Legal Ethics

by Patrick Emery Longan*

I. INTRODUCTION

During this past year, the new Georgia Rules of Professional Conduct went into effect. The new Rules replace the multi-faceted regulatory regime that consisted of Standards, Directory Rules, Ethical Considerations, and Canons. The Rules follow the format of the American Bar Association's Model Rules of Professional Conduct, although they do not follow the Model Rule's substance in every respect.[1] Because the Rules went into effect on January 1, 2001, it will take some time to assess their impact on the practice of law in Georgia. In the meantime, the Georgia courts dealt with a number of important issues relating to the legal profession this past year. The cases involved questions of professional discipline, confidentiality of client identity, attorney fees and related matters, disqualification, and professionalism.

II. PROFESSIONAL DISCIPLINE

This past year the Supreme Court of Georgia dispensed discipline for the usual panoply of types of attorney misconduct. The court disciplined lawyers for mishandling their trust accounts,[2] for neglecting their

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1. The easiest place to find a copy of the new Georgia Rules is on the web site of the State Bar of Georgia, <www.gabar.org>. There is a link on the home page to the full text of all of the new Rules.

2. *In re* Frazier, 273 Ga. 878, 546 S.E.2d 272 (2001); *In re* Aldridge, 273 Ga. 875, 548 S.E.2d 305 (2001); *In re* Swift, 273 Ga. 539, 544 S.E.2d 114 (2001); *In re* Carter, 273 Ga. 201, 539 S.E.2d 804 (2000); *In re* Hudson, 272 Ga. 853, 537 S.E.2d 68 (2000); *In re* Watkins, 272 Ga. 769, 534 S.E.2d 794 (2000) (there were other violations in this case as well).

clients,[3] for deceiving clients or courts,[4] for losing a law license in another state,[5] for continuing to practice with a suspended license,[6] for stealing from a client,[7] for using runners to solicit business,[8] and for receiving criminal convictions.[9] As usual, some of these situations resulted, at least in part, from substance abuse, alcoholism, or mental illness.[10] Two of the cases, however, were unusual in that they prompted dissents.

In re Erion[11] dealt with neglect of a client's case. The attorney took a $750 retainer and later requested and received another check for $2000. When the client was unable to contact the lawyer, the client placed a hold on the $2000 check.[12] Apparently, the lawyer's inattention did not prejudice the client's rights in the underlying litigation, but the client suffered the loss of the $750, experienced "needless worry and concern, and risked the loss of legal rights and remedies available to it."[13] Chief Justice Benham filed a dissent in which Justices Sears and Carley joined.[14] The dissenters' central point was:

> In order for attorney discipline to be effective and to have meaningful impact, the process must have consistency. Our treatment of Erion is not consistent with our treatment of other similarly situated attorneys accused of violating ethical standards. Because that lack of consistency has produced an unfair result in the present case, [we] must dissent.[15]

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3. *In re* Swift, 273 Ga. 539, 544 S.E.2d 114 (2001); *In re* Quinlan, 273 Ga. 501, 541 S.E.2d 383 (2001); *In re* Bagley, 273 Ga. 874, 548 S.E.2d 295 (2001); *In re* Trauffer, 273 Ga. 781, 545 S.E.2d 917 (2001); *In re* McGee, 273 Ga. 335, 540 S.E.2d 607 (2001); *In re* Childers, 273 Ga. 337, 540 S.E.2d 606 (2001); *In re* Lipscomb, 273 Ga. 199, 539 S.E.2d 805 (2000); *In re* Wilkinson, 273 Ga. 542, 545 S.E.2d 308 (2001); *In re* Burton, 273 Ga. 469, 542 S.E.2d 504 (2001).

4. *In re* Swift, 273 Ga. 539, 544 S.E.2d 114 (2001); *In re* Reuss, 273 Ga. 832, 546 S.E.2d 495 (2001).

5. *In re* Powell, 274 Ga. 89, 548 S.E.2d 615 (2001).

6. *In re* Lemmons, 273 Ga. 780, 545 S.E.2d 885 (2001).

7. *In re* Conway, 549 S.E.2d 85 (2001), *vacated* (August 27, 2001); *In re* Bell, 273 Ga. 196, 539 S.E.2d 806 (2000); *In re* Hudson, 272 Ga. 853, 537 S.E.2d 68.

8. *In re* Silver, 273 Ga. 727, 545 S.E.2d 886 (2001).

9. *In re* Threlkeld, 273 Ga. 331, 539 S.E.2d 823 (2001); *In re* Jarnagin, 273 Ga. 68, 537 S.E.2d 71 (2000).

10. *In re* Conway, 549 S.E.2d 85, *vacated* (August 27, 2001); *In re* Silver, 273 Ga. 727, 545 S.E.2d 886; *In re* Childers, 273 Ga. 337, 540 S.E.2d 606; *In re* Carter, 273 Ga. 201, 539 S.E.2d 804.

11. 273 Ga. 103, 538 S.E.2d 427 (2000).

12. *Id.* at 103, 538 S.E.2d at 428.

13. *Id.*

14. *Id.* at 105, 538 S.E.2d at 428 (Benham, C.J., dissenting).

15. *Id.*

The dissent referred primarily to *In re Zoota*[16] to make its point. In *Zoota* the supreme court suspended a lawyer rather than disbar him even though he, like Erion, failed to do the work for which he had been paid, failed to communicate with the client, and failed to respond to the disciplinary action.[17]

Chief Justice Benham, joined in dissent by Justice Hunstein, again objected to the disbarment of a lawyer in *In re Wood*.[18] The supreme court disbarred Wood for neglecting a client's personal injury claim for so long that the client lost whatever rights he may have had.[19] The lawyer also repeatedly lied to the client about the status of the case that Wood filed but then voluntarily dismissed.[20] Chief Justice Benham's dissent again cited *Zoota* as an example of more lenient treatment for a similarly situated lawyer.[21]

The troublesome aspect of these two cases is that the court did not respond in either case to Chief Justice Benham's criticism. The per curiam opinions ignore the dissents entirely. The failure of the opinions to meet the Chief Justice's criticism creates the impression that the court cannot reconcile the treatment the disbarred lawyers received with the more lenient treatment received by others. If that is true, the court has been inconsistent and therefore unfair. If the court finds the cases distinguishable, it should say why and not leave the Bar and the public wondering why the lawyers were treated differently. At worst, these cases reveal unfairness in the disciplinary process. At best, they reveal inadequate concern for the public's right to understand the basis of an appellate decision.[22] The court should have explained why Erion and Wood were disbarred when Zoota was not.

III. CONFIDENTIALITY OF CLIENT IDENTITY

The Georgia Supreme Court and the Georgia Court of Appeals each decided one case dealing with the revelation of a client's identity. In *Tenet Healthcare Corp. v. Louisiana Forum Corp.*,[23] a lawyer learned from one client that another client, Tenet Healthcare, might have claims

16. 272 Ga. 496, 532 S.E.2d 107 (2000).
17. *Id.* at 498, 532 S.E.2d at 108.
18. 273 Ga. 713, 714, 543 S.E.2d 731, 732 (2001) (Benham, C.J., dissenting).
19. *Id.* at 714, 543 S.E.2d at 732.
20. *Id.* at 713, 543 S.E.2d at 732.
21. *Id.* at 714, 543 S.E.2d at 732 (citing *Zoota*, 272 Ga. 496, 532 S.E.2d 107).
22. For a discussion of explanation as one function of appellate opinions, see Patrick E. Longan, *Professionalism on the Appellate Bench: The Life and Example of Justice George Rose Smith of the Arkansas Supreme Court*, 55 ARK. L. REV. (forthcoming 2001).
23. 273 Ga. 206, 538 S.E.2d 441 (2000).

against Louisiana Forum. The "tipster" made an agreement to share his information if he received a portion of the proceeds of the suit to collect the claim, but he requested that his identity be kept secret. The informant initially approached the lawyer because he was afraid he might have some "exposure" for some type of wrongful conduct. Tenet agreed to the arrangement and suit was brought, but Louisiana Forum sought the identity of the tipster in discovery. The attorney resisted the inquiry on the basis of attorney-client privilege and the attorney's ethical duty to keep client secrets.[24]

The case ultimately turned on the question of privilege. The attorney's ethical duty to keep client confidences is subject to a proviso that confidences may be revealed when ordered by a court. The court's order, in turn, was a valid discovery order as long as the information was not privileged, because Louisiana Forum was entitled to discovery of any relevant, unprivileged matter, including the identity of a potential witness. The supreme court correctly recognized that client identity is usually not privileged, but that it can become so when revelation of the client's identity would be the "last link" for a criminal prosecution, or revelation would necessarily reveal substantive attorney-client communications.[25] The application of that rule to this case might pose difficulty: What "wrongdoing" brought the client to the lawyer in the first place, and what effect would revelation of identity have on that unknown, underlying problem? This client, however, was not able to make such a showing.[26] Even if there was a basis for concern, the court's decision would almost certainly have been correct because this client waived any right to secrecy when he agreed to allow pursuit of the matter in court and insisted on a cut of the action. A client otherwise entitled to confidentiality cannot hide behind it while seeking recovery from another party. The court decided this case correctly and did so without any overbroad holding about the application of attorney-client privilege to client identity.

The second case dealt with the privilege against self incrimination. In *Begner v. State Ethics Commission*,[27] an attorney was subpoenaed to testify before the Georgia State Ethics Commission. Previously the subpoenaed lawyer made an anonymous contribution on behalf of a client to a political candidate. Anonymous political contributions are illegal in Georgia. When asked for the identity of his client, the lawyer

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24. *Id.* at 206-07, 538 S.E.2d at 443.

25. *See, e.g.*, NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 210-11 (2d ed. 2000).

26. *Tenet Healthcare*, 273 Ga. at 209, 538 S.E.2d at 445.

27. 250 Ga. App. 327, 552 S.E.2d 431 (2001).

invoked his statutory and constitutional rights against self incrimination. The trial court that issued the subpoena responded by holding the lawyer in contempt.[28] The court of appeals reversed and remanded because the trial court did not make a preliminary finding whether particular questions might call for incriminating answers.[29] If the questions could call for the witness to incriminate himself, the court of appeals concluded, then the attorney has the right to decide whether to invoke the self-incrimination privilege.[30]

Interestingly, the court of appeals went out of its way to dispose of the attorney-client privilege issue, although the litigants did not raise it on appeal.[31] As discussed above, there are circumstances in which the identity of the client would be the "last link" to a client's past criminal conduct, and therefore, the identity of the client would be privileged. Here, however, the lawyer involved himself in the criminal conduct because he delivered the anonymous donation.[32] Without much elaboration, the court of appeals correctly held the crime-fraud exception to the attorney-client privilege operated under these circumstances to block the assertion of the privilege.[33]

IV. FEES AND RELATED MATTERS

With respect to fees and related matters, the Georgia Supreme Court decided two cases worthy of note while the court of appeals decided one. In *Magnetic Resonance Plus, Inc. v. Imaging Systems International*,[34] the supreme court decided that the plaintiff was not a "prevailing party" for the purpose of a contractual provision entitling it to fees.[35] The trial court found defendant breached the contract and awarded damages measured by plaintiff's lost profits. Ordinarily, that award would have made plaintiff a prevailing party entitled to fees. The problem was the court of appeals set aside the damages, but not the finding of a breach. Another part of the contract prevented an award for lost profits. In other words, plaintiff "won" but recovered nothing.[36] The court of appeals held, in a second appeal, that plaintiff was not, under these

28. *Id.* at 327-29, 552 S.E.2d at 432-33.
29. *Id.* at 332, 552 S.E.2d at 435.
30. *Id.* at 332-33, 552, S.E.2d at 435.
31. *Id.* at 328, 552 S.E.2d at 433.
32. *Id.*, 552 S.E.2d at 432.
33. *Id.* at 333, 552 S.E.2d at 435.
34. 273 Ga. 525, 543 S.E.2d 32 (2001).
35. *Id.* at 526, 543 S.E.2d at 34.
36. *Id.* at 525, 543 S.E.2d at 33.

circumstances, a prevailing party, and the supreme court agreed.[37] The supreme court held plaintiff's "failure to obtain any of the relief it sought disqualified it from an award of attorney fees."[38]

The supreme court in this case was careful to state that one can be a prevailing party without recovering money.[39] A party can prevail by reducing a monetary obligation, by obtaining equitable relief, or by changing the other party's behavior in a way that directly benefits the plaintiff.[40] One must be careful to recognize the peculiar facts precluding plaintiff's right to attorney fees; by the terms of the parties' contract, there was no remedy for the breach that occurred.[41] The *Magnetic Resonance* opinion is important for the limited number of cases for which this statement would be true, but its holding is narrow.

In *Nodvin v. State Bar of Georgia*,[42] the supreme court dealt with a number of constitutional challenges to the mandatory arbitration of fee disputes between lawyers and clients. The court held mandatory arbitration does not violate equal protection or due process rights, nor does arbitration violate the lawyer's right to a jury or his right to enjoy the privileges and immunities of citizenship.[43] In the course of rejecting this challenge to arbitration, the court used the occasion to emphasize its inherent and exclusive authority to regulate the practice of law in Georgia.[44]

The fee case from the court of appeals dealt with a question of first impression: By what method should courts in class actions calculate attorney fees? Successful class actions generate a "common fund" that benefits the named plaintiffs and many others. Long ago, American courts accepted that attorneys whose work creates the common fund are entitled to compensation for their efforts.[45] In *Friedrich v. Fidelity National Bank*,[46] the court of appeals discussed the "lodestar" method of computing fees and the "percentage of the fund" method.[47] The lodestar method relies primarily on the number of hours billed and an

37. *Id.* at 525-26, 543 S.E.2d at 33-34.
38. *Id.* at 529, 543 S.E.2d at 36.
39. *Id.* at 528, 543 S.E.2d at 35.
40. *Id.* at 529, 543 S.E.2d at 35-36.
41. *Id.* at 527, 543 S.E.2d at 34.
42. 273 Ga. 559, 544 S.E.2d 142 (2001).
43. *Id.* at 559-61, 544 S.E.2d at 145-46.
44. *Id.* at 559, 544 S.E.2d at 145. For a discussion of inherent judicial power in this context, see CHARLES WOLFRAM, MODERN LEGAL ETHICS 556-58 (1986).
45. For a detailed discussion of the award of attorney fees in complex litigation, see RICHARD A. MARCUS & EDWARD M. SHERMAN, COMPLEX LITIGATION 752-90 (3d ed. 1998).
46. 247 Ga. App. 704, 545 S.E.2d 107 (2001).
47. *Id.* at 705-06, 545 S.E.2d at 109.

appropriate hourly rate for the lawyers. The percentage of the fund method uses the end result as its primary guide to the value of the lawyers' services, much like a contingent fee contract in an ordinary personal injury case does.[48] The court of appeals correctly concluded the lodestar method suffers from two fatal flaws: it discourages lawyers from settling cases early and it involves the trial court in too much detailed review of billed time.[49] The percentage method gives the class lawyers more desirable incentives to get the most compensation for the class in the most efficient way, while minimizing the trial court's burden in setting the fee.[50] The decision is a sound one, as far as it goes. The next challenge will be the valuation of "funds" in cases settled without the exchange of cash, but instead with the exchange of "discount coupons" or the like for members of the class.[51] Such settlements are becoming common. That, however, is a problem for another day.

V. DISQUALIFICATION OF STATE LEGISLATORS

In 1982, in *Georgia Department of Human Resources v. Sistrunk*,[52] the Georgia Supreme Court established a bright line rule disqualifing state legislators from representing clients for financial gain in any transaction or matter in which the State is an opposing party.[53] The court took the opportunity in July 2001 to reconsider and then overrule the decision in *Sistrunk* in *Georgia Ports Authority v. Harris*.[54] Thomas C. Bordeaux, Jr., a member of the Georgia House of Representatives, represented plaintiff in this case. The Ports Authority moved to disqualify Mr. Bordeaux, and in turn he urged the court to reconsider *Sistrunk*.[55]

Sistrunk was based upon an interpretation of the Georgia Constitution.[56] The court in *Harris* found nothing in the Constitution mandating the result in *Sistrunk* and thus freed itself to examine the rule as a

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48. *Id.*

49. *Id.* at 706-07, 545 S.E.2d at 109-10 (citing Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261 (D.C. Cir. 1993)) (citations omitted).

50. *Id.*

51. The classic example of such a settlement gave owners of General Motors trucks coupons to purchase new trucks at a discount. *See In re* GMC Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768 (3d Cir. 1995), *cert. denied sub nom.*, GMC v. French, 516 U.S. 824 (1995).

52. 249 Ga. 543, 291 S.E.2d 524 (1982), *overruled by* Georgia Ports Auth. v. Harris, 274 Ga. 146, 549 S.E.2d 95 (2001).

53. 249 Ga. at 547, 291 S.E.2d at 528.

54. 274 Ga. 146, 549 S.E.2d 95 (2001).

55. *Id.* at 146, 549 S.E.2d at 97.

56. 249 Ga. at 546-47, 291 S.E.2d at 528.

matter of policy.[57] The court recognized the burden of the *Sistrunk* rule fell primarily upon lawyers and made public service more expensive for them, because they had to turn away civil cases in which their client would oppose the State.[58] It is not in the State's interest, the court concluded, to discourage public service by lawyers.[59] The court also questioned another assumption underlying the *Sistrunk* rule: absent disqualification, lawyers could not be trusted to observe their duties to the State and their duties to their client.[60] Accordingly, the court concluded, "we take this opportunity now to join the overwhelming majority of states and adopt the ad hoc conflicts of interest standard."[61] In future cases, the court will look to the particular circumstances of each case to decide whether there is an actual conflict of interest justifying disqualification, rather than assuming there is always a conflict when a legislator/lawyer sues the State.[62]

VI. PROFESSIONALISM

Beyond the rules of legal ethics lie the expectations of professionalism.[63] The Georgia Supreme Court issued several opinions in the past year dealing with issues of professionalism. The most notable of these decisions was *Butts v. State*,[64] in which the court rejected a number of arguments about ineffective assistance of counsel.[65] One of those arguments was that counsel was courteous and respectful to the prosecutor and was therefore an ineffective advocate. That argument drew a separate opinion from Chief Justice Benham.[66] In a concurring opinion that will become a classic statement of the role of professionalism in litigation, the Chief Justice wrote:

> Civility is more than good manners. It is an essential ingredient in an effective adversarial legal system such as ours. The absence of civility would produce a system of justice that would be out of control and impossible to manage: normal disputes would be unnecessarily laced with anger and discord; citizens would become disrespectful of the

57. 274 Ga. at 147, 549 S.E.2d at 97.
58. *Id.*
59. *Id.*
60. *Id.* at 148, 549 S.E.2d at 98.
61. *Id.*
62. *Id.*
63. For a discussion of the difference between ethics and professionalism, see AMERICAN BAR ASSOCIATION, TEACHING AND LEARNING PROFESSIONALISM 1-127 (1997).
64. 273 Ga. 760, 546 S.E.2d 472 (2001).
65. *Id.* at 767-68, 546 S.E.2d at 482.
66. *Id.* at 772, 546 S.E.2d at 485 (Benham, C.J., concurring).

> rights of others; corporations would become irresponsible in conducting their business; governments would become unresponsive to the needs of those they serve; and alternative dispute resolution would be virtually impossible.
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> To avoid incivility's evil consequences of discord, disrespect, unresponsiveness, irresponsibility, and blind advocacy, we must encourage lawyers to embrace civility's positive aspects. Civility allows us to understand another's point of view. It keeps us from giving vent to our emotions. It allows us to understand the consequences of our actions. It permits us to seek alternatives in the resolution of our problems. All of these positive consequences of civility will help us usher in an era where problems are solved fairly, inexpensively, swiftly, and harmoniously. The public expects no less and we must rise to the occasion in meeting those expectations.[67]

Chief Justice Benham's opinion served notice that professionalism and civility will be taken seriously in Georgia courts.

In a similar vein, the court in *In re Thigpen*[68] chastised counsel for the State Bar for failure to serve Notices of Discipline on the respondent's lawyer at the same time they were sent to the respondent, Mr. Thigpen.[69] The court agreed with the State Bar that Mr. Thigpen should be disbarred, and the court agreed that serving Mr. Thigpen's lawyer was not required under the Bar Rules.[70] Nevertheless, the opinion stated that the bar counsel's "failure to [serve Thigpen's lawyer with Notices of Discipline] and his apparent unwillingness to communicate with Thigpen's counsel in an expeditious manner exhibit a lack of professionalism unworthy of a member of the State Bar."[71]

The court's concern for professionalism, however, is not boundless. In *Lucas v. Lucas*,[72] the court let a final decree of divorce stand even though the wife's counsel obtained the decree without notice to the husband's counsel.[73] The husband had not filed responsive pleadings and therefore was not technically entitled to further notice. The two lawyers, however, had engaged in settlement negotiations. The wife's lawyer certainly knew how to get in touch with opposing counsel and apparently made no attempt to do so.[74] In 1993 the court disapproved of similar actions with respect to an unrepresented opponent in *Green*

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67. *Id.* at 773, 546 S.E.2d at 486.
68. 273 Ga. 287, 538 S.E.2d 414 (2001).
69. *Id.* at 289-90, 538 S.E.2d at 415-16.
70. *Id.*, 538 S.E.2d at 416.
71. *Id.*
72. 273 Ga. 240, 539 S.E.2d 807 (2000).
73. *Id.* at 240, 539 S.E.2d at 808.
74. *Id.* at 240-41, 539 S.E.2d at 808-09.

v. Green.[75] In *Lucas*, however, the court held the husband's lawyer could be relied upon to recognize the risk of not filing responsive pleadings and to advise the husband accordingly.[76] Chief Justice Benham did not join this part of the opinion.[77]

The majority opinion in *Lucas* approved conduct that is unprofessional.[78] Lawyers should be able to trust each other. The more they are able to do so, the less they have to rely on procedural formalities and technicalities to resolve a dispute. Lawyers after *Lucas* will feel the need to be on their guard. If my opposing counsel, with whom I have been negotiating, can obtain a final judgment without calling me because I have not filed my pleadings, then I will make sure in every case that I dot every "i" and cross every "t." I will hesitate to try to expedite matters informally, to resolve cases quickly and inexpensively, for fear my informality may cost my client his case. I might even feel professionally obligated to take advantage of each of the other lawyer's technical lapses. Our mistrust may escalate and turn every case into an unfriendly or even nasty game of "Survivor." If lawyers will treat each other respectfully, and if the courts will promote trust between lawyers, then faster, less expensive, and more pleasant litigation can follow. *Butts* and the decision in *Thigpen* have come down since *Lucas*. Let us hope these decisions, and not *Lucas*, indicate the direction the Georgia courts will take to encourage professionalism.

VII. CONCLUSION

In these areas, the Georgia appellate courts in the past year provided Georgia lawyers with continuing guidance about their professional responsibilities. The next few years promise to be lively ones, as the courts begin to apply the new Georgia Rules of Professional Conduct. Next year's symposium issue will report on any such developments and on others affecting the law that governs lawyers.

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75. 263 Ga. 551, 553, 437 S.E.2d 457, 458-59 (1993).

76. 273 Ga. at 241, 539 S.E.2d at 809.

77. *Id.* at 242, 539 S.E.2d at 810 (Carley, J., concurring).

78. One of the most influential of the many "civility codes" promulgated in the last fifteen years is the Standards for Conduct of the Seventh Federal Judicial Circuit. Standard 18 is as follows: "[w]e will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity." THE FINAL REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT, APP. A (1992), <http://www.law.stetson.edu/litethics/conclave/aspenreport.htm>. That is precisely what the wife's lawyer in *Lucas* did.