Legal Ethics

by L. Ray Patterson*

With one exception, the legal ethics cases this year involved well established rules of law. The case constituting the exception dealt with the breach of a rule of ethics as the basis for a malpractice claim. This Article will discuss that issue first and then will proceed to discuss other relevant cases.

I. Rules of Ethics as a Basis for Malpractice

One of the recurring issues in legal ethics is the relationship of the rules of ethics to the rules of malpractice. In practical terms, the issue is whether the breach of a rule of ethics is sufficient to sustain a malpractice action against a lawyer. Because the breach of an ethical rule is the breach of a duty, it would seem to follow that such a breach should result in liability if damage occurs.

The obstacle to this conclusion is that the Bar has always taken the position that the rules of ethics are only for disciplinary purposes. Indeed, the ABA codes of legal ethics[1] specifically state that their breach shall not give rise to a cause of action for malpractice.[2] This position, of course, cannot be sustained as a matter of logic. It is particularly egregious given that the lawyer has a fiduciary relationship with the client; and the breach of an ethical duty is almost always the breach of a fiduciary duty.

Properly interpreted, the principle that the breach of a rule of ethics does not give rise to a cause of action for malpractice should mean that the breach of an ethical duty, *which does not harm the client*, does not

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1. Model Code of Professional Responsibility Preliminary Statement (1980); Model Rules of Professional Conduct Scope (1984) [hereinafter Scope].

2. Scope, *supra* note 1. "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." *Id.*

give rise to a cause of action. The breach of a rule of ethics, however, would still be the basis for a disciplinary proceeding, although no harm resulted to the client.

Consider, for example, the lawyer who comingles his funds with those of his client. The comingling does not harm the client because the lawyer always provides the client with his funds in a timely fashion. The client, therefore, has no cause of action, but the lawyer would still be subject to disciplinary proceedings.[3]

A more common example, perhaps, is a conflict of interest. A lawyer's conflict of interest may or may not result in harm to the client. The lawyer, for example, may represent the client against a corporation in which the lawyer has a substantial interest, but the client can demonstrate no harm from this relationship. The conflict may be a basis for the lawyer's disqualification.[4] If the conflict does provide the basis for the lawyer's disqualification, perhaps the client should be able to obtain the refund of fees paid to the lawyer, but nothing more. Thus, the mere fact that the duty breached is an ethical duty should not bar the client from recovery if the breach causes harm to the client. A recent Georgia Court of Appeals case suggests that this is the law in Georgia.

In *Hendricks v. Davis*,[5] the client based a malpractice claim against her former lawyer on the lawyer's conflict of interest. The court, in affirming a verdict for the lawyer, stated:

> Although Hendricks may have presented evidence of Davis' [sic] violation of the Georgia Code of Professional Responsibility, such a violation alone cannot support Hendricks' [sic] action seeking money damages.[6] In order for her to recover on the legal malpractice claim, Hendricks had to prove that Davis' [sic] alleged ethical violations proximately caused the deprivation of her right to receive [twenty-five] percent of the net profits from the subdivision development.[7]

Hendricks should be viewed in light of *Roberts v. Langdale*[8] and *Whitehead v. Cuffie*,[9] both of which were cited by the court in the above

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3. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1984) [hereinafter Rule] and RULES AND REGULATIONS FOR THE ORGANIZATION AND GOVERNMENT OF THE STATE BAR OF GEORGIA, Standard 65 (Part IV, ch. 2) (1990) [hereinafter Standard].

4. *See* Rule 1.7(b), Standard 30, *supra* note 3; *In re* Capps, 250 Ga. 242, 297 S.E.2d 249 (1982).

5. Fulton County Daily Rep., July 10, 1990, at 13B, col. 4 (Ga. Ct. App. June 27, 1990) (No. A90A0535) [hereinafter Daily Rep.].

6. *Id.* at 14B, col. 2 (citing Roberts v. Langdale, 185 Ga. App. 122, 363 S.E.2d 591 (1987)).

7. *Id.* (citing Whitehead v. Cuffie, 185 Ga. App. 351, 364 S.E.2d 87 (1987)).

8. 185 Ga. App. 122, 363 S.E.2d 591 (1987).

9. 185 Ga. App. 351, 364 S.E.2d 87 (1987).

passage.[10] In *Roberts* the court of appeals held that the affidavit of an expert witness stating that the lawyer "had violated one or more provisions of the Georgia Code of Professional Responsibility" did not preclude summary judgment for the lawyer in view of affidavits the lawyer submitted.[11] "[T]hese affidavits deposed in exhaustive detail as to the consequences of appellee's representation of appellant and concluded that appellant's alleged damages were 'in no way' precipitated by any act or omission on the part of appellee in his capacity as attorney for appellant."[12]

The court stated in *Roberts* "that an alleged violation of ethical guidelines for attorneys *enacted by the legislature* could not be the basis for a civil suit against a legal advocate."[13] The court also said, " '[A]n alleged violation (of a rule of the Code of Professional Responsibility,) *standing alone*, cannot serve as a legal basis to support plaintiff's civil action seeking money damages . . . .' "[14]

In *Whitehead v. Cuffie*,[15] the court stated, "We do not agree with appellants that a cause of action for legal malpractice can be maintained whe[n] there is no evidence that the breach of the professional duty proximately caused any harm to the client."[16] The court also explained that a professional malpractice action is merely a professional negligence action and cited the following elements as essential:

> (1) A legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risk of harm; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and (4) some loss or damage flowing to the plaintiff's legally protected interest as a result of the alleged breach of legal duty.[17]

In effect, therefore, the court of appeals has said that a client can recover in a malpractice action based on the breach of a rule of ethics only if the client shows damages.

The rulings in these cases should be considered in light of the Georgia Supreme Court's statement in an earlier case that "[t]hese rules [the

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10. Daily Rep., *supra* note 5, at 14B, col. 2

11. 185 Ga. App. at 123, 363 S.E.2d at 593.

12. *Id.* at 123-24, 363 S.E.2d at 593.

13. *Id.* at 123, 363 S.E.2d at 593 (quoting East River Sav. Bank v. Steele, 169 Ga. App. 9, 11, 311 S.E.2d 189, 191 (1983) (citing Tingle v. Arnold, Cate & Allen, 129 Ga. App. 134, 199 S.E.2d 260 (1973))) (emphasis added).

14. *Id.* (quoting *East River Sav. Bank*, 169 Ga. App. at 11, 311 S.E.2d at 191) (emphasis in original).

15. 185 Ga. App. 351, 364 S.E.2d 87 (1987).

16. *Id.* at 352, 364 S.E.2d at 89.

17. *Id.* (citing Bradley Center v. Wessner, 250 Ga. 199, 296 S.E.2d 693 (1982)).

Code of Professional Responsibility] do have the effect of law and are, therefore, proper charges in cases which directly or indirectly involve the conduct of attorneys licensed to practice law in this state."[18] If the ethics rules have the force of law, their breach must be the breach of a legal duty, and it follows that if there is harm to the client there is a cause of action. An ethical duty, however, is not necessarily a legal duty.

II. Rules of Ethics as a Basis for Other Relief

Disciplinary proceedings and malpractice actions are not the only sanctions available for the breach of a rule of ethics. For example, a judgment obtained in a case in which an ethical violation occurred may be reversed because of lawyer misconduct. A case in point is *Adams v. Camp Harmony Association*,[19] in which the court reversed a judgment for defendant in a wrongful death action for improper argument to the jury.[20]

The parents of a seven-year old girl brought an action for the wrongful death of their daughter, who drowned in a swimming pool at a day camp operated by defendant. During closing arguments, the lawyer for defendant said that he was representing "Camp Harmony and Beefy Eaves," although the latter was not a defendant. The lawyer then discussed Eaves' forty-four years of work with young people, and the good that flowed from Eaves' efforts. The jury returned a verdict for defendant.[21]

Defendant's argument was obviously designed to elicit sympathy for Eaves, and it succeeded in doing so.[22] The court of appeals quoted the argument at length, and found it to be improper, and, therefore, the trial court's refusal to grant a mistrial was error.[23]

The court cited no ethical rule, but it seems clear that the argument constituted unethical conduct in the sense that it was unprofessional. The lawyer was not asking the jury to decide the case on the facts, but on the basis of sympathy. The case can thus be viewed as a part of the common law of legal ethics, a concept that has too often been overlooked because of the emphasis given to the formal code of ethics.

Disqualification is another sanction imposed for unethical conduct.[24] In *State v. Sutherland*,[25] a member of the Board of Commissioners of Gordon County (the "Board") sought to disqualify the Chief Assistant

18. Cambron v. Canal Ins. Co., 246 Ga. 147, 151-52, 269 S.E.2d 426, 430 (1980).
19. 190 Ga. App. 506, 379 S.E.2d 407 (1989).
20. *Id.* at 508-09, 379 S.E.2d at 409.
21. *Id.* at 506-07, 379 S.E.2d at 407-08.
22. *Id.* at 506-08, 379 S.E.2d at 407-08.
23. *Id.* at 508-09, 379 S.E.2d at 408-09.
24. *See In re* Capps, 250 Ga. 242, 297 S.E.2d 249 (1982).
25. 190 Ga. App. 606, 379 S.E.2d 580 (1989).

District Attorney from prosecuting him in a criminal case. The trial court held that the attorney had a conflict of interest and quashed the indictments on the ground of the attorney's disqualification.[26] The court of appeals reversed.[27]

The facts were as follows: In September 1987 the District Attorney of Gordon County filed a civil action against the Board to enjoin the implementation of the Board's 1988 budget, which reduced the funds for the District Attorney's office. The complaint alleged that defendant had a personal vendetta against the District Attorney's office and that he had persuaded other members of the Board to reduce the budget.[28]

On June 13, 1988, the grand jury returned indictments of embracery and attempted embracery against defendant. The Chief Assistant District Attorney had prepared the indictments. Defendant filed a motion to quash the indictments on the grounds that the District Attorney and all the members of his staff were disqualified. The trial court reasoned that because the proposed budget would reduce the Chief Assistant District Attorney's salary, he had a financial interest in the outcome of the civil action and was therefore disqualified from prosecuting defendant.[29]

The court of appeals reversed,[30] reasoning that although the District Attorney had excused himself, his entire staff was not disqualified from prosecuting the board member.[31] Disqualification for interest "means a personal interest," and the prosecutor was not acting in a personal capacity or for his personal interest, but as an officer of the law with a statutory duty.[32] There was no factual connection between the civil action and criminal prosecution.[33]

III. MALPRACTICE ACTIONS

A. The Statute of Limitations

Two issues arise in applying the statute of limitations in a malpractice action. The first issue is whether the four-year contract statute[34] or the two-year injury to the person statute[35] applies. The second issue is

26. *Id.* at 606, 379 S.E.2d at 580-81.
27. *Id.* at 608, 379 S.E.2d at 582.
28. *Id.* at 606, 379 S.E.2d at 580.
29. *Id.*, 379 S.E.2d at 580-81.
30. *Id.* at 608, 379 S.E.2d at 582.
31. *Id.* at 606-07, 379 S.E.2d at 581.
32. *Id.* at 607, 379 S.E.2d at 581 (citing Scott v. State, 53 Ga. App. 61, 185 S.E. 131 (1935)).
33. *Id.*
34. O.C.G.A. § 9-3-25 (1982).
35. *Id.* § 9-3-33.

whether the statute begins to run from the date of the malpractice or the date of discovery. *Royal v. Harrington*[36] involved only the first issue. In *Royal* the client hired the lawyer to represent him in the sale of his business. On September 14, 1984, the lawyer filed the purchaser's financing statement in the wrong county. Because of this error, the client's lien was inferior to a properly filed lien. The purchaser subsequently alleged damages in the amount of $92,138.60.[37]

Although the suit was filed on August 30, 1988, within four years of the alleged negligent act, the court granted the lawyer's application for interlocutory review of the trial court's denial of his motion to dismiss.[38] The court held that "a cause of action for legal malpractice, alleging *negligence or unskillfulness*, sounds in *contract* . . . [and] is subject to the four-year statute of limitation . . . ."[39] The theory behind this reasoning is that "legal malpractice is based upon a breach of a duty imposed by the attorney-client contract of employment . . . ."[40]

Since the purchaser brought the action within the appropriate time frame, the court had no occasion to re-examine the rule that an action accrues, and the period of limitations begins to run, from the date of the negligence or unskillful act. This rule, however, is one whose merit is doubtful and that the Georgia courts should eventually re-examine. The better rule, of course, is that the action accrues at the time of discovery.

B. The Attorney-Client Relationship

In *Horn v. Smith & Meroney*,[41] the parents of a man killed in an airplane crash brought a legal malpractice action against the lawyers who represented the son's widow.[42] The court of appeals affirmed the grant of defendant's motion for summary judgment.[43]

The court of appeals ruled that an attorney-client relationship is necessary for a legal malpractice action.[44] "The relationship of attorney-client may be created by written contract or may be inferred from the conduct of the parties."[45] The basic question is whether a person seeks and re-

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36. 194 Ga. App. 457, 390 S.E.2d 668 (1990).
37. *Id.* at 457-58, 390 S.E.2d at 668.
38. *Id.* at 457, 390 S.E.2d at 668.
39. *Id.* at 458, 390 S.E.2d at 668 (quoting Ballard v. Frey, 179 Ga. App. 455, 459, 346 S.E.2d 893, 896 (1986)).
40. *Id.* (quoting Loftin v. Brown, 179 Ga. App. 337, 338, 346 S.E.2d 114, 116 (1986) (quoting O.C.G.A. § 9-3-25 (1982))).
41. 194 Ga. App. 298, 390 S.E.2d 272 (1990).
42. *Id.* at 298, 390 S.E.2d at 272.
43. *Id.* at 299, 390 S.E.2d at 273.
44. *Id.* at 298, 390 S.E.2d at 272.
45. *Id.* (citing Huddleston v. State, 259 Ga. 45, 376 S.E.2d 683 (1989)).

ceives legal assistance. In *Horn* plaintiffs had neither sought nor received legal assistance from defendants, and since no attorney-client relationship existed, the grant of the motion for summary judgment was affirmed.[46]

C. *Authority of the Lawyer*

A recurring theme in Georgia cases seems to be the authority of the lawyer to settle a client's claim. In *Wilson v. Anderson*,[47] the court of appeals reaffirmed the Georgia rule that an attorney of record has apparent authority to enter into an agreement to settle on behalf of his or her client.[48] The authority is plenary, unless the client limits it and communicates this limitation to the opposing parties.[49]

If the attorney possesses this authority and exercises it, the settling party may enforce the agreement against that attorney's client; however, this rule does not prohibit the client from bringing an action against the lawyer who settles without authority.[50] Because the rule is designed to protect third parties in their dealings with the lawyer, it seems clear that a lawyer who settles a case without the authority of the client may be liable to the client for any resulting damages.

In *Warren v. Jenkins*,[51] defendant in a breach of contract action appealed the trial court's judgment "in effect enforcing a verbal settlement and terminating the litigation."[52] Defendant acknowledged that he had given his lawyer authority to bring the matter to a conclusion, but denied that he had authorized the settlement figure.[53] He had, however, endorsed the settlement check that the insurer had issued to him, his wife, and plaintiff. The record also showed that plaintiff's attorney, with the permission of defendant's attorney, had negotiated the same settlement with defendant.[54] Given these facts, the court had little problem in affirming the judgment.[55] As a general proposition, of course, no lawyer should settle a case without the full knowledge and approval of the client. The rule is a matter of good business as well as good ethics.

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46. *Id.* at 299, 390 S.E.2d at 272-73.

47. 194 Ga. App. 167, 390 S.E.2d 86 (1990).

48. *Id.* at 167, 390 S.E.2d at 86-87.

49. *Id.*, 390 S.E.2d at 87 (citing Brumbelow v. Northern Propane Gas Co., 251 Ga. 674, 308 S.E.2d 544 (1983)).

50. Brumbelow v. Northern Propane Gas Co., 251 Ga. 674, 675, 308 S.E.2d 544, 546 (1983).

51. 190 Ga. App. 442, 379 S.E.2d 19 (1989).

52. *Id.* at 442, 379 S.E.2d at 20.

53. *Id.*

54. *Id.* at 443, 379 S.E.2d at 20.

55. *Id.* at 444, 379 S.E.2d at 21.

D. Affidavits

The rule pertaining to the use of affidavits in professional malpractice actions is something of an anomaly. Under section 9-11-9.1 of the Official Code of Georgia Annotated ("O.C.G.A."),[56] the plaintiff in a professional malpractice action must file an expert's affidavit setting forth at least one negligent act and its factual basis. Without the affidavit, the case will be dismissed.[57]

Since lawyers know the rule and experts are usually available, the rule poses no particular problem other than additional expense. The rule acts more as a nuisance than a deterrent, except in cases in which lay persons represent themselves. In the two cases in which the rule was applied during the survey period,[58] plaintiffs were acting *pro se*. In addition, both cases involved representation in criminal matters. In *Frazier v. Merritt*,[59] plaintiff sued his lawyer for malpractice arising from the lawyer's representation on criminal charges.[60] The court of appeals affirmed the trial court's dismissal of the complaint on the grounds that plaintiff had failed to file the requisite expert affidavit.[61] In *Kalustian v. McDonald*,[62] the court held to the same effect.

Even more anomalous than the malpractice affidavit rule is the non-malpractice affidavit rule that the court applied in *Taylor v. Spence*.[63] The court in *Taylor* held that "[t]he sworn testimony of the defendant in a legal malpractice action to the effect that his representation of the plaintiff complied with applicable standards of professional conduct, if not controverted by expert testimony to the contrary, will authorize the grant of summary judgment in his favor."[64]

The facts indicate that the result was proper. The client had agreed to make a loan to a friend and wanted defendant to handle the closing. Plaintiff wanted the borrower to execute a quitclaim deed on her home in addition to the promissory note and security deed. Defendant advised against this, but the client insisted. The client then filed the quitclaim deed for recording before the first monthly payment was due and thereaf-

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56. O.C.G.A. § 9-11-9.1 (Supp. 1990).

57. *Id.*

58. *See* Frazier v. Merritt, 190 Ga. App. 832, 380 S.E.2d 495 (1989); Kalustian v. McDonald, 194 Ga. App. 435, 390 S.E.2d 657 (1990).

59. 190 Ga. App. 832, 380 S.E.2d 495 (1989).

60. *Id.* at 832, 380 S.E.2d at 495.

61. *Id.*, 380 S.E.2d at 496.

62. 194 Ga. App. 435, 390 S.E.2d 657 (1990).

63. 194 Ga. App. 355, 390 S.E.2d 309 (1990) (citing Thomas v. Carlisle, 179 Ga. App. 315, 346 S.E.2d 79 (1986); Yates v. Carlisle, 171 Ga. App. 206, 319 S.E.2d 71 (1984); Graves v. Jones, 184 Ga. App. 128, 361 S.E.2d 19 (1987)).

64. *Id.* at 356, 390 S.E.2d at 310 (citations omitted).

ter sought to dispossess the borrower. The borrower then filed a successful lawsuit to have the deed set aside.[65]

Plaintiff-client, acting *pro se*, did not contradict the sworn testimony of the lawyer, who stated that he had complied with the applicable standards of professional conduct. The court affirmed the grant of a motion for summary judgment.[66]

Perhaps the affidavit of nonmalpractice was intended for such cases as this, but it would appear that the same result could be achieved without the rule.

IV. Attorney Fees

Burnette v. Bradley[67] presents an interesting case regarding a fee dispute between the client and the attorney. After the client was injured in a traffic accident, he employed the lawyer to represent him. The contract provided that the lawyer would receive forty percent of "the gross recovery." The lawyer obtained $2,500 in personal injury protection ("PIP") benefits. The client discharged the lawyer on April 1, 1987 and asked the lawyer to submit a bill for his services.[68]

Shortly thereafter, the lawyer received a $20,000 settlement offer, which he failed to convey to the former client. He did, however, submit a bill of $9,000 to the client, representing forty percent of the $20,000 and the $2,500, respectively. The client refused to pay, and the lawyer filed suit in two counts. In the first count, he sought to recover $9,000 under the contingent fee contract; in the second count, he sought to recover "at least $9,000" under *quantum meruit*. The trial court awarded the lawyer $9,000 on the contract claim. The trial court also found in favor of the lawyer on the *quantum meruit* claim, but refused to award damages because the evidence was too remote and any award would be too speculative.[69]

On appeal the client conceded that the evidence warranted the award of $1,000, but no more.[70] The court reiterated the rule that a lawyer "cannot recover under a contingent fee contract unless the contingency expressed in the contract occurs."[71] If the client prevents the contingency from occurring, the lawyer is entitled to reasonable fees for service ren-

65. *Id.* at 355-56, 390 S.E.2d at 309.
66. *Id.* at 356, 390 S.E.2d at 310.
67. 190 Ga. App. 427, 379 S.E.2d 225 (1989).
68. *Id.* at 427, 379 S.E.2d at 225.
69. *Id.* at 427-28, 379 S.E.2d at 225-26.
70. *Id.* at 428, 379 S.E.2d at 226.
71. *Id.*

dered.[72] Relying on these rules, the court held that the fee was limited to $1,000, or forty percent of the $2,500 recovery.[73] The additional $8,000 was not recoverable under the express contract because the recovery occurred after discharge.[74] *Quantum meruit* would have been available, but as the lawyer filed no cross-appeal from the trial court's judgment, the issue of the court's failure to award damages for *quantum meruit* was not before the court.

Davenport v. Nance[75] dealt with the recovery of attorney fees that had been provided for in two provisions of a promissory note. The first provision provided: "If this note is placed in the hands of an attorney for collection, attorney's fees of 15% will be added to the principal balance."[76] The second provision contained an acceleration clause and provided that if payment should not be paid at maturity, the borrower "promises to pay all costs of collection and reasonable attorney's fees."[77] The trial court awarded attorney fees in the amount of fifteen percent of the principal owed on the note.[78]

The court of appeals agreed with the borrower that the first provision was ambiguous because it did not specify the amount on which the fifteen percent fee was to be calculated and that the second provision was in conflict with the first.[79] The court, however, resolved the issue with rules of construction. Construing the contract against the drafter of the document, the court employed the principle "that a limited or specific provision will prevail over one that is more broadly inclusive."[80] Viewing the note as a whole, the court concluded that the intent was to provide recovery of attorney fees if any portion was collected by an attorney.[81] The court then resorted to O.C.G.A. § 13-1-11(a)(1)[82] in holding that attorney fees of fifteen percent of the principal and interest owing on the note were valid.[83] The court held that, as the parties were presumed to know the law, the note should be read as providing for fifteen percent of the principal and interest owed.[84]

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72. *Id.* (quoting Bearden v. Lane, 107 Ga. App. 424, 425-26, 130 S.E.2d 619, 621 (1963)).
73. *Id.*
74. *Id.* at 429, 379 S.E.2d at 227.
75. 194 Ga. App. 313, 390 S.E.2d 281 (1990).
76. *Id.* at 313, 390 S.E.2d at 282.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 314, 390 S.E.2d at 282.
81. *Id.*
82. O.C.G.A. § 13-1-11(a)(1) (1982).
83. 194 Ga. App. at 314, 390 S.E.2d at 282.
84. *Id.*

The court, however, violated its own rule of construction, that the instrument would be construed against the drafter. If the drafter knew the law and did not include the interest, one could reasonably infer that he or she did not intend that the interest be used in the calculation of attorney fees.