RULES, FORMAL ADVISORY OPINIONS, AND RELEVANT CASELAW EVERY CLOSING ATTORNEY SHOULD KNOW TO AVOID LEGAL MALPRACTICE CLAIM

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GEORGIA RULES OF PROFESSIONAL CONDUCT

Preamble [2]

. . . . As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. . . .

Rule 1.1

. . . . Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

> *Comment [5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. . . .*

Rule 1.2

. . . .

(c) A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent, nor knowingly assist a client in such conduct . . .

> *Comment [7] Although the Rule affords the lawyer and the client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. . . . Although an agreement for limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when*

determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.4

. . . .

(d) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 2.1

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. . . .

Comment [5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4: Communication may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Rule 4.1

In the court of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure prohibited by Rule 1.6 (Confidentiality of Information).

Rule 4.3

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

(a) state or imply that the lawyer is disinterested; when the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding; and
(b) give advice other than the advice to secure counsel, if a lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of a client.

Rule 8.4

(a) It shall be a violation of the Georgia Rules of Professional Conduct for a lawyer to:

(1) violate or knowingly attempt to violate the Georgia Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

. . .

(4) engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation;

. . . .

FORMAL ADVISORY OPINIONS

Opinion No. 86-5 (Ethical Propriety of Lawyer's Delegating to Nonlawyers the Closing of Real Estate Transactions)

A lawyer shall not aid a nonlawyer in the unauthorized practice of law. A violation of this Standard may be punished by a public reprimand.

Opinion No. 13-1 ("Witness Only" Closing)

A Lawyer does not violate the Georgia Rules of Professional Conduct by receiving documents from the client or elsewhere for use in a closing transaction, even though the Lawyer has not supervised the preparation of the documents. However, the Lawyer is responsible for utilizing these documents in compliance with the Georgia Rules of Professional Conduct, and must review and adopt work used in a closing.

The obligation to review, revise, approve and adopt documents used in a real estate closing applies to the entire series of events that comprise a closing. While the Supreme Court has not explicitly enumerated what all of those events are, they may include, but not be limited to: (i) rendering an opinion as to title and the resolution of any defects in marketable title; (ii) preparation of deeds of conveyance, including warranty deeds, quitclaim deeds, deeds to secure debt, and mortgage deeds; (iii) overseeing and participating in the execution of instruments conveying title; (iv) supervising the recordation of documents conveying title; and (v) in those situations where the Lawyer receives funds, depositing and disbursing those funds in accordance with Rule 1.15(II). Even if some of these steps are performed elsewhere, the Lawyer maintains full professional and direct responsibility for the entire transaction and for the services rendered to the client.

RELEVANT CASELAW

ATTORNEY-CLIENT RELATIONSHIP

Estate of Nixon v. Barber, 340 Ga. App. 103, 796 S.E.2d 489 (2017)

Court of Appeals held that an attorney-client relationship "can be implied for the parties' conduct" and that "the employment of an attorney 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'." However, "an attorney-client relationship cannot 'be created unilaterally in the

mind of a would-be client; a reasonable belief is required."

Richard v. David, 212 Ga. App. 661, 212 Ga. App. 661 (1994)

Purchaser's Lender provided Purchaser names of two attorneys on bank's preapproved list for real estate transactions. Purchaser contacted both recommended attorneys and selected Closing Attorney. After Closing, Purchaser's Agent asked Seller for Termite Letter and provided to Purchaser. Termite Letter indicated previous infestations and recommended further inspection. There was no discussion at the Closing about the Termite Letter. Purchaser sued Closing Attorney for Legal Malpractice asserting an attorney-client relationship existed because Purchaser selected Closing Attorney and paid Closing Attorney's fee as part of the Closing.

Court of Appeals affirmed Trial Court's grant of summary judgment that no attorney-client relationship existed between Purchaser and Closing Attorney. Court of Appeals noted that Purchaser never sought any legal advice from Closing Attorney and Closing Attorney never offered any legal advice to Purchaser. Nor did Purchaser ever communicate to Closing Attorney that Purchaser would rely on Closing Attorney for legal advice at the Closing. Court of Appeals held that Purchaser could not have had a reasonable belief that an attorney-client relationship existed with Closing Attorney.

Jenkins v. Pierce, 304 Ga. App. 603, 697 S.E.2d 286 (2010)

After her husband dies, relatives of Purported Client advised her she needed a will. Purported Client alleges her relatives took her to Closing Attorney's office twice in June and July. Purported Client alleges she thought she was signing documents related to her will during both visits. Instead, Purported Client signed a will in June and then later signed a security deed secured by her home, a quitclaim deed giving one relative a joint tenancy in her home, a will codicil disinheriting another relative, and a $69,000 check issued to her from Closing Attorney's IOLTA Account in July and August. Purported Client denies knowingly applying for a loan or giving away an ownership interest in her home. Purported Client sued Closing Attorney for Fraud, Gross Negligence, Misrepresentation, Dishonesty, Malpractice, Breach of Fiduciary Duty, and Deceit in connection with the closing of a real estate loan and the preparation of a quitclaim deed.

The Trial Court granted summary judgment to Closing Attorney holding that Purported Client's claims were barred by the Georgia principle that "a party to a contract who can read, must read or show a legal excuse for not doing so, and where fraud is alleged as an excuse, it must be such fraud as would prevent the party from reading the contract."

The Court of Appeals reversed summary judgment holding that there was a genuine issue of material fact as to the existence of a confidential attorney-client relationship at the time the security deed and quitclaim deed were signed because there was no dispute that Closing Attorney represented Purported Client in regard to the will. If there was such confidential attorney-client relationship, then Purported Client may have relied upon such relationship in not reading the documents.

DUTY TO THIRD PARTIES

Simmerson v. Blanks, 149 Ga. App. 478, 254 S.E.2d 716 (1979)

After Closing, Buyer's Closing Attorney offered to Seller to "take care of the filing of the papers," which included the filing of a financing statement giving Seller a first lien priority on the property. Closing Attorney filed the financing statement in the wrong county.

Seller was allowed to pursue a Negligence claim against Buyer's Closing Attorney because "a gratuitous agent owes his principal the duty to exercise slight diligence, and a property appraisal of the agent's conduct encompasses knowledge which he professes to possess." Simply, if you offer to handle filings then it is assumed you have the knowledge of exactly how to file.

Kirby v. Chester, 174 Ga. App. 881, 331 S.E.2d 915 (1985)

Under certain circumstances, an attorney may owe a duty to a party who is not the attorney's client, but who is a third-party beneficiary to an agreement between the attorney and the attorney's client. For a third party to claim such a duty exists, "it must clearly appear from the contract that it was intended for his benefit. The mere fact that he could benefit from performance of the agreement is not alone sufficient."

FRAUD

Paul v. Joseph, 212 Ga. App. 122, 441 S.E.2d 762 (1994)

The terms of a written contract for the purchase of real estate provided that Purchaser would satisfy the Purchase Price by a cash payment, promissory note executed in favor of Seller, and assumption of Seller's existing mortgage represented to be $15,700. After Closing, Purchaser discovered the balance of the assumed mortgage was more than $15,700. Purchaser sued Seller, Seller's real estate agent, and Closing Attorney for Fraud. Purchaser's claim against the Closing Attorney "was based on things that she thought should have been done and were not done."

Court of Appeals held that Purchaser failed to "point to specific evidence giving rise to a triable issue" and that Purchaser assertion that Closing Attorney should have done something that was not done was "insufficient to raise an issue of fraud". However, the Court of Appeals did observe such an assertion raised "an issue of professional negligence," which was not alleged by Purchaser.

LEGAL MALPRACTICE STANDARD

Legacy Homes, Inc. v. Cole, 206 Ga. App. 34, 421 S.E.2d 127 (1992)

It is generally held that an attorney-client relationship must be demonstrated before a plaintiff may recover in a legal malpractice suit this is essential in establishing the element of duty that is necessary to every lawsuit based upon a theory of negligence.

The basic question in regard to the formation of the attorney-client relationship is whether it has been sufficiently established that advice or assistance of the attorney is both sought and received in matters pertinent to his profession.

Factors to consider: contact between claimant and closing attorney before closing, communications from claimant to closing attorney that claimant is looking for advice, and whether closing attorney did offer claimant any legal advice or assistance.

Howard v. Sellers & Warren, P.C., 309 Ga. App. 302, 709 S.E.2d 585 (2011)

Court of Appeals held that to prevail on a legal malpractice claim, a claimant must prove that (1) employment of defendant attorney; (2) the attorney failed to exercise ordinary care, skill, and diligence; and (3) this failure was the proximate cause of damages to the claimant. Further, Court of Appeals held that to establish proximate cause, the claimant must show that but for the attorney's error, the outcome would have been different; any lesser requirement would invite speculation and conjecture. The defendant attorney is entitled to summary judgment if there is an absence of proof adduced by the claimant on the issue of proximate cause.

First Bancorp Mortg. Corp. v. Giddens, 251 Ga. App. 676, 555 S.E.2d 53 (2001)

Purchaser/Borrower defaulted on mortgage to Lender. Lender sued Lender's Closing Attorney for Legal Malpractice for failing to disclose previous "flip sales" or contemporaneous closings of the same property in which the Closing Attorney was involved and that involved substantially lower purchase prices. Lender alleged Closing Attorney knew or in the exercise of ordinary care should have known, that the value of the property was far below the amount of the loan being closed for Lender because Closing Attorney had been the closing attorney in the prior sales. Jury verdict entered in favor of Closing Attorney.

The Court of Appeals affirmed the jury verdict. On appeal, the Court of Appeals affirmed the right of the Closing Attorney to present evidence in defense of Lender's claims for Punitive Damages about "customary practices and procedures used by other closing attorneys, including those whom [Lender] had employed" on "the issue of whether the failure to report the flip sales was so grossly an aberration from standard practice as to constitute willfull misconduct or such an entire want of care as would raise the presumption of conscious indifference to consequences." The Court Appeals affirmed a jury instruction on the defenses of contributory and comparative negligence where evidence showed Lender, not Closing Attorney hired the real estate broker and trusted the broker to hire the appraiser valuing the property. Finally, the Court of Appeals affirmed a re-charge of the jury responding to a jury question that expressed an opinion that the failure to use "the better practice" of advising Lender about recent sales did not constitute malpractice holding that "the phrase 'better practice' does not mean the same thing as the term 'malpractice' as the "issue is not what conduct might constitute 'better practice' but what degree of skill and care is ordinarily used by other closing attorneys in similar situations." "The breach of duty in a legal malpractice case 'must relate directly to the duty of the attorney, that is, the duty to perform the task for which he was employed."

Don't Volunteer as No Good Deed Goes Unpunished

Abellera v. Williamson, 245 Ga. App. 312, 537 S.E.2d 130 (2000), 274 Ga. 324, 553 S.E.2d 806 (2001)

Closing Attorney engaged by Purchaser's Lender. After Closing, Closing Attorney overheard Seller tell Purchaser that stated she "dreaded" having to pay capital gains taxes. Closing Attorney volunteered that a § 1031 Exchange could be completed if everyone was willing to re-sign the closing documents, which the parties agreed to do so. Closing Attorney gave Seller a brochure and letter for Section 1031 Services, Inc., describing the company as an exchange facilitator and a licensed escrow agent. Closing Attorney gave Seller the name of the exchange company's president and told Seller "you can call him." Seller agreed to proceed with the exchange company and use Closing Attorney for the § 1031 Exchange. Closing Attorney prepared the closing documents and charging $200 Seller for closing costs. The exchange company's president fled the country with Seller's funds.

Seller sued Closing Attorney for Legal Malpractice. Closing Attorney moved for summary judgment asserting no attorney-client relationship and that the theft by the exchange company's president was an intervening criminal act. Trial Court did not decided whether an attorney-client relationship existed, but granted summary judgment to Closing Attorney as any negligence was not the proximate cause of Seller's damages due to intervening criminal act.

Court of Appeals reversed summary judgment observing that "[a]mong the dangers of entrusting property to another is the risk of theft. Thus, it is reasonably foreseeable that such funds might be lost if the attorney fails to exercise ordinary care, skill, and diligence in selecting or recommending a facilitator for that role." Court of Appeals noted Closing Attorney "made no efforts to ascertain or verify the identify, credentials, or trustworthiness" of and had no prior history with Section 1031 Services, Inc. or its president. Instead, Closing Attorney had simply received the company's solicitation letter and brochure assumed to be part of a mass mailing to members of the real estate section of the Georgia bar. While Closing Attorney asserted that there was no evidence of any propensity by the exchange company's president to steal, Seller's expert testified that Closing Attorney's failure to investigate prevented the discovery that the exchange company's president went by an alias, only recently moved to the area, did not hold a J.D., was not a "licensed escrow" agent, did not have the represented trust account, and had been incorporated for less than a year. Court of Appeals did not decide whether an attorney-client relationship existed.

Supreme Court remanded to Court of Appeals to decide the issue of whether an attorney-client relationship existed.

Remanded by Court of Appeals an unpublished opinion with direction for the Trial Court to decide whether an attorney-client relationship existed. Closing Attorney moved for another summary judgment. Case settled prior to resolution.

Closing occurred June 1997. Case settled August 2002.