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Legal Ethics

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by Patrick Emery Longan*

I. INTRODUCTION

This Article covers the period from June 1, 2012 through May 31, 2013.[1] During this period, the Georgia Supreme Court decided a number of lawyer-discipline cases and other matters related to licensure.

The supreme court and the Georgia Court of Appeals decided cases involving legal malpractice, ineffective assistance of counsel, judicial ethics, and several miscellaneous matters. The supreme court also approved one significant Formal Advisory Opinion and one set of changes to the Georgia Rules of Professional Conduct.

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1. For an analysis of Georgia legal ethics law during the prior survey period, see Patrick Emery Longan, *Legal Ethics, Annual Survey of Georgia Law*, 64 MERCER L. REV. 189 (2012).

II. LAWYER DISCIPLINE[2]

A. Disbarments[3]

1. Trust Account Abuse or Other Financial Transgressions. Seven lawyers were disbarred or voluntarily surrendered their licenses during the survey period primarily or exclusively because of trust account abuse or other financial wrongdoing. Gregory E. Stuhler commingled client and personal funds, withdrew trust account funds for personal use, did not deliver client funds, kept insufficient records, and overdrew his trust account.[4] Romin Vincent Alavi received a check for $20,000 for a client, but, instead of depositing the money into his trust account and delivering it to the client, Alavi told his client that the funds had not been received.[5] Joseph N. Harden received $180,000 on behalf of his two clients but never delivered the funds or accounted for them.[6] Michael Ditano worked as in-house counsel for a corporation but had his employer's permission to represent other clients. Ditano had the corporation's outside counsel do work for his private clients but then billed their fees to the corporation. He voluntarily surrendered his law license.[7] Lisa M. Cummings submitted false invoices as a contract attorney for the Atlanta Office of the Public Defender and compounded her difficulties by making false allegations against public officials and lying to the client about the status of a matter.[8] Wendel Lawrence Bowie failed to disburse or account for $300,000 in a refinancing

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2. In addition to the matters recited in the text, the Investigative Panel of the Georgia State Disciplinary Board imposed confidential discipline in dozens of cases. *See* Larry I. Smith, *Annual Report of the Investigating Panel State Disciplinary Board for Operational Year 2012-2013,* STATE BAR OF GEORGIA 2013 REPORT OF THE OFFICE OF GENERAL COUNSEL, at 5, *available at* http://www.gabar.org/barrules/ethicsandprofessionalism/uploaad/2012-13_OGC_Annual_Report.pdf.

3. Lawyers in Georgia can voluntarily surrender their licenses or submit a petition for voluntary discipline. GA. RULES OF PROF'L CONDUCT R. 4-110(f) (2012). The acceptance of a voluntary surrender of a license or the granting of a petition for voluntary discipline of disbarment are tantamount to disbarment by the court and are treated as such in this Article. *Id.*

4. *In re* Stuhler, 291 Ga. 660, 661, 732 S.E.2d 84, 84 (2012).

5. *In re* Alavi, 291 Ga. 663, 663-64, 732 S.E.2d 86, 87 (2012).

6. *In re* Harden, 291 Ga. 357, 357, 729 S.E.2d 369, 369 (2012).

7. *In re* Ditano, 293 Ga. 79, 79, 743 S.E.2d 427, 427-28 (2013).

8. *In re* Cummings, 291 Ga. 654, 654-56, 732 S.E.2d 755, 755-56 (2012). Earlier during the survey period, Cummings had been suspended for eighteen months for abandoning a client's matter and submitting false information during that disciplinary process. *In re* Cummings, 291 Ga. 310, 310, 728 S.E.2d 688, 689 (2012).

transaction, failed to disburse or account for funds in connection with an unrelated settlement, and failed to record deeds for another client.[9] Thomas W. Dickson voluntarily surrendered his license after he repeatedly ordered the accounting department at his firm to transfer money from the firm's trust account to his personal account without authorization of the firm or the clients.[10]

2. Client Abandonment. A number of Georgia lawyers lost their licenses during the survey period for abandoning clients, although some of these lawyers committed other types of misconduct as well. Dana Posey Gentry was disbarred because of his conduct in three divorce matters, including failing to communicate with his clients, not filing appropriate documents, failing to appear in court, and withdrawing without notice.[11] William M. Peterson voluntarily surrendered his license, which had been suspended for three years for other transgressions, because he had willfully abandoned two clients.[12] Steven Hyman Hurwitz also relinquished his license after he accepted payment from two clients, did no work for them, ceased communicating with them, and refused to return their payments.[13] Adrienne Regina McFall agreed to represent a client in an Ohio divorce case, despite her lack of an Ohio license, and then did no work, refused to communicate with the client, and failed to return the fee.[14] McFall had already been suspended for abandoning another client and was disbarred for her pattern of abandonment and for practicing in Ohio without a license.[15] Joseph Seth Shaw abandoned one client and was disbarred, and the court noted that Shaw had been previously disciplined three times.[16] Benjamin Christopher Free abandoned five clients and lied in his responses to the Notices of Investigation.[17] In light of these facts and his disciplinary history, Free was disbarred.[18] Charles W. Field voluntarily surrendered his license after he failed to perform work on guardianship and child support matters for one client. Field also did not advise the client that she needed court permission to pay his fees from the client's daughter's estate, and that failure led to a judgment against the client

9. *In re* Bowie, 291 Ga. 653, 653, 732 S.E.2d 759, 760 (2012).
10. *In re* Dickson, 292 Ga. 707, 707, 740 S.E.2d 622, 622 (2013).
11. *In re* Gentry, 291 Ga. 770, 770-71, 733 S.E.2d 330, 330-31 (2012).
12. *In re* Peterson, 291 Ga. 358, 358, 729 S.E.2d 369, 370 (2012).
13. *In re* Hurwitz, 291 Ga. 258, 258, 728 S.E.2d 660, 660 (2012).
14. *In re* McFall, 291 Ga. 312, 312, 728 S.E.2d 690, 690 (2012).
15. *Id.*
16. *In re* Shaw, 292 Ga. 149, 150, 734 S.E.2d 405, 406 (2012).
17. *In re* Free, 292 Ga. 339, 339, 737 S.E.2d 690, 690 (2013).
18. *Id.*

for the amount of the fees. Field asked to relinquish his license and noted that he had suffered severe personal problems and medical issues, including hospitalizations and cancer.[19] Scott Patrick Archer was disbarred after he abandoned one client who had paid him to file a motion for a new trial in a criminal case and abandoned another for whom he was supposed to be pursuing two collection matters.[20] John R. Wall was disbarred because he abandoned clients in three divorce actions.[21] In each, Wall accepted payment but ultimately stopped communicating with his clients.[22]

3. Felony Convictions. Seven Georgia lawyers lost their licenses during the survey period because of felony convictions. Arthur L. Gibson Jr. was disbarred after he was convicted in federal court of dealing in counterfeit obligations or securities.[23] Wayne Andrew Williams pled guilty to twenty-one counts of theft by taking and nineteen counts of forgery, and he voluntarily surrendered his license to practice law.[24] Marcus L. Vickers was convicted of conspiracy to defraud the United States and two counts of mail and wire fraud, all as a result of his participation in the closings of two condominium sales.[25] The supreme court acknowledged that there were mitigating factors in Mr. Vickers's case but ultimately disbarred him, noting that he was relatively experienced in the practice of law, that he acted for a dishonest motive, and that he facilitated mortgage fraud.[26] Zondra Taylor Hutto was disbarred as a result of her plea of guilty in federal court to one count of withholding information of a crime.[27] Charles Bailey Mullins II suffered the same fate after he pled guilty to tax evasion in federal court in West Virginia.[28] Robert E. Maloney Jr. voluntarily surrendered his license after his conviction for bank fraud,[29] while Lynn McNeese Swank did the same after pleading guilty to perjury.[30]

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19. *In re* Field, 292 Ga. 862, 862-63, 742 S.E.2d 477, 478-79 (2013).
20. *In re* Archer, 292 Ga. 553, 553-54, 739 S.E.2d 386, 386-87 (2013).
21. *In re* Wall, 292 Ga. 891, 891-92, 742 S.E.2d 726, 728 (2013).
22. *Id.* at 891-92, 742 S.E.2d at 727.
23. *In re* Gibson, 291 Ga. 660, 660, 732 S.E.2d 85, 85 (2012); *see also* 18 U.S.C. § 473 (2012).
24. *In re* Williams, 291 Ga. 659, 659, 732 S.E.2d 85, 85-86 (2012).
25. *In re* Vickers, 291 Ga. 354, 354, 729 S.E.2d 355, 356 (2012).
26. *Id.* at 354-55, 729 S.E.2d at 356.
27. *In re* Hutto, 292 Ga. 556, 556, 739 S.E.2d 385, 385-86 (2013).
28. *In re* Mullins, 292 Ga. 644, 644-45, 740 S.E.2d 173, 173-74 (2013).
29. *In re* Maloney, 292 Ga. 900, 900, 742 S.E.2d 738, 738 (2013).
30. *In re* Swank, 292 Ga. 900, 900, 742 S.E.2d 739, 739 (2013).

4. Reciprocal Disbarments. During the survey period, two Georgia lawyers were disbarred as reciprocal discipline. John Lee Scott lost his Florida license for reasons that the Georgia Supreme Court did not identify.[31] David Alan Friedman was disbarred in Kentucky after he failed to account for tens of thousands of dollars of client funds.[32] The Georgia Supreme Court disbarred them both in Georgia as a matter of reciprocity.[33]

5. Miscellaneous Disbarments. Three lawyers lost their licenses during the survey period for miscellaneous reasons. Patrick Jeffery Stubbs was disbarred because he filed a civil case while he was suspended from the practice of law.[34] Kevin Eugene Hooks lost his license because he committed that same infraction and numerous others, including an improper response to a motion for summary judgment and failures to respond to discovery, to communicate with clients, to inform opposing counsel and courts of his suspension, and to use funds that he received as a fiduciary as they were intended to be used.[35] Marion Jeanne Browning-Baker did not cooperate with discovery in her disciplinary proceeding, which arose from her representation of a client who sought a divorce. In the underlying matter, Ms. Browning-Baker represented a husband against a former client of hers, despite a clear conflict of interest, and was paid more than $12,000, although she filed the case in an improper jurisdiction and was never able to complete the divorce.[36]

B. Suspensions[37]

The supreme court suspended two lawyers for periods of less than six months. The court accepted the petition of Richard R. Buckley Jr. for a four-month suspension.[38] Buckley stopped communicating with a client and asserted a lien on the client's file for eighteen months after he was fired.[39] The court noted that he had been disciplined for similar conduct three times before but also noted that he had been suffering

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31. *In re* Scott, 291 Ga. 259, 259, 728 S.E.2d 661, 661 (2012).
32. *In re* Friedman, 292 Ga. 338, 338, 737 S.E.2d 689, 689 (2013).
33. *Id.*; *In re Scott*, 291 Ga. at 259, 728 S.E.2d at 661.
34. *In re* Stubbs, 291 Ga. 828, 828-29, 735 S.E.2d 281, 281 (2012).
35. *In re* Hooks, 292 Ga. 781, 781-84, 741 S.E.2d 645, 646-48 (2013).
36. *In re* Browning-Baker, 292 Ga. 809, 809-11, 741 S.E.2d 637, 637-38 (2013).
37. This Article discusses only those suspensions that constitute final discipline and does not discuss interim suspensions.
38. *In re* Buckley, 291 Ga. 661, 661-62, 732 S.E.2d 87, 87-88 (2012).
39. *Id.* at 662, 732 S.E.2d at 87.

from health problems that he was addressing through the Georgia Lawyers' Assistance Program.[40] Warner Russell Hodges received a sixty-day suspension as reciprocal discipline because he had been suspended in Tennessee for practicing while his Tennessee license was inactive.[41]

Five lawyers received six-month suspensions. Arjun S. Kapoor obtained and served a fake subpoena on a crisis center in an effort to obtain documents about someone who had made allegations of family violence against him.[42] Tony C. Jones received an additional six-month suspension, to be served consecutively with an existing eighteen-month suspension, for his abandonment of two clients, which he explained in part as resulting from "burnout or other mental health problems."[43] The court accepted his petition for voluntary discipline, including the suspension and the condition that he could be reinstated only with certification from a licensed psychologist or psychiatrist that he is fit to practice.[44] Paul Troy Wright was suspended for making false statements in a brief to the Georgia Court of Appeals, and the supreme court noted that it was troubled by Wright's continued assertions during the disciplinary proceedings that his statements had been true, an argument that the supreme court described as "sophistry."[45] Clark Jones-Lewis did not remit $4000 that she had received on behalf of a client until the client retained new counsel three years later, and she gave contradictory explanations of the matter in the disciplinary process.[46] Barbara Sims Arthur received her six-month suspension as reciprocal discipline after she was suspended for six months in Tennessee for failing to pay her registration fees.[47]

Two Georgia lawyers were suspended for periods between six and eighteen months. Chima Earnest Okene overdrew his trust account several times, commingled personal and client funds, and improperly advanced money to clients.[48] The supreme court accepted his petition for voluntary discipline, noting in mitigation that Okene had suffered from health problems and that no client funds were misappropriated or lost.[49] Eric C. Lang used client funds to pay his firm's bills in the

40. *Id.* at 662, 732 S.E.2d at 87-88.
41. *In re* Hodges, 291 Ga. 830, 830, 733 S.E.2d 775, 776 (2012).
42. *In re* Kapoor, 293 Ga. 161, 161, 743 S.E.2d 426, 426 (2013).
43. *In re* Jones, 292 Ga. 310, 310, 736 S.E.2d 432, 432 (2013).
44. *Id.* at 310-11, 736 S.E.2d at 432-33.
45. *In re* Wright, 291 Ga. 841, 842-44, 732 S.E.2d 275, 276-78 (2012).
46. *In re* Jones-Lewis, 291 Ga. 651, 651-52, 732 S.E.2d 79, 80-81 (2012).
47. *In re* Arthur, 291 Ga. 658, 658, 732 S.E.2d 86, 86 (2012).
48. *In re* Okene, 291 Ga. 656, 656-57, 736 S.E.2d 748, 748 (2012).
49. *Id.*

forlorn expectation that the firm would receive fees to cover the misappropriation. When those fees did not arrive, Lang deceived opposing counsel and his client for many months before finally admitting what he did.[50] The court suspended Lang for twelve months, noting that he had made full restitution to his client and that he had been treated for depression and for symptoms of bipolar disorder.[51]

Four lawyers were suspended for eighteen months. As noted earlier, Lisa M. Cummings received an eighteen-month suspension during the survey period and was later disbarred.[52] Carol Chandler received that same punishment for abandonment of one client in an immigration matter.[53] Chandler took the client's money but did not communicate with him, file the necessary documents, or return the fee.[54] Amjad Muhammad Ibrahim was suspended as a result of two grievances involving the commingling of client and firm funds.[55] The court accepted the petition for voluntary discipline of Christopher Todd Adams and suspended him for eighteen months because he submitted seventeen bills to the Gwinnett Judicial Circuit Indigent Defense Program for hours he falsely claimed to have worked for indigent clients.[56]

The supreme court ordered three suspensions of longer than eighteen months. James H. Dickey had been suspended for two years in South Carolina for three acts of misconduct: the creation of a false medical record that he submitted as part of a settlement package, a willful failure to comply with an arbitration award, and a failure to inform a client that her medical malpractice claim had been dismissed.[57] The supreme court imposed the same suspension as reciprocal discipline.[58] Ashley A. Davis received a thirty-month suspension after her conviction for unlawful possession of methamphetamine, for which she, as a first offender, had been sentenced to three years of probation.[59] The court noted in mitigation that her offense had nothing to do with her clients or law practice and came at a time of difficulties in her personal life.[60]

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50. *In re* Lang, 292 Ga. 894, 894-95, 741 S.E.2d 152, 153 (2013).
51. *Id.* at 897, 741 S.E.2d at 154.
52. *In re Cummings,* 291 Ga. at 654, 656, 732 S.E.2d at 755, 757.
53. *In re* Chandler, 292 Ga. 555, 555, 739 S.E.2d 387, 388 (2013).
54. *Id.*
55. *In re* Ibrahim, 291 Ga. 774, 774, 733 S.E.2d 331, 331-32 (2012); *see also In re* Ibrahim, 291 Ga. 94, 95, 727 S.E.2d 501, 502 (2012). One of the grievances also included allegations of a lack of diligence. *In re Ibrahim*, 291 Ga. at 95, 727 S.E.2d at 502.
56. *In re* Adams, 291 Ga. 768, 768-69, 732 S.E.2d 446, 446-47 (2012).
57. *In re* Dickey, 292 Ga. 12, 12, 734 S.E.2d 18, 18 (2012).
58. *Id.* at 13-14, 734 S.E.2d at 19.
59. *In re* Davis, 292 Ga. 897, 897, 742 S.E.2d 734, 734 (2013).
60. *Id.* at 898, 742 S.E.2d at 734-35.

The court imposed conditions on her reinstatement, including certifications from the Georgia State Bar Lawyer Assistance Program and a licensed therapist, psychologist, or psychiatrist.[61] The court accepted the petition for voluntary discipline and suspended Kathryn J. Jaconetti for three years because of her abandonment of eight clients.[62] The court noted in mitigation that Jaconetti had sought treatment for bipolar disorder and conceded that she was not currently mentally competent to practice law.[63] The court imposed conditions on her reinstatement, including restitution to clients and certifications of her mental fitness.[64]

C. Reprimands

The supreme court ordered three public reprimands and one Review Panel reprimand during the survey period. Kenneth A. Glenn successfully petitioned for such voluntary discipline as a result of neglect of one client's matter, for which he had made restitution.[65] The court also accepted a petition for a voluntary public reprimand from Neal Henry Howard, who admitted that he had deposited personal funds into his Interest on Lawyers Trust Account (IOLTA) and overdrew that account when a check was mistakenly deposited into the firm's operating account.[66] No clients were harmed, and Howard had changed his firm's accounting practices to prevent any further violations.[67] Jerry Wayne Moncus received a public reprimand because he undertook to represent three people seeking termination of probation that Moncus himself had imposed as Chief Judge of the Municipal Court of Dalton.[68] The Georgia Rules of Professional Conduct forbid a lawyer from representing "anyone in connection with a matter in which the lawyer participated personally and substantially as a judge" without the consent of all parties, which Moncus had not obtained.[69] Finally, the court accepted a voluntary petition seeking a Review Panel reprimand from Ted H. Reed.[70] Reed, who had lost his license in 1979 for accepting a bribe as a probation officer, had been reinstated in 1988, and had received a

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61. *Id.* at 898, 742 S.E.2d at 735.

62. *In re* Jaconetti, 291 Ga. 772, 772-74, 732 S.E.2d 447, 448-49 (2012).

63. *Id.* at 772-73, 732 S.E.2d at 448.

64. *Id.* at 773, 732 S.E.2d at 449.

65. *In re* Glenn, 292 Ga. 811, 811-12, 741 S.E.2d 651, 652 (2013). The Author served as special master in this matter.

66. *In re* Howard, 292 Ga. 413, 413-14, 738 S.E.2d 89, 89 (2013).

67. *Id.* at 414, 738 S.E.2d at 89.

68. *In re* Moncus, 291 Ga. 767, 767-68, 733 S.E.2d 330, 330 (2012).

69. *Id.* at 767, 733 S.E.2d at 330 (quoting GA. RULES OF PROF'L CONDUCT R. 1.12(a) (2012)).

70. *In re* Reed, 291 Ga. 257, 257-58, 731 S.E.2d 50, 50 (2012).

formal letter of admonition in 2007. In the most recent matter, Reed admitted that he had violated his duty of communication when he had been unable to answer a client's questions about post-judgment proceedings.[71]

D. Petitions for Voluntary Discipline Rejected

The supreme court rejected five petitions for voluntary discipline during the survey period. In three of these cases, the State Bar of Georgia either did not object or had agreed to the proposed punishment. Reed Emondson Jr. sought a Review Panel reprimand as discipline for his failure to communicate with a client and his failure to assist the client upon withdrawal, but the court rejected that petition in light of his prior disciplinary history.[72] The court rejected John Floyd Woodham's petition seeking a Review Panel reprimand for having admittedly filed two cases opposing bond validations and then offering not to pursue them in exchange for a payment of over $1 million.[73] Dale E. Calomeni collected funds for a client but did not notify the client or place them in his trust account. Calomeni also allowed a disbarred lawyer to work for him and have direct contact with clients, and he filed and prosecuted a suit for a client despite the client's instructions regarding the proper parties.[74] The State Bar agreed that a Review Panel reprimand would be appropriate, but the court rejected the petition because of the number of violations and because one of them involved mishandling client funds.[75]

The court rejected two petitions for voluntary discipline that had been recommended by special masters. Ricardo L. Polk failed to appear at hearings for two clients, did not communicate with them about their matters, and did not withdraw from representing one client while he was suspended.[76] The court rejected his petition for a two-year suspension in light of his prior disciplinary history and because of insufficient evidence of the restitution he had paid to his former clients.[77] The court also rejected a Review Panel reprimand for Margrett A. Skinner, who admitted that she had posted personal and confidential information

71. *Id.*
72. *In re* Edmondson, 291 Ga. 356, 356-57, 729 S.E.2d 368, 368-69 (2012).
73. *In re* Woodham, 291 Ga. 255, 255-57, 728 S.E.2d 659, 659-60 (2012).
74. *In re* Calomeni, 293 Ga. 76, 76, 743 S.E.2d 424, 425 (2013).
75. *Id.* at 77, 743 S.E.2d at 425-26.
76. *In re* Polk, 292 Ga. 147, 147, 149, 734 S.E.2d 391, 392-93 (2012).
77. *Id.* at 149, 734 S.E.2d at 393.

about a former client on the internet in response to negative reviews of Skinner, which the former client had posted on consumer web sites.[78]

E. Reinstatements

The supreme court granted a certificate of fitness for readmission to one disbarred lawyer and granted petitions for reinstatement to two suspended lawyers during the survey period. D. John Skandalakis had been disbarred in 2005 after he pled guilty in federal court to making false statements about events that occurred while he held a public office position.[79] The court granted his certificate of fitness for readmission in light of his letters of support and because he had "shown remorse and . . . strived to act with integrity and responsibility through his hard work, his devotion to his family, and as a volunteer in his community."[80] Benjamin Lanier Bagwell was reinstated after he completed his suspension and proved his mental fitness to practice by submitting letters about his therapy, medications, symptoms, and current mental health from a board-certified psychiatrist.[81] Similarly, Morris P. Fair Jr. was reinstated after he submitted letters showing that he was psychiatrically stable and fit to practice.[82]

III. LEGAL MALPRACTICE

The supreme court decided two important cases regarding legal malpractice claims during the survey period, and the court of appeals decided another, although its judgment in that case was vacated by the supreme court soon after the survey period ended.[83]

In *Villanueva v. First American Title Insurance Co.*,[84] the supreme court held that claims for attorney malpractice are not per se unassignable.[85] When a lender's funds that were intended to pay off prior mortgages were misappropriated after a closing, the title company made the payoffs and then asserted claims of legal malpractice against the

78. *In re* Skinner, 292 Ga. 640, 640-42, 740 S.E.2d 171, 172-73 (2013).

79. *In re* Skandalakis, 292 Ga. 902, 902, 742 S.E.2d 736, 737 (2013).

80. *Id.* at 903, 742 S.E.2d at 737.

81. *In re* Bagwell, 292 Ga. 340, 340, 737 S.E.2d 690, 691 (2013).

82. *In re* Fair, 292 Ga. 308, 308-09, 736 S.E.2d 430, 430 (2013).

83. One other case deserves a brief mention. In *Holland v. Cavaniss*, 292 Ga. 332, 737 S.E.2d 669 (2013), the supreme court held that evidence of an attorney's wealth could not be introduced in a legal malpractice action brought under O.C.G.A. § 51-12-6 (2000), in which the plaintiff seeks damages for injury to peace, happiness, or feelings but may not be awarded punitive damages. *Holland*, 292 Ga. at 332, 737 S.E.2d at 669-70 (interpreting O.C.G.A. § 51-12-6 (2000)).

84. 292 Ga. 630, 740 S.E.2d 108 (2013).

85. *Id.* at 630, 740 S.E.2d at 109.

closing attorney under its subrogation rights.[86] The supreme court rejected arguments that, as matters of statutory interpretation and of public policy, legal malpractice claims should not be assignable.[87] Section 44-12-24 of the Official Code of Georgia Annotated (O.C.G.A.)[88] permits assignments of rights of action for property rights but not for personal torts or fraud.[89] The court distinguished claims of legal malpractice, which arise in contract or tort and seek recovery of damages for financial harm, from personal tort claims such as injury to property, reputation, or feelings.[90] The court noted that a majority of states ban the assignment of legal malpractice claims as a matter of public policy but surveyed the states that have rejected that view and joined the minority.[91]

Leibel v. Johnson[92] involved the admissibility of expert testimony regarding causation in a legal malpractice case.[93] The plaintiff had the burden to show that the attorney's negligence caused her harm, and to do that she needed to show that, but for the attorney's negligence, she would have won the case for which the attorney had been hired.[94] Trial of such a "suit within a suit" is common in legal malpractice actions, and the question before the supreme court was whether the plaintiff should have been permitted to offer expert testimony regarding the likely outcome of the underlying case.[95] The court of appeals had held that such evidence was admissible in cases in which a layperson could not decide the issue of causation.[96] The supreme court reversed, noting that the jury's job in the malpractice action is not to decide what the first jury would have done but only to decide what a reasonable jury would have done.[97] The malpractice jury is just as capable of deciding the underlying issues as the first jury would have been, and therefore the court held that expert evidence on causation should not have been admitted.[98]

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86. *Id.* at 631, 740 S.E.2d at 109.
87. *Id.* at 635, 740 S.E.2d at 112.
88. O.C.G.A. § 44-23-24 (2002 & Supp. 2013).
89. *Id.*
90. *Villanueva*, 292 Ga. at 631-32, 740 S.E.2d at 110.
91. *Id.* at 633-35, 740 S.E.2d at 111-12.
92. 291 Ga. 180, 728 S.E.2d 554 (2012).
93. *Id.* at 183, 728 S.E.2d at 556-57.
94. *Id.* at 182, 728 S.E.2d at 556.
95. *Id.* at 180, 182-83, 728 S.E.2d at 555-57.
96. *Id.* at 182, 728 S.E.2d at 556.
97. *Id.* at 183, 728 S.E.2d at 556-57.
98. *Id.* at 182-83, 728 S.E.2d at 556.

During the survey period, the court of appeals decided a case involving the applicability of the attorney-client privilege and the work-product doctrine when it becomes apparent that a law firm's client may assert claims against the firm and the firm consults with in-house counsel and otherwise begins preparing to assess and defend the claim.[99] Although the court of appeals decided that resolving these issues involved inquiry and analysis regarding the firm's conflicts of interest and whether any conflicts should be imputed to in-house counsel, the supreme court vacated that judgment soon after the survey period ended.[100] The supreme court held that the rules of conduct are not relevant to issues of attorney-client privilege or work-product immunity and that the usual rules defining those doctrines should apply, even when the communications are with a law firm's in-house counsel about a potential claim by an existing client, and even when documents are created in anticipation of litigation with an existing client.[101]

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Cases in Which Claims of Ineffective Assistance Ultimately Prevailed

In *State v. Crapp*,[102] the court of appeals affirmed the Superior Court of Dougherty County's grant of a new trial based upon a claim of ineffective assistance of counsel.[103] The alleged crimes were armed robbery and kidnapping. The perpetrator of the crime forced the victim to drive him to a house. The victim could not identify the assailant but was able to retrace the route she had taken with the perpetrator and identify the house he had entered. A man at that house, Lorenzo Simpson, identified the defendant as someone who had come to the house on the night of the crime to buy crack cocaine. The defendant testified that Simpson identified him because the defendant owed Simpson money and because the defendant had filed a police report that led to an arrest warrant for, and the indictment of, one of Simpson's associates. The defense counsel had a copy of the indictment but did not introduce it, or the arrest warrant or police report, to buttress the defendant's testimony. In closing arguments, the prosecutor sought to

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99. Hunter, Maclean, Exley & Dunn, P.C. v. St. Simons Waterfront, LLC, 317 Ga. App. 1, 1-3, 730 S.E.2d 608, 611-13 (2012), *vacated*, 293 Ga. 419, 746 S.E.2d 98 (2013).

100. St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C., 293 Ga. 419, 419-20, 746 S.E.2d 98, 102 (2013).

101. *Id.* at 430, 746 S.E.2d at 109.

102. 317 Ga. App. 744, 732 S.E.2d 806 (2012).

103. *Id.* at 744, 732 S.E.2d at 807.

cast doubt on the defendant's explanation of why Simpson would identify him as having come to the house the night of the crime by reminding the jury that no police report had been offered by the defense.[104]

The court of appeals held that the failure to introduce the documentation that corroborated the defendant's story was deficient performance, because the state's case depended completely upon whether the jury believed Simpson or the defendant.[105] The court of appeals agreed with the trial court that there was sufficient prejudice to the defendant because the state's evidence was "thin" and affirmed the trial court's grant of a new trial.[106]

In *Owens v. State*,[107] the court of appeals reversed the Superior Court of Gwinnett County's denial of a motion for a new trial based upon a claim of ineffective assistance of counsel.[108] The defendant was convicted on two counts of robbery by sudden snatching. The physical evidence against the defendant was weak. It consisted only of similarities between shoes that the defendant owned and a print left at the scene of a crime. The most important evidence that the prosecution offered was testimony from a probation officer and a law enforcement officer that the defendant was the person in a surveillance video of one of the two crimes. The defense counsel did not object to this testimony and conceded that there was no strategic reason for her failure to do so.[109]

The court of appeals noted that the identification testimony from one of the two witnesses was inadmissible, because opinion testimony is only admissible if there is some reason to believe that the witness is better able to make the identification than the jury, such as when the appearance of the defendant has changed between the time of the crime and trial.[110] Here, there were no such circumstances.[111] Thus, the defense counsel's failure to object to the opinion testimony was deficient performance.[112] Additionally, the defendant demonstrated harm because the other evidence against him was so weak and he would likely have been acquitted.[113]

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104. *Id.* at 744-46, 732 S.E.2d at 807-09.
105. *Id.* at 748, 732 S.E.2d at 809.
106. *Id.* at 748, 732 S.E.2d at 810.
107. 317 Ga. App. 821, 733 S.E.2d 16 (2012).
108. *Id.* at 821, 733 S.E.2d at 17.
109. *Id.* at 823-24, 733 S.E.2d at 18-19.
110. *Id.* at 824, 733 S.E.2d at 19.
111. *Id.* at 825, 733 S.E.2d at 19.
112. *Id.* at 826, 733 S.E.2d at 20.
113. *Id.*

State v. Moore[114] was a rape case in which the defendant claimed that the intercourse was consensual.[115] The prosecution elicited testimony that the defendant refused to talk to a detective about the allegations before the defendant was arrested and declined to turn himself in right away. The prosecutor used this evidence against the defendant in closing argument. The defendant was convicted and sought a new trial.[116] Georgia law is clear that it is improper to comment on a defendant's pre-arrest silence or failure to come forward.[117] The defense counsel admitted that he was unaware of this, and the Superior Court of Gwinnett County found the failure to object to be deficient performance. The trial court found further that the prosecution had intentionally elicited the improper testimony and commented upon it and that the evidence against the defendant was not overwhelming.[118] The trial court ordered a new trial based upon ineffective assistance of counsel, and the court of appeals affirmed.[119]

B. Holdings of Ineffective Assistance Reversed

In seven cases, the supreme court reversed lower-court decisions that granted relief because of ineffective assistance of counsel, while the court of appeals reversed a trial court's grant of a new trial based upon ineffective assistance in one case.

In *Seabolt v. Hall*,[120] the Superior Court of Habersham County granted habeas corpus relief to a woman who had been convicted of murdering her husband.[121] The defendant's eight-year-old daughter testified at trial that she heard the victim, her stepfather, tell the defendant to "put the gun down." The daughter testified in the judge's chambers, with only the parties' attorneys present. The testimony was broadcast to the courtroom by closed circuit television, and the defendant's attorney did not object to this procedure.[122] The supreme court reversed the trial court's decision because the defendant could not show prejudice from the lawyer's failure to object to the in-chambers testimony of her daughter.[123] The defendant claimed that she could have assisted her attorney with his cross-examination of the daughter, but the

114. 318 Ga. App. 118, 733 S.E.2d 418 (2012).
115. *Id.* at 120, 733 S.E.2d at 420.
116. *Id.* at 120-22, 733 S.E.2d at 420-22.
117. *Id.* at 122, 733 S.E.2d at 422.
118. *Id.* at 121-22, 124, 733 S.E.2d at 421-24.
119. *Id.* at 118, 124, 733 S.E.2d at 419, 423.
120. 292 Ga. 311, 737 S.E.2d 314 (2013).
121. *Id.* at 311, 737 S.E.2d at 315.
122. *Id.* at 311-12, 737 S.E.2d at 315-16.
123. *Id.* at 315, 737 S.E.2d at 317-18.

supreme court noted that the lawyer was aware of all of the information that the defendant would have provided had she been present.[124] The trial court had applied a presumption-of-prejudice standard, but, applying *Strickland v. Washington*,[125] the supreme court held that the defendant had to show harm.[126] Although the defendant would have been entitled to a presumption-of-prejudice standard if this particular point had been raised on direct appeal, she had to show harm when it was raised as part of an ineffective assistance of counsel claim in a habeas petition.[127]

Williams v. Kelley[128] involved a claim of ineffective assistance by appellate counsel.[129] The defendant had been convicted of two counts of felony murder after the judge charged the jury on two methods of committing that offense, despite the fact that the indictment only listed one of those methods.[130] The supreme court acknowledged that it was error for the Superior Court of Baldwin County to do so but nevertheless reversed the grant of the defendant's habeas petition.[131] The court reasoned that appellate counsel was not ineffective for not raising the point, because the error was cured when the trial judge gave the jury the indictment.[132] Therefore, any argument about the jury charge on direct appeal would have failed.[133]

In *Tompkins v. Hall*,[134] the supreme court reversed the grant of habeas relief to a defendant who had been convicted in *absentia* of possession of marijuana with the intent to distribute and trafficking in cocaine.[135] The habeas court had found that "the defense lawyers merely winged it without any preparations. As a result there was no meaningful adversarial testing of the charges brought against Hall."[136] The supreme court reversed because the allegations of ineffective assistance of trial counsel had not been raised in a timely manner, and any claim about appellate counsel's effectiveness for not raising the claims would have failed because the prisoner was a fugitive from justice

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124. *Id.* at 315, 737 S.E.2d at 317.
125. 466 U.S. 668 (1984).
126. *Seabolt*, 292 Ga. at 313, 737 S.E.2d at 316.
127. *Id.* at 313-14, 737 S.E.2d at 316-17.
128. 291 Ga. 285, 728 S.E.2d 666 (2012).
129. *Id.* at 285, 728 S.E.2d at 667.
130. *Id.*
131. *Id.* at 287, 728 S.E.2d at 668.
132. *Id.* at 286-87, 728 S.E.2d at 668.
133. *Id.*
134. 291 Ga. 224, 728 S.E.2d 621 (2012).
135. *Id.* at 224, 728 S.E.2d at 622.
136. *Id.* at 225, 728 S.E.2d at 623.

and his appeal would have been dismissed, no matter what claims appellate counsel had made.[137]

In *Humphrey v. Lewis*,[138] the court reviewed the circumstances that led to the conviction of Christopher Lewis for murder, burglary, and related offenses for the fourth time.[139] This time, the habeas court had vacated all of the convictions on various grounds.[140] The supreme court reversed and reinstated the convictions.[141] The court held that there was no harm from two alleged violations of the prosecutor's duty to disclose exculpatory evidence.[142] It also held that appellate counsel was not ineffective for failing to raise the Superior Court of Butts County's refusal to charge on involuntary manslaughter, because the evidence would not have supported such a charge, and that appellate counsel was not ineffective for failing to raise several meritless claims of prosecutorial misconduct on appeal from the convictions.[143]

State v. Martinez[144] involved a claim by a resident alien that his lawyer had advised him erroneously not to be concerned about deportation if he pled guilty to aggravated battery.[145] In *Padilla v. Kentucky*,[146] the United States Supreme Court held in 2010 that incorrect advice about such a collateral consequence could constitute deficient performance by counsel.[147] However, in *Martinez*, the trial judge had specifically asked the defendant if he understood that he faced deportation if he pled guilty and asked him whether he wanted to continue with the plea even after the judge expressed the understanding that at some time in the future the federal government would take action to deport him.[148] The Georgia Supreme Court held that, because of this colloquy, Martinez could not show that he had been prejudiced by his lawyer's earlier advice.[149] The court took pains to note, however, that it would be possible to show prejudice despite a court's warnings if, for example, the lawyer advised the client before or during a plea hearing

137. *Id.* at 227, 728 S.E.2d at 624.
138. 291 Ga. 202, 728 S.E.2d 603 (2012).
139. *Id.* at 202, 728 S.E.2d at 606. The earlier decisions are reported. Hall v. Lewis, 286 Ga. 767, 692 S.E.2d 580 (2010); Lewis v. State, 277 Ga. 534, 592 S.E.2d 405 (2004); Lewis v. State, 275 Ga. 194, 565 S.E.2d 437 (2002).
140. *Humphrey*, 291 Ga. at 203, 728 S.E.2d at 606.
141. *Id.*
142. *Id.* at 204, 728 S.E.2d at 607.
143. *Id.* at 216, 728 S.E.2d at 615.
144. 291 Ga. 455, 729 S.E.2d 390 (2012).
145. *Id.* at 455, 729 S.E.2d at 391.
146. 559 U.S. 356 (2010).
147. *Id.* at 359-60.
148. 291 Ga. at 456, 728 S.E.2d at 392.
149. *Id.* at 457, 728 S.E.2d at 393.

to disregard any warnings given by the court.[150] Because there was no evidence of such advice in *Martinez*, however, the court reversed the grant of habeas relief.[151]

State v. Sosa[152] also involved the holding in *Padilla*.[153] The habeas court granted relief because Sosa pled guilty to child molestation in 2002 without the benefit of advice that the plea would subject him to deportation. Sosa was in fact deported in 2010.[154] The supreme court overturned the habeas court because they concluded that the petition was barred by Georgia's four-year statute of limitations.[155] The court noted that Sosa could only circumvent the limitations defense if he could show that the right he asserted based on the 2010 decision in *Padilla* was "newly recognized" and was made "retroactively applicable" to cases on collateral review.[156] The supreme court held that Sosa's claim should have been dismissed,[157] and the court's conclusion was validated when the United States Supreme Court later held that the rule in *Padilla* should not be applied retroactively to habeas cases.[158]

In *Humphrey v. Riley*,[159] the Georgia Supreme Court reversed the habeas court, reinstated both of the defendant's murder and arson convictions, as well as the death sentence.[160] The lower court had found multiple instances of ineffective assistance of counsel, but the supreme court held as to each that either the trial counsel was not deficient or, even if he was, the deficiencies did not prejudice the defendant because of "the overwhelming evidence of Riley's guilt, including the evidence of his prior contemplation of arson and murder, the evidence of his motive, and his pre-trial admission that he intentionally set the fire."[161]

In *State v. Wofford*,[162] the court of appeals reversed the Superior Court of Gwinnett County's grant of a new trial based upon ineffective assistance of counsel.[163] The defendant had been convicted of aggra-

150. *Id.* at 457, 728 S.E.2d at 392.
151. *Id.* at 457-58, 728 S.E.2d at 392-93.
152. 291 Ga. 734, 733 S.E.2d 262 (2012).
153. *Id.* at 736, 733 S.E.2d at 264.
154. *Id.* at 735, 733 S.E.2d at 263.
155. *Id.* at 738-39, 733 S.E.2d at 265; *see also* O.C.G.A. § 9-14-42(c) (2006).
156. O.C.G.A. § 9-14-42(c)(3); *Sosa*, 291 Ga. at 738, 733 S.E.2d at 265.
157. *Sosa*, 291 Ga. at 735, 733 S.E.2d at 263.
158. Chaidez v. United States, 133 S. Ct. 1103, 1105 (2013).
159. 291 Ga. 534, 731 S.E.2d 740 (2012).
160. *Id.* at 534-35, 731 S.E.2d at 742.
161. *Id.* at 544-45, 731 S.E.2d at 749.
162. 321 Ga. App. 249, 739 S.E.2d 110 (2013).
163. *Id.* at 256, 739 S.E.2d at 115.

vated child molestation and child molestation for acts he allegedly committed on his girlfriend's two daughters, who were the primary witnesses against him. The trial court granted the new trial because trial counsel had failed to locate and present as witnesses two teachers who would have testified that, at the time of the alleged crimes, the daughters did not have good reputations for truthfulness. Trial counsel had testified that he did not call the teachers because he did not know about them, but there was no finding from the trial court that the lawyer reasonably should have known about them. Alone, that would be grounds to say that the accused had not sustained his burden to show that the trial counsel's representation was deficient.[164] The court of appeals went on, however, and appeared to conflate the deficiency prong and the prejudice prong by concluding that the lawyer exercised reasonable professional judgment by impeaching the victims in numerous other ways.[165] That conclusion, of course, would serve to undermine any argument that the failure to find and call the teachers harmed the defense; it has nothing to do with whether a reasonable lawyer would have found and called them.

C. *One Other Noteworthy Case Involving Ineffective Assistance*

Taylor v. State[166] was a direct appeal of convictions for conspiracy to manufacture methamphetamine and related charges.[167] The court of appeals rejected the defendant's argument that she was denied effective assistance of counsel because her attorney's law partner represented her co-defendant.[168] As required by the United States Supreme Court in *Cuyler v. Sullivan*,[169] her burden was to show an actual conflict of interest that adversely affected the lawyer's performance.[170] The court of appeals in *Taylor* concluded that there was no conflict because her lawyer and his law partner did not engage in "finger pointing" at each other and because the two lawyers pursued the same strategy—that both defendants were innocent and that Taylor was "not . . . as involved."[171]

The decision is questionable. The court's conclusion is correct only if one lawyer could have represented both defendants without a conflict.

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164. *Id.* at 249, 253-54, 258-59, 739 S.E.2d at 111, 113-14, 116-17.
165. *Id.* at 258, 739 S.E.2d at 117.
166. 320 Ga. App. 596, 740 S.E.2d 327 (2013).
167. *Id.* at 596, 740 S.E.2d at 331.
168. *Id.* at 602, 740 S.E.2d at 334.
169. 446 U.S. 335 (1980).
170. *Taylor*, 320 Ga. App. at 602-03, 740 S.E.2d at 334 (citing *Cuyler*, 446 U.S. at 348).
171. *Id.* at 604-05, 740 S.E.2d at 335-36. The opinion assumes that Taylor did not give informed consent to any conflict and thus affirmance is explicable only if the court concluded there was no conflict.

If one could not do so, neither could do so because the conflict would be imputed from one to the other.[172] The "unified strategy" of not pointing fingers at each other surely cannot alone establish that there was no conflict. The strategy itself might well be the result of the conflict, especially where, as here, one client appears to have been more culpable than the other.[173] That difference in culpability highlights another aspect of the conflict: An independent lawyer representing Taylor presumably could have sought a plea bargain in exchange for testimony against her more culpable co-defendant. Her lawyer could not do so because of his law partner's representation of the co-defendant. Furthermore, the decision was made at trial not to call the co-defendant, who presumably could have testified to Taylor's minimal involvement or even her innocence. Trial counsel made the decision not to subject that defendant to "extensive cross-examination."[174] The decision to spare one defendant from testifying, at the apparent cost of the other, is exactly the type of actual conflict that eventually led to a new trial in *Cuyler v. Sullivan*.[175] The court of appeals should have granted Ms. Taylor a new trial or at least remanded for further proceedings.

V. FORMAL ADVISORY OPINION ON IMPUTATION OF PUBLIC DEFENDER CONFLICTS[176]

The Georgia Supreme Court decided one significant case involving an opinion of the Formal Advisory Opinion Board during the survey period. The court, per curiam, unanimously approved Formal Advisory Opinion 10-1 (*FAO 10-1*), which had answered the following question in the

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172. GA. RULES OF PROF'L CONDUCT R. 1.10(a) (2012) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by [Rule 1.7 (2012)] . . . ."). Note also that the Georgia Rules of Professional Conduct express serious reservations about one lawyer representing co-defendants in criminal matters. Comment 7 to Rule 1.7 states in part: "The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant." GA. RULES OF PROF'L CONDUCT R. 1.7 cmt. 7 (2012).

173. *See* GA. RULES OF PROF'L CONDUCT R. 1.7 cmt. 7 ("An impermissible conflict may exist by reason of . . . the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.").

174. *Taylor*, 320 Ga. App. at 604, 740 S.E.2d at 336.

175. Sullivan v. Cuyler, 723 F.2d 1077, 1085-86 (3d Cir. 1983).

176. Other activities of the Formal Advisory Opinion Board are available online. James B. Ellington, *Annual Report of the Formal Advisory Opinion Board for Operational Year 2012-2013*, STATE BAR OF GEORGIA 2013 REPORT OF THE OFFICE OF GENERAL COUNSEL, at 11-20, *available at* http://www.gabar.org/barrules/ethicsandprofessionalism/upload/2012 13_OGC_Annual_Report.pdf.

negative: "May different lawyers employed in the circuit public defender office in the same judicial circuit represent co-defendants when a single lawyer would have an impermissible conflict of interest in doing so?"[177] In its original opinion and the substituted opinion issued soon after the survey period ended, the court first noted that the key question was whether a circuit public defender office is a "firm" within the meaning of the Georgia Rules of Professional Conduct Rule 1.10(a),[178] which imputes conflicts of interest among lawyers in a firm.[179] The court answered that circuit public defender offices are firms within the meaning of that rule.[180] The court rejected the argument that *FAO 10-1* would create an automatic or per se rule of disqualification for circuit public defender offices that are appointed to represent co-defendants.[181] The court noted that the imputation rule only arises when there is a conflict that prevents one attorney from representing two parties.[182] If there is no conflict for that attorney, there is no conflict to impute to others.[183] Having said that, the court cautioned that a lawyer, and therefore a circuit public defender office, could represent multiple defendants in a criminal case only in an "unusual" case.[184] The court responded to the fiscal arguments that *FAO 10-1* imposes unacceptable costs on the state's indigent defense system by stating that the "problem of adequately funding indigent defense cannot be solved by compromising the promise of [*Gideon v. Wainwright*[185]]."[186] the case that established the constitutional right to counsel in criminal cases.[187]

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177. *In re* Formal Advisory Op. 10-1, 2013 Ga. LEXIS 331 (Ga. Apr. 15, 2013), substitute opinion at 293 Ga. 397, 744 S.E.2d 798 (2013) [hereinafter *FAO 10-1 Adoption*]. In the substitute opinion issued soon after the survey period ended, the court stood by the reasoning and conclusion reached in the first opinion but took some pains to explain that its result might not be constitutionally required but instead could be changed by amendment of the Georgia Rules of Professional Conduct Rule 1.10(a). *See FAO 10-1 Adoption*, 293 Ga. at 401 n.4, 744 S.E.2d at 801 n.4.

178. GA. RULES OF PROF'L CONDUCT R. 1.10(a) (2012).

179. *In re FAO 10-1 Adoption*, 293 Ga. at 398, 744 S.E.2d at 799.

180. *Id.*

181. *Id.* at 400, 744 S.E.2d at 800.

182. *Id.*

183. *Id.*

184. *Id.*

185. 372 U.S. 335 (1963).

186. *In re FAO 10-1 Adoption*, 293 Ga. at 400, 744 S.E.2d at 800.

187. *Gideon*, 372 U.S. at 334-45. In a case that preceded the Supreme Court's approval of *FAO 10-1*, the court of appeals rejected claims of ineffective assistance of counsel regarding a public defender whose colleague in the same office had previously represented two victims. Johnson v. State, 320 Ga. App. 161, 161, 739 S.E.2d 469, 471 (2013). In the context of a claim of ineffective assistance, the defendant must show both an actual conflict and a material adverse effect on the representation. *Cuyler*, 446 U.S. at 348-49. The court

VI. JUDICIAL ETHICS

The Georgia appellate courts dealt with several noteworthy cases involving judicial ethics during the survey period. In *Heidt v. State*,[188] the supreme court rejected claims that a trial judge should have recused himself because the judge's impartiality could reasonably be questioned.[189] The defendant sought disqualification because the judge had signed search warrants and orders for records related to the case and because the judge had expressed agreement with a third party's statement that the defendant would not get a fair trial in Effingham County.[190] The first argument failed because disqualification for bias cannot be based upon knowledge gained as part of the case itself, while the second failed because the judge's agreement did not reveal any sort of bias.[191]

The court of appeals decided four relatively straightforward cases involving judicial ethics. In *Hargis v. State*,[192] the court reversed a criminal conviction because the trial judge did not recuse himself after an ex parte conversation with the lawyer for a co-defendant about the defendant's propensity for violence.[193] In *Callaham v. State*,[194] a trial judge, whose ruling had been reversed after the first trial, gave the defendant an increased sentence after a retrial.[195] The court of appeals held that the prosecution overcame the presumption that the increased sentence was vindictive by demonstrating that some of the evidence that justified the second sentence came from a time after the first sentencing.[196] The trial judge in *Braddy v. State*[197] conceded that an affidavit that alleged she had ex parte conversations with the lead investigator in the case was both timely and legally sufficient, but she nevertheless personally denied the motion to recuse.[198] The court of appeals agreed as to the timeliness and sufficiency of the affidavit.[199] As required by Uniform Superior Court Rule 25.3,[200] the court

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of appeals in *Johnson* found no evidence of either. 320 Ga. App. at 166, 739 S.E.2d at 476.

188. 292 Ga. 343, 736 S.E.2d 384 (2013).
189. *Id.* at 347, 736 S.E.2d at 389.
190. *Id.* at 348, 736 S.E.2d at 390.
191. *Id.*
192. 319 Ga. App. 432, 735 S.E.2d 91 (2012).
193. *Id.* at 432, 735 S.E.2d at 92.
194. 317 Ga. App. 513, 732 S.E.2d 88 (2012).
195. *Id.* at 513-14, 732 S.E.2d at 89.
196. *Id.* at 519, 732 S.E.2d at 93.
197. 316 Ga. App. 292, 729 S.E.2d 461 (2012).
198. *Id.* at 292, 729 S.E.2d at 463.
199. *Id.* at 295, 729 S.E.2d at 464-65.

vacated and remanded the case so that a different judge could rule on the motion.[201]

In *Lacy v. Lacy*,[202] the court of appeals dealt with a series of recusal issues arising from a custody dispute.[203] One involved a claim that the trial judge should have recused himself because he had met with the father of one of the parties before the case. The alleged meeting came to light because the mother could not refrain from posting on the father's Facebook page that "[the judge] and my dad ha[d] a meeting the week before our case and guess what[,] you lost your kids."[204] The court of appeals rejected the argument that this evidence required disqualification, because there was no evidence that the judge gained any relevant knowledge in that meeting.[205] The father also complained that a different judge who held a hearing in the case should have recused himself because the judge's son was married to the mother's aunt.[206] The court of appeals noted that, under Georgia law, the judge's son's relationship by marriage to a party in the case did not mean that the judge was related to the mother, and therefore no recusal was necessary.[207]

In a troublesome case, the court of appeals appears to have held that there is no need to inquire into a judge's bias at sentencing as long as the sentences are within statutory limits.[208] During the sentencing hearing, but before imposing the sentence for rape, aggravated sodomy,

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200. GA. UNIF. SUPER. CT. R. 25.3 (2013). The rule states in its entirety:

> When a judge is presented with a motion to recuse, or disqualify, accompanied by an affidavit, the judge shall temporarily cease to act upon the merits of the matter and shall immediately determine the timeliness of the motion and the legal sufficiency of the affidavit, and make a determination, assuming any of the facts alleged in the affidavit to be true, whether recusal would be warranted. If it is found that the motion is timely, the affidavit sufficient[,] and that recusal would be authorized if some or all of the facts set forth in the affidavit are true, another judge shall be assigned to hear the motion to recuse. The allegations of the motion shall stand denied automatically. The trial judge shall not otherwise oppose the motion.

Id.

201. *Braddy*, 316 Ga. App. at 295, 729 S.E.2d at 464-65.

202. 320 Ga. App. 739, 740 S.E.2d 695 (2013).

203. *Id.* at 739-40, 740 S.E.2d at 698-99.

204. *Id.* at 744, 740 S.E.2d at 701 (second alteration in original).

205. *Id.*

206. *Id.* at 748, 740 S.E.2d at 704.

207. *Id.* The court of appeals also dealt with a more routine judicial disqualification issue, the failure of the husband to seek disqualification of all of the judges of the Ocmulgee Circuit in a timely fashion or with the required affidavit. *Id.* at 749-50, 740 S.E.2d at 705.

208. *See* Ellicott v. State, 320 Ga. App. 729, 737, 740 S.E.2d 716, 723-24 (2013).

aggravated assault, aggravated battery, and false imprisonment, the trial judge "compared Ellicott's conviction to the 'death of a monster,' and commented that, given his family's history, Ellicott should have committed suicide," and "stated that he was imposing a sentence that would ensure that Ellicott would spend his life confined to a small cell where he would spend every day thinking about the freedom that he once had."[209]

The court of appeals noted that the trial judge would not have been permitted to take into account anything outside the record but brushed aside any need to consider the question because "the comments did not result in any prejudice to Ellicott, because his sentences were well within applicable statutory limits."[210] The opinion does not seem to allow for the possibility that a judge's bias could lead to sentences that are longer because of matters outside the record, even though they are within the permitted statutory range. This seems to be prejudice to a defendant, and the court could have given a more searching analysis to this possibility.

VII. CHANGES TO THE GEORGIA RULES OF PROFESSIONAL CONDUCT[211]

The supreme court made one significant set of changes to the Georgia Rules of Professional Conduct during the survey period.[212] Rule 5.5 governs the unauthorized practice of law and multijurisdictional practice.[213] The 2012 amendment added a subsection to permit lawyers who are licensed in foreign countries to practice in Georgia if the lawyer's services are for the lawyer's employer (or its organizational affiliates) and are not services requiring pro hac vice admission to a court.[214] The foreign lawyer also must be in the United States legally and must comply with all relevant portions of the United States' immigration law.[215] In amendments to comment 14 to Rule 5.5, the supreme court gave additional guidance about an American lawyer's

209. *Id.* at 735, 740 S.E.2d at 722.

210. *Id.* at 735-36, 740 S.E.2d at 723 (footnote omitted).

211. The Georgia Supreme Court also made several changes to the rules governing disciplinary procedure and fee arbitration. A summary of these changes is available online. Order Granting Mot. to Am. R. and Reg. of the State Bar of Georgia Dec. 1, 2012, *available at* http://www.gabar.org/barrules/ethicsandprofessionalism/upload/RecentBarRuleAmendments_1212.pdf.

212. For a red-lined version of the changes, see 17 GA. B.J. 1, Aug. 2011, at 97-101 (special issue).

213. GA. RULES OF PROF'L CONDUCT R. 5.5 (2012).

214. GA. RULES OF PROF'L CONDUCT R. 5.5(e).

215. GA. RULES OF PROF'L CONDUCT R. 5.5(f).

ability to render temporary legal services in Georgia on a transactional matter.[216] Rule 5.5(c)(4) allows such activities only if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction where the lawyer is admitted.[217] The comment provides an amended list of factors that the lawyer should consider in determining whether the services meet that standard.[218]

VIII. MISCELLANEOUS MATTERS

Georgia appellate courts decided several cases during the survey period related to miscellaneous aspects of legal ethics.[219] The court of appeals decided two cases involving attorneys' liens, one a straightforward application of the statute,[220] and one concluding that a separate declaratory judgment action was not the proper way to enforce an attorney's lien.[221]

In *Gunter v. State*,[222] the judge, the prosecutor, and defense counsel all agreed that the jury should be given the option to convict the defendant, who had been charged with aggravated assault, of the lesser-included offense of simple assault.[223] The trial judge, however, insisted that the defense counsel consult with the defendant, and when the defense counsel reported that the defendant would not agree to the jury charge on the lesser-included offense, the Superior Court of Gwinnett County refused to give it.[224] The defendant was convicted of aggravated assault, and the majority on appeal held that any complaint about the

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216. GA. RULES OF PROF'L CONDUCT R. 5.5 cmt. 14.

217. GA. RULES OF PROF'L CONDUCT R. 5.5(c)(4).

218. GA. RULES OF PROF'L CONDUCT R. 5.5 cmt. 14.

219. In addition to the miscellaneous cases mentioned in the text, it is worth noting that there were several reported cases during the survey period in which prosecutors made improper closing arguments. Lopez-Jimenez v. State, 317 Ga. App. 868, 871-72, 733 S.E.2d 42, 45 (2012) (prosecutor misstated evidence in closing argument but defense counsel's decision not to object did not constitute ineffective assistance of counsel); Fisher v. State, 317 Ga. App. 761, 766, 732 S.E.2d 821, 827 (2012) (golden rule argument improper but the Superior Court of Bartow County's curative instruction was sufficient); Holsey v. State, 316 Ga. App. 801, 805, 729 S.E.2d 465, 468 (2012) (argument about future dangerousness and argument outside the record, both harmless errors); Lewis v. State, 317 Ga. App. 218, 222, 735 S.E.2d 1, 5 (2012) (arguments outside the record were harmless error).

220. *In re* Estate of Estes, 317 Ga. App. 241, 242, 731 S.E.2d 73, 74-75 (2012).

221. McRae, Stegall, Peek, Harman, Smith & Manning, LLP v. Ga. Farm Bureau Mut. Ins. Co., 316 Ga. App. 526, 530, 729 S.E.2d 649, 653 (2012).

222. 316 Ga. App. 485, 729 S.E.2d 597 (2012).

223. *Id.* at 487, 729 S.E.2d at 599.

224. *Id.*

failure to give the charge for simple assault had been waived by the defendant's refusal.[225]

Judge McFadden dissented because, he argued, the trial court's refusal to give the charge when counsel wanted it, but the defendant did not, interfered with the attorney-client relationship.[226] The dissent raises an interesting issue about the division of authority between lawyer and client in a criminal case.[227] Georgia Rule of Professional Conduct 1.2(a) reserves certain decisions for the client.[228] The objectives of the representation belong to the client in all matters, and in criminal cases the client is entitled to decide whether to waive a jury trial, what plea to enter, and whether to testify.[229] Presumably the client's objective in a criminal case like *Gunter* is usually clear, to escape or minimize punishment for the crimes charged. The issue in *Gunter*—whether to give the jury the lesser-included charge—is a way of hedging the defendant's bets and thus is a means to that objective.[230] Generally, Rule 1.2(a) states that the lawyer's responsibility as to means is to consult with the client.[231] That appears to have happened in the *Gunter* case. The crucial issue is: What happens if the lawyer and client disagree about the means, as the lawyer and client did in *Gunter*?

The Rules of Conduct assign neither the lawyer nor the client the right to trump the other as to means.[232] Comment 2 to Rule 1.2

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225. *Id.*

226. *Id.* at 488-89, 729 S.E.2d at 600-01 (McFadden, J., dissenting).

227. *Id.* at 489, 729 S.E.2d at 600.

228. GA. RULES OF PROF'L CONDUCT R. 1.2(a) (2012).

229. GA. RULES OF PROF'L CONDUCT R. 1.2(a) reads in its entirety:

> Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the scope and objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial[,] and whether the client will testify.

GA. RULES OF PROF'L CONDUCT R. 1.2(a).

230. *Gunter*, 316 Ga. App. at 487, 729 S.E.2d at 599.

231. GA. RULES OF PROF'L CONDUCT R. 1.2(a).

232. GA. RULES OF PROF'L CONDUCT R. 1.2 cmt. 2. The relevant language is in comment 2 to Rule 1.2:

> On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal[,] and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might

provides that a client "usually defer[s]" to the lawyer's judgment on technical, legal, or tactical matters but also notes that the rule does not prescribe how disagreements are to be resolved.[233] The comment then notes that "[o]ther law . . . may be applicable and should be consulted by the lawyer."[234] In the absence of such direction, however, the comment appears to leave the lawyer with the choice either to find agreement with the client, seek to withdraw, or wait to be fired.[235]

Judge McFadden's central point was that there is "other law" in these particular circumstances, and that "other law" gives the lawyer the exclusive right to decide whether the court should give the charge for a lesser-included offense.[236] The "other law" consists of a series of Georgia appellate cases, none of which deals specifically with the issue of whether to give the charge for a lesser-included offense.[237] The Georgia cases state a more general rule, one derived from the American Bar Association Standards for the Defense Function:

> Control and direction of the case. (a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions [that] are to be made by the accused after full consultation with counsel are: (i) what plea to enter; (ii) whether to waive jury trial; [and] (iii) whether to testify in his [or her] own behalf. (b) The decisions on [what] witnesses to call, whether and how to conduct cross-examinations, what jurors to accept or strike, what trial motions should be made, and *all other strategic and tactical decisions are the exclusive province of the lawyer* after consultation with his client.[238]

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be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. Conversely, the client may resolve the disagreement by discharging the lawyer.

GA. RULES OF PROF'L CONDUCT R. 1.2 cmt. 2 (internal citations omitted).

233. GA. RULES OF PROF'L CONDUCT R. 1.2 cmt. 2.

234. GA. RULES OF PROF'L CONDUCT R. 1.2 cmt. 2.

235. GA. RULES OF PROF'L CONDUCT R. 1.2 cmt. 2.

236. *Gunter*, 316 Ga. App. at 489, 729 S.E.2d at 600-01 (McFadden, J., dissenting).

237. *Id.*

238. Van Alstine v. State, 263 Ga. 1, 2-3, 426 S.E.2d 360, 362 (1993) (alterations in original) (emphasis added) (holding that it was not ineffective assistance of counsel to fail to consult about a lesser-included offense when it was clear that the client would have rejected it) (quoting Reid v. State, 235 Ga. 378, 379, 219 S.E.2d 740, 742 (1975)). *See also* McDaniel v. State, 279 Ga. 801, 802, 621 S.E.2d 424, 426-27 (2005) (holding that there was

If Judge McFadden is right that this general statement means that lawyers have the exclusive power to decide whether to seek a jury charge on a lesser-included offense, then what should have happened in *Gunter* would be clear.[239] After consultation with the client, the lawyer would choose a strategy. If the trial court refused to give the charge solely because the client would not agree to it, over the lawyer's request, then that would be error and would, as Judge McFadden concluded, be an interference with the attorney-client relationship.[240]

In *Heidt*, the supreme court rejected an argument that the Superior Court of Effingham County had erred when it disqualified one of the lawyers for a murder defendant.[241] The lawyer represented both the defendant and the defendant's lover (the widow of one of the victims, the defendant's brother). The woman also faced charges related to the murders.[242] The supreme court ruled that the trial court properly disqualified the lawyer because there was a serious potential for conflict at the time of the order, a potential that later became reality when the woman testified against the defendant.[243]

In *Amusement Sales, Inc. v. State*,[244] disqualification was also an issue.[245] The district attorney for the Middle Judicial Circuit of Georgia had hired two attorneys in private practice as Special Assistant District Attorneys (SADA) to pursue forfeiture of gaming equipment and

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no ineffective assistance of counsel when lawyer chose not to hire defense expert but instead relied on cross-examination of state's expert); Austin v. Carter, 248 Ga. 775, 780, 285 S.E.2d 542, 545 (1982) (holding that there was no ineffective assistance of counsel when trial counsel chose not to cross-examine all of state's witnesses); *Reid*, 235 Ga. at 380-81, 219 S.E.2d at 742 (holding that counsel has power to decide what arguments to raise on appeal); *Wofford*, 321 Ga. App. 249, 257, 739 S.E.2d 110, 116 (holding that there was no ineffective assistance of counsel when counsel did not find and call two witnesses who had opinions about the truthfulness of two victims).

239. Despite the authorities upon which the dissent relies, there are good arguments that the decision on the lesser-included charge should not be for the lawyer alone. This decision is more like the decision about what plea to enter than the decision about what arguments to raise, what witnesses to call, and what questions to ask, all of which are squarely in the lawyer's area of greater expertise. How much of a risk a client is willing to take on a lesser-included charge calls less for that expertise and more for the client's own sense of risk aversion or preference. Surely the client's autonomy demands at least a role in the decision.

240. *Gunter*, 316 Ga. App. at 490, 729 S.E.2d at 600 (McFadden, J., dissenting).

241. *Heidt*, 292 Ga. at 343, 736 S.E.2d at 386-87.

242. *Id.* at 343, 345, 736 S.E.2d at 386, 388.

243. *Id.* at 347, 736 S.E.2d at 389.

244. 316 Ga. App. 727, 730 S.E.2d 430 (2012).

245. *Id.* at 727, 730 S.E.2d at 433.

proceeds.[246] Because the SADA were to receive contingent fees in the quasi-criminal cases, the court of appeals held that the Superior Court of Emanuel County should have disqualified the lawyers because of a conflict of interest.[247] This decision was in accord with both an earlier court of appeals decision and a recent statutory amendment.[248]

In *Jefferson v. Stripling*,[249] the court of appeals considered the application of the Georgia Anti-Strategic Lawsuit Against Public Participation (Anti-SLAPP) statute[250] to a case in which a lawyer sought damages for tortious interference with her business, among other theories, from three individuals who had filed grievances with the State Bar of Georgia.[251] The court concluded that the Anti-SLAPP statute applied to the case because disciplinary proceeding[s] are "official proceeding[s] authorized by law."[252] The court remanded for a hearing required under the Anti-SLAPP statute.[253]

Finally, it is worth noting *Clarke v. State*,[254] if for no other reason than as a reminder that lawyers are subject to the criminal law as well as to rules of discipline and malpractice law. Sandra Clarke was an attorney who handled cases through Gwinnett County's indigent defense program. A jury convicted Clarke of nine felony counts of theft by taking because she did not remit her fees as indigent defense counsel to the law firm that employed her.[255] The court of appeals affirmed the conviction, holding that there was sufficient evidence of criminal intent and that the fees belonged to the firm per an oral contract of employment.[256]

IX. CONCLUSION

As usual, the survey period was an eventful one with respect to legal ethics in Georgia. As the Georgia Rules of Professional Conduct note, "a lawyer should engage in continuing study and education" to maintain

246. *Id.* at 728, 730 S.E.2d at 433.
247. *Id.* at 736, 730 S.E.2d at 438.
248. Id. at 736 & n.4, 730 S.E.2d at 436 & n.4; *see also* O.C.G.A. § 16-1-12 (Supp. 2013); Greater Ga. Amusements, LLC v. State, 317 Ga. App. 118, 728 S.E.2d 744 (2012).
249. 316 Ga. App. 197, 728 S.E.2d 826 (2012).
250. O.C.G.A. § 9-11-11.1 (2006).
251. 316 Ga. App. at 197-99, 728 S.E.2d at 827-28.
252. *Id.* at 200, 728 S.E.2d at 829 (alteration in original).
253. *Id.* at 201, 728 S.E.2d at 829.
254. 317 Ga. App. 471, 731 S.E.2d 100 (2012).
255. *Id.* at 472, 731 S.E.2d at 102.
256. *Id.* at 475, 731 S.E.2d at 104.

competence,[257] and recent decisions with respect to legal ethics surely deserve such study.

257. GA. RULES OF PROF'L CONDUCT R. 1.1 cmt. 6 (2012).

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