Legal Ethics and Malpractice

by L. Ray Patterson*

The courts rendered few legal ethics and malpractice decisions during the survey period; the few that were rendered, however, were significant. The opinions involved the following issues: (1) The use of rules of ethics as a basis for a malpractice action; (2) expert affidavits in malpractice actions; (3) damages as an element of malpractice actions; (4) the disqualification of a lawyer from representing himself; (5) the reversal of a trial court for rejecting a *Yost* claim; and (6) fees, including the annual case on attorney's liens, one of which seems to appear every year. In addition, the Georgia Supreme Court made a significant amendment to Standard 69 of the Georgia Bar Rules relating to public lawyers that merits discussion.

I. The Breach of Rules of Ethics is Not a Basis for Malpractice

In *Roberts v. Langdale*,[1] the court of appeals held that the breach of a rule of ethics alone will not support a malpractice action against a lawyer.[2] The case arose when a former client filed a third-party complaint against the attorney who represented the client, a guarantor on two promissory notes.[3] The former client was seeking indemnification from his former attorney.[4] The attorney denied the allegations of the complaint, moved for summary judgment, and filed three supporting affidavits of attorneys deposing that he had exercised "the requisite degree of 'skill, prudence and diligence.' "[5] The former client countered with the affidavit of an expert witness who testified that the lawyer "violated one

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1. 185 Ga. App. 122, 363 S.E.2d 591 (1987).
2. *Id.* at 124, 363 S.E.2d at 593.
3. *Id.* at 122, 363 S.E.2d at 592.
4. *Id.*
5. *Id.* at 123, 363 S.E.2d at 592.

or more provisions of the Georgia Code of Professional Responsibility"[6] in the representation of the client. The court granted the summary judgment motion.[7]

The controlling issue was whether a legal malpractice case in Georgia must include negligence.[8] The court held that the answer was yes and proceeded to examine the client's affidavit in light of the presumption of law that a lawyer performs legal services in an ordinarily skillful manner.[9] The court stated that the former attorney's affidavits in support of his motion for summary judgment reinforced the presumption.[10] The client's expert witness' claim that the attorney violated provisions of the Code of Professional Responsibility was not sufficient to withstand the motion for summary judgment.[11]

Without qualification, the court accepted the rule that the breach of a rule of ethics alone is not sufficient to sustain a malpractice action.[12] This position is consistent with provisions in both the ABA Model Code of Professional Responsibility[13] and the Model Rules of Professional Conduct.[14]

The facts as related in the opinion suggest that the court reached the correct result. They do not necessarily warrant the court's broad holding. If a party fails to produce relevant evidence under his control, one is justified in drawing an inference that the evidence is unfavorable. If the attorney did "violate one or more provisions of the Georgia Code of Professional Responsibility,"[15] it would seem that the former client could have stated alleged violations with more particularity.

The unusual aspect of the case is that a former client alleged the ethical violation. Because ethical rules for the most part have their counterpart in legal rules, a former client should not have to rely on rules of ethics in order to allege malpractice. Thus, the breach of ethical rules as the basis of attorney liability is usually raised when a third party, not a

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6. *Id.*
7. *Id.* at 124, 363 S.E.2d at 593.
8. *Id.* at 123, 363 S.E.2d at 592.
9. *Id.*
10. *Id.*, 363 S.E.2d at 592-93.
11. *Id.*, 363 S.E.2d at 593.
12. *Id.*; *see also* Bob Godfrey Pontiac, Inc. v. Roloff, 291 Or. 318, 630 P.2d 840 (1981).
13. "The Code . . . [does not] undertake to define standards for civil liability of lawyers for professional conduct." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1978).
14. "Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached . . . . The Rules . . . are not designed to be a basis for civil liability." MODEL RULES OF PROFESSIONAL CONDUCT Scope (1983).
15. 185 Ga. App. at 124, 363 S.E.2d at 593.

client, seeks recovery[16] or sues the attorney.[17]

Most courts accept the proposition that an attorney's breach of rules of ethics does not give rise to a cause of action. The rule is more a product of policy than analysis; however, this policy is questionable. To say that an attorney cannot be held liable for breaching a rule of ethics is to say that a criminal cannot be held liable in damages for committing a crime. The rule is superficially logical, but it ignores the fact that a crime may also be a tort. One does not seek damages for a murder or a burglary, but damages are available for wrongful death or conversion of property.

The analogy of criminal law to rules of ethics in this regard is striking. Just as the legislature designs criminal laws to protect the public against criminal conduct, the court designs the rules of ethics to protect the public against attorney misconduct; just as a state imposes criminal sanctions, it also imposes ethical sanctions; just as the commission of a crime is in breach of a public duty, so is an attorney's ethical violation. Thus, just as a crime may be a tort, there is no reason not to recognize that the breach of an ethical duty that results in harm to another is a tort. In short, the rules of ethics serve as a measure of the attorney's duty to both the client and others. Thus, the breach of the duty is easily recognizable not only as an ethical violation, but also as a tort. In *Yost v. Torok*,[18] the Georgia Supreme Court took a major step in this direction by creating the tort of abusive litigation.[19] The conduct that the tort proscribes has its counterpart in Disciplinary Rule 7-102(A)(1) of the Georgia Code of Professional Responsibility.[20] Thus, the mere fact that a rule of ethics proscribes certain conduct should no more protect the attorney from liability than criminal laws that proscribe certain conduct protect the criminal from punishment.

II. Expert Affidavits in Malpractice Actions

In *Elwell v. Cutler*,[21] the court considered the legal effect of an affidavit of an attorney sued for malpractice.[22] The question before the court was whether a defendant attorney's affidavit is conclusive as a matter of law if the plaintiff's affidavit is not "a particularized expert counter-affidavit"

16. *See, e.g.*, East River Savings Bank v. Steele, 169 Ga. App. 9, 311 S.E.2d 189 (1983).

17. *See, e.g., Roloff*, 291 Or. 318, 630 P.2d 840 (1981). *See also* Kinnamon v. Statman & Snyder, 66 Cal. App. 3d 893, 136 Cal. Rptr. 321 (1977).

18. 256 Ga. 92, 344 S.E.2d 414 (1986). *See* Patterson, *Yost v. Torok: Taking Legal Ethics Seriously*, 4 Ga. St. U.L. Rev. 23 (1988).

19. 256 Ga. at 96, 344 S.E.2d at 417.

20. Code of Professional Responsibility DR 7-102A(1).

21. 185 Ga. App. 423, 364 S.E.2d 81 (1987).

22. *Id.* at 423, 364 S.E.2d at 81.

when the undisputed facts are contrary to the defendant's affidavit.[23] Over a strong dissent, the majority held that it was not.[24]

The trial court granted the defendant attorney's motion for summary judgment on the following undisputed facts and the plaintiff appealed.[25] The attorney filed a lawsuit arising out of an automobile collision on November 29, 1982, four days before the statute of limitations ran.[26] The defendant was not served until April 15, 1983, and the trial court dismissed the case because of the expiration of the statute of limitations.[27] The other undisputed facts were: The attorney did not research the law to discover that failure to obtain prompt service, as section 9-11-4(c) of the Official Code of Georgia Annotated required, could lead to dismissal for laches; the attorney did not advise the sheriff of the urgency of prompt service; the client relied entirely on the attorney for filing and serving the lawsuit; on the hearing to dismiss the claim because of laches, the attorney presented no evidence to show why defendant was not timely served, nor did he present any evidence to explain why it took over four months to effect service; the attorney knew defendant's address, which did not change during the relevant period.[28]

Given these facts, the court said the opinion of the attorney that "he pursued service 'diligently and without delay' and that his conduct 'fell within the parameters of acceptable professional conduct' did not foreclose a consideration of whether his conduct constituted professional negligence even without any countering expert testimony, properly explicit or not."[29] Thus, the court seems to be saying that if the facts in a case are sufficiently strong, no counter affidavit is necessary to avoid summary judgment.

The dissenting opinion took the position that the attorney's affidavit, together with the presumption that attorneys perform legal services in an ordinarily skillful manner, required the plaintiff to produce an expert's affidavit in rebuttal.[30] This affidavit "must contain more than a mere naked conclusion [and] . . . provide some comparison between what was done and what should have been done."[31]

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23. *Id.*
24. *Id.* at 425, 364 S.E.2d at 82.
25. *Id.* at 423, 364 S.E.2d at 81.
26. *Id.*
27. *Id.*
28. *Id.* at 424, 364 S.E.2d at 81.
29. *Id.*, 364 S.E.2d at 82.
30. *Id.* at 425-26, 364 S.E.2d at 83 (McMurray, P.J., dissenting).
31. *Id.*

III. Damages as an Element of Malpractice

In *Whitehead v. Cuffie*,[32] plaintiffs engaged the defendant attorney to present their claims to the insurer of a tortfeasor whose negligence caused a fire that damaged their homes.[33] After more than three years without satisfaction, plaintiffs dismissed the defendant attorney and engaged another, who settled the claims within three weeks of the running of the statute of limitations.[34] Plaintiffs then sued their former attorney,[35] alleging that the attorney's wilful and intentional conduct caused them damages in the delay of recovering the settlement sums, mental and emotional distress by reason of defendant's neglect of their affairs, and forced acceptance of a lesser settlement to avoid litigation costs.[36] The trial court granted summary judgment to defendant on the ground that plaintiffs sustained no damages proximately flowing from defendant's conduct.[37]

The appellate court said the delay in receiving the settlement sums did not constitute damages and the claim for damages based on their feelings was speculative and conjectural.[38] The court went on to say that a professional malpractice action is merely professional negligence and an action for negligence requires damage.[39] Thus, there can be no cause of action for malpractice if there is no evidence of harm. The court, however, reversed in part because of the allegation of defendant's intentional wrongful conduct that caused plaintiff's mental and emotional distress.[40] As to this allegation, no actual damages need be shown.[41]

Presiding Judge MacMurray, in a dissent joined by Judge Pope, said that nominal damages are recoverable in a malpractice action; thus, it is necessary only to show a wrong.[42] "[A] cause of action for legal malpractice can be maintained whether or not actual damages are proven and submitted to the jury on the issue of nominal damages."[43] Judge Beasley, in a separate dissenting opinion, agreed with Judge Pope's dissent and further argued that the complaint and the alleged damages supported the

32. 185 Ga. App. 351, 364 S.E.2d 87 (1987).
33. *Id.* at 351, 364 S.E.2d at 88.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 352, 364 S.E.2d at 88.
39. *Id.*, 364 S.E.2d at 89.
40. *Id.* at 353, 364 S.E.2d at 89.
41. *Id.*, 364 S.E.2d at 90.
42. *Id.* at 354, 364 S.E.2d at 90 (MacMurray, P.J., dissenting).
43. *Id.*

cause of action.[44]

IV. Disqualification

In *Cherry v. Coast House, Ltd.*,[45] the trial court disqualified an attorney from representing the client and himself because he was a party to the litigation.[46] Recognizing that as a party, the attorney would be a witness not only for himself but also for the client, the supreme court affirmed the disqualification order as it related to the client.[47]

The court stated that the order disqualifying the attorney from representing himself involved constitutional overtones.[48] The 1983 Constitution of Georgia provides: "No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state."[49] The question before the court was "whether a person must be forced to choose between representing himself or being represented by counsel . . . ."[50]

The court said that "the right to represent oneself does not evaporate when an attorney is hired"[51] and held that the trial court erred when it barred the attorney from representing himself because other attorneys had appeared for him.[52] The court, however, also held that in this situation, the trial court has the authority to designate a lead counsel if the attorneys are unable to coordinate their efforts.[53]

V. The *Yost* Claim

The case of *Whitley v. Bank South, N.A.*[54] is interesting primarily because the court of appeals reversed the trial court's refusal to submit defendant's abusive litigation claim to the jury.[55] The relevant facts were as follows: a bank sued defendant and his daughter to recover for a deficiency on an automobile retail installment contract, cosigned by the father, and also to recover for the daughter's Mastercard account indebted-

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44. *Id.* at 355, 364 S.E.2d at 90 (Beasley, J., dissenting).
45. 257 Ga. 403, 359 S.E.2d 904 (1987).
46. *Id.* at 403, 359 S.E.2d at 905.
47. *Id.* at 405, 359 S.E.2d at 906.
48. *Id.*, 359 S.E.2d at 907.
49. Ga. Const. art. I, § 1, para. 12.
50. 257 Ga. at 406, 359 S.E.2d at 907.
51. *Id.*
52. *Id.*
53. *Id.*
54. 185 Ga. App. 896, 366 S.E.2d 182 (1988).
55. *Id.* at 901, 366 S.E.2d at 187.

ness in the amount of $1,805.67.[56] The father denied liability for either claim.[57]

Prior to trial, the bank amended its complaint to clarify that its claim on the Mastercard account was only against the daughter.[58] At trial, the court directed a verdict against the bank on its claim against the father for the balance due on the automobile loan.[59] The reason for the directed verdict was the bank's failure to send the father a deficiency notice in compliance with the relevant statute.[60] The court, however, refused to submit the father's abusive litigation claim to the jury because he had cosigned the contract and the loan had not been paid in full, which established substantial justification, as a matter of law, in naming him as a co-defendant.[61]

The appellate court reversed because the facts "revealed an added dimension to the dispute."[62] The father testified that after the loan went into default, but before repossession of the automobile, an employee of the bank telephoned him to advise him that the daughter was three payments behind.[63] The father offered to pay off the loan, but the bank employee told him that he would also have to pay the daughter's Mastercard indebtedness and apparently threatened "to ruin [his] credit for ten years."[64]

The bank argued that the claim on the Mastercard account was against the daughter only, but the court rejected this argument on the basis of the facts.[65] The court stated:

> We believe a jury could reasonably infer from the foregoing evidence that, by pursuing the present action against Whitley, the bank had sought to harass or intimidate him into paying one or more debts for which he had no arguable legal responsibility. A recovery of damages for "substantially frivolous, substantially groundless, or substantially vexatious" litigation would clearly be authorized under such circumstances pursuant to *Yost v. Torok*, 256 Ga. 92,(344 SE2d 414)(1986), as well as OCGA § 9-15-14. We consequently hold that the trial court erred in refusing to submit the abusive litigation counterclaim to the jury.[66]

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56. *Id.*, 366 S.E.2d at 183.
57. *Id.*
58. *Id.* at 896-97, 366 S.E.2d at 184.
59. *Id.* at 897, 366 S.E.2d at 184.
60. *Id.*
61. *Id.*
62. *Id.* at 900, 366 S.E.2d at 186.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 901, 366 S.E.2d at 187.

VI. Attorney Fees

The case of *Law Office of Tony Center v. Baker*,[67] involved the applicability of an attorney's lien to child support payments.[68] The attorney represented defendant in a divorce action that resulted in a decree ordering, "*inter alia*, $250 per month for each of two children as 'child support,' payable to the Clerk of the Superior Court."[69] Following a dispute with the client regarding the payment of the fee, the attorney filed an attorney's lien and claimed an amount of $2,809.08 with accruing monthly interest of $40.75.[70] On " 'Motion to Enforce Attorney's Lien' against 'funds received by the clerk of the court,' "[71] the trial judge denied the motion to the extent it sought to foreclose against child support.[72]

The court of appeals granted interlocutory review of the trial court's order[73] and had no difficulty in affirming it.[74] "There are two types of attorney's liens, a general or possessory lien, and a special or charging lien."[75] The former gives the right to retain possession until the client pays the attorney for professional services, while the latter is an equitable right to recover for professional services and may be satisfied from a judgment achieved thereby.[76] The lien in the present case was a charging lien.[77]

The court made the following point: "The attorney's lien statute is in derogation of the common law, and is to be strictly construed."[78] Child support is alimony in which the mother acquires no interest and over which she is a mere trustee;[79] when the funds are paid into court, the clerk of the court is likewise a trustee of the funds for the support of a child.[80]

Citing cases from other jurisdictions uniformly consistent with its holding, the court relied on "public policy" grounds, as well as the trust theory, and concluded "that an attorney's charging lien should not be 'allowed to nullify an award determined to be necessary to assure the support of a child' and 'is not enforceable against child support

67. 185 Ga. App. 809, 366 S.E.2d 167 (1988).
68. *Id.* at 809, 366 S.E.2d at 167.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 811, 366 S.E.2d at 169.
75. *Id.* at 809, 366 S.E.2d at 167.
76. *Id.*
77. *Id.*
78. *Id.* at 810, 366 S.E.2d at 168.
79. *Id.*
80. *Id.*

payments.' "[81]

In *Bryan v. Granade*,[82] an action for attorney fees, the attorney had successfully challenged the will of a grandmother, who had left her estate to her preacher.[83] The heirs asked the attorney to be administrator of the estate, assets of which he then proceeded to convert to his own personal use.[84] He subsequently resigned and the probate court disallowed his claim for administrator's fees.[85]

In this action, the attorney sued the heirs to recover his fee for the successful will challenge.[86] The heirs contended that the lawyer had forfeited his right to the fees by his misconduct as administrator.[87] The attorney prevailed. Relying on a court of appeals decision which held that when an attorney's services to a client are severable, misconduct of the attorney during one phase of the service will not result in forfeiture of the fees earned during another phase of the service,[88] the court held that attorney's services in the will contest were severable from his services as administrator.[89]

Justice Hunt, with Chief Justice Marshall and Justice Weltner joining, dissented. Justice Hunt stated: "The argument that Granade is insulated from his violation of at least six professional standards, because he changed hats from lawyer to administrator in concluding his involvement in this transaction, is one which only a lawyer would understand."[90] The decision does not constitute a notable contribution to either the cause of jurisprudence or professionalism.

VII. The Amendment to Standard 69

One of the most significant developments in legal ethics this past year was the supreme court's amendment to Standard 69 of Bar Rule 4-102, relating to public lawyers, as follows:

> **Standard 69.** A lawyer shall not represent a client whose interests are adverse to the interests of a former client of the lawyer in any matter substantially related to the matter in which the lawyer represented the former client unless he has obtained written consent of the former client

81. *Id.* at 811, 366 S.E.2d at 169 (quoting Brake v. Sanchez-Lopez, 452 So. 2d 1071, 1072 (Fla. 1984)).
82. 257 Ga. 219, 357 S.E.2d 92 (1987).
83. *Id.* at 220, 357 S.E.2d at 93.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 221, 357 S.E.2d at 94.
90. *Id.* (Hunt, J., dissenting).

> after full disclosure. *The term "client" as used in this Standard shall not include a public agency or public officer or employee when represented by a lawyer who is a full time public official. This provision shall apply retroactively.* A violation of this standard may be punished by disbarment.[91]

The effect of the rule is that a public agency or a public official or employee is not a client of a public attorney for purposes of conflict of interest. The rule, however, leaves open the larger issue: Are the rules of ethics otherwise applicable to public attorneys? For example, do the rules relating to the attorney's duty of candor to the court apply to prosecuting attorneys? The issue has particular relevance to the issue of client confidences. Arguably, the rules do not apply to confidentiality, because the confidence problem relates so closely to conflicts of interest. Thus, it is the potential use of client confidences that, in most instances, creates the conflict.

The following analysis may help to resolve these issues. The rules of ethics were developed and designed for the private attorney representing a private client. The justification for saying that a public agency, official, or employee is not the client of a public attorney for purposes of conflicts of interest is that the agency, official, or employee is a *public* client. As such, the law governing the position determines the rights and duties of these persons. This, of course, is in contrast to a *private* client, for the law relating to the rights and duties of individuals, as reflected in the rules of ethics, controls this situation.

For the most part, the rules of ethics direct the private attorney representing a private client. Amended Standard 69 implies that these rules do not govern the public attorney representing a public client. The rules of ethics, however, direct the attorney's duties to the court and to others. For example, all attorneys have a duty of candor to the court. There is no reason that such rules should not apply to the public as well as the private attorney.

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91. 257 Ga. 979 (1988).