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Legal Ethics

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I. INTRODUCTION

This Survey covers the period from June 1, 2020, to May 31, 2021.[1] The Article discusses developments concerning attorney discipline, bar admission and reinstatement, malpractice and other civil claims, ineffective assistance of counsel, disqualification of counsel and conflicts of interest, judicial conduct and recusal, attorney's fees and liens, contempt, formal advisory opinions, amendments to the Georgia Rules of Professional Conduct, and one miscellaneous matter.

II. LAWYER DISCIPLINE

A. Disbarments

1. Trust Accounts and Other Financial Issues

Five lawyers lost their licenses during the Survey period due to misconduct with respect to their trust accounts or because of other financial improprieties. [2]

The Georgia Supreme Court accepted Evelyn A. Miller's petition for the voluntary surrender of her license after she consented to the revocation of her law license in Virginia.[3] The misconduct in Virginia concerned Ms. Miller's work for a title agency at the same time as she had her own law practice. Her primary role for the title agency was to

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1. For an analysis of Georgia legal ethics during the Survey Period of June 1, 2019, to May 31, 2020, *see* Patrick Emery Longan, *Legal Ethics, Annual Survey of Georgia Law,* 72 MERCER L. REV. 165 (2020).

2. Lawyers in Georgia can submit petitions for voluntary discipline. GA. RULES OF PRO. CONDUCT r. 4-227 (2021). 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* Miller, 311 Ga. 81, 855 S.E.2d 628 (2021).

supervise settlements, and for six transactions there were significant sums (totaling more than $250,000) that were to be held in a designated escrow account post-closing. Instead, Ms. Miller wired the funds into her law firm's checking account, and she admitted that the funds for four of the transactions were spent.[4]

David R. Sicay-Perrow defaulted in the disciplinary process and thereby admitted allegations that led the supreme court to disbar him.[5] Mr. Sicay-Perrow settled a civil claim for two clients but deposited the settlement proceeds into his business checking account rather than his firm's trust account. Over the next few years, Mr. Sicay-Perrow did not send his clients their funds and repeatedly failed to communicate with his clients. He eventually sent them several checks, one from his business checking account rather than his trust account and several trust account checks that sent the clients funds that belonged to other clients and left the trust account without sufficient funds to repay the money owed to those other clients. The supreme court found that there were aggravating factors, including Mr. Sicay-Perrow's thirty years of experience, dishonest conduct, and prior disciplinary history.[6]

Joseph Harold Turner Jr. defaulted in the disciplinary process and was disbarred.[7] Mr. Turner represented a client in a civil case and was wired his client's settlement funds. Mr. Turner did not, however, turn the funds over to the client or respond to the client's inquiries about the matter. Separately, Mr. Turner's trust account became overdrawn, and he failed to respond to the State Bar's inquiries about the overdraft.[8]

Neil Richard Flit voluntarily surrendered his license after two grievances were filed against him.[9] Mr. Flit admitted that he settled personal injury cases and deposited the proceeds into his trust account but did not account for or deliver the funds to the administrator of the client's estate (in one case) or to the client (in the other case).[10]

The Georgia Supreme Court also disbarred Leighton Reid Berry Jr.[11] Mr. Berry, who had been disciplined four times before, could not be found and was served by publication. When he did not respond to the notice of discipline, Mr. Berry was deemed to have admitted the allegations against him, which concerned his representation of a personal injury

4. *Id.* at 81–82, 855 S.E.2d at 629.
5. *In re* Sicay-Perrow, 310 Ga. 855, 854 S.E.2d 728 (2021).
6. *Id.* at 858, 854 S.E.2d at 730.
7. *In re* Turner, 311 Ga. 204, 857 S.E.2d 197 (2021).
8. *Id.* at 204, 857 S.E.2d at 198–99.
9. *In re* Flit, 309 Ga. 440, 846 S.E.2d 403 (2020).
10. *Id.* at 441, 846 S.E.2d at 403.
11. *In re* Berry, 310 Ga. 158, 848 S.E.2d 71 (2020).

client. Mr. Berry did not enter into a written agreement with his client or explain the basis for his fees and expenses. Although Mr. Berry and the client agreed that Mr. Berry would pay the client's physical therapist from the settlement proceeds, Mr. Berry failed to do so and neglected to inform his client of the settlement or of his failure to pay the therapist. Mr. Berry misappropriated the funds that were to be used to pay the therapist and did not maintain proper records related to the settlement funds.[12]

2. Client Abandonment and Lack of Communication

The Georgia Supreme Court disbarred three lawyers for misconduct that included client abandonment and lack of communication.

George Michael Plumides was disbarred after he defaulted in connection with five different disciplinary matters.[13] The court described the misconduct as "a pattern of abandoning clients in civil and criminal matters."[14] Mr. Plumides's misconduct included failure to disburse settlement proceeds to clients, failure to appear for calendar calls, a contempt finding for which he was jailed for five weeks, payment of a client's filing fees with a bad check, and failure to respond to his clients' requests for information about their case. The supreme court found several aggravating factors, including prior discipline, dishonest or selfish motives, a pattern of misconduct with multiple offenses, refusal to acknowledge wrongful conduct, vulnerable victims, substantial experience, and indifference to restitution.[15]

Patrick A. Powell was disbarred for his abandonment of a client in a criminal case.[16] By defaulting in the disciplinary matter, Mr. Powell admitted that he undertook to represent the client and entered an appearance but thereafter failed to do any work on the case, to appear at pretrial and status conferences, or to respond to requests for an update on the case or to efforts of the court and prosecutor to contact him. In aggravation of discipline, the Georgia Supreme Court agreed with the Special Master that Mr. Powell had received prior punishment, had a dishonest or selfish motive, and engaged in a pattern of misconduct concerning a vulnerable victim, even though he had substantial experience in the practice of law.[17]

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12. *Id.* at 158, 848 S.E.2d at 71–72.
13. *In re* Plumides, 311 Ga. 65, 855 S.E.2d 651 (2021).
14. *Id.* at 66, 855 S.E.2d at 651.
15. *Id.* at 66–67, 855 S.E.2d at 651–52.
16. *In re* Powell, 310 Ga. 859, 854 S.E.2d 731 (2021).
17. *Id.* at 860, 854 S.E.2d at 732 n.1.

The Georgia Supreme Court accepted the petition for voluntary surrender of Ernest Redwine's license.[18] Mr. Redwine undertook to represent a client in a personal injury matter and falsely told the client that he was working on the case. The day before the statute of limitations would have run, he filed an action but failed to have the defendant served and declined to appear for a calendar call. The trial court dismissed the case with prejudice, but Mr. Redwine did not inform his client of that fact. Concerning mitigation and aggravation, the court found that Mr. Redwine did not have a prior disciplinary record but that he acted with a dishonest motive and had substantial experience in the practice of law.[19]

The Georgia Supreme Court disbarred Majd M. Ghanayem as a matter of reciprocal discipline after he lost his license in Texas.[20] The Texas panel disbarred Mr. Ghanayem based on his misconduct in his representation of a client who wished to file an involuntary relinquishment of her son's biological father's parental rights. Mr. Ghanayem failed to file the case on time and neglected to keep the client reasonably informed. In fact, Mr. Ghanayem gave his client a fraudulent order with the forged signature of a judge.[21]

3. Criminal Activity

Three lawyers were disbarred as a result of criminal conduct.

The Georgia Supreme Court accepted the voluntary surrender of Vincent Chidozie Otuonye's license.[22] Mr. Otunonye was convicted of the felony of Criminal Attempt to Furnish Prohibited Items (tobacco) to Inmates.[23]

Elizabeth Vila Rogan voluntarily surrendered her license.[24] She was indicted on one count of forgery because she signed a judge's initials to an order without obtaining the judge's express permission. Ms. Rogan pled *nolo contendere* under the First Offender Act to the crime of obstruction of an officer.[25] She admitted that she violated Rule 4.1, Rule 8.4(a)(3), and Rule 8.4(a)(4).[26]

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18. *In re* Redwine, 311 Ga. 287, 857 S.E.2d 193 (2021).
19. *Id.* at 288, 857 S.E.2d at 194.
20. *In re* Ghanayem, 311 Ga. 366, 857 S.E.2d 681 (2021).
21. *Id.* at 366–67, 857 S.E.2d at 682.
22. *In re* Otuonye, 309 Ga. 584, 847 S.E.2d 193 (2020).
23. *Id.* at 584, 847 S.E.2d at 193.
24. *In re* Rogan, 309 Ga. 583, 847 S.E.2d 308 (2020).
25. *Id.*
26. *Id. See* GA. RULES OF PRO. CONDUCT r. 4.1 (making a false statement of material fact), r. 8.4(a)(3) (conviction of a misdemeanor involving moral turpitude where the conduct relates to the lawyer's fitness to practice law), r. 8.4(a)(4) (engaging in professional conduct

The Georgia Supreme Court accepted Don Smart's voluntary surrender of his license after Mr. Smart pled guilty to theft by conversion.[27] The theft involved Mr. Smart's service as an administrator of an estate and his sale of real property of the estate for more than $500,000. Rather than deposit the funds into his trust account, Mr. Smart converted the funds to his own use.[28]

4. Miscellaneous Disbarments

Four other lawyers lost their Georgia licenses during the Survey period.

Cynthia Ann Lain was disbarred after she engaged in misconduct in connection with five disciplinary cases.[29] Ms. Lain's failure to comply with her discovery obligations in those cases led the Special Master to strike her answers, finding that her conduct amounted to at least reckless disregard for the process and for those involved in it and, at worst, was an intentional effort to avoid or delay the process. Because her answers were stricken, Ms. Lain was deemed to have admitted the allegations in the five formal complaints pending against her. Those underlying cases involved repeated failure to appear for court hearings, numerous findings of contempt (including bench warrants for her arrest), misrepresentations to courts about her unavailability to attend hearings, and failing to respond to client inquiries or to take required steps upon being discharged. The Special Master and the supreme court applied the American Bar Association Standards for Imposing Lawyer Discipline and concluded that disbarment was the appropriate sanction.[30]

Daniel Lee Dean, who was being treated for terminal cancer, sought to voluntarily surrender his license to resolve three grievances against him.[31] Mr. Dean promised not to seek reinstatement if he recovered from his illness, and the supreme court accepted the voluntary surrender of Mr. Dean's license.[32]

The Georgia Supreme Court accepted the voluntary surrender of the license of Pamela Sturdivant Stephenson.[33] Ms. Stephenson petitioned to surrender her license in response to a grievance alleging numerous

involving dishonesty, fraud, deceit or misrepresentation), r. 8.4(a)(8) (commission and admission in judicio of a criminal act that adversely reflects upon a lawyer's honesty, trustworthiness, or fitness).

27. *In re* Smart, 309 Ga. 336, 845 S.E.2d 688 (2020).

28. *Id.*

29. *In re* Lain, 311 Ga. 427, 857 S.E.2d 668 (2021).

30. *Id.* at 436–38, 857 S.E.2d at 675.

31. *In re* Dean, 310 Ga. 100, 849 S.E.2d 424 (2020).

32. *Id.* at 101, 849 S.E.2d at 425.

33. *In re* Stephenson, 310 Ga. 6, 849 S.E.2d 171 (2020).

violations of the Georgia Rules of Professional Conduct involving dishonesty, fraud, deceit, or misrepresentation.[34]

The supreme court disbarred Dennis W. Hartley as reciprocal discipline after Mr. Hartley was disbarred in Colorado for numerous violations of the Colorado disciplinary rules.[35] Those violations included failure to report multiple DUI convictions as required by the Colorado rules. They also included failing to deposit retainers into his trust account, failing to return unearned fees upon being discharged, failing to communicate with clients, filing a proceeding without the knowledge of a client, practicing with and sharing fees with non-lawyers, and practicing with a suspended license.[36]

B. Suspensions

The Georgia Supreme Court suspended three lawyers during the Survey period.[37]

The supreme court dealt with several straightforward issues and one of first impression when it suspended Christopher John Palazzola.[38] Two associates left Mr. Palazzola's firm. When a client called the firm to speak to one of them, a staff member told the client that the (now-former) associate was not available; the client was not informed that the associate had left the firm. Later the same client was told that the lawyer had departed, but the staff member falsely stated that the lawyer's contact information could not be provided. Another client decided to be represented by one of the departed lawyers. When Mr. Palazzola's firm received correspondence relating to the client's matter, the firm sent the correspondence back to the sender rather than forward it to the departed lawyer. A third client asked to have her file sent to one of the former associates, but Mr. Palazzola failed to do so for weeks. The supreme court agreed with the Special Master and the review board that these facts established violations of Mr. Palazzola's duty to help a client who discharged his firm and his duty to train and supervise his non-lawyer staff regarding his professional responsibilities.[39]

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34. *Id.* at 6, 849 S.E.2d at 171. *See* GA. RULES OF PRO. CONDUCT r. 8.4(a)(4) (misconduct to engage in professional conduct involving dishonesty, fraud, deceit, or misrepresentation).

35. *In re* Hartley, 309 Ga. 831, 848 S.E.2d 432 (2020).

36. *Id.* at 832, 848 S.E.2d at 433.

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

38. *In re* Palazzola, 310 Ga. 634, 853 S.E.2d 99 (2020).

39. *Id.* at 637–41, 853 S.E.2d at 102–05. *See* GA. RULES OF PRO. CONDUCT r. 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests"), r. 5.3 (responsibilities regarding non-lawyer assistants).

There was also agreement among the Special Master, the review board, and the supreme court concerning Mr. Palazzola's misconduct with his advertising.[40] He ran ads falsely stating that his firm's lawyers collectively had more than 100 years of experience and that the firm had offices in Florida and California. Those statements constituted violations of Rule 7.1 and Rule 8.4(a)(4).[41]

The issue of first impression related to Mr. Palazzola's failure to fulfill his promise to his associates to contribute to retirement accounts as part of their compensation.[42] The associates made their contributions, but Mr. Palazzola and the firm did not match those contributions as promised.[43] The legal question was whether this constituted a violation of Rule 8.4(a)(4) as "*professional conduct* involving dishonesty, fraud, deceit or misrepresentation."[44] The supreme court decided that it was unnecessary to determine whether Mr. Palazzola's failure to make the retirement account payments was professional conduct.[45] Regardless of the resolution of that issue, the court reasoned, the sanction would be the same: suspension of Mr. Palazzola *nunc pro tunc* to June 1, 2020, when he voluntarily ceased practicing law.[46] In a concurrence joined by Justice Boggs and Justice Bethel, Justice Petersen expressed doubt whether the court should include dishonest conduct involving law firm administration within the definition of professional conduct, as well as whether the supreme court's inherent constitutional authority to regulate the practice of law extends far enough to permit such an interpretation.[47] The issue awaits resolution in a future case.[48]

The Georgia Supreme Court accepted a petition for voluntary discipline from Thomas William Veach and suspended Mr. Veach for eighteen months.[49] Mr. Veach represented the executor of an estate that had one beneficiary and one asset encumbered by a Medicaid lien. When litigation over the lien was resolved, Mr. Veach disbursed the required amounts to the beneficiary but not to the lienholder. Mr. Veach could not pay those funds because he removed estate funds without authorization

40. *Id.* at 638–39, 853 S.E.2d at 103.

41. *Id. See* GA. RULES OF PRO. CONDUCT r. 7.1 (false or misleading advertising), r. 8.4(a)(4) (professional conduct involving dishonesty, fraud, deceit and misrepresentation).

42. *Id.* at 646–47, 853 S.E.2d at 109.

43. *Id.* at 636–37, 853 S.E.2d at 102.

44. *Id.* at 645–50, 853 S.E.2d at 108–10 (quoting GA. RULES OF PRO. CONDUCT r. 8.4(a)(4) (emphasis added)).

45. *Id.* at 649, 853 S.E.2d at 110.

46. *Id.* at 648–49, 853 S.E.2d at 110.

47. *Id.* at 649–50, 853 S.E.2d at 110–11 (Petersen, J., concurring).

48. *Id.*

49. *In re* Veach, 310 Ga. 470, 851 S.E.2d 590 (2020).

for several years. The decision to accept the petition required the weighing of factors in aggravation and mitigation. As to aggravation, Mr. Veach had substantial experience in the practice of law and acted with a dishonest or selfish motive. In mitigation, Mr. Veach pointed to personal and emotional problems brought on by his wife's death after a long illness and his heart surgery. Mr. Veach also asserted that he showed remorse and made a good faith effort at restitution by paying the estate and the lienholder all the funds he took without authorization. The supreme court took these factors into account and accepted the request for an eighteen-month suspension.[50]

The Georgia Supreme Court accepted the second petition for the voluntary discipline of David Godley Rigdon, who pled guilty and was sentenced for eight counts of violating the Georgia Controlled Substances Act; the court suspended him from the practice of law for a period of either thirty-six months or the expiration of his probation, whichever was longer.[51] The court rejected an earlier petition because it did not contain sufficient information about the charges of conspiracy and of crossing the guard lines of a correctional institution with drugs. Mr. Rigdon provided the missing information. The conspiracy charge resulted from one text message he sent to his drug dealer and, in the state's view, did not indicate a conspiracy. The charges relating to crossing the lines of a correctional institution arose from the discovery of drugs in Mr. Rigdon's car when he was arrested in the jail parking lot; he did not attempt to take any into the jail. The supreme court considered numerous mitigating factors in imposing the suspension rather than the usual sanction of disbarment following a felony conviction. Mr. Rigdon had no prior disciplinary history and had personal and emotional problems, including addiction, for which he voluntarily sought treatment. He suffered from depression and anxiety and underwent treatment for those conditions. Mr. Rigdon submitted evidence of good character, expressed remorse, and acknowledged the wrongfulness of his conduct. His misconduct did not injure any clients, and under all those circumstances, the court held that a long suspension was the appropriate sanction.[52]

C. Public Reprimands

One attorney was ordered to receive a public reprimand as the sanction for his misconduct.[53] Eugene Shuff Cook was a partner, with two other lawyers, in a law firm that primarily did personal injury work

50. *Id.* at 473, 851 S.E.2d at 593.

51. *In re* Rigdon, 310 Ga. 101, 849 S.E.2d 399 (2020).

52. *Id.* at 103–04, 849 S.E.2d at 401.

53. *In re* Cook, 311 Ga. 206, 857 S.E.2d 212 (2021).

against railroads, and he was in charge of the firm's trust account. Over the course of almost three years, Cook signed forty-five checks (totaling $1,776,868.07) to the firm for fees earned or expenses incurred before the corresponding settlement funds had been received. During this period, the firm was required to hold the settlement funds for three clients pending resolution of third-party claims against the funds. The amount that needed to be in the trust account to cover those funds was over $571,000, but the balance in the trust account was often well below that for months at a time, including a balance at one point of just $288.82. Clients were put at risk, but ultimately no client lost money as a result of these activities.[54]

The Special Master found that Mr. Cook had violated the rules relating to trust accounts but had not violated Rule 8.4(a)(4) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.[55] The Special Master found several mitigating factors and recommended a one-year suspension. The review board agreed with the Special Master about the trust account rule violations but found that Mr. Cook violated Rule 8.4(a)(4), and the review board recommended a two-year suspension.[56]

The supreme court ordered only a public reprimand over the dissent of Justice Nahmias, which Chief Justice Melton joined.[57] The court deferred to the Special Master's findings that Mr. Cook did not have any intent to deceive and therefore did not violate Rule 8.4(a).[58] The court concluded that the mitigating factors outweighed the aggravating factors.[59] The Special Master found in mitigation that Mr. Cook had no prior disciplinary history, had an excellent reputation, and had experienced serious personal issues (his wife's illness and hospitalization). The Special Master made more tepid findings about restitution and remorse. The Special Master noted that Mr. Cook's efforts at restitution were untimely and aided by his partners' contributions.[60] Mr. Cook expressed remorse, but his attitude during these disciplinary proceedings "reflected an unwillingness to appreciate the seriousness of his misconduct or the obligations an attorney has as a fiduciary of clients' funds."[61] The supreme court also mentioned in mitigation that Mr. Cook had undertaken steps (interim rehabilitation) to prevent the trust

54. *Id.* at 216–17, 857 S.E.2d at 220–21 (Nahmias, P.J., dissenting).
55. *Id.* at 207, 857 S.E.2d at 214.
56. *Id.*
57. *Id.* at 214–15, 857 S.E.2d at 219–20.
58. *Id.* at 212–13, 857 S.E.2d at 218.
59. *Id.* at 213, 857 S.E.2d at 218–19.
60. *Id.* at 211, 857 S.E.2d at 217.
61. *Id.*

account problems from recurring.[62] In aggravation, the Special Master noted that Mr. Cook engaged in a pattern of misconduct, committed multiple offenses, and had substantial experience in the practice of law.[63]

The court's majority opinion had two other noteworthy passages. The court recited as usual that the ABA Standards for Imposing Lawyer Sanctions guide the analysis of the appropriate discipline but specifically noted that they are "not controlling" and that the level of discipline "rests in the sound discretion of this [c]ourt."[64] Second, the court's opinion addressed the concerns of the Special Master and some members of the supreme court about the treatment of Mr. Cook's partners. They had been the ones to initiate the grievance process against Mr. Cook when their partnership was breaking up.[65] The other partners benefitted from the mishandling of the trust account in the same ways as Mr. Cook did, but they were not subject to any disciplinary process.[66] Furthermore, the partners stood to benefit economically if Mr. Cook were suspended because he would not be eligible to serve as "designated counsel" for a railroad union that regularly sent Mr. Cook clients; the former partners would be in a position to receive cases that otherwise would have gone to Mr. Cook.[67] The court explicitly refused to treat the disparate treatment of the partners and Mr. Cook as a mitigating factor in determining the appropriate level of discipline, but it did criticize the State Bar for failing to explain why the Bar did not pursue discipline against the partners and stated that "such failure could encourage lawyers to use the Bar's disciplinary process to resolve internal law firm disputes and settle old scores with former partners."[68] The court characterized such actions as the "weaponization of the disciplinary process."[69]

Justice Nahmias, joined by Chief Justice Melton, dissented to suggest suspension rather than reprimand.[70] Justice Nahmias detailed the extent of Mr. Cook's misconduct and disputed that any of the cases cited by the majority justified anything less than suspension.[71] The dissent also particularly addressed the question of the Bar's disparate treatment of Mr. Cook and his partners as well as the likely "collateral

62. *Id.* at 213, 857 S.E.2d at 218.
63. *Id.* at 212, 857 S.E.2d at 218.
64. *Id.* at 213, 857 S.E.2d at 218 (internal citations omitted).
65. *Id.* at 215, 857 S.E.2d at 219.
66. *Id.*
67. *Id.* at 212, 857 S.E.2d at 217.
68. *Id.* at 215, 857 S.E.2d at 219–20.
69. *Id.*
70. *Id.* at 215–16, 857 S.E.2d at 220 (Nahmias, P.J., dissenting).
71. *Id.* at 215–20, 857 S.E.2d at 220–23 (Nahmias, P.J., dissenting).

consequence"—the loss of designated counsel status and therefore of business—and concluded that neither should be a mitigating factor in a disciplinary case.[72]

D. Review Board Reprimands

Two lawyers received review board reprimands.

Daveniya Fisher received a review board reprimand because she failed to appear for several hearings in a forfeiture case.[73] At the final hearing, the trial court ordered the forfeiture of the client's property, but when Ms. Fisher learned about the order, she did not immediately notify the client.[74] The Special Master found that by these actions, Ms. Fisher negligently violated her duties of diligence and communication. Although the forfeiture harmed the client, the Special Master found that it was unlikely that the result would have been significantly different if Ms. Fisher had appeared. In mitigation, the Special Master noted that Ms. Fisher had not been disciplined before; she showed remorse; she had significant personal problems at the time; she took responsibility for her actions; she had a cooperative attitude; and she had good character and reputation. The court also noted some effort at interim rehabilitation in connection with the management of her practice.[75] In aggravation, the Special Master noted that Ms. Fisher had substantial experience in the practice of law.[76]

The Georgia Supreme Court accepted the voluntary petition for discipline in the form of a review board reprimand from Misty Oaks Paxton. Ms. Paxton had an arrangement to accept referrals from Kealy Law Center (KLC), a nationwide law firm that marketed loan modification services. In December 2017, KLC referred a Georgia client facing foreclosure on his home to Ms. Paxton. Between that time and August 1, 2018, KLC dealt directly with the client, but Ms. Paxton did not. The foreclosure sale was scheduled for September 4, 2018. The client contacted KLC on August 31 to express concern about the imminent sale. KLC responded that it could not help because the client had not paid the full amount of the fee owed to KLC. The client paid the rest of the fee that day, and KLC emailed Paxton, who in turn emailed the client. Her message was that she was out of town and could not file a bankruptcy petition to stop the foreclosure sale in time, but that the client could stop it by printing and filing a petition that was attached to her email. The

72. *Id.* at 220, 857 S.E.2d at 223. (Nahmias, P.J., dissenting).

73. *In re* Fisher, 311 Ga. 77, 855 S.E.2d 640 (2021).

74. *Id.* at 78, 855 S.E.2d at 642.

75. *Id.*

76. *Id.*

client could not print the attachment and, as a result, did not file a bankruptcy petition until the day after the foreclosure sale. The client hired Atlanta Legal Aid to help him and was able to reach an agreement with the lender to stay in his home. He then filed a grievance against Paxton.[77]

Ms. Paxton's petition admitted that she violated Rules 1.2(a), 1.2(c), 1.3, and 1.5(e).[78] The court considered aggravating and mitigating factors. In aggravation, Ms. Paxton had substantial experience in the practice of law.[79] In mitigation, the court noted that Ms. Paxton had no prior disciplinary record and no dishonest or selfish motive; she was cooperative in the disciplinary process; had good moral character and a positive reputation; and showed remorse.[80]

E. Petitions for Voluntary Discipline Rejected

The Georgia Supreme Court rejected the third petition for voluntary discipline (this time for discipline up to a four-month suspension) from William Leslie Kirby III in connection with four matters.[81] In one, Mr. Kirby represented a client in a child-support modification but did not appear for the hearing, failed to respond to the client's multiple requests for information, and failed to perform the necessary work for the matter. The second involved Mr. Kirby's failure to file a notice of withdrawal as counsel for a client and failure to respond to new counsel's request (including a motion to compel) for the file. In the third, Mr. Kirby was fired by a divorce client but failed to file a notice of withdrawal. The fourth matter was also in a divorce action. There, Mr. Kirby stopped communicating with the client and stopped working on the matter. When the client fired Mr. Kirby, he promised but failed to send the file to the client, did not withdraw from the action, and failed to respond to the client's inquiries and multiple requests for a refund. The supreme court acknowledged that Mr. Kirby apparently had taken appropriate steps to deal with the personal stress and practice management issues that led to his misconduct, but the court declined to order such a short suspension for misconduct in multiple client matters.[82]

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77. *In re* Paxton, 311 Ga. 363, 364, 857 S.E.2d 695, 696 (2021).

78. *Id.* at 364–65, 857 S.E.2d at 697; *see also* GA. RULES OF PRO. CONDUCT r. 1.2(a) (failure to abide by the client's objectives of the representation), r. 1.2(c) (unreasonable limitation on the scope of her representation), r. 1.3 (lack of diligence), r. 1.5(e) (regarding division of fees with KLC).

79. *In re* Paxton, 311 Ga. at 365, 857 S.E.2d at 697.

80. *Id.*

81. *In re* Kirby, 309 Ga. 826, 848 S.E.2d 429 (2020).

82. *Id.* at 830–31, 848 S.E.2d at 431–32.

The supreme court rejected the petition of Timothy Walter Boyd for voluntary discipline in the form of a suspension of six to eighteen months.[83] Mr. Boyd admitted that he had undertaken to investigate for a client whether the client had a basis to challenge the foreclosure and eviction process that Wells Fargo Bank followed with respect to the client's home. Mr. Boyd found no support for such a claim but chose not to tell the client. Instead, Mr. Boyd investigated the possibility of the client making a claim against the client's former attorney, the California lawyer who had hired Mr. Boyd to be local counsel for the client. Mr. Boyd falsely reported to the client that he had obtained a default judgment against the California lawyer and that he would domesticate the judgment in California. The Special Master found no mitigating factors and noted in aggravation that Mr. Boyd had been disciplined three times before for similar conduct, had acted from a dishonest or selfish motive, engaged in a pattern of misconduct with multiple rule violations, had substantial experience in the practice of law, and was dealing with a vulnerable client. The supreme court rejected the petition for voluntary discipline, noting that it recently imposed an interim suspension on Mr. Boyd for his failure to respond to a notice of investigation in a new matter.[84]

The Georgia Supreme Court rejected a petition from L. Nicole Brantley for voluntary discipline in the form of review board reprimand.[85] The State Bar alleged that Ms. Brantley was discharged by a client but refused to return the unearned portion of her fee. The client initiated fee arbitration with the Bar, and Ms. Brantley agreed to be bound by the result; however, she did not appear for the hearing and did not pay the arbitration award that the client obtained. In response to the client's grievance, Brantley denied the client fired her or that she refused to return an unearned fee, and she also claimed to have had no notice of the fee arbitration. In her petition for voluntary discipline, however, Ms. Brantley admitted that the client had discharged her, that she had not returned the unearned portion of the fee, and that she had not paid the arbitration award, even though she had agreed to be bound by it.[86]

The supreme court rejected her petition in light of her prior disciplinary history and her lack of candor in the disciplinary process.[87] Ms. Brantley was suspended in 2016 for neglect of client matters, continuing to practice while under administrative suspension, and for

83. *In re* Boyd, 310 Ga. 1, 849 S.E.2d 172 (2020).

84. *Id.* at 4–5, 849 S.E.2d at 174–75.

85. *In re* Brantley, 311 Ga. 61, 855 S.E.2d 625 (2021).

86. *Id.* at 61–62, 855 S.E.2d at 625–26.

87. *Id.* at 64–65, 855 S.E.2d at 628.

failure to cooperate in the disciplinary process. The court, at that time, found significant mitigating factors that justified leniency.[88] In contrast, Ms. Brantley's most recent case involved willful misconduct and "little in the way of mitigation."[89]

The Georgia Supreme Court rejected a petition for voluntary discipline from William D. Thompson.[90] Mr. Thompson was suspended for a year in Florida for misconduct relating to the mismanagement of his trust account; the Florida discipline also included a two-year probation period, in which he is restricted in using a trust account. Mr. Thompson sought a one-year suspension in Georgia as a reciprocal discipline. The supreme court rejected the petition because it was deficient in several respects.[91] It did not establish that a one-year suspension in Georgia would be substantially similar to the Florida discipline, particularly given that his Florida discipline included such a suspension as well as a two-year probationary period.[92] The Georgia disciplinary process does not allow for periods of probation.[93] Thompson's petition also failed to attach documents associated with the Florida discipline, and it did not note that his Georgia license was under suspension for failing to pay his license fee.[94]

The Georgia Supreme Court rejected a petition for voluntary discipline from Willie George Davis Jr.[95] Mr. Davis wrote a will for his sister, in which he was named the executor of the estate, guardian of his sister's thirteen-year-old son, and conservator of his nephew's funds. Mr. Davis did not seek or obtain appropriate consent to the conflict of interest in preparing a will naming him to serve in these capacities. Unbeknownst to Mr. Davis, his sister had breast cancer. She died shortly thereafter, and Mr. Davis came into possession of her life insurance policy proceeds. Although he initially placed the funds in his IOLTA account, Mr. Davis eventually created a conservatorship account, but he did not maintain good records of the funds' use. After the nephew turned eighteen, he and Mr. Davis had disagreements that led to litigation in the Fulton County Probate Court. During extensive proceedings in that court, Mr. Davis repeatedly failed to appear and did not make a proper accounting of the funds he held for his nephew. Mr. Davis was found in contempt multiple

88. *Id.* at 64, 855 S.E.2d at 627.
89. *Id.* at 64–65, 855 S.E.2d at 627–28.
90. *In re* Thompson, 310 Ga. 753, 854 S.E.2d 522 (2021).
91. *Id.*
92. *Id.* at 754, 854 S.E.2d at 523.
93. *Id.*
94. *Id.*
95. *In re* Davis, 311 Ga. 67, 855 S.E.2d 643 (2021).

times and was ultimately incarcerated by the court. Mr. Davis was suffering from depression and anxiety as a result of a series of family deaths. The nephew eventually obtained a judgment, including court-ordered attorney's fees but not statutory interest, against Mr. Davis of $193,174.91. Mr. Davis began paying the judgment in installments.[96]

The Special Master recommended acceptance of the voluntary petition.[97] The petition sought a suspension of at least eighteen months with conditions for reinstatement. The conditions were that Mr. Davis would have to provide a certificate of fitness from a licensed mental health professional that he was fit to practice law and proof that Mr. Davis had completely satisfied the nephew's judgment. The supreme court rejected the petition in part because it could have resulted in a suspension of as long as fifty years if Mr. Davis continued paying the judgment at the rate at which he had been paying it, and Georgia does not allow suspensions of such length.[98] Furthermore, the court concluded, a lawyer should not be permitted to resume practice after a lengthy separation from the practice of law without some assurance of the lawyer's character and competence.[99] The court also noted that the conditions might be too punitive for Davis because conditioning his return to practice on the ability to satisfy a large judgment would risk leaving him in "a disciplinary purgatory: if he cannot finish paying restitution, his discipline will be endless."[100]

Jason Lee Van Dyke filed a petition for voluntary discipline relating to his conviction—via a plea of nolo contendere—in Texas a charge of making a false report to a law enforcement officer.[101] The Georgia Supreme Court rejected the petition and ordered fact-finding about several aspects of the case that it found troubling; two aspects involved lack of respect for the law and the legal process.[102] Before entering his plea, Mr. Van Dyke violated the terms of his bond to attend a previously scheduled "waterfowl hunt."[103] Also, a witness against Mr. Van Dyke disappeared shortly before trial, and the judge entered an order that Mr. Van Dyke forfeited his right to confront the witness by procuring the absence of the witness through wrongdoing. Finally, it appeared in the record that Mr. Van Dyke failed to report to the court that he had been

96. *Id.* at 72–73, 855 S.E.2d at 648.
97. *Id.* at 67, 855 S.E.2d at 644.
98. *Id.* at 75, 855 S.E.2d at 649–50.
99. *Id.* at 76, 855 S.E.2d at 650.
100. *Id.*
101. *In re* Van Dyke, 311 Ga. 199, 857 S.E.2d 194 (2021).
102. *Id.* at 203, 857 S.E.2d at 197.
103. *Id.* at 200, 857 S.E.2d at 195, n.1.

sanctioned by the Texas Bar in 2019 in an entirely separate proceeding.[104]

III. BAR ADMISSION AND REINSTATEMENT

The Georgia Supreme Court granted the petition for a certificate of fitness for readmission from Stephen Vincent Fitzgerald Jr.[105] Mr. Fitzgerald voluntarily surrendered his license in 2011 after failing to account for and distribute approximately $455,000 that belonged to others, including a title insurance company and a trust. The Fitness Board found that Mr. Fitzgerald discharged his burden of demonstrating rehabilitation by clear and convincing evidence, and the supreme court agreed.[106] Mr. Fitzgerald provided evidence that his misconduct, for which he took responsibility and was remorseful, resulted from a struggle with substance abuse. He showed his efforts to become and remain sober, including his participation in Hall County Drug Court, and submitted letters of recommendation from his therapist and others attesting to his integrity and potential. The Fitness Board investigated and found no pending grievances against Mr. Fitzgerald nor any unfulfilled requirements of restitution. The two victims of Mr. Fitzgerald's actions were a title insurance company and a trust. The debt to the title insurance company was discharged in bankruptcy, and Mr. Fitzgerald provided evidence to the fitness board that he has been making regular payments to the trust.[107]

The Georgia Supreme Court granted the petition for a certificate of fitness for readmission from James Caleb Clarke III, who voluntarily surrendered his license in 2002 after he committed numerous acts of misconduct while acting as an administrator of an estate.[108] Mr. Clarke used $90,000 of estate money for his personal benefit, appropriated the use of a car belonging to the estate for his personal benefit, lied to the heirs when he told them that he had sold the car and deposited the funds into the estate account, and failed to file income tax returns for the estate for four years.[109]

In 2019, Mr. Clarke filed a petition for a certificate of fitness as the first step in gaining readmission to the Bar. He presented the following evidence: in 2007, Mr. Clarke obtained a master's degree in Divinity; he also has been employed by the same church since 2010, where he

104. *Id.* at 202, 857 S.E.2d at 197.
105. *In re* Fitzgerald, 310 Ga. 754, 854 S.E.2d 516 (2021).
106. *Id.* at 756, 854 S.E.2d at 518.
107. *Id.* at 756, 854 S.E.2d at 517, n. 1.
108. *In re* Clarke, 309 Ga. 187, 844 S.E.2d 724 (2020).
109. *Id.* at 187, 844 S.E.2d at 724.

currently serves as senior pastor. Mr. Clarke made full restitution to the heirs and reconciled with them. One of the heirs submitted a letter in support of Mr. Clarke's application. Mr. Clarke also presented evidence of his extensive community service in his role as a pastor and submitted letters of support from colleagues and members of his congregation. At his informal conference with the Fitness Board, Mr. Clarke accepted full responsibility for his actions and expressed a desire to clear his name. The Fitness Board and the supreme court concluded that Mr. Clarke showed rehabilitation by clear and convincing evidence, and the court granted the certificate of fitness.[110]

IV. MALPRACTICE AND OTHER CIVIL CLAIMS

The Georgia Court of Appeals affirmed a malpractice judgment in *Phillips v. Harris*.[111] The defendant-attorney represented a landlord in a case against former tenants, who sued the landlord for wrongfully not returning a security deposit. Although generally landlords can be liable for treble damages and attorney's fees for such an action, in Georgia there is a statutory exemption for landlords who are natural persons and who own fewer than ten rental units.[112] At trial, the attorney for the landlord briefly mentioned the exemption, but the transcript did not reveal any point at which the attorney otherwise argued or presented evidence about the exemption. The attorney claimed that the transcript was inaccurate and incomplete, but she took no steps to correct it. At the trial for legal malpractice, the landlord introduced expert testimony showing the lawyer's failure to present that defense in the former case failed to meet the requisite duty of care. With respect to causation and damages, the landlord presented evidence that he was eligible for the exemption. The court of appeals held that there was sufficient evidence to support a finding by the jury that a reasonable factfinder in the underlying case would have reached a different result—in other words, that the judge, who made findings in the underlying case, could reasonably have found that the landlord was entitled to the exemption had the lawyer presented the argument and evidence.[113]

A trial court dismissed a legal malpractice case because the expert affidavit came from an attorney who, the next day, became a partner in the law firm that represented the plaintiff.[114] The Georgia Court of

110. *Id.* at 188, 844 S.E.2d at 725.
111. 357 Ga. App. 600, 848 S.E.2d 703 (2020).
112. O.C.G.A. § 44-7-36 (2021).
113. *Phillips*, at 604–06, 848 S.E.2d at 707.
114. Mitchell v. Parian, 355 Ga. App. 498, 844 S.E.2d 555 (2020).

Appeals reversed.[115] The defendants argued that the expert was incompetent to testify due to a conflict of interest arising from his partnership in the firm representing the plaintiff, but the court of appeals rejected this argument.[116] The court analyzed the situation first under Georgia Rule of Professional Conduct 3.7, the so-called advocate-witness rule.[117] With some exceptions, an attorney may not act as an advocate and be a witness in the same trial.[118] However, a member of the advocate's firm who is not personally acting as an advocate in the matter may be a witness, unless the testimony would cause a conflict with the client.[119] For example, there would be a conflict if the testimony were contrary to the client's testimony. Here, the expert's testimony would be favorable to the client.[120] Therefore, as long as the expert was not also acting as an advocate at trial, there would be no conflict under Rule 3.7.[121] The court also rejected the argument that allowing a member of the plaintiff's law firm to provide the expert affidavit would defeat the purpose of the affidavit requirement.[122] The court noted that the purpose of the affidavit requirement is to discourage frivolous lawsuits, and that purpose is fulfilled when an expert with sufficient qualifications submits the affidavit.[123] The defendants did not challenge the expert's qualifications.[124]

The Georgia Supreme Court dealt with the enforceability of arbitration clauses in attorney-client engagement agreements in *Innovative Images, LLC v. Summerville.*[125] A former client sued its law firm for malpractice, and the law firm asked the trial court to compel arbitration per the arbitration clause in the engagement agreement. The trial court declined to do so and found that the arbitration clause was unconscionable because the law firm had not advised the client of the disadvantages of arbitration. In particular, the trial court held that the

115. *Id.*, 844 S.E.2d at 556.

116. *Id.* at 501–02, 844 S.E.2d at 558–59.

117. *Id.*

118. GA. RULES OF PRO. CONDUCT r. 3.7 (2021).

119. *Id.*

120. *Mitchell*, 355 Ga. App. at 502, 844 S.E.2d at 559.

121. *Id.* at 501–02, 844 S.E.2d at 558–59. The court also noted that the actual question in the case was not about trial testimony but rather a pretrial issue about satisfaction of a pleading requirement. *Id.* at 502, 844 S.E.2d at 559, n. 6. The Georgia Court of Appeals held in Clough v. Richelo, that Rule 3.7 does not apply to a lawyer's participation in pretrial activities. 274 Ga. App. 129, 137–38, 616 S.E.2d 888, 895 (2005).

122. *Mitchell*, 355 Ga. App. at 502, 844 S.E.2d at 559.

123. *Id.*

124. *Id.*

125. 309 Ga. 675, 848 S.E.2d 75 (2020).

arbitration clause was unenforceable because the lawyers had not complied with their obligations under Georgia Rule of Professional Conduct 1.4(b).[126] Although there was no authority in Georgia about the applicability of Rule 1.4(b) to arbitration clauses, the trial court relied on the interpretation of Model Rule 1.4(b), requiring lawyers to explain to clients the pros and cons of arbitration clauses in engagement agreements.[127]

The court of appeals reversed the trial court, and then the Georgia Supreme Court granted certiorari on two questions:

> 1. Under the Georgia Rules of Professional Conduct, is [a lawyer] required to fully apprise his or her client of the advantages and disadvantages of arbitration before including a clause mandating arbitration of legal malpractice claims in the parties' engagement agreement?
>
> 2. If so, does failing to so apprise a client render such a clause unenforceable under Georgia law?[128]

The supreme court concluded that it need not answer the first question.[129] Even if the rules of conduct require lawyers to explain the pros and cons of an arbitration agreement to clients, and the lawyers do not do so, the arbitration agreement "is neither void as against public policy nor unconscionable and therefore is not unenforceable on either of those grounds."[130]

The court dealt first with public policy. Generally, arbitration agreements are favored in Georgia.[131] There is no statutory exception for arbitration of legal malpractice claims, and the Georgia Rules of Professional Conduct encourage arbitration of fee disputes between lawyers and clients.[132] The court recognized that there are cases in Georgia in which the supreme court or the court of appeals has cited to

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126. *Id.*; *See* GA. RULES OF PRO. CONDUCT r. 1.4(b) (2021) (requiring lawyers to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

127. *Innovative Images*, 309 Ga. at 677, 848 S.E.2d at 78; ABA Comm. on Ethics & Pro. Resp., Formal Op. 02-425 (1974) (interpreting Model Rule 1.4(b), which is identical to Georgia Rule 1.4(b)).

128. *Innovative Images*, 309 Ga. at 677–78, 848 S.E.2d at 78.

129. *Id.* The court wrote that "we will leave it to the State Bar of Georgia to address in the first instance whether this is a subject worthy of a formal advisory opinion about or [an] amendment to the GRPC." *Id.* at 679, 848 S.E.2d at 79.

130. *Id.* at 681, 848 S.E.2d at 80.

131. *Id.* at 682, 848 S.E.2d at 81.

132. *Id.*

violations of the rules of conduct in support of decisions that held agreements invalid as a matter of public policy.[133] But the court distinguished such by pointing out that in those cases, the problem was the substance of the agreement—such as an agreement that purported to limit the ability of a client to fire a lawyer—and that is unlike the issue in the case before it, which was about the process of entering into the agreement (with or without disclosure of disadvantages of arbitration).[134]

The court then turned to the question of unconscionability. It noted that this doctrine has two components—substantive unconscionability and procedural unconscionability.[135] A contract to arbitrate legal malpractice claims could be substantively unconscionable only if "no sane client would enter a contract that mandated arbitration of future legal malpractice claims and no honest lawyer would take advantage of such a provision."[136] The court dismissed this notion, noting that the client in the case was complaining of the process by which it agreed to the clause, rather than the notion of arbitration in general; the court also pointed out that arbitration has advantages as well as disadvantages for clients and emphasized again that arbitration clauses are favored in Georgia.[137] Procedural unconscionability applies if the process of entering into the contract indicates that one party took "fraudulent advantage" of the other. The court rejected this argument because the former client had failed to discharge its burden to show that its lawyer had engaged in any fraudulent conduct.[138] The supreme court affirmed the court of appeals decision that the law firm's motion to compel arbitration should have been granted.[139]

V. INEFFECTIVE ASSISTANCE OF COUNSEL

The Georgia Supreme Court affirmed a grant of habeas relief to a defendant who pled guilty amidst a trial in which he was accused of possession of methamphetamine with intent to distribute.[140] His co-defendant testified that she was "just a user" and that the drugs were not hers.[141] The defendant pled guilty because his counsel had no incriminating evidence with which to impeach the co-defendant. Between

133. *Id.* at 682–84, 848 S.E.2d at 82–83.
134. *Id.* at 683–84, 848 S.E.2d at 82–83.
135. *Id.* 684–85, 848 S.E.2d at 83.
136. *Id.* at 685, 848 S.E.2d at 83.
137. *Id.*
138. *Id.* at 685–86, 848 S.E.2d at 83–84.
139. *Id.*
140. Nelson v. Wilkey, 309 Ga. 203, 845 S.E.2d 566 (2020).
141. *Id.* at 205, 845 S.E.2d at 568.

the date of the guilty plea and the date of sentencing, defense counsel learned that there was an outstanding warrant for the arrest of the co-defendant for the sale of methamphetamine. The warrant had not been served. Defense counsel could have used this information at trial to impeach the co-defendant's testimony; as soon as he learned about the warrant, the defendant wanted to withdraw his guilty plea because the warrant was evidence that his co-defendant was the one selling the drugs. Defense counsel did not advise the defendant that he had the absolute right to withdraw his guilty plea at any time before the sentencing hearing. After the sentencing hearing, the defendant filed a motion to withdraw his plea, but the motion was rejected as untimely.[142]

The supreme court affirmed the trial court's findings that the defense counsel rendered ineffective assistance by not informing the defendant of his right to withdraw his guilty plea once the defense learned about the co-defendant's warrant (before the sentencing hearing), and that counsel's failure to render effective assistance prejudiced the defendant.[143] The prejudice was that the defendant lost his absolute right to withdraw the guilty plea and insist on trial by jury.[144]

In another case, the Georgia Court of Appeals held that trial counsel rendered ineffective assistance by not raising a general demurrer to an indictment that was void because it failed to allege predicate offenses underlying the charges sufficiently.[145] The supreme court reviewed the decision solely for the question of prejudice to the defendant.[146] The supreme court agreed with the appellate court and found that there was prejudice.[147] The defendant was convicted of several felony charges that arose from an automobile accident that caused one death and numerous serious injuries.[148] The State admitted that the indictment was defective but argued that the defendant could not show prejudice from her counsel's failure to demur.[149]

The State argued first that the indictment was defective, but it nevertheless gave the defendant sufficient notice of the charges.[150] The supreme court rejected this argument because questions of notice relate to special demurrers to the form of an indictment rather than general

142. *Id.* at 204–07, 845 S.E.2d at 568–70.
143. *Id.* at 210–11, 845 S.E.2d at 571–73.
144. *Id.*
145. State v. Heath, 308 Ga. 836, 843 S.E.2d 801 (2020).
146. *Id.* at 837, 843 S.E.2d at 803.
147. *Id.*
148. *Id.* at 837–38, 843 S.E.2d at 803–04.
149. *Id.* at 838–39, 843 S.E.2d at 804.
150. *Id.* at 839–40, 843 S.E.2d at 804–05.

demurrers to its substance. With or without adequate notice of the charges, a general demurrer to a substantively defective indictment would have been sustained, and the defendant could not have been convicted of the felony counts.[151]

The State's second argument was that, if the demurrer had been filed, the State would simply have re-indicted the defendant; the subsequent trial likely would have led to the same result as the one in which the defendant was convicted.[152] The supreme court also rejected this argument. For one thing, trial counsel could have raised the general demurrer at any time during the trial, after jeopardy had attached, and possibly barred any re-indictment on double jeopardy grounds. The supreme court did not rest its holding on that basis, however.[153] It set aside the double jeopardy argument and noted that, regardless of how some future hypothetical trial might turn out, if counsel had filed the general demurrer, there is no question that the defendant's first trial would have had a different and more favorable outcome for her.[154] She could not have been convicted under a void indictment; therefore, there was sufficient prejudice to the defendant from counsel's failure to file the general demurrer.[155]

The Georgia Court of Appeals held that trial counsel rendered ineffective assistance of counsel with respect to one of the charges on which the defendant was convicted in *Harris v. State*.[156] The defendant was convicted of felony shoplifting, and the only evidence presented of her commission of the crime was testimony from police officers about what store employees had said to them and a dashcam video in which a store employee said that she saw "two females removing sensors from merchandise and that she could identify exactly which items of clothing were stolen."[157] Defense counsel did not object to this obvious hearsay, and the court of appeals held that there was prejudice to the defendant because there was no other evidence to establish the elements of the crime.[158] The appellate court reversed the trial court's denial of the defendant's motion for new trial on that charge but not the numerous other charges.[159]

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151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 840–41, 843 S.E.2d at 805–06.
155. *Id.*
156. 359 Ga. App. 356, 857 S.E.2d 815 (2021).
157. *Id.* at 358, 857 S.E.2d at 818.
158. *Id.* at 361, 857 S.E.2d at 819–20.
159. *Id.* at 362, 857 S.E.2d at 820.

The Georgia Court of Appeals affirmed the convictions in a separate case with the same name, *Harris v. State*.[160] The defendant pled not guilty to numerous crimes, with the least serious being possession of a small amount of methamphetamine. The evidence against the defendant was quite strong, and in closing argument of the defendant's bench trial, his counsel made a spur-of-the-moment decision to concede his client's guilt on that count. The defense attorney did not consult with the defendant about this concession, and the defendant was convicted on all counts.[161]

On appeal, the defendant argued that his trial counsel's unilateral decision to concede guilt was ineffective assistance that amounted to a structural error that required reversal, even without a showing of prejudice.[162] The argument was based on *McCoy v. Louisiana*,[163] in which the Supreme Court of the United States held that it violated the defendant's Sixth Amendment right to counsel for a defense lawyer to concede guilt in the face of the defendant's "intransigent and unambiguous objection" to the concession.[164] The Sixth Amendment guarantees the defendant's autonomy to decide the objectives of the defense, and that includes the decision to maintain innocence in the face of overwhelming evidence of guilt.[165] In *Harris*, however, the Georgia Court of Appeals distinguished *McCoy*, in part because the defendant's not guilty plea to the possession charge was not the same as an "intransigent and unambiguous instruction" not to concede guilt.[166] The court of appeals also noted that the Supreme Court had "previously held that an attorney is not per se ineffective for adopting a strategy to concede guilt, even if his client does not expressly consent to that strategy."[167]

The court of appeals also rejected the defendant's more conventional claims of ineffective assistance, which required a showing of unprofessional representation and a reasonable probability of a different result.[168] Although the trial counsel misunderstood one of the elements of the crime of possession, he testified at the hearing on the motion for

160. 358 Ga. App. 802, 856 S.E.2d 378 (2021).

161. *Id.*

162. *Id.*

163. 138 S.Ct. 1500 (2018).

164. *Harris*, 358 Ga. App. at 807, 856 S.E.2d at 382; *McCoy*, 138 S.Ct. at 1507.

165. *McCoy*, 138 S.Ct. at 1508.

166. Harris, 358 Ga. App. at 808–09, 856 S.E.2d at 383 (quoting *McCoy*, 138 S.Ct. at 1507).

167. *Id.* at 808, 856 S.E.2d at 383.

168. *Id.* at 809–10, 856 S.E.2d at 383–84.

new trial that, even if he had understood the crime correctly, he would have made the same decision to concede guilt. The court reiterated that it is not unreasonable per se for a lawyer to concede guilt on a lesser charge as a strategy to avoid conviction on a more serious one, which was exactly what trial counsel claimed he was trying to do.[169]

In a separate argument, the defendant asserted that his counsel's failure to consult with him about the concession of guilt was ineffective assistance.[170] The court of appeals rejected this argument as well because, considering the evidence on the possession charge, there was no reasonable probability that the defendant would have been acquitted even if his counsel had not conceded guilt.[171]

VI. DISQUALIFICATION OF COUNSEL AND CONFLICTS OF INTEREST

The Georgia Court of Appeals affirmed Greene County Superior Court's decision not to disqualify the lawyers who represented the plaintiff in *Georgia Trails & Rentals, Inc. v. Rogers*.[172] The plaintiff was a young man who at the age of fifteen, had been severely injured in a motorcycle accident during an off-road race at a recreational facility. The plaintiff's lawyers also represented the plaintiff's parents, and the defendants sought to disqualify the plaintiff's lawyers on the basis of an alleged conflict of interest; the argument was that there was a conflict in representing the plaintiff, who attained the age of eighteen before the case was over, and also the parents, because the plaintiff may have had a claim against his father for failure to warn him about the dangers of riding a motorbike. The trial court denied the motion, finding that there was no evidence of an actual conflict as opposed to theories about potential conflicts. The court of appeals affirmed, noting that the father was included on the special verdict form's allocation of fault at trial and that there was evidence that the plaintiff waived any conflict after being fully informed of the risks.[173]

In *Tucker v. State*,[174] a defendant was represented at trial by a lawyer with the Houston County Public Defender's Office.[175] Trial counsel left that office in 2015; years later, the trial court appointed another member

169. *Id.*

170. *Id.* at 810, 856 S.E.2d at 384.

171. *Id.* This is a separate question from whether trial counsel's failure to consult violated Georgia Rules of Professional Conduct r. 1.2(a) and 1.4, which impose duties of consultation.

172. 359 Ga. App. 207, 855 S.E.2d 103 (2021).

173. *Id.*

174. 355 Ga. App. 796, 845 S.E.2d 759 (2020).

175. *Id.* at 800, 845 S.E.2d at 763.

of the Houston County Public Defender's Office to argue the defendant's motion for new trial and to prosecute his appeal, both of which asserted the ineffectiveness of the original trial counsel.[176]

One question for the court of appeals was whether the second lawyer had an imputed conflict of interest.[177] A lawyer has a conflict of interest in arguing his own ineffectiveness, and, generally speaking, the conflicts of one member of a public defender's office are imputed to all members of the office.[178] Therefore, a public defender cannot argue the ineffectiveness of another lawyer in the same office.[179] In *Tucker*, however, the original trial counsel left the public defender's office years before the new lawyer joined the office and years before the new lawyer was appointed to argue the motion for new trial and the appeal; the court of appeals held that, in these circumstances, the original trial counsel's conflict would not be imputed to the other lawyers in the office where he worked years before.[180]

VII. JUDICIAL CONDUCT

In *Woody v. State,*[181] the Georgia Court of Appeals faced the question of whether, or under what circumstances, judicial misconduct that causes a mistrial in a criminal case gives rise to a double jeopardy defense to a retrial.[182] During the cross-examination of a prosecution witness, the judge initiated a break during which the judge advised the witness, outside the presence of the prosecutor or defense counsel, to be sure to establish a chain of custody. The witness informed the prosecutor, who in turn informed defense counsel, and the prosecutor's motion for a mistrial was immediately granted. When the defendant raised a double jeopardy plea in bar to a retrial, a different judge denied the plea, and the defendant appealed. The court of appeals held that it did not have to decide whether judicial misconduct could be imputed to the prosecution or serve as an independent basis for a double jeopardy defense.[183] Even if the court reached either conclusion, the defendant would still have to prove that the misconduct was intended to goad the defense into making a motion for mistrial; intent merely to aid the prosecution, even by

176. *Id.*
177. *Id.* at 799–800, 845 S.E.2d at 762–63.
178. *Id.*
179. *Id.* at 800, 845 S.E.2d at 763.
180. *Id.* at 800–01, 845 S.E.2d at 763.
181. 357 Ga. App. 752, 849 S.E.2d 527 (2020).
182. *Id.* at 753–54, 849 S.E.2d at 528.
183. *Id.* at 755, 849 S.E.2d at 529.

impermissible means, is not sufficient.[184] The court held that the evidence before the trial court on the plea in bar did not demonstrate that the judge's *ex parte* contact with the witness was intended to bring the trial to an end.[185] It, therefore, affirmed the denial of the double jeopardy plea.[186]

Two matters involved Griffin Judicial Circuit Superior Court Judge, Robert "Mack" Crawford.

First, the Hearing Panel of the Judicial Qualifications Commission found that Judge Crawford violated Rule 1.1 of the Code of Judicial Conduct, which requires judges to respect and comply with the law.[187] When Judge Crawford was in private practice, he deposited funds into the registry of the superior court of Pike County. Apparently because he believed at least some of the funds were owed to him as attorney's fees, and after taking judicial office, Judge Crawford succeeded in persuading the Clerk of Court to disburse $15,675.62 to him. The hearing panel found that Judge Crawford violated Rule 1.1 in two respects. First, he obtained the disbursement without following the requirements of the Uniform Superior Court Rules. Second, he impermissibly converted the funds for his personal benefit. The hearing panel recommended that Judge Crawford be removed from office but did not recommend that he be banned from holding judicial office in the future.[188] By the time of the supreme court's review of the hearing panel's decision, Judge Crawford pled guilty to misdemeanor theft and, as part of his plea bargain, agreed to serve twelve months probation, to resign his judicial office, and not to seek or hold judicial office until his probation was complete.[189]

The Georgia Supreme Court dismissed the proceeding.[190] It noted that it was indisputable that Judge Crawford had not followed the Uniform Superior Court Rules in obtaining the disbursement, but opined that the evidence of impermissible conversion of the funds was "not overwhelming."[191] In light of Judge Crawford's resignation, however, the supreme court saw no need to render a definitive decision on that question; the sanction recommended by the hearing panel was removal

184. *Id.* at 755–56, 849 S.E.2d at 529–30.

185. *Id.* at 757, 849 S.E.2d at 530.

186. *Id.*

187. *In re* Crawford, 310 Ga. 403, 851 S.E.2d 572, 573 (2020); *See* GA. RULES OF PRO. CONDUCT r. 1.1 (2021).

188. *Id.* at 403, 851 S.E.2d at 573.

189. *Id.* at 405, 851 S.E.2d at 574, n. 4.

190. *Id.* at 407, 852 S.E.2d at 575.

191. *Id.* at 405, 851 S.E.2d at 574.

from office, and that had already occurred.[192] The court considered whether it should enter an order permanently banning Judge Crawford from holding judicial office in the future but decided that would not be appropriate, in light of the less-than-overwhelming evidence on the question of conversion, the fact that his actions were not directly related to the exercise of judicial duties, the judge's voluntary resignation from office, his agreement not to seek or hold judicial office while on probation, and the lack of any evidence in the record that he intended to seek or hold judicial office in the future.[193] In an opinion joined by Justices Boggs, Peterson, and Bethel, Justice Blackwell concurred to express doubts that under the Georgia Constitution the supreme court has the power to ban someone from ever holding judicial office in the future.[194]

In the second matter involving Judge Crawford, a defendant who was convicted of aggravated child molestation and other crimes sought reversal of his convictions because Judge Crawford, the trial judge in his case, allegedly had a conflict of interest that caused him to be biased in favor of the State.[195] The court of appeals found no reversible error in connection with the judge's alleged bias and affirmed the convictions.[196] The alleged conflict arose from the fact that Judge Crawford obtained the payment from the registry of the court (as described above) during the trial. Judge Crawford was later indicted on charges of theft by taking and violation of oath by a public officer for ordering the clerk to issue the check. The defendant argued that during the trial, Judge Crawford knew he committed a criminal act and did not want to antagonize the State. The judge denied any wrongdoing as well as any bias; the defendant's trial counsel did not believe that the judge was biased and did not seek recusal at trial. There was no evidence of any actual impropriety. Under these circumstances, the court of appeals concluded Judge Crawford had no duty to recuse himself *sua sponte* and that there was no reasonable basis to believe that he could not be impartial.[197]

The Georgia Court of Appeals revisited a case in which a defendant convicted of unlawful surveillance, aggravated sodomy, and other crimes sought reversal based upon the failure of the superior court judge to recuse himself.[198] The defendant sought recusal based upon the fact that the district attorney served as the judge's campaign manager in an

192. *Id.*

193. *Id.* at 406–07, 851 S.E.2d at 574–75.

194. *Id.* at 407–10, 851 S.E.2d at 575–77 (Blackwell, J., concurring).

195. Zerbarini v. State, 359 Ga. App. 153, 855 S.E.2d 87 (2021).

196. *Id.* at 169–70, 855 S.E.2d at 102.

197. *Id.*

198. Serdula v. State, 356 Ga. App. 94, 845 S.E.2d 362 (2020).

aborted campaign for a state-court judgeship. The judge denied the motion to recuse without referring the matter to another judge, and in an earlier appeal, the court held that another judge should have decided the motion.[199] The case was remanded for that purpose, and another judge heard testimony about the relationship between the superior court judge and the district attorney.[200] The uncontradicted testimony of the district attorney at that hearing was that he nominally served as campaign manager but was not actively involved in the campaign and did not have a particularly close relationship with the superior court judge. The motion to recuse was accordingly denied, and the court of appeals affirmed that ruling.[201] Because the court of appeals found no other reversible error, it affirmed the convictions.[202]

The court of appeals affirmed the denial of a motion to recuse a superior court judge in a case involving custody, visitation, and child support.[203] The mother claimed that the judge showed he was biased in favor of the father by insisting that the mother's attorney attend a hearing after completing a hearing in another matter and by the following actions:

> As examples, the Mother pointed to, among other things, the trial court's: insistence on making her attorney appear for the September 18, 2019 hearing after concluding a hearing in another court listed in a conflict letter; conducting the temporary hearing without notice to the Mother; interrupting the Mother's attorney during argument; suggesting the Father prove his attorney fees in the absence of a request for such fees; awarding temporary relief not requested by the Father; scheduling a trial that conflicted with the Mother's attorney's leave of absence; closing discovery over the Mother's objection; and waiving mediation.[204]

The court of appeals reversed the trial court's modification order because it found that the judge had not afforded the mother sufficient notice and opportunity to be heard.[205] But the court of appeals affirmed the denial of the motion to recuse, noting that a court's rulings seldom justify recusal and that there was no evidence that the judge's alleged bias arose from an extrajudicial source.[206]

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199. *Id.* at 96, 845 S.E.2d at 366.
200. *Id.* at 97, 845 S.E.2d at 367.
201. *Id.* at 106–07, 845 S.E.2d at 373.
202. *Id.* at 116, 845 S.E.2d at 380.
203. Bass v. Medy, 358 Ga. App. 827, 854 S.E.2d 763 (2021).
204. *Id.* at 829–30, 854 S.E.2d at 766.
205. *Id.*
206. *Id.* at 830–31, 854 S.E.2d at 767.

The Georgia Court of Appeals disqualified a Special Master in a case involving alleged breaches of contract and fiduciary duty, in which the plaintiff sought to dissolve a limited liability corporation that operated hotels in three states.[207] The trial court appointed an attorney to serve as an auditor and Special Master in the case.[208]

A Special Master is essentially a part-time judge and is governed by the Code of Judicial Conduct.[209] The court held that the lawyer was attempting to perform an impermissible combination of roles because, as auditor, he would be an investigator and a witness, while as Special Master, he would be the judge of fact and law.[210] The Code of Judicial Conduct disqualifies a judge who has personal knowledge of disputed evidentiary facts or has been a witness in the proceeding, while a Georgia statute separately prohibits a judge from testifying as a witness in a matter before him.[211] Additionally, the Code of Judicial Conduct forbids a judge from conducting investigations into the facts of a dispute,[212] yet that is exactly what the lawyer in his capacity as the auditor was expected to do.[213] Because of the Special Master's "fundamentally incompatible duties," the court of appeals held that it was an abuse of discretion to appoint one person to fulfill all these roles.[214]

VIII. ATTORNEY'S FEES AND LIENS

The Georgia Court of Appeals reversed a trial court's default judgment on behalf of a law firm against a former client.[215] The firm and the former client had entered into a contingency fee contract; when the law firm sued to recover its fees, the former client defaulted by failing to participate in discovery. The trial court eventually entered judgment against the former client based in part upon the contingency-fee-formula set forth in the contract, but the court of appeals reversed because the contingencies recited in the contract never occurred. Therefore, the law firm's remedy was to recover the value of its services in *quantum meruit*. Because

207. A & M Hospitalities, LLC v. Alimchandani, 359 Ga. App. 271, 856 S.E.2d 704 (2021).

208. *Id.* at 271–73, 856 S.E.2d at 706–07.

209. GA. CODE OF JUDICIAL CONDUCT, *Application* (2021). "Anyone . . . who performs judicial functions under the Constitution and [L]aws of Georgia, including . . . [a] [S]pecial [M]aster . . . is a judge for the purpose of this Code." *Id.*

210. *A & M Hospitalities*, 359 Ga. App. at 276, 856 S.E.2d at 708.

211. *Id.* at 275, 856 S.E.2d at 708; *See* O.C.G.A. § 9-7-1 (2021).

212. GA. CODE OF JUDICIAL CONDUCT r. 2.9(C) (2021).

213. *A & M Hospitalities*, 359 Ga. App. at 274, 856 S.E.2d at 708.

214. *Id.* at 276, 856 S.E.2d at 708.

215. Paris v. E. Michael Ruberti, LLC, 355 Ga. App. 748, 845 S.E.2d 720 (2020).

quantum meruit damages are deemed unliquidated, the court of appeals remanded the case for an evidentiary hearing to determine the proper amount of damages.[216]

The Georgia Court of Appeals decided one case about the attorney's lien statute during the Survey period.[217] A law firm and a client entered a contingency fee contract that provided for the law firm to receive 40% of the client's gross recovery as its fee. The contract also specified how the fee would be calculated if the client terminated its relationship with the firm: if the client fired the firm while a settlement offer was pending, the firm would be entitled to 40% of the offer, plus expenses. Otherwise, the firm could elect to seek a reasonable percentage of the client's recovery based upon the amount of work it had performed, or it could seek recovery based on stated hourly rates. The contract granted the firm a lien on the client's recovery to secure the firm's fees and expenses.[218]

The defendant made a pre-suit settlement offer of $15,000, but the law firm filed suit for the client, conducted discovery, and made a pre-mediation settlement demand of $3,500,000.[219] When the client fired the firm, it filed a notice of an attorney's lien for $8,263.54, which is the sum of 40% of the $15,000 settlement offer, plus the expenses the law firm had incurred for the client. The case settled for $800,000. After the hearing on foreclosure of the attorney's lien, the court awarded the law firm its costs plus 13.5% of the client's recovery, which was the judge's assessment of a reasonable percentage of the client's recovery based on the effort expended by the firm. The trial court found that there was no pending offer of settlement (the only offer from the defense had been the $15,000 pre-suit offer, long before the $3,500,000 settlement demand made by the plaintiff's counsel). Therefore, under the fee contract, the law firm was entitled to recover a reasonable percentage of the ultimate settlement and not just 40% of the pre-suit settlement offer. The court of appeals deferred to the trial court's factual findings and affirmed.[220]

IX. CONTEMPT

The Georgia Court of Appeals vacated a contempt order entered by a Bibb County Superior Court Judge against an attorney who allegedly disobeyed the court's commands by sending emails to opposing counsel that lacked civility and were unprofessional.[221] The trial judge

216. *Id.* at 726–27, 845 S.E.2d at 755.

217. McWay v. McKenney's, Inc., 359 Ga. App. 547, 859 S.E.2d 523 (2021).

218. *Id.*

219. *Id.*

220. *Id.* at 551, 859 S.E.2d at 527.

221. *In re* Spix, 358 Ga. App. 119, 853 S.E.2d 893 (2021).

adjudicated the lawyer's contempt summarily, without giving the lawyer a reasonable opportunity to respond to the charges, the right to seek the assistance of counsel, or to call witnesses.[222] The court of appeals wrote that such summary procedures are permissible if the contumacious conduct occurs in open court, but where, as in this case, the conduct occurs outside of court, the attorney was entitled to "more normal adversary procedures."[223]

X. AMENDMENTS TO THE GEORGIA RULES OF PROFESSIONAL CONDUCT[224]

The Georgia Supreme Court ruled on some but not all of the proposed rule changes that the State Bar of Georgia presented as a package in its Motion to Amend 2020-1.[225] The court approved several amendments to Rule 1.6 on confidentiality.[226] It added a new exception to the general rule on confidentiality, under which a lawyer may reveal confidential information to the extent reasonably necessary to detect and resolve conflicts of interest when a lawyer changes firms or a firm's composition or ownership changes, unless revealing the information would compromise the attorney-client privilege or otherwise prejudice the client.[227] The court approved comments that provide further guidance on this new exception as well as new comments explaining the lawyer's duty to use reasonable efforts to protect a client's confidential information and to take reasonable precautions when transmitting information relating to the representation of a client.[228] The court also approved Rule 1.18, a new rule spelling out a lawyer's duties to a prospective client. These duties include a duty of confidentiality, identical to the duty owed to former clients, with respect to information a lawyer learns from a prospective client—regardless of whether an attorney-client relationship is formed.[229] The new rule also disqualifies any lawyer, and the lawyer's firm, from representing anyone whose interests are materially adverse to the interests of the prospective client in the same or a substantially

222. *Id.* at 119–21, 853 S.E.2d at 894–95.

223. *Id.*

224. The Author is a member of the State Bar of Georgia Disciplinary Rules and Procedures Committee. This discussion is the Author's alone and does not reflect any opinion or policy of the rules committee or any of its members. The Author thanks William NeSmith, Deputy General Counsel to the State Bar of Georgia, and Betty Derrickson, paralegal in the office of the general counsel for the State Bar of Georgia, for their assistance with this section.

225. Order of the Georgia Supreme Court (May 14, 2021).

226. *Id.* at *2.

227. *Id.* at *2–3.

228. *Id.* at *6–7.

229. *Id.* at *8–9.

related matter if the lawyer received from the prospective client information that could be significantly harmful to the prospective client in such a matter.[230]

The State Bar asked the court to amend the comments to Rule 1.1 on competence.[231] Under the proposed amendment, comment six would read, "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject."[232] The proposed change is based upon an amendment to the comments to the Model Rules of Professional Conduct.[233] The Georgia Supreme Court did not reject or approve the proposed amendment, but rather omitted any reference to it in its ruling on the State Bar's 2020-1 motion.[234]

XI. FORMAL ADVISORY OPINIONS

A. State Bar of Georgia Formal Advisory Opinion Board[235]

The State Bar Formal Advisory Opinion Board (FAOB) considers requests for formal advisory opinions that interpret the Georgia Rules of

230. *Id.* at *8–11.

231. *Id.* at *3–5.

232. *In re* STATE BAR OF GEORGIA Rules and Regulations for its Organization and Government, Motion to Amend 2020-1, at *2–3.

233. MODEL RULES OF PRO. CONDUCT r. 1.1, cmt. 8 (AM BAR ASS'N 2021).

234. Another pending change involves a prosecutor's duties under Rule 3.8. *In re* State Bar of Georgia Rules and Regulations for its Organization and Government, Motion to Amend 2021-2 at *22–32 (on file with the author). The proposed amendment would add two requirements to Rule 3.8. One requires disclosure of any new, credible, and material evidence that creates a reasonable likelihood that a convicted defendant did not commit the offense. *Id.* at 23–24. The other requires a prosecutor to seek to remedy a conviction in the prosecutor's jurisdiction, when the prosecutor knows of clear and convincing evidence that the defendant did not commit the crime. *Id.* at 24. Also, just after the survey period ended, the court rejected a proposed change to Rule 1.2 that would have allowed Georgia lawyers to counsel and assist clients who operate businesses relating to marijuana that are legal under Georgia law, but illegal under federal law. Order of the Supreme Court of Georgia at 2 (June 21, 2021). The court wrote: "[T]his Court has long prohibited Georgia lawyers from counseling and assisting clients in the commission of criminal acts. The passage of a Georgia statute purporting to permit and regulate conduct that constitutes federal crimes does not change that long-standing principle." *Id.* at 1–2.

235. 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.

Professional Conduct.[236] If the FAOB accepts a request, it drafts an opinion and if the Board approves the draft, publishes it for comment in an official State Bar publication or the State Bar website.[237] The FAOB then reviews any comments and decides whether to approve the opinion.[238] The Georgia Supreme Court reviews some, but not all, of FAOB's opinions.[239]

During the Survey year, the FAOB dealt with one new matter and several matters originating from prior years.

As noted above, the Georgia Supreme Court, in a case during the Survey year, invited the State Bar of Georgia to consider whether it would be appropriate to have an advisory opinion or a rule amendment to guide lawyers about their disclosure obligations when they enter into an arbitration clause with a client.[240] The State Bar Office of the General Counsel asked the FAOB to consider the issue, and the Board accepted the invitation and appointed a subcommittee to study it.[241] Simultaneously, the State Bar Disciplinary Rules and Procedures Committee was considering whether a rule amendment would be a more efficient approach. At the close of the Survey period, the matter was still pending before both the FAOB and the rules committee.[242]

Request 19-R sought guidance regarding whether it is a violation of the rules for a Georgia lawyer to buy Google Ad Words that include the name of a competing attorney to appear first in the results of a search for that lawyer.[243] The FAOB appointed a subcommittee to examine the issue but ultimately decided that the rules already adequately address the issues presented by such conduct.[244]

Finally, the FAOB redrafted Formal Advisory Opinion 94-3, concerning the permissibility of a lawyer's contact with a former constituent of a represented entity.[245] The new opinion is Formal Advisory Opinion 20-1, and it concludes, as did Opinion 94-3, that such contacts are permissible without the consent of the entity's counsel if certain conditions—including disclosure of the reason for the contact—are met. After considering numerous comments about 20-1, the FAOB

236. GA. RULES OF PRO. CONDUCT r. 4-403(a) (2021).

237. GA. RULES OF PRO. CONDUCT r. 4-403(c) (2021).

238. *Id.*

239. GA. RULES OF PRO. CONDUCT r. 4-403(d) –(e) (2021).

240. *Innovative Images*, 309 Ga. at 679, 848 S.E.2d at 79.

241. David N. Lefowitz, *Formal Advisory Opinion Board*, 2021 Report of the Office of General Counsel of the State Bar of Georgia, 1, 12–13 (on file with the author).

242. *Id.*

243. *Id.* at 14.

244. *Id.*

245. *Id.*

approved the opinion and sought discretionary review by the Georgia Supreme Court. The court accepted the petition, and the matter was pending before the supreme court after the Survey period.[246]

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 (ABA) do not directly bind Georgia lawyers or courts. Georgia courts do, however, frequently look to or cite ABA opinions as guidance. It is, therefore, worth mentioning the ABA's seven formal opinions that were issued during the Survey year.

ABA Formal Opinion 492 concerns the proper interpretation of several aspects of Model Rule of Professional Conduct 1.18, which sets forth a lawyer's obligations to a prospective client.[247] Since Georgia has adopted a version of Rule 1.18, this opinion has more potential to influence the professional responsibilities of Georgia lawyers. One significant difference between Georgia's new Rule 1.18 and the Model Rule is that, whereas the Model Rule under some circumstances permits lawyers to be screened to prevent the imputation of conflicts of interest, such screening is not permitted in Georgia.[248]

ABA Formal Opinion 493 provides guidance on the purpose, scope, and application of Model Rule of Professional Conduct 8.4(g), which makes it misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is harassment on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law.[249] Georgia is not among the few states that have adopted a version of Rule 8.4(g).

ABA Formal Opinion 494 included detailed guidance for lawyers with respect to conflicts of interest that arise from the lawyer's relationships with opposing counsel.[250] The opinion divided such relationships into three categories: intimate relationships, friendships, and acquaintances. Without informed consent, a lawyer generally may not represent a client when the lawyer is in an intimate relationship with opposing counsel. Friendships come in a variety of forms and degrees and so must be

246. *Id.*

247. ABA Standing Comm. on Ethics & Pro. Resp. Formal Op. 492 (2020).

248. Order of the Supreme Court of Georgia, at 8–11; *See* MODEL RULES OF PRO. CONDUCT r. 1.18 (2021).

249. ABA Standing Comm. on Ethics & Pro. Resp. Formal Op. 493 (2020).

250. ABA Standing Comm. on Ethics & Pro. Resp. Formal Op. 494 (2020).

examined on a case-by-case basis. Generally, if the relationship is that of mere acquaintances, then the relationship need not be disclosed to the client and consent need not be obtained.[251]

ABA Formal Opinion 495 addressed the propriety of lawyers working remotely from a jurisdiction in which they are not licensed.[252] The necessities of life during the Covid-19 pandemic led many lawyers to do this. The opinion concluded that a lawyer may engage in such work as long as the local jurisdiction has not determined that it constitutes the unauthorized practice of law and as long as lawyers do not hold themselves out as licensed in the jurisdiction, they do not advertise or otherwise hold themselves out as having an office in the jurisdiction, and they do not provide or offer legal services in the jurisdiction except as may otherwise be permitted under Rule 5.5.[253] Specifically, the opinion noted that having local contact information on advertising or business cards would violate Rule 5.5's prohibition on establishing a local office in a jurisdiction in which the lawyer is not licensed.[254]

In ABA Formal Opinion 496, the committee dealt with a lawyer's options in responding to online criticism from a former client.[255] A lawyer may feel that a review is incorrect and be tempted to respond with a post that reveals confidential client information. The ABA opinion concluded that an online negative review of the lawyer, by itself, does not trigger the lawyer's option to reveal confidential information as a matter of self-defense under Rule 1.6(b)(5).[256] The opinion suggested, as a matter of best practice, that lawyers should just not respond to negative online reviews.[257] Alternatively, a lawyer could ask the website or search engine host to remove the post or respond without revealing confidential information, such as posting an invitation to contact the lawyer or posting a response that professional considerations preclude a full response to the criticism.[258]

ABA Formal Opinion 497 provided guidance on what it means for a representation to be "materially adverse" to the interests of a former client or a prospective client.[259] The opinion discussed some situations that are clearly materially adverse, such as litigating or negotiating

251. *Id.* at *5–8.
252. ABA Standing Comm. on Ethics & Pro. Resp. Formal Op. 495 (2020).
253. *Id.* at *1.
254. *Id.* at *2.
255. ABA Standing Comm. on Ethics & Pro. Resp. Formal Op. 496 (2021).
256. *Id.* at *3.
257. *Id.* at *6.
258. *Id.* at *5–6.
259. ABA Standing Comm. on Ethics & Pro. Resp. Formal Op. 497 (2021).

against a former client or a prospective client in the same or a substantially related matter, attacking work done for a former client, and cross-examining a former client or prospective client.[260] A representation can be materially adverse to a former client or prospective client even if the former client or prospective client is not a party to the second matter; such situations, including when a lawyer attacks her own work, must be evaluated on a case-by-case basis.[261] The opinion concluded, however, that "materially adverse" does not include general economic or financial adversity.[262]

Finally, ABA Formal Opinion 498 explored the most common ethical problems associated with virtual practice, when a lawyer practices without a traditional physical office.[263] Virtual practice is permitted, but lawyers still must comply with their ethical responsibilities under the rules. The opinion discusses how the duties of competence, diligence, and confidentiality are challenged in virtual practice—especially with respect to the use of the technology that makes virtual practice possible. Lawyers must also be especially sensitive to their duties of supervision of their non-lawyer assistants and subordinate lawyers in a virtual practice.[264]

XII. MISCELLANEOUS MATTERS

The Georgia General Assembly amended Official Code of Georgia Annotated (O.C.G.A.) section 9-11-67.1,[265] relating to offers of settlement, in a way that has serious implications for the professional responsibilities of plaintiffs' lawyers. Under the Georgia Supreme Court's holding in *Southern General Insurance Company v. Holt*,[266] an insurer who refuses to settle a claim for its policy limits exposes itself to the risk of a claim from its insured for negligent or bad-faith failure to settle.[267] For example, if an insured with $25,000 in coverage is responsible for an accident that causes $100,000 in harm, and the injured party offers to settle for the policy limits of $25,000, the insurance company may be liable under certain circumstances for the entire claim, regardless of the policy limits. It is routine for plaintiffs' lawyers to make time-limited demands on insurance companies to settle for policy limits and put

260. *Id.* at *4–8.
261. *Id.* at *1.
262. *Id.* at *3.
263. ABA Standing Comm. on Ethics & Pro. Resp. Formal Op. 498 (2021).
264. *Id.* at *2–4.
265. O.C.G.A. § 9-11-67.1 (2021).
266. 262 Ga. 267, 416 S.E.2d 274 (1992).
267. *Id.* at 267, 416 S.E.2d 275.

insurers to the choice of acceding to the demand or risking a claim for negligent or bad-faith failure to settle.

The Georgia General Assembly decided in 2013 to regulate the process by which time-limited settlement demands are made by enacting O.C.G.A. § 9-11-67.1.[268] Before the amendments that took effect on July 1, 2021, that statute provided that any pre-suit offers, prepared by or with an attorney, to settle a claim for personal injury, bodily injury, or death in connection with motor vehicle accidents had to be in writing and contain certain terms.[269] Those terms included the period within which the offer could be accepted, at least thirty days from receipt; the amount of the demand; the identities of who would be released; the type of release; and the claims to be released.[270] The statute did not forbid additional terms; further, the inclusion of additional terms would sometimes be ethically required.[271] The plaintiff's lawyer owes the client a duty of competence, which includes the "thoroughness . . . reasonably necessary for the representation."[272]

An attorney for a plaintiff who suffered catastrophic injuries would need, in the name of thoroughness, to add additional terms to a settlement demand under certain circumstances. For example, suppose that there was reason to suspect that the tortfeasor had additional insurance (with the same insurer or any other); or if the tortfeasor had substantial assets that could be used to satisfy a judgment; or if it was not clear whether the tortfeasor was driving in the course and scope of employment at the time of the accident, implicating the employer's insurance policy. Under the old version of § 9-11-67.1, the competent and thorough plaintiff's lawyer would condition the offer to settle for policy limits on written assurances, such as by affidavit that no such additional sources of recovery exist, or that the tortfeasor was not acting in the course and scope of employment.[273]

That option is no longer permitted. In 2021, the Georgia General Assembly amended § 9-11-67.1 to provide that a pre-answer settlement demand must include certain terms and may:

> include a term requiring that in order to settle the claim the recipient shall provide the offeror a statement, under oath, . . . whether all liability and casualty insurance *issued by the recipient* that provides

268. Frank E. Jenkins III and Wallace Miller III, GEORGIA AUTOMOBILE INSURANCE LAW INCLUDING TORT LAW WITH FORMS § 21.8 (2020–2021 ed.).

269. *Id.*

270. *Id.*

271. *Id.*

272. GA. RULES OF PRO. CONDUCT r. 1.1 (2021).

273. O.C.G.A. § 9-11-67.1.

> coverage or that may provide coverage for the claim at issue has been disclosed to the offeror.[274]

Otherwise, absent mutual agreement, under the new version of § 9-11-67.1, no other terms may be included in the offer.[275] It is not proper under this code provision to condition the offer on representations about other insurance coverage that may be available from another carrier; or about whether the tortfeasor has sufficient assets to pay the claim if it exceeds the policy limits; or about facts regarding the accident—including whether the tortfeasor was working at the time.[276]

The new statute creates a dilemma for a plaintiff's lawyer. If there is reason to suspect that other insurance or assets are available to satisfy a claim, it would not be reasonably thorough for the lawyer to offer to settle a claim for the policy limits of one insurer without some assurance that such resources do not exist. A requirement that the recipient of the settlement demand provides such an assurance is now an improper additional term to the demand under § 9-11-67.1, with the result perhaps that the insurer who rejects the demand cannot later be held liable under *Holt* for a bad faith refusal to settle.[277] The new statute is at least a partial gutting of *Holt* because the lawyer's professional duty of competence in some cases will make it impossible to provide a reasonable opportunity to settle without filing a lawsuit; a plaintiff's attorney may need the power of subpoena and the tools of discovery to learn facts that previously could have been sorted out in settlement without a lawsuit. Ironically, a statute governing the process of avoiding lawsuits may require competent counsel to file more lawsuits.

XIII. CONCLUSION

This Article surveys recent developments in Georgia legal ethics through May 31, 2021. For updates on developments after that date, you may visit the Mercer Center for Legal Ethics and Professionalism website.[278]

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274. *Id.* (emphasis added).

275. *Id.*

276. *Id.*

277. No Georgia appellate court has addressed whether the requirements of O.C.G.A. § 9-11-67.1 supplant the common law rule from *Holt*, which requires that there be a reasonable opportunity to settle within the policy limits.

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