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Legal Ethics

by Patrick Emery Longan*

I. INTRODUCTION

Georgia's appellate courts made significant decisions during the survey year in matters of attorney discipline, malpractice, and ineffective assistance of counsel. They also issued opinions worth noting in cases concerning attorney and judicial disqualification and several miscellaneous matters.

II. DISCIPLINARY CASES

The Georgia Supreme Court disciplined numerous lawyers for misconduct during the survey period. As usual, the leading categories were client abandonment, criminal convictions, and financial improprieties. In addition, lawyers were disciplined for a variety of other transgressions and as matters of reciprocity.¹

A. *Client Abandonment*

Six lawyers were disbarred without dissent for client abandonment.²

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1. The supreme court also issued numerous interim suspensions and reinstated several lawyers. Those decisions are not discussed in this Article.

2. *In re Ali*, 283 Ga. 225, 658 S.E.2d 115 (2008) (one case of client abandonment by a lawyer who had previously been suspended for abandoning a client); *In re Pedrick*, 282 Ga. 627, 652 S.E.2d 543 (2007) (two cases of client abandonment); *In re Kleckley*, 282 Ga. 646, 651 S.E.2d 731 (2007) (three cases of client abandonment); *In re Thomas*, 282 Ga. 514, 651 S.E.2d 740 (2007) (two cases of client abandonment); *In re David*, 282 Ga. 517, 651 S.E.2d 743 (2007) (ten criminal defendant clients abandoned, three abandoned civil clients, and a guilty plea as a first offender to felony tax evasion); *In re Lenoir*, 282 Ga. 311, 647 S.E.2d

The court also unanimously accepted petitions for voluntary discipline from two lawyers in abandonment cases.³ Both lawyers were suspended.⁴ One of these lawyers abandoned two clients but had no prior record of discipline.⁵ He was suspended for one year.⁶ The other, Alice Caldwell Stewart, abandoned six clients but apparently had medical problems that impaired her ability to practice law.⁷ She was suspended with conditions, including a demonstration of a lack of impairment, before she could be reinstated.⁸ Ms. Stewart made a return appearance before the court six months later in another case of abandonment that arose during the same time frame.⁹ The court again imposed an indefinite suspension with conditions,¹⁰ although Justices Hunstein and Carley dissented.¹¹ The dissenting justices would have disbarred Stewart in light of her pattern of misconduct and two prior cases in which she was disciplined.¹²

Another abandonment case provoked dissent, this time by Justice Melton with Justice Hunstein concurring in the dissent.¹³ In *In re Johnson*,¹⁴ Johnson abandoned three client matters before closing her practice and moving to Florida. She had received a formal letter of admonition in 2006 for her handling of two client matters, but she demonstrated remorse and cooperated with the Bar.¹⁵ The court accepted her petition for voluntary discipline of a two year suspension.¹⁶ Justice Melton noted the multiple offenses and the prior discipline in his dissent, but he was particularly critical of the lack of evidence in the record that Johnson had provided restitution to her

572 (2007) (two cases of client abandonment by a lawyer who had been disciplined four times previously by the Bar).

3. *In re Hudson*, 283 Ga. 79, 656 S.E.2d 531 (2008); *In re Stewart*, 282 Ga. 337, 647 S.E.2d 53 (2007).

4. *In re Hudson*, 283 Ga. at 80, 656 S.E.2d at 532; *In re Stewart*, 282 Ga. at 338, 647 S.E.2d at 53.

5. *In re Hudson*, 283 Ga. at 79, 656 S.E.2d at 532-33.

6. *Id.* at 80, 656 S.E.2d at 532.

7. *In re Stewart*, 282 Ga. at 338, 647 S.E.2d at 53.

8. *Id.*

9. *In re Stewart*, 283 Ga. 312, 313, 658 S.E.2d 573, 574 (2008).

10. *Id.* at 313-14, 658 S.E.2d at 574.

11. *Id.* at 314, 658 S.E.2d at 574 (Hunstein, P.J., dissenting).

12. *Id.*

13. *In re Johnson*, 282 Ga. 473, 474, 651 S.E.2d 82, 84 (2007) (Melton, J., dissenting).

14. 282 Ga. 473, 651 S.E.2d 82 (2007).

15. *Id.* at 473, 651 S.E.2d at 83.

16. *Id.* at 474, 651 S.E.2d at 84.

clients.¹⁷ Justice Melton would have disbarred Johnson, and Justice Hunstein agreed.¹⁸

B. Criminal Convictions

Criminal convictions led to discipline for sixteen lawyers. Fourteen of the cases were uncontroversial. Twelve of these lawyers voluntarily surrendered their licenses after their convictions.¹⁹ Two others were suspended pending appeal of their convictions.²⁰ Two cases, however, provoked dissents.²¹

In *In re Waldrop*,²² Waldrop was suspended for twenty-four months despite pleading guilty under the First Offender Act²³ to possession of N-N-dimethylamphetamine and being sentenced to five years of probation.²⁴ According to the majority, the record showed that Waldrop's use of drugs was situational, not compulsive, and that he was neither addicted nor likely to become so.²⁵ Waldrop had no prior history of

17. *Id.* (Melton, J., dissenting).

18. *Id.* at 474-75, 651 S.E.2d at 84.

19. *In re Madison*, 283 Ga. 482, 660 S.E.2d 533 (2008) (guilty plea to theft by taking, theft by receiving, violation of oath by public official, using false statements and writings, and conspiracy to defraud a political subdivision); *In re Keenan*, 283 Ga. 481, 660 S.E.2d 534 (2008) (guilty plea to felony of furnishing dangerous weapons to an inmate and conspiracy to commit escape); *In re English*, 283 Ga. 483, 660 S.E.2d 533 (2008) (conviction of one felony of theft by receiving and two misdemeanor counts of theft by receiving); *In re Manown*, 283 Ga. 385, 659 S.E.2d 382 (2008) (guilty pleas to three felony counts of theft by taking); *In re Constanzo*, 283 Ga. 385, 659 S.E.2d 382 (2008) (guilty plea to one count of conspiracy to commit bank fraud, mail fraud, and wire fraud, and guilty plea to one count of bank fraud); *In re Thomas*, 283 Ga. 145, 657 S.E.2d 242 (2008) (pled guilty to four counts of misdemeanor theft and one count of misdemeanor criminal trespass); *In re Thomas*, 283 Ga. 86, 656 S.E.2d 535 (2008) (guilty plea under First Offender Act to felony theft by taking); *In re Howlette*, 283 Ga. 83, 656 S.E.2d 534 (2008) (guilty plea to selling cocaine, MDMA, and ketamine); *In re Campbell*, 282 Ga. 688, 653 S.E.2d 51 (2007) (conviction for three counts of tax evasion); *In re Key*, 282 Ga. 629, 652 S.E.2d 545 (2007) (pled guilty to felony conspiracy in connection with real estate closing fraud); *In re Smith*, 282 Ga. 626, 652 S.E.2d 545 (2007) (guilty plea to five counts of felony child molestation); *In re Wolf*, 282 Ga. 625, 652 S.E.2d 546 (2007) (guilty plea to federal felony conspiracy). It should be noted that another lawyer was disbarred after he pled guilty to felony tax evasion, but that lawyer's misconduct included at least thirteen abandoned clients. *In re David*, 282 Ga. 517, 651 S.E.2d 743 (2007).

20. *In re Adams*, 282 Ga. 628, 629, 652 S.E.2d 546, 546 (2007); *In re Carr*, 282 Ga. 138, 138, 646 S.E.2d 252, 253 (2007).

21. *In re Waldrop*, 283 Ga. 80, 82, 656 S.E.2d 529, 530 (2008); *In re Lewis*, 282 Ga. 649, 650, 651 S.E.2d 729, 730 (2007).

22. 283 Ga. 80, 656 S.E.2d 529 (2008).

23. O.C.G.A. §§ 42-8-60 to -68 (1997 & Supp. 2008).

24. *In re Waldrop*, 283 Ga. at 80, 656 S.E.2d at 529.

25. *Id.* at 81, 656 S.E.2d at 529.

discipline and had served with distinction for eighteen years in the military. In 2006 Waldrop stopped taking new clients, transferred existing clients to other attorneys, and sought treatment from a psychologist.²⁶ He consented to and passed nine random drug screens over a twelve month period.²⁷ Justice Hunstein dissented from the decision to suspend Waldrop in an opinion joined by Justice Thompson.²⁸ Justice Hunstein noted that Waldrop did not testify personally before the special master, and she found his failure to take direct responsibility “extremely troubling.”²⁹ Justice Hunstein also noted that the appearance of an attorney with a criminal conviction practicing law undermines public confidence in the profession more than any other problem.³⁰ She and Justice Thompson concluded that disbarment was the appropriate sanction.³¹

In a similar case, *In re Lewis*,³² Lewis pleaded guilty to one count of possession of cocaine and was also sentenced to five years of probation under the First Offender Act. At the time of his plea, Lewis was forty-six years old, and he testified that he had been using cocaine off and on since he was a teenager.³³ Although the special master recommended disbarment, the supreme court held that disbarment would be unduly harsh because Lewis had been in practice for over twenty years and had no disciplinary record.³⁴ Also, his offense did not directly relate to his work for clients and did not involve dishonesty.³⁵ Justice Hunstein, again joined by Justice Thompson, dissented and argued that disbarment was warranted.³⁶ In light of Lewis’s admitted use of cocaine for decades, Justice Hunstein understandably concluded that Lewis had a drug problem.³⁷ She saw no evidence that Lewis was doing what he needed to get his drug problem under control.³⁸ Lewis spent less than two months in treatment after his arrest, and he attended Alcoholics Anonymous or Narcotics Anonymous meetings only sporadically. Moreover, Lewis was not under the treatment of a mental health

26. *Id.* at 80, 656 S.E.2d at 529.

27. *Id.* at 81, 656 S.E.2d at 530.

28. *Id.* at 82, 656 S.E.2d at 530 (Hunstein, P.J., dissenting).

29. *Id.*

30. *Id.* (quoting *In re Stoner*, 246 Ga. 581, 582, 272 S.E.2d 313, 314 (1980)).

31. *Id.* at 82-83, 656 S.E.2d at 531.

32. 282 Ga. 649, 651 S.E.2d 729 (2007).

33. *Id.* at 649, 651 S.E.2d at 730.

34. *Id.*

35. *Id.*

36. *Id.* at 651, 651 S.E.2d at 731 (Hunstein, P.J., dissenting).

37. *Id.*

38. *Id.*

professional.³⁹ In light of these facts, Justice Hunstein concluded that disbarment was appropriate.⁴⁰

C. *Financial Improprieties*

The supreme court justices all agreed to disbar (or accept voluntary surrender of the law license of) seven lawyers who had engaged in some form of financial impropriety. Five of these cases involved misuse of funds in the lawyers' trust accounts.⁴¹ The sixth case involved a lawyer for the Department of Justice who took a Rolex watch and \$3500 in cash from an office of the Drug Enforcement Administration.⁴² The lawyer also submitted false travel vouchers to the United States Government and made numerous unauthorized charges on his government credit card. When government agents investigated these activities, the lawyer made false statements about them.⁴³ Ultimately, the lawyer was disbarred.⁴⁴ In the seventh case, Terrill Andrew Turner forged his client's name on deeds and diverted over \$700,000 to himself.⁴⁵ Turner, too, was disbarred.⁴⁶

One lawyer who converted client money to his own use was suspended rather than disbarred.⁴⁷ James Babson, Jr. represented a client in a workers' compensation case and converted over \$4000 of the client's money to his own use. He did so about six weeks after suffering a mental breakdown that led him to attempt suicide at a time when he was dealing with the terminal illness of his sister and the end of a relationship. Babson made full restitution to his client, sought

39. *Id.* at 650-51, 651 S.E.2d at 730-31.

40. *Id.* at 651, 651 S.E.2d at 731.

41. *In re* Butler, 283 Ga. 250, 250, 657 S.E.2d 245, 245 (2008) (\$50,000 in client money used for lawyer's own benefit; lawyer also obstructed disciplinary process and made false statements of fact during the disciplinary process); *In re* Davidson, 283 Ga. 144, 144, 657 S.E.2d 242, 242 (2008) (trust account overdrawn and trust account funds withdrawn for the personal use of the lawyer, the lawyer's nephew, and for a limited liability company owned by the two of them); *In re* Reagan, 283 Ga. 84, 84-85, 656 S.E.2d 533, 533 (2008) (issuance of checks totaling \$350,000 from trust account without sufficient funds to cover them); *In re* Byars, 282 Ga. 630, 630, 652 S.E.2d 567, 567 (2007) (misuse of funds in trust account and use of funds in his mother's estate to pay personal bill); *In re* Shoemaker, 282 Ga. 470, 470, 651 S.E.2d 82, 82 (2007) (four checks from lawyer's trust account returned for insufficient funds; lawyer also abandoned one client matter and had a prior disciplinary record).

42. *In re* McKenna, 282 Ga. 469, 469, 651 S.E.2d 80, 80-81 (2007).

43. *Id.* at 469, 651 S.E.2d at 81.

44. *Id.*

45. *In re* Turner, 282 Ga. 475, 475, 651 S.E.2d 81, 81 (2007).

46. *Id.* at 476, 651 S.E.2d at 82.

47. *In re* Babson, 283 Ga. 382, 659 S.E.2d 384 (2008).

professional help, and cooperated with the Georgia Bar.⁴⁸ In light of these mitigating factors, a unanimous supreme court suspended him for one year instead of disbaring him.⁴⁹

D. Other Disciplinary Matters

Three lawyers were disciplined for actions taken in litigation in which the lawyer was personally involved. In *In re Dogan*,⁵⁰ Dogan was a party to a child support case and produced paycheck stubs to prove his weekly earnings. The trial court found the stubs were fabricated and held Dogan in criminal contempt.⁵¹ The supreme court disbarred him.⁵²

Moreton Rolleston, Jr. became a frequent litigant after a judgment was entered against him for malpractice and fraud in 1995 in *In re Rolleston*.⁵³ Over the course of ten years, Rolleston filed so many actions on his own behalf and on the behalf of a related entity that the superior courts in Fulton and Cobb County enjoined him from filing any further claims, and the supreme court sanctioned him repeatedly for filing frivolous appeals.⁵⁴ The supreme court described Rolleston's behavior as "recalcitrant" and as having "flagrant disregard for the ethical standards imposed upon members of the Bar."⁵⁵ Rolleston was disbarred.⁵⁶

In the third case, *In re Morales*,⁵⁷ Morales had been a plaintiff in a personal injury case and had lost a dispute with his attorney over an attorney's lien. Morales filed a federal lawsuit against his former lawyers, the trial judge in his personal injury action, a member of that judge's staff, the clerk, the deputy clerk, the assistant clerk of the Georgia Court of Appeals, and the appellate judges who had ruled against him.⁵⁸ The supreme court determined that the federal lawsuit was frivolous and violated Georgia Rule of Professional Conduct 3.1.⁵⁹ It also expressed the opinion that the pleadings demonstrated "strong feelings of paranoia and persecution" and suspended him for at least one

48. *Id.* at 382, 659 S.E.2d at 384.

49. *Id.*, 659 S.E.2d at 384-85.

50. 282 Ga. 783, 653 S.E.2d 690 (2007).

51. *Id.* at 783, 653 S.E.2d at 690.

52. *Id.* at 783-84, 653 S.E.2d at 690.

53. 282 Ga. 513, 651 S.E.2d 739 (2007).

54. *Id.* at 513, 651 S.E.2d at 740.

55. *Id.*

56. *Id.* at 514, 651 S.E.2d at 740.

57. 282 Ga. 471, 651 S.E.2d 84 (2007).

58. *Id.* at 471-72, 651 S.E.2d at 85-86.

59. *Id.* at 472, 651 S.E.2d at 86; GA. RULE OF PROF'L CONDUCT 3.1 (2001).

year, with reinstatement conditioned upon successful treatment by a mental health professional.⁶⁰

The supreme court also took action in twelve other disciplinary matters and one character and fitness application. Eight lawyers received discipline in Georgia because they had been disciplined in other states.⁶¹ In *In re Ellison*,⁶² Ellison was disbarred, despite a special master's recommendation of suspension, for a variety of types of misconduct.⁶³ Ellison failed to communicate with clients, forged their names to court filings, and dismissed an action without client authority, among other transgressions.⁶⁴ In light of these numerous violations and three earlier disciplinary actions, the supreme court disbarred Ellison.⁶⁵

A similar multivariate pattern of misconduct, including forgery, lying, manufacturing evidence, and many other actions in a total of twenty-six cases led to the disbarment of Tara Gail McNaull.⁶⁶ Paul Owen Farr petitioned the court for a voluntary indefinite suspension because he was impaired by bipolar disorder and anxiety.⁶⁷ The court agreed to the petition.⁶⁸ James H. Bone, then the Standing Trustee for the United States Bankruptcy Court for the Northern District of Georgia, tape recorded a settlement conference. When the debtor's ex-wife requested a copy of the recording, Bone ordered his staff to delete the recording, destroyed a compact disc that contained it, and filed a false pleading with the court that the recording was never made. After an investigation, Bone admitted what he had done.⁶⁹ The supreme court suspended

60. *In re Morales*, 282 Ga. at 472, 651 S.E.2d at 86.

61. *In re Campbell*, 283 Ga. 481, 660 S.E.2d 532 (2008) (one year suspension); *In re Cronin*, 283 Ga. 383, 659 S.E.2d 383 (2008) (eleven month, four day suspension); *In re Owens*, 283 Ga. 384, 659 S.E.2d 383 (2008) (indefinite suspension pending reinstatement by the Florida Bar); *In re Wilson*, 283 Ga. 147, 657 S.E.2d 243 (2008) (disbarred); *In re Kraeger*, 283 Ga. 84, 656 S.E.2d 533 (2008) (suspension pending showing of reinstatement in Arizona); *In re Parker*, 283 Ga. 78, 656 S.E.2d 532 (2008) (disbarred); *In re Bernhard*, 283 Ga. 85, 656 S.E.2d 534 (2008) (disbarred); *In re White*, 282 Ga. 515, 651 S.E.2d 742 (2007) (disbarred).

62. 282 Ga. 647, 651 S.E.2d 746 (2007).

63. *Id.* at 649, 651 S.E.2d at 748.

64. *Id.* at 647-48, 651 S.E.2d at 747-48.

65. *Id.* at 649, 651 S.E.2d at 748.

66. *In re McNaull*, 282 Ga. 686, 686-87, 653 S.E.2d 46, 46-48 (2007).

67. *In re Farr*, 283 Ga. 314, 314-15, 658 S.E.2d 632, 632 (2008).

68. *Id.* at 315, 658 S.E.2d at 633.

69. *In re Bone*, 283 Ga. 147, 147-48, 657 S.E.2d 244, 244 (2008).

him for three months.⁷⁰ Justices Hunstein and Thompson dissented without opinion.⁷¹

Finally, in *In re White*,⁷² the court affirmed the decision of the Board to Determine Fitness of Bar Applicants to deny a certification of fitness to Willie Jay White, who had been suspended from law school for a year for plagiarism at the end of his second year.⁷³ Because White never gave any credible explanation for the plagiarism and never accepted responsibility for his actions, the court determined that he had not met his burden to demonstrate his fitness to practice law.⁷⁴

III. MALPRACTICE AND OTHER CLAIMS AGAINST ATTORNEYS

Proximate cause was an issue in several malpractice cases during the survey period. In *Kramer v. Yokely*,⁷⁵ the Georgia Court of Appeals affirmed the grant of summary judgment for the defendants in a legal malpractice case.⁷⁶ The plaintiff had retained the attorneys to pursue an action in federal court under 42 U.S.C. § 1983⁷⁷ against Gwinnett County and officials from the Gwinnett County Detention Center (GCDC) for failure to provide the plaintiff adequate medical care while the plaintiff was incarcerated. The federal court granted summary judgment for the defendants. The plaintiff then filed a legal malpractice action against his attorneys alleging a number of ways in which the attorneys breached their duty of care to him. The attorneys in the federal action failed to comply with local rules that applied to summary judgment proceedings, to authenticate the plaintiff's medical records from the GCDC, to list a fellow inmate as a potential witness, to secure expert testimony about the plaintiff's claim of deliberate indifference to his medical needs, and to submit an affidavit from a nurse who evaluated the plaintiff at the GCDC. The plaintiff also argued that the lawyers argued his case under the Eighth Amendment⁷⁸ when, in fact, the claim was governed by the Fourteenth Amendment.⁷⁹

The court of appeals affirmed summary judgment for the lawyers because the plaintiff could not show proximate cause.⁸⁰ In other words,

70. *Id.* at 147-48, 657 S.E.2d at 244.

71. *Id.* at 148, 657 S.E.2d at 245.

72. 283 Ga. 74, 656 S.E.2d 527 (2008).

73. *Id.* at 75-76, 656 S.E.2d at 528.

74. *Id.* at 75, 656 S.E.2d at 528.

75. 291 Ga. App. 375, 662 S.E.2d 208 (2008).

76. *Id.* at 378, 662 S.E.2d at 212.

77. 42 U.S.C. § 1983 (2000).

78. U.S. CONST. amend. VIII.

79. *Kramer*, 291 Ga. App. at 381, 662 S.E.2d at 214; U.S. CONST. amend. XIV.

80. *Kramer*, 291 Ga. App. at 380-82, 662 S.E.2d at 213-15.

he could not show that, but for these errors by the attorneys, he would have prevailed.⁸¹ The court of appeals took each issue in turn and concluded that the result in the federal case would have been the same—summary judgment for the defendants—even if the lawyers had done everything right.⁸² Although the lawyers did not abide by the local rules, the federal district court reached the merits of the case.⁸³ The unauthenticated documents nevertheless were part of the summary judgment record in federal court, and the fellow inmate's testimony would have been cumulative of other, admitted testimony.⁸⁴ The federal court considered the case under the correct standard even though the lawyers argued the wrong one.⁸⁵ Because the opinions of the plaintiff's expert on his deliberate indifference claim were already in the summary judgment record, an affidavit from the same expert would not have made any difference.⁸⁶ Finally, the substance of the nurse's affidavit was also already reflected in the record.⁸⁷ Even if one or more of these actions breached the attorneys' duties of care, the plaintiff still would have lost in federal court and so could not recover from his lawyers for malpractice.⁸⁸

*Millsaps v. Kaufold*⁸⁹ also involved the issue of proximate cause. In *Millsaps* an attorney represented the wife in a divorce action. The husband had assets of approximately \$2 million, but many of those assets were in corporations controlled by the husband. The wife's attorney did not file a *lis pendens* and did not name the husband's corporations as defendants in the divorce action. During the pendency of the divorce, the husband allegedly dissipated and encumbered assets in the corporations, and ultimately the wife settled for \$120,000. She then sued her former lawyer, and she provided expert affidavits stating it was malpractice not to file the *lis pendens* or name the corporations as parties.⁹⁰

The trial court granted summary judgment because the wife would not be able to prove that this alleged negligence proximately caused her any damages. Her ex-husband provided an affidavit in the malpractice

81. *Id.*

82. *Id.*

83. *See id.* at 380, 662 S.E.2d at 213.

84. *Id.*

85. *Id.* at 381, 662 S.E.2d at 214.

86. *Id.* at 382, 662 S.E.2d at 214.

87. *Id.*, 662 S.E.2d at 214-15.

88. *See id.* at 380, 662 S.E.2d at 213 (quoting *Millsaps v. Kaufold*, 288 Ga. App. 44, 44-45, 653 S.E.2d 344, 345 (2007)).

89. 288 Ga. App. 44, 653 S.E.2d 344 (2007).

90. *Id.* at 44-45, 653 S.E.2d at 345.

action that stated he would not have agreed to any settlement in excess of the \$120,000, presumably even if the wife's lawyer had done everything right.⁹¹ The court of appeals reversed the grant of summary judgment, apparently on the theory that the wife could prove her damages other than through speculation about what agreement she and her husband might have reached.⁹² Unlike a malpractice case involving a transaction unrelated to litigation, a plaintiff in the wife's shoes could show that she would have received more out of the divorce even without the husband's agreement because, absent that agreement, the property division would have been determined by the court.⁹³ That scenario is the familiar "case within a case" measure of damages in malpractice cases arising from litigation.

The court of appeals also briefly discussed proximate cause in *Amstead v. McFarland*,⁹⁴ a case that was primarily about attorneys fees. Amstead and her ex-husband signed a contingency fee agreement with attorney McFarland to represent them in a wrongful death action that resulted from the death of their adult son in an automobile accident. When Amstead expressed misgivings about continuing as a party to the case, McFarland responded that he would need a letter from her requesting that her name be withdrawn and acknowledging that she would not share in the proceeds of a settlement or judgment. Amstead sent the lawyer this letter, apparently in the incorrect belief that the waiver was necessary to be removed from the case as a party. By the time the case settled, Amstead became aware of her right to share in the proceeds, regardless of whether she had been a party to the case, and she refused to sign a settlement agreement that would have released her claim. She hired a second attorney who helped her obtain seventy-five percent of the settlement amount.⁹⁵

Amstead sued McFarland for malpractice for failing to advise her of potential conflicts caused by his representation of Amstead and her ex-husband and for failing to advise her of her right to share in the result of the case whether or not she was a party.⁹⁶ She argued that as a result she had to pay two attorneys instead of one to obtain her share of the proceeds.⁹⁷ The court of appeals rejected that argument on the basis of proximate cause:

91. *Id.* at 45, 653 S.E.2d at 346.

92. *Id.* at 47, 653 S.E.2d at 347.

93. *Id.* at 46, 653 S.E.2d at 346.

94. 287 Ga. App. 135, 650 S.E.2d 737 (2007).

95. *Id.* at 135-36, 650 S.E.2d at 739-40.

96. See O.C.G.A. § 19-7-1(c) (2004 & Supp. 2008).

97. *Amstead*, 287 Ga. App. at 137, 650 S.E.2d at 740.

Here, Amstead has provided no evidence demonstrating that but for McFarland's alleged failures, she was forced to pay attorney fees to two attorneys instead of only one. Indeed, her paying of fees to another attorney, who had no hand in procuring the settlement in the wrongful death case, was solely a result of her own decision as opposed to any alleged failure by McFarland.⁹⁸

Another way of looking at this is to suppose McFarland had informed Amstead of her rights when she wanted to withdraw from the case. Whether she chose to withdraw as a plaintiff or not, Amstead eventually would have had to hire a second attorney to prevail in her contested quest for equitable apportionment. McFarland would have had a conflict of interest that would have prevented him from representing Amstead against McFarland's other client, Amstead's ex-husband.⁹⁹

Causation was one of the issues in *Falanga v. Kirschner & Venker, P.C.*¹⁰⁰ In *Falanga* the plaintiff hired attorneys to defend him from disciplinary proceedings before the State Bar of Georgia. The plaintiff and the State Bar reached an agreement to resolve that matter with a petition for voluntary discipline that the Georgia Supreme Court accepted. Thereafter, the State initiated another investigation of the plaintiff, and the plaintiff had to expend an additional \$25,000 in legal fees to defend himself. The plaintiff claimed that his attorney committed malpractice by refusing to help the plaintiff draft an agreement with the State Bar in the first matter that would have prevented the bar from initiating the later one.¹⁰¹ The court of appeals affirmed summary judgment on this legal malpractice claim, concluding that it would be "simply speculation" to claim that, but for the attorney's alleged malpractice, the State Bar would not have initiated the second investigation, which arose from information provided by an FBI informant.¹⁰²

The court in *Falanga* also addressed issues relating to fraud claims against lawyers.¹⁰³ In particular, the court affirmed summary judgment for the defendant lawyers on the plaintiffs' claims that the defendants engaged in fraudulent billing practices.¹⁰⁴ The alleged fraud would have been evident from a review of the bills sent to the plaintiffs, but the plaintiffs did not review the bills in time to bring

98. *Id.* at 139, 650 S.E.2d at 741-42.

99. GA. RULE OF PROF'L CONDUCT 1.7 (2000).

100. 286 Ga. App. 92, 648 S.E.2d 690 (2007).

101. *Id.* at 92-93, 648 S.E.2d at 691-92.

102. *Id.* at 98, 648 S.E.2d at 695.

103. *See id.* at 94, 648 S.E.2d at 692.

104. *Id.*, 648 S.E.2d at 692-93.

claims within the statute of limitations.¹⁰⁵ The plaintiffs offered two arguments by which they sought to avoid the statute of limitations. One argument was that because the defendant attorneys were in a confidential relationship with the plaintiffs, the plaintiffs did not have to exercise ordinary care to discover the fraud (by reading the bills that were sent to them). The second argument was that the plaintiffs' attorneys had a duty to disclose the fraud, and thus the defendants' silence should be construed as a continuation of the fraud.¹⁰⁶ The court of appeals rejected both arguments.¹⁰⁷ The court agreed that there is a lessened duty of care to discover fraud, and a heightened duty to reveal it, when the parties are in a confidential relationship.¹⁰⁸ Under the particular circumstances of this case, however, the plaintiffs had possession of documents that would have revealed the fraud, and they had to exercise ordinary care and review them.¹⁰⁹ Furthermore, again because the plaintiffs had possession of the evidence of the fraud, the defendant's silence "did not deter appellants from discovering the alleged fraud."¹¹⁰ The court rejected the plaintiffs' arguments and affirmed summary judgment for the defendants.¹¹¹

In another malpractice case, *Brito v. The Gomez Law Group*,¹¹² the court of appeals decided one issue worth noting. The plaintiffs sought to recover their attorneys fees under Official Code of Georgia Annotated (O.C.G.A.) § 13-6-11,¹¹³ which provides that a plaintiff may recover attorneys fees under several circumstances, including when "the defendant has acted in bad faith."¹¹⁴ The evidence of bad faith was that the lawyer filed a negligence action in 1998 and then over the next four years pursued mediation and sent demand letters to the defendant but never initiated any discovery. When the lawyer's motion for a continuance of the trial was denied in October 2002, she voluntarily dismissed the case without prejudice and without informing her clients. During the six month period in which the case could be refiled without running afoul of the statute of limitations, the attorney attempted to settle the matter but did not communicate with her clients until shortly before the time would be up, at which point she asked for "bottom line"

105. *Id.*, 648 S.E.2d at 693.

106. *Id.*

107. *See id.*

108. *Id.* at 95, 648 S.E.2d at 693.

109. *Id.*

110. *Id.* at 96, 648 S.E.2d at 694.

111. *Id.* at 98, 648 S.E.2d at 695.

112. 289 Ga. App. 625, 658 S.E.2d 178 (2008).

113. O.C.G.A. § 13-6-11 (1982 & Supp. 2008).

114. *Id.*

settlement authority and payment up front of the costs and fees that would be incurred if the case was refiled. When the lawyer attempted to refile the case, the clerk refused to file it because the filing fee tendered was insufficient. The case was refiled after limitations had expired, and unsurprisingly, the defendant's motion to dismiss was granted.¹¹⁵ The lawyer did not tell her clients explicitly about missing the deadline but told them only that the case could not continue "because of the age of the complaint and time in which the complaint was re-filed with the court."¹¹⁶

The court reversed the trial court's grant of summary judgment to the defendant law firm on the plaintiff's claim for attorneys fees resulting from bad faith conduct.¹¹⁷ The court of appeals held that the plaintiff might be able to show bad faith because the defendant's "persistent failure to adequately represent the Britos went beyond mere negligence and rose to the level of bad faith in dealing with clients."¹¹⁸ In particular, there was "evidence from which a jury could find that Gomez's representation of the Britos was compromised by a motive of self-interest and that Gomez engaged in conscious wrongdoing in acting without authority and affirmatively misleading the Britos about the case."¹¹⁹

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

The Georgia Supreme Court decided four noteworthy cases on ineffective assistance of counsel during the survey period. Two were unanimous while two others provoked dissent.

In *Edwards v. Lewis*,¹²⁰ the court granted a writ of habeas corpus to an inmate who had been incarcerated since 2001 for cocaine possession.¹²¹ At the time of his trial, the DeKalb County Superior Court was still using data from the 1990 census to summon jurors even though reliable data from the 2000 census was available. The significance of the new data was that the racial composition of the county had changed dramatically during the 1990s. Because of the judges' refusal to use the latest data, the attorneys for the accused were in a position to challenge

115. *Brito*, 289 Ga. App. at 625-26, 658 S.E.2d at 180-81.

116. *Id.* at 626, 658 S.E.2d at 181.

117. *Id.* at 630, 658 S.E.2d at 183.

118. *Id.* at 629, 658 S.E.2d at 183.

119. *Id.* at 630, 658 S.E.2d at 183.

120. 283 Ga. 345, 658 S.E.2d 116 (2008).

121. *Id.* at 345, 658 S.E.2d at 117.

the jury array. These attorneys, who were public defenders, did not do so.¹²²

The reason they did not challenge the jury array was that they were instructed not to by their superiors at the public defender's office. The superior court judges had agreed to begin using the 2000 data but only on the condition that the public defender's office would not raise objections to the array in past cases, including Mr. Edwards's case.¹²³ Although the lawyers expressed discomfort with that course of action (one of them described the decision as "throwing people like Mr. Edwards overboard"),¹²⁴ they followed orders.¹²⁵

In a unanimous decision, the supreme court held that Mr. Edwards's lawyers were operating under a conflict of interest when they sacrificed his interests to preserve an agreement with the judges to benefit other, future clients.¹²⁶ That conflict adversely affected their performance because the lawyers declined to vigorously pursue an issue they believed to be significant.¹²⁷ The court's language was clear:

It should go without saying that judges may not negotiate deals with defense attorneys not to raise potentially meritorious issues on behalf of their clients. It is equally clear that a public defender cannot ethically instruct his or her staff not to pursue claims on behalf of a client or set of clients without regard to their merit in order to secure some perceived advantage in other cases.¹²⁸

The court reversed the denial of Mr. Edwards's petition for writ of habeas corpus.¹²⁹

Public defenders were also involved in *Garland v. State*.¹³⁰ The defendant, Mack Garland, was indigent. A public defender was appointed to represent him, but he was convicted of armed robbery and other crimes. Garland sought to raise on appeal the claim that his trial counsel had rendered ineffective assistance. He asked for new counsel to handle the appeal. The trial court declined to appoint new counsel for the appeal because the Georgia Public Defender Standards Council had a policy that it would not authorize new counsel for an appeal.¹³¹

122. *Id.* at 345-46, 658 S.E.2d at 117-18.

123. *Id.* at 346, 658 S.E.2d at 118.

124. *Id.*

125. *Id.* at 346-47, 658 S.E.2d at 118.

126. *Id.* at 349-50, 658 S.E.2d at 120-21.

127. *Id.* at 350, 658 S.E.2d at 121.

128. *Id.* at 350 n.19, 658 S.E.2d at 121 n.19 (internal citations omitted).

129. *Id.* at 351, 658 S.E.2d at 121.

130. 283 Ga. 201, 657 S.E.2d 842 (2008).

131. *Id.* at 201, 657 S.E.2d at 843.

That decision left Garland in an untenable position. He had a constitutional right to counsel on his appeal,¹³² but he had to raise the claim of ineffective assistance at the earliest possible time.¹³³ Yet the public defender who represented him at the trial would have a conflict of interest in asserting his own ineffectiveness.¹³⁴ Without the appointment of another lawyer to raise that issue, Garland would have to either forego the claim or forego his constitutional right to appointed counsel.¹³⁵ The supreme court held that Garland was constitutionally entitled to appointment of new, conflict-free counsel to prosecute his appeal.¹³⁶

Two other ineffective assistance cases from the supreme court provoked dissents. In *Upton v. Johnson*,¹³⁷ the defendant, Johnson, had assaulted his estranged wife in Cobb County and put her in the trunk of his car. He drove to Whitfield County, where the victim was able to escape. Charges for these events were brought in both Cobb County and Whitfield County. Johnson pleaded guilty in Cobb County after his attorney advised him that if he did not accept the plea offer, in which the Whitfield County charges would be *nolle prossed*, he could be prosecuted in both counties and possibly receive consecutive life sentences. Johnson sought a writ of habeas corpus and claimed that this advice was faulty because the second prosecution would have been barred by double jeopardy. The habeas court agreed and found as a fact, based upon Johnson's testimony, that he would not have pleaded guilty but for this bad advice.¹³⁸ The supreme court agreed that the lawyer's advice did not fall within the broad range of competence expected of attorneys and deferred to the trial court's factual finding regarding what Johnson would have done if the lawyer had given good advice.¹³⁹ Accordingly, the court affirmed the grant of habeas corpus.¹⁴⁰

Justice Carley dissented first on the basis that the attorney's advice may not have been deficient because the evidence might have shown the commission of separate crimes in the two counties rather than one continuous transaction.¹⁴¹ Even if the advice was bad, Justice Carley

132. *Id.* at 202, 657 S.E.2d at 843-44 (citing *Douglas v. California*, 372 U.S. 353, 357-58 (1963)).

133. *Id.*, 657 S.E.2d at 844.

134. *Id.* at 203, 657 S.E.2d at 844.

135. *See id.*

136. *Id.* at 205, 657 S.E.2d at 846.

137. 282 Ga. 600, 652 S.E.2d 516 (2007).

138. *Id.* at 601, 652 S.E.2d at 517-18.

139. *Id.* at 601-02, 604, 652 S.E.2d at 518, 520.

140. *Id.* at 604, 652 S.E.2d at 520.

141. *Id.* at 606, 652 S.E.2d at 521 (Carley, J., dissenting).

still would not have affirmed the granting of the writ.¹⁴² The trial court had found prejudice by concluding that Johnson would not have pleaded guilty because he would have had nothing to lose by going to trial on the kidnapping charge in Cobb County.¹⁴³ Justice Carley pointed out that he did have something to lose because part of the plea deal was that the other charges in Whitfield County, including false imprisonment, attempted murder, and possession of the tools for the commission of a crime, would also be *nolle prossed*.¹⁴⁴ Johnson would have lost that benefit if he had not pleaded guilty, and prosecution of those crimes might not have been barred by double jeopardy.¹⁴⁵ Justice Carley would at least have remanded for a hearing on what Johnson would have done,¹⁴⁶ but the majority ruled, and the granting of the writ of habeas corpus was affirmed.¹⁴⁷

*Cobb v. State*¹⁴⁸ was a much closer case. Larry Cobb was convicted of the murder of Grady Jones with a .45 caliber pistol, largely on the inconsistent eyewitness testimony of a crack addict who had been on a four-day drug binge at the time of the murder. Two earlier trials ended with hung juries. The only evidence linking Cobb to the .45 caliber pistol was that he owned a holster that was made for such a pistol. The jury heard this evidence when a firearms expert testified that he called the company that made the holster and was told that it was designed for such a gun. Cobb's lawyer did not object to this hearsay.¹⁴⁹ The supreme court, in a 4-3 decision, held that the failure to object was deficient and that there was a reasonable probability that the outcome was affected, especially given that the other juries had hung and the credibility of the eyewitness was in serious doubt.¹⁵⁰ Accordingly, Cobb's conviction was reversed.¹⁵¹

Justices Benham, Hunstein, and Carley dissented.¹⁵² The dissenting opinion, written by Justice Benham, assumed without deciding that the failure to object was deficient performance.¹⁵³ The problem, according

142. *See id.* at 607, 652 S.E.2d at 521.

143. *Id.* at 606, 652 S.E.2d at 521.

144. *Id.*

145. *Id.* at 607, 652 S.E.2d at 521.

146. *Id.* at 608, 652 S.E.2d at 522.

147. *Id.* at 604, 652 S.E.2d at 520 (majority opinion).

148. 283 Ga. 388, 658 S.E.2d 750 (2008).

149. *Id.* at 388-90, 658 S.E.2d at 751-52.

150. *Id.* at 390-92, 658 S.E.2d at 752-53.

151. *Id.* at 392, 658 S.E.2d at 753.

152. *Id.* at 394, 658 S.E.2d at 755 (Benham, J., dissenting).

153. *Id.*

to the dissenting justices, was that Cobb could not show prejudice.¹⁵⁴ On cross-examination, the expert admitted that the holster could hold guns other than .45 caliber pistols.¹⁵⁵ Justice Benham also emphasized the testimony of the eyewitness, which included a violent history between Cobb and the victim and threats by Cobb to kill the victim before and on the date of the murder.¹⁵⁶ Nevertheless, by the thinnest of margins, Cobb was entitled to a new trial because of his lawyer's failure to object to the expert's hearsay testimony.¹⁵⁷

V. DISQUALIFICATION OF JUDGES AND LAWYERS

Four cases during the survey period discussed issues of judicial disqualification. In *Harbuck v. Houston County*,¹⁵⁸ the plaintiff brought an action to quiet title, and a special master was appointed.¹⁵⁹ The Georgia Supreme Court held that the trial court properly denied the plaintiff's motion to recuse the special master based upon the fact that several years before, the special master had deeded unrelated land to the opposing party.¹⁶⁰ The court noted that the plaintiff had failed to meet the standard for recusal, which requires that "the judge harbored a bias stemming from an extrajudicial source that was 'of such a nature and intensity that it would impede the exercise of impartial judgment.'"¹⁶¹

The Georgia Court of Appeals upheld a trial court's decision not to recuse itself in *Georgia Kidney & Hypertension Specialists, Inc. v. Fresenius USA Marketing, Inc.*¹⁶² The trial judge's daughter worked for a company that provided contract legal services to counsel for one of the parties, and the trial judge spoke to lead counsel for that party before a hearing.¹⁶³ The judge "had known the attorney as a child but had not seen her for over 30 years."¹⁶⁴ The court of appeals found the motion to recuse both procedurally and substantively deficient.¹⁶⁵

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 392, 658 S.E.2d at 754 (majority opinion).

158. 284 Ga. 4, 662 S.E.2d 107 (2008).

159. *Id.* at 5, 662 S.E.2d at 108.

160. *Id.* at 7, 662 S.E.2d at 109-10.

161. *Id.*, 662 S.E.2d at 110 (quoting *Wellons v. State*, 266 Ga. 77, 88, 463 S.E.2d 868, 880 (1995)).

162. 291 Ga. App. 429, 662 S.E.2d 245 (2008).

163. *Id.* at 430, 662 S.E.2d at 247.

164. *Id.*, 662 S.E.2d at 246-47.

165. *Id.* at 430-31, 662 S.E.2d at 247.

In *English v. State*,¹⁶⁶ the court of appeals affirmed a trial court's finding that a magistrate who issued a warrant need not have recused himself.¹⁶⁷ The defendant was an attorney who had "practiced law in the judge's courtroom, worked on committees with the judge, discussed political campaigns with the judge, and placed the judge's campaign signs on his property."¹⁶⁸ The trial court determined that the magistrate could be neutral, and the court of appeals held that conclusion not to be clearly erroneous.¹⁶⁹

In *Lemming v. State*,¹⁷⁰ the defendant was charged with aggravated assault, cruelty to children, possession of a firearm during the commission of a crime, making terroristic threats, burglary, and armed robbery. The trial judge, the Honorable Tamra Colston, had been an Assistant District Attorney and in that capacity had prosecuted Lemming in 1994 on charges related to a shooting. Lemming decided not to seek disqualification of the judge because the defendant and her counsel were pleased that Judge Colston had been assigned to the case. After the judge refused to agree to a plea agreement under which Lemming would serve two years in prison, Lemming decided to reject an offer of a longer sentence and go to trial. The defendant also chose to waive a jury trial. Judge Colston convicted Lemming and sentenced her to serve thirty years in prison. The defendant appealed and claimed that Judge Colston should have recused herself.¹⁷¹

The court of appeals affirmed the conviction.¹⁷² First, the defendant chose not to challenge Judge Colston's involvement and thereby waived any error.¹⁷³ Second, Judge Colston need not have disqualified herself.¹⁷⁴ Lemming claimed that the judge's bias was demonstrated by three facts: the long prison sentence imposed, the judge's prior involvement in prosecuting Lemming for a different crime, and remarks the judge allegedly made after Lemming was sentenced.¹⁷⁵ The court of appeals noted that the sentence was within the limits set by law and therefore was not evidence of bias.¹⁷⁶ The earlier prosecution also did not necessitate disqualification; it was in evidence at the sentencing

166. 288 Ga. App. 436, 654 S.E.2d 150 (2007).

167. *Id.* at 443, 654 S.E.2d at 156-57.

168. *Id.* at 442, 654 S.E.2d at 156.

169. *Id.* at 443, 654 S.E.2d at 156-57.

170. 292 Ga. App. 138, 663 S.E.2d 375 (2008).

171. *Id.* at 138-40, 663 S.E.2d at 376-77.

172. *Id.* at 138, 663 S.E.2d at 376.

173. *Id.* at 140, 663 S.E.2d at 377.

174. *Id.* at 141-42, 663 S.E.2d at 378.

175. *Id.* at 141, 663 S.E.2d at 378.

176. *Id.* at 142, 663 S.E.2d at 378.

phase, and thus the judge would have known about it even if she had not personally prosecuted the case.¹⁷⁷ Finally, the allegedly improper remarks had been excluded from evidence at the new trial hearing, and Lemming had not appealed that ruling.¹⁷⁸ The order denying the new trial was affirmed.¹⁷⁹

The supreme court decided one case involving a conflict of interest for criminal defense lawyers arising from the problems in funding lawyers for defendants in capital cases.¹⁸⁰ In *Britt v. State*,¹⁸¹ two lawyers were defending Donald Steven Sanders in a death penalty case and became concerned about the funding of the defense. The lawyers served subpoenas seeking evidence about capital defense funding on the Executive Director of the Georgia Public Defender's Standards Counsel, other Counsel officials, and the Director of the Capital Defender. These lawyers also filed motions to challenge the constitutionality of the statutory funding scheme for capital cases and to seek payment of adequate compensation. One of the attorneys, Walter M. Britt, was a contract attorney whose compensation was to come from the capital defender. The other attorney, Douglas A. Ramseur, was employed by the capital defender. When the subpoenas were contested, the lawyers found themselves in an adversary position as to the source of payment of fees (Britt) and as to an employer (Ramseur). They recognized the conflict and declined to proceed further in representing Sanders until Sanders received independent advice about waiving the conflict that arose because of the subpoenas. The trial court ordered the lawyers to proceed and held them in criminal contempt when they refused to do so.¹⁸²

A divided supreme court reversed the trial court's refusal to quash the subpoenas but upheld the punishment of the lawyers for contempt.¹⁸³ The majority held that the lawyers were bound to obey the trial court's order to proceed even if the trial court's order was wrong.¹⁸⁴ It was within the court's jurisdiction and thus had to be obeyed.¹⁸⁵ Justice Hunstein, joined by Justice Benham, dissented because of the need to ensure that death penalty defendants are at all times receiving the assistance of conflict-free counsel.¹⁸⁶ The trial court had recognized

177. *Id.*

178. *Id.*

179. *Id.* at 143, 663 S.E.2d at 379.

180. *Britt v. State*, 282 Ga. 746, 653 S.E.2d 713 (2007).

181. 282 Ga. 746, 653 S.E.2d 713 (2007).

182. *Id.* at 746-47, 653 S.E.2d at 715-16.

183. *Id.* at 749, 653 S.E.2d at 717.

184. *Id.*

185. *Id.*

186. *See id.* at 751-53, 653 S.E.2d at 718-19 (Hunstein, P.J., dissenting).

that there might be a conflict, and the dissent would have held that the defense lawyers “properly refused the trial court’s order to proceed with divided loyalties at the motions hearing in this death penalty case.”¹⁸⁷

The court of appeals decided three criminal cases involving alleged conflicts of interest of lawyers. In *Lemming v. State*,¹⁸⁸ noted above, the court refused to overturn the conviction of the defendant even though the district attorney had represented the defendant in two matters that were unrelated to the current prosecution.¹⁸⁹ The defendant waived any right to complain, and in any event disqualification of the entire district attorney’s office was unnecessary.¹⁹⁰ Because the new case was unrelated to the old one, all that was required was for the district attorney to be screened from participation in the new case, and she was.¹⁹¹

In *Holsey v. State*,¹⁹² the defendant was charged with armed robbery, kidnapping, and aggravated assault.¹⁹³ When the defendant’s court-appointed lawyer allegedly did not communicate with the defendant for several months, the defendant filed a bar grievance against the lawyer. The attorney professed not to have taken offense and told the trial court that he was ready to proceed. The trial court denied the defendant’s motion to appoint new counsel.¹⁹⁴ The court of appeals held that the denial was within the trial court’s discretion under these circumstances.¹⁹⁵ Given the choice between using that lawyer and proceeding pro se, the defendant elected to be represented.¹⁹⁶ When the defendant was convicted, he sought a new trial in part based upon the conflict of the lawyer in representing someone who had filed a grievance against the lawyer.¹⁹⁷ The court of appeals rejected this argument as well because the alleged conflict was too speculative.¹⁹⁸ The trial counsel had testified that he knew about the grievance, was not offended by it, and that it did not undermine his ability to represent his client.¹⁹⁹

187. *Id.* at 754, 653 S.E.2d at 720.

188. 292 Ga. App. 138, 663 S.E.2d 375 (2008).

189. *Id.* at 142, 663 S.E.2d at 378-79.

190. *Id.*

191. *Id.*, 663 S.E.2d at 379.

192. 291 Ga. App. 216, 661 S.E.2d 621 (2008).

193. *Id.* at 216, 661 S.E.2d at 623.

194. *Id.* at 219, 661 S.E.2d at 625.

195. *Id.*

196. *Id.*

197. *Id.* at 221, 661 S.E.2d at 626.

198. *Id.*

199. *Id.*, 661 S.E.2d at 626-27.

The court of appeals also found no conflict of interest in *Gardner v. State*.²⁰⁰ The defendant's attorney, McKinnon, had a law partner who briefly represented another defendant, Wheeler. McKinnon brought the conflict to the attention of the court, which appointed another attorney to represent Wheeler. McKinnon told his client, and the court, he intended to argue that Wheeler actually committed one of the crimes for which his client was being tried. The defendant waived any conflict in open court, and at trial his lawyer in fact tried to blame one of the crimes on Wheeler.²⁰¹ The court of appeals held that there was no conflict of interest and that in any event, the defendant had knowingly waived it.²⁰²

The court of appeals decided two attorney conflict of interest cases in civil contexts. In *Benson v. McNutt*,²⁰³ the administrators of an estate sued McNutt for misappropriating funds from the decedent. McNutt sought to disqualify the lawyer for the plaintiff because the lawyer, or other lawyers in his firm, or both the lawyer and other lawyers in the firm, had helped her to probate her father's will, had drafted a will for her, and had assisted her in workers' compensation and criminal matters. McNutt did not elaborate on when this work was done or what confidential information those lawyers would have received.²⁰⁴ The court of appeals construed her complaint to be that the plaintiffs' lawyers had general familiarity with her assets.²⁰⁵ Because McNutt could not show any substantial relationship between the lawyer's knowledge of her assets and her pending suit, the court held that the trial court had not abused its discretion in denying the motion to disqualify.²⁰⁶ The court also noted that the extent of her assets would have been subject to discovery anyway.²⁰⁷

*Harris v. Albany Lime & Cement Co.*²⁰⁸ dealt with the enforceability of an arbitration clause between two parties to a contract. Harris made a deal with his father-in-law, Burt, under which Harris would renovate a house and share the profits with Burt's businesses. The buyers sued Harris. Burt, who was an attorney, represented Harris. The buyers soon amended the complaint to include Burt and his businesses as defendants. At that point, Burt had numerous conflicts of interest in

200. 289 Ga. App. 359, 657 S.E.2d 288 (2008).

201. *Id.* at 360-62, 657 S.E.2d at 289-90.

202. *Id.* at 362, 657 S.E.2d at 290.

203. 289 Ga. App. 565, 657 S.E.2d 639 (2008).

204. *Id.* at 565-66, 657 S.E.2d at 641-42.

205. *Id.* at 566, 657 S.E.2d at 642.

206. *Id.*

207. *Id.*

208. 291 Ga. App. 474, 662 S.E.2d 160 (2008).

continuing to represent Harris in the matter but nevertheless did so.²⁰⁹ Burt advised Harris to sign a written agreement, backdated several years, to evidence their agreement about the renovation. Harris did so, and the agreement contained an arbitration clause, even though the original arrangement had not.²¹⁰

Burt's daughter eventually filed for divorce from Harris. Burt withdrew from representing Harris, settled the case brought by the buyers, and sought contribution and indemnity from Harris, who sought to avoid the arbitration clause.²¹¹ The trial court enforced the clause, but the court of appeals reversed.²¹² The court's opinion on this point bears close examination.

The ethics question was whether the arbitration clause could be voided solely because of Burt's conflict of interest.²¹³ It is important to note first that the court of appeals need not have reached this question. In an alternative holding that by itself supports the result, the court held that the arbitration clause by its own terms did not cover claims for contribution and indemnity.²¹⁴ The court could have left it at that.

Nevertheless, the court addressed the ethics issue and held that the arbitration clause was voidable at the option of the client.²¹⁵ That result would have followed easily from the guidance provided by Georgia Rule of Professional Conduct 1.8(a)²¹⁶ (cited by the court), which allows fair business transactions between lawyers and clients, but only if certain procedural protections are in place,²¹⁷ and none of those protections appear to have been observed by Burt. That was not, however, the basis for the court's ruling. Instead, the court quoted at length from a 1902 case that stated, "There are authorities which sustain the proposition[] that such a [transaction], though made without fraud or undue advantage and upon payment of an adequate price, is

209. Georgia Rule of Professional Conduct 1.7 states that "[a] lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests . . . will materially and adversely affect the representation of the client." GA. RULE OF PROF'L CONDUCT 1.7 (2001). *See also* GA. RULE OF PROF'L CONDUCT 3.7(a) (2001) (general rule that a lawyer shall not act as an advocate in a case in which the lawyer will also be a witness).

210. *Harris*, 291 Ga. App. at 474-75, 662 S.E.2d at 161-62.

211. *Id.* at 475, 662 S.E.2d at 162.

212. *Id.* at 478, 662 S.E.2d at 164.

213. *Id.* at 475-76, 662 S.E.2d at 162.

214. *Id.* at 478, 662 S.E.2d at 163-64.

215. *Id.* at 477, 662 S.E.2d at 163.

216. GA. RULE OF PROF'L CONDUCT 1.8(a) (2008).

217. *Id.*

nevertheless voidable at the option of the client.”²¹⁸ This language implies that a client has the option to void a business transaction with the lawyer even if the terms are fair and presumably even if the procedural protections of Rule 1.8(a) are observed. That result would contradict Rule 1.8(a). The authorities cited by the court in *Harris* in support of the result either are not Georgia authorities or are cases that could be construed to be ones in which the lawyers defrauded clients or at least gave inadequate consideration. The court in *Harris* decided an ethics issue that it did not need to decide, and in doing so it may have raised a question about the enforceability of transactions between lawyers and clients and created a potential conflict with Rule 1.8(a).

VI. MISCELLANEOUS CASES

The appellate courts dealt with several miscellaneous issues regarding attorneys and judges during the survey period. These issues included one case each regarding attorney fees, the cost of copying client files, an attorney lien, and ex parte communications.

In *Amstead v. McFarland*,²¹⁹ the Georgia Court of Appeals dealt with an issue regarding attorney fees. In an earlier decision in the case, the court of appeals had held that Amstead was not liable to her former lawyer for the contingent fee to which she had originally agreed. Because she had terminated the lawyer before the contingency occurred, the lawyer’s recovery was limited to a quantum meruit recovery. On remand, McFarland contended that the reasonable value of his services was \$81,000, or one-third of Amstead’s share in the settlement. However, that amount obviously included compensation for services rendered after Amstead was no longer his client, and the court of appeals had already held that he could recover only the reasonable value of his services for the time period in which she was a client. The trial court rejected the lawyer’s arguments and awarded just under \$31,000.²²⁰ The court of appeals affirmed that award.²²¹

In *Adams v. Putnam County*,²²² the court examined the question of who should pay to copy client files when the attorney-client relationship ends. The court of appeals had previously held that under Georgia law, a client is presumptively entitled to the client’s files absent good cause

218. *Id.* at 477, 662 S.E.2d at 163 (second alteration in original) (quoting *Stubinger v. Frey*, 116 Ga. 396, 400, 42 S.E. 713, 714 (1902)).

219. 287 Ga. App. 135, 650 S.E.2d 737 (2007).

220. *Id.* at 136-37, 650 S.E.2d at 740.

221. *Id.* at 137-38, 650 S.E.2d at 740-41.

222. 290 Ga. App. 20, 658 S.E.2d 805 (2008).

for the attorney to retain some of them.²²³ The court had also held that the attorney must bear the expense of copying any files that the attorney wishes to retain unless there is a prior agreement that the client will bear that expense.²²⁴ The trial court found that there was no such agreement and ordered the attorney to pay for her own copies.²²⁵ The court of appeals affirmed.²²⁶ The client had agreed to pay for copies made by the attorney during the representation but there was no agreement about who would pay for the copies in the event of the termination of the attorney-client relationship.²²⁷ The lawyer, therefore, had to pay for her copies.²²⁸

In *Ruth v. Herrmann*,²²⁹ the issue was the validity of an attorney's lien in a divorce case. The husband's attorney had withdrawn representation and filed a lien against the marital property. The wife sought to remove the lien on the marital residence because the residence had been awarded to her. The court that handled the divorce action denied her motion, finding that the lien was properly filed and that the wife had received notice. The wife did not appeal that ruling but instead brought a separate action to attack it collaterally. The second court held that she was bound by collateral estoppel to the result in the first court.²³⁰ The court of appeals affirmed.²³¹ First, the court held that there was identity of parties in both the divorce action and the second action because the attorney was in privity with the husband for purposes of the lien in the divorce action.²³² Second, the court held that the divorce court's implicit ruling that the lien was valid was, in any event, correct because the lien was filed before the couple settled their divorce case and the wife had prior notice of the lien.²³³

Finally, the Georgia Supreme Court issued one opinion with some free advice for the lawyers and judge involved. In *Brooks v. Brown*,²³⁴ the court dismissed an appeal as moot but noted that the trial court had found ex parte communications with one side's counsel and issued an

223. Putnam County v. Adams, 282 Ga. App. 226, 228, 638 S.E.2d 404, 406 (2006).

224. *Id.*

225. *Adams*, 290 Ga. App. at 21, 658 S.E.2d at 806.

226. *Id.*, 658 S.E.2d at 807.

227. *Id.*

228. *Id.*

229. 291 Ga. App. 399, 662 S.E.2d 726 (2008).

230. *Id.* at 399-400, 662 S.E.2d at 727-28.

231. *Id.* at 402, 662 S.E.2d at 729.

232. *Id.* at 401, 662 S.E.2d at 729.

233. *Id.* at 401-02, 662 S.E.2d at 729.

234. 282 Ga. 154, 646 S.E.2d 265 (2007).

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order based upon those communications.²³⁵ The court admonished counsel and the trial court for these actions.²³⁶

VII. CONCLUSION

The Georgia appellate courts decided numerous matters during the survey year regarding the professional responsibilities of lawyers. Lawyers must look to such cases, and the rules and doctrines interpreted in them, for guidance as they seek to fulfill those responsibilities. The purpose of this Article has been to provide an updated resource for them as they do so.

235. *Id.* at 155, 646 S.E.2d at 267.

236. *Id.*