Legal Ethics

by Patrick Emery Longan*

I. INTRODUCTION

This Survey covers the period from June 1, 2015 to May 31, 2016.¹ The Article discusses attorney discipline, ineffective assistance of counsel, legal malpractice and breach of fiduciary duty, judicial ethics, several miscellaneous cases involving legal ethics, opinions of the Formal Advisory Opinion Board, and amendments to the Georgia Rules of Professional Conduct.

II. LAWYER DISCIPLINE²

A. Disbarments³

1. Trust Account Abuse or Other Financial Transgressions

The Georgia Supreme Court disbarred seven lawyers for violations of their duties with respect to financial matters. Michael L. Terrell voluntarily surrendered his license after he failed to account to his client

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³Lawyers in Georgia can voluntarily surrender their licenses or submit a petition for voluntary discipline. GA. RULES OF PROF'L CONDUCT R. 4-110(f) (2016). 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. Id.
for a $100,000 check he received in settlement of the client’s personal injury case. David P. Hartin also voluntarily surrendered his license, after he failed to account to his divorce client for the proceeds of the sale of the marital home, which were to be distributed equally to the divorcing parties. Jin Choi gave up his license after he failed to take proper care of funds entrusted to him in his fiduciary capacities, including funds for business ventures and funds involving his law practice.

Douglas J. Mathis lost his license because he abandoned his law office and converted client funds in connection with a real estate closing and an irrevocable trust. Russ Floyd Barnes voluntarily surrendered his license after he admitted that he took $275,000 of funds held in a fiduciary capacity from his firm’s trust account. The special master found (and the court agreed) that he should lose his license even though he claimed (albeit without documentation) he replaced the funds and no client was harmed. The court disbarred Tesha Nicole Clemmons because she did not maintain communication with her personal injury client, settled the case without the client’s authority, failed to disburse any of the funds to the client or keep them in her trust account, and made false statements to the Investigative Panel.

In one of the more bizarre cases, the court accepted the petition of Tony L. Axam to voluntarily surrender his license, after Axam acted as “paymaster” for a client. At the direction of a client, an individual wired $100,000 to Axam’s operating account (he did not have a trust account), and Axam then disbursed the money (minus a fee of $5000 for his trouble) as directed by his client. Axam did not know the nature of the underlying business and asked no questions, but when he failed to provide an accounting of the funds, the person who sent the money to him filed the grievance that led to Axam surrendering his license.

2. Client Abandonment, Lack of Communication, or Both

The supreme court disbarred ten lawyers primarily for either client abandonment or lack of communication, or both. Stephen Bailey Wallace,

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9. Id. at 499, 775 S.E.2d at 129.
12. Id. at 787, 778 S.E.2d at 222.
13. Id. at 787, 778 S.E.2d at 222-23.
II defaulted and was disbarred because he filed suit on behalf of a severely injured client in 2004 but filed nothing in the case after 2006, resulting in the case's dismissal in 2013. Perrin Bowie Lovett lost his license because he accepted payment of $1,000 to help a client in connection with an estate and subsequently closed his practice, kept the money, falsely told the client another lawyer would handle the matter for no additional fee, and refused to return the money or the file. Tanya Yvette Brockington lost her license because she abandoned three clients who paid her to help with immigration matters and never refunded their money. Steven Salcedo was disbarred because he agreed to represent a client in two medical malpractice claims but failed to file one at all, caused the other to be dismissed by not appearing at a status conference, did not inform the client of the status of her matters, was uncommunicative with the client, and did not return her files. The court disbarred William Charles Lea after he abandoned three clients and refused to return any of the fees they had paid him. Stephen B. Taylor was disbarred when he took money to represent two clients in criminal matters but did no work, abandoned the clients, did not communicate with the clients or the client’s family, and failed to return the fees.

The court seemed somewhat reluctant when it accepted the petition of Dianne Cook to surrender her license. Cook, who had no prior discipline, was cooperative with the investigation, and told the court she no longer intended to practice, but she had neglected one matter for a client at a time when she and her husband were in declining health.

Melissa Jill Starling lost her license after she defaulted in two disciplinary matters related to her abandonment of clients. In one, Starling undertook to represent a client in a personal injury case but did not consult the client about settlement, did not communicate with the client, allowed the statute of limitations to expire, and then withdrew without explanation. In the other matter, Starling accepted $750 to represent a client on an aggravated stalking charge but never communicated with the client or took any steps to obtain bond for the

21. *Id.*
23. *Id.* at 359-61, 773 S.E.2d at 768-69.
client.\textsuperscript{24} When the client replaced her, Starling did not refund the fee.\textsuperscript{25} In both disciplinary matters, Starling attempted to open the default judgments, but the special master found that she had met none of the criteria for opening a default.\textsuperscript{26}

The court disbarred Joel David Myers as a result of his abandonment of two clients.\textsuperscript{27} In one case, Myers did not file pleadings, respond to discovery, or respond to the client’s requests for information. Myers also misrepresented the work he had done and the justifications for his substantial fees but refused to return unearned fees.\textsuperscript{28} In the other case, Myers billed the client twice for the same work, borrowed $600 from the client without satisfying Georgia Rule of Professional Conduct 1.8,\textsuperscript{29} did not file the papers and fees necessary to achieve the client’s objectives, and lied to the client about whether he had done so.\textsuperscript{30}

Wayne Peter Merisotis was disbarred after he undertook the representation of two clients in criminal cases but gave them false information about what he would do, failed to act with diligence, to consult with the clients, to inform them of the status of their cases, to comply with their reasonable requests for information, or to withdraw from the cases.\textsuperscript{31} In one of the cases, Merisotis failed to appear at hearings and gave false information to the bar during its informal investigation.\textsuperscript{32}

3. Criminal Activity

The supreme court disbarred eight lawyers as a result of their criminal activity. Charles B. Merrill, Jr. voluntarily surrendered his license after being convicted of federal conspiracy to make false statements and reports in connection with a loan from the Rural Development Administration.\textsuperscript{33} John R. Thompson was disbarred after he exhausted his appeals from convictions on felony counts of conspiracy, bank fraud, wire fraud, and mail fraud.\textsuperscript{34} James Alan Langlais voluntarily surrendered his license after he pled guilty, as a first offender, to felony

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\item 24. \textit{Id.} at 362, 773 S.E.2d at 779.
\item 25. \textit{Id.} at 359-60, 773 S.E.2d at 768-69.
\item 26. \textit{Id.} at 361, 773 S.E.2d at 769.
\item 28. \textit{Id.} at 783-84, 778 S.E.2d at 224.
\item 29. GA. RULES OF PROF’L CONDUCT R. 1.8 (2016).
\item 30. \textit{Myers}, 297 Ga. at 784, 778 S.E.2d at 224.
\item 32. \textit{Id.} at 471, 775 S.E.2d at 151.
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charges of false statements, false writings, and forgery.\textsuperscript{35} Wilson R. Smith gave up his license after he pled guilty in federal court to mail fraud and aggravated identity theft.\textsuperscript{36} The court accepted Donald Carlton Gibson’s petition to relinquish his license after he pled guilty to bank fraud, a felony.\textsuperscript{37} Tashawna Lacher Griffieth voluntarily surrendered her license after pleading guilty in state court to a felony charge of first-degree forgery.\textsuperscript{38}

Jennifer L. Wright pled guilty to felony possession of Alprazolam (which is sold under the trade name Xanax) and was disbarred after the evidence at her hearing showed that she had not been compliant with the terms of her probation (including participation in drug treatment and cessation of marijuana use), and had a history of arrests for driving under the influence. She also had a history of failing to take responsibility, blaming others, and lack of candor with a drug counselor.\textsuperscript{39}

In a more unusual case, because it involved a misdemeanor rather than a felony, Dennis S. Childers lost his license after he pled guilty as a first offender for having received a vehicle tag he knew was stolen and doing so without the intention of restoring it to the owner.\textsuperscript{40} The special master found that this was a misdemeanor involving moral turpitude because it involved an act of dishonesty.\textsuperscript{41} In light of Childers’ prior disciplinary history and the lack of significant mitigation, the court approved the special master’s recommendation of disbarment.\textsuperscript{42}

4. Miscellaneous Disbarments

The supreme court disbarred three lawyers for other reasons. Jarlath Robert MacKenna was disbarred because he undertook to represent two clients (one of whom he abandoned) while his license to practice law had been suspended.\textsuperscript{43} The court disbarred Paul R. Koehler because he would not stop litigating a matter that he had definitively lost.\textsuperscript{44} After the supreme court had disposed of the matter, Koehler continued filing frivolous motions in the superior court (some even after the client had

\textsuperscript{36} In re Smith, 298 Ga. 137, 137, 779 S.E.2d 663, 663 (2015).
\textsuperscript{37} In re Gibson, 298 Ga. 437, 437, 782 S.E.2d 442, 443 (2016).
\textsuperscript{38} In re Griffieth, 298 Ga. 436, 436, 782 S.E.2d 443, 443 (2016).
\textsuperscript{39} In re Wright, 299 Ga. 139, 139, 786 S.E.2d 686, 686 (2016).
\textsuperscript{40} In re Childers, 297 Ga. 788, 788, 778 S.E.2d 216, 217 (2015).
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 789, 778 S.E.2d at 217.
\textsuperscript{43} In re MacKenna, 298 Ga. 826, 826, 784 S.E.2d 798, 798 (2016).
\textsuperscript{44} In re Koehler, 297 Ga. 794, 778 S.E.2d 218 (2015).
fired him) and frivolous appeals in the court of appeals. Koehler also filed a related federal civil action without his client's authority and made deceitful and misleading statements in the complaint.

Jay Harvey Morrey undertook to represent clients on contingency bases but did not prepare retainer agreements or any writing to describe his fees and expenses, and he also failed to maintain adequate records of his fee agreements. Morrey also represented a party in numerous garnishment actions but never investigated his suspicion, which apparently turned out to be correct, that his client was not actually the party to the case. Morrey informed the court that his actions resulted from depression and other emotional issues and conceded that he was unable to practice law, and the court accepted his petition to voluntarily surrender his license.

B. Suspensions

1. Less Than Six Months

The supreme court suspended four lawyers for less than six months. The court suspended Hugh O. Nowell for two months and ordered a public reprimand because Nowell falsely testified in two depositions in a civil case. The court gave Nowell lenient treatment because he took the initiative to alert the court and the bar to what he had done and corrected his false testimony. The court accepted the petition for voluntary discipline of Clifford E. Hardwick, IV and suspended him for ninety days because he negligently misrepresented to a client that he had filed a motion. James A. Meaney, III was suspended in Tennessee for three months (with an additional nine months of probation) for having practiced law there while his Tennessee license was suspended, and the Georgia Supreme Court imposed a ninety-day suspension of Meaney's Georgia license as reciprocal discipline.

45. Id. at 794-95, 778 S.E.2d at 218.
46. Id. at 795-96, 778 S.E.2d at 219.
48. Id. at 435, 782 S.E.2d at 444.
49. Id. at 436, 782 S.E.2d at 444.
50. This Article discusses only those suspensions that constitute final discipline and does not discuss interim suspensions.
52. Id.
54. In re Meaney, 298 Ga. 136, 136-37, 779 S.E.2d 662, 662-63 (2015). Because Georgia does not allow for probation in its disciplinary system, the court could not impose discipline that would have been identical to Tennessee's. Id. at 137, 779 S.E.2d at 663.
The fourth case involved Georgia Rule of Professional Conduct 5.3(d), which provides:

- a lawyer shall not allow any person who has been suspended or disbarred and who maintains a presence in an office where the practice of law is conducted by the lawyer, to:
  1. represent himself or herself as a lawyer or person with similar status;
  2. have any contact with the clients of the lawyer either in person, by telephone or in writing; or
  3. have any contact with persons who have legal dealings with the office either in person, by telephone or in writing.

Mary Ellen Franklin shared office space with her husband who, unbeknownst to Franklin, was practicing law while his license was suspended. He told her falsely that his license had been reinstated, but she never checked it herself. Her husband settled a case for a client but misappropriated the funds. The court suspended Ms. Franklin for three months, acknowledging that her violation of Rule 5.4 gave her husband the chance to harm the client but also noting that she had no prior disciplinary history, was suffering from depression, and was remorseful.

2. Six Months to One Year

The supreme court imposed suspensions of six months to one year in three cases. Gayle S. Graziano received a six-month suspension because she neglected a client matter at a time when she was dealing with personal health issues and the terminal illness of a close family member. Graziano was unable to attend a pre-trial conference and instructed her client (with notice to opposing counsel) to appear without her and ask for a continuance to obtain other counsel (Graziano had not requested a leave of absence). The client did not appear, and at the pre-trial conference the trial court dismissed the client’s case and set a hearing on the opposing party’s counterclaim. Opposing counsel sent an email notice to Graziano about that next hearing, but, because she did...
not see the email, she neither attended the hearing nor notified her client, and the court rendered judgment against her client. The court noted the personal circumstances with which Graziano was dealing and her lack of disciplinary history and accepted her petition for voluntary discipline of a six-month suspension.

Tony C. Jones received a suspension of one year (to be served consecutively with two other suspensions that had already been ordered) as a result of three grievances. In one, Jones could not initially refund a client’s fee when Jones had to withdraw because of one of the other suspensions. Although the matter was eventually resolved, Jones failed to respond to the grievance. In the second matter, Jones violated his duty of communication by not responding to three letters from a client (Jones maintained that he never received the letters) about the client’s appeal, although Jones claimed he had told the client that his representation ended with the client’s guilty plea. In the third matter, a client’s family wrote to him about trying to correct the sentence the client received as a result of a guilty plea, but Jones did not respond for many months, until long after the time to withdraw the plea had expired.

Nakata S. Smith Fitch’s petition for a six-month suspension was accepted, as discipline for having charged excessive fees and expenses for a conservatorship and for not having paid a judgment of the probate court to reimburse that money. The court noted in mitigation that the failure to pay was the result of financial difficulties, made worse by the illness and death of Fitch’s husband.

3. Indefinite

The supreme court imposed two indefinite suspensions (other than interim suspensions). Peggy Ruth Goodnight was suspended indefinitely until she received a previously-ordered Review Panel reprimand after she failed three times to appear to receive the reprimand. The court accepted Ricky W. Morris, Jr.’s voluntary petition for an indefinite

64. Id.
65. Id at 9, 785 S.E.2d at 538-39.
67. Id. at 185-86, 780 S.E.2d at 672-73.
68. Id. at 186, 780 S.E.2d at 673.
69. Id.
70. Id. at 186-87, 780 S.E.2d at 673.
72. Id. at 380, 782 S.E.2d at 41.
emergency suspension while various disciplinary and criminal matters, which may have arisen from his addiction and mental health issues, were resolved.\textsuperscript{74}

C. Public Reprimands

The supreme court imposed public reprimands in five cases. William F. Heitmann, III successfully petitioned for a public reprimand as discipline for his failure to take appropriate measures to see that an independent contractor he employed conformed his conduct to Heitmann’s professional obligations.\textsuperscript{75} Without Heitmann’s knowledge, the contractor solicited three potential clients who had been in automobile accidents to allow Heitmann to represent them.\textsuperscript{76} Michael Anthony Eddings received a public reprimand because he violated Rule 4.2 (the “no-contact rule”) by communicating on the eve of a criminal trial with people whom he knew to be represented by counsel.\textsuperscript{77} Tiffini Colette Bell’s petition for a public reprimand was accepted as discipline for her failures in a child custody case to truthfully communicate with her client about the appointment of a guardian ad litem and about discovery, to respond in a timely manner to discovery, to seek the appointment of a guardian ad litem, and to prepare for hearings.\textsuperscript{78} Just over one week later—just outside the survey period for this Article—Bell’s discipline was changed to a Review Panel reprimand.\textsuperscript{79}

Susan Michele Brown represented a wife in a divorce action and was supposed to hold funds from the sale of marital property in trust and disburse them at the close of the proceedings, but Brown held the funds in a non-trust account and withheld distribution at her client’s insistence, to ensure the husband’s compliance with other terms of the divorce.\textsuperscript{80} In a separate matter, Brown represented a client in a civil matter but caused the case to be dismissed without prejudice by not complying with discovery obligations or responding to a motion to compel.\textsuperscript{81} The court ordered a public reprimand and noted in mitigation that all parties had been made whole and that Brown’s lack of diligence occurred at a time when her elderly father was ill.\textsuperscript{82}

\textsuperscript{74} In re Morris, 298 Ga. 864, 785 S.E.2d 408 (2016).
\textsuperscript{75} In re Heitmann, 297 Ga. 280, 281, 773 S.E.2d 278, 279 (2015).
\textsuperscript{76} Id. at 280, 773 S.E.2d at 279.
\textsuperscript{78} In re Bell, 786 S.E.2d 687 (2016).
\textsuperscript{79} In re Bell, 299 Ga. 143, 787 S.E.2d 166 (2016).
\textsuperscript{80} In re Brown, 297 Ga. 865, 865, 778 S.E.2d 790, 791 (2015).
\textsuperscript{81} Id. at 865-66, 778 S.E.2d at 791.
\textsuperscript{82} Id. at 866-67, 778 S.E.2d at 792.
The court accepted (over Justice Melton’s dissent) a voluntary petition for a public reprimand from Robert B. Eddleman, who conceded that he violated Rule 1.783 regarding conflicts of interest and Rule 5.384 regarding non-lawyer assistants.85 Eddleman violated Rule 1.7 by representing his secretary, with whom he had an intimate relationship at the time and whom he later married, in her divorce proceeding while he was simultaneously counsel of record for the secretary’s husband in an unrelated matter.86 The Rule 5.3 violation resulted from his failure to train and supervise his secretary, who signed several documents (including a release in favor of Eddleman) with her husband’s name.87

D. Review Panel Reprimands

The supreme court approved Review Panel reprimands for four lawyers. A $40.95 trust account overdraft alerted the bar that Neville Trevor Francis commingled personal and fiduciary funds in his “very small, almost non-existent practice.”88 The court accepted his voluntary petition for a Review Panel reprimand.89 The court accepted Nicholas Pagano’s petition for voluntary discipline in the form of a Review Panel reprimand as discipline for having abandoned a personal injury client and for not telling the client that the case had been dismissed as a result of Pagano’s failure to appear for two calendar calls.90 S. Carlton Rouse received a Review Panel reprimand because he failed to return a client’s file and withdraw from a case, as instructed by the client, for two months.91

Thomas J. Ford, III undertook to defend a client in a murder case and knew he would need a forensic pathologist.92 Ford assumed his client’s prior counsel would secure one, but when that turned out not to be true, Ford neither consulted with the client about the effect on the case nor

86. Id. at 469-70, 782 S.E.2d at 669. The Georgia Rules of Professional Conduct, unlike the Model Rules of Professional Conduct, do not explicitly provide that it is a conflict of interest for a lawyer to represent a client with whom the lawyer is involved in a sexual relationship. The court in Eddleman’s case, however, mentioned “this Court’s repeated admonitions against lawyers entering into extramarital relationships with clients . . . .” Id. at 470, 782 S.E.2d at 669.
87. Id. at 470, 782 S.E.2d at 669.
89. Id. at 283, 773 S.E.2d at 281.
moved for a continuance.\textsuperscript{93} He admitted he was not ready for trial, and his client was convicted (although new counsel later obtained a new trial for her).\textsuperscript{94} Ford’s petition for a Review Panel reprimand was accepted, and the court noted that, at the relevant time, Ford was undergoing the dissolution of his marriage and was drinking to excess.\textsuperscript{95}

\textbf{E. Other Disciplinary Matters}

The Georgia Supreme Court decided five miscellaneous cases related to discipline. Joanna Temple pled guilty in New York to a misdemeanor charge that resulted from her role as lead counsel for payday lending companies, in which for over five years “she knowingly instructed and encouraged her payday lending clients to intentionally violate certain state lending laws . . . and assisted them in doing so.”\textsuperscript{96} The court rejected her petition for voluntary discipline of a one-year suspension because of the “very serious professional misconduct to which Temple has admitted.”\textsuperscript{97}

Morris P. Fair, Jr. petitioned for a Review Panel reprimand as discipline for lack of communication and diligence in his representation of a habeas petitioner, but, in light of Fair’s prior disciplinary history, the court rejected that request.\textsuperscript{98} Several months later, the court rejected Fair’s second request for a review panel reprimand, for the same reason.\textsuperscript{99}

The court granted certificates of fitness for readmission to two lawyers. Alvin Lamont Kendall was disbarred in 2003 after he was convicted in federal court of conspiring to give a client advance notice of federal law enforcement activities in connection with the client’s drug ring.\textsuperscript{100} The supreme court granted him a certificate of fitness for readmission, finding that he had shown clear and convincing evidence of his rehabilitation.\textsuperscript{101} Wallace Washington had been disbarred in 1998 because he returned client funds to someone not authorized to receive them, rather than returning them to his client.\textsuperscript{102} Washington sought a certificate of fitness for readmission, and the court granted it, noting that

\textsuperscript{93} Id. at 792, 778 S.E.2d at 227-28.  
\textsuperscript{94} Id. at 792, 778 S.E.2d at 228.  
\textsuperscript{95} Id.  
\textsuperscript{96} In re Temple, 299 Ga. 140, 140, 786 S.E.2d 684, 685 (2016).  
\textsuperscript{97} Id. at 141, 786 S.E.2d at 686.  
\textsuperscript{98} In re Fair, 297 Ga. 869, 870, 778 S.E.2d 794, 795 (2015).  
\textsuperscript{99} In re Fair, 299 Ga. 10, 12, 785 S.E.2d 539, 541 (2016).  
\textsuperscript{100} In re Kendall, 297 Ga. 798, 799, 778 S.E.2d 220, 220-21 (2015).  
\textsuperscript{101} Id. at 800-01, 778 S.E.2d at 222.  
\textsuperscript{102} In re Washington, 299 Ga. 142, 142, 786 S.E.2d 687, 687 (2016).
he had demonstrated rehabilitation by his course of conduct during the seventeen years since his disbarment.\footnote{103}

The supreme court denied Jonathan Richard Huddleston a certificate of fitness to practice law because, in his law school applications and his application for certification of fitness:

[He] consistently chose to conceal, rather than disclose, his relevant criminal background and academic history. He repeatedly gave false answers to direct questions about his criminal and academic background, and, even when directly confronted about his lack of candor on numerous occasions, he still chose to omit relevant portions of his record that should have been revealed from the beginning.\footnote{104}

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Cases in Which Claims of Ineffective Assistance Ultimately Prevailed

1. Georgia Supreme Court

The supreme court granted relief in four cases based upon ineffective assistance of counsel.

\textit{Seabolt v. Norris}\footnote{105} involved ineffective assistance of appellate counsel in a murder case. The defendant, Norris, was convicted of murder after she shot her father in the back of the head with a pistol.\footnote{106} The habeas court found four instances of ineffective assistance of appellate counsel, but the supreme court affirmed only one.\footnote{107} The supreme court affirmed the grant of habeas corpus because appellate counsel did not argue that the trial court erred when it refused to charge the jury on the lesser-included offense of involuntary manslaughter.\footnote{108} Because there was evidence that would have supported such a verdict (rather than malice murder), and because the evidence for malice murder was not overwhelming, it was likely that the conviction would have been reversed if appellate counsel had made the argument.\footnote{109} The supreme court held that was ineffective assistance by appellate counsel.\footnote{110}
In *State v. Garland*, the supreme court affirmed the grant of habeas corpus to a man who had been convicted of sexual battery involving a child. Garland’s trial counsel did not investigate or present evidence of Garland’s serious mental problems, which could have led either to a ruling that Garland was not competent to stand trial or perhaps not criminally responsible for his actions. Garland, therefore, had a viable claim of ineffective assistance at trial, but Garland’s second counsel waived the right to pursue those claims without Garland’s consent in exchange for an agreement by the state to allow Garland to serve his probation in Texas. The supreme court held that waiving the right to claim that trial counsel was ineffective, especially without the consent of Garland, was ineffective assistance by Garland’s second lawyer. The court therefore affirmed the grant of the writ of habeas corpus.

*Hillman v. Johnson* involved ineffective assistance in connection with sentencing. The prisoner, Hillman, had a prior felony conviction and was convicted of armed robbery, burglary, aggravated assault, and possession of a firearm by a convicted felon in a home invasion that netted seven dollars and a cell phone. The trial court felt itself constrained by Official Code of Georgia Annotated (O.C.G.A.) section 17-10-7(a) (the mandatory minimum sentencing statute for felony recidivists) to sentence Hillman to the maximum time authorized for armed robbery (life), burglary (twenty years), and aggravated assault (twenty years). The supreme court affirmed the trial court and, therefore, Hillman’s counsel was not ineffective for failing to argue to the contrary. However, the trial court also felt compelled to sentence Hillman to the maximum time allowed for the felon-in-possession charge, five years, even though the statute regarding felon-in-possession (which was enacted after the recidivist statute) provided for a sentencing range of one to five years. As the supreme court recognized, an automatic sentence under the recidivist statute of five years for a felon in possession would nullify the sentencing range the legislature set for that charge.

111. 298 Ga. 482, 781 S.E.2d 787 (2016).
112. *Id.* at 484, 781 S.E.2d at 789.
113. *Id.* at 483, 781 S.E.2d at 788.
114. *Id.* at 484, 781 S.E.2d at 789.
115. *Id.* at 487, 781 S.E.2d at 791.
117. *Id.* at 610, 774 S.E.2d at 616.
118. O.C.G.A. § 17-10-7(c) (Supp. 2016).
119. *Hillman*, 297 Ga. at 610, 774 S.E.2d at 617.
120. *Id.* at 614, 774 S.E.2d at 619.
121. *Id.* at 610, 774 S.E.2d at 617.
because, by definition, all defendants convicted of being a felon in possession are felons who would be subject to the recidivist statute. The supreme court deemed trial counsel’s failure to argue against an automatic five years on the felon in possession charge ineffective assistance, and the supreme court remanded the case for resentencing on that charge.

In *Chatman v. Walker*, the supreme court affirmed a finding of ineffective assistance of counsel in connection with the sentencing phase of a death penalty case. Trial counsel hired a mitigation specialist “without any investigation into his qualifications and then delegated to him responsibility for the mitigation investigation without sufficient supervision.” When it became clear, on the eve of trial, that the mitigation specialist had not conducted a proper investigation, trial counsel failed to ask for a continuance. The defects in the investigation were exacerbated by a deficient presentation in which the “specialist” testified about, among other things, “the alignment of the planets” in the defendant’s life, puzzling jurors and startling the judge. The supreme court agreed the defendant was prejudiced by these failures, because a later investigation revealed a deeply disturbing history of domestic violence and physical abuse in the defendant’s upbringing that, if it had been presented at the sentencing phase of the trial, would have had a reasonable probability of changing the result.

The court of appeals granted relief in five cases based upon ineffective assistance of counsel.

In *Bolden v. State*, the court of appeals held the defendant’s trial counsel rendered ineffective assistance when he failed to object to a variance between the indictment and the judge’s explanation of the charge in response to a jury question. The defendant was convicted of multiple crimes, including burglary of the home of a woman with whom he had three children. The indictment alleged that he committed

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122. *Id.* at 611, 774 S.E.2d at 618.
123. *Id.* at 614-15, 774 S.E.2d at 619–20.
125. *Id.* at 202, 773 S.E.2d at 200.
126. *Id.* at 203-204, 773 S.E.2d at 201.
127. *Id.* at 204, 773 S.E.2d at 201.
128. *Id.* at 209-10, 773 S.E.2d at 205.
130. *Id.* at 653, 782 S.E.2d at 710.
131. *Id.*
burglary by entering the dwelling with the intent to commit a felony, but
the judge told the jury that it could find the defendant committed
burglary if he had the intent to commit a felony, not just at the time he
entered the house, but also when he entered “any room or part of it.”

The defendant testified that he entered the home with the intent only to
talk to the victim. The court of appeals held there was a reasonable
probability that the result of the burglary charge would have been
different if trial counsel had objected to the judge’s deviation from the
indictment, and therefore the court ordered a new trial on that count.

In the Interest of S.B. involved the termination of parental rights.
Parents in such cases have the right to effective assistance of counsel.

In this case, a putative father’s attorney neglected to take steps to
legitimate the child and as a result the juvenile court’s decision was
d dictated by his lack of standing to assert his parental rights. The
juvenile court terminated the father’s parental rights, and the court of
appeals found he had received ineffective assistance of counsel. The
court remanded the case and gave the father thirty days to file the
petition to legitimatize the children.

In Everhart v. State, the defendant was convicted of three counts of
cruelty to children. The court of appeals held Everhart received
ineffective assistance of counsel with respect to one of those counts, which
alleged he had deprived his child of “necessary sustenance” by failing to
seek medical care for the child. The indictment was void, because
under Georgia law “necessary sustenance” does not include medical
care. To charge Everhart with cruelty for failure to seek medical care,
the indictment needed to charge him under a different part of the statute
and allege that by doing so he had maliciously caused the child cruel or
excessive physical or mental pain. Because trial counsel did not demur
to the indictment, and as a result Everhart was convicted of actions that

132. Id. at 656, 782 S.E.2d at 712.
133. Id. at 658, 782 S.E.2d at 713.
134. Id. at 658-59, 782 S.E.2d at 713-14.
137. In the Interest of S.B., 335 Ga. App. at 5, 780 S.E.2d at 525.
138. Id. at 5-6, 780 S.E.2d at 525.
139. Id. at 11, 780 S.E.2d at 529.
141. Id. at 353, 786 S.E.2d at 872-873.
142. Id. at 354, 786 S.E.2d at 873.
143. Id.
do not constitute a crime in Georgia, the court of appeals reversed that part of his conviction.\textsuperscript{144}

In \textit{Blackmon v. State},\textsuperscript{145} a rape case, the only evidence linking the defendant to the crimes alleged was the testimony of the victim. Yet during trial, the prosecution was allowed, without objection from defense counsel, to present six witnesses who testified about hearsay statements that the defendant had made describing what the defendant had done to her.\textsuperscript{146} None of these statements fit within an exception to the hearsay rule, and defense counsel testified that she did not object because she was a “bonehead,” “worn out,” and “overwhelmed.”\textsuperscript{147} To compound the problem, trial counsel also did not object to a jury instruction that the jury could consider those hearsay statements as “substantive evidence,” nor did counsel object when the victim’s mother testified as to her daughter’s truthfulness.\textsuperscript{148} Because the prosecution’s other evidence was limited to the victim’s testimony, and because each of these inexplicable errors by defense counsel related to that testimony, the court of appeals found that defense counsel had rendered ineffective assistance of counsel.\textsuperscript{149}

\textit{Dumas v. State}\textsuperscript{150} was a rape and child molestation case in which the prosecutor repeatedly asked the defendant on the stand whether he had ever denied the victim’s allegations and, in closing argument, used the defendant’s silence upon his arrest against him: “You’re getting picked up on a rape warrant. Scream it from the mountaintops, I didn’t do it.

\textsuperscript{144} \textit{Id.} at 355, 786 S.E.2d at 874.
\textsuperscript{145} 336 Ga. App. 387, 785 S.E.2d 59 (2016).
\textsuperscript{146} \textit{Id.} at 389, 785 S.E.2d at 62.
\textsuperscript{147} \textit{Id.} at 390, 785 S.E.2d at 62.
\textsuperscript{148} \textit{Id.} at 394, 785 S.E.2d at 65.
\textsuperscript{149} \textit{Id.} at 395-96, 785 S.E.2d at 66. Judge Rickman wrote a special concurrence in this case that received much attention. In that opinion, after he acknowledged the difficulties of doing criminal defense work, the judge wrote:

[T]here are three obligations that continue to be ignored by some practicing members of the Georgia bar. First, there is an obligation for the lawyer who feels burned out and ineffective to recognize it and either withdraw from a case or seek other assistance until the lawyer is prepared to perform competently. . . . Second, there is an obligation on the part of any lawyer who may be responsible for supervising a struggling lawyer to recognize when that lawyer needs assistance and/or to be replaced. . . . Third, there is an obligation on our profession to keep an ineffective attorney out of the courtroom until he or she is fully prepared to provide competent representation. . . . In a number of cases that have come before this Court, none of the foregoing obligations appeared to have been taken as seriously as they should have been.

\textit{Id.} at 396-397, 785 S.E.2d at 67 (Rickman, J., concurring).
\textsuperscript{150} 337 Ga. App. 124, 786 S.E.2d 508 (2016).
But nothing.” Defense counsel objected every time the prosecutor sought to introduce evidence of the defendant’s silence and eventually the court said in front of the jury, “He has a right to remain silent.” However, for no reason that trial counsel could recall, he did not object to the prosecutor’s improper comment during closing argument on the defendant’s silence. The court of appeals concluded that there was no strategic reason not to object and therefore this was deficient performance by defense counsel. The court of appeals reversed the conviction based on ineffective assistance of counsel because it found prejudice, based both upon the deliberate misconduct of the prosecutor to convince the jury to hold the defendant’s post-arrest silence against him and the lack of overwhelming evidence favoring conviction.

**B. Findings of Ineffective Assistance Reversed**

The supreme court reversed one finding of ineffective assistance of counsel. In *Williams v. Rudolph*, the defendant had been indicted for rape and other charges but not for statutory rape. Over trial counsel’s objection, the trial court instructed the jury on statutory rape as a lesser included offense of rape. The jury convicted Rudolph of statutory rape (and other charges) but not of rape. Appellate counsel did not raise the judge’s instruction on statutory rape as error, and the habeas court found this was ineffective assistance of counsel under the law as it existed at the time of the habeas decision. The supreme court reversed, however, because the standard should have been the state of the law at the time of the direct appeal, and at that time the impropriety of the charge of statutory rape as a lesser included offense of rape was not clear. The supreme court concluded “there is no requirement for an attorney to prognosticate future law in order to render effective representation.”

The Georgia Court of Appeals also reversed one finding of ineffective assistance of counsel. In *State v. Reynolds*, the defendant was
convicted of aggravated assault, burglary, and other crimes, perpetrated in the course of a home invasion, but the trial court ordered a new trial on the basis of ineffective assistance of counsel. One of the items of evidence against the defendant was a thumbprint on the outside of a stolen car that contained items taken from the victims.\textsuperscript{163} Trial counsel presented the theory that the thumbprint was there because Reynolds sold drugs to occupants of the car and touched the outside of the car during that transaction.\textsuperscript{164} Apparently to buttress that theory, trial counsel elicited testimony from Reynolds about his prior convictions for possession with intent to distribute cocaine.\textsuperscript{165} The court of appeals held the decision to present this evidence was part of a trial strategy, and that strategy was not so far-fetched that no competent attorney would choose to employ it.\textsuperscript{166} Therefore, the court concluded the trial court incorrectly ordered a new trial based upon ineffective assistance of counsel.\textsuperscript{167}

C. Miscellaneous Ineffective Assistance Cases

In \textit{Pyatt v. State},\textsuperscript{168} the defendant was convicted of aggravated assault and felony murder in connection with the death of a victim who was shot while he was driving a car. A detective testified that, in his opinion, one of the shots fired by the defendant was an aggravated assault because the shot was fired "in the direction of the car, over the car."\textsuperscript{169} Defense counsel did not object to this testimony even though it was improper as an opinion about the ultimate issue.\textsuperscript{170} Defense counsel testified there was no strategic reason not to object, but rather he "just missed it."\textsuperscript{171} In a four-to-three decision, the supreme court held the defendant had not made a sufficient showing of prejudice from this error of trial counsel, particularly because defense counsel elicited substantially the same testimony on cross-examination and impeached the basis of the detective’s opinion.\textsuperscript{172} It was also important to the majority that the jury naturally would have inferred the detective’s opinion because the defendant was charged with aggravated assault, the detective testified “I
don’t determine the guilt part,” the opinion apparently was not used in closing argument, and the trial court likely would have responded to any ultimate issue objection with a curative instruction. Three justices dissented and argued that the detective’s testimony intruded on the jury’s role to determine whether the shot, described variously as “at,” “toward,” and “over” the car, was made with the required intent to cause violent injury and that there was a reasonable probability that the jury considered the detective’s improper testimony with respect to all the charges.

In *Tolbert v. State*, a unanimous supreme court rejected a claim of ineffective assistance of counsel despite the fact that one lawyer represented two murder defendants (described in the opinion as “Leroy” and Tolbert”) at the same trial and the clients did not waive any conflict of interest. The court noted the obvious serious potential for conflict but reiterated prior holdings that concurrent representation of co-defendants is not per se ineffective assistance of counsel. The court recognized there was evidence of two alarming facts: the lawyer was paid to represent both defendants by Leroy, and the lawyer met alone with Leroy, but met with Tolbert only when both defendants were present. The court downplayed the credibility of that evidence but ultimately decided the case on the basis that there was insufficient evidence that any conflict of interest adversely affected the lawyer’s representation of both. The court specifically rejected the arguments that the lawyer gave priority in plea negotiations to Leroy and that the lawyer chose not to argue Tolbert was less culpable than Leroy because of a conflict of interest. Instead, the court concluded the “defenses of Tolbert and Leroy were perfectly compatible” and therefore found that there had been no ineffective assistance of counsel.

*Marshall v. State* was a murder case in which at one or more points defense counsel was at best inattentive and at worst asleep. In the one instance of inattention noted by the trial court, defense counsel put his

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173. *Id.* at 757, 784 S.E.2d at 771.
174. *Id.* at 755, 757-58, 784 S.E.2d at 770-71.
175. *Id.* at 759-61, 784 S.E.2d at 774 (Hines, J., dissenting).
177. *Id.* at 148-49, 780 S.E.2d at 302.
178. *Id.* at 151-52, 780 S.E.2d at 304.
179. *Id.* at 153, 780 S.E.2d at 305.
180. *Id.* at 154, 780 S.E.2d at 305.
181. *Id.* at 157, 780 S.E.2d at 307.
183. *Id.* at 450, 774 S.E.2d at 680.
head down on counsel table while the recording of the defendant’s interview with investigators was played for the jury.\textsuperscript{184} Although the supreme court agreed such inattentiveness was “outside professional norms,” the court held Marshall had failed to show that any improper evidence was introduced as a result.\textsuperscript{185} Therefore, the court rejected the claim of ineffective assistance of counsel.\textsuperscript{186}

*Wiley v. State*\textsuperscript{187} raised an interesting issue about the duties of counsel in counseling a client about a plea offer. Wiley declined a plea offer and was convicted at trial.\textsuperscript{188} She claimed her counsel rendered ineffective assistance because, although he counseled her about the strength of the evidence against her and the difference between the plea offer and the likely sentence if she was convicted, her attorney did not advise her specifically to accept or reject the offer.\textsuperscript{189} The court of appeals held that this was within the range of acceptable representation and quoted the following language from the Georgia Supreme Court:

\begin{quote}
[a]n attorney ordinarily may satisfy the duty to provide informed legal advice regarding a plea offer by discussing with the accused the risks of going to trial, the evidence against him or her, and difference in possible sentences that would be imposed following a guilty plea and following a conviction at trial.\textsuperscript{190}
\end{quote}

Because the court found there was nothing deficient in counsel’s representation, it did not reach the question of prejudice.\textsuperscript{191} In a concurrence, Judge McFadden agreed with the result but argued that the case should have been decided after assuming, but not deciding, that counsel was in fact deficient for not offering “bottom-line” advice.\textsuperscript{192} Judge McFadden noted that in 2009 the Georgia Supreme Court quoted language from the United States Supreme Court that an accused is entitled to rely on counsel “to offer his informed opinion as to what plea should be entered.”\textsuperscript{193} To avoid having to decide whether this language

\begin{itemize}
\item \textsuperscript{184} *Id.*
\item \textsuperscript{185} *Id.* at 451, 774 S.E.2d at 680-81.
\item \textsuperscript{186} *Id.*
\item \textsuperscript{187} 336 Ga. App. 641, 782 S.E.2d 850 (2016).
\item \textsuperscript{188} *Id.* at 641, 782 S.E.2d at 851.
\item \textsuperscript{189} *Id.* at 641-43, 782 S.E.2d at 852.
\item \textsuperscript{190} *Id.* at 643, 782 S.E.2d at 853 (quoting Cammer v. Walker, 290 Ga. 251, 255, 719 S.E.2d 437, 441 (2011)).
\item \textsuperscript{191} *Id.* at 644 n.5, 782 S.E.2d at 853 n.5.
\item \textsuperscript{192} *Id.* at 646, 782 S.E.2d at 854 (McFadden, J., concurring).
\item \textsuperscript{193} *Id.* at 645, 782 S.E.2d at 854 (quoting Cleveland v. State, 285 Ga. 142, 44, 674 S.E.2d 289, 291 (2009)).
\end{itemize}
requires such “bottom-line” advice in all cases, Judge McFadden urged that Wiley’s case should have been decided on the basis of lack of prejudice.\textsuperscript{194}

IV. LEGAL MALPRACTICE AND BREACH OF FIDUCIARY DUTY

Georgia appellate courts decided five cases involving legal malpractice or fiduciary duty during the survey period.

In \textit{Alston & Bird LLP v. Hatcher Management Holdings, LLC}, Alston & Bird was the sole defendant in a case alleging legal malpractice and breach of fiduciary duty and filed notice that, at trial, it would seek to show the plaintiff’s damages, if any, were caused in whole or in part by the actions of the plaintiff and others. The trial court struck the notice, but the court of appeals reversed that ruling and held, under recent supreme court precedent, that even in such a single defendant case, the law firm had the right to try to prove that fault should be apportioned.\textsuperscript{195}

\textit{Tucker v. Rogers} involved a personal injury case that was never filed. The attorney attempted unsuccessfully to settle the case and then sought the client’s authorization to file the case.\textsuperscript{196} When the lawyer’s call to the client’s home number revealed the number had been changed, and the client did not answer two calls to his cell phone, the lawyer sought authority to sue in a letter to which the client never responded, and which the client claimed never to have received.\textsuperscript{197} The lawyer did not file suit but, after the statute of limitations expired, settled the case without the client’s authorization.\textsuperscript{198} The court of appeals reviewed the trial court’s order regarding partial summary judgment and held there was no genuine issue of material fact that the lawyer violated the standard of care by settling the case without authority or that the would-be defendant in the underlying case would have been found liable for the accident.\textsuperscript{199} The court held there were genuine issues of material fact regarding whether the attorney’s failure to file the case before the statute of limitations expired violated the standard of care and what, if any, damages the plaintiff suffered as a result of any breaches of the lawyer’s duty of care.\textsuperscript{200}

\begin{footnotesize}
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\item 194. \textit{Id.} at 646, 782 S.E.2d at 854.
\item 195. \textit{Id.} at 530, 785 S.E.2d at 544.
\item 196. \textit{Id.} at 530, 785 S.E.2d at 544.
\item 197. \textit{Id.} at 59, 778 S.E.2d at 795 (2015).
\item 198. \textit{Id.} at 59, 778 S.E.2d at 796-97.
\item 199. \textit{Id.} at 59, 778 S.E.2d at 797.
\item 200. \textit{Id.} at 60-61, 778 S.E.2d at 797-98.
\item 201. \textit{Id.} at 63-64, 778 S.E.2d at 799.
\end{itemize}
\end{footnotesize}
In *Hines v. Holland*, an attorney hired a non-lawyer title examiner to do the title examination on a piece of real property. The title report did not show one of the security deeds on the property, and as a result of reliance on that report, the lawyer gave an incorrect legal opinion about encumbrances on the property. A title insurer issued a policy in reliance on the lawyer's opinion and eventually had to pay over $140,000 to prevent foreclosure by the creditor, who was not identified in the title report or the lawyer's legal opinion. The title company sued the lawyer, and the lawyer attempted to bring in the title examiner as a third-party defendant. The court of appeals affirmed the trial court's dismissal of the third-party claim, holding the lawyer's "third-party" claims were not for contribution or indemnity and thus were not "derivative" claims as required by third-party practice. Of particular note is the court's reasoning that the lawyer's liability to the insurance company was not "vicarious" (imputed liability for the negligence of the title examiner) because "only [the lawyer] can render a legal opinion on the status of title to property, and [the lawyer] is directly responsible to his client for his opinion on the status of the title . . . ."

In *Jim Tidwell Ford, Inc. v. Bashuk*, the court of appeals affirmed summary judgment for defendants in a legal malpractice case. The plaintiff (Tidwell Ford) had been a defendant in a personal injury case brought by Charles Chase. The defendants, Jeffrey Alan Bashuk and Bashuk & Glickman (collectively Bashuk), represented Tidwell Ford in Chase's case. Chase won the personal injury case, and Tidwell Ford appealed, but during the pendency of the appeal, Chase and Tidwell Ford settled. The court of appeals held that Tidwell Ford's decision to settle the underlying case cut off its right to pursue its malpractice and breach of fiduciary duty claims because Tidwell Ford still had a viable chance to obtain reversal of the judgment. Additionally, by settling, Tidwell Ford severed any proximate cause between the damages it agreed to pay in settlement and the alleged malpractice and breach of fiduciary duty of

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204. Id. at 292, 779 S.E.2d at 65.
205. Id.
206. Id. at 293, 779 S.E.2d at 65.
207. Id. at 294, 779 S.E.2d at 66.
208. Id. at 297, 779 S.E.2d at 68.
210. Id. at 668, 782 S.E.2d at 722.
211. Id. at 668-69, 782 S.E.2d at 723.
212. Id. at 670-71, 782 S.E.2d at 724.
Bashuk. The court of appeals noted that this rule may not be wise as a matter of policy:

Other policy considerations might suggest a different rule. A rule that requires would-be legal malpractice plaintiffs to exhaust all possible appeals in the underlying matter would appear to force those parties to risk increasing their own damages just so they can later pursue an uncertain malpractice remedy. However, binding precedent provides the rule we employ here.

Because the court of appeals determined that Tidwell Ford had a viable chance of obtaining reversal of the underlying judgment, the court of appeals affirmed the grant of summary judgment to Bashuk.

In Helms & Greene v. Willis, the court of appeals held that an agent forfeits any right to compensation for the period in which the agent breaches his or her fiduciary duties to the principal. The case states a general proposition of agency law and just happens to involve a lawyer who allegedly breached fiduciary duties to his law firm. The case is significant, however, because it draws attention to the doctrine that a lawyer may forfeit, or be obliged to disgorge legal fees to a client when the lawyer breaches a fiduciary duty, regardless of whether the lawyer causes any actual harm to the client.

V. JUDICIAL ETHICS

Post v. State involved three related felony murder convictions in Cobb County. Before trial, one defendant filed a verified motion to recuse the trial judge because the trial judge had been employed by the district attorney’s office when the case was brought and because the district attorney was listed as the judge’s campaign treasurer. The Georgia Supreme Court held that under these circumstances, the trial judge was required to refer the recusal motion to another judge. On its face, the motion was timely, and the verification of the motion served as

213. Id.
214. Id. at 670 n.3, 782 S.E.2d at 724 n.3.
215. Id. at 673, 782 S.E.2d at 726.
217. Id. at 399-400, 773 S.E.2d at 494-95.
218. Id.
219. Id. at 401, 773 S.E.2d at 495; See, e.g., Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999).
221. Id. at 241-42, 779 S.E.2d at 627.
222. Id. at 244-45, 779 S.E.2d at 628-29.
substantial compliance with the requirement of an affidavit.\textsuperscript{223} The factual allegations stated a basis for recusal not because the judge had worked for the district attorney when the case was brought (there was no allegation that the judge had been personally involved in the case) or because the district attorney merely supported or was involved in the judge’s election.\textsuperscript{224} However, the district attorney’s status as campaign treasurer raised an inference of a strong enough relationship that the motion should have been referred.\textsuperscript{225} The supreme court remanded the case for consideration by another judge, with the statement that the conviction would stand if it was determined that recusal was unnecessary but that the case would have to be retried if the judge was disqualified after all.\textsuperscript{226}

The supreme court reached a slightly different result as to the other two defendants.\textsuperscript{227} When they sought the judge’s recusal, the judge engaged the lawyers in a colloquy on the record about the merits of the motion instead of simply referring it to another judge for decision.\textsuperscript{228} Because this improper self-defense itself created an appearance of partiality on the part of the judge, the supreme court reversed the convictions and remanded the cases for new trials in front of a different trial judge.\textsuperscript{229}

In \textit{Beasley v. State},\textsuperscript{230} the trial judge allegedly had a conflict of interest due to marriage at the time of trial to a lawyer in the district attorney’s office. The court of appeals in an earlier appeal had remanded the case for a determination of whether the defendant raised the conflict in a timely manner, but instead the state stipulated to a retrial before a different judge.\textsuperscript{231} The court of appeals held this procedure was appropriate and did not violate the defendant’s right against double jeopardy, since he was subject to retrial even if he had been given the opportunity to show that he had raised the judge’s conflict of interest in connection with the first trial in a timely manner.\textsuperscript{232}

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\item \textsuperscript{223} \textit{Id.} at 253, 779 S.E.2d at 633.
\item \textsuperscript{224} \textit{Id.} at 248-50, 779 S.E.2d at 631-32.
\item \textsuperscript{225} \textit{Id.} at 249, 779 S.E.2d at 632.
\item \textsuperscript{226} \textit{Id.} at 253, 779 S.E.2d at 634.
\item \textsuperscript{227} \textit{Id.} at 258, 779 S.E.2d at 637-38.
\item \textsuperscript{228} \textit{Id.} at 254-55, 779 S.E.2d at 635-36.
\item \textsuperscript{229} \textit{Id.} at 258, 779 S.E.2d at 637-38.
\item \textsuperscript{230} 335 Ga. App. 530, 782 S.E.2d 315 (2016).
\item \textsuperscript{231} \textit{Id.} at 532-33, 782 S.E.2d at 318.
\item \textsuperscript{232} \textit{Id.} at 534-35, 782 S.E.2d at 319-20.
\end{itemize}
In *Price v. Reish*, the court of appeals dealt with questions relating to judicial recusal. A trial judge and an attorney had a history, including litigation in which the attorney represented parties in litigation involving the estate of the judge's sister. The judge routinely disqualified herself in cases involving this attorney. In this particular case, however, the attorney entered an appearance and filed a motion to recuse with the required affidavit, but the judge declined to recuse, instead vacating the lawyer's entry of appearance in the case because the lawyer "hired into a conflict" for the purpose of judge shopping. The court of appeals reversed and remanded because, under these circumstances, the judge was required to assign the recusal motion to a different judge. The court of appeals went on, however, to warn against counsel engaging in the practice of accepting representation with the intent of causing the judge's recusal. The court of appeals wrote that such actions would violate the Georgia Rules of Professional Conduct and would permit the judge assigned to the recusal motion to deny it and sanction the lawyer, including the sanction of disqualification in the case.

*State v. Ozment* involved a judge who overstepped his bounds in connection with a plea. The defendant faced four counts, entered a non-negotiated guilty plea as to one of them, and asked the judge to dismiss the remaining counts. The prosecutor objected, but the judge overruled the objection, stating, "I've just negotiated it. Thank you for your objection. I will go ahead and I will accept the plea." The court of appeals held the judge violated the rule against judicial involvement in plea negotiations and had no legal basis for dismissing the remaining counts. Rather, the judge's actions interfered with the prosecutor's right to decide what charges to bring.

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234. *Id.* at 492, 780 S.E.2d at 746.
235. *Id.* at 491-92, 780 S.E.2d at 746.
236. *Id.* at 494, 780 S.E.2d at 747.
237. *Id.* at 496-97, 780 S.E.2d at 749.
238. *Id.* at 495, 780 S.E.2d at 748.
239. *Id.* at 495-96, 780 S.E.2d at 748-49.
241. *Id.* at 82, 775 S.E.2d at 565.
242. *Id.* at 82-83, 775 S.E.2d at 565.
243. *Id.* at 84, 775 S.E.2d at 566.
244. *Id.*
VI. MISCELLANEOUS CASES

Georgia appellate courts decided seven miscellaneous cases involving issues of legal ethics during the survey period.

In *Neuman v. State*, the supreme court reversed a murder conviction because the trial court allowed the state to discover and use information protected by the attorney-client privilege. Defense counsel hired two professionals as consultants to interview the client to determine whether an insanity defense would be appropriate. The professionals reported back to the lawyer, who hired someone else to be the expert witness. The trial court permitted discovery of the notes of the consultants. The supreme court found that this was error because the attorney-client privilege protected the notes:

> Consistent with this general principle, and after a review of authority from other states on this issue, we join numerous other jurisdictions in holding that the attorney-client privilege applies to confidential communications, related to the matters on which legal advice is being sought, between the attorneys, their agents, or their client, and an expert engaged by the attorney to aid in the client’s representation; the privilege is not waived if the expert will neither serve as a witness at trial nor provide any basis for the formulation of other experts’ trial testimony.

The court rejected the argument that assertion of an insanity defense waives the attorney-client privilege. The court also rejected, over the dissent of Justice Melton, the argument that the attorney-client privilege did not apply because a form used by one of the consultants was conclusive evidence that the conversations were not intended to be confidential.

*Martin v. State* involved an unusual application of the advocate-witness disqualification rule. The defendant agreed to plead guilty to murder and other charges and to waive jury trial for sentencing, allegedly in reliance on an off-the-record statement by the trial judge that she would not impose the death penalty. When the trial judge did

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246. Id. at 502-03, 773 S.E.2d at 719.
247. Id. at 503, 773 S.E.2d at 719.
248. Id.
249. Id. at 504, 773 S.E.2d at 720.
250. Id. at 509, 773 S.E.2d at 723.
251. Id. at 508, 773 S.E.2d at 721-22.
253. Id. at 266-67, 779 S.E.2d at 352-53.
impose the death penalty, Martin’s lawyers filed a motion to withdraw his guilty plea and for a new trial, based upon the trial judge’s alleged statements. Those motions were referred to another judge, who disqualified Martin’s trial counsel from acting as advocates for his motions because they would be necessary witnesses to the original trial judge’s alleged statements. Georgia Rule of Professional Conduct 3.7(a) sets forth a general rule (with exceptions) against lawyers acting as both necessary witnesses and advocates at trial. The most common (but not the only) basis for applying this rule is to protect against jurors being confused about the dual roles of counsel who are both advocates and witnesses. The supreme court found no abuse of discretion in disqualifying the lawyers even though the matter for which the lawyers were disqualified was to be before the new judge rather than a jury. The supreme court held this case involved the “extraordinary circumstance” where the judge felt the need to disqualify the lawyers to ensure proper advocacy for Martin.

Smith v. Williams relates to a dispute that arose in connection with a law firm breakup over attorneys’ fees in workers’ compensation cases. The court of appeals affirmed two rulings of the trial court. First, the court held the superior court rather than the State Board of Workers’ Compensation had jurisdiction over the dispute, because the dispute was not between an employer and employee nor was it ancillary (in the sense that the employee’s rights were at stake) to any such dispute. Second, the court upheld the denial of partial summary judgment as to certain disputed fees, even though no attorneys’ fee liens had been filed with the Board because the fees in question may have been earned before the law firm partnership dissolved.

254. Id. at 267, 779 S.E.2d at 353.
255. Id.
256. GA. RULES OF PROF'L CONDUCT R. 3.7(a) (2016).
257. See, e.g., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 405 (Ellen J. Bennett et al. eds., 5th ed. 2015) (‘‘When a lawyer takes on both roles, jurors are likely to be confused about whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.’’).
258. Martin, 298 Ga. at 271, 779 S.E.2d at 355.
259. Id. at 271-72, 779 S.E.2d at 355-56.
261. Id. at 168, 167 S.E.2d at 641.
262. Id. at 168-69, 167 S.E.2d at 641.
263. Id. at 169-71, 167 S.E.2d at 642-43. The court of appeals also reversed the superior court with respect to case-specific order modifying an injunction to place certain fees in escrow. Id. at 171-73, 167 S.E.2d at 643-44.
Kemp v. Green\(^{264}\) involved the disqualification of counsel. In a related case, Kemp sued Wellstar Health Systems and was represented by Gary Brunch.\(^{265}\) In that underlying case, the attorneys for the hospital (collectively “Green & Sapp”) had been disqualified because they caused the withdrawal of Kemp’s expert witness by contacting the expert’s employer.\(^{266}\) Brunch represented Kemp in connection with those disqualification proceedings.\(^{267}\) In Kemp v. Green, Kemp (again represented by Brunch) sued Green & Sapp for tortiously interfering with the expert witness.\(^{268}\) Green & Sapp convinced the trial court to disqualify Brunch.\(^{269}\) The court of appeals vacated that order and remanded, noting that disqualification was premature until the trial court determined that Kemp had stated a claim and that Brunch would be an essential witness.\(^{270}\)

In Edwards v. State,\(^{271}\) the court of appeals rejected a double jeopardy claim from a defendant whose earlier trial for rape and child molestation ended in a court-declared mistrial because defense counsel alerted the court to a conflict of interest.\(^{272}\) Defense counsel had, at one time, represented the victim’s mother, who was expected to be a witness in the case.\(^{273}\) Defense counsel informed the court that he had confidential information about the mother that would be strong impeachment material.\(^{274}\) Defense counsel could not use that confidential information against his former client.\(^{275}\) Edwards purported to waive the conflict, but the court of appeals found that his waiver alone would not cure the conflict (the former client also had to waive it and had not done so), the consent was not in writing, and defense counsel had not given Edwards information in writing about risks and alternatives.\(^{276}\) Because the trial court was confronted with a situation in which defense counsel had a

\(^{265}\) Id. at 108, 786 S.E.2d at 504.
\(^{266}\) Id. at 109, 786 S.E.2d at 504.
\(^{267}\) Id.
\(^{268}\) Id. at 108-09, 786 S.E.2d at 504.
\(^{269}\) Id. at 109, 786 S.E.2d at 504.
\(^{270}\) Id. at 109, 786 S.E.2d at 505.
\(^{272}\) Id. at 595, 784 S.E.2d at 926.
\(^{273}\) Id.
\(^{274}\) Id.
\(^{275}\) Id. at 597-98, 784 S.E.2d at 927.
\(^{276}\) Id. at 599, 784 S.E.2d at 928.
serious, unresolved conflict of interest, the mistrial resulted from “manifest necessity” and thus did not bar retrial.\textsuperscript{277}

In \textit{Murphy v. Freeman},\textsuperscript{278} the court of appeals assessed sanctions against counsel whose brief the court described as follows: “To characterize Murphy’s brief as poorly supported by legal authority would be accurate; to characterize the brief as cogent would be an untruth.”\textsuperscript{279} What led to the sanctions, however, was not the abysmal quality of the brief but rather the repeated ad hominem (and admittedly irrelevant) attacks that the brief made on judges and others.\textsuperscript{280} The court of appeals reminded counsel of the Georgia Lawyer’s Creed, which calls for “dignified” disputes, “respect,” and “candor.”\textsuperscript{281} The court also mentioned Georgia Rule of Professional Conduct 3.1, which forbids a lawyer from taking an action for a client “when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.”\textsuperscript{282} Ultimately, the court of appeals assessed sanctions under its own Court of Appeals Rule 10: “Personal remarks, whether oral or written, which are discourteous or disparaging to any judge, opposing counsel, or any court, are strictly forbidden.”\textsuperscript{283}

In \textit{Woodham v. Atlanta Development Authority},\textsuperscript{284} the court of appeals reversed the trial court in connection with one aspect of a contempt order.\textsuperscript{285} The trial court had held an attorney in contempt for violation of post-judgment discovery orders.\textsuperscript{286} As a condition of purging the contempt, the trial court ordered the attorney to pay the attorney’s fees incurred by his opposing party in connection with the contempt motion.\textsuperscript{287} The court of appeals reversed that part of the contempt order because those fees were not part of any previous order issued and disobeyed by the attorney.\textsuperscript{288}

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\textsuperscript{277} \textit{Id.} at 600, 784 S.E.2d at 929. \\
\textsuperscript{278} \textit{337 Ga. App.} 221, 787 S.E.2d 755, (2016). \\
\textsuperscript{279} \textit{Id.} at 224, 787 S.E.2d at 759. \\
\textsuperscript{280} \textit{Id.} at 226, 787 S.E.2d at 759. \\
\textsuperscript{281} \textit{Id.} at 228, 787 S.E.2d at 761. \\
\textsuperscript{282} \textit{Id.} \\
\textsuperscript{283} \textit{Id.} at 227, 787 S.E.2d 760. \\
\textsuperscript{284} \textit{335 Ga. App.} 126, 779 S.E.2d 116 (2015). \\
\textsuperscript{285} \textit{Id.} at 131, 779 S.E.2d at 121. \\
\textsuperscript{286} \textit{Id.} at 128, 779 S.E.2d at 119. \\
\textsuperscript{287} \textit{Id.} \\
\textsuperscript{288} \textit{Id.} at 131, 779 S.E.2d at 121. \\
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VII. FORMAL ADVISORY OPINIONS

During the Survey period, the Formal Advisory Opinion Board took two noteworthy actions. First, the Board suspended its work on an opinion regarding conflicts of interest and part-time prosecutors because the State Bar of Georgia Disciplinary Rules and Procedures Committee undertook to deal with the issue by an amendment to Georgia Rule of Professional Conduct 1.7. That proposed amendment makes an exception for part-time prosecutors from the rule that a lawyer may not without consent represent a client that is adverse to an existing client in an unrelated matter. Second, the Board approved for publication proposed Advisory Opinion 15-R1, which concludes that “[a] sole practitioner may not use a firm name that includes ‘group’ or ‘& Associates’ because both terms would incorrectly imply that the sole practitioner practices with other lawyers. However, a sole practitioner may use a firm name that includes ‘firm.’”

VIII. AMENDMENTS TO THE GEORGIA RULES OF PROFESSIONAL CONDUCT

On July 9, 2015, the supreme court approved amendments to Rules 1.6(b)(3), 3.5(c) and (d) and comment 7, 7.3(c) and comments 2, 3, 7 and 8, and 8.4(d). The amendment to Rule 1.6(b)(3) clarifies that a lawyer’s duty to attempt to persuade the client not to act, or to warn a victim, before revealing confidential information applies only in connection with certain confidentiality exceptions and not others. Rule 3.5 and its comments were amended to add restrictions on when counsel may communicate with jurors after discharge of the jury. The amendments to Rule 7.3 and its comments, in recognition of the proliferation of out-of-state internet referral services, delete the requirement that the State Bar of Georgia certify lawyer referral services. These amendments require Georgia lawyers simply to make sure that their use of referral services does not violate any Georgia Rule of Professional Conduct. The supreme court amended Rule 8.4 to clarify that it is not a “violation” of

290. See 21 GA. B.J. 82 (June 2016).
294. Id. at 17-18.
295. Id. at 23.
296. Id.
the rules (and therefore it is not misconduct) for a lawyer not to comply with a rule of conduct for which there is no disciplinary penalty. 297

IX. CONCLUSION

This Article surveys recent developments in legal ethics through May 31, 2016. For updates on developments after that date, you may visit the website of the Mercer Center for Legal Ethics and Professionalism. 298

297. Id. at 24. For example, there is no disciplinary penalty for not reporting a fellow lawyer who has committed misconduct. GA. RULES OF PROF'L CONDUCT R. 8.3 (2016).

298. As a service to the Georgia bench and bar, the Mercer Center for Legal Ethics and Professionalism provides periodic updates and other resources on recent developments in Georgia legal ethics. Visit http://law.mercer.edu/academics/centers/clep/updates-legal-ethics/.