

Legal Ethics

by Roy M. Sobelson*

I. INTRODUCTION

The biggest news in Georgia legal ethics this year actually made it into the general press¹ when the Georgia Supreme Court approved a bar committee opinion confirming that real estate closings remained the exclusive province of licensed Georgia lawyers.² With the Justice Department, the Federal Trade Commission, and consumer advocates all weighing in with contrary opinions,³ the court held firm against the inevitable, continuing criticism and cries of protectionism.⁴ Combined with the current debates over both multidisciplinary⁵ and multijurisdictional practices,⁶ it looks like the profession will continue to engage in

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1. David McNaughton, *Closings to Require a Lawyer: Notaries Lose Fight in Court*, ATLANTA J. CONST., Nov. 11, 2003, at D1.

2. *Id.*

3. See, e.g., David McNaughton, *Bar Battles to Keep Real Estate Role: Court to Rule if Lawyer Needed at the Closing Table*, ATLANTA J. CONST., Sept. 21, 2003, at D1.

4. See, e.g., Anna Marie Stolley, *Lawyers Told to Back Off on Plan: Consumer Harm is Cited*, SUN-SENTINEL, Dec. 27, 2002, at 3D; Adam Liptak, *U.S. Opposes Proposal to Limit on Who May Give Legal Advice*, N.Y. TIMES, Feb. 3, 2003, at A11; *A Conspiracy Against Consumers*, ROCKY MOUNTAIN NEWS, Feb. 6, 2003 at 44A.

5. See STATE BAR OF GA., REPORT ON MULTIDISCIPLINARY PRACTICE, available at http://www.gabar.org/pdf/MDP_report.pdf.

6. See Amendments to Rules and Regulations for the Organization and Government of the State Bar of Georgia, available at http://www2.state.ga.us/Courts/Supreme/amended_rules/6_8_2004_order.htm.

heated debate in Georgia, if not worldwide,⁷ well into the foreseeable future. Meanwhile, the Georgia Supreme Court made several changes to our Rules of Professional Conduct⁸ along those lines, but all of them occurred just outside the operative dates of this survey, June 1, 2003 to May 31, 2004.⁹

As for news of interest almost exclusively for practicing attorneys, a local litigator created quite a stir when he repeatedly violated a court's motion *in limine* order and received no trial court sanction for his violations.¹⁰ Of more interest here, perhaps, is the surprising news that his conduct apparently contravenes no Georgia ethics rule. Whether the courts themselves can prevent such behavior or make it cost ineffective remains to be seen.

II. ADVISORY OPINIONS

A. *Opinions Issued by the Supreme Court*

Although several formal advisory opinions were issued this year, the supreme court entered the fray only once and approved a Formal Advisory Opinion Board opinion.¹¹ The supreme court agreed with the Standing Committee on the Unlicensed Practice of Law¹² ("Committee") that the preparation and execution of a deed of conveyance by someone other than a licensed Georgia attorney¹³ constitutes the unlicensed practice of law.¹⁴ The opinion should be no surprise, given the court's traditional insistence that the protection of the public is best served by

7. See, e.g., Katherine L. Harrison, *Multidisciplinary Practices: Changing the Global View of the Legal Profession*, 21 U. PA. J. INT'L ECON. L. 879 (2000).

8. GA. RULES OF PROF'L CONDUCT, STATE BAR OF GEORGIA HANDBOOK H-22 (2003-2004).

9. See, e.g., Amendments to Rules and Regulations for the Organization and Government of the State Bar of Georgia, available at http://www2.state.ga.us/Courts/Supreme/amended_rules\6_8_2004_order.htm.

10. Rachel Tobin Ramos, *Lawyer's Tactics Cost Him Verdict of \$150,000*, FULTON COUNTY DAILY REP., Dec. 16, 2003.

11. Formal Advisory Opinion Board opinions, which are approved or modified by the supreme court, are "binding on all members of the State Bar and shall be published in the official Georgia Court and Bar Rules manual [and] [t]he Supreme Court shall accord such . . . opinion the same precedential authority given to the regularly published judicial opinions of the Court." GA. RULES OF PROF'L CONDUCT R. 4-403(e), *supra* note 8, at H-64.

12. *In re* UPL Advisory Opinion No. 2003-2, 277 Ga. 472, 588 S.E.2d 741 (2003).

13. While the court is not explicit about the precise practices being questioned, the Standing Committee's opinion "focuses on 'notary closers,' 'signing agents,' and others who are not a party to the real estate closing, but nonetheless inject themselves into the closing process and conduct . . . a 'witness only closing.'" *Id.* at 472, 588 S.E.2d at 741.

14. *Id.*

prohibiting lay conveyancing¹⁵ or witness-only closings.¹⁶ In previous opinions¹⁷ the court made it clear that lawyers may not delegate responsibility for real estate closings to non-lawyers,¹⁸ and licensed Georgia lawyers must be physically present for the closings to be proper.¹⁹ While the court did not explicitly mention this idea,²⁰ the Committee concluded that “the execution of a deed of conveyance is so intimately interwoven with the other elements of the closing process so as to be inseparable from the closing It is one of the ‘entire series of events through which the title to land is conveyed’”²¹ Thus, it looks like Georgia lawyers will continue their traditional control over all the critical elements of the real estate closing business.

The court looked to two sources as the basis for its opinion. First, the Georgia General Assembly established statutory policy that only attorneys are authorized to close real estate transactions.²² Second, because the court ultimately controls the practice of law, it must render its own judgment about how the judiciary can best serve the interests of the public. On that count, the court insisted that lawyers are both uniquely qualified for closings and may be held accountable for any professional performance failures under malpractice law and the attorney disciplinary system.²³ Three things are interesting about the court’s judgment on this issue, quite apart from the statutory definition of the practice of law.

15. The court defines lay conveyancing as “the practice by which non-lawyers close real estate transactions, provide settlement services, or select, prepare and complete certain real estate closing documents.” *Id.* at 474 n.2, 588 S.E.2d at 742 n.2.

16. The court says that “[w]itness-only closings ‘occur when notaries, signing agents and other individuals who are not a party to the real estate closing preside’ over the execution of the deeds of conveyance and other closing documents, but purport to do so merely as a witness and notary, not as someone who is practicing law.” *Id.* at 474 n.3, 588 S.E.2d at 742 n.3.

17. See Formal Advisory Op. Bd., Formal Op. 86-5 (86-R9) (1989); Formal Advisory Op. Bd., Formal Op. 00-3 (2000).

18. *Id.*

19. *Id.*

20. *In re* UPL Advisory Opinion 2003-02, 277 Ga. at 474, 588 S.E.2d at 741. One of the peculiar things about the advisory opinion process is that if the court grants review, it writes a whole new opinion, leaving the reader with both the opinion of the Board and the opinion of the court. In this case the Board’s opinion is longer and more explicit than that of the court.

21. Ga. State Bar Standing Comm. on the Unlicensed Practice of Law, Advisory Op. 2003-2 (2003).

22. See O.C.G.A. § 15-19-50 (2003) (defining the “practice of law” as including conveyancing and the preparation of legal instruments whereby a legal right is secured).

23. *In re* UPL Advisory Opinion 2003-2, 277 Ga. at 474, 588 S.E.2d at 742.

First, the court acknowledged that lay-closing advocates complain that this rule increases prices, even while it decreases consumer choices.²⁴ The court, however, made no attempt at all to address either of these complaints.²⁵ Second, the court offered no evidence, apocryphal or empiric, that lawyers are more competent than non-lawyers at performing these functions.²⁶ Not all lawyers are veteran practitioners in this area, and Georgia has no system for registering specialists in given legal areas whereby only they are allowed to practice in that field. Yet, the court's position is basically that any lawyer, with any experience base, is better suited for these tasks than any non-lawyer.²⁷ Given the wide variety of education, training, experiences, and practices in which lawyers engage, this simply cannot be true. In fact, the court noted that several states allow non-lawyer closings, and it offered not a single word to suggest why these states are incorrect or are suffering from the practice.²⁸

Third, although lawyers may be liable for malpractice or subject to discipline, Georgia lawyers are not required to hold malpractice insurance. For injured consumers, these remedies offer little consolation. While the disciplinary process is applicable only to lawyers,²⁹ one would be hard pressed to find many instances where lawyers are publicly reprimanded, suspended, or disbarred for deficient performance of real estate closings. Even if a lawyer is disciplined, it is entirely possible that it will be confidential, leaving the public at the mercy of incompetent and dishonest lawyers.

Advocates of limiting closings to lawyers argue that although disciplinary action is not common, it is still possible. In fact it is more possible in Georgia than in other jurisdictions. Rule 1.1 of the Model Rules of Professional Conduct³⁰ requires a lawyer to provide a client with competent representation, which includes the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."³¹ The comments acknowledge that competent representation can be provided "through the association of a lawyer of established competence in the field."³² The Georgia version of this rule

24. *Id.* at 473, 588 S.E.2d at 742.

25. *See id.*

26. *See id.*

27. *Id.* at 473-74, 588 S.E.2d at 742.

28. *Id.* at 474 n.2, 588 S.E.2d at 742 n.2. The court noted that Virginia, Colorado, and Minnesota are among the jurisdictions allowing lay conveyancing. *See id.*

29. *In re UPL Advisory Opinion 2003-2*, 277 Ga. at 473-74, 588 S.E.2d at 742.

30. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003).

31. *Id.*

32. *Id.* R. 1.1 cmt. 2.

places the ABA's nonbinding³³ commentary within the enforceable rule itself, stating: "A lawyer shall not handle a matter which the lawyer knows or should know to be beyond the lawyer's level of competence without associating another lawyer who the original lawyer reasonably believes to be competent to handle the matter in question."³⁴ By adopting a unique combination of the American Bar Association ("ABA") model rule and Georgia's old directory rule on competence,³⁵ the Georgia rule requires, rather than suggests, that inexperienced lawyers get help in handling cases out of their comfort zone.³⁶

In the end one should not lose sight of two facts about lawyers who perform real estate closings incompetently. First, the violation of a disciplinary rule does not in itself give rise to a cause of action for damages.³⁷ Second, even a successful disciplinary prosecution provides the injured consumer no damages, no reparations, and no real remedy.³⁸ In fact, prosecution may not even provide protection for future victims of the lawyer's malpractice because most discipline is private and unavailable to consumers who seek information from the Bar.³⁹ Adding insult to injury, the Clients' Security Fund's charge is limited to cases involving dishonest conduct and does not cover negligence.⁴⁰

The controversy regarding nonlawyers who conduct closings is unlikely to die down any time soon. The Bar has already issued notice of another proposed opinion, which concerns the propriety of a lawyer's use of a nonlawyer entity to conduct closings and place the proceeds in a non-IOLTA account.⁴¹ Once again, the Board opines that if lawyers are present at closings, the proceeds must go into their IOLTA accounts. However, if lawyers are not present, a non-lawyer's participation constitutes the unauthorized practice of law.⁴² The only remaining question is whether the supreme court will find it necessary to grant

33. "The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." *Id.* at Preamble, Scope and Terminology cmt. 21.

34. GA. RULES OF PROF'L CONDUCT R. 1.1, *supra* note 8, at H-24.

35. "A lawyer shall not . . . handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it . . ." *Directory Rule 6-101(A)(1)*, STATE BAR OF GEORGIA HANDBOOK 33-H (1999-2000).

36. *Id.*

37. GA. RULES OF PROF'L CONDUCT R. 1.1 cmt. 1A, *supra* note 8, at H-24.

38. *Id.*

39. *Id.*

40. *Part X: Clients' Security Fund*, GA. RULES OF PROF'L CONDUCT R. 10-106(a), *supra* note 8, at H-129.

41. See First Publication of Proposed Formal Advisory Opinion 02-R1, GA. BAR J. 89-90 (June 2004).

42. *Id.*

review of yet another opinion saying the same thing—real estate closings in Georgia are reserved for those with a Georgia license to practice law.

B. Opinions Issued by the Formal Advisory Opinion Board

The Formal Advisory Opinion Board (“Board”) issued three opinions in this survey period, none of which was approved by the supreme court.⁴³ In *Formal Advisory Opinion 03-1*,⁴⁴ the Board addressed whether a Georgia attorney may contract for a non-refundable retainer. This is a critical question, not only because in criminal defense practice such fees are common,⁴⁵ but also because the supreme court has given confusing advice about retainers in the past. In *Formal Advisory Opinion 91-2*,⁴⁶ when asked whether a lawyer had to put a “retainer that represents payment of fees yet to be earned” in a trust account, the court⁴⁷ first declared that “one can reasonably take the position that ‘retainers’ and ‘flat fees’ may be placed in the general operating account”⁴⁸ This would suggest the fee was fully earned upon receipt and belonged only to the lawyer,⁴⁹ because any fees still belonging to the client, at least in part, should first be deposited in the lawyer’s trust account.⁵⁰ Yet, the same opinion went on to say that because the lawyer is a fiduciary, he must still “return to the client any unearned portion of a fee.”⁵¹ However, if the fee is fully earned upon receipt there would be nothing to refund, even if the client fired the lawyer immediately after paying him.⁵²

43. These opinions, not granted review or adoption by the supreme court, “shall be binding only on the State Bar of Georgia and the person who requested the opinion, and not on the Supreme Court, which shall treat the opinion as persuasive authority only.” GA. RULES OF PROF’L CONDUCT R. 4-403(d), *supra* note 8, at H-64.

44. Proposed Formal Advisory Opinion No. 98-R7 (2003).

45. See NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 85-90 (2d ed. 2000).

46. Formal Advisory Op. Bd., Formal Op. 91-2 (1992), *supra* note 8, at H-95.

47. At the time *Formal Advisory Opinion 91-2* was issued, all such opinions were approved and ultimately issued by the supreme court. See *id.*

48. *Id.*

49. Rule of Professional Conduct 1.15(II)(a) states that “[a]ll funds held by a lawyer for a client and all funds held by a lawyer in any other fiduciary capacity shall be deposited and administered from” the lawyer’s trust account. GA. RULES OF PROF’L CONDUCT R. 1.15(II)(a), *supra* note 8, at H-35. Rule of Professional Conduct 1.15(II)(b) states that “[n]o personal funds shall ever be deposited in a lawyer’s trust account, except that unearned attorney’s fees may be so held until the same are earned.” *Id.* R. 1.15(II)(b), *supra* note 8, at H-35.

50. *Id.*

51. Formal Advisory Op. Bd., Formal Op. 92-1 (1992), *supra* note 8, at H-96.

52. *Id.*

This opinion comes one step closer to approving non-refundable retainers by acknowledging two points.⁵³ First, the Board notes that “[s]ome services, for example, the . . . commitment to the client’s case and acceptance of potential disqualification from other representations,⁵⁴ are provided as soon as the contract is signed. The portion of the fee reasonably allocated to these services are, therefore, earned immediately.”⁵⁵ Second, the opinion notes that a lawyer may “designat[e] by contract points in representation at which specific advance fees payments under a special retainer will have been earned”⁵⁶

However, the opinion left open the question of whether a fee contract is ever reasonable, and fully enforceable, if it designates the entirety of the retainer as earned immediately upon payment, and the client fires the lawyer before allowing the lawyer to do any substantial work on the case. This is not merely an academic question. Suppose, for example, a criminal defense lawyer is approached by one of a number of co-defendants in a serious criminal matter. If the co-defendants’ interests do not warrant hiring one lawyer for all of them,⁵⁷ the lawyer has a critical choice to make. If the lawyer takes on only the one client, an immediate substantial investment could be required to hire the appropriate investigators, experts, support personnel, co-counsel, and the like. Such an investment is all the more likely if the case is ripe for trial, a more common occurrence for the criminal defense lawyer than any other practitioner. The lawyer will need to commit early and receive the retainer to make any other necessary commitments. Once the lawyer has committed to the client, taking on the defense of any other co-defendants will be impossible. Further, if the lawyer were hired and fired by the original client, it is highly unlikely the lawyer could later agree to represent one of the other co-defendants. The lawyer should not have to give up a substantial part of the fee simply because he lacks the requisite hours to justify it. The fee is justified by taking on and gearing up for one case at the expense of all others. One could argue the Board’s opinion brings us one step closer to a definitive answer, but we are not quite there.

In *Formal Advisory Opinion 03-2*,⁵⁸ the Board was asked whether confidentiality of information applied between two jointly represented

53. *Id.*

54. This would be especially appropriate if the lawyer were hired by only one of a number of co-defendants who appeared to have inconsistent needs and defenses, or both.

55. Formal Advisory Op. Bd., Formal Op. 03-1 (2003), *supra* note 8, at H-114.

56. *Id.*

57. GA. RULES OF PROF’L CONDUCT R. 1.7, *supra* note 8, at H-28.

58. Formal Advisory Op. Bd., Formal Op. 03-2 (2003).

clients.⁵⁹ The opinion is thorough, frank, and on point. First, the Board correctly noted that confidentiality under the Rules is different from the attorney-client privilege,⁶⁰ and the normal waiver rules encountered in dealing with the privilege do not apply.⁶¹ The Board noted that, conceivably, two persons requesting joint representation might not agree to share all information with one another.⁶² In that situation, the real problem is not honoring confidentiality; the problem is the inherent conflict that exists in representing two persons who profess to have common interests, yet refuse to be completely candid with one another. The likelihood that a lawyer could continue to represent such clients is very slim. Each client, whether represented alone or in tandem, is owed a duty of confidentiality.⁶³ If a lawyer's representation of a co-client jeopardizes that duty, the common representation will suffer, not the confidentiality obligations.⁶⁴

In *Formal Advisory Opinion 03-3*,⁶⁵ the Board addressed the propriety of attorneys receiving percentage finders fees for sending their clients to financial investment advisers.⁶⁶ While the Board did not completely foreclose the possibility of entering into these arrangements, it came very close to doing so by charitably declaring them "ethically and legally perilous."⁶⁷ Emphasizing that the lawyer must always exercise independent professional judgment on the client's behalf,⁶⁸ the Board made it clear that this arrangement would affect the lawyer's own financial interests, as well as the client's.⁶⁹ In particular the lawyer would always have to decide whether referral to an adviser was best,

59. *Id.*

60. *Id.* "The duty of confidentiality is broader than the attorney-client privilege First, the attorney-client privilege pertains only to the admissibility of particular evidence in a judicial proceeding By contrast, the duty of confidentiality applies beyond that setting . . . [and] instructs a lawyer not to use or divulge protected information in any setting. Second . . . privilege protects communications, not information." PAUL T. HAYDEN, *ETHICAL LAWYERING: LEGAL AND PROFESSIONAL RESPONSIBILITIES IN THE PRACTICE OF LAW* 157 (2003).

61. Formal Advisory Op. Bd., Formal Op. 03-2.

62. *Id.*

63. "A lawyer shall maintain in confidence all information gained in the professional relationship with a client" GA. RULES OF PROF'L CONDUCT R. 1.6(a), *supra* note 8, at H-27.

64. *Id.*

65. Formal Advisory Op. Bd., Formal Op. 03-3 (2004).

66. *Id.*

67. *Id.*

68. "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." GA. RULES OF PROF'L CONDUCT, R. 2.1, *supra* note 8, at H-38.

69. Formal Advisory Op. Bd., Formal Op. 03-3 (2004).

and then, whether the specific adviser best served the client's interests.⁷⁰

The Board's decision is correct, but banning the practice altogether would also have been completely justifiable. As with any conflict of interest issue, the problem is not the reality of an improper influence upon one's judgment but the potential for it. Any referral to another professional could benefit both the adviser and the lawyer, leading to more referrals and even kickbacks of one kind or another. The lawyer's potential for referral could even be influenced by the possibility that a relationship with an adviser might reduce the funds the client has available to pay to the lawyer. Once a referral is imminent, the decision of which adviser to choose could easily be determined by who pays the highest referral fees. Percentage referral fees to the lawyer could create bidding wars for the highest payor rather than the most competent financial adviser. This is similar to concerns over the propriety of referral fees amongst lawyers themselves, which are largely curbed by the requirement that fees only be shared with non-firm lawyers in relation to the work they perform or by a written agreement to assume joint responsibility for the matter.⁷¹

III. LAWYER DISCIPLINE

This year produced the usual array of disbarments, suspensions, and the like,⁷² but two cases are of particular interest. *In re W. Oellerich, Jr.*⁷³ is a classic case of a conflict between the lawyer's personal interests and those of his client. In 1994⁷⁴ Oellerich engineered a deal in which his executor client loaned \$120,000 to a corporation of which Oellerich's wife was president. The corporation defaulted, and the loan was eventually discharged in bankruptcy.⁷⁵ In this disciplinary action,

70. *Id.*

71. GA. RULES OF PROF'L CONDUCT R. 1.5(c), *supra* note 8, at H-26.

72. In the period from May 1, 2003, to April 30, 2004, the Georgia Supreme Court took the following public disciplinary actions: 34 disbarment/voluntary surrender cases, 22 lawyers; 42 suspension cases, 29 lawyers; 4 public reprimand cases, 4 lawyers; 1 Review Panel Reprimand case, 1 lawyer. James B. Wellington, *Chair, Review Panel, Annual Report of the Review Panel, STATE DISCIPLINARY BOARD FOR OPERATIONAL YEAR 2003-2004*.

73. 278 Ga. 22, 596 S.E.2d 156 (2004).

74. The statute of limitations for bar disciplinary cases is normally four years, with a tolling provision for the bar member's disappearance and the like. GA. RULES OF PROF'L CONDUCT R. 4-222(a), *supra* note 8, at H-62. The court held that Oellerich waived his statute of limitations defense by his failure to raise the issue in his answer or his response to the State Bar's motion for summary judgment. *In re Oellerich*, 278 Ga. at 24, 596 S.E.2d at 158.

75. *In re Oellerich*, 278 Ga. at 23, 596 S.E.2d at 157.

Oellerich was disbarred⁷⁶ for violating the now defunct Standard 30,⁷⁷ which provided that “if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests,”⁷⁸ the lawyer has to make full disclosure to the client and get the client’s consent.⁷⁹ The rule is based on the oft-stated principle that business transactions between clients and their lawyers are presumed to be the product of overreaching⁸⁰ and fraud.⁸¹ Thus, the rule requires the lawyer to insure that the client is fully apprised of all the risks inherent in such a transaction.⁸²

Oellerich claimed that the deal was done with his client’s consent, and he offered her signature on the loan check as evidence.⁸³ Oellerich’s claim was plausible given that Standard 30 only required the lawyer to obtain “the written consent or written notice . . . after . . . disclosure”⁸⁴ The Standard did not explain what had to be disclosed, nor did it require that the disclosure itself be in writing.⁸⁵ All the Standard

76. While Oellerich cooperated in this first disciplinary action against him, he ultimately failed to admit to the wrongfulness of his conduct, which may have been an even bigger mistake than entering the transactions with his client in the first place.

77. As of January 1, 2001, the Rules of Professional Conduct are effective, displacing the previous Code of Professional Responsibility and Standards of Conduct. See Office of General Counsel at <http://www.gabar.org/ogcrules.asp>.

78. *Part IV: Discipline*, STANDARD 30, *supra* note 35, 43-H.

79. *Id.*

80. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 126 cmt. e (2000).

81. See *Reeder v. Lund*, 236 N.W. 40, 44 (1931) (citing Comm. on Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. *Mershon*, 316 N.W.2d 895 (1982)).

82. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 126 (2000).

83. *In re Oellerich*, 278 Ga. at 23, 596 S.E.2d at 157-58.

84. Until January 1, 2001, the relevant rules and standards were contained in the aspirational Canons of Ethics and the accompanying mandatory Standards of Conduct. See *Part III: Canons of Ethics*, *supra* note 35, at 24-H; *Part IV, Discipline*, *supra* note 35, at 40-H. Standard 30 provided:

Except with the written consent or written notice to his client after full disclosure a lawyer shall not accept or continue employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests. A violation of this standard may be punished by disbarment.

Standard 30, *supra* note 35, at 43-H. Standard 30 is substantially similar to the current Rule of Professional Conduct 1.7 with three exceptions. First, Standard 30 allowed a lawyer to handle a conflict between the client’s interest and his own interest with “written consent or written notice” to his client, while Rule 1.7 requires actual consent. Second, Rule 1.7 requires that the lawyer inform the client of the risks in writing. And third, Rule 1.7 requires the lawyer to give the client “the opportunity to consult with counsel.”

85. *Part IV: Discipline, Standard 30*, *supra* note 35, at 43-H.

actually required was notice to the client, not the client's actual consent.⁸⁶

Invoking "the letter and spirit of Standard 30," the supreme court read it as requiring more than was apparent from reading the Standard itself, saying:

[T]he written notice or written consent must be clear enough to evidence to an objective third party *that the client has consented to the legal representation despite the disclosure* of a conflict of interest. Such *informed consent* cannot be shown by a mere signature The existence of the potential conflict must itself be expressed in writing⁸⁷

The court's holding is not only a very generous reading of Standard 30, it may also be more than is required by the current Georgia Rule of Professional Conduct, which displaced Standard 30. First, the now applicable Rule 1.7(b)⁸⁸ suggests the client's consent should "preferably [be] in writing" but does not require a writing.⁸⁹ Second, the rule does require a writing about the risks involved, but that writing need only provide "reasonable and adequate information about the material risks of the representation"⁹⁰ Third, the current rule does not actually require that the consent be clear enough to convince an objective third party of its genuineness, but perhaps that is accomplished by Rule 1.7(b)(3)'s requirement that the lawyer give the client "the opportunity to consult with independent counsel."⁹¹ Even interpreting the rule this way, Georgia does not go as far as most states, which require that "the client [be] *advised in writing of the desirability* of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction"⁹² In the end, what the court seems to be imposing is an informed consent⁹³ requirement, much like what the ABA has incorporated in its new and improved version of the Model Rules of Professional Conduct.⁹⁴ However, putting aside the require-

86. *Id.*

87. *In re Oellerich*, 278 Ga. at 24, 596 S.E.2d at 158 (emphasis added).

88. GA. RULES OF PROF'L CONDUCT R. 1.7(b), *supra* note 8, at H-28.

89. *Id.*

90. *Id.*

91. *Id.*

92. MODEL RULES OF PROF'L CONDUCT R. 1.8(a)(2), *supra* note 30, at 139 (emphasis added).

93. "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." MODEL RULES OF PROF'L CONDUCT R. 1.0(e), *supra* note 30, at 13.

94. *Id.*

ments of the rule, one has to wonder about the advisability of entering into any business transaction with a client without first obtaining a clearly written description of the risks involved; a signed consent form; and a written statement, in bold writing, encouraging the client to seek the objective advice of another lawyer before signing on the dotted line.

*In re Maples*⁹⁵ is an ordinary case in terms of its facts, but some critics may regard it as a regrettable statement about the level of seriousness with which grievances are sometimes taken against Georgia lawyers. Maples was charged with abandoning his client on a motion for a new criminal trial⁹⁶ and a subsequent failure to respond to the charges against him.⁹⁷ Neither of these charges were unique in Maples's career. As the court noted, Maples already had five prior disciplinary actions under his belt, including two public reprimands and two letters of admonition, at least two of which were for virtually the same misbehavior.⁹⁸ The Georgia Rules of Professional Conduct ("Rules") provide that a "third or subsequent disciplinary infraction . . . shall, in and of itself, constitute discretionary grounds for suspension or disbarment"⁹⁹ and that both admonitions and reprimands are included within the rule.¹⁰⁰ What is surprising is the court's imposition of a twenty-four month conditional suspension instead of disbarment.¹⁰¹ Justices Thompson and Hunstein dissented, stating the appropriate punishment should have been disbarment.¹⁰² The decision may have been based on extraneous factors not mentioned in the opinion, but at face value, the decision gives heart to serial offenders of our disciplinary rules.

IV. JUDGES—REMOVAL AND RECUSAL

A. *Removal*

During the survey period, one Georgia magistrate judge was removed from office. *In re Inquiry Concerning Judge Charles T. Robertson II*¹⁰³

95. 277 Ga. 453, 588 S.E.2d 742 (2003).

96. See *Standard of Conduct* 44, *supra* note 35, at 44-H.

97. *In re Maples*, 277 Ga. at 455, 588 S.E.2d at 744.

98. *Id.*

99. GA. RULES OF PROF'L CONDUCT R. 4-103, *supra* note 8, at H-54.

100. *Id.* R. 4-206, *supra* note 8, at H-54.

101. *In re Maples*, 277 Ga. at 456, 588 S.E.2d at 744.

102. *Id.*, 588 S.E.2d at 742 (Thompson, J., dissenting).

103. *In re Inquiry Concerning Judge Charles Robertson II*, 277 Ga. 831, 596 S.E.2d 2 (2004).

concerned Charles T. Robertson, II,¹⁰⁴ Chief Magistrate of Cherokee County. Judge Robertson's eligibility to hold office was challenged on the ground that he was a convicted felon, having received two court-martial convictions and a bad conduct discharge from the United States Army.¹⁰⁵ Thus, he was alleged to be statutorily unqualified to serve, as well as in violation of Canons One¹⁰⁶ and Two¹⁰⁷ of the Georgia Code of Judicial Conduct.¹⁰⁸

The supreme court concluded, without difficulty, that although the general court-martial convictions were not classified by the military as felonies, they were the equivalent of such, and thus, Judge Robertson "falsely swore that he had not been convicted of a felony involving moral turpitude . . ." when he qualified to run for office.¹⁰⁹ In deciding what sanction to impose upon Judge Robertson, the court¹¹⁰ made a rather curious statement. The court first stated that the test for the appearance of impropriety is "whether the situation would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired,"¹¹¹ which accurately captures the point of the "appearance of impropriety" test as it applies to judicial officers.¹¹² The court then held that Judge Robertson's presence on the bench was eroded, in part, by his "*taking the position* that his military crimes were not in the nature of crimes . . . [of] moral turpitude . . ." ¹¹³ Taken at its literal word, the court held that the public's confidence in Judge Robertson's service as a judge was eroded by his advocating that he was not in fact a convicted felon.¹¹⁴ Again, taking this holding literally, the court

104. Born Charles T. Sexton, the judge changed his name to Charles T. Robertson, II after his bad conduct discharge from the U.S. Army. *Id.* at 832, 596 S.E.2d at 4.

105. Robertson was convicted of wrongfully selling a missile tracker and remote control test, and a year later was convicted for possession of drugs. *Id.* at 832 n.2, 596 S.E.2d at 4 n.2.

106. GA. CODE OF JUDICIAL CONDUCT Canon 1, *supra* note 8, at H-137.

107. *Id.* Canon 2, at H-137.

108. *Id.* at H-137 to 138.

109. *In re Robertson*, 277 Ga. at 833, 596 S.E.2d at 5.

110. While all members of the Judicial Qualifications Commission ("JQC") agreed that Judge Robertson had falsely sworn that he had never been convicted of a felony and that his conduct violated Canons One and Two of the Code of Judicial Conduct, two members of the JQC did not think he should be removed from the bench. *Id.* at 833 n.3, 596 S.E.2d at 5.

111. *Id.* at 834, 596 S.E.2d at 5.

112. See GA. CODE OF JUDICIAL CONDUCT, Commentary to Canon 2, *supra* note 8, at H-137.

113. *In re Robertson*, 277 Ga. at 834, 596 S.E.2d at 6 (emphasis added).

114. *Id.*

would suggest that had the public known of Judge Robertson's court-martial convictions, and no proceeding had ever been brought against him in which he raised this defense, there may have been no problem at all. Surely, the court did not mean this literally. Of course, the court added to Robertson's list of misdeeds his failure to "disclose his actions or make an expression of contrition for them prior to being elected . . ." ¹¹⁵ The final question the opinion raises is: If an admitted convicted felon expressed contrition for his acts, would that eliminate any appearance of impropriety in his holding an elected judicial position? Maybe so.

B. Recusal

The Alapaha Judicial Circuit ¹¹⁶ produced two recusal cases, which skeptics may point to as unfortunate illustrations of small-town Georgia justice. *Smith v. Guest Pond Club, Inc.* ¹¹⁷ involved an alleged trespass in cutting down trees, and *Georgia Transmission Corp. v. Dixon* ¹¹⁸ involved a real property condemnation case. In each case the Georgia Court of Appeals ¹¹⁹ reversed the trial court's denial of a motion to recuse, largely based upon the Georgia Judicial Code of Conduct's prohibition of both impropriety and the appearance of impropriety. ¹²⁰

A little background is necessary to understand the two cases. The four county Alapaha Judicial Circuit has a Chief Judge, Brooks Blicht, and one other judge, Dane Perkins. Berrien Sutton and George Bessonnette, the only juvenile court judges in the circuit, also serve in that circuit as superior court judges by designation. The two are also empowered to designate each other as a superior court judge in any given matter. Judge Perkins was one of the parties in *Georgia Transmission*, ¹²¹ and Judge Bessonnette presided over *Smith*. ¹²² In both cases, Judge Sutton served as counsel for the appellees. ¹²³ Thus, each case involved some combination of the circuit's judges as parties, counsel for parties, or presiding judges.

115. *Id.*

116. This southeastern circuit comprises Atkinson, Berrien, Cook, and Lanier counties.

117. 277 Ga. 143, 586 S.E.2d 623 (2003).

118. 267 Ga. App. 575, 600 S.E.2d 381 (2004).

119. *Smith* was decided by the supreme court, and *Georgia Transmission* was decided by the court of appeals. See *Smith*, 277 Ga. at 143, 586 S.E.2d at 623 (2003); *Ga. Transmission*, 267 Ga. App. at 575, 600 S.E.2d at 381.

120. See GA. CODE OF JUDICIAL CONDUCT, Commentary to Canon 2, *supra* note 8, at H-137.

121. *Ga. Transmission*, 267 Ga. App. at 575, 600 S.E.2d at 382.

122. *Smith*, 277 Ga. at 145, 586 S.E.2d at 625.

123. *Id.*; *Ga. Transmission*, 267 Ga. App. at 578, 600 S.E.2d at 382.

In *Smith*, the first of the two cases, the Guest Pond Club (“Guest Pond”) sued Smith alleging that the canal he was building on his property constituted a continuing trespass on their lake. Guest Pond sought a temporary restraining order (“TRO”) and was granted one without any notice to Mr. Smith. Following a hearing, Guest Pond received the relief it sought, an award for attorney fees, and expenses against Smith. At some point during the litigation, Smith sought to recuse Judge Bessonnette, the juvenile court judge sitting by designation, on the ground that his court colleague, Judge Sutton, was counsel for Guest Pond.¹²⁴

After dealing with the obvious procedural irregularities in the trial court’s entry of a final order without first hearing the case for temporary relief, the court addressed the denial of appellant’s motion to recuse Judge Bessonnette.¹²⁵ The court noted that the Judicial Qualifications Commission (“JQC”) had already found it improper for a judge to preside in a case in which one of the parties held a judicial office in that circuit.¹²⁶ The court then had little trouble applying the same principle to cases in which one of the party’s lawyers held such a position because of the “confidential relationship between attorneys and their clients.”¹²⁷

The court insisted that its decision was based on the mere appearance of impropriety, concluding there was no evidence of actual impropriety.¹²⁸ However, the court’s opinion indicates that it relied on additional evidence. First, the court was careful to point out that Bessonnette and Sutton “confer regularly” in their capacities as the only circuit juvenile court judges with authority to ratify each other’s designations as superior court judges.¹²⁹ Indeed, the court determined the record was replete with orders in which the judges ratified each other’s appointments.¹³⁰ Second, because Judge Bessonnette should have recused himself in the first place, there was no real need to go into the fine, even obvious, procedural points about the court’s entry of a final order following the issuance of a TRO.¹³¹ The case should have simply been a non-starter from day one and all orders issued by Judge Bessonnette

124. *Smith*, 277 Ga. at 143, 145, 586 S.E.2d at 624-25.

125. *Id.* at 143, 586 S.E.2d at 624.

126. *Id.* at 146, 586 S.E.2d at 626. See Judicial Qualifications Comm’n, Op. 220 (1997) available at <http://www2.state.ga.us/courts/supreme/jqc220.htm>.

127. *Smith*, 277 Ga. at 146, 586 S.E.2d at 626.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 146-47, 586 S.E.2d at 626.

properly regarded as void *ab intio*.¹³² Third, the court of appeals pointed out that the trial court's final order, in which it seemingly delegated some of its authority over the issues at hand to the Guest Pond's board of directors, was improper.¹³³ If recusal under Canon Two is really about the perception that a judge is not carrying out his job with impartiality,¹³⁴ it is hard to imagine many circumstances that would be more likely to make the public suspicious than having a judge, who should never have decided the case in the first place, hand the keys to the courthouse over to a colleague and his colleague's client.

In *Georgia Transmission*, decided by the court of appeals just eight months later, Judge Blicht heard a condemnation case involving lands owned by superior court Judge Dane Perkins, Blicht's judicial circuit colleague.¹³⁵ After the special master issued his report finding that the condemnation was unnecessary and pursued in bad faith, Georgia Transmission sought Blicht's recusal, pointing to the "inherent 'interrelationship and affiliation between and among' judges serving on the same court."¹³⁶ The motion to recuse was based on the relationship between Blicht and Perkins as colleagues and also the fact that Sutton, a part-time judge in the circuit, was counsel.¹³⁷ For reasons that are undisclosed in the opinion, the judge denied the motion to recuse.¹³⁸

Despite Georgia Transmission's untimely filing of the motion to recuse, the court of appeals reversed for a number of reasons.¹³⁹ First, the court relied on Bessonnette's disqualification in *Smith*, where the judge and counsel were colleagues, an explicit extension of the JQC's ruling that "it is inappropriate for any trial court judge to preside in any action wherein one of the parties holds a judicial office on the same or any other court which sits in the same circuit."¹⁴⁰ Second, the court determined that a judge presiding over a colleague's own case could not possibly escape Canon Two's prohibition against the "appearance of impropriety."¹⁴¹ Third, the court of appeals followed *Smith*, which applied the JQC opinion, and held that

132. *Id.* at 147, 586 S.E.2d at 626.

133. *Id.*

134. *See Robertson*, 277 Ga. at 834, 596 S.E.2d at 6.

135. *Ga. Transmission*, 267 Ga. App. at 575, 600 S.E.2d at 382.

136. *Id.* at 576, 600 S.E.2d at 382 (quoting *Ga. Transmission's* motion to recuse).

137. *Id.* at 575-76, 600 S.E.2d at 382.

138. *Id.* at 576, 600 S.E.2d at 382.

139. *Id.*

140. Judicial Qualifications Comm'n, Op. 220 (1997) available at <http://www2.state.ga.us/courts/supreme/jqc220.htm>.

141. *Id.*

even without a showing of actual bias, prejudice or unfairness, and regardless of the merits or timeliness of a Motion to Recuse, . . . it is inappropriate for any trial court judge to preside in any action wherein one of the parties holds a judicial office on the same or any other court which sits in the same circuit.¹⁴²

As for why the motion to recuse was denied in the first place, that remains a mystery.

V. LEGAL MALPRACTICE

A. *Malpractice Affidavits*

*Smith v. Morris, Manning & Martin, LLP*¹⁴³ is yet another appellate case interpreting the statute¹⁴⁴ requiring that a malpractice complaint be accompanied by an expert's affidavit of merit. Here, plaintiffs originally sued Morris Manning for legal malpractice and breach of fiduciary duty, among other things. The trial court's dismissal of the legal malpractice claim for failure to include the proper expert affidavit was affirmed in 2002,¹⁴⁵ but the other claims did not suffer the same fate. On remand, plaintiffs avoided the effects of the malpractice affidavit requirement by recasting their claims as intentional ones, although some claims, traditionally reserved for lawyers, such as breach of fiduciary duty, were still included.¹⁴⁶ Defendants cried foul, arguing plaintiffs' failure to comply with the affidavit requirements made the case a nullity from the start. This was not a novel argument because the court previously reached a similar conclusion,¹⁴⁷ albeit in a slightly different context. Although the case is not explicit, defendants presumably argued that permitting this amendment would allow plaintiffs to accomplish indirectly what they could not accomplish directly; namely, the amendment would allow plaintiffs to sue a lawyer for dereliction of duty without using a proper malpractice affidavit to begin the case.

142. *Ga. Transmission*, 267 Ga. App. at 577, 600 S.E.2d at 383 (quoting *Smith v. Guest Pond Club, Inc.*, 277 Ga. 143, 586 S.E.2d 623 (2003)).

143. 264 Ga. App. 24, 589 S.E.2d 840 (2004).

144. "In any action for damages alleging professional malpractice . . . the plaintiff shall be required to file with the complaint an affidavit of an expert . . . which . . . shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim." O.C.G.A. § 9-11-9.1(2) (1998).

145. *Smith v. Morris, Manning & Martin, LLP*, 254 Ga. App. 355, 562 S.E.2d 725 (2002).

146. *Smith*, 264 Ga. App. at 24, 589 S.E.2d at 840.

147. See *Grier-Baxter v. Sibley*, 247 Ga. App. 560, 545 S.E.2d 5 (2001).

Relying mostly upon the general amendment statute,¹⁴⁸ the court agreed with plaintiffs.¹⁴⁹ Judge Ruffin, who presided, wrote, “[n]otwithstanding any similarities between these claims and Smith’s prior professional negligence claims, the fact remains that they allege intentional wrongdoing.”¹⁵⁰ The court found its hands tied by the general amendment rule and the fact that the expert affidavit statute does not expressly prohibit amendments.¹⁵¹ This case offers litigants a perfect opportunity to sue a lawyer for failure to properly perform his lawyerly duties without first jumping through the expert affidavit hoop. All a litigant must do is add a claim for intentional misconduct or insert the word “intentionally,” undeterred by our pleading rules, because allegations of “[m]alice, intent, knowledge, and other condition[s] of mind . . . may be averred generally.”¹⁵²

B. *Substantive Elements*

The survey period produced several interesting cases in the legal malpractice area, even if none really broke new ground in a profound way. All were decided by the court of appeals. In *Blackwell v. Potts*,¹⁵³ on April 15, 1991, nurse Shirley Goodwin allegedly committed malpractice upon patient Rita Blackwell by improperly administering an injection to her. In March 1993 the Blackwells’ lawyer, Blaska, sued Goodwin for malpractice. By August 1996 the Blackwells were dissatisfied with Blaska and relieved him of his duties; new counsel, Potts and Badaruddin, entered appearances in the case in November of that same year. At a January 1997 pretrial conference, Potts announced he was not ready for trial and intended to refile when he was able to get adequate expert testimony for the case. After a discussion with the judge,¹⁵⁴ the court dismissed the case.¹⁵⁵

148. O.C.G.A. section 9-11-15(a) permits amendments “as a matter of course and without leave of court at any time before the entry of a pretrial order.” *Id.* This extremely liberal amendment rule says nothing of any special application to malpractice cases. O.C.G.A. § 9-11-15(a) (2002). *Cf.* FED. R. CIV. P. 15.

149. *Smith*, 264 Ga. App. at 27, 589 S.E.2d at 844.

150. *Id.*

151. *Id.* at 25, 589 S.E.2d at 843.

152. O.C.G.A. § 9-11-9(b) (2002).

153. 266 Ga. App. 702, 598 S.E.2d 1 (2004).

154. Potts alleges that the judge told him that because he had only recently been retained, he could dismiss and refile when he was up to speed in the case. The judge’s order denying Potts’s subsequent motion to set aside the dismissal disputes that characterization of her statements at the pretrial conference. *Id.* at 702, 598 S.E.2d at 2.

155. *Id.* at 703, 598 S.E.2d at 2.

However, when Potts refiled in March 1997, defendants successfully moved to dismiss pursuant to the Georgia statute of ultimate repose.¹⁵⁶ After the trial court refused to set aside the dismissal,¹⁵⁷ the Blackwells filed a second malpractice suit, this time against Potts and Badaruddin because the attorneys dismissed their pending case without first insuring they could safely refile. In their motion for summary judgment, defendant lawyers argued that the court could only judge their actions by the state of the file as it existed when they took the case. In other words, any evidence plaintiffs introduced about the nurse's negligence¹⁵⁸ was irrelevant because the file defendant lawyers inherited from Blaska did not contain such evidence, and it was impossible for them to get it in time for the quick trial the judge demanded at the pretrial conference.¹⁵⁹ The trial court agreed, granting their motion *in limine* to exclude further medical evidence,¹⁶⁰ saying "the case must be judged on the circumstances . . . as it existed at the time the defendants represented the plaintiffs."¹⁶¹

Though not entirely unsympathetic to the lawyers, the court of appeals saw the inherent risk in agreeing with them.¹⁶² The court concluded that adopting the lawyers' position would allow any attorney to "avoid liability by intentionally or negligently failing to develop a record. In the event of a legal malpractice action . . . the defendant-attorney could then prevail simply by relying on the sparse record occasioned by his or her own action or inaction."¹⁶³ In some respects this result might seem unfair to Potts and Badaruddin because they came into the case late,

156. O.C.G.A. section 9-3-71(a) provides that "an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred." O.C.G.A. § 9-3-71(a) (1982 & Supp. 2004). O.C.G.A. section 9-3-71(b) then provides that "in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred." *Id.* § 9-3-71(b). O.C.G.A. section 9-3-71(c) states that subsection (b) "is intended to create a five year statute of ultimate repose and abrogation." *Id.* § 9-3-71(c).

157. *See* O.C.G.A. § 9-11-60(d)(2) (2004). On its face, this rule applies only to setting aside judgments, not voluntary dismissals.

158. Of course in order to prevail in their malpractice case against Potts and Badaruddin, plaintiffs had to demonstrate that they would have prevailed in the underlying medical malpractice case, if it had been properly handled.

159. *Blackwell*, 266 Ga. App. at 707, 598 S.E.2d at 5.

160. Plaintiffs sought to introduce evidence that defendants should have obtained "more suitable experts." Although the opinion does not fully explain how this happened, apparently the opinion that defendants could and should have done so came from the defendants' own doctor/lawyer expert. *Id.* at 704, 598 S.E.2d at 3.

161. *Id.* at 705, 598 S.E.2d at 3.

162. *Id.*

163. *Id.* at 706, 598 S.E.2d at 4.

and it had apparently been poorly developed. Furthermore, the lawyers were under the impression the trial judge said they could, and even should, dismiss the case without adverse consequences.¹⁶⁴

Two facts should be borne in mind before concluding the lawyers got a raw deal from the court of appeals. First, the trial judge who presided over the original pretrial conference, at which the lawyers dismissed the case, did not actually force the lawyers to dismiss; in any event, the judge was unaware of any special problems with the underlying case.¹⁶⁵ Thus, before following any of the judge's suggestions, the lawyers should have made certain it was safe to do so. This would seem especially appropriate given how old the case already was.¹⁶⁶

Second, Potts and Badaruddin had a duty to fully examine the case as it was presented to them after Blaska was dismissed. This examination would include the realities of the state of the file, as well as the statutes of limitation and repose. When asked to take the case, the lawyers had two choices. The first was to refuse to take the case at all, given its inherent dangers. Obviously, they had a perfect right to do so.¹⁶⁷ Second, the lawyers could have immediately gathered the necessary evidence; more to the point, they could have presented the trial judge with support for their argument that the case was not ripe for trial, due to no fault of their own.

*McKenna, Long & Aldridge, LLP v. Keller*¹⁶⁸ could easily be dismissed as just another in a line of cases generally holding that one may not sue a lawyer with whom one has no attorney-client relationship.¹⁶⁹ If there is no relationship and no consequent duty, there can be no liability. On another level, however, the case may stand for something more profound. The facts are simple enough. Mr. Keller left his job at First Atlanta Securities to work for Neidiger Tucker Bruner. About a month later, First Atlanta's lawyers at Long, Aldridge & Norman sent counsel for Keller and First Atlanta a letter suggesting that Keller may

164. *Id.* at 702-03, 598 S.E.2d at 2.

165. *Id.* at 707, 598 S.E.2d at 5.

166. The negligence allegedly occurred in 1991 and they took the case over in 1996.

167. Of course, for American lawyers, "it has never been professional orthodoxy that a lawyer is required to represent any particular client." CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 10.2.2, (student ed.); *see also* Former Ethical Consideration 2-26 which states: "A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become a client; but . . . a lawyer should not lightly decline proffered employment." *Ethical Consideration, supra* note 35, at 26-H.

168. 267 Ga. App. 171, 598 S.E.2d 892 (2004).

169. *See, e.g.,* Legacy Homes, Inc. v. Cole, 205 Ga. App. 34, 421 S.E.2d 127 (1992) (determining that one party to a real estate closing may not sue the other party's attorney); *Driebe v. Cox*, 203 Ga. App. 8, 416 S.E.2d 314 (1992).

have violated covenants he entered into with First Atlanta by taking some proprietary information with him when he left their employ. Keller then sued the lawyers at Long Aldridge, alleging negligence and several other claims, including libel. The trial court denied the lawyers' motion for judgment on the pleadings on all claims.¹⁷⁰

The court of appeals had no trouble concluding that some of Keller's claims against the lawyers had no valid basis, given the fact that the lawyers had no relationship with him.¹⁷¹ Thus, the court reversed the trial court's denial of the motion on the pleadings for the negligence claim.¹⁷² But the court of appeals went further.¹⁷³ At the end of its opinion, the court said, "Keller argues that even if his negligence claims are dismissed, his [claim] for libel . . . should survive . . ." ¹⁷⁴ Keller argued that the fault in his negligence claim, the lack of a lawyer-client relationship with defendants, should have no effect on his libel claim against them.¹⁷⁵ The court disagreed with Keller's notion and stated:

[A]ll his claims arise from the alleged negligent failure on the part of Long Aldridge to investigate adequately its client's allegations against Keller before sending the demand letter. Long Aldridge owed no legal duty to Keller giving rise to a claim in negligence, and the trial court erred in denying [the] motion for judgment on the pleadings.¹⁷⁶

Because the court of appeals had previously spoken of only one motion for judgment on the pleadings, it appears as though it reversed the lower court's decision on all of plaintiff's claims. In other words, not only is Keller's ordinary negligence claim barred by the lack of a relationship with the lawyer defendants, his libel and other related non-malpractice claims are barred for the same reason. This is a novel holding, to say the least, and raises the question of whether lawyers have just been granted a whole new line of defense in Georgia cases. More likely, the court of appeals has merely been a bit too casual with its wording, but it is impossible to say at this time.

Not all cases against lawyers raise such esoteric issues. If one believes all of plaintiff's allegations, *Mays v. Askin*¹⁷⁷ is a classic story of a real estate lawyer pulling a fast one on an unsuspecting seller of valuable timber property. Retired schoolteacher Mays, on behalf of herself and

170. *McKenna*, 267 Ga. App. at 171-72, 598 S.E.2d at 893.

171. *Id.* at 174, 598 S.E.2d at 895.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. 262 Ga. App. 417, 585 S.E.2d 735 (2003).

as executrix of her father's estate, was approached by Mr. Troupe and his lawyer, Askin, about buying timber. According to Mays, Askin, Troupe, or both, misled her about the sale documents she signed, the amount she received for the property, the real identity of the ultimate buyer,¹⁷⁸ and who was responsible for various costs and taxes, among other things.¹⁷⁹ In the end Mays likely received a bad deal because "Troupe paid nothing while Mays paid the costs of conveyance and much more."¹⁸⁰ More than four years after the closing date of the sale, Mays sued Askin for both malpractice and fraud. The trial court granted Askin's motion for summary judgment.¹⁸¹

The court of appeals noted several allegations to support a fraud claim, as well as reasons to extend the statute of limitations.¹⁸² The more interesting part of the case concerns the claim for malpractice. It is well established that the lawyer representing one party to a real estate closing does not, merely by conducting the closing, form an attorney-client relationship with the other party.¹⁸³ In this case, however, there was conflicting evidence on what role Askin played in relation to Mays. Not only did Mays end up paying all of Askin's attorney fees in the closing, it appeared that Askin may have given Mays legal advice about the contract, including its meaning, its terms, and even its enforceability.¹⁸⁴ Thus, the court quite correctly determined that plaintiff had raised a jury question on the issue of whether Askin was acting as Mays's attorney, either solely or at the same time he represented Troupe.¹⁸⁵ This case should be a lesson for attorneys who casually enter into real estate negotiations, transactions, and closings; a failure to obtain a clear, written understanding of the lawyer's role and loyalties to the parties involved can have devastating consequences. It also makes one question the wisdom of the supreme

178. *Id.* at 417, 585 S.E.2d at 736. Shortly after the sale, the finances of which were questionable, Askin facilitated an immediate transfer of the timber from Troupe to a forest products company, for substantially more than Mays received. *Id.*

179. *Id.* During the course of the events, the estate was represented by lawyer Sidney Shepard, who testified that he was never contacted about any of this. *Id.*

180. *Id.* at 421, 585 S.E.2d at 739.

181. *Id.*

182. *Id.* at 417-22, 585 S.E.2d at 735-39. The statute of limitations is tolled if the attorney prevented the client from finding out about the fraud's existence. *Hunter, Maclean, Exley & Dunn v. Frame*, 269 Ga. 844, 850, 507 S.E.2d 411 (1998).

183. *Guillebeau v. Jenkins*, 182 Ga. App. 225, 355 S.E.2d 453 (1987).

184. *Mays*, 262 Ga. App. at 420, 585 S.E.2d at 738.

185. *Id.* As Mays's expert opined, if he had done that, he would have needed to get "written consent or provide a written disclosure to Ms. Mays, and he has admitted he has not provided anything in writing." *Id.*

court's insistence that lawyers always serve the public best by putting a real estate transaction to rest.

*Paul v. Smith, Gambrell & Russell*¹⁸⁶ raised a novel question in the Georgia law of legal malpractice—whether a lawyer's client, against whom a jury awards punitive damages, may pass liability for those damages on to his allegedly malpracticing lawyer. *Paul v. Destito*¹⁸⁷ began with complicated corporate deals involving Destito and the Pauls, all clients of the Smith Gambrell firm. Eventually, Destito sued the Pauls, who were represented by Smith Gambrell in the litigation as well. Destito recovered both compensatory and punitive damages, demonstrating that the Pauls acted maliciously and dishonestly in their dealings with Destito.¹⁸⁸ The verdict was upheld on appeal.¹⁸⁹

The Pauls then sued Smith Gambrell for malpractice for their representation of the Pauls in Destito's lawsuit. A key allegation was that the Smith Gambrell lawyers decided not to call an expert accounting witness at trial, which defendants characterized as an honest exercise of professional judgment.¹⁹⁰ The trial court held that the lawyers were immune from malpractice liability because the lawyers' action was a strategic trial decision, the idea being that such liability would encourage endless litigation by every losing party.¹⁹¹

On appeal plaintiffs argued the lawyers lost the benefit of this immunity by virtue of an underlying conflict of interest in representing the Pauls, namely because they also represented Destito.¹⁹² The court of appeals agreed, in principle, holding that plaintiffs had raised a jury issue as to whether Smith Gambrell's conflict had a "real or subconscious effect" on their judgment during their representation, which would nullify the defense.¹⁹³ The decision on that point seems correct because the litigator must exercise independent professional judgment on the client's behalf when making strategic decisions, and the litigator must remain unaffected by interests of other persons.¹⁹⁴

The more difficult question was whether the Pauls, if they could recover for malpractice, could also recover for the punitive damages

186. 267 Ga. App. 107, 599 S.E.2d 206 (2004).

187. 250 Ga. App. 631, 550 S.E.2d 739 (2001).

188. *Id.* at 642-43, 550 S.E.2d at 748.

189. *Id.* at 631, 550 S.E.2d at 739.

190. *Paul*, 267 Ga. App. at 109, 599 S.E.2d at 209.

191. *Id.* (citing *Allen Decorating, Inc. v. Oxendine*, 225 Ga. App. 84, 88 (1997); *Hudson v. Windholz*, 202 Ga. App. 882, 886 (1992)).

192. *See id.* at 108-09, 599 S.E.2d at 208-09.

193. *Id.* at 111, 599 S.E.2d at 210.

194. *See* GA. RULES OF PROF'L CONDUCT, R. 2.1, 1.7 cmt. 4, *supra* note 8, at H-28.

assessed against them in Destito's underlying action.¹⁹⁵ Here, the court of appeals affirmed the trial court's grant of summary judgment, quickly concluding that as a matter of public policy it is inappropriate to allow plaintiffs to "shift their tort liability for punitive damages that . . . were specifically found by clear and convincing evidence to have [been] caused intentionally."¹⁹⁶ This rule makes perfect sense in the majority of instances. However, given the court's recognition in the first part of the opinion that a conflict of interest could have had a "real or subconscious effect on the judgment of counsel by creating divided loyalties" to plaintiff and defendant in the underlying trial, it seems inappropriate to apply that rule here.¹⁹⁷ After all, if the lawyers' very loyalty was affected in the underlying case and so were their strategic decisions therein, it is not much of a stretch to suggest plaintiffs may never have been found liable had their lawyers had nothing but the clients' interests in mind. Consider again that Smith Gambrell represented the Pauls, both in the underlying transactions with Destito and in Destito's suit when he charged the Pauls with fraud. An independent lawyer, representing the Pauls at trial in Destito's case, may very well have attempted to shift the blame for any alleged inappropriate behavior to the lawyers at Smith Gambrell, who may have been responsible for the Pauls' actions which harmed Destito.

Whether such a strategy would have been used, or successful if used, is beside the point, as is the question of whether Smith Gambrell's strategy was actually dictated by its conflict. The point is that the Smith Gambrell lawyers could not have been totally objective about the wisdom of their initial advice to the Pauls or the best way to keep the Pauls out of trouble when the deal soured.¹⁹⁸ The court seemed to understand this because it stated that "proof of the existence of a conflict also gives rise to the reasonable inference that such conflict influenced the exercise of discretion"¹⁹⁹ In other words the lawyers' very actions in conducting the trial could have been negatively affected by their loyalty to someone other than their client, whether it be Destito or themselves. That being the case, it is possible that the lawyers' proper exercise of discretion would have prevented the punitive damages judgment, or even the entire judgment itself, from ever being made. Allowing for such a possibility would undermine the court's basic concern that only those actually guilty of intentional misconduct should pay. It

195. *Paul*, 267 Ga. App. at 112, 599 S.E.2d at 210-11.

196. *Id.* at 113, 599 S.E.2d at 211.

197. *Id.* at 111, 599 S.E.2d at 210.

198. *Id.*

199. *Id.*

would have the same effect as making lawyers pay for underlying judgments that never would have been entered against their clients in the first place, which is, of course, what malpractice cases are all about.

*Traub v. Washington*²⁰⁰ reads like something from a John Grisham novel, or, at least, a professional responsibility exam. Sandra Traub and Glenn Connor, sister and brother, were estranged from each other when their mother died. Connor suggested they jointly hire Washington, a lawyer well known to him. When Traub raised the obvious questions about a conflict of interest, Washington reputedly told her that hiring multiple lawyers would be too expensive and unnecessary.²⁰¹

Connor and Traub began to feud over aspects of their mother's estate, and Traub became suspicious of Washington and Connor. Traub wrote Washington, informing him that she would no longer authorize his fees, at which point Washington agreed to represent Connor alone, apparently seeing no conflict in doing so. Washington even filed a petition to remove Traub as co-executor.²⁰²

In the meantime Traub's suspicions about the relationship between Connor and Washington proved to be merited. While Traub was still co-executor, and purportedly represented by Washington, Connor provided Washington a document suggesting that Traub and her mother, or both, may owe a good deal of money to a Mr. Hunter. Apparently concerned that this could jeopardize the interests of the estate, Connor had Washington search the public records for any judgments or liens against Traub. Washington also followed up by speaking with Mr. Hunter and consulting with another lawyer, Mr. Metz. Astonishingly, Washington sued Traub, by this point a former client, on Hunter's behalf. He then executed the judgment via a garnishment to collect the debt from Traub's estate proceeds.²⁰³

Traub sued Washington and Metz, as well as her brother.²⁰⁴ In Washington's appeal from the denial of his motion for summary judgment on the malpractice claim, he argued that Traub's claim of malpractice was "based solely on breach of ethical duties,"²⁰⁵ not on any

200. 264 Ga. App. 541, 591 S.E.2d 382 (2003).

201. *Id.* at 542, 591 S.E.2d at 384. Because this was already identified as an easy professional responsibility exam, it goes without saying that the lawyer may have been wrong or dishonest, or both, in giving Traub such advice. See, e.g., GA. RULES OF PROF'L CONDUCT R. 1.7, *supra* note 8, at H-28.

202. *Traub*, 264 Ga. App. at 542, 591 S.E.2d at 384.

203. *Id.*

204. *Id.* at 541, 591 S.E.2d at 382.

205. Traub's expert's affidavit apparently charged Washington with conflicts of interest and taking actions against Traub to gain an advantage for Connor.

act of negligence.”²⁰⁶ This argument may have been based on a misunderstanding of the principle that mere violation of a rule of ethical conduct does not, by itself, constitute malpractice.²⁰⁷ As the supreme court has noted before, the principle does not mean that a violation of the rules is irrelevant.²⁰⁸ It may, however, explain why the court never cited a single relevant Rule of Professional Conduct, even while emphasizing the evidence that Washington represented both Connor and Traub after Traub raised questions and petitioned to have Traub removed as co-executor.²⁰⁹

The most interesting claim is that Washington may have committed malpractice by using “confidential information gained in the process of representing Traub to her detriment.”²¹⁰ The court seemed to have lifted the idea directly from the Rules of Professional Conduct,²¹¹ despite its attempts to separate the malpractice and discipline issues. Truthfully, this allegation seems more like a basis for a breach of fiduciary duty claim,²¹² but even so, it is interesting on two counts.

First, it is not obvious what detriment or disadvantage, if any, Traub suffered from the use of the information. To the extent there were debts outstanding, she obviously could be sued for them at any time. If the debts were already reduced to judgments and liens, all that remained was to collect on them. While Traub was not actively pursued by her creditors until Washington’s actions, she had no legal right to remain exempt from collection. Nevertheless, the jury is still out on the question of whether our Rules contemplate the payment of debts, some of which were already reduced to judgments, as detrimental. Even the Restatement (Third) of the Law Governing Lawyers (“Restatement”),

206. *Traub*, 264 Ga. App. at 543, 591 S.E.2d at 385.

207. “The purpose of these rules is not to give rise to a cause of action nor to create a presumption that a legal duty has been breached They are not designed to be a basis for civil liability.” See GA. RULES OF PROF’L CONDUCT Preamble, cmt. 18, *supra* note 8, at H-24.

208. See *Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.*, 265 Ga. 374, 376, 453 S.E.2d 719 (1995).

209. *Traub*, 264 Ga. App. at 544, 591 S.E.2d at 386. See GA. RULES OF PROF’L CONDUCT R. 17, *supra* note 8, at H-28.

210. *Traub*, 264 Ga. App. at 544, 591 S.E.2d at 385-86.

211. Rule of Professional Conduct 1.8(b) prohibits a lawyer from using “information gained in the professional relationship with a client to the disadvantage of the client” See GA. RULES OF PROF’L CONDUCT R. 1.8(b), *supra* note 8, at H-29.

212. “[A] lawyer must, in matters within the scope of representation . . . comply with obligations concerning the client’s confidences . . . and not employ advantages arising from the client-lawyer relationship” See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(3) (2000).

which is vague on that point,²¹³ excludes from the definition of “confidential information” that which is generally known, including those claims reduced to judgments and/or liens.²¹⁴

Second, it is debatable whether the information should have been treated as confidential at all.²¹⁵ All of the information that Washington used against Traub seems to have come from Washington’s communications with Connor. Connor initially suggested that Washington search the public records and Traub’s finances. Then Connor presented Washington with documents found in the mother’s home, evidencing a debt from Traub, the mother, or both.²¹⁶ Nevertheless, had Washington used any of that information to Traub’s detriment,²¹⁷ he would have violated the ABA’s model versions of both Rule 1.6²¹⁸ and 1.8.²¹⁹ Each rule turns on the lawyer’s revelation or use of any information “relating to representation,” basically the same phrase used to define the scope of confidentiality in the Restatement.²²⁰ Unlike the Model Rules, the Restatement makes a substantial effort to define the term.²²¹ The Restatement makes it clear it does not matter where the information originates, what form it takes, whether it is discoverable, or whether a fee was paid for the information.²²² The Restatement even

213. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. c(i) (2000) states that “use or disclosure of confidential client information is generally prohibited if there is a reasonable prospect that doing so will adversely affect a material interest of the client” It is not clear whether collecting on debts already owed, but not yet collected, would fall within that prohibition. *Id.* § 60 cmt. c(i).

214. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 (2000), defines confidential information as “information relating to representation of a client, other than information that is generally known.” *Id.* § 59.

215. The word “confidential” is not used here in reference to the attorney-client privilege, but rather, refers to that information protected by the Rules of Professional Conduct. See GA. RULES OF PROF’L CONDUCT R. 1.6, *supra* note 8, at H-27.

216. *Traub*, 264 Ga. App. at 542, 591 S.E.2d at 384.

217. See earlier discussion about whether use of the information to collect on debts already reduced to judgments and liens was really to Traub’s detriment or disadvantage.

218. MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2004), *supra* note 30, at 83. “A lawyer shall not reveal information relating to the representation of a client” *Id.*

219. *Id.* R. 1.8. “A lawyer shall not use information relating to the representation of a client to the disadvantage of the client” *Id.* R. 1.8(b), at 139.

220. The ABA rules refer to information “relating to the representation of a client” Section 59 of the Restatement leaves out the word “the” before “representation,” referring to “information relating to representation of a client” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 (2000).

221. *Id.* § 59, cmt. b.

222. *Id.*

covers information the lawyer learns that is "relevant to representation of a client in the course of representing another client" ²²³

This is a point on which the Model Rules and the Georgia version of the Rules of Professional Conduct differ, and the difference may actually matter. In Georgia Rule 1.6, on confidentiality, and Rule 1.8, ²²⁴ on conflicts, both speak of a lawyer's obligations respecting "information *gained* in the professional relationship." ²²⁵ The meaning of this phrase has always been somewhat problematic ²²⁶ because it may have one of two alternate meanings. If it is a temporal requirement, then all of the information about Traub and her debts may be covered under Washington's obligations not to reveal or use the information to her detriment because he learned it during the course of her representation. On the other hand, if it is a causal requirement, Washington's obligations are not so clear. It seems likely that Connor would have given all of this information and documentation to Washington even if Traub had not also been represented by him. Regarding Connor's sister's debts, their mere estrangement from one another could have been enough of a motivator to cause him to use the information. Also, Connor's intention may have been to make certain that the documents found at their mother's house fell into the hands of the person most likely to present them as Traub's debt alone and not of his mother. In other words this may not have been information gained *as a result* of Traub's professional relationship. Thus, it is possible that our courts should not treat this as confidential information, regardless of the resolution of the detriment question.

Finally, the court backhandedly criticized Washington's representation of Hunter against Traub when it stated that, "[i]n spite of his former representation of Traub as co-executor, Washington represented Hunter in an action against Traub to collect the debt." ²²⁷ Putting aside the earlier question of whether suing Traub on her debts was really to her detriment at all, it seems the court was concerned about Washington's suit against Traub. There is a good chance the court believed Washing-

223. *Id.*

224. Even if a violation of the Rules of Professional Conduct does not itself constitute a cause of action, such violations are relevant. *See Allen*, 265 Ga. at 376, 453 S.E.2d at 719.

225. "A lawyer shall maintain in confidence all information gained in the professional relationship with a client." GA. RULES OF PROF'L CONDUCT R. 1.6(a), *supra* note 8, at H-27. "A lawyer shall not use information gained in the professional relationship with a client to the disadvantage of the client . . ." *Id.* R. 1.8(b), at H-29.

226. *See* Roy M. Sobelson, *Legal Ethics*, 51 MERCER L. REV. 353, 356 (1999).

227. *Traub*, 264 Ga. App. at 543, 591 S.E.2d at 385 (emphasis added).

ton's actions ran afoul of the prohibition against suing a former client in certain circumstances. That concern is worth examining.

At its most basic, "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client" ²²⁸ The question then is whether the debts Traub allegedly owed to Hunter, or the others who already had judgments against her, were matters substantially related to the estate case. Arguably, they are not related. There is no reason to think that any of the debts Traub herself had accumulated over the years had anything to do with the estate or Washington's representation of her. However, the case is closer as to the debt that either Traub, her mother, or both may have owed to Hunter. Washington came into possession of the document evidencing the debt during the representation of Connor and Traub. ²²⁹ If the mother owed the debt, the net value of the estate could be affected. ²³⁰ In resolving the relatedness issue, "[t]he underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." ²³¹ It is not as if Washington had previously represented Traub in a case with Hunter and then switched sides. Whatever obligations Traub might have owed to Hunter pre-dated her representation by Washington. If Traub's debt to Hunter cut into her inheritance, that had nothing to do with Washington. As far as the mother and the estate were concerned, Washington never represented them in the first place.

Of course that does not exhaust the limits on prohibitions against opposing former clients in Georgia. The Georgia courts imposed a slightly more onerous prohibition than that which exists in other states. Assuming the adoption of Rule 1.9 ²³² does not occupy the field in this area and impliedly overrule other related rules, ²³³ the supreme court

228. GA. RULES OF PROF'L CONDUCT R. 1.9(a), *supra* note 8, at H-31. See *Tilley v. King*, 190 Ga. 421, 9 S.E.2d 670 (1942), *rev'd on other grounds*, 193 Ga. 602, 19 S.E.2d 281 (1942).

229. *Traub*, 264 Ga. App. at 542, 591 S.E.2d at 385.

230. *Id.* at 542-43, 591 S.E.2d at 385-86.

231. GA. RULES OF PROF'L CONDUCT R. 1.9 cmt. 2, *supra* note 8, at H-31.

232. *Id.* R. 1.9, *supra* note 8, at H-31. "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter . . ." *Id.* R. 1.9(a), at H-31.

233. There is nothing in the Rules that directly addresses this question. Presumably, the case law is unaffected by the adoption of the Rules, but since the case was grounded in the appearance of impropriety and that principle is completely absent from the Rules of Professional Conduct, one can make the argument that *Yerby* has been displaced.

has held that even if the matters for a current and former client are not substantially related, the lawyer's representation may, nevertheless, be improper under the Yerby rule.²³⁴

The Yerby rule arises from a case in which a lawyer represented Crawford Long Hospital in several medical malpractice suits over a long period of time. When the lawyer left to pursue a private practice, he represented a plaintiff who filed a medical malpractice case against the hospital, which objected.²³⁵ Even though the case was not factually related to any the lawyer had previously handled for the hospital, the court held the representation improper.²³⁶ The court determined there existed an appearance of impropriety because the case was the same "general subject matter" and arose "during the time" of his representation of the hospital.²³⁷ Both of the Yerby rule requirements are questionable in the Traub case. First, it is doubtful the court would regard a pre-existing debt and the estate case as the same general subject matter. Second, while the information may have come to light during the course of Washington's representation of Traub, the pre-existing debts and liens themselves did not. The primary concern from *Yerby* is the need to prevent lawyers from taking advantage of their positions with clients, whereby they would acquire "knowledge (imparted to the lawyer by the client) of practices, policies, procedures, reporting requirements, and of ongoing or recurring problems"²³⁸ Traub would be hard pressed to argue that her case raised any such issue. That being the case, the theory that Washington inappropriately used confidential information to Traub's detriment is questionable.

VI. DISQUALIFICATION OF COUNSEL

*Piedmont Hospital, Inc. v. Reddick*²³⁹ raised an issue about using disqualification as a remedy for a violation of the Rules of Professional Conduct. In most respects the court of appeals affirms existing law, concluding both that disqualification is a discretionary remedy open to the trial court as one method of dealing with unethical conduct and that standing to disqualify for a conflict of interest exists only for "those as to whom the attorney in question sustains . . . the relation of attorney and client."²⁴⁰

234. *Crawford W. Long Mem'l Hosp. v. Yerby*, 258 Ga. 720, 373 S.E.2d 749 (1988).

235. *Id.*

236. *Id.* at 722, 373 S.E.2d at 751.

237. *Id.*

238. *Id.* at 721, 373 S.E.2d at 750.

239. 267 Ga. App. 68, 599 S.E.2d 20 (2004).

240. *Id.* at 86, 599 S.E.2d at 28.

In dealing with defendant hospital's motion to disqualify plaintiff's counsel for communicating with hospital agents, the court may have inadvertently raised a question about the continued effect of a Formal Advisory Opinion rendered by the supreme court before its adoption of the existing Rules of Professional Conduct. The question was a simple, yet troubling, one: Under what circumstances may counsel for one party contact an employee of an organizational opponent, without first getting permission of opposing counsel?

According to the court of appeals, the prohibition would apply to any one of three classes of employees: (1) those with "managerial responsibility," (2) those "whose act[s] or omission[s]" may be imputed to the hospital in the subject matter of the case, or (3) those whose statement . . . could "constitute an admission on the part of the [hospital]."²⁴¹ This reading of the anti-contact rule, taken directly from the comments to Georgia's Rule 4.2,²⁴² is consistent with most jurisdictions' view of the rule.²⁴³ Therefore, it was the court's intention to merely state and apply the existing Georgia rule.

However, the court of appeals anti-contact rule may not actually be the Georgia rule. In 1989 the supreme court adopted *Formal Advisory Opinion 87-6*²⁴⁴ addressing the very same question. Having no rule that directly answered the question,²⁴⁵ the court looked to an old ABA Informal Opinion²⁴⁶ for guidance. Following the old opinion, the court

241. *Id.* at 85, 599 S.E.2d at 27.

242. GA. RULES OF PROF'L CONDUCT R. 4.2 cmt. 4A, *supra* note 8, at H-45.

243.

[A] current employee or other agent of an organization represented by a lawyer: (a) if the employee or other agent supervises, directs, or regularly consults with the lawyer concerning the matter or if the agent has power to compromise or settle the matter; (b) if the acts or omissions of the employee or other agent may be imputed to the organization for purposes of civil or criminal liability in the matter; or (c) if a statement of the employee or other agent, under applicable rules of evidence, would have the effect of binding the organization with respect to proof of the matter.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100(2) (2000).

244. Formal Advisory Op. Bd., Formal Op. 87-6 (1987), *supra* note 8, at H-91.

245. Standard of Conduct 47 prohibited conduct with represented parties without the written consent of opposing counsel, but it said nothing about whether employees of organizational parties were covered by the Rules. Standard 47 was based on Directory Rule 7-104(A)(1) of the Code of Professional Responsibility. The Standards of Conduct were the enforceable rules of conduct, for the violation of which one could be disciplined, while the Directory Rules were aspirational only. See *Part IV: Discipline, Rule 4-101*, *supra* note 35, at 40-H.

246. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1410 (1978) (interpreting DR 7-104(A)(1)).

applied the prohibition to two categories of employees.²⁴⁷ The first was to “an officer or director or other employee with authority to bind the corporation,” and the second was to employees “whose acts or omissions may be imputed to the corporation in relation to the subject matter of the case.”²⁴⁸ The prohibition seemed simple enough in 1989, a full twelve years before Georgia adopted its own version of the Rules of Professional Conduct in 2001.

Thus, we have a potential problem. Both opinions encompass employees who are managers and the like, even if they use slightly different language. Both encompass persons whose acts might be imputed to the corporation, as well. But the court of appeals extends the prohibition to a third category of employees, those whose “statement[s] . . . could constitute an admission,”²⁴⁹ based upon the comments to Rule 4.2.²⁵⁰ While the comments are important, they are only “guides to interpretation . . . [while] the text of each Rule is authoritative.”²⁵¹ Has the court of appeals inadvertently prohibited lawyers from speaking to persons with whom the supreme court, in its advisory opinion, never prohibited them to speak?

It is possible that the categories look different but really are not. If “bind[ing] the corporation”²⁵² refers to making decisions by which the corporation is legally bound, such as negotiating and settlement positions, then the court of appeals rule and the advisory opinion rule are not the same. But if the phrase “bind the corporation” refers to making admissions by which the organizational entity will be bound as a matter of evidence law, then this first category collapses the managerial category and the admissions category together into one, and thus, all are consistent. The latter interpretation is more likely the correct one, especially given the Georgia courts’ traditional overlapping treatment of agency for purposes of acting for a corporation and agency for purposes of making corporate admissions.²⁵³

All of this raises an interesting question: If this formal advisory opinion²⁵⁴ does in fact conflict with a comment in a later adopted Rule of Professional Conduct, which one controls? One would think the formal

247. Formal Advisory Op. Bd., Formal Op. 87-6, *supra* note 8, at H-91.

248. *Id.*

249. *Piedmont Hosp.*, 267 Ga. App. at 85, 599 S.E.2d at 27.

250. GA. RULES OF PROF'L CONDUCT R. 4.2 cmt. 4A, *supra* note 8, at H-45.

251. *Id.* cmt. 21, at H-24.

252. HANDBOOK, *supra* note 8, at H-91.

253. See PAUL S. MILICH, COURTROOM HANDBOOK ON GEORGIA EVIDENCE 13 (2004).

254. At the time Formal Advisory Opinion No. 87-6 was issued, all such opinions were approved by the Supreme Court. See GA. RULES OF PROF'L CONDUCT, *supra* note 8, at H-57.

advisory opinion controls for three reasons. First, it was issued as an opinion of the supreme court, unlike those opinions issued by either the Disciplinary Board²⁵⁵ or the Formal Advisory Opinion Board alone.²⁵⁶ Second, it has never been revoked, even as some old opinions were sent to the dustbin when the Rules of Professional Conduct were adopted to replace the Code of Professional Responsibility. And third, even though the Rules are in effect, the answer to this question is found only in the non-binding comments, not the Rules themselves.

VII. THE LAST WORD IN PROFESSIONALISM

If one point of an article like this is to raise the reader's consciousness about issues of professionalism, then *Sangster v. Dujinski*²⁵⁷ is the perfect coda. *Sangster* raises questions about litigation tactics, the degree to which trial court judges prevent and deal with serious abuses of decorum, and whether our current Rules are up to the task of sending Georgia lawyers a message that certain behavior will not be tolerated.²⁵⁸ Before reading about the case, perhaps the reader should be reminded that our Lawyer's Creed contains the following promise: "To the opposing parties and their counsel, I offer fairness, integrity, and civility To the courts . . . I offer respect, candor, and courtesy."²⁵⁹

Dujinski sued Sangster for injuries resulting from a "road rage" incident, recovering less than \$700 in actual damages but \$150,000 in punitive damages.²⁶⁰ Unfortunately, Dujinski may have had the help of some rather questionable litigation tactics by her attorney, Eric Hertz, who claimed to have "[written] the book on punitive damages"²⁶¹

Before trial Sangster moved *in limine* to keep out evidence of his prior traffic citations, criminal charges, use of alcohol and marijuana, and the like. The trial court granted the motion and, during trial, refused to reconsider its decision, but Hertz refused to drop the issue. From Hertz's opening statement onward, he made reference after reference to matters the trial court excluded. Despite repeated cautions and motions for a mistrial, Hertz continued, undaunted, in his attempts to use facts the court had ordered him not to use. The trial court refused to grant a mistrial and never issued a verbal rebuke before the jury.²⁶²

255. See <http://www.gabar.org/sdb.asp>.

256. GA. RULES OF PROF'L CONDUCT R. 4-403(d), *supra* note 8, at H-64.

257. 264 Ga. App. 213, 590 S.E.2d 202 (2003).

258. *Id.* at 213, 590 S.E.2d at 202.

259. *A Lawyer's Creed, Part IX: Professionalism*, *supra* note 8, at H-128.

260. *Sangster*, 264 Ga. App. at 214, 590 S.E.2d at 202.

261. *Id.*

262. *Id.*

During closing arguments in the damages phase, Hertz referred to punitive damages and even commented that the judge did not want the jury to know “every bad thing this guy has done.”²⁶³ In Hertz’s closing on punitive damages, he argued things never presented into evidence and stated that Sangster could just file bankruptcy and avoid paying. Hertz also repeatedly invoked his personal opinion and made other grossly inappropriate remarks.²⁶⁴ Referring to defendant, he said, “I was afraid to go to sleep last night I am afraid this guy is going to show up at my house.”²⁶⁵ Hertz suggested that opposing counsel was “trying to create facts to make you think things are not there”²⁶⁶ Finally, as to himself, Hertz claimed, “[w]hen I give an oath I put God under there.’ You can hold me to it. You can hold my bar license’ ‘I do the same thing the district attorney does.’”²⁶⁷

Calling these “extreme circumstances,” the court of appeals admitted that “no amount of instruction by the court to disregard . . . counsel’s argument could have erased the effect[s]” thereof and reversed the trial court’s denial of Sangster’s motion for a new trial.²⁶⁸ A few readers of the opinion would have expected the court to say something in closing about referring the matter to Bar Counsel for appropriate actions under our Rules of Professional Conduct.

But those words never came because our rules do not condemn this deplorable conduct.²⁶⁹ ABA Model Rule 3.4(e) states that a lawyer shall not

in trial, allude to any matter that the lawyer does not reasonably believe . . . will not be supported by admissible evidence, assert personal knowledge of facts in issue . . . or state a personal opinion as to the justness of a cause, the credibility of a witness, [or] the culpability of a civil litigant²⁷⁰

By any reading of the case, Hertz violated this provision.²⁷¹ Furthermore, Model Rule 3.4(c) prohibits a lawyer’s “knowingly disobey[ing] an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists”²⁷² Any reasonable

263. *Id.* at 215, 590 S.E.2d at 204.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at 215-16, 590 S.E.2d at 204.

268. *Id.*

269. MODEL RULES OF PROF'L CONDUCT, *supra* note 30.

270. *Id.* R. 3.4(e), at 347.

271. *Sangster*, 264 Ga. App. at 213, 590 S.E.2d at 202.

272. MODEL RULES OF PROF'L CONDUCT R. 3.4(c), *supra* note 30, at 347.

reading of that provision would include a lawyer's deliberate violation of a court's order prohibiting him from referring to certain evidence during a trial, thus putting Mr. Hertz in violation of this rule as well.

By comparison the Georgia version of Rules 3.4(c) and 3.4(e) are labeled "Reserved," as is section (d).²⁷³ Neither the Rules nor the comments thereto give any explanation for the deletion, which is especially puzzling in light of the fact that our former Directory Rule 7-106²⁷⁴ prohibited all of the above and more. Presumably, that is why the court referenced the Directory Rule, instead of any current rule, to disapprove of Hertz's statements that "[w]hen I give an oath I put God under there.' 'You can hold me to it.'"²⁷⁵

But one should not wax too nostalgic over the past rules. Even when we had an aspirational Directory Rule on point, there was no corresponding Standard of Conduct.²⁷⁶ Thus, even if Hertz had done exactly the same thing before January 1, 2001,²⁷⁷ the result would have been no different. It seems as though Georgia competes, if it does not lead, in the race to the bottom by not providing even the slightest official disapprobation of this conduct. This is surprising in light of the fact that the Georgia Supreme Court was one of the first in the nation to establish its own Commission on Professionalism.²⁷⁸ Also, it is inconsistent with the court's recognition that "the way in which our clients resolve their disputes defines part of the character of our society

273. ABA Model Rule 3.4(d) states that a lawyer shall not "in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party . . ." MODEL RULES OF PROFESSIONAL CONDUCT R. 3.4(d), *supra* note 31, at 347.

274. Directory Rule 7-106(C) provided that a lawyer shall not state or allude to any matter that . . . will not be supported by admissible evidence . . . assert his personal knowledge of the facts in issue, except when testifying as a witness . . . assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant . . . fail to comply with known local customs of courtesy or practice . . . engage in undignified or discourteous conduct . . . intentionally or habitually violate any established rule of procedure or of evidence.

Directory Rule 7-106(c), *supra* note 35, at H-37.

275. *Sangster*, 264 Ga. App. at 215 n.3, 590 S.E.2d at 204 n.3.

276. See Part IV: Discipline, Rule 4-101, which made only the Standards of Conduct enforceable in bar disciplinary proceedings. DISCIPLINE RULE 4-101, *supra* note 35, at H-40.

277. The current Georgia Rules of Professional Conduct were adopted in June 2000, and went into effect January 1, 2001. See *supra* note 77, at <http://www.gabar.org/ogcrules.asp>.

278. A historical background of the Commission may be found at <http://www.gabar.org/cjphistory.asp>.

and we should act accordingly.”²⁷⁹ Maybe it is time we reconsider our position on the “Reserved” portions of the Rules.

VIII. CONCLUSION

Neither the supreme court nor the court of appeals rendered any earth-shaking opinions this past year in the legal ethics area. However, the supreme court’s advisory opinion on real estate closings guarantees the continuation of a debate over how much control the courts and lawyers have over services related to the practice of law. Enterprising nonlawyers will no doubt continue to devise methods by which they offer consumer services closely related to those offered by lawyers, sometimes in conjunction with lawyers, other times completely separate from them. The legal profession’s face changed dramatically with the advent of legal advertising; its face is likely to undergo more dramatic changes in the near future. It would also be nice if, in the process of changing with the times, we can catch up with other jurisdictions and speak our disapproval of actions like those in *Sangster*.

279. *Aspirational Statement of Professionalism*, *supra* note 8, at H-128.