

# **PROFESSIONALISM, ETHICS AND MALPRACTICE:**

## **Review of Georgia Ethics and Malpractice Cases**

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## I.

### STATUTE OF LIMITATIONS

The law regarding the statute of limitations applicable to legal malpractice cases is not altogether settled or clear, and may depend on the specific facts alleged in any particular case. Different limitation periods may apply depending on the content of the representation agreement at issue and the negligent or intentional actions that the attorney is alleged to have committed.

**A. The Statute of Limitations for Legal Malpractice is Generally Four Years, Although There Is Some Uncertainty in the Law Regarding the Applicable Number of Years in Certain Circumstances.**

There is no section of the Official Code of Georgia that provides for a statute of limitations specifically applicable to legal malpractice claims, but the Georgia Courts have consistently held that such claims are governed by O.C.G.A. § 9-3-25, which provides a four-year statute of limitations for a cause of action arising from an oral or implied contract. Several Georgia cases flatly state that the statute of limitations for legal malpractice is four years:

A cause of action for legal malpractice, alleging *negligence or unskillfulness*, sounds in *contract* (agency) and, in the case of an oral agreement, is subject to the four-year statute of limitation in [OCGA § 9-3-25](#). In Georgia legal malpractice is based upon the breach of a duty imposed by the attorney-client contract of employment, and as such, the applicable statute of limitation is four years.

Jones, Day, Reavis & Pogue v. American Envirecycle, Inc. 217 Ga.App. 80, 456 S.E.2d 264 (1995)(emphasis in the original). See also Villani v. Hughes, 279 Ga. App. 618, 631 S.E.2d 709 (Ga. App. 2006); Shores v. Troglin, 260 Ga. App. 696, 580 S.E.2d 659 (2003); Royal v. Harrington, 194 Ga. App. 457, 390 S.E.2d 668 (1990).

A few years ago, however, this general rule became subject to some uncertainty when a Georgia Supreme Court case concerning a different kind of professional negligence (engineering malpractice) held that the statute of limitations applicable to a breach of an obligation owed under a written contract for professional services could be subject to the six-year statute of limitations provided by O.C.G.A. § 9-3-24. Newell Recycling of Atlanta, Inc. v. Jordan Jones and Goulding, Inc., 288 Ga. 236, 703 S.E.2d 323 (2010). Newell referenced, and at least partially overruled Old Republic Nat. Title Ins. Co. v. Attorney Title Services, Inc., 299 Ga. App. 6, 9, 682 S.E.2d 134, 138 (2009), a legal malpractice case that held that the an attorney’s negligence in failing to provide an accurate legal description of real property referenced in a title insurance commitment was a breach of an implied contract, rather than an explicit one. The Court in Old Republic had reasoned that “the [representation agreement] did not specify what information the [attorney] was required to include in a title commitment or state that the [attorney] agreed to guarantee the accuracy of all legal descriptions of property provided in such title commitments.”

Newell, supra, may have at least partially altered the prior rule that legal malpractice claims based on an attorney’s negligent breach of responsibilities implied in a written representation agreement are governed by the four-year statute applicable to contracts which are “partly in writing and partly in parol.” See Plumlee v. Davis, 221 Ga. App. 848, 852(3), 473 S.E.2d 510 (1996). Although Newell involved engineering malpractice rather than legal malpractice, the malpractice in question resulted from a professional engineer’s failure to perform duties established by a written “Draft Scope of Work” in accordance with the applicable standard of care. The Court held that “because

an implied promise to perform would be written into [the contract for professional services] by law, an alleged breach of this implied obligation would necessarily be governed by the six year statute of limitations of O.C.G.A. § 9-3-24.” Id., 288 Ga. at 237, 703 S.E.2d at 325 (2010). Therefore, the Court stated “[t]o the extent that Old Republic Nat. Title Ins. Co. v. Attorney Title Svcs., 299 Ga. App. 6, 682 S.E.2d 134 (2009) can be read for the proposition that professional malpractice claims premised upon a complete written agreement are subject to the four-year statute of limitation of O.C.G.A. § 9-3-25, it is hereby overruled.” The Georgia Court of Appeals subsequently recognized Newell’s abrogation of the previous rule applying the four-year statute of limitation found in O.C.G.A. § 9-3-25 to non-medical professional negligence claims in a case involving the negligence of a construction consultant. Saiia Const., LLC v. Terracon Consultants, Inc., 310 Ga. App. 713, 714 S.E.2d 3 (2011).<sup>1</sup>

In 2012, however, the Newell case appeared before the Court of Appeals once again after the trial court, on remand, held (despite the Supreme Court’s prior ruling that a professional negligence case may be subject to a six-year statute of limitations if based upon a complete written engagement contract) that the documents at issue in the Newell case did not constitute contain all the necessary elements of a contract. “To constitute a valid contract, there must be parties able to contract, a consideration

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1 It should be noted, however, that while Saiia reversed the trial court’s granting of summary judgment to the defendant, a footnote in the opinion suggests that, on remand, the defendant may still be able to prevail on this issue if the writings on which the plaintiff relies did not form the entire contract between the parties. Id., 310 Ga. App. 713, 716, 714 S.E.2d 3, 6.

2 In ALR Oglethorpe, LLC v. Henderson, 336 Ga. App. 739, 783 S.E.2d 187 (2016), which was a complicated case involving one of several interrelated lawsuits brought by different parties to a real estate transaction, the Georgia Court of Appeals deftly avoided ruling on the issue of whether a six-year statute of limitations might apply to a legal malpractice claim arising from a lawyer’s negligence in carrying out the terms of a written contract. The court held that collateral

moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate.” Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc., 317 Ga. App. 464, 465, 731 S.E.2d 361, 363 (2012). The alleged contract in Newell was a “Draft Scope of Work” that contained descriptions of the projects to be performed as well as cost estimates, but it failed to specify the applicable hourly rates at which services would be billed. Therefore, the Court of Appeals affirmed the trial court’s holding on remand that the “Draft Scope of Work” did not constitute a complete written contract for statute of limitations purposes because it failed to specify the necessary element of consideration. “Because the parties’ contract was not wholly in writing, the entire contract is considered to be one in parol, and the four-year statute of limitation applies.” Id., 317 Ga. App. 464, 467, 731 S.E.2d 361, 364 (2012), citing Jankowski v. Taylor, Bishop & Lee, 154 Ga. App. 752, 754–755(2, 3), 269 S.E.2d 871 (1980).

Although the analysis found in Newell has not yet been applied in a legal malpractice context<sup>2</sup>, it appears that the law may have changed such that at least some legal malpractice actions are now subject to the six-year statute of limitations found in O.C.G.A. § 9-3-24 where the representation agreement is specific enough as to state or imply the specific duty which the attorney is alleged to have breached. See also Old

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<sup>2</sup> In ALR Oglethorpe, LLC v. Henderson, 336 Ga. App. 739, 783 S.E.2d 187 (2016), which was a complicated case involving one of several interrelated lawsuits brought by different parties to a real estate transaction, the Georgia Court of Appeals deftly avoided ruling on the issue of whether a six-year statute of limitations might apply to a legal malpractice claim arising from a lawyer’s negligence in carrying out the terms of a written contract. The court held that collateral estoppel precluded the argument that the six-year limitation should be applied because a previous ruling in a different lawsuit involving the same parties had applied a four-year statute of limitations to a claim based upon the same facts. The two concurring judges in ALR Oglethorpe concurred *in judgment only*, and the decision is therefore physical precedent only.

Republic Nat'l Title Ins. Co. v. Darryl J. Panella LLC, 319 Ga. App. 274, 734 S.E.2d 523 (2012)(citing Newell Recycling of Atlanta, Inc. v. Jordan Jones and Goulding, Inc., 288 Ga. 236, 703 S.E.2d 323 (2010) at footnote 4.). Nonetheless, given the current state of the law it would be foolish for a practitioner representing a plaintiff in a legal malpractice case to ever assume that the applicable statute of limitations is more than four years.

On the other hand, earlier cases from the Georgia Court of Appeals indicate that a legal malpractice action can also sound in tort and be subject to a shorter, two-year statute of limitations. Cheeley v. Henderson, 197 Ga. App. 543, 546, 398 S.E.2d 787 (1990), rev'd on other grounds, 261 Ga. 498, 405 S.E.2d 865 (1991). A fraud claim against an attorney can be a tort claim governed by the two-year period of limitation. Morris v. Atlanta Legal Aid Society, 222 Ga. App. 62, 473 S.E.2d 501 (1996). Compare Boggs v. Bosley Medical Institute, 228 Ga. App. 598, 492 S.E.2d 264 (1997), where a four year limitation is applied to a professional where the fraud arises out of a violation of the standard of care. Thus, it could be argued that any claim for damages flowing from the tortious conduct of an attorney must be brought within the shorter period of limitation; after that period expires, the only viable damages will be those resulting from the attorney's alleged breach of duties imposed by the attorney-client relationship. Cheeley v. Henderson, 197 Ga. App. at 547 (1990).

Nonetheless, no Georgia appellate case has applied a two-year statute of limitations to a legal malpractice claim in over a decade, and it appears that the Georgia Court of Appeals has abandoned this line of cases in favor of applying a clear four-year rule. This makes sense; after all, a claim asserting that a lawyer caused his client

financial harm by botching the client's file is hardly an "action for injury to the person" as contemplated by O.C.G.A. 9-3-33, which applies to personal injury claims. Also, as noted above, no legal malpractice case following Newell has yet to apply the six-year statute of limitations that Newell appears to suggest could be applicable in certain legal malpractice cases. The bulk of authority on this issue states that the statute of limitations for legal malpractice is four years, but practitioners should be aware of the nuances created by the conflicting case law cited above.

**B. Strict Application of the Occurrence Rule.**

Georgia courts have consistently followed the occurrence rule rather than the discovery rule with respect to the running of the statute of limitations. In a malpractice action for damages against an attorney, the statute of limitations runs from the date of the breach of the duty and not from the time when the extent of the resulting injury is ascertained nor from the date of the client's discovery of the error. Hunter, Maclean, Exley & Dunn v. Frame, 269 Ga. 844, 845, 507 S.E.2d 411 (1998); Hyman v. Jordan, 201 Ga. App. 852, 412 S.E.2d 615 (1991); Ekern v. Westmoreland, 181 Ga. App. 741, 353 S.E.2d 571 (1987). The courts have followed the principle that a right of action arises immediately upon the wrongful act having been committed, regardless of the presence or absence of special damages. Id., 181 Ga. App. at 742. See also Riddle v. Driebe, 153 Ga. App. 276, 265 S.E.2d 92 (1980). In reaching this conclusion, the courts have reasoned that the commission of an incident of legal malpractice will immediately give rise to at least nominal damages, and "the fact that nominal damages may be recovered is sufficient to create a cause of action and therefore result in the statute of limitation's

beginning to run.” Jankowski v. Taylor, Bishop & Lee, 246 Ga. 804, 806, 273 S.E.2d 16, 18 (1980).

Further, a cause of action for legal malpractice accrues when the plaintiff could first have maintained the action against the defendant attorney to a successful result. Gibson v. Casto, 233 Ga. App. 403, 504 S.E.2d 705 (1998). In Gibson, the plaintiff asserted a claim for legal malpractice against her attorney for failing to file a timely counterclaim on her behalf. Although the court found that a counterclaim *could* have been timely filed through April 6, 1990, the cause of action for legal malpractice did not arise on that date because at that time, the attorney had not yet been retained. Rather, the plaintiff's cause of action arose on or after May 7, 1990, when the defendant attorney filed an answer without seeking leave to add the omitted counterclaim.

Additionally, in Sapp v. Coshatt, 245 Ga. App. 549, 538 S.E.2d 193 (2000), the Appellate Court affirmed the trial court's denial of the defendant's motion to dismiss for failure to state a claim, holding that the plaintiff was not required to bring a time-barred suit against the defendant as a precondition to suing for malpractice. The court distinguished this case from Wood v. Anderson, 60 Ga. App. 262, 3 S.E.2d 788 (1939), because in Sapp no question existed of whether the one year period provided in the statute of limitations had expired.

In November of 2004, the Georgia Supreme Court granted cert in a legal malpractice case regarding an attorney's handling of a closing involving “a collateralized payment-over-time arrangement in exchange for a sale of business where the payment exceeds the five (5)-year life span afforded to initial [UCC] financing statements under O.C.G.A. § 11-9-515.” Barnes v. Turner, 278 Ga. 788, 606 S.E.2d 849 (2004). In this 4 - 3

opinion, the Georgia Supreme Court held that the statute of limitations had not expired even though the closing had taken place over four (4) years prior to the filing of the legal malpractice case. In reversing the Court of Appeals' affirmation of the trial court's grant of the attorney's motion to dismiss on the basis of the four (4) year statute of limitations, the Supreme Court concluded that if the attorney failed to inform his client of the renewal requirement, the attorney undertook a duty to renew the security interest himself and so the statute would not run until some nine (9) years after the closing. The dissent in this 4 - 3 decision argued, *inter alia*, that the majority in essence adopted the continuous representation rule, which the Georgia appellate courts had long rejected except in personal injury cases. However, the majority responded that that rule was not implicated in the case holding that a failure to inform the client by the attorney was not a continuing wrong that tolled the statute, but "[t]o the contrary we are holding that a failure [cite omitted] to inform in 1996 means that [the attorney] undertook a duty to renew in 2001, and the statute of limitations began running from the date of alleged breach of **that** duty." (emphasis added). See also Jenifer v. Fleming, Ingram & Floyd, P.C., 552 F. Supp. 2d 1370, 1376 (S.D. Ga. 2008)("[t]he Georgia Supreme Court has held that where an attorney's duties encompass alternative means of 'safeguarding' the client's interests, the statute of limitations runs from the time the lawyer fails to do both," citing Barnes, supra).

**C. Failure To Mitigate Damages Not Separate Occurrence Of Malpractice.**

Where the plaintiff's claim against her attorney for failing to file a notice of lis pendens was barred by the statute of limitations, the attorney's failure to realize the

mistake and correct it by filing a notice of lis pendens later was not a separate breach for purposes of extending the statute of limitations. Stocks v. Glover, 220 Ga. App. 557, 469 S.E.2d 677 (1996). In Stocks, the defendant's failure to file a notice of lis pendens enabled the client's husband to use the marital residence to secure two loans, thereby increasing the encumbrance on the home. The court held that the limitations period in a legal malpractice case begins as soon as there is a breach of the attorney's duty and some degree of harm. In this case, the attorney's subsequent failure to take advantage of an opportunity to correct the earlier mistake was not considered a separate breach for which the client had a new cause of action. The court noted that the continuing tort theory is applicable only to cases involving personal injury and, therefore, could not be successfully argued by the plaintiff.

See also Long v. Wallace, 214 Ga. App. 466, 448 S.E.2d 229 (1994); Green v. White, 229 Ga. App. 776, 494 S.E.2d 681 (1997) (holding that attorney's failure to dismiss an allegedly deficient bankruptcy petition did not inflict any new harm upon the plaintiff which could constitute a new cause of action for legal malpractice); Duke Galish, LLC v. Arnall Golden Gregory, LLP, 288 Ga. App. 75, 653 S.E.2d 791 (2008) (holding that attorney's failure to amend to add a claim of damages before a pre-trial order would have been entered in the dispossessory action is insufficient as a new breach for the purposes of applying the statute of limitation).

#### **D. Statute Of Limitations In Action Based On Negligent Preparation Of Contract.**

The date of contract execution is the controlling date in giving rise to a cause of action for malpractice and in commencing the running of the statute of limitation where

the negligence alleged is in the preparation of a contract. Jones, Day, Reavis & Pogue v. American Envirecycle, Inc., 217 Ga. App. 80, 456 S.E.2d 264 (1995). In this case, the defendant's predecessor drafted a contract for the purchase of real estate, which was held by the trial court to be unenforceable. The Court of Appeal held that "[w]hen legal malpractice is grounded in an *ex contractu* cause of action, the four-year statute of limitation commences to run from the date of the breach of duty and not from the time when the extent of the resulting injury is ascertained." 217 Ga. App. at 81. Thus, the statute of limitations began to run when the services rendered were consummated in the agreement and attendant document. Id. See also Daugherty v. Jarrett, 239 Ga. App. 466, 521 S.E.2d 406 (1999).

**E. Attorney Employment Contract May or May Not Carry 6-Year Statute.**

Prior to the Newell decision, and probably in most situations even after Newell, where an attorney and his client execute a written employment contract, the four-year statute of limitations will generally apply to a claim for legal malpractice arising from the representation. Plumlee v. Davis, 221 Ga. App. 848, 473 S.E.2d 510 (1996). In Plumlee, the plaintiff claimed that the six-year statute of limitations for simple contracts in writing should be applied based on the attorney employment contract between her and one of the attorneys. In Plumlee, the court noted that the two-page employment contract executed by the plaintiff did not constitute the entire agreement between the parties, but only created the attorney-client relationship and covered certain issues such as attorney's fees, expenses, and authority. The contract did not specify the manner in which the attorney was to carry out his duties or other material portions of the contract.

Rather, the court held that those matters were subject to the duty imposed by law and implied in the attorney's contractual relationship with the plaintiff. The court held that a contract partially in writing is considered one in parol, and thus the four-year statute of limitations would apply as to oral contracts. 221 Ga. App. at 852-53.

After the Newell decision, it appears that a six-year statute of limitations may now govern some, but probably not all, claims where the plaintiff alleges that the attorney was negligent in the manner in which he carried out the duties implied in the relationship created by a written attorney-client contract. If Newell is held to apply to legal malpractice claims, it appears that the question of whether a legal malpractice claim is subject to a four or six-year statute of limitations may depend on whether or not the representation agreement constitutes the entire agreement between the parties. See Newell, *supra*, and Saiia, *supra*.

At the present time, the law is still unsettled. Because the resulting uncertainty is not advantageous either to plaintiffs or to defendants, it would make a great deal of sense for the Legislature to enact a new code section creating a specific statute of limitations applicable to all legal malpractice actions.

#### **F. Tolling Of The Statute Of Limitations.**

O.C.G.A. § 9-3-96 provides for a tolling of the statute of limitations for the fraud of the defendant. The fraud that will relieve the bar of the statute of limitations must be of that character which involves moral turpitude, and must have the effect of debarring or deterring the plaintiff from his action. Arnall, Golden & Gregory v. Health Service Centers, Inc., 197 Ga. App. 791, 792, 399 S.E.2d 565 (1990); Wright v. Swint, 224 Ga. App. 417, 480 S.E.2d 878 (1997). The limitations period on fraud claims runs from the

date the actual injury occurs. Denson v. Maloy, 239 Ga. App. 778, 521 S.E.2d 666 (1999). In addition, this period may be tolled where the plaintiff is mentally incapacitated. O.C.G.A. § 9-3-90. A number of recent cases have considered tolling in the context of actions against attorneys for legal malpractice.

1. Tolling for mental incapacity.

Where a plaintiff falsely asserted mental incapacity due to medication, he could not avail himself of O.C.G.A. § 9-3-90. Foster v. Cohen, 203 Ga. App. 434, 417 S.E.2d 61 (1992).

2. Misrepresentations between attorneys insufficient to toll statute.

Where the misrepresentation that allegedly deterred the plaintiff from filing her complaint was made by the defendant's attorney to plaintiff's own counsel, fraud did not exist so as to toll the statute of limitations. Babb v. Cook, 203 Ga. App. 437, 417 S.E.2d 63 (1992).

3. Misrepresentation after client files bar complaint does not toll statute.

In Coleman v. Hicks, 209 Ga. App. 467, 433 S.E.2d 621 (1993), cert. denied, 209 Ga. App. 467 (1993), the court found that the statute of limitations period was not tolled when the plaintiff agreed to dismiss the state bar complaint after a meeting with the defendant attorneys in which the plaintiff contended the defendant attorneys fraudulently induced her to dismiss the bar complaint. "It is clear that plaintiff was not debarred or deterred from bringing her action inasmuch as she filed a complaint with the State Bar in March 1990. Besides, the confidential relationship between plaintiff and

defendants came to an end when plaintiff filed the complaint with the State Bar, if not before." 209 Ga. App. at 469; 433 S.E.2d at 623 (1993).

4. Expressions of opinion insufficient to toll statute.

Expressions of opinion were held insufficient to establish the fraud required to toll the statute of limitations pursuant to O.C.G.A. § 9-3-96. Brown v. Kinser, 218 Ga. App. 385, 461 S.E.2d 564 (1995). In Brown, the plaintiff contended that an opinion expressed as to a title search and an issuance of an owner's policy of title insurance constituted acts of actual fraud such as to toll the statute of limitations. The court held that the issuance by the defendant of the owner's title insurance policy constituted at most an implied expression of confidence in the legal sufficiency of the prior title search conducted by his law firm. The court held that "mere expressed or implied statements as to the legal sufficiency of any legal document prepared by a [defendant] or issued by him are not actionable as actual fraud nor designed to deter or debar [plaintiffs] from bringing suit. Such expressions of opinion (as opposed to [known] obfuscating facts) are not sufficient to establish the fraud required to toll the statute of limitation pursuant to [O.C.G.A. § 9-3-96]. . . . Fraud cannot consist of mere broken promises, unfulfilled predictions or erroneous conjecture as to future events." 218 Ga. App. at 389.

5. Allegations of fraud do not toll statute if client became aware of the malpractice during the limitations period.

Where a plaintiff asserts fraud, the statute of limitations is not tolled if the plaintiff becomes aware of her cognizable claim for malpractice against her former attorney during the limitations period. Sowerby v. Doyal, 307 Ga. App. 6, 703 S.E.2d 326 (2010). In Sowerby, the attorney failed to follow the required procedures for a

discretionary appeal with the Supreme Court of Georgia. After the Supreme Court of Georgia dismissed his client's appeal because of the procedural deficiency, the attorney sent a letter to the client incorrectly notifying her that the statute of limitations was running on any potential claim that she may have against the attorney when the Supreme Court dismissed her appeal. Since the clock on the statute of limitations began to run at the time of the attorney's act of legal malpractice, the client alleged that the attorney committed fraud by the misstating start date of the limitations period. The Court of Appeals stated that the burden is on the plaintiff to show that the alleged fraud occurred to deter her from bringing suit. When the plaintiff discovers her potential cause of action within the limitations period and takes steps to pursue the cause of action, the statute of limitations is not tolled for allegations of fraud.

6. Example of fraud tolling statute of limitations.

Where a plaintiff alleged that negligent title certifications also constituted fraud by deliberately misrepresenting to the plaintiff and leading it to believe that the defendant had performed within the required professional standard, plaintiff failed to produce any evidence that would support a finding of fraud to toll the statute of limitations. Farmers State Bank v. Huguenin, 220 Ga. App. 657, 469 S.E.2d 34 (1996). In Farmers State Bank, the court stated that "the problem with the [plaintiff's] position is that it claims the fraud is the legal malpractice." The plaintiff attempted to separate the legal malpractice, which it referred to as "failing to perform", from the statute-tolling fraud, which it referred to as intentionally "signing false certificates." The plaintiff did not contend that the attorney deliberately misrepresented the status of the title, but rather that the fraud was in what he did to determine it. The court held that "[e]ven if

the certificates are regarded not only as certificates of the property title but also of the signing attorney's performance of pertinent duties in accordance with professional standards, if such latter certification is not true it does not constitute fraud involving moral turpitude." Thus, summary judgment in favor of the defendant was affirmed. Where an attorney knows of a problem with the advice given and fails to disclose it, the statute is tolled.

In Green v. White, 229 Ga. App. 776, 494 S.E.2d 681 (1997), the Georgia Court of Appeals held that where an attorney knows of a problem with advice given and fails to disclose it, the statute is tolled. In Green, the client retained counsel to file a bankruptcy petition that would discharge federal tax debts. The tax debts were not discharged. When the attorney was faced with this fact, he wrote the client a letter, stating that (a) he knew of the problem at inception, and (b) believed that he probably told the client. In holding that a jury issue was presented as to whether the attorney committed fraud sufficient to toll the statute of limitations, the court held that although fraud which will relieve the bar of the statute of limitations must involve moral turpitude, "a confidential relationship between the parties . . . lessens, if not negates, the necessity for showing actual fraud." Id. at 779. "Where a person sustains towards another a relation of trust and confidence, his silence when he should speak, or his failure to disclose what he ought to disclose, is as much a fraud in law as an actual affirmative false representation." Id.

In contrast, in Kohoutek v. Hartley, 247 Ga. App. 422, 543 S.E.2d 406 (2000), the Court of Appeals rejected the plaintiff's contention that the statute of limitations was tolled by fraud through concealment, failure to disclose, and continued representation

when an eight and a half delay in filing a UCC-1 statement created a collateral security gap. The plaintiff failed to show that there was a separate, independent and actual fraud involving moral turpitude as is required when the gravamen underlying action is malpractice rather than fraud. Since there was no intentional concealment which barred or deterred the plaintiff from bringing an action, the limitation period was not tolled. In accord Barnes v. Turner, supra. In Ledee v. Devoe, 250 Ga. App. 15; 549 S.E.2d 167 (2001), the court also held that the statute was not tolled when the defendant falsely misrepresented himself to be an attorney.

7. Tolling of statute ends when plaintiff retains counsel.

From the point where a plaintiff sought the advice of another attorney, she could no longer contend that she was deterred or debarred by the alleged fraud of her attorney from finding out the true facts so as to toll the statute of limitations. Morris v. Atlanta Legal Aid Soc'y, 222 Ga. App. 62, 473 S.E.2d 501 (1996). In Morris, the plaintiff asserted that she was not barred by the statute of limitations on the claim of fraud against her attorney based on the tolling provisions in O.C.G.A. § 9-3-96. The court held that the plaintiff failed to present evidence that she was debarred or deterred from taking action within the applicable time. This conclusion was based on plaintiff's admission that she actively sought new counsel in order to sue her attorney several years before she actually filed the action. Furthermore, there was evidence that her attorney had informed the plaintiff about the alleged negligence. The court found that from the point where she had sought the advice of another attorney, she was no longer deterred from finding out the true facts. 222 Ga. App. at 64, 473 S.E.2d at 503 (1996).

8. Tolling during confidential relationship.

In Hunter MacLean Exley & Dunn, P.C. v. Frame, 269 Ga. 844, 507 S.E.2d 411 (1998), the defendant law firm, which had represented the plaintiffs for roughly twenty years, served as their counsel during a closing transaction. When it was later revealed that material financial information had been omitted from the closing documents, the plaintiffs filed a legal malpractice action. The Georgia Court of Appeals held that the existence of a confidential relationship between the plaintiffs and the law firm tolled the statute of limitations because the law firm used this confidential relationship to lull the plaintiffs into not understanding the quality and effect of the firm's prior legal services. On appeal, the Georgia Supreme Court reversed the decision of the Court of Appeals. The Georgia Supreme Court held that a confidential relationship cannot, standing alone, toll the running of the statute. While a confidential relationship imposes a greater duty on a defendant to reveal what should be revealed and a lessened duty on the party of the plaintiff, the defendant's fraudulent intent to conceal or deceive must still be established, as must the deterrence of the plaintiff from bringing suit. In conclusion, the Court held that the existence between the parties of a confidential relationship is not a separate and independent basis for tolling, but rather an important factor affecting the duty to disclose and the duty of ordinary diligence, to be considered in the fraud analysis itself. On remand the Court of Appeals determined the plaintiffs were not entitled to reformation of the written tolling agreement as there was no evidence of mutual mistake. 236 Ga. App. 226, 511 S.E.2d 585 (1999).

9. Tolling during minority.

Where an attorney represents a minor, the minor has four years from the time that the minor reaches age 18 to file a contract claim against the attorney. In Toporek v. Zepp, 224 Ga. App. 26, 479 S.E.2d 759 (1996), the Plaintiff was two years old at the time service was rendered. Suit was timely filed twenty years later. The attorney claimed that suit was time barred because he represented the guardian ad litem, and not the minor. The court held that the minor was the intended beneficiary, and thus there was privity.

**G. Arbitration Of Fee Disputes - Statute Of Limitations In Subsequent Civil Action.**

The Court of Appeals has held that when a client files a civil action to collect an award under the Arbitration of Fee Disputes (AFD) program of the State Bar of Georgia after the statute of limitations has expired, the client must show that he acted with reasonable diligence in filing the action in order for the statute to be tolled for the period between the award and the action. Antinoro v. Browner, 223 Ga. App. 664, 478 S.E.2d 392 (1996). In the Antinoro case, the four-year statute of limitations in O.C.G.A. § 9-3-25 was applicable to the client's claim that his attorney breached an oral attorney/client employment contract. The breach of duty which began the running of the period of limitations occurred on March 3, 1982. The client filed his petition with the State Bar Committee on the Arbitration of Attorney Fee Disputes on February 24, 1984. An award was rendered by arbitrators on September 27, 1985. However, the client waited until April 21, 1989, to file the action seeking a judgment in the amount of the arbitration award against the attorney. The court found that because the litigation filed

by the client on April 21, 1989, was a civil action, the four-year limitation period was applicable.

The question that the Court of Appeals considered was whether the timely filing of the petition to arbitrate under the AFD program prior to the expiration of the four-year statute of limitations tolled the statute of limitations during the pendency of the AFD proceeding. The court concluded that the statute of limitations was tolled from the date the petition was filed until the award was rendered by the arbitrators in favor of the client on September 27, 1985. The program, however, does not set forth a time limit applicable to filing subsequent litigation to enforce the award. The court found that in the absence of any time limit within the AFD program which would be applicable to filing subsequent litigation, after an award is rendered, the client must act with reasonable diligence in pursuing collection of the award and then filing any civil action necessary to accomplish that purpose. Whether or not the client acted with reasonable diligence is an issue to be determined within the discretion of the trial court based on the facts of each case. In this case, the trial court made no such determination in denying the attorney's Motion for Summary Judgment on the statute of limitation defense. Thus, the Court of Appeals remanded the case to the trial court to give the parties an opportunity to present additional evidence on the issue. C.f. Woods v. Jones, 305 Ga. App. 349, 699 S.E.2d 567 (2010) (Where an attorney is entitled to be paid only after a particular result is procured, the four-year statute on an open account does not start to run on an attorney's lien upon a client's action, judgment, or decree for money until the client can obtain recovery).

## II.

### EXPERT AFFIDAVIT

The sufficiency and necessity of an expert affidavit pursuant to O.C.G.A. § 9-11-9.1 is one of the most frequently litigated issues in the area of legal malpractice. Following are a few of the recent decisions addressing the affidavit requirement.

#### **A. Applicability Of O.C.G.A. § 9-11-9.1 Expert Affidavit Requirement.**

##### 1. Applicability in federal diversity actions.

The applicability of O.C.G.A. § 9-11-9.1 in federal court is still unsettled, but certain case law suggests that attaching an expert affidavit to the complaint is a good idea nonetheless. See Brown v. Nichols, 8 F.3d 770 (11th Cir. 1993); Cahela v. Bernard, 155 F.R.D. 221 (N.D. Ga. 1994); Boone v. Knight, 131 F.R.D. 609 (S.D. Ga. 1990); McGlamery v. Bruttomesso, Case No. 1:88-CV-787-RCF (N.D. Ga. June 15, 1989)(unpublished); Baird v. Celis, 41 F.Supp.2d 1358 (N.D. Ga. 1999); Botes v. Weintraub, 463 Fed. Appx. 879, fn. 3 (11<sup>th</sup> Cir. (Ga.) 2012) See also Lewis v. The Center for Counseling and Health Resources, 2009 WL 2342459 (W.D.Wash. Jul 28, 2009), which addresses a similar conflict of laws and specifically rejects the analysis contained in Baird.

It should be noted, however, that where a suit for professional malpractice is brought in a federal court and the complaint is not well pled, the plaintiff runs the risk of the complaint being dismissed under the heightened pleading standard adopted in Bell Atl. Corp. v. Twombly, 550 U.S. 544, (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009). Thus, the failure to attach an expert affidavit to a professional negligence action filed in

federal court may support a professional defendant's argument that the action should be dismissed on Rule 12(b)(6) grounds. See Lynch v. Jackson, 478 Fed. Appx. 613, 2012 WL 2005344 (C.A.11 (Ga.) 2012):

If this case had remained in Georgia state court, Lynch would have been required to accompany his claim with an expert affidavit at the time of filing. See O.C.G.A. § 9-11-9.1(a). Although the case has been removed to federal court and federal procedural rules apply, Plaintiff must still comply with federal pleading requirements. On a Rule 12(b)(6) motion to dismiss, the plaintiff has an obligation to provide the grounds for his entitlement to relief. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level." Id. Where a claim for professional negligence is made, "such a claim requires a complaint with enough factual matter (taken as true) to suggest" at least one negligent professional act or omission. See id. at 556, 127 S.Ct. 1955.

Although Lynch involved claims against doctors, rather than lawyers, there does not appear to be any reason that the same logic might not apply to a legal malpractice claim brought in federal court.

The federal courts have shown that they will readily entertain Twombly/Iqbal challenges in legal malpractice cases. For example, the Eleventh Circuit recently affirmed the dismissal of a complaint alleging that the defendant lawyers had committed various acts of legal malpractice in representing an investment company on the grounds that the factual allegations did not adequately support the legal conclusions asserted in the complaint. Hays v. Page Perry, LLC, 627 Fed.Appx. 892 (2015). This case is notable because the Court upheld the dismissal even despite the fact that the plaintiffs had attached an expert affidavit in support of the complaint.

Furthermore, regardless of the applicable pleading standard, the plaintiff in a legal malpractice action filed in or removed to federal court based on diversity

jurisdiction will nonetheless be subject to Georgia's requirement that the plaintiff proffer expert testimony in order to survive summary judgment. See Botes v. Weintraub, 463 Fed. Appx. 879, 885, 2012 WL 1059416 (C.A.11 (Ga.) 2012).

2. Expert affidavit requirement not excused because of indigency or pro se status.

O.C.G.A. § 9-11-9.1 applies with equal force to all plaintiffs claiming professional negligence, regardless of their financial status or whether they are represented. Abe Engineering, Inc. v. Griffin, Cochran & Marshall, 212 Ga. App. 586, 443 S.E.2d 1 (1994), cert. denied, 212 Ga. App. 895 (1994). Additionally, the Supreme Court of Georgia has found that the statute does not violate due process rights nor equal protection rights as applied to indigent clients. Walker v. Cromartie, 287 Ga. 511, 512, 696 S.E.2d 654, 657 (2010).

3. Applicability to suits in contract and simple negligence.

In Minix v. Department of Transp., 272 Ga. 566, 533 S.E.2d 75 (2000), the Georgia Supreme Court held that the plain and unequivocal language of O.C.G.A. § 9-11-9.1 (a), as amended, evinces the General Assembly's intent that the expert affidavit requirement in a professional malpractice case apply only to an employer that is a licensed health care facility in a suit where that employer's liability is premised on the action or inaction of a licensed health care professional listed in O.C.G.A. § 9-11-9.1 (f). Because the DOT is not a licensed health care facility, it is not an employer to which O.C.G.A. § 9-11-9.1 (a) applies. Therefore, the decision of the Court of Appeals was reversed.

The requirement of O.C.G.A. § 9-11-9.1 is applicable to all suits against a professional that allege the failure to perform the duties of the engagement, whether couched in terms of professional malpractice, simple negligence, or breach of contract. See, Richmond Leasing Co. v. Cooper, Cooper, Maioriello & Stalnaker, 207 Ga. App. 623, 428 S.E.2d 603 (1993), cert. denied, 207 Ga. App. 623 (1993), where the court held that, regardless of whether the action sounded in contract or in tort, the expert affidavit requirement of O.C.G.A. § 9-11-9.1 still applied. 207 Ga. App. at 623. See also, Old Republic National Title Insurance Company v. Attorney Title Services, Inc. et. al, 299 Ga. App. 6, 682 S.E.2d 134 (2009), cert. denied, 299 Ga. App. 6 (2009)(overruled on other grounds) (court held that the fact that claim was formulated as a claim for breach of contract did not preclude claim from being considered one for professional malpractice requiring compliance with the expert affidavit requirement of O.C.G.A. § 9-11-9.1(a)). See also, Smith v. Morris, Manning & Martin, LLP, cert. denied (2008), 293 Ga. App. 153, 666 S.E.2d 683 (2008) (court found that simple negligence claim asserted against law firm was one of professional negligence as its resolution would inescapably involve questions of professional standards, judgment and responsibility and held trial court properly granted summary judgment because all claims of professional malpractice were barred due to failure to file an expert affidavit).

However, not all complaints alleging wrongful acts committed by attorneys must be accompanied by an expert affidavit. Bailey v. Joyner, 229 Ga. App. 832, 495 S.E.2d 45 (1997). In Bailey, the court found that the gravamen of the plaintiff's complaint against her attorney was that the attorney, acting through his employees and agents, negligently presented an erroneous deed to the clerk of court for filing. The court noted

that none of these allegations required expert proof to establish negligence, nor did the allegations raise an implication that the act required professional legal judgment or that only a person with professional legal training was authorized to undertake it. Accordingly, the Court of Appeals affirmed the trial court's denial of a motion to dismiss under O.C.G.A. § 9-11-9.1; see also Crawford v. Johnson, 227 Ga. App. 548, 489 S.E.2d 552 (1997) (holding that professional malpractice exists only where the act or omission by a professional requires the exercise of expert professional judgment).

4. Applicability in breach of contract action.

Not all cases against a lawyer constitute professional malpractice claims requiring expert testimony pursuant to O.C.G.A. § 9-11-9.1. For instance, fraud claims and breach of fiduciary duty claims are claims that do not require an expert affidavit. In Peacock v. Beall, 223 Ga. App. 465, 477 S.E.2d 883 (1996), the court held that while O.C.G.A. § 9-11-9.1 requires an expert affidavit in support of claims for professional malpractice by negligent act or omission, whether sounding in tort or by breach of contract, this does not necessarily mean that "every claim which calls into question the conduct of one who happens to be a lawyer is a professional malpractice claim requiring expert testimony or an O.C.G.A. § 9-11-9.1 affidavit. It is only where the claim is based upon the failure of the professional to meet the requisite standards of the subject profession that the necessity to establish such standards and the violation thereof by expert testimony for the guidance of the jury arises."

In Peacock, the complaint raised questions relating to the existence of a legal services contract between the attorney and the client, whether the attorney breached the terms of any such contract, and whether the attorney had "duped" the client into

purchasing advice in exchange for a false promise to represent the client in a future action. The court thus held that the case did not appear to call into question professional standards of care applicable to attorneys, and therefore, no affidavit was necessary. Likewise, in Tante v. Herring, 264 Ga. 694, 695 (2), 453 S.E.2d 686 (1994) the Supreme Court held that no expert affidavit was needed where a breach of fiduciary duty claim is not based on negligence involving attorney's performance of legal services. See also Crosby v. Pittman, 305 Ga.App. 639, 700 S.E.2d 629 (2010).

The Supreme Court and the Court of Appeals reached a similar conclusion in Hopkinson v. Labovitz, 231 Ga. App. 557, 499 S.E.2d 338 (1998), aff'd., 271 Ga. 330, 519 S.E.2d 672 (1999). In Hopkinson, the plaintiff filed a complaint alleging that the defendant law firm negligently represented her in a divorce action. No expert affidavit was ever filed by plaintiff. However, two months after the filing of the original complaint, the plaintiff filed an amendment to her complaint adding a claim for fraud. The Court of Appeals affirmed the dismissal with prejudice of plaintiff's claims based on professional negligence. However, the Court reversed the dismissal of plaintiff's fraud claims raised in the amendment to her complaint. The Court held that every complaint that calls into question the conduct of one who happens to be a lawyer does not require an O.C.G.A. § 9-11-9.1 affidavit and that the amended complaint did not call into question professional standards of care. In accord, Smith v. Morris, Manning & Martin, 264 Ga. App. 24, 589 S.E.2d 840 (2003).

In another case, a client's legal malpractice complaint was not a nullity, and thus the client could amend the complaint after the expiration of the statute of limitations in order to withdraw the professional negligence claim and instead assert a fraud claim,

although the original complaint was not accompanied by an affidavit. Shuler v. Hicks, Massey & Gardner, LLP, 280 Ga. App. 738, 634 S.E.2d 786 (2006). The statute requiring an expert affidavit, and which does not allow the failure to file such affidavit to be cured by an amendment, does not prohibit other amendments to the body of the pleadings in the complaint. According to Shuler, the affidavit requirement applies only to allegations of negligent conduct whereas client's claims of fraud and breach of fiduciary duty alleged intentional conduct.

5. Applicability to counterclaim for malpractice.

The expert affidavit requirement of O.C.G.A. § 9-11-9.1 applies to counterclaims for legal malpractice. Jordan v. Lambreth, Bonapfel, Cifelli, Willson & Stokes, P.A., 206 Ga. App. 178, 424 S.E.2d 859 (1992). A counterclaim asserting malpractice must comply with all requirements of the code section, such as the requirement of the contemporaneous filing of an expert affidavit, or be subject to dismissal. Landau v. Davis Law Group, P.C., 269 Ga. App. 904, 605 S.E.2d 461 (2004).

6. Affidavit required where non-lawyer performed task.

Where a lawyer delegated a title search to a non-lawyer, a subsequent lawsuit alleging error in the title search was held to involve questions of professional judgment and skill. Centrust Mortgage Corp. v. Smith & Jenkins, 220 Ga. App. 394, 469 S.E.2d 466 (1996). The fact that the title search was assigned to a non-lawyer for performance was not determinative since the lawyer can be held liable in malpractice for work performed under his supervision. 220 Ga. App. at 396, 469 S.E.2d at 468 (1996).

7. Applicability to claims for intentional acts.

Where client claims that a lawyer committed intentional acts that caused harm, an expert affidavit pursuant to O.C.G.A. § 9-11-9.1 is not required. Walker v. Wallis, 289 Ga. App. 676, 658 S.E.2d 217 (2008) and Labovitz v. Hopkinson, 271 Ga. 330, 519 S.E.2d 672 (1999). Expert affidavit is applicable only to that subset of malpractice actions which allege a negligent act or omission or breach of contract. Id. (See also Crosby v. Pittman, 305 Ga. App. 639, 700 S.E.2d 629 (2010) (“Crosby has asserted claims for breach of fiduciary duty and fraud, rather than professional negligence. Because the allegations of his complaint support those claims, the trial court erred in finding that the expert affidavit requirement of O.C.G.A. § 9-11-9.1 applied to this case. The mere fact that those allegations may have also served as the basis of a legal malpractice claim, had Crosby chosen to assert one, is irrelevant.”))

**B. Sufficiency Of Expert Affidavits.**

1. Requirement of factual basis for each claim.

Unlike O.C.G.A. § 9-11-56, which imposes an evidentiary requirement in the context of summary judgment on the merits, O.C.G.A. § 9-11-9.1 imposes an initial pleading requirement on the plaintiff in a malpractice action. Hutchinson v. Divorce and Custody Law Center of Arline Kerman & Assoc., P.C., 215 Ga. App. 25, 449 S.E.2d 866 (1994).

2. Affidavit must specify negligent act.

An expert affidavit is insufficient to satisfy O.C.G.A. § 9-11-9.1 unless it specifies at least one act alleged to be negligent. Cheeley v. Henderson, 261 Ga. 498, 405 S.E.2d

865 (1991), rev'd on other grounds, and Hewett v. Kalish, 264 Ga. 183, 442 S.E.2d 233 (1994).

3. Personal knowledge not necessary.

The affiant is not required to possess personal knowledge of the facts giving rise to a malpractice action. Druckman v. Etheridge, 198 Ga. App. 321, 401 S.E.2d 336 (1991). In Druckman, an accounting malpractice case, the court held that the expert affidavit required by O.C.G.A. § 9-11-9.1 need not be based upon the affiant's actual personal knowledge. To the contrary, the affiant may base his expert opinion upon an assumption that the factual allegations of the complaint are true. 198 Ga. App. At 322. See also Dozier v. Clayton County Hospital Authority, 206 Ga. App. 62, 424 S.E.2d 632 (1992) (following the holding in Druckman to find that the trial court erred in finding that the expert affidavit submitted by the plaintiffs failed to meet the pleading requirements of O.C.G.A. § 9-11-9.1).

**C. Curing Defective Affidavits.**

1. Curing by dismissal and refileing not allowed.

Prior to 1997, a plaintiff could remedy his violation of O.C.G.A. § 9-11-9.1 by voluntarily dismissing his case and refileing suit within the statute of limitation, so long as the plaintiff voluntarily dismissed the first action before the Court issued a judgment on the merits. Moritz v. Orkin Exterminating Co., Inc., 215 Ga. App. 255, 450 S.E.2d 233 (1994). In 1997, however, subsection (f) of O.C.G.A. § 9-11-9.1 was amended to make curing by dismissal and renewal more difficult. The current O.C.G.A. § 9-11-9.1 states:

“If a plaintiff fails to file an affidavit as required by this Code section and the defendant raises the failure to file such an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, such complaint shall not be subject to the renewal provisions of Code Section 9-2-61 after the expiration of the applicable period of limitation, unless a court determines that the plaintiff had the requisite affidavit within the time required by this Code section and the failure to file the affidavit was the result of a mistake.”

The current statute therefore prevents the plaintiff from relying on O.C.G.A. § 9-2-61 to file a renewal action after the expiration of the original statute of limitations where the defendant moved to dismiss the original action at the time of filing the answer. The defendant, however, may waive the application of this rule if it does not file a motion to dismiss “contemporaneously with the answer.” Chandler v. Opensided MRI of Atlanta, 299 Ga. App. 145, 151(2)(b), n. 9, 682 S.E.2d 165 (2009). In any event, once the Court rules on a defendant’s motion to dismiss the plaintiff’s complaint due to a failure to file the affidavit required by O.C.G.A. § 9-11-9.1, such dismissal is with prejudice and any attempt to renew the action will be to no avail. See Roberson v. Northrup, 302 Ga. App. 405, 691 S.E.2d 547 (2010); Bardo v. Liss, 273 Ga. App. 103, 614 S.E.2d 101 (2005).

2. Extension of time to file affidavit.

O.C.G.A. § 9-11-9.1(b) provides the plaintiff with a remedy where the plaintiff’s attorney is retained shortly before the expiration of the applicable statute of limitations and is unable to obtain an expert affidavit due to time constraints. The current version of this subsection states:

“The contemporaneous affidavit filing requirement” shall not apply to any case in which the period of limitation will expire “within ten days of the date of filing the complaint and, because of time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared. In such

cases, if the attorney for the plaintiff files with the complaint an affidavit in which the attorney swears or affirms that his or her law firm was not retained by the plaintiff more than 90 days prior to the expiration of the period of limitation on the plaintiff's claim or claims, the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court shall not extend such time for any reason without consent of all parties. If either affidavit is not filed within the periods specified in this Code section, or it is determined that the law firm of the attorney who filed the affidavit permitted in lieu of the contemporaneous filing of an expert affidavit or any attorney who appears on the pleadings was retained by the plaintiff more than 90 days prior to the expiration of the period of limitation, the complaint shall be dismissed for failure to state a claim.”

This language is the product of a series of changes to the statute enacted by the legislature since 2005.

3. Curing by amendment to affidavit previously filed.

O.C.G.A. 9-11-9.1(e) provides:

If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed on or before the close of discovery, that said affidavit is defective, the plaintiff's complaint shall be subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment pursuant to Code Section 9-11-15 within 30 days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing said amendment or response to the motion, or both, as it shall determine justice requires.

In the context of a recent medical malpractice case, the Georgia Supreme Court held that where the defendant alleges that the affidavit is defective because the testifying expert lacks proper qualifications, the plaintiff may amend the affidavit by filing another affidavit from a different expert who has the proper qualifications. Gala v. Fisher, 296 Ga. 870, 770 S.E.2d 879 (2015). This logic would appear to apply to legal malpractice cases as well, although the standards governing the minimum qualifications that an

expert attorney must possess in order to give an O.C.G.A. § 9-11-9.1 affidavit are much less strenuous than those applied in the medical malpractice context.

**D. Expert Affidavit As Evidence On Summary Judgment And Admissibility Of Expert Testimony At Trial.**

An expert affidavit attached to a complaint in compliance with O.C.G.A. § 9-11-9.1 does not necessarily satisfy the evidentiary requirements of O.C.G.A. § 9-11-56. See Turner v. Kitchings, 199 Ga. App. 860, 406 S.E.2d 280 (1991); Rudd v. Paden, 279 Ga. App. 141, 630 S.E.2d 648 (2006). Furthermore as a recent federal court case demonstrated, when a court evaluates the admissibility of an attorney expert's testimony at trial under Daubert (or, for that matter, Daubert's Georgia corollary), the court may apply a more stringent standard in evaluating the expert's qualifications than is applied in determining whether the O.C.G.A. § 9-11-9.1 affidavit is sufficient to survive a motion to dismiss. In that case, the court exercised its discretion as "gatekeeper" under Daubert to exclude the testimony of an expert law professor because he did not have sufficient practical experience in conducting actual litigation.

Although [the expert] undoubtedly is familiar with the applicable rules of ethics and professionalism, the problem with his testimony is that he lacks sufficient knowledge or experience to credibly opine as to whether Mr. Strueber's specific conduct in this case violated those rules. See United States v. Paul, 175 F.3d 906, 912 (11th Cir.1999) (upholding the exclusion of an evidence professor's testimony concerning the limitations of handwriting analysis). Without any practical knowledge about how the details of the McDonald case should have been handled, such as how the case should have been investigated or valued for settlement, Longan is not qualified to testify that plaintiff mishandled the case. Consequently, Longan's testimony on that issue must be excluded.

Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC v. Teledyne Technologies, Inc., 1:12-CV-0686-JEC, 2013 WL 4806894, at \*4 (N.D. Ga. Sept. 9, 2013) aff'd, 606 Fed. Appx. 567 (11th Cir. 2015)(unpublished); aff'd 606 Fed.Appx. 567 (2015).

### III.

#### **ATTORNEY-CLIENT RELATIONSHIP - DUTIES TO NON-CLIENTS**

It is generally held that an attorney-client relationship must be demonstrated before a plaintiff may recover in a legal malpractice suit. Guillebeau v. Jenkins, 182 Ga. App. 225, 229, 355 S.E.2d 453 (1987). Such a relationship may be express or implied. The employment relationship is "sufficiently established when it is shown that the advice or assistance of the attorney is sought and received in matters pertinent to his profession." Id. See also Richard v. David, 212 Ga. App. 661, 442 S.E.2d 459 (1994); Crane v. Albertelli, 264 Ga. App. 910, 592 S.E.2d 684 (2003) (husband could not sue attorney who represented his wife and kids in separate matter); Viasys Services, Inc. v. McCurdy & Stone, Slip Copy 2006 WL 949932 (N.D.Ga.) (no duty was owed where plaintiff alleged and maintained that law firm defendants never represented him).

Absent an attorney-client relationship, there are three theories under which a non-client may nevertheless demonstrate a relationship with an attorney sufficient to establish a legal duty to the nonclient: (1) third-party beneficiary; (2) voluntary agent; and (3) negligent misrepresentation.

First, under certain limited circumstances, an attorney may owe a duty of reasonable care to a party who technically is not in privity with him, yet is a third-party beneficiary to the attorney's relationship with his client. See Kirby v. Chester, 174 Ga. App. 881, 331 S.E.2d 915 (1985); see also Badische Corp. v. Caylor, 257 Ga. 131, 356

S.E.2d 198 (1987). In Kirby v. Chester, for example, the attorney knew that his client's lender was relying upon his title search and title certification for assurance that the lender would have sufficient collateral for its real estate loan to his client. 174 Ga. App. at 884. However, the attorney's duty to such a third-party appears to be limited to matters undertaken in the agreement between the attorney and his client and does not create an attorney-client relationship so as to impose upon the attorney a fiduciary duty to the third-party. Geaslen v. Berkson, Gorov & Levin, Ltd., 220 Ill. App. 3d 600, 581 N.E.2d 138 (1991), rev'd in part on other grounds, 155 Ill.2d 223, 613 N.E.2d 702 (1993).

Significantly, in Young v. Williams, 285 Ga. App. 208, 645 S.E.2d 624 (2007), the Georgia Court of Appeals held that an attorney may be liable to a third-party beneficiary to an agreement between the attorney and his client. In Young, an attorney admitted that he inadvertently failed to include a provision in his testator-client's will, which would have caused the testator's marital residence to pass entirely to his wife, Ms. Williams. The Georgia Court of Appeals found that Ms. Williams had a valid legal malpractice cause of action against the attorney who drafted her deceased husband's will, even though her husband read the will before signing it, because she was an intended third-party beneficiary to the will her husband directed his attorney to prepare. Thus, in Georgia, a lawyer may be held liable for legal malpractice not only to his client, but also now to an intended third-party beneficiary of his client.

Second, a plaintiff may rely on the voluntary agent theory when another party's attorney voluntarily assumes a duty on behalf of the non-client. Simmerson v. Blanks, 149 Ga. App. 478, 254 S.E.2d 716 (1979). In Simmerson, the court held that "a gratuitous agent owes his principal the duty to exercise slight diligence, and a proper

appraisal of the agent's conduct encompasses the knowledge which he professes to possess." 149 Ga. App. at 480. Under this theory, the attorney must affirmatively volunteer to perform a service for the non-client before he can be liable. Legacy Homes v. Cole, 205 Ga. App. 34, 36, 421 S.E.2d 127 (1992). In addition, the attorney must be aware that the non-client is relying on him to perform the particular service. Rogers v. Hurt, Richardson, Garner, Todd & Cadenhead, 203 Ga. App. 412, 415-16, 417 S.E.2d 29 (1992); cert. denied, 203 Ga. App. 907 (1992); Moore v. Harris, 188 Ga. App. 251, 253, 372 S.E.2d 654 (1988). Finally, the harm to the non-client from the attorney's negligence must be foreseeable. See e.g. Schwartz v. Greenfield, Stein & Weisinger, 90 Misc.2d 882, 885, 396 N.Y.S.2d 582 (1977); DeAngelis v. Rose, 727 A.2d 61 (N.J. Super. App. Div. 1999); Strait v. Kennedy, 13 P.3d 671, 674 (Wash. App. Div. 1 2000).

The third theory, negligent misrepresentation, also has been utilized to hold attorneys liable for negligence to non-clients.

One who supplies information during the course of his business, profession, employment, or in any transaction in which he has a pecuniary interest has a duty of reasonable care and competence to parties who rely upon the information in circumstances in which the maker was manifestly aware of the use to which the information was to be put and intended that it be so used. This liability is limited to a foreseeable person or a limited class of persons for whom the information was intended, either directly or indirectly.

Robert & Co. Associates v. Rhodes-Haverty Partnership, 250 Ga. 680, 681-82, 300 S.E.2d 503 (1983). The attorney must be actually aware that the person will rely upon the information provided or representations made in order for him to be liable for

negligent misrepresentation. Badische Corp. v. Caylor, 257 Ga. 131, 133, 356 S.E.2d 198 (1987).

Whether or not an attorney owes a duty to a non-client must be determined on a case-by-case basis, considering the specific facts tending to show or preclude the existence of such a relationship. For example, an attorney breached no fiduciary duty when he refused to provide a copy of decedent's prenuptial agreement to the decedent's mother and sister. Bowen v. Hunter, Maclean, Exley & Dunn 241 Ga. App. 204, 525 S.E.2d 744 (1999). However, in Williamson v. Abellera, 245 Ga. App. 312, 537 S.E.2d 130 (2000), rev'd in part on other grounds, 274 Ga. 324, 553 S.E.2d 806 (2001), the court rejected the assertion that an intervening criminal act broke the chain of causation and found a closing attorney liable for a referral. Proximate causation arose out of the fact that the attorney and his firm should have reasonably foreseen that their acts or omissions could result in injury.

The following other cases involve circumstances in which the issue of the existence of a duty to a non-client commonly arises.

**A. Third-Party Beneficiaries In Real Estate Transactions.**

1. Closing attorney and seller.

Unless advice is sought and received from a closing attorney by a seller of real estate, no attorney-client relationship is established. Legacy Homes, Inc. v. Cole, 205 Ga. App. 34, 421 S.E.2d 127 (1992). The plaintiff in Legacy Homes contracted to sell a house he had built to Mr. Noel. The selling real estate agent arranged for the defendant attorney to handle the closing on an all-cash sale basis. Mr. Noel did not bring certified funds to the closing, but promised to return immediately after the closing

with the funds. The closing proceeded and the property was transferred to Mr. Noel, with the understanding that he would go home and get the checks and return to the defendant attorney's office. Instead, Mr. Noel fled the jurisdiction.

The plaintiff seller sued the defendant closing attorney. The Court of Appeals affirmed the grant of summary judgment in favor of the closing attorney, finding that no attorney-client relationship existed between the plaintiff and the defendant. The court reaffirmed the rule that it must be "sufficiently established that advice or assistance of the attorney is both sought and received in matters pertinent to his profession." 205 Ga. App. at 35. Since there was no contact between the seller and the closing attorney before the closing, the plaintiff never asked the defendant for legal advice, and the defendant attorney never offered any legal advice, the court found no attorney-client relationship existed. *Id.* The court expressly recognized the third-party beneficiary theory of Kirby v. Chester, 174 Ga. App. 881, 331 S.E.2d 915 (1985), and the voluntary agent theory of Simmerson v. Blanks, 149 Ga. App. 478, 254 S.E.2d 716 (1979), but held that neither theory applied in this case.

The court also held that the selection of the closing attorney by the selling agent was not sufficient to create an attorney-client relationship with the seller. 205 Ga. App. at 35. With regard to the third-party beneficiary theory, the court pointed out that the mere fact that the seller benefitted from the attorney's performance of the agreement is not sufficient, as it must clearly appear that the attorney's performance is intended for the seller's benefit. 205 Ga. App. at 36. However, see Mays v. Askin, 262 Ga. App. 417, 585 S.E.2d 735 (2003) where the court found a question of fact as to whether closing attorney had an attorney-client relationship with the seller, Ms. Mays, and found

other possible deviations by the closing attorney. See also Cleveland Campers, Inc. v. R. Thad McCormack, P.C., 280 Ga. App. 900, 635 S.E.2d 274 (2006).

In Threatt v. Rogers, 269 Ga. App. 402, 604, S.E.2d (2004), where the seller brought a claim against the seller's attorney for breach of fiduciary duty alleging that attorney agreed to act as escrow agent, the Court of Appeals found that to establish the fiduciary duties of an escrow, the person must be made an agent by the mutual consent of the parties and clothed with the authority to deliver the property to one party or the other upon the happening of a future event. The seller alleged that the attorney had agreed to deliver the earnest money under the terms of the sales contract. However, there was no evidence of this agreement nor was there evidence that the seller relied, as a required element of promissory estoppel, on the alleged promise of the buyers' attorney.

2. Closing attorney and buyer.

An attorney-client relationship does not arise between buyer and closing attorney simply by virtue of the buyer's selection of attorney and payment of fees. Richard v. David, 212 Ga. App. 661, 442 S.E.2d 459 (1994), cert. denied, 212 Ga. App. 896 (1994). The plaintiffs contracted to purchase a house with financing from a local bank. The bank gave the plaintiffs the names of two attorneys, including defendant, who were on the bank's approved list for closing real estate loans. The plaintiffs selected the defendant as the closing attorney and paid the defendant's fee as part of the closing cost. At the closing, the defendant reviewed the required termite letter, which indicated that the conditions at the time of inspection warranted further inspection by a qualified building inspector. There was no discussion about the termite letter, and after the

plaintiffs reviewed the letter, they signed it acknowledging receipt. Later, the plaintiffs discovered that the house had extensive structural damage as a result of an old termite infestation.

Plaintiffs sued the defendant, alleging that the defendant was negligent in failing to advise them about the significance of the findings in the termite letter. Relying on Legacy Homes v. Cole, 205 Ga. App. 34, 421 S.E.2d 127 (1992), and the record showing that plaintiffs never sought legal advice from the defendant and the defendant never offered legal advice to the plaintiffs, the court held that no attorney-client relationship existed and dismissed the case. The record also showed that plaintiffs never communicated with the defendant that they would rely on her for legal advice at the closing. Their selection of the defendant as the closing attorney and the payment of her fee was insufficient to establish a reasonable belief that an attorney-client relationship had existed. 212 Ga. App. at 662.

In Williams v. Fortson, Bentley & Griffin, 212 Ga. App. 222, 441 S.E.2d 686 (1994), the plaintiffs purchased a house and sued the sellers for breach of contract, fraud and negligence. In addition, they sued the closing attorney and the law firm for which he worked. In holding that no attorney-client relationship had been demonstrated between the plaintiff and the closing attorney, the Court of Appeals noted that it is generally held that an attorney-client relationship must be demonstrated before a plaintiff may recover in a legal malpractice suit. Id. at 223. See also, Fortson v. Hotard, 299 Ga. App. 800, 684 S.E.2d 18 (2009). In Williams, there was no contact between the plaintiffs and counsel prior to the closing and plaintiffs executed a representation disclaimer at the closing itself. The Court of Appeals also held that the

representation disclaimer prevented plaintiffs from successfully arguing that the attorney breached a duty of care to them as third parties. Williams at 224.

3. Closing attorney and debtor's secured creditor.

The closing attorney at a sale of debtor's business to third-party did not owe a fiduciary duty to the debtor's secured creditor to disburse the proceeds of the sale to the creditor to the extent of the debt. All Business Corp. v. Choi, 280 Ga. App. 618, 634 S.E.2d 400 (2006). The court recognized that when an attorney undertakes to provide information, the attorney owes a duty of reasonable care and competence to "foreseeable third parties who rely upon the information." Id. at 621-622. Here, however, the attorney did not undertake to provide information to either the creditor or the buyer concerning the status of any liens on the business. Moreover, both the debtor and the third-party buyer acknowledged that the attorney was acting as an escrow agent only and did not represent either party.

**B. Corporate Shareholders As Third-Party Beneficiaries.**

An attorney who represents a corporation may become the voluntary agent of the individual owners of the corporation when it is reasonable and foreseeable that his advice to the corporation would be relied upon by the owners. Rogers v. Hurt, Richardson, Garner, Todd & Cadenhead, 203 Ga. App. 412, 417 S.E.2d 29 (1992), cert. denied, 203 Ga. App. 907 (1992). In Rogers, the defendant law firm represented a corporation in numerous legal matters. The plaintiffs were the sole shareholders of the corporation. Plaintiffs made a capital contribution to the corporation in exchange for which they were to receive title in their individual capacities to 28 acres of land held by the corporation. The defendant law firm failed to obtain a release from the mortgagee

for the 28 acres, or record deeds showing that the property had been conveyed to the plaintiffs. In addition, after a judgment creditor of the corporation obtained title to the property, the defendant advised the plaintiffs that they could still protect their interest in the 28 acres by transferring title to themselves from the corporation. The judgment creditor subsequently sued the plaintiffs for fraud, and the plaintiffs filed a legal malpractice action against the attorneys.

Even though no express attorney-client relationship existed between the defendant and the plaintiffs, an attorney may be liable for negligence under the theory of voluntary agency where the attorney gratuitously undertakes to perform a legal service with the would-be client's approval. 203 Ga. App. at 415. The court found that, if the events occurred as the plaintiffs alleged, then the defendant law firm was "manifestly aware of the use to which the information was to be put," and the plaintiffs were "foreseeable persons for whom the information was intended." 203 Ga. App. at 416 (quoting *Badische Corp. v. Caylor*, 257 Ga. 131, 133, 356 S.E.2d 198 (1987)).

The voluntary agent theory may also apply in a situation where a lawyer represents a trust, but his advice is also relied upon by a beneficiary of the trust.

Here, the undisputed evidence shows that Neimark was hired to represent RK Trust and assist with the transfer of assets from Kahn to the trust. Kahn testified that Neimark advised him that the asset transfer was for *Kahn's own* protection as well as the protection of RK Trust. Consequently, there is an issue of fact as to the existence of an individual attorney-client relationship between Kahn and Neimark.

Moreover, even if no express attorney-client relationship existed, "an attorney may be liable for negligence under the theory of voluntary agent when the attorney gratuitously undertakes to perform a legal service (or, in this case, give legal advice) to another with the other's approval."

Kahn v. Britt, 330 Ga. App. 377, 387-388, 765 S.E.2d 446, 457-58 (2014)(citing Rogers, emphasis in the original).

No duty was found, however, in a case where the wife of a plastic surgeon, who also served as the corporate secretary, brought a claim of legal malpractice against an attorney for his failure to use due care in preparing the operating agreement for her husband's limited liability company (LLC). Graivier v. Dreger & McLelland, 280 Ga. App 74, 633 S.E.2d 406 (2006). The Court of Appeals found that "liability is only limited to a foreseeable person or limited class of persons for whom the information was intended, either directly or indirectly." Nothing in the record brought the wife within this theory, because the attorney could not reasonably foresee that his advice would be relied upon by her in her individual capacity. Id.

Recently, the 11<sup>th</sup> Circuit upheld a Summary Judgment Order from the Southern District of Georgia that held that the bankruptcy attorney for a corporation did not also represent the sole shareholder of that corporation, despite the fact that the shareholder paid the attorney's fee out of his own personal funds. "Although the fee might have come from [the individual]'s personal funds, the written engagement letter makes clear that [the individual] sought [the attorney]'s advice 'regarding assistance in filing a Chapter 11 proceeding,' 'on behalf of [the corporation].'" Abdulla v. Klosinski, 523 Fed. Appx. 580, 585 (11th Cir. 2013)(unpublished).

### **C. Limiting Duty To Non-Clients.**

An attorney may limit his duty to non-clients through disclaimers. Williams v. Fortson, Bentley & Griffin, 212 Ga. App. 222, 441 S.E.2d 686 (1994). In Williams, the purchasers of a home with substantial termite damage sued the closing attorney alleging

that she had breached a duty to the plaintiffs by accepting an incomplete termite report and disbursing sales proceeds prior to communicating with plaintiffs regarding the report. While similar to Richard v. David, 212 Ga. App. 661, 442 S.E.2d 459 (1994), the plaintiffs in this case signed a disclaimer of representation and a release and covenant not to sue during the closing. The disclaimer stated that legal services were performed by the broker on behalf of the lender and not the borrower, and the borrower was encouraged to obtain counsel to see that the borrower's legal interests and rights were protected. Plaintiffs further agreed in the release that the release would be a defense to any action or proceeding against the lender or law firm. The plaintiffs paid the closing costs, including attorney's fees, pursuant to the sales contract.

The court held that the representation disclaimer was effective to preclude any actionable reliance on any promise by the attorney with respect to the termite report. 212 Ga. App. at 224. The court pointed out that "there are few rules of law more fundamental than that which requires a party to read what he signs and to be bound thereby." 212 Ga. App. at 223. The court acknowledged that the trend in Georgia has been to relax the rule of strict contractual privity in malpractice actions and that this has led to a duty, under certain circumstances, owed to parties who are not clients in the strict sense. Nevertheless, the court approved limiting such additional duties "by appropriate disclaimers which would alert those not in privity with the supplier of the information that they rely upon it only at their peril." 212 Ga. App. at 224.

#### **D. Outer Limits Of Third-Party Liability.**

The grandparents of a child being sought for adoption were permitted to sue, on behalf of the child, the lawyers representing the adoptive couple for malpractice,

malicious prosecution, civil conspiracy, and intentional infliction of emotional distress after the child was removed from the grandparents' care during the proceedings. Rushing v. Bosse, 652 So.2d 869 (Fla. App. 1995). While ordinarily, "an attorney's liability for legal malpractice is limited to those with whom the attorney shares privity of contract," the court acknowledged a "limited exception . . . where a plaintiff is an intended third-party beneficiary of an attorney's actions and it is the apparent intent of the client to benefit the third-party." In the instant case, "not only was the child the intended beneficiary of the adoption, but defendants were the attorneys for the adoptive parents, who evidently intended to benefit the child by adopting her." 652 So.2d at 873.

Georgia has relaxed the rule of strict contractual privity in malpractice actions, recognizing that under certain circumstances, professionals owe a duty of reasonable care to parties who are not their clients. Williams v. Fortson, Bentley & Griffin, 212 Ga. App. 222, 441 S.E.2d 686 (1994). For example, in Home Insurance Co. v. Wynn, 229 Ga. App. 220, 493 S.E.2d 622 (1997), a man died as a result of a truck accident and the decedent's wife was named the executrix of his estate. The wife hired the defendant attorney to negotiate a claim with the automobile liability insurance company that insured the decedent. The claim was settled for \$650,000. Without any notice or involvement of the couple's sons, the settlement was divided as follows: \$325,000 for wrongful death damages, \$275,000 to the estate for the decedent's pain and suffering, and \$50,000 to the mother for loss of consortium. The sons had a stake only in the wrongful death claim.

Subsequently, the sons sued their mother and asserted a legal malpractice action against the defendant attorney. The Georgia Court of Appeals held that the trial court did not err in allowing the jury to consider the sons' legal malpractice claim. Although the defendant attorney argued that he represented only the mother, the court noted that the mother prosecuted not only her own interests, but those of the sons in the wrongful death action. Further, the court noted that the defendant attorney ignored the fact that the mother represented the sons' direct interest in the claim and that the attorney took most of his legal fees directly out of the sons' share of the proceeds. The court concluded that the defendant attorney owed a duty of reasonable care to the sons as third party beneficiaries of the relationship between the attorney and the mother. But see, Eric Hewko v. Gary S. Genovese, et al., 739 So.2d 1189, (Fla. App., 4 Dist. 1999) which demonstrates other jurisdictions' reluctance to expand the priority exception.

Subsequently, the Georgia Court of Appeals in Rhone v. Bolden, 270 Ga. App. 712, 608 S.E.2d 22 (2004) held that the decedent's father was not an intended beneficiary of the legal services that the attorneys provided to decedent's estate. Therefore, neither of the attorneys who represented the decedent's estate nor the attorneys who filed a wrongful death claim on behalf of the decedent were liable to decedent's father for legal malpractice and thus did not owe him a fiduciary duty.

**E. No Duty To Opposing Parties.**

In Oswell v. Nixon, 275 Ga. App. 205, 620 S.E.2d 419 (2005), a plaintiff who never sought legal advice from any of the attorney defendants could not assert a claim against one of the defendant attorneys for unauthorized practice of law. The plaintiff's claim arose out of the attorney defendants' representation of an opposing party in the

underlying litigation against this plaintiff. The court found that the attorney defendants did not offer any legal advice to the plaintiff and they did not owe him a fiduciary duty. In addition, the plaintiff here had no claim for fraud or deceit since he failed to allege that the defendant attorneys made any representation with the intent to induce him to act, refrain from acting, or that he justifiably relied upon any misrepresentation of theirs. Therefore, the attorneys owed him no duty, and there was no basis for his claims.

**F. No Duty To Investigate Former Employee.**

Where an employee in negotiations for a new job with his employer's competitor brought an action against his employer's attorneys, the court found that the employer's attorneys owed the employee no duty to investigate the truth of allegations they made in a demand letter, which was sent to the competitor on behalf of the employer-client, that the employee had taken computer disks, documents, and other items belonging to the employer. McKenna Long & Aldridge, LLP v. Keller, 267 Ga. App. 171, 598 S.E.2d 892 (2004). Finding no duty, the employee was precluded from bringing a claim of negligence against the employer's attorneys. Similarly in a real estate context, counsel for a foreclosing party owes no duty to the party being foreclosed upon. Ferguson v. CitiMortgage, Inc., 1:13-CV-01373-RWS, 2014 WL 587865, at \*2 (N.D. Ga. 2014)(attorney "owed no duty to Plaintiff because it acted solely as [bank]'s attorney and agent in the course of the foreclosure proceedings."); Harden v. JP Morgan Chase Bank, N.A., 1:13-CV-03535-RWS, 2014 WL 836013, at \*3 (N.D. Ga. 2014)("[attorney] acted solely as foreclosure counsel and did not have independent authority to foreclose. Accordingly, Plaintiff cannot state a claim for wrongful foreclosure against [attorney].")

#### IV.

#### PROXIMATE CAUSE

In cases involving alleged misfeasance by a professional, it has been the rule in Georgia that the causal connection between tort and injury must result from the negligence of the professional. Turner v. Malone, 176 Ga. App. 132, 134, 335 S.E.2d 404 (1985); Roberts v. Langdale, 185 Ga. App. 122, 123, 363 S.E.2d 591 (1987); Rogers v. Norvell, 174 Ga. App. 453, 457, 330 S.E.2d 392 (1985). If there has been no damage, or if there is a lack of sufficient evidence to show that the damage alleged resulted from the negligence of the attorney, then the attorney is entitled to summary judgment. Oehlerich v. Llewellyn, 285 Ga. App. 738, 647 S.E.2d 399 (2007). See also, Duke Galish, LLC v. Manton, 291 Ga. App. 827, 832(1), S.E.2d 880 (2008) (“any damage claimed to have been suffered by a plaintiff does not proximately result from the defendants’ alleged misconduct, if the damage would have occurred notwithstanding their misconduct”); Mosera v. Davis, 306 Ga. App. 226, 701 S.E.2d 864 (2010) (by not explaining how the plaintiff was harmed, the plaintiff’s expert merely concluding that the plaintiff was harmed was insufficient to prove proximate cause); Kitchen v. Hart, 307 Ga. App. 145, 704 S.E.2d 452 (2010)(client’s subsequent voluntary actions severed the causal link between the alleged malpractice and the damage incurred); Quarterman v. Cullum, 311 Ga. App. 800, 717 S.E.2d 267 (2011) (client’s argument that he would have prevailed in underlying action had attorney performed additional discovery found too speculative to provide proximate cause); compare, Hart v. Groves, 311 Ga. App. 587, 716 S.E.2d 631 (2011) (affirming verdict for plaintiff where jury found that attorney’s

negligent failure to pursue recovery under client's uninsured motorist policy for sums exceeding tortfeasor's insurance limits proximately caused damages to plaintiff).

**A. Speculation As To The Amount Of Damages As Affecting Proximate Cause.**

Although the plaintiff cannot recover where the existence of an injury is too speculative to be proven, once an injury is established difficulty in fixing the exact amount of damages does not necessarily preclude a plaintiff from establishing proximate cause in a legal malpractice case. Freeman v. Pitman, 220 Ga. App. 672, 469 S.E.2d 543 (1996). In Freeman, the plaintiff alleged that had her attorney informed her of a third security interest in her property, which she asked him to ascertain, she could have settled with that lienholder for a nominal amount while the lienholder remained the secondary lienholder. In response, the attorney argued that because there was no proof that the lienholder would have compromised its interest for a nominal amount or that a third-party would have bought the property at a foreclosure sale, the plaintiff's damages were too speculative to allow recovery.

However, the court noted that because the attorney had informed the plaintiff that there were only two other liens on the property, she did not attempt to settle with the third lienholder. The result was that the lienholder's position in the encumbered property improved so that it had no incentive to settle and the plaintiff eventually had to pay considerably more than the underlying principal owed to keep the property. Based on this, the court held that the plaintiff's experiences "with the other lienholders provided a logical basis for the jury to determine the amount of her damages. Establishing the proximate causation of damages and determining the extent of those

damages are analytically distinct elements of plaintiff's cause of action, and the rule against the recovery of speculative damages relates primarily to speculation regarding proximate cause rather than extent. Once a plaintiff establishes that damages proximately flow from the defendant's alleged conduct, mere difficulty in fixing their exact amount should not be a legal obstacle to recovery." 220 Ga. App. at 674. Similarly, see Millsaps v. Kanfold, 288 Ga. App. 44, 653 S.E.2d 344 (2007).

**B. Negligence In Following Office Procedures As Proximate Cause.**

Where the procedures used in a case deviated from the usual procedures resulting in failure to file a petition for bankruptcy in time to prevent a foreclosure, the attorney who implemented the procedure was held liable. Bill Parker & Associates v. Rahr, 216 Ga. App. 838, 456 S.E.2d 221 (1995). In Bill Parker, the plaintiff had signed the bankruptcy petition and mailed it to Parker's Atlanta office, from which it was transmitted to Parker's Newnan office for filing. Under normal Newnan procedures, the client would sign the petition in the office and then the petition would be filed. The attorney in Newnan, expecting those procedures to be followed in this case, did not immediately file the petition as the Atlanta office expected, but without even reading the petition, held it awaiting the plaintiff's signature. By the time the attorney realized the documents had already been signed, it was too late to prevent the foreclosure.

The court found sufficient evidence that Parker's personal negligence was responsible for the plaintiff's damages. In particular, Parker was the senior attorney of Bill Parker & Associates and was responsible for the firm's procedures and practices for doing business. While Parker may not have been responsible for another attorney's failure to read his mail or take action on it, or may not have been responsible for another

attorney's failure to communicate that a particular matter required special handling, he nevertheless was responsible for the system in which these attorneys operated. Therefore, whether the procedures caused the plaintiff's damages was a question for the jury. 216 Ga. App. at 841.

**C. Failure To Mitigate Damages.**

In Crowley v. Trust Co. Bank, 219 Ga. App. 531, 466 S.E.2d 24 (1995), the court held that since the plaintiff had stipulated that the absence of a perfected security interest in the collateral did not impair its ability to recover the entire principal balance from the guarantor, the plaintiff had not sustained its burden of proving damages proximately caused by the defendant's admitted negligence. The court held that if it is shown without dispute that a client could have avoided damages resulting from his attorney's mistake, but did not do so, recovery for legal malpractice is limited to those damages the client would have suffered had damages been properly mitigated. 219 Ga. App. at 532, citing O.C.G.A. § 51-12-11. In this case, the parties stipulated that the only adverse effect of the attorney's inaccurate title certification was the lack of collateral for the loan. However, by stipulating that it had acquired a consent judgment against the guarantor for the entire principal balance of the loan plus interest and attorney's fees, and stipulating that the guarantor was capable of satisfying the judgment, the plaintiff precluded its argument that the negligent omission resulted in the loss of the entire principal balance of the loan. 219 Ga. App. at 533. However, the remote possibility that the underlying defendant would fail to raise the expired statute of limitations as a defense does not justify putting the plaintiff client to the trouble and expense of bringing

a time-barred suit against the underlying defendant as a precondition to maintaining a legal malpractice case. Sapp v. Coshatt, 245 Ga. App. 549, 538 S.E.2d 193 (2000).

**D. Collectability.**

Where a plaintiff claimed that the defendant's negligence caused her to accept a note from her ex-husband as a means of obtaining payment under a divorce agreement without realizing the actual risk that the note might not be paid, she failed to show that payment in another manner would have been awardable or collectible against the ex-husband. Perry v. Ossick, 220 Ga. App. 26, 467 S.E.2d 604 (1996). In Perry, the plaintiff claimed that, had the defendant properly advised her of the risk of dischargeability of the obligation in bankruptcy, she would have rejected the note as a means to obtain payment and would have attempted to obtain payment from her ex-husband in some other manner. The court held that to the extent the plaintiff could have sought to collect all or part of the money in the form of alimony, there was no evidence in the record showing that any such claim would have been awardable or collectible against the former spouse. In short, there was no evidence that in the alleged failure by the defendant had any causative effect on the ex-spouse's right to seek discharge in bankruptcy or the bankruptcy court's determination that a portion of the obligation was dischargeable. Citing McDow v. Dixon, 138 Ga. App. 338, 339, 226 S.E.2d 145 (1976), for the proposition that the client must prove that her judgment would have been collectible in the full amount, the court affirmed summary judgment in favor of the Defendant. 220 Ga. App. at 29-30.

**E. Desired Results Impermissible.**

Where a plaintiff claimed that her attorney should have taken action that would not have been permissible under law, summary judgment to the defendants was appropriate. Coffey v. Alembik, 221 Ga. App. 501, 471 S.E.2d 590 (1996). In this case, plaintiff alleged that her attorney had untimely filed a consent order modifying the terms of her divorce decree. The defendants had obtained for the plaintiff the entry of a consent order containing a provision by which the prior divorce decree would be modified to provide that the former husband's civil service survivor benefits would be payable to the plaintiff in the event of his death or retirement in lieu of the alimony set forth in the original judgment and decree. Thereafter, the plaintiff's application for death benefits was disallowed due to federal regulations requiring that a court order must be issued prior to the death of the federal employee; here, the order was entered on the date of the former husband's death.

Although the plaintiff asserted that the consent order should and could have been obtained earlier, but for the negligence of the defendants, the court nonetheless granted summary judgment because the defendants "could not have obtained a valid order modifying the divorce decree so as to grant to plaintiff a survival annuity. Such a judgment is not a revision of a judgment for alimony, but would be a modification of the provisions of the divorce decree for the equitable division of property which is not permissible." 221 Ga. App. at 502 (emphasis added). The order which was sought by the plaintiff could not have properly been entered. Therefore, any negligence by the defendants could not have harmed the plaintiff.

**F. Intervening Criminal Act.**

A criminal defense lawyer cannot be held liable for the death of his client resulting from the criminal activity of a fellow inmate. Gammage v. Graham, 221 Ga. App. 383, 471 S.E.2d 237 (1996). In Gammage, the attorney negotiated a plea of guilty but mentally ill with the prosecutor on behalf of his client. The client entered a guilty plea in open court and confirmed to the judge that it was his desire to plead guilty. The client then underwent a mental assessment and was assigned to a prison facility for youthful offenders. While incarcerated, the client invited a fellow inmate into his cell and a discussion ensued regarding the client's crimes. The other inmate became enraged and beat the client to death.

Bypassing the question of whether the defendant's representation was negligent, the court stated that "no matter how negligent a party may be, if his act stands in no causal relation to the injury, it is not actionable." In the instant case, the court held that the evidence established as a matter of law that the sole proximate cause of the client's death was the intervening criminal act of the fellow inmate, which was neither foreseeable nor avoidable by the attorney. Thus, summary judgment for the defendant was appropriate. 221 Ga. App. at 385-86.

Villanueva v. First American Title Ins. Co., 313 Ga. App 164, 721 S.E.2d 150 (2011), aff'd 292 Ga. 630, 740 S.E.2d 108 (2013) held that, in a case where the defendant attorney alleges that the plaintiff's injuries resulted from an intervening criminal act, the key question is whether the criminal act would have been reasonably foreseeable to the attorney. In Villanueva, a non-lawyer working for the defendant attorney's firm stole funds from an escrow account to which the defendant attorney directed the plaintiff to

deposit funds. Although the defendant attorney did not own or control the escrow account in question, the court affirmed the trial court's denial of the attorney's motion for summary judgment on the grounds that the attorney testified that he had previous misgivings about the fact that the non-lawyer had access to the escrow account in question and nonetheless directed plaintiff's funds to that account. The court therefore ruled that the jury would be authorized to conclude that the attorney could have foreseen that the funds might be stolen and acted negligently by depositing the client's funds in the account anyway.

**G. Failure To Object To Venue.**

Where a plaintiff alleged that his attorney was negligent in failing to object to venue in the child custody proceeding, the plaintiff's case failed because he could not show a causal link between the attorney's failure to raise the venue defense and any injury suffered. Houston v. Surrett, 222 Ga. App. 207, 474 S.E.2d 39 (1996). In Houston, the Court of Appeals noted that the plaintiff's burden was to show that, but for his attorney's error, the outcome would have been different since any lesser requirement would invite speculation and conjecture. 222 Ga. App. at 209. The evidence showed that even had the attorney objected to venue of the plaintiff's ex-wife's counterclaim for change of custody, the ex-wife would have filed a separate action for change of custody in the proper county. The court also noted that the trial court could have severed the counterclaim from the main action and transferred it. Thus, the court held that the plaintiff could not show that, had the case been litigated in a different county, he would have suffered none of the injuries and incurred none of the damages he claimed.

The court went on to state that, in order to recover, the plaintiff must show that a different judge hearing the same evidence would have acted differently. In spite of expert testimony proffered by the plaintiff regarding what a different judge would have done, the court stated that "because all trial judges in the state are presumed to know the law and presumed to faithfully and lawfully perform the duties devolving upon them by law, we must also presume that judges in both Thomas and Columbia counties would decide this case based on the evidence presented and would not be influenced by any local bias. We may therefore presume that, hearing the same evidence, each judge would have reached the same result." 222 Ga. App. at 210.

#### **H. Burden Of Proof.**

1. Failure of plaintiff to mitigate.

A defendant attorney seeking summary judgment on the issue of causation has the burden of to demonstrate as a matter of law that the plaintiff would not have recovered even in the absence of his negligence. Nix v. Crews, 200 Ga. App. 58, 406 S.E.2d 566 (1991). Also, see Kramer v. Yokely, 291 Ga. App. 375, 662 S.E.2d 208 (2008).

2. Failure to inform client of appropriate appellate procedure.

Where the alleged negligence is the failure of an attorney to properly advise a client on filing or perfecting an appeal, a plaintiff must prove that he would have been successful on appeal and would have obtained a more favorable result on remand. Jaraysi v. Soloway, 215 Ga. App. 531, 451 S.E.2d 521 (1994).

3. Failure to file timely notice of appeal.

A plaintiff has the burden of proof on summary judgment to show that it would have prevailed on appeal. Kidd v. Georgia Association of Educators, 263 Ga. App. 171, 587 S.E.2d 289 (2003). In McMann v. Mockler, 233 Ga. App. 279, 503 S.E.2d 894 (1998), plaintiff filed a legal malpractice suit against the defendant attorney alleging that the attorney failed to file a timely appeal from a denial of her worker's compensation claim. The Georgia Court of Appeals affirmed the grant of the attorney's motion for summary judgment. More specifically, the Court found that the plaintiff failed to show that the appellate court would have reversed the denial of her worker's compensation claim and that, upon remand to the lower court, she would have obtained a more favorable result. Because the question of whether the plaintiff's appeal would have been successful was a question of law, it was proper for summary adjudication. Further, the Court noted that "failure to file an appeal which would be unsuccessful on the merits or frivolous would not harm the losing litigant but instead would save the litigant time, money and anguish."

Likewise, in Dow Chemical Co. v. Ogletree, Deakins, Nash, Smoak & Stewart, 237 Ga. App. 27, 514 S.E.2d 836 (1999), the Court of Appeals stated "we decline to place the burden on a defendant in a malpractice case to show that an appeal would not have been successful." Id. at 29. While the Court acknowledged that it is difficult for a plaintiff in a malpractice action to show how an appellate court would have ruled on a legal question: (i) in a legal malpractice action, "the plaintiff must establish. . . that [the attorney's] negligence was the proximate cause of damage to the plaintiff." Id. at 29. Because a defendant would not bear the burden of proof at trial, he discharges his

burden on a motion for summary judgment by pointing out by reference to the affidavits, depositions and other documents in the record that there is an absence of evidence to support the plaintiff's case for failure to timely file an appeal.

Furthermore, in Dow Chemical Co., the court reiterated that the question of whether an appeal would have been successful is a question of law, exclusively within the provinces of judges, and an action for legal malpractice. Id. at 30. As such, it would be improper for the trial court to rely upon an expert opinion as to the probably outcome of an appeal. Id. Rather, it is the duty of the trial court and the appellate court to apply the relevant law to determine whether the appeal would have been successful. Id.

4. Failure to inform client of potential claims.

In Chaney v. Blackstone, 249 Ga. App. 194, 547 S.E.2d 340 (2001), summary judgment was reversed due to the material issues of disputed fact. The claim from which this case evolved was a personal injury suit related to a car accident. Plaintiff claimed that the defendant attorney acted negligently when he failed to make a claim against a potential source of recovery. The disputed material fact was whether the attorney informed his client of the existence of potential claims.

5. Client response to attorneys' motion for summary judgment.

In Alta Anesthesia Assoc. v. Bouhan, Williams, & Levy, LLP, the plaintiff alleged that its attorneys were negligent in the underlying action for their failure to move for a directed verdict on civil conspiracy and for failing to object to the charge on civil conspiracy. 268 Ga. App. 139, 601 S.E.2d 503 (2004). Plaintiff claimed that this failure proximately caused the court's refusal to vacate the tort and punitive damages

verdict and judgment. Id. at 139. When the attorneys moved for summary judgment, claiming that there was no proximate cause, the plaintiff's response was inadequate under the standards applicable to motions for summary judgment. Id. at 142. Furthermore, the court rejected any finding of proximate cause because the attorneys' failures to object to the charge on civil conspiracy were not determinative factors in the prior decision. Id. at 143.

6. Failure to adequately prepare clients for trial.

Clients brought a legal malpractice action against a law firm that handled their corporate work and that represented them in litigation brought by a former business partner. Paul et. al. v. Smith, Gambrell & Russell, 283 Ga. App. 584, 642 S.E.2d 217 (Ga. App. 2007). The clients alleged that the law firm failed to prepare them adequately for trial. As damages, the clients sought to recover from their counsel the award their former business partner received at trial. The Georgia Court of Appeals affirmed the lower court's grant of summary judgment on this issue because the clients could not articulate what additional testimony they would have given if they had been better prepared or explain how such testimony would have changed the outcome of the trial. Id. at 588. See also, Nash v. Studdard 294 Ga. App. 845, 670 S.E.2d 508 (2009) (Court of Appeals affirmed lower's grant of summary judgment and held that attorney did not breach his fiduciary duty to client by failing to discuss trial strategy with him, where client did not demonstrate that any damage resulted from the alleged breach).

Notably, on a separate issue in the case, the appellate court affirmed the trial court's denial of the law firm's motion for summary judgment, finding that a viable legal

malpractice claim existed against the law firm, where an attorney failed to obtain proper approval of the company's shareholders for a corporate merger to occur. Paul at 591.

7. Failure to effectuate client's intent.

It is a lawyer's responsibility to his client to select and employ words in the drafting of a contract that will accurately convey the meaning intended, and although he is not an insurer of the documents he drafts, the attorney may breach his duty towards his client when, after undertaking to accomplish a specific result, he then fails to effectuate the intent of the parties. Bonner Roofing & Sheet Metal Company, Inc. v. Karsman, 285 Ga. App. 586, 589, 646 S.E.2d 763 (2007). In Bonner, a client sued his attorney for legal malpractice for failing to draft an indemnity agreement, which allowed an LLC member to be held personally liable for paying a roofing company for repair work. Id. at 586. However, summary judgment in favor of the attorney was granted because there was an absence of evidence to show that the attorney had been instructed to include a personal liability provision in the indemnity agreement; and thus, a lack of evidence to show that the attorney failed to effectuate his client's intent. Id. at 590.

**I. Client's Acts As Proximate Cause.**

1. Waiver or judicial estoppel by client.

A plaintiff may waive his right to complain of his former attorney's failure to file an appeal by refusing to permit his attorney to pursue relief through litigation. Mauldin v. Weinstock, 201 Ga. App. 514, 411 S.E.2d 370 (1991). Judicial estoppel banned plaintiff's suit against defendants since plaintiff failed to list his claims as assets in his Chapter 7 bankruptcy petition or to amend the petition. Reagan v. Lynch, 241 Ga. App. 642, 524 S.E.2d 510 (1999).

2. Client's failure to read as proximate cause of injury.

While an attorney may prevail as a matter of law where his client fails to read what she signs, this may not be true to the extent that a legal interpretation is necessary. Little v. Middleton, 198 Ga. App. 393, 401 S.E.2d 751 (1991). The defendant attorneys in Little represented the plaintiff in connection with an automobile accident and obtained a \$25,000.00 settlement from the automobile liability insurer of the driver of the other automobile. However, in settling the case, the attorney had the plaintiff sign a written release of the other driver, which included a release of "all other persons, firms or corporations liable or who might be claimed to be liable . . . ." 198 Ga. App. at 393. The plaintiff's own insurer subsequently refused to pay the plaintiff for any uninsured motorist benefits based upon this release language.

The plaintiff brought a legal malpractice action against the defendant attorney. The court refused to apply the "duty to read" defense of Berman v. Rubin, 138 Ga. App. 849, 227 S.E.2d 802 (1976), finding that the duty to read defense applies to "factual" issues, but not legal issues:

Unlike Berman, the alleged negligence attributed to [the attorneys] in the instant case does not relate so much to a factual issue as it does to the legal effect of the release that [plaintiff] signed. [Plaintiff] maintains that [the attorneys] were negligent in their representation because the release inured to the benefit of her UM carrier. There are perhaps few areas of Georgia law in which legal expertise and precision are more crucial than in the negotiation and execution of releases. . . . Under these circumstances, it cannot be said that, as a matter of law, the legal effect of the release did not pose 'to [plaintiff] a legal technicality that [she] was unequipped to appreciate as a non-lawyer.'

198 Ga. App. at 395 (emphasis in original). Accordingly, the court reversed the grant of summary judgment in favor of the defendant attorneys.

The court further stated that "[r]easonable minds would disagree as to whether the release in the instant case did require a legal knowledge or explanation to become clear to a layman ... and whether the attorney's failure to inform appellant fully as to the purported effect of the release constituted the proximate cause of appellant's inquiry." Id. Thus, a jury question remained as to whether the appellant's failure to detect the legal defect in the release was the proximate cause of her own injury. Id.

### 3. Guilty plea in underlying criminal action.

Where an underlying action in a legal malpractice case is a criminal trial, the plaintiff is precluded from prevailing if he has pled guilty to the charge. Gomez v. Peters, 221 Ga. App. 57, 470 S.E.2d 692 (1996). In Gomez, the court held that "a client who has acknowledged his guilt cannot assert that his attorney's poor performance caused his incarceration." 221 Ga. App. at 60. Even where, as in Gomez, the plaintiff pled guilty to a lesser included offense, proximate cause is absent as long as the plaintiff's "damage" is no greater than what he would have sustained for the offense to which he pled. Id.

### **J. Evidence Not In The Record Below.**

In Blackwell v. Potts, 266 Ga. App. 702, 598 S.E.2d 1 (2004), the Court would not restrict Plaintiffs in legal malpractice cases to the record in the underlying case because any attorney could avoid liability by intentionally or negligently failing to develop a record. As a recent federal court case points out, however, this rule may only be applicable where the plaintiff-client alleges that the lawyer failed to properly develop the

record below, and may not apply to a situation where a defendant-lawyer attempts to introduce evidence not presented in the underlying litigation.

Defendants contend that [Blackwell] stands for the proposition that “the evidence in a legal malpractice case is not limited to the evidence within the four corners of the underlying case’s record.” But Plaintiff argues that Blackwell was meant to ease the burden on legal malpractice plaintiffs who were plaintiffs in the underlying suit and does not go so far as to hold that new evidence should be permitted in all legal malpractice actions...The Court agrees with Plaintiff. The Court will limit the evidence in this case to that developed in the underlying medical malpractice action. Unlike in Blackwell, the rationale for allowing new evidence does not exist here because there is no risk of Defendants benefitting from their previous negligence in developing the record.

First Prof. Ins. Co. v. Owen, Gleaton, Egan, Jones & Sweeney, LLP,  
1:12-CV-00419-RWS, 2015 WL 1862891, at \*5 (N.D. Ga. Apr. 22, 2015)

**K. Attorney's Conduct As Proximate Cause.**

1. Failure to exercise due diligence in perfecting service.

An attorney's failure to serve a defendant in a timely fashion may constitute the proximate cause of the plaintiff's injuries. Huntington v. Fishman, 212 Ga. App. 27, 441 S.E.2d 444 (1994).

2. Failure to introduce expert evidence to defeat motion for summary judgment.

An attorney's failure to introduce relevant and admissible evidence states a cause of action for legal malpractice. Jacobsen v. Boyle, 196 Ga. App. 411, 397 S.E.2d 1 (1990), cert. denied, 196 Ga. App. 908 (1990). After the plaintiff in Jacobsen was terminated from her job, her former employer retained a counseling firm to provide her with career counseling services. The plaintiff began a sexual relationship with the career counselor assigned to her. After that relationship ended, the plaintiff hired the

defendant attorneys to bring an action for actual and punitive damages against the career counseling firm and the individual counselor. The Court of Appeals affirmed summary judgment in favor of the defendants in that action.

Subsequently, the plaintiff sued the attorneys who represented her in the action against the career counseling firm and career counselor. The court held that an issue of fact existed as to whether the attorneys were negligent in not submitting an expert affidavit concerning the "transference phenomenon" in an attempt to defeat the career counseling firm's motion for summary judgment in the prior case. 196 Ga. App. at 413.

However, in Holmes v. Peebles, 251 Ga. App. 417, 554 S.E.2d 566 (2001) the court, in accord with its decision in Goodman v. Glover, 247 Ga. App. 829, 544 S.E.2d 214 (2001), found no reason to believe that the trial court would have responded differently to a more formal objection than that made by Peebles and Goodman.

### 3. Conflict of interest not proximate cause.

Even if there was a conflict of interest in the law firm's representation of a bankrupt corporation in a lawsuit against the United States Postal Service ("USPS"), and the law firm's subsequent employment as special counsel to the bankruptcy trustee in pursuing the bankruptcy estate's claim against the USPS, the corporation failed to establish that the conflict was the proximate cause of damage to the corporation. Thornton v. Mankovitch, 277 Ga. App. 221, 626 S.E.2d 189 (2006). Because the corporation was actually "defunct" and had ceased to exist at the time the attorney represented the bankruptcy estate, there was no true conflict of interest. Id. at 222. Moreover, though Mankovitch contended that the settlement reached between the

trustee and the USPS was too low, there was no evidence that the bankruptcy trustee would have reached a different decision. Id. at 223.

The Georgia Court of Appeals upheld a finding that an attorney who represented multiple family members in the same auto accident was not laboring under a conflict of interest and did not cause the plaintiff any ascertainable damages. Anderson v. Jones, 323 Ga. App. 311, 745 S.E.2d 787 (2013). There was no evidence to support the plaintiff's argument that the lawyer negotiated a lump sum settlement and then arbitrarily distributed the settlement proceeds among his various clients. Furthermore,

Even assuming that Jones breached his fiduciary duty in his manner of settling Anderson's claims, Anderson is unable to recover for legal malpractice because she is unable to show that she was damaged by such breach. There is no evidence that a \$1.75 million settlement, including the life annuity, was inadequate or that Anderson would likely have obtained a greater settlement if she and her parents had been represented by separate legal counsel. A legal malpractice claim cannot be based upon speculation and conjecture. See Szurovy v. Olderman, 243 Ga. App. 449, 452–453, 530 S.E.2d 783 (2000).

Id.

#### **L. Intervening Negligence Of Second Attorney.**

The unforeseeable intervening negligence of the plaintiff's second attorney may shield the first attorney from liability for damages resulting from his own negligence. Meiners v. Fortson & White, 210 Ga. App. 612, 436 S.E.2d 780 (1993); White v. Rolley, 225 Ga. App. 467, 484 S.E.2d 83 (1997); Cf. Ledee v. Devoe, 250 Ga. App. 15(3), 549 S.E.2d 167 (2001). For instance, a lawyer who files a complaint on the last day of a limitations period and does not perfect service may be liable for damages to his client. However, if a second attorney takes over the case, the second attorney must perfect service, regardless of the time frame; promptly file a voluntary dismissal; file a renewal

action pursuant to O.C.G.A. § 9-2-61(a); and promptly serve the defendant to preserve the client's claim. See Robinson v. Boyd, 288 Ga. 53, 701 S.E.2d 165 (2010). Otherwise, the second attorney's negligence of not utilizing the ruling in Hobbs v. Arthur, 264 Ga. 359, 444 S.E.2d 322 (1994) which was reaffirmed in Robinson would insulate the first lawyer of liability by breaking the causal chain. Thus, the client would be able to pursue a legal malpractice claim against the second attorney for the loss of the client's original claim.

**M. No Proximate Cause If Non-Occurrence Of Condition.**

In Studio X, Inc. v. Weener, Mason, & Nathan, LLP, the plaintiff-client brought a malpractice claim against the law firm for its negligence in drafting the plaintiff's right of first refusal for property the plaintiff leased when plaintiff's lessor refused its offer to purchase the property. 276 Ga. App. 652, 624 S.E.2d 157 (2005). The lease agreement only gave the plaintiff a right of first refusal when it obtained an acceptable offer to purchase the property. Although the lessor placed the property on the market and entertained offers, it withdrew the property from the market, so it never obtained an acceptable offer to trigger the right. Id. at 654. Furthermore, it was not required to sell the property to plaintiff.

**N. Proximate Cause In Merger Negotiations.**

The majority shareholder, Goldman, of a company, DPT, did not succeed in a legal malpractice action where he alleged negligence and breach of fiduciary duties of the attorneys who represented DPT in merger negotiations. Goldman v. Bracewell & Giuliani, 183 Fed Appx. 873, 2006 WL 1559758 (11<sup>th</sup> Cir. 2006). The Court of Appeals affirmed the trial court's finding that Goldman did not demonstrate that the law firm's

negligence proximately resulted in any loss to him. Id. The purchasing company had sought damages from Goldman and DPT for their breach of certain warranties about DPT made prior to the sale. The trial court found that it was only speculation that some other company would have purchased DPT for an amount greater than the purchase price minus the damages the purchasing company recovered. Goldman v. Bracewell & Guiliani, 2006 U.S. Dist. LEXIS 23503 (2005).

**O. Expert Testimony As To Proximate Cause.**

In Leibel v. Johnson, 291 Ga. 180, 728 S.E.2d 554 (2012) the Georgia Supreme Court held that the testimony of an expert lawyer may not be offered to prove proximate causation where the facts relating to proximate cause are within the understanding of lay jurors. In that case, Johnson retained Leibel to pursue an age and gender discrimination suit and later sued for malpractice, claiming that Leibel failed to present certain crucial evidence on Johnson's behalf. In the underlying case, Johnson's expert testified that the evidence in question would have "tipped the balance" in Johnson's favor. Leibel argued the expert testimony should have been excluded because it improperly usurped the role of the jury.

The Court of Appeals disagreed and held the testimony was admissible, but the Supreme Court reversed. The Court held that the jury in a legal malpractice case is required to independently evaluate the evidence on the merits in order to determine what a reasonable jury would have done in the underlying case had the lawyer complied with the standard of care, not to try to determine what the particular jury that heard the original case would have done. Therefore, since the issue of the merits of the underlying case was solely for the jury, it was improper for an expert lawyer to bolster

the client's case by expressing an opinion as to what the previous jury would have done. Nonetheless, given that Leibel is a relatively recent decision, it is so far unclear whether or not the testimony of an expert lawyer may be admitted regarding legal issues in the underlying case that are not within the knowledge of lay jurors, or which do not center entirely on the ultimate issue in the case. See Tidwell v. Hinton & Powell, 322 Ga. App. 486, 744 S.E.2d 87 (2013) (Court of Appeals excluded expert testimony in a legal malpractice action as to the proximate cause, damage, and collectability of an award in the underlying case in the event that the attorney had not been negligent).

## V.

### **PUNITIVE DAMAGES**

Generally, professional negligence will not subject an attorney to liability for punitive damages. There must be evidence showing willful misconduct, malice, fraud, wantonness, oppression or that entire want of care which would raise the presumption of conscious indifference to consequences. O.C.G.A. § 51-12-5.1. See Bolden v. Ruppenthal 286 Ga. App. 800, 650 S.E.2d 331 (2007), where the court discusses the proper utilization of bifurcation in a legal malpractice case. The following cases illustrate circumstances where punitives may be submitted to a jury.

#### **A. Conscious Indifference.**

The Georgia Court of Appeals held that punitive damages could be awarded in a legal malpractice action if the attorney acted with a conscious indifference to consequences with regard to this client's rights. Read v. Benedict, 200 Ga. App. 4, 406 S.E.2d 488 (1991). The defendant attorney was asked to close the sale of a home owned by the plaintiff's mother. Since there was "some evidence" that the attorney

entered into an attorney-client relationship both with the lending institution and with the plaintiff, creating a clear-cut conflict of interest, the court ruled that the trial court should have allowed the jury to decide the issue of punitive damages. See also Home Insurance Co. v. Wynn, 229 Ga. App. 220, 493 S.E.2d 622 (1997) (holding that the jury was authorized to conclude that punitive damages were appropriate on plaintiff's legal malpractice in light of the defendant attorney's conscious indifference to consequences), but see Duncan v. Klein, 313 Ga. App. 15, 720 S.E.2d 341 (2011)(holding that attorney's negligent research and erroneous advice did not give rise to a claim for punitive damages because there was no willful misconduct).

**B. Concealment Of Malpractice.**

An attorney's willful concealment of his failure to file a timely demand for jury trial, resulting in dismissal of the plaintiff's case, supports an award of punitive damages for fraud under O.C.G.A. § 51-12-5.1. Thomas v. White, 211 Ga. App. 140, 438 S.E.2d 366 (1993). In Thomas, the court found a jury issue on whether the attorneys "were fraudulently concealing from Thomas, by refusing to communicate with her and misstatements of the facts, that they had caused her case to be dismissed because they had failed to file the jury trial demand." 211 Ga. App. at 142.

**C. Conflict Of Interest.**

Punitive damages can be awarded in a legal malpractice action based on a conflict of interest. Peters v. Hyatt Legal Svcs., 220 Ga. App. 398, 469 S.E.2d 481 (1996). In Peters, the plaintiff paid the first installment of the total fee for an uncontested divorce. After plaintiff's wife subsequently paid the remaining balance, the defendant undertook representation of the wife without notifying the plaintiff and obtained a divorce for the

wife using an acknowledgment of service and a consent to final hearing, both of which contained forged signatures of the plaintiff. The court found that the following evidence of the defendant's entire want of care was sufficient for the jury to determine the evidence raised a presumption of consciousness indifference to consequences: The forged documents were at all times in the defendant's sole custody and control; the defendant represented adverse parties in the divorce proceeding without obtaining the informed consent of both; defendant's expert testified he would not allow an attorney in his office to represent both parties to a divorce; plaintiff's expert testified that the conduct was unethical, improper, illegal, and constituted breach of the attorney's agreement with the plaintiff; plaintiff never received any paperwork from defendant; when plaintiff inquired about the matter, he was told that his file had been lost; and defendant employed a notary who admitted she sometimes notarized documents without people signing in her presence in violation of the statutory duty imposed on notary publics. 220 Ga. App. at 400. The court noted that evidence of even a potential conflict of interest is sufficient to raise a jury issue on punitive damages in a legal malpractice case. *Id.* at 401 (citing Read v. Benedict, 200 Ga. App. 4, 6, 406 S.E.2d 488 (1991)). However, see Hopkinson v. Labovitz, 263 Ga. App. 702, 589 S.E.2d 255 (2003) where Court held that client failed to show that she suffered any damages from the attorney's alleged fraud.

## **VI.**

### **SETTLEMENT AUTHORITY**

Under Georgia law, an attorney of record has apparent authority to enter into an agreement on behalf of his client and the agreement is enforceable against the client by

other settling parties. Brumbelow v. Northern Propane Gas Co., 251 Ga. 674, 308 S.E.2d 544 (1983), appeal after remand, 169 Ga. App. 816, 315 S.E.2d 11 (1984). Such authority is determined by the contract between the attorney and client and by verbal or written instructions given the attorney by the client. Id. Absent express restrictions, the authority may be considered plenary unless it is limited by the client and the limitation is communicated to opposing parties. 251 Ga. at 675. But see City of Atlanta v. Black, 265 Ga. 425, 457 S.E.2d 551 (1995) (holding that Brumbelow is not applicable to public sector attorneys.). A number of recent cases have dealt with issues of apparent authority of attorneys to bind their clients. See e.g. Stephens v. Alan V. Mock Const. Co., Inc., 690 S.E.2d 225 (2010).

**A. Unauthorized Settlement Enforceable.**

In spite of a plaintiff's claim that he made it expressly clear to opposing counsel that he personally would have to provide consent to any settlement agreement, a settlement agreement between counsel was held enforceable. Tranakos v. Miller, 220 Ga. App. 829, 470 S.E.2d 440 (1996). Plaintiff argued that because he did not consent, there was no agreement. The court noted that oral settlement agreements made between counsel, if established, are enforceable. In this case, taped transcripts indicated there was an agreement as to all counts and a sum certain for each claimant. Further, when plaintiff's counsel acted on his behalf, he believed he had received settlement authority from plaintiff and had been in telephone contact with the client. The fact that plaintiff later had a change of heart was irrelevant as to whether, on the date of the agreement, his attorney had settlement authority. The court stated "from the prospective of the opposing party, in the absence of knowledge of express

restrictions on another attorney's authority, the opposing party may deal with the attorney as if with the client, and the client will be bound by the acts of the attorney within the scope of his apparent authority. The client's remedy, where there have been restrictions not communicated to the opposing party, is against the attorney who oversteps the bounds of his agency, not against the third-party." 220 Ga. App. at 834.

See also Penny Profit Foods, Inc. v. McMullen, 214 Ga. App. 740, 448 S.E.2d 787 (1994) (affirming ability of attorney to bind client to settlement agreement where attorney lacks authority to settle); Ballard v. Williams, 223 Ga. App. 1, 476 S.E.2d 783 (1996); Green v. Lanford, 222 Ga. App. 480, 474 S.E.2d 681 (1996); but see Omni Builders Risk, Inc. v. Bennett, 313 Ga. App. 358, 721 S.E.2d 563 (2011), in which Court found that the attorney had no apparent authority to bind his client by signing a settlement agreement at mediation where the agreement in question was drafted so as to also require client's signature, but client stormed out of the mediation without signing the agreement. See also Mori Lee, LLC v. Just Scott Designs, Inc., 325 Ga. App. 625, 754 S.E.2d 616 (2014) in which the Court of Appeals held that ambiguities regarding the scope of the attorney's authority to enter into the type of agreement at issue raised a fact issue.

#### **B. Apparent Authority Of Corporate Attorney.**

In a case of first impression, the Court of Appeals held that an attorney for a corporation does not, by that fact, become the attorney for the officers of the corporation in their personal capacity, and cannot, by that fact, bind the officers personally for the debts of the corporation. Addley v. Beizer, 205 Ga. App. 714, 423 S.E.2d 398 (1992). When an attorney purports to bind an alleged client personally for

the debt of another client, the party dealing with that attorney must inquire into the actual authority of the attorney. 205 Ga. App. at 716. The rule that an attorney has apparent authority for his client which is "plenary" from the perspective of an opposing party applies only to an attorney of record for a particular client who is actually authorized to represent that client in the formal legal proceeding in which the third party seeks to bind him. 205 Ga. App. at 717. Generally, an "attorney's authority is limited to the particular purpose for which he was retained," and any reliance upon the attorney's apparent authority to do something on behalf of his principal (i.e. the client) must be "created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him. First American Title Ins. Co. v. DJ Mortg., LLC, 328 Ga. App. 249, 761 S.E.2d 811 (2014).

**C. Effect Of Unauthorized Settlement As Between Attorney And Client - Fee Forfeiture.**

An attorney may not take advantage of apparent authority principles as against his own client. Lewis v. Uselton, 202 Ga. App. 875, 416 S.E.2d 94 (1992), cert. denied, 202 Ga. App. 906 (1992). In Lewis, an attorney filed suit against his client to collect his contingent fee. The attorney had settled the plaintiff's claims for \$22,500.00, claiming he had full settlement authority by virtue of an employment contract providing him with "full power and authority to settle, compromise or take such action as he might deem proper." The client filed a counterclaim for legal malpractice, contending that he

had instructed the attorney not to settle the case for less than the policy limits of \$50,000.00.

The Court of Appeals affirmed the denial of the attorney's motion for summary judgment. The court held that "an attorney may not settle or compromise his client's claim, defense or property without obtaining 'special authority,' that is, without consulting the client as to a specific offer of settlement when it is made." 202 Ga. App. at 878 (emphasis in original). The court went on to state that the burden is on the attorney to prove that he had authority to settle the case "unequivocally." 202 Ga. App. at 879. Moreover, the language of the legal employment contract did not give the attorney the right to settle for whatever amount he deemed proper, but only to settle for an amount approved by the client.

In addition, the fact that the attorney was entitled to a 40% contingent fee did not make him "a 40% partner" with the plaintiff. The court rejected the attorney's assertion of proprietary rights in the client's claims as "inimical to the law" and "strictly forbidden by the Ethical Regulations of the State Bar Standard 31 and DR 5-103(A)(2)." 202 Ga. App. at 881. Accordingly, the court affirmed the denial of the attorney's motion for summary judgment. On its return to the Appellate Court, it was determined that the attorney's violation of the client's instructions caused a forfeiture of "all right to compensation." Lewis v. Uselton, 224 Ga. App. 428, 480 S.E.2d 856 (1997).

#### **D. Agreement Between Counsel For Parties To Extend Time.**

Parties must comply with the Civil Practice Act with respect to the extension of time for filing pleadings. In Roberson v. Gnann, 235 Ga. App. 112, 508 S.E.2d 480 (1999), the defendant, an attorney sued for malpractice, alleged that a default judgment

entered against the Client was wrongfully entered because the parties had informally agreed to delay answering of the complaint until the conclusion of settlement negotiations. Id. at 113. The court rejected this argument stating that the agreement was not formalized, was not filed with the court, and thus would not prevent an automatic default. The court noted that “[a] request for an extension of time governed by the CPA must be made before the expiration of the original period prescribed by the statute (O.C.G.A. § 9-11-6(b)), and by written stipulation of counsel filed in the action. A private agreement between counsel extending time to file pleadings is not binding except when in compliance with this code section and it is filed with the court.” Id. at 114.

## **VII.**

### **BREACH OF FIDUCIARY DUTY**

#### **A. Lawyer’s Breach Of Fiduciary Duty To Client.**

##### **1. Georgia**

In Georgia, an attorney owes a fiduciary duty to his client which arises from the attorney-client relationship. Tante v. Herring, 264 Ga. 694, 453 S.E.2d 686 (1994). As such, attorneys have “fiduciary duties to be loyal to the client, to exercise the utmost good faith to him, to apply the attorney’s best skill, zeal and diligence in representing the client and to avoid interests and actions that are incompatible with the client’s interests.” Nelson & Hill, P.A. v. Wood, 245 Ga. App. 60, 67, 537 S.E.2d 670, 676-677 (2000). Accordingly, the breach of a fiduciary duty is actionable. Spears v. Mack & Bernstein, P.C., 227 Ga. App. 743, 490 S.E.2d 463 (1997). Moreover, a breach of fiduciary duty claim should not be confused with a legal malpractice claim. Former

Georgia State University Law Professor William A. Gregory best describes the difference of the two claims by stating, “a breach of fiduciary duty connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.” William A. Gregory, The Fiduciary Duty of Care: A Perversion of Words, 38 Akron L. Rev. 181 (2004).

In Tunsil v. Jackson, 248 Ga. App. 496, 546 S.E.2d 875 (2001), the attorneys/defendants appealed from a verdict against them in a legal malpractice and breach of fiduciary duty case stemming from their representation of a wrongful death case. The defendants, relying in part on Florida law, failed to file a complaint within the time allotted under the statute of limitations. Later, they failed to reply to a motion for partial summary judgment, failed to provide timely responses to discovery requests, and failed to file a consolidated pre-trial order by a court specified date, which got the wrongful death claim dismissed on the merits. Then, they failed to appeal the subsequent dismissal within thirty days. All the while, the defendants did not inform their client that the case was dismissed and misled their client by painting a dismal picture of the merits of the case. Finally, the defendants refused to provide him with a copy of his file. The Court of Appeals affirmed the trial court’s decision that rejected the defendants’ contentions (1) that the underlying wrongful death action lacked merit, (2) that fiduciary duty was not breached because the plaintiff was eventually informed of the dismissal, and (3) that the trial court erred in denying their motion for a directed verdict on punitive damages.

Even an attorney serving as an escrow agent has a fiduciary duty. In Crosby v. Kendall, 247 Ga. App. 843, 545 S.E.2d 385 (2001), the court held that an attorney breached his duty as an escrow agent when he violated the escrow instructions. The attorney repeatedly failed to perform six specified acts while acting as an escrow agent for a series of loan transactions, involving a party with whom he had a prior attorney-client relationship. The court declined to address whether the fiduciary duty an escrow agent owes to a principal encompasses the standards for professional conduct when the agent is a practicing attorney.

Nelson & Hill v. Wood, 245 Ga. App. 60, 537 S.E.2d 670 (2000), is a case which involved a fee dispute between attorneys and client after attorneys settled client's federal discrimination claim. Attorneys had a written fee contract with client for the EEOC portion of the claim, but an unexecuted contingency contract for the trial portion. After winning a verdict at trial in federal court, attorneys filed for reasonable attorneys' fees under federal law and were awarded a sum certain from defendants. However, the 40% contingency amount in the contract was greater than the amount recovered from defendants through the court award, thus attorneys sought to obtain the 40% amount. The client disputed that an agreement had been reached and refused to accept the disbursement.

The attorneys filed suit against client for quantum meruit. Likewise, the client counterclaimed for breach of fiduciary duty alleging that the attorneys falsely asserted they were entitled to a 40% contingency fee under contract; the attorneys refused to turn over all proceeds exceeding the federal court award; and they initiated a frivolous breach of contract suit, etc. Thus, the counterclaim sounded in breach of fiduciary

duty. The Court ultimately found that the attorneys did not have an enforceable fee contract with client for the 40% contingency, and the attorneys were only entitled to the amount awarded against defendant by the previous federal court. However, the Court found against the client on the breach of fiduciary duty claim(s) based upon the fact that the attorneys properly disbursed the amount to client as to which there was no dispute, deposited the remainder in an escrow account and did not assert a frivolous claim for quantum meruit.

In Owens v. McGee & Oxford, 238 Ga. App. 497, 518 S.E.2d 699 (1999), a law firm sought to collect from a previous client on fees that were past due. The client counterclaimed. The case was presented to a jury, which resulted in the law firm's favor. However, the client had moved for a directed verdict that was denied. On appeal, the client asserted that the trial court erred on denying the motion for directed verdict. Two claims of breach of fiduciary duty are discussed: first, it was the contention that charging \$.25 per photocopy was a breach of fiduciary duty as the client proffered an expert that testified that this was "probably unreasonable." The attorney testified that it was reasonable. The court found that this created a jury issue on this subject; and therefore, the trial court did not err on denying the client's motion. Second, the client argued that the law firm's withdrawal from the case (when it was not getting paid) was a breach of its fiduciary duty. The attorney, however, testified to the work that was completed to preserve any issues for the client, after discussing it with the client. Similarly, the court concluded that this also was an issue for jury resolution; and therefore, the trial court did not err by denying the client's motion.

In Tante v. Herring, 264 Ga. 694, 453 S.E.2d 686 (1994), the Supreme Court held that because the husband-wife plaintiffs had a viable claim against their attorney for damages for breach of fiduciary duty based upon the attorney's misuse of information to engage wife client in sexual relations. The attorney was a fiduciary with regard to the confidential information provided to him by his client just as he would have been a fiduciary with regard to money or other property entrusted to him by a client. The court held that the Herrings may pursue their claim for damages resulting from Tante's breach of that fiduciary duty. Similarly, the Court of Appeals in Traub v. Washington, 264 Ga. App. 541, 591 S.E.2d 382 (2003), found that the Plaintiffs had a viable claim for breach of fiduciary duty for using confidential information against the client.

However, in McMann v. Mockler, 233 Ga. App. 279, 503 S.E.2d 894 (1998), the Georgia Court of Appeals held that a claim for breach of fiduciary duty can be merely duplicative of a malpractice claim. In McMann, the plaintiff filed suit against the defendant attorney for failing to file an appeal from a denial of plaintiff's worker's compensation claim. The Court of Appeals noted that the cause of action for legal malpractice arises because the law imposes upon attorneys a duty to act with a certain degree of skill in performing their contractual duties to their clients. "Accordingly, the trial court correctly concluded that [plaintiff's] claims for breach of contract, breach of implied duty of good faith and fair dealing, and breach of fiduciary duty were merely duplications of her malpractice complaint." (Emphasis provided). In accord, Griffin v. Fowler, 260 Ga. App. 443, 579 S.E.2d 848 (2003).

Subsequently, in Both v. Frantz, 278 Ga. App. 556, 629 S.E.2d 427 (2006), a wife in a divorce action had the right to plead breach of fiduciary duty as an alternative

theory, should the jury find that no attorney-client relationship existed. Here, to the contrary, her fiduciary duty claim was not “merely duplicative of her legal malpractice claim.” Id. at 559. The court found that she should be able to present her theory, that the law firm owed her a fiduciary duty as it was an executor and fiduciary under her will and the family trust, to a jury. Id. at 559.

## 2. Other Jurisdictions

Such claims for breach of fiduciary duty, as opposed to claims for legal malpractice, are becoming more prevalent, and the courts of other jurisdictions have approved them. For example, in Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537 (2d Cir. 1994), the court stated that lawyers occupy a "unique position of trust and confidence" toward clients. Id. at 543. On appeal, Milbank argued that even if the law firm did breach a duty owed to its client, no harm was caused to her. Id. at 542. This causation argument was rejected by the Second Circuit. The court noted that "breaches of a fiduciary relationship in any context comprise a special breed of cases that often loosen normally stringent requirements of causation and damages." Id. at 543. Accordingly, all that the plaintiff was required to show was that Milbank's conduct was at least a substantial factor in preventing the plaintiff from entering into the deal at the heart of the matter. Id. But see Sheehy v. New Century Mortg. Corp., 690 F.Supp.2d 51 (E.D.N.Y., 2010.), quoting Nordwind v. Rowland, 584 F.3d 420, 433 (2d Cir.2009) for proposition that New York courts may now require “but for” and proximate causation rather than applying the more lenient “substantial factor” test.

In Estate of Joseph Re v. Kornstein, Veisz & Wexler, 958 F. Supp. 907 (S.D. N.Y. 1997), Mr. Re contacted the defendant law firm to represent him an action against Bear

Stearns, his former partnership. Mr. Re concluded that the partnership removed him from their ranks because of a desire to deprive him of the financial benefits of participating in Bear Stearns subsequent public offering. Defendant Wexler accepted Mr. Re's decision to proceed with lawsuit, although he informed Mr. Re that he was unlikely to succeed in any action against his former colleagues. Bear Stearns was represented by its corporate counsel, Paul Weiss. After considerable discovery, arbitration took place between the parties. Shortly thereafter, the arbitrator ruled against Mr. Re. Mr. Re then commenced an action against the defendant law firm alleging, among other things, breach of fiduciary duty. The United States District Court for the Southern District of New York denied the defendant's motion for summary judgment as to the alleged breach of fiduciary duty. The Court held that to prevail on a claim of breach of fiduciary duty, the plaintiff must demonstrate only conflict of interest which amounted to a "substantial factor" in his loss at arbitration. *Id.* at 924. The Court found troubling the fact that there was evidence that certain partners in the defendant law firm had worked as associates at Paul Weiss' law firm at various times between 1973 and 1981. In addition, after leaving Paul Weiss, the defendants had approximately a dozen cases referred to them from their former firm. The District Court held that a jury could well conclude that this volume of referrals could have affected the defendant's judgment in any action involving Paul Weiss or that it might have left Paul Weiss in a position to exert considerable influence over defendants. The Court specifically noted that an action for breach of fiduciary duty is a prophylactic rule intended to remove all incentive to breach - not simply to compensate for damages in the event of breach. The Court held that although there was insufficient evidence to

establish the "but-for" causation necessary for a legal malpractice claim, the "substantial factor" standard (prophylactic in nature) invited a more generous evaluation of plaintiff's claims and required the Court to deny the defendant's motion for summary judgment. "Though Mr. Re's case was perhaps unlikely to succeed from the outset, it is plausible that a jury would conclude that the defendants' failure to pursue that case vigorously was a 'substantial factor' in Mr. Re's ultimate defeat." Id. at 928.

In Miller v. Byrne, 916 P.2d 566 (Colo. Ct. App. 1995), the attorneys were sued for breach of fiduciary duty and legal malpractice stemming from an allegedly wrongful rejection of a settlement offer and failure to advise the clients of a policy limits settlement offer tendered by the underlying plaintiff. The trial court dismissed the negligence claim against the attorneys as barred by the statute of limitations but allowed presentation of the breach of fiduciary duty claim to a jury. The jury returned a verdict against the attorneys for \$705,000.

An appeal followed based, in part, upon allegedly improper jury instructions. The attorneys contended that the trial court erred in not instructing the jury on the elements of a "case within a case," even though the malpractice claim had been dismissed prior to trial. The appellate court agreed and reversed on this point, remanding for a new trial. The court recognized that when an action for legal malpractice is predicated upon an error in handling an underlying matter, the claim requires proof that the lawyer has failed to exercise reasonable care and also that the plaintiff should have been successful in the underlying action had the attorneys performed properly. In this case, however, the claim was based upon two underlying issues: (1) would there have been a settlement of the wrongful death claim asserted by

the plaintiff if the attorneys had communicated the settlement offer, and (2) if so, what effect is created by the failure of the settlement, or, in the alternative, if not, whether the plaintiff should have prevailed if the wrongful death case had proceeded to trial, and in what amount would a verdict have been entered. Accordingly, the plaintiffs in this case were required to prove not only that there should have been a settlement of the wrongful death claim but also that the underlying plaintiff should have won the underlying case and the amount she should have recovered. The jury should have been correspondingly instructed as to the underlying case.

The court specifically noted that "[t]his holding is not affected by the fact that the claims asserted against attorneys were framed in terms of breach of fiduciary duty. Some breach of fiduciary duty claims, such as those here, are basically negligence claims . . . often requiring the plaintiff to establish identical elements that must be established by a plaintiff in negligence actions." *Id.* (citing Martinez v. Badis, 842 P.2d 245, 252 (Colo. 1992)).

California courts have also recognized a claim for breach of fiduciary duty separate and distinct from a cause of action for legal malpractice. Stanley v. Richmond, 35 Cal. App. 4th 1070, 41 Cal. Rptr. 2d 768 (1995). The issue presented in this case was whether the appellant had presented sufficient evidence to support a *prima facie* claim of breach of fiduciary duty, professional negligence, and/or breach of contract. In finding that the client's expert testimony was sufficient to establish both the duty and breach elements for a cause of action for breach of fiduciary duty, the court noted that "[a] breach of fiduciary duty is a species of tort distinct from a cause of action for professional negligence." 35 Cal. App. 4th at 1086. The elements of a cause of

action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach. The court found that the scope of an attorney's fiduciary duty may be determined as a matter of law based upon the Rules of Professional Conduct which, along with statutes and general principles relating to other fiduciary relationships, "all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client." Id. Whether an attorney has breached a fiduciary duty is considered a question of fact; thus, expert testimony is not required, but is admissible to establish the duty and breach elements of a cause of action for breach of fiduciary duty where the attorney conduct is a matter beyond common knowledge. Id. at 1087.

In Stanley, the defendant entered into an agreement to go into law practice with opposing counsel during the pendency of the case. The court found that, at a minimum, the defendant was required to make full and timely disclosure of the extent of the relationship with opposing counsel and to obtain the plaintiff's intelligent, informed consent to the dual representation. 35 Cal. App. 4th at 1090. The plaintiff testified that the defendant concealed from her the fact that she had made a commitment to join forces with opposing counsel, and that if she had known she would have fired the defendant. Furthermore, there was evidence to show that the defendant's personal interests in joining with opposing counsel as law partners before the plaintiff's case could be resolved actually conflicted with her duty to obtain for her client a reasonable settlement to the outstanding property division issues in the divorce action.

Moreover, there was evidence that the defendant placed undue pressure on the plaintiff to accept a settlement that was significantly altered in the late stages of the

parties' negotiations without adequate legal research or consideration of adverse consequences to the plaintiff. Finally, there was evidence that the defendant forced the appellant to remove all references to her conflict of interest in a motion filed for relief from the judgment entered on the property settlement. Under these circumstances, the court found that a reasonable trier of fact could find that the defendant had violated her fiduciary duties to the plaintiff and allowed the case to proceed. See also Mosier v. Southern California Physicians Insurance Exchange, 63 Cal. App.4th 1022, 74 Cal. Rptr.2d 550 (1998) (holding that while the plaintiff did not have a case of legal malpractice in the classical sense, plaintiff did state a claim for breach of fiduciary duty, a concept which is separate and distinct from professional negligence but which still comprises legal malpractice).

In Hendry v. Pelland, 73 F.3d 397 (D.C. Cir. 1996), the court concluded that clients suing their attorney for breach of fiduciary duty of loyalty and seeking disgorgement of legal fees, as opposed to compensatory damages, as their sole remedy need only prove that their attorney breached that duty, not that the breach caused them injury. Id. at 402. The court noted that forfeiture of legal fees serves several different purposes: "It deters attorney's misconduct, a goal worth furthering regardless of whether a particular client has been harmed. . . . It also fulfills a long standing and fundamental principle of equity - that fiduciaries should not profit from their disloyalty. . . . Unlike other forms of compensatory damages, however, forfeiture reflects not the harm clients suffer from the tainted representation, but the decreased value of the representation itself. Because of breach of the duty of loyalty diminishes the value of the attorney's representation as a matter of law, some degree of forfeiture is thus

appropriate without further proof of injury." Id. In Hendry, the court also noted that even courts which occasionally do require a showing of injury and causation in claims seeking forfeiture of legal fees have stated that it is not necessary when the client's claim is based, as in Hendry, on a breach of a duty of loyalty. Id.

In Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Cotkin, 247 Conn. 48 (1998), the Supreme Court of Connecticut held that professional negligence alone does not automatically give rise to a claim for a breach of fiduciary duty. "A fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of who has superior knowledge, skill or expertise and is under a duty to represent the interests of the other." Id. at 56. Thus, the Court held that professional negligence implicates a duty of care, while breach of a fiduciary duty implicates a duty of loyalty and honesty. Id. at 57.

There are other states, however, which appear to treat the claim for breach of fiduciary as one for legal malpractice. For example, in Donahue v. Shughart, Thomson & Kilroy, P.C., 900 S.W.2d 624 (Mo. 1995), the plaintiffs alleged that because of their attorney's malpractice, an attempted testamentary transfer had failed. The court concluded that facts pleaded were sufficient to assert a breach of legal duty and to state a cause of action in lawyer malpractice actions. However, the court found that the counts based upon breach of fiduciary relationship were properly dismissed since the fiduciary relationship, if one existed, arose out of the attorney-client relationship. The court stated that "the specific breaches depended upon the existence of attorney negligence, not on the breach of a trust." 900 S.W.2d 624 at 629. The court went on to state that "any breach by [the defendant] and the law firm of a fiduciary duty to the

[testator] is . . . a result of the defendant attorney's negligent performance of professional services. That alleged breach is no more than a claim for attorney malpractice, and must be treated as such." Id. at 630. In this case, it was not alleged that the attorney failed to follow the testator's directions under a trust, but rather that the attorney and the law firm negligently failed to draft documents and advise the testator in order to properly effectuate the intended transfers. See also Brandecker v. Morris, 963 S.W.2d 461 (Mo. App. 1998) (defining legal malpractice as any misconduct or unreasonable lack of skill or fidelity or the breach of fiduciary duties of loyalty and confidentiality).

In addition, in Bell v. Clark, 653 N.E.2d 483 (Ind. App. 1995), a client recovered compensatory and punitive damages against his attorney for legal malpractice, breach of fiduciary duties and libel based upon the lawyer's conflict of interest. The court addressed the client's claims for malpractice and breach of fiduciary duty as a single claim. The court acknowledged that the lawyer's representation of an interest adverse to his client can constitute malpractice because such action taken against clients' interests constitutes the failure to exercise the knowledge, skill and ability ordinarily possessed and exercised by lawyers. The court further stated that "[i]t is a basic principle of professional conduct that an attorney must faithfully, honestly, and consistently represent the interests and protect the rights of his client, and that he is bound to discharge his duties to his client with the strictest fidelity, to observe the highest and utmost good faith, and to inform his client promptly of any known information important to him. [citations omitted]. A lawyer commits a breach of trust according to the very essence of the attorney-client relationship when he takes a

position adverse to that of his client, or former client, in a business transaction." Id. In this case, the record disclosed numerous conflicts of interest in the attorney's representation, and that the attorney was motivated to take a position adverse to his client. Based on this, the judgment was affirmed.

In Sheehy v. New Century Mortg. Corp., 690 F.Supp.2d 51 (E.D.N.Y. 2010), the Eastern District of New York addressed a lawyer's conflict of interest in combination with a number of breaches of the lawyer's fiduciary duty in a context that became increasingly common in the wake of the real estate market crash. In Sheehy, various parties to a series of real estate transactions induced the plaintiff to invest in the real estate deals through fraud, and referred plaintiff to a lawyer whose loyalty was to the other investors, rather than plaintiff. The lawyer then made a series of false representations and omitted key facts in advising plaintiff to agree to contractual terms that were favorable to the other investors and unfavorable to plaintiff. Based on these facts, the court denied the defendant lawyer's motion for summary judgment as to plaintiff's claims for breach of fiduciary duty, finding that "[f]alse statements or material omissions by an attorney to a client clearly breach the attorney's fiduciary duties, particularly where those false statements and omissions further conflicting interests." The court further held (as would be consistent with Georgia law) that expert testimony is not necessary to establish the standard of care in support of a claim that an attorney's intentional acts breached his fiduciary duties to his client. See Crosby v. Pittman, 305 Ga. App. 639, 700 S.E.2d 629 (2010).

**B. Lawyer's Breach Of Fiduciary Duty To Another Lawyer.**

Recently, many cases that have dealt with the issue of an attorney's breach of fiduciary duty have been in cases where an attorney leaves a firm to join a competing firm (see, *Shutting Out Former Partners*, January 1999 A.B.A.J. 32). In particular, at issue has been the validity of non-compete clauses in partnership and employment agreements. Regarding those agreements, the issues have been whether firms can withhold money from departing lawyers and collect damages for any breach of fiduciary duties to the remaining partners.

Illinois seems to be leading other states with respect to setting precedent for a departing lawyer's breach of fiduciary duty to his previous law firm. In *Dowd & Dowd v. Gleason*, 693 N.E.2d 358 (1998), the issue was whether departing partners could solicit former clients in light of non-complete clauses and, further, whether such solicitation was a breach of the departing partner's fiduciary duties to their former partners. The departing partners contended that the employment agreement containing the non-compete clause violated Rule 5.6 of the Illinois Code of Professional Ethics which prohibits agreements that bar lawyers from practicing law for a specified time or within a certain geographic area after leaving a law firm.

Although this Rule had not yet been adopted in Illinois, the Illinois Supreme Court applied Rule 5.6 retroactively finding that it barred attorneys from entering into non-compete agreements. The Court, however, allowed the remaining partners to sue the departing partners for a breach of fiduciary duty. Most courts have not allowed firms to withhold money such as based upon a non-complete clause. See, A.B.A.J. at 33.

A minority of courts, however, have allowed firms to condition payments of funds upon a lawyer's agreement to not solicit firm clients for a limited period of time. The rationale is that the firms are attaching economic consequences for the lawyer's departure and not restricting their ability to practice law elsewhere. A.B.A.J. at 33.

## VIII.

### MISCELLANEOUS

#### A. Experts.

In Thompson v. Ezor, 272 Ga. 849, 536 S.E.2d 749 (2000), the Georgia Supreme Court held that the self-contradictory testimony rule does not apply to the testimony of non-party expert witnesses. See also Naik v. Booker, 303 Ga. App. 282, 692 S.E.2d 855 (2010). Moreover, an expert whose only connection to litigation is to provide an affidavit pursuant to O.C.G.A. § 9-11-9.1 is not subject to claims for abusive litigation. Kirsch v. Meredith, 211 Ga. App. 823, 440 S.E.2d 702 (1994). Also, as noted above (§ IV(O)), Johnson v. Leibel, 291 Ga. 180, 728 S.E.2d 554 (2012) recently held that a lawyer expert cannot bolster the plaintiff-client's case on the issue of proximate causation by expressing an opinion as the merits of the ultimate issue in the underlying case.

#### B. Attorney's Fees For Attorney's Defense Of Himself.

The personal time spent by an attorney in defense of a legal malpractice claim is not a compensable component of an award of attorney's fees under O.C.G.A. § 9-15-14. Moore v. Harris, 201 Ga. App. 248, 410 S.E.2d 804 (1991). However, the attorneys in Moore were entitled to recover attorney's fees and costs incurred in defending a malpractice action brought against them by non-clients since there was a complete

absence of any justiciable issue of law or fact in the case. 201 Ga. App. at 250. But see Harkleroad v. Stringer, 231 Ga. App. 464, 499 S.E.2d 379 (1998) (distinguishing Moore and holding that law firm may be awarded attorney's fees under O.C.G.A. § 9-15-14 for legal services provided to themselves because the attorneys were seeking reimbursement for time and expertise spent doing legal work and not for time spent and knowledge conveyed in the capacity of a client). But see In re Adkins, 277 Ga. 757, 596 S.E.2d 1 (2004) (holding that disbarment was appropriate for an attorney who, among other things, billed clients for “legal services” for time spent responding to bar complaints and filing liens against the clients).

### **C. Judgmental Immunity.**

Attorneys cannot be held liable for tactical decisions made during the course of litigation in the good faith exercise of professional judgment. Hudson v. Windholz, 202 Ga. App. 882, 416 S.E.2d 120 (1992); Allen Decorating, Inc. v. Oxendine, 225 Ga. App. 84, 483 S.E.2d 298 (1997); Mosera v. Davis, 306 Ga. App. 226, 701 S.E.2d 864 (2010). However, “when conflicts of interest are raised and when judgmental immunity is also raised as a defense, a jury question as to judgmental immunity arises, because proof of the existence of a conflict also gives rise to the reasonable inference that such conflict influenced the exercise of discretion, requiring the denial of the motion for summary judgment and allowing the jury to resolve such issues.” Paul v. Smith, Gambrell & Russell, 267 Ga. App. 107, 599 S.E.2d 206 (2004).

If the law is not well settled liability will not be found. In Harrison v. Deming, 246 Ga. App. 471, 540 S.E.2d 407 (2000), the court found that failure to comply with O.C.G.A. § 34-9-100 did not support an action for malpractice. The claim arose from a

worker's compensation case in which the plaintiff lost her right to a hearing because her attorneys failed to pursue the issue in a timely manner postponing her hearing seven times and then withdrawing from her case. The court refused to hold the attorney's liable because it found that the relevant statute was subject to more than one reasonable interpretation and therefore not well settled. In accord, Jones, Day, Reavis & Pogue v. American Envirecycle, Inc., 217 Ga. App. 80, 456 S.E.2d 264 (1995). See Chatham Orthopaedic Surgery Center, LLC et al. v. White, 283 Ga. App. 10, 640 S.E.2d 633 (2006), (court granted summary judgment in favor of the attorney because the law on the issue was not settled, clear, or widely recognized at the time of the original lawsuit and accordingly, the attorney was insulated from liability).

Summary judgment may also be inappropriate where the legal experts for each side voice a legitimate disagreement as to what a reasonable lawyer might decide to do in a particular situation. Tucker v. Rogers involved a case where the defendant-attorney claimed that he missed the statute of limitations in a litigated matter because he could not locate or communicate with his client, and therefore did not have authority to proceed with the suit. 334 Ga.App. 58, 778 S.E.2d 795 (2015). The trial court awarded summary judgment *to the plaintiff-client* on the issue of liability, but the Georgia Court of Appeals reversed on this issue. The plaintiff's attorney expert opined that the defendant-lawyer had the authority to file the suit anyway "pursuant to the fee contract, and did not require further permission to file under Bar Rule 1.2(a), which provides that a lawyer is impliedly authorized to do what is necessary to effect the purpose of the engagement." Id. However, the defendant-lawyer's expert opined that the lawyer's efforts to contact his client put a burden on the client to respond, and that in the

absence of explicit authority from the client the expert “thought that the parties' fee agreement in this case did not authorize Tucker to file suit without Rogers' permission.” Id. The court held that “[t]he competing expert testimony regarding whether Tucker’s actions fell below the standard of care or not constitutes a genuine issue of material fact that must be resolved by a jury.” Id.

#### **D. Vicarious Liability For Shareholders Of Professional Corporation.**

The Court of Appeals has held that lawyers who practice in a professional corporation are not personally liable for the acts of other shareholders in their professional corporation. Henderson v. HSI Financial Svcs., Inc., 266 Ga. 844, 471 S.E.2d 885 (1996); see also Kent v. Mitchell 319 Ga.App. 115, 735 S.E.2d 110 (2012). In a decision overruling First Bank & Trust Co. v. Zagoria, 250 Ga. 844, 302 S.E.2d 674 (1983), the court in Henderson held that "lawyers may practice their profession as shareholders in a professional corporation with the same rights and responsibilities as shareholders of other professional corporations. Allowing lawyers to organize their practice in this particular form will not undermine professional conduct or leave the public unprotected. Lawyers practicing in a professional corporation still owe a duty to clients and remain personally liable to them for acts of professional negligence. In addition, the professional corporation is liable for the malpractice of its members to the extent of its corporate assets." 266 Ga. at 845. This decision overrules Zagoria to the extent that it stated that the court rather than legislature determined the ability of lawyers to insulate themselves from personal liability for the acts of their fellow shareholders.

**E. Contribution For Abusive Litigation.**

It has been the rule that where the client is sued for abusive litigation and a judgment is predicated on that theory, if the abusive litigation was the result of joint conduct between attorney and client, they are joint tortfeasors. Consequently, the client may seek contribution from the attorney, notwithstanding the fact that the third party did not. Rolleston v. Cherry, 226 Ga. App. 750, 487 S.E. 2d 354 (1997). It is unclear, as of yet, whether or not this analysis has been altered by the changes the Legislature made to O.C.G.A. § 51-12-33, the 2005 version of which has abolished the doctrine of joint and several liability in most tort cases.

**F. Notice Of Trial On Voice Mail.**

The presence of a message on an attorney's answering machine left after 5:00 p.m. informing the attorney that the case would be called for trial the next morning at 9:00 a.m. was not sufficient notice of a call to trial. In Thornton v. National American Ins. Co., 269 Ga. 518, 499 S.E.2d 894 (1998), the Georgia Supreme Court reversed a decision of the Georgia Court of Appeals which held that such notice was sufficient. While noting that the State Bar urges the adoption of a bright line rule that reasonable notice should be construed as 24 hours notice, or at a minimum, two business hours, the Georgia Supreme Court declined to establish such a rule. However, the Court noted that the better practice would be to provide notice within normal business hours of 9:00 a.m. to 5:00 p.m. and to provide at least two business hours' notice. Further, in order to constitute reasonable notice, greater notice may be required in certain situations, such as cases requiring parties or witnesses to travel from out of town.

### **G. Billing Records.**

In a suit over unpaid fees, the client counterclaimed to support a claim against the attorney, the client submitted an affidavit. The court found that the client's contentions were "eviscerated by the billing documents" that the lawyer sent to the client during the representation of the client. Lipton v. Warner, Mayoue & Bates, P.C., 228 Ga. App. 516, 492 S.E.2d 281 (1997). Similarly, in Hipes & Norton, P.C. v. Pye Automobile Sales of Chattanooga, Inc., the Court upheld summary judgment for a law firm who sued a client to collect an unpaid bill 254 Ga. App. 360, 562 S.E.2d 729 (2002) ("As in any suit on account for services rendered, after a lawyer presents evidence of the terms of the contract, the services provided and accepted, and the amount left unpaid, the burden in opposing summary judgment shifts to the client to point to specific evidence giving rise to a triable issue.") See also Burds v. Hipes, 329 Ga. App. 112, 763 S.E.2d 887 (2014). Compare Shepherd v. Greer, Klosic & Daugherty, 325 Ga. App. 188, 750 S.E.2d 463 (2014), in which the Court of Appeals held that an attorneys' contingency fee contract that contained a clause requiring client to pay for her lawyers' time at an hourly rate if she terminated the firm before the contingency arose was ambiguous as to whether she was also required to pay for time spent by paralegals.

### **H. Misdirected Email As Basis For Malpractice Liability.**

Bar associations in a number of states, including Arizona, Illinois and South Carolina, have issued opinions that lawyers may send unencrypted email messages to clients without breaching the ethical duty of confidentiality. Chanen, *"Return to Sender" Won't Cut It*, 84 Mar. A.B.A.J. 84 (1998). However, the opinions caution that email is still susceptible to interception, misdirection and attorney error that could give

rise to malpractice liability. Id. Lawyers should take precautionary measures including obtaining the client's consent to using e-mail after informing the client of the risks associated with the use of e-mail, not using the e-mail for communications involving extraordinarily sensitive matters that would be damaging to the client if disclosed to any outside party, and stating on e-mail messages that they are privileged communications. Id.

A recent Georgia decision indicates that the trial court in the underlying case may be able to undo some of the harm done by such a disclosure. In Alston & Bird, LLP v. Mellon Ventures II, L.P., 307 Ga. App. 640, 706 S.E.2d 652 (2010) the court stated that a party did not waive the attorney-client privilege by inadvertently disclosing privileged emails, and that the trial court had discretion to order the return of the privileged emails and prohibit the use of their contents at trial. Nonetheless, when sensitive information is inadvertently disclosed, it may not be possible to undo the harm done simply by excluding the inadvertently disclosed documents from being introduced as evidence at trial.

#### **I. Ownership Of Documents In A Legal File.**

In Swift, Currie, McGhee & Hiers v. Henry, 276 Ga. 571, 581 S.E.2d 37 (2003), the Georgia Supreme Court held that documents created by an attorney belong to the client who retained him. This reflects the majority view in jurisdictions that have confronted the issue. See, e.g., Resolution Trust Corp. v. H---, P.C., 128 F.R.D. 647 (N.D. Tex. 1989); In the Matter of Kaleidoscope, Inc., 15 B.R. 232 (Bankr. N.D. Ga. 1981); In the Matter of Sage Realty Corp. v. Proskauer, Rose, Goetz & Mendelsohn LLP., 91 N.Y.2d 30, 689 N.E.2d 879 (1997). A client is presumed entitled to discover any document

prepared by his attorney during the course of representation. The burden is then on the attorney to show good cause to rebut this presumption (e.g., where disclosure would violate a duty to a third party). The Court reasoned that the burden should be placed on the party in the better position to assess discoverability and, more importantly, that an attorney's fiduciary relationship with a client is highly dependent upon full, candid disclosure. Swift, Currie at 573.

**J. Attorney Liens On Client Property.**

An attorney's recovery of monetary damages for a client does not entitle the attorney to a lien against the client's home to recover fees. Gutter-Parker v. Pridgen, 268 Ga. App. 205, 601 S.E.2d 707 (2004). In Gutter-Parker, the superior court's dismissal of the attorney's lien against the client's home was not error when the lien was taken to recover fees in a breach of contract and negligent construction suit involving the client's home. Settlement of the case resulted in a payment of the purchase price plus additional monies by the construction company, and thus the fruit of the attorney's labor was monetary, and not the house itself.

Recently, in Outlaw v. Rye, 312 Ga. App. 579, 718 S.E.2d 905 (2012), the Court of Appeals held that the attorney's lien statute permits a lawyer to assert a statutory lien only against property recovered by the lawyer for her client. In that case, Outlaw represented Rye in a custody dispute with his ex-wife. Their fee agreement provided that she could assert a lien on Rye's property for unpaid fees. Rye failed to pay Outlaw, Outlaw filed an attorney's lien on Rye's real property, and Rye conveyed the interest in that property to his ex-wife. As the property was not recovered by Outlaw for Rye in the scope of the representation, the attorney's lien was invalid, because the statute

concerning attorney's fees is in derogation of the common law, it must be strictly construed. Language in the fee agreement stating otherwise cannot change the reading of the statute.

**K. Reciprocal Attorney Discipline.**

In a reciprocal disciplinary action, the Supreme Court found that the 90-day suspension in Georgia was an appropriate sanction for an attorney who had already been suspended for 90 days in Illinois for the attorney's neglect of a client matter and false denial of liability for the resulting default judgment. In the Matter of Spurgeon, 279 Ga. 309, 612 S.E.2d 794 (2005). Georgia Rule of Professional Conduct 9.4(b)(3) mandates the imposition of identical discipline to that imposed in the other jurisdiction unless certain circumstances exist, none of which existed in this case. Id.

**L. Former Attorney's Standing.**

In Clough v. Richelo, a client's former attorney lacked standing to assert a conflict of interest between the client and the client's new attorney. 274 Ga. App. 129, 616 S.E.2d 888 (2005). An attorney's assertion that the testimony of his former client's new attorney was necessary to his defense of a malpractice action brought by his former client was insufficient to establish the new attorney as a "necessary witness" for purposes of attorney disqualification. Id. at 135. The client's new attorney had not yet been deposed, so there was no proof of the substance of his testimony. He could not be a "necessary witness" because the former attorney's claim was based on pure speculation. Id. at 135-36.

**M. Legal Malpractice Action Property Of The Bankruptcy Estate.**

A property interest in a legal malpractice cause of action is defined by state law, and state law controls when malpractice action accrued, for purposes of determining whether the cause of action is part of the bankruptcy estate. Gingold v. Allen, 272 Ga. App. 653, 613 S.E.2d 173 (2005). If the cause of action accrues before the commencement of a bankruptcy case, then the cause of action is property of the bankruptcy estate and the trustee is the proper party to bring suit. See id. at 655. Here, the legal malpractice cause of action accrued prior to the bankruptcy case when the alleged negligent advice breached the attorney-client relationship. Id. at 655. Therefore, the bankruptcy estate and not the former client, was the real party in interest to prosecute the legal malpractice suit. Id. at 655-56; see also Witko v. Menotte, 374 F.3d 1040 (11th Cir. 2004) (on the other hand, the entry of an adverse judgment in the underlying divorce action did not become a legal malpractice claim of the debtor-husband's bankruptcy estate because it was entered several months after the commencement of bankruptcy case).

**N. Legal Fee Disputes.**

1. No forfeiture of legal fees earned.

In Cole v. Webb, the client hired the attorney as personal representative for his wife in a medical malpractice/wrongful death action, after which the client brought a claim of legal malpractice. 267 Ga. App. 174, 598 S.E.2d 886 (2004). The client alleged that the attorney should forfeit the legal fees paid to him for telling the client that he did not have to share the recovery in the underlying action with his children, contrary to the statutory standard of distribution. Id. at 175. The attorney and the client entered into a

settlement agreement, which they did not disclose to the jury. *Id.* at 176. Subsequently, the jury found that the attorney did not have to forfeit his legal fees he earned during his representation of the client, and set off the client's recovery by the amount already recovered from the attorney in the previous settlement. *Id.* at 176.

2. Quantum meruit in contingency fee contract.

In Doman v. Stapleton, the client, Doman retained his attorney to recover a judgment obtained against his former partner. 272 Ga. App. 114, 611 S.E.2d 673 (2005). The contract entered into was a contingency fee contract. When the attorney, Stapleton, withdrew from representing Mr. Doman, Doman contended that the withdrawal was unjustified, and therefore, he owed no legal fees. In a first arbitration proceeding, the arbitrator found that the attorney was justified in withdrawing and that the attorney could recover reasonable fees for an action in quantum meruit. *Id.* at 115. The attorney filed a demand for a second arbitration of his calculated legal fees, and his award for quantum meruit was confirmed. *Id.* at 116. On the client's appeal, the court confirmed the award, noting that its authority to review an arbitration award pursuant to a motion to vacate is very limited. *Id.* at 117. See also Durden v. Suggs, 271 Ga. App. 688, 610 S.E.2d 640 (2005)(in attorney fee dispute, court held that unless one of statutory grounds for vacating an arbitration award exists, the trial court reviewing the award is bound to confirm it).

Likewise, where a law firm that was hired by the lead counsel to serve as local counsel in a personal injury action, and which was fired by the client before the settlement of the action, was not entitled to half of the contingency fee recovered by lead counsel but could only recover in *quantum meruit* for the reasonable value of its

services. Kirschner & Venker v. Taylor & Martino, 277 Ga. App. 512, 627 S.E.2d 112 (2006). Notably, determining the reasonable value of an attorney's services rendered before his client discharged him is a task of the factfinder, whose finding will not be disturbed if there is any evidence to support it. Amstead v. McFarland, 287 Ga. App. 135, 650 S.E.2d 737 (2007). However, a claim for quantum meruit is not viable until the client's case is settled. Stoll v. Scarber, 287 Ga. App. 672, 652 S.E.2d 834 (2007); see also Woods v. Jones, 305 Ga. App. 349, 699 S.E.2d 567 (2010) (attorney's lien for attorney's fees on former client's contingency fee claim is not actionable until the client is able to recover).

In Tolson v. Sistrunk, 332 Ga.App. 324, 772 S.E.2d 416 (2015), the Court of Appeals further defined what constitutes *quantum meruit* in a fee dispute between attorneys. That case involved an attorney who had left her former law firm and taken a client with her. Once the client's case was decided, the attorney's former firm moved to enforce a lien and recover a portion of the attorney's fee for the work the firm had done on the case before the attorney and the client left the firm. The firm argued that in addition to compensation for their work, they should also receive additional compensation based on the value of "originating" the case, in other words for rainmaking. The Court of Appeals held that while the firm could recover the value of its work on the case, the amount awarded should not reflect any value for originating the case. "Origination or procurement of a case—in other words, rainmaking—is not a service by an attorney that confers value upon a client or that is rendered to or for the benefit of the client. 332 Ga.App. at 334, 772 S.E.2d at 424.

### 3. Fee Dispute Between Attorneys.

In the absence of a written fee agreement, where two attorneys worked together on shareholder litigation, the trial court ordered a fifty-fifty split of fees in a dispute between the two. Kilgore v. Sheetz, 268 Ga. App. 761, 603 S.E.2d 24 (2004). Lawyers who jointly undertake the representation of a client, without a contract as to the division of fees, share equally. Id. 769-70. However, the Georgia Court of Appeals held that where an attorney-client contract showed on its face that an attorney was intended to receive a portion of a contingent fee, he was entitled to bring an action on the contract as a third-party beneficiary. "While the third-party beneficiary need not be specifically named, the question is 'whether the parties' [to the contract] intention to benefit the third party is shown on the face of the contract." Furthermore, accepting the benefits from the third party can be a ratification of the contract. American Computer Technology, Inc. v. Hardwick, 274 Ga. App. 62, 616 S.E.2d 838 (2005).

#### **O. Ineffective Assistance Of Counsel.**

Counsel's failure to advise the defendant of the collateral consequences of his guilty plea is not a factor in determining whether or not a plea was intelligently entered. See Cornwell v. Kirwan, 270 Ga. App. 147, 606 S.E.2d 1 (2004). As a result, the failure of the client's habeas corpus counsel to argue that the client's trial counsel was ineffective, did not establish legal malpractice. Id.

#### **P. No contribution from title examiner in legal malpractice action.**

Many cases have held that an attorney can be held liable for the work of a non-lawyer title-examiner. See e.g. Centrust Mortgage Corp. v. Smith & Jenkins, 220 Ga. App. 394, 469 S.E.2d 466 (1996); Old Republic Nat'l Title Ins. Co. v. Attorney Title

Services, 299 Ga. App 6, 682 S.E.2d 134 (2009)(overruled on other grounds by Newell Recycling of Atlanta, Inc. v. Jordan Jones and Goulding, Inc., 288 Ga. 236, 703 S.E.2d 323 (2010)). The Georgia Court of Appeals recently ruled that an attorney who is sued based on the negligent work of a non-lawyer title examiner cannot bring a third party complaint for contribution or indemnity against the non-lawyer title examiner in the same action. The Court reasoned that “only [the attorney] can render a legal opinion on the status of title to property, and [the attorney] is directly responsible to his client for his opinion on the status of the title to the Property. Whether he bases that opinion on information supplied to him by non-attorneys or garners the information himself, [the attorney] is directly, rather than vicariously, liable for any claim of professional negligence arising out of the title examination.” Hines v. Holland, 334 Ga. App. 292, 297, 779 S.E.2d 63, 68 (2015).

**Q. Apportionment of fault in legal malpractice action.**

In 2005, the Georgia legislature changed O.C.G.A. § 51-12-33 in such a manner as to abolish the doctrine of joint and several liability in most tort cases, and the new version of the law establishes a procedure whereby a defendant can ask the jury to apportion fault to non-parties. Recently, the Court of Appeals held that this procedure applied in a legal malpractice case where the defendant attorneys had attempted to apportion fault to various non-parties that included both other lawyers and non-lawyers. Alston & Bird, LLP v. Hatcher Management Holdings, LLC 336 Ga.App. 527, 785 S.E.2d 541 (2016).

**R. Settlement of underlying case may sever proximate causation**

If a litigant settles an underlying litigated matter while still having viable claims or defenses, the settlement may preclude a subsequent legal malpractice lawsuit against the litigant's attorney, especially where the attorney who committed the alleged error is discharged and a subsequent attorney advises the litigant to settle. "In a case where a plaintiff's pending claims remain viable despite the attorney's alleged negligence, the plaintiff severs proximate causation by settling the case, an act which makes it impossible for his lawsuit to terminate in his favor." Duncan v. Klein, 313 Ga. App. 15, 20 (1), 720 SE2d 341(2011). A claim or defense is "viable" if "further litigation of that claim may lead to a favorable result as of the time prior counsel was dismissed from the case." White v. Rolley, 225 Ga.App. 467, 484 S.E.2d 83 (1997), citing Huntington v. Fishman, 212 Ga. App. 27, 441 S.E.2d 444 (1994). Recently, the Georgia Court of Appeals held that this doctrine may even apply where the attorney's negligence causes the client to lose on an evidentiary issue at trial, if the client could have won an appeal of the issue but instead chose to settle. Jim Tidwell Ford, Inc. v. Bashuk, 335 Ga. App. 668, 782 S.E.2d 721 (2016).

**IX.**

**ETHICS**

**A. Violation Of Code Of Professional Responsibility As Giving Rise To Cause Of Action.**

A client's allegation that his attorney charged excessive fees for legal services is insufficient to state a claim for professional malpractice, despite the fact that it may be a

violation of the Code of Professional Responsibility. Davis v. Findley, 262 Ga. 612, 422 S.E.2d 859 (1992).

**B. Use Of Ethics Violations In Legal Malpractice Actions.**

Pertinent Bar Rules may be relevant to the standard of care in a legal malpractice action. Allen v. Lefkoff, Duncan, Grimes & Dermer, 265 Ga. 374, 376, 453 S.E.2d 719 (1995). The Supreme Court, however, clarified this holding by finding that “in order to relate to the standard of care in a particular case, . . . a Bar Rule must be intended to protect a person in the plaintiff's position or be addressed to the particular harm suffered by the plaintiff.” Id. at 377. Thus, the Supreme Court reversed the Court of Appeals decision disallowing evidence of, reference to, or jury instruction on the defendant attorneys' alleged violation of provisions of the Code of Professional Responsibility.

On remand to the Court of Appeals, the court found that the trial court had not had the opportunity to make the mixed findings of fact and law, as required by the Supreme Court's decision expanding the applicable rule of law. Allen v. Lefkoff, Duncan, Grimes & Dermer, 217 Ga. App. 782, 458 S.E.2d 503 (1995). See also, Smith v. Haynsworth, 472 S.E.2d 612 (S.C. 1996); Sommers v. McKinney, 287 N.J. Super. 1, 670 A.2d 99 (1996).

The Court of Appeals, however, seems to have indicated a looser requirement that Bar Rules are, in fact, relevant to the standard of care. In Watkins & Watkins, P.C. v. Williams, 238 Ga. App. 646, 518 S.E.2d 704 (1999), the Court stated that the violation of two directory rules “was” evidence of professional negligence. See also Traub v. Washington, 264 Ga. App. 541, 591 S.E.2d 382 (2003)(“Although the violation of a

professional ethical standard, standing alone, cannot serve as a basis for a legal malpractice action, state bar rules are relevant to the standard of care in a legal malpractice action”).

**C. No Disqualification Of An Attorney Who Represents Himself Against Former Client.**

An attorney may exercise his constitutional right to represent himself, even though he has provided representation in the past to an opposing party. Johnston v. Aderhold, 216 Ga. App. 487, 455 S.E.2d 84 (1995). The court recognized that "although rules of professional conduct preclude attorneys from engaging in certain behavior considered unethical when they are exercising their privilege of representing others, such prohibitions do not necessarily apply when attorneys themselves are parties to litigation." 216 Ga. App. at 489. "The rules of disqualification of an attorney will not be mechanically applied; rather, we should look to the facts peculiar to each case in balancing the need to ensure ethical conduct on the part of lawyers appearing before the court and other social interests, which include the litigant's right to freely chosen counsel." Id.

In Farrington v. Sessions Fishman, 687 So.2d 997 (La. 1997), the plaintiff filed suit for breach of fiduciary duty and legal malpractice against the defendant law firm. A member of the law firm represented the firm in the defense of the case. On appeal, the Supreme Court of Louisiana held that a lawyer who is sued by a former client on grounds of malpractice has the right to conduct adversarial proceedings on his or her own behalf under ABA Model Rules 1.7, 1.9, and 3.7. Id. at 999. "We think that plaintiff has waived any right to complain about the embarrassment and the oppression

she may suffer should she have to confront her former attorneys as advocates." In allowing the proposed self-representation, the Court added that the defendants must conduct themselves in the role of advocates under the same standards of conduct expected of all members of the legal profession in relation to the opposing party, the court and the public. Id.

**D. Lawyer's Duty To Report Ethics Violations By Colleagues.**

Although not in Georgia, various jurisdictions and courts have held that lawyers have an ethical obligation to report the misconduct of their colleagues. In Weider v. Skala, 80 N.Y.2d 628, 609 N.E.2d 105 (1992), the New York Court of Appeals held that intrinsic to the relationship between a law firm and its associates is the "unstated but essential compact that in conducting the firm's legal practice both [the associates] and the firm would do so in compliance with the prevailing rules of conduct and ethical standards of the profession." Id. at 637. The plaintiff had sued his firm for wrongful termination of his employment due to his insistence that the firm report the misconduct of a fellow associate. The court allowed plaintiff to pursue his claim for breach of contract against the firm. The court stated that "[i]nsisting that as an associate in their employ plaintiff must act unethically and in violation of one of the primary professional rules amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship." Id. at 638.

The Supreme Court of Rhode Island addressed the issue of whether an attorney may or must report his client's predecessor counsel whom he discovered had embezzled funds of the client, where the counsel had repaid the client and the client had directed the attorney not to report the embezzlement to the disciplinary authorities. In Re

Ethics Advisory Panel Opinion No. 92-1, 627 A.2d 317 (R.I. 1993). The court looked to Rule 8.3 of the Rules of Professional Conduct which requires "[a] lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects" to inform the proper authorities. Id. at 321. The attorney clearly had knowledge of the violation in this case based on the fact that the predecessor counsel had admitted to the embezzlement. The court, however, noted that the disclosure of otherwise confidential information is not allowed except to prevent the client from committing criminal acts the lawyer believes are likely to result in death or bodily harm or in controversies between the lawyer and the client. In this case, even though the attorney-client evidentiary privilege did not protect the information learned from the predecessor counsel, the Rules of Professional Conduct prevented the attorney from disclosing it because it related to the representation of the client. Id. at 322.

While the lawyer who learns of the misconduct in the course of representing a client may not reveal the information without first obtaining the client's consent, the lawyer who has knowledge of the misconduct of a member of his firm cannot take advantage of this exception. Pitulla, *Firm Commitments: Lawyers Cannot Ignore Duty to Report Ethics Violations by Colleagues*, 81 Apr. A.B.A. J. 108 (1995). "While a lawyer generally is not subject to discipline for another firm member's misconduct absent knowledge, direction or ratification of the wrongdoing, knowledge may be inferred from the circumstances, according to the terminology section of the ABA Model Rules." Id.

### **E. Signing Blank Documents.**

A number of courts recently considered whether it is ethical to take shortcuts such as preparing affidavits in blank that are filled out later by the attorney. A number of courts over the past few years have harshly disciplined lawyers who have taken such actions. See Pitulla, *Name Games: Signing Blank Documents Is a Shortcut to Trouble*, 80 Dec. A.B.A.J. 102 (1994). A number of cases have sanctioned attorneys for violation of state counterparts of Model Rule 3.3, which prohibits a lawyer from submitting false statements or evidence to a court, and Model Rule 8.4 concerning conduct involving dishonesty, fraud, deceit and misrepresentation. *Id.*

In *Lisi v. Resmini*, 603 A.2d 321 (R.I. 1992), the Rhode Island Supreme Court suspended a lawyer for a full year for filing false jurats, comparing the conduct to perjury. The lawyer had signed his clients' names to interrogatory responses and had the signatures notarized by one of his employees. Similarly, an Oregon lawyer was disbarred for obtaining false will attestations which were notarized by the lawyer or his employees. *In Re Morin*, 319 Ore. 547, 878 P.2d 393 (1994).

In *Committee on Professional Standards and Conduct v. Bauerle*, 460 N.W. 452 (Iowa 1990), the Iowa Supreme Court suspended an attorney's license, rejecting the attorney's argument that "the practice of notarizing known signatures of absent persons is neither uncommon nor unnecessarily deceitful," and finding the practice inexcusable. *Id.* at 454. The court stated that "[f]undamental honesty is the baseline and mandatory requirement to serve in the legal profession. The whole structure of ethical standards is derived from the paramount need for lawyers to be trustworthy. The court system and the public we serve are damaged when our officers play fast and loose with the

truth. The damage occurs without regard to whether misleading conduct is motivated by the client's interest or the lawyer's own." Id. at 453.

#### **F. Sexual Relationships With Clients.**

The Georgia Supreme Court has held that having sex with a client may not subject an attorney to liability for legal malpractice where a favorable result was obtained, but could subject the attorney to liability for fiduciary breach. Tante v. Herring, 264 Ga. 694, 453 S.E.2d 686 (1994).

#### **G. Liquidated Damages In Retainer Agreements.**

The Georgia Supreme Court has held that an attorney may not recover damages under a penalty clause when a client exercises the legal right to terminate the attorney's retainer contract. AFLAC, Inc. v. Williams, 264 Ga. 351, 444 S.E.2d 314 (1994). Although the Court of Appeals approved the liquidated damages clause, the Supreme Court had a different view. The court focused on the "special fiduciary relationship" between a client and his attorney that gives the client "the absolute right to discharge the attorney and terminate the relation at any time, even without cause." 264 Ga. at 353.

#### **H. Formal Advisory Opinions Of State Bar.**

A formal advisory opinion of the State Bar does not necessarily constitute controlling authority in every case. Rolleston v. Munford, 201 Ga. App. 219, 410 S.E.2d 801 (1991).

#### **I. Lack Of Professionalism.**

The unprofessional conduct of an attorney that prejudices the opposing party, alone, may be sufficient ground to warrant reversal of a court order. Green v. Green,

263 Ga. 551, 437 S.E.2d 457 (1993). In this appeal from the denial of a motion to set aside the judgment in a divorce case, the Supreme Court reversed the trial court's denial based upon the unprofessional conduct of the attorney for the husband. The husband's counsel was aware that the appellant was unrepresented by counsel and knew the appellant's whereabouts.

However, counsel made no effort to inform the appellant of the trial calendar on which their case occupied an on-call status. As a result, the trial court conducted the trial in the appellant's absence and awarded the appellee child custody and child support without any opposition. 263 Ga. at 553. The court noted that the "spirit of cooperation and civility, when taken together with the notions of fundamental fairness that lie at the heart of the principal of due process of law, requires that attorneys, as officers of the court, make a good faith effort to ensure that all parties to a controversy have a full and fair opportunity to be heard. Such an effort may entail, as is already the customary practice of many attorneys, counsel assuming the burden of notifying by mail any unrepresented opposing party when their case appears on a trial calendar. No such effort was made in this case." 263 Ga. at 554-55. Therefore, the court held that the proper exercise of the trial court's discretion required that the judgment be set aside. Id.

Justice Sears-Collins concurred specially taking the position that the majority's reliance on professionalism principles to vacate a judgment infringes upon, if not violates, both the appellee's and the appellee's lawyer's rights to due process. Justice Sears-Collins' opinion also maligned the holding to the extent it imposes sanctions against a client as a penalty for his attorney's professionalism violations as it conflicts

with the holding in Davis v. Findley that a violation of the Code of Professional Responsibility does not give rise to a cause of action for damages against an attorney. 263 Ga. at 557.

**J. Seeking A Client's Release From Malpractice Liability.**

A number of courts have considered whether it is ever proper to ask a former client for a release from malpractice liability or the right to make malpractice complaints. Based on ABA Model Rule of Professional Conduct 1.8, a West Virginia court held that a lawyer was required to issue a written warning to clients to consult with independent counsel before entering into any exculpatory agreement with the clients. Committee on Legal Ethics v. Cometti, 189 W.Va. 262, 430 S.E.2d 320 (1993). Rulings have also been issued by courts prohibiting the refusal to forward the client's file until a release of all malpractice claims has been signed or the withholding of payment from a personal injury settlement until the signing of a release. See Cincinnati Bar Ass'n v. Schultz, 71 Ohio St. 3d 383, 643 N.E. 2d 1139 (1994); In re: Powell, 526 N.E.2d 971 (Ind. 1988).

The Washington, D.C. Bar issued Opinion 260, which requires an attorney to give timely written notice that independent counsel should be retained and to allow a client a reasonable period of time to consult or retain new counsel prior to negotiating a settlement or a release of malpractice liability. In that Opinion, the Ethics Committee pointed out that "the former client must be able to compare the value of the offer of reduction with the value of the lawyer's potential malpractice liability in order to determine whether the settlement offer is fair." Therefore, when engaging in

settlement negotiations, the lawyer must disclose all facts and circumstances that the lawyer believes may give rise to a claim for malpractice liability.

Under certain circumstances, it is permissible to seek a release of malpractice liability, as shown above according to the ABA Journal. However, all jurisdictions condemn seeking a release for an ethical violation. Pitulla, *Please Release Me: There Is No Easy Way Around Malpractice Liability*, 82 August A.B.A.J. 92 (1996). See Matter of Blackwelder, 615 N.E.2d 106 (Ind. 1993); In re Himmel, 125 Ill. 2d 531, 533 N.E.2d 790 (Ill. 1988).

**K. Bar Rules On Advertising And Soliciting By Lawyers Challenged.**

In Falanga v. State Bar of Georgia, 150 F.3d 1333 (11th Cir. 1998), the United States Court of Appeals for the Eleventh Circuit addressed a challenge by two Atlanta lawyers that certain Georgia Bar rules on advertising and soliciting violated their commercial speech rights under the First Amendment as incorporated under the Fourteenth Amendment. In Falanga, the attorneys primarily represented plaintiffs pursuing personal injury and wrongful death claims arising out of automobile accidents. They retained new clients through in-person, telephone and direct mail solicitation. In addition, they obtained the names of potential clients by asking doctors and chiropractors to recommend them to injured patients in return for lunch and free legal advice and also by sifting through police reports at the Department of Safety. With this information, the attorneys mailed approximately three hundred letters and brochures per week to accident victims. The State Bar, after receiving a sworn grievance from a chiropractor, threatened to prosecute the attorneys for violating various standards of professional conduct.

The attorneys filed a complaint in the United States District Court for the Northern District of Georgia. The District Court, in an Order written by Judge G. Ernest Tidwell, struck down as unconstitutional Georgia Standard 12 (now Rule of Professional Conduct 7.3(d)), which provides that a lawyer shall not solicit professional employment through directly personal contact with a non-lawyer who has not sought his advice regarding employment as a lawyer. In addition, Judge Tidwell struck down Standard 16 (Rule 7.3(e)) to the extent that it prohibits a lawyer from accepting employment from a client who seeks services because of the contact prohibited under Standard 12 (Rule 7.3(d)). Finally, Judge Tidwell voided Standard 17 (Rule 7.3(e)), which states that an attorney who has given in-person unsolicited advice to a lay person that he should obtain counsel or take legal action shall not accept employment resulting from that advice. On appeal, the Eleventh Circuit Court of Appeals reversed the District Court's holding that Standards 12, 16 (as it relates to 12) and 17 were unconstitutional. In addition, the Court of Appeals upheld as constitutional Standards 5(a)(2), 5(a)(3), 6(b), 7(a), 8, 13 and 18 of Rule 4-102. These Standards are now embodied in Rules 7.1(a), 7.3(b), 7.1(b), 7.5(a), 7.3(c)(1), and 7.4, respectively. In the disciplinary matter the Bar and the attorney eventually agreed to discipline. In re: Falanga, 272 Ga. 615, 533 S.E.2d 711 (2000).

**L. Georgia Rules Of Professional Conduct.**

On June 12, 2000, the Supreme Court of Georgia passed an Order, which amended the Rules of the State Bar of Georgia by deleting and reserving Part III of the Rules (the Canons of Ethics) in its entirety, and renaming Part IV, Chapter 1, and Rules 4-101 and 4-102 by the adoption of the Georgia Rules of Professional Conduct (“Rules”),

modeled after the ABA Model Rules. The new Rules became effective on January 1, 2001 and have been twice amended effective November 3, 2011 and December 1, 2012. Before that time, the former standards and rules remained in full force. The full text of the Rules is available at the State Bar's website [http://www.gabar.org/ethics/ethics\\_discipline\\_rules/](http://www.gabar.org/ethics/ethics_discipline_rules/). The Rules combine the aspirational aspects of the former Ethical Considerations and Directory Rules with the mandatory requirements of the former Standards of Conduct. The rules that are punishable by discipline are couched in the imperative terms of "shall" and "shall not" and end with a statement of maximum discipline. The Rules that are permissive or aspirational are cast in terms of "may" or "should" and define areas in which the lawyer has professional discretion.

**M. Attorney Efforts To Protect Fee Interest In Contingency Cases.**

In a situation where the client in a contingency fee case rejects a proposed settlement that the lawyer believes would be the best possible outcome, can a lawyer protect his/her fee interest? Several states have cautioned against doing so. For example, a lawyer proposed to include a clause in a contingency fee agreement requiring that the client reimburse him for costs if the client rejected a "fair and reasonable" settlement offer. Cohen, *"Hedge Your Bets Carefully,"* 84 Apr. A.B.A.J. 76 (1998). The Philadelphia Bar Association, in opinion 88-16 (1998), found this clause troublesome, yet stopped short of an automatic ban on such practices, stating that if the client is a person or entity of substantial means, such a provision might be reasonable. Id. Another lawyer proposed as a standard term in his contingency fee agreement the provision that if a client rejected a settlement offer that the lawyer deemed reasonable,

the lawyer would be entitled to an agreed-upon percentage of the rejected amount plus an hourly fee. The Oregon State Bar Association held in Ethics Opinion 1991-54 that the provision could very well make an otherwise lawful fee clearly excess or unreasonable. However, the opinion declined to hold that all uses of split contingency/hourly fee agreements are necessarily unethical. In addition, the Connecticut Bar Association in Ethics Opinion 95-24 stated that a lawyer may not reserve the option of withdrawing from representation and converting the fee from contingent to hourly if the client rejects the settlement proposal the lawyer thinks should be accepted.

**N. Forfeit Of Attorney’s Fees For Unethical Behavior.**

When an attorney acts unprofessionally or unethically in a case, the court may order that the attorney forfeits his attorney’s fees. See Odom v. Hilton, 105 Ga. App. 286, 124 S.E.2d 415 (1962) (“[a]n attorney may lose his right to fees for unprofessional conduct or abandonment of his client’s cause”); Sweeney v. Athens Regional Medical Ctr., 917 F.2d 1560 (1990) (“[u]nder Georgia law, a court may order an attorney to forfeit his fee as punishment for unethical conduct.”)

**O. Local Counsel Beware Of Out-of-State Associates’ Unethical Conduct.**

As local counsel, a lawyer puts himself on the line for any ethical misconduct by the out-of-state lawyer. A South Carolina Bar Advisory Opinion recognizes such; an arrangement is often designed to take advantage of the particular expertise of one of the lawyers and is subject to certain limitations. In particular, pursuant to Model Rule 1.5 concerning the division of fees between lawyers, the local lawyer must be jointly

responsible for the legal representation and cannot merely be “a conduit for the out-of-state lawyer.” See *Hello, Welcome. . . Behave!*, Feb. A.B.A.J. 79 (1999). In that regard, if the local lawyer’s involvement in a case is merely perfunctory, he or she may be implicitly permitting the unauthorized practice of law by the out-of-state lawyer. The Opinion further warns that the local lawyer has a duty to report the out-of-state lawyer if he or she violated the state’s solicitation rule. Finally, the Opinion states that the out-of-state lawyer’s activity in the state must not be “substantial and continuous” lest it be considered an unauthorized practice of law.

Likewise, Georgia has issued Formal Advisory Opinion 05-10 with regard to the same issue. The Opinion advises that local counsel can be disciplined for discovery abuses committed by out-of-state counsel in two situations: (1) where local counsel knows of the out-of-state lawyer’s abuses and thereafter ratifies it by his or her on conduct; or (2) where local counsel has supervisory authority over the out-of-state counsel and knows of improper conduct but does not take measures to mitigate the consequences. The standard is not actual knowledge of the out-of-state lawyer’s impropriety but rather that of “willful blindness.”

**P. Disclosure Of Conflicts.**

The requirements of Rule 1.7(a) are crucial safeguards, not mere formalities, with the requirements of full disclosure and written notice and/or consent providing important safeguards to both attorneys and clients. *In re Henley*, 267 Ga. 366, 478 S.E.2d 134 (1996). “The written notice or written consent must be clear enough to evidence to an objective third party that the client has consented to the legal representation despite the disclosure of a conflict of interest. Such informed consent

cannot be shown by a mere signature on a check or promissory note. The existence of the potential conflict must itself be expressed in writing, and the mere client's signature on a document which does not make that disclosure will not suffice.” In re Oellerich, 278 Ga. 22, 596 S.E.2d 156 (2004).

The Georgia Supreme Court recently reviewed a case regarding disqualification due to a conflict of interest with a nonlawyer legal employee (paralegal) in Hodge v. URFA-Sexton LP, 295 Ga. 136, 758 S.E.2d 314 (2014). The issue was whether a law firm that hired a paralegal could continue representing a client when the paralegal worked on an issue with conflicting interests for that client with a former employer. The Supreme Court held that a law firm can use certain screening procedures to avoid disqualification when a non-lawyer employee has a conflict that would result in disqualification (under the “imputed disqualification” doctrine stated in GRPC 1.10) if that employee were a lawyer. Deciding an issue or first impression that had been decided differently by different jurisdictions, the Court held:

We believe that screening measures are appropriate for nonlawyers, rather than imputed disqualification, for several reasons. First, nonlawyers generally have neither a financial interest in the outcome of a particular litigation nor a choice about which clients they serve, which reduces the appearance of impropriety. See Hayes, 51 P.3d at 567. Second, nonlawyers have different training, responsibilities, and discovery and use of confidential information compared to lawyers. In re Complex Asbestos Litig., 232 Cal.App.3d at 593, 283 Cal.Rptr. 732. Third, as noted above, disqualification of the new firm would present a hardship to the new firm's client, such as delays, further expenses, and a loss of specialized knowledge. Bernocchi, 279 Ga. at 462, 614 S.E.2d 775; see also In re Columbia Valley Healthcare Sys., L.P., 320 S.W.3d at 825. Fourth, if imputation and disqualification were automatic, nonlawyers' employment mobility could be “unduly restricted.” In re Columbia Valley Healthcare Sys., L.P., 320 S.W.3d at 825...Fifth, our Rules recognize that screening is effective at protecting a client's confidences.

This case then sets forth a specific procedure that must be followed when a non-lawyer has a conflict, including a requirement of “prompt written notice”, an opportunity for the opposing party to move for disqualification, and specific screening procedures that must be followed.

(See also previous topic paper on “The Role of In-House ‘Firm Counsel’ and the Application of the Attorney-Client Privilege” for a discussion of Hunter, Maclean Exley & Dunn v. St. Simon’s Waterfront, LLC, 293 Ga. 419, 746 S.E.2d 98 (2013))

**Q. Assignability Of Legal Malpractice Claims.**

Villanueva v. First American Title Ins. Co., (2013) 313 Ga. App 164, 721 S.E.2d 150 (2011), aff’d 292 Ga. 630, 740 S.E.2d 108 (2013) involved the theft by a non-attorney law firm employee of escrow funds that were intended to be used in connection with a real estate closing. As a matter of first impression, the Court of Appeals originally held that, unlike a personal injury claim, the claim against the lawyer whose negligence arguably allowed the employee to steal the funds could be assigned by the original party in interest to a third party.

The Georgia Supreme Court affirmed this ruling, holding that legal malpractice claims are not per se unassignable, and those legal malpractice claims that allege a purely pecuniary injury and are not a personal tort are assignable under O.C.G.A. § 44-123-24. However, shortly thereafter the Georgia General Assembly amended the statute so that such legal malpractice claims are not assignable. O.C.G.A. § 44-12-24 (2013).

## X.

### ABA FORMAL ADVISORY OPINIONS

The following are summaries of the Advisory Opinions which the American Bar Association has issued from 2002 through 2016:

**A. Retainer Agreement Requiring The Arbitration Of Fee Disputes And Malpractice Claims.**

The Committee issued Formal Opinion 02-425 on February 20, 2002. This opinion states that it is permissible under the Model Rules to include in a retainer agreement with a client a provision that requires the binding arbitration of disputes concerning fees and malpractice claims, provided that the client has been fully apprised of the advantages and disadvantages of arbitration and has given her informed consent to the inclusion of the arbitration provision in the retainer agreement.

It should also be noted that the enforceability of an arbitration clause in an attorney's fee agreement was recently upheld in the matter of Schklar v. Evans, 2015 WL 9913859.

**B. Contractual Security Interest Obtained By A Lawyer To Secure Payment Of A Fee.**

According to Formal Opinion 02-427, which was issued by the Committee on May 31, 2002, a lawyer who acquires a contractual security interest in a client's property to secure payment of fees earned or to be earned must comply with Model Rule 1.8(a). A lawyer may acquire such a security interest in the subject matter of the litigation in which the lawyer represents the client; however, this opinion states that the acquisition of such a security interest must be authorized by law as required by Model Rule 1.8(i).

**C. Drafting Will On Recommendation Of Potential Beneficiary Who Also Is Client.**

The Committee issued Formal Opinion 02-248 on August 9, 2002. This opinion states that under the Model Rules of Professional Conduct, a lawyer may, on the recommendation of a person who is a potential beneficiary, draft the testator's will, provided Rule 5.4(c) is satisfied and any informed consents required by other rules are obtained. If the person recommending the lawyer also agrees to pay or assure the lawyer's fee, the testator's informed consent to the arrangement must be obtained and the other requirements of Rule 1.8(f) satisfied. When the person recommending the lawyer is also a current client of the lawyer, the lawyer should obtain clear guidance from the person and the testator as to the lawyer's use or revelation of protected information of each in representing the other. The lawyer also must assure compliance with any requirements of Rule 1.7 that are implicated under the circumstance.

**D. Obligations With Respect To Mentally Impaired Lawyer In The Firm.**

Formal Opinion 03-429 was issued by the Committee on June 11, 2003. It states that if a lawyer's mental impairment is known to partners in a law firm or a lawyer having direct supervisory authority over the impaired lawyer, steps must be taken that are designed to give reasonable assurance that such impairment will not result in breaches of the Model Rules. If the mental impairment of a lawyer has resulted in a violation of the Model Rules, an obligation may exist to report the violation to the appropriate professional authority. If the firm removes the impaired lawyer in a matter, it may have an obligation to discuss with the client the circumstances surrounding the change of responsibility. If the impaired lawyer resigns or is removed

from the firm, the firm may have disclosure obligations to clients who are considering whether to continue to use the firm or shift their relationship to the departed lawyer, but must be careful to limit any statements made to ones for which there is a factual foundation. The obligation to report a violation of the Model Rules by an impaired lawyer is not eliminated by departure of the impaired lawyer.

**E. Propriety Of Insurance Staff Counsel Representing The Insurance Company And Its Insureds: Permissible Names For An Association Of Insurance Staff Counsel.**

The Committee issued Formal Opinion 03-430 on July 9, 2003. This opinion addresses two ethical issues arising under the Model Rules of Professional Conduct. It first addresses whether insurance staff counsel, or insurance company employees, represent both their employer and their employer's insureds in a civil lawsuit resulting from an event defined in the insurance policy. Secondly, it discusses under what name may an association of insurance staff counsel practice.

The Committee reaffirms, in this opinion, its prior opinions and concludes that insurance staff counsel ethically may undertake such representations so long as the lawyers inform all insureds whom they represent that the lawyers are employees of the insurance company, and exercise independent professional judgment in advising or otherwise representing the insureds. The Committee also concludes that insurance staff counsel may practice under a trade name or under the names of one or more of the practicing lawyers, provided the lawyers function as a law firm and disclose their affiliation with the insurance company to all insureds whom they represent.

**F. Lawyer's Duty To Report Rule Violations By Another Lawyer Who May Suffer From Disability Or Impairment.**

According to Formal Opinion 03-431, which was issued by the Committee on August 8, 2003, a lawyer who believes that another lawyer's known violations of disciplinary rules raise substantial questions about her fitness to practice must report those violations to the appropriate professional authority. A lawyer who believes that another lawyer's mental condition materially impairs her ability to represent clients, and who knows that that lawyer continues to do so, must report that lawyer's consequent violation of Rule 1.16(a)(2), which requires that she withdraw from the representation of clients.

**G. Lawyer Arranging Or Posting Bail For A Client.**

According to Formal Opinion 04-432, which was issued by the Committee on January 14, 2004, a lawyer may post, or arrange for the posting of, a bond to secure the release from custody of a client whom the lawyer represents in the matter with respect to which the client has been detained, but only in those rare circumstances in which there is no significant risk that her representation of the client will be materially limited by her personal interest in recovering the amount advanced.

**H. Obligation Of A Lawyer To Report Professional Misconduct By A Lawyer, Including A Non-Practicing Lawyer.**

Formal Opinion 04-433 was issued by the Committee on August 25, 2004. It states that a lawyer having knowledge of the professional misconduct of another licensed lawyer, including a non-practicing lawyer, is obligated under Model Rule 8.3 to report such misconduct if it raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer. The professional misconduct must be reported

even if it involves activity completely removed from the practice of law. The opinion further states that if the report would require revealing the confidential information of a client, the lawyer must obtain the client's informed consent before making the report.

**I. Lawyer Retained By Testator To Disinherit Beneficiary That Lawyer Represents On Unrelated Matters.**

Formal Opinion 05-434 was issued by the Committee on December 8, 2004. It states that there is ordinarily no conflict of interest when a lawyer is engaged by a testator to disinherit a beneficiary whom the lawyer represents on unrelated matters, unless doing so would violate a legal obligation of the testator to the beneficiary, or unless there is a significant risk that the lawyer's representation of the testator will be materially limited by the lawyer's responsibilities to the beneficiary.

**J. Ethical Obligations Of A Lawyer Who Represents A Liability Insurer Named In Litigation Who Simultaneously Represents A Client Against An Insured Of The Liability Insurer.**

The Committee issued Formal Opinion 05-435 on December 8, 2004. This opinion states that unless the liability insurer is a party to the action brought by the lawyer's plaintiff-client, or unless the particular circumstances of the case, the lawyer's taking testimony or discovery from the liability insurer presents a disqualifying adversity, representation of the plaintiff is not directly adverse and therefore does not present a concurrent conflict of interest to the lawyer's representation of the insurer in another action.

However, a concurrent conflict may arise if there is a significant risk the representation of the individual plaintiff will be materially limited by the lawyer's responsibilities to the insurer, as for example, when it would be to the advantage of the

plaintiff for the lawyer to reveal or use information relating to the representation of the insurer. If the lawyer concludes there is a concurrent conflict of interest, she may seek the informed consent of each affected client, confirmed in writing, to waive the conflict if she reasonably believes she will be able to provide competent and diligent representation.

**K. Informed Consent To Future Conflicts Of Interest: Withdrawal Of Formal Opinion 93-372.**

The Committee issued Formal Opinion 05-436 on May 11, 2005, which states that the Model Rules contemplate that a lawyer in appropriate circumstances may obtain the effective informed consent of a client to future conflicts of interest. The Committee stated that general and open-ended consent is more likely to be effective when given by a client that is an experienced user of legal services, particularly, if for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the representation. Model Rule 1.7, as amended in February 2002, permits a lawyer to obtain effective informed consent to a wider range of future conflicts that would have been possible under the Model Rules prior to their amendment. Formal opinion 93-372 is withdrawn in its entirety.

**L. Inadvertent Disclosure Of Confidential Materials.**

The Committee issued Formal Opinion 05-437 on October 1, 2005, withdrawing Formal Opinion 92-368. A lawyer who receives a document from opposing parties or their lawyers and knows or reasonably should know that the document was inadvertently sent should promptly notify the sender in order to permit the sender to take protective measures. To the extent that Formal Opinion 92-368 opined otherwise,

it is hereby withdrawn. This opinion is based on the Model Rules of Professional Conduct as amended by the addition of Rule 4.4(b). Rule 4.4(b) only obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly. It does not require the receiving lawyer to either refrain from examining the materials or to abide by the sending lawyer's instructions. The decision whether to voluntarily return the document as a matter of professional judgment reserved to the lawyer. See Model Rules 1.2 and 1.4.

**M. Lawyer Proposing To Make Or Accept An Aggregate Settlement Or Aggregated Agreement.**

The Committee issued Formal Opinion 06-438 on February 10, 2006, which states that in seeking to obtain the informed consent of multiple clients to make or accept an offer of an aggregate settlement agreement of their claims as required under Model Rule 1.8(g), a lawyer must advise each client to the total amount or result of the settlement or agreement, the amount and nature of every client's participation in the settlement or agreement, the fees and costs to be paid to the lawyer from the proceeds or by an opposing party or parties, and the method by which the costs are to be apportioned to each client.

This opinion is based on Rule 1.8(g), which pertains to the conflicts of interest that arise when a lawyer or law firm represents multiple clients, some or all of whose claims or defenses are to be resolved under a single proposal. The rule states that a lawyer who represents two or more clients shall not make or participate in making an aggregate settlement of claims of or against the clients, or an aggregated agreement as to

a guilty plea or nolo contendere plea, unless each client gives informed consent in a writing signed by the client.

This opinion clarifies that an “aggregate settlement” occurs when two or more clients who are represented by the same lawyer together resolve their claims or defenses or pleas. Each client does not have to be facing the same criminal charges or the same claims or have the same defenses. The rule simply applies whenever any two or more clients consent to have their matters resolved together. In obtaining clients’ consent, the lawyer should advise the group that the failure of one of the clients to consent to the settlement may result in the withdrawal of the offer.

**N. Lawyer’s Obligation To Truthfulness When Representing A Client In Negotiation: Application To Caucused Mediation.**

The Committee issued Formal Opinion 06-439 on April 12, 2006, which discusses the obligation of a lawyer to be truthful when making statements on behalf of clients in negotiations, including the specialized form of negotiation known as caucused mediation. Under Model Rule 4.1, in the context of negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party’s negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation “puffing,” ordinarily are not considered “false statements of material fact” within the meaning of the Model Rules. Such remarks are statements upon which parties to a negotiation ordinarily would not be expected to justifiably rely, and must be distinguished from false statements of material fact.

In a caucused mediation, there is no higher or lower standard of truthfulness that is different from what is required in other negotiating settings. In either context, a lawyer may not make false statements of material fact, and must take care not to convert communications, which otherwise would not be considered statements of fact, into false factual representations.

**O. Unsolicited Receipt Of Privileged Or Confidential Materials: Withdrawal Of Formal Opinion 94-382.**

The Committee issued Formal Opinion 06-440 on May 13, 2006, which withdrew Formal Opinion 94-382 entirely. The opinion stated that the instructions laid out in Formal Opinion 94-382 are not supported by Rule 4.4(b). The opinion further stated that if providing the materials is not the result of the sender's inadvertence, Rule 4.4(b) does not apply to the factual situation addressed in Formal Opinion 94-382. A lawyer receiving materials under such circumstances is therefore not required to notify another party or that party's lawyer of receipt as a matter of compliance with the Model Rules. Whether a lawyer may be required to take any action in such an event is a matter of law beyond the scope of Rule 4.4(b).

**P. Ethical Obligations Of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent And Diligent Representation.**

The Committee issued Formal Opinion 06-441 on May 13, 2006, which considers the ethical obligations of lawyers who represent indigent persons charged with criminal offenses, when lawyers' workloads prevent them from providing competent and diligent representation. If a workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are

being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. If the court denies the motion to withdraw, and any appeal of the ruling is unsuccessful, the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to competently and diligently represent the defendant. Further, lawyer supervisors must monitor the workload of the supervised lawyers to ensure that the workloads do not exceed a level that may be competently handled by the individual lawyers.

**Q. Review And Use Of Metadata.**

The Committee issued Formal Opinion 06-442 on August 5, 2006, concerning metadata, which is “embedded” information found in email and other electronic documents. In particular, metadata may reveal the date and time a document was created. It may also show the name of the person who last saved the document and in some cases, metadata may even show “redlined” changes that were made to the document. There is no specific provision in the Model Rules, which addresses a lawyer’s receipt and production of metadata from an opposing party. The Committee, however, generally concludes that a lawyer may review metadata found in electronic documents that are produced to him or her. In addition, the Committee stated that counsel producing electronic documents may seek to limit the likelihood of transmitting metadata by using certain types of software that may be available, sending the image of the document only, or by transmitting the document by sending a traditional hard copy.

**R. Contact With Inside Counsel Of An Organization Regarding A Matter When The Organization Is Represented In The Matter By Outside Counsel.**

The Committee issued Formal Opinion 06-443 on August 5, 2006, which addresses whether the ABA Model Rules of Professional Conduct prohibit contact by an opposing lawyer with inside counsel of an organization regarding a matter, when the organization is represented in the matter by outside counsel. In general, the Committee stated that adverse counsel is free to contact inside counsel for an organization, unless (1) adverse counsel is asked not to communicate about the matter with inside counsel; and (2) if the inside counsel is actually a party in the matter and represented by the same counsel as the organization. Of course, inside counsel are free to avoid such contact by referring the opposing lawyer to their outside counsel.

**S. Permissibility Of Restrictive Covenants In Lawyer Agreements Concerning Benefits Upon Retirement.**

The Committee issued Formal Opinion 06-444 on September 13, 2006, which provides that a lawyer may offer a partnership, employment or other similar type of agreement that restricts the right of a another lawyer to practice after termination of the relationship, only if the agreement concerns benefits upon retirement. The Committee stated that Model Rule 5.6(a) broadly prohibits agreements that restrict the rights of lawyers to engage in the practice of law after they end relationships with a law firm or employer. Accordingly, the Committee commented that the exception for restrictions concerning the receipt of retirement benefits must be construed strictly and narrowly. Specifically, the provision in question must affect benefits that are available only to a

lawyer who is in fact retiring from the practice of law, and cannot serve as a forfeiture of income already earned by the lawyer.

**T. Contact By Counsel With Putative Members Of Class Prior To Class Certification.**

The Committee issued Formal Opinion 07-445 on August 9, 2007, which addresses whether counsel for the plaintiff or the defense may contact a putative member of a class action before the class has been certified. In general, the Committee stated that the Model Rules do not prohibit counsel for either plaintiff or defendant from communicating with persons who may become members of a certified class. The Committee recognized that both sides could have a legitimate need to contact potential class members regarding facts that are the subject of the potential class action, including information which may be relevant as to whether a class should be certified. Notably, the Committee warned that while Model Rule 4.3 does not prohibit factual inquiries with unrepresented persons, both sides are prohibited from giving legal advice to the individual contacted other than to engage counsel, if warranted. In addition, the Committee stated that the underlying policies of Rule 7.3, which prohibit certain types of direct contact with prospective clients continue to apply.

**U. Undisclosed Legal Assistance To *Pro Se* Litigants.**

The Committee issued Formal Opinion 07-446 on May 5, 2007, which discusses whether a lawyer may provide undisclosed legal assistance to a “pro se” litigant. Notably, this opinion supersedes ABA Informal Opinion 1414 and provides that there is no prohibition in the Model Rules of Professional Conduct against undisclosed assistance to pro se litigants, as long as the lawyer does not do so in a manner that

violates rules that otherwise would apply to the lawyer's conduct. The Committee held that an attorney's non-disclosure of providing legal assistance to a pro se litigant was not dishonest. It further noted that State and local ethics committees have reached different opinions on this issue. Regardless, overall, it is the Committee's position that the fact a litigant submitting papers to a tribunal on pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation, and thus, should not be wholly prohibited.

#### **V. Ethical Considerations In Collaborative Law Practice.**

The Committee issued Formal Opinion 07-447 on August 9, 2007, which concerns the implications of the Model Rules on a collaborative law practice. Collaborative law is a type of alternative dispute resolution in which the parties and their lawyers commit to working cooperatively to reach a settlement. The process focuses on negotiating a mutually acceptable settlement without court intervention. The product of the process is then submitted to the court as a final decree. This type of negotiation is often used by family law practitioners. Notably, if the collaborative process breaks down, the lawyers will withdraw from representing their respective clients and will not handle any subsequent court proceedings for the matter. The Committee stated that this type of limited representation is permissible as long as the lawyer advises the client about the risks and benefits of the process and the client gives informed consent to participate in it. A lawyer, who engages in a collaborative law practice, remains bound by the rules of professional conduct.

**W. Appointed Counsel's Relationship To A Person Who Declines To Be Represented.**

The Committee issued Formal Opinion 07-448 on October 20, 2007 on the consensual nature of the attorney-client relationship. However, situations arise in which a lawyer is appointed to represent someone who declines the representation. Whatever purposes may be served by requiring lawyers to provide services relating to such a person, the person refusing representation is not entitled to expect of the lawyer the duties arising out of the client-lawyer relationship. The lawyer's legal duties B if any B are defined in such circumstances by the order of the assigning tribunal, and the lawyer's ethical duties are limited to those obligations a lawyer owes under the Rules to tribunals or to persons other than a client.

**X. Lawyer Concurrently Representing Judge And Litigant Before the Judge In Unrelated Matters.**

The Committee issued Formal Opinion 07-449 on August 9, 2007. The opinion states that a lawyer who is asked to represent a client before a judge and is simultaneously representing that judge in an unrelated matter may, under Model Rule 1.7(b), undertake the representation only if he reasonably believes that he will be able to provide competent and diligent representation to both the litigant and the judge and they give their informed consent, confirmed in writing. Pursuant to Model Code of Judicial Conduct Rule 2.11(A), the judge in such a situation must disqualify herself from the proceeding over which she is presiding if she maintains a bias or prejudice either in favor of or against her lawyer. This disqualification obligation also applies when it is another lawyer in her lawyer's firm who is representing a litigant before her.

However, absent such a bias or prejudice for or against her lawyer, under Judicial Code Rule 2.11(C), the judge may continue to participate in the proceeding if the judge discloses on the record that she is being represented in the other matter by one of the lawyers, and the parties and their lawyers all consider such disclosure, out of the presence of the judge and court personnel, and unanimously agree to waive the judge's disqualification. If a judge is obligated to make disclosures in compliance with Judicial Code Rule 2.11(C), refuses to do so, and insists upon presiding over the matter in question, the lawyer's obligation of confidentiality under Model Rule 1.6 ordinarily would prohibit his disclosing to his other client his representation of the judge without the judge's consent, rendering it impossible to obtain the client's consent to the dual representation, as required by Model Rule 1.7(b). The lawyer's continued representation of the judge in such a circumstance constitutes an affirmative act effectively assisting the judge in her violation of the Judicial Code, and thereby violates Model Rule 8.4(f). The lawyer (or another lawyer in the lawyer's firm), in that circumstance, is obligated to withdraw from the representation of the judge under Model Rule 1.16. The duty of confidentiality that the lawyer owes to the judge as a client prohibits his disclosing the judge's violation of the Judicial Code to the appropriate disciplinary agency, as would otherwise be required under Model Rule 8.3.

**Y. Confidentiality When Lawyer Represents Multiple Clients In The Same Or Related Matters.**

The Committee issued Formal Opinion 08-450 on April 9, 2008. The opinion states that frequently lawyers are engaged to represent a client by a third party, most commonly an insurer or a relative. In some circumstances, the third party also may be

a client of that lawyer, either with respect to the matter in question, or with respect to a related matter. When a lawyer represents multiple clients, either in the same or related matters, Model Rule 1.6 requires that the lawyer protect the confidentiality of information relating to each of his clients. Because the scope of the "implied authority" granted in Rule 1.6(a) to reveal confidential information "to carry out a representation" applies separately and exclusively to each representation the lawyer has undertaken, a conflict of interest arises when the lawyer recognizes the necessity of revealing confidential information relating to one client in order effectively to carry out the representation of another. In such a circumstance, the lawyer would be required to withdraw from representing one or both of her clients

**Z. Lawyer's Obligations When Outsourcing Legal And Nonlegal Support Services.**

The Committee issued Formal Opinion 08-451 on August 5, 2008. This opinion states that a lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1. In complying with her Rule 1.1 obligations, a lawyer who engages lawyers or nonlawyers to provide outsourced legal or nonlegal services is required to comply with Rules 5.1 and 5.3. She should make reasonable efforts to ensure that the conduct of the lawyers or nonlawyers to whom tasks are outsourced is compatible with her own professional obligations as a lawyer with "direct supervisory authority" over them. In addition, appropriate disclosures should be made to the client regarding the use of lawyers or nonlawyers outside of the lawyer's firm, and client consent should be obtained if those lawyers or nonlawyers will be receiving information

protected by Rule 1.6. The fees charged must be reasonable and otherwise in compliance with Rule 1.5, and the outsourcing lawyer must avoid assisting the unauthorized practice of law under Rule 5.5.

**AA. In-House Consulting On Ethical Issues.**

The Committee issued Formal Opinion 08-453 on October 17, 2008. This opinion states that the desire to ensure that law firm members comply with their ethical obligations has given rise to the designation of “ethics counsel” within law firms to whom the firm and its members may turn for advice on ethics matters. Ethics consultations within law firms create client-lawyer relationships separate from those between law firms and their outside clients. A firm’s ethics counsel typically represents the organization as a whole, and not individual firm lawyers, although simultaneous representation of an individual firm member is permitted where no conflict exists between the firm and the individual lawyer. A firm’s ethics counsel may be obligated to disclose an individual lawyer’s ethical violations to firm management. Whether ethical misconduct must be reported to disciplinary authorities will be determined under the principles that generally apply to lawyers advising clients. The obligation to disclose an individual lawyer’s possible misconduct to the firm’s client turns on the firm’s duty fully to inform the client on matters related to the representation.

**BB. Prosecutor’s Duty To Disclose Evidence And Information Favorable To The Defense.**

The Committee issued Formal Opinion 09-454 on July 8, 2009. The opinion states that Rule 3.8(d) of the Model Rules of Professional Conduct requires a prosecutor to “make timely disclosure to the defense of all evidence or information known to the

prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, [to] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor.” This ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders.

Furthermore, Rule 3.8(d) requires a prosecutor who knows of evidence and information favorable to the defense to disclose it as soon as reasonably practicable so that the defense can make meaningful use of it in making such decisions as whether to plead guilty and how to conduct its investigation. Prosecutors are not further obligated to conduct searches or investigations for favorable evidence and information of which they are unaware. In connection with sentencing proceedings, prosecutors must disclose known evidence and information that might lead to a more lenient sentence unless the evidence or information is privileged. Supervisory personnel in a prosecutor’s office must take reasonable steps under Rule 5.1 to ensure that all lawyers in the office comply with their disclosure obligation.

**CC. Disclosure Of Conflicts Information When Lawyers Move Between Law Firms.**

The Committee issued Formal Opinion 09-455 on October 8, 2009. The opinion states that when a lawyer moves between law firms, both the moving lawyer and the prospective new firm have a duty to detect and resolve conflicts of interest. Although Rule 1.6(a) generally protects conflicts information (typically the “persons and issues involved” in a matter), disclosure of conflicts information during the process of lawyers moving between firms is ordinarily permissible, subject to limitations. Any

disclosure of conflicts information should be no greater than reasonably necessary to accomplish the purpose of detecting and resolving conflicts and must not compromise the attorney-client privilege or otherwise prejudice a client or former client. A lawyer or law firm receiving conflicts information may not reveal such information or use it for purposes other than detecting and resolving conflicts of interest. Disclosure normally should not occur until the moving lawyer and the prospective new firm have engaged in substantive discussions regarding a possible new association.

**DD. Disclosure Of Information To Prosecutor When Lawyer's Former Client Brings Ineffective Assistance Of Counsel Claim.**

The Committee issued Formal Opinion 10-456 on July 14, 2010. The opinion states that although an ineffective assistance of counsel claim ordinarily waives the attorney-client privilege with regard to some otherwise privileged information, that information still is protected by Model Rule 1.6(a) unless the defendant gives informed consent to its disclosure or an exception to the confidentiality rule applies. Under Rule 1.6(b)(5), a lawyer may disclose information protected by the rule only if the lawyer “reasonably believes [it is] necessary” to do so in the lawyer’s self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.

### **EE. Lawyer Websites.**

The Committee issued Formal Opinion 10-457 on August 5, 2010. The opinion states that websites have become a common means by which lawyers communicate with the public. Lawyers must not include misleading information on websites, must be mindful of the expectations created by the website, and must carefully manage inquiries invited through the website. Websites that invite inquiries may create a prospective client-lawyer relationship under Rule 1.18. Lawyers who respond to website-initiated inquiries about legal services should consider the possibility that Rule 1.18 may apply, as Rule 1.18(a) addresses whether the inquirer has become a “prospective client,” defined as “a person who discusses with a lawyer the possibility of forming a client-lawyer relationship.”

### **FF. Changing Fee Arrangements During Representation.**

The committee issued Formal Opinion 11-458 on August 4, 2011. The opinion states that modification of an existing fee agreement is permissible under the Model Rules, but the lawyer must show that any modification was reasonable under the circumstances at the time of the modification as well as communicated to and accepted by the client. Periodic, incremental increases in a lawyer’s regular hourly billing rates are generally permissible if such practice is communicated clearly to and accepted by the client at the commencement of the client-lawyer relationship and any periodic increases are reasonable under the circumstances. Modifications sought by a lawyer that change the basic nature of a fee arrangement or significantly increase the lawyer’s compensation absent an unanticipated change in circumstances ordinarily will be unreasonable. Changes in fee arrangements that involve a lawyer acquiring an interest

in the client's business, real estate, or other nonmonetary property will ordinarily require compliance with Rule 1.8(a).

**GG. Duty To Protect The Confidentiality Of E-mail Communications With One's Client.**

The committee issued Formal Opinion 11-459 on August 4, 2011. The Opinion states that a lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access. In the context of representing an employee, this obligation arises, at the very least, when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means, using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party.

**HH. Duty When Lawyer Receives Copies Of A Third Party's E-mail Communications With Counsel.**

The committee issued Formal Opinion 11-460 on August 4, 2011. The opinion states that when an employer's lawyer receives copies of an employee's private communications with counsel, which the employer located in the employee's business e-mail file or on the employee's workplace computer or other device, neither Rule 4.4(b) nor any other Rule requires the employer's lawyer to notify opposing counsel of the receipt of the communications. However, court decisions, civil procedure rules, or other law may impose such a notification duty, which a lawyer may then be subject to discipline for violating. If the law governing potential disclosure is unclear, Rule

1.6(b)(6) allows the employer's lawyer to disclose that the employer has retrieved the employee's attorney-client e-mail communications to the extent the lawyer reasonably believes it is necessary to do so to comply with the relevant law. If no law can reasonably be read as establishing a notification obligation, however, then the decision whether to give notice must be made by the employer-client, and the employer's lawyer must explain the implications of disclosure, and the available alternatives, as necessary to enable the employer to make an informed decision.

## **II. Direct Contact Among Represented Persons.**

The committee issued Formal Opinion 11-461 on August 4, 2011. The opinion states that it is permissible for parties to a legal matter to communicate directly with each other. A lawyer may advise a client of that right and may assist the client regarding the substance of any proposed communication. The lawyer's assistance need not be prompted by a request from the client. Such assistance may not, however, result in overreaching by the lawyer. Prime examples of overreaching include assisting the client in securing from the represented person an enforceable obligation, disclosure of confidential information, or admissions against interest without the opportunity to seek the advice of counsel. To prevent such overreaching, a lawyer must, at a minimum, advise her client to encourage the other party to consult with counsel before entering into obligations, making admissions or disclosing confidential information.

## **JJ. Judges' Use Of Electronic Social Networking Media.**

The committee issued Formal Opinion 462 on February 21, 2013. The opinion states that a judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of

Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety.

**KK. Client Due Diligence, Money Laundering, And Terrorist Financing.**

The committee issued Formal Opinion 463 on May 23, 2013. The purpose of the Opinion is to encourage lawyers to engage in appropriate client due diligence to avoid inadvertently participating in or facilitating money laundering or terrorist financing activities in a manner consistent with the Model Rules.

**LL. Division Of Legal Fees With Other Lawyers Who May Lawfully Share Fees With Nonlawyers.**

The committee issued Formal Opinion 464 on August 19, 2013. The Opinion states that lawyers subject to the Model Rules may work with other lawyers or law firms practicing in jurisdictions with rules that permit sharing legal fees with nonlawyers. Where there is a single billing to a client in such situations, a lawyer subject to the Model Rules may divide a legal fee with a lawyer or law firm in the other jurisdiction, even if the other lawyer or law firm might eventually distribute some portion of the fee to a nonlawyer, provided that there is no interference with the lawyer's independent professional judgment.

**MM. Lawyers' Use Of "Deal-Of-The-Day" Marketing Programs.**

The committee issued Formal Opinion 465 on October 21, 2013. The Opinion states that lawyers who advertise by using "deal-of-the-day" or group-coupon marketing programs must comply with various Rules of Professional Conduct, including, but not limited to, rules governing fee sharing, advertising competence, diligence, and the proper handling of legal fees. Lawyers must also analyze conflicts of interest issues. The

Opinion goes on to state “[t]he committee has identified numerous difficult issues associated with prepaid deals, especially how to properly manage payment of advance legal fees, and is less certain that prepaid deals can be structured to comply with all ethical and professional obligations under the Model Rules.” In sum, the Opinion advises attorneys to proceed with caution when advertising with this type of online deal.

**NN. Lawyer’s Reviewing Jurors’ Internet Presence.**

The Committee found that lawyers should be allowed to review jurors’ internet presence on social media websites such as Facebook. However, lawyers should not proactively interact with jurors on such websites because such would constitute an ex parte communication with a juror in violation of Rule 3.5. In other words, for example, a lawyer may check out the publicly-available portions of a juror or potential juror’s Facebook page, but the lawyer may not send the potential juror a “friend” request. The Opinion further states that judges should be increasingly aware of the hazards posed by social media, and should instruct counsel and the jurors accordingly. In some cases, judges should instruct jurors that it will be expected that the lawyers will view the juror’s social media pages and that the lawyers are not acting improperly by doing so.

**OO. Facilitating The Sale Of A Law Practice.**

In 1990, a revised Rule 1.17 changed the previous rule that a lawyer could not sell a law practice. Rule 1.17 now allows a lawyer to sell a firm or a practice in an area of law provided that the lawyer is ceasing to practice, or ceasing to practice in that area of the law. This Opinion clarifies that the lawyer selling the practice may not continue practicing in the firm or practice area being sold, but that the lawyer may nonetheless assist the buyer or buyers in the orderly transition of active client matters for a

reasonable period after the closing of the sale. Neither the selling lawyer or law firm nor the purchasing lawyer or law firm may bill clients for time spent only on the transition of matters.

**PP. Prosecutors Who Farm Out The Use Of Their Letterhead To Debt Collectors.**

The Committee issued Formal Opinion 469 on November 12, 2014. That Opinion notes that some prosecutors' offices around the country have been essentially selling their letterhead to debt collection companies who then threaten debtors with criminal prosecution unless they pay the debt. In cases where this happens, the prosecutors themselves seldom actually review the letters or the facts contained therein in order to determine whether any crime may have actually occurred. Not surprisingly, the Committee found that such conduct is unethical and violative of MRPC 8.4(c) and 5.5(a).

**QQ. Judicial Encouragement Of *Pro Bono* Service.**

The Committee issued Formal Opinion 470 on May 20, 2015. After addressing various policy concerns, the Opinion concludes that it is permissible for a judge to work with a unified bar association to send out direct mailings encouraging lawyers to represent *pro bono* those in need.

**RR. Ethical Obligations Of Lawyer To Surrender Papers And Property To Which Former Client Is Entitled.**

The Committee issued Formal Opinion 471 on July 1, 2015. This Opinion deals with the relatively complicated issue of exactly what papers the client is entitled to upon the termination of the lawyer's representation in the event that the client requests that the lawyer relinquish the file to the client. The lawyer has a duty to "safeguard" the

client's "property" and deliver it upon request under Rule 1.15, and has a duty to "surrender" the client's papers and property upon request at the end of the representation under Rule 1.16. The question is exactly what papers generated by the lawyer during the representation constitute the client's "property." Does this include notes, internal memoranda, etc.?

Previously in 1976, the Committee answered this question in ABA Informal Ethics Opinion 1376 and concluded that the client was only entitled to materials furnished to the lawyer by the client, and to the "end product" produced by the lawyer. The Committee notes that the change from the Model Code to the Model Rules and the proliferation of new technology for storing documentary information has necessitated an updated Opinion on this issue. The Committee also notes that, in contrast to Opinion 1376, many states have taken a different approach and have adopted an "entire file" rule. The "entire file" rule essentially states that the client is entitled to everything the lawyer generates unless there is some overriding reason why the information should not be produced to the client (e.g. protection of privileges owed to another party).

The Committee essentially rejects the "entire file" approach and, for the most part, reaffirms Opinion 1376. In contrast to the approach taken by some states, the Committee states that prior drafts and lawyer's notes are usually of little value to the client and need not ordinarily be retained or produced upon request. However, the Committee also states that what need be produced may vary depending on the situation. Particularly when a lawyer is terminated while a matter is ongoing, the lawyer may have a somewhat greater duty to produce documents that the client needs to protect its

interests, such as the most recent draft of a pleading that has not yet been filed but which will soon be due.

**SS. Communicating With a Person Who Has Received Limited-Scope Representation From Another Lawyer.**

Formal Opinion 472 gives attorneys guidance regarding the rules to be followed when communicating with an individual whom the attorney has reason to believe is, or previously has been, represented by another lawyer on a limited-scope basis. Rule 1.2(c) allows attorneys to represent clients on a limited basis, but the scope of the limitation can become a tricky issue if another attorney later wishes to contact the client regarding something that may or may not be part of the limited scope of representation. If a lawyer providing limited scope representation is contacted by opposing counsel, he should unequivocally “identify the issues on which the inquiring lawyer may not communicate directly with the person receiving limited-scope services.”

If a lawyer who wishes to contact an individual knows that the individual is represented by another lawyer but that the scope of the other lawyer’s representation does not include the matter in question, Rule 4.3 regarding dealing with an unrepresented person applies. However, the “lawyer must comply with Rule 4.2 and communicate with the person’s counsel when the communication concerns an issue, decision, or action for which the person is represented.” If the lawyer has reason to believe that the individual may have received limited scope legal advice but is not sure of the scope of the representation, he should “begin the communication by asking whether the person is represented by counsel for any portion of the matter so that the lawyer knows whether to proceed under ABA Model Rule 4.2 or 4.3.”

**TT. Lawyer's Obligations to Reveal Client Information in Response to Subpoena or Other Compulsory Process.**

Formal Opinion 473 expands upon and refines the analysis provided in Formal Opinion 94-385 over two decades ago. Rule 1.6(a) provides that a lawyer can only reveal his client's confidential information in certain circumstances. Under both GRPC 1.6 and Model Rule 1.6 (although they are drafted somewhat differently) these circumstances include situations where production of the client's information is necessary to comply with the law or with a court order. Where the discoverability of the client's information is subject to differing legal arguments, this can put the client in the tough position of having to balance the duties required by the law with the instructions of his client. "In making these judgments the lawyer must balance obligations inherent in the lawyer's dual role as an advocate for the client and an officer of the court."

As with many issues, proper communication with the client (in compliance with Rule 1.4) is paramount. The lawyer should fully inform the client regarding what the law requires, and the viability of any objections the client may have to producing the information. When the client is unavailable for consultation, the lawyer should assert all non-frivolous defenses to the production of the information until the client can be consulted. If the client cannot be consulted at all and a trial court rules against the lawyer's objections, "[i]n the absence of instructions from the client to appeal, the ethics rules do not require a lawyer to shoulder further burdens. Accordingly, a lawyer is not ethically required to take an appeal on behalf of a client whom the lawyer cannot locate after due diligence."

## **UU. Referral Fees And Conflict of Interest.**

The Committee issued Formal Opinion 474 regarding referral fees and conflicts of interest on April 21, 2016. Under Rule 1.5(e), a referring lawyer may collect a referral fee that is out of proportion to the services performed by the referring lawyer only if the referring lawyer “assumes joint responsibility for the representation,” the client consents in writing, and the total fee is reasonable. The Committee notes that “[i]mplicit in the terms of the fee division allowed by Rule 1.5(e) is the concept that the referring lawyer who divides a legal fee has undertaken representation of the client.” Therefore, the rules governing conflicts of interest apply to the referring lawyer regardless of the level of his involvement with the case, and a lawyer cannot accept a referral fee if the lawyer could not have actively represented the client because of a conflict of interest. If the referring lawyer has a conflict of interest that the client is capable of waiving, the referring lawyer must comply with the procedure required by Rule 1.7(b) and obtain informed written consent from the client, just as if he were actively representing the client, if he is to receive a fee.

Finally, the Committee notes that Rule 1.5(e)’s requirement that the client shall be advised of “the share that each lawyer is to receive” is deliberately stated in the future tense. “The use of the future tense envisions that the fee division agreement will precede the division of fees. Such an agreement should not be entered into toward the end of such a relationship. Instead, the division of fees must be agreed to either before or within a reasonable time after commencing the representation.”

## XI.

### GEORGIA ADVISORY OPINIONS

#### **A. Discovery Abuses By An In-House Or An Out-of-State Counsel.**

Formal Advisory Opinion No. 98-1, issued June 1, 1998: A Georgia attorney serving as local counsel can be disciplined under Standard 71 (Rule 5.1) for discovery abuses committed by an in-house or out-of-state counsel when local counsel knows of the abuse and ratifies it by his or her conduct. "Knowledge" in this situation includes "willful blindness" by the local counsel. Additionally, ratification may include any conduct by the attorney that does not actively oppose the violation.

#### **B. Unclaimed Funds In Escrow Trust Account.**

Formal Advisory Opinion No. 98-2, issued June 1, 1998: A lawyer which is holding client funds and/or funds in a fiduciary capacity may remove unclaimed funds from the lawyer's escrow trust account and deliver the funds to the custody of the State of Georgia in accordance with the disposition of Unclaimed Property Act only if the lawyer has exhausted all reasonable efforts prior to delivery to locate the rightful recipient.

#### **C. Representation Of Co-Defendants By The Same Law Firm.**

Formal Advisory Opinion No. 98-4, issued October 29, 1998, addresses whether a lawyer may represent a criminal defendant when a co-defendant in the same action is represented by a second attorney who is listed as "of counsel" to the same law firm. The distinction of "of counsel" does not change the analysis for this potential conflict of representation which occurs in the more traditional relationships existing between associates and partners with other attorneys in their law firms. Thus, if the "of counsel"

attorney would be required to decline or withdraw from multiple representations under Rule 1.7, then under Rule 1.10, no partner, associate or other “of counsel” attorney of the principal firm may accept or continue such employment.

**D. In-House Counsel Providing Legal Services In Transactions Involving Real Estate.**

Formal Advisory Opinion No. 99-2, issued October 18, 1999, discusses whether in-house counsel for a real estate lending institution may provide legal services to a customer, relative to that transaction. Further, the Opinion discusses whether the institution may charge the customer a fee for such services. The answer to both questions is no. Specifically, Rule 5.5 prohibits in-house counsel of a real estate lending institution from providing legal services to its customers as the unauthorized practice of law. Moreover, such conduct would constitute an impermissible conflict of interest under Rule 1.7. While the institution may include the legal expenses as part of its cost of doing business, when determining its charge to its customers, it may not denominate such expenses as a “legal or attorney fee.”

**E. Supreme Court Of Georgia Formal Advisory Opinion No. 00-1.**

Question Presented:

When the City Council controls the salary and benefits of the members of the Police Department, may a councilperson, who is an attorney, represent criminal defendants in matters where the police exercise discretion in determining the charges?

Summary Answer:

Representation of a criminal defendant in municipal court by a member of the City Council where the City Council controls salary and benefits for the police does not

violate any Rules and does not subject an attorney to discipline. In any circumstance where it may create an appearance of impropriety; however, it should be avoided.

**F. Supreme Court Of Georgia Formal Advisory Opinion No. 00-2.**

Question Presented:

Is a lawyer aiding a nonlawyer in the unauthorized practice of law when the lawyer allows a nonlawyer member of his or her staff to prepare and sign correspondence which threatens legal action or provides legal advice or both?

Summary Answer:

Yes, a lawyer is aiding a nonlawyer in the unauthorized practice of law when the lawyer allows a nonlawyer member of his or her staff to prepare and sign correspondence which threatens legal action or provides legal advice or both. Generally, a lawyer is aiding a nonlawyer in the unauthorized practice of law whenever the lawyer effectively substitutes the legal knowledge and judgment of the nonlawyer for his or her own. Regardless of the task in question, a lawyer should never place a nonlawyer in situations in which he or she is called upon to exercise what would amount to independent professional judgment for the lawyer's client. Nothing in this limitation precludes paralegal representation of clients with legal problems whenever such is expressly authorized by law.

In order to enforce this limitation in the public interest, it is necessary to find a violation of the provisions prohibiting aiding a nonlawyer in the unauthorized practice of law whenever a lawyer creates the reasonable appearance to others that he or she has effectively substituted the legal knowledge and judgment of the nonlawyer for his or her own in the representation of the lawyer's client.

As applied to the specific questions presented, a lawyer permitting a nonlawyer to give legal advice to the lawyer's client based on the legal knowledge and judgment of the nonlawyer rather than the lawyer, would be in clear violation of Rules 5.5(b), 7.1(a), and 8.4(a). A lawyer permitting a nonlawyer to prepare and sign threatening correspondence to opposing counsel or unrepresented persons would be in violation of these Rules of Professional Conduct because doing so creates the reasonable appearance to others that the nonlawyer is exercising his or her legal knowledge and professional judgment in the matter.

**G. Supreme Court Of Georgia Formal Advisory Opinion No. 00-3.**

Question Presented:

Ethical propriety of lawyers telephonically participating in real estate closings from remote sites.

Summary Answer:

Formal Advisory Opinion No. 86-5 explains that a lawyer cannot delegate to a nonlawyer the responsibility to "close" the real estate transaction without the participation of an attorney. Formal Advisory Opinion No. 86-5 also provides that "Supervision of the work of the paralegal by the attorney must be direct and constant to avoid any charges of aiding the unauthorized practice of law." The lawyer's physical presence at a closing will assure that there is supervision of the work of the paralegal which is direct and constant.

**H. Supreme Court Of Georgia Formal Advisory Opinion No. 01-1.**

Question Presented:

Is it ethically permissible for an attorney, with or without notice to a client, to charge for a standard time unit without regard to how much time is actually expended?

Summary Answer:

A lawyer may charge for standard time units so long as this does not result in a fee that is unreasonable, and so long as the lawyer communicates to the client the method of billing the lawyer is using so that the client can understand the basis for the fee.

**I. Supreme Court Of Georgia Formal Advisory Opinion No. 03-1.**

Question Presented:

May a Georgia attorney contract with a client for a non-refundable special retainer?

Summary Answer:

A Georgia attorney may contract with a client for a non-refundable special retainer so long as: 1) the contract is not a contract to violate the attorney's obligation under Rule 1.16(d) to refund "any advance payment of fee that has not been earned" upon termination of the representation by the attorney or by the client; and 2) the contracted for fee, as well as any resulting fee upon termination, does not violate Rule 1.5(a)'s requirement of reasonableness.

**J. Supreme Court Of Georgia Formal Advisory Opinion No. 03-2.**

Question Presented:

Does the obligation of confidentiality described in Rule 1.6, Confidentiality of Information, apply as between two jointly represented clients?

Summary Answer:

The obligation of confidentiality applies as between two jointly represented clients. An attorney must honor one client's request that information be kept confidential from the other jointly represented client. Honoring the client's request will, in most circumstances, require the attorney to withdraw from the joint representation.

**K. Supreme Court Of Georgia Formal Advisory Opinion No. 04-1.**

Question Presented:

May a lawyer participate in a non-lawyer entity created by the lawyer for the purpose of conducting residential real estate closings where the closing proceeds received by the entity are deposited in a non-IOLTA interest bearing bank trust account rather than an IOLTA account?

Summary Answer:

The closing of a real estate transaction constitutes the practice of law. If an attorney supervises the closing conducted by the non-lawyer entity, then the attorney is a fiduciary with respect to the closing proceeds and closing proceeds must be handled in accordance with Rule 1.15 (II). If the attorney does not supervise the closings, then, under the facts set forth above, the lawyer is assisting a non-lawyer in the unauthorized practice of law.

**L. Supreme Court Of Georgia Formal Advisory Opinion No. 05-2.**

Approved and issued on April 25, 2006 by the Supreme Court of Georgia thereby replacing Formal Advisory Opinion 90-1.

Question Presented:

"Hold Harmless" Agreements Between Employers and Their In-House Counsel.

Whether an attorney employed in-house by a corporation may enter into an agreement by which his or her employer shall hold the attorney harmless for malpractice committed in the course of his employment.

Summary Answer:

"Hold harmless" agreements between employers and attorneys employed in-house are ethical if the employer is exercising an informed business judgment in utilizing the "hold harmless" agreement in lieu of malpractice insurance on the advice of counsel and the agreement is permitted by law.

**M. Supreme Court Of Georgia Formal Advisory Opinion No. 05-3.**

Approved and issued on April 26, 2006, by the Supreme Court of Georgia thereby replacing Formal Advisory Opinion 90-2.

Question Presented:

Ethical propriety of a part-time law clerk appearing as an attorney before his or her present employer-judge.

Summary Answer:

The representation of clients by a law clerk before a present employer-judge is a violation of Rule 1.7 of the Georgia Rules of Professional Conduct.

**N. Supreme Court Of Georgia Formal Advisory Opinion No. 05-4.**

Approved and issued on March 19, 2007, by the Supreme Court of Georgia thereby replacing Formal Advisory Opinion 91-3.

Question Presented:

Ethical propriety of a lawyer paying his nonlawyer employees a monthly bonus from the gross receipts of his law office.

Summary Answer:

The payment of a monthly bonus by a lawyer to his nonlawyer employees based on the gross receipts of his law office in addition to their regular monthly salary is permissible under Georgia Rule of Professional Conduct 5.4. It is ethically proper for a lawyer to compensate his nonlawyer employees based upon a plan that is based in whole or in part on a profit-sharing arrangement.

**O. Supreme Court Of Georgia Formal Advisory Opinion No. 05-5.**

Approved and issued on February 13, 2007, by the Supreme Court of Georgia thereby replacing Formal Advisory Opinion 92-1.

Question Presented:

- (1) Ethical propriety of a law firm obtaining a loan to cover advances to clients for litigation expenses;
- (2) Ethical considerations applicable to payment of interest charged on loan obtained by law firm to cover advances to clients for litigation expenses.

Opinion:

With respect to the first question, the Board holds that an arrangement where a lawyer borrows money to cover advances to clients for litigation expenses is permissible. If this type of arrangement is in a contingent fee contract, the lawyer must inform the client whether he or she is responsible for these expenses, even if there is no recovery. Additionally, the lawyer must be careful to make sure the bank understands that its contractual arrangement can in no way affect or compromise the lawyer's obligations to his or her individual clients.

Regarding the second question, the Board concludes that a lawyer may charge interest on such advances only if (i) the client is notified in the contingent fee contract of the maximum rate of interest the lawyer will or may charge on such advances; and (ii) the written statement given to the client upon conclusion of the matter reflects the interest charged on the expenses advanced in the matter.

**P. Supreme Court Of Georgia Formal Advisory Opinion No. 05-6.**

Approved and issued on May 3, 2007, by the Supreme Court of Georgia thereby replacing Formal Advisory Opinion 92-2.

Question Presented:

Ethical propriety of a lawyer advertising for legal business with the intention of referring a majority of that business to other lawyers without disclosing that intent in the advertisement.

Summary Answer:

It is ethically improper for a lawyer to advertise for legal business with the intention of referring a majority of that business out to other lawyers without disclosing that intent in the advertisement.

**Q. Supreme Court of Georgia Formal Advisory Opinion No. 05-7.**

Approved And Issued On November 26, 2007 Pursuant To Bar Rule 4-403 By Order Of The Supreme Court Of Georgia Thereby Replacing FAO No. 93-2 Supreme Court Docket No. So8U0023.

Question Presented:

Ethical considerations of an attorney representing an insurance company on a subrogation claim and simultaneously representing the insured.

Summary Answer:

A lawyer representing an insurance company on a subrogation claim should not undertake the simultaneous representation of the insured on related claims, unless it is reasonably likely that the lawyer will be able to provide adequate representation to both clients, and only if both the insurance company and the insured have consented to the representation after consultation with the lawyer, have received in writing reasonable and adequate information about the material risks of the representation, and have been given the opportunity to consult with the independent counsel. Rule 1.7, Conflict of Interest: General Rule.

**R. Supreme Court Of Georgia Formal Advisory Opinion No. 05-8.**

Approved and issued on April 4, 2006, by the Supreme Court of Georgia thereby replacing Formal Advisory Opinion 96-2.

Question Presented:

The question presented is whether an attorney may stamp client correspondence with a notice stating that the client has a particular period of time to notify the lawyer if he/she is dissatisfied with the lawyer and that if the client did not notify the lawyer of his/her dissatisfaction within that period of time, the client would waive any claim for malpractice.

Summary Answer:

A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. Therefore, in the absence of independent representation of the client, the lawyer should not condition the representation of a

client upon the waiver of any claim for malpractice and should not attempt to cause the waiver of any claim for malpractice by the inclusion of language amounting to such a waiver in correspondence with a client.

**S. Supreme Court Of Georgia Formal Advisory Opinion No. 05-9.**

Approved and issued on April 13, 2006, by the Supreme Court of Georgia thereby replacing Formal Advisory Opinion 97-1.

Question Presented:

Is it ethically proper to work on a temporary basis for other attorneys? Is it ethically proper for a lawyer, law firm, or corporate law department to hire other attorneys on a temporary basis?

Summary Answer:

Yes. While a temporary lawyer and the employing firm or corporate law department must be sensitive to the unique problems of conflicts of interest, confidentiality, imputed disqualification, client participation, use of placement agencies and fee division produced by the use of temporary lawyers, there is nothing in the Georgia Rules of Professional Conduct that prohibits the use of temporary lawyers.

**T. Supreme Court Of Georgia Formal Advisory Opinion No. 05-10.**

Approved And Issued On April 25, 2006 Pursuant To Bar Rule 4-403 by Order of the Supreme Court Of Georgia, thereby Replacing FAO No. 98-1.

Question Presented:

Can a Georgia attorney, who has agreed to serve as local counsel, be disciplined for discovery abuses committed by an in-house or other out-of-state counsel who is not a member of the State Bar of Georgia?

Summary Answer:

Georgia attorney, serving as local counsel, can be disciplined under Rule 5.1(c) for discovery abuses committed by an out-of-state in-house counsel or other out-of-state counsel when the local counsel knows of the abuse and ratifies it by his or her conduct. Knowledge in this situation includes "willful blindness" by the local counsel. Local counsel can also be disciplined for discovery abuse committed by an out-of-state in-house counsel or other out-of-state counsel when the local counsel has supervisory authority over the out-of-state counsel also in accordance with Rule 5.1(c). Finally, the role of local counsel, as defined by the parties and understood by the court, may carry with it affirmative ethical obligations.

**U. Supreme Court Of Georgia formal Advisory Opinion No. 05-11**

Approved and Issued On September 22, 2008 Pursuant to Bar Rule 4-403 by Order of the Supreme Court of Georgia, thereby Replacing FAO No. 99-1.

Question Presented:

May an attorney ethically defend a client pursuant to an insurance contract when the attorney simultaneously represents, in an unrelated matter, the insurance company with a subrogation right in any recovery against the defendant client?

Summary Answer:

In this hypothetical, the attorney's successful representation of the insured would reduce or eliminate the potential subrogation claim of the insurance company that is a client of the same attorney in an unrelated matter. Thus, essentially, advocacy on behalf of one client in these circumstances constitutes advocacy against a simultaneously represented client. "Ordinarily, a lawyer may not act as an advocate against a client the

lawyer represents in some other matter, even if the other matter is wholly unrelated." See, Rule 1.7, Comment 8. This is true because adequate representation of any client includes a requirement of an appearance of trustworthiness that is inconsistent with advocacy against that client.

Thus, if the insurance company, as opposed to an insured of that company, is in fact the client of the attorney in the unrelated matter, then this representation would be an impermissible conflict of interest under Rule 1.7(a) and consent of both clients, as sometimes permitted under Rule 1.7 to cure an impermissible conflict, would not be available. See, Rule 1.7(c)(3).

If, however, as is far more typically the case, it is not the insurance company that is the client in the unrelated matter, but an insured of the insurance company, then there is no advocacy against a simultaneous representation client and the representation is not prohibited for that reason. Instead, in such circumstances, the attorney may have a conflict with the attorney's own interests under Rule 1.7 (a) in that the attorney has a financial interest in maintaining a good business relationship with the non-client insurance company. The likelihood that the representation will be harmed by this financial interest makes this a risky situation for the attorney. Nevertheless, under some circumstances the rules permit this personal interest conflict to be cured by consent of all affected clients after compliance with the requirements for consent found in Rule 1.7(b). Consent would not be available to cure the conflict, however, if the conflict "involves circumstances rendering it reasonably unlikely that the lawyer [would] be able to provide adequate representation to one or more of the affect clients." See, Rule 1.7(c). The question this asks is not the subjective one of whether or not the attorney thinks he

or she will be able to provide adequate representation despite the conflict, but whether others would reasonably view the situation as such. The attorney makes this determination at his or her own peril.

**V. Supreme Court Of Georgia Formal Advisory Opinion No. 05-12.**

Question Presented:

When the City Council controls the salary and benefits of the members of the Police Department, may a councilperson, who is an attorney, represent criminal defendants in matters where the police exercise discretion in determining the charges?

Summary Answer:

Representation of a criminal defendant in municipal court by a member of the City Council where the City Council controls salary and benefits for the police implicates Rule 3.5(a), which prohibits attorneys from seeking to influence officials by means prohibited by law. In any circumstance where the representation may create an appearance of impropriety it should be avoided.

**W. Supreme Court Of Georgia Formal Advisory Opinion No. 05-13.**

Approved and issued on June 21, 2007, by the Supreme Court of Georgia thereby replacing Formal Advisory Opinion 93-1.

Question Presented:

(1) Whether the designation “Special Counsel” may be used to describe an attorney and/or law firm affiliated with another law firm for the specific purpose of providing consultation and advice to the other firm in specialized legal areas; (2) and whether the ethical rules governing conflict of interest apply as if the firm, the affiliated attorney and the affiliated firm constitute a single firm.

Summary Answer:

It is not improper for a law firm to associate another lawyer or law firm for providing consultation and advice to the firm's clients on specialized matters and to identify that lawyer or law firm as "special counsel" for that specialized area of the law. The relationship between the law firm and special counsel must be a bona fide relationship. The vicarious disqualification rule requiring the additional disqualification of a partner or associate of a disqualified lawyer does apply to the outside associated lawyer or law firm.

**X. Supreme Court Of Georgia Formal Advisory Opinion No. 07-1.**

Question Presented:

May a lawyer ethically disclose information concerning the financial relationship between the lawyer and his client to a third party in an effort to collect a fee from the client?

Summary Answer:

A lawyer may ethically disclose information concerning the financial relationship between himself and his client in direct efforts to collect a fee, such as bringing suit or using a collection agency. Otherwise, a lawyer may not report the failure of a client to pay the lawyer's bill to third parties, including major credit reporting services, in an effort to collect a fee.

**Y. Formal Advisory Opinion 11-1.**

Issued by the Formal Advisory Opinion Board Pursuant to Rule 4-403 on April 14, 2011.

Question Presented

What are the ethical considerations bearing on a lawyer's decision to enter into a flat fixed fee contract?

Summary Answer:

There is nothing in the Georgia Rules of Professional Conduct that would prohibit the lawyer from charging a flat fee in any particular circumstances, and in many cases a flat fee may be beneficial to both the client and the lawyer. In all cases, however, the lawyer should be mindful of his duties of competence and diligence, as well as the requirement that the fee be reasonable (as established by Rules 1.1, 1.3 and 1.5, respectively). The opinion notes that flat fees may become problematic in situations where someone other than the client is paying a fee for an indeterminable amount of work. There is a risk that if a third party pays the lawyer an inadequate fee on behalf of the client, the lawyer may not have an incentive to prepare properly. The opinion notes that the analysis varies somewhat depending on whether the payer is an insurance company B which would have an incentive to pay the lawyer a sufficient fee to ensure that the lawyer prepared adequately so as to protect the insurable interest B and a party that would not bear the loss, such as a legal aid society. Nonetheless, the opinion declines to state that a flat fee would be impermissible in any particular circumstance.

**Z. Formal Advisory Opinion 10-1.**

Approved and issued by the Supreme Court of Georgia on July 11, 2013. The Board concluded that the standard for the imputation of conflicts of interest under Rule 1.10 (a) of the Georgia Rules of Professional Conduct applies to the office of a circuit public defender as it would to a private law firm, and the Supreme Court of Georgia agreed.

**AA. Formal Advisory Opinion 10-2.**

Approved and issued by the Supreme Court of Georgia on January 9, 2012.

Question Presented:

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?

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.

**BB. Formal Advisory Opinion 11-1.**

Approved and issued by the Formal Advisory Opinion Board on April 14, 2011 (but not yet approved by the Supreme Court of Georgia).

Question Presented:

Ethical Considerations Bearing on Decision of Lawyer to Enter into Flat Fixed Fee Contract to Provide Legal Services.

Summary Answer:

This opinion analyses the ethical implications of various types of fixed fee arrangements. Sophisticated business clients and insurers are well positioned to enter into such arrangements. On the other hand, a problem may arise when a third party is paying for the legal services but does not have a direct stake in the outcome, especially where the amount of work subject to the agreement is indeterminate. "A situation where a third party that will not be harmed directly itself by the result of the lawyer's

representation is compensating the lawyer with a fixed fee to provide an indeterminate amount of legal services to the clients of the lawyer may present an unacceptable risk that the workload and compensation will compromise the competent and diligent representation of those clients.”

**CC. Formal Advisory Opinion 13-1.**

Approved and issued by the Supreme Court of Georgia on September 22, 2014.

Question Presented:

1. Does a Lawyer[1] violate the Georgia Rules of Professional Conduct when he/she conducts a “witness only” real estate closing?
2. Can a Lawyer who is closing a real estate transaction meet his/her obligations under the Georgia Rules of Professional Conduct by reviewing, revising as necessary, and adopting documents sent from a lender or from other sources?
3. Must all funds received by a Lawyer in a real estate closing be deposited into and disbursed from the Lawyer’s trust account?

Summary Answer:

1. A Lawyer may not ethically conduct a “witness only” closing. Unless parties to a transaction are handling it pursuant to Georgia’s pro se exemption, Georgia law requires that a Lawyer handle a real estate closing (see O.C.G.A § 15-19-50, UPL Advisory Opinion No. 2003-2 and Formal Advisory Opinion No. 86-5)[2] . When handling a real estate closing in Georgia a Lawyer does not absolve himself/herself from violations of the Georgia Rules of Professional Conduct by claiming that he/she has acted only as a witness and not as an attorney. (See UPL Advisory Opinion No. 2003-2 and Formal Advisory Opinion No. 04-1).

2. The closing Lawyer must review all documents to be used in the transaction, resolve any errors in the paperwork, detect and resolve ambiguities in title or title defects, and otherwise act with competence. A Lawyer conducting a real estate closing may use documents prepared by others after ensuring their accuracy, making necessary revisions, and adopting the work.

3. A Lawyer who receives funds in connection with a real estate closing must deposit them into and disburse them from his/her trust account or the trust account of another Lawyer. (See Georgia Rule of Professional Conduct 1.15(II) and Formal Advisory Opinion No. 04-1).

**DD. Formal Advisory Opinion 13-2.**

Approved and issued by the Formal Advisory Opinion Board on April 14, 2011 (but not approved by the Supreme Court of Georgia).

Questions Presented:

1. May a lawyer representing a plaintiff personally agree, as a condition of settlement, to indemnify the opposing party from claims by third persons to the settlement funds?

2. May a lawyer seek to require, as a condition of settlement, that a plaintiff's lawyer make a personal agreement to indemnify the opposing party from claims by third persons to the settlement funds?

Summary Answer:

1. A lawyer may not ethically agree, as a condition of settlement, to indemnify the opposing party from claims by third persons to the settlement funds. Such agreements violate Rule 1.8(e) of the Georgia Rules of Professional Conduct, which

prohibits a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation.

2. Further, a lawyer may not seek to require, as a condition of settlement, that a plaintiff's lawyer make a personal agreement to indemnify the opposing party from claims by third persons to the settlement funds. Such conduct violates Rule 8.4(a)(1) of the Georgia Rules of Professional Conduct, which prohibits a lawyer from knowingly inducing another lawyer to violate the Georgia Rules of Professional Conduct.

**EE. Formal Advisory Opinion 16-1.**

Approved and issued by the Formal Advisory Opinion Board on July 25, 2016 (but not approved by the Georgia Supreme Court).

Question Presented:

Does the obligation of confidentiality described in Rule 1.6, Confidentiality of Information, apply as between two jointly represented clients?

Summary Answer:

The obligation of confidentiality described in Rule 1.6, Confidentiality of Information, applies as between two jointly represented clients. An attorney must honor one client's request that information be kept confidential from the other jointly represented client. Honoring the client's request will, in almost all circumstances, require the attorney to withdraw from the joint representation.

**FF. UPL Advisory Opinion No. 2002-1.**

Issued by the Standing Committee on the Unlicensed Practice of Law on July 1, 2002. Approved by the Supreme Court of Georgia on January 12, 2004. In re UPL Advisory Opinion 2002-1, 277 Ga. 521 (2004).

Question Presented:

Debtor incurs a debt with Dr. A, a sole proprietor. Dr. A transfers the account to Collector C by written "assignment." However, the purported assignment states that the transfer is "for the purpose of collection only." Collector C pays nothing for the account, but has an arrangement with Dr. A to receive a set fee or contingency fee upon collection. Collector C is not an attorney, but files suit on the account against Debtor as "Dr. A by his transferee/assignee Collector C vs. Debtor." In the event the case is contested, Collector C also attempts to present the case in court. Is collector C engaged in the unauthorized practice of law?

Summary Answer:

Yes. Individuals normally have the right to represent themselves with regard to legal matters to which they are a party. In the scenario set out above, however, Collector C is not the true party in interest, but is instead taking legal action on behalf of another in exchange for a fee. The actions of Collector C violate O.C.G.A. § ' 15-19-50 et seq., the Georgia statute pertaining to the unauthorized practice of law.

**GG. UPL Advisory Opinion No. 2003-1**

Issued by the Standing Committee on the Unlicensed Practice of Law on March 21, 2003.

Question Presented:

Attorney representing the creditor on an account files a lawsuit against the debtor. The attorney receives a letter and agency power of attorney from a company stating that it has been authorized to act as the agent for the debtor in settlement

negotiations. Is the company engaged in the unlicensed practice of law? Is the individual directing the company engaged in the unlicensed practice of law?

Summary Answer:

Yes. Under the circumstances set out above, the company is representing one of the parties to a lawsuit in settlement negotiations. Since such representation can only be lawfully undertaken by an individual who is duly licensed to practice law, and cannot legitimately arise out of an agency power of attorney, the company and its personnel are engaged in the unlicensed practice of law.

**HH. UPL Advisory Opinion No. 2003-2.**

Issued by the Standing Committee on the Unlicensed Practice of Law on April 22, 2003. Approved by the Supreme Court of Georgia on November 10, 2003. In re UPL Advisory Opinion 2003-2, 277 Ga. 472 (2003).

Question Presented:

Is the preparation and execution of a deed of conveyance (including, but not limited to, a warranty deed, limited warranty deed, quitclaim deed, security deed, and deed to secure debt) considered the unlicensed practice of law if someone other than a duly licensed Georgia attorney prepares or facilitates the execution of said deed(s) for the benefit of the seller, borrower and lender?

Summary Answer:

Yes. Under Georgia law, the preparation of a document that serves to secure a legal right is considered the practice of law. The execution of a deed of conveyance, because it is an integral part of the real estate closing process, is also the practice of law.

As a general rule it would, therefore, be the unlicensed practice of law for a nonlawyer to prepare or facilitate the execution of such deeds.

## **II. UPL Advisory Opinion No. 2004-1.**

Issued by the Standing Committee on the Unlicensed Practice of Law on August 6, 2004.

### Question Presented:

Is the preparation or filing of a lien considered the unlicensed practice of law if it is done by someone other than the lienholder or a licensed Georgia attorney?

### Summary Answer:

A nonlawyer's preparation of a lien for another in exchange for a fee is the unlicensed practice of law. The ministerial act of physically filing a lien with a court is not the practice of law.

## **JJ. UPL Advisory Opinion No. 2005-1.**

Issued by the Standing Committee on the Unlicensed Practice of Law on June 10, 2005.

### Question Presented:

Does a nonlawyer engage in the unlicensed practice of law when he prepares, for another and for remuneration, articles of incorporation, bylaws or other documents relating to the establishment of a corporation?

### Summary Answer:

Yes. The existence of a corporation depends entirely upon the law, and the documents that bring it into being secure legal rights. Consequently, the preparation of

those documents involves the practice of law. A nonlawyer who prepares such documents for another in exchange for a fee engages in the unlicensed practice of law.

**KK. UPL Advisory Opinion No. 2010-1.**

Issued by the Standing Committee on the Unlicensed Practice of Law on June 4, 2010; approved by the Supreme Court of Georgia on September 12, 2011

Question Presented:

Assuming no traverse has been filed by any party in a garnishment action, is the completion, execution and filing of an answer in the garnishment action by a non-attorney employee of the garnishee considered the unlicensed practice of law?

Summary Answer:

A nonlawyer who answers for a garnishee other than himself in a legal proceeding pending with a Georgia court of record is engaged in the unlicensed practice of law.

**LL. UPL Advisory Opinion 2012-1.**

Issued by the Standing Committee on the Unlicensed Practice of Law on August 13, 2012.

Question Presented:

A consulting forester represents a landowner in the sale of his timber. The consulting forester, in the past, had an attorney draft a timber contract for the sale of timber by a different landowner. The consulting forester wants to use the same timber contract for closing of the present timber sale, and not have an attorney involved in the sale and closing of the timber sale. He proposes to merely change name of landowner, name of timber company purchaser, sales price, timber being purchased and land description where the timber is located. All of this to be done so that the sale of timber

can be accomplished without timber company employing an attorney to close the timber sale. Is the consulting forester engaging in the unauthorized practice of law?

Summary Answer:

To the extent any questioned activity involves the preparation or execution of a deed of conveyance, one should look to prior opinions of the Committee and the Supreme Court of Georgia. If, however, a consulting forester's actions do not extend beyond the use of a pre-existing contract, that activity would not by itself constitute the unlicensed practice of law.