ETHICAL CONSIDERATIONS

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"Ethics is that which is required and professionalism is that which is expected".

--Chief Justice Clarke

Introduction

There is not a topic within the practice of law about which I am more passionate than professionalism. Unfortunately, my passion has been inspired by my rude awakening to the fact that so many members of our profession lack the spirit which I always believed was the root underlying our honorable profession. Former Supreme Court Justice Hardy Gregory has outlined both the problem and the solution for the state of professionalism among lawyers today, in the following remarks:

> "I detect in law practice today a new meanness and blind insistence on the rights of clients with a serious lack of a spirit of compromise and sometimes even common sense. There's a time to take a stand and there's a time to find a way. Good lawyering is knowing the difference."[1]

Chief Justice Robert Benham agrees that to maintain respect for the community of lawyers will require an increased spirit of cooperation and civility:

> "The practice of law is dependent to a great extent on lawyers having respect for each other, honoring their promises, cooperating with others, and according each other a high degree of civility. . . What is disturbing to me is that many lawyers fail to realize that the law and the Code of Professional Responsibility set minimum levels of reasonable conduct. As members of an honorable profession, we must be willing to conduct our

> business in a manner consistent with higher standards embodied in the Ethical Considerations and aspirational goals embodied in the professionalism movement."[2]

Chief Justice Robert Benham's Commission on Professionalism enumerated a six-part Creed for Lawyers which is an inspirational reminder of our *professional* obligations to our clients, opposing parties and their counsel, the courts, our colleagues in the practice of law, our profession, and finally to the public. A copy of the creed can be found in the "Professionalism Page" of the Georgia State Bar Journal at 27 Ga. St. B.J. 48 (1990).

Despite my passion regarding professionalism among lawyers, it is nonetheless my assignment today to discuss ethics, or the minimum standards by which we must govern our conduct. Of course, the topics of ethics and professionalism are not mutually exclusive, and it is important to keep in mind as you study ethics that they are baselines – they are what is required, but less than what is expected.

A. Formation of the Attorney-Client Relationship

1. How the Attorney-Client Relationship is Established

In Georgia, there are essentially three ways in which a plaintiff can demonstrate the existence of an "attorney-client relationship" to sustain a legal malpractice claim.

First, if an attorney acknowledges that he or she has been retained by or served as counsel for the plaintiff, then it is indisputable that an attorney-client relationship exists. Such a relationship can be evidenced by the existence of an engagement letter, a fee contract or correspondence in which the attorney acknowledges that he or she represents or that he or she is counsel to the plaintiff.

Second, if the attorney acts in a way that causes a plaintiff to reasonably believe that the attorney is representing the interests of the plaintiff, then the plaintiff can prove an attorney-client relationship sufficient to sustain a legal malpractice action.

> "Generally, the relation of attorney and client is a matter of contract but the contract may be express, or implied from the conduct of the parties." *In the Matter of Dowdy*, 247 Ga. 488, 491 (1981). Thus, contractual formalities are not essential to the creation of the relationship. *Nicholson v. Shockey*, 192 Va. 270 (1951); *Lawrence v. Tschirgi*, 244 Iowa 386 (1953). And, in fact, the relation of attorney and client may be implied from the conduct of the parties. *E.F. Hutton & Co. v. Brown*, 205 F. Supp. 371, 388 (S.D. Tex. 1969); *Lawrence v. Tschirgi*, *supra*. As it is said, "the employment 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." *In the Matter of Dowdy*, 247 Ga. 488, 491, *supra*.[3]

In Guillebeau, the court held that "all that is necessary is a reasonable belief on the part of the would-be client that he or she was being represented by the attorney. A reasonable belief is one which is 'reasonably induced by representations or . . . conduct' on the part of the attorney."

Third, Georgia courts have found that professionals owe a duty to those persons of whom the professional is **actually aware** will rely upon the professional in the transaction. As a result, attorneys have been unable to avoid a legal malpractice claim by asserting that, "technically," they were never "employed" to represent a particular client in a transaction.[4] There are three cases in Georgia that demonstrate that an attorney-client relationship may arise outside the context of an agreement on behalf of the attorney to represent a person:

In Badische Corp v. Caylor[5], the Court of Appeals, citing Robert & Co.[6], reaffirmed the adoption of the Restatement of Torts 2d Section 552 (1) 1977), which states:

> One who, in the course of his business, professional or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.[7]

The Badische court explains the Restatement rule. It stated that the duty of reasonable care and competence extends to those 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 limited class of persons for whom the information was intended, either directly or indirectly.

The Badische court held:

> Rather, professional liability for negligence, including the liability of accountants, extends to those persons, or the limited class of persons who the professional is actually aware will rely upon the information he prepared.

So, what should one do to prevent an attorney-client relationship from arising in this manner where the attorney does not really intend to create such a relationship? Both Robert & Co and Badische stated that appropriate disclaimers which would inform the potential client that it cannot rely on information supplied by the attorney would minimize the attorney's liability exposure.

One case that applies specifically in the real estate context is Carmichael v. Barham, Bennett, Miller & Stone[8]. In that case, the closing attorney, who represented the lender, had the borrower sign a document stating that the firm did not represent the borrower and that the borrower was entitled to obtain counsel of its choice. The court held, in that case, that the document was sufficient to preclude the creation of an attorney-client relationship.

The Carmichael case is both good news and good guidance for closing attorneys. Closing attorneys who do not have clients acknowledge who the attorney actually represents at a closing run the risk of a borrower (or seller, or another unrepresented party) forming the reasonable belief that the attorney represents the borrower. The good news is that a simple acknowledgement can reduce an attorney's risk substantially. Of course, it is also necessary for the attorney to refrain from actually giving the unrepresented party any advice.

2. When Someone Asks for Legal Advice – Be Prepared to Say "No"

Real estate attorneys are often faced with ethical dilemmas, especially those involving avoiding conflicts of interest and giving advice to unrepresented parties. Usually all parties in a transaction (particularly in the residential real estate closing) are not represented by counsel. It is not uncommon for at least one person at the closing table to be unrepresented by counsel. Since the closing attorney is the person conducting the transaction, it is natural for an unrepresented person to look to the closing attorney for advice, such as an explanation of the documents, or an explanation of what the unrepresented person should do in light of certain facts that come to light during the closing. Since the closing attorney represents another party to the transaction, the closing attorney should not answer questions which would constitute legal advice to the unrepresented person. It is perfectly acceptable to let the person asking for advice know that closing can be postponed until the person has obtained independent advice from an attorney who can answer the person's questions impartially and competently.

A difficult question to answer is "what constitutes legal advice"? There is not a lot of case law available to answer that question. However, one may draw a logical conclusion that "legal advice" is anything that will determine a person's course of action, or any interpretation of cases, statutes, or other governing law. Therefore, answering a question about the meaning of a term in a document; or what would happen in the absence of a particular document; or how a law applies to a specific person or situation; would most likely constitute the rendering of legal advice.

B. Conflicts of Interest

Despite that the fact that an attorney can be disbarred for failing to adhere to the rules of Professional Conduct regarding conflicts of interest, conflicts are nonetheless prevalent in the real estate arena. There are many attorneys who either fail to recognize

them, or ignore the rules which govern them, perhaps because conflicts of interest in contexts other than litigation sometimes may be difficult to assess.

There are three rules relevant to conflicts of interest in the Georgia Rules of Professional Conduct: Rule 1.7 (General Rule), Rule 1.8 (Prohibited Transactions), and Rule 1.9 (Former Clients). The rules cover the two broad categories of types of conflicts attorneys face – those involving multiple or successive representation of different clients' interests, and those in which the attorney's own interests may be opposed to those of his client.[9]

Rule 1.7 provides that "a lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyers' duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b)." Subsection (b) goes on to stipulate how a lawyer must inform a client of a potential conflict of interest: "If client consent is permissible, a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected or former client consents, preferably in writing, to the representation after: (1) consultation with the lawyer, (2) having received in writing reasonable and adequate information about the material risks for the representation; and (3) having been given the opportunity to consult with independent counsel.".

Rule 1.7(b) contemplates situations only where there is a potential conflict of interest. If there is an actual conflict of interest, then the lawyer is simply prohibited from representing the client, regardless of whether the client consents. Rule 1.7(c). Rule 1.7 (c) states that client consent to representation of multiple clients is not permissible if representation ". . . (2) includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding; or (3) involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients."

With these rules in mind, it is clear that an attorney could not represent both a lender and a seller in a transaction, since their interests in the transaction are substantially

different (the seller desires to sell, regardless of the property condition or status of title, and receive money from the transaction, and the lender wants to make sure that the property which is securing its loan is in good condition, and is marketable) and it would be reasonably unlikely that a lawyer would be able to provided adequate representation to both of them. While it is easier to argue that the interests of a lender and buyer in the same transaction might be more aligned, it is also clear that a lender and a buyer have separate interests as well. The lender wants to make sure it's loan will be repaid, while the buyer may not have the same interest. Therefore, it is the safe practice for an attorney to avoid representing more than one party in a transaction.

It is more difficult to apply Rule 1.9, relating to former clients. This Rule is written for the protection of former clients, and therefore, if a lawyer desires to represent a new client in a matter substantially related, and materially adverse, to the matter of a former client, then the former client must consent to the representation. Even in the case of consent, the lawyer should not use information gained during representation of the new client to the disadvantage of the former client.

Rule 1.8 is a list of scenarios in which it would be unethical for an attorney to represent certain clients or to take certain actions. Many of the actions are listed in this Rule because the actions themselves create an inherent conflict of interest between the attorney and the client. That list includes, but is not limited to: (a) entering into certain business transactions with a client; (b) using confidential information to the disadvantage of a client; (c) preparing estate planning instruments conferring a substantial benefit upon the lawyer, unless the lawyer is related to the donor; (d) negotiating an agreement giving the lawyer media rights in a story about the matter in which the lawyer represents a person; (e) providing financial assistance to a client other than paying for the costs of litigation; (f) entering into an agreement with a client whereby the client waives any claims of malpractice against the attorney, except in limited circumstances; and (g) except for contingency cases, entering into an agreement with a client that would give the lawyer a pecuniary interest in the outcome of the matter.

C. Duties of Competence and Diligence

The Georgia Code of Professional Conduct sets forth two standards with respect to the duty of competence and diligence. The rules, and select comments to the rules are set forth below:

1. RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation as used in this Rule means that a lawyer shall not handle a matter which the lawyer knows or should know to be beyond the lawyer's level of competence without associating another lawyer who the original lawyer reasonably believes to be competent to handle the matter in question. Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The maximum penalty for a violation of this Rule is disbarment.

Comments

[1B] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal

skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in

[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. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education.

2. RULE 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client. Reasonable diligence as used in this Rule means that a lawyer shall not without just cause to the detriment of the client in effect willfully abandon or willfully disregard a legal matter entrusted to the lawyer.

The maximum penalty for a violation of this Rule is disbarment.

Comments

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction

or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2: Scope of Representation. A lawyer's work load should be controlled so that each matter can be handled adequately.

[3] Unless the relationship is terminated as provided in Rule 1.16: Declining or Terminating Representation, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will serve on a continuing basis. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

3. Civil Liability for violation of the Code of Professional Responsibility

Comment 1 to Rule 1.1 states that the "purpose of these rules is not to give rise to a cause of action nor to create a presumption that a legal duty has been breached. These Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability".

On the other hand, it appears that a violation of the Code of Professional Responsibility when combined with damage caused by such violation, may be sufficient to state a claim of legal malpractice.[10] The plaintiff would, however, still have to show that the attorney was negligent in that he or she failed to meet the standard of care in exercising his or her duties to the client. The Georgia Supreme Court has held that the pertinent bar rules are relevant to the standard of care in a legal malpractice action and, thus, may be admissible. The court articulated the following standard:

> 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. Thus, while a bar rule is not determinative of the standard of care applicable in a legal malpractice action, it may be a circumstance that can be considered, along with other facts and circumstances.[11]

In short, a violation of the Georgia Code of Professional Conduct, standing alone, cannot serve as a legal basis to support a civil action for legal malpractice; however, it may be relevant to the standard of care and admissible as evidence in the civil suit.

D. Disclosure of Defects in Property

So far, this paper's focus has been on the ethical obligations of the attorney. Now, it's time to turn our focus to an area of the law which imposes obligations of our clients to disclose certain facts to other parties. The following is a summary of Georgia law regarding the obligation of a Seller to refrain from committing fraud through silence. Therefore, the analysis below does not extend to fraud through statements (or intentional misrepresentations), but is limited only to claims for fraud arising from the failure to disclose defects in property. Additionally, the summary is limited to physical defects, and does not address title defects.

Generally, the rule in Georgia is the common law rule of *caveat emptor*. In other words, let the buyer beware[12]. Let her see to it, that the title she is buying is good. The idea behind the doctrine of *caveat emptor* is that a buyer has in its power the ability to protect itself by requiring proper covenants in the deed or purchase contract. The law

will not protect the buyer from something against which the buyer could have protected himself.

The development of the passive concealment exception to caveat emptor for the sale of real property now places a duty upon a seller to disclose facts not apparent to the buyer of which the seller has special knowledge and when the seller is aware that the buyer is acting under a misapprehension of such facts that would be important to him and would probably affect his purchase decision.[13]

Typically, the case law holds that if a diligent buyer could have found the defect through an inspection, the Seller should have no liability to disclose the defect unless the Seller concealed the defect. Therefore, the passive concealment doctrine does not come into play for defects that are readily discoverable through observation and the use of due diligence and inspection.[14]

However, it should also be noted that simply because the concealed information may be located in a public record, a claim of passive concealment will not necessarily be defeated.[15]

Take, for example, the Weiderhold case, where the Court of Appeals found that there was sufficient evidence to support a jury verdict of fraud, where a seller sold a home within a subdivision knowing that the local Public Works Department had placed a hold on the lot because of subdivision problems which necessitated an expenditure of roughly $34,000.00 before a home could be constructed. In short, there is "an exception to the general rule of caveat emptor in cases involving passive concealment by the seller of defective reality". As a result, a seller has a duty to disclose regulatory defects where he or she has "special knowledge" not apparent to the buyer and where the buyer is acting under a misapprehension as to the facts which would be important to the buyer and would probably affect his decision to buy—even where the information is located "in a file that is open to the public," since such regulatory problems are not disclosed by the deed records, and it is "not common for potential buyers of lots to ask to see the files maintained in subdivisions . . . before purchasing property."

Nonetheless, a purchaser attempting to hold a seller liable for fraud under the passive concealment doctrine still has to show an intention to deceive, as well as knowledge of the falsehood.[16] Therefore, if a seller has reason to believe that defects were corrected by repairs, the seller is not obligated to reveal repairs to the buyer since the seller does not fail to disclose based on an intention to deceive.[17] Nor does the seller, in that instance, know that the failure to disclose would cause harm to the buyer.

The doctrine of passive concealment has been limited in its application to cases involving controversies between residential homeowners and residential builder/sellers[18]; therefore, the doctrine is not applicable to commercial property. Commercial buyers, therefore, do not benefit from the passive concealment exception carved out of the *caveat emptor* rule.

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[1] Justice Hardy Gregory, quoted in Clarke, "Professionalism: Repaying the Debt," 25 Ga. St. B.J. 170, 171 (1989)
[2] Evanoff v. Evanoff, 262 Ga. 303, 304-305 (1992) (Benham, J., concurring)
[3] Guillebeau v. Jenkins, 182 Ga. App. 225 (1987).
[4] Evans, J. Randolph, Practical Guide to Legal Malpractice Prevention, Institute of Continuing Legal Education in Georgia (2000).
[5] 257 Ga. 131 (1987)
[6] 250 Ga. 680 (1983)
[7] Restatement (Second) of Torts § 552 (1977)
[8] 187 Ga. App. 494 (1988), *cert denied* (Sept. 8, 1988)
[9] Adams, Charles R. III, Ga. Law of Torts, (2002 ed.) §1-6
[10] Hendricks v. Davis, 196 Ga. App. 286 (1990), *cert. denied* (Sept. 4, 1990), overruled on other grounds by Hardaway Co. v. Amwest Sur. Ins. Co., 263 Ga. 697 (1993)
[11] Rolleston v. Cherry, 226 Ga. App. 750 (1997), *cert. denied* (Oct. 31, 1997); see also Watkins & Watkins, P.C. v. Williams, 238 Ga. App. 646 (1999).
[12] Black's Law Dictionary 202 (rev. 5th ed. 1979).
[13] Wilhite v. Mays, 140 Ga. App. 816 (1976), aff'd 230 Ga. 31 91977).
[14] Delk v. Tom Peterson Realtors, Inc. 220 Ga. App. 576 (1996); Smith v. Stanley, 223 Ga. App. 334 (1996); Smalls v. Blueprint Development, Inc., 230 Ga. App. 556 (1998)
[15] Akins v. Couch, 271 Ga. 276 (1999); Weiderhold v. Smith, 203 Ga. App. 877 (1992).
[16] Cooley v. King & Co., 113 Ga. 1163 (1901); Camp Realty Co. v. Jennings, 77 Ga. App. 149 (1948); Lively v. Garnick, 160 Ga. App. 591 (1981); Wilson v. Phillips, 230 Ga. App. 290 (1998).
[17] Duenas v. Bence, 174 Ga. App. 80 (1985); Conner v. Branch, 185 Ga. App. 565 (1988); Webb v. Rushing, 194 Ga. App. 732 (1990); Deckert v. Foster, 230 Ga. App. 164 (1998).
[18] Butts v. Southern Clays, Inc., 215 Ga. App. 110 (1994).