Legal Ethics

by Patrick Emery Longan*

I. INTRODUCTION

This Survey covers the period from June 1, 2017 to May 31, 2018.[1] The Article discusses attorney discipline, ineffective assistance of counsel, disqualification, several miscellaneous cases involving legal ethics, actions of the Formal Advisory Opinion Board, and amendments to the Georgia Rules of Professional Conduct.

II. LAWYER DISCIPLINE[2]

A. Disbarments[3]

1. Trust Account and Other Financial Issues

The Georgia Supreme Court disbarred five lawyers during the survey period for misconduct that primarily or exclusively related to trust

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1. For an analysis of Georgia legal ethics during the June 1, 2016 to May 31, 2017 survey period, see Patrick Emery Longan, *Legal Ethics*, *Annual Survey of Georgia Law*, 69 MERCER L. REV. 157 (2017).

2. In addition to the matters recited in the text, the Investigative Panel of the State Disciplinary Board imposed confidential discipline in the form of Formal Letters of Admonition in fourteen cases and Investigative Panel Reprimands in ten cases between May 1, 2017 and April 30, 2018 (a slightly different time period than this Survey). *See* Daniel S. Reinhardt, *Investigative Panel*, 2018 REP. OF THE OFF. OF GEN. COUNS. OF THE ST. B. OF GA. at 6, https://www.gabar.org/barrules/ethicsandprofessionalism/upload/18_ OGC_ Report.pdf. The Investigative Panel also dismissed thirty-nine cases with Letters of Instruction. *Id.*

3. Lawyers in Georgia can voluntarily surrender their licenses or submit a petition for voluntary discipline. GA. RULES OF PROF'L CONDUCT r. 4-110(f) (2018). 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.*

accounts or other financial matters.[4] In three of these cases, the supreme court accepted the lawyers' voluntary surrenders of their licenses.[5]

Lorne Howard Cragg misappropriated client "funds for his personal use and did not" preserve those funds in his trust account or account to the client for them. Cragg also wrote checks on his trust account that were returned for insufficient funds and "provided false and misleading information" to the State Bar during its investigation of his conduct. [6] Next, April Dabney-Froe admitted that in multiple cases she did not promptly account to clients for their settlement proceeds and did not promptly disburse settlement funds or pay her clients' medical bills.[7] Lastly, Richard V. Merritt admitted that he settled a client's personal injury case but failed to promptly deliver the settlement funds to the client or the client's medical providers, and failed to properly account for the money.[8]

The Georgia Supreme Court disbarred Jeffrey W. Harris because Harris misappropriated funds from his trust account and commingled personal funds with funds held in trust.[9] A bank notified the State Bar of Georgia of checks that Harris had written on his trust account without sufficient funds. Harris deposited some personal funds into the trust account to cover the deficiencies, but then withdrew the same amount as attorney's fees. Harris did not respond to the formal complaint.[10] The supreme court agreed with the special master that, under the American Bar Association (ABA) Standards for Imposing Lawyer Sanctions,[11] disbarment was the appropriate sanction.[12] The supreme court also disbarred Nolen Arthur Hamer because he neglected three separate client matters and, in one of them, improperly deposited client funds into his firm's operating account.[13]

4. *See In re* Cragg, 302 Ga. 873, 809 S.E.2d 792 (2018); *In re* Merritt, 302 Ga. 874, 809 S.E.2d 791 (2018); *In re* Dabney-Froe, 302 Ga. 746, 808 S.E.2d 649 (2017); *In re* Harris, 301 Ga. 378, 801 S.E.2d 39 (2017); *In re* Hamer, 302 Ga. 747, 808 S.E.2d 647 (2017).

5. *See In re Cragg*, 302 Ga. at 873, 809 S.E.2d at 792; *In re Merritt*, 302 Ga. at 874, 809 S.E.2d at 792; *In re Dabney-Froe*, 302 Ga. at 747, 808 S.E.2d at 649.

6. *In re Cragg*, 302 Ga. at 873, 809 S.E.2d at 792.

7. *In re Dabney-Froe*, 302 Ga. at 746, 808 S.E.2d at 649.

8. *In re Merritt*, 302 Ga. at 874, 809 S.E.2d at 792.

9. *In re Harris*, 301 Ga. at 379–80, 801 S.E.2d at 39–40.

10. *Id.* at 379, 801 S.E.2d at 39.

11. AM. BAR ASS'N, STANDARDS FOR IMPOSING LAWYER SANCTIONS (AM. BAR ASS'N 1992), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sanction_standards.authcheckdam.pdf.

12. *In re Harris*, 301 Ga. at 379–80, 801 S.E.2d at 39–40.

13. *In re Hamer*, 302 Ga. at 747–50, 808 S.E.2d at 647–49.

2. Client Abandonment or Lack of Communication

The Georgia Supreme Court disbarred eight attorneys during the survey period primarily because of client abandonment or lack of client communication.[14] All of these lawyers defaulted in the disciplinary process.[15]

The supreme court disbarred Gregory Reece Barton because of two grievances.[16] In one matter, Barton undertook to represent a criminal defendant but failed to do any work on the matter and failed to communicate with his client. Barton was removed from the case by the judge when Barton did not appear at a hearing that the judge called to address these failures. In the other case, Barton failed to appear in court for calendar calls "and did not notify either [the] client or the court that he would be absent." Barton admitted that he was "unable to remember the events in question because of his abuse of alcohol."[17]

The supreme court disbarred Miguel Angel Garcia, Jr. after he defaulted with respect to two matters.[18] In the first, Garcia failed to appear for a hearing and a subsequent contempt hearing, and he was ordered to be incarcerated for contempt. In the other matter, he undertook to represent an immigration client "but did not communicate with the client for months." When Garcia did finally meet with the client, he lacked knowledge about the matter and did not respond to the client's followup communications. The client requested a refund and his file but received neither. Garcia also made deceptive statements to the bar during the disciplinary process.[19]

The supreme court disbarred Walter Linton Moore as a result of six grievances that alleged abandonment of clients in domestic relations proceedings.[20] The court also noted that Moore improperly conditioned a refund for one client on withdrawal of the client's grievance and that, in

14. *See In re* Barton, 303 Ga. 818, 813 S.E.2d 590 (2018); *In re* Garcia, 303 Ga. 537, 813 S.E.2d 591 (2018); *In re* Moore, 303 Ga. 296, 811 S.E.2d 343 (2018); *In re* Mays, 303 Ga. 152, 810 S.E.2d 479 (2018); *In re* Shahab, 302 Ga. 867, 809 S.E.2d 795 (2018); *In re* Watkins, 302 Ga. 226, 805 S.E.2d 816 (2017); *In re* Miller, 302 Ga. 366, 806 S.E.2d 596 (2017); *In re* Rambeau, 302 Ga. 367, 806 S.E.2d 572 (2017).

15. *See In re Barton*, 303 Ga. at 818, 813 S.E.2d at 590; *In re Garcia*, 303 Ga. at 537, 813 S.E.2d at 591; *In re Moore*, 303 Ga. at 296, 811 S.E.2d at 343; *In re Mays*, 303 Ga. at 152, 810 S.E.2d at 479; *In re Shahab*, 302 Ga. at 867, 809 S.E.2d at 795; *In re Watkins*, 302 Ga. at 226, 805 S.E.2d at 816; *In re Miller*, 302 Ga. at 366, 806 S.E.2d at 597; *In re Rambeau*, 302 Ga. at 368, 806 S.E.2d at 572.

16. *In re Barton*, 303 Ga. at 818–19, 813 S.E.2d at 590–91.

17. *Id.*

18. *In re Garcia*, 303 Ga. at 537–38, 813 S.E.2d at 591–92.

19. *Id.*

20. *In re Moore*, 303 Ga. at 296, 811 S.E.2d at 344.

fee arbitration proceedings related to another client, the "arbitrators concluded the evidence showed that Moore was impaired."[21]

The supreme court disbarred Natalie Dawn Mays, who, by her default, was deemed to have willfully abandoned a client in a bankruptcy matter, failed to communicate with the client about the matter, and failed to return the unearned portion of her fee.[22]

The supreme court disbarred Cameron Shahab because of his misconduct in connection with two immigration matters.[23] In the first, Shahab accepted a retainer and agreed to prepare an asylum petition for the client. Shahab never did so, despite repeated requests from the client and numerous assurances to the client that it would be done. In the meantime, the client's legal-resident student status expired. Shahab "refused the client's demand for a full refund." In the second, the client paid Shahab $11,750 for help obtaining legal-resident status. Shahab did not communicate with the client properly, and that failure included failing to notify the client of an immigration hearing. As a result, the client did not appear and a deportation order for the client was entered. Shahab repeatedly promised to "file a motion to reopen the client's case" but apparently never did so. Shahab refused to return the client's fee voluntarily.[24]

The supreme court disbarred James Edward Watkins, who defaulted in connection with two disciplinary matters.[25] In the first, Watkins abandoned a client's matter and lied to the client about work that was never done. In the second, Watkins filed a motion to reduce the bond of a criminal defendant but otherwise abandoned the client. "[T]he client apparently remain[ed] incarcerated and unindicted" as a result.[26]

The supreme court disbarred Brenden E. Miller, who did not respond to a Notice of Discipline in connection with his abandonment of a client's bankruptcy matter.[27] The supreme court noted that Miller had been suspended for twelve months in connection with the neglect of another client's bankruptcy matter.[28]

The supreme court disbarred James Edward Rambeau, Jr. in connection with three matters.[29] Two of the matters involved

21. *Id.*
22. *In re Mays*, 303 Ga. at 152–53, 810 S.E.2d at 479.
23. *In re Shahab*, 302 Ga. at 867–68, 809 S.E.2d at 795–96.
24. *Id.* at 867–69, 809 S.E.2d at 795–97.
25. *In re Watkins*, 302 Ga. at 226–27, 805 S.E.2d at 816–17.
26. *Id.*
27. *In re Miller*, 302 Ga. at 366, 806 S.E.2d at 597.
28. *Id.* at 367, 806 S.E.2d at 597.
29. *In re Rambeau*, 302 Ga. at 367–69, 806 S.E.2d at 572–73.

abandonment of matters undertaken for clients, while the third involved checks on Watkins's trust account that had been returned for insufficient funds.[30]

3. Criminal Activity

The supreme court accepted the voluntary surrender of the licenses of six lawyers as a result of the lawyers' criminal activity.[31] Raymond Juiwen Ho used his trust account in a money laundering scheme and pled guilty in federal court to felony money laundering and money laundering conspiracy.[32] Adam Lorenzo Smith gave up his license after he pled guilty in federal court to conspiracy to commit bribery.[33] Larry Bush Hill did the same after he pled guilty in superior court to felony counts of improperly influencing a witness and attempting to suborn perjury.[34] Robert Jutzi Howell "pled guilty in South Carolina to [a] felony count of pointing/presenting a firearm" and to two misdemeanors: the unlawful carrying of a pistol and possession of cocaine. Howell successfully petitioned to surrender his Georgia law license.[35] The supreme court accepted Gerald W. Fudge's petition after he pleaded guilty to the felony of bank fraud.[36] The supreme court accepted the voluntary surrender of the license of Christopher Mark Miller, who pleaded guilty to numerous felonies, including "financial transaction card fraud, financial transaction card theft, theft by taking, theft by conversion, and theft by deception."[37]

There was one disbarment case in this category that did not involve the voluntary surrender of a law license.[38] The supreme court disbarred David Wesley Fry after he pleaded guilty as a first offender to the bribery of county commissioners.[39] The special master recommended a one-year suspension in light of various mitigating factors, and the State Bar agreed with that recommendation.[40] The supreme court nevertheless

30. *Id.*

31. *See In re* Ho, 303 Ga. 751, 814 S.E.2d 674 (2018); *In re* Smith, 303 Ga. 68, 810 S.E.2d 133 (2018); *In re* Hill, 302 Ga. 871, 809 S.E.2d 793 (2018); *In re* Howell, 302 Ga. 871, 809 S.E.2d 794 (2018); *In re* Miller, 302 Ga. 872, 809 S.E.2d 793 (2018); *In re* Fudge, 301 Ga. 793, 804 S.E.2d 59 (2017).

32. *In re Ho*, 303 Ga. at 751–52, 814 S.E.2d at 674.

33. *In re Smith*, 303 Ga. at 68, 810 S.E.2d at 133–34.

34. *In re Hill*, 302 Ga. at 871–72, 809 S.E.2d at 794.

35. *In re Howell*, 302 Ga. at 871, 809 S.E.2d at 794–95.

36. *In re Fudge*, 301 Ga. at 793, 804 S.E.2d at 59.

37. *In re Miller*, 302 Ga. at 872–73, 809 S.E.2d at 793.

38. *See In re* Fry, 302 Ga. 370, 806 S.E.2d 604 (2017).

39. *Id.* at 370, 806 S.E.2d at 605.

40. *Id.*

ordered disbarment because Fry had shown no remorse and, by bribing public officials, had undermined public confidence in the legal system.[41]

4. Miscellaneous Disbarments

The supreme court disbarred Jerry Ricardo Caldwell, who defaulted in the disciplinary process and thereby admitted the following.[42] Caldwell represented two clients in connection with claims for damages arising from an automobile accident. Caldwell filed the case but voluntarily dismissed it. He settled with the defendant's insurer but filed a renewal action to recover underinsured motorist benefits. Caldwell failed to serve the defendant and the renewal action was dismissed with prejudice. Caldwell did not communicate with his clients about the voluntary dismissal, the renewal action, or the dismissal of the second action with prejudice and did not respond to attempts from his clients to discuss the progress of the case with them. Caldwell did eventually respond to a certified letter from his clients. He falsely told the clients that he had malpractice insurance and that he would "file a claim with his . . . carrier for $25,000, the amount of the underinsured motorist coverage." When "[t]he clients later learned that Caldwell had no malpractice insurance," Caldwell agreed to resolve the matter by paying the clients $2500 and giving them an unsecured promissory note for the remaining $22,500, plus interest. Caldwell did not advise the clients that they should seek independent representation in connection with that agreement. He made no payments on the note. Caldwell was offered confidential discipline by the Investigative Panel on the condition that he would pay his clients the amount owed to them by a certain date. Caldwell agreed to do so but did not make the payment. Caldwell "misled the Investigative Panel and his clients" about his intention to make the payment for the purpose of delaying the resolution of the disciplinary case.[43]

The supreme court disbarred Ronald John Doeve for violations of the rules of conduct in connection with three matters.[44] In the first, Doeve agreed to hold money in his trust account pending an instruction to disburse the funds as an investment in one of the lawyer's corporate clients. Doeve disbursed the funds to his client without the investor's permission and did not respond to the investor's inquiries. In the second, Doeve agreed to help several parties collect money from one of his individual clients, Herring. Doeve and Herring falsely represented that Herring had given Doeve substantial funds with which to pay the claims.

41. *Id.* at 371, 806 S.E.2d at 606.

42. *In re* Caldwell, 303 Ga. 748, 748–49, 814 S.E.2d 674, 675–76 (2018).

43. *Id.*

44. *In re* Doeve, 303 Ga. 672, 672, 674, 814 S.E.2d 330, 330, 332 (2018).

Doeve wrote checks on a non-trust account to pay the claims, but the checks were returned for insufficient funds. Doeve misrepresented the reason for the non-payment and gave the bar misleading information about the matter during the disciplinary proceedings. In the third matter, Doeve agreed to help Herring in connection with a claim by another attorney for legal fees that Herring owed. Doeve misrepresented that he had received funds to pay the fees from Herring and wrote a check on a non-trust account. The check was returned for insufficient funds. Doeve misled the other attorney about the reason for the returned check and about when the lawyer could expect to be paid.[45] The special master found numerous facts in aggravation, including a pattern of misconduct, a dishonest or selfish motive, indifference to making restitution, false statements in the disciplinary process, and "substantial experience in the practice of law."[46]

The supreme court disbarred Sam Louis Levine, whose answers to three grievances were struck as a sanction for the attorney's willful failure to respond to discovery.[47] As a result, Levine was deemed to have admitted in one grievance that he was not diligent in his representation, that he had lied to the client about what he had done, and that he had made false representations to the State Bar. The sanctions order also meant Levine admitted in another case that he had not prepared the case, made conflicting statements to the trial judge about why he needed a continuance, and refused to follow the client's instruction to designate a co-counsel as lead counsel. Levine was also deemed to have admitted claims of misconduct in connection with his divorce.[48] The supreme court described the conduct in detail:

> Levine represented himself during most of the divorce proceedings. The divorce decree awarded various items of property, including the family dog, to Levine's wife. Levine repeatedly refused to allow his ex-wife to retrieve these items and challenged the divorce decree in numerous collateral proceedings, most of which stemmed from Levine's insistence that the dog was a therapy dog that he was entitled to have under the Americans with Disabilities Act. In pursuit of this unwavering belief, Levine filed meritless federal lawsuits against two judges who at different times presided over his divorce action; filed a discrimination complaint against one of the judges; sent a threatening letter to the two judges, with copies to numerous public figures, alleging that the judges had committed heinous crimes and were

45. *Id.* at 672–74, 814 S.E.2d at 331–32.

46. *Id.* at 674, 814 S.E.2d at 331–32.

47. *In re* Levine, 303 Ga. 284, 284–85, 290, 811 S.E.2d 349, 350–51, 353 (2018).

48. *Id.* at 285–86, 811 S.E.2d at 350–51.

> suffering from psychiatric disorders; filed meritless lawsuits and police complaints against his brother, whom Levine had asked to act on his behalf after Levine was incarcerated for contempt; filed meritless applications for criminal warrants against his ex-wife and others; and filed meritless applications for temporary protective orders and a separate civil action against his ex-wife. Levine was ultimately held in contempt in the divorce action and was incarcerated for three weeks when he continued to defy the court's orders. To obtain his release, his lawyer negotiated a consent order, which included, at Levine's mother's request, a provision for a psychiatric examination.[49]

The special master recommended disbarment.[50] The special master noted, but did not rely upon, the strength of the evidence suggesting that Levine was subject to disbarment for want of a sound mind under State Bar Rule 4-104(a).[51] Rule 4-104(a) provided that "[w]ant of a sound mind, senility, habitual intoxication or drug addiction, to the extent of impairing competency as an attorney, when found to exist under the procedure outlined in Part IV, Chapter 2 of these Rules, shall constitute grounds for removing the attorney from the practice of law."[52] In disbarring Levine, the supreme court noted that the misconduct in the underlying matters was sufficient to support disbarment and stated that "Levine's filings in this Court strongly support the special master's belief that Levine is not emotionally or mentally fit for the practice of law."[53]

The supreme court disbarred Ricky W. Morris, Jr., who had defaulted in connection with numerous grievances.[54] Morris had taken retainers from numerous clients for criminal matters but abandoned the clients or did not properly handle their matters. Morris failed to communicate with the clients and did not return the unearned portion of his fees. Two of the grievances arose from his representation of a client in a criminal matter in Henry County. Morris failed to hire an expert witness for which the client had provided the funds. Morris was also overheard by an assistant district attorney on a phone call in which Morris was "attempting to purchase controlled substances for himself."[55] The supreme court described what happened the next morning in court:

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49. *Id.* at 286–87, 811 S.E.2d at 351.

50. *Id.* at 287, 811 S.E.2d at 351.

51. *Id.* (citing GA. RULES OF PROF'L CONDUCT r. 4-104(a) (2016)). Rule 4-104 has since been amended by the supreme court. See the discussion in section VIII.A below.

52. GA. RULES OF PROF'L CONDUCT r. 4-104(a).

53. *In re Levine*, 303 Ga. at 289, 811 S.E.2d at 352–53.

54. *In re* Morris, 302 Ga. 862, 862, 865, 809 S.E.2d 799, 800–01 (2018).

55. *Id.* at 863, 809 S.E.2d at 800–01.

> The next morning, Morris appeared in court for jury selection but seemed to be under the influence of a controlled substance. He had bloodshot eyes and welts and bruises on his face, and he fell asleep at counsel's table. The court recessed the trial and held a hearing on Morris's fitness to proceed as defense counsel. At that hearing, Morris declined the court's request that he submit to a drug test; denied he was under the influence or that he had made the phone call the prior day; and threatened the ADA with bodily harm. The court held Morris in contempt and imposed jail time that was to be immediately served. As a result, when Morris's client returned to court, she was advised by the presiding judge that Morris was unable to represent her and she would need to seek new counsel. Morris took no further action on behalf of the client, and failed to refund the unearned portion of the retainer. In addition, Morris was charged with felony intimidation of a court officer and felony terroristic threats for threatening the ADA. In November 2016, Morris resolved the charges by pleading guilty to disorderly conduct and simple assault.[56]

In another matter, Morris appeared at the Spalding County jail to see a client but acted "erratically and appeared [to be] under the influence of an unknown substance." Morris did not have proper identification and falsely identified the client's wife as his paralegal. He was allowed to visit his client but was asked to leave the jail when he was observed to be asleep during the meeting.[57] In light of the other clear bases for disbarment, the supreme court declined to decide whether Morris's guilty pleas to the misdemeanors of disorderly conduct and simple assault warranted disbarment as convictions for "misdemeanor[s] involving moral turpitude where the underlying conduct relate[d] to his fitness to practice law."[58]

The supreme court accepted the voluntary surrender of Cassandre M. Galette's license because she admitted that she submitted false information to the Office of General Counsel during its investigation of a grievance.[59]

The supreme court disbarred Anthony Sylvester Kerr, who was the subject of three formal complaints.[60] In the first, Kerr agreed to represent a client even though Kerr was suspended. Kerr accepted payment of a fee but only returned it to the client when the client filed a grievance. In the second matter, Kerr undertook to represent a client in a civil case and filed an answer and counterclaim and submitted some discovery

56. *Id.* at 863–64, 809 S.E.2d at 801.

57. *Id.* at 864, 809 S.E.2d at 801.

58. *Id.* at 864 n.3, 809 S.E.2d at 801 n.3.

59. *In re* Galette, 302 Ga. 5, 5–6, 804 S.E.2d 335, 335–36 (2017).

60. *In re* Kerr, 302 Ga. 126, 126–29, 805 S.E.2d 15, 16–18 (2017).

responses. Kerr then did no further work on the case, failed to keep the client informed, gave the client misleading information, did not convey a settlement offer, and refused to refund the client's fee. The third complaint arose from Kerr's felony conviction for deposit-account fraud for giving a client a refund of fees with a check drawn upon an account that had been closed.[61] The supreme court agreed with the special master that disbarment was the appropriate sanction.[62]

B. Suspensions[63]

1. Six-Month Suspensions

The court accepted a petition for voluntary discipline and ordered a six-month suspension of Clarence R. Johnson, Jr.[64] Johnson admitted that he had been unable to work during a period of illness and as a result became the subject of collection efforts from his creditors. He deposited personal funds in his trust account to try to protect them from creditors, failed to keep adequate records of his clients' funds, and, by also depositing settlement funds into his operating account, exposed his clients' funds to his personal creditors.[65] The court noted in mitigation that Johnson had been cooperative in the investigation, had no prior discipline, had shown remorse, and had provided letters in support of his good character and reputation.[66]

The supreme court accepted the petition of John Dennis Duncan for voluntary discipline in the form of a six-month suspension because he did not communicate adequately with one client and then took for himself the entire amount of a settlement that he reached on the client's case and failed to respond to the client's communications about the funds.[67] In another case, Duncan failed to withdraw properly from a representation.[68] The supreme court described the evidence in mitigation:

> Duncan took full responsibility for his failings and the fact that his clients have suffered as a result of his conduct. Although he admitted

61. *Id.* at 126–28, 805 S.E.2d at 16–17.

62. *Id.* at 129, 805 S.E.2d at 18.

63. This Article discusses only those suspensions that constitute final discipline and does not discuss interim suspensions.

64. *In re* Johnson, 302 Ga. 865, 866–67, 809 S.E.2d 797, 799 (2018).

65. *Id.* at 865–66, 809 S.E.2d at 798.

66. *Id.* at 866, 809 S.E.2d at 798–99.

67. *In re* Duncan, 301 Ga. 898, 898–901, 804 S.E.2d 342, 343–45 (2017).

68. *Id.* at 899, 804 S.E.2d at 343.

> that he has no excuse and understands that discipline is appropriate, he offered in mitigation that he has no prior disciplinary history and that his behavior is the result of personal and emotional difficulties, including an addiction, which he is trying to overcome. His difficulties are more fully described in two sealed documents: one is a letter from a licensed professional counselor, and the second is a narrative authored by Duncan himself. Together, the documents describe Duncan's addiction; the reasons that it flared up in 2011, culminating with him hitting rock bottom in 2015; the manner in which it affected Duncan's behavior and caused him to ignore client and family matters to his great peril and to use the money he had access to (including settlement funds from the client in SDB Docket No. 6922) to fuel his addiction; the ways it destroyed his existing practice and his ability to obtain new business; his recognition that he needed help; and his efforts, through counseling, therapy, and recovery groups, to obtain and maintain sobriety. Duncan asserts that he now fully understands what his behavior has wrought; that he has asked the client from SDB Docket No. 6922 for forgiveness; that he is not currently practicing law, having either completed representation of his former clients or referred their matters to other attorneys; that he has relocated to a new state and currently has no plans to practice law; but that he is interested in saving his license.[69]

Despite the misappropriation of funds, the supreme court ordered only a six-month suspension, with conditions upon reinstatement, in light of the mitigation evidence.[70]

2. Suspensions Longer than Six Months

The Georgia Supreme Court accepted a petition for voluntary discipline and suspended David E. Morgan III for two years.[71] Morgan acted as executor of an estate and took over $77,000 of estate funds for his personal use. He returned the funds and offered in mitigation that he had been providing long-term care to his wife of thirty years before she died and that, as a result, he suffered from anxiety and depression for which he did not seek treatment. Morgan also explained that "he [then] developed an intimate relationship with a family friend, whom he [eventually] married" and that during this time he began spending excessively.[72] The court conditioned reinstatement on a certification of fitness from a licensed, mental-health professional, on evidence that Morgan has been attending weekly Alcoholics Anonymous meetings, and

69. *Id.* at 899–900, 804 S.E.2d at 343–44.

70. *Id.* at 901, 804 S.E.2d at 344–45.

71. *In re* Morgan, 303 Ga. 678, 680, 814 S.E.2d 394, 395 (2018).

72. *Id.* at 678–79, 814 S.E.2d at 394–95.

on successful participation by Morgan in the State Bar's Law Practice Management Program.[73]

The supreme court suspended John Benneth Iwu for three years.[74] Iwu had filed pleadings for a client at a time when the lawyer's license to practice was suspended for failure to pay bar dues. Iwu then exacerbated his problems by lying to the Bar during the disciplinary proceedings.[75] The court noted several mitigating factors, including the facts that Iwu had no prior disciplinary history in Georgia, had already been disciplined for the unauthorized practice in Tennessee, and had been suspended in Georgia since 2014.[76]

Andre Keith Sanders, a member of the Florida and Georgia Bars, was suspended for five years.[77] Sanders was the subject of numerous disciplinary matters in Florida, where he successfully petitioned the Florida Supreme Court to grant a "Disciplinary Revocation [of his law license] with Leave to Apply for Readmission."[78] Under Florida law, the revocation was tantamount to disbarment, even without an admission of misconduct.[79] The Georgia Supreme Court imposed as reciprocal discipline a five-year suspension, with the proviso that Sanders may not seek reinstatement without proof that he is eligible to be reinstated, and has in fact been reinstated, in Florida.[80]

The Georgia Supreme Court accepted the petition for voluntary discipline of John Michael Spain and imposed a one-year suspension.[81] Spain sought a suspension of at least thirty days but agreed to "accept a longer suspension, or even disbarment."[82] The court had earlier refused to accept a petition in which Spain sought (with the support of the Bar) a Review Panel reprimand or a public reprimand as a result of his *nolo contendere* pleas to the misdemeanor of stalking and the misdemeanor of sending harassing communications in connection with emails Spain sent in connection with his divorce case.[83] "[T]he emails included inappropriate, threatening language, intimidation and personal attacks directed to opposing counsel, including inappropriate remarks about

73. *Id.* at 680, 814 S.E.2d at 395–96.
74. *In re* Iwu, 303 Ga. 539, 541, 813 S.E.2d 336, 338 (2018).
75. *Id.* at 539–40, 813 S.E.2d at 337–38.
76. *Id.* at 540–41, 813 S.E.2d at 338.
77. *In re* Sanders, 303 Ga. 293, 295–96, 811 S.E.2d 344, 346 (2018).
78. *Id.* at 293, 811 S.E.2d at 345.
79. *Id.* at 293–94, 811 S.E.2d at 345.
80. *Id.* at 295–96, 811 S.E.2d at 346.
81. *In re* Spain, 301 Ga. 663, 666, 802 S.E.2d 240, 242 (2017).
82. *Id.* at 664, 802 S.E.2d at 241.
83. *Id.* at 663–65, 802 S.E.2d at 241–42.

counsel and members of her family, and *ad hominem* statements about his wife."[84] Although Spain disputed the point, the supreme court treated the *nolo* plea as misconduct[85] under Georgia Rule of Professional Conduct 8.4(a)(3)[86] because the nolo plea was a conviction of "a misdemeanor involving moral turpitude where the underlying conduct relates to the lawyer's fitness to practice law."[87] Justices Blackwell and Peterson concurred in the acceptance of the petition but dissented because they did not believe "that a one-year suspension [was] necessary."[88]

The supreme court suspended David Sicay-Perrow as a matter of reciprocal discipline.[89] Sicay-Perrow had been disbarred in Tennessee with a conditional right of reinstatement.[90] Because Georgia law does not allow such a sanction, the issue for the supreme court was to determine what would be "substantially similar discipline."[91] The court concluded that Sicay-Perrow should be suspended in Georgia for five years or until he is reinstated in Tennessee, whichever comes first.[92] The court also conditioned the lifting of the Georgia suspension on Sicay-Perrow's satisfaction of other obligations imposed in Tennessee.[93]

The supreme court imposed a four-year suspension as reciprocal discipline on Fincourt Braxton Shelton, who had received such a suspension in Pennsylvania for his conduct in two matters.[94] In one, the lawyer "made material misrepresentations in court documents, mishandled funds that had been entrusted to him, labored under a significant conflict of interest, committed a breach of his fiduciary duties, and engaged in extreme incompetence." In the other, the lawyer "persistently misrepresented the identity of a party in filed pleadings, acted without the consent of his client, filed inaccurate and false documents, and disbursed funds without authority to do so."[95]

In the case of John F. Meyers, the special master recommended disbarment, but the Review Panel recommended a two-year

84. *Id.* at 664, 802 S.E.2d at 241.

85. *Id.* at 665, 802 S.E.2d at 242.

86. GA. RULES OF PROF'L CONDUCT r. 8.4(a)(3) (2018).

87. *Id.*

88. *In re Spain*, 301 Ga. at 666, 802 S.E.2d at 243 (Blackwell, J., concurring in part and dissenting in part).

89. *In re* Sicay-Perrow, 301 Ga. 666, 668, 802 S.E.2d 252, 254 (2017).

90. *Id.* at 667, 802 S.E.2d at 253–54.

91. *Id.* at 667, 802 S.E.2d at 254.

92. *Id.* at 668, 802 S.E.2d at 254.

93. *Id.*

94. *In re* Shelton, 302 Ga. 1, 1–3, 804 S.E.2d 338, 338–39 (2017).

95. *Id.* at 1–2, 804 S.E.2d at 338–39.

suspension.[96] The supreme court agreed with the Review Panel and imposed the suspension.[97] Meyers had been an equity partner at a large firm. He had a corporate client for whom his contact "was [the] in-house counsel for one of the corporation's wholly owned subsidiaries." The in-house counsel told Meyers that the corporation permitted in-house attorneys to have other clients under certain circumstances, and Meyers's firm did some work for the in-house counsel's other clients.[98] When those clients did not pay the firm's bills, the fees "were rolled into the bills [that went] to the law firm's corporate client," and the descriptions on the bills were deceptive in order not to show that the work had been performed for someone other than the corporate client. When the corporate client discovered the practice, it fired in-house counsel and contacted Meyers's firm, which reimbursed the corporate client and wrote off other invoices.[99]

Meyers admitted that he altered and submitted the invoices but contended that he trusted in-house counsel and was misled. Meyers reimbursed the law firm for the fees and resigned from the firm. He admitted "that the alterations to the bills could have helped" deceive the corporate client into believing that the legal work was performed for that client and not the in-house counsel's other clients, but Meyers claimed that he did not knowingly participate in any scheme to defraud the corporate client.[100]

The supreme court agreed with the Review Panel that the special master wrongfully found a violation of Rule 8.1(a),[101] which forbids lawyers from knowingly making false statements of material fact in connection with a disciplinary matter.[102] The special master found a violation of Rule 8.1(a) in Meyers's "continued denial during the disciplinary proceedings that he was complicit in any scheme to defraud the corporate client."[103] The supreme court agreed

> with the Review Panel's implicit conclusion that a lawyer's decision to put up a defense in a disciplinary proceeding—whether by disputing evidence against him or refusing to concede whatever inferences the

96. *In re* Meyers, 302 Ga. 742, 743, 808 S.E.2d 650, 651 (2017).
97. *Id.* at 746, 808 S.E.2d at 653.
98. *Id.* at 742, 808 S.E.2d at 650–51.
99. *Id.* at 742–43, 808 S.E.2d at 650–51.
100. *Id.* at 743, 808 S.E.2d at 651.
101. GA. RULES OF PROF'L CONDUCT r. 8.1(a).
102. *In re Meyers*, 302 Ga. at 744, 808 S.E.2d at 652.
103. *Id.* at 743, 808 S.E.2d at 651.

> State Bar argues may be drawn therefrom—is not always an aggravating factor that counsels imposition of harsher discipline.[104]

The supreme court held that a two-year suspension was the appropriate sanction.[105]

The supreme court accepted the petition for voluntary discipline of Christopher Aaron Corley, who pleaded guilty in South Carolina to felony domestic violence for hitting his wife.[106] Corley set forth numerous factors in mitigation, including severe mental health issues for which he was being treated. Corley also presented evidence that he had a good reputation before the incident and that his wife had forgiven him and was living with him again. He also showed that he was in the process of completing the terms of his probation.[107] The supreme court suspended Corley for two years or until the completion of his probation, whichever is longer.[108] The court also required as conditions of reinstatement a certification of a mental health professional that Corley "is fit to return to the practice of law, and that he is continuing to receive mental health treatment."[109]

C. Public Reprimands

The supreme court imposed two public reprimands during the survey period.[110] The court ordered a public reprimand for Michael Bernard King, and suspended his license until the reprimand was administered, because King "failed to properly advance" a client's appeal, including a failure to file the transcript, with the result that the appeal was dismissed.[111] The Investigative Panel initially decided to impose an Investigative Panel reprimand, but King failed to appear for that sanction and thereby incurred the more severe sanction of a public reprimand, coupled with a suspension of his license until he appeared for that reprimand.[112]

The supreme court accepted a petition for voluntary discipline in the form of a public reprimand from Lakeisha Tennille Gantt, who violated her duties of consultation, communication, and diligence when she

104. *Id.* at 745, 808 S.E.2d at 652.

105. *Id.* at 746, 808 S.E.2d at 653.

106. *In re* Corley, 303 Ga. 290, 290, 293, 811 S.E.2d 347, 347, 349 (2018).

107. *Id.* at 291–92, 811 S.E.2d at 347–48.

108. *Id.* at 292–93, 811 S.E.2d at 349.

109. *Id.* at 293, 811 S.E.2d at 349.

110. *See In re* King, 301 Ga. 791, 792, 804 S.E.2d 116, 117 (2017); *In re* Gantt, 302 Ga. 3, 5, 804 S.E.2d 336, 337–38 (2017).

111. *In re King*, 301 Ga. at 791–92, 804 S.E.2d at 117.

112. *Id.*

dismissed a client's case without prejudice but failed to consult or communicate with the client about the dismissal and failed to refile the case.[113] The court approved the public reprimand in light of significant mitigating factors, including personal and emotional problems that may have contributed to Gantt's conduct.[114]

D. Review Panel Reprimands

The supreme court imposed Review Panel reprimands on three lawyers during the survey period.[115] Donald Edward Smart received that sanction after he defaulted in a disciplinary proceeding.[116] By his default, Smart admitted that he undertook to represent a client in an administrative proceeding but missed the deadline for filing his witness list. Although the hearing officer nevertheless expressed interest in hearing the testimony of the lawyer's client, Smart told the client not to appear at the hearing because Smart intended to file a voluntary dismissal. Smart missed that deadline as well, "and the hearing officer dismissed the matter with prejudice."[117] The supreme court found in aggravation that "Smart had substantial experience in the practice of law and that he had a selfish motive when he failed to inform [the] client that, despite the matter being dismissed due to Smart's mistake, the hearing officer wanted to hear the client's testimony."[118]

Emmanuel Lucas West's third petition for voluntary discipline in the form of a Review Panel reprimand was accepted.[119] West admitted and contended as follows:

> In the summer of 2014, an individual paid him $3,500 to represent her minor son in an immigration matter. The son, who was a citizen of Guatemala, had been detained in Texas and was facing removal proceedings. After discussing the matter through an interpreter, West agreed to represent the son in seeking asylum in the United States and timely completed the application for asylum. West did not read the application to the client in the client's native language, however, and he signed the client's name where required in the application and supporting documents, despite the fact that one of those signatures

113. *In re Gantt*, 302 Ga. at 3–5, 804 S.E.2d at 337–38.

114. *Id.* at 4–5, 804 S.E.2d at 337–38.

115. *See In re* Smart, 303 Ga. 156, 158, 810 S.E.2d 475, 476 (2018); *In re* Clyatt, 302 Ga. 372, 374, 806 S.E.2d 594, 596 (2017); *In re* West, 301 Ga. 901, 905, 804 S.E.2d 340, 342 (2017).

116. *In re Smart*, 303 Ga. at 157–58, 810 S.E.2d at 475–76.

117. *Id.*

118. *Id.* at 157, 810 S.E.2d at 475.

119. *In re West*, 301 Ga. at 905, 804 S.E.2d at 342.

> was under penalty of perjury and required an attestation that the client had signed the document in West's presence. West claims that he signed the client's name knowing that an applicant generally is allowed to amend or supplement his or her application freely up until the time of the hearing, and maintains that he fully intended to supplement with the client's real signature at a later date.[120]

Since West's earlier petition for voluntary discipline did not admit a violation of Rule 8.4(a)(4),[121] the supreme court rejected it.[122] Rule 8.4(a)(4) provides that it is misconduct to "engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation."[123] In this third petition, West added this further explanation of what happened:

> West made one significant addition to the present petition, however. He explained that two sections of the asylum application were left unsigned, for the client to sign when his case proceeded to an appearance, at which time the applicant would be required to sign an affirmation that explicitly addresses whether any prior misstatements in the application were in need of correction.[124]

In light of these new facts, the court's concerns about a possible violation of Rule 8.4(a)(4) were allayed, and the court approved the petition and ordered the Review Panel reprimand.[125]

Upon deciding Melissa M. Clyatt violated Georgia Rule of Professional Conduct 1.8(a),[126] the supreme court ordered a Review Panel reprimand.[127] Clyatt helped a client settle a workers' compensation claim and helped the client in many other ways. Clyatt and the client made an agreement that Clyatt could use the client's settlement funds in exchange for interest payments and an agreement to repay any principal upon request. Clyatt, however, did not comply with the requirements of Rule 1.8(a) before entering into this business transaction with her client. The special master recommended a Review Panel reprimand in light of the predominance of mitigating factors, including "the rare, personal relationship that developed between Clyatt and the client and which benefitted the client greatly; and . . . the absence of evidence of malice,

120. *Id.* at 901–02, 804 S.E.2d at 340.
121. GA. RULES OF PROF'L CONDUCT r. 8.4(a)(4).
122. *In re West*, 301 Ga. at 903, 804 S.E.2d at 341.
123. GA. RULES OF PROF'L CONDUCT r. 8.4(a)(4).
124. *In re West*, 301 Ga. at 903, 804 S.E.2d at 341.
125. *Id.* at 905, 804 S.E.2d at 342.
126. GA. RULES OF PROF'L CONDUCT r. 1.8(a).
127. *In re Clyatt*, 302 Ga. at 374, 806 S.E.2d at 596.

deceit, or bad faith."[128] The supreme court agreed with the special master and ordered the Review Panel reprimand.[129]

E. Petitions for Voluntary Discipline Rejected

The supreme court rejected five petitions for voluntary discipline.[130] It rejected a petition in the form of a Review Panel reprimand from Edward Neal Davis.[131] Davis admitted to violations of Rules 1.15(I)(a)[132] and 1.15(II)(b)[133] but did not admit to a violation of Rule 8.4(a)(4) (misconduct to "engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation"),[134] even though he admittedly notarized a signature on a deed that had not been signed in his presence.[135] Davis refused to admit to a violation of Rule 8.4(a)(4) because he claimed that "he had no intent to violate the Rule" and because no one was hurt as a result of his actions.[136] The court noted that Rule 8.4(a)(4) "contains no requirement that harm result from an attorney's conduct and, to the extent that Rule 8.4 (a)(4) contains an implicit intent element, that element is not focused on whether the attorney intended to violate the Rule."[137] The court rejected the voluntary petition in light of Davis's refusal to admit to a violation of Rule 8.4(a)(4).[138]

The supreme court rejected a petition for voluntary discipline from Ricardo L. Polk, who had a significant record of prior discipline.[139] The particular matter before the court involved an admitted violation of Rule 1.16(d).[140] Polk had to withdraw from representing a client because the lawyer had been suspended for unrelated misconduct. Polk and the client agreed to a partial refund of the retainer the client paid, but Polk did not make the payment.[141] The court noted that the maximum penalty for just

128. *Id.* at 372–73, 806 S.E.2d at 595–96.

129. *Id.* at 374, 806 S.E.2d at 596.

130. *See In re* Davis, 303 Ga. 564, 567, 814 S.E.2d 383, 386 (2018); *In re* Polk, 303 Ga. 675, 678, 814 S.E.2d 327, 330 (2018); *In re* Braziel, 303 Ga. 154, 156, 810 S.E.2d 476, 478 (2018); *In re* Coulter, 301 Ga. 895, 898, 804 S.E.2d 345, 347 (2017); *In re* Hunt, 301 Ga. 661, 663, 802 S.E.2d 243, 245 (2017).

131. *In re Davis*, 303 Ga. at 567, 814 S.E.2d at 386.

132. GA. RULES OF PROF'L CONDUCT r. 1.15(I)(a).

133. GA. RULES OF PROF'L CONDUCT r. 1.15(II)(b).

134. GA. RULES OF PROF'L CONDUCT r. 8.4(a)(4).

135. *In re Davis*, 303 Ga. at 565, 814 S.E.2d at 384–85.

136. *Id.* at 565, 814 S.E.2d at 385.

137. *Id.*

138. *Id.* at 566–67, 814 S.E.2d at 386.

139. *In re Polk*, 303 Ga. at 677–78, 814 S.E.2d at 330.

140. *Id.* at 675, 814 S.E.2d at 328 (citing GA. RULES OF PROF'L CONDUCT r. 1.16(d)).

141. *Id.* at 675–76, 814 S.E.2d at 328–29.

a violation of Rule 1.16(d) would be a public reprimand but noted that, because of Polk's record of prior discipline, Bar Rule 4-103[142] permitted suspension or disbarment for the latest offense.[143] The court rejected Polk's argument that his inability to pay restitution to the client was a mitigating factor and rejected his petition for a suspension that would have run concurrently with the one already in place.[144]

The supreme court rejected a petition for voluntary discipline in which Richard Allen Hunt sought "a suspension [of] between six and twelve months" for having withdrawn and used client funds from his trust account for personal and business expenses, as well as for living expenses and litigation expenses of a client whom he was representing in a personal injury case.[145] Hunt offered various facts in mitigation, including cancer treatment, *pro bono* work, community service, remorse, and restitution.[146] Although the State Bar of Georgia did not object to Hunt's petition, the supreme court rejected the petition because Hunt had an extensive prior disciplinary history.[147]

The supreme court rejected Gary Lanier Coulter's petition for voluntary discipline in the form of a two-year suspension.[148] Coulter had represented an artist's representative and opened and handled numerous bank accounts for the client. The accounts were not lawyer trust accounts. Coulter also paid himself $400,000 in fees, but his billing records contained numerous discrepancies and did not justify all of the fees. Coulter also took possession of valuable art, allegedly as security for unpaid fees, but he did not take the proper steps to allow this business transaction with a client.[149] The court noted that Coulter had been subjected to prior discipline and held that a two-year suspension would not be harsh enough for the conduct that he admitted.[150]

The supreme court rejected a petition for voluntary discipline from Cheryl Joyce Braziel even though the State Bar supported it.[151] Braziel's office had fabricated a lien letter that purportedly concerned her client and then presented the fabricated letter to an insurance company. Braziel explained the sequence of events that led to the creation and

142. GA. RULES OF PROF'L CONDUCT r. 4-103.
143. *In re Polk*, 303 Ga. at 676, 814 S.E.2d at 329.
144. *Id.* at 677–78, 814 S.E.2d at 329–30.
145. *In re Hunt*, 301 Ga. at 661–63, 802 S.E.2d at 243–45.
146. *Id.* at 661–62, 802 S.E.2d at 243–44.
147. *Id.* at 663, 802 S.E.2d at 244–45.
148. *In re Coulter*, 301 Ga. at 898, 804 S.E.2d at 347.
149. *Id.* at 895–96, 804 S.E.2d at 346.
150. *Id.* at 897–98, 804 S.E.2d at 347.
151. *In re Braziel*, 303 Ga. at 154, 810 S.E.2d at 477.

presentation of the letter as a violation of Georgia Rule of Professional Conduct 5.3.[152] She admitted facts that, if true, would reflect a failure of her as a supervisory lawyer to "make reasonable efforts to ensure" that the actions of her nonlawyer assistants were consistent with her ethical obligations.[153] The court rejected the petition and noted that this version of the facts differed from what the grievance alleged.[154] The court noted the possibility that Braziel may have violated Rule 8.4,[155] presumably 8.4(a)(4), which prohibits "professional conduct involving dishonesty, fraud, deceit[,] or misrepresentation."[156] The court also noted that the voluntary petition admitted to a violation of Rule 7.5,[157] despite the fact that the underlying events, as recited by Braziel, did not support a violation of that rule.[158]

F. One Miscellaneous Disciplinary Case

The supreme court dismissed an attempt to impose reciprocal discipline against James Hugh Potts II, who was "suspended" as a member of the "Trial Bar" of the United States District Court for the Northern District of Illinois.[159] The effect of that "suspension" was not to preclude Potts from practicing law but rather to preclude him temporarily from appearing in that court without supervision.[160] The supreme court noted that it could impose reciprocal discipline only in cases of suspension or disbarment in another jurisdiction and that, despite its name as a "suspension," the Illinois discipline was actually neither.[161] The supreme court did acknowledge, however, that the State Bar of Georgia might seek to discipline Potts for the underlying conduct because the Georgia Rules of Professional Conduct permit discipline of a Georgia lawyer for misconduct, regardless of where the misconduct occurs.[162]

152. *Id.* at 154-55, 810 S.E.2d at 477 (citing GA. RULES OF PROF'L CONDUCT r. 5.3)
153. *Id.* at 155, 810 S.E.2d at 477–78.
154. *Id.* at 156, 810 S.E.2d at 478.
155. *Id.*
156. GA. RULES OF PROF'L CONDUCT r. 8.4(a)(4).
157. GA. RULES OF PROF'L CONDUCT r. 7.5.
158. *In re Braziel*, 303 Ga. at 155–56, 810 S.E.2d at 478.
159. *In re* Potts, 301 Ga. 789, 789–91, 804 S.E.2d 59, 60–61 (2017).
160. *Id.* at 790, 804 S.E.2d at 61.
161. *Id.*
162. *Id.* at 790–91, 804 S.E.2d at 61.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Claim of Ineffective Assistance Prevailed in Two Cases

A defendant was convicted of aggravated sexual battery and child molestation, almost exclusively on the basis of the testimony of the victim.[163] The victim's mother told a therapist that the victim "constantly lies" to the mother and "does things to be vindictive."[164] When the mother testified at trial, defense counsel did not ask the mother about the mother's opinion of the victim's truthfulness, because defense counsel mistakenly believed that such evidence was inadmissible.[165] Given that the victim's credibility was a crucial issue in the case, the court of appeals held that defense counsel had rendered ineffective assistance of counsel.[166] Judge Branch dissented on the basis that the decision not to ask the mother about her opinion was made after consultation with the defendant and was a matter of trial strategy rather than a failure to satisfy an objective standard of reasonableness.[167]

The Georgia Court of Appeals reversed a trial court's denial of a motion for new trial on the basis of ineffective assistance of counsel in connection with a plea offer that the defendant rejected.[168] The lawyer erroneously advised the client that, if the client went to trial and was convicted, the judge had discretion not to sentence the defendant as a recidivist.[169] The court held this to be deficient performance.[170] With respect to prejudice, the court held that the trial court was clearly erroneous in its finding that the defendant was not reasonably likely to have accepted the plea offer if he had been properly advised.[171] The court remanded for factual determinations regarding whether the prosecution would have withdrawn the offer in light of intervening circumstances and whether the trial court would have accepted the plea.[172]

B. Finding of Ineffective Assistance Reversed in One Case

The Georgia Supreme Court reversed a grant of habeas corpus in a case that turned on how much of an expert a criminal defense attorney

163. Gonzales v. State, 345 Ga. App. 334, 334, 338, 812 S.E.2d 638, 640, 643 (2018).
164. *Id.* at 336, 812 S.E.2d at 642.
165. *Id.* at 337–38, 812 S.E.2d at 642.
166. *Id.* at 338, 812 S.E.2d at 643.
167. *Id.* at 344, 812 S.E.2d at 646–47 (Branch, J., dissenting).
168. Daniel v. State, 342 Ga. App. 448, 451, 454, 803 S.E.2d 603, 607–08 (2017).
169. *Id.* at 451, 803 S.E.2d at 607.
170. *Id.*
171. *Id.* at 453–54, 803 S.E.2d at 608.
172. *Id.* at 454, 803 S.E.2d at 608.

must be with respect to immigration law.[173] The defendant, Aduka, pled guilty to counterfeiting after his lawyer had advised him that the plea "could" mean that he was subject to deportation. Aduka was sentenced "to five years of 'confinement' to be served entirely on probation."[174]

At that time, any noncitizen was subject to mandatory deportation proceedings if he or she was convicted of an "aggravated felony," which was defined to include the "offense of counterfeiting for which 'the term of imprisonment [was] at least one year.'"[175] Under federal law, the "term of imprisonment" included any period in which the sentence was "suspended."[176] In Aduka's case, the judge did not use the term "suspended" to describe the sentence, but instead ordered that it would be served on probation. There was, therefore, a difficult and subtle legal issue regarding whether Aduka's sentence would subject him to mandatory deportation.[177]

Aduka was deported by an immigration judge, who concluded under Eleventh Circuit precedent that his guilty plea meant that he had been convicted of an aggravated felony, even though the sentence was probated.[178] An expert in immigration law presumably would have been able to advise Aduka that this was the likely outcome in immigration court.[179] The supreme court, however, held that Aduka's counsel was not required "to have the knowledge of immigration judges or experts," and therefore, "did not act outside the wide range of reasonable conduct afforded attorneys who represent criminal defendants, including those defendants who are noncitizens, when he advised appellee that he 'could be' deported, rather than informing appellee that he 'would be' deported if he entered the plea in question."[180]

C. Miscellaneous Ineffective Assistance Cases

The court of appeals held that a trial court erred when it denied a criminal defendant an out-of-time appeal after a guilty verdict.[181] The defendant demonstrated in an earlier visit to the court of appeals that he had a meritorious issue regarding merger of some of his convictions. The

173. State v. Aduka, 303 Ga. 309, 313–14, 812 S.E.2d 266, 269–70 (2018).
174. *Id.* at 309–10, 812 S.E.2d at 267.
175. *Id.* at 311, 812 S.E.2d at 268 (quoting 8 U.S.C. § 1101(a)(43)(R) (2018)).
176. *Id.* at 312, 812 S.E.2d at 269.
177. *Id.*
178. *Id.* at 310–11, 812 S.E.2d at 267–68.
179. *Id.* at 313, 812 S.E.2d at 269.
180. *Id.* at 313–14, 812 S.E.2d at 269–270.
181. Reid v. State, 344 Ga. App. 895, 895, 812 S.E.2d 89, 91 (2018).

defendant also presented uncontradicted evidence that his lawyer had not advised him of his right to appeal.[182]

The Georgia Supreme Court rejected a claim of ineffective assistance of counsel in connection with a conviction for malice murder, among other crimes.[183] The defendant claimed that his counsel was ineffective because counsel pursued an "all-or-nothing trial strategy" and did not consult with him about, or request, a jury charge on voluntary manslaughter.[184] The supreme court acknowledged that the attorney was obliged to consult with the defendant but held that

> the failure to consult fully with the accused about whether to pursue an all-or-nothing defense or request a jury charge on a lesser included offense should be rigorously scrutinized, but that such failure does not constitute ineffective assistance of counsel in every case as a matter of law.[185]

The court rejected the claim of ineffective assistance in this case because the decision whether to ask for a jury charge on voluntary manslaughter was a strategic decision for the lawyer to make, and the decision to forego it was not unreasonable in light of his client's strong feelings that the killing was justified and the risk that such a charge would pose to the lawyer's credibility with the jury.[186] The court also held that, even if the decision were unreasonable, the defendant could not establish prejudice:

> Blackwell relies on his testimony that, had counsel explained the offense of voluntary manslaughter and its penalty, he would have asked trial counsel to request a charge on that offense. To demonstrate prejudice, however, Blackwell would have to establish a reasonable probability that, had counsel consulted with him, counsel would have opted to pursue a charge on the lesser included offense of voluntary manslaughter and that such a strategy would in reasonable probability have resulted in a different outcome. In the first place, there is no evidence that counsel would have requested a charge on voluntary manslaughter, a decision that was his to make, even if he had properly consulted Blackwell. To the contrary, counsel's testimony shows that he reasonably viewed such a charge as inappropriate and unhelpful.[187]

182. *Id.* at 896–97, 812 S.E.2d at 91.

183. Blackwell v. State, 302 Ga. 820, 820, 827, 809 S.E.2d 727, 730, 735 (2018).

184. *Id.* at 824, 809 S.E.2d at 733.

185. *Id.* at 825, 809 S.E.2d at 733–34.

186. *Id.* at 825–26, 809 S.E.2d at 734.

187. *Id.* at 826, 809 S.E.2d at 734 (citations omitted).

The court also held that the defendant could not establish prejudice because the evidence of guilt for malice murder was so strong that there was no reasonable probability that the jury would have returned a verdict for voluntary manslaughter rather than murder.[188]

The supreme court held that a murder defendant's trial counsel was not ineffective for failing to object to the following statement in the prosecutor's closing argument: "It's shocking to think about. Shocking to think about somebody getting out of jail and four hours later killing a man. That's what we've got here. *That's the truth*."[189] The court held that it was not ineffective assistance of counsel to fail to object to these comments, because the "comments were 'permissible since they [were] the conclusion the prosecutor wished the jury to draw from the evidence[] and not a statement of the prosecutor's personal belief as to the veracity of a witness.'"[190]

In *Williams v. State*,[191] the supreme court concluded that there was no ineffective assistance of counsel.[192] Two men, Samuels and the defendant Williams, participated in the killing of the victim. Both Samuels and Williams were represented by lawyers in the same public defender's office. Samuels entered into a plea bargain and testified against Williams. Counsel for Williams sought unsuccessfully to withdraw.[193] A public defender's office in Georgia is treated as a "firm" for purposes of imputation of a conflict of interest.[194] Williams sought a new trial because, he claimed, his lawyer "had an actual conflict of interest that adversely affected [the] counsel's representation."[195] Although the supreme court seems to hold that neither prong was satisfied,[196] the existence of the imputed conflict cannot seriously be doubted. The relevant question, given that lawyers in a public defender's office are treated as members of the same firm, is whether one lawyer could represent these two defendants and make a plea deal for one that harmed the other.[197] Of course not. That is an actual conflict.[198] The court's

188. *Id.* at 827, 809 S.E.2d at 735.

189. Jackson v. State, 301 Ga. 774, 774–75, 804 S.E.2d 73, 74–75 (2017).

190. *Id.* at 776, 804 S.E.2d at 75–76 (alterations in original) (quoting Fulton v. State, 278 Ga. 58, 64, 597 S.E.2d 396, 402 (2004)).

191. 302 Ga. 404, 807 S.E.2d 418 (2017).

192. *Id.* at 404, 807 S.E.2d at 420.

193. *Id.* at 404–06, 807 S.E.2d at 420–21.

194. *Id.* at 409 n.6, 807 S.E.2d at 424 n.6 (citing *In re* Formal Advisory Op. 10-1, 293 Ga. 397, 399–400, 744 S.E.2d 798, 799–800 (2013)).

195. *Id.* at 404, 807 S.E.2d at 420.

196. *Id.* at 412, 807 S.E.2d at 425.

197. *Id.* at 411, 807 S.E.2d at 425.

198. *Id.*

conclusion, to deny the claim of ineffective assistance of counsel, is plausible only on the basis that the conflict did not adversely affect the performance of counsel.[199] The supreme court held that there was no evidence that counsel pulled any punches in representing Williams because of any obligations to Samuels: "Nothing in the record indicates that Appellant's counsel bypassed any meritorious defenses, that Samuels's plea bargain was negotiated at the expense of Appellant, or that counsel's ability to cross-examine Samuels was constrained in any way."[200]

IV. DISQUALIFICATION

A trial court denied a motion for out-of-time appeal based upon alleged ineffective assistance of counsel.[201] On appeal from the denial of that motion, the court of appeals vacated the denial and remanded the case because the lawyer who represented the appellant at the hearing on the motion for out-of-time appeal (Tarleton) "should have been deemed disqualified from representing the Appellant" in connection with that motion.[202] Tarleton was a lawyer in the Appellate Division of the Georgia Public Defender Standards Council (GPDC). Another lawyer for the GPDC (Clark) had claimed in the motion for out-of-time appeal that the notice of appeal for the appellant was not timely filed because Clark or his staff had failed to ensure that it was filed on time and that this failure constituted ineffective assistance of counsel.[203] Clark, however, had a conflict of interest in the assertion of his own ineffectiveness, and this conflict should have been imputed to Tarleton because the two lawyers were both members of the same "firm," the Appellate Division of the GPDC.[204]

The court also noted that the version of events offered by the appellant at the hearing and the version recited in the motion by Clark differed in material ways, which raised an additional problem.[205] Clark was therefore a necessary witness on a crucial issue but, under Georgia Rule of Professional Conduct 3.7(a),[206] could not personally be the appellant's

199. *See id.* at 410, 807 S.E.2d at 424.

200. *Id.* at 412, 807 S.E.2d at 425.

201. Delevan v. State, 345 Ga. App. 46, 47, 811 S.E.2d 71, 72 (2018).

202. *Id.* at 49, 811 S.E.2d at 74–75.

203. *Id.* at 47–48, 811 S.E.2d at 72–73.

204. *Id.* at 52, 811 S.E.2d at 75–76.

205. *Id.* at 50–51, 811 S.E.2d at 75.

206. GA. RULES OF PROF'L CONDUCT r. 3.7(a).

advocate and a witness at the same time.[207] Under Rule 3.7(b),[208] an advocate–witness conflict ordinarily is not automatically imputed to other lawyers in a firm, but the differences between Clark's testimony and the appellant's testimony created a conflict under Rule 1.7,[209] which prohibited Clark or any member of Clark's "firm," including Tarleton, from representing the appellant.[210] The court also noted that Tarleton may have had a conflict of interest between his loyalty to the appellant and his loyalty to his office colleague Clark.[211]

In another case, the supreme court declined to reverse a murder conviction because of an alleged conflict of interest that should have caused the district attorney's office to be disqualified.[212] "[T]he murder victim . . . was the son of a longtime employee of the district attorney's office."[213] The court held that there was no evidence of a conflict of interest.[214] The lead prosecutor in the case testified that the victim's mother was on the support staff of a trial team on a different floor, in an office that employed more than 100 lawyers and tried about sixty-five murder cases per year.[215] The prosecutor also "testified that he did not have a personal relationship with the mother" and that there was nothing unusual about his interactions with her, because their relationship was like his relationship with any other parent of a homicide victim. The district attorney also testified that

> at the time he read the case file, he was unsure that he "even correlated" that a parent of the victim might have been an employee; he knew the mother only professionally as an employee in the office; he never interacted with her outside of the office; he knew that the employee's son had died, but when he reviewed a case file, he intentionally excluded certain information, so it might not have been apparent to him that the employee's son was the victim in the case; he did not recall any particular conversation with the prosecutors about the case; his personal interest in this case was the same as that in every case he had; he would have ensured that the mother had no part in the investigation of the case and he made sure that she had no part

207. *Delevan*, 345 Ga. App. at 51, 811 S.E.2d at 75.
208. GA. RULES OF PROF'L CONDUCT r. 3.7(b).
209. GA. RULES OF PROF'L CONDUCT r. 1.7.
210. *Delevan*, 345 Ga. App. at 52–53, 811 S.E.2d at 76.
211. *Id.* at 52, 811 S.E.2d at 75–76.
212. Battle v. State, 301 Ga. 694, 694–95, 804 S.E.2d 46, 48–49 (2017).
213. *Id.* at 698, 804 S.E.2d at 51.
214. *Id.* at 698–99, 804 S.E.2d at 51.
215. *Id.* at 699 n.5, 804 S.E.2d at 51 n.5.

> in its actual prosecution; he did not direct the lead prosecutor to do anything differently, and he would not have done so.[216]

The district attorney also testified that he went to the victim's funeral but that he attended the funerals of other homicide victims and it was not unusual for members of the D.A.'s office to do so.[217]

In another case, the Georgia Court of Appeals remanded an appeal from a disqualification of counsel to require the trial court to consider whether the movants had waived the right to seek disqualification.[218] The court ordered "findings of fact and conclusions of law on this potentially dispositive question": whether the movants had waived the right to seek disqualification because the motion to disqualify had not been filed promptly.[219]

V. MISCELLANEOUS CASES

The plaintiffs sued their former law firm for malpractice in *Moody v. Hill, Kertscher & Wharton, LLP*.[220] The plaintiffs had also engaged another firm, Holland & Knight, in connection with the matters that gave rise to the malpractice suit. The defendants in the malpractice action sought discovery of the plaintiffs' files from Holland & Knight, but the plaintiffs objected on the basis of the attorney–client privilege. The trial court refused to grant a protective order, and the plaintiffs appealed.[221] In a case of first impression in Georgia, the court of appeals reversed and held that the plaintiffs had not waived their attorney–client privilege with respect to the Holland & Knight files, because they had chosen not to sue Holland & Knight.[222]

In *In re Dillon*,[223] the court of appeals affirmed a finding of criminal contempt.[224] Dillon obtained a judgment in 2007 in a case with a case number ending in "36." Time passed, and the judgment became dormant. In 2014, Dillon filed an action to revive the judgment in a case with a case number that ended in "16," but he voluntarily dismissed the "16" action in 2015.[225] Later that year, Dillon filed the first of four petitions

216. *Id.*

217. *Id.*

218. Zelda Enters., LLLP v. Guarino, 343 Ga. App. 250, 254, 806 S.E.2d 211, 214–15 (2017).

219. *Id.*

220. 346 Ga. App. 129, 129, 813 S.E.2d 790, 791 (2018).

221. *Id.* at 129–30, 813 S.E.2d at 791.

222. *Id.* at 130–31, 813 S.E.2d at 791–92.

223. 344 Ga. App. 200, 808 S.E.2d 436 (2017).

224. *Id.* at 200, 808 S.E.2d at 437.

225. *Id.* at 200–01, 808 S.E.2d at 437–38.

for a writ of *scire facias* in the "16" case to collect the judgment he obtained in the "36" case. The judge dismissed the first petition because the "16" case had been dismissed without prejudice, and at that point Dillon became aware that any later petition for *scire facias* should use the "36" case number. Dillon then filed a second and a third petition for *scire facias* using the wrong case number, each time having signed the petition without noticing the mistake.[226] When the trial court dismissed the third petition, it noted that if Dillon filed the "identical petition the court [would] refer this matter to the State Bar of Georgia for investigation."[227]

Nevertheless, Dillon filed a fourth petition using the wrong number.[228]

> After the trial court's third order, Dillon met with his staff and determined that the software that they used to generate pleadings was automatically inserting 14VS003116 because it was the most recent civil action file number associated with their case file. Accordingly, Dillon claims that he had Case No. 14VS003116 deleted from his software system and instructed his staff to prepare a fourth petition without a case number on it. Inexplicably, he failed to consult with other members of his staff or the Clerk of Court to find out whether he should leave the case number assignment blank or insert 06VS103736, the case number of the original action in which the judgment was obtained. Had Dillon done so, he would have been able to confirm that the filing procedures in the State Court of Fulton County require petitions for scire facias to be filed in the original action in which the judgment was obtained. After signing the fourth petition without a case number assignment, Dillon had the petition forwarded to his paralegal for filing. However, Dillon failed to provide any instructions to his paralegal regarding the assignment of a case number for the fourth petition. Consequently, the paralegal inserted 14VS003116 as the case number assignment and e-filed the fourth petition in the State Court of Fulton County.[229]

The trial court found Dillon in criminal contempt, and the court of appeals held that "a rational factfinder could infer that Dillon wilfully disregarded the seriousness of the trial court's admonition in its third order" because "Dillon [was] on notice that there would be adverse consequences" if a fourth petition was filed incorrectly.[230] Yet, "[a]lthough Dillon took some steps to remedy the discrepancy, he failed to follow

226. *Id.* at 201, 808 S.E.2d at 438.

227. *Id.*

228. *Id.*

229. *Id.* at 201–02, 808 S.E.2d at 438.

230. *Id.* at 203, 808 S.E.2d at 439.

through and personally *ensure* that the proper case number was utilized before filing his fourth petition with the trial court."[231]

The court of appeals affirmed the denial of a motion by a criminal defense counsel to withdraw in *Bourassa v. State*.[232] The defense counsel made the motion on the morning of trial and claimed that she had a conflict of interest because it was apparent that the defendant's mother might be called as a witness. Defense counsel had previously represented the mother in another case. The trial court denied the motion. At trial, the mother testified, but not with respect to anything that related to defense counsel's prior representation.[233] The court of appeals held that the motion to withdraw was untimely and that defense counsel did not have a conflict of interest because the mother was a former, rather than a current, client and because the testimony did not concern "any matters that appeared to touch on the attorney–client relationship between the mother and Bourassa's counsel."[234]

In *In the Interest of J.N.*,[235] a mother sought discovery from her child's guardian ad litem in a dependency action in juvenile court.[236] The court entered "a blanket protective order over the entire file without considering its contents."[237] The court of appeals reversed.[238] The court noted that there are statutory protections for such files and that access might also be limited by "attorney–client privilege and [the] work product doctrine."[239] However, the court remanded the case and ordered the juvenile court to consider whether the particular information sought by the mother should be provided because "there is no absolute privilege that prevents discovery merely because a file belongs to, or the information was created, gathered, and maintained by [a guardian ad litem]."[240]

The supreme court declined to order a new trial for a defendant who was convicted of murder, based in part upon the testimony of an accomplice named Hambrick.[241] One alleged basis for the new trial was that an assistant district attorney testified at the hearing on the motion

231. *Id.*
232. 345 Ga. App. 463, 463, 811 S.E.2d 113, 116 (2018).
233. *Id.* at 467–70, 811 S.E.2d at 118–20.
234. *Id.* at 471–72, 811 S.E.2d at 121.
235. 344 Ga. App. 409, 810 S.E.2d 191 (2018).
236. *Id.* at 409, 810 S.E.2d at 192.
237. *Id.* at 410, 810 S.E.2d at 192.
238. *Id.* at 411, 810 S.E.2d at 193.
239. *Id.* at 410, 810 S.E.2d at 192.
240. *Id.* at 411, 810 S.E.2d at 193.
241. Coleman v. State, 301 Ga. 753, 758, 804 S.E.2d 89, 93–94 (2017).

for new trial that there was no deal at the time of trial between the prosecutors and the accomplice. The defendant claimed that he was entitled to a new trial because this testimony violated Georgia Rule of Professional Conduct 3.7.[242] The supreme court disagreed because the lawyer "testified only with regard to the existence of a deal for Hambrick's testimony, and this testimony occurred after Coleman's jury trial concluded."[243] In another case, the court had previously observed that "[a] lawyer is . . . more likely to be allowed to serve as a witness and an advocate where his or her testimony concerns collateral matters heard outside the main trial, such as rebuttal testimony regarding a deal allegedly made by a prosecutor."[244]

VI. FORMAL ADVISORY OPINIONS[245]

The Georgia Supreme Court approved an opinion from the Formal Advisory Opinion Board.[246] The question presented was: "May an attorney who has been appointed to serve both as legal counsel and as guardian ad litem for a child in a termination of parental rights case advocate termination over the child's objection?"[247] The opinion relied on Georgia Rules of Professional Conduct 1.14,[248] 1.2,[249] 1.7[250] and 3.7 and explained this summary answer: "When it becomes clear that there is an irreconcilable conflict between the child's wishes and the attorney's considered opinion of the child's best interests, the attorney must withdraw from his or her role as the child's guardian ad litem."[251] The basic problem is that, as the attorney for the child, the attorney must defer to the client's determination of the objectives of the representation.[252] A minor child might, for example, direct the lawyer to oppose termination of parental rights. At the same time, the lawyer's obligation as guardian ad litem is to serve the best interests of the child, as determined not by the child but by the lawyer as guardian ad litem.[253]

242. *Id.* at 757–58, 804 S.E.2d at 93–94; *see* GA. RULES OF PROF'L CONDUCT r. 3.7.

243. *Coleman*, 301 Ga. at 758, 804 S.E.2d at 94.

244. Martin v. State, 298 Ga. 259, 271, 779 S.E.2d 342, 355 (2015).

245. The Author is a member of the State Bar of Georgia Formal Advisory Opinion Board. This discussion is the Author's alone and does not reflect any opinion or policy of the Board or any of its members.

246. *In re* Formal Advisory Op. 16-2, 302 Ga. 736, 736, 812 S.E.2d 484, 484 (2018).

247. *Id.* at 737, 812 S.E.2d at 484.

248. GA. RULES OF PROF'L CONDUCT r. 1.14.

249. GA. RULES OF PROF'L CONDUCT r. 1.2.

250. GA. RULES OF PROF'L CONDUCT r. 1.7.

251. *In re Formal Advisory Op. 16-2*, 302 Ga. at 737, 812 S.E.2d at 484.

252. *See* GA. RULES OF PROF'L CONDUCT r. 1.2(a).

253. O.C.G.A. § 15-11-105(a) (2018).

For example, the lawyer as guardian ad litem might conclude that it is in the best interests of the child to terminate parental rights, even though the child, as the client, directs otherwise. Those circumstances create a conflict of interest under Georgia Rule of Professional Conduct 1.7 because "there is a significant risk that . . . the lawyer's duties to . . . a third person [(the duty to report to the court as the guardian ad litem on the child's best interests)] will materially and adversely affect the representation of the client," who has determined that the objective is contrary to the lawyer-as-guardian's determination of the child's best interests.[254]

Note in the summary answer that the lawyer may be able to withdraw as guardian ad litem and continue as the lawyer for the child.[255] The lawyer may choose to seek to withdraw as counsel under Rule 1.16(b)(3)[256] if the lawyer finds the child's objective to be repugnant or imprudent, but generally there would be no requirement that the lawyer withdraw as counsel.[257] However, the lawyer would violate Rule 1.6(e)[258] if the lawyer were to withdraw as counsel and continue as guardian ad litem because the child would then become a former client, and the lawyer as guardian would be in a position to use confidential information against the former client in the very same matter in which the lawyer represented the client.[259]

The Formal Advisory Opinion Board considered one other matter that concerns the rules of conduct but is not answered by an existing rule.[260] The Board received a request about confidentiality and unsolicited statements made to the lawyer by a potential client with whom the client has no pre-existing relationship.[261] The request asked two questions, only one of which the Board determined was not answered by Georgia's rules of conduct.[262] That question was, "Does Rule 1.6 extend to unsolicited statements made by a potential client with whom there is not a pre-existing relationship?"[263] For example, a person might visit a lawyer's web site and complete an online form with information that the

254. GA. RULES OF PROF'L CONDUCT r. 1.7(a).

255. *In Re Formal Advisory Op. 16-2*, 302 Ga. at 737, 812 S.E.2d at 484.

256. GA. RULES OF PROF'L CONDUCT r. 1.16(b)(3).

257. *Id.*

258. GA. RULES OF PROF'L CONDUCT r. 1.6(e).

259. GA. RULES OF PROF'L CONDUCT r. 1.9(a).

260. *See* Jeffrey Hobart Schneider, *Formal Advisory Opinion Board*, 2018 REP. OF THE OFF. OF GEN. COUNS. OF THE ST. B. OF GA. at 11, https://www.gabar.org/barrules/ethicsandprofessionalism/upload/18_OGC_Report.pdf.

261. *Id.*

262. *Id.*

263. *Id.*

person might want kept confidential and that would be confidential in an attorney–client relationship. This scenario raises one of the many concerning issues when someone becomes a prospective client and what duties a lawyer owes to a prospective client. Georgia has not adopted Model Rule of Professional Conduct 1.18,[264] which sets forth, in detail, guidance on those questions.[265] The Formal Advisory Opinion Board concluded that ABA Formal Opinion 10-457,[266] which interprets Model Rule 1.18, correctly addresses this question, and the Board referred the matter to the State Bar Disciplinary Rules and Procedures Committee to consider adopting Model Rule 1.18.[267] At the end of the survey period, the rules committee had not made such a recommendation.

VII. AMENDMENTS TO THE GEORGIA RULES OF PROFESSIONAL CONDUCT

The Georgia Supreme Court approved extensive amendments to the rules that govern the disciplinary process.[268] It is impossible in the space permitted to discuss all of the changes. This Article will highlight only four of the major changes.

A. Rule 4-104: Mental Incapacity and Substance Abuse

Rule 4-104 sets forth grounds for removing a lawyer from the practice of law that are independent of violations of the rules of professional conduct.[269] The new version of Rule 4-104 lists those grounds as "[m]ental illness, cognitive impairment, alcohol abuse or substance abuse"[270] rather than, as in the older version of the rule, "[w]ant of sound mind, senility, habitual intoxication or drug addiction."[271] The new rule also changes the procedures that follow "a determination by the State Disciplinary Board that a lawyer may be impaired or incapacitated" for

264. MODEL RULES OF PROF'L CONDUCT r. 1.18 (AM. BAR ASS'N 2016).

265. MODEL RULES OF PROF'L CONDUCT r. 1.18(b) ("Even when no client–lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.").

266. ABA Comm'n on Ethics & Prof'l Responsability, Formal Op. 10-457 (2010) (discussing confidentiality with prospective clients when they visit a lawyers website).

267. Schneider, *supra* note 260.

268. Order of the Supreme Court of Georgia, at 1–2, 2017-3 Motion to Amend the Rules and Regulations for the Organization and Government of the State Bar of Georgia (Jan. 12, 2018), https://www.gasupreme.us/wp-content/uploads/2018/01/ORDER_2017_3_FINAL_APPX_Final.pdf.

269. GA. RULES OF PROF'L CONDUCT r. 4-104.

270. GA. RULES OF PROF'L CONDUCT r. 4-104(a) (2018).

271. GA. RULES OF PROF'L CONDUCT r. 4-104(a) (2016) (amended 2018).

one of these reasons.[272] Before, the Board could make a referral to the Lawyer's Assistance Program (LAP), which is a confidential service offered to Georgia lawyers to help with a variety of issues, including depression and alcohol or drug abuse.[273] Under the new rule, the LAP no longer has a role in the disciplinary process.[274] Instead, the Board may "make a confidential referral of the matter to an appropriate medical or mental health professional for the purposes of evaluation and possible referral to treatment and/or peer support groups."[275] The Board may defer disciplinary proceedings to give the lawyer the chance "to be evaluated and, if necessary, to begin recovery."[276] In such situations, the medical or mental health professional to whom the lawyer has been referred must report on the lawyer's progress to the Board and the State Bar of Georgia Office of General Counsel (OGC), and a lawyer's failure to cooperate with evaluation or treatment is grounds for further proceedings, including emergency suspension.[277]

B. Rule 4-202: Investigation by Bar Counsel Without the Necessity of a Grievance

Before the recent amendments, the OGC could undertake to investigate a lawyer only upon receipt of a grievance.[278] This requirement constrained the OGC in ways that had the potential to harm the public and the public's perceptions about the bar's diligence in dealing with lawyer misconduct. For example, a lawyer could be arrested for stealing client money amidst widespread publicity, but the bar would have no power to investigate until someone filed a grievance. Under the new procedures, the OGC can initiate an informal investigation on its own "upon [the] receipt of credible information from any source after notifying the respondent lawyer and providing a written description of the information that serves as the basis for the investigation."[279]

272. GA. RULES OF PROF'L CONDUCT r. 4-104(b) (2018).

273. GA. RULES OF PROF'L CONDUCT r. 4-104(b) (2016) (amended 2018). For a description of the Georgia Lawyers Assistance Program, visit https://www.gabar.org/committees programssections/programs/lap/index.cfm.

274. GA. RULES OF PROF'L CONDUCT r. 4-104(b) (2018).

275. *Id.*

276. *Id.*

277. *Id.*

278. GA. RULES OF PROF'L CONDUCT r. 4-202(a) (2016) (amended 2018).

279. GA. RULES OF PROF'L CONDUCT r. 4-202(b) (2018).

C. Rules 4-201 and 4-201.1: Structural Changes to the Disciplinary System

Responsibilities in the disciplinary process previously were split between two panels of the State Disciplinary Board, the Investigative Panel and the Review Panel.[280] As the names suggest, the Investigative Panel investigated grievances against lawyers and the Review Panel acted as a sort of intermediate appellate court with the power to review special master reports and recommendations before they went to the supreme court.[281] Under the amended rules, the panels no longer exist.[282] Instead, the rules provide that the State Disciplinary Board has the power to investigate and discipline lawyers for alleged violations of the rules of professional conduct[283] and creates a new State Disciplinary Review Board to take the place of the old Review Panel.[284] The Review Board is empowered "to review for error final reports and recommendations of Special Masters in public proceedings arising under the Georgia Rules of Professional Conduct."[285]

D. Rules 4-209.1 and 4-209.2: Smaller Corps of Compensated Special Masters

In the past, the supreme court appointed volunteer special masters to preside over disciplinary proceedings from a fairly large pool of qualified lawyers.[286] The new rules require the supreme court to appoint a much smaller group of no more than "[twenty] lawyers to serve as Special Masters [for] disciplinary cases"[287] and also provides that "Special Masters shall be paid by the State Bar of Georgia" at a rate set by the supreme court.[288] On May 31, 2018, the supreme court appointed twenty lawyers to serve as special masters for disciplinary cases[289] and set their hourly rate at $125.[290]

280. GA. RULES OF PROF'L CONDUCT r. 4-201 (2016) (amended 2018).
281. *Id.*
282. *See* GA. RULES OF PROF'L CONDUCT r. 4-201 (2018).
283. GA. RULES OF PROF'L CONDUCT r. 4-201(a).
284. GA. RULES OF PROF'L CONDUCT r. 4-201(a), 4-201.1(a).
285. GA. RULES OF PROF'L CONDUCT r. 4-201.1(a).
286. *See* GA. RULES OF PROF'L CONDUCT r. 4-209.2(a) (2016) (amended 2018).
287. GA. RULES OF PROF'L CONDUCT r. 4-209.1(b) (2018).
288. GA. RULES OF PROF'L CONDUCT r. 4-209.2(a).
289. Order of the Supreme Court of Georgia (May 31, 2018) (on file with Author).
290. Order of the Supreme Court of Georgia (June 14, 2018) (on file with Author).

VIII. CONCLUSION

This Article surveys recent developments in Georgia legal ethics through May 31, 2018. For updates on developments after that date, you may visit the web site of the Mercer Center for Legal Ethics and Professionalism.[291]

291. As a service to the Georgia Bench and Bar, the Mercer Center for Legal Ethics and Professionalism provides regular updates and other resources on recent developments in Georgia legal ethics. Visit http://law.mercer.edu/academics/centers/clep/updates-legal-ethics/ (last updated May 21, 2018).