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Legal Ethics

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I. INTRODUCTION

This Survey covers the period from June 1, 2021 to May 31, 2022. The Article discusses developments with respect to attorney discipline, bar admission, malpractice and other civil claims, ineffective assistance of counsel, disqualification of counsel, contempt, prosecutorial misconduct, judicial conduct, amendments to the Georgia Rules of Professional Conduct, and formal advisory opinions of the State Bar of Georgia Formal Advisory Opinion Board.[1]

II. ATTORNEY DISCIPLINE

A. Disbarments

1. Trust Account and Other Financial Issues

Three lawyers lost their licenses during the Survey period because of misconduct involving their trust accounts or because of other financial improprieties.[2]

Timothy Walter Boyd was disbarred for his misconduct in connection with the representation of a client whose daughter died.[3] Boyd defaulted in the disciplinary case and thus admitted the alleged facts. Boyd represented the client in the administration of his daughter's estate.

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1. For an analysis of Georgia legal ethics during the June 1, 2020 to May 31, 2021, survey period, *see* Patrick Emery Longan, *Legal Ethics*, *Annual Survey of Georgia Law*, 73 MERCER L. REV. 155 (2021), https://digitalcommons.law.mercer.edu/jour_mlr/vol67/iss1/11/ [https://perma.cc/U756-RGJ5].

2. Lawyers in Georgia can submit petitions for voluntary discipline. GA. RULES OF PRO. CONDUCT r. 4-227 (2022). 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* Boyd, 312 Ga. 282, 862 S.E.2d 135, 136 (2021).

Boyd estimated that his services would cost the client between $2,000 and $5,000. One service Boyd rendered was to help sell the daughter's residence; the closing statement revealed that Boyd had directed the payment of $14,397.50 to his firm for attorney's fees without the knowledge or authorization of his client. Boyd deposited the remaining proceeds of the sale into a checking account—not a trust account—and wrote two checks for cash totaling $14,650, again without the client's knowledge or permission. Last, Boyd failed to follow the client's instructions about two checks from an insurance company and did not fulfill his duties of communication with the client.[4]

The Supreme Court of Georgia agreed with the special master that Boyd violated Rule 1.2, Rule 1.3, Rule 1.4, Rule 1.5, Rule 1.15(I), Rule 4.1, and Rule 8.4.[5] The special master found no factors in mitigation but noted that, in aggravation, Boyd had a prior disciplinary history, committed numerous rule violations, engaged in a pattern of misconduct, acted for a dishonest or selfish motive, harmed a vulnerable victim, engaged in bad faith conduct during the disciplinary proceeding, and had substantial experience in the practice of law.[6]

Next, the Supreme Court of Georgia accepted the voluntary surrender of Waymon Sims's license after he admitted misconduct in connection with five bank accounts.[7] Sims commingled personal and client funds in purported trust accounts and paid personal and business expenses from those accounts.[8] Two of the purported trust accounts used by Sims were not even true trust accounts because the interest from the accounts did not go to the Georgia Bar Foundation or the client.[9]

Matthew Alexander Bryan was disbarred in Georgia, as a matter of reciprocal discipline, after he was disbarred in Montana for misconduct related to a trust.[10] Bryan created the trust for a Georgia resident. When the settlor died in 2013, the trust had an approximate value of $398,000, but the beneficiary was unable to locate Bryan for three years. After the

4. *Id.* at 282–84, 862 S.E.2d at 136–37.

5. *Id.* at 284, 862 S.E.2d at 137. *See* GA. RULES OF PRO. CONDUCT r. 1.2 (duty to follow client's instructions), r. 1.3 (duty of diligence), r. 1.4 (duty of communication), r. 1.5 (duty to charge only reasonable fees), r. 1.15(I) (duties to keep estate funds in a trust account, to pay amounts owed to client and third parties, and to account for funds in response to client request), r. 4.1 (duty of truthfulness in connection with fees allegedly owed to law firm on sale of residence), r. 8.4 (deceit related to fees paid at closing, checks drawn for cash from estate funds, and opening secret bank accounts).

6. *Id.* at 285, 862 S.E.2d at 138.

7. *In re* Sims, 313 Ga. 117, 117–18, 868 S.E.2d 192, 193 (2022).

8. *Id.* at 118, 868 S.E.2d at 193.

9. *Id.*

10. *In re* Bryan, 312 Ga. 286, 862 S.E.2d 146, 147 (2021).

beneficiary located him in 2016, Bryan made excuses for the next two years about why the trust funds were unavailable.[11] The beneficiary eventually complained to the Montana disciplinary authorities, who disbarred Bryan after he failed to respond to Montana authorities who found that Bryan had engaged in "extreme dishonesty and breaches of duty."[12]

2. Client Abandonment and Lack of Communication

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

Evelyn Proctor was disbarred after she defaulted in connection with three disciplinary matters.[13] Proctor abandoned three clients: one who wanted to seek a divorce, one who wanted a child support modification, and one who had been accused of a misdemeanor.[14] Proctor had no prior disciplinary history, but the supreme court observed in aggravation that Proctor had substantial experience in the practice of law and engaged in multiple offenses and a pattern of misconduct.[15]

The supreme court accepted the voluntary surrender of David J. Farnham's license.[16] In his petition, Farnham admitted that he represented a minor in a personal injury matter and, after receiving $250,000 in settlement of the claim, Farnham promised to file a petition in probate court for approval. Farnham never did so, although he did eventually send the settlement funds to the client's new counsel.[17] Farnham had an extensive history of prior discipline and another disciplinary matter pending.[18]

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11. *Id.*

12. *Id.* at 286–87, 862 S.E.2d at 147.

13. *In re* Proctor, 313 Ga. 637, 872 S.E.2d 691, 692 (2022).

14. *Id.* at 637–38, 872 S.E.2d at 692.

15. *Id.* at 639, 872 S.E.2d at 693.

16. *In re* Farnham, 313 Ga. 801, 802, 873 S.E.2d 164, 166 (2022).

17. *Id.* at 802, 873 S.E.2d at 165.

18. *In re* Farnham, 312 Ga. 65, 860 S.E.2d 547 (2021). There was a reported decision regarding the other disciplinary matter during the Survey period. The special master struck the respondent's answer without a hearing due to a lengthy history of delays in discovery caused by the respondent and incomplete responses provided by him. *Id.* at 68, 860 S.E.2d at 549–50. The Supreme Court of Georgia held that the special master should not have stricken the respondent's answer without a hearing and remanded the matter for further proceedings before the special master. *Id.* at 70, 860 S.E.2d at 551. Although a hearing is not always necessary, it is most often required unless a case involves either a total failure to respond in discovery or to provide any explanation for the failure to meet discovery obligations. *Id.*, 860 S.E.2d at 550. The supreme court instructed the special master that, if the motion to strike were to be granted, the special master should hold a

Tiffini Colette Bell was disbarred for a pattern of misconduct concerning the representation of a client in a dispossessory action.[19] Bell made a series of misrepresentations to the client during the course of the proceedings. Bell made false statements about when she filed the complaint, when and whether she had the defendant served, and that she would amend the complaint. Bell also stated that she had filed a motion for default, that she had filed a necessary certificate that the defendant was not on active duty, and that she would refile the case after it was dismissed. The case was dismissed because Bell did not attend a hearing, and Bell failed to communicate adequately with the client about the case. The special master found in aggravation that Bell had an extensive history of prior discipline, acted for dishonest or selfish motives, engaged in a pattern of misconduct, committed numerous offenses, and had substantial experience in the practice of law.[20] Bell claimed the conduct occurred at a time when she was mentally unfit to practice law, but the special master found that Bell had presented no evidence other than her own unsubstantiated testimony that she suffered from a mental condition that affected her ability to practice law.[21]

The supreme court also disbarred Joel S. Wadsworth.[22] During the disciplinary process, Wadsworth did not respond to the complaint against him. Wadsworth thereby admitted that he abandoned several clients in a civil case and that, after he was suspended for failing to pay his bar dues, Wadsworth neither informed the clients nor withdrew from the case.[23] The special master found no mitigating factors and found in aggravation that Wadsworth had been disciplined four times before, had a dishonest or selfish motive, had committed multiple offenses, and had substantial experience in the practice of law.[24]

Last, the supreme court disbarred Joseph Roger Davis after he defaulted in the disciplinary process.[25] By his default, Davis admitted the allegations against him. Specifically, Davis accepted a retainer to represent a client in a criminal matter. The client expressed concerns about outstanding arrest warrants. She asked Davis to find out about the warrants and, if necessary, to arrange for her to turn herself in. Davis

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hearing on aggravation and mitigation. If the motion to strike were to be denied, the case was to proceed through discovery and an evidentiary hearing. *Id.*, 860 S.E.2d at 551.

19. *In re* Bell, 313 Ga. 615, 872 S.E.2d 290 (2022).
20. *Id.* at 615–16, 872 S.E.2d at 291.
21. *Id.* at 617–18, 872 S.E.2d at 292.
22. *In re* Wadsworth, 312 Ga. 159, 861 S.E.2d 104 (2021).
23. *Id.* at 159–60, 861 S.E.2d at 105–06.
24. *Id.* at 160, 861 S.E.2d at 106.
25. *In re* Davis, 311 Ga. 797, 860 S.E.2d 467, 468 (2021).

did not conduct an appropriate investigation and then falsely told the client that there were no outstanding warrants. The client made additional payments to Davis, but he did not respond to her inquiries, did not appear at a hearing, did not explain how he earned the payments the client was making, and repeatedly told the client that there were no outstanding warrants. Eventually, the client was arrested and spent seven weeks in jail on warrants that had been issued before the client ever hired Davis. One reason cited by the prosecution to keep the client in jail for so long was the failure to turn herself in despite knowing about the warrants. The client eventually was released with the help of another attorney. Davis never responded to a letter from the client asking Davis how he earned the fees she paid him and who Davis had contacted about the warrants.[26]

The special master found that by these actions Davis violated numerous rules of professional conduct.[27] Additionally, there were many aggravating factors including a dishonest or selfish motive, a pattern of misconduct, refusal to acknowledge wrongful conduct, and substantial experience in the practice of law. The supreme court agreed and added to the list of aggravating factors the fact that Davis had received confidential discipline in 2015.[28]

3. Criminal Activity

Four lawyers were disbarred as a result of criminal conduct.

The Supreme Court of Georgia accepted the voluntary surrender of the license of Donald Francis Hawbaker.[29] Hawbaker was convicted of five felony counts of aggravated assault on a peace officer after Hawbaker opened fire on deputies who came to his home with an arrest warrant for simple assault and disorderly conduct.[30]

The supreme court also accepted the petition for voluntary surrender of Mark Preston Jones's license.[31] Jones was convicted of influencing a witness, violating an oath of a public officer, and attempted violation of oath of a public officer—all felonies.[32]

Donald Richard Donovan was indicted on five felony counts, including bribery and false swearing, while he served as the district attorney for

26. *Id.* at 798, 860 S.E.2d at 469.
27. *Id.* at 799, 860 S.E.2d at 469.
28. *Id.*
29. *In re* Hawbaker, 314 Ga. 77, 872 S.E.2d 690 (2022).
30. *Id.*
31. *In re* Jones, 313 Ga. 571, 571–72, 871 S.E.2d 671 (2022).
32. *Id.*

Paulding County.[33] Donovan pled guilty to a misdemeanor and admitted that he had made false statements in an affidavit. As part of the plea deal, Donovan agreed to surrender his law license.[34] The supreme court accepted the surrender, finding that Donovan had violated Rule 8.4(a)(3).[35]

Last, Billy Reid Zeh III's petition for voluntary surrender was accepted.[36] Zeh plead guilty to one count of aggravated assault and one count of simple assault.[37]

4. One Miscellaneous Disbarment

One attorney was disbarred for misconduct that did not fit into the foregoing categories. Jerry Boykin was on disabled status and thus not eligible to practice law.[38] Boykin nevertheless filed a petition to probate a will. When Boykin learned that the decedent had executed a subsequent will, Boykin tried but failed to persuade one of the co-executors to renounce the appointment. When his persuasion failed, Boykin forged the executor's name on an affidavit renouncing the appointment, notarized the falsified affidavit, and submitted it to the probate court.[39] The supreme court accepted the voluntary surrender of his license.[40]

B. Suspensions

The Supreme Court of Georgia suspended six lawyers during the Survey period.[41]

The supreme court accepted the petition for voluntary discipline of Reginald J. Lewis and suspended him for six months.[42] Lewis undertook to represent a client in a personal injury matter, but Lewis did not communicate with the client or do any work on the case. Although Lewis eventually notified the client that he was no longer representing her,

33. *In re* Donovan, 313 Ga. 557, 871 S.E.2d 282 (2022).

34. *Id.*

35. *Id. See* GA. RULES OF PRO. CONDUCT r. 8.4(a)(3) (conviction of a misdemeanor involving moral turpitude when the underlying conduct relates to the lawyer's fitness to practice law).

36. *In re* Zeh, 313 Ga. 56, 867 S.E.2d 124 (2021).

37. *Id.*

38. *In re* Boykin, 313 Ga. 332, 869 S.E.2d 500 (2022).

39. *Id.*

40. *Id.* at 333, 869 S.E.2d at 500.

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

42. *In re* Lewis, 313 Ga. 695, 697, 872 S.E.2d 693, 695 (2022).

Lewis did not send the client her file. In another case, Lewis filed a statement of claim in magistrate court. The parties agreed to transfer the case to superior court, but Lewis did no further work on the case other than to dismiss the case without prejudice. Lewis did not tell the client about the dismissal or otherwise communicate with the client about the case. In a third matter, Lewis filed suit, but the case was dismissed when Lewis did not appear for a calendar call. Lewis did not inform the client and tried to file a renewal action one week late. When the defendant moved to dismiss the renewal action as untimely, Lewis did not respond or inform the client of the motion or the court's decision to grant the motion.[43]

Lewis argued in mitigation that he had no prior disciplinary record, lacked a dishonest or selfish motive, was cooperative in the disciplinary proceedings, and was remorseful.[44] The State Bar of Georgia did not oppose the petition for voluntary discipline but noted in aggravation that Lewis committed multiple offenses, engaged in a pattern of misconduct, and had substantial experience in the practice of law.[45]

The supreme court suspended Phillip Norman Golub for one year with conditions for reinstatement.[46] Golub undertook to represent an elderly client in two related matters. During those proceedings, Golub did not pursue the claims diligently and failed to communicate with the client, either directly or through the client's son. Golub misled the client's son into believing that the defendants had defaulted and that the case would be put on a trial calendar when, in fact, some of the defendants had filed motions. The defendants served discovery, but Golub did not respond. Golub took no action in the cases for roughly two years. When the cases were called to trial, Golub dismissed them and then filed renewal actions without informing or consulting with the client. Because Golub did not communicate with his client, Golub did not learn that she had died before the renewal actions were filed. A year later, Golub—again without informing the client's son or consulting with him—dismissed the claims a second time. Golub did not return any of the $7,500 he had been paid to handle these matters.[47]

The supreme court approved the special master's report in which the special master found that Golub had violated Rule 1.2, Rule 1.3, Rule 1.4,

43. *Id.* at 695–96, 872 S.E.2d at 694.

44. *Id.* at 696, 872 S.E.2d at 694.

45. *Id.* at 697, 872 S.E.2d at 694.

46. *In re* Golub, 313 Ga. 686, 694, 872 S.E.2d 699, 705 (2022).

47. *Id.* at 687–88, 872 S.E.2d at 700–01.

Rule 1.16(d), Rule 3.2, and Rule 8.4(a)(3).[48] In aggravation, the special master observed that Golub was disciplined before (albeit many years before), had substantial experience in the practice of law, committed multiple offenses, and was representing a vulnerable client. Although the special master found that Golub did not initially act with a dishonest or selfish motive, the report stated that Golub had misled the client and the client's son about the status of the proceedings. In mitigation, the special master found that Golub suffered serious health issues during the representation and expressed remorse.[49] The supreme court approved the special master's recommendation of a twelve-month suspension with reinstatement contingent upon Golub's refunding the full $7,500 fee and paying any costs associated with ensuring the funds are available to the client's heirs.[50]

Next, the supreme court accepted a petition for voluntary discipline and suspended Sawand Palmer for three months.[51] Palmer's reinstatement was conditioned on the satisfaction of numerous conditions. Palmer violated Rule 5.5 by continuing to practice law while she was suspended for failure to complete her required continuing legal education hours.[52] According to the record, Palmer suffered mental and emotional difficulties after the death of her father and because of a past violent relationship.[53] Palmer's reinstatement to practice law was contingent upon adherence to a medication regimen. Palmer was further required to attend regular meetings with mental health professionals and a substance abuse program for impaired professionals. Last, Palmer was required to maintain her continuing legal education hours.[54]

The supreme court accepted a fourth petition for voluntary discipline of Anthony O. Van Johnson.[55] Van Johnson was suspended for six months due to misconduct in connection with two separate matters. In the first, Van Johnson represented a client in a personal injury case and received $9,000 in settlement of the claim. Van Johnson paid himself $3,000 without notifying the client or delivering the remaining funds to the

48. *Id.* at 688, 872 S.E.2d at 701. *See* GA. RULES OF PRO. CONDUCT r. 1.2 (duty to consult with client about means of achieving client objectives), r. 1.3 (duty of diligence), r. 1.4 (duty of communication), r. 1.16(d) (duty to return unearned fees upon conclusion of representation), r. 3.2 (duty to expedite litigation), r. 8.4(a)(3) (prohibition on dishonesty, fraud, deceit, and misrepresentation).

49. *In re* Golub, 313 Ga. at 693–94, 872 S.E.2d at 704.

50. *Id.* at 694–95, 872 S.E.2d at 705.

51. *In re* Palmer, 313 Ga. 115, 117, 868 S.E.2d 234, 235 (2022).

52. *See* GA. RULES OF PRO. CONDUCT r. 5.5.

53. *In re* Palmer, 313 at 116, 868 S.E.2d at 235.

54. *Id.* at 117, 868 S.E.2d at 235.

55. *In re* Van Johnson, 313 Ga. 151, 154, 868 S.E.2d 794, 797 (2022).

client and the client's medical care providers. Instead, Van Johnson transferred all but $1 of the funds to his law firm's operating account. Van Johnson did not respond to some of the client's requests for information about the settlement proceeds and at other times gave inaccurate responses. After the client filed a grievance, Van Johnson remitted the settlement funds to the client and the client's medical care providers. Van Johnson also refunded his $3,000 fee to the client. In the second matter, Van Johnson waited several months before filing a contempt action and a name-change petition for a client and her son. During that delay, Van Johnson failed to communicate adequately with the client. Van Johnson again refunded the fee the client had paid.[56]

In aggravation, Van Johnson had substantial experience in the practice of law and committed multiple offenses.[57] In mitigation, Van Johnson had no prior disciplinary history, experienced personal or emotional problems that affected his practice, and expressed remorse.[58] The supreme court suspended Van Johnson for six months with reinstatement contingent upon Van Johnson completing an assessment of his practice under the Law Practice Management Program of the State Bar.[59]

The supreme court accepted the fifth petition for voluntary discipline from William Leslie Kirby III and ordered a six-month suspension.[60] Kirby's misconduct occurred in four separate matters. First, Kirby filed a child support modification action but failed to appear at a hearing on a motion for contempt. The client was found in contempt. Kirby did not respond to multiple requests for information from the client and did not do the work necessary for the representation. Next, Kirby represented a client who was convicted on criminal charges. Kirby told the client that he would not represent her on appeal. Kirby did not file a notice of withdrawal or provide a copy of the client's file to her new counsel, even though new counsel filed a motion to compel its production. A third client fired Kirby, but Kirby prevented the client from retaining new counsel by failing to file a notice of withdrawal. The fourth matter was a divorce proceeding in which Kirby stopped communicating with the client and did no work on the case for eighteen months after the case was filed. The client eventually fired Kirby, who did not provide the client with a copy

56. *Id.* at 151–52, 868 S.E.2d at 796.

57. *Id.* at 152–53, 868 S.E.2d at 796–97.

58. *Id.* at 152, 868 S.E.2d at 796.

59. *Id.* at 154, 868 S.E.2d at 797–98.

60. *In re* Kirby, 312 Ga. 341, 342, 862 S.E.2d 550, 551 (2021).

of the file, did not file a notice of withdrawal, and did not respond to the client's questions or request for a refund.[61]

Kirby presented evidence that his misconduct arose from stress caused by the death of his parents and that he was under the care of a licensed psychologist.[62] The supreme court noted that Kirby had taken the steps necessary to help deal with the underlying causes of his conduct and concluded that a six-month suspension was an appropriate sanction.[63]

Last, the supreme court accepted a petition for voluntary discipline in the form of a six-month suspension for Carl S. Von Mehren due to misconduct that occurred in connection with two separate matters.[64] In the first, Von Mehren held $70,000 in his trust account for a client but did not maintain adequate records related to the account. As a result, the balance in the trust account fell below $70,000 at various times. In the second, Von Mehren agreed to represent a client in connection with a land dispute but did not file suit because he lost the client's affidavit. After the opposing party filed suit, Von Mehren learned information that led him to conclude that the client's legal position was untenable. Von Mehren told the client that he would not continue to represent the client but did not confirm that in writing. The client defaulted in the case, although he was able to have the default opened after retaining new counsel.[65]

The special master found that in both instances Von Mehren had acted negligently but that his misconduct caused no harm in the first case and little or no harm in the second.[66] The supreme court accepted the special master's recommendation that Von Mehren be suspended for six months.[67]

C. Public Reprimands

Three lawyers received public reprimands during the Survey period.

Justin Grey Woodward received a public reprimand because he failed to communicate and consult with clients properly in one case and because Woodward mishandled his trust account on two other occasions.[68] Woodward represented a couple in a suit against a general contractor, but, before trial, Woodward did not respond to his clients' requests for

61. *Id.* at 342–43, 862 S.E.2d at 551–52.
62. *Id.* at 343, 862 S.E.2d at 552.
63. *Id.* at 344, 862 S.E.2d at 552.
64. *In re* Von Mehren, 312 Ga. 345, 349, 862 S.E.2d 547, 550 (2021).
65. *Id.* at 346–47, 862 S.E.2d at 548–49.
66. *Id.* at 348, 862 S.E.2d at 549.
67. *Id.* at 349, 862 S.E.2d at 550.
68. *In re* Woodward, 313 Ga. 112, 112–13, 868 S.E.2d 231, 232 (2022).

information. Woodward also did not consult with the clients about how to achieve their objectives. After trial, which resulted in a judgment against the couple, Woodward did not respond adequately to their questions about the best way to proceed. Then, the first of the two trust account matters arose when Woodward tried to make a one-time transfer from his trust account for earned fees but inadvertently set up a weekly transfer for that amount. The mistake caused an overdraft which Woodward resolved by depositing sufficient funds into the account. Next, Woodward unintentionally overdrew the trust account by mistake when he presented a check for payment before a PayPal payment from the client processed. Again, Woodward deposited funds to cover the overdraft.[69]

The supreme court noted in aggravation that Woodward had previously been disciplined in Tennessee, had committed multiple offenses, and that he had substantial experience in the practice of law.[70] In mitigation, the court considered Woodward's remorse, his actions to rectify the consequences of his misconduct, his lack of a selfish or dishonest motive, personal issues arising from the need to care for his ill-father, and his cooperative attitude toward the proceedings.[71] The supreme court concluded that a public reprimand was appropriate, although the court noted that the sanction likely would have been more severe if there was any evidence of additional misconduct.[72]

The supreme court accepted a petition for voluntary discipline in the form of a public reprimand for Monte Kevin Davis.[73] Davis admitted that he violated Rule 3.1,[74] which prohibits lawyers from taking action on behalf of a client "when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another."[75] Davis had attempted on behalf of a client to mediate a domestic dispute between the client and a former client of Davis. When the former client was not responsive, Davis sent her a text message informing the former client that he was aware she was an "illegal alien" and threatened to call immigration authorities and have her picked up. Davis also stated in the message that he knew her address.[76] The maximum penalty for a

69. *Id.*
70. *Id.* at 115, 868 S.E.2d at 233.
71. *Id.* at 114–15, 868 S.E.2d at 233.
72. *Id.* at 115, 868 S.E.2d at 233.
73. *In re* Davis, 312 Ga. 808, 865 S.E.2d 132, 133 (2021).
74. *Id.*
75. GA. RULES OF PRO. CONDUCT r. 3.1.
76. *In re* Davis, 312 Ga. at 808, 865 S.E.2d at 133.

violation of Rule 3.1 is a public reprimand.[77] The supreme court approved that sanction after considering the aggravating and mitigating factors.[78] In aggravation, Davis had substantial experience in the practice of law and acted with a dishonest or selfish motive. Furthermore, the victim of his misconduct was vulnerable. In mitigation, the supreme court observed that Davis had been both cooperative and remorseful.[79]

Leonard T. Mathis successfully petitioned to receive voluntary discipline in the form of a public reprimand for misconduct related to his trust account.[80] A personal injury client received a check from Mathis as part of a settlement, but, when the client negotiated the $47,000 check, there was only $18,000 in the trust account. Mathis immediately made the client whole, but this incident turned out not to be the only issue with the trust account. Because of insufficient recordkeeping and his misunderstanding of proper trust account management, Mathis had been obliged to deposit funds from his personal and operating accounts to make sure that there was enough money in the trust account to cover checks that were issued. In mitigation of these admitted violations of Rule 1.15(I)(a) and 1.15(II)(b), Mathis argued that no clients were harmed and that he did not have a dishonest or selfish motive. Mathis further instituted interim rehabilitation steps, was cooperative and did not have substantial experience in the practice of law. Last, Mathis had a good reputation and expressed remorse.[81] The court found no factors in aggravation and approved the petition for a public reprimand.[82]

D. Review Board Reprimands

One lawyer received a review board reprimand during the Survey period. Debra Kaye Scott negligently violated Rule 1.5(b) when she failed to explain the basis for her fee.[83] Scott's failure to do so led to a misunderstanding with her client about a $13,000 payment the client made to Scott. In another case, Scott negligently failed to reasonably communicate with a client about a deadline for witness and exhibit lists in the client's case. Scott and the client disagreed about what to include. Scott was unable to resolve the disagreement, and Scott deferred to the client by asking for a list of what the client wanted to submit. When the client did not provide the information by the deadline, Scott allowed the

77. GA. RULES OF PRO. CONDUCT r. 3.1.
78. *In re* Davis, 312 Ga. at 811, 865 S.E.2d at 135.
79. *Id.* at 810, 865 S.E.2d at 134.
80. *In re* Mathis, 312 Ga. 626, 864 S.E.2d 40, 41 (2021).
81. *Id.* at 626–28, 864 S.E.2d at 41–42.
82. *Id.* at 629–30, 864 S.E.2d at 43–44.
83. *In re* Scott, 313 Ga. 618, 619, 872 S.E.2d 279, 280 (2022).

deadline to pass, and the case was dismissed. Scott admitted that Rule 1.4's duty of communication required her to make a more substantial effort to consult with the client.[84] The supreme court accepted her petition for voluntary discipline in the form of a review panel reprimand.[85]

E. Petition for Voluntary Discipline Rejected

The Supreme Court of Georgia rejected one petition for voluntary discipline during the Survey period.[86]

Jason Lee Van Dyke filed two previous petitions for voluntary discipline as a result of his conviction of a misdemeanor for filing a false report of a theft.[87] In rejecting the second petition, the supreme court expressed concern about several matters and stated that there had been no hearing to explore them.[88] Specifically, Van Dyke violated the terms of his bond to attend a previously scheduled "waterfowl hunt." Van Dyke also procured the absence of a witness against him.[89] These concerns led the supreme court to write that "Van Dyke's conduct in the criminal proceeding reflects a level of disrespect for the law and legal process that warrants serious consideration."[90] In addition, the court learned that Van Dyke had been subject to discipline in Texas for a different matter. The court remanded the matter for additional fact-finding.[91]

At the time of the supreme court's consideration of Van Dyke's third petition, this fact-finding had still not occurred. The court again remanded the case to make those findings and to consider other matters related to possible reciprocal discipline.[92]

III. BAR ADMISSION

The Supreme Court of Georgia decided five matters related to bar admission during the Survey period.

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84. *Id.*

85. *Id.* at 620, 872 S.E.2d at 281.

86. *In re* Van Dyke, 313 Ga. 53, 55, 867 S.E.2d 124, 126 (2021) (hereinafter *Van Dyke II*).

87. *Id.* at 53, 867 S.E.2d at 125.

88. *In re* Van Dyke, 311 Ga. 199, 200, 857 S.E.2d 194, 195–96 (2021) (hereinafter *Van Dyke I*).

89. *Id.* at 200, 857 S.E.2d at 195 n.1.

90. *Id.* at 202, 857 S.E.2d at 197.

91. *Id.* at 202–03, 857 S.E.2d at 197.

92. *Van Dyke II*, 313 Ga. at 55, 867 S.E.2d at 126.

Barry Dean Carothers sought admission to the Georgia State Bar on motion rather than by taking the Georgia Bar examination.[93] To be admitted in Georgia by motion, the applicant must have been admitted by examination in a state that has reciprocity for bar admissions with Georgia.[94] Alabama has reciprocity with Georgia, and Carothers had been admitted to the Alabama Bar. Alabama uses the Uniform Bar Examination (UBE) allowing applicants to transfer their scores from the UBE taken in other states. Carothers previously became a member of the South Carolina Bar after taking the UBE, and he became a member of the Alabama Bar (in accordance with Alabama's procedures) by transferring his UBE score to Alabama.[95]

The Georgia Board of Bar Examiners denied Carothers's application for admission on motion, finding that Carothers had not been "admitted by examination" in Alabama.[96] Over the dissent of Justices McMillian, Ellington, and Colvin, the Supreme Court of Georgia held that Carothers was eligible for admission on motion in Georgia because his admission in Alabama based on the transfer of his South Carolina UBE score was "admitted by examination" in Georgia within the meaning of the Georgia Rules on admission by motion.[97]

Gregory Bartko voluntarily surrendered his license to practice law in 2014 after he was convicted of conspiracy, mail fraud, and selling unregistered securities.[98] Bartko was sentenced to prison and ordered to pay $885,946.89 in restitution. In 2020, when Bartko still had approximately ten years left to serve on his prison sentence and had paid little of his restitution, Bartko was moved to home confinement because of the COVID-19 pandemic. Bartko filed an application for certification of fitness to practice law, which the Board to Determine Fitness of Bar Applicants (Fitness Board) denied in accordance with its policy of not considering applications from incarcerated persons.[99] The supreme court affirmed that decision, even though Bartko was in home confinement, stating that to allow someone to practice law while they are serving a prison sentence would undermine public trust in the legal profession.[100]

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93. *In re* Carothers, 312 Ga. 393, 394, 863 S.E.2d 35, 37 (2021).

94. *Id.* at 394, 863 S.E.2d at 37 (*citing* GA. RULES GOV'G ADMIS. PRAC. LAW Pt. C § 2 (2022)).

95. *In re* Carothers, 312 Ga. at 394–95, 863 S.E.2d at 36–37 n.1.

96. *Id.* at 394, 863 S.E.2d at 37.

97. *Id.* at 402, 863 S.E.2d at 42.

98. *In re* Bartko, 312 Ga. 630, 630–31, 864 S.E.2d 39, 40 (2021).

99. *Id.*

100. *Id.* at 631, 864 S.E.2d at 40.

Next, James Archie Barnett was disbarred in 1995 after he abandoned clients in four separate matters and did not respond to the disciplinary process.[101] Barnett applied to the Fitness Board for a certificate of fitness for readmission.[102] The supreme court agreed with the unanimous recommendation of the Fitness Board to grant the certificate, finding that Barnett had demonstrated by clear and convincing evidence that he is fit to practice law.[103] Barnett made this showing in part by accepting full responsibility and expressing remorse for the misconduct that led to his disbarment. Barnett presented further evidence of his employment with the State Court of Fulton County and his extensive community service. Last, Barnett provided numerous letters supporting his readmission, including several letters from judges.[104]

Megan Kate Andrews applied for admission on motion.[105] To be eligible, Andrews had to show that she had "been primarily engaged in the active practice of law for five of the seven years immediately preceding the date" of her application.[106] Andrews had been employed as general counsel to a New York state senator; as a policy analyst for the Georgia General Assembly; and as Director of Government Relations for the Georgia Department of Public Health. The board denied her application and denied her request for a waiver of its policy regarding active practice of law.[107] The supreme court dismissed Andrews's appeal of the denial of her application as untimely and concluded that the board did not abuse its discretion in declining to waive the rule requiring active practice of law for five of the seven previous years.[108]

Jenny Lindsay, who was educated and licensed outside the United States, completed the requirements for an LL.M. degree from Emory University School of Law, a law school accredited by the American Bar Association (ABA).[109] Most applicants for admission to the Georgia Bar must show that they have received a law degree (J.D. or LL.B.) from an ABA-accredited law school. Lawyers who are educated and admitted to practice outside the United States may instead satisfy the educational requirement by demonstrating that they have received an LL.M. degree from such a school. Applicants do so by submitting an official transcript

101. *In re* Barnett, 312 Ga. 161, 861 S.E.2d 102, 103 (2021).
102. *Id.* at 162, 861 S.E.2d at 103.
103. *Id.* at 163, 861 S.E.2d at 104.
104. *Id.* at 162–63, 861 S.E.2d at 103.
105. *In re* Andrews, 312 Ga. 875, 866 S.E.2d 397, 398 (2021).
106. GA. RULES GOV'G ADMIS. PRAC. LAW Pt. C § 2.
107. *In re* Andrews, 312 Ga. at 876, 866 S.E.2d at 398–99.
108. *Id.* at 877–78, 866 S.E.2d at 399–400.
109. *In re* Lindsay, 311 Ga. 734, 859 S.E.2d 96, 97 (2021).

from the ABA-accredited school that awarded the LL.M. degree.[110] Applicants may also seek waiver of the educational requirement by submitting a "Dean's letter" that analyzes the applicant's foreign legal education and whether it is equivalent to the education provided at an ABA-accredited law school.[111] Lindsay was unable to provide an official transcript from Emory by the deadline for the October 2020 bar exam because her transcript was on hold for non-payment of fees.[112]

Lindsay sought a waiver of the requirement for the official transcript from the Board of Bar Examiners, and in the alternative, Lindsay sought a waiver of the educational requirement.[113] The board denied both requests, and the supreme court affirmed.[114] With respect to the transcript, the supreme court saw "no abuse of discretion in the Board's refusal to second-guess Emory's decision not to release Lindsay's transcript or in the Board's refusal to waive the requirement that she provide proof of the conferral of her LL.M. degree by the published deadline."[115] With respect to Lindsay's request for waiver of the educational requirement entirely, Lindsay did not provide a Dean's letter. Instead, Lindsay submitted information herself concerning her professional and educational background.[116] The court saw "no abuse of discretion in the Board's determination that Lindsay's own assertions about her education and experience are not a proper substitute for the Dean's letter and thus that Lindsay failed to establish good cause for a waiver of the educational requirements."[117]

110. *Id.* at 734–35, 859 S.E.2d at 97–98.
111. *Id.* at 736, 859 S.E.2d at 98–99.
112. *Id.* at 735, 859 S.E.2d at 98.
113. *Id.* at 737, 859 S.E.2d at 99.
114. *Id.* at 737–38, 859 S.E.2d at 99–100.
115. *Id.* at 738, 765 S.E.2d at 99.
116. *Id.* at 735, 738, 765 S.E.2d at 98, 100.
117. *Id.* at 738, 765 S.E.2d at 100.

IV. MALPRACTICE AND OTHER CIVIL CLAIMS[118]

In *Potts v. Clowdis*,[119] a former client brought a seven-count complaint against a lawyer and the lawyer's firm.[120] The DeKalb County Superior Court dismissed all of the claims except those for breach of fiduciary duty and legal malpractice. The lawyer-defendant then engaged in discovery abuse that led the trial judge to strike the lawyer's answer and enter a default. After a jury trial on damages, the court entered judgment against the lawyer for just under $5.8 million including compensatory damages, attorney's fees, and punitive damages.[121]

The jury was permitted to have a redacted portion of the original complaint.[122] The redacted complaint included a list of all claims originally made against the defendants, including the ones previously dismissed by the trial court.[123] The redacted complaint further left in headings related to those dismissed claims and the assertion that the plaintiff was entitled "to recover damages, including punitive damages, determined by this [c]ourt to have been sustained by him on account of Defendants' violations as outlined above[.]"[124] The trial court instructed the jury that the facts alleged in the complaint were deemed true but did not instruct the jury that it could award damages only for the breaches of fiduciary duty and legal malpractice.[125] The Georgia Court of Appeals reversed because of the possibility that the amount of the verdict was affected by the jury seeing redacted claims and the instruction that the defendants were not allowed to contest them.[126]

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118. One update is in order regarding a malpractice case reported in a prior year's survey. *See* Patrick Emery Longan, *Legal Ethics*, *Annual Survey of Georgia Law*, 72 MERCER L. REV. 165, 204 (2020). In Alston & Bird LLP v. Hatcher Management Holdings, LLC, the Georgia Court of Appeals refused to allow Alston & Bird to reduce the damages it owed in a malpractice case by the percentage of fault assigned by the jury to a non-party, because Alston & Bird was the sole defendant in the case. 355 Ga. App. 525, 534, 843 S.E.2d 613, 620 (2020). The court relied on the language of O.C.G.A. § 51-12-33(b) (2020). That section of the Georgia Code has since been amended such that a party in Alston & Bird's position is able to reduce its damages to the extent that a non-party is apportioned part of responsibility for the harm. *See* 2022 Ga. Laws 802 § 1, H.B. 961 (codified at O.C.G.A. § 51-12-33 (2022)).

119. 360 Ga. App. 581, 859 S.E.2d 875 (2021).

120. *Id.* at 582, 859 S.E.2d at 877.

121. *Id.* at 582–83, 859 S.E.2d at 877–78.

122. *Id.* at 586, 859 S.E.2d at 879–80.

123. *Id.*, 859 S.E.2d at 880.

124. *Id.*

125. *Id.*

126. *Id.* at 586–87, 859 S.E.2d at 880.

In *Browne & Price, P. A. v. Innovative Equity Corp.*,[127] one of the issues concerned a legal malpractice claim asserted by the plaintiff against a law firm that agreed to act as an escrow agent in a real estate transaction.[128] The plaintiff was the seller. When the transaction did not close, the seller sued the law firm.[129] The court of appeals reversed the denial of summary judgment for the law firm on the malpractice claim because there was no attorney-client relationship between the seller and the law firm.[130] It was clear that, under the terms of the contract to sell the real estate, the law firm represented the buyer and not the seller.[131]

Rimert v. Meriwether & Tharp, LLC,[132] involved, among other issues, the judgmental immunity defense to a legal malpractice action.[133] The lawyers advised a divorce client to place a recording device in his wife's bedroom in violation of a standing order of court, which led to the client's arrest for aggravated stalking. The client claimed that this advice was malpractice, and the Fulton County State Court denied summary judgment to the lawyers.[134] The court of appeals reversed, reasoning that the doctrine of judgmental immunity applies and precludes a malpractice action where the underlying legal principles are not well-settled.[135] Here, the question whether a violation of a standing court order could constitute aggravated stalking was not well-settled, and therefore the court of appeals held that the trial court should have granted summary judgment to the lawyers on this claim.[136]

In *Alexander Law Firm, P.C. v. Richburg*,[137] the court of appeals upheld a jury verdict for conversion against a law firm.[138] The firm had

127. 361 Ga. App. 521, 864 S.E.2d 686 (2021).

128. *Id.* at 521, 864 S.E.2d at 687.

129. *Id.* at 522, 864 S.E.2d at 688.

130. *Id.* at 528, 864 S.E.2d at 692.

131. *Id.* at 528–29, 864 S.E.2d at 692.

132. 361 Ga. App. 589, 865 S.E.2d 199 (2021).

133. *Id.* at 596, 865 S.E.2d at 205. In addition to the malpractice issue, the court faced the question of whether the attorneys violated O.C.G.A. § 16-11-62(6) by "distributing" video that their client surreptitiously recorded of his wife having sexual relations with another person in the marital home. Because the "distribution" was to the attorneys for the wife in response to discovery, the court held that it was the fulfillment of discovery obligations "authorized by law" and thus not a violation of the statute. *Id.* at 595, 864 S.E.2d at 204.

134. *Id.* at 589, 865 S.E.2d at 200.

135. *Id.* at 596–97, 865 S.E.2d at 205.

136. *Id.* at 597, 865 S.E.2d at 205.

137. 361 Ga. App. 376, 864 S.E.2d 479 (2021). The decision also dealt with the Fulton County Superior Court's denial of a motion to disqualify counsel. This part of the decision is discussed below. *See infra* note 158.

138. *Id.* at 376, 864 S.E.2d at 482.

been hired by Curtis Richburg to represent his brother James Richburg, who suffered from dementia and was being victimized by family members. Over the course of the representation, the law firm obtained control over a storage unit containing James's possessions. Although Curtis held a power of attorney from James and demanded access to the storage unit under its authority, the law firm refused.[139] The jury found that the firm was liable for conversion of the items within the unit, and the court of appeals affirmed.[140]

V. INEFFECTIVE ASSISTANCE OF COUNSEL

During the Survey period, the Supreme Court of Georgia decided one significant case involving a claim of ineffective assistance of counsel.

In *Emmons v. Bryant*,[141] the supreme court reversed the Lowndes County Superior Court's grant of habeas corpus relief based upon ineffective assistance of counsel to Steven Bryant.[142] Bryant was convicted of aggravated sexual battery in 2015 and sentenced as a recidivist to life in prison without the possibility of parole. The evidence at Bryant's trial included testimony about text messages that were sent in the aftermath of the alleged assault but not the text messages themselves.[143] There was additional testimony about out-of-court statements made by and about the victim, who died before trial. Much of the evidence against Bryant came from Bryant's girlfriend Kimberly Bridges. Although she was indicted with Bryant, Bridges pled guilty and made an agreement with prosecutors under which she testified against Bryant at trial. Bryant appealed his conviction and later filed a *pro se* habeas petition alleging ineffective assistance of trial and appellate counsel.[144]

James Wyatt was trial counsel for Bryant and also represented Bryant on a failed motion for new trial and direct appeal.[145] Both the motion and the appeal were dismissed after Bryant claimed in a *pro se* filing that Wyatt had rendered ineffective assistance of counsel. New counsel, Juwayn Haddad, was appointed to represent Bryant in connection with a second motion for new trial and thereafter on direct appeal. The habeas

139. *Id.* at 376–77, 864 S.E.2d at 482–83.
140. *Id.* at 382, 864 S.E.2d at 486.
141. 312 Ga. 711, 864 S.E.2d 1 (2021).
142. *Id.* at 711–12, 864 S.E.2d at 4–5.
143. *Id.* at 712, 864 S.E.2d at 5.
144. *Id.* at 711–12, 864 S.E.2d at 4–5.
145. *Id.* at 712–13, 864 S.E.2d at 5.

court concluded that Haddad had rendered ineffective assistance and granted the petition.[146]

One basis for the granting of the petition was Haddad's failure to raise on direct appeal an alleged violation of Bryant's right to conflict-free counsel.[147] There was a time between the point at which Bryant claimed that Wyatt rendered ineffective assistance and when Haddad was appointed to replace Wyatt. A lawyer has at least a potential conflict of interest in asserting the lawyer's own ineffectiveness. During that time, Bryant's first direct appeal was pending in the Georgia Court of Appeals.[148]

The supreme court concluded that Wyatt took the proper steps to protect Bryant during this interval, despite his client's claim that Wyatt had been ineffective at trial.[149] Wyatt successfully sought to have the court of appeals remand the case for consideration of the ineffective assistance claims and meanwhile filed a brief for Bryant to protect his rights. Accordingly, the supreme court reasoned that Wyatt's potential conflict of interest never ripened into an actual conflict.[150] On remand, Haddad was appointed to replace Wyatt, eliminating even a potential conflict.[151]

The habeas court had found that Haddad rendered ineffective assistance in connection with his failure to pursue evidence of Wyatt's alleged ineffectiveness for not impeaching the testimony of Bridges at trial on the basis of her plea deal with the prosecution.[152] However, the supreme court disagreed noting that Wyatt's decision not to cross-examine Bridges about the plea deal was a strategic one and thus was not ineffective assistance.[153] Regardless of what Haddad did or did not do with respect to this claim, his efforts ultimately would have been fruitless. It is not ineffective assistance for appellate counsel to fail to pursue additional evidence in support of a meritless claim.[154]

There were additional grounds for the habeas court's decision, but the supreme court rejected them.[155] The habeas court faulted Haddad for raising only two arguments about Wyatt's ineffectiveness, but the

146. *Id.* at 715–16, 864 S.E.2d at 7.
147. *Id.* at 717–18, 864 S.E.2d at 8.
148. *Id.* at 719–20, 864 S.E.2d at 9–10.
149. *Id.* at 720, 864 S.E.2d at 10.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 726, 864 S.E.2d at 13.
155. *Id.* at 722–23, 864 S.E.2d at 11.

supreme court concluded this was a reasonable, strategic decision.[156] Other bases for the habeas court's conclusion failed because there was insufficient evidence to conclude that Bryant was prejudiced by what Haddad did or did not do, regardless of whether Haddad's performance was deficient.[157]

VI. DISQUALIFICATION OF COUNSEL

The Georgia Court of Appeals dealt with one case involving disqualification of counsel. As described above, in *Alexander Law Firm, P.C. v. Richburg*, a law firm undertook to represent James Richburg at the request of James's brother, Curtis Richburg, in a case against James's son and daughter-in-law.[158] The firm also represented Curtis. Eventually, the firm no longer represented Curtis and sued him for unpaid fees. Curtis filed counterclaims against the law firm for malpractice. Meanwhile, the law firm was still listed as counsel of record for James in the case against James's son and daughter-in-law. Counsel for Curtis in the malpractice case spoke directly with James without the permission of the law firm and while the law firm still represented James. The firm then sought to disqualify Curtis's counsel for an alleged violation of Rule 4.2,[159] which prohibits an attorney who is representing a client from communicating with someone who is represented by counsel in a matter, if the communication relates to that matter.[160] The court of appeals affirmed the Fulton County Superior Court's denial of the motion to disqualify, observing that the law firm had not presented evidence that the communication with James related to the matter for which the law firm represented James.[161] In the absence of such evidence, the law firm had not shown a violation of Rule 4.2.[162]

VII. CONTEMPT

The Georgia Court of Appeals reversed the Bartow County Superior Court's finding of contempt against a lawyer in *In re Ragas*.[163] Arnold Ragas represented Ricky Taylor in three criminal matters. As part of the resolution of those charges, Taylor was sentenced to remain in jail until he was accepted into a residential recovery program that had space for

156. *Id.* at 723, 864 S.E.2d at 12.

157. *Id.* at 725, 864 S.E.2d at 13.

158. *Alexander Law Firm, P.C.*, 361 Ga. App. at 376, 864 S.E.2d at 482.

159. *Id.* at 376–79, 864 S.E.2d at 482–84.

160. *See* GA. RULES OF PRO. CONDUCT r. 4.2.

161. *Alexander Law Firm, P.C.*, 361 Ga. App. at 380, 864 S.E.2d at 484–85.

162. *Id.* at 379–80, 864 S.E.2d at 484.

163. 359 Ga. App. 670, 859 S.E.2d 827, 829 (2021).

him. On November 27, 2019, Ragas picked Taylor up at the jail and took him to a treatment center for an interview. However, the center did not have space for Taylor. At the conclusion of the interview, Ragas did not return Taylor to jail but instead took him to a restaurant and left him with a brother. On December 3, 2019, Ragas appeared in court on unrelated matters before the trial judge who had sentenced Taylor. Ragas did not tell the judge what happened with Taylor. On December 4, 2019, Taylor did not report to his probation officer, who called Ragas and told him that an arrest warrant for Taylor would be entered. The next day Ragas informed the judge and the prosecutor about what had happened and sought guidance.[164]

The trial judge held Ragas in criminal contempt for disobeying the sentencing order and for not revealing what had happened on November 27 until December 5.[165] A different trial judge held a hearing and found Ragas to be in contempt, apparently upon erroneous application of a clear and convincing standard of proof. The proper standard for criminal contempt is beyond a reasonable doubt.[166] In a 2–1 decision, the court of appeals reversed the trial court but did not remand the matter for a new hearing.[167] For the majority, Chief Judge McFadden took into consideration the trial court's application of the wrong standard of proof but held that the evidence was insufficient under the correct standard.[168]

As to Ragas's "disobedience" of the sentencing order, the opinion points out that the order was not directed to Ragas and that Ragas had no ability or authority to enforce it.[169] As to the alleged lack of candor—not revealing at the December 3 hearing what had happened on November 27—the opinion points out that the duty of candor ordinarily binds attorneys not to make certain kinds of misrepresentations or omissions in connection with a matter before the court.[170] Ragas's situation was unusual in that his court appearance on December 3 before the trial judge was on an unrelated matter.[171] The majority found no authority for extending the duty of candor to a situation in which "the alleged breach of the duty is the attorney's failure to affirmatively contact and inform the court about what are essentially extrajudicial events."[172]

164. *Id.* at 671, 859 S.E.2d at 829–30.
165. *Id.* at 671, 859 S.E.2d at 830.
166. *Id.* at 672, 859 S.E.2d at 830.
167. *Id.* at 676, 859 S.E.2d at 833.
168. *Id.* at 672–73, 859 S.E.2d at 830–31.
169. *Id.* at 673, 859 S.E.2d at 831.
170. *Id.* at 676, 859 S.E.2d at 833.
171. *Id.*
172. *Id.*

Judge Rickman dissented and would have remanded the case for consideration of the evidence by the trial court under the appropriate burden of proof.[173] Judge Rickman characterized the majority opinion as displaying "its zeal to usurp the trial court's role as factfinder[.]"[174]

VIII. PROSECUTORIAL MISCONDUCT

In *Caldwell v. State*,[175] the Supreme Court of Georgia reversed a murder conviction in a unanimous decision because the prosecutor made improper statements during closing argument.[176] The Dougherty County Superior Court also declined to give a curative instruction. The prosecution's case rested almost entirely on a witness who the evidence showed may have been an accomplice to the crime. The conviction could not be upheld on the sole basis of the testimony of an accomplice. The issue whether the witness was an accomplice was submitted for determination by the jury.[177] In closing argument, the prosecutor referred to matters outside the record, including his prosecutorial discretion. The prosecutor further asserted incorrectly that the district attorney was the sole arbiter of whether the witness was an accomplice, and the district attorney decided not to seek indictment of the witness as an accomplice; therefore, the jury should find that she was not an accomplice and convict the defendant on that basis.[178] The supreme court found that the trial court's failure to give a curative instruction for these improper arguments was harmful error, given the conflict in the evidence about whether the witness was an accomplice and the significance of a jury finding that she was or was not.[179]

IX. JUDICIAL CONDUCT

In *Ellis v. Oles*,[180] the Georgia Court of Appeals rejected an argument that a trial judge violated Uniform Superior Court Rule 25.3 by not assuming that the facts recited in a Motion to Recuse were true.[181] The court of appeals noted that the appellant failed to identity what facts were not assumed to be true.[182] The court applied the presumption of

173. *Id.* at 677, 859 S.E.2d at 833 (Rickman, J., dissenting).
174. *Id.*
175. 313 Ga. 640, 872 S.E.2d 712 (2022).
176. *Id.* at 640, 872 S.E.2d at 714.
177. *Id.* at 641–43, 872 S.E.2d at 715–16.
178. *Id.* at 646, 872 S.E.2d at 718.
179. *Id.* at 648–49, 872 S.E.2d at 719–20.
180. 364 Ga. App. 133, 873 S.E.2d 251 (2022).
181. *Id.* at 135, 873 S.E.2d at 254.
182. *Id.*

regularity and presumed that the trial judge performed her duties properly.[183]

Next, the Supreme Court of Georgia approved an agreement between a municipal court judge and the director of the Judicial Qualifications Commission for imposition of a public reprimand of the judge for improperly dismissing cases without the legal authority to do so.[184] Specifically, in connection with some guilty pleas presented to the judge, the judge dismissed the cases when the extent of her authority was to reject the plea.[185]

In *A & M Hospitalities, LLC v. Alimchandani*,[186] the court of appeals ordered the recusal of a trial judge.[187] The judge had allegedly ordered the clerk of court to delay transmission of the record of the case to the court of appeals—without notice to the parties—in a case that had already been delayed and in which the defendants were paying large amounts of money to a receiver. The judge refused to send the motion to recuse to another judge, improperly set forth a factual claim in opposition to the motion and mischaracterized the movants' allegation about the reason for delay.[188] Under these circumstances, the court of appeals ordered the recusal of the judge without necessity of further hearings on the matter.[189]

The supreme court approved a thirty-day unpaid suspension and a public reprimand as discipline for a judge who engaged in a verbal and physical altercation with a defendant.[190] When the judge set the defendant's bond, the defendant cursed the judge and kept cursing him as the defendant was escorted from the courtroom, handcuffed and his feet shackled. The judge verbally engaged the defendant and followed him into a hallway. The judge exchanged words with the defendant, grabbed him and then pushed the defendant against the wall. The defendant had not physically threatened the judge. The defendant was not injured.[191]

The supreme court affirmed the discipline and noted that it justifiably was one of the harshest sanctions the court had imposed short of removal

183. *Id.*
184. *In re* Baker, 313 Ga. 359, 870 S.E.2d 356 (2022).
185. *Id.* at 361–62, 870 S.E.2d at 358–59.
186. 363 Ga. App. 531, 871 S.E.2d 290 (2022).
187. *Id.* at 543, 871 S.E.2d at 300.
188. *Id.* at 540, 871 S.E.2d at 298.
189. *Id.* at 543, 871 S.E.2d at 300.
190. *In re* Hays, 313 Ga. 148, 868 S.E.2d 792 (2022).
191. *Id.* at 149, 868 S.E.2d at 793.

from judicial office.[192] The court further held, however, that the incident did not warrant removal from office because it was momentary, the defendant was not injured, and there were mitigating factors.[193] The judge accepted full responsibility for the incident and lacked any prior disciplinary history, and was also a well-respected member of the community who had served honorably in the military.[194]

In *Hill v. Hill*,[195] Christopher Hill faced a contempt action brought by his ex-wife, Julia Hill. Hill filed a motion to recuse the presiding superior court judge (and all the superior courts in the Brunswick Judicial Circuit) because the attorney for his ex-wife was a part-time magistrate in the circuit, whose appointment was approved by all the superior court judges in the circuit.[196] The court of appeals held that, as a matter of law, this fact alone could not in reasonable minds create the perception that a superior court judge could not handle the contempt action with integrity, impartiality, and competence.[197] Accordingly, the Camden County Superior Court's denial of the motion to recuse was upheld.[198]

X. AMENDMENTS TO THE GEORGIA RULES OF PROFESSIONAL CONDUCT[199]

A. Rejection of Amendments to Rule 1.2

The Supreme Court of Georgia 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 legally under Georgia law but in violation of federal law.[200] The proposed amendment would have

192. *Id.* at 150, 868 S.E.2d at 794.

193. *Id.*

194. *Id.*

195. 360 Ga. App. 530, 859 S.E.2d 906 (2021).

196. *Id.* at 530–31, 859 S.E.2d at 907.

197. *Id.* at 533, 859 S.E.2d at 908.

198. *Id.* at 534, 859 S.E.2d at 909.

199. In addition to the amendments discussed in this Article, the Supreme Court of Georgia approved a series of amendments to conform terminology in the rules to changes that were made in the disciplinary process in 2018. It also made a few amendments to eliminate superfluous language. 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.

200. *In re* STATE BAR OF GEORGIA Rules and Regulations for its Organization and Government, Motion to Amend 2021-3.

created an exception to the general prohibition in Rule 1.2(d) that lawyers may not counsel or assist clients with crimes. The exception would have been for activities that are permitted under state law but illegal under federal law.[201] 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."[202]

B. Amendments to Rule 3.8

The supreme court approved amendments to Rule 3.8, which concerns the special responsibilities of prosecutors.[203] The court added subsection (c) to provide that prosecutors must comply with Rule 4.2, the "no-contact" rule that generally forbids contact with represented parties without the consent of counsel.[204] The court further added two new subsections: (h) and (i). Subsection (h) provides that a prosecutor shall:

> promptly disclose new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted to an appropriate court or authority. If the conviction was obtained in the prosecutor's jurisdiction, the prosecutor shall promptly disclose that evidence to the defendant unless a court authorizes delay and undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit[.][205]

Similarly, new subsection (i) provides that a prosecutor shall "seek to remedy a conviction obtained in the prosecutor's jurisdiction when the prosecutor knows of clear and convincing evidence establishing that a defendant did not commit the offense."[206]

The supreme court also changed the maximum penalty for violating Rule 3.8 from a public reprimand to disbarment.[207] Comments seven and eight were added to provide additional guidance about new

201. *Id.* at *1.

202. *Id.* at *1–2.

203. Order of the Georgia Supreme Court (May 26, 2022) (granting *In re* STATE BAR OF GEORGIA Rules and Regulations for its Organization and Government, Motion to Amend 2021-2).

204. *Id.* at *7.

205. *Id.* at *8.

206. *Id.*

207. *Id.*

subsections (h) and (i).[208] New comment nine provides that "[a] prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (h) and (i), though subsequently determined to have been erroneous, does not constitute a violation of this Rule."[209]

XI. FORMAL ADVISORY OPINIONS OF THE STATE BAR OF GEORGIA FORMAL ADVISORY OPINION BOARD[210]

During the Survey period, the Supreme Court of Georgia approved one formal advisory opinion.[211]

In 1994, the supreme court had approved Formal Advisory Opinion 94-3, which provided that a lawyer who is representing a client may communicate with a former employee of a represented entity without violating the "no-contact" provisions of Rule 4.2 if the lawyer made certain disclosures.[212] Because of rule changes and the withdrawal of another advisory opinion that 94-3 cited, the Formal Advisory Opinion Board decided to re-draft opinion 94-3.[213] The proposal was met with resistance from the Georgia Defense Lawyers Association, and the supreme court held oral argument before it approved the new opinion and withdrew opinion 94-3.[214] Formal Advisory Opinion 20-1 permits contact with former employees of represented organizations if a lawyer first discloses the identity of the lawyer's client and the client's interest in relation to the former employer, the reason for the communication, and the essence of the information sought.[215] Once the lawyer makes these disclosures, the lawyer may proceed if the former employee consents to the communication.[216]

The Formal Advisory Opinion Board accepted one new request during the Survey period. This request sought guidance regarding the

208. *Id.* at *9–10.

209. *Id.* at *10.

210. 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, and Betty Derrickson, paralegal in the Office of the General Counsel for the State Bar of Georgia, for their assistance with this section.

211. *In re Formal Advisory Op. No. 20-1*, 313 Ga. 803, 806–07, 872 S.E.2d 745, 748 (2022).

212. *Id.* at 803, 872 S.E.2d at 746 (discussing *Formal Advisory Op. No. 94-3*).

213. *Id.* at 804, 872 S.E.2d at 746.

214. *Id.* at 805, 872 S.E.2d at 747.

215. *Id.* (discussing *Formal Advisory Op. No. 20-1*).

216. *Id.*

circumstances (if any) under which a lawyer licensed only in one or more jurisdictions other than Georgia may practice remotely from a Georgia location.[217] As of the end of the Survey period, the advisory opinion board had not approved a draft version of this opinion for publication, and it remained pending.

The board tabled two requests for opinions. It received a request for an opinion regarding the ethical propriety of a lawyer advertising for legal business with the intent of referring a majority of that business to other lawyers without disclosing that intent. The Formal Advisory Opinion Board tabled the request in light of possible amendments to the advertising rules under consideration by the state bar disciplinary rules and procedures committee.[218] The board also received a request for an opinion on whether an attorney may fulfill the duty of physical presence at a closing by using certain communication technology as defined in proposed legislation.[219] The board tabled the request while the legislature considered the bill.[220]

Finally, the board received a request for an opinion regarding the ethical considerations for a lawyer who is a party in a legal matter and communicates directly with an adverse party about the matter. At the end of the Survey period, this request was still pending with the board.[221]

XII. CONCLUSION

This Article surveys recent developments in Georgia legal ethics through May 31, 2022. For updates on developments after this date, you may visit the website of the Mercer Center for Legal Ethics and Professionalism.[222]

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217. Meeting Minutes, *Formal Advisory Op. Board* at *2 (Sep. 21, 2021) (on file with the Author).

218. *Id.* at *2.

219. Meeting Minutes, *Formal Advisory Op. Board* at *2 (Jan. 13, 2022) (on file with the Author).

220. *Id.*

221. Meeting Minutes, *Formal Advisory Op. Board* at *2 (May 4, 2022) (on file with the Author).

222. 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. Mercer Center for Legal Ethics, *Recent Developments in Georgia Legal Ethics*, MERCER UNIVERSITY SCHOOL OF LAW, https://law.mercer.edu/academics/centers/clep/updates-legal-ethics/ [https://perma.cc/9LYL-673F] (last visited Jan. 11, 2023).