

Legal Ethics

by Patrick Emery Longan*

I. INTRODUCTION

This Article surveys legal ethics decisions of the Georgia appellate courts for a period from June 1, 2008 to May 31, 2009.¹ The cases concern discipline of lawyers, ineffective assistance of counsel, judicial conduct, contempt, attorney fees, suits against lawyers, and a few miscellaneous matters.

II. DISCIPLINARY ACTIONS

A. *Diligence and Communication*

During the survey period, the justices of the Georgia Supreme Court agreed upon the discipline of twelve lawyers who failed to act diligently for, or effectively communicate with, one or more clients. Ten lawyers were unanimously disbarred or voluntarily surrendered their licenses as a result primarily or exclusively of client abandonment.² Two lawyers

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1. For analysis of Georgia legal ethics law during the prior survey period, see Patrick Emery Longan, *Legal Ethics, Annual Survey of Georgia Law*, 60 MERCER L. REV. 237 (2008).

2. *In re Hayes*, 285 Ga. 400, 677 S.E.2d 132 (2009) (abandoned two clients in one personal injury case); *In re Hanes*, 285 Ga. 293, 676 S.E.2d 167 (2009) (abandoned client and practiced law while suspended, with one instance of prior discipline); *In re Deckle*, 285 Ga. 47, 673 S.E.2d 234 (2009) (abandoned two cases); *In re Shinall*, 285 Ga. 31, 673 S.E.2d 233 (2009) (abandoned one case); *In re Clark*, 284 Ga. 857, 672 S.E.2d 663 (2009) (abandoned four matters); *In re Elkins*, 284 Ga. 869, 672 S.E.2d 662 (2009) (abandoned one matter and had five prior disciplinary infractions); *In re Frazier*, 284 Ga. 443, 667 S.E.2d 615 (2008) (voluntary surrender of license and one case of client abandonment); *In re Levy*, 284 Ga. 281, 664 S.E.2d 195 (2008) (abandoned four matters).

received suspensions, without dissent. Michael Anthony Edmunds admitted to multiple violations of the Georgia Rules of Professional Conduct—namely Rule 1.4's³ requirement of communication with clients—although it did not appear that he totally abandoned any clients.⁴ The court noted that it appeared the lawyer did not harm his clients and that his problems arose from his divorce, alcoholism, and depression.⁵ Edmunds received a three-year suspension with conditions on reinstatement.⁶ Stephen Lee Stincer received a public reprimand and a one-month suspension for lack of diligence and misrepresentation to the court in a federal case.⁷ The court noted in mitigation that at the time of his infractions, Stincer was under intense stress and suffered from extreme anxiety and panic attacks for which he sought and received treatment.⁸

The supreme court could not reach unanimity on the appropriate discipline for two lawyers who violated their duties of diligence and communication. Russell William Pope essentially abandoned a client in a child custody case and failed for over a year to prepare a consent order to document an agreement in another custody dispute.⁹ In a third matter, Pope undertook to represent two clients in a personal injury matter but let the statute of limitations expire.¹⁰ A majority of the court voted to accept his petition for voluntary discipline of a six-month suspension and noted that during the relevant time period Pope was having significant marital difficulties.¹¹ Chief Justice Sears and Presiding Justice Hunstein would have disbarred Pope under these circumstances.¹² In the other case, attorney Christine M. Livingston received a one-year suspension for abandoning a real estate matter in which she represented the mortgage company.¹³ Livingston never responded to the notice of discipline and thus admitted the allegations against her.¹⁴ A majority of the court, without elaboration, held that

3. GA. RULES OF PROF'L CONDUCT R. 1.4 (2001).

4. *In re Edmunds*, 284 Ga. 97, 98, 663 S.E.2d 182, 183 (2008). Edmunds also admitted to one violation of Rule 1.15(II), GA. RULES PROF'L CONDUCT R. 1.15(II) (2001), for holding the funds of a corporation in which he held an interest in his trust account. *In re Edmunds*, 284 Ga. at 99, 663 S.E.2d at 184.

5. *In re Edmunds*, 284 Ga. at 99, 663 S.E.2d at 184.

6. *Id.*

7. *In re Stincer*, 284 Ga. 451, 451–52, 668 S.E.2d 257, 257–58 (2008).

8. *Id.* at 451, 668 S.E.2d at 258.

9. *In re Pope*, 284 Ga. 156, 156, 663 S.E.2d 695, 695–96 (2008).

10. *Id.* at 156–57, 663 S.E.2d at 696.

11. *Id.* at 157, 663 S.E.2d at 696.

12. *Id.* (Hunstein, P.J., dissenting).

13. *In re Livingston*, 285 Ga. 173, 174, 674 S.E.2d 878, 879 (2009).

14. *Id.*

a one-year suspension was the appropriate punishment.¹⁵ Chief Justice Sears, Presiding Justice Hunstein, and Justice Thompson dissented on the basis that the court should have disbarred Livingston under these circumstances.¹⁶

B. *Financial Improprieties*

During the survey period, the supreme court unanimously disbarred five lawyers for financial improprieties.¹⁷ The court's unanimity held for two such cases that resulted in suspension rather than disbarment. In one of these cases, the attorney took most of \$45,000 in client funds and converted them for his own use.¹⁸ The attorney notified his client and repaid the money, and the client continued to use the lawyer's services.¹⁹ Under those circumstances, and because the attorney had no prior disciplinary history and was acting as a result of personal problems "of a non-recurring nature," the court concluded that a six-month suspension was sufficient.²⁰ In the other case, the attorney issued title insurance premiums after he terminated his relationship with the insurer but kept the insurance forms and collected premiums.²¹ The attorney failed to account for the funds, withdrew them from his trust account, and commingled personal funds with money in his trust account.²² The supreme court noted the attorney's cooperation, remorse, and lack of prior discipline, and the court accepted a petition for voluntary discipline of a one-year suspension, with numerous

15. *Id.*

16. *Id.* (Sears, C.J., dissenting).

17. *In re Harris*, 285 Ga. 412, 677 S.E.2d 131 (2009) (unexplained overdraft of \$32,692.64 on trust account); *In re Winningham*, 285 Ga. 175, 674 S.E.2d 877 (2009) (converted \$2000 of client money and commingled \$28,000 of client funds with personal funds); *In re Landers*, 285 Ga. 29, 673 S.E.2d 232 (2009) (received funds in a fiduciary capacity in five real estate closings but did not notify third parties of his receipt of funds in which they held interests, did not forward the funds to the appropriate parties, did not maintain complete records regarding the funds, and did not maintain the funds separate from his own); *In re Richards*, 284 Ga. 154, 663 S.E.2d 708 (2008) (converted \$8000 of client money to his own use in one case and in another case did not account for settlement funds, deducted more than the agreed-upon fee, and gave his client checks that were repeatedly rejected for insufficient funds); *In re Silvis*, 283 Ga. 587, 663 S.E.2d 141 (2008) (failed to turn over \$28,000 and records of bankruptcy estate despite court order).

18. *In re Taylor*, 284 Ga. 867, 867, 672 S.E.2d 653, 653-54 (2009).

19. *Id.* at 868-69, 672 S.E.2d at 654.

20. *Id.* at 868, 672 S.E.2d at 654.

21. *In re Harste*, 285 Ga. 80, 80, 673 S.E.2d 235, 236 (2009).

22. *Id.*

conditions designed to ensure that the title insurance company received what it was entitled to receive.²³

Three cases involving financial improprieties provoked dissents. Before he was admitted to the bar, Lester Christopher Solomon undertook to manage the financial affairs of a disabled man.²⁴ Solomon took title to his ward's real property, secured a mortgage on it, and paid the mortgage and a monthly stipend to himself out of the ward's annuity income.²⁵ When Solomon became a member of the bar, he violated Rule 1.15(II)²⁶ when he did not separate his own funds from the funds of his ward.²⁷ The supreme court suspended Solomon from the practice of law for six months,²⁸ but Presiding Justice Hunstein and Justices Melton and Thompson dissented on the ground that the suspension was insufficient.²⁹ Justice Melton wrote the opinion and noted that Solomon had an attorney-client relationship with the ward, yet sought to evict the ward from his real property when a dispute between the two arose.³⁰ The three dissenting justices did not state what punishment they would have found appropriate.³¹

Gary Dale Simpson received a four-year suspension as a result of three formal complaints against him.³² One complaint surfaced when Simpson's trust account came up short by \$300,000, and his records were incomplete. He addressed the bank's concerns by beginning to repay the bank and by cooperating with its requests for information. A second complaint involved three checks on Simpson's trust account, totaling about \$3000, which were returned for insufficient funds. Simpson reimbursed the parties for those checks. The third complaint resulted from Simpson's failure, in a real estate transaction, to obtain title insurance or file the warranty deeds. He eventually filed the deeds and refunded the money that was supposed to be used for the insurance.³³ The supreme court noted that Simpson had presented evidence that he suffered from adult attention deficit disorder and executive dysfunction and that this mental impairment, rather than any intent to violate the

23. *Id.* at 81, 673 S.E.2d at 236.

24. *In re Solomon*, 284 Ga. 855, 856, 672 S.E.2d 662, 663 (2009).

25. *Id.*

26. GA. RULES OF PROF'L CONDUCT R. 1.15(II) (2001).

27. *In re Solomon*, 284 Ga. at 856, 672 S.E.2d at 663.

28. *Id.*

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

30. *Id.* at 857, 672 S.E.2d at 663.

31. *See id.* at 856-57, 672 S.E.2d at 663.

32. *In re Simpson*, 284 Ga. 446, 447, 668 S.E.2d 243, 244 (2008).

33. *Id.*

rules, was the underlying cause of the problems.³⁴ The court suspended Simpson for four years and imposed conditions upon his reinstatement.³⁵ Those conditions included proof that he is no longer impaired and proof of continued restitution to the bank.³⁶ Presiding Justice Hunstein dissented.³⁷ She would have disbarred Simpson because to do otherwise was “detrimental to the public and to the legal profession.”³⁸

Jennifer Nicole Favors represented a personal injury client and deposited the settlement funds into her escrow account.³⁹ She used some of the money for her own benefit and lied to her client about how the funds had been used. She then lied to the Office of General Counsel and the Investigative Panel about what happened and submitted to them a falsified bank statement. Favors eventually admitted the truth.⁴⁰ A majority of the supreme court noted that she had shown remorse, had no prior disciplinary history, and may have acted as a result of personal and emotional factors for which she was seeking counseling.⁴¹ The majority accepted a petition for voluntary discipline and suspended Favors for three years.⁴² Chief Justice Sears, Presiding Justice Hunstein, and Justice Melton would have disbarred the attorney.⁴³

C. Criminal Convictions

The supreme court disbarred four lawyers as a result of felony convictions and suspended one lawyer following a misdemeanor. Louis Dante DiTrapano was disbarred, as a matter of reciprocity, after the West Virginia Supreme Court of Appeals disbarred him for pleading guilty to the felonies of possessing firearms while being addicted to and unlawfully using controlled substances.⁴⁴ The Georgia Supreme Court disbarred R. Scott Cunningham after he used his escrow account to help a former client launder money; he was convicted of three federal felonies.⁴⁵ Ulysses Thomas Ware was sentenced in federal court to

34. *Id.*

35. *Id.* at 447–48, 668 S.E.2d at 244.

36. *Id.*

37. *Id.* at 448, 668 S.E.2d at 244 (Hunstein, P.J., dissenting).

38. *Id.*

39. *In re Favors*, 283 Ga. 588, 589, 662 S.E.2d 119, 119–20 (2008).

40. *Id.*, 662 S.E.2d at 120.

41. *Id.*

42. *Id.* at 588–89, 662 S.E.2d at 119–20.

43. *Id.* at 590, 662 S.E.2d at 120 (Hunstein, P.J., dissenting).

44. *In re DiTrapano*, 284 Ga. 628, 629, 670 S.E.2d 68, 68 (2008).

45. *In re Cunningham*, 284 Ga. 449, 669 S.E.2d 93, 93–94 (2008).

ninety-seven months in prison for securities fraud and for conspiracy to commit securities fraud, and the supreme court disbarred him.⁴⁶ The supreme court accepted the voluntary surrender of James F. Stovall's license after he pled guilty to two federal felonies.⁴⁷ Anthony Brett Williams received more lenient treatment after his misdemeanor conviction for assisting his former boss, a district attorney, in a scheme to obtain county money wrongfully.⁴⁸ The supreme court suspended Williams for six months and noted that he had no prior disciplinary history, had pled guilty under the First Offender Act,⁴⁹ and was remorseful and cooperative.⁵⁰

D. *Violations of Duties to Tribunals*

During the survey period, four attorneys received discipline primarily as a result of violations of their duties to tribunals. The supreme court accepted the petition for voluntary discipline of Neil Lovett Wilkinson in which he admitted that he negligently made or caused to be made false statements to the Superior Court of Cobb County and the Georgia Court of Appeals and that he negligently failed to correct those statements.⁵¹ The supreme court ordered a public reprimand and a one-month suspension.⁵² The court also accepted a petition for voluntary discipline in the case of John Alfred Roberts, who admitted that he filed a "Notice of Suggestion of Bankruptcy" in a civil case two months before he actually filed the bankruptcy petition.⁵³ The court accepted that Roberts acted negligently rather than purposefully in violating Georgia Rule of Professional Conduct 8.4(a)(4)⁵⁴ and suspended him for six months for the violation.⁵⁵ In another case, the court ordered a review panel reprimand for an attorney who continued to defend a client in a civil case when there was no defense.⁵⁶ The attorney violated Georgia

46. *In re Ware*, 284 Ga. 444, 445, 667 S.E.2d 616, 616 (2008).

47. *In re Stovall*, 285 Ga. 48, 48, 673 S.E.2d 234, 234 (2009).

48. *In re Williams*, 284 Ga. 96, 96, 663 S.E.2d 181, 182 (2008).

49. O.C.G.A. §§ 42-8-60 to -66 (1997 & Supp. 2009).

50. *In re Williams*, 284 Ga. at 97, 663 S.E.2d at 182.

51. *In re Wilkinson*, 284 Ga. 548, 548-49, 668 S.E.2d 707, 708 (2008).

52. *Id.* at 549, 668 S.E.2d at 708.

53. *In re Roberts*, 284 Ga. 445, 445-46, 668 S.E.2d 256, 256-57 (2008).

54. GA. RULES OF PROF'L CONDUCT R. 8.4(a)(4) (2001).

55. *In re Roberts*, 284 Ga. at 445-46, 668 S.E.2d at 256-57. Rule 8.4(a)(4) provides that it is misconduct for any lawyer to "engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation." GA. RULES OF PROF'L CONDUCT R. 8.4(a)(4).

56. *In re Sims*, No. S08Y1784, at 1 (Ga. Oct. 6, 2008), available at http://www.gabar.org/public/pdf/PublicDiscipline/S08Y1784sims_RPR.pdf.

Rule of Professional Conduct 3.1(a),⁵⁷ which forbids a lawyer from knowingly advancing a defense that would serve merely to harass or maliciously injure another,⁵⁸ and Georgia Rule of Professional Conduct 1.16(a)(1),⁵⁹ which requires a lawyer to withdraw when continuing the representation will result in the violation of the Georgia Rules of Professional Conduct.⁶⁰ Finally, the supreme court disbarred an attorney who advised two clients to perjure themselves in immigration proceedings and submitted false statements, forged signatures, and false death certificates in connection with the clients' applications for asylum.⁶¹

E. Conflicts of Interest

The supreme court disciplined two lawyers for conflicts of interest. The court accepted a petition for voluntary discipline and suspended an attorney for three years for actions that the petition and the court treated as violations of Georgia Rule of Professional Conduct 1.7(a),⁶² the rule on concurrent conflicts of interest.⁶³ The attorney took a seventeen-year-old client to a motel and photographed her while she was wearing only a towel.⁶⁴ In accepting the petition and ordering the suspension, the court noted that the attorney had no prior disciplinary history, had achieved a favorable outcome for the client, had not sought payment for his services, had not sought or had any additional contact with the client, had been cooperative, and had agreed to pay for counseling for the client if she needed it.⁶⁵

The court accepted a petition for voluntary discipline and reprimanded an attorney who violated Georgia Rule of Professional Conduct 1.11,⁶⁶ which deals with conflicts of interest of government lawyers who enter private practice.⁶⁷ The attorney had helped to prosecute a defendant

57. GA. RULES OF PROF'L CONDUCT R. 3.1(a) (2001).

58. *Id.*

59. GA. RULES OF PROF'L CONDUCT R. 1.16(a)(1) (2001).

60. *Id.*; *In re Sims*, No. S08Y1784, at 1.

61. *In re Harrison*, 284 Ga. 442, 442–43, 668 S.E.2d 254, 255 (2008).

62. GA. RULES OF PROF'L CONDUCT R. 1.7(a) (2001).

63. *Id.*; *In re McCalep*, 283 Ga. 586, 586–87, 662 S.E.2d 120, 121 (2008). Rule 1.7(a) states in relevant part that an attorney “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. RULES OF PROF'L CONDUCT R. 1.7(a).

64. *In re McCalep*, 283 Ga. at 586, 662 S.E.2d at 121.

65. *Id.* at 586–87, 662 S.E.2d at 121.

66. GA. RULES OF PROF'L CONDUCT R. 1.11 (2001).

67. *Id.*; *In re Joshi*, No. S09Y0429, at 1 (Ga. Feb. 23, 2009), available at http://www.gabar.org/public/pdf/PublicDiscipline/S09Y0429Joshi_PR.pdf. Rule 1.11 states, in relevant part, that “a lawyer shall not represent a private client in connection with a matter in

and then, when he entered private practice, spoke with the defendant's family about representing the defendant on appeal.⁶⁸ The court did not address the propriety of discipline in connection with the attorney's statements to the family that certain witnesses at the defendant's criminal trial had testified falsely.⁶⁹

F. Other Cases

The supreme court took significant disciplinary action in several other cases during the survey period. The court disbarred one attorney for practicing law in Colorado without a license.⁷⁰ The court disbarred another attorney, as a matter of reciprocity, after Pennsylvania disbarred him for violating his firm's partnership agreement when he failed to report and remit fees.⁷¹ In another case, the court accepted a voluntary petition for discipline and ordered a public reprimand, attendance at the Bar's ethics school, and quarterly assessments of the attorney's intake procedures.⁷² The attorney failed to supervise a paralegal who met clients at a chiropractor's office and who had the clients sign a contingent fee agreement, and the attorney took action on the clients' behalf without ever speaking to them.⁷³ Another attorney received a public reprimand for failing to ensure that only lawyers conducted the Georgia real estate closings under her supervision.⁷⁴ A small percentage of the thousands of closings that her practice conducted did not include lawyers.⁷⁵ Finally, the supreme court rejected a petition for reinstatement from a lawyer who had been suspended with conditions because the attorney failed to satisfy those conditions by failing to provide a waiver to allow her psychiatrist to provide informa-

which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government entity consents after consultation." GA. RULES OF PROF'L CONDUCT R. 1.11.

68. *In re Joshi*, No. S09Y0429, at 1.

69. *Id.* If this statement to the family was true, and the attorney knew the witnesses were testifying falsely, then the attorney would have violated Georgia Rule of Professional Conduct 3.3(a)(4). See GA. RULES OF PROF'L CONDUCT R. 3.3(a)(4) (2001). If the statement to the family was false, and the lawyer knew it was false, then he violated Rule 8.4(a)(4). See GA. RULES OF PROF'L CONDUCT R. 8.4(a)(4).

70. *In re Campbell*, 284 Ga. 441, 441-42, 668 S.E.2d 253, 254 (2008).

71. *In re Bramhall*, 284 Ga. 448, 448, 667 S.E.2d 616, 616-17 (2008).

72. *In re Stuhler*, No. S08Y1349, at 1-2 (Ga. Mar. 9, 2009), available at http://www.gabar.org/public/pdf/PublicDiscipline/S08Y1349stuhler_PR.pdf.

73. *Id.* at 1.

74. *In re Dewrell*, No. S09Y0143, at 1 (Ga. Jan. 26, 2009), available at http://www.gabar.org/public/pdf/PublicDiscipline/S09Y0143Dewrell_PR.pdf.

75. *Id.*

tion to the Bar and prove that she had continued treatment with a board-certified psychiatrist during her suspension.⁷⁶

III. INEFFECTIVE ASSISTANCE OF COUNSEL

The Georgia Supreme Court and the Georgia Court of Appeals decided dozens of cases during the survey period in which there were claims of ineffective assistance of counsel. The courts routinely rejected most of these claims. In the following cases, however, the appellate courts rendered decisions that are noteworthy.

A. Georgia Supreme Court

1. The Proper Standard for Ineffectiveness Claims. In *Miller v. State*,⁷⁷ the supreme court clarified the standard to be applied to claims of ineffective assistance of counsel.⁷⁸ The standard has two prongs.⁷⁹ First, the defendant must show some way in which the counsel's representation was deficient.⁸⁰ Representation is deficient if it falls below an objective standard of reasonableness.⁸¹ The second prong requires the defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."⁸²

In *Miller* the supreme court had to make the startling confession that the appellate courts in Georgia had applied the wrong standard to the second prong in numerous cases.⁸³ In these cases from the court of appeals and the supreme court, the courts applied a stricter test in which the defendant had to make a showing that, but for the deficiencies of counsel, the outcome of the case *would have been different* rather than a showing of a *reasonable probability* that the outcome would have been different.⁸⁴ The supreme court expressly disapproved of these cases.⁸⁵ Because the court of appeals had applied this inappropriately strict

76. *In re Lenn*, 284 Ga. 671, 671–72, 670 S.E.2d 441, 441 (2008).

77. 285 Ga. 285, 676 S.E.2d 173 (2009).

78. *See id.* at 285, 676 S.E.2d at 174.

79. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984)).

80. *Id.* (citing *Strickland*, 466 U.S. at 687).

81. *See, e.g.*, *Rayshad v. State*, 295 Ga. App. 29, 36, 670 S.E.2d 849, 855 (2008) ("The test for reasonable attorney performance is whether a reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.")

82. *Miller*, 285 Ga. at 286, 676 S.E.2d at 174 (quoting *Strickland*, 466 U.S. at 694).

83. *Id.*

84. *Id.*

85. *Id.* at 287, 676 S.E.2d at 175.

standard in *Miller*, the supreme court remanded the case for reconsideration under the correct standard.⁸⁶

2. Death Penalty Cases. In two cases, the supreme court reinstated the death penalty after habeas courts found that the defendant received ineffective assistance of counsel. In *Hall v. Brannan*,⁸⁷ the defendant had been convicted and sentenced to death for murdering a Laurens County deputy sheriff after a traffic stop.⁸⁸ Because there was no question that the defendant shot and killed the officer, much of the testimony at trial concerned the defendant's history of mental illness.⁸⁹ The habeas court found numerous instances of ineffective assistance of counsel, most of which related to mental health evidence.⁹⁰ With respect to each of the findings of the trial court, the supreme court disagreed with the habeas court and held unanimously, as a matter of law, that either trial counsel had not been deficient, that any alleged deficiency had not prejudiced the defense, or that neither prong of the test for ineffective assistance had been satisfied.⁹¹

In *Schofield v. Cook*,⁹² the defendant had been convicted of the murders of two Mercer University students in 1995 and had been sentenced to death. The habeas court concluded that trial counsel was ineffective in failing to investigate and present evidence of the defendant's mental health, in failing to investigate the defendant's background sufficiently, in failing to prepare the defendant's father adequately to testify, and in failing to subpoena a witness in the sentencing phase of the trial.⁹³ The supreme court reversed the habeas court on all counts and reinstated the death penalty.⁹⁴

In contrast, the supreme court upheld a habeas court's finding that the defendant had received ineffective assistance of counsel at the sentencing phase of another death penalty case, *Hall v. McPherson*.⁹⁵ The trial court convicted the defendant of malice murder and sentenced him to death. The habeas court vacated the death sentence because of trial counsel's failure to adequately investigate and present evidence regarding the defendant's history of childhood abuse and neglect and of

86. *Id.*

87. 284 Ga. 716, 670 S.E.2d 87 (2008).

88. *Id.* at 716–17, 670 S.E.2d at 91.

89. *See id.* at 718–21, 670 S.E.2d at 92–93.

90. *Id.* at 721–25, 670 S.E.2d at 93–96.

91. *Id.*

92. 284 Ga. 240, 663 S.E.2d 221 (2008).

93. *Id.* at 240–50, 663 S.E.2d at 224–30.

94. *Id.* at 241–51, 663 S.E.2d at 224–30.

95. 284 Ga. 219, 235, 663 S.E.2d 659, 670 (2008).

the defendant's history of drug addiction and depression.⁹⁶ The evidence at the habeas hearing showed that the defendant was abused by his mother in numerous outrageous ways. Trial counsel, however, relied primarily on the mother for information about the defendant's upbringing and failed to hire a mitigation investigator or to follow obvious leads that would have led to the truth about the history of abuse.⁹⁷ Furthermore, the supreme court agreed with the habeas court that trial counsel was deficient in not seeking the defendant's medical records from several facilities where he had sought treatment for his drug addiction and mental illness.⁹⁸ Among other things, this evidence would have tended to show that, because of the defendant's genetic predisposition to addiction and his early childhood traumas, the defendant had no choice about whether to develop the addictions from which he suffered at the time of the murder.⁹⁹ The supreme court concluded "as a matter of law that there was a reasonable probability that, were it not for trial counsel's deficient performance in investigating and presenting mitigating evidence, at least one juror would have been persuaded to vote for a life or life without parole sentence."¹⁰⁰ Justice Carley dissented without opinion.¹⁰¹

3. Guilty Pleas. The supreme court decided two cases in which defendants claimed to have received ineffective assistance of counsel in connection with their guilty pleas. In *Cleveland v. State*,¹⁰² the defendant was convicted of possession of methamphetamine with intent to distribute (among other crimes) and was sentenced to twenty years in prison, with ten years to serve. He rejected a plea offer that would have resulted only in probation and a fine. When he rejected the plea, the defendant did not know that the prosecution intended to use particularly damning evidence that was collected at his home. The defendant did not know this because his trial counsel had not taken the time to review the prosecution's file under the prosecutor's "open file" policy.¹⁰³ The supreme court held that the defendant had not shown prejudice from his counsel's deficiency because there was no evidence from which the court could infer that he would have pleaded guilty if he had known about the

96. *Id.* at 219–20, 663 S.E.2d at 660.

97. *Id.* at 222–23, 663 S.E.2d at 661–62.

98. *Id.* at 232–33, 663 S.E.2d at 668.

99. *Id.* at 230–31, 663 S.E.2d at 667.

100. *Id.* at 234, 663 S.E.2d at 669.

101. *Id.* at 235, 663 S.E.2d at 669.

102. 285 Ga. 142, 674 S.E.2d 289 (2009).

103. *Id.* at 142–44, 674 S.E.2d at 290.

evidence.¹⁰⁴ The defendant testified that he would have pleaded guilty had he known, but the supreme court characterized that testimony as self-serving and not credible in light of the defendant's persistent insistence that he was not guilty.¹⁰⁵

Presiding Justice Hunstein filed a vigorous dissent and noted both the defendant's need for professional assistance in evaluating a plea offer and the overwhelming evidence of guilt that police had gathered at the defendant's home.¹⁰⁶ Presiding Justice Hunstein concluded that no competent attorney would have advised a client in these circumstances to reject probation and a fine in exchange for a guilty plea, and accordingly Presiding Justice Hunstein concluded that the defendant received ineffective assistance of counsel.¹⁰⁷

The supreme court reached the opposite result in *Garrett v. State*.¹⁰⁸ In that case, the only evidence before the habeas court about the guilty plea was the defendant's affidavit, in which he stated that he pleaded guilty to possession of crack cocaine with intent to distribute only because his trial counsel told him, erroneously, that he could be convicted simply because the drugs were in his car.¹⁰⁹ Because there was no evidence to the contrary, the supreme court reversed the decision of the habeas court and granted habeas relief.¹¹⁰

4. Other Cases. The supreme court decided three other noteworthy cases involving ineffective assistance of counsel. In *Bass v. State*,¹¹¹ the defendant was convicted after a trial in which the county sheriff testified against him and then, with the express agreement of defense counsel, served as bailiff for the duration of the trial. As bailiff, the sheriff had a custodial relationship with the jury.¹¹² The supreme court reversed the court of appeals and concluded that the trial counsel's failure to object was deficient performance and resulted in prejudice to the defendant because the evidence was close and the sheriff's credibility was important to the prosecution.¹¹³ Justice Carley dissented.¹¹⁴

104. *Id.* at 147–48, 674 S.E.2d at 292–93.

105. *Id.*

106. *Id.* at 152–54, 674 S.E.2d at 296–97 (Hunstein, P.J., dissenting).

107. *Id.* at 154–55, 674 S.E.2d at 297–98.

108. 284 Ga. 31, 663 S.E.2d 153 (2008).

109. *Id.* at 31–32, 663 S.E.2d at 154.

110. *Id.* at 32–33, 663 S.E.2d at 155.

111. 285 Ga. 89, 674 S.E.2d 255 (2009).

112. *Id.* at 89–92, 674 S.E.2d at 255–57.

113. *Id.* at 93, 674 S.E.2d at 258.

114. *Id.* at 94, 674 S.E.2d at 258 (Carley, J., dissenting).

In *Reynolds v. State*,¹¹⁵ the supreme court reversed the court of appeals and remanded the case for reconsideration.¹¹⁶ The defendant was convicted of aggravated battery in a trial in which the prosecutor commented during closing argument on the defendant's failure to explain his version of events to the police. The defendant's trial counsel failed to object to this comment on the defendant's silence, and the court of appeals concluded that a failure to do so was not deficient performance because the prosecutor's comment under the circumstances was proper.¹¹⁷ The supreme court disagreed and overruled the cases upon which the lower court had relied.¹¹⁸ The supreme court remanded, presumably for consideration of the prejudice prong of the test for ineffectiveness.¹¹⁹

In another case involving a prosecutor's comment on the defendant's silence prior to arrest, the supreme court held that the trial counsel's failure to object was deficient performance, but that it did not prejudice the defense in light of the weight of the evidence against the defendant.¹²⁰ In an odd concurrence, Justice Melton noted that, in his opinion, the evidence against the defendant was of "questionable strength."¹²¹ Justice Melton expressed his "concern that harmless error has become an escape route for any error created by the State's inappropriate comments on a defendant's pre-arrest silence, regardless of the proportional strength of the evidence presented of a defendant's guilt."¹²² Despite that concern, and despite his view of the weakness of the evidence, Justice Melton concurred in the judgment.¹²³

B. Georgia Court of Appeals

1. Failures to Object. The court of appeals decided three cases during the survey period that involved ineffective assistance of counsel and the failure of trial counsel to object. In *Walker v. State*,¹²⁴ the defendant was convicted of molesting three children. His conviction as to one of the victims rested solely on the testimony of that victim.¹²⁵

115. 285 Ga. 70, 673 S.E.2d 854 (2009).

116. *Id.* at 72, 673 S.E.2d at 855.

117. *Id.* at 70–71, 673 S.E.2d at 854–55.

118. *Id.* at 72, 673 S.E.2d at 855.

119. *Id.*

120. *Lampley v. State*, 284 Ga. 37, 38–39, 663 S.E.2d 184, 186–87 (2008).

121. *Id.* at 42, 663 S.E.2d at 188 (Melton, J., concurring).

122. *Id.* at 41, 663 S.E.2d at 188.

123. *Id.* at 42, 663 S.E.2d at 188.

124. 296 Ga. App. 531, 675 S.E.2d 270 (2009).

125. *Id.* at 531–32, 535, 675 S.E.2d at 271, 273.

During trial, the victim's aunt testified that her reaction when the victim told her about the molestation was, "I'm like now this child is telling me the truth."¹²⁶ The court of appeals held that trial counsel was deficient for not objecting to this opinion as to the truthfulness of the victim.¹²⁷ Given that the victim's testimony was the only admissible evidence as to that part of the conviction, the court found there was prejudice and overturned the conviction as to that victim, based upon the ineffectiveness of trial counsel.¹²⁸

In *Rayshad v. State*,¹²⁹ the defendant was convicted of armed robbery, aggravated assault, and kidnapping.¹³⁰ The defendant denied participating in the crimes,¹³¹ and the evidence against him was not overwhelming.¹³² The court of appeals held that the defendant's trial counsel made several significant errors during trial.¹³³ First, trial counsel allowed the defendant to be impeached with a guilty plea to an earlier crime that the defendant had entered under the First Offender Act.¹³⁴ Second, trial counsel did not object to the admission of out-of-court statements made by the defendant's alleged co-conspirators after the crimes had been committed.¹³⁵ Because of the timing of those statements, they were not admissible as statements of a co-conspirator and, therefore, were inadmissible hearsay.¹³⁶ Failing to object to these pieces of evidence was deficient performance.¹³⁷ Given the closeness of the evidence and the centrality of the defendant's credibility, the court of appeals held that the defendant had satisfied the prejudice prong as well, and the court reversed the convictions.¹³⁸

In *Cash v. State*,¹³⁹ the defendant was convicted of aggravated child molestation.¹⁴⁰ During trial, the father of the victim testified to what the victim told him had transpired between her and the defendant. The jury also heard a recording of an interview between the victim and an

126. *Id.* at 534, 675 S.E.2d at 273.

127. *Id.* at 535, 675 S.E.2d at 273.

128. *Id.*

129. 295 Ga. App. 29, 670 S.E.2d 849 (2008).

130. *Id.* at 29, 670 S.E.2d at 851.

131. *Id.* at 31, 670 S.E.2d at 852.

132. *Id.* at 39, 670 S.E.2d at 857.

133. *See id.*

134. O.C.G.A. §§ 42-8-60 to -66 (1997 & Supp. 2009); *Rayshad*, 295 Ga. App. at 36, 670 S.E.2d at 855.

135. *Rayshad*, 295 Ga. App. at 36, 670 S.E.2d at 855.

136. *Id.* at 37, 670 S.E.2d at 856.

137. *Id.* at 37-38, 670 S.E.2d at 856.

138. *Id.* at 40, 670 S.E.2d at 858.

139. 294 Ga. App. 741, 669 S.E.2d 731 (2008).

140. *Id.* at 741, 669 S.E.2d at 732.

investigator who worked for the sheriff's department. The defendant's trial counsel did not object to any of this hearsay testimony.¹⁴¹ The court of appeals held that this failure to object was deficient performance and, without explanation, concluded that the admission of these statements resulted in harm to the defendant.¹⁴² Presumably the harm flowed from the fact that the key evidence in the case came from the victim and the defendant, and each gave a different version of what happened between them.¹⁴³ The hearsay statements would have tended to bolster the victim's version of the events and thus harmed the defendant.¹⁴⁴

2. Failure to Inform. The court of appeals dealt with two cases during the survey period that concerned the failure of attorneys to inform their clients correctly. In *Nejad v. State*,¹⁴⁵ the defendant was convicted of rape, aggravated sodomy, and other crimes.¹⁴⁶ The defendant did not testify at trial. At the hearing on the motion for a new trial, the defendant testified that he told his trial counsel he wanted to testify, but his trial counsel did not tell him he had the right to do so.¹⁴⁷ In fact, his trial counsel confirmed this statement and added more details to how he treated his client's right to testify:

During the hearing on the motion for new trial, trial counsel unequivocally stated on several occasions that he told Nejad that he was not testifying; that he ordered Nejad to inform the court that he was not going to testify; that he told Nejad that he ruled with an iron fist and that Nejad would have to do as instructed; that Nejad's family asked about him testifying to explain the situation with the gun and he told them that Nejad was not testifying; and that he did not advise Nejad of his right to make the final decision about testifying at trial. Trial counsel testified that he was proud of his reputation, but that he wrongfully made the decision about whether Nejad would testify.¹⁴⁸

The court of appeals held that this was deficient performance.¹⁴⁹ The defendant testified at the hearing on the motion for new trial about how, if he had been allowed to testify, he could have explained or refuted the

141. *Id.* at 742–43, 669 S.E.2d at 732–33.

142. *Id.* at 746, 669 S.E.2d at 735.

143. *See id.*

144. *Id.*

145. 296 Ga. App. 163, 674 S.E.2d 60 (2009).

146. *Id.* at 163, 674 S.E.2d at 61.

147. *Id.* at 167, 674 S.E.2d at 64.

148. *Id.* at 165, 674 S.E.2d at 62.

149. *Id.* at 167, 674 S.E.2d at 64.

evidence against him.¹⁵⁰ The court held that the defendant suffered prejudice as a result of trial counsel's deficiencies.¹⁵¹

In *Fleming v. State*,¹⁵² the defendant pleaded guilty to aggravated assault even though the indictment was defective. The defendant did not file a timely appeal and then filed a motion for an out-of-time appeal, in which the defendant alleged ineffective assistance of counsel. The trial court initially denied the motion, but the court of appeals remanded the claim for a determination of the ineffectiveness claim. The trial court found counsel to have been ineffective because he did not advise the defendant of the defendant's right to appeal.¹⁵³ The court of appeals affirmed that result and then, on the merits, reversed the conviction because the indictment was defective.¹⁵⁴

IV. JUDICIAL CONDUCT

A. Georgia Supreme Court

The Georgia Supreme Court decided one significant case regarding judicial conduct during the survey period. In *Cousins v. Macedonia Baptist Church of Atlanta*,¹⁵⁵ the parties were litigating over control of the church and its assets. The trial judge held a hearing on an application for a temporary injunction, and counsel for the contesting parties told the judge that they were ready to present witnesses and documentary evidence. Rather than proceed in this fashion, however, the judge first informally solicited the unsworn preferences of the church members who attended the hearing about who should be in charge of the church. The judge then ordered a recess during which the judge or his staff made phone calls and obtained bank documents related to the dispute. The judge called one of the parties to the stand, cross-examined

150. *Id.* at 167–68, 674 S.E.2d at 64.

151. *Id.* at 167, 674 S.E.2d at 64. Presiding Judge Smith wrote a concurrence that bears mentioning. He noted that trial counsel had readily admitted to violating well-established law that entitled the defendant to decide whether or not to testify. *Id.* at 169, 674 S.E.2d at 65 (Smith, P.J., concurring). Judge Smith went on to suggest that counsel may have been unaware of that law or instead may have testified untruthfully to help his client with the claim of ineffective assistance of counsel. *Id.* The concurring opinion concludes, “The developing trend of emphatically and even eagerly testifying to one’s own incompetence or misconduct is dangerous to the administration of justice, particularly if it is allowed to continue without any consequences for the testifying trial counsel.” *Id.* at 170, 674 S.E.2d at 65.

152. 291 Ga. App. 787, 662 S.E.2d 861 (2008).

153. *Id.* at 787–88, 662 S.E.2d at 862–63.

154. *Id.*

155. 283 Ga. 570, 662 S.E.2d 533 (2008).

him using the documents the judge obtained from the bank, and then briefly called another witness. The judge then concluded the hearing without affording any of the parties an opportunity to present evidence or argument. The judge entered a permanent injunction and ordered the first witness jailed for twenty days for contempt because the judge determined that the witness was lying under oath.¹⁵⁶ The supreme court reversed all of these rulings.¹⁵⁷ The supreme court held that the judge's actions were "clearly improper" and reversed the rulings on the merits of the case because the judge denied the parties their rights to due process and access to the courts.¹⁵⁸ The supreme court described the judge's role as that of an advocate rather than an arbiter and criticized the ex parte communications in which the judge engaged.¹⁵⁹ As to the contempt citation, the court reversed the trial court because the witness was never given a chance to defend himself or his testimony and because the judge relied upon unsworn statements, unauthenticated documents, and other information gathered by the judge ex parte.¹⁶⁰

B. Georgia Court of Appeals

The court of appeals decided five cases during the survey period regarding judicial conduct. The court held that judges misbehaved in three of the cases. In *Wilson v. McNeely*,¹⁶¹ the court of appeals held that a superior court judge should have recused herself because one of the parties was a judge of a municipal court in one of the counties in the superior court judge's circuit.¹⁶² To preside over a case involving a judge in the same circuit created an appearance of impropriety that required recusal.¹⁶³

The court disapproved of the actions of another judge who committed reversible error in a sentencing hearing.¹⁶⁴ After the court of appeals reversed the trial judge, the judge reimposed the original sentence but he did so before the trial court had obtained jurisdiction.¹⁶⁵ Once the judge obtained jurisdiction, he threatened to increase the sentence if the defendant appealed again.¹⁶⁶ The court of appeals described this

156. *Id.* at 570–73, 662 S.E.2d at 534–36.

157. *Id.* at 574–75, 662 S.E.2d at 536–37.

158. *Id.* at 573–74, 662 S.E.2d at 536.

159. *Id.* at 574, 662 S.E.2d at 536.

160. *Id.* at 575, 662 S.E.2d at 537.

161. 295 Ga. App. 41, 670 S.E.2d 846 (2008).

162. *Id.* at 43, 670 S.E.2d at 847–48.

163. *Id.* at 42–43, 670 S.E.2d at 847–48.

164. *Schilanger v. State*, 297 Ga. App. 785, 678 S.E.2d 190 (2009).

165. *Id.* at 785–86, 678 S.E.2d at 191–92.

166. *Id.* at 787, 678 S.E.2d at 192.

action as “rank error.”¹⁶⁷ The court noted that resentencing cannot be conducted with vindictiveness, reversed the sentence again, and warned that it would view any increase in sentence “with suspicion.”¹⁶⁸

In *Gooch v. Tudor*,¹⁶⁹ a contractor secured from a magistrate an arrest warrant for a customer who disputed his bill. When the customer sued for malicious prosecution, the contractor claimed immunity because the magistrate found probable cause to issue the warrant.¹⁷⁰ The court of appeals rejected this argument and noted with disapproval that the magistrate did not act as a neutral party, but instead advised the contractor on how to proceed, conducted several ex parte meetings with the contractor about the matter, and helped the contractor collect payment in at least two other cases.¹⁷¹

The court of appeals found no error in two other cases. In one, a plaintiff in a slip and fall case appealed and sought a new trial because a trial judge allegedly expressed an improper opinion.¹⁷² The court of appeals rejected this argument and noted that the trial judge, in one instance, merely inquired into the relevance of one bit of testimony without ruling it inadmissible.¹⁷³ The other complaints concerned the trial judge’s comments in closing argument to the plaintiff’s lawyer that were made for the limited purpose of keeping the argument within proper bounds and that did not express the judge’s opinion about the case.¹⁷⁴ The court of appeals held that the judge acted properly and affirmed the judgment.¹⁷⁵

In another case, a probate judge presided over a dispute between a decedent’s father and her ex-husband about which of them would be the administrator of the decedent’s estate.¹⁷⁶ The judge appointed a guardian ad litem for the decedent’s minor child, and then the judge recused herself because she assisted the decedent’s father with his petition for letters of administration. The ex-husband lost the case and argued on appeal that the appointment of the guardian ad litem by the first judge was invalid.¹⁷⁷ The court rejected this argument and noted

167. *Id.*

168. *Id.* at 786–87, 678 S.E.2d at 192–93.

169. 296 Ga. App. 414, 674 S.E.2d 331 (2009).

170. *Id.* at 415–17, 674 S.E.2d at 333–34.

171. *Id.* at 420, 674 S.E.2d at 336–37.

172. *Muskett v. Sketchley Cleaners, Inc.*, 297 Ga. App. 561, 561, 677 S.E.2d 731, 732 (2009).

173. *Id.* at 562, 677 S.E.2d at 733.

174. *Id.* at 562–63, 677 S.E.2d at 733.

175. *Id.* at 564–65, 677 S.E.2d at 734.

176. *In re Estate of Sands-Kadel*, 292 Ga. App. 343, 343–44, 665 S.E.2d 46, 47 (2008).

177. *Id.* at 344, 665 S.E.2d at 47–48.

that the appointment was made before any motion for recusal had been filed and that appointment of a guardian ad litem in such a case was both necessary and appropriate.¹⁷⁸

V. CONTEMPT

The Georgia Court of Appeals decided two cases in which it applied the standards and procedures for findings of contempt against attorneys,¹⁷⁹ as set forth by the Georgia Supreme Court in 2008.¹⁸⁰ In the first case, the trial court held counsel in contempt for being disrespectful to witnesses and the court, despite warnings to cease such behavior, and for making a closing argument that threatened the jury and impugned the integrity of the court and the judicial process.¹⁸¹ Because at least some of the troublesome conduct was directed toward the judge and because the trial judge delayed imposition of the punishment for contempt, the court of appeals held that the contempt hearing should have been held before a disinterested judge.¹⁸² The court of appeals vacated the order of contempt and remanded the case.¹⁸³

In the other case, an attorney in a child deprivation hearing in juvenile court announced she was ready for trial but then sought a continuance to obtain documents she could have obtained earlier through discovery.¹⁸⁴ The attorney described her failure to obtain the documents as “ineffectiveness,” and the judge asked her, “Ma’am, shall I hold you in contempt for that?” The attorney replied, “I guess.” The judge then applied the court’s own per se rule and held her in contempt, stating that “an attorney who comes into my court and claims ineffective assistance of counsel is going to be held in contempt of court. So I do find you in contempt of court today, Ms. Morris.”¹⁸⁵ The court of appeals noted that the attorney’s conduct might have been a legitimate basis for contempt, but reversed the order because the judge had not

178. *Id.* at 344–45, 665 S.E.2d at 48.

179. *Morris v. State*, 295 Ga. App. 579, 672 S.E.2d 531 (2009); *Wilson v. McNeely*, 295 Ga. App. 41, 670 S.E.2d 846 (2008).

180. *In re Jefferson*, 283 Ga. 216, 657 S.E.2d 830 (2008).

181. *Wilson*, 295 Ga. App. at 43, 670 S.E.2d at 848.

182. *See id.* at 43–44, 670 S.E.2d at 848.

183. *Id.* at 44, 670 S.E.2d at 849.

184. *Morris*, 295 Ga. App. at 580, 672 S.E.2d at 532–22.

185. *Id.* Note that this judge was not the only one during the survey period to express the opinion that there should be consequences for an attorney who admits his or her own ineffectiveness. *See Nejad v. State*, 296 Ga. App. 163, 169–70, 674 S.E.2d 60, 65 (2009) (Smith, P.J., concurring).

weighed the evidence properly; the judge applied an erroneous per se standard.¹⁸⁶

VI. ATTORNEY FEES

The Georgia Court of Appeals decided two cases during the survey period concerning attorney fees. In one case, the court of appeals affirmed a trial court's decision to award attorney fees and expenses of thirty percent of a common fund generated by attorneys on behalf of a class of retirees.¹⁸⁷ The court approved the procedure the trial court followed, in which the court started with a benchmark percentage of twenty-five percent and then upwardly adjusted the fee after analyzing and explaining the factors upon which it relied in doing so.¹⁸⁸ In particular, the trial court noted the novelty and difficulty of the case, the risk of zero recovery, and the results obtained for the class.¹⁸⁹

In another case, five heirs hired an attorney to help them contest a will.¹⁹⁰ Each challenger entered into a twenty-percent contingent fee contract with the attorney. The challenge succeeded, but the attorney sought to recover his contingent fee not from his clients (who were not beneficiaries of the entire estate), but from the estate itself. The trial court instead awarded the attorney a much lower fee based upon his hourly rate and the time expended.¹⁹¹ The court of appeals affirmed the award and noted that the trial court implicitly found that a fee of twenty percent of the entire estate would have been an unreasonable fee.¹⁹²

VII. SUITS AGAINST ATTORNEYS

The Georgia Court of Appeals decided two noteworthy cases involving suits against attorneys during the survey period. In *Nash v. Studdard*,¹⁹³ the court had the opportunity to discuss several issues that arise in such cases. A client hired an attorney in a criminal matter and paid a \$5000 retainer. The client fired the lawyer, but the lawyer would not return the retainer. The lawyer claimed to have worked a sufficient number of hours on the case such that, at his hourly rate, he would have

186. *Morris*, 295 Ga. App. at 582, 672 S.E.2d at 534.

187. *Teachers Ret. Sys. of Ga. v. Plymel*, 296 Ga. App. 839, 846–47, 676 S.E.2d 234, 241 (2009).

188. *Id.*

189. *Id.* at 846, 676 S.E.2d at 241.

190. *In re Estate of Boss*, 293 Ga. App. 769, 769, 668 S.E.2d 283, 284 (2008).

191. *Id.* at 769–70, 668 S.E.2d at 284.

192. *Id.* at 772 & n.11, 668 S.E.2d at 286 & n.11.

193. 294 Ga. App. 845, 670 S.E.2d 508 (2008).

more than earned the fee. The former client sued the lawyer on a number of theories.¹⁹⁴ The court of appeals affirmed summary judgment for the attorney on a breach of fiduciary duty claim—based on failure to communicate trial strategy—because the client presented no evidence of damages.¹⁹⁵ The court also affirmed summary judgment on a claim that the lawyer breached a fiduciary duty by not returning the retainer fee.¹⁹⁶ The court noted that although nonrefundable fee contracts are invalid in Georgia and unearned fees must be returned if the client fires the lawyer, the former client in this case presented no evidence that any of the fee was unearned.¹⁹⁷ Finally, the court of appeals held that the trial court should have granted summary judgment to the lawyer on the client's breach of contract claim, but only to the extent that the breach would involve the exercise of professional judgment.¹⁹⁸ The plaintiff had not elaborated on how the attorney breached a contract.¹⁹⁹ To the extent that breach involved the exercise of professional judgment, the plaintiff was obligated to provide an expert affidavit attesting to the breach.²⁰⁰ Because the plaintiff did not do so, any such claim had to be dismissed.²⁰¹ To the extent, however, that the alleged breach of contract did not involve professional judgment, the claim would survive without an expert affidavit.²⁰²

In *Rommelman v. Hoyt*,²⁰³ an attorney represented a decedent's wife in a wrongful death action. The attorney settled the case and received a forty-percent contingent fee. Under the law, two of the decedent's children from a previous marriage were entitled to part of the settlement, and they alleged that their stepmother did not pay them. These children and their mother, the decedent's ex-wife, sued the lawyer and, among other claims, sought to recover the lawyer's fee under a theory of unjust enrichment.²⁰⁴ The trial court granted partial summary judgment for the attorney, and the court of appeals affirmed.²⁰⁵ The court of appeals observed that the theory of unjust enrichment applies

194. *Id.* at 846–47, 670 S.E.2d at 511–12.

195. *Id.* at 850, 670 S.E.2d at 514.

196. *Id.* at 851, 670 S.E.2d at 515.

197. *Id.* at 850–51, 670 S.E.2d at 514–15.

198. *Id.* at 853–54, 670 S.E.2d at 516–17.

199. *Id.* at 853, 670 S.E.2d at 516.

200. *Id.*

201. *Id.* at 853–54, 670 S.E.2d at 516.

202. *Id.* at 853, 670 S.E.2d at 516.

203. 295 Ga. App. 19, 670 S.E.2d 808 (2008).

204. *Id.* at 20, 670 S.E.2d at 809–10.

205. *Id.*, 670 S.E.2d at 810.

when a party has conferred a benefit on another party.²⁰⁶ Here, the court held, the ex-wife and her children provided no benefit to the attorney and had no legal right to participate in the wrongful death suit.²⁰⁷ Therefore, the trial court properly granted summary judgment for the attorney on their claims for unjust enrichment.²⁰⁸

VIII. MISCELLANEOUS MATTERS

Several additional decisions during the survey period related to questions of legal ethics in Georgia. In *Hargett v. State*,²⁰⁹ the Georgia Supreme Court affirmed murder convictions,²¹⁰ but Chief Justice Sears concurred to note an instance of what she believed was prosecutorial misconduct.²¹¹ A defense witness testified that one of the defendants was with her when the crimes occurred. At the close of that day's testimony, the witness was arrested and charged with perjury. The next day, the witness changed her story and testified that the defendant was not with her at the relevant time.²¹² Oddly, Chief Justice Sears concluded that this prosecutorial misconduct deprived the defendant of due process of law but, nevertheless, voted to affirm the convictions.²¹³

In another case, the supreme court affirmed the decision of the Georgia Board to Determine Fitness of Bar Applicants to deny admission to an applicant who was convicted of crimes in the 1980s.²¹⁴ The court concluded that the applicant had not carried his burden of demonstrating that he had rehabilitated himself and noted particularly that the applicant misrepresented the circumstances of the crime when he sought an early release from prison, when he applied to college, and when he first applied for a certification of fitness.²¹⁵

The court of appeals affirmed the conviction of John Sawhill for the crime of practicing law without a license.²¹⁶ Sawhill contacted an out-of-state probationer and offered to assist him with making his probation payments. Sawhill called the probation officer and stated that he was representing the probationer. When the probationer sent Sawhill \$800 to use for his fee and for partial payment of probation fees, Sawhill

206. *Id.*

207. *Id.* at 20–21, 670 S.E.2d at 810.

208. *Id.* at 20, 670 S.E.2d at 810.

209. 285 Ga. 82, 674 S.E.2d 261 (2009).

210. *Id.* at 82, 674 S.E.2d at 263.

211. *Id.* at 89, 674 S.E.2d at 268 (Sears, C.J., concurring).

212. *Id.* at 88, 674 S.E.2d at 267 (majority opinion).

213. *Id.* at 89, 674 S.E.2d at 268 (Sears, C.J., concurring).

214. *In re Cook*, 284 Ga. 575, 668 S.E.2d 665 (2008).

215. *Id.* at 576, 668 S.E.2d at 666.

216. *Sawhill v. State*, 292 Ga. App. 438, 438, 665 S.E.2d 353, 353 (2008).

ceased communicating with the probationer and apparently pocketed the \$800.²¹⁷ The court of appeals held that this evidence was sufficient to convict Sawhill of the unauthorized practice of law.²¹⁸

Finally, the supreme court adopted one opinion of the State Bar of Georgia Formal Advisory Opinion Board (the Board).²¹⁹ The Board addressed the following question: "May an attorney ethically defend a client pursuant to an insurance contract when the attorney simultaneously represents, in an unrelated matter, the insurance company with a subrogation right in any recovery against the defendant client?"²²⁰ The Board addressed two scenarios.²²¹ In one scenario, the attorney has two clients.²²² The attorney represents an insured and seeks to avoid or minimize any judgment against the insured.²²³ At the same time, the lawyer represents an insurance company that seeks, through a right of subrogation, to receive all or part of a judgment against the insured.²²⁴ The attorney's successful representation of the insured, in other words, would be to the direct disadvantage of the lawyer's other client.²²⁵ The Board determined that this situation, under Georgia Rule of Professional Conduct 1.7,²²⁶ presents an unconsentable conflict.²²⁷ The Board also dealt with the much more common situation in which the lawyer does not represent the insurance company seeking subrogation but does have reason to want to please that company because that insurance company sends the lawyer business.²²⁸ The Board concluded that this situation presents a conflict of interest between the lawyer's loyalty to the insured client and the lawyer's own interest in maintaining a good relationship with the insurance company seeking subrogation.²²⁹ This conflict could be cured by informed

217. *Id.* at 438–39, 665 S.E.2d at 354.

218. *Id.* at 439, 665 S.E.2d at 354 (citing O.C.G.A. § 15-19-51(a) (2008) (making it a crime to practice law without a license)).

219. Formal Advisory Op. 05-11, 284 Ga. 283, 667 S.E.2d 93 (2008). Other activities of the Board are described in STATE BAR OF GEORGIA REPORT OF THE OFFICE OF THE GENERAL COUNSEL 8–11 (2009), available at http://www.gabar.org/public/pdf/OGC/OGC_Report_08_09.pdf.

220. Formal Advisory Op. Bd., Formal Op. 05-11 (2008), available at http://gabar.org/handbook/supreme_court_of_georgia/fao_05-11/.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. GA. RULES OF PROF'L CONDUCT R. 1.7 (2001).

227. Formal Advisory Op. Bd., *supra* note 219.

228. *Id.*

229. *Id.*

consent of all affected clients unless it “involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.”²³⁰

IX. CONCLUSION

Lawyers and judges look to appellate decisions for guidance about their ethical and professional responsibilities. This Article has highlighted the guidance the Georgia Supreme Court and the Georgia Court of Appeals provided during the survey period.

230. *Id.* (quoting GA. RULES OF PROF'L CONDUCT R. 1.7(c)).