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Legal Ethics

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Legal Ethics

by Patrick Emery Longan

During the survey period, from June 1, 2010 through May 31, 2011, the appellate courts in Georgia decided cases involving the discipline of lawyers, ineffective assistance of counsel, legal malpractice, judicial ethics, and attorney disqualification. The State Bar of Georgia Formal Advisory Opinion Board took several actions that relate to the professional responsibilities of Georgia lawyers.

I. LAWYER DISCIPLINE

A. Disbarments

As usual, the three primary reasons for disbarments during the survey period were misconduct with respect to money (particularly misappropriation of client funds), abandonment of clients, and felony convictions.

1. Money Issues. Nine Georgia lawyers lost their licenses primarily as a result of misconduct related to money. Three of these lawyers settled personal injury claims for clients, but each lawyer took the

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1. For analysis of Georgia legal ethics law during the prior survey period, see Patrick Emery Longan, Legal Ethics, Annual Survey of Georgia Law, 62 MERCER L. REV. 215 (2010).


3. Lawyers in Georgia can voluntarily surrender their licenses or submit a petition for voluntary discipline. GA. RULES OF PROF'L CONDUCT R. 4-227 (2011). The acceptance of a voluntary surrender of a license or the granting of a petition for voluntary discipline of disbarment are tantamount to disbarment by the court and are treated as such in this Article.
client's portion of the settlement proceeds for personal use. Rodney F. Tew did the same and also misappropriated funds that he held in escrow for his client. Craig Dean Miller received funds from a corporate client for his fees and other purposes. He failed to account for the ones he received in a fiduciary capacity and converted those funds for his own use. Donald Keith Knight surrendered his license rather than contest the ten grievances describing his theft of client and law firm money and/or his abandonment of clients. Similarly, Gregory C. Menefee lost his license, as a matter of reciprocal discipline, after the Kentucky Supreme Court disbarred him for ten instances in which he abandoned clients and misappropriated funds or failed to return client money. Gary Allen Moss represented a client for whom he filed numerous collections matters, but eventually Moss began to convert the amounts collected to his own use and ceased communicating with the client. Finally, Michael J.C. Shaw was disbarred for defrauding his law firm of $526,922 through the use of falsified invoices.

2. Neglect or Abandonment. Nine Georgia lawyers were disbarred for abandoning clients in violation of their duties of diligence and communication. Five of these cases involved a pattern of accepting fees from clients, doing little or no work for them, and then failing to communicate with, or respond to, the clients. Lecora Bowen was disbarred because she abandoned two clients: one for whom she filed a medical malpractice action but failed to prosecute it, and one for whom she filed a notice of appeal but failed to file a timely brief. Similarly, Derrick L. Wallace lost his license because he abandoned a client when trial was imminent and failed to prosecute another client's appeal. Two other lawyers were disbarred because each abandoned a client.

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deceived the client about the status of the matters, stopped communicating with the client, and did not return the client’s file.¹⁴

3. Criminal Convictions. Twelve lawyers lost their licenses as a result of felony convictions. Six of these cases involved guilty pleas to charges of theft or other financial crimes.¹⁵ Other lawyers were disbarred after pleading guilty to perjury,¹⁶ making false statements,¹⁷ obstructing a Department of Labor investigation,¹⁸ and distributing a controlled substance.¹⁹ United States District Judge Jack Camp voluntarily surrendered his license after he pled guilty to aiding and abetting a felon’s possession of a controlled substance, possession of a controlled substance, and theft of public property.²⁰

One case in this category is worthy of particular note. Brooks E. Blitch III served as a superior court judge for twenty-seven years. He pled guilty in federal court to honest services fraud conspiracy, a federal felony. Although the usual discipline for a felony conviction is disbarment, Judge Blitch presented the special master with significant evidence in mitigation. This evidence included numerous letters and live testimony from members of the public who attested to Judge Blitch’s character.²¹ The special master recommended a three-year suspension rather than disbarment and also noted that the statute under which Judge Blitch pled guilty had been found to be unconstitutionally vague by the United States Supreme Court.²² Nevertheless, the Georgia Supreme Court overrode the special master:

In this case, it is undisputed that Blitch chose to plead guilty to a federal felony offense and that the charge to which he admitted guilt related directly to the manner in which he performed his duties as a sitting superior court judge. It hardly bears stating that a judge occupies a unique and crucial position of power, trust and responsibility

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²² Id. at 690-91, 706 S.E.2d at 461-62 (citing Skilling v. United States, 130 S. Ct. 2896, 2934 (2010)).
in our society. We cannot rightfully expect members of the public to respect the law and remain confident in the integrity and impartiality of our judiciary where judges themselves do not respect and follow the law. No matter how one looks at this case, Blitch's felony conviction deals a serious blow to the public's confidence in the legal system and, given his position as a judicial officer, his admitted violation of Rule 8.4(a)(2) warrants a severe level of discipline despite the various mitigating factors urged below.\textsuperscript{23}

Judge Blitch was disbarred.\textsuperscript{24}

4. Other Disbarments. Two disbarments from the survey period do not fit easily into the three usual categories. Samuel Warren Cruse filed a frivolous federal discrimination case for a client. When the court sanctioned Cruse and his client, he commingled his funds with client money. He also failed to keep the client informed about the case, failed to represent her competently, and charged her an unreasonable fee. Another client obtained a judgment against Cruse for $4,000 that Cruse had improperly charged the client as a legal fee.\textsuperscript{25} When the Georgia Supreme Court disbarred him, Cruse had not paid the judgment.\textsuperscript{26} Finally, Michael H. Graham charged a client a $1,500 retainer but did not explain the basis or rate of the fee. When the client asked for the retainer to be refunded, Graham gave the client a bad check.\textsuperscript{27} Because of these facts and a long history of discipline and failures to cooperate in the disciplinary process, the supreme court disbarred Graham.\textsuperscript{28}

B. Suspensions

1. Indefinite Suspensions. The Georgia Supreme Court indefinitely suspended five lawyers as a result of the lawyers' mental impairments.\textsuperscript{29} Melvin Ricks undertook to represent three clients in their

\textsuperscript{23} In re Blitch, 288 Ga. at 692, 706 S.E.2d at 462-63; see also GA. RULES OF PROF'L CONDUCT R. 8.4(a)(2) (2011).
\textsuperscript{24} In re Blitch, 288 Ga. at 692, 706 S.E.2d at 463.
\textsuperscript{25} In re Cruse, 288 Ga. 787, 787-88, 705 S.E.2d 664, 665-66 (2011). Justice Melton dissented and would instead have suspended Cruse for either one year or until he paid the $4,000, whichever was longer. Id. at 790, 705 S.E.2d at 667 (Melton, J., dissenting).
\textsuperscript{26} Id. at 789, 705 S.E.2d at 667 (majority opinion).
\textsuperscript{27} In re Graham, 287 Ga. 582, 582, 697 S.E.2d 835, 835 (2010).
\textsuperscript{28} Id. at 583, 697 S.E.2d at 833.
\textsuperscript{29} In addition, the court issued indefinite suspensions to four other lawyers for different reasons. Two were suspended pending resolution of criminal charges against the lawyers. In re Bartko, 289 Ga. 175, 175, 709 S.E.2d 812, 812 (2011); In re Swank, 288 Ga. 479, 480, 704 S.E.2d 807, 807 (2011). Two others received indefinite suspensions as matters of reciprocity with other states. In re Friedman, 289 Ga. 214, 214, 710 S.E.2d 144,
domestic relations matters but did little or no work as a result of severe
depression and bipolar disorder. Jennifer Dawn LeDoux was not
diligent in connection with one matter, and in another, she provided
financial assistance to a client and issued a check from her trust account
that was returned for insufficient funds. These events preceded a
hospitalization “for psychiatric treatment due to an acute mental health
episode and sedative-hypnotic dependence.” The supreme court
also indefinitely suspended Morris P. Fair, Jr., when it accepted his
petition for voluntary discipline based upon physical, mental, and
emotional impairment. Jeffrey G. Gilley failed to file cases for two
clients within the statutes of limitation, failed to communicate with the
clients, and failed to respond to the clients’ grievances. The supreme
court accepted Gilley’s petition for voluntary discipline based upon
evidence that his lack of diligence resulted from severe depression for
which he was being treated. Finally, Charles Philip Giallanza faced
charges in six separate matters that concerned mishandling or misappropriating client funds. He received an indefinite suspension because
of the report of his psychologist, who concluded the lawyer suffered from
“significant cognitive impairments, meets the criteria for a diagnosis of
dementia, and is not able to function at the level required of a practicing
attorney.” The significance of the indefinite suspensions is that they
leave open the possibility of reinstatement upon the proper showing that
the disabilities no longer exist, without the necessity of a precise waiting
period, an application for a certificate of fitness, or retaking the bar
exam.

2. Suspensions Longer Than One Year. The Georgia Supreme
Court suspended four lawyers for periods of time that exceeded one year.
In the most unusual of these cases, Arthur F. Millard received the
longest suspension, three years, for his misconduct in connection with
his representation of a client who had been accused of violating a city
ordinance. After his client was convicted, Millard continued to try to
litigate the matter through various motions, appeals, and petitions for

145 (2011); In re Kirkland, 288 Ga. 480, 480, 704 S.E.2d 806, 806 (2011).
32. Id. at 778, 707 S.E.2d at 89.
35. Id. at 585, 697 S.E.2d at 834.
37. Id. at 257, 695 S.E.2d at 254.
writs of habeas corpus, for at least the next six years. He undertook some of these even after the client had made it clear that she did not want him to be her lawyer. Courts repeatedly sanctioned Millard and his client. The supreme court found numerous violations of the Rules of Professional Conduct and suspended Millard for three years, with numerous conditions for reinstatement, including evaluation by a psychiatrist.

Two lawyers were suspended for two years. Robbie M. Levin sent an obscene image of himself over the internet to someone who he believed was his friend's sixteen-year-old daughter. Levin was actually communicating with an officer pretending to be the girl. When Levin made a date to meet the girl at a movie, he was arrested, and he eventually pled guilty to the misdemeanors of distributing obscene material and criminal attempt to commit interference with custody. The supreme court rejected Levin's argument that his conduct was a matter of personal morality, rather than fitness to practice law, and suspended him for two years.

Kota Chalfant Suttle received the same punishment for his role in connection with a mortgage fraud. Suttle maintained his innocence of any criminal wrongdoing but entered an Alford plea of guilty to one count of felony residential mortgage fraud in exchange for a sentence that did not include incarceration. Although a felony conviction typically results in disbarment, the court suspended Suttle for two years instead. The special master had counted as an aggravating factor Suttle's continued insistence that he had done nothing wrong. In the opinion, the court made it clear that a refusal to acknowledge wrongdoing "should not automatically be considered a factor in aggravation of punishment, particularly in the face of an honest and objectively reasonable belief in one's own innocence."

Jay Harvey Morrey received an eighteen-month suspension for his misconduct in connection with two cases. In one, he failed to prepare the client for her deposition, did not keep her reasonably informed,
dismissed the case without speaking to her, and failed to inform her or protect her rights in connection with the defendant's request for fees and expenses. In the other matter, Morrey did not know the applicable law, and as a result, he filed a frivolous lawsuit for which three of the defendants were awarded fees.\(^5\)

3. Suspensions of One Year or Less. Six lawyers received suspensions of one year or less during the survey period. Two of the twelve-month suspensions were noteworthy because of separate opinions written by Justice Nahmias. In one, Robert Douglas Ortman had entered an Alford plea to one felony count of aggravated battery.\(^5\) The usual discipline for a conviction for a violent felony would be disbarment, but the court decided that mitigating circumstances precluded such discipline.\(^5\) One of those circumstances noted by the special master—but not the supreme court—was that Ortman had already been punished for his conduct in the criminal case.\(^5\) In his concurrence, Justice Nahmias noted that in several prior cases the court recognized such punishment as an appropriate mitigating factor.\(^5\) Justice Nahmias concurred specially because, in his words,

\begin{quote}
I believe that the Court should take this opportunity to hold that the fact that a lawyer "has already been punished for his conduct" in the criminal justice system should not be considered as a mitigating factor that reduces the seriousness of or the sanctions to be imposed for the lawyer's professional misconduct.\(^5\)
\end{quote}

The other separate opinion of Justice Nahmias was his dissent in another case in which the lawyer received a twelve-month suspension.\(^5\) In that case, Tony Eugene Mathis undertook to represent a client in an action to modify a child custody order. Mathis filed the action a considerable time after being retained, did not communicate with the client, abandoned the client, and did not return the file or the fee. When Mathis failed to respond to the notice of investigation, he was suspended on March 12, 2010. Mathis attributed his misconduct to his growing depression, which had surfaced over the years, and showed he had taken

\(^5\) Id. at 820-21, 700 S.E.2d at 382-83.
\(^5\) In re Ortman, 289 Ga. 130, 130, 709 S.E.2d 784, 785 (2011).
\(^5\) Id. at 130, 709 S.E.2d at 785.
\(^5\) Id. at 131, 709 S.E.2d at 786 (Nahmias, J., concurring).
\(^5\) Id. at 132, 709 S.E.2d at 786 (citing In re Suttle, 288 Ga. at 15-16, 701 S.E.2d at 155; In re Bailey, 267 Ga. 370, 478 S.E.2d 131 (1996)).
\(^5\) Id. at 133, 709 S.E.2d at 787.
steps to deal with it. The court suspended the lawyer for one year on February 7, 2011, but made the suspension nunc pro tunc to March 12, 2010, the date of his interim suspension. The nunc pro tunc part of the ruling provoked a dissent from Justice Nahmias, in which Justice Thompson joined. The dissent noted that the lawyer’s cessation of practice was not voluntary, but rather was a result of the court’s suspension of his right to practice, and argued that only voluntary cessations of practice should entitle the lawyer to seek a later disciplinary order nunc pro tunc to the date he or she stopped practicing.

Nakata S. Smith Fitch was also suspended from practice for one year. The court determined that Fitch had failed to enter into a clear representation agreement and fee schedule, and had poorly managed her practice, with the result that she violated rules related to accounting for and delivering client property. Fitch also failed to communicate properly with the client when she did not respond to the client's requests for return of funds and when she failed to provide a means for her clients to contact her during her maternity leave.

Four lawyers received shorter suspensions. Clifford E. Hardwick IV was suspended for six months because he neglected a federal court case at a time when he was dealing with “serious personal issues” that were described in a filing submitted to the court under seal. The court suspended H. Owen Maddux for five months, as a matter of reciprocity, when he received that discipline in Tennessee for neglecting a client matter, failing to tell the clients that the statute of limitations had expired, and for commingling client and personal funds. Ricardo L. Polk received a three-month suspension in the wake of grievances from four clients, the most serious of which involved his failure to file documents in connection with traffic citations for one client, and his failure, for another client, to locate a video recording that had been a part of the client’s file. The court noted in its opinion that Polk had been suffering from “emotional distress bordering on depression from his personal child support case and financial circumstances . . . .

57. Id. at 548-49, 705 S.E.2d at 158 (majority opinion).
58. Id. at 549, 705 S.E.2d at 158.
59. Id. at 549, 705 S.E.2d at 158-59 (Nahmias, J., dissenting).
60. Id. at 549-51, 705 S.E.2d at 158-59.
62. Id. at 255-56, 289 S.E.2d at 565.
63. Id. at 254-55, 289 S.E.2d at 564.
64. In re Hardwick, 288 Ga. 60, 60-61, 701 S.E.2d 163, 163-64 (2010).
67. Id. at 64, 701 S.E.2d at 162.
Finally, Patrick Anthony Powell represented a client in federal court but did not respond to discovery requests, supply information for reports to the court, respond to a motion to dismiss, or promptly return his client’s phone calls. Powell had become ill during this time but failed to tell his client. The court suspended Powell for three months.

C. Reprimands

Three lawyers received public reprimands during the survey period. Felicia Prudence Rowe received a public reprimand because she failed to communicate properly with six clients, albeit during a time of personal and emotional problems. The court imposed a public reprimand on Jefferson Lee Adams with an additional condition that the lawyer refund fees to the affected clients. Adams had abandoned numerous legal matters but sought long-term, in-patient treatment and later residential treatment for substance abuse. Leighton Reid Berry, Jr. failed to return a file to a client until he received a notice of investigation and then failed to cooperate with the disciplinary authorities. Berry received a public reprimand because he “ap-pear[ed] not to understand the seriousness of the disciplinary process” and because he had received an investigative panel reprimand in 2001.

Six lawyers received review panel reprimands. The court approved this sanction of Karen Suzanne Wilkes. At the request of the Georgia Public Defenders Standards Council, she undertook to represent a client in connection with a motion for new trial after a criminal conviction, but she returned the file without ever informing the court or the client that she no longer represented the client. Two dissenting justices would have imposed a public reprimand. Eric Shapiro received a review panel reprimand because he failed to communicate diligently with one client in the aftermath of a mediated settlement and because he did not adequately respond to another client about the client’s desire to file an action to quiet title. Melvin Robinson, Jr. received his review panel

69. Id. at 216, 710 S.E.2d at 146.
72. Id. at 818, 700 S.E.2d at 385.
74. Id. at 60, 701 S.E.2d at 188.
76. Id. at 456, 704 S.E.2d at 791.
77. Id. at 457, 704 S.E.2d at 791 (Nahmias, J., dissenting).
reprimand for his lack of diligence in connection with a bankruptcy case. A majority of the court approved a review panel reprimand for Chalmer E. Detling II because he violated his duty of competence when he signed an opinion letter. Three justices dissented and would have approved a lighter sanction. Hassan Elkhalil did not properly advise a client about a fee and was found in arbitration to owe the client a refund of just over $10,000. For the failure to communicate about the fee and for charging the excessive fee, Elkhalil received a review panel reprimand. Clark Jones-Lewis represented eight couples who alleged that an adoption service promised each of them the same infant. When the litigation overwhelmed her, Jones-Lewis did not act with diligence and did not seek to withdraw. As a result, the court approved a review panel reprimand.

D. Rejections of Petitions for Voluntary Discipline

The Georgia Supreme Court rejected five petitions for voluntary discipline during the survey period. Two of the matters are discussed above. Jefferson Lee Adams sought a review panel reprimand for his abandonment of clients due to his substance abuse, but the court rejected that petition and eventually imposed a public reprimand. Michael C.J. Shaw submitted a petition for a voluntary suspension for his actions in defrauding his law firm of over $500,000, but the court rejected that request and eventually disbarred him.

Edward C. Henderson admitted that, in three personal injury cases, he used settlement funds that belonged to his clients for his personal use. The court rejected his request for a suspension because he had not made restitution to all three of his former clients. Joseph A. Maccione sought a review panel reprimand for his misconduct in

80. Id. at 257-58, 710 S.E.2d at 566-67 (Melton, J., dissenting).
81. Id. at 693, 706 S.E.2d at 463.
83. Id. at 581, 697 S.E.2d at 836.
84. Id. at 582, 697 S.E.2d at 836.
86. Id. at 816, 700 S.E.2d at 384.
87. Id. at 332, 334, 695 S.E.2d 640, 642 (2010).
88. In re Shaw, 288 Ga. 404, 703 S.E.2d at 664.
90. Id. at 135-36, 710 S.E.2d at 124.
connection with his use of a nonlawyer "employee/contractor." Maccione did not adequately supervise the efforts of his employee/contractor to assist a client with a legal matter, did not assist the client himself, and did not inform the client that he would not be assisting with the case. That same client hired Maccione in another case, and the employee/contractor took numerous items from the client's home purportedly in partial payment of the fee. The supreme court rejected the petition, reasoning that a review panel reprimand would not be the appropriate sanction. Finally, Marcea O'Brien-Carriman sought a three-month suspension in her voluntary petition. She had shared legal fees with a nonlawyer and then initially lied to the bar about the arrangement. The supreme court rejected the petition, reasoning that a three-month suspension would not be a sufficient punishment.

E. Reinstatements

The Georgia Supreme Court denied one motion for reinstatement and granted one application for certification of fitness during the survey period. Joyce Marie Griggs was disbarred in 2004 after she was barred from practicing in the United States District Court for the Southern District of Georgia. In 2009, the Georgia Supreme Court held that reciprocal discipline did not apply to discipline administered by a federal court rather than a state licensing authority. The court nevertheless rejected Griggs's motion for reinstatement because the court determined that reciprocal discipline was not the sole basis for her disbarment. Accordingly, Griggs could apply for reinstatement only by following the usual procedures of the court's rules governing admission to the practice of law. Under those procedures, Russell Thomas Bridges was granted a certification of fitness for readmission. Bridges had been disbarred in 1993 after pleading guilty to one count of manufacturing
marijuana. He was pardoned in 2002 and demonstrated that since his conviction he had been a responsible member of society. Accordingly, the court granted his request for a certification of fitness and cleared him to take the bar examination in his next step to regaining his license to practice law.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Georgia Supreme Court

The Georgia Supreme Court decided nine significant cases involving ineffective assistance of counsel during the survey period. In Smith v. State, the parents of an eight-year-old child were convicted of numerous crimes, including felony murder, in connection with the child's death. The claim of ineffective assistance concerned, among other things, the prosecutor's closing argument, here described by Chief Justice Hunstein in her dissent:

The record in this case establishes that the prosecutor, in the final moments of her concluding argument on behalf of the State, “clicked” her fingers at which signal one of the deputies in the courtroom turned out the lights and an associate prosecutor “popped out a cake out of a grocery bag” complete with eight candles, which were then lit with a lighter brought into the courtroom; the prosecutor and her associate then proceeded to sing to “dear Josef,” i.e., the deceased victim, the celebratory words to “Happy Birthday.”

Defense counsel did not object and explained his decision as a “strategic” one designed not to alienate the jury. On that basis, the majority of the court held that the failure to object was not ineffective assistance of counsel.

Chief Justice Hunstein, joined by Justice Benham, filed a vigorous dissent. The dissenting opinion described the prosecutor's actions as “a theatrical stunt spun out of pure fantasy” that “offended the dignity and decorum of the court and violated every precept of professionalism and fair play.” The dissenting justices would have held...
the failure to object to be deficient performance because no reasonable
attorney would "stand by silently" in the face of such misconduct by the
prosecutor.\footnote{113} The dissent further would have held that the defen-
dants suffered prejudice as a result of their counsel's failure to object
because it would be "difficult if not impossible to imagine that the minds
of the jurors would not have been influenced by the spectacle they ob-
erved."\footnote{114} The dissent concluded:

Our courtrooms are not theaters; the participants in a criminal trial
are not actors in reality television programs. It is not enough to "frown
on" behavior that undermines the very foundation of the criminal
proceedings. We have to stop it. And the only effective means of
stopping it is to punish this behavior in the strongest possible manner.
The only thing that gets attention is reversal.\footnote{115}

Nevertheless, the majority upheld the convictions.\footnote{116}

The court decided one case involving advice that a lawyer gave in
connection with a guilty plea. In \textit{Crowder v. State},\footnote{117} the defendant
pled guilty to malice murder and one other count in connection with the
death of his estranged wife.\footnote{118} The defendant's trial counsel advised
him that he would serve "probably 20 years or in excess of 20 years."\footnote{119}
In fact, under these circumstances Georgia law would require the
defendant to serve thirty years.\footnote{120} The court held that the lawyer's
bad advice constituted ineffective assistance and remanded the case for
a hearing on prejudice.\footnote{121}

The supreme court decided two cases involving conflicts of interest and
ineffective assistance of counsel. In \textit{State v. Mamedov},\footnote{122} the defendant
pled guilty to one count of false imprisonment for his role as the
driver in the brief abduction by his friend of a young woman that the
friend was interested in romantically. The defense lawyer represented
both Mamedov and his friend, and accepted payment from the
friend.\footnote{123} The habeas court held that the lawyer had a conflict of
interest in representing these codefendants because one was more

\footnotesize{113. \textit{Id.} at 360, 703 S.E.2d at 640.}
\footnotesize{114. \textit{Id.} at 361-62, 703 S.E.2d at 641.}
\footnotesize{115. \textit{Id.} at 362-63, 703 S.E.2d at 642 (footnote omitted).}
\footnotesize{116. \textit{Id.} at 356, 703 S.E.2d at 638 (majority opinion).}
\footnotesize{117. 288 Ga. 739, 707 S.E.2d 78 (2011).}
\footnotesize{118. \textit{Id.} at 739, 707 S.E.2d at 79.}
\footnotesize{119. \textit{Id.} at 740, 707 S.E.2d at 80 (internal quotation marks omitted).}
\footnotesize{120. \textit{Id.} at 739-40, 707 S.E.2d at 80.}
\footnotesize{121. \textit{Id.} at 740, 707 S.E.2d at 80.}
\footnotesize{122. 288 Ga. 858, 708 S.E.2d 279 (2011).}
\footnotesize{123. \textit{Id.} at 858-60, 708 S.E.2d at 280-81.}
culpable than the other. The habeas court further held that this conflict of interest adversely affected the defense counsel's representation of Mamedov because counsel failed to consider any theory of defense that did not consist of a united front for the defendants. The supreme court affirmed the habeas court's decision.

Williams v. Moody is a more troublesome case. The defendant was convicted of armed robbery and aggravated battery, and sentenced to twenty years in prison. The defendant claimed, in a pro se motion filed almost immediately after his conviction, that his trial counsel was ineffective, and the trial court immediately appointed a new lawyer to represent the defendant on appeal. For reasons that are not explained, however, the new appellate lawyer did not represent the defendant as the case proceeded. Instead, the original trial counsel represented the defendant in connection with a motion for new trial and on direct appeal. Not surprisingly, the lawyer did not seek relief for his client based upon his own ineffectiveness. The habeas court ordered a new trial because the defendant did not have "conflict-free" counsel on appeal.

The supreme court reversed. The court noted that, as a general rule, indigent criminal defendants do not have the constitutional right to decide what arguments to raise on appeal when they are represented by appointed counsel. Those judgments are left to the lawyer, who presumably is better equipped by training and experience to present the strongest case. The court also noted that the judgments made by such a counsel will not be questioned under Strickland v. Washington unless they are judgments that no competent attorney would make, and the habeas court had not performed that analysis.

124. Id. at 861, 708 S.E.2d at 285; see also Ga. Rules of Prof'L Conduct R. 1.7 cmt. 7 (2011) ("The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.").
125. Mamedov, 288 Ga. at 861, 708 S.E.2d at 282.
126. Id. at 862, 708 S.E.2d at 282.
128. Id. at 665-66 & n.2, 697 S.E.2d at 201 & n.2.
129. Id. at 665-66, 697 S.E.2d at 201.
130. Id. at 669, 697 S.E.2d at 203.
131. Id. at 668, 697 S.E.2d at 202-03 (quoting Jones v. Barnes, 463 U.S. 745, 751 (1983)).
Therefore, the court reasoned, the defendant’s counsel’s performance on appeal was not a basis for habeas relief.\textsuperscript{135}

The court applied the wrong standard and reached the wrong result. The defendant’s counsel on appeal had a clear conflict of interest because it was not in the lawyer’s self-interest to argue that he had rendered ineffective assistance during the trial.\textsuperscript{136} The standard for assessing ineffective assistance when the lawyer has a conflict of interest is not deferential to the strategic judgments the lawyer made. The judgments are suspect, and treated so, precisely because of the conflict. Instead, the standard is whether the conflict of interest adversely affected the lawyer’s performance, and often that standard is satisfied by recognizing things the lawyer did not do as a result of the conflict. Here, this lawyer, operating under a conflict of interest, did not raise the arguments that were against his own self-interest. His conflict adversely affected his performance. The habeas court got this case right, and a new trial should have been awarded to this defendant.\textsuperscript{137}

In \textit{Perkins v. Hall},\textsuperscript{138} the supreme court reversed the habeas court’s determination that the defendant’s counsel had not been ineffective during the sentencing phase of a capital murder case.\textsuperscript{139} The defendant’s lawyers had reason to know that the defendant had a troubled background and that information was available about the abuse and injuries the defendant suffered before the murder. Nevertheless, trial counsel did not pursue the evidence, apparently because the client told them not to do so.\textsuperscript{140} The court held this course of action to be ineffective assistance, and noted that the ABA Guidelines for the Appointment

\textsuperscript{135} \textit{Id.} at 669, 697 S.E.2d at 203.

\textsuperscript{136} See GA. RULES OF PROF’L CONDUCT R. 1.7(a) (2011) (“A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer’s own interests . . . will materially and adversely affect the representation of the client, except as permitted in (b) [a consent provision].”).

\textsuperscript{137} The supreme court also wrote that there was no conflict because the defendant’s pro se motion, raising claims of ineffective assistance, was filed while he was still represented by his trial counsel. The motion, therefore, was “‘unauthorized and without effect’ . . . [and] its contents [were] without force to support any viable claim of an actual conflict of interest on the part of counsel.” \textit{Williams}, 287 Ga. at 669, 697 S.E.2d at 203 (footnote omitted) (quoting Cotton v. State, 279 Ga. 358, 361, 613 S.E.2d 628, 631 (2005)). That is a nightmarish Catch-22. The defendant’s attempts to raise the ineffective assistance of his counsel go unheard because he was represented by the allegedly ineffective counsel, who refused to raise the claims. Regardless of when or how the defendant articulated his claims of ineffectiveness, the lawyer was operating under a conflict of interest at the instant the lawyer learned of those claims.

\textsuperscript{138} 288 Ga. 810, 708 S.E.2d 335 (2011).

\textsuperscript{139} \textit{Id.} at 810, 708 S.E.2d at 339.

\textsuperscript{140} \textit{Id.} at 812-13, 708 S.E.2d at 340.
and Performance of Defense Counsel in Death Penalty Cases\textsuperscript{141} clearly state that trial counsel should conduct an investigation into mitigation evidence regardless of the client's wishes.\textsuperscript{142} Although the client retains the authority to decide whether to introduce the mitigating evidence, the lawyers must seek it.\textsuperscript{143} The court also described the mitigation evidence in detail and concluded that there was a reasonable probability the jury would not have sentenced him to death if the jury had heard the evidence.\textsuperscript{144} Therefore, the defendant was entitled to a new trial on sentencing.\textsuperscript{145}

In \textit{Thompson v. Brown},\textsuperscript{146} the court affirmed the holding of the habeas court that appellate counsel was deficient for not raising on appeal the argument that the prosecution had failed to prove venue.\textsuperscript{147} The court recognized that, although everyone involved in the trial may have known from experience that the events described in the testimony took place in Toombs County, there was no evidence in the record to that effect.\textsuperscript{148} Accordingly, the court granted the writ of habeas corpus, although it left open the possibility that the prosecution could try the defendant again.\textsuperscript{149}

\textit{Henderson v. Hames}\textsuperscript{150} involved the habeas petition of Joshua Hames, who was convicted in 2002 of felony murder, among other crimes, in the shooting death of his brother.\textsuperscript{151} The underlying felony that allegedly supported the felony murder conviction was that he caused serious bodily harm to his brother while they were hunting and that he used a

\begin{quote}
firearm in a manner endangering the bodily safety of [another person] by consciously disregarding a substantial and unjustifiable risk that his act or omission will cause harm to or endanger the safety of another person and the disregard constitutes a gross deviation from the
\end{quote}

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142. Perkins, 288 Ga. at 814, 708 S.E.2d at 341; ABA Death Penalty Guidelines, supra note 141, at 10.7(A)(2).
143. \textit{Id.} at 814, 708 S.E.2d at 341.
144. \textit{Id.} at 818, 708 S.E.2d at 334.
145. \textit{Id.}
147. \textit{Id.} at 855, 708 S.E.2d at 271.
148. \textit{Id.} at 857, 708 S.E.2d at 272-73.
149. \textit{Id.} at 857, 708 S.E.2d at 272.
151. \textit{Id.} at 534-35, 697 S.E.2d at 800.
\end{flushright}
The problem was that the indictment did not charge, and the evidence at trial did not prove, that Hames consciously disregarded a substantial and unjustifiable risk that his act or omission would cause harm to another. The supreme court affirmed the findings of the habeas court that this was ineffective representation that prejudiced the defendant and concluded, "the writ of habeas corpus was properly granted, and Joshua Hames should be released from prison."

In *Moon v. State*, the court rejected the defendant's claims of ineffective assistance of counsel. The case is worthy of note because Justice Nahmias filed a special concurrence. The majority opinion states that the defendant's acquittal on one of the charges "strongly supports the conclusion that the assistance rendered by the attorney fell within that broad range of reasonably effective assistance..." Justice Nahmias described this language as a "mantra" that is frequently used by the court of appeals and wrote specially to discourage its use. The concurrence argued that acquittal on one count could result from excellent work by the defense counsel, but it could also follow from many other factors, including weak evidence from the prosecution. Justice Nahmias urged the courts in the future to "use that language only where the conclusion is actually supported by the circumstances of the case."

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152. *Id.* at 538, 697 S.E.2d at 802 (punctuation and internal quotation marks omitted); O.C.G.A. § 16-11-108(a) (2011).
154. *Id.* at 539-40, 697 S.E.2d at 803.
155. *Id.* at 541, 697 S.E.2d at 804.
157. *Id.* at 515, 705 S.E.2d at 657.
158. *Id.* at 517, 705 S.E.2d at 658 (Nahmias, J., concurring specially).
159. *Id.* at 516, 705 S.E.2d at 657 (majority opinion) (quoting Carter v. State, 265 Ga. App. 44, 50 n.25, 593 S.E.2d 69, 75 n.25 (2004)).
160. *Id.* at 519, 705 S.E.2d at 659 (Nahmias, J., concurring specially).
161. *Id.* at 517, 705 S.E.2d at 658.
162. *Id.* at 519, 705 S.E.2d at 659.
B. Georgia Court of Appeals

The Georgia Court of Appeals decided nine noteworthy cases related to ineffective assistance of counsel. Four of the cases related to failure by counsel to object. The other five dealt with an assortment of issues.

In Word v. State, trial counsel failed to object when a police officer bolstered the testimony of the victim by testifying that the officer believed the victim. The lawyer had no recollection of the trial and so could not offer any strategic reason for failing to object to evidence that was obviously inadmissible and highly prejudicial. Because the credibility of the victim was the central issue in the case, the court of appeals reversed the conviction.

A failure to object was also central to the disposition of Higgins v. State. The defendant in that case was convicted of rape and aggravated sodomy, and the court of appeals noted that the evidence was not overwhelming and that there was evidence that the sexual acts underlying the claim may have been consensual. To prove a similar transaction, the prosecution sought to introduce a disposition order in a juvenile case that described the defendant's molestation, at the age of fourteen, of a four-year-old girl. Part of the disposition order recited: "All children younger than Zachary with whom he may come into contact need to be protected from him. And he should not be allowed to have any unsupervised contact with children." The defendant's trial counsel raised an objection to this language at a pretrial hearing and obtained the agreement of the prosecutor to redact it from the disposition order. When the prosecutor did not live up to that agreement at trial, defense counsel made no objection. The court of appeals determined that the failure to object was deficient representation and there was a reasonable probability that the result of the trial might have been different without this evidence, and reversed the conviction.

Scott v. State involved a defense lawyer's failure to object to part of the prosecutor's closing argument:

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164. Id. at 639-40, 708 S.E.2d at 624.
165. Id. at 640, 708 S.E.2d at 624.
167. Id. at 771, 773, 698 S.E.2d at 336-37.
168. Id. at 771 & n.1, 698 S.E.2d at 336 & n.1.
169. Id. at 772, 698 S.E.2d at 336-37.
170. Id. at 771, 698 S.E.2d at 336.
171. Id. at 771-72, 698 S.E.2d at 336-37.
During closing argument, the prosecutor noted the evidence showing that after the arrest warrant issued in June 2004, police had notified Scott's family and girlfriend that they were looking for him. Despite this fact, Scott failed to turn himself in. The prosecutor went on to argue that the jury should view this conduct as evidence of Scott's guilt, stating: "He was on the run. The good book sums up that behavior. The wicked man flees though no man pursues where the righteous stand bold as lions. If he [Scott] hadn't done anything, why would he run for three months? Why? Why not go in and give police a statement?" The prosecutor later reiterated his argument that "the wicked man flees but the righteous stand bold as lions." Defense counsel offered no objection to these arguments.\(^{173}\)

The argument was improper because it invited the jury to infer guilt from the defendant's prearrest silence.\(^{174}\) To allow the defendant's silence to be used against him in this way violated his right not to incriminate himself.\(^{175}\) Defense counsel did not object to the argument, not as a matter of strategy, but because he incorrectly believed there was nothing wrong with it.\(^{176}\) That is deficient representation. Because the prosecution's improper argument was not inadvertent, and because the evidence against the defendant was not overwhelming, the court of appeals reversed the conviction.\(^{177}\)

In *Ward v. State*,\(^{178}\) the defendant was convicted of armed robbery, aggravated assault, and numerous other crimes in a trial in which his counsel failed to object to numerous items of hearsay evidence and to the testimony of a detective that bolstered the credibility of another witness.\(^{179}\) Among the matters to which counsel did not object were statements that the defendant "was a drug trafficker who always carried a gun, that he was a dangerous man, . . . and that his other girlfriend, Ammons, knew where the gun was located. . . ."\(^{180}\) Because of counsel's performance and the lack of overwhelming evidence against the defendant, the convictions were reversed.\(^{181}\)

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173. *Id.* at 712-13, 700 S.E.2d at 697-98 (alteration in original).
174. *Id.* at 717-18, 700 S.E.2d at 701.
175. *Id.* at 716, 700 S.E.2d at 699-700 (quoting Reynolds v. State, 285 Ga. 70, 71, 673 S.E.2d 854, 855 (2009)).
176. *Id.* at 716, 700 S.E.2d at 699.
177. *Id.* at 717-18, 700 S.E.2d at 701.
179. *Id.* at 529, 696 S.E.2d at 482.
180. *Id.*
181. *Id.* at 529, 696 S.E.2d at 483.
The defendant in *Taylor v. State*[^182] pled guilty to two counts of child molestation but sought to withdraw the plea once he learned he would be required to register as a sex offender once he was released. He claimed his trial counsel did not tell him about that requirement and he would not have pled guilty if he had known about it.[^183] The court of appeals acknowledged that under existing Georgia precedent it is not ineffective assistance for a lawyer to fail to counsel a client about the collateral consequences of a guilty plea.[^184] However, during the pendency of this case, the United States Supreme Court held that a failure to counsel a client about the risk of deportation as a result of a guilty plea would be deficient performance.[^185] The court of appeals held that, by analogy, the failure to advise about the need to register as a sex offender is ineffective assistance with a guilty plea.[^186] The court of appeals remanded the case for a hearing to determine whether there was a reasonable probability the defendant would have insisted on going to trial if he had known about the need to register.[^187]

In *Fedak v. State*,[^188] the defendant was convicted of being a “peeping Tom.”[^189] The defendant, admittedly, went across the street, looked into the window of the sixteen-year-old daughter of his neighbor, and then fled.[^190] When the police found him, the defendant’s speech was slowed, he kept repeating himself, and he said he was “playing a game.”[^191] By all accounts, his behavior was strange and out of character for him. The defendant had a good relationship with the neighbors for years before the incident.[^192] The key issue in the case was mens rea, whether the defendant was “looking through the neighbors’ window ‘for the purpose of spying upon or invading the privacy of the [victim].’”[^193] The defendant denied that was his purpose and told his lawyer he had multiple sclerosis (MS), which can cause short-term memory loss, impeded judgment, and impaired cognitive abilities. The

[^183]: *Id.* at 878, 698 S.E.2d at 385.
[^184]: *Id.* at 881, 698 S.E.2d at 387 (quoting *Williams v. Duffy*, 270 Ga. 580, 581-82, 513 S.E.2d 212, 214 (1999)).
[^185]: *Id.* at 881-82, 698 S.E.2d at 387 (citing *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010)).
[^186]: *Id.* at 882-83, 698 S.E.2d at 388.
[^187]: *Id.* at 878-79, 698 S.E.2d at 385.
[^189]: *Id.* at 580, 696 S.E.2d at 422.
[^190]: *Id.* at 580-81, 696 S.E.2d at 423.
[^191]: *Id.* at 581, 696 S.E.2d at 423.
[^192]: *Id.*
[^193]: *Id.* at 584, 696 S.E.2d at 425 (alteration in original); O.C.G.A. § 16-11-61(b) (2011).
lawyer, who began preparing for the case the night before trial, never spoke with a medical professional about his client’s condition and introduced no evidence of the MS or its effects. In fact, the lawyer discouraged the idea of having the defendant’s neurologist testify by asking his client: “Is that doctor going to testify that MS makes you stupid?” Because trial counsel failed to investigate his client’s medical condition, and because that condition was crucial to the only available defense in the case, the court of appeals reversed the conviction on the basis of ineffective assistance of counsel.

Gregoire v. State split the court of appeals into three groups. In Gregoire, the defendant was convicted of molesting his three-year-old and four-year-old nephews. The main evidence came from these small children, and the defendant argued on appeal that at trial the prosecution improperly elicited testimony on numerous occasions to bolster their credibility. For example, the children’s mother testified that she believed them. Defense counsel did not object, but the majority held that there was no ineffective assistance because the lawyer’s failure to object was part of an unspecified trial strategy. In a special concurrence, Judge Phipps wrote:

merely invoking the word “strategy” or “tactics”—even if there is evidence to show that some defensive strategy or tactics were employed—“does not automatically immunize trial counsel against a claim that a tactical decision or strategic maneuver was an unreasonable one no competent attorney would have made under the same circumstances.”

Nevertheless, Judge Phipps, joined by Judge Miller, concurred specially in the result, reasoning that there was no prejudice. The boys’ stories were consistent and could be judged on their own merits. Judge McFadden dissented and noted that the only evidence against the defendant came from the children whose testimony was improperly

195. Id. at 583, 696 S.E.2d at 425 (footnote omitted).
196. Id. at 585-86, 696 S.E.2d at 426-27.
198. Id. at 309-12, 711 S.E.2d at 307-08.
199. Id. at 312, 711 S.E.2d at 308-09.
200. Id. at 315, 711 S.E.2d at 310 (Phipps, P.J., concurring fully and specially) (quoting Benham v. State, 277 Ga. 516, 518, 591 S.E.2d 824, 826 (2004)).
201. Id. at 318-19, 711 S.E.2d at 312-13.
202. Id.
bolstered. He would have found deficient performance and prejudice, and would have reversed the convictions.

In *Murray v. State*, the defendant pled guilty to robbery, armed robbery, and aggravated assault with a deadly weapon. The court of appeals rejected a number of the defendant’s claims of ineffective assistance of counsel but accepted one. The charges of aggravated assault with a deadly weapon were in fact lesser included offenses to the armed robbery charges. Trial counsel should have argued that the charges merged, and therefore, the defendant could not be guilty of, and could not be sentenced for, the aggravated assaults. The court of appeals agreed and remanded the case for resentencing.

Finally, the defendant in *Thomas v. State* was convicted of possession of a firearm by a convicted felon. Another man, Kevin Lee, had been arrested at the same time and charged with possession of drugs and other crimes. Thomas argued that, because he and Lee were represented by counsel from the same Metro Conflict Defender Office, his lawyer had an inherent conflict of interest. Thomas had not raised the issue before trial and, thus, had to demonstrate both that his lawyer had a conflict and that it adversely affected his performance. The court of appeals did not discuss whether there was a conflict in this case but disposed of the claim by noting that Thomas “failed to articulate any basis for concluding that his lawyer would have done anything differently if Lee’s attorney had not also worked for the Metro Conflict Defender Office. . . .”

III. LEGAL MALPRACTICE

The Georgia Supreme Court decided one noteworthy case during the survey period related to actions for attorney malpractice. The court of appeals decided eight such cases.

In *Walker v. Cromartie*, the plaintiffs filed an action for legal malpractice but did not attach an expert affidavit as required by Georgia

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203. *Id.* at 320, 711 S.E.2d at 314 (McFadden, J., dissenting).
204. *Id.* at 319, 711 S.E.2d at 313.
206. *Id.* at 621-22, 705 S.E.2d at 727.
207. *Id.* at 622-27, 705 S.E.2d at 728-31.
208. *Id.* at 628, 705 S.E.2d at 732.
209. *Id.*
211. *Id.* at 801-02, 701 S.E.2d at 203-04.
212. *Id.* at 802, 701 S.E.2d at 204.
213. *Id.* at 802-03, 701 S.E.2d at 204.
When the defendants filed a motion to dismiss, the plaintiffs argued that the expert affidavit requirement was unconstitutional because they were indigent. The trial court rejected this argument, and the supreme court affirmed. The supreme court reasoned that there is no state action involved to support a claim of denial of due process. The costs associated with obtaining the expert affidavit resulted from the actions of private actors rather than state actors. Furthermore, there is no equal protection violation because the rule applies to all legal malpractice plaintiffs. The supreme court determined that there was no suspect classification or fundamental right involved and, therefore, there only needed to be a rational basis for the rule. The rule exists for the purpose of reducing the number of frivolous legal malpractice claims and, therefore, is constitutional.

Two of the cases from the court of appeals also involved expert testimony. In Wilson v. McNeely, the court of appeals affirmed a directed verdict rendered by the trial court for the defendant after the trial court ruled that the plaintiff's only expert was not entitled to testify. The purported expert was a licensed attorney but was not qualified to testify as an expert because he was not actively practicing law at the time. In Johnson v. Leibel, the court of appeals reinstated a multi-million dollar verdict against an attorney and his law firm. One issue concerned the expert testimony offered by the plaintiff on causation. The expert testified about the "case within the case," which was a claim for gender and age discrimination against a hospital. The expert opined that the evidence in the underlying case, which was not presented by the lawyer in response to a motion for summary judgment, would have made out a prima facie discrimination case and shown that the hospital's actions were pretextual. The court of appeals held that the expert's testimony was properly admitted.

215. Id. at 511, 696 S.E.2d at 656; see also O.C.G.A. § 9-11-9.1 (2006).
216. Walker, 287 Ga. at 511, 696 S.E.2d at 656.
217. Id. at 511, 696 S.E.2d at 656.
218. Id. at 511-12, 696 S.E.2d at 656.
219. Id.
220. Id. at 512, 696 S.E.2d at 657.
221. Id.
222. Id.
224. Id. at 876, 705 S.E.2d at 875-76.
225. Id. at 876, 705 S.E.2d at 875; see also O.C.G.A. § 24-9-67.1(c)(1) (2010).
227. Id. at 32, 703 S.E.2d at 706.
228. Id. at 37, 703 S.E.2d at 708-09.
because "expert testimony is admissible to prove proximate cause in those legal malpractice cases in which a lay person could not competently determine whether or not the negligence of the attorney proximately caused the plaintiff's damages, i.e., whether or not the plaintiff would have prevailed in the underlying action."\(^{229}\)

Three cases from the court of appeals turned on questions of causation. In \textit{Kitchen v. Hart},\(^ {230}\) the plaintiffs claimed their attorney's negligence led them to assume full, rather than partial, liability for a multi-million dollar loan. The plaintiffs later, however, voluntarily assumed full liability for the loan and thereby severed any causal connection between their liability and the negligence of the defendants.\(^ {231}\) Furthermore, the damages sought by the plaintiffs included lost profits that the plaintiffs allegedly would have made but for the attorney's negligence, but the trial court and the court of appeals found that these damages were too speculative to be recoverable.\(^ {232}\)

\textit{Howard v. Sellers & Warren, P.C.}\(^ {233}\) involved a commercial real estate transaction in which the lawyers had the plaintiff sign an acknowledgement that the plaintiff understood that the lawyers were representing only the lender. Nevertheless, the plaintiff contended that at closing he had to leave early, before the settlement statement was ready, and the lawyer told him that he would have to trust the lawyer to complete the settlement statement properly. The plaintiff then allegedly signed the settlement statement in blank.\(^ {234}\) The court of appeals did not opine on the existence of an attorney-client relationship under these circumstances but affirmed summary judgment for the law firm because the plaintiff's damages arose from an earlier, related transaction rather than the one handled by the firm.\(^ {235}\)

In \textit{Freeman v. Eichholz},\(^ {236}\) the attorney failed to file a required ante-litem notice in connection with the plaintiff's claim against the Georgia Department of Corrections. The plaintiff had been injured when a chair collapsed while she was visiting an inmate at Wayne State Prison.\(^ {237}\) The court of appeals held that the plaintiff was an invitee but nevertheless affirmed summary judgment for the attorney because the plaintiff had not presented any evidence that the prison had breached its duty of

\begin{itemize}
\item \(^ {229}\) \textit{id. at }38, 703 S.E.2d at 709.
\item \(^ {231}\) \textit{id. at }150-52, 704 S.E.2d at 456-57.
\item \(^ {232}\) \textit{id. at }152-53, 704 S.E.2d at 458.
\item \(^ {233}\) 309 Ga. App. 302, 709 S.E.2d 585 (2011).
\item \(^ {234}\) \textit{id. at }304, 709 S.E.2d at 588.
\item \(^ {235}\) \textit{id. at }308-09, 709 S.E.2d at 591.
\item \(^ {236}\) 308 Ga. App. 18, 705 S.E.2d 919 (2011).
\item \(^ {237}\) \textit{id. at }19-20, 705 S.E.2d at 921-22; \textit{see also} O.C.G.A. § 50-21-26 (2009).
\end{itemize}
care toward her.\textsuperscript{238} The record contained no evidence of why the chair collapsed or whether the defect should have been discovered by the prison.\textsuperscript{239} Because she would not have prevailed on the underlying case, the plaintiff could not prove damages in her malpractice case.\textsuperscript{240}

The plaintiff in \textit{Mosera v. Davis}\textsuperscript{241} had thought that his loan to a developer was secured by a first lien on real estate, but the security deed was never recorded. The plaintiff hired lawyers to sue those responsible for the losses resulting from his inability to foreclose or use the lien as leverage. The lawyers helped the plaintiff settle the case, but the settlement did not, in the end, make the plaintiff whole. He sued his lawyers for negligence in connection with the settlement.\textsuperscript{242} The trial court granted summary judgment, and the court of appeals affirmed on multiple grounds.\textsuperscript{243} These included that the plaintiff could not prove proximate cause and damages, because he failed to show that a better settlement offer was obtainable or that a better outcome would have been achieved had the underlying litigation proceeded to trial; that under the judgmental immunity rule, appellees were not liable for the good faith exercise of their judgment in handling or in recommending settlement of the underlying litigation. . . \textsuperscript{244}

In \textit{Jenkins v. Pierce},\textsuperscript{245} the court of appeals reversed summary judgment in favor of a lawyer and his law firm.\textsuperscript{246} The plaintiff was a widow who, on the recommendation of relatives, engaged the lawyer to draft a will. She visited the lawyer twice and signed not only a will but also closing documents on a loan on her property, a quitclaim deed giving an interest in her property to the relatives, and a living will.\textsuperscript{247} The trial court had granted summary judgment to the lawyer and the law firm on the basis of the general rule that a party to a contract must read the contract.\textsuperscript{248} The court of appeals reversed reasoning that there is an exception to that rule that would apply if the plaintiff and the attorney were in a confidential attorney-client relationship at the

\begin{thebibliography}{99}
\bibitem{238} \textit{Freeman}, 308 Ga. App. at 22, 705 S.E.2d at 923.
\bibitem{239} \textit{Id.} at 23, 705 S.E.2d at 924.
\bibitem{240} \textit{Id.} at 23-24, 705 S.E.2d at 924.
\bibitem{242} \textit{Id.} at 226-30, 701 S.E.2d at 865-67.
\bibitem{243} \textit{Id.} at 230, 232, 701 S.E.2d at 867, 869.
\bibitem{244} \textit{Id.} at 230, 701 S.E.2d at 867.
\bibitem{245} 304 Ga. App. 603, 697 S.E.2d 286 (2010).
\bibitem{246} \textit{Id.} at 603, 697 S.E.2d at 287.
\bibitem{247} \textit{Id.} at 603-04, 697 S.E.2d at 287.
\end{thebibliography}
time the documents were signed.\textsuperscript{249} Because there were issues of fact about the existence of that relationship, the court of appeals reversed.\textsuperscript{250}

Finally, in \textit{Sowerby v. Doyal},\textsuperscript{251} the court of appeals reversed a trial court's denial of summary judgment to an attorney and a law firm.\textsuperscript{252} In that case, the lawyer and his firm represented the plaintiff in a domestic relations case. The court in that underlying case held the plaintiff in contempt, and the lawyer had until July 16, 2004 to file an application for a discretionary review of the contempt order. Instead, the lawyer simply attempted to appeal the order. When it became clear in February 2005 that the lawyer had made this mistake, and that the appeal would be dismissed, the lawyer advised the client of his own malpractice and gave her the number of his insurance carrier. He also advised her that the statute of limitations on her malpractice action had begun to run on February 21, 2005. The lawyer was wrong about that too. The statute actually had begun to run when he committed malpractice on July 16, 2004. The client filed a malpractice action on July 16, 2004. The client filed a malpractice action within the limitations period but voluntarily dismissed it. She refiled within four years of February 21, 2005, but more than four years after July 16, 2004.\textsuperscript{253} The court of appeals rejected her argument that the lawyer had committed fraud that tolled the statute of limitations when he gave the wrong date.\textsuperscript{254} Because she knew about her claim well before the expiration of the statute, the court reasoned that she was not prevented from filing within the limitations period by the lawyer's alleged fraud.\textsuperscript{255} Therefore, the statute of limitations was not tolled, and the court of appeals reversed the trial court's denial of the defendants' motion for summary judgment.\textsuperscript{256}

IV. BAR ADMISSION

The Georgia Supreme Court decided one case during the survey period related to bar admission.\textsuperscript{257} The Board to Determine Fitness of Bar Applicants denied Marilyn Ringstaff the certification of fitness that would have enabled her to sit for the bar examination. The board

\begin{footnotesize}
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\item \textsuperscript{249} Id.
\item \textsuperscript{250} Id.
\item \textsuperscript{251} 307 Ga. App. 6, 703 S.E.2d 326 (2010).
\item \textsuperscript{252} Id. at 6, 703 S.E.2d at 327.
\item \textsuperscript{253} Id. at 7-8, 703 S.E.2d at 327-28.
\item \textsuperscript{254} Id. at 8, 703 S.E.2d at 328.
\item \textsuperscript{255} Id. at 8, 703 S.E.2d at 328-29.
\item \textsuperscript{256} Id. at 8, 703 S.E.2d at 329.
\item \textsuperscript{257} \textit{In re} Ringstaff, 288 Ga. 583, 706 S.E.2d 394 (2011).
\end{itemize}
\end{footnotesize}
reached this decision after reviewing evidence that related to the applicant's conduct in connection with a traffic ticket. She represented herself in a way that evidenced "a total lack of understanding and mistrust of the court and the law" and also appealed the judgment based on her own ineffective assistance as counsel. Ringstaff also sent a note to the clerk along with payment of the fine:

April: Thanks for taking care of this—keep the change [smiley face] put it into a police/judicial education fund. I can certainly say this has been an educational experience. I'm now a second-year law student and can honestly relate to what a crooked and inequitable system of "justice" we have. The money was well-spent, I'm sure it will make me a better attorney [smiley face]. Marilyn Ringstaff.

The supreme court held that there was "no evidence to support the [b]oard's decision." The court reviewed her explanations for her conduct at length, noted her acknowledgment that she had come to realize the note was inappropriate, and cited to recommendations from a supervisor at Atlanta Legal Aid and from two faculty members at her law school. The court unanimously granted the certification of fitness to practice law.

V. JUDICIAL ETHICS

The Georgia Supreme Court decided two noteworthy cases related to judicial ethics during the survey period. The court of appeals decided one.

In Propst v. Morgan, the question for the supreme court was whether the court of appeals erred when it addressed the merits of a recusal motion before considering whether the trial judge properly dismissed a party's appeal. In the trial court, Morgan filed a motion to recuse, and the trial judge denied it. After Morgan lost at trial, Morgan filed a notice of appeal, but the trial judge dismissed the appeal. The court of appeals held that it should consider the recusal motion first and held further that the motion was handled improper-

258. Id. at 583, 706 S.E.2d at 394.
259. Id. at 583 n.1, 706 S.E.2d at 394 n.1 (internal quotation marks omitted).
260. Id. at 583 n.2, 706 S.E.2d at 395 n.2 (alterations in original).
261. Id. at 585, 706 S.E.2d at 396.
262. Id. at 589, 706 S.E.2d at 398.
263. Id.
265. Id. at 862, 708 S.E.2d at 292; see also O.C.G.A. § 5-6-48(c) (1995).
266. Propst, 288 Ga. at 862-63, 708 S.E.2d at 292-93.
Propst argued that the court of appeals should have followed the general rule that the it must first address the dismissal of any appeal before reaching other issues. The supreme court recognized the general rule but created an exception to it. If the judge should have been disqualified, then all the orders of the judge, including the one dismissing the appeal, would be "invalid and of no effect." Therefore, logically the court of appeals had to decide the merits of the appeal on the recusal motion before addressing the propriety of what the judge did later.

The supreme court also ordered the removal of Judge Kenneth Fowler from the bench and barred him from ever again holding or seeking judicial office. The Judicial Qualifications Commission (JQC) had found numerous violations of the Code of Judicial Conduct, including: (1) telling criminal defendants that they had the burden to prove their innocence; (2) allowing criminal defendants to "buy out" their community service with money that the judge then controlled; (3) abusing and insulting parties in court, such as screaming at one defendant to "shut up" and implying to another that she had given sexual favors to an arresting officer; and (4) engaging in numerous ex parte communications. The JQC and the supreme court rejected Judge Fowler's argument that all the transgressions resulted from the fact that he is not a lawyer, and the court upheld the JQC's recommendation of permanent removal from office.

In Mayor of Savannah v. Batson-Cook Co., the court of appeals decided that the affidavits filed in support of a motion to recuse the trial judge were not sufficient to require the judge to refer the matter to another judge. Such referrals must be made if the judge determines that, if any of the facts alleged in the affidavits are true, recusal would be warranted. The affidavits in this case recited that the judge assigned himself the case and that the judge's nephew was a partner in

267. Id. at 863, 708 S.E.2d at 293.
268. Id. at 863-64, 708 S.E.2d at 293.
269. Id. at 864, 708 S.E.2d at 294.
270. Id. at 864, 708 S.E.2d at 293-94 (quoting Gillis v. City of Waycross, 247 Ga. App. 119, 122, 543 S.E.2d 423, 426 (2000)) (internal quotation marks omitted).
271. Id. at 864, 708 S.E.2d at 294.
273. Id. at 467-69 & n.8, 696 S.E.2d at 645-46 & n.8 (internal quotation marks omitted).
274. Id. at 469, 473, 696 S.E.2d at 647, 649.
276. Id. at 878-79, 714 S.E.2d at 244.
277. Id. at 880, 714 S.E.2d at 245; Ga. UNIF. SUPER. CT. R. 25.3 (2011).
the law firm that acted as general counsel for one of the parties.\textsuperscript{278} The court of appeals held that the affidavits did not require the trial judge to have another judge rule on the motion because the factual allegations were "legally insufficient to warrant recusal because they did not demonstrate that Judge Lee's impartiality might reasonably be questioned."\textsuperscript{279} The affidavits theoretically could have done so if, for example, they alleged facts to support the claim that the judge's nephew was acting as a lawyer in the proceeding or was known to the judge to have more than a de minimis interest in the outcome of the proceeding.\textsuperscript{280} Presumably the affidavits made no such claim, in which case the court of appeals correctly held that the motion need not have been referred to another judge.

VI. ATTORNEY DISQUALIFICATION

The Georgia Supreme Court decided one case involving attorney disqualification during the survey period, while the court of appeals decided two.

\textit{In Registe v. State,}\textsuperscript{281} the supreme court affirmed, on interlocutory appeal, the trial judge's decision to disqualify defense counsel in a murder case.\textsuperscript{282} The lawyer hired by the defendant had previously worked in the district attorney's office and had, in fact, signed three applications for search warrants in an effort to find and apprehend the defendant in connection with this same prosecution.\textsuperscript{283} The supreme court disqualified defense counsel on numerous grounds.\textsuperscript{284} The lawyer could not represent the defendant in the same case in which he formerly represented the state—in effect, he switched sides without the permission of the state.\textsuperscript{285} Furthermore, as an attorney who left public sector work and went into private practice, the lawyer could not represent a private client in connection with a matter in which he was personally and substantially involved as a lawyer for the government without the

\begin{itemize}
\item \textsuperscript{278} \textit{Batson-Cook Co.}, 310 Ga. App. at 881, 714 S.E.2d at 246.
\item \textsuperscript{279} Id.
\item \textsuperscript{280} \textit{See} \textit{GA. CODE OF JUDICIAL CONDUCT} Canon 3(E)(1)(b)(ii) & (iii) (2010) (setting forth grounds for disqualification with respect to the interests of persons within the third degree of relationship to the judge, which includes nephews).
\item \textsuperscript{281} 287 Ga. 542, 697 S.E.2d 804 (2010).
\item \textsuperscript{282} Id. at 551, 697 S.E.2d at 811.
\item \textsuperscript{283} Id. at 542-43, 697 S.E.2d at 805-06.
\item \textsuperscript{284} Id. at 551, 697 S.E.2d at 811.
\item \textsuperscript{285} Id. at 548, 697 S.E.2d at 809; \textit{GA. RULES OF PROF'L CONDUCT} R.1.9(a) (2011).
\end{itemize}
district attorney's consent. The case had to proceed with new defense counsel.\textsuperscript{286} In \textit{Rescigno v. Vesali},\textsuperscript{288} the court of appeals affirmed the trial court's decision not to disqualify counsel.\textsuperscript{289} The plaintiff, Rescigno, sued Vesali, who was defended by the law firm of Weinstock & Scavo. The plaintiff immediately moved to disqualify that firm because another of the firm's lawyers represented her in an unrelated matter pending before a different judge.\textsuperscript{290} The opinion is unclear whether that representation had ended. If it had, then Rescigno was simply a former client of the firm, and none of the lawyers in the firm would have a conflict in representing a new client against her, as long as the matters were not the same or substantially related, and the court of appeals concluded that they were not related.\textsuperscript{291} However, if that other lawyer in Weinstock & Scavo was still representing Rescigno while the firm represented Vesali against her, then the issues would be quite different. In that case, the firm would be simultaneously representing Rescigno and representing a party adverse to her, and that would violate Georgia Rule of Professional Conduct 1.7:

\begin{quote}
As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer
\end{quote}

\textsuperscript{286} \textit{Registe}, 287 Ga. at 550, 697 S.E.2d at 810-11; GA. RULES OF PROF'L CONDUCT R. 1.11 (2011). The supreme court did get one part of the analysis wrong. The court pointed out that the defense lawyer also had a conflict under Georgia Rule of Professional Conduct 1.7, which prohibits a lawyer from representing a client "if there is a significant risk that . . . [the lawyer's own interests or] the lawyer's duties to . . . a former client . . . will materially and adversely affect the representation of the client." \textit{Registe}, 287 Ga. at 547, 697 S.E.2d at 809 (internal quotation marks omitted); GA. RULES OF PROF'L CONDUCT R. 1.7(a) (2011). The lawyer did have such a conflict because there would be a risk that the lawyer would "pull a punch" as a result of his prior relationship with the district attorney's office or his prior representation of the state, or perhaps he would be unable to pursue certain matters because of his confidentiality obligations. However, the court went on to write that such a conflict would not be waivable because the representation involved the assertion of a claim by one client against another client. \textit{Registe}, 287 Ga. at 547, 697 S.E.2d at 809; GA. RULES OF PROF'L CONDUCT R. 1.7(c)(2) (2011). That part of the rule is irrelevant because it applies only when the lawyer attempts to represent opposing interests in the same case at the same time. Here, the defense lawyer was obviously not attempting to defend and prosecute in the same case. \textit{See Registe}, 287 Ga. at 542-43, 697 S.E.2d at 806.

\textsuperscript{287} \textit{See Registe}, 287 Ga. at 542, 697 S.E.2d at 805-06.

\textsuperscript{288} 306 Ga. App. 610, 703 S.E.2d 65 (2010).

\textsuperscript{289} \textit{Id.} at 611, 703 S.E.2d at 67-68.

\textsuperscript{290} \textit{Id.} at 610-11, 703 S.E.2d at 67.

\textsuperscript{291} \textit{See id.} at 612-13, 703 S.E.2d at 68-69; GA. RULES OF PROF'L CONDUCT R. 1.9 (2011).
ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated.\textsuperscript{292} The conflict would be imputed among members of the firm.\textsuperscript{293} Thus, the propriety of the decision by the court of appeals depends upon whether the firm was simultaneously representing Rescigno and a party that was adverse to Rescigno in another matter.

Finally, the court of appeals decided \textit{Schaff v. State}.\textsuperscript{294} In that case, the court of appeals reversed the trial court’s order disqualifying a defense counsel in a child molestation case.\textsuperscript{295} The lawyer had videotaped a recantation by the victim of her allegations of abuse. The state moved to disqualify defense counsel because he would be a necessary witness to the circumstances of the recantation, and generally lawyers cannot serve as both an advocate and a necessary witness in the same case.\textsuperscript{296} The court of appeals reversed the disqualification order because there were other witnesses to the videotaped statement, and therefore the lawyer’s testimony would not be necessary.\textsuperscript{297}

\section*{VII. ACTIONS OF THE STATE BAR OF GEORGIA FORMAL ADVISORY OPINION BOARD\textsuperscript{298}}

The State Bar of Georgia Formal Advisory Opinion Board (FAOB) took noteworthy action with respect to three matters during the survey period.

On June 15, 2010, the FAOB filed Opinion 10-1 with the Georgia Supreme Court.\textsuperscript{299} This opinion concludes that different public defenders “employed in the [same] circuit public defender office . . . may not represent co-defendants when a single lawyer would have an impermissible conflict of interest in doing so.”\textsuperscript{300} The opinion concludes that lawyers in a circuit public defender’s office are part of the same “firm” for purposes of the imputation of conflicts under Georgia

\begin{itemize}
\item \textsuperscript{292} \textit{GA. RULES OF PROF’L CONDUCT} R. 1.7 cmt. 3 (2011).
\item \textsuperscript{293} See \textit{GA. RULES OF PROF’L CONDUCT} R. 1.10 (2011).
\item \textsuperscript{294} 304 Ga. App. 638, 697 S.E.2d 305 (2010).
\item \textsuperscript{295} \textit{Id.} at 640, 697 S.E.2d at 307.
\item \textsuperscript{296} \textit{Id.} at 638-39, 697 S.E.2d at 306; see also \textit{GA. RULES OF PROF’L CONDUCT} R. 3.7 (2011).
\item \textsuperscript{297} \textit{Schaff}, 304 Ga. App. at 641, 697 S.E.2d at 308.
\item \textsuperscript{298} The Author is a member of the Formal Advisory Opinion Board (FAOB). All statements in this Article are the Author’s and are not to be attributed to the State Bar, the FAOB, or any of its staff or members.
\item \textsuperscript{299} \textit{Notice of Filing of Formal Advisory Opinions in Supreme Court}, 15 GA. B. J. 91, 91 (June 2010).
\item \textsuperscript{300} \textit{Second Publication of Formal Advisory Opinion No. 07-R1 hereinafter known as Formal Advisory Opinion No. 10-1}, 15 GA. B. J. 92, 92 (June 2010).
\end{itemize}
Rule of Professional Conduct 1.10. The supreme court granted a petition for discretionary review in January 2011, and the matter is fully briefed and pending before the court.

The FAOB filed a petition for discretionary review of Opinion 10-2 with the supreme court in February 2011. This opinion concerns whether an attorney, who serves both as legal counsel and as guardian ad litem in a case about the termination of parental rights, may advocate for termination over the client’s objection. The opinion concludes that the attorney must withdraw when it is “clear that there is an irreconcilable conflict between the child’s wishes and the attorney’s considered opinion” about what is in the child’s best interests. The party who requested the opinion also requested discretionary review. The supreme court granted the petitions for discretionary review in March 2011, and the matter is still pending before the court.

Finally, the FAOB approved Opinion 11-1 for second publication. That opinion concerns the ethical considerations for lawyers who enter into flat-fee contracts to deliver legal services. The opinion discusses three types of circumstances: (1) a sophisticated client hires a lawyer or firm to do an indeterminate amount of work for a fixed fee; (2) a third party, such as an insurance company, retains a lawyer or firm to do an indeterminate amount of work for a fixed fee, and that work is the representation of parties who the third party is contractually obligated to defend and indemnify, such as policyholders; and (3) a third party retains a lawyer or firm to provide an indeterminate amount of legal services for an indeterminate number of clients, when the third party is obligated to pay for the lawyer but has no direct stake in the outcome of the litigation (for example, a government entity that supplies indigent criminal defense services through a contract with a law firm). After second publication, the opinion was to be filed with the supreme court.

301. Id. at 94; see also Ga. Rule of Prof’l Conduct R.1.10 (2011).
303. Id. at 17.
305. Id.
307. Id.
308. Id.
309. Id.
311. State Bar of Georgia Annual Report, supra note 2, at 17.
VIII. CONCLUSION

Lawyers need guidance in their continuing efforts to conform their conduct to the ethical norms of the profession. The cases and other matters described in this Article comprise the latest set of such guidance in Georgia.