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Legal Ethics

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Legal Ethics

by Patrick Emery Longan*

I. INTRODUCTION

This Survey covers the period from June 1, 2019, to May 31, 2020.[1] The Article discusses developments with respect to attorney discipline, ineffective assistance of counsel, bar admission, disqualification of counsel, judicial conduct, malpractice and other civil claims, contempt, several miscellaneous cases, formal advisory opinions (State Bar of Georgia and the American Bar Association), and amendments to the Georgia Rules of Professional Conduct.

II. LAWYER DISCIPLINE

A. Disbarments[2]

1. Trust Account and Other Financial Issues

The Georgia Supreme Court disbarred six attorneys during the Survey period for misconduct that primarily related to their trust accounts or other financial issues.

Two of the cases involved voluntary surrenders of the lawyers' licenses. The supreme court accepted the voluntary surrender of Matthew A. Dickason's license in response to numerous grievances relating to his failure to account for funds that he received as a fiduciary in connection with real estate closings.[3] Sarah M. Wayman voluntarily surrendered her license after admitting that, although she received

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[1] For an analysis of Georgia legal ethics during the June 1, 2018 to May 31, 2019 survey period, *see* Patrick Emery Longan, *Legal Ethics, Annual Survey of Georgia Law,* 71 MERCER L. REV. 157 (2019).

[2] Lawyers in Georgia can submit petitions for voluntary discipline. GA. RULES OF PROF'L CONDUCT R. 4-227 (2020). The acceptance of a petition for voluntary discipline of disbarment (sometimes described as a voluntary surrender of the lawyer's license) is tantamount to disbarment by the court and is treated as such in this Article.

[3] *In re* Dickason, 308 Ga. 411, 841 S.E.2d 728, 729 (2020).

$75,000 in funds that should have been distributed to her client and certain third parties, she did not distribute those funds to the appropriate parties and could account for only $5,000 of the funds.[4]

The supreme court disbarred Andrew D. Taylor as a matter of reciprocal discipline after he was disbarred in Nevada.[5] Mr. Taylor lost his Nevada license because he misappropriated more than one million dollars of client funds, commingled client funds with his, and opened numerous law firms and trust accounts in an attempt to mislead the bar. Mr. Taylor had also entered into litigation-advance loan agreements on behalf of clients without their knowledge, used the proceeds for his own expenses, failed to repay the loans, failed to cooperate with the disciplinary authorities, and made false statements during the disciplinary process.[6]

Carla Burton Gaines was disbarred after she failed to distribute over $337,000 she held in trust and instead commingled the funds with her own and converted them to her own use.[7] Ms. Gaines falsely told the company that was to receive the funds that she had wired them, and the company sued her and obtained a default judgment against her. In a post-judgment deposition, Ms. Gaines testified falsely that she had transferred $280,000 of the funds to a third-party in error, and thereafter she failed to respond to discovery requests, even when she was ordered to do so. The court held her in contempt, and Ms. Gaines told the court that she would comply with the court's orders. When she did not, the trial court ordered her to be incarcerated until she complied. Ms. Gaines did not respond to the State Bar's complaint and was held in default.[8] In aggravation, the special master found that Ms. Gaines had a prior disciplinary history, had a dishonest or selfish motive, committed multiple offenses, engaged in bad-faith obstruction of the disciplinary process, had substantial experience in the practice of law, and was indifferent to making restitution.[9]

The supreme court disbarred Alexander E. Kahn for violating multiple Rules of conduct in connection with his representation of one client.[10] Mr. Kahn defaulted in the disciplinary process and therefore admitted that he induced the client to invest $300,000 in an LLC that Mr. Kahn had formed, and that in connection with that investment Mr.

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[4] *In re* Wayman, 307 Ga. 586, 586–87, 837 S.E.2d 261 (2019).

[5] *In re* Taylor, 308 Ga. 490, 841 S.E.2d 661 (2020).

[6] *Id.* at 491, 841 S.E.2d 661 (2020).

[7] *In re* Gaines, 307 Ga. 459, 836 S.E.2d 82, 83 (2019).

[8] *Id.* at 459–60, 836 S.E.2d at 83.

[9] *Id.* at 460, 836 S.E.2d at 84.

[10] *In re* Kahn, 306 Ga. 189, 829 S.E.2d 344 (2019).

Kahn failed to comply with the requirements of Rule 1.8(a)[11] (business transactions with clients). Mr. Kahn did not provide documentation of the client's supposed investment in the LLC and did not upon request return the client's money. Mr. Kahn also failed: (1) to provide the client with copies of tax returns that he supposedly was preparing; (2) to provide documentation about his representation of the client with respect to a tax penalty that had been assessed; (3) to file a tax return that he had prepared and the client had signed; and (4) to prepare a will that he promised to prepare for the client.[12]

The supreme court disbarred Clarence A. Sydnor, IV after he settled a client's claim, forged the client's name on the insurance company's check, deposited the money into his operating account, failed to inform the client about the funds, and failed to deliver the money to the client.[13] Mr. Sydnor failed to respond to numerous inquiries from the client about the status of the settlement.[14] The supreme court noted that Mr. Sydnor acted with a dishonest or selfish motive.[15]

2. Client Abandonment and Lack of Communication

The supreme court disbarred eight attorneys for misconduct that included client abandonment and failure to communicate.

The supreme court disbarred Christopher John Thompson because he abandoned a client and did not respond to the state bar's formal complaint.[16] Mr. Thompson had been hired to represent a client in a personal injury case and, although he filed the complaint, he thereafter took no action in the matter. The case was eventually dismissed.[17] The supreme court noted the absence of mitigating circumstances and disbarred Mr. Thompson.[18]

The supreme court disbarred Johnnie Mae Graham.[19] Ms. Graham defaulted and thereby admitted that she had undertaken to represent a client in a claim related to a car accident but (after filing the complaint) abandoned the matter, failed to communicate with the client, did not return the client's file, and did not respond to the state bar's requests for information regarding the matter. The client's case was dismissed because Ms. Graham did not appear at a hearing. The court found that

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[11] GA. RULES OF PROF'L CONDUCT R. 1.8(a) (2020).

[12] *Id.* at 189–90, 829 S.E.2d at 345.

[13] *In re* Sydnor, 306 Ga. 383, 830 S.E.2d 732, 733 (2019).

[14] *Id.* at 384, 830 S.E.2d at 733.

[15] *Id.*, 830 S.E.2d at 734.

[16] *In re* Thompson, 306 Ga. 618, 832 S.E.2d 334 (2019).

[17] *Id.* at 618, 832 S.E.2d at 334.

[18] *Id.* at 619, 832 S.E.2d at 335.

[19] *In re* Graham, 306 Ga. 380, 829 S.E.2d 67, 68 (2019).

there were two aggravating factors, substantial experience in the practice of law and previous disciplinary history.[20]

The supreme court disbarred Lesley Annis,[21] who accepted fees to represent two clients in bankruptcy matters but then abandoned the clients and stopped communicating with them.[22] Ms. Annis defaulted in the disciplinary process.[23]

Jeffrey L. Sakas was disbarred[24] after he defaulted in connection with three formal complaints that raised six different disciplinary matters. Mr. Sakas had been disciplined twice before in recent years, once by public reprimand and once by suspension. Many of the new matters involved Mr. Sakas representing clients while he was under that suspension. In two other matters, Mr. Sakas did not do the agreed-upon work, did not respond to the clients' inquiries, and refused to return the clients' retainers.[25] In another matter, Mr. Sakas followed the same pattern and ended up in fee arbitration with his former clients, where he initially made numerous false statements about the work he allegedly performed.[26] Mr. Sakas agreed to represent another client who was being evicted by the client's mortgage lender. Mr. Sakas filed an appeal of the eviction order but, after Mr. Sakas did not respond to a dispositive motion filed by the lender, the court granted summary judgment to the lender and issued a writ of possession. Mr. Sakas also had advised his client not to comply with the court's order to make the client's mortgage payments to the court registry. Mr. Sakas made another attempt, in a separate suit, to stop the eviction, but again he failed to respond to a motion to dismiss, and the case was dismissed. Mr. Sakas then refused to return the client's file.[27]

The special master found numerous grounds for finding that the presumptive sanction under the ABA Standards for Imposing Lawyer Sanctions was disbarment. The special master found no mitigating circumstances and found in aggravation that Mr. Sakas acted with a dishonest or selfish motive, engaged in a pattern of misconduct, committed numerous violations of the Rules, showed bad faith obstruction of the disciplinary process, refused to acknowledge the wrongful nature of his conduct, and had substantial experience in the

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[20] *Id.* at 380, 829 S.E.2d at 68.

[21] *In re* Annis, 306 Ga. 187, 188, 829 S.E.2d 346, 348 (2019).

[22] *Id.* at 187–88, 829 S.E.2d at 347–48.

[23] *Id.* at 187, 829 S.E.2d at 347.

[24] *In re* Sakas, 306 Ga. 504, 507, 831 S.E.2d 734, 736 (2019).

[25] *Id.* at 504–05, 831 S.E.2d at 735.

[26] *Id.* at 504–05, 831 S.E.2d at 735.

[27] *Id.* at 506, 831 S.E.2d at 735–36.

practice of law.[28] The supreme court accepted the special master's recommendation to disbar Mr. Sakas.[29]

An attorney accepted a retainer in excess of $29,000 to handle a divorce case. The monthly invoices sent by the attorney totaled $12,866 as of September 2014. When the case was resolved approximately a year later, the parties agreed to have the trial court decide the issue of attorney's fees. However, the lawyer did not file a fee petition, respond to the spouse's fee petition, attend the hearing on fees, respond to numerous requests for information from her client, or refund the difference between her earned fees and the retainer. The lawyer moved to Maine without leaving any forwarding information and failed to respond to the state bar's notice of discipline.[30] Finding violations of Rules 1.2(a),[31] 1.3,[32] 1.4,[33] 1.5,[34] 1.15(I),[35] 1.15(II),[36] 1.16(d),[37] and 3.2,[38] the supreme court disbarred her.[39] The court noted as aggravating factors that the lawyer committed multiple offenses, had a dishonest or selfish motive, had substantial experience in the practice of law, and showed indifference to making restitution.[40]

The supreme court disbarred Julianne W. Holliday after she defaulted with respect to three grievances.[41] In the first, she represented a client with respect to several traffic matters but failed to make a timely filing to prevent the suspension of the client's license and then falsely told the client that she had done so. After his license was suspended, the client attempted unsuccessfully and repeatedly to reach Ms. Holliday until she sent him an incorrect message on social media that he could get his license back by attending DUI school. The client fired Ms. Holliday, but she did not return his fee despite promising to do so. There was also evidence that during this time Ms. Holliday was not authorized to represent private clients, because she was serving as a public defender.[42]

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[28] *Id.* at 506–07, 831 S.E.2d at 736.

[29] *Id.* at 507, 831 S.E.2d at 736.

[30] *In re* Noriega-Allen, 308 Ga. 398, 398, 841 S.E.2d 1, 1.

[31] GA. RULES OF PROF'L CONDUCT R. 1.2(a) (2020).

[32] GA. RULES OF PROF'L CONDUCT R. 1.3 (2020).

[33] GA. RULES OF PROF'L CONDUCT R. 1.4 (2020).

[34] GA. RULES OF PROF'L CONDUCT R. 1.5 (2020).

[35] GA. RULES OF PROF'L CONDUCT R. 1.15(I) (2020).

[36] GA. RULES OF PROF'L CONDUCT R. 1.15 (II) (2020).

[37] GA. RULES OF PROF'L CONDUCT R. 1.16 (d) (2020).

[38] GA. RULES OF PROF'L CONDUCT R. 3.2 (2020).

[39] *Noriega-Allen*, 308 Ga. at 398–99, 841 S.E.2d at 1.

[40] *Id.* at 399, 841 S.E.2d at 1-2.

[41] *In re* Holliday, 308 Ga. 216, 216, 839 S.E.2d 518, 520 (2020).

[42] *Id.* at 216–17, 839 S.E.2d at 520.

In the second matter, Ms. Holliday agreed to file a habeas corpus petition for a client. When she had failed to do so as a deadline approached, the client was forced to file the petition *pro se*. Ms. Holliday thereafter could not be reached and did not communicate further with the client or the client's family.[43]

In the third matter, Ms. Holliday represented a client in a divorce action and failed to include in the proposed divorce decree modifications relating to a quitclaim deed as requested by her client. Initially, after falsely telling the client that she did not know what had happened, Ms. Holliday agreed to correct her error but never did so. She ignored the client's efforts to communicate with her for three months and then, in response to a request from the client for a refund, paid back only a portion of the money on the pretense that the rest would cover additional work, which was never done. Ms. Holliday refunded the rest of the fee only upon submission of the grievance but failed to return the client's file and relocated her office without notifying the client.[44]

On the basis of these three grievances, and in light of the aggravating factors of Ms. Holliday's default, her substantial experience in the practice of law, her dishonesty, and her abandonment of clients, the supreme court disbarred her.[45]

The supreme court disbarred Scott D. Bennett after he filed an insufficient response to a notice of discipline and thereby defaulted in connection with a grievance filed against him.[46] By defaulting, Mr. Bennett admitted that he represented a client in a dispute that the parties settled for payment by Mr. Bennett's client of $8,000. The client sent Mr. Bennett the money to be disbursed to the other party upon execution of the settlement documents. Mr. Bennett then abandoned the matter. He did not respond to opposing counsel or his client, and he did not send the $8,000 payment. The opposing party filed a motion to enforce the settlement, and Mr. Bennett did not attend the hearing. When the court contacted him, Mr. Bennett said the client did not oppose the order, and the trial court ordered Mr. Bennett's client to pay the $8,000 plus $2,500 in attorney's fees. Mr. Bennett did not inform his client of the order, with the result that the court entered judgment against the client for $10,500. Mr. Bennett did not inform the client or respond to the client's inquiries, and Mr. Bennet did not return the $8,000.[47] The supreme court disbarred Mr. Bennett, noting in aggravation that he had a dishonest or selfish motive, that he did not

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[43] *Id.* at 217, 839 S.E.2d at 520.

[44] *Id.* at 217–18, 839 S.E.2d at 520–21.

[45] *Id.* at 218, 839 S.E.2d at 521.

[46] *In re* Bennett, 307 Ga. 679, 837 S.E.2d 298 (2019).

[47] *Id.* at 679, 837 S.E.2d at 299.

respond properly to the notice of discipline, and that he had substantial experience in the practice of law.[48]

Jared Michael Arrington was disbarred after he failed to use $972.50 in funds he collected as part of the closing of a residential real estate transaction to purchase a title insurance policy.[49] Mr. Arrington failed to respond to requests by the lender for information about the policy over a two-year period, after which the lender filed a grievance. Mr. Arrington responded that due to personal issues he had closed his practice and that he thought that his assistant had taken care of all outstanding issues regarding title policies. He discovered that this was not the case and promised to send the policy and proof of payment, but he never did so.[50] The supreme court found that this conduct constituted violations of Rule 1.3, 1.4, and 1.15.[51] In aggravation, the State Bar noted that Mr. Arrington had acted willfully, dishonestly and with a selfish motive and that he had substantial experience in the practice of law, was indifferent to making restitution, engaged in multiple violations of the Rules, had taken advantage of a vulnerable victim, and intentionally failed to comply with the disciplinary process.[52]

3. Criminal Activity

Three Georgia lawyers lost their licenses during the Survey period as a result of criminal conduct.

Marc Celello voluntarily surrendered his license to practice law after pleading guilty in federal court to conspiracy to commit securities fraud.[53] Richard P. Colbert voluntarily surrendered his license after he pled guilty in federal court in Florida to thirteen felony charges.[54] Natasha Simone White did the same after pleading guilty in federal court to the felony of corruptly obstructing a civil forfeiture case.[55]

4. Miscellaneous Disbarments

The supreme court disbarred five lawyers for misconduct that cannot easily be classified into the usual categories of financial impropriety, client abandonment, and criminal conduct.

Charles Edward Taylor defaulted in connection with a formal complaint by the State Bar, and as a result he admitted to numerous

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[48] *Id.* at 680, 837 S.E.2d at 299.

[49] *In re* Arrington, 308 Ga. 486, 488, 841 S.E.2d 663, 665 (2020).

[50] *Id.* at 487, 841 S.E.2d at 665.

[51] *Id.*

[52] *Id.*

[53] *In re* Celello, 308 Ga. 339, 840 S.E.2d 349 (2020).

[54] *In re* Colbert, 307 Ga. 675, 837 S.E.2d 761 (2020).

[55] *In re* White, 307 Ga. 461, 836 S.E.2d 82 (2019).

violations of the Georgia Rules of Professional Conduct.[56] Mr. Taylor cooperated with a non-lawyer who set up an entity named C. Taylor Law Firm, LLC to advertise and provide "mortgage loan modification services."[57] This entity was separate from Mr. Taylor's regular law practice, and Mr. Taylor did not supervise the activities of his non-lawyer associate and allowed payments to the LLC to go directly to the associate rather than to a trust account.[58]

Mr. Taylor accepted referrals from the non-lawyer associate.[59] In two cases, Mr. Taylor obtained payments from clients, ostensibly for the filing fees for bankruptcy cases that would at least delay foreclosure on their homes.[60] Mr. Taylor filed "skeletal" bankruptcy petitions for both clients but kept some of the funds for the filing fee for himself as compensation and then falsely represented to the bankruptcy court that he had received no compensation from the clients (he did this twice in one client's case). As a result of the failure to pay the entire filing fee, the bankruptcy cases for both clients were dismissed.[61] In one of the cases, Mr. Taylor filed a second bankruptcy petition but, because the entire filing fee had not been paid, the client's home was sold in foreclosure. Mr. Taylor eventually stopped communicating with the client about why the filing fee had not been paid with the funds supplied by the client.[62] In the other case, Mr. Taylor failed to appear at a meeting of creditors. After the case was dismissed for failure to pay the filing fee, the client hired new counsel and obtained a fee arbitration award against Mr. Taylor.[63]

Mr. Taylor violated at least eight different Rules, for several of which the maximum penalty is disbarment. The only mitigating factor was his lack of a prior disciplinary history, but there were numerous aggravating factors, including a dishonest or selfish motive, a pattern of misconduct, multiple violations of the Rules, failure to cooperate in the disciplinary process, substantial experience in the practice of law, and indifference to making restitution.[64] The supreme court accepted the special master's recommendation and disbarred Mr. Taylor.[65]

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[56] *In re* Taylor, 306 Ga. 622, 832 S.E.2d 328, 329 (2019).

[57] *Id.* at 622–23, 832 S.E.2d at 329.

[58] *Id.* at 623, 832 S.E.2d at 329–30.

[59] *Id.*, 832 S.E.2d at 330.

[60] *Id.* at 623–24, 832 S.E.2d at 330–31.

[61] *Id.* at 623–25, 832 S.E.2d at 330–31.

[62] *Id.* at 624, 832 S.E.2d at 330.

[63] *Id.* at 625, 832 S.E.2d at 331.

[64] *Id.* at 625–26, 832 S.E.2d at 331.

[65] *Id.* at 626, 832 S.E.2d at 331–32.

The supreme court disbarred Sherri Jefferson.[66] The formal complaint against Ms. Jefferson alleged that she violated Rules 3.3,[67] 4.2,[68] 8.1,[69] and 8.4,[70] and when Ms. Jefferson did not submit timely responses in discovery, the special master held a hearing on the State Bar's motion for sanctions.[71] Ms. Jefferson invoked the Fifth Amendment[72] when she appeared at the hearing. The special master struck her answer and deemed the allegations of the complaint to be admitted.[73] The special master found that the presumptive sanction was disbarment and noted the following aggravating factors in aggravation and mitigation:

> The special master also found the following aggravating factors, including: the existence of prior discipline, specifically, Jefferson's receipt of an Investigative Panel Reprimand in two cases in 2006; a selfish and dishonest motive, as Jefferson made misrepresentations to multiple tribunals with the intent to deceive and communicated with the other woman with the intent to intimidate her and otherwise affect the outcome of the relevant proceedings; a pattern of misconduct and the existence of multiple violations; bad faith obstruction of, and the submission of false statements in, the disciplinary proceedings; and the refusal to acknowledge the wrongful nature of her conduct. The only factor in mitigation recognized by the special master was the remoteness in time of Jefferson's prior disciplinary violations, and the special master excluded those prior violations from consideration in recommending sanctions.[74]

The special master recommended disbarment, and the review board approved.[75] The supreme court rejected Ms. Jefferson's claim that she was entitled to a jury trial and agreed that disbarment was the appropriate sanction.[76]

Melvin T. Johnson failed to respond to discovery requests in connection with five disciplinary matters. Without a hearing, the special master found that he had intentionally or consciously failed to respond

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[66] *In re* Jefferson, 307 Ga. 50, 56, 834 S.E.2d 73, 77 (2019). The Author served as special master in this case.

[67] GA. RULES OF PROF'L CONDUCT R. 3.3 (2020).

[68] GA. RULES OF PROF'L CONDUCT R. 4.2 (2020).

[69] GA. RULES OF PROF'L CONDUCT R. 8.1 (2020).

[70] GA. RULES OF PROF'L CONDUCT R. 8.4 (2020).

[71] *Jefferson*, 307 Ga. at 51, 834 S.E.2d at 74.

[72] U.S. CONST. amend. V.

[73] *Jefferson*, 307 Ga. at 51, 834 S.E.2d at 74.

[74] *Id.* at 53, 834 S.E.2d at 75.

[75] *Id.* at 55, 834 S.E.2d at 77.

[76] *Id.* at 54, 834 S.E.2d at 76.

to discovery and on that basis struck his pleadings and entered defaults against him.[77] The supreme court held that there was no abuse of the special master's discretion in making this determination.[78] The five matters included the following actions that constituted violations of the Rules of Professional Conduct.[79]

In one matter, Mr. Johnson failed to attend hearings and, upon being contacted by the judge's secretary about one absence, did not disclose that he was under interim suspension at the time.[80] In another, Mr. Johnson represented an executor and took possession of over $340,000 but did not deposit it into a trust account, gave misleading information about the funds to the client, did not disburse the funds when requested, and eventually returned the funds with a cashier's check that was not written on his trust account.[81] The third matter involved improper solicitation of a client who had been in an automobile accident. Mr. Johnson performed work for her while he was suspended without disclosing the suspension but also failed to respond to the client's requests for information and failed to appear in court on her behalf.[82] In the fourth matter, Mr. Johnson represented clients in Alabama, where he is not licensed to practice. He forged an Alabama attorney's name on the complaint and later forged his clients' names on a certificate of service for notice of dismissal of the case and falsely informed the clients that the case was progressing well. Mr. Johnson was indicted in Alabama for possession of a forged instrument and lied to the state bar of Georgia when he said that the Alabama lawyer had given him authority to file the case.[83] Finally, in the fifth matter Mr. Johnson represented a divorce client while he was under suspension and did not inform the client of the suspension and otherwise failed to communicate adequately with the client.[84]

The supreme court noted the following factors in aggravation: dishonest or selfish motive; pattern of misconduct and multiple offenses; refusal to acknowledge the wrongful nature of his actions; intentional failure to comply with the Rules regarding disciplinary matters; vulnerability of his victims; substantial experience in the practice of law;

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[77] *In re* Johnson, 308 Ga. 233, 234–35 838 S.E.2d 755, 756–57 (2020).

[78] *Id.* at 235, 838 S.E.2d at 757.

[79] *Id.* at 234, 838 S.E.2d at 756.

[80] *Id.* at 235, 838 S.E.2d at 757.

[81] *Id.* at 235–36, 838 S.E.2d at 757–58.

[82] *Id.* at 236, 838 S.E.2d at 758.

[83] *Id.* at 236–37, 838 S.E.2d at 758.

[84] *Id.* at 237, 838 S.E.2d at 758.

and indifference to making restitution.[85] The court found no mitigating factors and disbarred Mr. Johnson.[86]

The supreme court disbarred Millard C. Farmer after he was deemed in default in the disciplinary proceedings for failing to file an amended answer that conformed to the requirements of the bar Rules, as ordered by the special master.[87] By reason of his default, Mr. Farmer admitted the allegations against him.[88]

The allegations arose from a series of actions that Mr. Farmer took in the course of representing a client (Wife) in post-divorce proceedings. Wife's ex-husband filed a petition to modify the child custody arrangement, and in response Mr. Farmer advised and assisted the wife in a series of actions intended to disrupt the proceedings. These included filing frivolous motions and appeals; threatening witnesses; engaging in *ad hominem* attacks against parties, the trial judge, and the judge's staff; counseling Wife not to participate in a child custody evaluation; discussing issues about custody with the parties' children (in violation of a court order); and refusing to appear at the subsequent hearing on contempt (at which Mr. Farmer and his client were held in contempt).[89] Mr. Farmer also counseled the Wife to encourage the parties' children to run away from their father's home and endeavored to create evidence of child abuse and neglect by the father. On behalf of his client, Mr. Farmer sued a court reporter and, after the case was dismissed, filed an appeal that resulted in sanctions by the Georgia Court of Appeals for filing a frivolous appeal.[90] As a result of his actions, Mr. Farmer was found civilly liable for numerous acts of racketeering, including attempted theft by extortion, attempted bribery, intimidation of a court officer, influencing witnesses, and employing interstate travel to interfere with the father's lawful custody of his children.[91] Mr. Farmer did not satisfy this civil judgment.[92]

The supreme court found that this conduct violated numerous Rules of Professional Conduct and that aggravating factors included a pattern of misconduct, multiple violations, intentional noncompliance in the disciplinary process, refusal to acknowledge that his conduct was wrongful, substantial experience in the practice of law, and indifference

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[85] *Id.*, 838 S.E.2d at 759.

[86] *Id.*

[87] *In re* Farmer, 307 Ga. 307, 307–08, 835 S.E.2d 629, 630 (2019).

[88] *Id.* at 308, 835 S.E.2d at 630.

[89] *Id.* at 308, 835 S.E.2d at 630–31.

[90] *Id.* at 309, 835 S.E.2d at 631.

[91] *Id.*

[92] *Id.* at 310, 835 S.E.2d at 632.

to restitution.[93] The court concluded that "we have little difficulty concluding that disbarment is the appropriate sanction in this matter."[94]

The supreme court accepted the voluntary surrender of the license of Timothy Paul Healy.[95] Numerous grievances had been filed against Mr. Healy. He underwent two alcohol and drug evaluations, the second of which specifically found that Mr. Healy's condition impaired his ability to practice and put the public at risk.[96] Mr. Healy then sought to surrender his license under Rule 4-104,[97] which provides that it is grounds for removal from the practice of law if alcohol abuse or substance abuse to the extent of impairing the lawyer's competency to practice law.[98] Mr. Healy asserted that he had taken steps to wind down his practice and promised not to seek reinstatement, even if he recovers from his current conditions.[99]

B. Suspensions[100]

1. Six-Month Suspensions

The supreme court suspended two lawyers for six months.

The supreme court suspended Barry Wayne Rorex for six months, as a matter of reciprocal discipline, after he was suspended for that length of time in Arizona.[101] Mr. Rorex had abandoned matters for three clients in Arizona. He failed to communicate with those clients; return their files or unearned fees; or respond to the Arizona bar.[102]

The supreme court accepted a voluntary petition and suspended Howard L. Sosnik for six months, as reciprocal discipline after Mr. Sosnik received that discipline in New York.[103] Mr. Sosnik admitted that he failed to review, audit, and reconcile his firm's trust account and did not adequately supervise an employee of his practice, with the result that the employee was able to steal client funds and cause the firm's trust account to have a deficiency.[104] Mr. Sosnik self-reported the matter in New York,

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[93] *Id.* at 310, 835 S.E.2d at 632.

[94] *Id.*

[95] *In re* Healy, 308 Ga. 658, 660, 842 S.E.2d 844, 845 (2020).

[96] *Id.* at 659, 842 S.E.2d at 844.

[97] GA. RULES OF PROF'L CONDUCT R. 4-104 (2020).

[98] *Healy*, 308 Ga. at 660, 842 S.E.2d at 845.

[99] *Id.* at 659, 842 S.E.2d at 845.

[100] This Article discusses only those suspensions that constitute final discipline and does not discuss interim suspensions.

[101] *In re* Rorex, 308 Ga. 488, 490, 841 S.E.2d 662, 663 (2020).

[102] *Id.* at 489, 841 S.E.2d at 662.

[103] *In re* Sosnik, 308 Ga. 823, 823, 843 S.E.2d 402, 403 (2020).

[104] *Id.*, 843 S.E.2d at 402.

and his firm replaced all the missing funds.[105] The court noted in mitigation that Mr. Sosnik was candid and cooperative with the bar authorities, had undertaken interim rehabilitation by instituting proper banking and bookkeeping practices, was remorseful, had good character, had no prior discipline, and did not act from a selfish motive.[106] In aggravation, the court noted that Mr. Sosnik was experienced and had a background in accounting, yet, because of his inadequate supervision of the employee, he missed several early warning signs that the employee was stealing client's money.[107] The supreme court found that the six-month suspension was appropriate.[108]

2. Suspensions Longer Than Six Months

The supreme court suspended one lawyer for longer than six months during the Survey period.

The supreme court accepted a petition for voluntary discipline and imposed a twelve-month suspension on Preston B. Kunda.[109] Mr. Kunda was retained to prepare a will for a client but also agreed to serve as the estate's executor without obtaining written informed consent to the conflict of interest between his role as attorney for the individual and as executor of the estate. Mr. Kunda also sold a gun collection for the client but did not deposit all of the cash proceeds of the sale into his trust account. Finally, Mr. Kunda prepared a codicil to the client's will under which, if the client died before the sale of the gun collection could be finalized, Mr. Kunda would inherit the gun collection, sell it and give the money to the client's beneficiary. Mr. Kunda admitted that this arrangement was a violation of Rule 1.8(c),[110] under which Mr. Kunda was prohibited from preparing an instrument that would give him a substantial gift.[111] The supreme court noted that, despite Mr. Kunda's admission of a violation of Rule 1.8(c), this particular arrangement may not have constituted a gift but rather may have been more appropriately characterized as a constructive trust.[112] The supreme court noted that Mr. Kunda had no prior disciplinary history, had been cooperative, and was remorseful.[113]

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[105] *Id.*

[106] *Id.* at 824, 843 S.E.2d at 402–03.

[107] *Id.*, 843 S.E.2d at 403.

[108] *Id.*

[109] *In re* Kunda, 306 Ga. 109, 109 829 S.E.2d 65, 66 (2019).

[110] GA. RULES OF PROF'L CONDUCT R. 1.8(c) (2020).

[111] *Kunda*, 306 Ga. at 109–10, 829 S.E.2d at 66.

[112] *Id.* at 110, n.2, 829 S.E.2d at 66, n.2.

[113] *Id.* at 110, 829 S.E.2d at 66.

C. Public reprimands

The supreme court ordered two public reprimands during the Survey period.

The supreme court accepted a petition for voluntary discipline and ordered a public reprimand of Cheryl Joyce Braziel.[114] The special master found that Ms. Braziel attempted to learn whether a hospital had filed a Medicaid lien against a current client.[115] She recalled that a previous client had received a letter about such a lien from a particular lawyer. While she was traveling, Ms. Braziel instructed her assistant to copy that earlier letter and place it in her current client's file as a reminder to contact the hospital's lawyer about the current client. The assistant instead created a new letter, patterned after the old one, that purported to be from the hospital's lawyer about a lien related to Ms. Braziel's current client. Although Ms. Braziel admonished her assistant for the mistake, the new letter eventually made its way to the hospital's lawyer. When that lawyer confronted Ms. Braziel, she admitted what had occurred, took responsibility, and tried to explain.[116]

The special master found on these facts that Ms. Braziel had violated her training and supervisory responsibilities with respect to a non-lawyer assistant (Rule 5.3[117]) and noted a number of mitigating factors, including a lack of prior discipline, lack of a selfish motive or intent to deceive, personal health problems, efforts to rectify the consequences of her misconduct, acceptance of responsibility and remorse, and cooperation in the disciplinary proceeding.[118] The only aggravating factor was Ms. Braziel's substantial experience.[119] The supreme court accepted the special master's findings and recommendation and ordered a public reprimand.[120]

The supreme court ordered a public reprimand of Edward Neal Davis.[121] Mr. Davis represented a client in the purchase of real estate from a husband and wife, who were former clients of Mr. Davis. The husband was present for the closing, but the wife was not. Nevertheless, based upon the husband's representation that the wife had signed the documents, Mr. Davis notarized both signatures. The wife later claimed in divorce proceedings that she had not signed the documents.[122] Mr.

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[114] *In re* Braziel, 306 Ga. 385, 385, 830 S.E.2d 730, 731 (2019).

[115] *Id.* at 385–86, 830 S.E.2d at 731.

[116] *Id.* at 386, 830 S.E.2d at 731.

[117] GA. RULES OF PROF'L CONDUCT R. 5.3 (2020).

[118] *Braziel*, 306 Ga. at 386–87, 830 S.E.2d at 731–32.

[119] *Id.* at 387, 830 S.E.2d at 732.

[120] *Id.* at 388, 830 S.E.2d at 732.

[121] *In re* Davis, 306 Ga. 381, 383, 830 S.E.2d 734, 736 (2019).

[122] *Id.* at 381, 830 S.E.2d at 735.

Davis's false notarization constituted a violation of Rules 4.1(a)[123] (duty of truthfulness in statements to others) and 8.4(a)(4)[124] (misconduct to engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation).[125] Mr. Davis also negligently deposited personal funds into his trust account and then paid a personal debt from the funds that he had mistakenly deposited.[126]

In mitigation, Mr. Davis had no prior disciplinary record, intent to harm, or dishonest or selfish motive. He expressed remorse, accepted responsibility, and cooperated in the disciplinary process. In aggravation, Mr. Davis had substantial experience in the practice of law.[127]

D. Review board reprimands

The supreme court ordered two review board reprimands during the Survey period.

The supreme court accepted a petition for voluntary discipline and ordered a review board reprimand for Hakeem Bertrand Brock.[128] All of Mr. Brock's misconduct related to his trust account. Mr. Brock admitted that he failed to provide proper supervision of a paralegal, who forged Mr. Brock's signature on $21,000 worth of checks on Mr. Brock's trust account. The paralegal wrote the checks to friends and members of her family, and people whom the paralegal purported to represent as a lawyer. The theft was possible because Mr. Brock did not keep adequate records of the funds in his trust account. Mr. Brock replaced the funds and fired the paralegal.[129] It also came to light that: (1) Mr. Brock had made a student loan payment from his trust account, using funds that were earned attorney's fees but which had not been removed from the trust account; and (2) Mr. Brock made two mortgage payments for a former client from his trust account, using funds that belonged to the former client but which Mr. Brock had failed to promptly deliver to the former client.[130]

The court noted in aggravation that there were multiple offenses and that Mr. Brock had substantial experience in the practice of law. In mitigation, the court found that Mr. Brock did not have a prior disciplinary record; that he did not have a dishonest or selfish motive; that he undertook timely, good-faith efforts to make restitution and

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[123] GA. RULES OF PROF'L CONDUCT R. 4.1(a) (2020).

[124] GA. RULES OF PROF'L CONDUCT R. 8.4(a)(4) (2020).

[125] *Davis*, 306 Ga. at 382, 830 S.E.2d at 735.

[126] *Id.*

[127] *Id.* at 382–83, 830 S.E.2d at 736.

[128] *In re* Brock, 306 Ga. 388, 390, 830 S.E.2d 736, 738 (2019).

[129] *Id.* at 388–89, 830 S.E.2d at 737.

[130] *Id.* at 389, 830 S.E.2d at 737–38.

otherwise to rectify the consequences of his misconduct; that he showed remorse; and that he cooperated in the disciplinary process.[131]

The supreme court accepted a petition for voluntary discipline in the form of a state disciplinary review board reprimand from Muhammed Abdul-Warit Abdur-Rahim.[132] Mr. Abdur-Rahim admitted that he violated Georgia Rule of Professional Conduct 3.5[133] when he appeared in court as a defendant on charges of family violence battery, cruelty to children, and disorderly conduct.[134] Mr. Abdur-Rahim engaged in disruptive conduct, including being unduly argumentative with the prosecutors, using profanity, and failing to follow the instructions of the judge. In mitigation, he showed that he had no prior disciplinary record, that his conduct was an isolated incident, that he was suffering from emotional and personal problems at the time, that he had obtained treatment for those problems, that he apologized to the judge and the court staff, that he cooperated with the state bar, and that he was remorseful.[135]

E. Petition for reinstatement accepted

The supreme court accepted one petition for reinstatement during the Survey period.

Christopher Aaron Corley was suspended from the practice of law in 2018 after he pled guilty in South Carolina to first-degree domestic violence.[136] Although disbarment is the usual discipline for a felony conviction, Mr. Corley presented significant mitigating evidence.[137] The supreme court imposed conditions on his reinstatement when it suspended him, which included that he complete his sentence of probation in South Carolina, that a board-certified and licensed mental health professional certify that he is fit to return to the practice of law, and that he provide evidence that he is continuing to receive mental health treatment from a board-certified and licensed medical professional.[138] The supreme court stated that these conditions had been met and reinstated Mr. Corley to the practice of law.[139]

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[131] *Id.* at 389–90, 830 S.E.2d at 738.

[132] *In re* Abdur-Rahim, 308 Ga. 485, 486, 841 S.E.2d 666, 667 (2020).

[133] GA. RULES OF PROF'L CONDUCT R. 3.5(a) (2020).

[134] *Abdur-Rahim*, 308 Ga. at 485, 841 S.E.2d at 666.

[135] *Id.*

[136] *In re* Corley, 303 Ga. 290, 290, 811 S.E.2d 347, 347 (2018).

[137] *Id.* at 291, 811 S.E.2d at 347–48.

[138] *Id.* at 293, 811 S.E.2d at 349.

[139] *In re* Corley, 307 Ga. 788, 788, 838 S.E.2d 588, 588 (2020).

F. Notice of Discipline Rejected

The supreme court took the unusual step of rejecting a notice of discipline against a lawyer who defaulted in the disciplinary process.[140] By reason of his default, attorney Joel S. Wadsworth admitted that he was representing several plaintiffs in a civil case and failed on multiple occasions to respond to requests for information from his clients. That constitutes a violation of Georgia Rule of Professional Conduct 1.4, the maximum sanction for which is a public reprimand. While the case was pending, Mr. Wadsworth failed to pay his bar dues but did not withdraw from the representation or take actions to protect the client's interests upon withdrawal.[141] That was a violation of Rule 1.16,[142] and the maximum sanction for violation of Rule 1.16 is also a public reprimand.[143]

The State Bar's notice of discipline sought disbarment on the basis of Mr. Wadsworth's violation of Rule 5.5(a),[144] which forbade him from continuing to represent these clients once he was ineligible to practice for failure to pay his dues.[145] The maximum sanction for such a violation is disbarment.[146] The supreme court, however, declined to disbar Mr. Wadsworth in the absence of information regarding the extent to which he continued to represent his clients after he was no longer eligible to do so.[147] The court expressed its hope that a future filing of the State Bar would either contain additional information sufficient to support disbarment or would seek a lesser sanction that would be appropriate for Mr. Wadsworth's misconduct.[148]

G. Petitions for voluntary discipline rejected

The supreme court rejected five petitions for voluntary discipline during the Survey period.

The supreme court declined to accept a petition for voluntary discipline from Philip Norman Golub, even though the state bar supported the petition.[149] Mr. Golub had filed two lawsuits for a client (whose son was the primary contact), and he eventually received instructions from his client to resolve them as quickly as possible.

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[140] *In re* Wadsworth, 307 Ga. 311, 312, 835 S.E.2d 632, 634 (2019).

[141] *Id.*

[142] GA. RULES OF PROF'L CONDUCT R. 1.16 (2020).

[143] *Wadsworth*, 307 Ga. at 311, 835 S.E.2d at 633.

[144] GA. RULES OF PROF'L CONDUCT R. 5.5(a) (2020).

[145] *Wadsworth*, 307 Ga. at 311, 835 S.E.2d at 633.

[146] *Id.*

[147] *Id.* at 311–12, 835 S.E.2d at 633.

[148] *Id.* at 312, 835 S.E.2d at 633–34.

[149] *In re* Golub, 306 Ga. 620, 622, 832 S.E.2d 332, 333 (2019).

Instead, Mr. Golub continued to extend the discovery period and made no effort to have the cases put on a trial calendar, all the while not consistently responding to his client's requests for information. Mr. Golub was then hospitalized, and motions to dismiss the cases were made. Believing that the court would grant the motions, Mr. Golub voluntarily dismissed them but did not tell the client or the client's son until the son contacted him. Several months later, after his client had died, Mr. Golub filed renewal actions (without consent) but never had the defendants served, failed to substitute the proper party for his deceased client, failed to perform any more work on the cases, and did not communicate with the son about the status. Mr. Golub's petition also admitted that he had no further communications with the son, did not provide any billing information to the client or the son, and did not return an unearned fee.[150] The petition admitted violation of numerous Rules, including Rule 1.3 (diligence) and Rule 1.4 (communication). Significantly, Mr. Golub's petition also admitted a violation of Rule 8.4(a)(4), which concerns professional conduct involving dishonesty, fraud, deceit, or misrepresentation.[151] Mr. Golub offered in mitigation that he was dealing with a severe illness, that he had no dishonest or selfish motive, that he was remorseful, and that his only prior discipline was remote in time.[152] He also stated that he intends to repay the client's son "to the extent that he is able[.]"[153]

The supreme court rejected the petition for two reasons.[154] First, the court noted that the facts as admitted would not necessarily support the conclusion that Mr. Golub engaged in professional conduct involving dishonesty, fraud, deceit or misrepresentation.[155] The court cited several recent cases in which it has expressed similar concerns about admitted violations of particular Rules in cases where the admitted facts might not support the supposed violation.[156] The court was also concerned that Mr. Golub had neither made complete restitution to the client's son nor expressed an intention to do so.[157] Instead, Mr. Golub had only stated that he would "pay as much of the money" back as he is "able" to pay.[158]

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[150] *Id.* at 620–21, 832 S.E.2d at 332–33.

[151] *Id.* at 620, 832 S.E.2d at 332.

[152] *Id.* at 621, 832 S.E.2d at 333.

[153] *Id.*, 832 S.E.2d at 333.

[154] *Id.* at 621–22, 832 S.E.2d at 333.

[155] *Id.*

[156] *Id.*

[157] *Id.* at 622, 832 S.E.2d at 333.

[158] *Id.* The ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS lists as a mitigating factor, "timely good faith effort to make restitution or to rectify consequences of misconduct" (§10 (4)(d)). The supreme court appears to be requiring more when it rejects Mr. Golub's

The supreme court rejected a second petition for voluntary discipline in the form of a public reprimand despite the recommendation of the State Bar and the special master that the petition be granted.[159] The lawyer had been disciplined for other misconduct in 2004 and 2010.[160] In the most recent matter, both the first and second petitions for voluntary discipline admitted that the lawyer undertook to represent a client who had been injured in an automobile accident, abandoned the client, ceased communicating with the client, and failed to protect the client's interests even though the lawyer had effectively withdrawn from representing him.[161] The court rejected the lawyer's first petition because it did not reveal whether her previous disciplinary matters involved similar conduct.[162] The second petition made it clear that the earlier sanctions were for similar conduct, but the special master nevertheless recommended a public reprimand given the steps the lawyer had taken to improve her office practices, including a meeting with the State Bar's law practice management program.[163] The supreme court noted that such a step is a mitigating factor but held that it was outweighed by the lack of any explanation why it took so many disciplinary actions to get the lawyer to take it.[164] The court held that a "short suspension would likely be sufficient"[165] but rejected the petition because it sought at most a public reprimand.[166]

The supreme court rejected a voluntary petition for discipline in the form of a suspension from David Godley Rigdon.[167] Mr. Rigdon was indicted on thirteen counts of drug offenses, including conspiracy and crossing the guard lines of a correctional institution with drugs. Mr. Rigdon pled guilty to eight of the alleged offenses; the other charges, including the conspiracy charge and three charges relating to drugs and correctional institutions, were *nolle prossed*. He was sentenced as a first offender to five years' probation.[168]

In seeking suspension rather than the usual sanction of disbarment for a felony conviction, Mr. Rigdon offered evidence that his criminal conduct occurred at a time of personal and emotional problems, that he

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petition, in part, because he "states no intention of making the client's son whole." *In re* Golub, 306 Ga. at 622, 832 S.E.2d at 333.

[159] *In re* Hemmann, 307 Ga. 56, 59, 834 S.E.2d 105, 107 (2019).

[160] *Id.* at 58, 834 S.E.2d at 107.

[161] *Id.* at 56, 834 S.E.2d at 106.

[162] *Id.*

[163] *Id.* at 58, 834 S.E.2d at 107.

[164] *Id.* at 58–59, 834 S.E.2d at 107.

[165] *Id.*at 59, 834 S.E.2d at 107.

[166] *Id.*

[167] *In re* Rigdon, 307 Ga. 676, 678, 837 S.E.2d 759, 761 (2020).

[168] *Id.* at 676, 837 S.E.2d at 759–60.

was diagnosed with anxiety and depression, that he has been undergoing successful treatment, that he has never before been subject to discipline, that he voluntarily ceased practicing law and returned all unearned fees, and that he was fully cooperative with the bar in the disciplinary proceeding. Mr. Rigdon also offered letters attesting to his good character from three members of the Georgia bar.[169] The State Bar and the special master recommended that the supreme court reject the petition.[170]

The supreme court rejected the petition because it contained insufficient information.[171] In particular, the court noted that it contained no information other than the indictment as to the facts underlying the guilty plea, the nature of the conspiracy of which Mr. Rigdon was alleged to have been a part, or the three counts relating to correctional institutions.[172] The court concluded that without this information it would be unable to determine whether the requested discipline would be appropriate.[173]

The supreme court rejected a second voluntary petition for discipline, this time in the form of a thirty-day suspension, from William Leslie Kirby III.[174] Mr. Kirby submitted some additional information with the second petition, including more detail about how the grievances came about, a letter from a psychologist attesting that Mr. Kirby was under his care, a description of changes Mr. Kirby had made to his practice (interim rehabilitation), and an expression of deep remorse.[175]

The supreme court found that a thirty-day suspension, which the special master and the State Bar supported, would be insufficient in light of the four grievances pending against Mr. Kirby.[176] Those grievances alleged that Mr. Kirby violated numerous Rules of professional conduct in multiple matters, including his duties of diligence (Rule 1.3) and communication (Rule 1.4), as well as his duties upon withdrawal (Rule 1.16(d)).[177] Mr. Kirby also had been disciplined before.[178] The supreme court noted that it had imposed suspensions of four months or more in similar cases that involved neglect of multiple clients, prior discipline,

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[169] *Id.* at 677, 837 S.E.2d at 760.

[170] *Id.* at 677–78, 837 S.E.2d at 760.

[171] *Id.* at 678, 837 S.E.2d at 761.

[172] *Id.*, 837 S.E.2d at 761.

[173] *Id.,* 837 S.E.2d at 761.

[174] *In re* Kirby, 307 Ga. 316, 316–17, 835 S.E.2d 637 (2019).

[175] *Id.* at 318–19, 835 S.E.2d at 638–39.

[176] *Id.* at 320, 835 S.E.2d at 639.

[177] *Id.* at 316, 835 S.E.2d at 637.

[178] *Id.* at 319, 835 S.E.2d at 639.

and doubts about the lawyer's ability to fulfill his professional obligations.[179]

The supreme court rejected the petition for voluntary discipline in the form of a review board or public reprimand, which the state bar supported, from Nevada M. Tuggle.[180] The case involved two grievances.[181]

Mr. Tuggle entered into an engagement agreement with a client who was a defendant in a civil suit. The agreement provided that Mr. Tuggle could charge the client's credit card for fees as they were incurred, upon twelve hours' notice. Mr. Tuggle failed to file a timely answer in the case and did not respond to the client's requests for information, but he did charge the client's credit card $1000, without notice to the client. Mr. Tuggle did eventually file a late answer but thereafter did no further work on the case and ceased communicating with his client and opposing counsel.[182] The plaintiff eventually obtained a default judgment against Mr. Tuggle's client in excess of $815,000, which the client learned about when she received notice of a garnishment. The client then made several unsuccessful attempts to obtain her file but only received it after she filed a grievance. The client sued Mr. Tuggle for malpractice.[183]

In the other matter, Mr. Tuggle agreed to file an application for VA benefits for a client and to prepare a revocable trust, a deed, a will, a financial power of attorney, and an advanced directive for health care. Mr. Tuggle did none of these things, except that he filed the application for VA benefits, albeit using the wrong social security number. The client died before his application could be corrected and processed.[184]

Mr. Tuggle offered in mitigation that he had been cooperative with the bar and was remorseful, and he also submitted some information regarding "unspecified substance abuse issues" during the time of the events giving rise to the grievances.[185] Although the State Bar supported the petition, it noted in aggravation that the grievances involved multiple violations and vulnerable victims and that Mr. Tuggle had substantial experience in the practice of law.[186]

The supreme court rejected the petition and expressed two concerns.[187] The first was that there was nothing in the petition to

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[179] *Id.* at 320, 835 S.E.2d at 639.

[180] *In re* Tuggle, 307 Ga. 312, 313, 835 S.E.2d 634, 634 (2019).

[181] *Id.*

[182] *Id.* at 313–14, 835 S.E.2d at 635.

[183] *Id.* at 314, 835 S.E.2d at 635.

[184] *Id.* at 314–15, 835 S.E.2d at 635–36.

[185] *Id.* at 315, 835 S.E.2d at 636.

[186] *Id.*

[187] *Id.*

indicate that Mr. Tuggle had accepted financial responsibility for his conduct and made restitution.[188] Of particular concern was the lack of information about the status of the malpractice action involving the first client and damages of over $800,000.[189] The supreme court also expressed concern that the information about Mr. Tuggle's substance abuse issues lacked specificity.[190]

H. One miscellaneous disciplinary case

In one miscellaneous disciplinary case, the supreme court reversed a special master's ruling that the State Bar was entitled to summary judgment.[191] D. Duston Tapley Jr., filed a motion to withdraw as counsel in a criminal case after the jury had been selected and told that court that, due to his age (he was in his eighties), he was no longer physically and mentally capable of representing his clients. After learning about this hearing, the chief judges of two circuits met with Mr. Tapley, who agreed that he would withdraw as counsel in pending criminal cases and refrain from undertaking new cases in those circuits.[192]

The State Bar initiated disciplinary proceedings against Mr. Tapley.[193] The evidentiary record included deposition testimony from a psychologist to the effect that, although Mr. Tapley had experienced age appropriate cognitive decline, there was no evidence of psychological or mental health issues and that Mr. Tapley's cognitive abilities were in the normal range. The psychologist acknowledged that he had evaluated Mr. Tapley's ability to function generally and not specifically with respect to his ability to practice law.[194]

The special master granted summary judgment to the State Bar and disregarded the psychologist's evidence because it did not relate to Mr. Tapley's ability to be competent as a lawyer.[195] The special master recommended disbarment under Rule 4-104(a), [196] which provides that it is grounds for removal from the practice of law if a lawyer has a cognitive impairment to the extent of impairing the lawyer's competency to practice law. The supreme court reversed, finding that the psychologist's report was some evidence that Mr. Tapley was competent to practice law and that therefore there was a genuine issue of material fact on that

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[188] *Id.* at 315–16, 835 S.E.2d at 636.

[189] *Id.* at 316, 835 S.E.2d at 636.

[190] *Id.*

[191] *In re* Tapley, 308 Ga. 577, 577, 842 S.E.2d 36, 37 (2020).

[192] *Id.* at 577–78, 842 S.E.2d at 37–38.

[193] *Id.* at 579, 842 S.E.2d at 38.

[194] *Id.*

[195] *Id.*

[196] GA. RULES OF PROF'L CONDUCT r. 4-104(a) (2020).

point.[197] The court remanded the case to the special master for an evidentiary hearing.[198]

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Cases in which a claim of ineffective assistance succeeded

During the Survey period, the Georgia Supreme Court decided three cases in which a claim of ineffective assistance of counsel succeeded, while the court of appeals decided four such cases.

1. Georgia Supreme Court

Sean Swanson was found guilty of felony murder for shooting Noel Reed during a sale of marijuana.[199] Mr. Swanson shot the victim from the driver's seat of Swanson's car, after the victim had pulled out his own gun.[200] Mr. Swanson's trial counsel asked for and received a jury instruction on self-defense but did not seek a jury instruction on defense of habitation. Significantly, self-defense is not available to someone, like Swanson, who kills someone during the commission of a felony, such as Mr. Swanson's sale of marijuana. On the other hand, the defense of habitation contains no such restriction.[201] Mr. Swanson's trial counsel did not request an instruction on defense of habitation, because, he said, he did not realize that "habitation" included a motor vehicle.[202]

The supreme court unanimously held that Mr. Swanson had received ineffective assistance of counsel.[203] The court held that counsel's conduct performance at trial was objectively unreasonable and that it was reasonably probable that, but for counsel's errors, the result of the trial would have been different.[204]

As to the first condition, the court stated that trial counsel's failure to request a charge on defense of habitation was objectively unreasonable.[205] There was sufficient evidence in the record to support a charge of defense of habitation.[206] Trial counsel did request and receive a charge on one justification defense, self-defense, which legally was not available to Mr. Swanson because he shot the victim during the

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[197] *Tapley*, 308 Ga. at 581, 842 S.E.2d at 39.

[198] *Id.*

[199] Swanson v. State, 306 Ga. 153, 153, 829 S.E.2d 312, 313 (2019).

[200] *Id.* at 153, 829 S.E.2d at 314.

[201] *Id.* at 156, 829 S.E.2d at 316

[202] *Id.* at 158, 829 S.E.2d at 317.

[203] *Id.* at 164, 829 S.E.2d at 321.

[204] *Id.*

[205] *Id.* at 158, 829 S.E.2d at 317.

[206] *Id.* at 157, 829 S.E.2d at 316.

commission of a felony.[207] A failure to raise another justification defense, defense of habitation—which was available to Swanson even if he was committing a felony at the time—could not have been a matter of strategy but rather could only be explained by trial counsel's lack of understanding of the law.[208] That was objectively unreasonable performance.[209]

As to the prejudice prong, the court relied on two events during the trial.[210] First, the prosecutor in closing emphasized that Mr. Swanson had shot the victim while selling marijuana and, thereby, forfeited his right to claim self-defense.[211] As the supreme court noted, this argument capitalized on defense counsel's failure to raise defense of habitation (which is available even during the commission of a felony) and also seemed to concede that, but for the fact that the shooting happened during a felony, Mr. Swanson would have had a strong claim of justification.[212] The supreme court also noted that the jury had submitted a question about the charge of self-defense and wanted to know if it was "bound" by the unavailability of self-defense for those who harm someone during the commission of a felony.[213] The supreme court inferred from the jury's focus on this limitation of self-defense that it was reasonably probable that the jury would have found that the killing was justified by defense of habitation if that instruction had been given and the jury had therefor been free to disregard the fact that Mr. Swanson killed the victim during the commission of a felony.[214] As a result of trial counsel's ineffectiveness, the supreme court ordered a new trial for Mr. Swanson.[215]

Ashley and Albert Debelbot were convicted of murdering their infant daughter by inflicting blunt force trauma.[216] In closing argument, the prosecutor gave the following gross misstatement of the "beyond a reasonable doubt" standard:

> Reasonable doubt. The Judge will charge you on reasonable doubt. Just keep in mind, and he will charge you, reasonable doubt does not mean beyond all doubt. It does not mean to a mathematical certainty. Which means we don't have to prove that ninety percent. You don't

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[207] *Id.* at 157–58, 829 S.E.2d at 316–17.

[208] *Id.* at 158, 829 S.E.2d at 317.

[209] *Id.*

[210] *Id.* at 161, 829 S.E.2d at 319.

[211] *Id.* at 162, 829 S.E.2d at 319.

[212] *Id.*

[213] *Id.* at 162, 829 S.E.2d at 319–20.

[214] *Id.* at 162, 829 S.E.2d at 320.

[215] *Id.* at 164, 829 S.E.2d at 321.

[216] Debelbot v. State, 308 Ga. 165, 165, 839 S.E.2d 513, 515 (2020).

> have to be ninety percent sure. You don't have to be eighty percent sure. *You don't have to be fifty-one percent sure.* It does not mean to a mathematical certainty.
>
> And it does not mean beyond a shadow of a doubt. That's just something the [television] made up. It's actually beyond a reasonable doubt. And that would be a doubt to which you can attach a reason. And I submit to you there is no reasonable doubt in this case.[217]

Defense counsel did not object to this argument, and the supreme court held that no competent attorney would have failed to make such an objection.[218] The court also held that the Debelbots had made a sufficient showing of prejudice.[219] Although the court had earlier held that the evidence against them was sufficient to sustain the conviction, the court noted that this was a "close question" and noted further that evidence of their criminal intent was "underwhelming."[220] The supreme court reversed the convictions.[221]

A jury convicted Antiwan Lane of malice murder for hiring Kevin Stallworth to kill Hector Gonzales; Mr. Stallworth mistakenly shot and killed Ivan Perez instead.[222] Mr. Stallworth was the state's primary witness, and he testified to the details of the plot to kill Mr. Gonzales as well as its botched execution and the aftermath.[223] Mr. Stallworth's story was substantially corroborated by hearsay testimony from Mr. Stallworth's girlfriend, which the trial court erroneously allowed over objection.[224] The trial court initially accepted the argument that the statements from Mr. Stallworth to the girlfriend were admissible as statements in furtherance of a conspiracy, but the trial court later concluded that ruling was erroneous, and the Georgia Supreme Court agreed that it was error.[225]

The state also used the testimony of the lead investigator, Detective Delima.[226] In connection with that testimony, defense counsel rendered ineffective assistance of counsel in two respects, in the opinion of both the trial court and the supreme court.[227] First, Detective Delima testified falsely that Mr. Lane's cousin, Eddie Davis, confirmed to the detective

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[217] *Id.* at 167, 839 S.E.2d at 516 (alterations made by the supreme court).

[218] *Id.*, 839 S.E.2d at 516–17.

[219] *Id.* at 168, 839 S.E.2d at 517.

[220] *Id.*

[221] *Id.* at 170, 839 S.E.2d at 518.

[222] State v. Lane, 308 Ga. 10, 10, 838 S.E.2d 808, 810 (2020).

[223] *Id.* at 11, 838 S.E.2d at 811.

[224] *Id.*

[225] *Id.* at 19–20, 838 S.E.2d at 816–17.

[226] *Id.* at 11, 838 S.E.2d at 811.

[227] *Id.* at 13, 838 S.E.2d at 812.

Mr. Stallworth's statement that Mr. Lane had initially tried to hire Mr. Davis to kill Mr. Gonzales. The detective's report showed that Mr. Davis had expressly denied that anyone had tried to recruit him to kill Mr. Gonzales. Defense counsel had been provided with that report but inexplicably failed to cross-examine the detective about his false testimony.[228] Second, Detective Delima testified extensively to hearsay and gave statements that bolstered Mr. Stallworth's testimony. Defense counsel did not object, and there was no apparent strategic reason why any competent lawyer would not have done so. Not even the state offered any such reason.[229]

The supreme court took the occasion of this case to overrule a long line of cases that had held that Georgia would not recognize the "cumulative error Rule" and ruled instead that "the proper approach . . . is to consider collectively the prejudicial effect, if any, of trial court errors, along with the prejudice caused by any deficient performance of counsel."[230] In this case, the supreme court looked at the cumulative effect of the ineffective assistance of counsel and the erroneous admission of the girlfriend's testimony in determining that Mr. Lane was prejudiced by his counsel's ineffectiveness:

> By virtue of trial counsel's deficient performance, the jury also heard a detective's testimony that he had confirmed certain details about the crime, including that the shooting was a murder for hire, from unnamed sources. And, due to counsel's deficient performance, the detective's false testimony that Stallworth's now-deceased cousin confirmed that Lane initially tried to hire him to kill Gonzalez went unchallenged. We conclude that Lane has shown that, particularly given that key portions of Thompson's [the girlfriend] testimony were erroneously admitted, there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different.[231]

2. Georgia Court of Appeals

Brandon Jones was convicted of being a felon in possession of a firearm, a .22 caliber pistol that Jones allegedly had purchased from the man who had stolen it, Frank Taylor.[232] A crucial issue in the case was whether Mr. Jones had purchased the gun from Mr. Taylor. Mr. Jones testified at trial that he had not done so.[233] An investigator for the City

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[228] *Id.* at 18–19, 838 S.E.2d at 815–16.

[229] *Id.* at 19, 838 S.E.2d at 816.

[230] *Id.* at 17, 838 S.E.2d at 815.

[231] *Id.* at 22–23, 838 S.E.2d at 818.

[232] Jones v. State, 350 Ga. App. 618, 618–19, 829 S.E.2d 820, 823 (2019).

[233] *Id.* at 619, 829 S.E.2d at 823.

of Oakwood Police Department testified that Mr. Jones had admitted buying the gun from Mr. Taylor (although the investigator's written report did not reflect such an admission).[234] The investigator had also interviewed Mr. Taylor and was also allowed to testify without objection that "I had Mr. Taylor advise he sold the gun to Mr. Jones . . . ."[235] Later, after Jones was convicted, defense counsel and the prosecutor listened to the recording of Mr. Taylor's interview with the investigator and stipulated that "there was no mention in Taylor's statement to police that Jones purchased the gun from him . . . ."[236] Mr. Taylor did not testify at trial.[237]

The court of appeals ordered a new trial based upon ineffective assistance of counsel.[238] Trial counsel's performance was deficient when he failed to object to the investigator's hearsay statements that Mr. Taylor had told the investigator that Mr. Taylor had sold the gun to Mr. Jones.[239] Such an out-of-court statement violated the Confrontation Clause of the United States Constitution,[240] and defense counsel's failure to object was objectively unreasonable.[241] The court of appeals further found that Jones was prejudiced by the failure to object because the evidence of Mr. Taylor's alleged statements bolstered the testimony of the investigator, who had testified that Mr. Jones admitted to buying the gun.[242] In an understated footnote, the court of appeals noted: "The harm is more obvious given that the parties later stipulated that Taylor had not told the investigator that Jones purchased the gun."[243]

In another case, a defendant was convicted of armed robbery and possession of a firearm in the commission of a felony.[244] The defendant claimed he acted as a result of coercion.[245] The defendant was a passenger in a car and claimed that the driver of the car pressed a gun against the defendant's leg and told the defendant to "go see what he [the victim] got."[246]

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[234] *Id.* at 624, 829 S.E.2d at 826.

[235] *Id.* at 624, 829 S.E.2d at 826–27.

[236] *Id.* at 620, 829 S.E.2d at 824.

[237] *Id.* at 624, 829 S.E.2d at 827.

[238] *Id.* at 626, 829 S.E.2d at 828.

[239] *Id.* at 625, 829 S.E.2d at 827.

[240] U.S. CONST. amend. VI.

[241] *Jones*, 350 Ga. App. at 625, 829 S.E.2d at 827.

[242] *Id.*

[243] *Id.* at 625, n. 6, 829 S.E.2d at 827, n.6.

[244] Jackson v. State, 354 Ga. App. 225, 840 S.E.2d 609, 610 (2020).

[245] *Id.* at 228, 840 S.E.2d at 612.

[246] *Id.* at 227, 840 S.E.2d at 612.

The defendant and his lawyer met with police to explain what happened.[247] The meeting was recorded on video.[248] When the detective asked the defendant why he didn't just run when he left the car, the defendant's lawyer interrupted to say, "Dell, Dell, you're not going to convince us that this was reasonable behavior. It wasn't . . . . What I told you the first time I met you . . . kind of crazy."[249] This recording was played to the jury. Defense counsel made no attempt to redact her comments that undercut her client's defense of coercion.[250] The court of appeals stated that there was no strategic reason to do so and that, in light of the strength of the other evidence, there was a reasonable probability of a different result if she had asked for the recording to be redacted.[251] The court stated that she had rendered ineffective assistance of counsel and ordered a new trial.[252]

Lester Owensby Pauley was convicted of committing multiple crimes against several women. The charges for which he was convicted included charges of kidnapping, aggravated battery, false imprisonment, and terroristic threats that related to incidents that occurred more than four years before the indictment.[253] The defendant's trial counsel did not raise the defense of statute of limitations to these charges as a general demurrer to the indictment or in a motion in arrest of the judgment.[254] The court of appeals held that this was ineffective assistance of counsel because the indictment was deficient on its face, given that it was issued after the statute of limitations had run on these four charges, and that either the general demurrer or the motion in arrest of judgment would have prevented conviction of the defendant on these grounds.[255] The court of appeals reversed the convictions on these counts but let the convictions on numerous other counts stand.[256]

The court of appeals reversed the trial court's denial of a motion for new trial for Kemar Henry based upon ineffective assistance of counsel.[257] The defendant had been convicted of driving under the influence *per se* based upon the results of a state-administered blood test.[258] The defendant had made some statements to the arresting officer

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[247] *Id.*

[248] *Id.* at 229, 840 S.E.2d at 612.

[249] *Id.* at 227–28, 840 S.E.2d at 612.

[250] *Id.* at 229, 840 S.E.2d at 613.

[251] *Id.* at 230, 840 S.E.2d at 613–14.

[252] *Id.* at 230–31, 840 S.E.2d at 614.

[253] Pauley v. State, 355 Ga. App. 47, 842 S.E.2d 499, 503 (2020).

[254] *Id.* at 57, 842 S.E.2d at 509.

[255] *Id.* at 64, 842 S.E.2d at 513–14.

[256] *Id.* at 65, 842 S.E.2d at 514.

[257] Henry v. State, 355 Ga. App. 217, 222, 843 S.E.2d 884, 889 (2020).

[258] *Id.* at 218, 843 S.E.2d at 887.

that reasonably could have been construed as a request for an independent blood test administered by his doctor. That independent test was never performed, and therefore the state's test was inadmissible. Defendant's trial counsel did not make a motion to suppress it.[259] The court of appeals held that the failure to make the motion to suppress was unreasonable and that the defendant suffered prejudice because, without the test, the state could not have carried its burden to prove driving under the influence *per se*.[260] The court reversed and remanded the case for further proceedings consistent with its opinion.[261]

B. Cases in which orders finding ineffective assistance were reversed or vacated

The Georgia Supreme Court reversed orders granting new trials to two defendants based upon the alleged ineffective assistance of counsel.

The supreme court reversed a finding by a trial court that defense counsel had rendered ineffective assistance of counsel in a murder case.[262] The trial court had found that trial counsel was ineffective for failing to call the defendant as a witness, to seek a mistrial when the jury heard evidence that the defendant was on probation at the time of the killing, and to introduce booking photos showing scratches on the defendant.[263] The scratches allegedly would have supported a theory that the defendant had been provoked and therefore was guilty perhaps of manslaughter rather than murder.[264]

The supreme court held that trial counsel's decisions were tactical and were not so unreasonable that no competent attorney would have done likewise.[265] Although the defendant could have provided evidence to support the theory that he was provoked into the killing, the defendant would have been subject to cross-examination about inconsistent pretrial statements on this point. The defendant also was emotional and had mental health issues, both of which would have made him unpredictable as a witness. For both of these reasons, the supreme court held that defense counsel's advice not to testify was not unreasonable.[266]

The mention of the defendant's probationary status was in passing and did not identify the reason for his probation.[267] Defense counsel did

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[259] *Id.* at 220–21, 843 S.E.2d at 888.

[260] *Id.* at 222, 843 S.E.2d at 889.

[261] *Id.*

[262] State v. Goff, 308 Ga. 330, 330–31, 840 S.E.2d 359, 361 (2020).

[263] *Id.* at 333, 840 S.E.2d at 362.

[264] *Id.* at 336, 840 S.E.2d at 364.

[265] *Id.* at 334, 840 S.E.2d at 363.

[266] *Id.* at 334–35, 840 S.E.2d at 363–64.

[267] *Id.* at 335, 840 S.E.2d at 364.

not ask for a mistrial because in his judgment the trial was going well and the jury was "pretty good."[268] The supreme court found that this tactical decision, too, was not unreasonable.[269]

With respect to the photos that would have shown scratches on the defendant, the court noted that the only way to explain the significance of the scratches would have been to call the defendant to testify.[270] Because there were sufficient tactical reasons otherwise for the advice that the defendant should not testify, the decision not to call him to introduce and explain the scratches in the photos was not an unreasonable decision.[271]

The supreme court also reversed the grant of a writ of habeas corpus to Larry Williams.[272] Mr. Williams was convicted of armed robbery, terroristic threats, and use of a hoax device in connection with a bank robbery.[273]Mr. Williams claimed that his appellate counsel was ineffective by not including on direct appeal two claims that Mr. Williams's trial counsel had been ineffective.[274] The supreme court rejected both contentions.[275]

The first was that trial counsel had been ineffective in connection with the plea-bargaining process.[276] The court gave an instruction to the jury that they could take into account Mr. Williams's possession of recently stolen cash (he was arrested with two pillowcases stuffed with the bank's money) in deciding whether he had stolen it.[277] Mr. Williams contended that, had he known soon enough that this charge was going to be given, he would have pled guilty.[278] Mr. Williams could not, however, discharge his burden to show that there had been an offer that he would have accepted, that the court would have accepted such a plea, or that his sentence under any such hypothetical plea would have been less. Mr. Williams presented no evidence that there was a plea offer at all. The first claim of ineffective assistance of counsel accordingly failed.[279]

The second claim was that appellate counsel was ineffective for not raising on direct appeal that trial counsel was ineffective for not objecting

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[268] *Id.*

[269] *Id.*

[270] *Id.* at 336, 840 S.E.2d at 364.

[271] *Id.*

[272] Johnson v. Williams, 308 Ga. 791, 791, 843 S.E.2d 550, 553 (2020).

[273] *Id.*, 843 S.E.2d at 553.

[274] *Id.*, 843 S.E.2d at 552–53.

[275] *Id.*, 843 S.E.2d at 555.

[276] *Id.*, 843 S.E.2d at 553.

[277] *Id.* at 793, 843 S.E.2d at 553.

[278] *Id.* at 793–94, 843 S.E.2d at 553.

[279] *Id.* at 795, 843 S.E.2d at 555.

to alleged character evidence.[280] The evidence was testimony from one of the arresting officers, who testified that bank robbers typically wear layers of clothing in order to be able to change their appearance and that they usually change directions frequently as they flee the scene of the crime.[281] The trial court sustained an objection to this evidence as speculation.[282] The habeas court held that the trial counsel was ineffective for not also raising an objection that it was character evidence.[283] The supreme court reversed, finding that the evidence had nothing to do with the defendant's character, that trial counsel's objection to it was sustained, and that there was nothing to indicate that the outcome of the case would have been different if the character evidence objection had been made.[284]

C. Necessity of a hearing

The Georgia Court of Appeals decided that two ineffective assistance cases needed to be remanded for hearings.

The court remanded one for a hearing on prejudice. A law enforcement officer with the Athens-Clarke County Police Department was convicted of child molestation and enticement of a child for indecent purposes.[285] The police department conducted an internal affairs investigation into the allegations, and in that investigation the defendant made statements that are deemed by law to be compelled and therefore inadmissible against him. Trial counsel objected to the use of the statements and succeeded in keeping them out of evidence but did not object to the prosecution's possession of the internal affairs investigation file, which the state might have used derivatively, and impermissibly, in the development of the case.[286] The trial court found without an evidentiary hearing that the state's possession of the file did not affect the result of the trial.[287] The court of appeals held that a hearing was required and remanded the case for a hearing to determine whether the state could "show the absence of taint and that the evidence was derived from legitimate, independent sources."[288]

The court remanded the second case because of a conflict of interest. Kirk C. Shelton was convicted of armed robbery and aggravated assault

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[280] *Id.* at 793, 843 S.E.2d at 553.

[281] *Id.*

[282] *Id.* at 794, 843 S.E.2d at 553.

[283] *Id.*, 843 S.E.2d at 554.

[284] *Id.* at 797, 843 S.E.2d at 555.

[285] Ward v. State, 353 Ga. App. 1, 1, 836 S.E.2d 148, 152 (2019).

[286] *Id.* at 9, 836 S.E.2d at 157.

[287] *Id.* at 12, 836 S.E.2d at 159.

[288] *Id.* at 13, 836 S.E.2d at 159–60.

after a trial in which he was represented by an assistant public defender from the Lookout Mountain Office of the Public Defender.[289] Eventually, an amended motion for new trial was filed by another attorney from that office, and the amended motion claimed that trial counsel had been ineffective. That same day, the trial court denied the amended motion for new trial after a hearing at which the original trial counsel—who then still worked in the Lookout Mountain Office of the Public Defender—was not called to testify.[290]

The court of appeals held, among other things, that the claim regarding ineffectiveness of trial counsel had to be remanded for a new hearing at which Shelton must be represented by conflict-free counsel.[291] A lawyer has a conflict of interest in asserting his or her own ineffectiveness.[292] Shelton's trial counsel, therefore, had a conflict of interest regarding the assertion of this claim.[293] Because circuit public defender's offices are treated as law firms for purposes of the imputation of conflicts of interest, every lawyer in the Lookout Mountain Office of the Public Defender had a conflict of interest in claiming that trial counsel, a member of that office, had rendered ineffective assistance.[294] Therefore, Shelton had been represented in connection with the amended motion for new trial by conflicted counsel and was entitled to a new hearing, with new and unconflicted counsel, regarding his claim that his trial counsel had been ineffective.[295]

D. Ineffective assistance and guilty pleas

The Georgia Supreme Court decided two cases relating to ineffective assistance and guilty pleas.

In *Collier v. State*, [296] the court overruled a number of cases and clarified the standard for ineffective assistance of counsel in the context of a request for an out-of-time appeal.[297] The court held that defendants are entitled to out-of-time appeals if they can show that their counsel's constitutionally ineffective performance deprived them of appeals as of right that they otherwise would have pursued.[298] The court overruled cases that required such defendants to specify the points they would raise

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[289] Shelton v. State, 350 Ga. App. 774, 774–75, 830 S.E.2d 335, 337–38 (2019).

[290] *Id.* at 784, 830 S.E.2d at 343.

[291] *Id.* at 785, 830 S.E.2d at 344.

[292] *Id.*

[293] *Id.*

[294] *Id.* at 784–85, 830 S.E.2d at 344.

[295] *Id.* at 785–86, 344–45.

[296] 307 Ga. 363, 834 S.E.2d 769 (2019).

[297] Id. at 376–77, 834 S.E.2d 781.

[298] *Id.* at 365, 834 S.E.2d at 773–74.

on appeal and to demonstrate that they would have prevailed in any such appeal.[299]

The court also overruled a "peculiar line of cases" in which the court seemed to have held that an appeal from a guilty plea was limited in scope, to issues that could be "resolved by facts appearing in the record."[300] The court held that "[b]ecause prejudice is presumed, a criminal defendant cannot be required to identify the meritorious issue he would have raised (on the existing record or otherwise) in a hypothetical appeal in order to establish that his counsel's deficient performance prejudiced him."[301]

The defendant in the case filed his motion for out-of-time appeal in the trial court where he had pled guilty nine years before, a procedure that Georgia law has long permitted. The district attorney urged the court to require defendants to file petitions for habeas corpus instead of motions for out-of-time appeals in the original trial court. In a habeas case, the state would be able to rely upon statutory defenses of limitations and prejudicial delay.[302] The supreme court declined to stop the time-honored practice of allowing motions for out-of-time appeals in the original trial courts but did hold that the state could raise the defense of prejudicial delay if the defendant chose to do so.[303] The court remanded the case for further proceedings in the trial court consistent with its opinion.[304]

Douglas Burley pled guilty to murder in 1992 and did not appeal, allegedly because his attorney erroneously advised him that he could not appeal a conviction based upon a guilty plea. In 2019, Mr. Burley filed a motion for an out-of-time appeal and alleged that his failure to appeal was the result of ineffective assistance of counsel.[305] The trial court denied the motion without a hearing, but the supreme court, following its earlier holding in *Collier*, [306] ordered the case remanded for a hearing.[307]

IV. BAR ADMISSION

The Georgia Supreme Court decided two cases related to bar admission during the Survey period.

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[299] *Id.* at 366–67, 834 S.E.2d at 774.

[300] *Id.* at 367, 834 S.E.2d at 775.

[301] *Id.* at 368–69, 834 S.E.2d at 776.

[302] *Id.* at 369–70, 834 S.E.2d at 776–77.

[303] *Id.* at 370, 834 S.E.2d at 777.

[304] *Id.* at 376, 834 S.E.2d at 781.

[305] Burley v. State, 308 Ga. 650, 650, 842 S.E.2d 851, 852 (2020).

[306] *Collier*, 307 Ga. at 363, 834 S.E.2d at 769.

[307] *Burley*, 308 Ga. at 652 ,842 S.E.2d at 853.

The supreme court upheld the decision of the board to determine character and fitness not to approve the fitness application of a lawyer who had been disbarred in 2012.[308] The lawyer was disbarred as a result of a grievance from a client who was contesting his obligation to pay child support. The lawyer failed to appear for the hearing and effectively withdrew from representing the client. Yet in both the response to the notice of investigation and in her testimony before the special master, the lawyer falsely claimed that she actually had attended the hearing.[309] The supreme court disbarred her, noting that it had "little tolerance for attorneys who make false statements during disciplinary proceedings."[310] Numerous other clients had filed grievances, and one of the clients eventually recovered $3,500 from the State Bar client security fund.[311]

When the lawyer first sought reinstatement, she had not paid the security fund the $3,500 that it had paid to her former client. The lawyer said that she had not made the payment because her former client may have committed "fraud" on the security fund. When the board to determine character and fitness issued a tentative order denying her application, the lawyer paid the $3,500. However, at the subsequent formal hearing, the lawyer again claimed that her former client may have defrauded the security fund and claimed that the charges of unethical conduct against her were untrue.[312] The board voted to deny her application, and the supreme court concurred, noting that the lawyer:

> showed in the proceedings below the same type of dishonesty and inability to take responsibility for her prior misdeeds that she demonstrated in the disciplinary proceedings that led to her disbarment in the first place. This [c]ourt does not countenance such dishonesty and blame shifting in those who seek to practice law in the state of Georgia.[313]

Sandra M. Fuller surrendered her license in 2011 after she was found guilty of nine felony counts of theft by conversion and sentenced under the First Offender Act. She had done indigent defense work and kept the fees rather than remitting them to the firm where she worked at the time.[314]

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[308] *In re* Davis, 307 Ga. 276, 276–77, 834 S.E.2d 93, 94 (2019).

[309] *Id.* at 277–78, 834 S.E.2d at 94–95.

[310] *Id.* at 278, 834 S.E.2d at 95.

[311] *Id.*

[312] *Id.* at 279, 834 S.E.2d at 95.

[313] *Id.* at 280, 834 S.E.2d at 96.

[314] *In re* Fuller, 307 Ga. 581, 581, 837 S.E.2d 297, 297 (2020).

As a first step toward regaining her license, Ms. Fuller sought a certificate of fitness to practice law from the fitness board and provided evidence of her rehabilitation, including completion of her sentence, volunteer and paid work for a ministry-based organization that helps people build businesses, evidence of leadership and service awards from other organizations, and letters of recommendation.[315] The fitness board determined after an informal conference that Ms. Fuller had demonstrated her rehabilitation by clear and convincing evidence, and the supreme court agreed and approved her application for a certificate of fitness.[316]

V. DISQUALIFICATION OF COUNSEL

In a dispute over control of an LLC, the majority owner sued the minority owner and nominally sued the LLC itself in a derivative capacity.[317] The attorney for the minority owner also entered an appearance for the LLC and, on behalf of the LLC, filed an answer and opposed the plaintiff's motion to realign the parties to make the LLC a plaintiff. The trial court granted the motion to realign the parties and granted the plaintiffs' motion to disqualify the lawyer who represented the minority owner and who had represented the LLC before it was realigned.[318] The court of appeals affirmed.[319] The court of appeals relied on Georgia Rule of Professional Conduct 1.9(a)[320] and found that the lawyer's continued representation of the minority owner was the representation of a client against a former client (the LLC) in the same matter in which the lawyer had represented the former client.[321]

The Georgia Court of Appeals affirmed the disqualification of a husband's attorney in a divorce case.[322] The attorney had represented the husband for many years, but during the marriage the wife contacted the attorney about a dispute with her former employer over payment of a commission. The attorney agreed to look at the issue and give the wife his opinion. The attorney asked for more information and learned the commission structure under which the wife worked. The attorney gave the wife advice about whether she could secretly record a conversation

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[315] *Id.* at 581–82, 837 S.E.2d at 297–98.

[316] *Id.* at 582, 837 S.E.2d at 298.

[317] Brooks v. Quinlan, 353 Ga. App. 573, 574, 839 S.E.2d 51, 53 (2020).

[318] *Id.* at 575–76, 839 S.E.2d at 54.

[319] *Id.* at 578, 839 S.E.2d at 56.

[320] GA. RULES OF PROF'L CONDUCT r. 1.9(a) (2020).

[321] *Brooks*, 353 Ga. App. at 577–78, 839 S.E.2d at 55.

[322] Samnick v. Goodman, 354 Ga. App. 805, 805–06, 841 S.E.2d 468, 470 (2020).

with her former employer and promised to write a letter for her, but he never did so.[323]

Although the wife never paid a fee or entered into an engagement agreement, the trial court found that there was an implied attorney-client relationship between the wife and the attorney.[324] The court of appeals agreed.[325] Furthermore, the court of appeals agreed with the trial court that the representation of the wife was substantially related to the divorce case because an issue in the divorce would be the wife's earning potential, and her commission structure was relevant to that issue.[326] Because the attorney had represented the wife in a substantially related matter, the attorney was disqualified from representing the husband in the divorce.[327]

VI. JUDICIAL CONDUCT

The Georgia Supreme Court decided one case during the Survey period regarding judicial conduct.

Marlina Hamilton killed her ex-husband because, according to her, he was attacking her with his fists in her home, after many years of having physically abused her.[328] She was tried and convicted of felony murder and other counts, but the trial judge granted a new trial, in part because her lawyer rendered ineffective assistance of counsel by not seeking a pretrial determination that she was immune from criminal prosecution because she acted in self-defense.[329] After appeals and a remand to the trial court, the trial judge held a hearing and granted Ms. Hamilton such immunity.[330]

On appeal, the state raised numerous arguments, including the argument that the trial judge should have recused himself because the judge had disregarded the jury's verdict by granting a new trial and had with his detailed order (including references to the trial transcript and the failure of trial counsel to seek immunity), given the appearance of having a "personal agenda" about how the case should turn out.[331] The supreme court rejected this argument, noting that it was not unusual for the same judge to preside over a case after a new trial has been

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[323] *Id.* at 806–07, 841 S.E.2d at 470–71.

[324] *Id.* at 809, 841 S.E.2d at 472.

[325] *Id.* at 811–12, 841 S.E.2d at 473.

[326] *Id.* at 813, 841 S.E.2d at 474–75.

[327] *Id.* at 814, 841 S.E.2d at 475.

[328] State v. Hamilton, 308 Ga. 116, 118, 839 S.E.2d 560, 564 (2020).

[329] *Id.* at 118, 839 S.E.2d at 564.

[330] *Id.* at 119, 839 S.E.2d at 565.

[331] *Id.* at 130, 839 S.E.2d at 572.

granted.[332] The supreme court characterized the state's position that the trial court's grant of the earlier motion for new trial created an "appearance of impropriety" on remand as "borderline-frivolous."[333]

VII. MALPRACTICE AND OTHER CIVIL CLAIMS

The court of appeals decided four cases involving malpractice or other civil claims against lawyers during the Survey period.

Alexandra Myles hired Kenneth S. Nugent, P.C. to bring a claim against the City of Smithville regarding a car accident. The law firm assigned one of its attorneys, Christopher Warren, to handle the matter. The city's insurance adjuster made a settlement offer that Myles rejected. During the meeting in which Myles rejected the offer, Warren came to believe (perhaps incorrectly) that he had missed the statute of limitations for bringing Myles's claim. Warren adjourned the meeting and soon accepted a slightly higher settlement offer, on behalf of Myles but without her knowledge or permission. The check for the insurer's payment of the settlement amount was deposited into the Nugent law firm's escrow account after someone at the firm signed Myles's name to it.[334]

In her pleadings, Myles alleged repeatedly that the engagement agreement she signed with the Nugent firm was "illegal."[335] The Nugent firm sought partial summary judgment regarding the legality of its engagement agreement, but the trial court declined to grant summary judgment because a decision on this issue would not have disposed of any of the plaintiff's claims. Lawyers for the Nugent firm in the trial court could not identify any such claim, and the court of appeals declined to consider arguments first raised on appeal that several of the plaintiff's claims would fail if the contract were deemed to be legal.[336]

The court of appeals also reviewed the trial court's grant of partial summary judgment to the plaintiff that the Nugent firm had effectively settled her case (according to Myles, without her knowledge or permission) and that as a result her claims against the City of Smithville had been released.[337] The court of appeals affirmed the trial court, noting that the insurance company was entitled to rely on Warren's apparent authority to settle his client's case.[338] Myles's remedy under these

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[332] *Id.*

[333] *Id.*, 839 S.E.2d at 573.

[334] Nugent v. Myles, 350 Ga. App. 442, 443–44, 829 S.E.2d 623, 625 (2019).

[335] *Id.* at 444, 829 S.E.2d at 625.

[336] *Id.* at 445, 829 S.E.2d at 626.

[337] *Id.* at 446–47, 829 S.E.2d at 627.

[338] *Id.* at 448–49, 829 S.E.2d at 628–29.

circumstances was against the attorneys who "overstepped the bounds" of their agency, not against the City.[339]

The court of appeals affirmed a trial court's granting of summary judgment to a law firm that had been sued by a former client for legal malpractice and for fraud.[340] The plaintiff had been injured and had a potential tort claim against the Georgia Ports Authority. Because the Ports Authority is a state entity, the tort claim could not proceed without a timely and adequate ante litem notice.[341] The law firm sent a notice, but the plaintiff hired a different law firm before a suit was filed. The law firm then gave the plaintiff a disk with all of the law firm's files on the matter, but the plaintiff's wife misplaced it. The plaintiff did not ask for a replacement disk. The plaintiff gave his new law firm the documents he had, which did not include the ante litem notice. When the new law firm saw what it believed to be the entire file, and the absence of an ante litem notice, the firm declined to proceed (without asking further about the ante litem notice). By the time the plaintiff hired another attorney, the statute of limitations had expired.[342]

The plaintiff claimed first that the Eichholz firm committed malpractice by sending a defective ante litem notice.[343] The court of appeals held that the notice was legally sufficient.[344] The plaintiff also claimed that the law firm was negligent in failing to provide him with a copy of the ante litem notice and in failing to advise him that the notice was important and that it should be provided to any new attorney the plaintiff hired.[345] The court of appeals held that, as a matter of law, the plaintiff could not show that any failures by the Eichholz firm were the proximate cause of the loss of his claim.[346] The court held that the firm could not have foreseen that the plaintiff's wife would misplace the disk, that the plaintiff would not request a replacement, and that the new lawyer would not verify whether an ante litem notice had been sent.[347] These intervening events severed any causation between the actions of the Eichholz firm and the plaintiff's injuries.

The plaintiff also claimed that the Eichholz firm perpetrated a fraud on him by its advertising.[348] Specifically, the plaintiff claimed first that

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[339] *Id.* at 447, 829 S.E.2d at 628 (quoting Clark v. Perino, 235 Ga. App. 444, 509 S.E.2d 707 (1998)).

[340] Bush v. Eichholz, 352 Ga. App. 465, 466, 833 S.E.2d 280, 282 (2019).

[341] *Id.*

[342] *Id.* at 467, 833 S.E.2d at 282–83.

[343] *Id.* at 467–68, 833 S.E.2d at 283.

[344] *Id.* at 470, 833 S.E.2d at 284.

[345] *Id.* at 473, 833 S.E.2d at 287.

[346] *Id.* at 471, 833 S.E.2d at 285–86.

[347] *Id.* at 474, 833 S.E.2d at 287.

[348] *Id.* at 475, 833 S.E.2d at 288.

the firm falsely advertised that it had obtained three significant verdicts.[349] The court of appeals rejected this part of the claim because the firm was co-counsel in one of the cases and the plaintiff presented no evidence to support his contention that the firm played no role in obtaining the other two verdicts.[350] More broadly, the plaintiff alleged that the firm falsely advertised itself as "the people's lawyer" and "the justice lawyer" when in fact it was a "settlement mill fueled by television and billboard advertising."[351] The court of appeals held that such statements in advertising were statements of opinion, or puffing, and that they could not be a basis for a fraud claim because they were not the type of "empirically verifiable statement[s] that can be affirmatively disproven[.]"[352] The court also noted that the plaintiff never took any steps to ascertain the accuracy of the firm's descriptions of itself and in particular never asked how many cases the firm actually had taken to trial.[353]

The court of appeals affirmed in part and reversed in part the trial court's decisions in connection with a malpractice claim against Alston & Bird.[354] Understanding the decision requires a detailed recitation of the facts that led to the case.

Maury Hatcher retained Alston & Bird to form and represent Hatcher Management Holdings, LLC (HMH), a holding company for the assets of Maury's family. The operating agreement drafted by Alston & Bird provided that the members had the right to inspect the company's books and to know about distributions to other members through quarterly statements. It did not list the percentages owned by each member, although Maury was permitted by the agreement to have that information. The members held an organizational meeting in March 2001, but Alston & Bird did not point out these aspects of the operating agreement to the members at that time.[355]

Between 2005 and the spring of 2008, Maury embezzled over a million dollars from HMH. In the spring of 2008, Maury's brother Jerry (a member of HMH) expressed concerns about the lack of information about HMH's affairs. At Maury's request, Alston & Bird responded by sending

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[349] *Id.*

[350] *Id.*

[351] *Id.* at 468, 476, 833 S.E.2d at 283, 288.

[352] *Id.* at 476, 833 S.E.2d at 288.

[353] *Id.* at 476–77, 833 S.E.2d at 289.

[354] Alston & Bird LLP v. Hatcher Management Holdings LLC, 355 Ga. App. 525, 536, 843 S.E.2d 613, 622 (2020).

[355] *Id.* at 526–27, 843 S.E.2d at 616.

Jerry a letter that described Maury's broad authority to manage HMH without responding to the members' requests to see HMH's records.[356]

In June and then in July, Maury sent letters to Jerry. The first letter asked Jerry to withdraw from HMH.[357] The second letter told Jerry that Alston & Bird had "indicated" that Jerry was not entitled to know the members' ownership interests or income.[358]

The family held a meeting on August 2, 2008. Maury's brother Barry complained about the lack of access to information about the income of HMH's members and suggested having his own accountant go over the books. Maury responded that he would not necessarily respond to any such effort.[359] Maury said that listing everyone's ownership interest and income was "not appropriate."[360] At the meeting, Alston & Bird's attorney stated that members could have the ownership and income information only if there was majority approval for it or for replacing Maury. This statement was incorrect, because as noted the HMH operating agreement required the manager to provide quarterly statements showing the distributions to each member.[361]

There was evidence that, if the other members had seen that information in August, they could have taken steps to recoup much of what Maury had embezzled by taking court action to apply the value of Maury's membership interest in HMH to the deficiencies. That became impossible when Maury redeemed his shares before the other members saw the books.[362]

In the wake of the August meeting, Maury discussed with Alston & Bird redeeming his shares in HMH. In October 2008, Maury redeemed his shares for $397,000 more than they were worth. Neither Maury nor Alston & Bird disclosed the redemption to other members of HMH until Maury resigned from HMH on January 2, 2009, soon after which he moved to Florida.[363] Later that month, the members appointed Jerry and Barry to manage HMH, and they sought access to HMH's records. Alston & Bird sent them a cease-and-desist letter demanding that they stop interfering in HMH's interests, even though a junior attorney with the firm warned that Alston & Bird had a conflict of interest between its representation of Maury and its representation of HMH. The junior attorney gave a similar warning as Alston & Bird worked on a second

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[356] *Id.* at 527, 843 S.E.2d at 616.

[357] *Id.*

[358] *Id.*

[359] *Id.*

[360] *Id.*

[361] *Id.* at 527–28, 843 S.E.2d at 616–17.

[362] *Id.* at 528, 843 S.E.2d at 617.

[363] *Id.*

cease and desist letter. In February 2009, Alston & Bird offered to provide Jerry and Barry HMH's records if they signed a release. They refused.[364]

In August 2009, HMH's accountant was able to determine, even without all of the documents, that Maury had misappropriated $1.49 million from HMH. In December 2009, HMH sued Maury for this sum and accrued interest and obtained a judgment of over $4 million. HMH has been unable to collect the judgment.[365]

HMH sued Alston & Bird to recover its losses. The jury found that Alston & Bird had committed legal malpractice and breached its fiduciary duties. It found that HMH had been damaged in the amount of $697,614 and awarded prejudgment interest of $341,831 and attorney's fees and costs of $1,096,561.48. The jury apportioned fault for HMH's damages at 8% to HMH itself, 60% to Maury, and 32% to Alston & Bird. The trial court apportioned everything according to these percentages and entered final judgment against Alston & Bird for 32% of the sum of the compensatory damages, the prejudgment interest, and the attorney's fees and costs.[366]

The court of appeals had to decide several issues on the appeal.[367] These issues were proximate cause, apportionment of damages, prejudgment interest, and apportionment of attorney's fees.[368]

The court of appeals rejected Alston & Bird's argument that it was entitled to a directed verdict because the breaches of Alston & Bird's duties to HMH were not the proximate cause of HMH's injuries.[369] The court noted that, although Maury had been embezzling money from HMH since 2005, the other members of HMH could have recouped some of those funds by applying Maury's membership interest against what he stole.[370] The members were deprived of the opportunity to do so because Alston & Bird incorrectly advised them at the August 2008 meeting of their rights to see the records that would have revealed the embezzlement and because the firm failed to disclose Maury's October 2008 redemption of his membership interest.[371]

The court of appeals reversed the trial court's reduction of the damage award by the percentage of Maury's fault.[372] The court held that the

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[364] *Id.*

[365] *Id.*

[366] *Id.* at 528–29, 843 S.E.2d at 617.

[367] *Id.*, 843 S.E.2d at 617.

[368] *Id.* at 525, 843 S.E.2d at 613.

[369] *Id.* at 530, 843 S.E.2d at 618.

[370] *Id.*

[371] *Id.*

[372] *Id.* at 534–35, 843 S.E.2d at 621.

applicable portion of the apportionment statute only allowed reduction of the damages by the percentage of fault assigned to the plaintiff, HMH, and not to Maury, a non-party.[373] The relevant statutory language is:

> (a) Where an action is brought against one or more persons for injury to person or property and *the plaintiff is to some degree responsible* for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and *the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.*[374]

Because HMH brought the case only against one party, the court reasoned, this section directs the trial court to reduce the damages only according to the percentage of fault attributed to the plaintiff.[375]

The court of appeals agreed with Alston & Bird, however, with respect to prejudgment interest.[376] HMH sought prejudgment interest under O.C.G.A. § 13-6-13,[377] which allows for the recovery of prejudgment interest in actions involving breaches of duty that arise from a specific contract.[378] Because HMH did not include a breach of contract action in its suit and did not point to a specific contract from which the duties that Alston & Bird violated arose, the court of appeals held that HMH was not entitled to recovery of prejudgment interest. [379]

HMH sought to recover attorney's fees and costs under O.C.G.A. § 13-6-11.[380] The jury found that Alston & Bird had "acted in bad faith" and awarded just under $1.1 million in fees and costs.[381] The trial court apportioned the award of fees and costs to track the apportionment of compensatory damages, [382] but the court of appeals reversed this part of the judgment.[383] Because HMH was the prevailing party in the litigation

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[373] *Id.* at 534, 843 S.E.2d at 620–21.

[374] O.C.G.A. § 51-12-33 (2020) (alterations added by court).

[375] *Alston & Bird*, 355 Ga. App. at 534, 843 S.E.2d at 620.

[376] *Id.* at 531, 843 S.E.2d at 618.

[377] "In all cases where an amount ascertained would be the damages at the time of the breach, it may be increased by the addition of legal interest from that time until the recovery." O.C.G.A. § 13-6-13 (2020).

[378] *Alston & Bird*, 355 Ga. App. at 532, 843 S.E.2d at 619.

[379] *Id.*

[380] *Id.* at 535, 843 S.E.2d at 621. "The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them." O.C.G.A. §13-6-11 (2020).

[381] *Id.*

[382] *Id.*

[383] *Id.*

and there was no evidence that anyone other than Alston & Bird had acted in bad faith, the court of appeals held that Alston & Bird should be held liable for the entire amount of the attorney's fees and costs.[384]

In another case, the court of appeals affirmed in part and reversed in part a grant of summary judgment to attorneys who represented the wife in a multi-million dollar divorce case that settled.[385] The court of appeals reversed the grant of summary judgment on a claim that the wife's attorneys did not include, as part of the settlement, recoupment by the wife of $166,567.70 that she was ordered to pay for the husband's attorney's fees in the midst of the case.[386] The trial court had ordered that interim payment with the proviso that it would be credited against the husband's ultimate share of the marital estate and also had ordered the attorneys to enter into a stipulation that this would be done.[387] It was not, and the court of appeals held that summary judgment on this point had to be reversed because there was evidence that the wife's lawyers had not exercised reasonable care on this point and that the wife would have received a better deal in the settlement in the divorce if they had done so.[388]

Otherwise, the court of appeals affirmed summary judgment for the attorneys.[389] The wife alleged that the lawyers failed to advise her of the significant tax consequences of the settlement,[390] but the court of appeals held that she severed any causation between their alleged negligence and her damages by making an "independent, well-informed and deliberate decision to accept the assets with the attendant tax consequences" that others had explained to her.[391] She also claimed that she received an inequitable share of the marital assets,[392] but the court of appeals held that she could not show that she would have received a better deal but for the lawyers' alleged errors.[393] The court of appeals rejected a claim that there were any fact issues with respect to the failure of her lawyers to secure payment of her attorney's fees by the husband, given that such an award in any event would have been discretionary for the trial judge.[394] Finally, the court of appeals affirmed summary judgment for

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[384] *Id*.

[385] Rollins v. Smith, 353 Ga. App. 209, 209, 836 S.E.2d 585, 587 (2019).

[386] *Id*. at 214, 836 S.E.2d at 590.

[387] *Id*. at 213, 836 S.E.2d at 589–90.

[388] *Id*. at 214, 836 S.E.2d at 590.

[389] *Id.* at 211, 836 S.E.2d at 588.

[390] *Id.* at 215, 836 S.E.2d at 591.

[391] *Id*. at 219, 836 S.E.2d at 593.

[392] *Id*., 836 S.E.2d at 593.

[393] *Id*., 836 S.E.2d at 594.

[394] *Id*. at 219–20, 836 S.E.2d at 594.

the defendants with respect to punitive damages because the only remaining count, the lawyers' failure to enter into the stipulation to credit the interim attorney's fees for the husband to the husband's ultimate share of the marital estate, was at most the result of negligence.[395]

VIII. PROSECUTORIAL MISCONDUCT

In a closing argument in a murder trial, an experienced prosecutor purported to tell the jury what a particular witness would have said if she had been called to testify. The defense objected to the argument as being outside the evidence and successfully moved for a mistrial.[396] The defendant then argued that retrial should be barred by double jeopardy because the prosecutor intentionally committed misconduct to goad the defense into obtaining a mistrial.[397] The trial court agreed with the defendant,[398] and the supreme court affirmed, holding that it was proper for the trial court to infer the prosecutor's intent from the facts that the prosecutor was experienced and that the evidence against the defendant was not overwhelming.[399]

IX. ATTORNEY-CLIENT PRIVILEGE

In a legal malpractice case, the plaintiffs sued one firm that represented them in connection with the underlying matter but did not sue another firm that also represented them in connection with that same matter.[400] The defendants sought discovery of documents from the firm that had not been sued, and the plaintiffs sought to prevent that discovery on the basis of the attorney-client privilege.[401] The trial court held that the privilege had been waived as to communications with all of the plaintiffs' attorneys in connection with the underlying matter, including those attorneys who were not defendants.[402] The court of appeals reversed and held that the waiver of the privilege only extends to communications with the defendants.[403] The supreme court reversed and held that the waiver extends to communications with all the lawyers

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[395] *Id.* at 220, 836 S.E.2d at 594.

[396] State v. Jackson, 306 Ga. 626, 628, 831 S.E.2d 798, 800 (2019).

[397] *Id.* at 628, 831 S.E.2d at 800–01.

[398] *Id.*

[399] *Id.* at 633, 831 S.E.2d at 803–04.

[400] Hill, Kertscher & Wharton, LLP v. Moody, 308 Ga. 74, 74, 839 S.E.2d 535, 536 (2020).

[401] *Id.* at 75–76, 839 S.E.2d at 537–38.

[402] *Id.* at 76, 839 S.E.2d at 538.

[403] *Id.* at 77, 839 S.E.2d at 538.

who represented the plaintiffs in connection with the underlying matters.[404]

X. CONTEMPT

A trial court held two defense lawyers in direct contempt in a criminal case and, after giving them an opportunity to be heard, summarily fined them each $175. The alleged contempt related to the court's order to sequester witnesses.[405] The lawyers had placed two defense witnesses in a conference room that opened into the courtroom, and the door to that room had been open during the testimony of other witnesses.[406] The defense witnesses told the judge that they could hear some of what was going on in the courtroom but one stated, "I wasn't paying attention" and the other said, "it wasn't clear."[407]

The court of appeals reversed.[408] The majority held first that the alleged conduct was not direct contempt because it did not occur in open court and therefore was not subject to summary adjudication.[409] Whatever instructions the lawyers gave to the witnesses were not given in open court, and therefore at most the lawyers could have been guilty of indirect contempt. For such charges, the lawyers were entitled to be advised of the charges, to have a reasonable opportunity to respond to them, and to have the assistance of counsel.[410]

The majority also held that the evidence did not establish beyond a reasonable doubt that the attorneys had willfully violated the court's order to sequester the witnesses.[411] There was insufficient evidence that the witnesses could hear the testimony from the conference room, and there was no evidence that the attorneys assisted or were otherwise responsible even if the witnesses were able to do so.[412]

Judge McMillian dissented on the grounds that the allegations against the attorneys did constitute a direct contempt and that there was sufficient evidence to sustain the trial court's finding that the attorneys had willfully violated the court's order of sequestration.[413]

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[404] *Id.* at 79, 839 S.E.2d at 539.

[405] *In re* Adams, 354 Ga. App. 484, 485, 841 S.E.2d 143, 145 (2020).

[406] *Id.* at 484, 841 S.E.2d at 145.

[407] *Id.* at 485, 841 S.E.2d at 145.

[408] *Id.* at 484, 841 S.E.2d at 144.

[409] *Id.* at 485–86, 841 S.E.2d at 145.

[410] *Id.* at 486–87, 841 S.E.2d at 146.

[411] *Id.* at 488, 841 S.E.2d at 147.

[412] *Id.* at 488–89, 841 S.E.2d at 147.

[413] *Id.* at 489, 841 S.E.2d at 148 (McMillian, J., dissenting).

XI. MISCELLANEOUS CASES

The Georgia Supreme Court decided one miscellaneous legal ethics case during the Survey period, while the court of appeals decided one.

A plaintiff asserted claims for abusive litigation against his former employer, the employer's law firm, and two individual lawyers in that firm relating to their conduct in an underlying breach of contract case.[414] The trial court dismissed the case for failure to state a claim upon which relief can be granted because the plaintiff had not pled special damages, and the court also ruled that punitive damages are not available in abusive litigation cases.[415] The court of appeals reversed the trial court with respect to the need to plead special damages but affirmed the holding that punitive damages are not available in an abusive litigation case.[416]

By writ of certiorari, the plaintiff sought review of the court of appeals ruling with respect to punitive damages.[417] The supreme court granted the writ and unanimously held that the abusive litigation statute's language that permits recovery of "all damages allowed by law as proved by the evidence" includes punitive damages.[418] In so doing, the court overruled two prior cases and disapproved language in a third case.[419]

In the other case, a group of investors sued a lawyer and his client (among others) and claimed that the lawyer had helped the client perpetrate a fraud on the investors.[420] The lawyer allegedly furthered the fraudulent scheme by providing the investors with documents that purported to show that the investments were legitimate.[421] The complaint alleged in particular that the lawyer "aided and abetted" the client's fraud.[422]

The lawyer sought dismissal of the case on the basis that Georgia law does not recognize the tort of aiding and abetting fraud.[423] The trial court denied the motion.[424] The court of appeals affirmed and held that, although there is no tort in Georgia for "aiding and abetting" fraud, one who knowingly participates in a fraud may be held liable for it.[425] Here,

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[414] Coen v. Aptean, Inc., 307 Ga. 826, 827, 838 S.E.2d 860, 861 (2020).

[415] *Id.* at 828, 838 S.E.2d at 862.

[416] *Id.*

[417] *Id.* at 828–29, 838 S.E.2d at 862.

[418] *Id.* at 830, 838 S.E.2d at 863.

[419] *Id.* at 840, 838 S.E.2d at 870.

[420] Siavage v. Gandy, 350 Ga. App. 562, 562, 829 S.E.2d 787, 788 (2019).

[421] *Id.* at 562–63, 829 S.E.2d at 788.

[422] *Id.* at 562, 829 S.E.2d at 788.

[423] *Id.* at 563, 829 S.E.2d at 788.

[424] *Id.*, 829 S.E.2d at 789.

[425] *Id.* at 566, 829 S.E.2d at 790.

the court of appeals concluded, the investors had sufficiently alleged that the lawyer was a knowing participant in the fraud by drafting documents that created the false impression that the investments were legitimate.[426]

XII. FORMAL ADVISORY OPINIONS[427]

A. State Bar of Georgia Formal Advisory Opinion Board

The State Bar of Georgia Formal Advisory Opinion Board (FAOB) considers requests for formal advisory opinions that interpret the Georgia Rules of Professional Conduct.[428] If the FAOB accepts a request, it drafts an opinion and publishes it for comment in an official state bar publication or the State Bar website.[429] The FAOB then reviews any comments and decides whether to adopt the opinion.[430] Some, but not all, of the FAOB's opinions are reviewed by the Georgia Supreme Court.[431]

During the Survey year, the FAOB received two requests for formal advisory opinions. Request 19-1 asked whether it is a violation of Georgia Rules of Professional Conduct for a Georgia lawyer to purchase Google Ad Words selecting the name of a competing attorney such that a Google search for the competing attorney would cause the lawyer's name to appear in the search results before the name of the competing attorney.[432] As of the end of the Survey year, this request was still pending before the Board.[433]

Request 19-R2 asked several questions about the propriety under the Georgia Rules of Professional Conduct of an attorney advising, assisting, or accepting as a fee an ownership interest in a client that cultivates, processes, manufactures, distributes, or sells hemp or a cannabis plant.[434] Certain activities related to hemp and cannabis are legal under Georgia law but illegal under federal law, and Rule 1.2(d)[435] forbids an

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[426] *Id*., 829 S.E.2d at 790.

[427] The Author is a member of the State Bar of Georgia Formal Advisory Opinion Board. This discussion is the Author's alone and does not reflect any opinion or policy of the Board or any of its members. The Author thanks John Shiptenko, Senior Assistant General Counsel to the State Bar of Georgia and staff liaison to the Formal Advisory Opinion Board, for his assistance with this section.

[428] GA. RULES OF PROF'L CONDUCT r. 4-403(a) (2020).

[429] GA. RULES OF PROF'L CONDUCT r. 4-403(c) (2020).

[430] *Id*.

[431] GA. RULES OF PROF'L CONDUCT r. 4-403(d)–(e) (2020).

[432] Formal Advisory Opinion Board Meeting Agenda October 24, 2019 at 2.

[433] Formal Advisory Opinion Board Meeting Minutes, Thursday, January 23, 2020 at 2.

[434] Formal Advisory Opinion Board Meeting Agenda October 24, 2019 at 3.

[435] GA. RULES OF PROF'L CONDUCT r. 1.2(d) (2020).

attorney from advising or assisting clients in the commission of crimes.[436] The Board tabled this request because the State Bar disciplinary Rules and procedures committee had proposed an amendment to Rule 1.2(d) to deal with these issues.[437] As of the end of the Survey period, that proposed amendment had not been acted upon by the supreme court.

During the same time period, the FAOB acted upon two matters that related to earlier requests or opinions. Request 18-R1 concerned conflicts of interest in the context of an insurance company that elects to defend a personal injury case in the name of a tortfeasor when the plaintiff has his uninsured/under-insured motorist coverage with the insurance company.[438] The FAOB declined this request.[439] The FAOB voted to redraft Formal Advisory Opinion 94-3 relating to contacts with former employees of a represented party.[440] At the close of the Survey period, the new opinion had not been approved by the board, and this matter remained pending.

B. American Bar Association Standing Committee on Ethics and Professional Responsibility

The formal opinions of the Standing Committee on Ethics and Professional Responsibility of the American Bar Association do not directly bind Georgia lawyers or courts. However, Georgia courts frequently look to ABA formal opinions for guidance.[441] It is worth noting,

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[436] Formal Advisory Opinion Board Meeting Agenda October 24, 2019 at 2–3.

[437] *Id.*

[438] *Id.* at 1.

[439] Formal Advisory Opinion Board Meeting Minutes, Thursday, January 23, 2020 at 1–2.

[440] Formal Advisory Opinion Board Meeting Minutes, Thursday, October 24, 2019 at 2.

[441] *See, e.g., In re* Woodham, 296 Ga. 618, 621–22, 769 S.E.2d 353, 356–57 (2015) (discussing and following ABA Formal Op. 06-443 (2006) regarding the propriety of contacts between a lawyer and the in-house counsel for an opposing party who is represented by outside counsel); Outdoor Advert. Ass'n of Georgia, Inc. v. Garden Club of Georgia, Inc., 272 Ga. 146, 148–49, 527 S.E.2d 856, 860 (2000) (using ABA Formal Op. 342 for guidance about conflicts of interest for former government lawyers); Henderson v. HSI Fin. Servs., Inc., 266 Ga. 844, 845–46, 471 S.E.2d 885, 887 (1996) (citing and following ABA Formal Op. 303 regarding lawyers practicing in corporate form); Jones v. Jones, 258 Ga. 353, 355, 369 S.E.2d 478, 479 (1988) (citing and following ABA Formal Op. 340 regarding disqualification when lawyers who are married to each other appear on opposite sides of a case); Frazier v. State, 257 Ga. 690, 694, 362 S.E.2d 351, 357 (1987) (discussing and following ABA Formal Op. 342 regarding imputation of conflicts of interest); Sanifill of Georgia, Inc. v. Roberts, 232 Ga. App. 510, 511, 502 S.E.2d 343, 344 (1998) (discussing and following ABA Formal Op. 91-359 with respect to the no-contact rule and contacts with a former employee of a represented corporation). *But see* Thompson v. State, 254 Ga. 393, 397, n.6, 330 S.E.2d 348, 351–52, n.6 (1985) (citing but not following ethics opinions, including ABA opinions, regarding disqualification of part-time prosecutors, for "pragmatic" reasons); Summerville v. Innovative Images, LLC, 349 Ga. App. 592, 596, 826 S.E.2d 391, 396 (2019) (declining to

therefore, the ABA formal opinions that were issued during the Survey year.

1. Formal Opinion 487: Fee Division with Client's Prior Counsel[442]

Suppose a client enters into a contingent fee contract with a lawyer but then fires that lawyer without cause and hires successor counsel, also under a contingent fee arrangement. The first lawyer may have a claim against the client under quantum meruit for the value of the services rendered before termination.[443] Formal opinion 487 provides guidance for successor counsel in such situations. The primary points are these.

First, the successor counsel must advise the client in writing of the first lawyer's possible claim for a portion of the successor counsel's contingent fee in the event of a recovery.[444] This obligation flows from both model Rule 1.5(b)[445] (lawyer's duty to communicate the basis or rate of fees) and 1.5(c)[446] (duty to obtain client written consent to a contingent fee and to state the method by which the fee is to be determined).[447] Second, the opinion rejects authorities that apply the terms of Rule 1.5(e)[448] on fee sharing to the successor counsel scenario, because that Rule is about arrangements among lawyers who simultaneously represent a client and does not apply to sequential representation.[449] Third, when the matter is concluded, successor counsel may not share the fee with the original counsel without client consent.[450] Finally, as long as there is a disagreement about the first lawyer's share of the fee, the successor counsel must hold the amount claimed by the first lawyer in trust.[451]

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use ABA Formal Op. 02-425 to support a conclusion that a law firm's arbitration clause was unconscionable, noting that the Georgia Supreme Court had not addressed whether that opinion will be adopted as the proper interpretation of Georgia Rule of Professional Conduct 1.4(b)).

[442] ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 487 (2019).

[443] *Id.* at 1.

[444] *Id.* at 2–3.

[445] GA. RULES OF PROF'L CONDUCT r. 1.5(b) (2020).

[446] GA. RULES OF PROF'L CONDUCT r. 1.5(c) (2020).

[447] ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 487 at 2.

[448] GA. RULES OF PROF'L CONDUCT r. 1.5(e) (2020).

[449] ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 487 at 4–5.

[450] *Id.* at 5.

[451] *Id.*

2. Formal Opinion 488: Judges' Social or Close Personal Relationships with Lawyers or Parties as Grounds for Disqualification or Disclosure[452]

Under Rule 2.11 of the Model Code of Judicial Conduct,[453] judges must disqualify themselves in certain specific circumstances and otherwise when their impartiality might reasonably be questioned.[454] Formal opinion 488 offers guidance for judges with respect to social relationships with lawyers and parties that do not automatically require disqualification.[455]

The committee divided social relationships into three categories: acquaintances, friendships, and close personal friendships.[456] An acquaintance is someone with whom the judge has social interactions that are coincidental and relatively superficial, such as membership in the same place of worship, country club, gym, or professional association.[457] A judge and an acquaintance do not seek each other's company but are cordial when they do interact.[458] Opinion 488 states that a judge's relationship as an acquaintance with a lawyer or party is not a basis for disqualification because the judge's impartiality could not be reasonably questioned on the basis of such a relationship.[459] The judge may but need not disclose to all counsel and parties that the judge has such a relationship with an attorney or a party in a case.[460]

A friendship with a party or lawyer exists if there is "a degree of affinity greater than being acquainted with a person; indeed, the term connotes some degree of mutual affection."[461] Because some friendships are closer than others, some will require a judge's disqualification and others will not.[462] It is a matter of degree, to be assessed on a case-by-case basis.[463] Even if the judge does not believe that the judge's impartiality might reasonably be questioned, the judge should disclose to the parties and counsel any facts about the friendship that the parties and counsel might consider relevant to a possible motion for disqualification.[464] If a party objects to the judge's participation in the

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[452] ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 488 (2019).

[453] MODEL CODE OF JUD. CONDUCT r. 2.11 (2020).

[454] ABA Standing Comm. on Ethics & Prof. Resp., Formal Op. 488 at 1.

[455] *Id.* at 3.

[456] *Id.* at 2.

[457] *Id.* at 4.

[458] *Id.*

[459] *Id.*

[460] *Id.*

[461] *Id.*

[462] *Id.* at 5–6.

[463] *Id.* at 6.

[464] *Id.*

matter, the judge has discretion to decide whether to recuse and should explain the decision on the record.[465]

A judge has a close personal relationship with a party or lawyer if the relationship "goes beyond or is different from common concepts of friendship."[466] For example, a judge may be romantically involved with a party or a lawyer, or the judge may desire or be actively pursuing such a relationship.[467] In those circumstances, the judge's impartiality might reasonably be questioned, and the judge is disqualified.[468] With respect to other close personal relationships, such as the judge being the godparent to a child of an attorney or a party, the judge must exercise discretion.[469] Even if the judge does not believe the close personal relationship is a reasonable basis to question the judge's impartiality, the judge must disclose enough facts about the relationship to allow the parties and counsel to decide whether to seek the judge's disqualification.[470]

Formal opinion 488 closes by noting that any disqualification that would result from a friendship or close personal relationship between the judge and a lawyer or party may be waived if all lawyers and parties agree to do so.[471]

3. Formal Opinion 489: Obligations Related to Notice When Lawyers Change Firms[472]

Formal opinion 489 provides detailed guidance to lawyers and law firms about their ethical responsibilities when a lawyer leaves a firm.[473] It will be easiest to summarize the most important guidance in the context of a hypothetical Departing Lawyer who is leaving a Law Firm and wants to continue to represent a Client at the Departing Lawyer's new firm.

The Client has the right to decide who will represent it.[474] The Departing Lawyer must inform the Client of the imminent departure and may do so without first telling the Law Firm, as long as the Departing Lawyer informs the Law Firm contemporaneously.[475] The Departing

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[465] *Id.*

[466] *Id.*

[467] *Id.*

[468] *Id.*

[469] *Id.*

[470] *Id.*

[471] *Id.* at 7.

[472] ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 489 (2019).

[473] *Id.* at 1.

[474] *Id.* at 3.

[475] *Id.*

Lawyer and the Law Firm may not make false or misleading statements to the Client, such as false disparaging statements about each other in an attempt to persuade the Client.[476] If the Client decides to stay with the Law Firm (and the Law Firm can provide competent representation to the Client without the Departing Lawyer), then the Departing Lawyer must take all reasonable steps to protect the Client's interests, including updating files and briefing the lawyers at the Law Firm who are going to take over the representation.[477] If the Client chooses to have the Departing Lawyer continue to represent it, the Law Firm may not deny the Departing Lawyer access to the resources necessary to continue to represent the Client during any period of transition before the Departing Lawyer leaves the Law Firm.[478]

The Law Firm may require a reasonable period of advance notice for the Departing Lawyer's departure from the law firm in order to provide sufficient time for a smooth transition, regardless of whom the Client chooses.[479] However, notice periods and financial consequences of departure may not be set up or enforced in such a way that they interfere with the Client's choice of counsel or are used to coerce or punish the Departing Lawyer.[480] There is a difference between a reasonable policy to protect the Client during a transition and a policy that imposes a financial penalty or disincentive on a Departing Lawyer who wishes to compete with the Law Firm.[481] The latter type of provision is unenforceable as an indirect restriction on the lawyer's right to practice.[482]

4. Formal Opinion 490: Ethical Obligations of Judges in Collecting Legal Financial Obligations and Other Debts[483]

The Model Code of Judicial Conduct requires judges to comply with the law (Rule 1.1[484]); to promote public confidence in the independence, integrity and impartiality of the judiciary (Rule 1.2[485]); to uphold the law and perform judicial duties fairly and impartially (Rule 2.2[486]); and to

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[476] *Id.*

[477] *Id.* at 4.

[478] *Id.* at 6.

[479] *Id.* at 5.

[480] *Id.*

[481] *Id.* at 5.

[482] *Id.* at 6.

[483] ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 490 (2020).

[484] MODEL CODE OF JUD. CONDUCT r. 1.1 (2020).

[485] MODEL CODE OF JUD. CONDUCT r. 1.2 (2020).

[486] MODEL CODE OF JUD. CONDUCT r. 2.2 (2020).

accord every person the right to be heard according to law (Rule 2.6[487]).[488] Formal opinion 490 explores these duties in the context of judges using incarceration as punishment for failure to fulfill a financial obligation such as a court fine or civil debt or using the threat of incarceration as an inducement to make such payments.[489] The opinion concludes that judges must make meaningful inquiries into the litigants' ability to pay such amounts before resorting to incarceration.[490] A "[f]ailure to adopt and consistently follow 'carefully prescribed procedures' in proceedings that could result in incarceration for failure to pay strikes at the very roots of the fair and impartial administration of justice and poses a direct threat to public faith in the legitimacy of the judicial process."[491] The opinion includes some guidance on best practices for making sure that an appropriate inquiry into ability to pay is made.[492]

5. Formal Opinion 491: Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings[493]

Model Rule of Professional Conduct 1.2(d)[494] provides that a lawyer must not counsel a client to engage in, or assist a client with, conduct that the lawyer knows is criminal or fraudulent.[495] Because of concerns about lawyer assistance with money-laundering and financing terrorism, the ABA standing committee issued formal opinion 491 to provide guidance to lawyers about when they must seek more information before helping clients.[496]

"Knowledge" in the Model Rules is defined to mean actual knowledge, but such knowledge can be inferred from circumstances.[497] The opinion deals with transactions in which the client does not reveal any criminal or fraudulent intent.[498] It addresses the question of when the lawyer must make inquiries in order to be sure not to be rendering improper counseling or assistance.[499] If the circumstances are such that there is a "high probability" that the client is seeking to use the lawyer's services

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[487] MODEL CODE OF JUD. CONDUCT r. 2.6 (2020).

[488] ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 490 at 5.

[489] *Id.* at 1.

[490] *Id.* at 10.

[491] *Id.* at 7, (quoting *In re* Benoit, 487 A.2d 1158, 1165 (Me. 1985)).

[492] *Id.* at 10.

[493] ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 491 (2020).

[494] MODEL RULES OF PRO. CONDUCT r. 1.2 (AM BAR ASS'N 2020).

[495] ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 491 at 1.

[496] *Id.* at 1–2.

[497] *Id.* at 1.

[498] *Id.* at 2.

[499] *Id.*

for criminal or fraudulent activity, the lawyer must inquire further.[500] In the absence of such an inquiry, the lawyer will be deemed to be acting with willful blindness or conscious disregard of known facts, in which case the lawyer's knowledge will be inferred from the circumstances and the lawyer will be in violation of Rule 1.2(d).[501]

Formal opinion 491 also notes that a duty to make further inquiries into the legality of a transaction can arise as part of the lawyer's duties of competence, diligence, communication, and honesty.[502] If the client refuses to provide sufficient information for the lawyer to assess the legality of the transaction, the lawyer ordinarily must withdraw from or decline the representation.[503]

XIII. AMENDMENTS TO THE GEORGIA RULES OF PROFESSIONAL CONDUCT

During the Survey period, the Georgia Supreme Court amended the Georgia Rules of Professional Conduct in several significant respects.[504]

A common issue for lawyers is to try to sort out their obligations to prospective clients. Although the ABA model Rules of Professional Conduct contain detailed guidance in Rule 1.18,[505] as of the close of the Survey period Georgia had not adopted such a Rule (although a motion from the state bar of Georgia giving the court the opportunity to do so was pending).[506] Comment 4A to Rule 1.6[507] on confidentiality states:

> Information gained in the professional relationship includes information gained from a person (prospective client) who discusses the possibility of forming a client-lawyer relationship with respect to a matter. Even when no client-lawyer relationship ensues, the restrictions and exceptions of these Rules as to use or revelation of the information apply, e.g. Rules 1.9 and 1.10.[508]

To provide additional guidance, at least until Georgia adopts a version of Rule 1.18, the supreme court approved adding "prospective client" to

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[500] *Id.*

[501] *Id.*

[502] *Id.* at 7.

[503] *Id.* at 9–10.

[504] The Author thanks Bill NeSmith, Deputy General Counsel to the State Bar of Georgia, for his assistance with this section.

[505] MODEL RULES OF PRO. CONDUCT r. 1.18 (AM BAR ASS'N 2020).

[506] *In re* State Bar of Georgia Rules and Regulations for its Organization and Government, Motion to Amend 2020-1 at 46-48 (on file with the author).

[507] GA. RULES OF PROF'L CONDUCT r. 1.6 cmt. 4A (2020).

[508] *Id.*

Rule 1.0[509] as a defined term.[510] A "prospective client" is "a person who consults with a lawyer about the possibility of forming a client–lawyer relationship with respect to a matter."[511]

The court made two changes in light of developments in the ways that clients and lawyers communicate with each other. The definition of "writing" or "written" in Rule 1.0 was changed to delete a specific reference to email and replace it with the more general term "electronic communication."[512] Comment four to Rule 1.4 on communication no longer instructs that lawyers should promptly return or acknowledge client telephone calls but rather provides that lawyers "should promptly respond to or acknowledge client communications."[513]

The court added two comments to Rule 5.3, which sets forth a lawyer's responsibilities with respect to nonlawyer assistants. Both of the new comments are addressed to the use of nonlawyer assistants outside the lawyer's firm. New comment four provides that a lawyer may use such assistance but "must take reasonable efforts to ensure that the assistance is provided in a manner that is compatible with the lawyer's professional obligations."[514] The comment then lists circumstances that are relevant to the extent of this obligation.[515] New comment five recognizes that sometimes clients direct the lawyer to use a particular nonlawyer outside the lawyer's firm and that the lawyer ordinarily should agree with the client about the division of responsibility between the lawyer and the client for monitoring the provider of the assistance.[516]

The State Bar asked the court to approve a new exception to the general Rule that lawyer's may not share legal fees. The Bar's proposed amendment provided that "a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter."[517] The supreme court approved the request with one change. Rule 5.4(a)(4)[518] now reads, "a lawyer shall share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter."[519]

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[509] GA. RULES OF PROF'L CONDUCT r. 1.0 (2020).

[510] Order of the Supreme Court of Georgia at 5 (November 18, 2019).

[511] *Id.*

[512] *Id.* at 6.

[513] *Id.* at 7.

[514] *Id.* at 8.

[515] *Id.*

[516] *Id.* at 8–9.

[517] *In re* State Bar of Georgia Rules and Regulations for its Organization and Government, Motion to Amend 2019-4 at 23.

[518] GA. RULES OF PROF'L CONDUCT r. 5.4(a)(4) (2020).

[519] *Id.*

The court made one change to the advertising Rules. Rule 7.1(a)[520] had provided that "[a] lawyer may advertise through all forms of public media and through written communication not involving personal contact so long as the communication is not false, fraudulent, deceptive or misleading."[521] The court simplified the statement to: "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."[522]

On a related note, the court amended Rule 7.5[523] on firm names and letterhead.[524] The state bar disciplinary Rules and procedures committee was considering amendments to this Rule, but the executive committee of the bar voted to bypass the usual procedures and ask the court to remove from the Rule some specific requirements with respect to trade names.[525] One requirement was that the trade name had to include the name of at least one of the lawyers practicing under that name or the name of a deceased or retired partner in the firm.[526] The other was that the firm name could not "imply a connection with a government entity, with a public or charitable legal services organization or any other organization, association or institution or entity, unless there is, in fact, a connection."[527] Instead, the Rule now states with respect to trade names that a lawyer "shall not use a . . . trade name . . . that is false or misleading."[528]

XIV. CONCLUSION

This Article surveys recent developments in Georgia legal ethics through May 31, 2020. For updates on developments after that date, you may visit the website of the Mercer Center for Legal Ethics and Professionalism.[529]

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[520] GA. RULES OF PROF'L CONDUCT r. 7.1(a) (2020).

[521] *In re* State Bar of Georgia Rules and Regulations for its Organization and Government, Motion to Amend 2019-4 at 28.

[522] Order of the Supreme Court of Georgia at 12 (November 18, 2019).

[523] GA. RULES OF PROF'L CONDUCT r. 7.5 (2020).

[524] Order of the Supreme Court of Georgia at 5 (February 6, 2020).

[525] *In re* State Bar of Georgia Rules and Regulations for its Organization and Government, Motion to Amend 2020-2 at 1–2.

[526] Order of the Supreme Court of Georgia at 3 (February 6, 2020).

[527] *Id.* at 4.

[528] *Id.* at 1.

[529] As a service to the Georgia bench and bar, the Mercer Center for Legal Ethics and Professionalism provides monthly updates and other resources on recent developments in Georgia legal ethics. Visit http://law.mercer.edu/academics/centers/clep/updates-legal-ethics/.