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Legal Ethics

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Legal Ethics

by Patrick Emery Longan*

I. INTRODUCTION

The Georgia Supreme Court and the Georgia Court of Appeals decided a number of cases concerning the professional responsibilities of lawyers during the survey period. Those cases concerned attorney discipline, malpractice, bar admission, attorney fees and liens, ineffective assistance of counsel, and judicial ethics and recusal.

II. DISCIPLINARY CASES

A. *Disbarments and Voluntary Surrenders*

The Georgia Supreme Court disbarred (or, to the same effect, accepted the voluntary surrender of the licenses of) a number of lawyers, mostly for all-too-familiar reasons. Six lawyers lost their licenses because of discipline administered by other states.[1] Eleven were disbarred because they either had been convicted of felonies or had admitted to serious criminal activity.[2] Problems with handling client money caused six

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1. *In re* Ashworth, 279 Ga. 296, 296, 612 S.E.2d 305, 305 (2005); *In re* Bruneio, 278 Ga. 892, 893, 608 S.E.2d 224, 224 (2005); *In re* Hutchinson, 278 Ga. 863, 863, 607 S.E.2d 888, 888 (2005); *In re* Perry, 278 Ga. 866, 866, 607 S.E.2d 889, 889 (2005); *In re* Howze, 278 Ga. 799, 799, 606 S.E.2d 256, 257 (2004); *In re* Steckler, 278 Ga. 382, 382-83, 602 S.E.2d 639, 639-40 (2004).

2. *In re* Fuller, 279 Ga. 310, 310, 612 S.E.2d 801, 801 (2005); *In re* Coats, 279 Ga. 322, 322-23, 612 S.E.2d 306, 306 (2005); *In re* Shwiller, 279 Ga. 295, 295, 612 S.E.2d 305, 305-06 (2005); *In re* Bush, 279 Ga. 189, 189, 611 S.E.2d 50, 51 (2005); *In re* Ellis, 278 Ga. 900, 900, 608 S.E.2d 225, 225 (2005); *In re* Howard, 278 Ga. 864, 864, 607 S.E.2d 887, 888 (2005); *In re* Palmer, 278 Ga. 722, 723, 606 S.E.2d 256, 256 (2004); *In re* Frazier, 278 Ga. 723, 723, 606 S.E.2d 255, 255 (2004); *In re* Avant, 278 Ga. 458, 458-59, 603 S.E.2d 295,

lawyers to be disbarred,[3] and seven others suffered the same fate as a result of client neglect and abandonment.[4]

Two disbarments caused Justice Benham to dissent. In *In re Alford*,[5] Thomas Marvin Alford ("Alford") lost his license because he failed twice to appear for calendar calls. Alford explained his first failure to appear by telling the judge's staff about his "severe alcohol dependency." However, the staff was unable to find him after his second failure to appear.[6] The supreme court disbarred Alford, under GEORGIA RULE OF PROFESSIONAL CONDUCT 1.3,[7] for violating his duty of diligence.[8] Justice Benham questioned whether two instances were sufficient to constitute a "pattern," and also whether Alford had received actual notice of the charges against him.[9] Justice Benham also argued unsuccessfully that it would have been more appropriate to suspend Alford with conditions that would have addressed the underlying substance abuse problem rather than impose "a professional death penalty by default."[10]

The case of *In re Cohen*[11] also troubled Justice Benham. Marshall L. Cohen ("Cohen") had been on inactive status with the Georgia Bar since 1983 and had become a member of the Florida Bar. Despite his inactive status, Cohen represented a fellow Floridian in a criminal matter in Georgia. Cohen did not keep the client informed, and when the client missed a court date, the judge issued a bench warrant and had the client arrested. Cohen did not return the client's phone calls or refund his money.[12] Although the Investigative Panel recommended a one-year

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295-96 (2004); *In re* Williams, 278 Ga. 393, 393-94, 602 S.E.2d 641, 641-42 (2004); *In re* Linahan, 278 Ga. 388, 388, 602 S.E.2d 638, 639 (2004).

3. *In re* Gignilliat, 279 Ga. 384, 384-85, 613 S.E.2d 609, 609-10 (2005); *In re* Frederick, 278 Ga. 571, 571-72, 604 S.E.2d 487, 487-88 (2004); *In re* King, 278 Ga. 384, 384-85, 602 S.E.2d 636, 637-38 (2004); *In re* Ross, 278 Ga. 213, 213-14, 599 S.E.2d 185, 186 (2004); *In re* Capps, 278 Ga. 157, 157-58, 598 S.E.2d 478, 478-79 (2004); *In re* Redd, 278 Ga. 112, 112-13, 597 S.E.2d 363, 363-64 (2004).

4. *In re* Byars, 279 Ga. 293, 294-95, 612 S.E.2d 784, 785 (2005); *In re* Ruleman, 279 Ga. 296, 297, 612 S.E.2d 307, 307 (2005); *In re* Brennan, 279 Ga. 58, 58-59, 609 S.E.2d 355, 355-56 (2005); *In re* Armwood, 278 Ga. 867, 867-68, 607 S.E.2d 557, 557-58 (2005); *In re* Garnett, 278 Ga. 527, 527-28, 603 S.E.2d 281, 281-83 (2004); *In re* Mullman, 278 Ga. 390, 390-91, 603 S.E.2d 217, 217-18 (2004); *In re* Williams, 278 Ga. 211, 212-13, 599 S.E.2d 180, 181-82 (2004).

5. 278 Ga. 389, 602 S.E.2d 640 (2004).

6. *Id.* at 389, 602 S.E.2d at 640.

7. GA. RULE OF PROF'L CONDUCT 1.3 (2000).

8. *In re* Alford, 278 Ga. at 389, 602 S.E.2d at 640.

9. *Id.* at 389-90, 602 S.E.2d at 640-41 (Benham, J., dissenting).

10. *Id.* at 390, 602 S.E.2d at 641 (Benham, J., dissenting).

11. 279 Ga. 319, 612 S.E.2d 294 (2005).

12. *Id.* at 320, 612 S.E.2d at 295.

suspension with conditions, the Georgia Supreme Court disbarred Cohen because of his "complete disregard of the obligations and responsibilities owed by attorneys both to their clients and to the legal profession."[13] Justice Benham noted in his dissent that there was no record of any other infraction, and he described Cohen as "salvageable."[14] He concluded, therefore, that disbarment was too severe a penalty.[15]

B. Suspensions

The Georgia Supreme Court also suspended a number of lawyers, with most of the decisions being unanimous. The suspensions were for such transgressions as: suspension in another state for client neglect and a false denial of malpractice liability;[16] a trust account violation in which the client was made whole;[17] a felony conviction for filing false tax returns (with mitigating factors);[18] a negligent failure to act expeditiously in handling a client's case;[19] a failure to return a former client's complete file or provide an accounting of fees;[20] and accessing, listening to, and deleting voicemail messages at the lawyer's former firm.[21] Five suspension cases, however, sparked dissents.

In *In re Caroway*,[22] Anthony Gus Caroway ("Caroway") pleaded guilty to driving under the influence and possession of cocaine, methamphetamine, and marijuana, all of which are felonies. Caroway also admitted to buying and using drugs in his law office and to conducting real estate closings under the influence of cocaine. The Special Master found that the problems resulted from a long-standing addiction to drugs and alcohol, but also found there were numerous mitigating factors.[23] The Special Master recommended that Caroway receive a public reprimand with conditions, but the supreme court, in a 4-3 decision, suspended him for two years with conditions.[24] Justices Hines, Hunstein, and Thompson dissented on the basis that "'the appearance of a convicted attorney continuing to practice does more to disrupt public confidence in the legal

13. *Id.*
14. *Id.* (Benham, J., dissenting).
15. *Id.* at 322, 612 S.E.2d at 296 (Benham, J., dissenting).
16. *In re* Green, 279 Ga. 309, 309, 612 S.E.2d 794, 795 (2005).
17. *In re* Summers, 278 Ga. 57, 57-58, 597 S.E.2d 364, 364-65 (2004).
18. *In re* Haugabrook, 278 Ga. 721, 721-22, 606 S.E.2d 257, 258 (2004).
19. *In re* Norton, 279 Ga. 31, 32, 608 S.E.2d 614, 615 (2005).
20. *In re* Coleman, 278 Ga. 864, 865, 607 S.E.2d 556, 557 (2005).
21. *In re* Schwartz, 278 Ga. 216, 216, 599 S.E.2d 184, 184-85 (2004).
22. 279 Ga. 381, 613 S.E.2d 610 (2005).
23. *Id.* at 381, 613 S.E.2d at 610.
24. *Id.* at 383, 613 S.E.2d at 612.

profession than any other disciplinary problem.'"[25] The dissenters also noted that Caroway sought treatment only after his second arrest.[26] They concluded that disbarment was the appropriate remedy.[27]

Justices Hunstein and Thompson joined together to dissent in three other suspension cases.[28] In *In re Shelfer*,[29] William S. Shelfer ("Shelfer") received a two-year suspension for writing unauthorized checks to himself, totaling more than $100,000, on the account of an estate for which he was the executor. Shelfer also failed to respond to requests for information or to provide an accounting. The Special Master found mitigating circumstances (including complete restitution and a clean disciplinary record), and the supreme court agreed.[30] Justices Thompson and Hunstein dissented on the grounds that Shelfer's actions warranted disbarment.[31]

Similarly, in *In re Hammock*,[32] another attorney received a two-year suspension for his actions in three matters in which he failed to communicate with his clients and neglected and deceived them.[33] Despite these actions and three prior disciplinary actions, the court imposed only a suspension.[34] Justices Thompson and Hunstein, who favored disbarment, dissented.[35]

Finally, in *In re Armwood*,[36] an attorney neglected a client's criminal matter and failed to communicate with his client. The lawyer had been reprimanded twice by the Investigative Panel, and by the time his latest infraction reached the Georgia Supreme Court, he was already on suspension for neglect of another client matter.[37] Despite this history,

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25. *Id.* at 383-84, 613 S.E.2d at 612 (quoting *In re* Stoner, 246 Ga. 581, 582, 272 S.E.2d 313, 314 (1980)) (Hunstein, Thompson & Hines, JJ., dissenting).

26. *Id.* at 383, 613 S.E.2d at 612 (Hunstein, Thompson & Hines, JJ., dissenting).

27. *Id.* (Hunstein, Thompson & Hines, JJ., dissenting).

28. Justice Hunstein also dissented, without opinion, from the imposition of a six-month suspension on a lawyer who exhibited a pattern of client neglect and abandonment in four cases. *In re* Grable, 279 Ga. 1, 3, 607 S.E.2d 554, 554 (2005). The Special Master found that the lawyer's conduct was the "result of procrastination, confusion, lack of diligence and a failure to communicate, rather than . . . dishonest conduct on his part." *Id.* at 2, 607 S.E.2d at 556.

29. 278 Ga. 55, 597 S.E.2d 365 (2004).

30. *Id.* at 55-56, 597 S.E.2d at 365-66.

31. *Id.* at 56, 597 S.E.2d at 366 (Hunstein & Thompson, JJ., dissenting).

32. 278 Ga. 385, 602 S.E.2d 658 (2004).

33. *Id.* at 386-87, 602 S.E.2d at 659.

34. *Id.* at 387, 602 S.E.2d at 660.

35. *Id.* (Hunstein & Thompson, JJ., dissenting).

36. 278 Ga. 214, 600 S.E.2d 369 (2004).

37. *Id.* at 215, 600 S.E.2d at 369-70.

the court imposed only a two-year suspension[38] over the dissent of Justices Thompson and Hunstein, who again concluded that disbarment was appropriate.[39]

III. MALPRACTICE

The Georgia Supreme Court decided one important malpractice case during the survey period, while the Georgia Court of Appeals handed down two. The court of appeals also decided several routine malpractice actions.[40]

In the supreme court case *Barnes v. Turner*,[41] an attorney helped his client sell his business in a transaction that called for payments over time to be secured by the assets of the business. To protect the client, the lawyer prepared and filed UCC-1[42] financing statements to ensure priority if the buyer defaulted. The payments, however, were to continue for more than five years, after which the priority over the collateral would be lost if the financing statements were not renewed. The attorney neither advised the client that he needed to renew the financing statements nor filed the renewals himself five years later. When the financing statements were not filed, other secured creditors took priority over the assets of the buyer, who by that time was in bankruptcy.[43]

The supreme court held that the attorney had the duty to advise the client, at the time of the original transaction, of the client's need to file the renewals.[44] If the court had stopped there, the result would have been unsurprising but useless to the client because the statute of limitations would have expired. The supreme court, however, held that when the lawyer failed to advise the client to renew the financing statements, the lawyer undertook the duty to file them himself five years later.[45] The statute of limitations, of course, had not expired on the client's claim for damages for breach of that duty.[46]

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38. *Id.*, 600 S.E.2d at 370.

39. *Id.* (Hunstein & Thompson, JJ., dissenting).

40. Gingold v. Allen, 272 Ga. App. 653, 613 S.E.2d 173 (2005); Cornwell v. Kirwan, 270 Ga. App. 147, 606 S.E.2d 1 (2004); Alta Anesthesia Assocs. of Ga., P.C. v. Bouhan, Williams & Levy, LLP, 268 Ga. App. 139, 601 S.E.2d 503 (2004).

41. 278 Ga. 788, 606 S.E.2d 849 (2004).

42. U.C.C. § 9-502 (2000).

43. 278 Ga. at 788-89, 606 S.E.2d at 849-51.

44. *Id.* at 790, 606 S.E.2d at 851-52.

45. *Id.* at 791, 606 S.E.2d at 852.

46. *Id.* at 792, 606 S.E.2d at 852. The court wrote that the statute of limitations began to run at the breach of the attorney's duty to refile, which occurred in 2001, as opposed to when the attorney breached his duty to inform the client that the client needed to refile, which occurred in 1996. *Id.*

Justices Benham, Thompson, and Hines dissented. They first attacked the result as bad policy because it destroys the ability of lawyers to have any sense of finality about their obligations to clients, and because it will make malpractice insurance harder to obtain and more expensive.[47] The dissenting justices also claimed that the decision had no rational basis because it imposes a duty on lawyers not just to competently complete the task for which the attorney was hired (e.g., closing the sale of the client's business), but instead, "in some unspecified fashion, to ascertain the full extent of the client's 'objectives' in undertaking the transaction and then take whatever actions are necessary to see that the objectives are fulfilled."[48] Nevertheless, the majority of the court held that the attorney had the duty either to advise the client of the need to renew the statements or to do it himself.[49]

The court of appeals decided two malpractice cases worth noting. In *Rhone v. Bolden*,[50] the court of appeals decided a case of first impression in Georgia regarding the duties of lawyers for an estate administrator.[51] In this case, the administrator hired the lawyers, but an heir sued the lawyers for legal malpractice.[52] The court of appeals held that heirs of an estate have no attorney-client relationship with the lawyers for the administrator, and that the heirs cannot maintain an action for legal malpractice against the attorneys.[53] The court cited cases from Maryland and California in support of its conclusion.[54]

In *Landau v. Davis Law Group, P.C.*,[55] a law firm sued to collect unpaid fees. The former client counterclaimed for legal malpractice, but did not include an affidavit of an expert competent to testify that malpractice had occurred, as required under Georgia law.[56] The client filed the compulsory counterclaim on the last day possible and later supplied the expert affidavit. The client argued that she should be entitled to take advantage of the exception to the affidavit requirement,

47. *Id.* at 794, 606 S.E.2d at 853-54 (Benham, Thompson & Hines, JJ., dissenting).
48. *Id.*, 606 S.E.2d at 854 (Benham, Thompson & Hines, JJ., dissenting).
49. *Barnes*, 278 Ga. at 792, 606 S.E.2d at 852.
50. 270 Ga. App. 712, 608 S.E.2d 22 (2004).
51. *Id.* at 718, 608 S.E.2d at 30.
52. *Id.* at 712, 608 S.E.2d at 26.
53. *Id.* at 720, 608 S.E.2d at 32.
54. *Id.* at 718-19, 608 S.E.2d at 30 (citing Ferguson v. Cramer, 709 A.2d 1279, 1284 (1998); Goldberg v. Frye, 217 Cal. App. 3d 1258, 1269, 266 Cal. Rptr. 483, 490 (1990)). The court also held that a lawyer who represented one parent in an action for wrongful death of a child has no attorney-client relationship with the other parent and cannot be sued by that other parent for legal malpractice. *Id.* at 716-17, 608 S.E.2d at 29-30.
55. 269 Ga. App. 904, 605 S.E.2d 461 (2004).
56. *See* O.C.G.A. § 9-11-9.1 (1993 & Supp. 2005).

which permits the filing of a malpractice claim without an affidavit if the statute of limitations is about to expire and the affidavit is supplied within forty-five days.[57] The court of appeals rejected her argument and affirmed the dismissal of the counterclaim.[58] Although the client was operating under a deadline, it was not a "period of limitation" within the meaning of the statute, and therefore, she was not excused from filing an expert affidavit with her counterclaim.[59]

IV. BAR ADMISSION

The Georgia Supreme Court decided two cases regarding admission to the bar. The first case, *In re Hedge,*[60] concerned a mistake in one of the questions on the February 2005 bar examination.[61] One applicant, Tony Hedge ("Hedge"), initially failed the bar examination because he scored a 269, one point below the minimum passing score. When the bar examiners discovered the mistake, they regraded the exams of all the applicants who had failed and omitted the flawed question in the second grading. Hedge, however, still did not have a passing score. He appealed to the supreme court and challenged the results as a violation of due process and equal protection because the exams of those who initially passed the exam were not regraded, and theoretically, some of them might have failed if their exams had been regraded.[62] The supreme court rejected the appeal, concluding that there was no record that this would have been true and no showing, if it was true, that Hedge was harmed.[63]

The court also took the unusual step of denying a certificate of fitness to practice law in *In re Jenkins.*[64] The applicant attended law school while serving as Chief Magistrate for Screven County, a full-time position. Attending law school required him to be absent from his job up to two days a week for two and one-half years, and the Judicial Qualifications Commission ("JQC") issued a public reprimand because of his repeated absences from the bench. Although the JQC had recommended that the reprimand not be an impediment to the Magistrate's bar admission, the Board to Determine Fitness to Practice

57. *Landau*, 269 Ga. App. at 905, 605 S.E.2d at 463. *See* O.C.G.A. § 9-11-9.1(b).
58. *Landau*, 269 Ga. App. at 907, 605 S.E.2d at 464.
59. *Id.* at 906, 605 S.E.2d at 463.
60. 279 Ga. 241, 610 S.E.2d 519 (2005).
61. *See* Rachel Tobin Ramos, *Exam Slip-Up Slips By All But One Bar Hopeful*, FULTON COUNTY DAILY REP., June 9, 2004.
62. *In re* Hedge, 279 Ga. at 241-42, 610 S.E.2d at 519-20.
63. *Id.* at 242, 610 S.E.2d at 520-21.
64. 278 Ga. 529, 603 S.E.2d 218 (2004).

Law took that and several other factors into account when it determined, over the recommendation of the hearing officer, that the applicant was not fit to practice.[65] The court affirmed the decision over the dissent of Justices Sears and Benham.[66]

Bar admission was also a topic for the Georgia Legislature during the survey period. A bill was introduced that would have permitted candidates to sit for the Georgia bar exam if they passed the bar of any other state.[67] Many people were concerned that some states, such as California, do not require candidates to graduate from an accredited law school. Georgia, however, currently does require candidates to graduate from an accredited law school. Another issue lurking in the background of this proposal is a constitutional one: Who has the authority to regulate admission to the bar, the legislature, or the supreme court? Although the bill did not pass in the last legislative session, it is possible that it will be introduced again. Who should be permitted to take the bar exam, and who should decide that question, may continue to be controversial issues.

V. ATTORNEY FEES AND LIENS

The Georgia Court of Appeals decided three cases concerning attorney compensation. In *Kilgore v. Sheetz*,[68] two attorneys, Kilgore and Livingston, had been working together on litigation—Kilgore handled paperwork while Livingston handled court appearances. They had no written agreement about how they would split any fees earned. In fact, Kilgore testified that he and Livingston had never made an oral agreement about how any contingent fee would be split. When Livingston died, a substantial contingent fee was interpled for Kilgore and Livingston's estate to fight over. The trial court held that as a matter of law, the fees were to be split 50-50 in the absence of an agreement to the contrary.[69] The court of appeals affirmed, noting that "[w]hile it may be true, as Kilgore asserts, that he was the mastermind behind the litigation, in the absence of a fee agreement with Livingston he cannot divide the fees in a way he thinks they would have agreed to if Livingston had lived."[70]

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65. *Id.* at 529-30, 604 S.E.2d at 219-20.

66. *Id.* at 531, 603 S.E.2d at 531.

67. *See, e.g.*, Greg Bluestein, *No Degree? No Problem. Bill Would Let More Take Bar*, FULTON COUNTY DAILY REP., Feb. 28, 2005.

68. 268 Ga. App. 761, 603 S.E.2d 24 (2004).

69. *Id.* at 761-62, 603 S.E.2d at 25.

70. *Id.* at 769, 603 S.E.2d at 30.

Rowen v. Estate of Hughley[71] centered on a contingent fee contract in a probate court proceeding. Attorney Sharon Rowen ("Rowen") represented three minor children and their mother in an attempt to establish their claims against the estate of Jerry Hughley, Jr. ("Hughley") and their inchoate claims against the estate of Hughley's mother, who was alive but incapacitated. The agreement was for forty percent of all amounts recovered. The petition to determine the heirs of Hughley's estate was uncontested, and the contingent fee contract would have yielded Rowen a fee of $740,000. The administrator of the estate objected to the forty percent contingent fee, and subsequently, Rowen and the mother of the children entered into a new agreement that would have entitled the lawyer to a fee of $79,000. The probate court, however, undertook an independent review of the reasonableness of the fee and used the factors outlined in GEORGIA RULE OF PROFESSIONAL CONDUCT 1.5.[72] When Rowen failed to present any evidence of the value of the services beyond the existence of the contingent fee contract, the court awarded her a fee of $15,000.[73] The court of appeals affirmed, noting that setting fees in matters regarding minor children is within the probate court's discretion, and the court had not abused its discretion in arriving at a reasonable fee in this case.[74]

Finally, the court of appeals affirmed the dismissal of an attorney's lien in *Gutter-Parker v. Pridgen*.[75] In *Gutter-Parker* the attorney represented a client in an action that claimed breach of contract and negligent construction of the client's house. The case settled, and the defendant repurchased the client's house and agreed to pay her some additional money. The attorney filed a lien against the house to secure payment of his fee. The trial court, however, dismissed the lien because the attorney's work was not for recovery of the real property, as required by the lien statute,[76] but rather was for money related to the purchase and sale of the property.[77] The court of appeals affirmed the dismissal of the lien.[78]

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71. 272 Ga. App. 55, 611 S.E.2d 735 (2005).
72. GA. RULE OF PROF'L CONDUCT 1.5 (2000).
73. *Rowen*, 272 Ga. App. at 56, 611 S.E.2d at 737.
74. *Id.* at 56-61, 611 S.E.2d at 737-40.
75. 268 Ga. App. 205, 601 S.E.2d 707 (2004).
76. O.C.G.A. § 15-19-14(c) (2005).
77. *Gutter-Parker*, 268 Ga. App. at 205-06, 611 S.E.2d at 708.
78. *Id.*

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

As usual, the Georgia Supreme Court and the Georgia Court of Appeals rejected over one hundred claims of ineffective assistance of counsel during the survey period. The supreme court, however, upheld such claims in three cases, while the court of appeals did so in two others.

Crawford v. Thompson[79] concerned a claim of ineffectiveness of appellate counsel. Crawford was convicted of armed robbery and conspiracy to commit armed robbery. He would have had a good claim for acquittal based upon the speedy trial provisions of Georgia law,[80] but his trial counsel incompetently cited the wrong Georgia statute and failed, despite the correct statute's requirements, to announce that Crawford was ready to be tried on the indictment. Appellate counsel compounded the error by not including these mistakes as part of a claim of ineffective assistance of counsel on direct appeal.[81] The supreme court held that the appellate counsel's assistance was ineffective because of this omission.[82] Appellate counsel's assistance was also ineffective because he evaluated trial counsel's performance under the wrong standard—what appellate counsel would himself have done—rather than the correct standard—whether trial counsel's performance fell below an objective standard of reasonableness.[83] Furthermore, the supreme court held that Crawford was prejudiced by appellate counsel's mistake because "Crawford would have been entitled to a reversal of his armed robbery and conspiracy convictions" if appellate counsel had included the speedy trial mistakes with the other claims of ineffective assistance of counsel.[84] Accordingly, the supreme court granted the writ of habeas corpus.[85]

Gerisch v. Meadows[86] was the most controversial of the court's ineffectiveness cases. Gerisch pleaded guilty in superior court to aggravated battery, simple battery, felony possession of marijuana, and driving under the influence. He was sentenced to serve ten years on the aggravated battery charge and concurrent sentences on the other charges. The problem with his plea, however, was that he apparently

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79. 278 Ga. 517, 603 S.E.2d 259 (2004).
80. O.C.G.A. § 17-7-171 (1993 & Supp. 2005).
81. *Crawford*, 278 Ga. at 517, 603 S.E.2d at 260.
82. *Id.* at 520, 603 S.E.2d at 262.
83. *Id.* at 519, 603 S.E.2d at 261.
84. *Id.* at 521, 603 S.E.2d at 262.
85. *Id.*
86. 278 Ga. 641, 604 S.E.2d 462 (2004).

already pleaded guilty in municipal court to charges arising from the fight that led to the aggravated battery charge. Gerisch asked his lawyer about being sentenced twice for the same offense, but his lawyer checked with the prosecutor, who told the defense lawyer that a double jeopardy defense would fail. The defense lawyer also learned that Gerisch had been charged in municipal court with a violation of an ordinance rather than a state law. The lawyer then incorrectly concluded that a municipal court prosecution could not provide a basis for a valid double jeopardy claim. The defense lawyer advised Gerisch to plead guilty, and Gerisch did so.[87] The supreme court concluded that no reasonable attorney would have done so little research or investigation on the issue, and that the advice given to Gerisch "fell below an objective standard of reasonableness."[88] The court also concluded that Gerisch would not have pleaded guilty but for that advice; therefore, the court granted the habeas corpus petition.[89]

Justice Carley filed a vigorous dissent in this case. He first took issue with the proof Gerisch offered of his municipal court conviction and described the majority opinion as a departure from the settled procedures of review in habeas cases.[90] Along with his own testimony, Gerisch submitted uncertified copies of an incident report and a disposition sheet, rather than certified copies of his conviction. The majority relied on this evidence, but Justice Carley concluded that after this case "the habeas courts of this state should be apprised that, from this day forward, they are no longer authorized to enforce the rules of evidence and to make credibility determinations. . . ."[91] Justice Carley also criticized the decision on the basis that there was no showing that the advice Gerisch received–that his double jeopardy claim was invalid–was wrong.[92] For both procedural and substantive reasons, Justice Carley would have affirmed the denial of habeas relief.[93]

Finally, in *Petty v. Smith*,[94] the supreme court unanimously voted to grant a habeas corpus petition based upon the ineffective assistance of defense counsel.[95] Petty was charged with malice murder, felony murder, and aggravated assault. Defense counsel advised Petty to plead guilty to the felony murder and aggravated assault charges to secure a

87. *Id.* at 642, 604 S.E.2d at 463.
88. *Id.* at 645-46, 604 S.E.2d at 466.
89. *Id.*, 604 S.E.2d at 465.
90. *Id.* at 647, 604 S.E.2d at 466 (Carley, J., dissenting).
91. *Id.* (Carley, J., dissenting).
92. *Id.* at 648-49, 604 S.E.2d at 467-68 (Carley, J., dissenting).
93. *Id.* at 650, 604 S.E.2d at 468 (Carley, J., dissenting).
94. 279 Ga. 273, 612 S.E.2d 276 (2005).
95. *Id.* at 277, 612 S.E.2d at 279.

life sentence for murder with a concurrent twenty-year sentence for the assault, rather than risk going to trial and receiving a life sentence for the murder and a consecutive twenty-year sentence for the assault.[96] In fact, Petty could not have been convicted of the assault, given the way the prosecution had drafted the indictment.[97] Because no reasonably competent attorney would have given the advice to plead guilty, Petty received ineffective assistance of counsel.[98] He easily showed prejudice because the sentence he received, life with a consecutive twenty-year sentence, was more than he could have received on conviction.[99] Therefore, the court granted the petition for habeas relief.[100]

As mentioned above, the court of appeals also addressed the issue of ineffective assistance of counsel. The court of appeals upheld the claim of ineffective assistance of counsel in *Heath v. State*.[101] In an earlier opinion, the court of appeals held that Heath's counsel's efforts were so defective that Heath did not need to show prejudice in order to prevail on his ineffective assistance claim.[102] The supreme court reversed, holding that prejudice needed to be shown.[103] On remand, the court of appeals again detailed the woeful performance of Heath's trial counsel. Heath pleaded guilty to the offense of serious injury by vehicle, even though he had no memory of the accident and alerted his counsel to the possibility that a co-worker may have been driving. Trial counsel made no effort to find the co-worker and did not trouble himself to look up the elements of the offense with which his client was charged.[104] The court of appeals determined prejudice existed in that:

> [T]he record of evidence supports a finding that there is a reasonable probability that, had the case been investigated, and a determination made that in fact [the coworker] had been driving, Heath, who did not know who had been driving, would have insisted on going to trial especially when coupled with the fact that the evidence did not suit the elements of the crime as to some of the charges.[105]

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96. *Id.* at 273-75, 612 S.E.2d at 277-78.
97. *Id.* at 274-75, 612 S.E.2d at 277-78.
98. *Id.* at 275-76, 612 S.E.2d at 278.
99. *Id.* at 276, 612 S.E.2d at 278-79.
100. *Id.* at 276-77, 612 S.E.2d at 279.
101. 268 Ga. App. 235, 601 S.E.2d 758 (2004).
102. Heath v. State, 258 Ga. App. 612, 616, 574 S.E.2d 852, 855 (2002), *rev'd*, 277 Ga. 337, 588 S.E.2d 738 (2003).
103. *Heath*, 277 Ga. at 339, 588 S.E.2d at 740.
104. *Id.*
105. *Heath*, 268 Ga. App. at 242, 601 S.E.2d at 762.

The court of appeals reversed the trial court and permitted Heath to withdraw his guilty plea.[106]

The court of appeals also ordered a new trial on the basis of ineffective assistance of counsel in *Gibbs v. State*.[107] This was a robbery case in which the defense was mistaken identity. The clerk who identified the defendant as the perpetrator testified that he had ample opportunity to observe the robber at close range, under good light, and with "'heightened'" and "'very intense'" concentration.[108] The witness told the defendant's investigator that he had not noticed any gold teeth in the robber's mouth. In fact, the defendant's counsel had dental records showing that at the time of the robbery the defendant had "at least six solid gold teeth . . . in the front of his mouth."[109] Although defense counsel elicited testimony from witnesses that the defendant had these teeth, counsel was unable to introduce the dental records because the records had not been provided to the prosecution.[110] The court of appeals concluded that no reasonable attorney would have foreclosed the option of introducing the records by not living up to reciprocal discovery obligations, and that the defendant's defense of mistaken identity was seriously prejudiced because the records would have helped significantly to refute the prosecution's suggestion that the gold teeth were recent acquisitions.[111] Thus, a new trial was necessary.[112]

VII. JUDICIAL ETHICS AND RECUSAL

The Georgia Supreme Court and the Georgia Court of Appeals each decided one significant case regarding judicial ethics and recusal. In the supreme court case, *Johnson v. State*,[113] the defendant was convicted of felony murder, armed robbery, aggravated assault, and illegal possession of a weapon.[114] The supreme court, however, reversed her convictions and remanded for a new trial because the trial judge's impartiality might reasonably be questioned because of how the judge handled the trial:[115]

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106. *Id.*, 601 S.E.2d at 763.
107. 270 Ga. App. 56, 606 S.E.2d 83 (2004).
108. *Id.* at 59, 606 S.E.2d at 87.
109. *Id.* at 59-60, 606 S.E.2d at 86.
110. *Id.* at 58, 606 S.E.2d at 87.
111. *Id.* at 58, 60, 606 S.E.2d at 86, 87.
112. *Id.* at 60, 606 S.E.2d at 87.
113. 278 Ga. 344, 602 S.E.2d 623 (2004).
114. *Id.* at 344, 346, 602 S.E.2d at 624, 625.
115. *Id.* at 345, 602 S.E.2d at 624-25.

> [T]he trial judge in this case stated his conclusions regarding appellant's guilt even before trial began; repeatedly treated defense counsel in a demeaning and disparaging manner in the jury's presence; belittled counsel in the jury's presence for his attempts to raise objections; forbade counsel in the jury's presence from raising legitimate objections; participated in ex parte communications with the prosecutor in which he directed the State's line of questioning and referred to the State's witnesses as "our witnesses"; and construed counsel's well-grounded recusal motion as an effort to demean and debase the court.[116]

Although there was sufficient evidence to uphold the convictions otherwise,[117] the supreme court reversed the convictions because it could not conclude that these incidents, most of which occurred in the jury's presence, had no impact on the jury's verdict.[118]

In the court of appeals case, *Eastside Baptist Church v. Vicinanza*,[119] the trial judge was presiding over a case that had been brought as a class action. The plaintiffs' lawyers, however, filed an unrelated class action against Life University and all of its Trustees, including the trial judge in *Eastside*.[120] The court of appeals cited Canon 3E of the CODE OF JUDICIAL CONDUCT,[121] which provides that judges shall disqualify themselves if "their impartiality might reasonably be questioned, including but not limited to instances where: . . . (a) the judge has a personal bias or prejudice concerning a . . . party's lawyer."[122] The trial judge did not recuse himself, but the court of appeals held that recusal was mandatory on these facts and remanded the case for assignment to another judge.[123]

VIII. ONE MISCELLANEOUS CASE

One miscellaneous case warrants a brief mention. In *Askins v. Colon*,[124] the defendant allegedly signed an acknowledgment of service of process. If that acknowledgment was valid, the case could proceed. If the acknowledgment was not, however, the case would have to be

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116. *Id.* at 348-49, 602 S.E.2d at 627.
117. *Id.* at 346, 602 S.E.2d at 625.
118. *Id.* at 348-49, 602 S.E.2d at 627.
119. 269 Ga. App. 239, 603 S.E.2d 681 (2004).
120. *Id.* at 240, 603 S.E.2d at 682-83.
121. GA. CODE OF JUDICIAL CONDUCT 3E (1998).
122. *Eastside Baptist Church*, 269 Ga. App. at 240, 603 S.E.2d at 683 (quoting GA. CODE OF JUDICIAL CONDUCT 3E(1)).
123. *Id.* at 242, 603 S.E.2d at 683-84.
124. 270 Ga. App. 737, 608 S.E.2d 6 (2004).

dismissed. The evidence indicated that the plaintiff's counsel obtained the defendant's signature on the acknowledgment without the consent of the defendant's attorney, in violation of the "no-contact" provision of the GEORGIA RULES OF PROFESSIONAL CONDUCT 4.2 ("Rule 4.2").[125] The court of appeals, however, refused to exclude the acknowledgment and allowed the case to proceed, noting that "we are aware of no authority supporting the exclusion of an acknowledgment of service on the basis of an ex parte communication."[126] Ironically, the facts as presented indicate that the improper contact accomplished what the rule is designed to avoid. It is hard to imagine that the defendant's counsel would have permitted his client to sign the acknowledgment. The defendant did not call into question the circumstances surrounding the execution of the acknowledgment, but the court of appeals or the supreme court may, in a later case, want to revisit the question of how to remedy a violation of Rule 4.2.[127]

IX. CONCLUSION

There have been many developments in Georgia relating to legal ethics during the survey period. The Georgia courts have been active with respect to attorney discipline, malpractice, bar admission, and other related matters. The legislature has shown an interest in regulating admission to the bar directly. Attorneys who wish to ensure that they comply with their responsibilities and that the profession maintains high standards for its members should monitor these developments with care.

125. GA. RULE OF PROF'L CONDUCT 4.2 (2000).

126. *Askins*, 270 Ga. App. at 740, 608 S.E.2d at 9-10.

127. *See, e.g.*, Midwest Motor Sports v. Arctic Cat Sales, Inc., 347 F.3d 693 (8th Cir. 2003).

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