AFLAC would also seem to prohibit nonrefundable advance fee agreements as creating unenforceable penalties rather than enforceable liquidated damages. This is because nonrefundable fees would seldom meet the requirement of being a "reasonable estimate of probable loss" since the amount the client forfeits depends entirely on the amount of fees earned by the time of termination.

The simple solution to this problem for lawyers with a legitimate interest in preventing losses suffered when a client exercises her "absolute right" to terminate the relationship is to avoid nonrefundable advance fees altogether and to design instead a contractual method of redress that honestly attempts the difficult task of measuring the probable losses the attorney will suffer upon termination. Under such an arrangement, the lawyer would return unearned advance fees to the

\textsuperscript{84.} 264 Ga. at 354 n.5, 444 S.E.2d at 317 n.5.
\textsuperscript{85.} Id. at 352, 444 S.E.2d at 315.
\textsuperscript{86.} Id. at 353, 444 S.E.2d at 316 (quoting White v. Aiken, 197 Ga. 29, 32, 28 S.E.2d 263, 265 (1943)).
\textsuperscript{87.} It is true, of course, that the AFLAC contract talked of "damages" for "termination for just cause" (and thus the court's discussion of termination not being a breach of the contract was appropriate) and nonrefundable fee contracts talk instead of a forfeiture (rather than damages for a breach), but surely this is a distinction of form only because the substance is the same.
\textsuperscript{88.} 264 Ga. at 353, 444 S.E.2d at 316.
\textsuperscript{89.} Id.
client, but retain liquidated damages. I know of no contractual bar to doing this. Generally applicable contract law would seem to permit an attorney to collect from the client, as liquidated damages advanced against a client's termination without just cause, some portion of the value of work that the lawyer declines (because of over-commitment fears or conflict of interests) and other losses that the lawyer may suffer due solely to the lawyer's representation of the client. These losses are, of course, difficult to measure—thus meeting the first of the three Georgia requirements for liquidated damages. They would not be imposed as a penalty upon the client, but rather as protection against projected losses—thus meeting the second requirement for liquidated damages. And, if the contractual method of determining the amount bears some reasonable relationship to actual damages—the third and final requirement—the court's contractual concerns should be fully satisfied. My guess is that when these contractual concerns are satisfied we will find the court's regulatory concerns will be satisfied as well. This "guess" requires some elaboration and in doing so, we return necessarily to our theme of the struggle between the two functions of the appellate courts in Georgia.

One regulatory concern the appellate courts should have with nonrefundable advance fees agreements, a concern briefly mentioned above, is the possibility that the forfeiture of nonrefundable advance fees can produce "clearly excessive" or "unreasonable" fees when the representation is terminated by the client. The supreme court did not address this concern in AFLAC. Nevertheless, it is a perfectly valid one. If, however, lawyers follow the course I recommend of drafting advance fee contracts that honestly attempt to estimate the damages they would suffer should the client withdraw, this concern will disappear. Thus, my "guess" is at least justified to the extent of this regulatory concern.

But the second regulatory concern with nonrefundable advance fee agreements, the concern the supreme court did address in AFLAC, remains. Even an advance payment of estimated damages could be construed as an impermissible restriction on a client's "absolute right" to terminate the relationship although contract law permits such an arrangement. Some language in AFLAC is certainly conducive to such a broad reading of the case. For example, the supreme court stated that

90. Id. at 354, 444 S.E.2d at 317. See supra note 77, at 67.
91. 264 Ga. at 354, 444 S.E.2d at 317. See supra note 77, at 67.
92. 264 Ga. at 354, 444 S.E.2d at 317. See supra note 77, at 67.
93. See supra note 81, at 68.
94. It would disappear because in such an arrangement the fees charged for work done could not be construed to have changed at all upon termination by the client.
in exercising its duty to regulate the profession the court must "assure the public that the practice of law 'will be a professional service and not simply a commercial enterprise,'"95 and that lawyer-client contracts, therefore, cannot be forced into the "conventional status of commercial contracts."96 Discharging an attorney is not, the court says, a breach of the contract at all.97 It is an implied right that must be given priority over the enforcement of "damages provisions" in such contracts.98

What the court may be saying here is that lawyers have ethical obligations to their clients that go beyond those of ordinary commercial contract law and that the court is willing to impose these special ethical obligations upon lawyers as a matter of law as part of its regulatory function. In the terms of our theme, here the court seems to accept the hierarchy of the regulatory function as binding upon it and superior to that of the judicial function. Perhaps this means that lawyers must be willing to suffer some damages upon termination of the representation by the client so that the client's "absolute right" to terminate remains completely unfettered by economic concerns. Otherwise, the special ethical obligations the court is imposing upon lawyers do not go beyond those of ordinary commercial contract law at all.99

To see why this could be the case under AFLAC, look at how a cynic would read this case if this analysis is not correct. If there is no difference in results between the norms of the judicial function and the norms of the regulatory function in this area, if, what is really going on in AFLAC is nothing more than a routine penalty versus liquidated damages issue, then the court's talk of the practice of law as a "profes-

95. 264 Ga. at 352, 444 S.E.2d at 316 (citing First Bank & Trust Co. v. Zagoria, 250 Ga. 844, 845, 302 S.E.2d 674, 675 (1983)).
96. Id. at 353, 444 S.E.2d at 316.
97. Id.
98. Id., 444 S.E.2d at 316-17.
99. One should not assume that a court's turning to ethical obligations, or at least to ethical regulations, will always mean that the client will obtain an outcome better than what the client could have obtained under contract law. See, e.g., Smith v. R.J. Reynolds Tobacco Co., 630 A.2d 820 (N.J. App. Super. Ct. Div. 1993), a case very much related to our issue, but on the other side of the contract. In Smith a law firm withdrew from the representation of the client on a contingent fee when it realized that the representation was going to cost the firm more than it would be likely to collect. The appellate court said that ABA Model Rule 1.6(b)(5) permits lawyers to withdraw when the case would create an unreasonable financial burden. Therefore, the court went on, we must make this assessment here. The court argued that if this had been on an hourly basis, everyone would have agreed that the case was too expensive to pursue. With a contingent fee, the client has no incentive to stop and so some limits must be imposed by the courts. Id. at 832.
sional service and not simply a commercial enterprise,” and “a calling that demands adherence to the public interest as the foremost obligation of the practitioner,” and the relationship between the lawyer and client as “a special one of trust,” that is so “unique,” that the client has an “absolute right” to terminate it for any reason—all this proud talk—is disingenuous, self-serving, puffery. Our cynic could have a field day with: “Our obligation to regulate the legal profession in the public’s interest causes us to favor AFLAC’s freedom in ending the... relationship without financial penalty over Williams’ right to enforce the damages provision in his retainer contract” if it is understood that Williams in fact had no right to enforce the damages provision because it called for an ordinarily unenforceable penalty! Such a cynic might tell us that the court has only announced that lawyers are subject to the same legal rules everyone else is and, going on sarcastically, that this is quite an accomplishment! I am not our cynic and yet I too believe, as my guess suggests, that there is probably little difference in results between the hierarchies of norms of the regulatory function and of the judicial function on this issue. This is, as I described in the introduction, one of the “more harmonious” situations in which the appellate courts are only confused over which function is to be given the greatest expression of allegiance. (And in this one the supreme court has tried to split the middle.) If a lawyer is careful to comply with contract law on penalties, I believe that the courts will enforce damage provisions in advance fee contracts although this certainly places some financial fetters on the client’s right to terminate the representation. I believe this is true because it would be quite unusual for the appellate courts to do otherwise. Even the most ardent critic of nonrefundable advance fee contracts has never suggested that lawyers cannot anticipate legitimate damages contractually in this way. We could wish for a profession in which lawyers truly placed

100. 264 Ga. at 352-53, 444 S.E.2d at 316.
101. Id. at 353, 444 S.E.2d at 316-17.
102. Our cynic might be prompted to say that by tactics like those of the lawyer in American Home Assurance Co. v. Golomb, 606 N.E.2d 793 (Ill. App. Ct. 1992) in which a medical malpractice lawyer contracted for a contingent fee with an agreement to “hold the lawyer harmless” from any reduction required by a statute limiting contingent fees in medical malpractice cases. Id. at 795, 797. The court voided the contract and denied all recovery including in quantum meruit. Id. at 797. So the law applied to this lawyer and with a regulatory vengeance!
the interests—even the unfair interests—of their clients over their own financial interests to this extent, but it is to my mind, unlikely that courts will try to create such a profession by fiat.

Nevertheless, this does not lead me to the cynical conclusion that the supreme court's talk of ethical obligations of lawyers more demanding than the law is, in our cynic's venomous terms, "disingenuous, self-serving, puffery." It is important I think, for the court to recognize that there are reasons for a lawyer to respect a client's freedom to terminate a representation other than legal ones even if these other reasons produce the same results. The reason we do certain things as lawyers is extremely important to our understanding of who we are as a profession. There is a very real and important characterological difference in a profession that does not demand nonrefundable advance fees because contract law prohibits it and one that does not do so because it is something good lawyers do not do. I think the supreme court is trying to hold on to this difference in the character of our acts by announcing both regulatory and judicial function reasons for its decision in *AFLAC*.104

B. Contracting for Costs and Expenses

Another legal fees case decided this year by the court of appeals stands in sharp contract to *AFLAC*. In *Donohue v. Green*,105 the court seemed to go to great lengths to restrict the issue to the hierarchy of the judicial function. Donohue, an attorney, sued his former client, Green, for costs and expenses he had advanced in an automobile accident case taken on a contingent fee.106 After losing badly—the trial court granted summary judgment in favor of all defendants—Donohue demanded payment of expenses and costs.107 Green failed to respond and Donohue filed to recover fees in quantum meruit and alleged Green had terminated the representation.108 When Green answered by referring the trial court to Donohue's letter to him reporting that the appeal had been unsuccessful, Donohue amended his complaint to ask instead for a recovery of costs and expenses pursuant to a paragraph in

104. There are other reasons to hold on to this difference. For example, judicial function reasons, because they are based on laws of general applicability, can be changed by the legislators while regulatory function reasons, based on ethical rules of special applicability to lawyers, cannot. Also, while the norms of both functions seem harmonious here, they may not always be so, they may develop differently even on this issue and, if so, it is important to announce both reasons at the beginning of the development.

106. *Id.* at 381, 433 S.E.2d at 431-32.
107. *Id.*, 433 S.E.2d at 432.
108. *Id.*
the fee contract providing that the client would "pay an amount equal or equivalent to 33-1/3 percent of whatever amount may be recovered or collected . . . on said claim without suit, and 40 percent if suit is filed, plus all advances or expenses." The trial court ruled that this paragraph was ambiguous, construing it against Donohue as the drafter. Writing for the court of appeals, Judge Smith affirmed.

There is nothing remarkable about this holding. It may prompt a few lawyers to reexamine their fee contracts, and this is certainly a good and a needed thing, but the analysis is routine. The court stated the existence of an ambiguity is a question of law and the trial court was correct in its legal determination. This paragraph was ambiguous; and parol evidence was not admissible to clarify the ambiguity. In interpretation, however, trial courts must consider the intention of the parties and they can use the surrounding circumstances to prove these. In this case, the trial court found that Donohue informed Green orally that he would not owe any expenses if there was no recovery. If Donohue believed instead that the contract provided he could recover costs and expenses, then no meeting of the minds occurred and thus, no contract was formed.

What is worth remarking about is how different from AFLAC this analysis is! It is very well established as a matter of public policy that courts will closely scrutinize contracts between lawyers and clients as part of their regulatory function. This scrutiny is, in theory at least, different from the scrutiny prompted by the legal maxim that courts will construe contracts against the drafter, a maxim the trial court relied upon in Donohue. In recognition of this theoretical difference, most appellate courts routinely announce some regulatory basis for their

109. Id. (emphasis added)
110. Id.
111. Id.
112. It has been my experience in reviewing fee contracts brought to me by law students, law clerks, and lawyers that large numbers of these contracts contain violations obvious to someone familiar with this area of law and ethical regulation. The situation is not unlike the heyday of Truth-in-Lending when it was possible to find violations in every loan agreement because lawyers paid so little attention to Truth-in-Lending regulations.
113. The case does, however, have its own conceptual difficulties as a matter of contract law.
114. 209 Ga. App. at 382, 433 S.E.2d at 432.
115. Id.
116. Id.
117. Id.
118. Id.
decisions in client-lawyer contract cases. But in Donohue the court of appeals studiously avoided any reference to its regulatory function and instead analyzed this contract as if it had the “conventional status of a commercial contract,” so belittled in AFLAC.120

As if to highlight its reliance solely on its judicial function, the court added that it agreed with the trial court’s ruling on the relevance of ethical regulatory standards.121 Georgia State Bar Directory Rule 5-103(C), prohibiting an attorney from advancing costs and expenses unless the client remains ultimately liable for them had “no bearing” on the case, the court said.122 If the contract drawn here violates this Directory Rule, the court continued, “such a violation properly addresses itself to the State Bar.”123

Apparently, Donohue had argued the contract should not be construed to be in violation of the ethical regulations of the profession. Perhaps he also argued that these ethical regulations were indirect evidence of his intent, that is, that it is less likely that he would have intended to enter into a contract that subjected him to discipline. Finally, he may have argued that in the absence of a meeting of the minds the court should impose costs and expenses upon the client because not to do so runs contrary to ethical regulations and contrary to the custom of the trade. All of these arguments seem logically relevant to the issue.

But the court was having none of this. The premise that must be accepted if these arguments are to be relevant is that clients must bear some of the costs of protecting the integrity of the profession. In other words, the court of appeals could have easily said, as the supreme court did in AFLAC, that as a matter of public policy we read ethical restrictions into contracts between clients lawyers. Thus, they could find in this contract a prohibition on payment of costs and expenses by the attorney even if this worked to the financial disadvantage of this particular client. It may be true that courts acting in their regulatory function sometimes impose the profession’s public interest burdens upon clients,124 but in a case like this one the court was simply not going to

120. 264 Ga. at 353, 444 S.E.2d at 316.
121. 209 Ga. App. at 382, 433 S.E.2d at 433.
122. Id.
123. Id. Of course, the court of appeals has cited a Directory Rule of the Georgia Code of Professional Responsibility, a provision adopted in Georgia for guidance only. If there is to be a referral to the State Bar, it would have to be for a violation of Standard of Conduct 32. Ignoring the hierarchy of the norms of the competing function is common in cases like these.
124. For example, clients often bear some of the costs of disqualification. Clients also bear the increased transactional costs involved in conflict of interests rules, for example, when opposing spouses are forced by these rules to hire separate attorneys.
permit Donohue to use the ethical regulations of the profession, regulations designed to protect client's from their attorney's conflicting interests, to his own financial advantage.

The broader question that both Donohue, by its refusal to recognize any connection between ethical regulations and the interpretation of a client-lawyer contracts, and AFLAC, by reading in an ethical restriction—if not an ethical regulation—on all client-lawyer contracts, ask is: What is the legal role, if any, of the ethical norms of our profession? (This broader question is a variation on our theme.) Although this broader question arises here, it does not appear manageable in client-lawyer contract cases, an area the judicial function normally dominates. Perhaps the sharp differences between AFLAC and Donohue alone are enough to tell us this. This broader question also arises in legal malpractice, however, where judicial and regulatory functions necessarily combine. Will the appellate courts find narrower issues there with which to fence in this question and perhaps confront the struggle between our competing hierarchies in a more manageable way?

III. LEGAL MALPRACTICE

A. Use of Ethical Standards

For many years, the appellate courts have told us that, as a general rule, violations of ethical regulations, standing alone, cannot be the basis for malpractice.125 In one way this is obvious. The elements of malpractice require proof of damages and causation in addition to proof of professional misconduct.126 If all the appellate courts mean by the

125. See Tante v. Herring, 211 Ga. App. 322, 439 S.E.2d 5 (1993). "The correct statement of the law from the cases Tante relies upon is that 'standing alone' a violation of a bar standards [sic] will not support a legal malpractice claim." Id. at 328, 439 S.E.2d at 11. This case was decided during the period covered by this survey and is discussed in the text below. See infra note 154. See also Roberts v. Langdale, 185 Ga. App. 122, 363 S.E.2d 591 (1987).

126. See, e.g., Whitehead v. Cuffie, 185 Ga. App. 351, 353, 364 S.E.2d 87, 89 (1987). It is well-established Georgia law that before an action for a tort will lie, the plaintiff must show he sustained injury or damage as a result of the negligent act or omission to act in some duty owed to him . . . . Although nominal damages can be awarded where there has been an injury but the injury is small, . . . where there is no evidence of injury accompanying the tort, an essential element of the tort is lacking, thereby entitling the defendant to judgment in his favor. Whitehead is correct if the court’s understanding of nominal damages is also correct. See, e.g., dissenting opinion of Judge Murray. Id. at 354, 364 S.E.2d at 90. See also Nix v. Crews, 200 Ga. App. 58, 59, 406 S.E.2d 566, 567 (1991). "In a legal malpractice action, the client has the burden of establish three elements: . . . (3) that such negligence was the proximate cause of damage to the plaintiff." Rogers v. Norvell, 174 Ga. App. 453, 457, 330
general rule is that the plaintiff must also prove damages and causation,\textsuperscript{127} then this general rule offers no limitation on malpractice claims other than the limitation that the requirement of proof of all elements provides in all tort cases.\textsuperscript{128} Of course, requiring proof of harm may limit which ethical regulations can serve as the basis for malpractice because the violations of some ethical regulations are not


\textsuperscript{127} \textit{See, e.g.}, Huntington v. Fishman, 212 Ga. App. 27, 441 S.E.2d 444 (1994), a malpractice case, decided during the year covered by this survey, on the issue of whether the trial court erred in granting a summary judgment for the defendant based on a failure of the plaintiff to show that defendant-attorney's negligence was the proximate cause of the plaintiff's loss. The court of appeals ruled for the plaintiff-appellant and reversed the trial court's grant of the motion.

\textsuperscript{128} \textit{See} Hendricks v. Davis, 196 Ga. App. 286, 395 S.E.2d 632 (1990). The basis of Hendricks' malpractice claim against Davis was that he acted under a conflict of interest because of his representation of both Hendricks and Field Properties, and because of his personal involvement. Although Hendricks may have presented evidence of Davis' violation of the Georgia Code of Professional Responsibility, such a violation alone cannot support Hendricks' action seeking money damages. In order for her to recover on the legal malpractice claim, Hendricks had to prove that Davis' alleged ethical violations proximately caused the deprivation of her right to receive 25 percent of the net profits . . . .

\textit{Id. at} 287, 395 S.E.2d at 633-34 (citation omitted). The proposition that malpractice actions in Georgia may be based on violations of ethical regulations if harm is shown was argued as the correct interpretation of Georgia case law by Professors Ray Patterson and Ray Phillips in their amici brief in Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C., 212 Ga. App. 560, 442 S.E.2d 466 (1994), \textit{cert. granted}. The supreme court has not issued its opinion in this case. It has been assigned to the September 1994, oral argument calendar and an opinion should be issued about the time of publication of this edition of the Law Review. Your author was a co-author with Professors Patterson and Phillips of an amicus brief seeking certiorari to the supreme court from the court of appeals decision in \textit{Allen v. Lefkoff}, but did not join with them in the brief on the issues submitted after certiorari was granted on May 9, 1994. Your author has no financial or other interest in the outcome of the appeal nor was he involved in it in any way other than as amicus.
likely to proximately cause harm to particular clients.\textsuperscript{129} Even if this is so, however, this limitation is a very minor one.

This general rule has recently been called into question as a lingering effect of the infamous case of \textit{Davis v. Findley}.\textsuperscript{130} As a direct result, the appellate courts may soon face our broader question: What is the legal role, if any, of the ethical norms of our profession?

In \textit{Davis}, a malpractice claim against Davis based on an allegation of overcharging, the supreme court reversed a decision by the court of appeals permitting the claim.\textsuperscript{131} The supreme court announced that:

\begin{quote}
[T]he Code of Professional Responsibility provides specific sanctions for . . . professional misconduct . . . [but] it does not establish civil liability of attorneys . . . nor does it create remedies in consequence thereof . . . Inasmuch as the appellee seeks to support his cause of action for malpractice solely in reliance upon duties imposed by the Code . . . the conclusion by the Court of Appeals to the contrary must be overruled and the judgment of the trial court affirmed.\textsuperscript{132}
\end{quote}

This announcement seemed superfluous to the appeal because the court of appeals had agreed that violation of an ethical rule, such as Standard 31 prohibiting illegal or clearly excessive fees, did not, standing alone, state a claim for malpractice.\textsuperscript{133} However, the court of appeals had gone on to say: "This principle, however, does not bar appellant's malpractice action."\textsuperscript{134} The allegation of excessive fees here did state a claim for legal malpractice, the court found, because:

In our view, appellant has made . . . a showing [of all the elements of a malpractice case.] The Georgia Code of Professional Conduct in Standard 31 prohibits a lawyer from entering into an agreement for a "clearly excessive fee." The affidavit of [the expert witness], submitted with the complaint, alleges that appellees' collection of excessive fees from appellant deviated from "the required standard of skill, care and diligence normally possessed and utilized by other

\textsuperscript{129} For example, the Standards of Conduct concerning bar admission may be designed to prevent harm to clients generally, but a violation of these Standards are not likely to be the proximate cause of harm to a particular client. I have said \textit{may} in the text because, as argued below, the concept of harm is so expansive that even this one example may not work.


\textsuperscript{131} 262 Ga. 612, 422 S.E.2d 859.

\textsuperscript{132} \textit{Id.} at 613, 422 S.E.2d at 861. At the end of the opinion, the supreme court reminded the parties that fee arbitration was available through the bar. See discussion \textit{infra} note 136.

\textsuperscript{133} 202 Ga. App. at 336, 414 S.E.2d at 320.

\textsuperscript{134} \textit{Id.}
attorneys who represent clients in real estate . . . matters under the same or similar circumstances.\footnote{135}

If we are to read this finding consistently with the court’s recognition of the general rule (that a violation of an ethical standard, standing alone, is insufficient for malpractice), then the court must mean that the claim here is not based solely on Standard 31, but that Standard 31 was only evidence of the general proposition testified to by the expert witness, that is, that the lawyer deviated from ordinary professional standards of care.\footnote{136} If this is correct, then the court of appeals is reading “standards of care” with a very broad view of what lawyers owe to their clients. Under this broad view, our standards of care include care in assessing the fees to be charged. Such a broad view stands in direct opposition to a narrower (and far more common) view of “standards of care” that would strictly limit malpractice actions to the mishandling of a client’s legal affairs.\footnote{137} Under this narrower view, the supreme court’s concerns with reliance solely upon duties created by ethical regulations as a basis for malpractice is well taken; if, however, the broader view is correct then it is not well taken at all, and the court of appeals’ determination that the ethical regulations in issue here are evidence of the relevant standards of care of our profession is undoubtedly correct.

\footnote{135} Id. at 337, 414 S.E.2d at 320.

\footnote{136} Part of the difficulty here is that the ethical regulations and the law governing attorney fees are so interwoven as to be almost indistinguishable. For example, illegal fees are also unethical. (Ga. RULEs OF CT. ANN., Bar Rule 4-102, Standard 31(a) (1994). Does this mean, for example, that the fees found to be illegal (as in violation of contract law prohibiting penalties) in AFLAC would now also subject an attorney to discipline for an ethical violation? One would think so. In determining whether a fee is reasonable, and therefore illegal in the sense that it is not collectable, courts have routinely referred to factors set forth in the ethical codes sometimes even adopting these lists of factors to be considered as a matter of law. Does this mean that a fee that is determined to be unethical in that it fails the “clearly excessive” test is necessarily illegal and, therefore unenforceable? One would think so. Does this mean that the ethical and legal standards here are the same? One would think so, but many courts and formal advisory opinions have read these rules differently finding that fees that are unreasonable as a matter of law may still not be enough to subject an attorney to discipline.

\footnote{137} See infra notes 154-84 and accompanying text for a discussion of Tante v. Herring, 211 Ga. App. 322, 439 S.E.2d 5 (date). See also Sobelson, supra note 130, at 292. Professor Sobelson argues that malpractice claims are usually premised on a narrower view of standards of care. Studies of the services lawyers provide indicate that the quality of a lawyer’s practice is more dependent upon the more intangible aspects of the representation than on technical proficiencies. See, e.g., Roger C. Cramton, Lawyer Competence and the Law Schools, 4 U. ARK. LITTLE ROCK L.J. 1 (1981).
In any event, the court of appeals must have been puzzled by the supreme court's reversal of its decision in *Davis*. It may have reasonably understood the reversal as not refuting the court of appeals' understanding of the scope of our standards of care, but challenging instead the court of appeals' understanding of the evidentiary relevance of ethical regulations. In *Lefthoff, Duncan, Grimes & Dermer v. Allen*, we see that this is true.

In its relevant part, *Allen* was an action brought for malpractice and violation of trust and confidence. Ms. Allen retained the defendants to settle the estate after her husband's untimely death.

During counseling, she expressed an interest in selling her husband's lithographic business. Quick to respond, the defendants introduced her to a potential buyer. After she reached an informal agreement with this buyer, and at the insistence of both parties, the defendants represented the buyer and Ms. Allen at the sale. Unfortunately, the buyer defaulted, and Ms. Allen brought this action against her attorneys to recover her losses.

At trial, the judge disallowed "any evidence of, reference to, or jury instruction on [the violation of ethical regulations by the defendants]." Ms. Allen appealed from this ruling, and from others not relevant to our inquiry. Taking the message of *Davis v. Findley* to be that even any evidentiary role for ethical regulations in malpractice actions is prohibited, the court of appeals, speaking again through Judge Blackburn, cited to *Davis* and let it go at that. The trial judge must have been correct, the court said, to "[exclude] all references to the Code of Professional Responsibility." Ms. Allen had relied upon *Cambron v. Canal Insurance Co.* mistakenly, Judge Blackburn noted, because although the supreme court approved jury instructions on ethical regulations in that case, it involved an equitable action to set aside default judgements collusively obtained by two parties represented by the same attorney and did not profess to address the issue of the role of

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139. Id.
140. Id. at 560, 442 S.E.2d at 467.
141. Id.
142. Id.
143. Id.
144. Id. at 561, 442 S.E.2d at 467.
145. Id.
146. Id.
147. 246 Ga. 147, 269 S.E.2d 426 (1980).
ethical regulations in malpractice actions. On this issue, he said, Davis and not Cambron is the supreme court's command.

I hope the reader will agree that the court of appeals' decision in Allen is, in the context of the Davis reversal, understandable. I also hope the reader will agree that it is surely wrong. Most malpractice actions are based on some violation of the standards of practice established by the professional community. This is, for example, how we know what negligence means in a professional context. If so, then what the profession has said about its standards of practice in its ethical regulations is at least relevant evidence of these standards generally, and therefore, relevant to proving malpractice. Such an analysis, however, is really nothing more than a clearer statement of what the court of appeals said in Davis. Allen, then, forces us back to a reconsideration of the Davis issue by pointing out that there was more going on than the supreme court thought. And presumably, the supreme court has realized the necessity of reexamining Davis in Allen for it recently granted certiorari to address the following issues:

1. Under what conditions can a violation of the Code of Professional Responsibility or the Standards of Conduct under Bar Rule 4-102 serve as a legal basis for a legal malpractice claim?
2. Is a violation of the Code of Professional Responsibility or the Standards of Conduct under Bar Rule 4-102 admissible as relevant evidence in a legal malpractice action?

If the court had only wished to clarify the course it was already on, the second listed issue would have been all it needed. Its willingness to

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149. Id. The court of appeals acted similarly in Coleman v. Hicks, 209 Ga. App. 467, 433 S.E.2d 621 (1993), a case decided at the very beginning of this year. But in that case Davis was clearer precedence because the malpractice claim in Coleman was also for overcharging. Citing Davis, the court stated: "Even if plaintiff's complaint were not time barred, it must fail insofar as it can be construed to allege that defendants breached duties imposed by the Code of Professional Conduct when they charged excessive fees for their services." 209 Ga. App. 69 at 4, 433 S.E.2d at 623.
150. See RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE 3-4 (1989). The careful reader will note that some malpractice claimants separate malpractice claims from breach of fiduciary duties and even from breach of professional regulation. See infra notes 154-84 and accompanying text for a discussion of Tante. This is probably based on cautious pleading practices more than it is on the ability to maintain clear distinctions between these. Some courts, however, distinguish breach of fiduciary obligations from malpractice. See generally MALLEN & SMITH, supra at 4. The concept of malpractice is broad enough to encompass all three claims.
152. Id.
address the first issue, however, tells us that the court understands there is more going on here. To understand the full extent of what the court will face in its consideration of Allen, and reconsideration of Davis, we need to review one additional recent court of appeals decision in this area. The case is Tante v. Herring\textsuperscript{153} and it is yet another case pending before the supreme court on certiorari.\textsuperscript{154}

*Tante* is a sad case for our profession. The Herrings, a husband and wife, sued their attorney, Tante, for legal malpractice, breach of fiduciary duty, and breach of contract.\textsuperscript{155} According to the court, both Herrings retained Tante to pursue a Social Security disability claim for Ms. Herring.\textsuperscript{156} The trial court granted summary judgment on liability for the Herrings finding that Tante, during the representation, took advantage of confidential information about Ms. Herring and her impaired state to gain an adulterous sexual relationship with her.\textsuperscript{157} His conduct caused physical and mental harm to Ms. Herring and infected both Herrings with two strains of venereal disease.\textsuperscript{158}

The Herrings' attorney used a shotgun approach to the filing, alleging as many legal bases for the claim as he could find. Tante attempted to respond to them all. As for the malpractice claim, Tante said that "he could not be liable for malpractice as a matter of law because he performed in a manner consistent with the standard of care ordinarily exercised by lawyers generally under similar conditions and like

\textsuperscript{155} 211 Ga. App. at 323, 439 S.E.2d at 7.
\textsuperscript{156} *Id.* at 323-24, 439 S.E.2d at 7-8. The malpractice action was brought by both Herrings. In order for Mr. Herring to pursue a malpractice claim for damages he suffered because of Tante's professional misconduct, Mr. Herring had to show first that he was in a client-lawyer relationship with Tante. Tante denied representation of Mr. Herring, asserting that he only represented Ms. Herring, but the court found that the contract and the conduct of the parties created a representation of Mr. Herring as well as Ms. Herring even though Mr. Tante only pursued Ms. Herring's claim.
\textsuperscript{157} *Id.* at 324-26, 439 S.E.2d at 7-9. Tante's professional advice to Ms. Herring was what she really needed was a sexual relationship with him. *Id.* at 326, 439 S.E.2d at 9. My guess is that Tante would defend this by saying that it was not professional advice, but a casual opinion about her mental state unrelated to his practice of law. If so, then the court was quite right, as discussed below, infra note 184 and accompanying text, to complain that Tante's understanding of the practice was too narrow. We do not represent legal claims; we represent real people. To separate these as Mr. Tante would have us do is to corrupt the ethics that define our profession. For further discussion see, Jack L. Sammons, *Rebellious Ethics and Albert Speer*, in *AGAINST THE GRAIN: NEW APPROACHES TO PROFESSIONAL ETHICS*, (M. Goldberg, ed., 1993). (Trinity: Valley Forge, Pa. 1993).
\textsuperscript{158} 211 Ga. App. at 323, 439 S.E.2d at 7.
circumstances, and he was successful.\textsuperscript{159} Making explicit what was only implicit in the court of appeal's thinking in \textit{Davis},\textsuperscript{160} Judge Birdsong said: "In our view . . . this argument takes a too narrow view of attorneys' obligations to their clients. 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{161}

Lawyers, the court said, "... must exercise the degree of skill, prudence, and diligence which ordinary members of the . . . profession commonly possess and exercise."\textsuperscript{162} To emphasize that they were not talking about technical proficiency in handling a client's legal affairs, the court added: "Tante was 'bound to the highest honor and integrity, to the utmost good faith' . . . in the representation of the Herrings . . ." citing for this lofty language to the 1849 case of \textit{Cox v. Sullivan}.\textsuperscript{163} If lawyers are honor bound to "prudence" in their representation of the interests of their clients, the court continued, then Tante's conduct here, conduct that included use of confidential information adverse to the client's personal interests, was clearly professional misconduct meriting malpractice.\textsuperscript{164} In other words, you cannot defend against legal malpractice, by claiming to have successfully represented clients if by the very manner of your representation you caused them egregious harm. This is true even if your pursuit of their legal claim was successful and even if you served well their financial interests or otherwise obtained their legal objectives. Furthermore, the court went on, Tante's sexual misconduct with his client was potentially damaging to the Social Security claim and constituted the crime of adultery.\textsuperscript{165}

Tante's defense against the breach of fiduciary duty is not reported in the opinion, but the court's response is, and it is much the same as its response to his malpractice defense (as one would expect given the difficulty of distinguishing the two claims.) Tante, the court maintained,

\begin{itemize}
  \item \textsuperscript{159} Id. at 324, 439 S.E.2d at 8.
  \item \textsuperscript{160} See supra note 160 and accompanying text.
  \item \textsuperscript{161} 211 Ga. App. at 324, 439 S.E.2d at 8. See discussion of the narrower view at infra note 184.
  \item \textsuperscript{162} 211 Ga. App. at 325, 439 S.E.2d at 8.
  \item \textsuperscript{163} Id. at 326, 439 S.E.2d at 9. This was a bad choice. In Cox, the court did use the language quoted, but it did so in the context of permitting an attorney to apply funds obtained from a common debtor to his own account rather than to the client's. Cox v. Sullivan, 7 Ga. 144, 147 (1849).
  \item \textsuperscript{164} 211 Ga. App. at 325-27, 439 S.E.2d at 10.
  \item \textsuperscript{165} Id. at 325-26, 439 S.E.2d at 9. Under State Bar of Georgia Standard of Conduct No. 3 a lawyer shall not engage in illegal professional conduct involving moral turpitude. Interestingly, Tante could be read broadly to mean that a sexual relationship with a married client is a disbarable offense.
\end{itemize}
occupied a position of trust and confidence, and abused it to promote his own sexual interests to the injury of the Herrings.166

Finally, the court of appeals responded to Tante's objections to the Herrings' expert witnesses' references to violations of ethical regulations.167 Unlike the decision it was soon to render in Allen, the court did not interpret Davis to prohibit all reference to ethical regulations. Instead, noting that the supreme court has "foreclosed a claim of legal malpractice based upon [violations of ethical regulations],"168 the court returned to its pre-Davis view:

... [C]onduct which violates the Code of Professional Responsibility may, in appropriate circumstances, also provide a basis for claim[s] for legal malpractice. The correct statement of law from the cases Tante relies upon is that "standing alone" a violation of a bar standards [sic] will not support a legal malpractice claim ... [Here], Tante's conduct, when measured against the standards stated in the affidavits of the Herrings' expert, was sufficient to state a claim of legal malpractice.169

From the landscape of Davis, Allen, and Tante we can now see the full extent of what the supreme court faces as it reexamines more closely our general rule that violations of ethical regulations, standing alone, cannot be the basis for a malpractice action. Because this is complex, surely it must be tempting to the court to see these cases as nothing more than a circuitous side-trip from our "general rule." It must be tempting, that is, to announce that the "standing alone" limitation on basing malpractice actions on violations of ethical regulations is only an obscure reference to the obvious need to prove the other elements of malpractice. This is, as I have noted above, the reading of the law that is most consistent with earlier cases,170 and it is a reading that not only permits a reconciliation of our general rule with Davis, but even offers a good solution for Allen. Davis becomes understandable because in Davis171 there are damages only if there is overcharging. In other words, the only harm done to the client is the specific harm proscribed by the ethical regulation. There are no consequential harms. The court then, could distinguish Davis and return the general rule by declaring that overcharging cannot be the basis for malpractice. (Thus making more relevant the supreme court's reminder to the parties in Davis that

166. 211 Ga. at 327, 439 S.E.2d at 10.
167. Id. at 328, 439 S.E.2d at 10-11.
168. Id., 439 S.E.2d at 10.
169. Id., 439 S.E.2d at 11.
170. See supra note 125.
bar-sponsored fee arbitration was an available remedy).\textsuperscript{172} The only reason for ever thinking otherwise about overcharging is that overcharging is also a violation of ethical regulations, but this standing alone, the court could say, would not convert a fee dispute into a malpractice claim and this was all we meant in} \textit{Davis}. The court of appeals was simply wrong, the court would add, when it found that the elements of legal malpractice had been met in \textit{Davis}.

Relying on the elements analysis approach would simplify \textit{Allen} because \textit{Davis} would now be distinguished. When the basis for malpractice is truly in torts or contracts,\textsuperscript{173} the court could say, there is nothing wrong with proving violations of ethical regulations as a way of establishing both the duty and the breach if there is consequential harm to the client proximately caused by the violation, harm, that is, other than the violation itself.

Hidden behind this straightforward return to our general rule, however, is a new implication that should at least give the supreme court pause. If I have our general rule correct, all violations of ethical regulations have always had the potential for providing a basis for malpractice if damage and causation could be shown. \textit{Davis} was the only real challenge to this and, as we can now see, \textit{Davis} can be reconciled with our general rule. In the past however, we lacked the imagination to see how much this general rule implied. Now, however, with cases like \textit{Davis, Allen,} and \textit{Tante} for encouragement, we are not likely to be so restrained. For example, suppose that a court disqualifies a lawyer from representation for a recently discovered conflict of interests. (Usually, a court's understanding of whether a conflict of interests exists is based upon the ethical regulations of the profession. We will not be stretching at all to say that our hypothetical disqualification also shows a violation of an ethical regulation). Now, in almost all cases, clients are badly damaged by disqualifications. The case becomes markedly more expensive, for one thing; time is lost, for another; recovery may be postponed, and there could indeed be compensable physical or emotional harm. But if all this is true, and if our general rule is also correct, then the client of a disqualified lawyer should have

\textsuperscript{172} See supra note 136.

\textsuperscript{173} Georgia courts have long held that malpractice claims can sound in contracts (because they treat agency as a contract claim) or that they can sound in torts. Different rules have been applied depending on which is correct for a particular claim. See, e.g., Coleman v. Hicks, 209 Ga. App. 467, 433 S.E.2d 621 (1993). But contracts makes sense as a theoretical basis for malpractice only because the contract between the client and the lawyer includes an implied term to exercise ordinary professional skill and knowledge in the representation. Thus, there would seem to be no difference between torts and contracts relevant to the issue of whether ethical regulations can provide a basis for malpractice.
a prima facie malpractice claim against her attorney. Note well the implication of this! Rather than being tempted to stretch conflict of interests rules to increase profitable representations, economically-minded lawyers who realize that the financial risk of disqualification has been shifted to them may instead become zealous in their compliance.

Now as this example shows, this could be something the supreme court wishes for our profession. Almost every ethical regulation would be backed by the potential legal sanction of malpractice. This would include not only rules that are not designed primarily for the protection of clients, but also those designed for the protection of the adversarial system or the public because it is often possible to show some damage to clients from almost any rule violation. For example, in some jurisdictions lawyers are ethically obligated to reveal a client's intention to commit a serious crime. In these jurisdiction, lawyers are at risk of being sued by those harmed by their clients if the lawyer knew of the client's intention and took no action to prevent it. Under our general rule however, in these jurisdictions the client, in theory at least, could also sue the attorney in malpractice for failing to reveal sufficient information to prevent her from committing the crime!

Time, space limitations, and editorial tolerance do not allow me to go on with examples, but many could be given, and the implication of each is that the enforcement of ethical regulations through legal malpractice could have an enormous impact on the practice. Without attempting the extremely difficult task of assessing the quality of this impact, one would think that the extent of it alone would be enough to give the supreme court pause before adopting a straightforward return to our general rule.

What is now facing the supreme court is even more daunting than this however, because we have yet to consider what the court would do with Tante if the court returned to our general rule. When we consider this, we see our theme returning once again.

Tante expands our "general rule" because its malpractice concern is not with specific ethical regulations. Like AFLAC, it is concerned with general ethical obligations imposed upon all attorneys as professional standards. Despite the impression one might get from Davis and Allen, most malpractice actions are not concerned with violations of ethical regulations. This is probably true because most malpractice actions are

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174. This should be unsurprising since malpractice may be based on harm produced by a conflict of interests determined by a violation of ethical regulations in Georgia. See, e.g., Peters v. Hyatt Legal Servs., 211 Ga. App. 587, 440 S.E.2d 222 (1993). In the text I am only extending this to the damage done by disqualification.

175. See supra note 126, at 75.

176. See, e.g., FLA. STAT. ANN. Bar Rule 4-1.6(b) (West 1983 & Supp. 1994).
based on negligence in the handling of a client's legal case. The ethical regulations dealing with competency, diligence, and so forth, especially those in Georgia, are simply not helpful in malpractice cases and there is no good reason for a plaintiff to refer to them. Often these regulations demand less than the law requires. Instead of being based on ethical regulations, most malpractice cases are based upon the ordinary performance standards of our profession. Courts typically describe these performance standards using something like the litany of "skills, prudence, and diligence" found in the Tante opinion, although these litanies often vary. Before Tante, and before its predecessor on this subject, the court of appeals decision in Davis, most would have assumed that these litanies were to be narrowly construed to include only the performance of "technical" duties such as the timely filing of a claim or an appeal, due diligence in searching out and interviewing witnesses, thorough exploration of legal precedence, and so forth, in the handling of the client's legal affairs. On this reading, malpractice claims based upon these ordinary performance standards of the profession were severely limited.

Tante calls all this into question. By describing this understanding of the ordinary performance standards as "too narrow," the court of appeals announces that it will include within these ordinary performance standards the far broader ethical obligations of the practice. The performance standards that provide bases for malpractice, the court is saying, are not just about "technical" duties; they are not just about the handling of a client's legal affairs, but they are also about the way the client is treated in the process. Tante is telling us here that we need a truer description of our profession, a broader understanding of the service lawyers perform for their clients. Lawyers are not simply technicians in the pursuit of a maximum recovery on legal claims; we should not measure their success only by the outcome of their cases. Lawyers are trusted problem solvers with obligations to clients that are "professional" precisely because these obligations reflect this broader function.

Now in a case involving sexual misconduct with clients, we should not ordinarily take too seriously what any appellate court says—any court will find a way of punishing the conduct even at the expense of consistency with prior case law. Given the "professionalism" climate in

178. 211 Ga. App. at 324, 439 S.E.2d at 8.
180. See supra note 20 and accompanying text.
Georgia however (and given *Tante*’s consistency with the court of appeals’ decision in *Davis*), I think we should take the court of appeals’ claim about broader obligations seriously regardless of the questionable context in which it appears.  

Taken seriously, what the court of appeals says in *Tante* sounds virtuous, and worth applauding, but the court is certainly not getting this broad description of the practice from any decisions within the judicial function. This description is instead coming straight from the regulatory function. Such an understanding of the practice is, for example, the understanding that lies behind all of the supreme court’s proud talk of higher standards in *AFLAC* and, as we shall see later, in *Green v. Green*.  

But now, viewed from *Tante*’s conception of what can constitute malpractice, permitting ethical regulatory violations to be the basis for malpractice actions if all elements are proven, as a return to our general rule would do, no longer seems to be an expansion in potential liability for lawyers, but rather a limitation!  

*Tante* then, may be best understood as an attempt to combine a regulatory understanding of the practice with enforcement of that understanding through the malpractice law of the judicial function. Such an ascendency of the hierarchy of the regulatory function must surely be an intimidating prospect for the court. Accepting the implications of *Tante* would be a bold and, perhaps, desperate move of regulation. Are we at that point? Some argue that we are. Yet, even if the supreme court determines we are not, surely it must see that *Tante*’s description of the practice is much truer to what the supreme court itself has said when acting in its regulatory function. It will be

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181. See infra notes 182-84 and accompanying text.
183. For example, it is conventional to describe good lawyering as including a willingness to tell clients when they are being fools or, what is worse, immoral fools; it is also considered good lawyering to advise clients that a case is probably not worth pursuing in the long run. Suppose that a client comes to a lawyer with a perfectly valid claim, but one that a person of good prudence would not pursue. Suppose that this same lawyer takes the case without hesitation and does what the client wants. Later the client understands that he has made a mistake—an expensive one at that with loss of time, business, money, and so forth. Under the broad view, the client would not need to cite to any ethical regulatory violations (at most he could only find aspirational statements regarding good counseling), but could claim that the performance standards of conduct of our profession were violated by the lawyer’s failure to counsel him about his own stupidity and he was damaged as a result. If instead malpractice had to be based either on narrowly understood performance standards or on ethical regulatory violations, no action would lie!
difficult for the supreme court either to reject Tante or to accept Tante without facing the struggle between its competing functions. 184

184. The Supreme Court, speaking through Justice Hunt, issued its opinion in the certified appeal on October 31, 1994. Although the court announced that it was affirming in part and reversing in part, the effect of the opinion is to affirm the results of the court of appeals decision in Tante thus permitting the plaintiff to maintain a damage action against the attorney. The Supreme Court thought the court of appeals had erred in affirming the trial court's grant of summary judgment on Tante's claim for legal malpractice because: "It is axiomatic that 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 he was employed." Finding that Tante's conduct had no effect on his performance of legal services because he had obtained the Social Security benefits for the Herrings, the court said that "... a satisfactory result under an agreement for legal services by necessity precludes a claim for legal malpractice." However, the court went on, that the Herrings may pursue their claim for breach of fiduciary duty because it is "... based on Tante's alleged misuse, to his own advantage, of confidentiality information ... obtained ... in ... [the] representation."

This is an odd opinion. Usually, I believe, the term "legal malpractice" is understood to include claims based on either negligent professional performance or a breach of fiduciary duties or both. MALLEN & SMITH, LEGAL MALPRACTICE 4 (3d ed. 1989). Some courts distinguish standard of care duty violations from standard of conduct duty violations, but both are considered legal malpractice. Id. Even if a distinction between legal malpractice and breach of fiduciary duties of an attorney is maintained, as it sometimes may be, most authorities agree that the distinction makes very little difference. See id. at 402 and HORAN & SPELLMIRE, ATTORNEY MALPRACTICE: PREVENTION AND DEFENSE 16-1 (1985). With very little research effort one can find equally strong statements of what is axiomatic to legal malpractice that are in direct opposition to Justice Hunt's observations about the harm done here. "The most obvious kind of malpractice is an intentional and unprofessional act that injures the client." KINDREGAN, MALPRACTICE AND THE LAWYER 3 (revd. ed. 1981). Perhaps this is so because Justice Hunt's axiom is question begging. What the task is that the lawyer is hired to perform is the issue. Justice Hunt would describe that task narrowly as obtaining good financial results on a particular claim while others would insist that the two essential tasks of good lawyering are counseling and the maintenance of the relationships upon which good counseling must be based.

But we really do not need to pursue this question. The far more important one is what difference Justice Hunt's distinction of a violation of a standard of conduct or breach of fiduciary duties from a violation of a standard of care or legal malpractice makes other than the one he noted, that is, that one requires an expert's affidavit since it is described as legal malpractice while the other does not.

What Justice Hunt has done is what I said in the text would be difficult to do. He has avoided facing squarely the struggle between the court's competing functions. The way he avoids this is by shifting the inquiry from the court of appeals concern with the regulatory function back to the judicial function. But now, however, the judicial function's inquiry will be on whether or not the lawyer has breached a fiduciary obligation. This permits him to avoid discussing the regulatory function because breach of fiduciary obligations is a rather untapped legal source of regulation of the profession. Often, the law of fiduciaries would demand more of lawyers than even our professional codes would. For example, the ABA Model Rules of Professional Conduct permit the lawyer to use confidential information to
Before going on with two relatively minor legal malpractice cases, I hope the reader now understands why I described this pervasive struggle between the competing judicial and regulatory functions of the appellate courts as this year's dominant event in this area of law. I fear however, that I have belabored the point. Perhaps I can now get by in the rest of the survey with just a brief mention of connections to our theme because my hope is that you are now going to see this struggle everywhere.

B. Real Estate Closing/Client-Lawyer Relationship

Almost all of the judicial talk about ethical norms applicable only to lawyers is dependent upon first finding a client-lawyer relationship. Georgia case law on when a client-lawyer relationship is formed has moved slowly in the direction of the test of a putative client's subjective, but reasonable, belief that the relationship exists. The movement to this test has been slow, although the test is a common one in other jurisdictions, because Georgia courts have been rigid about form and formalities while insisting that they are not. The most troubling area involving the client-lawyer relationship issue has been malpractice in real estate closings. We were not spared from this troubling area this year.

In Richard v. David, plaintiffs selected defendant from a list of approved lawyers provided by the lending bank. The bank notified defendant of their selection. At the end of the closing, the realtor asked for the required termite letter; the seller passed the letter to defendant;

his own advantage without a client's consent if the use is not disadvantageous to the client. Fiduciary law permits no such thing. Because plaintiffs have not tapped out fiduciary law, Justice Hunt can postpone the face off between the competing functions—at least he can in this case.

185. J.L. Sammons, Conflict of Interest: Identifying the Relationship, Recent Developments In Ethics, The Institute Of Continuing Legal Education In Georgia (Feb. 10, 1989). The starting point of the relationship varies depending upon the nature of the putative client’s claim, e.g., malpractice, conflict of interests, confidentiality. If the question is whether a conversation with an attorney is sufficient to form a client-lawyer relationship for the purposes of the privilege, the Georgia test seems to be whether the putative client subjectively and reasonably believed that the conversation was in contemplation of employment of the attorney. Id. at 65.

186. Id. at 66. This is an important area for malpractice. During 1983-85, 50% of all reported malpractice cases arose out of real estate and personal injury matters. Will H. Gates & Sheree L. Swetin, Characteristics of Legal Malpractice: Report of the National Legal Malpractice Data Center (1989) as cited in Geoffrey C. Hazard, Jr. et al, THE LAW AND ETHICS OF LAWYERING 175 (2d ed. 1994).

189. Id. at 661, 442 S.E.2d at 460.
defendant reviewed it, and passed it to the plaintiffs. In all this passing around no one noticed, or at least, no one commented upon, the serious past pest infestations clearly shown by the letter. As you have already guessed, six months later the plaintiffs discovered extensive structural damage. Upset with "their" lawyer, they filed a malpractice action alleging negligence in failing to advise them of the significance of the findings in the letter.

The court of appeals announced its test for determining if a client-lawyer relationship existed in Legacy Homes, Inc. v. Cole. "The basic question [regarding] the formation of the attorney-client relationship is whether it has been sufficiently established that advice or assistance of the attorney is both sought and received in matters pertinent to [the] profession." Legacy Homes was a 1992 case that in turn quoted Guillebeau v. Jenkins, yet another real estate closing case, for the same language. The quoted portion of Guillebeau came from In re Dowdy, an earlier disciplinary case. (Professor Sobelson reviewed this line of cases in last year's survey, providing excellent analysis, and I will refrain from adding my own thoughts).

Applying this "advice or assistance" test in a typically rigid fashion, the court found that the plaintiffs "never sought any legal advice from defendant and defendant never offered any legal advice to plaintiff. Nor did plaintiff ever communicate to defendant that they would rely on her for legal advice at the closing." And then, turning to the truer test and a better reading of Guillebeau, the court said:

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190. Id.
191. Id.
193. Id. There are cases permitting a malpractice claim in the absence of client-lawyer relationship. Those cases are based on third party liability to those affected by a representation or on "gratuitous agency theory." They were distinguished in Legacy Homes as discussed in Sobelson, supra note 130, at 307-08.
196. See Sobelson, supra note 130, at 307-11. As I noted in a previous survey: "The use of the quote [in a case denying the creation of a client-lawyer relationship] is ironic because Guillebeau's adoption of the quote from Dowdy seemed to be a significant liberalization of prior case law governing malpractice claims by putative clients and is sufficiently out of line with other cases and with the holding in Guillebeau to make one wonder if the quote should be taken seriously at all." Jack L. Sammons, Legal Ethics, 41 MERCER L. REV. 237, 284 (1989). The continued use of Guillebeau is the strongest evidence we have that the law in this area is moving towards a "subjective, but reasonable" test for determining when the relationship is formed. See also Sammons, supra note 184.
197. See Sobelson, supra note 130, at 310.
198. 212 Ga. App. at 662, 442 S.E.2d at 460.
199. See Sammons, supra note 184.
"We conclude that plaintiffs could not have had a reasonable belief that an attorney-client relationship existed with defendant."\(^{200}\)

This is interesting for two reasons: First, the seeking "advice or assistance" test applied in *Legacy Homes*, and quoted with approval here, now seems reduced to one method by which the court will determine whether or not the putative client's subjective belief in the existence of a client-lawyer relationship is reasonable. Second, this combination of the *Legacy Homes* test and the "subjective, but reasonable" test could not possibly produce the results the court said it did here. The reason plaintiffs never sought legal advice, nor communicated to defendant that they would expect it was, quite obviously, because they already assumed that defendant was acting as their lawyer! They selected the lawyer, paid for the lawyer, and absent anyone telling them in certain terms that they were not being represented, they should have assumed they were.

This was a routine closing. The only parties at the closing were the seller, the purchaser, and a lawyer paid for and selected by the purchaser. An appellate court willing to place itself in this specific context to determine reasonableness would have little choice but to find the Richards' subjective belief in their representation reasonable. The court in *Richard*, however, did not use this as its context for determining reasonableness. It could not have and held as it did. Instead, it must have looked at closings from within the context of the law, that is, as members of the legal community would, fully aware before any determination of reasonableness is made that as a matter of law, practice, and custom the lawyer represents the lending institution. Surely, in thinking through the reasonableness issue, the court unconsciously imagined the closing as an attorney would, rather than as a putative lay client.

Of course, the attorney's perspective should not be the one used to determine reasonableness here. Furthermore, even within this limited professional context we may find a legal community that is itself sufficiently confused about whom the lawyer represents to make reasonable a wide array of subjective beliefs in representation. For example, as Professor Sobelson ably demonstrated in last year's survey, the logical conclusion of the court's analysis in *Legacy Homes* is that the lawyer involved in the closing in that case represented no one!\(^{201}\) Look also at FAO 86-5 concerning the "ethical propriety of lawyers delegating to nonlawyers the closing of real estate transactions."\(^{202}\) One reason,
according to this FAO, that closings cannot be delegated to nonlawyers is that the lawyer may be called upon to give advice at the closing. But to whom? Most routine closings do not include the lawyer's client, the lending institution. Does this mean that the fear of improper advice-giving is absent in routine closings; if so, why was the opinion so rigid about requiring attorney participation in all closings?

The truth of the matter is that we as a profession have done a terrible job of educating the public about the lawyer's role in closings. Far too often, when a price is to be paid for this confusion, the price is self-protectively thrust upon the public as it was in Richards.203

This year gave us yet another real estate closing malpractice case displaying more of this self-protection. In Williams v. Fortson, Bentley & Griffin,204 the court of appeals affirmed a grant of summary judgment finding that the closing attorney did not commit malpractice leading plaintiffs to purchase a home substantially damaged by termites because no client-lawyer relationship existed between the parties.205 About halfway through the closing, plaintiffs signed a disclaimer of representation and a release and covenant not to sue.206 The disclaimer explained that legal services at the closing were on behalf of the lender.207 The borrowers were also encouraged to retain separate counsel to protect their legal interests.208

Now if this were all there was to it, no one would find that plaintiffs, in the face of this clear disclaimer, could have formed a reasonable subjective belief that the lender's lawyer represented them. And, if this were so, there would be no tension here, no reason to question the enforceability of the disclaimer.209 But this is not all there was to it. The closing attorney, according to plaintiffs' affidavits,210 told the plaintiffs during closing that she was their attorney and would take care of them; she advised that the termite report presented at the closing was unacceptable; accepted a revised termite report submitted after closing

205. Id. at 223, 441 S.E.2d at 687.
206. Id.
207. Id. at 222, 441 S.E.2d at 687.
208. Id.
210. This was in the procedural context of a motion for summary judgment. The court must have felt that any disagreement over these facts was unimportant.
(it, too, was inadequate) without consulting with plaintiffs as if she were acting as their attorney, and, during the closing, advised plaintiffs that they need not read everything presented for signatures.\textsuperscript{211}

Some of these actions are consistent with the attorney's sole representation of the lender—refusing the termite report, for example—but some are not. The defendant may have been as confused about whom she represented as the plaintiffs were because of her willingness to act for the plaintiffs by accepting the termite letter without consulting them;\textsuperscript{212} her giving them the bad legal advice that they need not read everything presented for signatures; and the alleged announcement, that she was acting as their representative.\textsuperscript{213} Should a disclaimer of representation be effective if it is effectively discredited by the conduct and speech of the one seeking the advantage of the disclaimer? One would think this would be an interesting question at least, but the court rejected this substantive inquiry entirely, so anxious were they to permit the lawyer to protect herself against her own poor judgment through a written disclaimer.

Plaintiffs argued further that the attorney's willingness to act for them by ensuring that seller delivered an acceptable report was an assumption of a voluntary or gratuitous agency status.\textsuperscript{214} The court rejected this because the reliance required for voluntary agency status must be justifiable. It could not be justifiable here, the court found, because of the disclaimer.\textsuperscript{215} Of course, this disclaimer was a disclaimer of representation, that is, a disclaimer of a client-lawyer relationship between the lender's lawyer and the buyer. It was not a disclaimer of a voluntarily assumed agency status.\textsuperscript{216} In the primary authority on

\textsuperscript{211} 212 Ga. App. at 222-23, 441 S.E.2d at 687.

\textsuperscript{212} We do not know the rest of the story here since this was an appeal from a grant of summary judgment, but one would think that she jeopardized the closing by not having the purchasers assent to the revised termite letter. Surely the courts will not permit her to have it both ways, that is, not to be responsible for representation of the plaintiffs and yet capable of binding them as if she were their representative.


\textsuperscript{214} Id. at 662, 442 S.E.2d at 460. Not enough facts were given in the case to make this clear. The attorney could have been acting appropriately for the lender and in a manner consistent with her sole representation of the lender in assuming the duty to review a subsequently submitted termite letter. But if so and as noted in the previous footnote, her actions should not have been binding on the purchaser. On the other hand, if she led the purchaser to reasonably believe that she would be acting on their behalf in reviewing the subsequently submitted letter, then this would appear to be a classic case of voluntary agency.

\textsuperscript{215} 212 Ga. App. at 224, 441 S.E.2d at 688.

this issue, *Simmerson v. Blanks*, the court found the existence of a voluntary agency after finding that there was no client-lawyer relationship. Surely a disclaimer of the latter should not be considered a disclaimer of the former as the court seemed to believe or at least not in all circumstances. The disclaimer should be nothing more than circumstantial evidence on the issues of whether a voluntary agency was assumed and whether reliance was justifiable.

Finally, suppose the court of appeals analysis is correct. In that case, the attorney here has acted in violation of Standard 48 prohibiting the giving of advice to unrepresented parties with interests in conflict with the attorney's client. The court does not notice that its opinion here creates this violation because it did not take this regulatory standard seriously. If instead the court had taken this regulation as seriously here as other ethical norms were taken in *AFLAC* or in *Tante*, we would have expected the court to say that attorneys are liable for advice given in violation of the standard if reliance on the advice were reasonable.

*Williams* then, just continues our problems in this area. Solutions however, do not lie in rigid enforcement of ethical regulations although I may have implied this. Nor do they lie, as I also implied above, in better education of putative clients and the public concerning the attorney's role at closings. They may not lie even in good lawyers who are more careful about their limited role. Solutions lie instead, in accepting what is behind our current confusion. We are trying to impose a model of individual advocacy upon a situation crying out for something different. In closings the good attorney should act, in Justice Brandeis' term, as a "counselor to the situation" responsible to all for the success of the transaction, but zealously representing the individual interests of no one. Both hierarchies of governing norms, however, are based upon a model of zealous advocacy for individuals and thus both prevent us from seeing this other possibility.

217. *Id.* at 479, 254 S.E.2d at 718.
219. *Id.*
220. One reason the solution does not lie here is that rigid enforcement of conflict of interests rules here would increase transaction costs prohibitively.
IV. BADPRACTICES

A. Notice to Opposing Parties

One problem with the appellate court’s treatment of malpractice issues in real estate closings is that the appellate courts seem to permit lawyers to take the full measure of all legal advantages to avoid liability regardless of the ethics of doing so. This is far from the rhetoric of AFLAC and even further from the bold language of Tante. Unlike what we have seen in these other areas, there is no hint of an ethical regulatory concern in these real estate closing cases.

Two years ago, in a concurring opinion in Evanoff v. Evanoff, Justice Benham announced his personal concerns with lawyers who take the full measure of all legal advantages. He returned to this theme again this year in the case of Green v. Green, an adequate notice case very similar to Evanoff but with different results. Justice Benham’s concerns in these cases however, were not with the legal advantages lawyers take for their own self-protection, as in the real estate closing cases, nor with using the full measure of the law to obtain financial

222. Id. at 305, 418 S.E.2d at 63.
223. 263 Ga. 551, 437 S.E.2d 457 (1993). He also used this theme in a concurring opinion in King v. State, 262 Ga. 477, 421 S.E.2d 708 (1992). In King Justice Benham was concerned with the professionalism of police officers appearing as witnesses for the prosecution. In the first appearance of the case, King v. State, 261 Ga. 534, 407 S.E.2d 733 (1991), a police officer had disregarded the court’s instruction to avoid specifics in referring to the defendant’s character. This contemptuous conduct resulted in a reversal. On retrial, this same officer, “a veteran of over seventeen years of services, after having been made aware of the reason for the first reversal . . . , after having been counseled by . . . the district attorney’s staff, . . . and after having been advised in open court . . . not to give testimony as to certain matters,” (262 Ga. at 479, 421 S.E.2d at 709) made an unsolicited reference to appellants “past history.” Justice Benham stated: “[T]he reference gave the appearance of a deliberate effort to prejudice [the defendant].” 262 Ga. at 478, 421 S.E.2d at 709 (Benham, J., concurring).

Referring to the Chief Justice’s Commission on Professionalism, Justice Benham chided the officer for acting unprofessionally and violating the spirit of the court’s order, if not its letter. The goal of improving our courts cannot be achieved, the Justice went on, “if participants in court proceedings go all the way to the line of permissible conduct without crossing it. They must be willing to walk wide of error and impropriety and seek to abide by the letter and the spirit of the law.” Id. at 479, 421 S.E.2d at 709. See also Bell v. State, 263 Ga. 776, 439 S.E.2d 480 (1994) in which the court stated that “adherence to the limitation on the latitude of oral argument is also integral to legal professionalism” in reversing judgment. Id. at 778, 439 S.E.2d at 481. The prosecutor exceeded limits on closing argument by “inject[ing] into the argument of extrinsic and prejudicial matters which have no basis in the evidence.” Id. at 777, 439 S.E.2d at 481.
advantages over clients as in AFLAC—although his concerns may eventually reach these areas as well. His announced concerns were with the harm that lawyers do to nonclients and to the adversarial system by their overly zealous pursuit of clients' legal interests. Justice Benham calls issues of this ilk "professionalism" issues, but to avoid the confusion that seems to be inevitable in that term, I have described them as "badpractices."

"Badpractices" is one area in which the hierarchy of governing norms of the regulatory function, led by Justice Benham, is rapidly gaining ascendency and, as Justice Sears-Collins noted in her concurring opinion in Green v. Green, threatens the judicial function as it does so. Green v. Green was an appeal from the denial of a motion to set aside a judgment in a divorce case. The issue was the adequacy of notice to the appellant. After appellant filed her divorce action, she moved to Ohio. Her attorney withdrew, following the appropriate procedure of notifying the court and giving opposing counsel his client's new address. Later, when the case was calendared, the clerk published notice of the trial date in the local paper as required. No one however, made any effort to give actual notice to the appellant. With the case fifteenth on the calendar and assigned to an "on call" status, appellee and his counsel appeared and announced ready on the published date. Apparently anxious to proceed, appellee's counsel searched in the desk drawer of the previously assigned judge to find a missing record that threatened the case's postponement. When the missing record was found, the case was heard in appellant's absence and a judgment was entered granting child custody to the appellee and ordering child support from the appellant.

The trial court, in denying appellant's motion to set aside, found the publication notice adequate. The trial judge also found that appellant had not complied with Uniform Superior Court Rule ("USCR") 8.4 requiring parties to actions beyond the first ten scheduled for a trial date to be ready for trial or to obtain permission to await the call

224. 263 Ga. at 554, 437 S.E.2d at 459.
225. Id. at 553, 437 S.E.2d at 459.
226. 263 Ga. at 560, 437 S.E.2d 463 (Sears-Collins, J., concurring).
227. 263 Ga. at 551, 437 S.E.2d at 457.
228. Id., 437 S.E.2d at 457-58.
229. Id. at 551-52, 437 S.E.2d at 457-58.
230. Id. at 551, 437 S.E.2d at 458.
231. Id. at 552, 437 S.E.2d at 458.
232. Id.
233. Id.
of the calendar clerk. The supreme court granted appellant’s application for a constitutional review of notice by publication, but finding other issues dispositive, the court avoided the constitutional issue.

Justice Benham, writing for a court unanimous in its judgment, said that a trial court has discretion to set aside judgments in circumstances like these: a calendar call that did not always require the presence of the parties and “extraordinary efforts made by appellee’s counsel to bring the case to trial in the absence of the unrepresented opposing party whom [he] knew to live out of this state.” The legal issue here was a simple matter he concluded because trial judges retain enough equitable power to do the right thing in these circumstances.

Having dismissed the legal issue quickly, Justice Benham made it clear that there was something more important he wanted to say. With a long quote from his concurring opinion in Evanoff, he turned to his professionalism theme. In Evanoff, he had told us that we should expect more of lawyers than mere compliance with legal and ethical regulatory requirements. For one thing, we should expect the civility among them that our system depends upon, and we should expect them to honor the need our citizens have for their day in court for another. These, he said, with praise for the Chief Justice’s Commission on Professionalism, are “higher standards” that have been embodied in the professionalism movement. Referring to the appellee’s attorney in Evanoff, Justice Benham remembered that during oral argument this attorney had been asked why he took a final decree without notice to the adverse party. The lawyer replied that the law allowed the procedure, and because it did, he had every right to use it. But the law, Justice Benham complained, including the Code of Professional

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235. 263 Ga. at 552, 437 S.E.2d at 458.
236. Id.
237. Id.
238. Id.
240. Id. at 305, 418 S.E.2d at 63.
241. Id. at 304, 418 S.E.2d at 63.
242. Id. Justice Benham is not alone in utilizing “professionalism standards” this way. See Owens v. Neely, 866 S.W.2d 716 (Tex. App. 14th Dist. 1993). For other recent references to professionalism standards, see, Fox v. LAM, 632 So. 2d 877 (La. App. 2d Cir. 1994) and Paramount v. QVC, 1994 WL 30181 (Del. Super.).
243. Id. at 305, 418 S.E.2d at 63.
244. Id.
Responsibility, sets minimum standards. It does not guide us on what our conduct as lawyers should be.  

Equating the conduct of the lawyer in *Evanoff* with the conduct of the lawyer in *Green*, Justice Benham praised the case law that permitted the court to do the right thing here; something it could not do in *Evanoff*. He then warned the bar that lawyers who act "out of a sense of blind and unbridled advocacy," and not "out of a spirit of cooperation and civility" will not profit from their conduct if the court can prevent it. In notice cases, this means that lawyers as "officers of the court" should "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."

Notice that the regulatory function prevails so much here that the court is writing as if it were issuing an FAQ offering advice for future conduct. The only peep we hear from the judicial function in the

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245. *Id.* Of course the Justice Benhams of the world have a long way to go to convince us that it is not whether you win or lose but how you play the game. While this may be our better ethic, the opposing view is also part of our tradition. For a good example see Deron Snyder, *Practice of Corking with Rules: Code of Silence Accepted Among Hitters*, USA TODAY BASEBALL WEEKLY, July 27-Aug. 2, 1994, at 6 quoting Angels announcer Billy Samples, who played for three teams from 1978 to 1986, on the subject of corked bats: "If you know how to do it and get away with it, it's part of the game. Like Gaylord Perry throwing spitballs all those years. It's basic Americana. If allowed, you'll stretch the boundaries of the game." Justice Benham reminds us that the boundaries of the game are important and in doing so he faces squarely this "basic Americana" tradition that forever competes with the one he seeks to honor.

246. 263 Ga. at 554, 437 S.E.2d at 459.

247. *Id.*

248. *Id.*

249. *Id.* at 554-55, 437 S.E.2d at 459-60.

250. *Id.* at 552-55, 437 S.E.2d at 458-60. In some ways, this opinion appears to be another example of something we have already seen: In some circumstances lawyers have special ethical obligations beyond the law that the appellate courts are apparently willing to impose upon them as a matter of law within the regulatory function. What cases like *AFLAC* or *Tante* are doing is insisting as a matter of law that lawyers live truthfully as the trusted confidants of their clients. What Justice Benham is doing here, however, is not the same. He is arguing for a particular conception of the lawyer's role in society—quite a different matter indeed! For example, to oppose the regulation of lawyers we have seen thus far, a principled judge would have to argue that lawyers are not special or not so special or offer some variation on this theme. These are not, however, arguments that most judges are comfortable making so what they do instead, as was done in Donahue or in the real estate closing cases, is to avoid the conversation entirely by staying within the
majority opinion is Justice Benham's brief nod to case support for equitable discretion in circumstances like these.

But the judicial function will not give up the struggle so easily. Rushing to its defense, Justice Sears-Collins disagreed with the majority's interpretation of USCR 8.4 and with its reliance on professionalism standards to reverse the judgment.251 As for the first, she said that a natural reading of the provision is that it requires the parties and counsel to be ready for trial.252 The options it provides are merely substitutes for an appearance, she added.253 Accordingly, Justice Benham was wrong to find that appearance was not always required (thus making room for his finding of equitable discretion). It is permissible, she implied, to do equity while preserving the law, but not at the law's expense.254

This quibble was clearly not what was troubling her, however. She agrees that notification of appellant by appellee's counsel would have been the better practice she added, and she too, applauds the Chief Justice's Commission on Professionalism, but neither of these should have much to do with the outcome of this case.255 Here are her judicial function. But a judge opposed to the kind of regulation Justice Benham proposes in Green has no need to avoid the argument. Such a judge can agree with Benham that lawyers are just as special as he claims, but disagree with his particular conception of the lawyer's role in society. Justice Sears-Collins hinted at one opposing conception in her concurring opinion in Green. Green v. Green, 263 Ga. at 555, 437 S.E.2d at 460 (Sears-Collins, J., concurring).

251. 263 Ga. at 555, 437 S.E.2d at 460 (Sears-Collins, J., concurring).
252. Id. at 555-56, 437 S.E.2d at 460.
253. Id. at 556, 437 S.E.2d at 460.
254. Id. There is another way of analyzing Justice Benham's opinion. His references to professionalism can be seen as nothing more than taking into account the attorney's conduct in determining whether equitable discretion is permissible here. It is true, of course, as Justice Sears-Collins also points out, that doing this imposes sanctions against the client for the attorney's misconduct. But there is nothing new in this! Clients are almost always bound by their attorneys' mistakes. Furthermore, while consistent with the law, the misconduct of the attorney here gave the client an unfair advantage in the case that is inconsistent in principle with the client's own claim to zealous advocacy. Zealous advocacy is justified by the morality that demands that each person be heard. Here, all that would be imposed upon the client is a prohibition on denying this same right to the opposing party. Resting upon the principle that justifies the lawyer's advocacy for the client to begin with, as it does, this moral burden could be as fairly shared by clients as by attorneys. This is true even though Benham says that the source of the obligation to give notice is the lawyer's role as an officer of the court.

In any event, an appellate court should consider the attorney's misconduct in the exercise of its equitable powers whether it does so by reference to professionalism standards or not. Here Benham refers to a practice of making a good faith effort to notify the other side. If there is such a practice, it should be considered in any equitable inquiry.

255. Id., 437 S.E.2d at 461.
reasons: First, there are judicial function due process concerns in using nonmandatory professionalism standards this way. Unspoken, but implied, is that it is disingenuous to speak of a day in court while ignoring due process notice requirements. Second, using professionalism standards in this regulatory function way is contrary to prior case law including *Davis v. Findley* and contrary to the guidance of the profession as expressed in the ABA Model Rules of Professional Conduct and other sources. Third, this is a slippery regulatory slope to head down. Finally, the judicial function has its own resources to bring to bear on the inequities here—namely, the constitutional insufficiency of notice by publication in these circumstances. Because she found this

256. *Id.* at 556-57, 437 S.E.2d at 461. Note that all Georgia professionalism "standards," if it is right to call them that, are aspirational and nonmandatory by their own terms. STATE BAR OF GA., A Lawyer's Creed in STATE BAR OF GA. DIRECTORY & HANDBOOK 107-H (1993); STATE BAR OF GA. Specific Aspirational Ideals in STATE BAR OF GA. DIRECTORY & HANDBOOK 107-H (1993).

257. 263 Ga. at 557, 437 S.E.2d at 461 (Sears-Collins, J., concurring). (Justice Sears-Collins added this citation to *Davis* subsequently in a revision. The opinion was not republished to include it.) The support she musters for her position is concerned with the use of ethical regulatory standards such as the Model Rules or the Code of Professional Responsibility and not with professionalism standards. I suppose however, that the only significant difference for this argument would be that professionalism standards are not disciplinary matters and that, therefore, consideration of them by appellate courts is in some ways more appropriate. Even though it is unimportant here, it is another example of judges within the judicial function ignoring the hierarchy of the regulatory function. In one place, Justice Sears-Collins treats professionalism standards as if they were disciplinary standards.

258. *Id.*

259. *Id.* at 558, 437 S.E.2d at 462. Although this is a slippery slope argument, there is something more to it than just an imagined risk. So many lawyers tell us that the judiciary must act soon to correct our lack of professionalism, that Justice Benham seems fully justified in his efforts, and yet appellate courts are severely limited in what can do. We must wonder from judicial attempts to civilize discovery with sanctions and so forth, and case filings with the many variations on Rule 11, if judges are in fact the right group for controlling the excesses of the bar? Can the community that is essential to civility be formed this way? Can judges effectively control behavior outside the court without corrupting the adversarial system? Are the norms they must use corrupted by the only way in which they can be used by judges? Hidden within Justice Sears-Collins' discomfort may also be concern that the enforcement of these norms may disadvantage the representation of some groups as Professor Mashburn claims in Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657 (1994).

Having said all that, I would like to add my personal opinion that Justice Benham goes too far. I certainly agree with his assessment but not with his methods. Professor Mashburn tells us that "[c]ivility codes are built upon a subsurface pessimism about the possibility of governing human behavior through institutional control." *Id.* at 688. I think that is right and that such pessimism is a good thing.
last argument to be dispositive, she joined in the judgment of reversal despite her quarrel with Justice Benham.260

Justice Sears-Collins is right to be concerned. Justice Benham’s opinion dramatically shifts towards the regulatory function and, in doing so, shifts the nature of the judicial conversation. Justice Sears-Collins fears this shift because she knows that preserving this ongoing conversation is what the law is about. Despite the legitimacy of her concerns, she should also recognize that the appellate courts are stuck deep in this struggle between competing functions, and whatever her wish, it will not go away. Her concurring opinion fails by not coming to terms with this reality.

Behind this dispute between these excellent justices there lies an important difference. It is one thing for a lawyer and a client261 to give notice to the opposing party because due process requires it, as Justice Sears-Collins would have them do. It is quite another to give that notice because it is something good lawyers and good people do. She agrees with Justice Benham, of course, that the second reason is preferable, but having done so, she argues that our courts have to ignore this difference as they use the law to hold us together in good community.262 But courts cannot ignore this difference. To do so would be to ignore the responsibility the courts have for shaping lawyers who, in turn, shape their clients to be the kind of people for whom good community is possible.263 While many, like Justice Sears-Collins, may find Justice Benham’s methods disturbing, his methods should be recognized as an honest attempt at exercising the court’s unavoidable regulatory responsibilities even when acting in the judicial function. Nevertheless, for now and to me, it seems good that we have the balance in this struggle that a Justice Benham and a Justice Sears-Collins provide.

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260. 263 Ga. at 558, 437 S.E.2d at 462 (Sears-Collins, J., concurring).
261. See supra note 253.
262. 263 Ga. at 558, 437 S.E.2d at 462 (Sears-Collins, J., concurring).
263. For the most part, the public comes to lawyers not knowing what our system of law entails; they do not know how the game is played. We lawyers teach them its rules. We tell them whether fairness to others is expected and, in the process, we shape who they are. Most people respond to moral concerns even in extreme personal circumstances if there is someone willing to tell them the truth. The truth to be told to the client in Green was that we (the lawyer and the client) do not want to proceed without giving your wife notice that the day in court has finally arrived—not because the due process clause or the court requires this, but because this is the kind of people we would like to be if we were thinking at our best. Will the client hear this truth? Perhaps not; so much depends on the relationship with the lawyer, and because it does, we return again to the importance of cases like AFLAC and others that profess to hold lawyers to higher standards than we may sometimes like to be held.
B. Fee Waivers in Plea Bargaining

We were cursed with another bad practice issue this year. In FAQ 93-3, the court considered the tactic of a prosecutor conditioning a plea agreement in a death penalty case on a waiver of defense counsel's fee.\(^{264}\) This bad practice is as bad an example of a breakdown in the legal community as \textit{Tante} is of a breakdown in a client-lawyer relationship. Fortunately, because the request prompting the FAQ was based on a much earlier incident that to my knowledge has not been repeated, this bad practice may be an isolated event.

Unsurprisingly, the supreme court found this tactic to be unprofessional conduct.\(^{265}\) It creates a personal interest conflict of interest for the defense attorney, the court began, one that cannot be waived, despite language in the applicable Standard of Conduct\(^ {266}\) that seems to permit waiver of personal interest conflicts in all circumstances.\(^ {267}\) Even in personal interest conflicts however, a blanket nonwaivable prohibition is not without precedence, the court continued, offering as an example Standard 34's prohibition on obtaining publication rights from a client.\(^ {268}\)

In this first part of the FAQ the court seems to be forcing this issue into the category of personal interests conflicts so that it can rely upon the appropriate Standards of Conduct. But the real problem presented by this objectionable tactic is not the personal interest conflict it creates for the defendant's attorney; the real problem is the intentional creation of this conflict by the prosecutor. After struggling through this awkward beginning, the court turned its attention to this real problem.\(^ {269}\) Apparently not finding any ethical regulations on point (other than the vague admonition to avoid impropriety, an admonition not found in the Standards of Conduct nor in any Directory Rule of the Georgia Code of

\footnotesize


\(^{265}\) \textit{Id.}

\(^{266}\) \textit{GA. RULES OF CT. ANN., Bar Rule 4-102, Standard 30 (1994).}


\(^{268}\) See Formal Op. 93-3 (1993); \textit{GA. RULES OF CT. ANN., Bar Rule 4-102, Standard 34 (1994).} This was a poor choice because Standard 34 does not create a prohibition on obtaining publication rights at all! It is a procedural rule that postpones any conversation with a client about publication rights until after the representation. Completely ignored by this rule is the reality that publication rights can still affect the lawyer's professional judgment in the representation even though they cannot be talked about until after the representation is over. All the rule really does is lessen the possibility that the lawyer will use his or her representation in the case as an overt way of pressuring the client into accepting a publication agreement.

Professional Responsibility), the court resorted to public policy reasons to denounce the tactic. In the final analysis, the court concluded, this tactic is simply inconsistent with the role of the prosecutor to seek justice. And right they are. The appointed attorney's fee is absolutely irrelevant to guilt or to the degree of punishment appropriate for the crime. Were this requested waiver of fees for individual profit, rather than ostensibly for the protection of the county coffers, this would be extortion or bribery or at least, compounding a crime. There is, I believe, very little difference between this death penalty deal-making and a police officer asking for twenty dollars to tear up a parking ticket. The primary difference is that the ticket here is the defendant's life, and neither the defendant, nor the defendant's attorney, has any choice but to accept the lawless offer.

As right as this FAO is, however, it still presents problems. Relevant to our theme is a problem that plagues all FAO's. (Not surprisingly, it is in the FAO context that we first saw the beginning struggle between the competing functions of the court)." FAO's are supposed to be advisory and based on hypothetical situations. FAQ 93-3 was neither. It is generally well known that this FAQ was prompted by the conduct of District Attorney Joseph H. Briley of the Ocmulgee Judicial Circuit in the death penalty case of Tony B. Amadeo. (Your author joined with numerous other law professors in an amicus brief in the case protesting Briley's methods.) This FAQ was read by most lawyers practicing in this area as a thinly disguised dressing down of Joe Briley. Now there are obvious problems with dealing with unethical conduct this way. Normally, if an attorney is alleged to have acted unethically, the proper course is to refer the matter to disciplinary processes, and as we have seen, to seek legal remedies for the harm done. Here the defendant's lawyers could have filed for their fees arguing that the waiver was unenforceable. They were not likely to do this, however, because of the possibility of jeopardizing the plea bargain—even if that possibility was viewed as remote. Furthermore, given the inability of the FAQ Board to find a Standard of Conduct on point, it is not likely that the Disciplinary Board would have acted at all, thus giving at least an implicit sanction to the conduct. The best way to handle this was the way it was handled even though the function of FAQ's was distorted in the process.

270. The term is the heading of DR 9-101 (Avoiding Even the Appearance of Impropriety), but is not found in any of the rules under this heading.
272. In the text I discuss the problem most related to our theme. A second problem with FAQ 93-3 is that FAQ's are supposed to be advisory and based on hypothetical situations. FAQ 93-3 was neither. It is generally well known that this FAQ was prompted by the conduct of District Attorney Joseph H. Briley of the Ocmulgee Judicial Circuit in the death penalty case of Tony B. Amadeo. (Your author joined with numerous other law professors in an amicus brief in the case protesting Briley's methods.) This FAQ was read by most lawyers practicing in this area as a thinly disguised dressing down of Joe Briley. Now there are obvious problems with dealing with unethical conduct this way. Normally, if an attorney is alleged to have acted unethically, the proper course is to refer the matter to disciplinary processes, and as we have seen, to seek legal remedies for the harm done. Here the defendant's lawyers could have filed for their fees arguing that the waiver was unenforceable. They were not likely to do this, however, because of the possibility of jeopardizing the plea bargain—even if that possibility was viewed as remote. Furthermore, given the inability of the FAQ Board to find a Standard of Conduct on point, it is not likely that the Disciplinary Board would have acted at all, thus giving at least an implicit sanction to the conduct. The best way to handle this was the way it was handled even though the function of FAQ's was distorted in the process.
274. Sobelson, supra note 39, at 287-89.
confirmed this all too obvious truth.\textsuperscript{275} For example, even conduct as egregious as that complained of in FAO 93-3 has at least a plausible claim to legality that may conflict with its unethical status. In fact, this bargaining tactic is similar to others that, while roundly condemned in state advisory opinions, have been approved by the United States Supreme Court.\textsuperscript{276} It is my opinion that the tactic complained of here is distinguishable from those approved, but the point is that the effect of this FAO, and all others, always remains in doubt until this distinguishing is done. And, where is this to be done? Only in the ongoing struggle in the appellate courts between the ethical regulatory function and the judicial function. Until that is done, we simply will not know the effectiveness of this (or any other) FAO.

V. CONCLUSION

This last topic, Formal Advisory Opinions, takes us back to where the struggle between the competing judicial and regulatory functions first arose. Georgia's legal community's history, along with that of every other state's, is replete with battles between the bar and the courts over ethical issues. In these battles, the bar often used advisory opinions as its primary weapon.\textsuperscript{277} But these battles could not continue in an intramural context because what the bar does in the ethical regulation

\textsuperscript{275} Id.

\textsuperscript{276} This plea bargaining technique was borrowed from defense tactics in civil rights cases. See Evans v. Jeff D., 475 U.S. 717 (1986). Evans was a question of statutory interpretation and is a civil case. Nevertheless, the Supreme Court's primary rationale, that offers requiring waivers of attorney fees encouraged settlement by providing defense with a strong justification to settle (and that the conflict of interests on the other side were unimportant because the lawyer had an ethical responsibility to act in the client's best interests), is plausible in a criminal plea bargaining context as well. See also Town of Newton v. Rumery, 480 U.S. 386 (1987) in which the Supreme Court approved release/dismissal plea bargaining, that is, an offer to dismiss a criminal charge conditioned upon the criminal defendant's dismissal of a civil action. The dissent in Rumery said this was like asking for a contribution to the policemen's retirement fund in exchange for dropping a felony charge. 480 U.S. at 408 (Stevens, J., dissenting). But, in dicta, the Supreme Court said this was a permissible exercise of prosecutorial discretion to preserve scarce resources for other allocations. 480 U.S. at 396. (And once you start talking about the economics of plea bargaining, it is going to be hard to stop. These arguments are also plausible in our context.)

As mentioned in the text, prior to the Supreme Court's approval of these tactics, both had been condemned as unethical by state advisory opinion boards. See, e.g., Ethics Commission of Oregon State Bar Opinion 463, 801 ABA/BNA Lawyer's Manual on Professional Conduct, 7111 (1984). As far as I know, no state disciplinary board has been willing to enforce ethical regulations in the face of the Supreme Court's approval of the tactic.

\textsuperscript{277} See generally Koniak, supra note 3, at 59.
of the profession, even in the issuing of advisory opinions, is done as the delegate of the courts, specifically, of the states' supreme courts. What we have seen in this year's survey of recent cases is the Georgia's appellate courts effectively reclaiming what had been delegated to the bar. They have done this by rendering decisions that are addressed to the bar as much as they are to the disputants. And, thus, what had been an intramural battle between the bar and the courts is now truly a competition between the judicial and the regulatory functions the appellate courts must serve in this area.

In reclaiming regulation, and in the process giving new importance to the hierarchy of governing norms of ethical regulations, the appellate courts are no doubt responding to repeated cries from many quarters that reform of the legal profession is desperately needed. It is certainly understandable that the courts would respond to these cries as its has, but in doing so, they have started us on a process that is all too familiar to our profession. Our initial efforts to regulate ourself as a profession in this country were rhetorical calls to community, reminders of who we are and of what it meant to be a good lawyer. These rhetorical appeals eventually gave way to educational ethical codes which soon became disciplinary ethical regulations. With each step in this increasing legalization came concomitant decreases in aspirations and increases in coerciveness.

The courts are willing to return us to this process of legalization of our aspirations because we, as a profession, despair of our ability to reform ourselves through the renewal of our community and of the good ethics of our craft that is so obviously needed. As a profession (and as a people) we simply do not have the patience nor the faith required for the kind of reform that is truly needed. The courts' response to our situation then, however necessary it might be, is out of a moral of despair. Only those who believe that by force of law we can make people better and those who believe that there are no other alternatives should find much solace in it.
## Legal Ethics

### Formal Advisory Opinions

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<td>Representation of criminal defendants by county attorneys.</td>
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<tr>
<td>86-R4</td>
<td>86-1</td>
<td>Ethical propriety of lawyer serving simultaneously as state legislator and part-time solicitor.</td>
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</tr>
<tr>
<td>86-R5</td>
<td></td>
<td>&quot;Request for reconsideration as Advisory Opinion No. 40.&quot;</td>
<td>Withdrawn.</td>
</tr>
<tr>
<td>86-R6</td>
<td></td>
<td>Ethical propriety of a former superior court judge representing a client that had appeared before judge in a related case.</td>
<td>Request declined.</td>
</tr>
<tr>
<td>86-R7</td>
<td>86-4</td>
<td>Ethical propriety of the plaintiff's attorney in a personal injury case writing a letter to the insured defendant which may contain legal advice.</td>
<td></td>
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<tr>
<td>86-R8</td>
<td></td>
<td>Closing real estate transactions on sight drafts.</td>
<td>Tabled.</td>
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<tr>
<td>86-R9</td>
<td>86-5</td>
<td>Closing of real estate transactions by non-lawyers.</td>
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<tr>
<td>86-R10</td>
<td>86-7</td>
<td>Fee arrangements on domestic cases.</td>
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<tr>
<td>86-R11</td>
<td></td>
<td>Contingent fees in no-fault cases.</td>
<td>Request declined.</td>
</tr>
<tr>
<td>86-R12</td>
<td>91-2</td>
<td>Advance fee payments</td>
<td>Original no. 86-6.</td>
</tr>
<tr>
<td>86-R13</td>
<td>91-1</td>
<td>Drafter of will serving as executor.</td>
<td>Original no. 87-2.</td>
</tr>
<tr>
<td>86-R14</td>
<td></td>
<td>Ethical propriety of conduct of a district attorney in communicating with prosecution and defense witnesses.</td>
<td>Request declined.</td>
</tr>
<tr>
<td>86-R15</td>
<td></td>
<td>Ethical duty of a lawyer to inquire as to the source of fees.</td>
<td>Request declined.</td>
</tr>
<tr>
<td>86-R16</td>
<td></td>
<td>Ethical considerations applicable to a prosecutor who formerly served as a public defender.</td>
<td>Request declined.</td>
</tr>
<tr>
<td>86-R17</td>
<td></td>
<td>Ethical propriety of service simultaneously as a public defender and a city court judge.</td>
<td>Request declined.</td>
</tr>
<tr>
<td>87-R1</td>
<td>88-3</td>
<td>Ethical propriety of an attorney sending the written notice required in O.C.G.A. § 51-12-14, to an unrepresented opposing party.</td>
<td></td>
</tr>
<tr>
<td>87-R2</td>
<td>87-6</td>
<td>Ethical propriety of a lawyer interviewing the officers and employees of an organization when that organization is the opposing party in litigation without the consent of the organization.</td>
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<tr>
<td>87-R3</td>
<td>88-3</td>
<td>Ethical propriety of an attorney sending the written notice required in O.C.G.A. § 51.12-14. See also 87-R1.</td>
<td></td>
</tr>
<tr>
<td>87-R4</td>
<td></td>
<td>Conflict of Interest problems in child support recovery actions. Request declined.</td>
<td></td>
</tr>
<tr>
<td>87-R5</td>
<td></td>
<td>Ethical propriety of attorney communicating with expert witnesses for opposing parties without knowledge or consent of the opposing counsel. Request declined.</td>
<td></td>
</tr>
<tr>
<td>87-R6</td>
<td>93-4</td>
<td>Ethical obligation of criminal defense lawyers to provide indigent clients with copies of transcripts needed to pursue collateral post-conviction remedies. Request declined.</td>
<td></td>
</tr>
<tr>
<td>87-R7</td>
<td></td>
<td>Ethical propriety of an attorney representing a defendant in a domestic relations action when that attorney has previously consulted with plaintiff in that action. Request declined.</td>
<td></td>
</tr>
<tr>
<td>87-R8</td>
<td></td>
<td>Ethical propriety of a criminal defense lawyer acting as a special prosecutor in isolated cases. Request declined.</td>
<td></td>
</tr>
<tr>
<td>87-R9</td>
<td></td>
<td>Guidelines for attorney utilizing disbarred attorney as paralegal. Request declined.</td>
<td></td>
</tr>
<tr>
<td>87-R10</td>
<td></td>
<td>Request declined.</td>
<td></td>
</tr>
<tr>
<td>87-R11</td>
<td>89-2</td>
<td>Attorney/Councilor of city representing private clients before city recorder's court. Request declined.</td>
<td></td>
</tr>
<tr>
<td>87-R12</td>
<td></td>
<td>Unauthorized practice of law, an attorney's obligation to disclose illegal acts of his clients and whether communications between unlicensed attorney and his client would be obtainable through discovery. Request declined.</td>
<td></td>
</tr>
<tr>
<td>87-R13</td>
<td></td>
<td>Incorporation services by a CPA. Request declined.</td>
<td></td>
</tr>
<tr>
<td>88-R1</td>
<td></td>
<td>Ethical duty to report judicial misconduct. Request declined.</td>
<td></td>
</tr>
<tr>
<td>88-R2</td>
<td></td>
<td>Ethical propriety of corporation collecting attorney's fees for legal work of corporation's in-house attorneys. Withdrawn</td>
<td></td>
</tr>
<tr>
<td>88-R3</td>
<td></td>
<td>Ethical issues concerning use of temporary lawyers. Being redrafted by the Board—combined with 89-R2.</td>
<td></td>
</tr>
<tr>
<td>No.</td>
<td>Request/Response</td>
<td></td>
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</tr>
<tr>
<td>88-R4</td>
<td>Whether the collection of debts owed by the US government on behalf of the creditors constitutes the practice of law.</td>
<td>Request declined.</td>
<td></td>
</tr>
<tr>
<td>88-R5</td>
<td>Ethical propriety of partnership between part-time magistrate and part-time solicitor.</td>
<td>Request declined.</td>
<td></td>
</tr>
<tr>
<td>88-R6</td>
<td>Use of in-house counsel by collection agency.</td>
<td>Request declined.</td>
<td></td>
</tr>
<tr>
<td>88-R7</td>
<td>Part-time county attorneys.</td>
<td>Published for comments.</td>
<td></td>
</tr>
<tr>
<td>88-R8</td>
<td>Ethical propriety of part-time law clerk appearing before a present employer judge.</td>
<td>Request declined.</td>
<td></td>
</tr>
<tr>
<td>88-R9</td>
<td>Duty of Lawyer to preserve the funds of a missing client</td>
<td>Request declined.</td>
<td></td>
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<tr>
<td>88-R10</td>
<td>Use of in-house counsel to conduct real estate closing.</td>
<td>Declined by S.Ct.</td>
<td></td>
</tr>
<tr>
<td>88-R11</td>
<td>Ethical considerations applicable to the practice of law by an attorney not licensed to practice law in Georgia in the law department of a Georgia corporation.</td>
<td>Request declined.</td>
<td></td>
</tr>
<tr>
<td>88-R12</td>
<td>Ethical propriety of a lawyer establishing a corporation as a separate entity from his law practice to present seminars to prospective clients.</td>
<td>Request declined.</td>
<td></td>
</tr>
<tr>
<td>88-R13</td>
<td>Ethical propriety of an attorney employed in-house by corporation entering into an agreement by which his employer holds the attorney harmless for personal malpractice committed in the course of his employment.</td>
<td>Request declined.</td>
<td></td>
</tr>
<tr>
<td>89-R1</td>
<td>(1) Ethical propriety of a law firm obtaining a loan to cover advances to clients for litigation expenses; and (2) ethical considerations applicable to payment of interest charged on loan obtained by law firm to cover advances to clients for litigation expenses.</td>
<td>Combined with 88-R3.</td>
<td></td>
</tr>
<tr>
<td>89-R2</td>
<td>Ethical propriety of placement agencies for temporary lawyers.</td>
<td>Combined with 88-R3.</td>
<td></td>
</tr>
</tbody>
</table>
Whether the designation "special counsel" may be used to describe an attorney and/or law firm affiliated with another law firm for the specific purpose of providing consultation and advice to the other firm in specialized legal areas; and (2) whether the ethical rules governing conflict of interest apply as if the firm, the affiliated attorney and the affiliated firm constitute a single firm.

Ethical considerations applicable to the fee agreement between a collection agency and an attorney.

Ethical considerations applicable to a lawyer's offer of specialized assistance or consultation services to other lawyers.

Lawyer as a witness.

Ethical propriety of a lawyer serving simultaneously as county attorney and part-time state court judge for the same county.

Ethical propriety of a lawyer paying his non-lawyer employees a monthly bonus from the gross receipts of his law office.

Ethical propriety of an attorney sharing court awarded attorney's fees with the attorney's client.

Ethical considerations applicable to lawyer paying client's expenses out of settlement over client's objections.

Confidentiality issues.

Ethical propriety of lawyer representing two separate legal entities with conflicting interest without obtaining the informed consent of both entities.

Ethical propriety of disclosing client's names to the Internal Revenue Service.

Ethical propriety of lawyer referral service collecting percentage of fees paid to participating attorneys.

"Modification of Advisory Opinion No. 40."

Request declined.

Request declined.

Request declined.

Request declined.

Referred to Jud. Qualifications Commission.

Awaiting order at the S.Ct.

Request declined.

Deferred until pending litigation involving issues is resolved.

Request declined.

Awaiting order at the S.Ct.

Request declined.
<table>
<thead>
<tr>
<th>Case Number</th>
<th>Date</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>90-R3</td>
<td>92-2</td>
<td>Ethical propriety of a lawyer advertising for legal business with the intention of referring a majority of that business out to other lawyers without disclosing that intent in the advertisement. Request declined.</td>
</tr>
<tr>
<td>90-R4</td>
<td></td>
<td>Ethical issues relating to a lawyer's participation in a for-profit prepaid legal services plan. Request declined.</td>
</tr>
<tr>
<td>90-R5</td>
<td></td>
<td>Whether conduct by an attorney in violation of DR7-102 is subject to discipline under provisions of Standard 45(c). Request declined.</td>
</tr>
<tr>
<td>90-R6</td>
<td>93-2</td>
<td>Ethical considerations of an attorney representing an insurance company on a subrogation claim and simultaneously representing the insured. Request declined.</td>
</tr>
<tr>
<td>90-R7</td>
<td></td>
<td>Disclosure of clients confidences and secrets. Request declined.</td>
</tr>
<tr>
<td>90-R8</td>
<td></td>
<td>Ethical propriety of public defender handling more cases than he/she can confidently handle. Request declined.</td>
</tr>
<tr>
<td>90-R9</td>
<td></td>
<td>Ethical propriety of city or county attorney representing criminal defendant in proceedings to contest civil condemnations when the proceeds are forfeited to the city or county. Request declined</td>
</tr>
<tr>
<td>91-R1</td>
<td></td>
<td>Ethical propriety of a county attorney also serving as indigent defense counsel for all indigent criminal defendants in county. Request declined.</td>
</tr>
<tr>
<td>91-R2</td>
<td>93-3</td>
<td>Ethical propriety of a prosecutor conditioning a plea agreement in a criminal case on the waiver of defense counsel's fee. Request declined.</td>
</tr>
<tr>
<td>91-R3</td>
<td></td>
<td>May a lawyer properly contact and interview former employees of an organization represented by counsel to obtain information relevant to litigation against the organization?        Awaiting order at S.Ct.</td>
</tr>
<tr>
<td>91-R4</td>
<td></td>
<td>Ethical propriety of a lawyer promoting his or her services by direct mail through coupon mailouts that are obviously advertisements. Request declined.</td>
</tr>
<tr>
<td>91-R5</td>
<td></td>
<td>Ethical propriety of an attorney recording or causing to be recorded a conversation to which the attorney or the attorney's agent is a party without the knowledge and consent of the party to the conversation. Request declined.</td>
</tr>
<tr>
<td>Request</td>
<td>Description</td>
<td>Status</td>
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<tr>
<td>91-R6</td>
<td>Ethical propriety of prosecutors participating in contract between Georgia</td>
<td>Request declined.</td>
</tr>
<tr>
<td></td>
<td>Department of Human Resources and prosecuting attorney's council for</td>
<td></td>
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<td></td>
<td>collection in criminal prosecution of cases involving suspected welfare</td>
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<td></td>
<td>fraud.</td>
<td></td>
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<tr>
<td>91-R7</td>
<td>Ethical propriety of a lawyer posting bail for his clients.</td>
<td>Request declined.</td>
</tr>
<tr>
<td>91-R8</td>
<td>Propriety of an attorney permitting the use of his letterhead stationary by</td>
<td>Advisory No. 5.</td>
</tr>
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<td></td>
<td>a retainer client who is writing as a creditor or as a collection agency</td>
<td>See State Bar Handbook</td>
</tr>
<tr>
<td></td>
<td>seeking to collect an account or debt from the recipient.</td>
<td></td>
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<tr>
<td>91-R9</td>
<td>A lawyer communicating to other lawyers his or her availability to act as</td>
<td>Advisory No. 11.</td>
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<td></td>
<td>a consultant in particular areas of law.</td>
<td>See State Bar Handbook</td>
</tr>
<tr>
<td>91-R10</td>
<td>Use by lawyers of bank credit cards in effecting collection of fees.</td>
<td>Advisory Nos. 13 and 24.</td>
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<td></td>
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<td>See State Bar Handbook</td>
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<tr>
<td>91-R11</td>
<td>Ethical considerations applicable to communications between a former</td>
<td>Being re-written.</td>
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<td>partner or associate of a law firm with clients of the firm.</td>
<td>Advisory No. 32.</td>
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<td></td>
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<td>See State Bar Handbook</td>
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<td>91-R12</td>
<td>Status of non-admitted lawyers.</td>
<td>Request declined.</td>
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<tr>
<td>91-R13</td>
<td>Ethical propriety of real estate closing attorney's disclosure of identity</td>
<td>Request declined.</td>
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<td></td>
<td>of lender client.</td>
<td></td>
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<tr>
<td>91-R14</td>
<td>Duty of appointed counsel to seek bond for indigent defendant.</td>
<td>Request declined.</td>
</tr>
<tr>
<td>92-R1</td>
<td>Ethical considerations applicable to lawyers in a space sharing arrangement.</td>
<td>Request declined.</td>
</tr>
<tr>
<td>92-R2</td>
<td>Is an Assistant General Counsel of the State Bar liable under O.C.G.A. § 51-7-</td>
<td>Request declined.</td>
</tr>
<tr>
<td></td>
<td>81 or any portion of O.C.G.A. § 51-7-80 for abusive litigation.</td>
<td></td>
</tr>
<tr>
<td>93-R1</td>
<td>Ethical propriety of an attorney representing a municipality and its police</td>
<td>Request declined.</td>
</tr>
<tr>
<td></td>
<td>department while simultaneously representing a law enforcement officer</td>
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<td></td>
<td>employed by the municipality under certain circumstances.</td>
<td></td>
</tr>
<tr>
<td>93-R2</td>
<td>Ethical propriety of lawyer participating in lawcard fee collection program.</td>
<td>Published for comments.</td>
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<tr>
<td>93-R3A</td>
<td>Ethical propriety of a court appointed attorney changing his/her status from appointed to retained counsel upon notification that indigent client is capable and willing to pay appointed counsel.</td>
<td>Published for comments.</td>
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<tr>
<td>93-R3B</td>
<td>Whether a court-appointed attorney should notify the appointing authority if he/she determines that the client is presently and/or was never indigent.</td>
<td>Pending with the Board.</td>
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</tbody>
</table>