Legal Ethics

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I. INTRODUCTION

Between June 1, 2002, and June 1, 2003, the Georgia Court of Appeals and the Georgia Supreme Court decided over two hundred cases concerning legal ethics. Those cases included disciplinary cases against lawyers, bar admission matters, claims of ineffective assistance of counsel in criminal cases, judicial discipline and disqualification, and several miscellaneous matters involving clients and lawyers. In addition, the United States Court of Appeals for the Eleventh Circuit decided one significant case involving judicial elections in Georgia.

II. DISCIPLINARY CASES

A. Trust Accounts and Other Financial Problems

Lawyers in a variety of practice settings have occasion to handle other people's money. One of the leading causes of attorney discipline is the mishandling of client money, and this past year was no exception. Six attorneys were disbarred for mishandling money belonging to others, while one attorney received a twelve-month suspension.

Two attorneys were disbarred because they settled cases without client authorization and converted the money to their own uses. *In re Jones*¹ arose from one incident, while a different *In re Jones*² involved ten

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^{1. 275} Ga. 496, 569 S.E.2d 844 (2002).

^{2.} 276 Ga. 111,575 S.E.2d 508 (2003). This matter also involved an eleventh violation in which the attorney converted a duplicate insurance check rather than return it to the insurance company as he was supposed to do. Id. at 111,575 S.E.2d at 508.

cases. In *In re Snead*³ and *In re Burrell*,⁴ two lawyers lost their licenses because they absconded with money they received in trust at real estate closings.⁵ Another lawyer, in *In re Clarke*,⁶ voluntarily surrendered his license after he withdrew funds from an estate for which he was the administrator and took for his own use a car that belonged to the estate.⁷ In *In re McFarland*,⁸ another attorney was disbarred after she became an issuing agent for a title insurance company but never accounted for the premiums that were paid to her.⁹ Finally, in *In re Cunningham*,¹⁰ an attorney received a twelve-month suspension after he filed a Petition for Voluntary Discipline for commingling client funds with his personal funds and "borrowing" money from the client's funds, even though the client was repaid.¹¹

B. Problems of Client Neglect and Abandonment

In the Georgia Supreme Court's 2002-2003 term, the court disciplined numerous lawyers for neglect or abandonment of client matters. Some of these cases involved multiple matters, while neglect of just one matter was sufficient cause for discipline in a number of others.

Three cases displayed patterns of client abandonment, and all resulted in disbarment. *In re Dickson*¹² concerned an attorney who undertook one divorce case and two post-conviction cases, did little or no work on the matters, and in two of the three cases, kept the money that the client paid up front.¹³ In *In re McDaniel*,¹⁴ another lawyer abandoned six clients, kept \$3500 retainers from two clients, and converted \$13,500 belonging to one client for his own use.¹⁵ Finally, in *In re Broom*,¹⁶ an attorney was disbarred after abandoning clients in six personal injury

^{3. 276} Ga. 278, 577 S.E.2d 592 (2003).

^{4. 276} Ga. 112, 575 S.E.2d 508 (2003).

^{5.} $In\ re\ Snead$, 276 Ga. at 278, 577 S.E.2d at 593; $In\ re\ Burrell$, 276 Ga. at 112, 575 S.E.2d at 509.

^{6. 275} Ga. 814, 573 S.E.2d 81 (2002).

^{7.} Id. at 815, 573 S.E.2d at 82.

^{8. 275} Ga. 815, 573 S.E.2d 56 (2002).

^{9.} Id. at 817, 573 S.E.2d at 58.

^{10. 276} Ga. 400, 578 S.E.2d 892 (2003).

^{11.} Id. at 400, 578 S.E.2d at 892.

^{12. 275} Ga. 271, 565 S.E.2d 455 (2002).

^{13.} Id. at 272, 565 S.E.2d at 456.

^{14. 276} Ga. 226, 577 S.E.2d 275 (2003).

^{15.} Id. at 227-28, 577 S.E.2d at 276.

^{16. 276} Ga. 114, 575 S.E.2d 492 (2003).

cases and one divorce case. ¹⁷ In five of these cases, Broom did nothing to pursue the client's matter. ¹⁸

A number of other cases resulted in discipline for abandonment of a single client. In re Strickland¹⁹ and In re Quinlan²⁰ concerned two lawyers who were disbarred for neglecting bankruptcy matters entrusted to them; in each case, the lawyer also took client money for the lawyer's personal use.²¹ Two other lawyers, in In re Burton²² and In re Eastham,²³ undertook to represent clients in criminal cases but abandoned the clients and lost their licenses as a result.²⁴ In In re Beall²⁵ and In re Eaton,²⁶ lawyers with prior disciplinary history were disbarred for neglecting civil cases,²⁷ and in In re Shehane,²⁸ a lawyer was disbarred for abandoning a client's civil claim and then lying about it to the Investigative Panel.²⁹ Two other lawyers were suspended for abandoning clients in civil cases. An attorney in In re Wallace³⁰ was suspended for two years for neglecting a case that had already been filed,³¹ and in In re Luquire,³² an attorney was suspended for one year for failing to take any action on the client's behalf.³³

C. Other Disciplinary Cases

The supreme court also decided a number of miscellaneous disciplinary cases. These cases involved criminal activity by lawyers, reciprocal discipline issues, the use of "runners," and deceptive actions by lawyers.

- 17. Id. at 114-17, 575 S.E.2d at 493-95.
- 18. Id. at 114-15, 575 S.E.2d at 493-94.
- 19. 276 Ga. 122, 575 S.E.2d 500 (2003).
- 20. 275 Ga. 273, 565 S.E.2d 457 (2002).
- 21. In re Strickland, 276 Ga. at 123-24, 575 S.E.2d at 501; In re Quinlan, 275 Ga. at 273-74, 565 S.E.2d at 457-58.
 - 22. 276 Ga. 323, 578 S.E.2d 399 (2003).
 - 23. 275 Ga. 813, 573 S.E.2d 78 (2002).
- 24. In re Burton, 276 Ga. at 324, 578 S.E.2d at 400; In re Eastham, 275 Ga. at 813, 573 S.E.2d at 78-79.
 - 25. 276 Ga. 214, 576 S.E.2d 882 (2003).
- 26. 275 Ga. 489, 569 S.E.2d 522 (2002). The court noted that a petition for voluntary surrender of license is "tantamount to disbarment." *Id.* at 490, 569 S.E.2d at 523.
- - 28. 276 Ga. 168, 575 S.E.2d 503 (2003).
 - 29. Id. at 169, 575 S.E.2d at 504.
 - 30. 275 Ga. 629, 571 S.E.2d 388 (2002).
 - 31. Id., 571 S.E.2d at 389.
 - 32. 275 Ga. 493, 569 S.E.2d 843 (2002).
 - 33. Id. at 494, 569 S.E.2d at 844.

The court dealt with cases involving criminal activity by lawyers. In In re Rutherford, 34 a lawyer's voluntary surrender of his license was accepted after the lawyer pleaded guilty to three felony counts of bribery. In In re Jackel, 36 a lawyer pleaded guilty to one count of sexual battery and one count of solicitation of sodomy, both of which arose from an attorney-client relationship, and the lawyer was disbarred.³⁷ In In re Wyatt, ³⁸ attorney Wyatt pleaded guilty in United States District Court to knowingly aiding and abetting an alien attempting to enter the United States by use of false and misleading As part of Wyatt's probation, the federal court representations. prohibited him from practicing law for two years. Wyatt petitioned the Georgia Supreme Court for a one-year suspension,³⁹ and the court granted it.⁴⁰ Justices Hunstein, Thompson, and Hines dissented, arguing that there was not enough information to determine exactly what Wyatt had done and how Wyatt's criminal actions might have been related to the practice of law. 41 Finally, in In re Nelson, 42 the court lifted the suspension (after seven years) of a lawyer who had been convicted of money laundering, but who had completed his term of probation and shown remorse, and whose community presented evidence of his personal character and professional competence. 43

The supreme court also decided three cases involving reciprocal discipline. *In re Drumheller*⁴⁴ concerned a Georgia lawyer who was disbarred after he voluntarily surrendered his license to practice law in Virginia after he was accused by numerous clients of neglecting them and failing to communicate with them.⁴⁵ In *In re Barrett*,⁴⁶ another attorney was disbarred in Georgia after she surrendered her license in Florida for "ethical misconduct." Barrett's misconduct included her conviction in Florida of three counts of grand theft and one count of

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34. 275 Ga. 490, 569 S.E.2d 840 (2002).
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^{35.} Id. at 491, 569 S.E.2d at 841.

^{36. 275} Ga. 568, 569 S.E.2d 835 (2002).

^{37.} Id. at 568, 569 S.E.2d at 836.

^{38. 275} Ga. 545, 570 S.E.2d 330 (2002).

^{39.} Id. at 546, 570 S.E.2d at 330-31.

^{40.} Id., 570 S.E.2d at 331.

^{41.} Id. at 546-47, 570 S.E.2d at 331 (Hines, Hunstein, and Thompson, JJ., dissenting).

^{42. 275} Ga. 491, 569 S.E.2d 841 (2002).

^{43.} Id. at 493, 569 S.E.2d at 842.

^{44. 276} Ga. 399, 578 S.E.2d 893 (2003).

^{45.} Id. at 399, 578 S.E.2d at 893.

^{46. 276} Ga. 279, 577 S.E.2d 771 (2003).

^{47.} Id. at 279, 577 S.E.2d at 771.

carrying a concealed firearm.⁴⁸ *In re Craig*⁴⁹ concerned a lawyer who was disbarred in Georgia after she consented to disbarment in South Carolina for misappropriating client money and failing to communicate with clients, failing to obey a court order, and failing to cooperate with disciplinary counsel's office.⁵⁰

Two lawyers were disciplined for paying a non-lawyer organization, Professional Management, Inc., for the referral of personal injury clients. In *In re Robbins*, ⁵¹ an attorney was disbarred for giving a non-lawyer cash to deliver to "runners" who would secure personal injury clients for the lawyer. ⁵² The non-lawyer received twenty-five percent of any fee the attorney realized from this arrangement. The lawyer had a lengthy prior record of discipline. ⁵³ In the other case, *In re Barnes*, ⁵⁴ a lawyer petitioned for a voluntary three-year suspension for paying Professional Management to refer personal injury clients. ⁵⁵ The court granted that petition, although Justices Hunstein and Thompson dissented and argued disbarment was appropriate. ⁵⁶

Finally, two lawyers received one-year suspensions for different types of deceptive behavior. In *In re Toler*, ⁵⁷ a lawyer submitted to a judge a conflict letter stating inaccurately that he was a sole practitioner. The falsity of the letter must have become obvious when the lawyer's associate appeared for him in court. Meanwhile, the lawyer's secretary had submitted a second conflict letter falsely stating that the lawyer would be in municipal court that morning. ⁵⁸ The judge held a hearing and found the lawyer in contempt. ⁵⁹ *In re Vaughn* ⁶⁰ concerned a lawyer who failed to record a deed to secure debt. Rather than confess the failure to the client, the attorney photocopied a file stamp from the clerk's office and sent the "file-stamped" document to his client. ⁶¹ The Special Master recommended a six-month suspension, but the supreme court suspended the lawyer for a year. ⁶² Justice Benham dissented,

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48. Id.
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^{49. 276} Ga. 225, 576 S.E.2d 862 (2003).

^{50.} Id. at 225, 576 S.E.2d at 862.

^{51. 276} Ga. 124, 575 S.E.2d 501 (2003).

^{52.} Id. at 124-25, 575 S.E.2d at 502.

^{53.} Id.

^{54. 275} Ga. 812, 573 S.E.2d 80 (2002).

^{55.} Id. at 812, 573 S.E.2d at 81.

^{56.} Id. at 812-13, 573 S.E.2d at 81 (Hunstein and Thompson, JJ., dissenting).

^{57. 276} Ga. 228, 576 S.E.2d 898 (2003).

^{58.} Id. at 229, 576 S.E.2d at 898.

^{59.} Id.

^{60. 275} Ga. 295, 565 S.E.2d 463 (2002).

^{61.} Id. at 295, 565 S.E.2d at 463.

^{62.} Id. at 296, 565 S.E.2d at 464.

stating the Special Master had a rational basis for recommending only a six-month suspension because of the personal circumstances under which the lawyer was operating and because the client was not harmed by the lawyer's deception.⁶³

III. BAR ADMISSIONS

The supreme court decided four cases concerning admission to the The first case, In re Singh, 64 concerned an applicant's complaint about the way the bar exam grade is computed. Under the supreme court's Rules Governing Admission to the Practice of Law⁶⁵ an applicant must have a score of 270 to pass the bar exam. 66 The score is computed by adding the "scaled" scores of the Multistate Bar Exam (MBE), the Multistate Performance Test (MPT), and the essay questions prepared by the Georgia Board of Law Examiners.⁶⁷ Singh received a scaled score of 126.95 on the MPT/Essay part of the exam and a scaled score of 143.32 on the MBE. The sum of those two numbers is 270.27, enough for a passing grade, but Singh encountered a problem. Since the 1980s, the Office of Bar Admissions (OBA) has rounded the MBE scaled score for every examinee. Singh's rounded MBE score was 143, making his final score just under 270.68 In light of the OBA's historical practice and the expert opinion of the Director of Research for the National Conference of Bar Examiners, the supreme court concluded that the term "scaled score" in the Rules Governing Admission to the Practice of Law includes a rounded, scaled score.⁶⁹ The Board of Bar Examiners, therefore, acted within the Rules when it concluded that Singh had not passed the bar examination.⁷⁰

Another bar exam problem arose in *In re Goodman*.⁷¹ The applicant received a poor grade on the MPT and "surmised" that it must have been because of his poor handwriting. The applicant asked the Board of Bar Examiners to transcribe his scrawled answers and regrade them.⁷²

^{63.} Id. at 296-97, 565 S.E.2d at 464-65 (Benham, J., dissenting).

^{64. 276} Ga. 288, 576 S.E.2d 899 (2003).

^{65.} SUPREME COURT OF GEORGIA RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW *available at* http://www2.state.ga.us/courts/bar/pdf/rules10.pdf (last visited Sept. 2, 2003) [hereinafter RULES GOVERNING ADMISSION].

^{66.} In re Singh, 276 Ga. at 288, 576 S.E.2d at 899 (citing Rules Governing Admission, supra note 65, at Part B, \S 8(a)).

^{67.} Id.

^{68.} Id., 576 S.E.2d at 899-900.

^{69.} Id. at 290, 576 S.E.2d at 900.

^{70.} Id.

^{71. 276} Ga. 518, 578 S.E.2d 884 (2003).

^{72.} Id. at 518, 578 S.E.2d at 884.

Georgia's Rules Governing Admission to the Practice of Law forbid regrading of exam answers after the general release of grades,73 and the supreme court concluded that re-reading the typed answers of this applicant would be regrading his exam.74 The court, therefore, denied the applicant's request. 75 The court also warned future applicants not to complain that their handwriting must have been the cause of their failing grade, because "implicit in the requirement that applicants handwrite a portion of their bar examinations is the requirement that any handwritten answers be sufficiently legible for bar examiners to assign a grade based on the substance of the answer."76

The court also decided two character and fitness cases during the survey period. In In re Lee, 77 the applicant pleaded guilty in 1998 to six counts of the unauthorized practice of law.⁷⁸ Although the applicant paid his fine and completed the terms of his probation, the court concluded that he had not borne his burden to show that he was rehabilitated.⁷⁹ In particular, the applicant failed to show remorse for his conduct, and he failed to show rehabilitation, having sued the lawyer and the investigator who brought the unauthorized practice of law charges.⁸⁰ Rehabilitation requires more than compliance with the law, and the court denied the request for a certification of fitness to practice.81 In In re Allen,82 an attorney was denied a certification of fitness because he was the subject of disciplinary action by the Florida Bar and because he did not demonstrate candor or a sense of accountability about that disciplinary action.83

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

As usual, the appellate courts in Georgia reviewed dozens of claims of ineffective assistance of counsel in criminal cases during the survey Most claims were denied with little discussion, including Zinnamon v. State, 84 in which the defense lawyer was suspended from

^{73.} RULES GOVERNING ADMISSION, supra note 65, Part B, § 13.

²⁷⁶ Ga. at 518, 578 S.E.2d at 884-85.

^{75.} Id., 578 S.E.2d at 885.

^{76.} *Id*.

^{77. 275} Ga. 763, 571 S.E.2d 720 (2002).

^{78.} Id. at 763, 571 S.E.2d at 720.

^{79.} Id. at 764, 571 S.E.2d at 721.

^{80.} Id.

^{81.} *Id*.

^{82. 275} Ga. 818, 573 S.E.2d 79 (2002).

^{83.} Id. at 818, 573 S.E.2d at 79-80.

²⁶¹ Ga. App. 170, 582 S.E.2d 146 (2003).

practice at the time of Zinnamon's trial⁸⁵ and *Shiver v. State*,⁸⁶ in which the defense lawyer was later disbarred for unrelated reasons.⁸⁷ *Burgess v. State*,⁸⁸ *Bates v. State*,⁸⁹ *Phillips v. State*,⁹⁰ *Talbot v. State*,⁹¹ and *Emilio v. State*⁹² were remanded for hearings on the claims of ineffective assistance. In seven cases, the ineffective assistance claims were granted,⁹³ while two claims were denied only over vigorous dissents.⁹⁴

A. Claims of Ineffective Assistance Granted

1. Asleep at the Switch. Four convictions were overturned because defense counsel did not recognize obvious opportunities for their clients to avoid conviction or other prejudice. One of these cases came from the Supreme Court of Georgia. In Nelson v. Hall, 95 the defendant had been convicted of kidnapping with bodily injury, among other things. However, at trial the jury received an erroneous instruction that omitted the need to find bodily injury before convicting the defendant of kidnapping with bodily injury. The defendant would have been entitled to have that part of his conviction reversed, but defense counsel failed to enumerate this issue on appeal. 96 Because the error was one that no reasonable attorney should have made, and because the outcome of the defendant's appeal certainly would have been different, the court concluded that the defendant was entitled to have his petition for a writ of habeas corpus granted. 97

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85. Id. at 172, 582 S.E.2d at 148.
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^{86. 276} Ga. 624, 581 S.E.2d 254 (2003).

^{87.} Id. at 626, 581 S.E.2d at 256.

^{88. 276} Ga. 185, 576 S.E.2d 863 (2003).

^{89. 275} Ga. 862, 572 S.E.2d 550 (2002).

^{90. 275} Ga. 595, 571 S.E.2d 361 (2002)

^{91. 261} Ga. App. 12, 581 S.E.2d 669 (2003).

^{92. 257} Ga. App. 49, 570 S.E.2d 372 (2002).

^{93.} Nelson v. Hall, 275 Ga. 792, 573 S.E.2d 42 (2002); Shabazz v. State, 259 Ga. App. 339, 577 S.E.2d 45 (2003); Turner v. State, 259 Ga. App. 902, 578 S.E.2d 570 (2003); Blovin v. State, 255 Ga. App. 788, 567 S.E.2d 39 (2002); Head v. Thomason, 276 Ga. 434, 578 S.E.2d 426 (2003); Heath v. State, 258 Ga. App. 612, 574 S.E.2d 852 (2002); Guzman v. State, 260 Ga. App. 689, 580 S.E.2d 654 (2003).

^{94.} Braithwaite v. State, 275 Ga. 884, 572 S.E.2d 612 (2002); Woods v. State, 275 Ga. 844, 573 S.E.2d 394 (2002).

^{95. 275} Ga. 792, 573 S.E.2d 42 (2002).

^{96.} Id. at 792-93, 573 S.E.2d at 42-43.

^{97.} *Id. Nelson* presented an odd, if not unique, case on the necessity of finding harm from his counsel's ineffective assistance. The outcome of his appeal would have been different because of the erroneous jury instruction. His sentence, however, probably would be the same because he was sentenced as a recidivist. A conviction for simple kidnapping

Three other such cases came from the court of appeals. The sixteenyear-old defendant in Shabazz v. State98 was permitted by his counsel to plead guilty, resulting in a twenty-year prison sentence for what the prosecutor described in court as committing incest with his stepsister. The problem his counsel overlooked was that it is not incest to have sex with your stepsister.99 The court of appeals permitted Shabazz to withdraw his guilty plea due to ineffective assistance of counsel; 100 his counsel failed to recognize that the State had not articulated a legally sufficient factual basis for the plea. 101 With similar passivity, defense counsel in Turner v. State 102 remained silent while a prosecutor used a conviction from another state at a sentencing hearing without giving the notice required by law. 103 The court of appeals found that defense counsel's silence was ineffective assistance of counsel because it led to a longer sentence. 104 Finally, in Blouin v. State 105 the court of appeals overturned John Blouin's conviction for selling cocaine because Blouin's defense lawyer "just didn't think about" using the transcript of testimony from a witness stating Blouin was not the one who sold the drugs. 106 The lawyer knew about the transcript and knew that only one witness testified that the seller was Blouin. 107 The court concluded that the failure to obtain and use the transcript "was the equivalent of simply forgetting to call a key witness" and reversed the conviction. 108

2. Lack of Diligence. In three cases, Georgia courts held that attorneys rendered ineffective assistance by not doing enough for their clients. *Head v. Thomason*¹⁰⁹ was a death penalty case heard by the supreme court. Gary Thomason was convicted in a bench trial of murdering a homeowner who interrupted Thomason's burglary of the victim's home. At the sentencing hearing, Thomason's mitigation

rather than kidnapping with bodily injury still would have been enough to trigger the recidivist sentencing. Id.

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98. 259 Ga. App. 339, 577 S.E.2d 45 (2003).
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^{99.} Id. at 339, 577 S.E.2d at 46; see O.C.G.A. § 16-6-22(a)(3) (1999).

^{100.} Shabazz, 259 Ga. App. at 340, 577 S.E.2d at 46.

^{101.} Id. at 339, 577 S.E.2d at 47.

^{102. 259} Ga. App. 902, 578 S.E.2d 570 (2003).

^{103.} Id. at 903, 578 S.E.2d at 571.

^{104.} Id.

^{105. 255} Ga. App. 788, 567 S.E.2d 39 (2002).

^{106.} Id. at 790, 567 S.E.2d at 41-42.

^{107.} Id.

^{108.} Id.

^{109. 276} Ga. 434, 578 S.E.2d 426 (2003).

^{110.} Id. at 434, 578 S.E.2d at 428.

evidence "consisted only of Thomason's profession of remorse, his lack of violent tendencies, testimony that he was easily influenced and was always with someone else when he got in trouble, and his mother's mention of his hospitalization at Charter Peachford Hospital for marijuana usage."

The judge sentenced Thomason to death. Thomason brought a habeas action, and the trial court ordered a new trial on sentencing. 112

The supreme court affirmed the trial court's habeas decision. 113 The court was particularly concerned that defense counsel did not call any expert witnesses at the sentencing hearing, although two were known to him. 114 The first expert witness was a clinical psychologist who had already testified, at a competency hearing, that the defendant had an IQ of 77. The other was a psychiatrist who interviewed the defendant and concluded that the defendant suffered from intellectual impairment, low self-esteem, and depression. When the trial court refused to authorize the payment of \$25,000 for mental health experts, however, defense counsel gave up. He never gave the psychiatrist the relevant school and medical records, and he never tried to make a less expensive arrangement with the expert, or another expert, to testify at the sentencing. 115 The court concluded that "given the importance of mitigating evidence in death penalty cases, . . . an attorney has not acted reasonably when he fails to call mental health experts he knows have mitigating evidence and explains his failure to present lay mitigating evidence by asserting that he had no experts to call."116

The court of appeals decided two cases in which the defense counsel's lack of diligence constituted ineffective assistance of counsel. In *Heath v. State*, ¹¹⁷ a case later reversed by the Georgia Supreme Court, the defendant was involved in a head-on collision and was charged with fifteen counts of serious injury by vehicle, two counts of driving under the influence of alcohol, and one count of reckless driving. The

^{111.} Id. at 435, 578 S.E.2d at 428.

^{112.} Id. at 435-36, 578 S.E.2d at 428-29.

^{113.} Id. at 434, 578 S.E.2d at 428.

^{114.} Id. at 435, 578 S.E.2d at 429-30.

^{115.} Id., 578 S.E.2d at 430.

^{116.} *Id.* at 437, 578 S.E.2d at 430. The court's opinion in this case predated a similar holding from the United States Supreme Court. In *Wiggins v. Smith*, 123 S. Ct. 2527 (2003), the Court held that a defendant who had been sentenced to death had received ineffective assistance of counsel in the sentencing phase. *Id.* at 2542-43. The Court relied specifically on the failure of the defense lawyers to commission a report from a forensic social worker when the lawyers knew that the defendant's life history likely would constitute persuasive mitigating evidence. *Id.* at 2536-37.

^{117. 258} Ga. App. 612, 574 S.E.2d 852 (2002).

defendant told his public defender that he could not remember the accident, and that a co-worker might have been driving. The lawyer made no effort to find this co-worker and, according to a family member, defense counsel

told [him] that he had so many cases on his load, that if he looked into every nook and cranny that there was to this case, that he would never get anything done, and that [the defendant] was nothing but a drunk, \dots and that his only option \dots was to say that he was guilty. 119

Also, the lawyer did not research whether the victims' injuries fit the definition of "serious" in the relevant statute (the provisions of which the lawyer could not recall), and the lawyer did not consult with his client for the thirteen months between arraignment and the guilty plea. 120 The court concluded that this representation was "tantamount to no representation." 121 The court applied a "presumption of prejudice" to the case because of the disgraceful quality of the representation. 122 This was the first time a Georgia court applied such a presumption in a non-capital case. 123 It was on this point that the supreme court reversed the court of appeals. 124

In *Guzman v. State*, ¹²⁵ the defendant was convicted of burglary after he entered a neighbor's apartment in a confused state of mind. The defendant had never been in trouble before and had a history of "confusional migraines" that could have caused his behavior and his appearance the night he was arrested; this evidence would have negated the criminal intent necessary to convict him. ¹²⁶ Defense counsel had twenty-five pages of medical records to substantiate the condition but sought improperly, and unsuccessfully, to introduce the records through the defendant's testimony. The lawyer did not try to contact the defendant's doctor or obtain records from other facilities that had treated the defendant. ¹²⁷ Because of the lawyer's lack of effort with respect to a crucial factual issue that would have exonerated the defendant, the

^{118.} Id. at 615, 574 S.E.2d at 854.

^{119.} *Id*.

^{120.} Id. at 615-16, 574 S.E.2d at 854-55.

^{121.} Id. at 612, 574 S.E.2d at 852-53.

^{122.} Id., 574 S.E.2d at 853.

^{123.} Id. at 616, 574 S.E.2d at 855.

^{124.} See State v. Heath, SO3G0528, 2003 LEXIS 943 (Ga. Nov. 10, 2003).

^{125. 260} Ga. App. 689, 580 S.E.2d 654 (2003).

^{126.} Id. at 692, 580 S.E.2d at 657.

^{127.} Id. at 691-93, 580 S.E.2d at 656-57.

court of appeals held that the lawyer's assistance had been ineffective, and it reversed defendant's conviction. 128

B. Claims of Ineffective Assistance Rejected Over Dissent

A majority of the supreme court rejected a claim of ineffective assistance of counsel in *Braithwaite v. State*, ¹²⁹ but the opinion drew a stinging dissent from Justices Hunstein, Benham, and Thompson. ¹³⁰ The defendant was tried for his participation in a triple murder in 1996. The principal witnesses against him were two alleged accomplices and his ex-wife. ¹³¹ At the beginning of closing arguments, the prosecutor made the following remarks:

Two 18-year-old kids, sleeping in their house, never done anything wrong, not bothering anybody, engaged to be married, recent graduates from high school, both working promising careers, maybe college. What must it have been like to be in that bedroom, minding your own business when five men come in there, order you get down face first? Do you scream? Well, they couldn't do that because they'd stuffed socks in their mouth. Do you fight back? These men have guns. What must it be like laying there next to the man you love, your face covered up so you can't see but you can hear everything? What must it be like when that first shot was fired into Eddie Fleming's [sicl back and she's laying there right next to him? And he can still talk. He can still move his head and she has to sit there and listen. And then they wait. And what must it be like while the men are deciding who the next shot is going to be fired from? She's laying there waiting. The blood is pouring out of Eddie's back, who's right next to her. The men decide. A second shot is fired—she's inches away from it—into the head of Eddie McMillian. What must it have been like for Eddie McMillian as he lay paralyzed? And then what was it like when Nekeba Turner as she lay there waiting for her turn to die? . . . What was it like for Chauncey Fleming as he lay there all tied up listening to his friends being killed knowing his turn is coming? And one last piece of worthless metal takes Chauncev's life. I mean the last images anybody has of him is laying there tied up at the ankles and the arms and around the head. And what must it be like to be Eddie McMillian's mother and find those bodies?¹³²

^{128.} Id. at 696, 580 S.E.2d at 659.

^{129. 275} Ga. 884, 572 S.E.2d 612 (2002).

^{130.} Id. at 896, 572 S.E.2d at 622 (Benham, Hunstein, and Thompson, JJ., dissenting).

^{131.} Id. at 884-85, 572 S.E.2d at 615.

^{132.} Id. at 893-94, 572 S.E.2d at 621.

This type of argument, which asks members of the jury to place themselves in the position of a victim or a party, is impermissible. It is a "golden rule" argument, and it is not allowed because it asks jurors to abdicate their independence. Braithwaite's counsel did not object to the argument. His failure to object waived any direct complaint about the prosecutor's closing argument. The surviving issue was whether the failure to object was so egregious that it made the lawyer's assistance ineffective. 136

The majority concluded that Braithwaite was not the victim of ineffective assistance of counsel, even though it recognized that the closing was an improper "golden rule" argument. The court reasoned that his counsel's decision not to object, ostensibly because the objection would draw the jury's attention to the argument, was a reasonable tactical choice for the lawyer to make. The court also concluded that, even if the decision not to object was unreasonable, there was no harm to Braithwaite because the evidence against him was overwhelming. Braithwaite could not carry his burden to show that, but for his lawyer's failure to object during closing argument, there was a reasonable probability that he would not have been convicted. For both of these reasons, the majority rejected the claim of ineffective assistance of counsel.

The dissent disagreed on both counts. First, Justice Hunstein's opinion concluded that "trial counsel's decision to remain silent in the face of the prosecutor's prolonged and egregious golden rule argument was a decision no reasonable defense counsel would have made under the same circumstances." Second, the dissent rejected the claim that the argument did not matter, noting that the "overwhelming" evidence against Braithwaite consisted of accomplice testimony and the testimony of the defendant's estranged wife, who had had a sexual relationship with one of the accomplices and could have learned the details of the

^{133.} Id. at 894, 572 S.E.2d at 621.

^{134.} Id.

^{135.} Id. at 895, 572 S.E.2d at 622.

^{136.} Id. at 886, 572 S.E.2d at 615-16.

^{137.} Id. at 887, 572 S.E.2d at 616.

^{138.} Id. at 886, 572 S.E.2d at 615-16.

^{139.} Id., 572 S.E.2d at 616.

^{140.} *Id.* at 885, 572 S.E.2d at 615. The two-prong standard for assessing whether counsel was so ineffective that a new trial is necessary comes from $Strickland\ v$. *Washington*, 466 U.S. 668 (1984). *Id.* at 885 n.6, 572 S.E.2d at 615 n.6.

^{141.} Id. at 886, 572 S.E.2d at 616.

^{142.} Id. at 896, 572 S.E.2d at 622 (Hunstein, J., dissenting).

crime from the accomplice rather than from her husband. The dissent concluded by noting that, as a matter of policy, it would be better to overturn this conviction to send a message to prosecutors that golden rule arguments will not be tolerated. Nevertheless, Braithwaite's conviction was upheld. 145

The court also rejected a number of claims of ineffective assistance of counsel in Woods v. State. 146 The State's theory of the case was that the defendant, along with a co-defendant, Antonio Brown, murdered Brian Palmer. Woods allegedly shot the victim in Brown's presence, and Brown helped conceal the crime. Woods was found guilty and sentenced to life imprisonment. 447 Woods raised a number of claims of ineffective assistance of counsel, but the one that provoked dissent was that the same attorney represented both Woods and Brown. 148 Comment Seven to Rule 1.7 of the Georgia Rules of Professional Conduct states that "[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant." Woods's defense counsel nevertheless undertook to represent both Woods and Brown. After their convictions, Brown's motion for new trial was granted because Brown received ineffective assistance of counsel. Woods was not so fortunate. 151

The majority concluded that Woods actually benefited from the conflict of interest. In particular, defense counsel insisted during plea negotiations on the same "deal" for both defendants, even though the evidence indicated that Woods was more culpable. Also, trial counsel tried to persuade the jury that both defendants were in Florida at the time of the murder. By taking that approach, counsel sacrificed a potential defense for Brown-mere presence at the scene—that would have undermined Woods's defense. If anyone was sold down

^{143.} Id. at 898, 572 S.E.2d at 624.

^{144.} Id. at 900-01, 572 S.E.2d at 625.

^{145.} Id. at 889, 572 S.E.2d at 618.

^{146. 275} Ga. 844, 573 S.E.2d 394 (2002).

^{147.} Id. at 844, 573 S.E.2d at 396.

^{148.} *Id.* at 851, 573 S.E.2d at 401.

^{149.} GEORGIA RULES OF PROFESSIONAL CONDUCT, available at http://www.gabar.org/partiv.asp (last visited Aug. 20, 2003).

^{150. 275} Ga. at 845, 573 S.E.2d at 397 n.2.

^{151.} Id. at 850, 573 S.E.2d at 400.

^{152.} Id. at 845, 573 S.E.2d at 397.

^{153.} Id.

^{154.} Id.

^{155.} Id. at 845-46, 573 S.E.2d at 397.

the river, it was Brown. Brown got a new trial, but according to the majority, Woods was not entitled to one. 156

Chief Justice Fletcher dissented in an opinion joined by Justice Sears. 157 The dissent pointed out two ways that the conflict of interest hurt Woods. 158 First, defense counsel's attempt to negotiate identical plea agreements actually hurt Woods because counsel's only offer was to release the defendants for time served. 159 Counsel might have refused to negotiate a longer sentence because to do so would have been unfair to Brown, who may have merely been present at the murder. 160 Counsel, free of loyalty to Brown, might have been able to reach a less lenient plea agreement on behalf of Woods, which still could have avoided a life sentence. 161 Second, there was evidence that Brown, rather than Woods, might have been the shooter. 162 Counsel did not exploit this evidence to Woods's advantage, presumably because of his loyalty to Brown. 163 In the end, however, Brown received a new trial and Woods did not. 164 The collective judgment of the Georgia courts was that trial counsel's assistance was ineffective for Brown but effective for Woods. 165

V. JUDICIAL DISCIPLINE, DISQUALIFICATION, AND FREE SPEECH

The appellate courts in Georgia decided one case involving removal of a judge from office and numerous cases involving judicial disqualification or recusal. The United States Court of Appeals for the Eleventh Circuit also decided a significant case about free speech in judicial elections in Georgia.

A. Judicial Discipline

In *In re Inquiry Concerning a Judge*,¹⁶⁶ the Georgia Supreme Court permanently removed Joseph Hammill as the Chief Magistrate of the Glynn County Judicial Circuit.¹⁶⁷ Although the Judicial Qualifications Commission had recommended that Judge Hammill be suspended for six

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156. Id.
157. Id. at 851, 573 S.E.2d at 401 (Fletcher, C.J., dissenting).
158. Id. at 852, 573 S.E.2d at 402.
159. Id.
160. Id.
161. Id.
162. Id.
163. Id.
164. Id. at 845-46, 573 S.E.2d at 397-98.
165. Id. at 850, 573 S.E.2d at 401.
166. 275 Ga. 404, 566 S.E.2d at 310 (2002).
167. Id. at 404, 566 S.E.2d at 310.
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months, the supreme court found that he should be removed for incompetence, for failing to maintain the decorum and dignity of judicial office, and for failing to respect and comply with the law. 168 The judge demonstrated incompetence when he ordered one citizen to pay a fine without notice or hearing, assessed damages against a defendant without notice or hearing, and ordered a warrantless search of another citizen's home. 169 The judge failed to maintain appropriate decorum when he told an applicant for a restraining order that, "if [the alleged offender] kills you, we'll get him." Judge Hammill also told a defendant that the defendant had "shit for brains," and Hammill reassured an older black man that his community service would not "be outdoors doing physical labor like picking cotton." The judge demonstrated his indifference to the law when, while he was a municipal court judge, he wrote approximately forty-five checks that were returned for insufficient funds. 172 For all of these reasons, Judge Hammill was removed from office immediately and permanently. 173

B. Judicial Disqualification

1. **Procedural Issues.** Motions to recuse or disqualify judges in Georgia must be made in writing, filed timely, and accompanied by one or more affidavits that support the motion. Four cases failed to meet these procedural hurdles. In *Carter v. State*, a case involving several ordinance violations, the defendant filed written motions to recuse the trial judge because the judge was a defendant in a federal civil action. The motion neither offered any evidence in support of the assertion nor any argument about why, if true, that fact would require recusal. The court of appeals affirmed the trial court's denial of the motion to recuse. In *Brewer v. Waldroup*, one party's attorney appeared in court late and learned that judgment had already been entered. The attorney asked the court to vacate its judgment and alleged that she had spoken to the judge about her need to be in another

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168. Id.
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^{169.} Id. at 408-09, 566 S.E.2d at 313.

^{170.} Id. at 410, 566 S.E.2d at 314.

^{171.} Id.

^{172.} Id. at 411, 566 S.E.2d at 315.

^{173.} Id. at 413, 566 S.E.2d at 316.

^{174.} Ga. Super. Ct. R. 25.1-25.2.

^{175. 259} Ga. App. 798, 578 S.E.2d 508 (2003).

^{176.} Id. at 802, 578 S.E.2d at 512.

^{177.} Id.

^{178. 259} Ga. App. 479, 578 S.E.2d 139 (2003).

court the morning of trial. The attorney moved to recuse the judge because the judge, who denied being informed of the other case, had become a material witness. The court of appeals affirmed the trial court's decision that the motion was neither timely made nor supported by the requisite affidavits. Similarly, in *BITT International, Inc. v. Fletcher*, the court of appeals affirmed a trial judge who refused to recuse himself for allegedly exhibiting bias in favor of a party, when no motion to recuse was filed. Finally, in *Dodson v. Dean*, the court of appeals upheld the denial of a motion to recuse when the motion was late, and the purported "affidavits" were not notarized.

The previous three cases presented an additional procedural issue. The parties seeking recusal in each case argued that the procedural defects of the motion should not matter because the judge was required to recuse himself sua sponte. 185 Canon 3(E) of the Georgia Code of Judicial Conduct¹⁸⁶ contains a general rule that "[j]udges shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned,"187 and then lists specific, non-exclusive circumstances in which this general statement would apply. 188 example, a judge who has personally served as a lawyer in the case must recuse himself. 189 The argument for sua sponte recusal is that if one of the specific circumstances listed in Canon 3(E) applies, then it is reversible error for the judge not to recuse himself, even if the aggrieved party does not follow the procedures of Rule 25.190 This argument failed in BITT International and Dodson because the parties were seeking recusal only under the general standard that the judge's impartiality might reasonably be questioned. 991 Both cases implied, however, that the argument might succeed if the basis for the recusal

^{179.} Id. at 479, 578 S.E.2d at 141.

^{180.} Id. at 481-82, 578 S.E.2d at 142.

^{181. 259} Ga. App. 406, 577 S.E.2d 276 (2003).

^{182.} Id. at 409-10, 577 S.E.2d at 281-82.

^{183. 256} Ga. App. 4, 567 S.E.2d 348 (2002).

^{184.} Id. at 7, 567 S.E.2d at 350.

^{185.} Brewer, 259 Ga. App. at 481, 578 S.E.2d at 142; BITT Int'l, 259 Ga. App. at 409, 577 S.E.2d at 281; Dodson, 256 Ga. App. at 7, 567 S.E.2d at 350.

^{186.} Georgia Code of Judicial Conduct, Ga. Ct. and Bar. R., available at http://www.gabar.org/judcondt.asp (last visited Aug. 20, 2003).

^{187.} Id. at Canon 3(E)(1).

^{188.} Id. at Canon 3(E)(1)(a), (b).

^{189.} Id. at Canon 3(E)(1)(b).

^{190.} Brewer, 259 Ga. App. at 481, 578 S.E.2d at 142.

^{191.} BITT Int'l, 259 Ga. App. at 409-10, 577 S.E.2d at 281; Dodson, 256 Ga. App. at 6, 567 S.E.2d at 350.

had been one of the specific triggers in Canon 3(E).¹⁹² Nevertheless, in *Brewer*, where the party did assert one of those circumstances—the personal knowledge by the judge of disputed evidentiary facts—the court of appeals held the motion to be procedurally barred.¹⁹³ The appellate courts eventually will need to reach a consistent resolution of the interplay between the procedural requirements of Rule 25 and the standards of Canon 3(E).

2. Decisions on the Merits. The Georgia Court of Appeals decided six cases that touched on the merits of motions to recuse. In *Ellis v. Stanford*, ¹⁹⁴ the estranged wife of the mayor of Macon refused to vacate the home that she and her husband had agreed to sell. She sought to have the judge disqualified because the mayor previously appointed the judge to a diversity committee composed of eighty members. ¹⁹⁵ The court held that the connection did not call the judge's impartiality into question. ¹⁹⁶ In a condemnation case, *Ware v. Henry County Water & Sewerage Authority*, ¹⁹⁷ the Special Master was compensated as a judge pro tem of a juvenile court over which one of the other party's lawyer presided on a part-time basis. ¹⁹⁸ The court of appeals concluded this connection was not evidence of bias so severe that the parties could not get a fair hearing. ¹⁹⁹

In Wise v. $State^{200}$ and Moody v. $State^{201}$ the court of appeals held that the judges had recused themselves unnecessarily but the reversals did not invalidate rulings made earlier in the cases. The court in Head v. $Brown^{203}$ upheld the decision of a trial judge to recuse himself when the judge learned that his former law firm held an attorney's lien against the insurance company for one of the parties. Finally, in Williams v. $State^{205}$ the court of appeals concluded that a trial judge

^{192.} $BITT\ Int'l$, 259 Ga. App. at 409-10, 577 S.E.2d at 281; Dodson, 256 Ga. App. at 7, 567 S.E.2d at 350-51.

^{193. 259} Ga. App. at 481-82, 578 S.E.2d at 142.

^{194. 256} Ga. App. 294, 568 S.E.2d 157 (2002).

^{195.} Id. at 295, 568 S.E.2d at 159.

^{196.} Id. at 296, 568 S.E.2d at 160.

^{197. 258} Ga. App. 778, 575 S.E.2d 654 (2002).

^{198.} Id. at 778, 575 S.E.2d at 657.

^{199.} Id. at 781-82, 575 S.E.2d at 659.

^{200. 257} Ga. App. 211, 570 S.E.2d 656 (2002).

^{201. 256} Ga. App. 65, 567 S.E.2d 709 (2002).

^{202.} Wise, 257 Ga. App. at 213-14, 570 S.E.2d at 660; Moody, 256 Ga. App. at 67, 567 S.E.2d at 711-12.

^{203. 259} Ga. App. 855, 578 S.E.2d 559 (2003).

^{204.} Id. at 859, 578 S.E.2d at 559.

^{205. 257} Ga. App. 589, 571 S.E.2d 571 (2002).

properly denied a motion to recuse despite the fact that the judge was familiar with the defendant from earlier cases.²⁰⁶

C. Judicial Free Speech

In Weaver v. Bonner, 207 a former candidate for the Georgia Supreme Court successfully challenged two parts of the Georgia Code of Judicial Conduct. 208 The former candidate published campaign literature and aired television commercials portraying his opponent as a proponent of same-sex marriage and an opponent of the death penalty. The Georgia Judicial Qualifications Commission (JQC) found that these statements violated Canon 7(B)(1)(d) of the Georgia Code of Judicial Conduct, which prohibited any communication "that the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading." The JQC eventually issued a public statement that the candidate had engaged in deceptive tactics, and the candidate lost. 211

The United States Court of Appeals for the Eleventh Circuit held that Canon 7(B)(1)(d) violated the First Amendment of the United States Constitution. The court of appeals relied in part on *Republican Party v. White*, in which, just months before, the United States Supreme Court struck down a state's ban on judicial candidates "announcing" their positions on matters of public controversy. The Eleventh Circuit held that Georgia's restrictions on speech during judicial elections did not give enough "breathing space" for errors in public debate. The court also struck down Georgia's ban on judicial candidates soliciting political contributions, holding that this restriction was not narrowly tailored to serve Georgia's compelling state interest in judicial impartiality because others could solicit contributions on behalf of the candidate. Although the Eleventh Circuit declined to award

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206. Id. at 590, 571 S.E.2d at 573-74.
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^{207. 309} F.3d 1312 (11th Cir. 2002).

^{208.} Id. at 1325.

^{209.} Id. at 1316.

^{210.} Id. at 1321 n.12.

^{211.} Id. at 1317.

^{212.} Id. at 1325.

^{213. 536} U.S. 765 (2002).

^{214.} Id. at 788.

^{215. 309} F.3d at 1319.

^{216.} Id. at 1322-23.

the plaintiffs damages or a new election,²¹⁷ the court's decision means that future judicial elections in Georgia will look and sound more like other political campaigns than ever before.

VI. MISCELLANEOUS DECISIONS

The Georgia appellate courts decided a number of miscellaneous cases involving the ethical duties of lawyers and the proper remedies for violations of these duties. The supreme court had to decide whether a lawyer or a client owns papers in a client's file, while the court of appeals dealt with several cases concerning the availability of civil remedies for alleged ethical violations, two cases about disqualification, and two cases about alleged prosecutorial misconduct.

In *Swift, Currie, McGhee & Hiers v. Henry*, ²¹⁸ the supreme court confronted a dispute between a client who sought a document in the client's file and a law firm that declined to provide it. The client hired the firm to represent him in a dispute. His lawyer tried unsuccessfully to negotiate a resolution of the dispute. The client later asked the lawyer to prepare a memorandum about the unsuccessful negotiations. The lawyer did so but declined to give the memo to the client. The dispute over the memo eventually reached the supreme court. ²¹⁹ The court held that in Georgia, a document created by a lawyer belongs to the client unless the lawyer can show good cause for not giving the client the document. ²²⁰ Good cause might exist, for example, if the document was an assessment of the client. ²²¹ The court remanded the case for a determination whether good cause existed for the lawyer to withhold the document from the client. ²²²

The court of appeals had to decide in four cases how, if at all, to remedy alleged violations of the Georgia Rules of Professional Conduct. One case concerned alleged malpractice for withdrawing from a case. In $Patton\ v.\ Turnage,^{224}$ an attorney represented a client (who was also an attorney) in a divorce action. The client and lawyer disagreed about how the case should be handled, and the lawyer secured court permission to withdraw from the case less than one month before

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217. Id. at 1325.
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^{218. 276} Ga. 571, 581 S.E.2d 37 (2003).

^{219.} Id. at 571-72, 581 S.E.2d at 38-39.

^{220.} Id. at 574, 581 S.E.2d at 40.

^{221.} Id. at 573, 581 S.E.2d at 39.

^{222.} Id. at 574, 581 S.E.2d at 40.

^{223.} GEORGIA RULES OF PROFESSIONAL CONDUCT, supra note 149.

^{224. 260} Ga. App. 744, 580 S.E.2d 604 (2003).

the scheduled trial.²²⁵ The court of appeals held that it could not be malpractice for an attorney to withdraw in accordance with the Rules of Professional Conduct and with court permission, especially when the client did not object to the withdrawal at the time.²²⁶ This first case is straightforward because it is not a violation of the Rules of Professional Conduct to withdraw, with court permission, when good cause exists.²²⁷

Three cases involved the more difficult question of what remedy is available in civil litigation for violations of the Rules of Professional Conduct. In *Rice v. Lightmas*, ²²⁸ a non-lawyer filed a suit pro se and on behalf of his wife. His adversary, an attorney, correctly pointed out that the husband could not represent the wife without a law license. The trial court remedied this violation by "disqualifying" the husband and striking his name from the pleadings. 229 The court of appeals held this remedy denied the husband his constitutional right to represent himself and therefore was the wrong remedy for his unauthorized practice of law.²³⁰ In Griffin v. Fowler,²³¹ a former client sued his lawyer for malpractice and for breach of fiduciary duty. One basis for the fiduciary duty claim was that the lawyer charged an excessive fee in violation of the Rules of Professional Conduct, 232 but the court of appeals held that "a plaintiff cannot base a claim for civil damages solely on duties imposed by the [Rules] of Professional Conduct."233 court, however, appeared to reach the opposite conclusion in Willett v. In Willett the court disallowed a claim for breach of fiduciary duty against a lawyer who violated his ethical duty of confidentiality solely because the plaintiff could not show any damages. 235

There is no controversy about the remedy when an attorney represents an opposing party despite a conflict of interest. Disqualification is called for under these circumstances. In two cases this year, however, the court of appeals reminded parties that delay can waive this as a basis

^{225.} Id. at 744-45, 580 S.E.2d at 604-06.

^{226.} Id. at 745-46, 580 S.E.2d at 606-07.

^{227.} GEORGIA RULES OF PROFESSIONAL CONDUCT, supra note 149, at 1.16(b), (c).

^{228. 259} Ga. App. 380, 577 S.E.2d 2 (2003).

^{229.} Id. at 380, 577 S.E.2d at 3.

^{230.} Id. at 381, 577 S.E.2d at 4.

^{231. 260} Ga. App. 443, 579 S.E.2d 848 (2003).

^{232.} *Id.* at 443, 579 S.E.2d at 848.

^{233.} Id. at 446, 579 S.E.2d at 850.

^{234. 256} Ga. App. 403, 568 S.E.2d 520 (2002).

^{235.} Id. at 411-12, 568 S.E.2d at 527-28.

for disqualification. In *Head v. CSX Transportation, Inc.*,²³⁶ the defendant learned that the plaintiff's counsel had a partner who was representing the defendant in unrelated litigation.²³⁷ Plaintiff's counsel had a conflict of interest under Georgia Rules of Professional Conduct 1.7(a) and 1.10(a).²³⁸ However, the defendant waited until after the verdict was rendered against him to raise the point.²³⁹ The court of appeals found the issue to be waived.²⁴⁰ Similarly, in *Yates v. Dublin Sir Shop, Inc.*,²⁴¹ two parties to the suit had been represented on other matters by a lawyer who formed a partnership with their adversary's lawyer and even appeared to participate in the trial against them. The parties waived any claim to disqualify the lawyer by waiting to raise it until after judgment had been entered against them.²⁴²

In two cases, the court of appeals dealt with claims of prosecutorial misconduct. Jackson v. State²⁴³ concerned a claim that an assistant district attorney had threatened a witness, who then testified against the defendants.²⁴⁴ The court noted that the testimony given by the witness at trial was perfectly consistent with earlier statements he had given to the police, and the defendants had ample opportunity to attack his testimony by cross-examination.²⁴⁵ The court rejected the defendant's request for a new trial without deciding whether there was prosecutorial misconduct.²⁴⁶ Similarly, in State v. Young,²⁴⁷ the court of appeals reversed a trial court's decision to dismiss an indictment because a prosecutor allegedly had not lived up to a promise to allow the defendant to testify before a grand jury.²⁴⁸ The court held that this promise was not enforceable because there was no consideration for it but noted that "[w]e understand the trial court's concern over the ethical considerations involved when the State fails to keep its word."²⁴⁹

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236. 259 Ga. App. 396, 577 S.E.2d 12 (2003).
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^{237.} Id. at 396, 577 S.E.2d at 13.

^{238.} Georgia Rules of Professional Conduct, supra note 149, at 1.7(a), 1.10(a).

^{239. 259} Ga. App. at 396, 577 S.E.2d at 13.

^{240.} Id. at 398, 577 S.E.2d at 15.

^{241. 260} Ga. App. 369, 579 S.E.2d 796 (2003).

^{242.} Id. at 372, 579 S.E.2d at 799.

^{243. 259} Ga. App. 727, 578 S.E.2d 298 (2003).

^{244.} Id. at 730, 578 S.E.2d at 301.

^{245.} Id.

^{246.} Id. at 731-32, 578 S.E.2d at 301-02.

^{247. 260} Ga. App. 44, 579 S.E.2d 16 (2003).

^{248.} Id. at 47, 579 S.E.2d at 19.

^{249.} Id.

VII. CONCLUSION

Legal ethics encompasses a number of topics: from the lawyer's duties of competence, diligence, confidentiality, and loyalty, to the judge's duties of impartiality and fairness. As this Article demonstrates, these various duties arise in a wide array of contexts, including disciplinary cases, civil litigation, and post-conviction petitions. Lawyers must keep up with their own duties, just as they keep up with the substantive law in the areas in which they practice. The purpose of this Article has been to help Georgia lawyers do just that.