Legal Ethics

by Patrick Emery Longan*

I. INTRODUCTION

Issues of legal ethics arose during the survey year in the usual contexts of attorney discipline, malpractice, and ineffective assistance of counsel. In a handful of cases, the Georgia appellate courts also dealt with other issues related to legal ethics.

II. DISCIPLINARY CASES

A. Disbarments

The Georgia Supreme Court disbarred thirteen lawyers during the survey period.[1] Unlike the disbarment decisions in several previous years, there were no dissents from any of these decisions.[2] Five lawyers were disbarred as a result of criminal convictions.[3] Three lawyers lost

---

* William Augustus Bootle Chair in Ethics and Professionalism in the Practice of Law, Director of the Mercer Center for Legal Ethics and Professionalism, Mercer University, Walter F. George School of Law. Washington University (A.B., 1979); University of Sussex (M.A., 1980); University of Chicago (J.D., 1983).

1. *In re* Williams, 281 Ga. 558, 558, 640 S.E.2d 292, 293 (2007) (per curiam); *In re* Hipe, 281 Ga. 557, 557, 640 S.E.2d 292, 292 (2007) (per curiam); *In re* Quay, 281 Ga. 549, 550, 640 S.E.2d 290, 291 (2007) (per curiam); *In re* Pronk, 281 Ga. 511, 511, 640 S.E.2d 32, 33 (2007) (per curiam); *In re* Halcomb, 281 Ga. 510, 510, 640 S.E.2d 31, 32 (2007) (per curiam); *In re* Calugar, 281 Ga. 509, 510, 640 S.E.2d 32, 32 (2007) (per curiam); *In re* McElroy, 281 Ga. 317, 318, 637 S.E.2d 705, 706 (2006); *In re* Goldberg, 281 Ga. 168, 169, 635 S.E.2d 750, 751 (2006) (per curiam); *In re* Kaufman, 281 Ga. 58, 58, 635 S.E.2d 751, 751 (2006) (per curiam); *In re* Strickland, 281 Ga. 56, 57, 635 S.E.2d 739, 739 (2006) (per curiam); *In re* Culpepper, 281 Ga. 55, 56, 635 S.E.2d 756, 758 (2006) (per curiam); *In re* Wallace, 281 Ga. 7, 7, 635 S.E.2d 706, 707 (2006) (per curiam); *In re* Sisk, 280 Ga. 635, 635, 631 S.E.2d 662, 663 (2006) (per curiam).

2. *See id.*

3. *In re Hipe*, 281 Ga. at 557, 640 S.E.2d at 292; *In re Quay*, 281 Ga. at 550, 640 S.E.2d at 290-91; *In re Halcomb*, 281 Ga. at 510, 640 S.E.2d at 31-32; *In re Pronk*, 281 Ga. at 511, 640 S.E.2d at 32-33; *In re Calugar*, 281 Ga. at 509-10, 640 S.E.2d at 32.

their licenses for violations of the rules governing their trust accounts.[4] Two lawyers were disbarred for client neglect and abandonment.[5] One lawyer voluntarily surrendered his license for permitting an employee to solicit business for him by telephone and in person,[6] while another was disbarred because he had been disbarred in another state.[7] Another lawyer lost his license as a result of violating a variety of rules, including Rule 1.3 (diligence),[8] Rule 1.4 (communication),[9] Rule 1.15 (trust accounts),[10] and Rule 1.16 (withdrawal).[11]

B. Suspensions

The supreme court imposed fifteen suspensions (other than interim suspensions) for a variety of offenses.[12] The majority of these decisions were unanimous. Three decisions concerned lawyers who were appealing felony convictions.[13] Two others concerned the imposition of reciprocal discipline on lawyers who had been suspended in other states.[14] Three lawyers received suspensions for isolated infractions.[15] In *In re*

---

4. *In re Williams*, 281 Ga. at 558, 640 S.E.2d at 293; *In re Goldberg*, 281 Ga. at 169, 635 S.E.2d at 751; *In re Wallace*, 281 Ga. at 7, 635 S.E.2d at 706-07.

5. *In re Kaufman*, 281 Ga. at 58, 635 S.E.2d at 751; *In re Strickland*, 281 Ga. at 57, 635 S.E.2d at 739.

6. *In re McElroy*, 281 Ga. at 317-18, 637 S.E.2d at 706.

7. *In re Sisk*, 280 Ga. at 635, 631 S.E.2d at 663.

8. GA. RULE OF PROF'L CONDUCT 1.3 (2006).

9. GA. RULE OF PROF'L CONDUCT 1.4 (2006).

10. GA. RULE OF PROF'L CONDUCT 1.15 (2006).

11. GA. RULE OF PROF'L CONDUCT 1.16 (2006); *In re Culpepper*, 281 Ga. at 55-56, 635 S.E.2d at 757-58.

12. *In re* Walker, 282 Ga. 53, 54, 644 S.E.2d 860, 860-61 (2007) (per curiam); *In re* English, 281 Ga. 896, 896, 644 S.E.2d 137, 137 (2007) (per curiam); *In re* Wilson, 281 Ga. 782, 782, 642 S.E.2d 806, 806 (2007) (per curiam); *In re* Johnson, 281 Ga. 674, 675, 641 S.E.2d 535, 536 (2007) (per curiam); *In re* Moody, 281 Ga. 608, 608, 642 S.E.2d 17, 18 (2007) (per curiam); *In re* Gbaja, 281 Ga. 659, 659, 641 S.E.2d 532, 533 (2007) (per curiam); *In re* Maddux, 281 Ga. 607, 608, 642 S.E.2d 317, 317 (2007) (per curiam); *In re* Hamilton, 281 Ga. 556, 556, 640 S.E.2d 291, 292 (2007) (per curiam); *In re* Geary, 281 Ga. 554, 555, 640 S.E.2d 253, 254 (2007) (per curiam); *In re* Campbell, 281 Ga. 316, 317, 637 S.E.2d 705, 705 (2006) (per curiam); *In re* Cunningham, 281 Ga. 315, 316, 637 S.E.2d 704, 705 (2006) (per curiam); *In re* Elkins, 281 Ga. 249, 249, 637 S.E.2d 399, 399-400 (2006) (per curiam); *In re* Garfinkel, 281 Ga. 142, 143, 636 S.E.2d 543, 544 (2006) (per curiam); *In re* Mitchell, 280 Ga. 769, 770, 632 S.E.2d 649, 650 (2006) (per curiam); *In re* Lenn, 280 Ga. 633, 634, 632 S.E.2d 89, 90 (2006) (per curiam).

13. *In re English*, 281 Ga. at 896, 644 S.E.2d at 137; *In re Campbell*, 281 Ga. at 316, 637 S.E.2d at 705; *In re Cunningham*, 281 Ga. at 315, 637 S.E.2d at 704.

14. *In re Wilson*, 281 Ga. at 782, 642 S.E.2d at 806; *In re Maddux*, 281 Ga. at 607-08, 642 S.E.2d at 317.

15. *In re Walker*, 282 Ga. at 54, 644 S.E.2d at 860; *In re Johnson*, 281 Ga. at 675, 641 S.E.2d at 535; *In re Gbaja*, 281 Ga. at 659, 641 S.E.2d at 532.

Johnson,[16] Eric Robert Johnson II was suspended for thirty days and received a public reprimand for accepting compensation to represent two criminal defendants while he was working as an assistant public defender.[17] Johnson also received a public reprimand for failing to take reasonable remedial measures in another case when he learned his client had testified falsely.[18] In *In re Gbaja*,[19] Femi Gbaja was suspended for thirty-six months after taking $25,000 of client money and leaving the country.[20] Because he returned the money, cooperated with authorities, and expressed remorse, the court suspended Gbaja instead of disbarring him.[21] In *In re Walker*,[22] Monique Walker received a 120-day suspension and a public reprimand after she pleaded guilty to the misdemeanor of filing a fraudulent federal tax return.[23] Walker had failed to report as income $700 that her father's company had paid her.[24]

Three of the unanimous decisions for suspensions concerned lawyers who committed serious violations of the Georgia Rules of Professional Conduct but did so while suffering from health issues.[25] In *In re Lenn*,[26] the supreme court accepted the petition for voluntary discipline of an eighteen-month suspension from Lisa Paige Lenn for using a client's funds for her personal benefit and initially failing to return the client's phone calls.[27] The court accepted the attorney's assertion that she was suffering from mental health issues at the time and noted that she made full restitution and was sorry for her misconduct.[28] Similarly, in *In re Moody*,[29] Renate Downs Moody submitted a petition for voluntary discipline for her misconduct in failing to pursue two matters for clients and for appearing in court intoxicated.[30] The court noted that the attorney had diabetes and a bi-polar condition and that she

---

16. 281 Ga. 674, 641 S.E.2d 535 (2007) (per curiam).
17. *Id.* at 675, 641 S.E.2d at 535-36.
18. *Id.*, 641 S.E.2d at 536.
19. 281 Ga. 659, 641 S.E.2d 537 (2007).
20. *Id.* at 659, 641 S.E.2d at 532-33.
21. *Id.*
22. 282 Ga. 53, 644 S.E.2d 860 (2007) (per curiam).
23. *Id.* at 54, 644 S.E.2d at 860.
24. *Id.*
25. *In re Moody*, 281 Ga. at 608, 642 S.E.2d at 17-18; *In re Garfinkel*, 281 Ga. at 143, 636 S.E.2d at 544; *In re Lenn*, 280 Ga. at 633-35, 632 S.E.2d at 90.
26. 280 Ga. 633, 632 S.E.2d 89 (2006) (per curiam).
27. *Id.* at 633, 633-34, 632 S.E.2d at 90.
28. *Id.* at 634, 632 S.E.2d at 90.
29. 281 Ga. 608, 642 S.E.2d 17 (2007) (per curiam).
30. *Id.* at 608, 642 S.E.2d at 17-18.

consumed alcohol to medicate herself.[31] The court suspended her for six months with the added condition that she obtain a certification from a psychologist or psychiatrist certifying that she has no impairment affecting her ability to practice law.[32] In *In re Garfinkel*,[33] another lawyer was suspended indefinitely for abandoning his practice and moving to another state, allegedly as a result of severe depression.[34]

Four of the suspensions provoked dissents.[35] In *In re Hamilton*,[36] the special master found that attorney Hunter J. Hamilton wrote bad checks on his trust account, commingled personal funds and client funds, withdrew funds from the trust account that were not earned fees, and failed to maintain proper records of his trust account.[37] These were not isolated incidents, as the attorney had "failed to adequately and properly maintain his trust account for many years."[38] Hamilton failed to submit to the bar an agreed upon audit of his account and was otherwise uncooperative.[39] The court suspended him for one year, with conditions on reinstatement.[40] Justice Hunstein dissented because she would have disbarred the attorney.[41]

Justice Hunstein also dissented alone in two other cases.[42] In *In re Mitchell*,[43] the supreme court suspended a lawyer after he neglected four client matters while he was practicing law in Texas.[44] Texas had imposed a two-year suspension with a probated suspension of an additional three years.[45] The Georgia Supreme Court imposed reciprocal discipline in the form of a two-year suspension (Georgia does not have probated suspensions).[46] Justice Hunstein dissented, presumably

---

31. *Id.*, 642 S.E.2d at 18.
32. *Id.*
33. 281 Ga. 142, 636 S.E.2d 543 (2006) (per curiam).
34. *Id.* at 143, 636 S.E.2d at 544.
35. *In re Hamilton*, 281 Ga. at 557, 640 S.E.2d at 292 (Hunstein, J., dissenting); *In re Geary*, 281 Ga. at 555, 640 S.E.2d at 254 (Hunstein, J., dissenting); *In re Elkins*, 281 Ga. at 249, 637 S.E.2d at 400 (Hunstein, J., dissenting); *In re Mitchell*, 280 Ga. at 770, 632 S.E.2d at 650 (Hunstein, J., dissenting).
36. 281 Ga. 556, 640 S.E.2d 291 (2007).
37. *Id.* at 556, 640 S.E.2d at 291.
38. *Id.*
39. *Id.*, 640 S.E.2d at 291-92.
40. *Id.*, 640 S.E.2d at 292.
41. *Id.* at 557, 640 S.E.2d at 292 (Hunstein, J., dissenting).
42. *In re Elkins*, 281 Ga. at 249, 637 S.E.2d at 400 (Hunstein, J., dissenting); *In re Mitchell*, 280 Ga. at 770, 632 S.E.2d at 650 (Hunstein, J., dissenting).
43. 280 Ga. 769, 632 S.E.2d 649 (2006) (per curiam).
44. *Id.* at 769-70, 632 S.E.2d at 650.
45. *Id.*
46. *Id.* at 770, 632 S.E.2d at 650.

because she believed disbarment would have been more appropriate.[47] The Justice also dissented in *In re Elkins*[48] when another lawyer was suspended for ninety days for failing to cooperate with bar authorities.[49] This lawyer had been disciplined on five previous occasions.[50]

Justice Thompson joined Justice Hunstein in one dissent from a decision for suspension.[51] In *In re Geary*,[52] a lawyer with three prior disciplinary offenses received a one-year suspension for his actions in two matters.[53] In the first matter, the lawyer accepted representation in a legal malpractice case after a disbarred lawyer told him about the client and obtained the client's signature on a contract. The lawyer only had telephonic contact with the client and was eventually ordered to refund his $5,000 fee. In the second matter, the lawyer apparently did not notify a client about a hearing, and the client's absence at the hearing caused the client harm.[54] Justices Hunstein and Thompson would have disbarred the lawyer, but the supreme court accepted his petition for voluntary discipline of a one-year suspension.[55]

C. *Other Discipline*

The supreme court imposed other forms of discipline in nine other cases.[56] In *In re Ranalli*,[57] a lawyer received a letter of formal admonition as a result of being disciplined in Nevada.[58] The discipline in Nevada resulted from several incidents in which trust account funds were moved temporarily into the firm's operating account to meet

---

47. *Id.* (Hunstein, J., dissenting).
48. 281 Ga. 249, 637 S.E.2d 399 (2006) (per curiam).
49. *Id.* at 249, 637 S.E.2d at 399-400 (Hunstein, J., dissenting).
50. *Id.*, 637 S.E.2d at 399 (majority opinion).
51. *In re Geary*, 281 Ga. at 555, 640 S.E.2d at 254 (Hunstein, J., dissenting).
52. 281 Ga. 554, 640 S.E.2d 253 (2007) (per curiam).
53. *Id.* at 555, 640 S.E.2d at 254.
54. *Id.* at 554-55, 640 S.E.2d at 253-54.
55. *Id.* at 555, 640 S.E.2d at 254 (Hunstein, J., dissenting).
56. *In re Johnson*, 281 Ga. at 675, 641 S.E.2d at 536; *In re* Taylor, No. S07Y0646 (Ga. Mar. 26, 2007) (order for public reprimand); *In re* Adkins, No. S06Y2140 (Ga. Nov. 20, 2006), *reprinted in* THE OFFICE OF THE GENERAL COUNSEL OF THE STATE BAR OF GEORGIA'S ANNUAL REPORT FOR OPERATIONAL YEAR 2006-2007 43-44 (2007) (order for Review Panel reprimand); *In re* Syrop, No. S07Y0052 (Ga. Nov. 6, 2006) (order for Review Panel reprimand); *In re* Wright, No. S06Y1749 (Ga. Oct 16, 2006) (order for Review Panel reprimand); *In re* Goldberg, No. S06Y1895 (Ga. Oct. 2, 2006) (order for public reprimand); *In re* Ranalli, No. S06Y1271 (Ga. Sept. 18, 2006) (order for Letter of Formal Admonition); *In re* Davis, No. S06Y1436 (Ga. July 13, 2006) (order for Review Panel reprimand); *In re* Harris, No. S06Y1158 (Ga. May 17, 2006) (order for Review Panel reprimand).
57. No. S06Y1271 (Ga. Sept. 18, 2006).
58. *Id.*, slip op. at 3.

expenses. Ironically, each time the firm moved those funds, which it later replaced, the firm was actually entitled to move them as earned fees.[59] Nevertheless, the Nevada Supreme Court imposed discipline, and because there is no equivalent to that discipline in Georgia, the supreme court issued a letter of formal admonition.[60]

Five lawyers received Review Panel reprimands.[61] Four of the cases were straightforward.[62] In *In re Harris*,[63] a lawyer received a reprimand for assisting her husband in the unauthorized practice of law when the husband, who was not an attorney, used her office and staff to close real estate transactions in which he acted, in effect, as the closing attorney.[64] In *In re Davis*,[65] Michael Davis received the same discipline for his lack of communication and diligence in connection with two habeas petitions which he was hired to handle.[66] In *In re Wright*,[67] another lawyer was reprimanded for failing to respond to discovery, to comply with a court order, and to appear at a hearing concerning a case that was ultimately dismissed; the lawyer also failed to inform his client of the dismissal and lied to the Investigative Panel about why he missed the hearing.[68] In *In re Adkins*,[69] Stephen W. Adkins, Jr. neglected one matter and failed to communicate with his clients at a time when he was dealing with personal problems.[70] He made restitution, showed remorse, and received a Review Panel reprimand.[71]

A fifth case in which the court imposed a Review Panel reprimand was more complex.[72] In *In re Syrop*,[73] the court began its order with the understatement that the matter "ha[d] a complicated procedural history."[74] The attorney had filed a case for a client. The case was

---

59. *Id.*, slip op. at 1-2.
60. *Id.*, slip op. at 2.
61. *In re* Adkins, *supra* note 56, at 44; *In re Syrop*, No. S07Y0052, slip op. at 3; *In re Wright*, No. S06Y1749, slip op. at 1; *In re Davis*, No. S06Y1436, slip op. at 2; *In re Harris*, No. S06Y1158, slip op. at 2.
62. *See In re* Adkins, No. S06Y185 (Ga. Nov. 20, 2006); *In re Wright*, No. S06Y1749; *In re Davis*, No. S06Y1436; *In re Harris*, No. S06Y1158.
63. No. S06Y1158 (Ga. May 17, 2006).
64. *Id.*, slip op. at 1-2.
65. No. S06Y1436 (Ga. July 13, 2006).
66. *Id.*, slip op. at 1-2.
67. No. S06Y1749 (Ga. Oct. 16, 2006).
68. *Id.*, slip op. at 1.
69. No. S06Y2140 (Ga. Nov. 20, 2006).
70. GEORGIA BAR REPORT, *supra* note 56, at 43-44.
71. *Id.* at 44.
72. *See In re* Syrop, No. S07Y0052 (Ga. Nov. 6, 2006).
73. No. S07Y0052 (Ga. Nov. 6, 2006).
74. *Id.*, slip op. at 1.

removed to federal court, but the lawyer was not familiar with federal procedures. As a result, the lawyer failed to respond in a timely manner to discovery requests and failed to file mandatory disclosures. He ultimately filed a dismissal without prejudice and a faulty withdrawal from the case. The client retained new counsel and recovered on the claim. As a result of a miscommunication between the supreme court and the state bar, the lawyer was mistakenly suspended for a seven-week period in 2004.[75] The court ultimately ordered a Review Panel reprimand for violations of the duties of diligence and communication, and for the improper withdrawal in the underlying federal court case.[76]

Finally, the supreme court ordered that three lawyers receive public reprimands.[77] One such sanction accompanied a suspension described above.[78] In *In re Goldberg*,[79] the court reprimanded Ralph S. Goldberg for failing to take remedial action against his paralegal (who was also his wife) when she acquired property being sold at auction to satisfy his clients' judgment.[80] Goldberg had obtained the underlying judgment for the clients in a case in which he had a one-third contingency fee agreement. The property was later sold to Goldberg's wife, and the clients received two-thirds of the net proceeds of the sale, while Goldberg retained the rest as his fee.[81] In *In re Taylor*,[82] another attorney received a public reprimand as reciprocal discipline for having received a public censure in Tennessee for improperly withdrawing from the representation of a client.[83]

III. MALPRACTICE AND OTHER CLAIMS AGAINST ATTORNEYS

The Georgia Court of Appeals decided several significant cases involving malpractice or other claims against attorneys.[84] The issue of

---

75. *See id.*, slip op. at 2-3.
76. *Id.*, slip op. at 3.
77. *In re Johnson*, 281 Ga. at 675, 641 S.E.2d at 536; *In re Taylor*, No. S07Y0646, slip op. at 1; *In re Goldberg*, No. S06Y1895, slip op. at 1.
78. *In re Johnson*, 281 Ga. at 675, 641 S.E.2d at 536.
79. No. S06Y1895 (Ga. Oct. 2, 2006).
80. *Id.*, slip op. at 1.
81. *Id.*, slip op. at 1-2.
82. No. S07Y0646 (Ga. Mar. 26, 2007).
83. *Id.*, slip op. at 2.
84. Bonner Roofing & Sheet Metal Co. v. Karsman, 285 Ga. App. 586, 646 S.E.2d 763 (2007); Young v. Williams, 285 Ga. App. 208, 645 S.E.2d 624 (2007); Paul v. Smith, Gambrell & Russell, 283 Ga. App. 584, 642 S.E.2d 217 (2007); Chatham Orthopaedic Surgery Ctr., LLC v. White, 283 Ga. App. 10, 640 S.E.2d 633 (2006); Cleveland Campers, Inc. v. McCormack, 280 Ga. App. 900, 635 S.E.2d 274 (2006); Butler v. Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando, P.L., 280 Ga. App. 207, 633 S.E.2d 614 (2006); Shuler v. Hicks, Massey & Gardner, LLP, 280 Ga. App. 738, 634 S.E.2d 786

standing to recover arose in three cases,[85] while several other cases addressed the circumstances under which a client might be estopped from complaining about malpractice because the client reviewed the relevant documents.[86] Causation of damage also came up several times,[87] as did the question of breach of duty.[88] The cases also raised several other issues.[89]

A. Standing

The usual rule of standing in an attorney malpractice case is that there must be an attorney-client relationship between the plaintiff and the attorney.[90] In *Cleveland Campers, Inc. v. McCormack*,[91] the plaintiffs sold their business to Ballard, who was represented by McCormack. When Ballard defaulted on his obligations to the plaintiffs, the plaintiffs blamed the legal work that McCormack had done for their inability to collect from Ballard. They sued, claiming malpractice.[92] The trial court granted summary judgment for McCormack, and the court of appeals affirmed.[93] The court of appeals stated the usual rule, that "'[a]ll that is necessary is a "reasonable belief" on the part of the would-be client that he or she was being represented by the attorney.'"[94] The court held, however, that there was no genuine issue of material fact regarding the existence of the attorney-client relationship because there was no evidence that the plaintiffs paid a fee, sought or obtained legal advice or assistance, or told the attorney that they were looking to him for advice.[95] The plaintiffs claimed that they told

---

(2006); Graivier v. Dreger & McClelland, 280 Ga. App. 74, 633 S.E.2d 406 (2006); All Bus. Corp. v. Choi, 280 Ga. App. 618, 634 S.E.2d 400 (2006).

85. *Cleveland Campers, Inc.*, 280 Ga. App. at 900, 635 S.E.2d at 275; *Young*, 285 Ga. App. at 209, 645 S.E.2d at 625; *Graivier*, 280 Ga. App. at 79, 633 S.E.2d at 411.

86. *Young*, 285 Ga. App. at 210, 645 S.E.2d at 626; *Paul*, 283 Ga. App. at 585-87, 642 S.E.2d at 219; *Graivier*, 280 Ga. App. at 77, 633 S.E.2d at 410.

87. *Bonner Roofing & Sheet Metal Co.*, 285 Ga. App. at 590, 646 S.E.2d at 767; *Paul*, 283 Ga. App. at 587, 642 S.E.2d at 219-20; *Graivier*, 280 Ga. App. at 78-79, 633 S.E.2d S.E.2d at 411.

88. *Bonner Roofing & Sheet Metal Co.*, 285 Ga. App. at 590, 646 S.E.2d at 767; *Chatham Orthopaedic Surgery Center, LLC*, 283 Ga. App. at 14, 640 S.E.2d at 637.

89. *Butler*, 280 Ga. App. 207, 633 S.E.2d 614; *Shuler*, 280 Ga. App. 738, 634 S.E.2d 786; *All Bus. Corp.*, 280 Ga. App. 618, 634 S.E.2d 400.

90. *Cleveland Campers, Inc.*, 280 Ga. App. at 903, 635 S.E.2d at 276.

91. 280 Ga. App. 900, 635 S.E.2d 274 (2006).

92. *Id.* at 902-03, 635 S.E.2d at 276.

93. *Id.* at 900, 635 S.E.2d at 274.

94. *Id.* at 903, 635 S.E.2d at 277 (quoting Calhoun v. Tapley, 196 Ga. App. 318, 319, 395 S.E.2d 848, 849 (1990)).

95. *Id.* at 903-04, 635 S.E.2d at 277.

McCormack's client, who was the other party to the transaction, that they would rely on McCormack for legal advice, but there was no evidence that the plaintiffs ever communicated this alleged fact to McCormack. The only contacts between the plaintiffs and McCormack before the closing were a meeting with an accountant to discuss inventory and a chance meeting in the hallway of McCormack's office.[96] The court of appeals declined to hold that a fact issue existed just because the lawyer had not affirmatively told the plaintiffs that he did not represent them.[97] The court of appeals concluded that although the plaintiffs may have believed McCormack was acting for them, that belief, under these circumstances, was not reasonable.[98]

The issue of standing to recover for malpractice also arose in *Young v. Williams*.[99] A lawyer had been hired to draft a will in which the testator would leave his residence to his wife. The will, as drafted by the lawyer, did not have any provision relating to real property, and it contained no residuary clause. As a result, the real property (the residence of the testator and his wife) was distributed according to the rules of intestate succession—one-third to the widow and two-thirds to the testator's children from a previous marriage. The attorney admitted he breached the duty of care when he did not follow his client's instructions.[100] The trial court granted summary judgment regarding liability, and the court of appeals affirmed.[101] The court of appeals rejected the lawyer's argument that the plaintiff could not recover because there was no privity of contract between the lawyer and the plaintiff.[102] The court held that the wife was an intended third-party beneficiary to an agreement between the attorney and his client, the husband.[103] Even though she was not the client, the wife had standing to recover as the intended heir under a document that the lawyer negligently drafted.[104]

A different theory of standing was raised in *Graivier v. Dreger & McClelland*.[105] In *Graivier* the lawyer had represented two doctors in the creation of a limited liability company ("LLC") that would manage a surgery center. The lawyer indisputably represented Dr. Graivier, one

---

96. *Id.*
97. *Id.* at 904, 635 S.E.2d at 277.
98. *Id.*
99. 285 Ga. App. 208, 645 S.E.2d 624 (2007).
100. *Id.* at 208-09, 645 S.E.2d at 625.
101. *Id.* at 209-10, 645 S.E.2d at 625-26.
102. *Id.* at 210, 645 S.E.2d at 626.
103. *Id.*
104. *Id.* at 209-10, 645 S.E.2d at 625-26.
105. 280 Ga. App. 74, 633 S.E.2d 406 (2006).

of the plaintiffs, but the efforts of Mrs. Graivier to recover against the lawyer failed.[106] She sought to bring herself within the rule of *Rogers v. Hurt, Richardson, Garner, Todd & Cadenhead*:[107]

> Even where no express attorney-client relationship exists, an attorney may be liable for negligence under the theory of voluntary agent when the attorney gratuitously undertakes to perform a legal service (or, in this case, give legal advice) to another with the other's approval. Even if only the corporation was defendants' client, it is reasonable and foreseeable that the advice to transfer assets from the corporation to plaintiffs, the individual owners of the corporation, would be relied upon by the plaintiffs, not only in their capacity as stockholders and officers in the corporation but also as individuals. The Georgia Supreme Court has held that liability for professional acts extends not only to the actual client but also to third parties who rely upon the professional's advice in situations where the professional "was *manifestly aware of the use to which the information was to be put and intended that it be so used. This liability is limited to a foreseeable person or limited class of persons for whom the information was intended, either directly or indirectly.*"[108]

The court of appeals rejected Mrs. Graivier's attempt to fit within the rule of *Rogers*.[109] The court reasoned that it was unclear whether the attorney gave her advice, and further, there was no evidence that the attorney could have reasonably foreseen that Mrs. Graivier would be relying on his advice in her individual capacity.[110]

B. Estoppel

In several cases, lawyers tried to argue that they were not liable in malpractice because their clients had read the relevant documents that the lawyer had prepared.[111] Each relied on the holding in *Berman v. Rubin*,[112] which did not allow a former client to recover against a

---

106. *Id.* at 79, 633 S.E.2d at 411.

107. *Graivier*, 280 Ga. App. at 79, 633 S.E.2d at 411-12; 203 Ga. App. 412, 417 S.E.2d 29 (1992).

108. *Rogers*, 203 Ga. App. at 415-16, 417 S.E.2d at 32-33 (emphasis in original) (citation omitted) (internal quotation marks omitted) (quoting Badische Corp. v. Caylor, 257 Ga. 131, 133, 356 S.E.2d 198, 200 (1987)).

109. *Graivier*, 280 Ga. App. at 80, 633 S.E.2d at 412.

110. *Id.*

111. *Young*, 285 Ga. App. at 210, 645 S.E.2d at 626; *Paul*, 283 Ga. App. at 585-87, 642 S.E.2d at 219; *Graivier*, 280 Ga. App. at 77, 633 S.E.2d at 410.

112. 138 Ga. App. 849, 227 S.E.2d 802 (1976).

lawyer for negligently drafting a document that the client had reviewed and initialed.[113] The court in *Berman* explained its holding:

> Our decision should not be read to state or imply that an attorney may not be held responsible for his negligent draftsmanship whenever the client can or does read the document. Indeed, where the document requires substantive or procedural knowledge, is ambiguous, or is of uncertain application, the attorney may well be liable for negligence, notwithstanding the fact that his client read what was drafted. This holding is simply that when the document's meaning is plain, obvious, and requires no legal explanation, and the client is well educated, laboring under no disability, and has had the opportunity to read what he signed, no action for professional malpractice based on counsel's alleged misrepresentation of the document will lie.[114]

All of the attempts by lawyers to use this doctrine during the survey year failed.[115]

In *Graivier v. Dreger & McClelland*,[116] discussed above, the attorney drafted an operating agreement for an LLC. The purpose of the LLC was to manage a surgery center. The plaintiff, one of two doctors who hired the lawyer to draft the agreement, claimed that the lawyer's instructions were that the LLC would receive revenue only from surgeries performed by doctors other than the two founders of the center. The agreement was allegedly ambiguous on this point, and the other founding doctor sued.[117] When the lawyer defended on the basis that the plaintiff had read the operating agreement, the court of appeals wrote that "[g]iven the length of the operating agreement and the range of rather technical subjects that it covered, we cannot conclude that Dr. Graivier's failure to detect any error or lack of clarity in [the attorney's] draftsmanship insulates [the attorney] from liability as a matter of law."[118] This argument met a similar fate in *Young v. Williams*,[119] discussed above, in which the attorney negligently drafted a will that did not provide for the disposition of the client's real estate or contain a residuary clause.[120] The court of appeals in *Young* rejected the

113. *Id.* at 854, 227 S.E.2d at 806.
114. *Id.*
115. *Young*, 285 Ga. App. at 210, 645 S.E.2d at 626; *Paul*, 283 Ga. App. at 585-87, 642 S.E.2d at 219; *Graivier*, 280 Ga. App. at 77, 633 S.E.2d at 410.
116. 280 Ga. App. 74, 633 S.E.2d 406 (2006).
117. *Id.* at 75-76, 633 S.E.2d at 408-09.
118. *Id.* at 77, 633 S.E.2d at 410.
119. 285 Ga. App. 208, 645 S.E.2d 624 (2007).
120. *Id.* at 208-09, 645 S.E.2d at 625.

lawyer's argument that he was insulated from liability because his client had read the will.[121]

The estoppel issue arose in a more subtle context in *Paul v. Smith, Gambrell & Russell*,[122] a case which made a return visit to the court of appeals during the survey year. In that case, the lawyers drafted the necessary documentation to merge two entities. The documents did not contain a place for one of the shareholders to sign, despite a requirement of unanimous consent in these circumstances under Georgia law.[123] The shareholder whose name was omitted later sued the law firm's client for fraud and breach of fiduciary duty. In the malpractice action, the firm's former clients sued the attorneys for negligently drafting the merger documents, even though the clients had reviewed those documents.[124] The court of appeals rejected the argument that the former clients were estopped from complaining about the documents and distinguished *Berman*:

> In the case at bar, the true issue is neither the complexity nor the simplicity of the merger documents but the potential effect of the execution of those documents upon Destito and the jury in the underlying litigation. "Unlike *Berman*, the alleged negligence attributed to [the law firm] in the instant case does *not* relate so much to a factual issue as it does to the *legal effect* of the [merger documents] that appellant[s] signed." There is evidence that the Pauls relied upon the law firm to effectuate the merger in compliance with Georgia law and that the law firm failed to do so. The effects of such a deviation from the standard of care upon a nonconsenting shareholder cannot be said to be within the Pauls' substantive or procedural knowledge as a matter of law. In this regard, we note that Mr. Paul deposed that he remembered asking Meyer how it was "going to play out," and Meyer responded that it did not matter what Destito wanted to do because the Pauls were majority shareholders. This testimony raises a jury question as to whether the law firm's actions caused the Pauls' damages.[125]

The argument under *Berman* had failed again.

---

121. *Id.* at 210, 645 S.E.2d at 626.
122. 283 Ga. App. 584, 642 S.E.2d 217 (2007).
123. *Id.* at 589-90, 642 S.E.2d at 221.
124. *Id.* at 585-87, 642 S.E.2d at 219.
125. *Id.* at 592, 642 S.E.2d at 223 (brackets in original) (footnote omitted) (quoting Little v. Middleton, 198 Ga. App. 393, 395, 401 S.E.2d 751, 753 (1991)).

C. Causation and Damage

Claims against attorneys also typically require plaintiffs to show that their lawyer's misconduct caused them damage.[126] Issues of causation and damage arose in three cases.[127]

In *Paul v. Smith, Gambrell & Russell*,[128] one of the plaintiffs' claims was that the attorneys failed to prepare them adequately for their trial testimony in the litigation that arose from the claims of fraud and breach of fiduciary duty. The trial court granted summary judgment on this claim because the plaintiffs had not put forth evidence that the outcome of the case would have been different if the plaintiffs had been prepared adequately.[129] The court of appeals agreed and affirmed summary judgment on this issue.[130]

The court rejected the generalized expert testimony which alleged that the plaintiffs would have given more meaningful answers and not looked evasive if they had been better prepared, and the court noted further that the record showed evidence of preparation.[131] In the end, the court searched for evidence of testimony that the plaintiffs would have given if they had been better prepared and for reasons to believe that any such evidence would have changed the outcome of the trial.[132] Determining there was no such evidence, the court of appeals affirmed.[133]

Graivier v. Dreger & McClelland[134] also contained a causation issue. Recall that part of the claim was based upon the lawyer's alleged negligent drafting of an operating agreement for an LLC. The plaintiffs claimed that the ambiguity the lawyer created caused them damage in that they had to litigate over the intent of the document with a co-owner of the LLC.[135] The court of appeals agreed that there was a fact issue regarding the causal connection between the alleged negligence and the expenses incurred in that lawsuit.[136]

---

126. *Graivier*, 280 Ga. App. at 76-78, 633 S.E.2d at 410-11.
127. *Bonner Roofing & Sheet Metal Co.*, 285 Ga. App. 586, 646 S.E.2d 763; *Paul*, 283 Ga. App. 584, 642 S.E.2d 217; *Graivier*, 280 Ga. App. 74, 633 S.E.2d 406.
128. 283 Ga. App. 584, 642 S.E.2d 217 (2007).
129. *Id.* at 587, 642 S.E.2d at 219-20.
130. *Id.*
131. *Id.* at 588, 642 S.E.2d at 220.
132. *Id.*
133. *Id.*, 642 S.E.2d at 220-21.
134. 280 Ga. App. 74, 633 S.E.2d 406 (2006).
135. *Id.* at 78-79, 633 S.E.2d at 410-11.
136. *Id.*, 633 S.E.2d at 411.

However, the court of appeals determined there was no such connection between the alleged negligence and other alleged items of damage.[137] Specifically, the court held that other litigation that involved a buy-sell agreement did not involve the ambiguity the lawyer had allegedly created.[138] According to the court, the damages the client had to pay in that litigation, the costs of the bankruptcy proceedings for the LLC that followed, and the relocation expenses that the client incurred when he had to move his practice were not causally related to the alleged negligence.[139] Accordingly, the court of appeals held that summary judgment on these items was appropriate.[140] The plaintiffs were also unable to show damage from the alleged breaches of fiduciary duty by their lawyer when he turned on them and represented their business partner against them.[141] Because the plaintiffs could not show that the litigation would not have gone forward even if the lawyer had remained neutral, their claim for damages failed.[142]

An issue of causation arose in *Bonner Roofing & Sheet Metal Co. v. Karsman*.[143] An attorney was sued by his former clients because he allegedly was negligent when he drafted a construction lien and an indemnity agreement.[144] The trial court granted summary judgment for the lawyer on the claim about the lien on the basis of causation, and the court of appeals agreed with this part of the trial court's decision.[145] The court noted that another lawyer had attempted to foreclose the lien but failed to give notice to the clerk of court as required by law.[146] Thus, it would not have mattered if the property description drafted by the first lawyer had been perfect.[147] Any mistake he may have made in the property description was not the cause of the plaintiffs' inability to collect based upon the lien.[148]

---

137. *Id.*, 633 S.E.2d at 410-11.
138. *Id.*
139. *Id.*, 633 S.E.2d at 411.
140. *Id.* at 78, 633 S.E.2d at 410-11.
141. *Id.* at 80-81, 633 S.E.2d at 412-13.
142. *Id.*
143. 285 Ga. App. 586, 646 S.E.2d 763 (2007).
144. *Id.* at 587, 646 S.E.2d at 765.
145. *Id.* at 587, 590, 646 S.E.2d at 765, 767.
146. *Id.* at 587-88, 646 S.E.2d at 765 (citing O.C.G.A. § 44-14-361.1(a) (2002)).
147. *Id.*
148. *Id.*

D. Breach of Duty

In two of the malpractice cases, the court of appeals dealt with issues related to breach of duty by the lawyer.[149] In *Bonner Roofing & Sheet Metal Co. v. Karsman*,[150] the lawyer had also drafted an indemnity agreement in connection with the split-up of a business. The lawyer's former clients claimed that he had breached his duty of care by not ensuring that the agreement provided for personal liability of another party.[151] The court of appeals held that because there was no evidence that the lawyer had ever been instructed to provide for personal liability, there was no evidence to show that the lawyer had breached a duty to the client.[152] Accordingly, the court of appeals reversed the trial court's denial of summary judgment on this issue.[153]

Chatham Orthopaedic Surgery Center, LLC v. White[154] concerned a lawsuit in which a group of doctors sued a hospital association for tortious interference with contractual relations. The hospital association moved to dismiss for failure to verify the complaint, as required by the anti-Strategic Lawsuits Against Public Participation statute.[155] That statute had a ten-day grace period, after which (without verification) the statute provides that the pleading "shall be stricken."[156] Instead of getting the verifications, the lawyer dismissed the case and re-filed it, only to lose the second case because the failure to verify was determined to be a nonamendable defect that required dismissal with prejudice. The doctors alleged their lawyer committed malpractice when he failed to have the initial complaint verified, when he re-filed the case instead of obtaining the verifications, and when he failed to advise the doctors of the risks associated with the strategy.[157] The court of appeals affirmed summary judgment for the lawyer on the first two claims.[158] The court held that failing to verify the complaint did not cause any harm because the defect may have been cured.[159] The court also held that the decision to re-file rather than verify the first suit was not malpractice

149. *Bonner*, 285 Ga. App. 586, 646 S.E.2d 763; *Chatham Orthopaedic Surgery Ctr., LLC*, 283 Ga. App. 10, 640 S.E.2d 633.
150. 285 Ga. App. 586, 646 S.E.2d 763 (2007).
151. *Id.* at 586, 588, 646 S.E.2d at 764, 766.
152. *Id.* at 590, 646 S.E.2d at 767.
153. *Id.*
154. 283 Ga. App. 10, 640 S.E.2d 633 (2006).
155. *Id.* at 10, 640 S.E.2d at 635; O.C.G.A. § 9-11-11.1 (2006).
156. O.C.G.A. § 9-11-11.1(b).
157. *Chatham*, 283 Ga. App. at 11, 640 S.E.2d at 635-36.
158. *Id.* at 12, 640 S.E.2d at 636.
159. *Id.*

even though it turned out to be incorrect.[160] Because the law on this point was so unsettled at the time, the lawyer was insulated from liability.[161] However, the court of appeals reversed the grant of summary judgment on the claim that the lawyer failed to advise the clients of the risks associated with the strategy, given the unsettled nature of the law.[162] The court held there was a fact issue with respect to "whether [the attorney] breached his duty of ordinary care by failing to fully advise appellants about the potential risks involved in not complying with the verification requirement."[163]

E. Miscellaneous Issues Regarding Malpractice and Other Liability

Three other cases raised a variety of issues regarding attorneys' liability to clients and to others.[164]

In *Butler v. Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando, P.L.*,[165] the court of appeals reversed a grant of summary judgment for a law firm in a malpractice case.[166] A different law firm filed suit for damages that resulted from an automobile collision, but the defendant could not be found within the limitations period. The defendant was eventually served by publication, and the plaintiffs hired new counsel, the Gary, Williams law firm, to pursue the matter. The new lawyers had several options open to them. They could have dismissed the case and re-filed the case within six months of the dismissal. That strategy might have enabled them to defeat a claim of lack of due diligence in serving the defendant. The lawyers might also have simply taken a nominal judgment against the defendant, which would have enabled the plaintiffs to recover under the uninsured motorist provision of their own insurance policies. The third possible strategy was to continue trying to serve the defendant. This third strategy is the route the lawyers took. When they finally purported to serve the defendant, five years after the accident and almost three years after the statute of limitations expired, the court granted the defendant's motion to dismiss for failure to exercise due diligence in serving him.[167] In the malpractice action, the court of appeals held that there were fact

---

160. *Id.* at 12-13, 640 S.E.2d at 636.
161. *Id.*
162. *Id.* at 13-14, 640 S.E.2d at 637.
163. *Id.* at 14, 640 S.E.2d at 637.
164. *Butler*, 280 Ga. App. 207, 633 S.E.2d 614; *Shuler*, 280 Ga. App. 738, 634 S.E.2d 786; *All Bus. Corp.*, 280 Ga. App. 618, 634 S.E.2d 400.
165. 280 Ga. App. 207, 633 S.E.2d 614 (2006).
166. *Id.* at 211, 633 S.E.2d at 619.
167. *Id.* at 207-08, 210, 633 S.E.2d at 616, 618.

issues with respect to whether the Gary, Williams firm committed malpractice when it did not choose either of the other two options of dismissal followed by re-filing or a nominal judgment.[168]

In *Shuler v. Hicks, Massey & Gardner, LLP*,[169] a former client brought an action for legal malpractice and breach of fiduciary duty but failed to attach the required expert affidavit. When the defendant moved to dismiss, the plaintiff filed an amended complaint alleging fraud after the limitations period had expired. The trial court dismissed the case, reasoning that the lack of an expert affidavit made the initial pleading a nullity, such that the amended complaint after the limitations period passed could not survive.[170] The court of appeals reversed and held that the lack of an expert affidavit made the complaint subject to dismissal but not void from its inception.[171] Thus, the plaintiff had the right to amend to add the claims for intentional wrongdoing.[172] Although the plaintiff could not cure the lack of an affidavit,[173] the plaintiff could still amend to bring the other claims, even if they arose from the same events as the original claim for negligence.[174]

In *All Business Corp. v. Choi*,[175] an attorney acted as closing agent for the sale of a business in which the seller of the business sold assets that were covered by a security agreement with a third party. The attorney held $80,000 of the proceeds for a period of time but eventually delivered all the proceeds to the seller. When the third party, All Business Corp. ("ABC"), could not recover its collateral, it sued the attorney for breach of trust and conversion.[176] The court of appeals affirmed summary judgment for the attorney.[177] The breach of trust claim alleged that the attorney owed fiduciary duties to the seller and the buyer, including the duty to see that all liens on the property were paid.[178] The court of appeals made short shrift of this argument, noting that there was no authority for the proposition that a creditor can recover for an attorney's breach of fiduciary duties owed to others, or

168. *Id.* at 210-11, 633 S.E.2d at 618.
169. 280 Ga. App. 738, 634 S.E.2d 786 (2006).
170. *Id.* at 738, 634 S.E.2d at 787.
171. *Id.* at 739-41, 634 S.E.2d at 788-89.
172. *See id.*
173. *See* O.C.G.A. § 9-11-9.1 (2005) (amended 2007).
174. *Shuler*, 280 Ga. App. at 740, 634 S.E.2d at 788.
175. 280 Ga. App. 618, 634 S.E.2d 400 (2006).
176. *Id.* at 619-20, 634 S.E.2d at 401-02.
177. *Id.* at 618, 634 S.E.2d at 401.
178. *Id.* at 620, 634 S.E.2d at 402.

that an attorney handling the sale of a business owes a fiduciary duty directly to creditors to discover their debts.[179]

The court of appeals also affirmed summary judgment on the conversion claim.[180] This part of the case turned on the attorney's constructive and actual knowledge of ABC's security interest before the attorney delivered the last $80,000 to the seller.[181] The court held that there was no constructive knowledge because the financing statement filed by ABC contained misspellings that made it "seriously misleading."[182] In addition, the undisputed direct evidence, in the form of letters between ABC, its counsel, and the attorney, demonstrated that the attorney did not have actual knowledge of ABC's security interest before he disbursed the last of the money.[183] The court held that without constructive or actual knowledge of the security interest, the lawyer could not be held liable for conversion of the funds.[184]

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

The Georgia appellate courts disposed of a number of ineffective assistance of counsel claims during the survey period.[185] To prevail on such a claim, the convicted defendant must show that the attorney's conduct fell below an objective standard of reasonableness and that the lawyer's deficiencies caused the defendant actual prejudice.[186] Prejudice in this context means that there must be a reasonable probability that the outcome of the case would have been different if the lawyer had not been deficient.[187] A failure to satisfy either prong of this analysis results in the denial of a claim of ineffective assistance, and in fact, each year dozens of ineffective assistance claims are denied because they fail one, or both parts of the test.[188]

---

179. *Id.* at 621, 634 S.E.2d at 403.
180. *Id.* at 625, 634 S.E.2d at 405.
181. *Id.*
182. *Id.* at 624, 634 S.E.2d at 405.
183. *Id.* at 625, 634 S.E.2d at 405.
184. *Id.*
185. Starling v. State, 285 Ga. App. 474, 646 S.E.2d 695 (2007); Hill v. State, 285 Ga. App. 310, 645 S.E.2d 758 (2007); Portilla v. State, 285 Ga. App. 401, 646 S.E.2d 277 (2007); Johnson v. State, 284 Ga. App. 147, 643 S.E.2d 556 (2007); State v. McMillon, 283 Ga. App. 671, 642 S.E.2d 343 (2007); Goldstein v. State, 283 Ga. App. 1, 640 S.E.2d 599 (2006); Gibson v. State, 280 Ga. App. 435, 634 S.E.2d 204 (2006); McCroskey v. State, 280 Ga. App. 638, 634 S.E.2d 824 (2006).
186. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Smith v. Francis, 253 Ga. 782, 783, 325 S.E.2d 362, 363 (1985).
187. *Strickland*, 466 U.S. at 687; *Smith*, 253 Ga. at 783, 325 S.E.2d at 363.
188. *Strickland*, 466 U.S. at 700.

The Georgia Supreme Court decided three noteworthy ineffective assistance of counsel cases during the survey term.[189] In *Tillman v. Massey*,[190] the court affirmed the habeas court's decision to grant the habeas petition in a murder case in which the trial court gave an erroneous instruction on the presumption of innocence.[191] The trial court instructed the jury that the presumption "'is for the protection of the innocent. It is not intended to be a cloak behind which guilty persons may hide.'"[192] The supreme court held that this charge was erroneous because it implied that the presumption of innocence does not apply to guilty defendants.[193] However, because the lawyer failed to object to the charge, the court concluded that trial counsel's performance fell below the objective standard of reasonableness.[194] The court also determined that this failure caused the defendant actual prejudice because "the trial court gave an erroneous charge on a 'basic component of a fair trial, . . . a fundamental liberty secured by the Fourteenth Amendment[,]' and permitted the jury to determine guilt from factors other than proof adduced at trial."[195] The defendant was entitled to a new trial.[196]

In *Schofield v. Holsey*,[197] the Georgia Supreme Court reinstated a death sentence that had been vacated by a habeas court.[198] The supreme court stated that even if it assumed, without deciding, that trial counsel had been deficient in not supplying certain materials to an expert witness who could testify about the defendant's mental retardation, the defendant suffered no actual prejudice.[199] In addition, the supreme court concluded that even if trial counsel had been deficient in the preparation and presentation of mitigating evidence about the defendant's mental slowness, family, and upbringing, the evidence not submitted would have been cumulative of what the jury heard.[200] Finally, the supreme court assumed, for the sake of analysis, that the

---

189. Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007); Greer v. Thompson, 281 Ga. 419, 637 S.E.2d 698 (2006); *Tillman*, 281 Ga. 291, 637 S.E.2d 720.

190. 281 Ga. 291, 637 S.E.2d 720 (2006).

191. *Id.* at 295, 637 S.E.2d at 725.

192. *Id.* at 291, 637 S.E.2d at 722 (emphasis omitted).

193. *Id.* at 293-94, 637 S.E.2d at 723-24.

194. *Id.* at 294, 637 S.E.2d at 724.

195. *Id.* at 295, 637 S.E.2d at 725 (alteration in original) (brackets in original) (citation omitted) (quoting Estelle v. Williams, 425 U.S. 501, 503 (1975)).

196. *Id.*

197. 281 Ga. 809, 642 S.E.2d 56 (2007).

198. *Id.* at 810, 642 S.E.2d at 59.

199. *Id.* at 812, 642 S.E.2d at 60.

200. *Id.* at 813-14, 642 S.E.2d at 61-62.

defendant's trial counsel had been deficient in his failure to develop the theory that there was a "second shooter" involved in the murder.[201] Once again, the court held that the defendant suffered no prejudice in light of other evidence introduced to show that the defendant had fired the fatal shot.[202] As a prelude to these holdings, the supreme court expressly disapproved a long line of cases from the Georgia Court of Appeals that had held that the cumulative effect of trial counsel's errors should not be considered in a claim of ineffective assistance of counsel.[203] The supreme court distinguished cases relying on cumulative effects rather than cumulative errors by counsel.[204]

The supreme court decided another ineffective assistance of counsel case by a 4 to 3 vote.[205] In *Greer v. Thompson*,[206] the defendant had been convicted of trafficking in cocaine and possession of a firearm by a convicted felon. During the trial, it came to the court's attention that someone had tried to bribe a juror to vote not guilty.[207] Trial counsel did not ask for a hearing to determine whether the State could prove that there was no prejudice to the defendant from this tampering.[208] Nor did trial counsel move for a mistrial regarding the failure to provide such a hearing, to state the reasons why a mistrial was appropriate, or to ask for curative instructions.[209] The lawyer also did not move for a mistrial when the trial judge referred to the attempt to bribe the juror as having been made "'to vote not guilty on behalf of the defendant.'"[210] The habeas court found that trial counsel had been ineffective in each of these respects and that there had been a sufficient showing of harm.[211]

The supreme court reversed and remanded for consideration of other issues.[212] The majority concluded that the trial court was not required to hold a hearing concerning the improper juror contacts.[213] The dissent disagreed, arguing that *Remmer v. United States*[214] required

---

201. *Id.* at 814, 642 S.E.2d at 62.
202. *Id.* at 815, 642 S.E.2d at 62.
203. *Id.* at 812 n.1, 642 S.E.2d at 60 n.1 (citing *Strickland*, 466 U.S. at 687).
204. *Id.*
205. *Greer*, 281 Ga. 419, 637 S.E.2d 698.
206. 281 Ga. 419, 637 S.E.2d 698 (2006).
207. *Id.* at 419, 637 S.E.2d at 699.
208. *Id.*; *see* Remmer v. United States, 347 U.S. 227, 229-30 (1954) (holding that jury tampering in a federal criminal case is presumptively prejudicial).
209. *Greer*, 281 Ga. at 419-20, 637 S.E.2d at 699.
210. *Id.* at 423, 637 S.E.2d at 701.
211. *Id.*
212. *Id. passim*.
213. *Id.* at 420, 637 S.E.2d at 700.
214. 347 U.S. 227 (1954).

such a hearing.[215] The majority also concluded that the defendant had not shown any actual prejudice from the way in which trial counsel responded to the jury tampering because the juror in question testified that the bribery attempt had not influenced his decision, and no other juror testified to the contrary.[216] The majority also refused to apply a presumption of prejudice to this set of facts because the case was not on direct appeal.[217] The dissent argued that the habeas court had properly found that there was actual prejudice because trial counsel's failure to request the hearing had deprived the defendant of the hearing to which he was entitled, and at that hearing, the juror who had been contacted might have been removed.[218] Finally, the majority determined there was no prejudice in the trial court's statement that the bribe was for the juror "'to vote not guilty on behalf of the defendant.'"[219] The supreme court concluded that the words could mean that the *vote*, rather than the *bribe*, is what would be "on behalf of" the defendant.[220] The dissent noted that the habeas court had made a finding of ineffective assistance of counsel when trial counsel did not move for a mistrial after this comment was made.[221] That finding, according to the dissent, could not be disturbed on appeal because it was not clearly erroneous.[222] Despite the sharp division of the court, the habeas court's grant of the writ of habeas corpus was reversed, and the case was remanded for consideration of issues that the habeas court did not reach.[223]

The court of appeals decided eight ineffective assistance of counsel cases that are instructive.[224] Five of the cases concerned claims of lack of diligence on the part of trial counsel.[225]

---

215. *Greer*, 281 Ga. App. at 424, 637 S.E.2d at 702 (Hines, J., dissenting) (citing *Remmer*, 347 U.S. at 229-30).

216. *Id.* at 422, 637 S.E.2d at 701 (majority opinion).

217. *Id.* at 421, 637 S.E.2d at 700-01.

218. *Id.* at 425, 637 S.E.2d at 703 (Hines, J., dissenting).

219. *Id.* at 423, 637 S.E.2d at 701 (majority opinion).

220. *Id.*, 637 S.E.2d at 701-02.

221. *Id.* at 426, 637 S.E.2d at 704 (Hines, J., dissenting).

222. *Id.*

223. *Id.* at 423, 637 S.E.2d at 702 (majority opinion).

224. *Starling*, 285 Ga. App. 474, 646 S.E.2d 695; *Hill*, 285 Ga. App. 310, 645 S.E.2d 758; *Portilla*, 285 Ga. App. 401, 646 S.E.2d 277; *Johnson*, 284 Ga. App. 147, 643 S.E.2d 556; *McMillon*, 283 Ga. App. 671, 642 S.E.2d 343; *Goldstein*, 283 Ga. App. 1, 640 S.E.2d 599; *Gibson*, 280 Ga. App. 435, 634 S.E.2d 204; *McCroskey*, 280 Ga. App. 638, 634 S.E.2d 824.

225. *Portilla*, 285 Ga. App. 401, 646 S.E.2d 277; *Johnson*, 284 Ga. App. 147, 648 S.E.2d 556; *McMillon*, 283 Ga. App. 671, 642 S.E.2d 343; *see Goldstein*, 283 Ga. App. 1, 640 S.E.2d 599; *Gibson*, 280 Ga. App. 435, 634 S.E.2d 204.

In *Gibson v. State*,[226] the defendant had been convicted of vehicular homicide for killing someone when he allegedly ran a red light. The defendant claimed that his light was green. His lawyers failed to diligently investigate evidence that the traffic lights at the intersection had a history of malfunctions that caused the lights to be green in all directions.[227] The court of appeals held that counsel was deficient by not being diligent, and the evidence they did not pursue went to the heart of the defense.[228] The lack of diligence, therefore, caused actual prejudice.[229]

In *Goldstein v. State*,[230] the court of appeals upheld a claim of ineffective assistance of counsel on direct appeal.[231] The defendant had been convicted of child molestation for the digital penetration of the vagina of a seven-year-old girl.[232] The court determined that trial counsel was deficient in two respects.[233] First, counsel knew that there were numerous witnesses who were prepared to testify that the victim's mother had a long history of making claims about molestation. Counsel failed to call these witnesses and did not cross-examine the mother about her many claims.[234] The court of appeals held that the defendant suffered actual prejudice because the evidence of the many other claims was highly relevant to the mother's credibility and, indirectly, to the child's credibility.[235] The court of appeals also determined that trial counsel rendered ineffective assistance of counsel when he failed to present expert testimony.[236] One of the State's experts at trial had testified that deep digital penetration of a seven-year-old girl's vagina could be, as the victim had described it, pleasurable. Another State expert explained away the findings that the girl's hymen was normal by testifying that the hymen in a girl that young is very flexible and elastic.[237] Trial counsel stated later that it "never crossed his mind" to consult with doctors to determine whether these opinions, of which he had notice, were valid.[238] In fact, as evidence at the hearing on the

---

226. 280 Ga. App. 435, 634 S.E.2d 204 (2006).
227. *Id.* at 435-37, 634 S.E.2d at 205-06.
228. *Id.* at 437, 634 S.E.2d at 206.
229. *Id.*
230. 283 Ga. App. 1, 640 S.E.2d 599 (2006).
231. *Id.* at 1, 640 S.E.2d at 600.
232. *Id.*
233. *Id.* at 6, 8-9, 640 S.E.2d at 603, 605.
234. *Id.* at 4, 640 S.E.2d at 602.
235. *Id.* at 6, 640 S.E.2d at 603.
236. *Id.*, 640 S.E.2d at 604.
237. *Id.* at 7, 640 S.E.2d at 604.
238. *Id.* at 8, 640 S.E.2d at 605.

motion for new trial demonstrated, the State's experts' conclusions were highly suspect.[239] Given the weakness of the State's case, other than the opinions from these experts, the court of appeals held that counsel's failure to seek expert testimony was deficient and caused actual harm to the defendant.[240] The case was remanded for a new trial.[241]

Johnson v. State,[242] also concerned a lack of diligence in a child molestation case. The defendant was convicted and appealed from the denial of his motion for new trial.[243] The court of appeals reversed and remanded because the defendant had received ineffective assistance of counsel.[244] The defendant allegedly attempted to have oral sex with a fifteen-year-old girl and allegedly performed oral sex twice on her fourteen-year-old brother while the defendant was employed at a church.[245] One of the acts on the boy allegedly occurred in the church parking lot at a time when as many as three security guards may have been patrolling the lot.[246] Defense counsel was given a substantial amount of discovery a week before trial.[247] He did not review this material before trial, however, possibly on the mistaken assumption that his motion for continuance would be granted.[248] Trial counsel also did not investigate the fact that the victims' family was seeking a financial settlement from the church, nor did he try to find any of the security guards who may have been patrolling the parking lot during one of the alleged acts of molestation.[249] At trial, defense counsel presented no evidence on behalf of his client.[250] He did not try to impeach any of the witnesses on the basis of their interest in obtaining money from the church.[251] The court of appeals concluded that these deficiencies were not the result of trial strategy, but instead were the result of counsel's failure to investigate and prepare.[252] As to prejudice, the court noted that the case rested entirely on the testimony of the two victims, and they had an unexplored financial motive.[253] Furthermore, post-trial

239. *Id.* at 7-8, 640 S.E.2d at 604-05.
240. *Id.* at 9, 640 S.E.2d at 605.
241. *Id.*
242. 284 Ga. App. 147, 643 S.E.2d 556 (2007).
243. *Id.* at 147, 643 S.E.2d at 557.
244. *Id.*
245. *Id.* at 147-48 & nn.1-2, 643 S.E.2d at 557 & nn.1-2.
246. *Id.* at 151, 643 S.E.2d at 559-60.
247. *Id.* at 149, 643 S.E.2d at 558.
248. *Id.* at 150, 643 S.E.2d at 558.
249. *Id.* at 151, 643 S.E.2d at 559-60.
250. *Id.* at 150-51, 643 S.E.2d at 559.
251. *Id.* at 151, 643 S.E.2d at 560.
252. *Id.*
253. *Id.*

examination of the discovery material that counsel did not review revealed material that would have been exculpatory and beneficial if counsel had looked at it in time.[254] The case was remanded for a new trial.[255]

The other two diligence cases were *State v. McMillon*,[256] and *Portilla v. State*.[257] In *McMillon* the trial court had granted the defendant's motion for a new trial because trial counsel had failed to investigate and prepare an adequate defense. In particular, the lawyer failed to interview the State's witnesses or obtain their taped interviews prior to trial. He also failed to investigate whether the victim's death was an accident.[258] The court of appeals affirmed the grant of a new trial.[259] *Portilla* was a direct appeal from the denial of the defendant's motion for new trial. Appellate counsel claimed that trial counsel had not diligently sought witnesses regarding a prior similar incident involving the victim in Texas.[260] The court of appeals remanded for a hearing on effectiveness.[261]

Two cases from the court of appeals concerned claims that the lawyer had insufficient knowledge to represent the defendant adequately,[262] while another expressed concern about a possible lack of communication.[263] In *Starling v. State*,[264] the defendant was convicted of aggravated assault for shooting a neighbor and of possession of a firearm by a convicted felon. The defendant denied shooting the victim, but one witness testified that she saw the defendant shoot the victim.[265] The defendant's credibility, therefore, was essential to his defense.[266] The court of appeals held that trial counsel seriously undermined that credibility, and thereby caused actual prejudice, because counsel did not know enough to stipulate that the defendant was a felon.[267] The court stated that if trial counsel had done so, the jury would never have learned the following:

---

254. *Id.* at 151-52, 643 S.E.2d at 560.
255. *Id.* at 152, 643 S.E.2d at 560.
256. 283 Ga. App. 671, 642 S.E.2d 343 (2007).
257. 285 Ga. App. 401, 646 S.E.2d 277 (2007).
258. *McMillon*, 283 Ga. App. at 672-73, 642 S.E.2d at 344-45.
259. *Id.* at 673, 642 S.E.2d at 345.
260. *Portilla*, 285 Ga. App. at 404, 646 S.E.2d at 279.
261. *Id.*
262. *See Starling*, 285 Ga. App. 474, 646 S.E.2d 695; *McCroskey*, 280 Ga. App. 638, 634 S.E.2d 824.
263. *Hill*, 285 Ga. App. 310, 645 S.E.2d 758.
264. 285 Ga. App. 474, 646 S.E.2d 695 (2007).
265. *Id.* at 475-76, 646 S.E.2d at 696.
266. *Id.* at 478, 646 S.E.2d at 698.
267. *Id.* at 476-78, 646 S.E.2d at 697-98.

> (a) that Starling stated on direct that "I had a receiving stolen property and I had aggravated assault. I didn't have no weapon then. I did draw blood and I got caught with a possession of a firearm by a convicted felon. And that was a small pistol. They took that," (b) that Starling had committed a prior aggravated assault involving a gun (elicited on cross-examination via Starling's admission to his guilty plea to an indictment read to the jury and describing the crime), and (c) that Starling had committed possession of a gun by a first offender (elicited on cross-examination via Starling's admission to a guilty plea).[268]

Thus, according to the court, counsel's lack of knowledge led to deficient performance and caused actual harm to the defendant's credibility.[269] Because the court held the defendant received ineffective assistance of counsel, the court of appeals reversed and remanded for a new trial on the aggravated assault charge.[270]

McCroskey v. State[271] also concerned a claim of ineffective assistance of counsel based upon a lawyer's lack of knowledge.[272] The defendant entered non-negotiated guilty pleas to several crimes and received a thirty-five year sentence. Immediately after the sentence was announced, the defendant sought to withdraw the guilty pleas.[273] His counsel believed that the defendant had the right to withdraw the pleas if he did not like the sentence imposed, as long as he withdrew them before written entry of the sentence.[274] This had once been the rule in Georgia, but that rule was overruled by the Georgia Supreme Court in *State v. Germany*.[275] Trial counsel stated that he "'probably'" advised the defendant incorrectly on this point of law.[276] The court of appeals remanded the case for a hearing to determine whether the lawyer gave this bad advice and whether, but for the advice, the defendant would have pleaded guilty.[277]

Finally, in *Hill v. State*,[278] the defendant lost his motion to file an out-of-time appeal. He claimed that he had lost his right to appeal his

---

268. *Id.* at 476, 646 S.E.2d at 697.
269. *Id.* at 477, 646 S.E.2d at 697.
270. *Id.* at 479, 646 S.E.2d at 699.
271. 280 Ga. App. 638, 634 S.E.2d 824 (2006).
272. *Id.* at 641, 634 S.E.2d at 827.
273. *Id.* at 638, 634 S.E.2d at 825.
274. *Id.* at 641, 634 S.E.2d at 827.
275. 246 Ga. 455, 456, 271 S.E.2d 851, 852 (1980) ("[A] defendant does not have an absolute statutory right . . . to withdraw a guilty plea, [sic] after the trial court's oral announcement of the same.").
276. *McCroskey*, 280 Ga. App. at 641, 634 S.E.2d at 827.
277. *Id.* at 642, 634 S.E.2d at 828.
278. 285 Ga. App. 310, 645 S.E.2d 758 (2007).

convictions because of ineffective assistance of counsel.[279] The court of appeals remanded the case to determine whether there was a failure of communication.[280] In particular, the court directed the trial court to find whether the defendant was indigent at the time of his conviction and, if so, whether trial counsel or the trial court fully informed the defendant of his right to appeal and his right to appointed counsel on appeal.[281]

V. OTHER SIGNIFICANT CASES

A. *Attorney Fees and Attorneys' Liens*

The Georgia Supreme Court decided one case during the survey period concerning attorneys' liens.[282] In *Howe & Associates v. Daniels*,[283] the court examined whether a duly filed attorney's lien could be circumvented by the voluntary dismissal of the case to which it applies.[284] The attorney who filed the lien succeeded in having the trial judge vacate the dismissal, reopen the case to hear evidence regarding his fees, and foreclose the lien.[285] The court of appeals held that this procedure was proper, and the supreme court affirmed.[286]

The court of appeals was also faced with a more complicated fee case.[287] In *Amstead v. McFarland*,[288] an attorney represented a divorced father and mother in an action to recover damages for the death of their son. The mother decided that she did not want to pursue the case any further, and her attorney withdrew as counsel of record for her.[289] The lawyer did not tell the mother that she would be entitled to share in the proceeds of the case even if she chose not to be a party.[290] When the case settled for $325,000, the mother learned that she had a right to a share of those funds, and after a hearing, the trial court apportioned the money 75% ($243,750) to the mother and 25% ($81,250) to the father.[291]

---

279. *Id.* at 310, 645 S.E.2d at 759.
280. *Id.* at 311-12, 645 S.E.2d at 760.
281. *Id.*
282. Howe & Assocs. v. Daniels, 280 Ga. 803, 631 S.E.2d 356 (2006).
283. 280 Ga. 803, 631 S.E.2d 356 (2006).
284. *Id.* at 803, 631 S.E.2d at 356-57.
285. *Id.*, 631 S.E.2d at 357.
286. *Id.* at 803-04, 807, 631 S.E.2d at 357, 359.
287. Amstead v. McFarland, 279 Ga. App. 765, 632 S.E.2d 707 (2006).
288. 279 Ga. App. 765, 632 S.E.2d 707 (2006).
289. *Id.* at 766, 632 S.E.2d at 708.
290. *Id.*; *see* O.C.G.A. § 19-7-1 (2004 & Supp. 2007).
291. *Amstead*, 279 Ga. App. at 766-67, 769, 632 S.E.2d at 708-09.

The remaining issue concerned attorney fees. The attorney had a one-third contingent fee contract with both the mother and the father. One-third of $325,000 is $108,333, which is the amount the attorney sought to retain despite the mother's motion to recoup some of those fees.[292] The trial court found that the mother was bound by the contingent fee contract, but the court of appeals disagreed.[293] The court held that at the time of the mother's withdrawal from the case, her attorney-client relationship with the attorney came to an end.[294] At that point, the contingency in the contract had not been fulfilled, and the usual rule under these circumstances is that the attorney can only recover the reasonable value of his services under the doctrine of quantum meruit.[295] The court of appeals applied this rule to the case and remanded for further proceedings.[296] The attorney was left with one-third of the father's 25%, or $27,083, and the prospect of further recovery for the reasonable value of his services rendered to the mother before their relationship ended.[297]

B. Contempt

The decision of the Georgia Court of Appeals in *In re Jefferson*[298] sparked a vigorous dissent written by Judge Bernes.[299] The Juvenile Court in Glynn County held an attorney in criminal contempt and sentenced her to serve thirty days of incarceration. The attorney was defending a minor who had been charged as a party to an aggravated battery. During the delinquency hearing, the attorney encountered a hearsay problem, and the judge rejected her proposed solution to it.[300] The attorney responded, "'[T]hat's a gross interference with the way that I can represent my client, Your Honor.'"[301] Later the judge told the attorney that he had "'heard enough'" about the issue.[302] The attorney then made the following comment: "'I just find the Court is biased in its view. You say that you're not prejudging the case but it seems to me

292. *Id.* at 769, 632 S.E.2d at 709-10.
293. *Id.* at 770, 632 S.E.2d at 710.
294. *Id.*
295. *Id.* (citing Overman v. All Cities Transfer Co., 176 Ga. App. 436, 438, 336 S.E.2d 341, 342-43 (1985)).
296. *Id.* at 772, 632 S.E.2d at 711-12.
297. *Id.*, 632 S.E.2d at 711.
298. 284 Ga. App. 877, 645 S.E.2d 349 (2007).
299. *See id.* at 881-85, 645 S.E.2d at 353-56 (Bernes, J., concurring in part & dissenting in part).
300. *Id.* at 877-79, 645 S.E.2d at 351-52 (majority opinion).
301. *Id.* at 878, 645 S.E.2d at 351 (brackets in original).
302. *Id.*

like you've made up your mind and any and everything that I do to effectively defend my client I'm being rebutted.'"[303] The majority opinion for the court of appeals upheld the attorney's conviction for criminal contempt because her statements represented "'a clear and present danger to [the] orderly administration of justice.'"[304]

Judge Bernes dissented and argued that the two statements did not constitute contempt.[305] She found them to be uncivil but not contemptuous.[306] The dissenting judge noted that the attorney "did not use any derogatory language or epithets" and that "there is no evidence in the record that [the attorney] had a disrespectful tone or demeanor."[307] Judge Bernes pointedly quoted the opinion of the United States Supreme Court in *In re Little*[308] and applied it to the present case:

> "There is no indication, and the State does not argue, that petitioner's statements were uttered in a boisterous tone or in any wise actually disrupted the court proceeding. Therefore, the vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil. The law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate. Trial courts must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice."[309]

Nevertheless, the majority prevailed, and the attorney's conviction for criminal contempt was upheld.[310] The Georgia Supreme Court, however, has granted certiorari and oral argument has been heard.[311] The supreme court expressed particular interest in the question, "What

---

303. *Id.*

304. *Id.* at 879-80, 645 S.E.2d at 352 (brackets in original) (quoting Garland v. State, 253 Ga. 789, 790, 325 S.E.2d 131, 133 (1985)).

305. *Id.* at 881, 645 S.E.2d at 353 (Bernes, J., concurring in part & dissenting in part).

306. *Id.* at 885, 645 S.E.2d at 356.

307. *Id.* at 884, 645 S.E.2d at 355.

308. 404 U.S. 553 (1972) (per curiam).

309. *In re Jefferson*, 284 Ga. App. at 884, 645 S.E.2d at 355 (quoting *In re Little*, 404 U.S. at 555) (concurring in part & dissenting in part).

310. *Id.* at 881, 645 S.E.2d at 353 (majority opinion).

311. Supreme Court of Georgia, 2007 Granted Certioraris, http://www.gasupreme.us/granted_certs/gc_07.php.

is the proper standard for determining whether a lawyer's comments during trial constitute contempt of court."[312]

C. *Fitness to Practice*

The Georgia Supreme Court affirmed the denial of a certificate of fitness to practice law in the case of *In re Baska*.[313] The applicant had lost his license to practice medicine in Vermont as a result of various types of misconduct.[314] He had engaged in a sexual relationship with a patient for four years, had failed to follow the standard of care with five patients, and had "evidenced unfitness to practice medicine by his behavior with patients, their families, and nursing staff between 1998-2001."[315] The Board of Fitness also found that the applicant had not been candid when he said that he had never tried to hide after the revocation of his medical license. The board noted a newspaper article that suggested he had disappeared from Vermont and affidavits from the Vermont plaintiffs' attorneys that alleged they had been unable to serve the applicant with civil complaints. Despite recommendations from the hearing officer that the applicant be permitted to sit for the bar exam, the board denied his application for a certificate of fitness.[316] The supreme court affirmed, noting that it was the applicant's burden to establish fitness and that the board is not bound by the hearing officer's recommendations.[317] The court determined that the applicant's lack of candor and his behavior as a doctor in Vermont justified denial of his application.[318]

D. *Ownership of Client Files*

Putnam County v. Adams[319] presented the Georgia Court of Appeals with a set of issues concerning the ownership of client files. The County used a private lawyer as county attorney for three years. A dispute arose over the costs of copying the closed files, and the trial court ordered that the County would have to pay for the copies.[320] The court of appeals reversed and remanded on the authority of *Swift, Currie,*

---

312. *Id.* A summary of the oral argument is available at http://www.gasupremeus/oas/oct_15.pdf.
313. 281 Ga. 676, 678, 641 S.E.2d 533, 535 (2007).
314. *Id.* at 676, 641 S.E.2d at 534.
315. *Id.*
316. *Id.* at 676-77, 641 S.E.2d at 534.
317. *Id.* at 677, 641 S.E.2d at 534.
318. *Id.*, 641 S.E.2d at 534-35.
319. 282 Ga. App. 226, 638 S.E.2d 404 (2006).
320. *Id.* at 226-27, 638 S.E.2d at 405.

McGhee & Hiers v. Henry,[321] in which the Georgia Supreme Court held that documents in a legal file presumptively belong to the client.[322] The court of appeals held there was no distinction between open and closed files, and it extended the holding in *Henry* to include the proposition that the attorney must bear the cost of copying any files that the attorney chooses to keep.[323] The court remanded for further proceedings.[324]

E. Disqualification of Public Defenders

The Georgia Supreme Court and the Georgia Court of Appeals each decided one case during the survey period regarding disqualification of public defenders.[325]

In *Burns v. State*,[326] the supreme court granted certiorari to consider what the standard should be when a public defender claims that he or she has a conflict of interest in representing a criminal defendant who is represented by another public defender in the same office.[327] Two men were indicted together for burglary and other crimes. They went to trial together, each represented by a public defender from the Dekalb County Public Defender's office. That trial ended in a hung jury. During the trial, each lawyer made comments to the jury that emphasized that the lawyer represented only one defendant and did not care what happened to the other one.[328]

Before the second trial, Appellant Burns's new public defender claimed that these antagonistic statements created a conflict of interest and sought to withdraw.[329] The trial judge denied that request, and Burns was convicted. The supreme court noted that representation of codefendants by one attorney is not always a conflict of interest and declined to adopt any per se rule that would prevent two attorneys from the same public defender's office from representing codefendants. The court further held that, in the context of this case, there was no conflict:

> Our review of the specific statements identified by appellant as supporting his claim of conflict reveals that they do not evidence the

---

321. 276 Ga. 571, 581 S.E.2d 37 (2003).
322. *Id.* at 573, 581 S.E.2d at 39; *Putnam*, 282 Ga. App. at 227-28, 638 S.E.2d at 406.
323. *Putnam*, 282 Ga. App. at 228, 638 S.E.2d at 406.
324. *Id.*
325. Burns v. State, 281 Ga. 338, 638 S.E.2d 299 (2006); Odum v. State, 283 Ga. App. 291, 641 S.E.2d 279 (2007).
326. 281 Ga. 338, 638 S.E.2d 299 (2006).
327. *Id.* at 339, 638 S.E.2d at 300.
328. *Id.* at 338, 340, 638 S.E.2d at 300-01.
329. *Id.* at 339, 638 S.E.2d at 300.

> existence of antagonistic defenses between appellant and [the codefendant]. Counsel in these statements merely stressed to the jurors that each attorney was focused solely upon representing his respective client and did not care how the jury treated the other party. There was no "finger pointing" in these statements: counsel did not argue or even intimate that the other defendant was guilty of the charged crimes or otherwise attempt to shift blame from counsel's own client to the other defendant for the crimes. Rather, the statements mischaracterized by appellant amounted to nothing more than mutual expressions of indifference by counsel over the outcome of the criminal charges against the other party. A careful review of the record in the second trial reveals nothing that intimated, much less showed, the possible existence of any antagonistic defenses between the co-defendants either in the form of blame shifting or in the presentation of inconsistent versions of the crime. In opening statements, cross-examination of State witnesses and closing argument, both counsel pursued the same defense strategy that their respective clients were innocently present in the area of the burglary, no evidence showed they actually committed the charged crimes and no evidence showed the defendants knew each other or acted together in regard to the crimes.[330]

Because there was no conflict, the court was able to put off for another day the difficult, and potentially expensive, question of whether a conflict of one attorney in a public defender's office should be imputed to other members of the office to the same extent that a conflict would be imputed in a private law firm.[331]

In *Odum v. State*,[332] the court of appeals dealt with two issues that arose when a public defender sought to withdraw.[333] The defendant had been charged with several serious crimes, but he claimed to be dissatisfied with his public defender. He also refused to meet with other lawyers from the office. The defendant eventually expressed his displeasure by filing a federal lawsuit against his public defender and her office, after which the public defender sought to withdraw.[334] The trial court denied the request but issued a certificate for immediate review, which the court of appeals granted.[335] The court first interpreted the Indigent Defense Act of 2003[336] not to divest the trial court

---

330. *Id.* at 340-41, 638 S.E.2d at 301 (internal quotation marks omitted) (footnotes omitted).

331. *See id.*

332. 283 Ga. App. 291, 641 S.E.2d 279 (2007).

333. *Id.* at 292, 641 S.E.2d at 280.

334. *Id.* at 291-92, 641 S.E.2d at 280.

335. *Id.* at 292, 641 S.E.2d at 280.

336. O.C.G.A. §§ 17-12-1 to -128 (2004 & Supp. 2007) (amended 2007).

of the power to disqualify public defenders who have conflicts of interest.[337] Second, the court determined that in this particular case the trial judge abused his discretion in denying the motion to withdraw.[338] According to the court, the federal lawsuit created a significant risk of a conflict of interest, and because disqualification would not delay the trial, interfere with the orderly operation of the court, or be manifestly unfair to the client, the trial court should have granted the motion to withdraw.[339]

VI. CONCLUSION

The appellate courts in Georgia decided numerous cases concerning the professional responsibilities of lawyers in the survey year. These cases provide useful guidance for lawyers as they seek to conform their conduct to their responsibilities.

---

337. *Odum*, 283 Ga. App. at 293-94, 641 S.E.2d at 281.
338. *Id.* at 294, 641 S.E.2d at 282.
339. *Id.* at 294-95, 641 S.E.2d at 282.