

Legal Ethics

by Patrick Emery Longan*

During the survey period from June 1, 2009 through May 31, 2010, the appellate courts in Georgia decided cases involving the discipline of lawyers, ineffective assistance of counsel, legal malpractice, bar admission, judicial ethics, and attorney disqualification.¹ The courts also decided one case involving an important issue of professionalism and several miscellaneous cases. The State Bar of Georgia Formal Advisory Opinion Board issued several opinions that relate to the professional responsibilities of Georgia lawyers.

I. LAWYER DISCIPLINE²

A. Disbarments

The Georgia Supreme Court disbarred lawyers during the survey period for theft and other issues involving the handling of money, client

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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*, 61 MERCER L. REV. 231 (2009).

2. In addition to dispensing discipline, the Georgia Supreme Court also has the power to order reinstatements for suspended lawyers and to grant certifications of fitness for readmission to lawyers who were previously disbarred. BAR OF GA. HANDBOOK R. 8-108 (2009), available at http://gabar.org/public/pdf/handbook_web.pdf. During the survey period, the court reinstated five lawyers who had been suspended. *In re Hudson*, 286 Ga. 727, 728, 690 S.E.2d 853, 854 (2010); *In re Lewis*, 287 Ga. 130, 131, 694 S.E.2d 664, 664 (2010); *In re Lenn*, 286 Ga. 257, 258, 686 S.E.2d 771, 772 (2009); *In re Caroway*, 285 Ga. 811, 812, 683 S.E.2d 598, 598 (2009); *In re Waldrop*, 285 Ga. 529, 530, 678 S.E.2d 90, 91 (2009). The court also granted certifications for fitness to three lawyers who previously had been disbarred or who had voluntarily surrendered their licenses following felony convictions. *In re Calhoun*, 286 Ga. 471, 471-72, 689 S.E.2d 311, 311-12 (2010); *In re Friedberg*, 286 Ga. 472, 472-73, 689 S.E.2d 312, 312-13 (2010); *In re Siegelman*, 285 Ga. 817, 817-18, 683 S.E.2d 595, 595-96 (2009).

neglect or abandonment, and criminal convictions.³ The court also disbarred one lawyer by a vote of 4-3 in an unusual case in which there were many disputed issues of fact.

1. Money Issues. The supreme court disbarred nine lawyers during the survey period for transgressions that involved client or law firm money. Three lawyers were disbarred for what appear to be straightforward acts of thievery. Sabrina K. Bozeman settled a client's personal injury claim, forged her client's name to the settlement check, and converted the funds to her own use. When the State Bar of Georgia's Office of General Counsel contacted Bozeman about her conduct, she falsely stated that she had delivered the settlement proceeds to her client.⁴ Another lawyer, Howard Geoffrey Slade, voluntarily surrendered his license after he received \$80,000 on behalf of a client but never deposited the funds into his trust account, gave them to the client, or otherwise accounted for them. Slade received \$238,000 from another client but did not deposit the money in his trust account and never returned or accounted for the funds.⁵ A third lawyer, Steven E. Zagoria, did not take money from clients. Instead, he forged a partner's signature on checks from clients to his firm for attorney fees and thereby converted over \$343,000 of his firm's money to his own use.⁶

Three lawyers were disbarred for violations related to money that occurred in other states. The supreme court disciplined two of these lawyers as matters of reciprocal discipline.⁷ One had been disbarred in North Carolina for misappropriating \$23,780 from a trust account.⁸ Another had suffered the same fate in the District of Columbia after she was appointed by a court as guardian for a ward of the state but then misappropriated \$10,000 from the ward's estate for her personal use.⁹ A third lawyer represented a client in a Texas probate proceeding and allowed his personal financial interests to impair his representation. The lawyer owned several promissory notes and convinced his client to

3. Lawyers in Georgia can voluntarily surrender their licenses or submit a petition for voluntary discipline. GA. RULES OF PROF'L CONDUCT R. 4-227 (2001). The acceptance of a voluntary surrender of a license or the granting of a petition for voluntary discipline of disbarment are tantamount to disbarment by the court and are treated as such in this Article.

4. *In re Bozeman*, 286 Ga. 510, 510, 689 S.E.2d 318, 319 (2010).

5. *In re Slade*, 286 Ga. 465, 465, 689 S.E.2d 315, 316 (2010).

6. *In re Zagoria*, 286 Ga. 415, 415-16, 687 S.E.2d 832, 832 (2010).

7. *In re Boniface*, 285 Ga. 815, 816-17, 684 S.E.2d 268, 268-69 (2009); *In re Wilson*, 285 Ga. 875, 875, 684 S.E.2d 630, 630 (2009).

8. *In re Boniface*, 285 Ga. at 815-16, 684 S.E.2d at 268.

9. *In re Wilson*, 285 Ga. at 875, 684 S.E.2d at 630.

purchase the notes. The notes turned out to be worthless. The lawyer also borrowed money from his client.¹⁰ The supreme court accepted his voluntary surrender of his license.¹¹

Three other lawyers lost their licenses because of their conduct in connection with numerous real estate matters. In one case, the supreme court held that Wade Gunnar Anderson failed to supervise his nonlawyer staff adequately.¹² Employees double-wired funds at ten closings, with the result that Anderson's trust account became overdrawn by approximately \$2.3 million.¹³ In a separate matter, about which the supreme court expressed particular concern, Anderson was the escrow agent for funds related to a dispute about the repair of a condominium.¹⁴ Mr. Anderson worked to resolve the claim and then paid himself \$30,000 out of the escrowed funds without authorization.¹⁵ The court disbarred Mr. Anderson and specified conditions for his reinstatement.¹⁶ In another real estate case, the supreme court disbarred Leonanus A. Moore for a number of infractions, including failures to return money held in escrow, failure to record deeds in several transactions that he closed, and overdrawing two trust accounts.¹⁷ Finally, the court accepted the voluntary surrender of the license of a lawyer who closed numerous real estate loans in which he prepared false documentation showing that the lender had a first lien.¹⁸ The lawyer also prepared false title opinions and title insurance policies for these loans.¹⁹

2. Neglect or Abandonment. The supreme court disbarred six lawyers for, at least in part, abandonment or neglect of clients. Three of these lawyers present classic cases. Sami Omar Malas accepted over \$10,000 to file two patent applications for a client and to perform other tasks. Malas apparently did not do the work, ceased communicating with the client, never returned any of the fees, and abandoned his practice.²⁰ Thomas Burke was serving as the attorney for an estate but

10. *In re Bain*, 286 Ga. 35, 35-36, 685 S.E.2d 80, 81 (2009).

11. *Id.* at 36, 685 S.E.2d at 81.

12. *In re Anderson*, 286 Ga. 137, 139-40, 685 S.E.2d 711, 712-13 (2009).

13. *Id.* at 138, 685 S.E.2d at 712.

14. *Id.* at 139-40, 685 S.E.2d at 712-13.

15. *Id.* at 140, 685 S.E.2d at 713.

16. *Id.* at 141, 685 S.E.2d at 713.

17. *In re Moore*, 285 Ga. 731, 732-33, 684 S.E.2d 71, 72 (2009).

18. *In re Wright*, 286 Ga. 468, 468-69, 689 S.E.2d 822, 822 (2010).

19. *Id.* at 468, 689 S.E.2d at 822.

20. *In re Malas*, 286 Ga. 34, 35, 685 S.E.2d 81, 81-82 (2009).

neglected to disburse the assets or wind up the estate.²¹ Burke was disbarred for his conduct in New York and disbarred in Georgia as a matter of reciprocal discipline.²² Jeffrey Brooks Kent filed a suit for a client but failed to serve one defendant, did not meet a court deadline for filing a proposed scheduling and discovery order, and “stipulated to the dismissal of the case without his client’s consent.”²³ Kent did not communicate with his client during the case, and after the client fired him, Kent did not refund the fee or send the file to the client’s new lawyer.²⁴

Three of the cases involving abandonment included other violations as well. Coleman C. Eaton Jr. represented a client in an automobile accident case but failed to act with diligence, explain the case to the client, or comply with the client’s information requests. Eaton then falsely claimed to the State Bar of Georgia’s Office of General Counsel that he met with the client and resolved their differences. In another case involving a different client, Eaton falsified discovery responses and a financial affidavit, and after he was fired, he failed to turn over the unearned fees or the complete file.²⁵ Eaton was disbarred.²⁶

The supreme court also disbarred Wendell S. Henry as a result of four grievances.²⁷ In two of the underlying matters, Henry failed to return client files after being fired.²⁸ In another, Henry served for a time as a “member agent” of a title insurance company but failed to account to the company or permit an audit of his escrow account and was fired.²⁹ Henry also practiced law while he was on suspension.³⁰

Finally, the supreme court disbarred James M. Kimbrough III for abandoning clients.³¹ With respect to one client, he failed to file a petition for adoption, initially responded untruthfully to the client’s inquiries, and then stopped responding to the client at all. With respect to another client, Kimbrough undertook to incorporate a business on behalf of the client, but he never filed the necessary papers. The client was unable to contact Kimbrough because Kimbrough moved his office and disconnected his phone. With respect to yet a third client,

21. *In re Burke*, 286 Ga. 729, 730, 690 S.E.2d 854, 854 (2010).

22. *Id.* at 729-30, 690 S.E.2d at 854-55.

23. *In re Kent*, 287 Ga. 129, 129, 694 S.E.2d 665, 665 (2010).

24. *Id.* at 129, 694 S.E.2d at 665.

25. *In re Eaton*, 286 Ga. 28, 29, 685 S.E.2d 279, 280 (2009).

26. *Id.* at 30, 685 S.E.2d at 280.

27. *In re Henry*, 285 Ga. 871, 873, 684 S.E.2d 624, 626 (2009).

28. *Id.* at 872, 684 S.E.2d at 625.

29. *Id.* (internal quotation marks omitted).

30. *Id.* at 873, 684 S.E.2d at 626.

31. *In re Kimbrough*, 286 Ga. 30, 31-32, 685 S.E.2d 713, 715-16 (2009).

Kimbrough failed to honor an agreement that required him to reimburse a client if he was paid by an opposing party in a child support case. He eventually stopped responding to this client as well.³²

3. Criminal Convictions. Six Georgia lawyers voluntarily surrendered their licenses as a result of criminal convictions. Frederick Andrew Gardner misled an agent of the Georgia Bureau of Investigation who was investigating alleged mortgage fraud. Gardner pled guilty to misdemeanor obstruction of a police officer.³³ In accepting the surrender of his license, the supreme court noted “that mortgage fraud is . . . a very serious problem in Georgia and that real estate closing attorneys are relied on by their lender clients and by the public to act ethically and lawfully to identify and prevent such fraud, rather than facilitating and concealing it as Gardner admits doing.”³⁴ Deborah K. Rice, Christopher M. Kunkel, and Robert P. Copeland all surrendered their licenses after they pled guilty to federal fraud charges.³⁵ Jeffrey Scott Denny pled guilty to one felony count of forgery and three felony counts of fraud-financial identity.³⁶ One of the special conditions of Denny’s probation was the surrender of his law license, and the supreme court accepted his voluntary surrender.³⁷ Charles A. Thomas Jr. surrendered his license after he was convicted of fifty-five counts of forgery and theft by taking in superior court.³⁸

4. One Unusual Case. The supreme court, by a vote of 4-3, disbarred Marcus Stan Ballew.³⁹ The Special Master recommended disbarment, but the Review Panel took issue with the Special Master’s findings of fact and recommended a one-year suspension instead.⁴⁰ The court, however, accepted the Special Master’s findings of fact.⁴¹ Ballew’s problems arose primarily from his representation of a client and her children in connection with an automobile collision. Ballew settled all the claims without client approval and did not provide an accounting of the funds. He signed the client’s name to the check for the settlement

32. *Id.* at 30-31, 685 S.E.2d at 715-16.

33. *In re Gardner*, 286 Ga. 623, 623-24, 690 S.E.2d 611, 612 (2010).

34. *Id.* at 624, 690 S.E.2d at 613.

35. *In re Rice*, 286 Ga. 622, 622, 690 S.E.2d 613, 613 (2010); *In re Kunkel*, 285 Ga. 877, 877, 684 S.E.2d 628, 628 (2009); *In re Copeland*, 285 Ga. 528, 528, 678 S.E.2d 90, 90 (2009).

36. *In re Denny*, 286 Ga. 895, 895, 692 S.E.2d 386, 386 (2010).

37. *Id.* at 895-96, 692 S.E.2d at 386.

38. *In re Thomas*, 286 Ga. 177, 177, 686 S.E.2d 130, 130 (2009).

39. *In re Ballew*, 287 Ga. 371, 376, 695 S.E.2d 573, 576 (2010).

40. *Id.* at 371-72, 695 S.E.2d at 573.

41. *Id.* at 376, 695 S.E.2d at 576.

of the children's claims. He also signed his client's name to settlement documents and had his employees falsely notarize some of them. Unlike most attorneys who engage in such conduct, however, Ballew did not just abscond with the money; he paid the client sums over several years. However, the amounts did not bear any particular relation to the amounts of the settlements and exceeded the amounts to which the client was entitled. Ballew also filed a claim for the client for social security benefits but left her uninformed about the status of the matter.⁴² On this version of the facts, the supreme court disbarred Ballew.⁴³ Three justices dissented in a three-sentence opinion.⁴⁴

B. *Suspensions*

The supreme court suspended five lawyers during the survey period. Gregory C. Menefee received an indefinite suspension as a matter of reciprocal discipline after the Kentucky Supreme Court suspended him on an interim basis following allegations that he had dealt improperly with client funds.⁴⁵ Patrick J. Smith's suspension also resulted from reciprocal discipline, which stemmed from the Maryland Court of Appeals decision to suspend him for committing the criminal act of falsely representing himself as a police officer to a witness in a criminal case.⁴⁶ Michael B. Wallace caused his client and himself to miss a court hearing and initially lied to his former client's new counsel about why they missed the hearing.⁴⁷ In light of two prior incidents of discipline, the supreme court suspended Wallace for sixty days.⁴⁸ Finally, George E. Powell Jr. received a three-year suspension for deceitful conduct in connection with the preparation of false HUD-1 statements for six related real estate transactions.⁴⁹

In one somewhat surprising case, the supreme court suspended a lawyer who failed to pursue legal matters entrusted to him by five clients.⁵⁰ The lawyer also failed to communicate with these clients.⁵¹ This conduct usually warrants disbarment, especially in light of the lawyer's prior history of discipline.⁵² Chief Justice Hunstein dissented

42. *Id.* at 372-73, 695 S.E.2d at 573-74.

43. *Id.* at 376, 695 S.E.2d at 576.

44. *Id.* (Benham, J., dissenting).

45. *In re Menefee*, 286 Ga. 32, 32-34, 685 S.E.2d 276, 276-77 (2009).

46. *In re Smith*, 286 Ga. 463, 463-64, 689 S.E.2d 315, 315 (2010).

47. *In re Wallace*, 287 Ga. 157, 157, 695 S.E.2d 23, 24 (2010).

48. *Id.*

49. *In re Powell*, 285 Ga. 812, 812-13, 683 S.E.2d 613, 614 (2009).

50. *In re Bagwell*, 286 Ga. 511, 511, 689 S.E.2d 316, 317 (2010).

51. *Id.*

52. *See supra* Part I.A.

because she believed the lawyer should have been disbarred.⁵³ In reaching its decision, the court noted that the lawyer had been diagnosed with bipolar disorder, attention deficit hyperactivity disorder, depression, and anxiety, and that he had experienced marital difficulties during the relevant time period.⁵⁴ The court imposed a two-year suspension and made reinstatement conditional upon the lawyer's addressing his psychiatric issues.⁵⁵

C. Reprimands

The supreme court approved seven voluntary petitions for Review Panel reprimands from the Review Panel of the State Disciplinary Board of the State of Georgia (Review Panel) and ordered one public reprimand during the survey period. Craig Steven Mathis received a Review Panel reprimand for his misconduct in connection with a child custody case.⁵⁶ He did not meet with the client in person, delayed filing the petition for several months, and had the client sign a verification of the petition before the petition was even prepared.⁵⁷ Ralph James Villani received his Review Panel reprimand because he failed to communicate with a client and charged her an unreasonable fee.⁵⁸ The same punishment befell Sylvia Ann Martin after she helped her husband obtain a cash advance from his business when he was in a dispute with a business partner.⁵⁹ The cash advance came from her husband's American Express business card. Martin used his wife's merchant account, which had been established to enable her to collect legal fees. The cash advance went into her operating account and then presumably to the husband, even though no legal services had been rendered. That deceitful conduct was the basis of the discipline.⁶⁰

Kindall Grant neglected to supervise a paralegal who swindled her clients out of \$2000 at a real estate closing, and as a result, Grant received a reprimand from the Review Panel.⁶¹ Grant also improperly monitored her trust account and failed to inform a title insurance company when her agency was terminated.⁶² Kevin Schumaker failed to communicate and act with promptness for two clients when he was

53. *In re Bagwell*, 286 Ga. at 512, 689 S.E.2d at 318 (Hunstein, C.J., dissenting).

54. *Id.* at 511, 689 S.E.2d at 317 (majority opinion).

55. *Id.* at 511-12, 689 S.E.2d at 318.

56. *In re Mathis*, 286 Ga. 728, 728-29, 691 S.E.2d 202, 202 (2010).

57. *Id.* at 728, 691 S.E.2d at 202.

58. *In re Villani*, 286 Ga. 621, 621-22, 690 S.E.2d 614, 614 (2010).

59. *In re Martin*, 286 Ga. 417, 417-18, 687 S.E.2d 830, 831 (2010).

60. *Id.*

61. *In re Grant*, 287 Ga. 131, 131-33, 694 S.E.2d 647, 648-49 (2010).

62. *Id.* at 132, 694 S.E.2d at 648.

serving as a public defender.⁶³ After he sought treatment for depression and alcoholism, Schumaker sought and received a Review Panel reprimand for his misconduct.⁶⁴ The supreme court approved the same punishment for Stanley J. Kakol Jr.⁶⁵ Kakol was a bankruptcy lawyer who accepted a \$1000 retainer from a client but did not place the money in an escrow account, although he allegedly told the bankruptcy trustee that he had done so.⁶⁶ The court added conditions to his reprimand that limited the type of work he could do and required him to continue treatment with a licensed psychologist or a board-certified psychiatrist.⁶⁷ Gary Gilbert Guichard received a Review Panel reprimand because in his representation of three indigent criminal defendants, he failed to adequately explain matters to his clients, comply with their reasonable requests for information, or keep them reasonably informed.⁶⁸ Finally, Richard Allen Hunt received a public reprimand for failing to respond to a client's requests for information.⁶⁹ The court imposed the public reprimand because Hunt had a history of prior discipline.⁷⁰

D. Reciprocal Discipline and Federal Court Discipline

The supreme court decided one significant case with respect to reciprocal discipline during the survey period.⁷¹ The United States District Court for the Southern District of Georgia held M. Francis Stubbs in contempt of court for representing clients in the district court at a time when he was suspended from practice in the Southern District. The district court fined Stubbs and placed conditions on when and how

63. *In re Schumaker*, 287 Ga. 128, 128, 695 S.E.2d 1, 1 (2010).

64. *Id.* at 128-29, 695 S.E.2d at 1.

65. *In re Kakol*, 286 Ga. 469, 470, 689 S.E.2d 308, 310 (2010).

66. *Id.* at 469, 689 S.E.2d at 309.

67. *Id.* at 470-71, 689 S.E.2d at 310.

68. *In re Guichard*, 286 Ga. 466, 466, 689 S.E.2d 823, 823 (2010).

69. *In re R.A.H.*, 285 Ga. 870, 870-71, 684 S.E.2d 631, 632 (2009).

70. *Id.* at 871, 684 S.E.2d at 632.

71. *See In re Stubbs*, 285 Ga. 702, 681 S.E.2d 113 (2009). In addition to *Stubbs*, the supreme court dealt with three other cases in which it rejected petitions for reciprocal discipline. The court rejected one because the Georgia attorney had already been disbarred in Georgia for misconduct. *In re Campbell*, 285 Ga. 874, 874, 684 S.E.2d 630, 631 (2009). In another, the court rejected reciprocal discipline for a Florida lawyer because it approved the Review Panel's finding that there was insufficient proof the lawyer had committed the misconduct for which he consented to discipline, without making an admission of misconduct, in Florida. *In re R.E.J.*, 285 Ga. 813, 813-14, 683 S.E.2d 597, 597 (2009). The third case followed the holding of *Stubbs* described in the text. *In re Cruse*, 285 Ga. 673, 673, 681 S.E.2d 156, 156 (2009) (citing *Stubbs*, 285 Ga. at 703, 681 S.E.2d at 114).

Stubbs could be readmitted to practice in the Southern District.⁷² Reciprocal discipline flows from Rule 9.4 of the Georgia Rules of Professional Conduct,⁷³ which sets forth the streamlined procedures to be followed to discipline a Georgia lawyer when “another jurisdiction” has imposed discipline on the lawyer.⁷⁴ The question presented in *Stubbs* was whether the federal district court is “another jurisdiction” for purposes of this rule.⁷⁵ The supreme court held that it is not and that “another jurisdiction” means other licensing jurisdictions rather than individual courts.⁷⁶ Thus, the supreme court rejected reciprocal discipline for Stubbs without prejudice to allow the State Bar to seek disciplinary action under normal procedures for the underlying misconduct.⁷⁷ The opinion overruled a 2004 case in which the court had imposed reciprocal discipline after a federal court had imposed discipline.⁷⁸ The opinion provoked a dissent from three justices who argued that the court should be able to impose discipline on a reciprocal, streamlined basis as long as the court that adjudicated the misconduct did so “under procedures that meet the requirements of due process” and as long as the action taken “is the functional equivalent of our state’s disciplinary proceedings.”⁷⁹

E. Rejections of Petitions for Voluntary Discipline

In four cases, the supreme court rejected petitions for voluntary discipline despite support for them from the State Bar. In one case, an attorney wrongfully retained prepaid fees that he could not earn because he had been suspended from practice.⁸⁰ The court rejected the voluntary petition for a public reprimand.⁸¹ In another case, an attorney agreed to represent a client in three matters and accepted payment from the client. The lawyer then dissolved his practice, and the client was unable to reach him. The lawyer entered into a consent judgment for

72. *Stubbs*, 285 Ga. at 702, 681 S.E.2d at 113.

73. GA. RULES OF PROF'L CONDUCT R. 9.4 (2009).

74. *Stubbs*, 285 Ga. at 702-03, 681 S.E.2d at 113-14; see GA. RULES OF PROF'L CONDUCT R. 9.4.

75. *Stubbs*, 285 Ga. at 703, 681 S.E.2d at 114.

76. *Id.* at 703-04, 681 S.E.2d at 114.

77. *Id.* at 704, 681 S.E.2d at 115.

78. *Id.*; see *In re Griggs*, 277 Ga. 663, 663, 593 S.E.2d 328, 328 (2004).

79. *Stubbs*, 285 Ga. at 705, 681 S.E.2d at 115 (Hines, J., dissenting).

80. *In re Toler*, 286 Ga. 412, 412-13, 687 S.E.2d 833, 833 (2010).

81. *Id.* at 413, 687 S.E.2d at 833.

the unearned fees but did not satisfy that judgment.⁸² The court rejected his petition for a public reprimand.⁸³

Attorney Michael J.C. Shaw sought a suspension after he defrauded his law firm of approximately \$527,000.⁸⁴ The court rejected his petition,⁸⁵ and Justice Nahmias filed a concurrence in which he stated that “Shaw is fortunate not to be incarcerated in a state or federal prison for the half-million-dollar fraud he perpetrated against his employer.”⁸⁶

In another case, Justice Nahmias was again outraged at the State Bar’s support of a voluntary petition from an attorney who submitted false evidence in a personal injury case in which she represented herself pro se.⁸⁷ The petition sought a Review Panel reprimand, and the State Bar supported the petition.⁸⁸ However, the court rejected the petition,⁸⁹ and in a long, scathing concurrence, Justice Nahmias stated the following:

The attorney disciplinary process must protect the public from attorney misconduct and promote public confidence in the legal profession. Those purposes are not advanced by the proposal, recommended by the State Bar in this case, that nothing more than a quiet reprimand is the appropriate discipline for a lawyer who, based on her admissions and the current record, knowingly submitted two fabricated documents to her opposing party in discovery and again as evidence in a jury trial, in an effort to obtain a damages award for herself.⁹⁰

II. INEFFECTIVE ASSISTANCE OF COUNSEL

The Georgia Supreme Court and the Georgia Court of Appeals decided numerous cases during the survey period regarding ineffective assistance of counsel. Most of those cases were routine rejections of the claim.⁹¹

82. *In re Pope*, 286 Ga. 715, 716, 690 S.E.2d 851, 852 (2010).

83. *Id.*

84. *In re Shaw*, 286 Ga. 725, 725-26, 691 S.E.2d 544, 544 (2010).

85. *Id.* at 727, 691 S.E.2d at 545.

86. *Id.* (Nahmias, J., concurring).

87. *In re Manning-Wallace*, 287 Ga. 223, 224, 695 S.E.2d 237, 238 (2010) (Nahmias, J., concurring).

88. *Id.* at 223, 695 S.E.2d at 237 (majority opinion).

89. *Id.* at 223-24, 695 S.E.2d at 238.

90. *Id.* at 232, 695 S.E.2d at 244 (Nahmias, J., concurring) (citation omitted).

91. One of those rejections warrants a brief mention. In *Taylor v. State*, 298 Ga. App. 145, 679 S.E.2d 371 (2009), the defendant was convicted of burglary and claimed ineffective assistance of counsel because his lawyer “was hostile, disrespectful, and demeaning toward him.” *Id.* at 145, 148, 679 S.E.2d at 372, 374. The court of appeals rejected the claim because “a meaningful relationship between [the] defendant and his counsel is not a

A number of the cases, however, are noteworthy not only because in some the supreme court upheld claims of ineffective assistance, but also because some involved reversals of lower court findings of ineffective assistance, and some provoked dissenting opinions from one or more of the justices.

A. Georgia Supreme Court

The Georgia Supreme Court unanimously reversed four death penalty cases in which habeas courts had found ineffective assistance of counsel.⁹² The supreme court unanimously took the same action in one drug possession case.⁹³ In another case, *Williams v. Hall*,⁹⁴ the court reversed a habeas court's finding of ineffectiveness,⁹⁵ but the majority opinion provoked a dissent from Justice Benham that was joined by Chief Justice Hunstein.⁹⁶ Trial counsel admitted at the habeas hearing that he had done nothing to gather information independently of what the prosecutor gave or told him.⁹⁷ The habeas court and the dissenting justices concluded that such conduct constructively denied the defendant counsel.⁹⁸ The majority, however, reversed and remanded the case because the defendant's pro se petition for habeas corpus did not include the lack of investigation as a basis for relief.⁹⁹

In three cases, the supreme court affirmed convictions on direct appeal over dissents of one or more justices with respect to claims of ineffective assistance of counsel. In *Reid v. State*,¹⁰⁰ the trial judge closed the

[constitutional] guarantee." *Id.* at 148, 679 S.E.2d at 374 (quoting *Hammonds v. State*, 218 Ga. App. 423, 424, 461 S.E.2d 589, 590 (1995)) (internal quotation marks omitted). The court of appeals noted, however, that there was testimony that the lawyer called Mr. Taylor "stupid" and that in a note passed to the client during trial, his lawyer called him a "mother fucker." *Id.* Although Mr. Taylor could not demonstrate harm from counsel's attitude, such treatment of a client is a far cry from what is expected of Georgia lawyers. See STATE BAR OF GA. HANDBOOK, A LAWYER'S CREED H-147 (2009), available at http://www.gabar.org/related_organizations/chief_justices_commission_on_professionalism/lawyers_creed/ ("To my clients, I offer faithfulness, competence, diligence, and good judgment. I will strive to represent you as I would want to be represented and to be worthy of your trust.").

92. *Hall v. Lewis*, 286 Ga. 767, 783-84, 692 S.E.2d 580, 594-95 (2010); *Hall v. Lance*, 286 Ga. 365, 376, 687 S.E.2d 809, 818 (2010); *Hall v. Lee*, 286 Ga. 79, 79, 684 S.E.2d 868, 871 (2009); *Hall v. Terrell*, 285 Ga. 448, 457, 679 S.E.2d 17, 25 (2009).

93. *Frazier v. Mathis*, 286 Ga. 647, 648-49, 690 S.E.2d 840, 841-42 (2010).

94. 286 Ga. 280, 687 S.E.2d 414 (2009).

95. *Id.* at 280-82, 687 S.E.2d at 415.

96. *Id.* at 282, 687 S.E.2d at 415-16 (Benham, J., dissenting).

97. *Id.* at 281, 687 S.E.2d at 415 (majority opinion).

98. *Id.* at 283, 687 S.E.2d at 416 (Benham, J., dissenting).

99. *Id.* at 281-82, 687 S.E.2d at 415 (majority opinion).

100. 286 Ga. 484, 690 S.E.2d 177 (2010).

courtroom during the testimony of two witnesses after the prosecutor raised concerns for their safety.¹⁰¹ The court noted that the closure was error and conceded that if the defense counsel had objected, the error would have required automatic reversal.¹⁰² Here, however, the trial counsel did not object, and that was one of the bases for the claim of ineffectiveness.¹⁰³ The court concluded that an ineffectiveness claim based upon a failure to object to the closure of a courtroom does require a showing of harm.¹⁰⁴ Chief Justice Hunstein dissented, arguing unsuccessfully that prejudice should be presumed and that the conviction should have been set aside.¹⁰⁵

The issue in *Patterson v. State*¹⁰⁶ was also whether prejudice could be presumed.¹⁰⁷ During the trial, the prosecutor made the following statements in his closing argument:

And [defense counsel] says, you know, he makes that as if he's some great innocent man because he wants a lawyer. Well if he hadn't done anything, what did he want a lawyer for? I mean, a lawyer, I submit to you, will tell you not to tell the police anything. If he didn't want to talk, if he hadn't done anything, why does he not want to tell something, you know, because the only thing that can hurt him is admitting to the crime. But he wanted a lawyer, this great innocent man over here wanted a lawyer. And he wouldn't sign the form. He wouldn't even sign the form that he'd been advised of his rights. . . . He refused to sign the form. Why wouldn't he at least sign the form that he'd been advised of his rights? I mean, how can that hurt him? But he wasn't cooperating. He wasn't doing anything. Guilty people do that, I submit to you.¹⁰⁸

The majority refused to presume prejudice from this commentary on the defendant's right to remain silent and held that the defendant had not established a reasonable probability that but for the failure to object to this argument, the result of the trial would have been different.¹⁰⁹ The majority seemed to concede that if the defendant had been tried after 1991 rather than in 1987, the prejudice would be presumed.¹¹⁰ In 1991 the supreme court held as follows:

101. *Id.* at 487, 690 S.E.2d at 180.

102. *Id.* at 487-88, 690 S.E.2d at 181.

103. *Id.* at 487, 690 S.E.2d at 181.

104. *Id.* at 487-88, 690 S.E.2d at 181.

105. *Id.* at 490-91, 690 S.E.2d at 182-83 (Hunstein, C.J., dissenting).

106. 285 Ga. 597, 679 S.E.2d 716 (2009).

107. *See id.* at 602, 679 S.E.2d at 721.

108. *Id.* at 601, 679 S.E.2d at 720 (alteration in original).

109. *Id.* at 602, 679 S.E.2d at 721.

110. *See id.*

[I]n criminal cases, a comment upon a defendant's silence or failure to come forward is far more prejudicial than probative. Accordingly, from the date of publication of this opinion[] in the advance sheets of Georgia Reports, such a comment will not be allowed even where the defendant has not received Miranda warnings and where he takes the stand in his own defense.¹¹¹

The dissenting justices in *Patterson* argued unsuccessfully that the commentary on Patterson's silence was so egregious that it violated his due process rights under the Georgia Constitution, "which uncontrovertedly predates appellant's trial in 1987."¹¹²

In *Carter v. State*,¹¹³ three justices of the supreme court dissented.¹¹⁴ In *Carter* a man shot and killed his brother as the brother was running away from a house where their father lived.¹¹⁵ According to the dissent, the trial court properly refused to instruct the jury on the defense of accident that was asserted by trial counsel.¹¹⁶ The dissent reasoned that the defense of "accident" is unavailable to persons who intentionally discharge a gun, even if their intent is merely to scare the victim.¹¹⁷ When that defense was refused by the trial court, trial counsel did not have a "Plan B."¹¹⁸ The dissenting justices concluded that adequate legal research would have led to the recognition that accident was not a defense but that the defense of another person—here, the father—was available.¹¹⁹ The majority rejected this argument.¹²⁰ Rather, it concluded that trial counsel's failure to seek an instruction on this defense was harmless because the evidence was insufficient as a matter of law to warrant the instruction.¹²¹

The supreme court decided one other ineffectiveness case that is worthy of note. In *State v. Nejad*,¹²² the court of appeals had reversed a conviction because the defendant's trial counsel did not advise the

111. *Mallory v. State*, 261 Ga. 625, 630, 409 S.E.2d 839, 843 (1991), *overruled on other grounds* by *Clark v. State*, 271 Ga. 6, 515 S.E.2d 155 (1999).

112. 285 Ga. at 604, 679 S.E.2d at 722 (Hunstein, C.J., dissenting).

113. 285 Ga. 565, 678 S.E.2d 909 (2009).

114. *Id.* at 567, 678 S.E.2d at 911.

115. *Id.* at 565, 678 S.E.2d at 910.

116. *Id.* at 569, 678 S.E.2d at 912 (Hines, J., dissenting).

117. *Id.*

118. *Id.*

119. *Id.* at 569-70, 678 S.E.2d at 912-13.

120. *Id.* at 567, 678 S.E.2d at 911 (majority opinion).

121. *Id.*

122. 286 Ga. 695, 690 S.E.2d 846 (2010).

defendant of his right to testify.¹²³ The court of appeals opinion explained,

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. Trial counsel also explicitly recalled that the trial judge did not advise Nejad of his right to testify.¹²⁴

The supreme court noted that the trial transcript did "not reflect that the trial judge [had] informed Nejad of his right to testify," and the trial judge's notes did not show any indication that he had been so advised.¹²⁵ Nevertheless, the supreme court held that the transcript from the trial had been, in effect, amended, because after a post-conviction evidentiary hearing a different trial judge concluded that Nejad had, after all, been informed by the court of his right to testify.¹²⁶

B. Georgia Court of Appeals

The Georgia Court of Appeals decided ten cases in which the court found that criminal defendants had received ineffective assistance of counsel. In seven cases, the ineffectiveness related to trial counsel's failure to object to the admissibility of certain kinds of evidence or the propriety of certain arguments.¹²⁷ In two cases, convictions were set

123. *Id.* at 695, 690 S.E.2d at 847-48.

124. *Nejad v. State*, 296 Ga. App. 163, 165, 674 S.E.2d 60, 62 (2009), *rev'd*, 286 Ga. 695, 690 S.E.2d 846 (2010).

125. *Nejad*, 286 Ga. at 696-97, 690 S.E.2d at 848-49.

126. *Id.* at 698-99, 690 S.E.2d at 850.

127. *Cabrera v. State*, 303 Ga. App. 646, 652, 694 S.E.2d 720, 724 (2010) (trial counsel did not know that a codefendant's guilty plea was inadmissible if the codefendant refused to testify); *Wadlington v. State*, 302 Ga. App. 559, 559, 561, 692 S.E.2d 28, 29, 31 (2010) (trial counsel did not know that an officer's testimony that the defendant was the person depicted on a surveillance tape was inadmissible); *Reynolds v. State*, 300 Ga. App. 353, 353, 685 S.E.2d 346, 347 (2009) (trial counsel failed to object to an argument about the defendant's silence); *Grindle v. State*, 299 Ga. App. 412, 415-16, 683 S.E.2d 72, 75 (2009) (trial counsel failed to object to detective's hearsay testimony that an accomplice had identified the defendant as the perpetrator in a custodial statement); *Pointer v. State*, 299 Ga. App. 249, 250-51, 682 S.E.2d 362, 364 (2009) (trial counsel failed to object when an

aside because counsel failed to file a meritorious motion to suppress critical evidence.¹²⁸ One case related to the lack of diligence by trial counsel.¹²⁹

III. LEGAL MALPRACTICE

The court of appeals decided three cases during the survey period related to legal malpractice.¹³⁰ In *Old Republic National Title Insurance Co. v. Attorney Title Services, Inc.*,¹³¹ a lawyer who was working under a contract with a title insurance company allegedly drafted an incorrect title description, with the result that the insurance company had to pay a claim to a buyer. The title insurance company sued the lawyer and a corporation owned by the attorney. The trial court dismissed the case because the title company did not include an expert affidavit. The plaintiff argued that the claim was for negligence as a title examiner rather than as an attorney and that the claim was for breach of contract.¹³² The court of appeals affirmed the trial court,¹³³ noting that title examination is a legal service provided by a lawyer or under the lawyer's supervision.¹³⁴ As to the breach of contract claim, the court of appeals noted simply that "[t]he . . . [a]greement was very clearly a contract for legal services."¹³⁵

expert testified not just that in his opinion, the victim had been sexually abused, but also that the abuse was perpetrated by the victim's father); *Frazier v. State*, 298 Ga. App. 487, 490-91, 680 S.E.2d 553, 556 (2009) (trial counsel did not consider objecting to the defendant's custodial statement on the basis that it was involuntary); *Bennett v. State*, 298 Ga. App. 464, 466, 680 S.E.2d 538, 540 (2009) (trial counsel did not know that violent acts of a victim, even those occurring after the alleged crime, were admissible once the defendant makes a prima facie case of justification).

128. *Suluki v. State*, 302 Ga. App. 735, 738, 691 S.E.2d 626, 629 (2010) (trial counsel failed to move to suppress evidence of a gun, the only evidence against the defendant in a case about possession of a firearm by a convicted felon); *Thrasher v. State*, 300 Ga. App. 154, 157, 684 S.E.2d 318, 321 (2009) (trial counsel failed to move to suppress evidence of a blood sample that was used to convict the defendant of driving under the influence of methamphetamines).

129. *Gravitt v. State*, 301 Ga. App. 131, 133, 687 S.E.2d 150, 152 (2009) (trial counsel did little or nothing to locate and secure the testimony of two crucial witnesses, both of whom were readily available).

130. In a fourth case, the court of appeals affirmed the dismissal of a claim for professional negligence brought by someone who indisputably was never a client of the lawyer but was instead the adversary of the lawyer's client. *Fortson v. Hotard*, 299 Ga. App. 800, 802, 684 S.E.2d 18, 20 (2009).

131. 299 Ga. App. 6, 682 S.E.2d 134 (2009).

132. *Id.* at 7-9, 682 S.E.2d at 136-37.

133. *Id.* at 10, 682 S.E.2d at 138.

134. *Id.* at 8, 682 S.E.2d at 137.

135. *Id.* at 9, 682 S.E.2d at 137.

Another case arose from a law firm's failure to timely file an action to foreclose on a mechanic's lien in the approximate amount of \$651,000. The law firm's client settled its claim for legal malpractice by accepting an assignment of the firm's right to seek reimbursement of the damages from the firm's malpractice carrier. The policy, however, contained an exclusion for any claim arising from actions before the effective date of the policy if the law firm knew or should have reasonably foreseen that the act would be the basis of a claim. The trial court granted summary judgment because the undisputed evidence showed that the firm knew or should have reasonably foreseen the claim at the time it acquired the insurance policy.¹³⁶ The court of appeals affirmed.¹³⁷

The third case concerned attorney Stephen M. Katz's representation of Francine Crowell in a federal suit for wrongful termination in the United States District Court for the Northern District of Georgia. Katz did not comply with the district court's case management requirements, and as a result, the case was dismissed. Katz did not inform his client of the dismissal, but the client discovered that fact and sued Katz for malpractice. Katz defaulted, and the only issue at trial was damages. Crowell obtained a substantial judgment against Katz. The lawyer's only attempt to escape the judgment was to argue that his former client had confided that she had been charged with a felony twenty-five years earlier and had not disclosed that fact to her employer. Employers can use such after-acquired information to defend against discrimination claims; therefore, Katz argued that his client would have lost the underlying case and was not damaged by his malpractice.¹³⁸ The trial court and the court of appeals both rejected this argument.¹³⁹ Katz did not come forward with any support for his claim that his former client had been convicted, and neither did he offer any evidence that her former employer ever asked about such matters or would have declined to hire or would have fired her as a result of her conviction.¹⁴⁰ The court of appeals affirmed the judgment and assessed a \$2500 penalty against Katz for filing a frivolous appeal.¹⁴¹

136. *C. Ingram Co. v. Phila. Indem. Ins. Co.*, 303 Ga. App. 548, 548-51, 694 S.E.2d 181, 182-84 (2010).

137. *Id.* at 552, 694 S.E.2d at 185.

138. *Katz v. Crowell*, 302 Ga. App. 763, 763-66, 691 S.E.2d 657, 658-59 (2010).

139. *Id.* at 766-67, 691 S.E.2d at 659-60.

140. *Id.* at 766, 691 S.E.2d at 660.

141. *Id.* at 767, 691 S.E.2d at 660.

IV. BAR ADMISSION

The supreme court issued two opinions during the survey period related to admission to practice. One applicant graduated from the John F. Kennedy School of Law, a California law school that is not accredited by the American Bar Association. Generally, applicants must hold an initial law degree from an ABA-accredited law school in order to take the Georgia Bar Examination. The applicant sought a waiver but failed to make the showing that his education was the equivalent of an education at an ABA-accredited school. In particular, the applicant failed to provide analysis and documentation from a dean of an ABA-accredited law school that the John F. Kennedy School of Law provided an equivalent legal education.¹⁴² The Board of Bar Examiners denied his application for a waiver of the educational requirements, and the supreme court unanimously affirmed.¹⁴³

Another applicant had obtained her first law degree from a California “correspondence” law school that used online instruction. Although this applicant had a master of laws degree from an ABA-accredited school, she still was required to prove that her first law degree came from an institution that provided the equivalent of the legal education provided at an accredited school. The applicant did not provide the dean’s letter as required and instead submitted a letter from the dean of her online law school and a general, conclusory letter from the associate dean of the law school where the applicant received her master’s degree.¹⁴⁴ The Board of Bar Examiners denied her waiver.¹⁴⁵ The supreme court unanimously affirmed.¹⁴⁶

V. JUDICIAL ETHICS

The supreme court issued two opinions related to judicial disqualification during the survey period, and the court of appeals issued one. In *Friends of the Chattahoochee, Inc. v. Longleaf Energy Associates, LLC*,¹⁴⁷ Justice Nahmias took the unusual step of explaining why he chose to recuse himself from all cases in which the firm of King & Spalding represents parties before the supreme court.¹⁴⁸ Justice

142. *In re Domantay*, 285 Ga. 876, 876-77, 684 S.E.2d 628, 629 (2009).

143. *Id.* at 876-77, 684 S.E.2d at 629-30.

144. *In re Batterson*, 286 Ga. 352, 352-53, 687 S.E.2d 477, 478-79 (2009).

145. *Id.* at 352, 687 S.E.2d at 478.

146. *Id.* at 354, 687 S.E.2d at 479.

147. 285 Ga. 859, 684 S.E.2d 632 (2009).

148. *Id.* at 859-63, 684 S.E.2d at 632-35.

Nahmias is married to a King & Spalding equity partner.¹⁴⁹ Justice Nahmias discussed some of the particular circumstances that require recusal based upon family relationships, such as a circumstance under which a person too close to the judge is acting as a lawyer in the proceeding or has more than a de minimis interest in the outcome.¹⁵⁰ Ultimately, however, Justice Nahmias relied upon the more general rule that judges must disqualify themselves whenever the judge's impartiality might reasonably be questioned.¹⁵¹ Because Justice Nahmias concluded that his impartiality might reasonably be questioned any time he heard a case in which one of the parties was represented by a law firm in which his wife is an equity partner, he recused himself from all such cases.¹⁵²

In *Jones County v. A Mining Group, LLC*,¹⁵³ the supreme court granted an application for interlocutory review of an order of recusal.¹⁵⁴ A corporation sought permission to build a rock quarry in Jones County, Georgia, but the Jones County Board of Commissioners (Board) denied the application. The corporation sued Jones County (County), and the owners of the land where the quarry would be built intervened as plaintiffs. All the plaintiffs then filed motions to disqualify all the judges of the Ocmulgee Judicial Circuit because each of the judges receives a supplement from the County.¹⁵⁵ Due to the supplement, the judges would have more than a de minimis interest in the outcome because the judges would be reluctant to displease the Board.¹⁵⁶ A senior judge granted the motions.¹⁵⁷ The supreme court reversed.¹⁵⁸ Because the County does not legally have discretion regarding whether to pay the supplement or how much to pay, the supreme court reasoned that no fair-minded person could reasonably conclude that the judges would be partial to the County.¹⁵⁹ Furthermore, the court concluded that even if the judges did have an interest in the outcome, the \$2700

149. *Id.* at 859, 684 S.E.2d at 632.

150. *Id.* at 861, 684 S.E.2d at 633-34; see GA. CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(c)(ii)-(iii) (2004), available at http://www.gabar.org/handbook/georgia_code_of_judicial_conduct/.

151. *Longleaf Energy*, 285 Ga. at 862-63, 684 S.E.2d at 635; see GA. CODE OF JUDICIAL CONDUCT Canon 3(E)(1).

152. *Longleaf Energy*, 285 Ga. at 861-63, 684 S.E.2d at 633-35.

153. 285 Ga. 465, 678 S.E.2d 474 (2009).

154. *Id.* at 465, 678 S.E.2d at 474.

155. *Id.*

156. *See id.*

157. *Id.*

158. *Id.* at 468, 678 S.E.2d at 476.

159. *Id.* at 467, 678 S.E.2d at 475.

yearly supplement was de minimis and therefore would not require recusal.¹⁶⁰

*Morgan v. Propst*¹⁶¹ involved a suit between the administrators of two estates. The attorney for one of the parties feared that the trial judge assigned to the case could not be impartial. The attorney had previously been the district attorney and in that capacity had investigated the trial judge and the judge's husband. The lawyer had also directed the prosecution of the judge's husband, who was incarcerated as a result. The trial judge denied the lawyer's motion to recuse on the grounds that it was untimely and that the accompanying affidavit did not set forth sufficient facts to warrant recusal.¹⁶² The court of appeals vacated the trial court's order.¹⁶³ The court held that the motion was timely even though the action was a renewal action because such proceedings are de novo, and the motion to recuse was filed within four days of the judge being assigned to the renewed action.¹⁶⁴ The court further held that the circumstances set forth in the affidavit did state a basis for recusal.¹⁶⁵ The judge's alleged bias against the lawyer stemmed from an extra-judicial source rather than opinions formed by the judge in the course of the pending case.¹⁶⁶ Based on the source of the bias, there was sufficient support that the judge could not be fair.¹⁶⁷ Therefore, the court of appeals sent the case back to the trial court, where a different judge would be assigned to decide the recusal motion.¹⁶⁸

VI. ATTORNEY DISQUALIFICATION

During the survey period, the supreme court decided one case involving an attempt to disqualify a law firm. In that case, the attorneys had a preexisting relationship with Leonard Moody. He was one of four individuals who were affiliated with a corporation, Cardinal Robotics. The lawyers agreed to represent the corporation in an action to quiet title to real estate with the understanding that Moody would pay the attorney fees and be reimbursed by receiving a quitclaim deed from Cardinal Robotics for approximately 50% of the property in question. The lawyers took their instructions from Moody, and the quiet

160. *Id.* at 467-68, 678 S.E.2d at 475-76.

161. 301 Ga. App. 402, 688 S.E.2d 357 (2009).

162. *Id.* at 402-03, 688 S.E.2d at 358-59.

163. *Id.* at 405, 688 S.E.2d at 360.

164. *Id.* at 404, 688 S.E.2d at 359-60.

165. *Id.* at 405, 688 S.E.2d at 360.

166. *See id.*

167. *See id.*

168. *Id.*

title action was soon dismissed without prejudice. Later, the lawyers represented Moody and then his executor in an action against Cardinal Robotics to enforce the agreement to give Moody the quitclaim deed. Cardinal Robotics sought to disqualify the law firm, and the trial court denied the motion.¹⁶⁹ The supreme court affirmed because the new matter was not substantially related to the matter the firm handled for its former client, Cardinal Robotics.¹⁷⁰

Obviously, there was some relationship between the two actions because the second suit was to enforce an agreement regarding the funding of the first action.¹⁷¹ The matters were not substantially related for purposes of disqualification, however, because there was no unfairness to the former client from the lawyers' participation in the second suit.¹⁷² Cardinal Robotics was unable to

set forth any specific fact or assert any special knowledge that the . . . attorneys might have gleaned from their brief participation in the prior action which would have been material to the present suit, or in any manner, have gained advantage for the plaintiff Moody or worked a disadvantage to [Cardinal Robotics].¹⁷³

The court of appeals also decided one disqualification case during the survey period. In that case, a lawyer represented a client against Life Care Centers of America. In the settlement of that action, Life Care and the attorney agreed that the attorney would maintain the confidentiality of all information he obtained in discovery for three years.¹⁷⁴ The agreement also contained a provision that stated that the lawyer's "firm was 'deemed hired and retained as counsel on behalf of [Life Care].'"¹⁷⁵ The agreement also apparently provided that if requested, the lawyer would agree to be retained by the firm of Baker Donelson to provide advice to Life Care. The lawyer submitted an affidavit in which he stated that he was never asked to do so and in fact never provided professional services to Baker Donelson or to Life Care. When the lawyer filed a new action for a different client against Life Care, Life Care filed a motion to disqualify the lawyer.¹⁷⁶

The court of appeals affirmed the trial court's decision not to disqualify the firm because Life Care made only "conclusory allegations" and had

169. *Cardinal Robotics, Inc. v. Moody*, 287 Ga. 18, 18-20, 694 S.E.2d 346, 347-48 (2010).

170. *Id.* at 22, 694 S.E.2d at 350.

171. *See id.* at 19, 694 S.E.2d at 348.

172. *Id.* at 21-22, 694 S.E.2d at 349-50.

173. *Id.* at 22, 694 S.E.2d at 350.

174. *Life Care Centers v. Smith*, 298 Ga. App. 739, 744, 681 S.E.2d 182, 187 (2009).

175. *Id.* (alteration in original).

176. *Id.* at 744-45, 681 S.E.2d at 187.

not shown that the lawyer had violated the settlement agreement in the earlier case.¹⁷⁷ Nevertheless, the court could have done more. Georgia Rule of Professional Conduct 5.6(b)¹⁷⁸ provides that a “lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a controversy between private parties.”¹⁷⁹ That is exactly what the agreement in the settlement of the earlier case would have done. If the agreement “to maintain the confidentiality of all the information produced during discovery”¹⁸⁰ meant the lawyer could not use the discovery information in the earlier case on behalf of another client, the agreement would in effect be an agreement not to sue Life Care and would thus be prohibited.¹⁸¹ Furthermore, the agreement to employ the lawyer in the future is another roundabout way of agreeing that the lawyer will not sue Life Care.¹⁸² The effect of that agreement is to create a conflict of interest that would restrict the lawyer’s right to practice—his right to sue Life Care—as part of the settlement of the first claim.¹⁸³ This settlement agreement could well have been declared invalid as a matter of public policy because it violated the Georgia Rules of Professional Conduct.¹⁸⁴

VII. ONE LESSON IN PROFESSIONALISM

In *Ellis v. Ellis*,¹⁸⁵ the supreme court dealt with a fundamental issue of lawyer professionalism. In *Ellis* a husband filed for divorce. The wife was represented by counsel, Law, but he did not file a responsive pleading. Instead, Law secured the informal agreement of the husband’s lawyer, Turner, to give notice before any final hearing, and the two

177. *Id.* at 745, 681 S.E.2d at 187.

178. GA. RULES OF PROF’L CONDUCT R. 5.6(b) (2001).

179. *Id.*

180. *Smith*, 298 Ga. App. at 744, 681 S.E.2d at 187.

181. *See* ABA Formal Ethics Op. 00-417 (2000).

As a practical matter, however, this proposed limitation effectively would bar the lawyer from future representations because the lawyer’s inability to use certain information may materially limit his representation of the future client and, further, may adversely affect that representation. Once the lawyer reaches these conclusions, client consent is ineffective. Rule 1.7(b) would prohibit the representation. Thus, a prohibition against using the information is a restriction upon the lawyer’s right to practice.

Id. (footnote omitted).

182. *See Smith*, 298 Ga. App. at 744, 681 S.E.2d at 187.

183. *See id.*

184. *See, e.g., In re Lewis*, 266 Ga. 61, 61-63, 463 S.E.2d 862, 863-64 (1995) (contract that gave attorney right to accept settlement without consulting client violated the applicable rules of conduct and was unenforceable as a matter of public policy).

185. 286 Ga. 625, 690 S.E.2d 155 (2010).

lawyers exchanged correspondence about mediation and discovery. The husband then hired a new lawyer, Sheppard, who promptly secured a judgment on the pleadings without a hearing and without notice to the wife's lawyer. Because the wife's counsel did not file a responsive pleading, no rule or statute required Sheppard to give notice of her application for judgment on the pleadings.¹⁸⁶

A preliminary issue is whether what Sheppard did was unprofessional. In Georgia, professionalism requires that lawyers treat opposing counsel with "fairness, integrity, and civility."¹⁸⁷ Part of civility in the context of lawyer-to-lawyer professionalism is to live up to all agreements with opposing counsel, regardless of whether they are in writing.¹⁸⁸ It would have been unprofessional, therefore, for Turner to take the case to a final hearing without telling Law, the wife's lawyer. Of course, there was no final "hearing;" instead, there was an *ex parte* judgment on the pleadings.¹⁸⁹ Yet that must be a distinction without a difference: the clear import of the agreement between Law and Turner was that Turner would not seek a final resolution of the case without informing his adversary.¹⁹⁰ Of course, Sheppard did not make the agreement with the wife's counsel.¹⁹¹ Yet if she knew about it (a fact that she denied), then surely it would be unfair to Law and therefore unprofessional to take the case to judgment without notifying Law either that she was doing so or that she did not consider herself bound by her predecessor's agreement. Even if Sheppard did not know about the agreement, the papers in the file revealed that Law and Turner had corresponded about discovery and mediation.¹⁹² Those documents should have put Sheppard on notice that the wife's lawyer was not ignoring the case and expected to be involved—and presumably notified—as the case proceeded. Again, if Sheppard wanted to handle the case "by the book," that would be her right, but fairness required that she notify Law of her intention to do so. If this analysis is correct, then under any interpretation of the facts, Sheppard acted unprofessionally in obtaining the judgment without notice.

186. *Id.* at 625-26, 690 S.E.2d at 156-57.

187. A LAWYER'S CREED, *supra* note 91.

188. See FINAL REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH JUDICIAL CIRCUIT, at 12 (one proposed standard for conduct in the United States Court of Appeals for the Seventh Circuit states that lawyers shall "adhere to all express promises and to agreements with other counsel, whether oral or in writing"), available at <http://www.ca7.uscourts.gov/civility.pdf>.

189. See *Ellis*, 286 Ga. at 625, 690 S.E.2d at 156.

190. See *id.*

191. See *id.* at 625-26, 690 S.E.2d at 156.

192. See *id.* at 625, 690 S.E.2d at 156.

The harder question is whether the courts should do anything about it. Determining how to enforce professionalism is a much more difficult problem than defining it.¹⁹³ The Georgia Lawyer's Creed, which describes the professionalism obligations of Georgia lawyers, states that the creed "cannot be imposed by edict because moral integrity and unselfish dedication to the welfare of others cannot be legislated."¹⁹⁴ Courts and scholars have expressed differing views about the wisdom of judicial enforcement of professionalism.¹⁹⁵ *Ellis* presents perhaps the most difficult kind of case: the lawyer did not violate any rule or statute and served her client well, even if some would call her means unprofessional. How should the courts rule in such cases?

One would have thought this question was answered in Georgia by *Green v. Green*,¹⁹⁶ a case in which a wife filed for divorce but then moved from the state. After she moved, her lawyer withdrew. When the case reached the court's trial calendar, the husband's lawyer took aggressive steps to obtain judgment without notifying the wife, even though the husband's counsel knew where the wife was.¹⁹⁷ Although there was no statute or rule that required the husband's counsel to notify the wife, the supreme court held,

[T]he courts will not condone a refusal "to act out of a spirit of cooperation and civility and not wholly out of a sense of blind and unbridled advocacy." That spirit of cooperation and civility, when taken together with the notions of fundamental fairness that lie at the heart of the principle of due process of law, requires that attorneys, as officers of the court, make a good faith effort to ensure that all parties to a controversy have a full and fair opportunity to be heard. Such an effort may entail, as is already the customary practice of many attorneys, counsel assuming the burden of notifying by mail any

193. See Patrick E. Longan, *Teaching Professionalism, Articles Edition*, 60 MERCER L. REV. 659, 679-87 (2009).

194. A LAWYER'S CREED, *supra* note 91.

195. See, e.g., *Dondi Prop. Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284, 288 (N.D. Tex. 1988) (asserting that lawyers who act unprofessionally should expect a range of sanctions from "a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances." *But see* Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 325 (1995) ("[Judges] should be careful, however, in their efforts to police both frivolous litigation and incivility, given the intrinsic limitations we have identified in the use of both bright-line legal rules and broad equitable discretion in addressing those problems. They should, in particular, be wary of using highly coercive penalties in view of the dangers of chilling vigorous advocacy and the difficulties of distinguishing conscientious activism from ill-motivated aggression.").

196. 263 Ga. 551, 437 S.E.2d 457 (1993).

197. *Id.* at 551-53, 437 S.E.2d at 457-59.

unrepresented opposing party when their case appears on a trial calendar. No such effort was made in this case.¹⁹⁸

Justice Sears-Collins concurred in the result but cautioned against using notions of professionalism rather than statutes and rules to decide cases.¹⁹⁹ She described the case as beginning “the descent of the slippery slope of legislating civility and courtesy” and urged that the supreme court “should not permit its distaste for lawyers who may not be exercising common sense, maturity, and civility to blind it to the problems of legislating such conduct.”²⁰⁰ Thus, it would seem after the decision in *Green* that Georgia courts will at least sometimes rectify the consequences of unprofessional conduct that violates no rule or statute.

However, the supreme court’s decision in *Ellis* may signal a departure from that approach. In *Ellis* the court affirmed the judgment because the wife, through counsel, waived notice by failing to file a responsive pleading.²⁰¹ The majority did not address the question of Sheppard’s professionalism but instead simply noted that the applicable procedures entitled her to proceed without notice.²⁰² In other words, it appears to be permissible to litigate “by the book” without fear that the courts will take action to discourage conduct that is legal but nevertheless unprofessional. Three justices dissented, in part because “the manner of resolution of this case violated basic notions of fairness and professionalism.”²⁰³ It will bear watching to see whether the courts in Georgia adopt the approach to the enforcement of professionalism evidenced in *Green* or that which appears in *Ellis*.

VIII. MISCELLANEOUS CASES

The appellate courts in Georgia decided three miscellaneous cases regarding the professional responsibilities of lawyers during the survey period. In *Gonnella v. State*,²⁰⁴ the supreme court reversed the trial court’s denial of a motion for new trial because of prosecutorial misconduct.²⁰⁵ The main witness against the defendant was an accomplice who pled guilty under an agreement that allowed him to seek a lighter sentence after he testified. The prosecution did not produce to

198. *Id.* at 554-55, 437 S.E.2d at 459-60 (footnotes omitted) (citation omitted).

199. *Id.* at 556, 437 S.E.2d at 461 (Sears-Collins, J., concurring).

200. *Id.* at 558, 437 S.E.2d at 462.

201. *Ellis*, 286 Ga. at 626, 690 S.E.2d at 156-57.

202. *See id.* at 626, 690 S.E.2d at 157.

203. *Id.* at 633, 690 S.E.2d at 161 (Hunstein, C.J., dissenting).

204. 286 Ga. 211, 686 S.E.2d 644 (2009).

205. *Id.* at 215-16, 686 S.E.2d at 647-48.

the defense the document that would have shown this part of the deal and enabled the defense to impeach the witness on that basis.²⁰⁶

The case of *Cabiness v. Lambros*²⁰⁷ dealt with a judgment of criminal contempt against an attorney. The trial court placed the assets of several people and entities under receivership and issued an injunction to prohibit all persons from creating liens on the receivership property. Nevertheless, the lawyer's client filed a notice of lien against the property. After the lawyer forwarded the notice to the receiver, the trial court found the lawyer in criminal contempt for violating the injunction.²⁰⁸ The court of appeals reversed because the client, rather than the lawyer, violated the injunction by filing the notice of lien.²⁰⁹ The act of forwarding the notice to the receiver did not violate the injunction; nor could the attorney be held in contempt for failing to dismiss the notice of lien.²¹⁰ The lawyer had no authority to dismiss the notice without instructions from his client.²¹¹

Finally, the court of appeals decided a case involving an attorney's apparent authority to enter into a settlement on behalf of a client.²¹² A husband and wife sued Liberty Mutual Fire Insurance Company, among other defendants. The couple's lawyer negotiated a settlement with counsel for Liberty Mutual, and the uncontroverted evidence was that Liberty Mutual's counsel was never informed of any limitation on the authority of the couple's lawyer to settle the case. The trial court enforced a settlement agreement reached by the couple's attorney with the lawyer for Liberty Mutual despite the couple's contention that the attorney did not have authority to enter into that settlement.²¹³ The court of appeals affirmed.²¹⁴ Because the limitation, if there was one, was not communicated to Liberty Mutual, Liberty Mutual was entitled to rely on the plenary apparent authority of the lawyer to settle the case on behalf of the client.²¹⁵

206. *Id.* at 213-14, 686 S.E.2d at 646-47.

207. 303 Ga. App. 253, 692 S.E.2d 817 (2010).

208. *Id.* at 253-55, 692 S.E.2d at 818-19.

209. *Id.* at 255-56, 692 S.E.2d at 819.

210. *Id.*

211. *Id.*

212. *Stephens v. Alan V. Mock Constr. Co.*, 302 Ga. App. 280, 690 S.E.2d 225 (2010).

213. *Id.* at 280-82, 690 S.E.2d at 227-29.

214. *Id.* at 281, 690 S.E.2d at 227.

215. *Id.* at 284-85, 690 S.E.2d at 230.

IX. OPINIONS OF THE FORMAL ADVISORY OPINION BOARD²¹⁶

During the survey period, the State Bar of Georgia Formal Advisory Opinion Board (Board) took actions with respect to four items that are worthy of note. First, the Board voted to withdraw an opinion that addressed this question: “Is it permissible for an attorney to compensate a lay public relations or marketing organization to promote the services of an attorney through the advertising means listed in Rule 7.2 of the Georgia Rules of Professional Conduct?”²¹⁷ The Board had issued and twice published a proposed opinion, but the Board voted to withdraw the opinion and not submit it to the supreme court for review.²¹⁸

Second, the Board dealt with an opinion addressing these questions: “Is a lawyer obligated to notify a client’s creditors or third persons when the lawyer receives the proceeds of a client’s settlement or judgment? If the lawyer is obligated to notify a third person, is the lawyer then obligated to pay that third person, even over the client’s objections?”²¹⁹ The answers to these questions require an interpretation of Georgia Rule of Professional Conduct 1.15(I).²²⁰ Although the Board had approved a proposed opinion, during the survey year the Board tabled the opinion because the State Disciplinary Rules and Procedure Committee is considering a proposed amendment to Rule 1.15(I).²²¹

Third, the Board approved proposed opinion 08-R5, “Ethical Considerations Bearing on Decision of Lawyer to Enter into Flat Fixed Fee Contract to Provide Legal Services.”²²² The proposed opinion appeared in the Georgia Bar Journal’s April 2010 issue.²²³ That draft opinion discusses the ethical issues that arise in three circumstances:

1. A Sophisticated User of Legal Services Offers to Retain a Lawyer or Law Firm to Provide It With an Indeterminate Amount of Legal Services of a Particular Type for an Agreed Upon Fixed Fee
2. A Third-Party Offers to Retain a Lawyer or Law Firm to Handle an Indeterminate Amount of Legal Work of a Particular Type for a Fixed

216. The Author is a member of the Formal Advisory Opinion Board (Board). In this Article, the Author speaks only for himself and not for the Board or its other members.

217. OFFICE OF THE GENERAL COUNSEL, STATE BAR OF GEORGIA ANNUAL REPORT FOR OPERATIONAL YEAR 2009-2010, at 17 (2010), available at http://www.gabar.org/public/pdf/OGC/OGC_Report_09_10.pdf.

218. *Id.*

219. *Id.* at 14.

220. GA. RULES OF PROF’L CONDUCT R. 1.15(I) (2001).

221. STATE BAR OF GEORGIA ANNUAL REPORT, *supra* note 217, at 14.

222. *Id.* at 15.

223. *First Publication of Proposed Formal Advisory Opinion No. 08-R5*, 15 GA. B.J. 82 (Apr. 2010).

Fee for Those the Third-Party Payor is Contractually Obligated to Defend and Indemnity Who Will Be the Clients of the Lawyer or Law Firm

3. A Third-Party Offers to Retain a Lawyer or Law Firm to Provide an Indeterminate Amount of Legal Work for an Indeterminate Number of Clients Where the Third-Party Paying for the Legal Service Has an Obligation to Furnish the Assistance of Counsel to Those Who Will Be Clients of the Lawyer But Does Not Have a Direct Stake in the Outcome of Any Representation.²²⁴

The publication of the proposed opinion began a period in which interested parties could submit comments.²²⁵

Finally, the Board continued to deal with an important issue related to conflicts of interest and public defenders. Proposed opinion 07-R1 addresses the following question: “May different public defenders employed by the same agency represent co-defendants when a single public defender would have an impermissible conflict of interest in doing so?”²²⁶ The Board initially approved and in October 2008 published an opinion with the following summary conclusion:

Different public defenders employed by the same agency are not automatically disqualified from representing co-defendants when a single public defender would have an impermissible conflict of interest merely because of such employment. Public defenders working in different offices and employing effective safeguards to protect each client’s confidential information and trial strategy may represent such co-defendants unless other circumstances create a conflict of interest for one or more of the public defenders.²²⁷

After the Board received comments on that draft opinion, the Board revised it and issued the published version with a different conclusion.²²⁸ The new summary answer was as follows: “Lawyers employed in the circuit public defender office in the same judicial circuit may not represent co-defendants when a single lawyer would have an impermissible conflict of interest in doing so.”²²⁹ The Board approved a second publication of the opinion for June 2010 (with the opinion now denoted as “Formal Advisory Opinion 10-1”) with one sentence added to the end

224. *Id.* at 82-83, 85.

225. *See* GA. RULES OF PROF’L CONDUCT R. 4-403(c) (2001).

226. STATE BAR OF GEORGIA ANNUAL REPORT, *supra* note 217, at 15.

227. *First Publication of Proposed Formal Advisory Opinion No. 07-R1*, 14 GA. B.J. 82, 82 (Oct. 2008).

228. *See First Publication of Amended Proposed Formal Advisory Opinion No. 07-R1*, 15 GA. B.J. 72 (Feb. 2010).

229. *Id.* at 72.

of the opinion: “Conversely, lawyers employed in circuit public defender offices in different judicial circuits are not considered members of the same ‘unit’ or ‘firm’ within the meaning of Rule 1.10.”²³⁰

X. CONCLUSION

These decisions from the appellate courts of Georgia and from the Formal Advisory Opinion Board provide important guidance for Georgia lawyers as they seek to discharge their professional responsibilities. As the Georgia law of lawyering continues to develop, it will behoove Georgia lawyers to pay close attention to these developments.

²³⁰. *Second Publication of Formal Advisory Opinion No. 07-R1 Hereinafter known as “Formal Advisory Opinion No. 10-1,”* 15 GA. B.J. 92, 94 (June 2010).