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Legal Ethics

by Roy M. Sobelson *

I. INTRODUCTION

The survey period¹ was relatively quiet in terms of judicial and legislative developments in the Legal Ethics area. Nevertheless, it may prove to be an important transition period in the history of the State Bar of Georgia, insofar as lawyer discipline and consumer assistance is concerned. On June 1, 1995, the State Bar of Georgia began an experimental Consumer Assistance Program, sometimes known as "Central Intake." The reason for the program was simple. History has shown that the vast majority of complaints about lawyers do not raise disciplinary² issues at all.³ In the past, such nondisciplinary complaints were summarily dismissed, leading to substantial public disillusionment and dissatisfaction with the lawyer discipline process.⁴

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1. June 1, 1995 through May 31, 1996.

2. "Disciplinary" refers to complaints alleging Standards of Conduct [hereinafter Standards] violations, for which a lawyer may be disciplined by the State Bar of Georgia Disciplinary Board or the Georgia Supreme Court. See STATE BAR OF GEORGIA HANDBOOK, [hereinafter HANDBOOK], Part III: Canons of Ethics, at 40-H (Rule 4-101, 4-102). "Nondisciplinary" refers to complaints involving matters which do not violate any Standards. These may even include matters that are prohibited by the Ethical Considerations [hereinafter ECs] or Directory Rules [hereinafter DRs], but not the Standards.

3. See AMERICAN BAR ASSOCIATION LAWYER REGULATION FOR A NEW CENTURY 11 (1992) [hereinafter MCKAY COMMISSION REPORT]; COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT 4 (1996) [hereinafter GA-CEDE REPORT] (final report).

4. MCKAY COMMISSION REPORT, *supra* note 3, at 11; GA-CEDE REPORT, *supra* note 3, at 4.

The purpose of the Consumer Assistance Program is to resolve as many nondisciplinary complaints as possible through conciliation,⁵ negotiation, and education. Those matters that cannot be readily resolved may be referred to other ancillary services or agencies, such as Fee Arbitration,⁶ the Lawyer Assistance Program,⁷ the Clients' Security Fund,⁸ lawyer referral services, and the like.⁹

Thus far, the evidence indicates that the program is having some positive effects. From June 1, 1995 to May 31, 1996, the Consumer Assistance Program handled nearly four thousand telephone calls, a substantial portion of which raised nondisciplinary complaints.¹⁰ While a substantial number of the callers were eventually referred to the Office of the General Counsel to file disciplinary complaints, over sixty percent of the cases were actively handled by Central Intake in one way or another.¹¹ Because these cases comprise matters that were once summarily dismissed for failure to allege a disciplinable offense, complainants are getting much better service than ever before. What is

5. Conciliation is a mild form of intervention in which Consumer Assistance Program personnel attempt in a very informal fashion to facilitate communication between the disputants to encourage them to resolve their differences. Because of their thorough knowledge of the practice of law, the disciplinary process, and services available from the State Bar and other agencies, conciliators perform a substantial educational role as well.

6. HANDBOOK, *supra* note 2, at 100-H.

7. *Id.* at 103-H (Impairment Program).

8. *Id.* at 115-H.

9. Whether the Consumer Assistance Program should have the authority to "resolve" minor disciplinary complaints is a controversial issue. On June 8, 1996, the Board of Governors of the State Bar of Georgia adopted a rule proposal that would give Central Intake screeners this authority. The proposal is currently pending before the supreme court. See GA-CEDE REPORT, *supra* note 3, at 24.

10. The majority of the complaints arose in the domestic relations (23%), personal injury (18%), and criminal (15%) areas of practice. The most frequent complaints or inquiries were that the lawyer had: (i) taken no action on the client's case (24%); (ii) refused to return phone calls (18%); (iii) refused to return the client's file (8%); (iv) refused to return an unearned fee (7%); or, (v) refused to return a client's funds (6%). Only about 5% of the calls alleged serious punishable misconduct. Interview with and memorandum from Cynthia Hinrichs, Senior Central Intake Counsel, State Bar of Georgia (June 21, 1996) [hereinafter Hinrichs]; see also GA-CEDE REPORT, *supra* note 3, at 20. (Percentages reported by the Consumer Assistance Program may not equal 100% since some complaints may contain more than one allegation of wrongdoing).

11. Cases were typically handled in the following ways: (i) referral to the Office of General Counsel (38%); (ii) no routing necessary (26%); (iii) referral to bar association sponsored referral services (15%); (iv) referral to Fee Arbitration (11%); (v) referral to nonbar organizations (6%); (vi) referral to the Judicial Qualifications Commission (2%); and (vii) referral to the Law Practice Management Program. Hinrichs, *supra* note 10. (Percentages reported by the Consumer Assistance Program may not equal 100% since some complaints may generate more than one response).

especially encouraging is the fact that twenty-six percent of the complaints required no routing at all, suggesting that the matters were "resolved" quickly and informally¹² by Consumer Assistance Program personnel.

This program may also have salutary effects on the workload and efficiency of the disciplinary system and disciplinary counsel. Both the requests for grievance forms and the number of grievances actually filed have decreased substantially since the implementation of the program.¹³ Whether these trends will continue or improve remains to be seen.¹⁴

II. FORMAL ADVISORY OPINIONS

During the survey period, the Georgia Supreme Court issued three new Formal Advisory Opinions ("FAOs").¹⁵ All of them seem rather straightforward and should surprise no one paying close attention to our Code of Professional Responsibility¹⁶ and Standards.

FAO 95-1¹⁷ presented the question of whether a lawyer could participate in a fee collection program which purchases client fee bills and collects the fees from the clients. The methods of processing and the percentage fee of the collection firm depend on the client's credit-worthiness. Two specific features of the program stand out: (i) the client must sign a warranty of the services provided; and (ii) a participating lawyer must share with the program information about each client's

12. Of course, "resolution" is often an elusive concept. In this context, it means that the matter was closed after the parties and the screener deemed it appropriate to do so.

13. In the June 1, 1994 to May 31, 1995 period, the State Bar received 6805 requests for grievance forms, 2335 of which resulted in written complaints. Between June 1, 1995 and May 31, 1996, the requests were down to 5127, 2180 of which resulted in written complaints. STATE BAR OF GEORGIA, BOARD OF GOVERNORS REPORT OF THE GENERAL COUNSEL'S OFFICE 4 (June 8, 1996) [hereinafter GENERAL COUNSEL'S REPORT].

14. The Supreme Court of Georgia created the Commission on Evaluation of Disciplinary Enforcement on February 20, 1995, and set its expiration at August 31, 1996. Its primary mission was to study the system of lawyer regulation in Georgia and determine whether improvements or changes were necessary. The Commission's final report made several recommendations regarding the Consumer Assistance Program. See GA-CEDE REPORT, *supra* note 3.

15. Opinions are drafted by the Formal Advisory Opinion Board, published for public comment, and finally issued (or not) by the supreme court. HANDBOOK, *supra* note 2, at 57-H (Rule 4-403).

16. Georgia's version of the Code of Professional Responsibility, HANDBOOK, *supra* note 2, at 24-H, is substantially based upon the AMERICAN BAR ASSOCIATION MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983) [hereinafter MODEL CODE], since supplanted by the MODEL RULES OF PROFESSIONAL CONDUCT (1994) [hereinafter MODEL RULES].

17. HANDBOOK, *supra* note 2, at 97-H.

case, as well as information about the client's credit-worthiness and other personal matters. Obviously, the entire arrangement threatens a lawyer's obligations of confidentiality and loyalty, and the court strongly disapproved of it on those grounds.¹⁸

Concentrating primarily on the lawyer's responsibilities as officer of the court and fiduciary, the supreme court stated:

The basic vice of the program is that it . . . requir[es] the lawyer to dilute his or her role as fiduciary . . . [because it] requires the client to sign a warranty as to the services rendered, which purports to contract away the client's legal right to complain or to dismiss the lawyer.¹⁹

Although it placed less emphasis on concerns about confidentiality, the court acknowledged that participation in the program "entails the possible violation of at least six standards [of conduct]," including Standard 28.²⁰

FAO's 96-1 and 96-2 share three similarities. First, they both acknowledge that the practice in question has been brought to the attention of the State Disciplinary Board.²¹ Presumably, the Investigative Panel has seen a number of complaints raising these issues. Second, the practices evaluated in both FAO's have the same purpose in mind—to protect lawyers from clients' claims of wrongdoing, whether through malpractice suits or Bar complaints. Finally, like FAO 95-1, they indicate at most that the questioned behavior *may* violate various Standards.

FAO 96-1²² discusses whether an attorney may ethically require a client who desires to discharge the lawyer to release the lawyer from all claims, including disciplinary complaints, in order to obtain his files and a waiver of any liens the lawyer may wish to assert. The opinion disapproves of this practice by relying upon two principles: (i) a lawyer should represent a client competently; and (ii) a lawyer should exercise independent professional judgment on behalf of a client.²³ As to competence, the court relies upon EC 6-6²⁴ and DR 6-102,²⁵ both of

18. *See id.*

19. *Id.*

20. *Id.* at 98-H (emphasis added). HANDBOOK, *supra* note 2, at 43-H (Standard 28) prohibits a lawyer from revealing or using to the client's disadvantage a confidence or secret, in the absence of some exception, none of which are applicable here.

21. The Disciplinary Board, which consists of the Investigative and Review Panels, has the power to investigate, discipline, and punish members of the State Bar. HANDBOOK, *supra* note 2, at 48-H (Rule 4-201).

22. January 25, 1996.

23. Order of Supreme Court of Georgia, January 25, 1996.

24. "A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice." HANDBOOK, *supra* note 2, at 33-H.

which clearly prohibit such a practice; but of course they are aspirational only, not enforceable.²⁶ As to independence of judgment, the court cites EC 5-1,²⁷ which does not directly address the issue, but at least makes it clear that a lawyer should not let his own interests interfere with or compromise the interests of his client.

The opinion then goes on to state that the practice *potentially* violates both Standard 22(b)²⁸ and FAO 87-5,²⁹ in which the court addressed the conflict between an attorney's duty upon discharge to avoid any foreseeable prejudice to his client and the right to assert a lien on a client's papers.³⁰ There, the court concluded that "an attorney's ethical obligation not to cause prejudice to his or her client is paramount over rights under the lien statute."³¹ In this instance, it is hard to understand why forcing a client to release all claims to get one's file back is only a *potential* violation of the Standards and FAO. It would seem that releasing all rights to sue one's lawyer for malpractice, demand fee arbitration, or complain to the State Bar would be a fortiori prejudicial, and such a forced release should be per se unethical.

FAO 96-2³² evaluates a very similar practice in which lawyers included in all correspondence with clients a form notice that the client had a specified period of time to notify the lawyer of any dissatisfaction with the lawyer's services or waive any malpractice claim. Emphasizing the same principles as FAO 96-1, the court again found that the practice

25. "A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice." *Id.*

26. See generally *supra* note 2.

27. "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client." HANDBOOK, *supra* note 2, at 30-H (EC 5-1).

28. "[A] lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including . . . delivering to the client all papers and property to which the client is entitled . . ." HANDBOOK, *supra* note 2, at 42-H.

29. HANDBOOK, *supra* note 2, at 84-H.

30. See O.C.G.A. § 15-19-14(a) (1994).

31. HANDBOOK, *supra* note 2, at 84-H.

32. March 18, 1996.

may violate Standards 4³³ or 30,³⁴ although the opinion offers no further explanation.

Both of these practices clearly violate the spirit, if not the letter, of the rules. However, neither of them, according to the court, clearly violates any specific Standard. An interesting question is raised by the fact that the Disciplinary Board, as investigator and sanctioning body for errant attorneys, brought these questions before the Formal Advisory Opinion Board: Just what force do these opinions have? To state it another way, if a lawyer's actions violate the pronouncements in a FAO but not any Standards, is that lawyer subject to discipline? The answer appears to be no.³⁵ So now what? Lawyers are now on notice that these practices are contrary to the ECs, DRs, existing and new FAOs, and that they *potentially* violate the Standards; yet lawyers can apparently continue to engage in them with impunity. What is wrong with this picture?

With respect to Opinion Request No. 93-R3B, the court issued an order which "neither adopts nor rejects" the opinion proposed by the Formal Advisory Opinion Board.³⁶ Since the court has the authority to adopt a proposed opinion as submitted, amend it, or hold it indefinitely, their response is tantamount to rejecting the opinion. That is too bad, because the issue raised is both interesting and important. It seeks to determine the appropriate course for counsel appointed to represent an indigent criminal defendant and who then discovers that the client is no longer, or never was, indigent.

The opinion first correctly concluded that while the information regarding indigent status may or may not be a "confidence,"³⁷ it is certainly a "secret."³⁸ In discussing the exceptions to secrecy, the

33. "A lawyer shall not engage in professional conduct involving dishonesty, fraud, deceit, or wilful misrepresentation." HANDBOOK, *supra* note 2, at 41-H (Standard 4).

34. "Except with the written consent or written notice to his client after full disclosure a lawyer shall not accept or continue employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests." HANDBOOK, *supra* note 2, at 43-H (Standard 30).

35. See HANDBOOK, *supra* note 2, at 57-H (Rule 4-403), which provides that the Formal Advisory Opinion Board may draft opinions concerning the interpretation of Canons of Ethics or "any of the grounds for disciplinary action." According to the Rules, the opinions are supposed to address "prospective conduct," but that rule may be honored in the breach more often than not. *Id.* HANDBOOK, *supra* note 2, at 40-H (Rule 4-101) provides that the State Bar is given the authority to enforce the Standards and punish for violations thereof, but no similar authority is given to the Bar or any other entity for violations of the FAOs.

36. Order of Supreme Court of Georgia, March 18, 1996.

37. A "confidence" is a communication covered by the attorney-client privilege. See HANDBOOK, *supra* note 2, at 43-H (Standard 28(c)).

38. A "secret" is "other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to a client." HANDBOOK, *supra* note 2, at 43-H (Standard

opinion noted that treating the court's standing order to attorneys to determine indigence as an exception³⁹ could eviscerate confidentiality completely,⁴⁰ and thus the too facile reliance upon that exception is not acceptable. Further addressing that same point, the opinion concluded that deputizing the lawyer to determine indigence creates an irreconcilable conflict between the lawyer's duty of confidentiality and the lawyer's responsibilities to the court.⁴¹

The opinion then examined the exception that allows an attorney to reveal "the intention of his client to commit a crime."⁴²

Assuming *arguendo* that facts that come to the attorney's attention establish the intention of the client to commit a crime [such as theft of services], Standard 28 merely permits the disclosure of the secret by the attorney. It does not require disclosure. The attorney must balance the harm caused by nondisclosure against the attorney's professional, fiduciary responsibility to the client [T]he better course . . . would be to comply with the aspiration of Canon 4 and preserve the secret of the client.⁴³

The opinion also took note of the fact that appointments usually result in lower fees than private hires, meaning that disclosure could work to the advantage of the lawyer and the disadvantage of the client, thus making disclosure inappropriate.⁴⁴ In the end, the opinion advised that the lawyer should:

advise the client of the wrongfulness of that conduct, and should advise the client to be candid with the court. Should the client decline to do so, however, the attorney must balance the importance to the criminal justice system of providing defendants with zealous advocates in whom

28(c)). Information concerning one's income and consequent eligibility for appointed counsel would fall into this category.

39. "A lawyer may reveal . . . (2) confidences or secrets when permitted under disciplinary rules or required by law or court order." HANDBOOK, *supra* note 2, at 43-H (Standard 28(b)).

40. "If an attorney can be directed to report to the court as to whether a client has been candid in claiming indigence, what would prevent an attorney from being required to report to the court as to whether a client has been candid in pleading not guilty on the basis of an alibi, or a claim of false identification?" Order of Supreme Court of Georgia, March 18, 1996.

41. The discussion of this dilemma is often prefaced by a reminder that an attorney is an "officer of the court," but the phrase alone does not help one determine the appropriate balance between one's duties to a client and those owed to the court.

42. HANDBOOK, *supra* note 2, at 43-H (Standard 28(c)).

43. *Id.*

44. *Id.*

they can confide against the harm of not disclosing the fraud
[T]he attorney, however, should move to withdraw.⁴⁵

Unlike the first part of the opinion, which is clearly based on Standard 28, the advice to encourage the client to come clean, and if he refuses, to withdraw, is not given a specific pedigree. Nevertheless, the opinion clearly draws on DR 7-102(B)(1),⁴⁶ which deals with a lawyer's responsibilities upon concluding that a client has perpetrated a fraud upon the court. Three things are noteworthy about this source. First, it is not embodied in a Standard, and thus, is aspirational only. The supreme court has never addressed the question of how a lawyer should deal with such behavior, and has never directly addressed the force and effect of this DR in the absence of a corresponding Standard. Second, it is the conflict between this DR and the mandates of confidentiality which have made it so controversial and led the American Bar Association to substantially amend the official version several years ago, effectively vitiating the lawyer's responsibility to reveal the client's fraud.⁴⁷ Finally, the Georgia rule concludes that a lawyer should reveal the secret the client refuses to reveal, but says nothing about withdrawing.⁴⁸ Indeed, it is this very admonition to breach confidentiality that led many ethics opinion boards, courts, and commentators to urge the DR's repeal or amendment.⁴⁹

Whether or not one agrees with the conclusion, the Board's proposed opinion is in the spirit of what an advisory opinion should be. It addresses prospective conduct of lawyers who may be put in this position, considers the possible alternatives, points out some of the advantages and disadvantages, recognizes the differing interests involved, and recommends what it views as the better course of action.

45. *Id.*

46. "A lawyer who receives information clearly establishing that: . . . his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal . . ." HANDBOOK, *supra* note 2, at 36-H.

47. The official version of the MODEL CODE was amended in 1974, so as to provide that "if his client refuses [to rectify the fraud] . . . [the lawyer] shall reveal the fraud to the affected person or tribunal, *except when the information is protected as a privileged communication.*" (emphasis added). See C. WOLFRAM, MODERN LEGAL ETHICS § 12.5.3 at 658 (1986).

48. *But see* HANDBOOK, *supra* note 2, at 28-H (DR 2-110(B)(2)), which provides that a lawyer shall withdraw if "he knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule." Since Georgia has no "Disciplinary Rules," it is not clear whether this is a reference to the DRs (including 7-102(B)(1)) or the Standards, which do not contain provisions relating to revealing fraud or mandatory withdrawal.

49. *See supra* note 47.

However, it leaves the final decision to the lawyer. The advantage of this approach is that it gives lawyers the leeway needed to make a decision that is appropriate for the circumstances, perhaps even providing the lawyer with ammunition to fend off pressure from a presiding judge to reveal information the lawyer feels uncomfortable about revealing. It also provides the lawyer with an absolute defense against any potential Bar prosecutions.⁵⁰

III. RECENT CASE DEVELOPMENTS

A. Discipline

In the survey period, the Bar received over 5000 requests for grievance forms, which generated about 2100 formal written complaints.⁵¹ Of those, 1517 were dismissed for failure to state facts sufficient to invoke the jurisdiction of the State Bar of Georgia. Three-hundred eighty grievances were referred to Investigative Panel members for investigation. One-hundred eighty-five cases were dismissed (63 with letters of instruction), 74 cases were placed on inactive status for one reason or another, and 211 met the probable cause test and were sent to General Counsel's office for further action. Forty-two times the Investigative Panel issued confidential discipline,⁵² 16 times in the form of an Investigative Panel reprimand and 26 times as Letters of Formal Admonition. One-hundred six cases were referred to Fee Arbitration. As for public discipline, 22 lawyers were disbarred, 27 were suspended, 6 received public reprimands, and 7 received Review Panel Reprimands.⁵³

Of the public discipline cases, two are of particular interest. The first is *In re Kennedy*,⁵⁴ in which Stephen Kennedy was charged with employing runners to procure personal injury clients.⁵⁵ When the State Bar accused Kennedy of violating Standards 3,⁵⁶ 13(b),⁵⁷ and 16,⁵⁸ he

50. HANDBOOK, *supra* note 2, at 55-H (Rule 4-223).

51. *See supra* note 13.

52. *See* HANDBOOK, *supra* note 2, at 50-H (Rules 4-205 and 4-206). While confidential, these impositions of discipline are considered in applying the "three strike rule." HANDBOOK, *supra* note 2, at 46-H (Rule 4-103).

53. GENERAL COUNSEL'S REPORT, *supra* note 13, at 4-10.

54. 266 Ga. 249, 466 S.E.2d 1 (1996).

55. The events, set up by the State Commissioner of Insurance in conjunction with an Atlanta television station, were captured on videotape. *Id.* at 250, 466 S.E.2d at 1.

56. "A lawyer shall not engage in illegal professional conduct involving moral turpitude." HANDBOOK, *supra* note 2, at 41-H.

57. "A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client . . ." HANDBOOK, *supra*

claimed he had been entrapped.⁵⁹ The Special Master granted the Bar's motion for summary judgment, but the Review Panel rejected the Special Master's findings because the "only credible evidence against Kennedy was 'the fruit of his entrapment.'"⁶⁰

The supreme court disagreed, holding that the defense of entrapment "*generally* is not available in disciplinary proceedings."⁶¹ Because the court does not categorically reject the use of the entrapment defense, it is important to examine its reasons for finding the defense *generally* inapplicable. First, the court said, entrapment is a criminal defense, and disciplinary proceedings are civil in nature.⁶² This is only partly true, of course. In support of this part of its reasoning, the court cites to the rule which provides that "the procedures and rules of evidence applicable to civil cases . . . shall apply . . ."⁶³ in disciplinary proceedings. But the court omits the introductory language to that section, which says: "In all proceedings under this chapter occurring *after a finding of probable cause . . .*"⁶⁴ The probable cause determination, clearly a child of the criminal law, is not the only way in which disciplinary proceedings resemble criminal cases—the standard of proof is "beyond a reasonable doubt,"⁶⁵ respondents are described in the rules as "offenders,"⁶⁶ and the sanctions are known as "punishments."⁶⁷ Indeed, some courts classify attorney discipline proceedings as quasi-criminal in nature.⁶⁸

More importantly, the court found the very nature of the entrapment defense inconsistent with the disciplinary process, stating: "Attorneys are required to know and understand the ethical canons and directory rules . . . and to govern themselves accordingly. This affirmative obligation is entirely inconsistent with the implementation of criminal

note 2, at 42-H.

58. "A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct by any person or organization prohibited . . ." HANDBOOK, *supra* note 2, at 42-H.

59. Apparently, some Bar Associations are beginning to set up "sting" operations, especially aimed at lawyers who improperly solicit clients after major disasters. *See, e.g., Texas Sends Message to Overzealous Lawyers*, N.Y. TIMES, September 15, 1996, at 20.

60. 266 Ga. at 251, 466 S.E.2d at 2.

61. *Id.* at 250, 466 S.E.2d at 2 (emphasis added).

62. HANDBOOK, *supra* note 2, at 55-H (Rule 4-221(e)(2)).

63. *Id.*

64. *Id.* (emphasis added).

65. *Id.* at 55-H (Rule 4-221(e)(2)).

66. *Id.* at 40-H (Rule 4-102(a)).

67. *Id.*

68. *See, e.g., Attorney U v. Mississippi Bar*, No. 92-BA-01201-SCT, 1996 WL 338684 (Miss. 1996); *In re Abrams*, 662 A.2d 867 (D.C. 1995), *vacated and reh'g en banc granted*, 674 A.2d 499 (D.C. 1996).

intent in the mind of an innocent person, as contemplated by the essential elements of an entrapment defense.⁶⁹ In support of its position, the court cited and paraphrased *In re Porcelli*,⁷⁰ an Illinois case in which a lawyer claimed entrapment in a disciplinary proceeding for bribing a police officer. There, the Illinois Supreme Court rejected Porcelli's claim of entrapment because "the respondent's ready negotiations evidence a willingness to join in the illegal conduct which is inconsistent with the defense of entrapment."⁷¹ This notion, that one's own independent readiness and willingness to commit a crime is inconsistent with the defense of entrapment, is the crux of Georgia's statutory entrapment defense. That defense provides:

Entrapment exists where the idea and intention of the commission of the crime originated with a government officer or employee, or with an agent of either, and he, by undue persuasion, incitement, or deceitful means, induced the accused to commit the act which the accused would not have committed except for the conduct of such officer.⁷²

Thus, the critical question is not whether the defendant was aware that his conduct was wrongful, but whether he would have engaged in the conduct in the absence of the incitement and insistence of the government agent.⁷³ Perhaps the court is creating a presumption that lawyers, who must be aware of the Standards, could not possibly have the requisite independent intention to violate those rules, and anyone charged with a violation must be a miscreant who has strayed from that path by forming such an intention independently. If so, this should have been clearly expressed by the court.⁷⁴ As it is, since the court has said that entrapment is not *generally* available as a defense, it is impossible to know how the court might distinguish between those cases in which it is a permissible defense and those in which it is not.

The case that generated the most controversy, however, was probably *In re Holloway*,⁷⁵ in which McNeill Holloway pled guilty in federal

69. 266 Ga. at 252, 466 S.E.2d at 3.

70. 397 N.E.2d 830 (Ill. 1979).

71. *Id.* at 832.

72. O.C.G.A. § 16-3-25 (1996). The classic Georgia case on entrapment is consistent with the statute. *State v. Royal*, 247 Ga. 309, 275 S.E.2d 646 (1981), requires that the defendant prove the following: (1) the idea and intention to commit the crime came from a state agent; (2) the criminal act was induced by a state agent; and (3) the claimant was not predisposed to commit the crime. *Id.* at 310 n.2, 275 S.E.2d at 648 n.2.

73. See *United States v. Jacobsen*, 503 U.S. 540 (1992).

74. Whether such a presumption would unconstitutionally shift the burden of proof to the defendant is a question left for another day.

75. 266 Ga. 599, 469 S.E.2d 167 (1996).

court to felonious invasion of privacy after luring his secretary to his cabin and surreptitiously videotaping her in the bathroom. The sentencing court ordered that Holloway surrender his license to practice law for a minimum of six months or until the State Bar of Georgia determined that his license should be reinstated.⁷⁶

Under the Bar rules, "[c]onviction of any felony or misdemeanor involving moral turpitude shall be grounds for disbarment."⁷⁷ Invoking the Standard in a per curiam opinion, the supreme court suspended Holloway for three years. Its decision was based largely upon six factors: (i) he had a good record and reputation in the community; (ii) he had no previous convictions or disciplinary complaints; (iii) the crime did not involve illegal acts as an attorney, but as a private citizen; (iv) he suffered from psychiatric disorders; (v) the likelihood was "slight" that he would pose a danger to the public; and, perhaps most importantly, (vi) disbarment would be inconsistent with earlier supreme court decisions in which respondents were suspended for misdemeanor sex offenses.⁷⁸

Justice Hunstein wrote a blistering dissent,⁷⁹ the likes of which we have not often seen in the supreme court. She pointed out that disbarment almost always follows from felony convictions, the notable few⁸⁰ exceptions being those cases related to crimes involving drug addiction or tax evasion. She went on to say:

To these categories the Bar can now add a third: lawyers who victimize women . . . It does not matter whether the lawyer's victim is client or employee, it does not matter whether the lawyer preys on one woman or five, whether there is physical contact or premeditated plotting, it does not even matter whether the lawyer's crime is a misdemeanor or a felony. Sex crimes against women are all on one level. Like cocaine addicts and tax evaders, lawyers who commit sex crimes against women will be accorded special treatment by this Court.⁸¹

Justice Hunstein does have a point, and her dissent raises three difficult questions. The first is whether convictions for sexual misconduct are of a different sort than those involving other types of miscon-

76. *Id.* at 599, 469 S.E.2d at 167-68.

77. HANDBOOK, *supra* note 2, at 46-H (Standard 66(a)).

78. 266 Ga. at 600, 469 S.E.2d at 168. See *In re Yarbrough*, 264 Ga. 720, 450 S.E.2d 414 (1994), and *In re Brooks*, 264 Ga. 583, 449 S.E.2d 87 (1994), in both of which the respondents were suspended.

79. 266 Ga. at 603, 469 S.E.2d at 170 (Hunstein, J., dissenting).

80. Justice Hunstein reports that disbarment has been denied in only 14 of 93 felony conviction cases. *Id.*

81. *Id.* at 603-04, 469 S.E.2d at 170.

duct, thus justifying different treatment. After all, one may argue that sexual misconduct does not relate directly to one's fitness to practice law, but the Rules do not speak to any connection between one's conduct and one's fitness to practice.⁸² Justice Hunstein's criticism is especially troublesome, of course, since virtually all sexual misconduct cases involve conduct by men against women.⁸³ Second is the question of whether all felonies are inherently more serious than all misdemeanors.⁸⁴ The criminal law obviously treats them as such, but whether there is a direct relationship between the criminal law's treatment and how the supreme court should treat an offending lawyer is open to question. The third is how Holloway could have been disbarred, when all previous sex offenders were suspended, a point emphasized by Justice Sears.⁸⁵ This last issue underscores the need for the court to articulate a coherent and consistent theory of the reason(s) for lawyer discipline, as well as uniform sanctions—a point the court has emphasized in several recent cases.⁸⁶

B. Lawyer Disqualification

The number of lawyer disqualification issues reaching the appellate courts seems to have slowed over the past couple of years, but there are still a few left. This year's most interesting case was *Carragher v. Harman*.⁸⁷ There, attorney Robert Feagin had represented "Katherine Ross Harman and Paulette Carragher d/b/a The Corner Cupboard" in an action concerning a defective rug. They were represented generally by Harman's husband's firm, and specifically by Feagin on their abusive

82. Cf. Standard 66, *supra* note 77, with Model Rule 8.4(b), which provides that "It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer . . ." MODEL RULES, *supra* note 16.

83. If sexual misconduct is inherently different from most criminal conduct, then the case law would suggest that addiction-related behavior and cheating on taxes are also inherently different from other misconduct. Just what these three categories have in common that distinguish them from most other cases has never been made clear by the court.

84. The supreme court has apparently assumed so up until now. Felonies are, as a matter of law, crimes of moral turpitude, thus justifying disbarment under the Rules. Misdemeanors, on the other hand, may or may not involve moral turpitude, and the individual facts of each case must be examined to determine that.

85. 266 Ga. at 602, 469 S.E.2d at 170 (Sears, J., concurring).

86. The court has occasionally referred approvingly to the AMERICAN BAR ASSOCIATION STANDARDS FOR IMPOSING LAWYER SANCTIONS (1991 ed.). See, e.g., *In re Lyles*, 266 Ga. 668, 469 S.E.2d 670 (1996); *In re Morse*, 266 Ga. 652, 470 S.E.2d 232 (1996); *In re Robinson*, 266 Ga. 636, 469 S.E.2d 190 (1996).

87. 220 Ga. App. 690, 469 S.E.2d 443 (1996).

litigation claim.⁸⁸ Later Harman and Carragher separated, and Feagin represented Harman against Carragher in an action seeking recovery of half the expenses in the rug case. The court of appeals held that Feagin's prior representation in the related lawsuit necessitated his disqualification and reversed the judgment in Harman's favor.⁸⁹

The opinion started by stating that a party seeking disqualification "need only show that the matters embraced within the pending suit are substantially related to the matters or cause of action wherein the attorney previously represented him."⁹⁰ This is the test applied by virtually all courts in deciding whether a lawyer should be disqualified for representing a client in a matter adverse to that of a former client. The court also invoked the so-called *Yerby test*,⁹¹ which disqualifies a lawyer "representing a client against a former client in an action that is of the same general subject matter, and grows out of an event that occurred during the . . . representation"⁹²

Both of these tests apply if, and only if, the adverse party in the second litigation was the lawyer's client in the first case. Since the matters clearly were substantially related and they arose during the attorney's earlier representation, the critical question was whether Carragher was ever Feagin's client. Oddly enough, the court never addressed this point directly.⁹³

As a matter of fact, the opinion started by noting that "the precise nature of the business relationship between Carragher and [Harman] is disputed."⁹⁴ Thus, it is by no means clear whether Feagin initially had only one client (the business) or two separate individual clients (Carragher and Harman). If the business itself was his client, then his representation against an individual owner may not be covered by the

88. The case was eventually settled, and Feagin was listed as a payee on two settlement checks. *Id.* at 690, 469 S.E.2d at 444.

89. *Id.* at 692, 469 S.E.2d at 445.

90. *Id.* at 691, 469 S.E.2d at 444 (quoting *Summerlin v. Johnson*, 176 Ga. App. 336, 337(1), 338, 335 S.E.2d 879 (1985)). The same rule is embodied in the Standards. See HANDBOOK, *supra* note 2, at 46-H (Standard 69).

91. The name comes from *Crawford W. Long Mem. Hosp. v. Yerby*, 258 Ga. 720, 373 S.E.2d 749 (1988).

92. *Id.* at 722, 373 S.E.2d at 751.

93. The court categorically rejects Feagin's claim that he did not believe an attorney-client relationship existed, but there is no explanation for that rejection. 220 Ga. App. at 691, 469 S.E.2d at 445.

94. *Id.* at 690, 469 S.E.2d at 444.

rule.⁹⁵ If he had two individual clients, however, representation against either of them would be prohibited.⁹⁶

How could the court have determined the precise nature of Feagin's relationship with either the two individuals or the entity itself? It is not an easy task, but there is some guidance on the issue. When the American Bar Association was asked whether a lawyer representing a trade union could represent a client litigating against an individual member of the association, it said:

The Committee's analysis starts with the proposition that by representing the association the lawyer does not necessarily enter into a client-lawyer relationship with each member [D]etermining whether and to what extent the individual member has become a client requires careful examination of all of the circumstances [T]he factors to analyze include . . . whether the lawyer affirmatively assumed the duty of representation to the individual partner, whether the partner was separately represented by other counsel when the partnership was created or in connection with its affairs, whether the lawyer had represented an individual partner before undertaking to represent the partnership, and whether there was evidence of reliance by the individual partner on the lawyer as his or her separate counsel, or of the partner's expectation of personal representation.⁹⁷

Thus, in a case like *Carragher*, it is not enough to note that the nature of the relationship between plaintiff and defendant is disputed. Rather, the trial court must carefully examine the facts to determine the nature

95. The court distinguishes *Atwood v. Sipple*, 182 Ga. App. 831, 357 S.E.2d 273 (1987), in which three joint venturers agreed to import cars. After the deal fell apart, two of them (Gibson and Sipple) filed suit. Only after judgment was entered was Atwood made a party. It wasn't until five years later that he moved to disqualify plaintiff's counsel, the same attorney who set up the joint venture deal. The motion was denied. In affirming, the court of appeals noted two things: (i) there was a question whether counsel had initially represented all three venturers or merely Gibson and Sipple; and (ii) since all meetings with counsel included all three parties, no attorney-client privilege applied. 220 Ga. App. at 692, 469 S.E.2d at 447. The two *Atwood* matters were found to be unrelated and the *Yerby* test did not yet exist. *Id.* See GEOFFREY C. HAZARDS, JR. & WILLIAM HODES, *THE LAW OF LAWYERING* §§ 390.2, 395 (Supp. 1993) ("Even a small group informally organized for a limited purpose can be considered an entity If need be, [the lawyer] can even litigate on behalf of the entity against its former constituents, because they do not qualify as former clients.").

96. The primary reason for this is the duty of confidentiality. Regardless of the potential inapplicability of the attorney-client privilege to statements made by one client in the presence of another, any such statements are nevertheless protected as "secrets," thus prohibiting the lawyer from using such information to the former client's disadvantage. See *HANDBOOK*, *supra* note 2, at 43-H (Standard 28(a)(1)).

97. ABA Formal Opinion No. 92-365 (July 6, 1992) (quoting Formal Opinion No. 91-361 (1991)). See also Conn. Advisory Opinion No. 92-16 (May 27, 1992).

of the relationship between the lawyer and the client or clients involved. Then, and only then, should the court invoke the various rules and presumptions regarding representation adverse to a former client.

C. *Legal Malpractice*

1. **Malpractice Affidavits.**⁹⁸ The battles continue over the professional malpractice affidavit rules. The cruel irony of these cases, of course, is that the rules were adopted to weed out frivolous malpractice cases, thus, reducing the courts' caseloads. Whether or not they have decreased the original filings, they have undoubtedly increased several-fold the appellate caseload. What makes matters even worse is that these cases seem to produce a disproportionate number of concurring and dissenting opinions, making it difficult to know exactly what the rules are at any given moment.⁹⁹

Of three cases decided in this area during the survey period, *Roberts v. Faust*¹⁰⁰ is the simplest, perhaps explaining why it generated only two opinions and no dissenters. Plaintiffs Linda and Larry Faust filed a medical malpractice case against Dr. Roberts, but they did not file an expert's affidavit with the complaint. Instead, they invoked section 9-11-9.1(b) of the Official Code of Georgia Annotated ("O.C.G.A.") which entitles a plaintiff to a forty-five day extension if the statute of limitations is about to run and the plaintiff has not yet been able to obtain an affidavit. Over three months later,¹⁰¹ plaintiffs submitted their affidavit, albeit in facsimile form. Two weeks after that, they filed what appeared to be the original from which the facsimile was made.¹⁰² The court held that the plaintiffs' use of the facsimile under O.C.G.A. section 9-11-9.1(b) was sufficient, largely because the court had already held that a facsimile was the equivalent of the original.¹⁰³ This result makes eminent good sense because one can only make a

98. Otherwise known as "sound and fury signifying nothing." WILLIAM SHAKESPEARE, *MACBETH*, V, v, 17.

99. The following three cases alone generated seven different opinions. Although all three cases involved medical malpractice claims, the requirements for medical and legal malpractice affidavits are identical.

100. 217 Ga. App. 787, 459 S.E.2d 448 (1995).

101. In addition to the forty-five day extension, the trial court granted the plaintiff two additional extensions. *Id.* at 787, 459 S.E.2d at 448.

102. As Judge Beasley points out, the facsimile and the "original" filed two weeks later did not appear to be exactly the same. *Id.* at 789, 459 S.E.2d at 450 (Beasley, J., concurring specially).

103. *Id.* at 788, 459 S.E.2d at 449 (citing *Sisk v. Patel*, 217 Ga. App. 156, 456 S.E.2d 718 (1995)).

facsimile of a document one already has. As long as one has been given the automatic extension to avoid the running of the statute of limitations, it is difficult to see how the defendant or the court is harmed by the submission of the facsimile before the original.

In *Works v. Aupont*,¹⁰⁴ plaintiffs filed a medical malpractice complaint on Friday, June 10, thinking that was the day before the limitations period expired. In the complaint, the lawyer invoked O.C.G.A. section 9-11-9.1(b), alleging that he was not able to secure the expert's affidavit within the fast-approaching deadline, thus entitling plaintiff to the forty-five day extension. Plaintiffs' lawyer then received the affidavit on the 13th and filed it on June 15th, well within the extension period. As it turned out, plaintiffs had miscalculated; the case could have been filed as late as the 13th, the very day they received their expert's affidavit in the mail.¹⁰⁵

Defendants' motion to dismiss was granted by the trial judge, who did not believe the plaintiffs' allegations that they could not get the affidavit in time. In fact, the evidence showed that the affidavit had actually been signed on June 9th, so it was obviously not literally true that "an affidavit of an expert could not be prepared"¹⁰⁶ before the statute ran. The court of appeals reversed, holding that the forty-five day extension is automatic and that "it does not matter whether the trial court believes or disbelieves a plaintiff's allegations" on these points.¹⁰⁷

Judge Beasley concurred specially, arguing that the word "automatic" meant only that the plaintiff did not need to seek leave to get the extension; it occurred by operation of law.¹⁰⁸ However, she bristled at the suggestion that a plaintiff's allegations are not subject to challenge, arguing that untruthful allegations should not be "shield[ed] . . . from both consequence and sanction . . ." ¹⁰⁹ Given Georgia's Rule 11,¹¹⁰

104. 219 Ga. App. 577, 465 S.E.2d 717 (1995).

105. Plaintiffs' counsel mistakenly thought the statute of limitations would expire on Saturday, June 11, so he was careful to file it on Friday, June 10. In fact, the limitations period did not expire until the following Monday, the 13th. *Id.* at 577, 465 S.E.2d at 718.

106. O.C.G.A. § 9-11-9.1(b) (1993).

107. 219 Ga. App. at 578, 465 S.E.2d at 718-19.

108. *Id.* at 580, 465 S.E.2d at 720.

109. *Id.* This may be an exaggeration, albeit a slight one. One consequence of such untruthful allegations could be sanctions under Rule 11, although Georgia's Rule 11 certainly looks like a paper tiger because it only requires that a signing lawyer signify that he has read a pleading and that it is not interposed for delay. O.C.G.A. § 9-11-11(a) (1993). Another consequence could be a complaint to the State Bar for "engag[ing] in professional conduct involving dishonesty, fraud, deceit or wilful misrepresentation." HANDBOOK, *supra* note 2, at 41-H (Standard 4). In truth, neither of these consequences seems very likely to occur.

she is likely correct about this. In this case, the plaintiff's allegation was incorrect, but it would certainly pass Georgia's Rule 11 test.

Judge Andrews dissented. Noting that plaintiffs' expert had signed the affidavit within the statutory period, he said, "The record clearly shows that time constraints did not prevent the affidavit from being filed with the complaint."¹¹¹ Not mincing words, he stated, "I reject the premise that [the statutory requirements] may be satisfied through deceit."¹¹²

What is interesting about the three opinions is that they all purport to read the statute exactly as it is written. Judge McMurray says the statute "*unambiguously* provides for an automatic 45-day extension"¹¹³ to justify his opinion that the trial court erred. Judge Beasley, espousing her views about what the words "automatic" and "allege" mean, proclaims that the courts must give "'ordinary signification' to words."¹¹⁴ Judge Andrews insists that this is "simply another example of this Court's refusal to apply [the statute] as framed by our legislature."¹¹⁵

What is truly ironic, however, is that a completely literal application of this statutory provision is nonsensical, as a careful reading will demonstrate. The section says: "The contemporaneous filing requirement . . . shall not apply to any case in which the period of limitation will expire within ten days of the date of filing and, *because of such time constraints*, the plaintiff has alleged that an affidavit of an expert *could not be prepared*."¹¹⁶ Grammatically speaking, the statute contains a non sequitur. It literally says that the plaintiff's *allegation* has come about because of the time constraints, which is obviously not so. It is not the allegation itself which is caused by the time constraints; rather, it is the pleader's inability to prepare the affidavit in a timely fashion

110. "The signature of an attorney [on a pleading] constitutes a certificate by him that he has read the pleading and that it is not interposed for delay." O.C.G.A. § 9-11-11(a) (1993). *Cf.* Federal Rule of Civil Procedure [hereinafter FRCP] 11, which provides that "By presenting to the court . . . a pleading . . ., an attorney . . . is certifying that to the best of the person's knowledge, formed after an inquiry reasonable under the circumstances . . . the allegations and other factual contentions have evidentiary support . . ." FED. R. CIV. P. 11.

111. 219 Ga. App. at 583, 465 S.E.2d at 722 (Andrews, J., dissenting).

112. *Id.*

113. 219 Ga. App. at 578, 465 S.E.2d at 718 (emphasis added).

114. *Id.* at 579, 465 S.E.2d at 719 (Beasley, J., concurring specially).

115. *Id.* at 583, 465 S.E.2d at 722 (Andrews, J., dissenting). Judge Andrews also dissented in *Sisk v. Patel*, 217 Ga. App. 156, 456 S.E.2d 718 (1995), the case which held that a facsimile was sufficient to meet the affidavit requirement.

116. O.C.G.A. § 9-11-9.1(b) (1993) (emphasis added).

that is caused by the time constraints. That this has occurred must be the subject of a special allegation accompanying the complaint.

Additionally, the statute requires an allegation that an affidavit could "not be prepared."¹¹⁷ But the mere preparation is not critical; it is the *submission of the affidavit* that should be the focus of the statute. An example will reveal the absurdity of a literal reading of the statute and its improper focus on preparation instead of filing.

Suppose that a lawyer consults with a client for the first time just two days before the statute of limitations runs. The lawyer quickly finds a physician to write the affidavit and asks that the physician return it as soon as possible. The next day, the lawyer still has no affidavit in hand; thus, she takes the cautious approach and files the complaint. Per the statutory requirement, she seeks the forty-five day extension by alleging that an affidavit of an expert could not be "prepared" within the statutory period. But if it turns out that the affidavit was in the mail when the lawyer filed the complaint, the allegation in the complaint is literally untrue. Under Judge Andrews' analysis, the lawyer has satisfied the rule through deceit and the case should be dismissed. How Judge Beasley, who would not accord the allegation "unassailable conclusiveness,"¹¹⁸ would rule in the case is a bit harder to say.

Perhaps what is most fascinating about this opinion is trying to figure out just what the appellate court's position is. Judges Pope and Blackburn concurred in McMurray's opinion. No one specifically joined Judge Beasley's special concurrence, and Judges Smith and Ruffin concurred only in the judgment. Finally, Judge Andrews was joined in dissent by Judges Birdsong and Johnson. It is obvious that these plaintiffs' complaint survives, but it is difficult to draw many firm conclusions about how slightly different cases might be decided in the future.

Allen v. Caldwell,¹¹⁹ a five-to-four decision affirming the dismissal of a medical malpractice action for failure to meet the affidavit requirement, is probably the weirdest of the affidavit cases decided during the survey period. There, plaintiffs dismissed their initial malpractice case for reasons not explained by the court. It is clear, however, that the first complaint contained the necessary affidavit. But the renewal action, which incorporated by reference everything in the first complaint, contained not a standard expert's affidavit, but a "copy of an unnotarized affidavit . . . transmitted by facsimile to the Allens' attorney."¹²⁰ In

117. *Id.*

118. 219 Ga. App. at 580, 465 S.E.2d at 720 (Beasley, J., concurring specially).

119. 221 Ga. App. 54, 470 S.E.2d 696 (1996).

120. *Id.* at 55, 470 S.E.2d at 697.

addition, the affidavit eventually filed with the amended complaint did not appear to be precisely the same as the facsimile filed with the renewed complaint.¹²¹

The odd thing about the case is that the renewed complaint alleged that the required affidavit was "attached."¹²² According to the majority, since the only thing attached was the copy of the unnotarized facsimile, the plaintiffs must have intended to rely upon this document as the affidavit.¹²³ Obviously, that was insufficient.

Judge Blackburn and three other judges dissented. The dissenters agreed that the renewal complaint's attached affidavit without a jurat was no affidavit at all, and therefore could not itself meet the statutory requirement. Nevertheless, the renewed complaint specifically incorporated by reference all of the pleadings and the affidavit from the original case.¹²⁴ According to the dissent, since an admittedly sufficient affidavit was already in the record, no important purpose was served by requiring the expert to submit another affidavit.¹²⁵

Since the majority affirmed the dismissal of the complaint, it is apparently now the rule in Georgia that the trial court may consider only those affidavits attached to the complaint, and not any which may be incorporated by reference. But why an affidavit incorporated by reference does not meet the rule's requirement that the "plaintiff . . . file with the complaint an affidavit . . ."¹²⁶ is not clear. This is especially puzzling in light of two earlier cases, neither of which is cited by the majority or the dissent.

First, in *Hospital Authority of Fulton County v. McDaniel*,¹²⁷ plaintiffs filed a malpractice case in 1985. After the original action was dismissed without prejudice, it was renewed within the statutory six-month period. The renewed complaint specifically incorporated the discovery taken in the previously dismissed action, but plaintiffs failed to attach the required affidavit. The court held that "[b]y incorporating the discovery from the original action in the complaint for the renewed action, the McDaniels complied with the spirit, if not the letter, of O.C.G.A. Section 9-11-9.1."¹²⁸

121. According to the dissent, the explanation for the differences is that new parties were added in the second actions. All allegations against the original defendants were the same in both cases. *Id.* at 56-57, 470 S.E.2d at 698-99 (Blackburn, J., dissenting).

122. 221 Ga. App. at 55, 470 S.E.2d at 697.

123. *Id.*

124. *Id.* at 56, 470 S.E.2d at 698 (Blackburn, J., dissenting).

125. *Id.*

126. O.C.G.A. § 9-11-9.1(a) (1993).

127. 192 Ga. App. 398, 385 S.E.2d 8 (1989).

128. *Id.* at 398, 385 S.E.2d at 9.

A similar case, *Brown v. Middle Georgia Hospital*,¹²⁹ was resolved differently. In that case, Brown filed a medical malpractice action in 1992, and included the proper affidavit with the complaint. After voluntarily dismissing the action without prejudice, Brown refiled the complaint, pursuant to O.C.G.A section 9-2-61. Attached to the renewed complaint was a facsimile copy of a nurse's affidavit. No reference was made to the prior affidavit in the renewal action. In affirming the dismissal of the complaint for failure to include the affidavit, the court of appeals said:

The fact that a different affidavit was filed with the original complaint does not change the result. There was no *reference* to the former affidavit in the refiled complaint. No *reference* was made to that affidavit in plaintiff's . . . motion to allow the filing In fact, the present *record* did not even contain a copy of the prior affidavit until Brown filed the motion for reconsideration The fact that the former affidavit was not the basis for Brown's argument *distinguishes this case from . . . Hosp. Auth. of Fulton County v. McDaniel*, 192 Ga. App. 398, 385 S.E.2d 8 (1989).¹³⁰

Apparently, the court in *Brown* would have dismissed the complaint in *McDaniel* had it not specifically made reference to the earlier affidavit; the reference made it clear that there was an adequate affidavit in the record. And who authored the *Brown* opinion? None other than Judge Andrews, who also wrote the majority opinion in *Allen*. Thus, on at least one occasion the court has recognized the propriety of incorporating materials from an original case to meet the affidavit requirement. It was apparently critical that the renewal action specified the intent to incorporate those materials. Perhaps, then, *Allen* would have been decided differently if the Allens' complaint had said that the "affidavit required by O.C.G.A. Section 9-11-9.1 is *incorporated* herein," rather than "*attached* hereto." If that is the difference between success and failure, it seems a very small difference indeed.

2. Damages. In legal malpractice actions, the Georgia courts have always insisted that the plaintiff prove the three traditional elements: (1) employment of the defendant attorney; (2) failure of the attorney to exercise ordinary care, skill, and diligence; and (3) that the negligence was the proximate cause of damage to the plaintiff.¹³¹ In addressing damages, the courts have been very strict in requiring that they be both

129. 211 Ga. App. 884, 440 S.E.2d 687 (1994).

130. *Id.* at 886, 440 S.E.2d at 689 (emphasis added).

131. *See, e.g.*, *Huntington v. Fishman*, 212 Ga. App. 27, 441 S.E.2d 444 (1994) (citing other cases).

certain¹³² and collectible.¹³³ Two court of appeals cases decided during the survey period seem to go in opposite directions on those points, with *Perry v. Ossick*¹³⁴ requiring great certainty, and *Freeman v. Pittman*¹³⁵ taking a much less stringent view.

In *Perry*, Ossick represented Ms. Perry in a divorce and incorporated in the final judgment a property settlement negotiated by the Perrys. Part of the settlement was a substantial sum payable over nine years, secured by Mr. Perry's business office and the marital residence. This was all designated in the divorce decree as a property distribution. Later, when the business office and residence were foreclosed, Mr. Perry filed for bankruptcy and sought to have the remainder of the note obligation discharged. Ms. Perry objected, arguing that the property distribution was actually a nondischargeable support obligation. The bankruptcy court held that the note was a dischargeable property distribution,¹³⁶ but no appeal was taken from that order.

Ms. Perry sued Ossick for malpractice, claiming that he did not fully explain the possible effects on her interests of foreclosures or bankruptcy filings and specifically claiming that he failed to advise her that property divisions are dischargeable in bankruptcy but that alimony and support are not. She claimed that if Ossick had properly advised her, she would have insisted on designating the money as alimony. Ossick disputed the charges about what he did or did not tell Ms. Perry, but the court held that was irrelevant, as Ms. Perry's malpractice claim was deficient for two reasons.¹³⁷

First, the court discussed Perry's claim that with full disclosure, she would have rejected the original offer for the \$185,000 and sought payment in some other manner.¹³⁸ Citing *McDow v. Dixon*,¹³⁹ the court held that "[e]ven if Ms. Perry could have sought to collect . . . in the form of alimony, there is no evidence . . . that any such claim would have been awardable or collectable against Mr. Perry."¹⁴⁰ Second, as to that portion of the award which the bankruptcy court discharged, the

132. See, e.g., *Whitehead v. Cuffie*, 185 Ga. App. 351, 364 S.E.2d 87 (1987).

133. For example, in *McDow v. Dixon*, 138 Ga. App. 338, 226 S.E.2d 145 (1976), Judge Stolz writes, "A client suing his attorney for malpractice not only must prove that his claim was valid and would have resulted in a judgment in his favor, but also that said judgment would have been collectible in some amount, and therein lies the measure of his damages." *Id.* at 389, 226 S.E.2d at 147.

134. 220 Ga. App. 26, 467 S.E.2d 604 (1996).

135. 220 Ga. App. 672, 469 S.E.2d 543 (1996).

136. 220 Ga. App. at 27, 467 S.E.2d at 605.

137. *Id.* at 29, 467 S.E.2d at 607.

138. *Id.*

139. 138 Ga. App. 338, 226 S.E.2d 145 (1976).

140. 220 Ga. App. at 29, 467 S.E.2d at 607.

court found that the original divorce agreement's characterization of the award as a property distribution was irrelevant because the bankruptcy court would independently determine the true nature and dischargeability of the obligation, regardless of what the parties called it.¹⁴¹ In other words, nothing Ossick did or did not do affected the outcome. As to the nondischargeable part, the court found "no evidence showing that the obligation would have been otherwise awardable or collectable against Mr. Perry;"¹⁴² thus, no damages had been demonstrated.

Although the result may be correct as a matter of policy, the court's implicit assumption that the bankruptcy court's determination of whether the award was support or a property distribution was a simple question of law is not very realistic. Courts have struggled with these issues for years, and one court recently listed twenty relevant factors, one of which is the label the parties themselves put on the settlement.¹⁴³ It is a bit disingenuous to suggest that the bankruptcy court's ruling was ineluctable, especially in light of the fact that it was not subject to appellate review. This seems especially startling considering the posture of Perry's claim against Ossick. Because she lost on summary judgment, she will have no opportunity to present to a jury the question of whether it really was so clear that Ossick's alleged actions had no actual effect on her recovery.

141. *Id.*

142. *Id.*

143. *Daulton v. Daulton*, 139 B.R. 708 (Bankr. C.D. Ill. 1992). The factors to test whether a property settlement agreement is in the nature of alimony, maintenance, or support include the following:

1. Whether the settlement agreement includes payment for the ex-spouse; 2. Whether there is any indication that provisions within the agreement were intended to balance the relative income of the parties; 3. The position of the assumption to pay debts within the agreement; 4. The character or method of payment of the assumption; 5. The nature of the obligation; 6. Whether children resulted who had to be provided for; 7. The relative future earning power of the spouse; 8. The adequacy of support absent debt assumption; 9. *The parties' understanding of the provisions*; 10. *The label of the obligations*; 11. The age of the parties; 12. The health of the parties; 13. Existence of "hold harmless" or assumption terminology; 14. Whether the assumption terminated upon death or remarriage; 15. Whether the parties had counsel; 16. Whether there was a knowing, voluntary, and intelligent waiver of rights; 17. *Length of the marriage*; 18. Employment of the parties; 19. The demeanor and credibility of the parties; 20. Other special or unique circumstances of the parties.

Id. at 710 (emphasis added). See also *Campbell v. Campbell*, 198 B.R. 467 (Bankr. D.S.C. 1996) for a more complete discussion of the difficulty in determining the difference between property and alimony.

Freeman v. Pittman,¹⁴⁴ on the other hand, is one of those rare cases in which the court reversed a grant of summary judgment in the attorney's favor. Plaintiff hired Pittman in her divorce case and asked him to check on security interests against certain real properties. In fact, there were at least three lienholders, the Farmers Home Administration ("FmHA") (first mortgage), the Small Business Association ("SBA") (second mortgage), and the Plain Product Credit Association ("PCA"). After another attorney helped Freeman negotiate a settlement of FmHA's interest, Pittman misinformed Freeman that there were no remaining liens on the property. When the SBA subsequently initiated foreclosure proceedings, Freeman had to pay a substantial sum to settle the matter. She then sued Pittman for malpractice, arguing that since the SBA had taken first priority position when the FmHA mortgage was negotiated, its bargaining position with her had substantially improved. In other words, if Pittman had properly ascertained SBA's interest at the outset, she would have been able to negotiate with them as secondary interest holders, which would have given her greater negotiation leverage.¹⁴⁵

Pittman did not challenge the allegations about his actions. Rather, he argued that Freeman had not demonstrated a causal connection between his actions and a legally cognizable injury. The court disagreed, holding:

As a result [of Pittman's failure to advise her of the SBA's interests], the SBA's position with respect to the encumbered property improved, so that it had no incentive to settle and plaintiff eventually had to pay the SBA considerably more than the underlying principal owed, just to keep the property We know that plaintiff was successful in negotiating favorable settlements with two other lien holders, one of whom was in a far stronger position than the SBA would have been. Given these favorable settlements, the inference that a favorable settlement could have been reached with the SBA is not too speculative.¹⁴⁶

Guessing at the probable results of negotiations based upon the actions of other lienors certainly seems like the kind of speculation the courts discourage in these types of actions. On the other hand, it may be possible to distinguish *Perry* from *Freeman*. Because they were both decided on summary judgment, it is possible that *Perry* was decided as it was simply because the plaintiff had failed to produce any convincing evidence demonstrating that the bankruptcy court's order would have

144. 220 Ga. App. 672, 469 S.E.2d 543 (1996).

145. *Id.* at 674, 469 S.E.2d at 545.

146. *Id.*

changed had Ossick acted differently. In *Freeman*, on the other hand, since Pittman only challenged the legal sufficiency of the causation and damage claims, the court may merely be saying that the plaintiff should have the opportunity to demonstrate that things would have turned out differently if Pittman had performed adequately. Otherwise, the messages sent by the two opinions do seem to conflict with one another.

3. Punitive Damages. In *Peters v. Hyatt Legal Services*,¹⁴⁷ a jury awarded punitive damages to Richard Peters against Hyatt Legal Services and two of its employees.¹⁴⁸ The story is the stuff of soap operas, with everything from adultery to fraud and forgery. Mr. and Ms. Peters, both members of the armed forces, decided to get a divorce. Mr. Peters, stationed overseas, came back to Atlanta and consulted Hyatt attorney Linda Gross, paying half of the fee for an uncontested divorce. Mr. Peters never heard from Gross or Hyatt again.¹⁴⁹

By agreement with Mr. Peters, Ms. Peters proceeded to pay Gross the balance of the fee due. What Mr. Peters did not know, however, was that Gross agreed to represent Ms. Peters as plaintiff against Mr. Peters. Not only was Mr. Peters not told of this turn of events, Gross and another Hyatt employee apparently forged Mr. Peters' signature to an acknowledgement of service and consent to final hearing. Only after the divorce was final did Mr. Peters find out that Gross had represented his wife and that the divorce was over.¹⁵⁰

Given Hyatt's meager evidence of conflict audits and the callousness of the behavior of both Gross and her coworker, the award of punitive damages was neither surprising nor radical. But one interesting thing about the case is the difference between the court's approach on the first appeal and on the second.

In the first appearance of the case, the court of appeals disapproved of summary judgment, finding a jury question as to whether Hyatt had actually agreed to represent Mr. Peters when he made a partial payment at his meeting with Gross.¹⁵¹ Presumably, the court assumed that if

147. 220 Ga. App. 398, 469 S.E.2d 481 (1996).

148. This was the case's second appearance in the court of appeals. In the first appearance, 211 Ga. App. 587, 440 S.E.2d 222 (1993), the court of appeals held that Hyatt was not entitled to summary judgment on Peters' claim for punitive damages. *Id.* at 591, 440 S.E.2d at 226. Insofar as that part of the case is concerned, the court here held, in 1996, that its earlier ruling was the "law of the case." 220 Ga. App. at 400, 469 S.E.2d at 483.

149. 220 Ga. App. at 398-99, 469 S.E.2d at 483.

150. *Id.* at 399, 469 S.E.2d at 483.

151. Since Mr. Peters only paid half of the required fee, there was some question as to whether he was a client who had not yet fully paid, or was not to be considered a client at

Mr. Peters had never had an attorney-client relationship with Gross, Gross would have been allowed to represent Ms. Peters in her action against Mr. Peters.¹⁵² However, the court went one step further in the first case, holding that representation of both parties to the divorce would have been permissible, with proper consent.¹⁵³ In the second appearance of the case, the court of appeals said, "it is undisputed that Hyatt represented adverse parties . . . without obtaining the informed consent of both,"¹⁵⁴ again suggesting that dual representation would be proper, as long as the clients consented.

This becomes all the more interesting because it is not clear from the opinion what specific basis or bases the court relied on to approve the award of punitive damages. It is difficult to tell, for instance, whether punitive damages would have been upheld merely on the basis of fraud¹⁵⁵ and forgery in the absence of a dual representation issue. Likewise, it is impossible to know whether dual representation without consent could justify punitive damages, even in the absence of fraud or forgery.

Perhaps the most interesting question of all, however, is whether dual representation of divorcing spouses, even with consent, is ever appropriate. The court tells us that the Army Legal Center refused to represent both spouses, and that Hyatt's policy was to refuse to do so.¹⁵⁶ Peters' expert testified that "Gross' conduct" was unethical, although it is difficult to tell whether the reference to her "conduct" focused on the fraud and forgery, the dual representation, dual representation without consent, or a combination of all of them. Suffice it to say, the practice of dual representation is controversial,¹⁵⁷ and has never been sanctioned by the supreme court, the final arbiter of the propriety of lawyers' conduct.

all until the full fee was paid.

152. This conclusion is subject to doubt, however. See the discussion of *Capers v. State*, 220 Ga. App. 869, 470 S.E.2d 878 (1996), *infra* section D.

153. 211 Ga. App. at 591, 440 S.E.2d at 226.

154. 220 Ga. App. at 400, 469 S.E.2d at 484.

155. Even after Gross undertook representation of Ms. Peters, Hyatt employees gave Mr. Peters no indication of this. They even told him that his file had been lost. *Id.* at 399, 469 S.E.2d at 483.

156. *Id.* at 400, 469 S.E.2d at 484.

157. For a very thorough discussion of the problem, see Utah Ethics Advisory Opinion 116, 1992 WL 685249 (Utah June 25, 1992); Mich. Ethics Opinion RI-172, 1993 WL 566232 (Mich. Sept. 17, 1993); Ohio Advisory Opinion 89-005, 1989 WL 535010 (Ohio Feb. 17, 1996).

4. **Legal Malpractice Insurance.** In *Home Indemnity v. Toombs*,¹⁵⁸ lawyer Hillman Toombs represented James Shelling in an FELA¹⁵⁹ case in Fulton County State Court. About two years after Toombs entered the case, he voluntarily dismissed the action without prejudice. Three days later, he filed the same case in Fulton County Superior Court. After the case was transferred to Bibb Superior Court, the Bibb court held the action was barred by the statute of limitations. In granting summary judgment for the defendant railroad, the trial court found that the Georgia renewal statute did not apply to FELA claims, and referred to Toombs' dismissal of the state court claim as an "error."¹⁶⁰ Toombs filed an appeal and a motion for reconsideration in the court of appeals, and petitioned the Georgia Supreme Court for certiorari, but the trial court's order stood.¹⁶¹

In the midst of these appeals, Toombs applied for both an original and renewal malpractice insurance policy. In both applications, he was asked questions about any errors he might have made that could result in malpractice claims against him.¹⁶² In both applications, Toombs answered "no" to all questions asking if he knew of any actions he had taken that might lead to claims. When Shelling made a claim against Toombs, Toombs notified Home Indemnity, which immediately refunded Toombs' premiums and brought this action for rescission of the policy and a declaration that it had no obligation to defend or indemnify Toombs.¹⁶³

The Georgia policy rescission statute, O.C.G.A. section 33-24-7, provides that misrepresentations are not a ground for rescission, with three notable exceptions.¹⁶⁴ The first, which is fraud, is hardly surprising, but undoubtedly difficult to prove.¹⁶⁵ The third ground,

158. 910 F. Supp. 1569 (N.D. Ga. 1995).

159. Federal Employers Liability Act, 45 U.S.C. § 51 (1986).

160. 910 F. Supp. at 1571.

161. *Id.*

162. On the first application, question 11(d) asked, "Does [any lawyer in your firm] know of any circumstances, acts, errors or omissions that could result in a professional liability claim against any attorney of the firm, the firm or its predecessors?" 910 F. Supp. at 1574 (emphasis added). A policy was issued, but it contained a prior acts exclusion. *Id.* at 1572. On the renewal application, question 7(a) asked, "Is any lawyer aware of any claim, incident, act or omission in the last year which might reasonably be expected to be the basis of a claim or suit, arising out of the performance of professional service for others?" *Id.* at 1574. The policy was renewed, this time without a prior acts exclusion endorsement. *Id.* at 1572.

163. *Id.* at 1572.

164. O.C.G.A. § 33-24-7 (1996).

165. *Id.* § 33-24-7(b).

that the insurer would not have issued the policy had it known the true facts,¹⁶⁶ is also likely to be difficult to substantiate at times. But the second ground, O.C.G.A. section 33-24-7(b), is quite different. It provides for rescission if any misrepresentation is "material either to the acceptance of the risk or to the hazard assumed by the insurer."¹⁶⁷

Toombs argued that he had "no reason to believe, at the time he completed the applications, that the Shelling case would result in a claim"¹⁶⁸ The court rejected Toombs' argument. Looking to Georgia precedent,¹⁶⁹ the court stated that the insurer need only show that the statements were "objectively false,"¹⁷⁰ rather than that the maker knew of their falsity. Conceding that it "can envision circumstances in which a dispute of material fact could arise" on objective falsity,¹⁷¹ the court concluded that Toombs' statement was "as a matter of law . . . objectively false."¹⁷²

This is tricky indeed, for the "objective falsity" test makes summary judgment appropriate for an inquiry (misrepresentation) that is traditionally subjective and not appropriate for summary judgment. Although objective falsity may be easy enough to determine for some facts,¹⁷³ it is especially difficult here since both the original and the renewal applications asked questions about what the attorneys *knew* or *were aware of*.¹⁷⁴

Just how, then, does the court conclude that Toombs' misrepresentations were objectively false, thus rendering his beliefs and state of mind irrelevant? It looked to the surrounding circumstances and concluded that anyone in his position would have realized that a "no" on the application was the inappropriate response. The court explained:

The Court agrees that requiring an attorney to disclose on his application . . . every adverse ruling would be unreasonable . . . [but] . . . [t]he facts . . . are so clear—namely, that the only reason Shelling's case was lost on summary judgment was because of Toombs' decision to voluntarily dismiss the case. Thus . . . the Court *does not find it unreasonable to expect an attorney to disclose the fact that he chose to*

166. *Id.* § 33-24-7(b)(1).

167. *Id.* § 33-24-7(b)(2).

168. 910 F. Supp. at 1573-74.

169. *Lee v. Chrysler Life Ins. Co.*, 204 Ga. App. 550, 419 S.E.2d 727 (1992); *United Family Life Ins. Co. v. Shirley*, 242 Ga. 235, 248 S.E.2d 635 (1978).

170. 910 F. Supp. at 1574.

171. *Id.* at 1575.

172. *Id.* at 1574.

173. Physically demonstrable facts, like the phase of the moon on a given date, are a good example.

174. 910 F. Supp. at 1574.

voluntarily dismiss a client's viable action, refile it in another court, and, as a result of that choice, lost the case because the second action was barred by the statute of limitations.¹⁷⁵

The court may be performing a little sleight of hand here. Trying to fit the case within the rubric of "objective falsity," the court has transformed a question about what the lawyer knew or was aware of (an inherently subjective inquiry) into an objective inquiry by casting the inquiry in terms of reasonableness, rather than awareness. Perhaps the result a jury would reach would be the same anyway, but it does seem as if the court is short-cutting the process with this use of summary judgment.

D. Ineffective Assistance of Counsel

Two interesting cases raising ineffective assistance of counsel claims were decided by the court of appeals during the survey period. *Capers v. State*¹⁷⁶ raises a difficult point about conflicts of interest. *Williams v. State*,¹⁷⁷ unremarkable standing on its own, is similar to *Capers* in one respect. Both of them continue a disturbing trend of cases in which an appellate court concedes that the prosecution deliberately violated the rules of evidence, and yet no consequences flow from that conduct. Even if the conduct does not warrant reversal,¹⁷⁸ should not the courts discourage unethical behavior by prosecutors? This could be done, short of reversal, by any one of a number of means, including naming the prosecutor, referring the matter to the State Bar, or even just labeling the conduct as unethical and therefore unacceptable.¹⁷⁹ Doing nothing amounts to condoning the behavior, an especially bad message in light of the fact that "[T]he responsibility . . . of prosecutor[s] differs from that of the usual advocate; his duty is to seek justice, not merely to convict."¹⁸⁰

In *Capers*, the defendant was convicted of cocaine trafficking. *Capers*, being the only one of two original codefendants who was tried and convicted, argued that trial counsel had been ineffective because of his

175. *Id.* at 1575 (emphasis added).

176. 220 Ga. App. 869, 470 S.E.2d 887 (1996).

177. 217 Ga. App. 636, 458 S.E.2d 671 (1995).

178. There is precedent in Georgia for setting aside a civil judgment largely on the basis of unprofessional behavior. See *Green v. Green*, 263 Ga. 551, 437 S.E.2d 457 (1993).

179. At a minimum, the behavior seems unprofessional. See *A Lawyer's Creed*, in which each Georgia lawyer promises, "To the opposing parties . . . I offer fairness, integrity and civility . . . As a professional, I should . . . [a]ct with complete honesty [and] . . . [k]now court rules and procedures . . ." HANDBOOK, *supra* note 2, at 114-H, 115-H.

180. HANDBOOK, *supra* note 2, at 34-H (EC 7-13).

dual representation of Whitley and Capers, whose defenses were inconsistent and incompatible with one another.¹⁸¹

In analyzing the conflicts claim, the court stated that the defendant can only prevail if he proves that: (i) counsel actively represented conflicting interests; and (ii) the conflict adversely affected counsel's performance.¹⁸² On both points, however, the court's analysis is problematic.

As to representation of the codefendants, the court's statements are hopelessly contradictory. The court stated that, "Initially, one attorney represented both defendants."¹⁸³ Later, the court twice noted that when the attorney learned that the codefendants' defenses conflicted (each claiming that the gym bag in the trunk belonged to the other), he *withdrew* from the representation of Whitley.¹⁸⁴ It also says that by the time of trial, "the relationship between counsel and Whitley had been completely severed."¹⁸⁵ Obviously, since counsel withdrew from representation of Whitley, he must have been Whitley's lawyer at one time, right? One would think so, but further reading invites some confusion on that point.

First, the court referred to Whitley as counsel's "potential client."¹⁸⁶ Later, the court said that Whitley met twice with counsel but "never retained him."¹⁸⁷ The truth is, it is likely that the defendants and counsel were just as confused about the relationship as the court seemed to be. Regardless of their confusion, the law generally provides that a lawyer-client relationship exists if the client reasonably believes it exists,

181. The police stopped a car in which Capers was a passenger and Whitley was the driver. When Whitley consented to a search of the car, drugs were found. Both were placed under arrest, but only Capers was tried. Whitley was called as a prosecution witness, and the state filed a motion for nolle prosequi in his case. 220 Ga. App. at 870, 470 S.E.2d at 890-91.

182. *Id.* at 873, 470 S.E.2d at 893 (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984) and *Barnes v. State*, 160 Ga. App. 232, 233, 286 S.E.2d 519, 520 (1981)).

183. Underscoring the difficult questions in this case is the court's contradictory statements about the relationship between counsel and Whitley. The court first says, "Initially, one attorney represented both defendants." 220 Ga. App. at 870, 470 S.E.2d at 891. Later, however, it says, "Trial counsel then [moved to sever on the ground that] he had interviewed Whitley as a potential client." *Id.* Finally, the court finds that, "The record . . . reveals that counsel met twice with Whitley, who never retained him." *Id.* at 874, 470 S.E.2d at 893. Whichever version is correct, it is clear that counsel felt that his prior relationship with Whitley prevented him from doing some things he might otherwise do, and it appears that both the trial and appellate court agreed with that assessment.

184. 220 Ga. App. at 870, 874, 470 S.E.2d at 891, 893 (emphasis added).

185. *Id.* at 874, 470 S.E.2d at 893 (emphasis added).

186. *Id.* at 870, 470 S.E.2d at 891.

187. *Id.* at 874, 470 S.E.2d at 893.

looking to the objective facts and behavior of the lawyer and putative client.¹⁸⁸

Perhaps this is much ado about nothing; the court said there must be an "active" representation of conflicting interests to demonstrate ineffectiveness, and the evidence shows that the lawyer had "withdrawn" from any representation of Whitley by trial.¹⁸⁹ But the confusion does raise two important questions. The first is what the codefendants thought and when they thought it. If the evidence is unclear about the nature of the relationship, it may have been equally unclear about when this murky relationship actually ended. The second, and more difficult, aspect of the problem is whether or not a formal lawyer-client relationship was formed with Whitley, such that trial counsel's obligations to Capers were significantly hampered by counsel's interactions with Whitley. Since counsel and the court both concede as much, it is obvious that even the uncertain relationship with Whitley before trial resulted in counsel's ineffectiveness.

Regarding the initial discussions with counsel, the court said it is unclear whether counsel received any "privileged information from Whitley."¹⁹⁰ However, even if no privileged information was exchanged between the two, the information counsel received from Whitley was "secret," that is, "information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing or would likely be detrimental to the client."¹⁹¹

As far as a lawyer's responsibilities are concerned, whether the information was a "confidence"¹⁹² or "secret" is irrelevant—neither of them may be revealed, or used to the disadvantage of the client or the advantage of another, except under limited circumstances.¹⁹³ The fact that the person is a former or almost-client is irrelevant. Thus, trial counsel was ethically (and legally)¹⁹⁴ prohibited from asking Whitley

188. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 26 (Proposed Final Draft No. 1, 1996).

189. 220 Ga. App. at 874, 470 S.E.2d at 893.

190. *Id.*

191. *See supra* note 38. Inasmuch as the dismissal of the charges against Whitley was dependent upon his cooperation with and testimony for the prosecution, it is not hard to imagine how the disclosure of some evidence in counsel's possession could have been embarrassing or detrimental to Whitley.

192. A confidence is "information protected by the attorney-client privilege under an applicable law." *See supra* note 37.

193. One exception is that the client has consented "after full disclosure." HANDBOOK, *supra* note 2, at 43-H (Standard 28).

194. "It is the duty of attorneys at law . . . to maintain inviolate the confidences and, at every peril to themselves, to preserve the secrets of their clients . . ." O.C.G.A. § 15-19-4(3) (1994).

not only about any statements he made, but also about any information counsel learned about in those discussions. While Whitley may have objected to any questions which would reveal privileged information, he would not have had a valid objection to the disclosure of "secret" information if the judge ordered the questions answered.¹⁹⁵ None of these limitations on counsel's role would have applied to a lawyer who had no previous relationship with Whitley.¹⁹⁶

Considering these facts, it is troubling that the court rejected the defendant's claim on the ground that he "failed to demonstrate that an actual conflict of interest adversely affected his lawyer's performance."¹⁹⁷ The truth is that both law and ethics prevented counsel from adequately representing the defendant. In a word, his vigorous cross-examination of Whitley would have been unethical. In a case like this, perhaps it should be the impropriety of an effective defense, rather than the actuality, which the court considers.

On reconsideration in *Capers*, the court found that

after agreeing to the exclusion of the prior conviction, [the prosecutor] *deliberately* asked its first witness about *Capers*' prior conviction . . . [and] . . . directly and *intentionally* elicited the excluded evidence from the state's first witness . . . the only conceivable purpose . . . was to suggest to the jury that *Capers* was guilty of the offense charged because of his bad character.¹⁹⁸

The court then cites *Perry v. State*,¹⁹⁹ and *Bryant v. State*.²⁰⁰ In all three cases, the prosecution is conceded to have done this purposely, yet there was no reversal, no reprimand, no mention of the district attorney's name. In short, there was no consequence.

In *Williams v. State*,²⁰¹ the defendant was convicted of drug-related offenses. On cross-examination, the prosecutor asked the defendant whether he had any prior drug convictions, a question that was clearly

195. Standard 28(b)(2) provides that, "A lawyer may reveal . . . confidences or secrets when . . . required by law or court order." However, the statement is slightly inaccurate. A judge can always require one to reveal a secret. It is not appropriate, however, for a judge to require a lawyer to reveal a confidence, i.e., privileged information. HANDBOOK, *supra* note 2, at 43-H. See also O.C.G.A. § 24-9-21 (1995) (regarding attorney-client privilege).

196. Note that "[c]ounsel admitted that the prior relationship prevented him from asking whether Whitley had told counsel the bag was his . . ." 220 Ga. App. at 874, 470 S.E.2d at 893.

197. *Id.*

198. *Id.*, 470 S.E.2d at 894-95 (emphasis added).

199. 154 Ga. App. 559, 269 S.E.2d 63 (1980).

200. 204 Ga. App. 856, 420 S.E.2d 801 (1992).

201. 217 Ga. App. 636, 458 S.E.2d 671 (1995).

prohibited under the circumstances. The trial court sustained a defense objection, and it was never mentioned again.²⁰²

In rejecting the argument that this improper cross-examination is a basis for reversal, the court ignores the prosecutor's misconduct because the issue "was never raised again . . . there was never any argument raised in the trial court as to prosecutorial misconduct . . . [and] . . . Williams does not cite to any legal authority for his claim that this question rises to the level of prosecutorial misconduct . . ." ²⁰³ Just why a defendant must cite to specific legal authority for the proposition that a prosecutor may not ask a question that is prohibited by law (and the objection to which is sustained) is puzzling.

The court could have taken judicial notice of our own Bar rules, which provide that: "[A] lawyer . . . should not ask a witness a question solely for the purpose of harassing or embarrassing him . . . [or] . . . by subterfuge put before a jury matters which it cannot properly consider."²⁰⁴ The Georgia Bar rules also provide that:

[A] lawyer shall not . . . state or allude to any matter that he has no [] reasonable basis to believe is . . . supported by admissible evidence . . . [or] ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person . . . [or] intentionally or habitually violate any established rule of procedure or of evidence.²⁰⁵

Alternatively, the court could have looked to American Bar Association Standards which provide, "A prosecutor should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury."²⁰⁶

202. *Id.*

203. *Id.* at 638, 458 S.E.2d at 674.

204. HANDBOOK, *supra* note 2, at 35-H (EC 7-25).

205. *Id.* at 37-H (DR 7-106(C)(1), (2),(7)).

206. AMERICAN BAR ASSOCIATION STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Standard 3-5.6 (b).

