Chapter 1

Legal Elements of a Claim

1-1 INTRODUCTION

The risks for Georgia lawyers from bar grievances and legal malpractice suits are significant. Indeed, in 2019 in Georgia, the Office of General Counsel received 2,197 grievance forms for screening and further consideration.[1] This marks an increase over the previous year, confirming that the potential exposure for those attorneys who are the subject of grievance forms remain serious. Of those forms, 159 contained allegations that, if true, would constitute violations of Georgia's Rules of Professional Conduct.[2] This actually marks a decrease from the prior year. Of the cases that were reviewed and resolved, 15 resulted in reprimands, 16 resulted in letters of formal admonition, 26 were dismissed with letters of instruction, and 15 resulted in suspensions.[3]

Meanwhile, the amount that law firms or insurers are paying in indemnity or settlement payments in litigation is steadily increasing, making malpractice claims more expensive to litigate or settle than ever before.[4] Thus, it is critical that practitioners continue to develop an understanding of the basic elements of a

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[1.] State Bar of Georgia, 2019 Report of the Office of General Counsel, available at: https://www.gabar.org/barrules/ethicsandprofessionalism/upload/19_OGC_Report.pdf. (last visited Mar. 2, 2021).

[2.] State Bar of Georgia, 2019 Report of the Office of General Counsel, available at: https://www.gabar.org/barrules/ethicsandprofessionalism/upload/19_OGC_Report.pdf. (last visited Mar. 2, 2021).

[3.] State Bar of Georgia, 2019 Report of the Office of General Counsel, available at: https://www.gabar.org/barrules/ethicsandprofessionalism/upload/19_OGC_Report.pdf. (last visited Mar. 2, 2021).

[4.] ABA Standing Comm. on Lawyers' Prof'l Liability, *Profile of Legal Malpractice Claims 2012-2015* (Sept. 2016).

legal malpractice cause of action and the steps to take to prevent or minimize liability for such claims.

Although a legal malpractice action may sound in tort or contract, the requisite elements of this claim closely track the elements of a simple negligence claim. Specifically, in *Tante v. Herring*,[5] the Supreme Court of Georgia reiterated the following three elements of an action for a legal malpractice claim: (1) the employment of an attorney; (2) failure of the attorney to exercise ordinary care, skill and diligence; and (3) damages proximately caused by that failure.[6] The first element corresponds with the existence of a duty of care to the plaintiff, while the second element requires a breach of that duty. The third element comprises the elements of proximate cause and damages. Notably, the remedy in a civil case for an attorney's negligent performance during the representation is to bring a legal malpractice suit against the attorney. There is no relief available on appeal of the civil matter.[7]

1-2 DUTY

1-2:1 Generally

An attorney is not necessarily liable for every harm her or his negligence causes to a potential plaintiff. Instead, an attorney's liability is limited to the class of people to whom the attorney owes a duty to exercise ordinary care, skill, and diligence in the performance of professional services. Typically, an attorney owes a duty to only her or his clients. Indeed, "the law is clear that to

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5. *Tante v. Herring*, 439 S.E.2d 5 (Ga. Ct. App. 1993), *aff'd in part, rev'd in part*, 264 Ga. 694, 453 S.E.2d 686 (1994).

6. *Tante v. Herring*, 439 S.E.2d 5 (Ga. Ct. App. 1993), *aff'd in part, rev'd in part*, 264 Ga. 694, 453 S.E.2d 686 (1994); *see also Fortson v. Hotard*, 684 S.E.2d 18, 20 (Ga. Ct. App. 2009); *Gilbert v. Montlick & Assocs., P.C.*, 546 S.E.2d 895, 901 (Ga. Ct. App. 2001); *Chaney v. Blackstone*, 547 S.E.2d 340, 341 (Ga. Ct. App. 2001); *Tunsil v. Jackson*, 546 S.E.2d 875, 877 (Ga. Ct. App. 2001); *Allen Decorating, Inc. v. Oxendine*, 483 S.E.2d 298, 301 (Ga. Ct. App. 1997); *Perry v. Ossick*, 467 S.E.2d 604, 606-07 (Ga. Ct. App. 1996); *Huntington v. Fishman*, 441 S.E.2d 444, 446 (Ga. Ct. App. 1994); *Guillebeau v. Jenkins*, 355 S.E.2d 453, 456 (Ga. Ct. App. 1987); *Rogers v. Norvell*, 330 S.E.2d 392, 396 (Ga. Ct. App. 1985). Federal question jurisdiction will lie in a malpractice action if the federal issue is: (1) necessarily raised; (2) actually disputed; (3) substantial; and (4) capable of resolution in federal court without disrupting federal-state balance. *Gunn v. Minton*, 133 S. Ct. 1059 (2013); *see also Mercer v. Allen*, No. 7:13-CV-148, 2014 WL 185252 (M.D. Ga. Jan. 15, 2014) (referring legal malpractice case to bankruptcy court because action arose in a case under title 11).

7. *Mitchell v. City of Mobile*, 744 F. App'x 687, 688 (11th Cir. 2018).

make out a case of legal malpractice, a lawyer-client relationship must exist between the plaintiff and the defendant attorney."[8] This proof is "essential in establishing the element of duty that is necessary to every lawsuit based upon a theory of negligence."[9] Whether an attorney-client relationship existed between an alleged client and an attorney is typically a question for a jury.[10] However, as discussed herein, there are additional circumstances that give rise to an implied attorney-client relationship or which support a duty to a non-client third party.

1-2:2 Duty to Client

1-2:2.1 Who is the Client?

Given the contract-based origins of legal malpractice, it seems axiomatic that an attorney owes to a client the duty to competently perform the services that the attorney bargained to perform on the client's behalf. However, as the case law in Georgia demonstrates, to say that an attorney owes a duty to a client raises the question of who qualifies as a client.

In Georgia, there are essentially three ways a plaintiff can demonstrate the existence of an attorney-client relationship that would sustain a legal malpractice claim. First, if an attorney acknowledges having been retained by or serving as counsel for the plaintiff, then it is indisputable that an attorney-client relationship exists. This is an express attorney-client relationship. Such an acknowledgment can be evidenced by the existence of an engagement letter, a fee contract, or other correspondence in which the attorney acknowledges that he or she represents or that he or she is counsel to the client.

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 implied attorney-client relationship sufficient to sustain a legal malpractice action.

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8. *Crane v. Albertelli*, 592 S.E.2d 684, 685 (Ga. Ct. App. 2003).

9. *Guillebeau v. Jenkins*, 355 S.E.2d 453, 457 (Ga. Ct. App. 1987) (internal citations omitted).

10. *Stewart v. McDonald*, 815 S.E.2d 665, 672 (Ga. Ct. App. 2018).

Third, Georgia courts have found that professionals owe a duty to those persons whom the professional actually is aware will rely upon the professional in the transaction, even non-clients.[11]

1-2:2.2 Express Attorney-Client Relationship

The existence of an attorney-client relationship is the threshold question in a legal malpractice case.[12] An express relationship, however, is the easiest to identify and rarely is contested or litigated.[13] In such a representation, the attorney-client relationship generally is expressed by written contract.[14] An express attorney-client relationship is personal and not vicarious.[15] Additionally, an attorney in an express privileged relationship with a client may not be contractually relieved from the duty to exercise reasonable care; any attempt to do so is void as against public policy.[16]

1-2:2.3 Implied Attorney-Client Relationship

> Though an attorney-client relationship generally is a matter of express contract, it may be implied from the conduct of the parties. 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.[17]

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11. *Badische Corp. v. Caylor*, 356 S.E.2d 198 (Ga. 1987).

12. *Mays v. Askin*, 585 S.E.2d 735 (Ga. Ct. App. 2003).

13. Indeed, the existence of an attorney-client relationship is litigated infrequently because the parties typically recognize it when they have agreed to an express relationship. One of the only contexts in which the express relationship is litigated, therefore, is in determining who the real party in interest is after a bankruptcy. *See, e.g., Thornton v. Mankovitch*, 626 S.E.2d 189 (Ga. Ct. App. 2006) (when a bankruptcy trustee settles an estate during an involuntary Chapter 7 bankruptcy proceeding, the corporation becomes defunct and thus lacks standing to sue, leaving the bankruptcy trustee as the real party in interest); *Gingold v. Allen*, 613 S.E.2d 173 (Ga. Ct. App. 2005) (determining that when a cause of action for legal malpractice arises prior to the litigation of a bankruptcy case, the bankruptcy trustee is the real party in interest to prosecute the case because the interest in the property belongs to the bankruptcy estate).

14. *Huddleston v. State*, 376 S.E.2d 683, 684 (Ga. 1989).

15. *Crane v. Albertelli*, 592 S.E.2d 684, 685 (Ga. Ct. App. 2003).

16. *Little v. Middleton*, 401 S.E.2d 751, 754 (Ga. Ct. App. 1991).

17. *Cleveland Campers, Inc. v. R. Thad McCormack, P.C.*, 635 S.E.2d 274, 276 (Ga. Ct. App. 2006) (internal citations omitted).

Following the general rule that contracts are formed according to the objective manifestation of mutual intent, an attorney-client relationship cannot be created unilaterally by the client.[18] However, an attorney-client relationship will be implied where the client has a reasonable belief, induced by the attorney's representations or conduct, that the attorney was representing the "client".[19]

Thus, in determining whether an attorney-client relationship has been created by implication, there are a number of factors to consider. While the payment of a fee from "client" to "attorney" is a factor to be considered in determining whether an implied attorney-client relationship exists, it is not dispositive.[20] Other factors include the request for and receipt of legal advice, the sophistication of the client, any history of representation between the parties, and the involvement of another attorney advising the alleged client (such as in a closing).[21]

Although the inquiry of whether an implied attorney-client relationship has been created is often viewed from the perspective of the potential client, courts will generally require that the potential client's belief is "reasonable." In *Estate of Nixon v. Barber*, the plaintiffs sued their deceased son's lawyer for legal malpractice in his handling of their son's criminal case. They alleged that the lawyer had a direct attorney-client with both the son and his parents, alleging that the lawyer had provided "legal representation, assistance and advice directly" to them, that he

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18. *Guillebeau v. Jenkins*, 355 S.E.2d 453, 458 (Ga. Ct. App. 1987); *see also Solis v. The Taco Maker, Inc.*, No. 1:09-CV-3293-RWS, 2013 WL 4541912, at *4 (N.D. Ga. Aug. 27, 2013) (holding that no attorney-client relationship existed because the provision of legal services was contingent on purchase of shares, which did not occur).

19. *Guillebeau v. Jenkins*, 355 S.E.2d 453, 458 (Ga. Ct. App. 1987); *see also Abdulla v. Klosinski*, No. 12-15448, 2013 WL 3490728 (11th Cir. July 10, 2013) (affirming *Abdulla v. Klosinski*, 898 F. Supp. 2d 1348 (S.D. Ga. 2012); *Fitzpatrick v. Harrison*, 854 F. Supp. 2d 1334, 1337 (S.D. Ga. 2010); *Stewart v. McDonald*, 815 S.E.2d 665, 672 (Ga. Ct. App. 2018).

20. *Guillebeau v. Jenkins*, 355 S.E.2d 453, 457 (Ga. Ct. App. 1987); *cf. Fitzpatrick v. Harrison*, 854 F. Supp. 2d 1334, 1337 (S.D. Ga. 2010) (holding implied attorney-client relationship did not exist where attorney clearly communicated an employment relationship would not be created until plaintiff paid a retainer, which plaintiff had not done.); *Stewart v. McDonald*, 815 S.E.2d 665, 672 (Ga. Ct. App. 2018) (reversing grant of judgment notwithstanding the verdict, holding that the record supported a finding that it was reasonable for the plaintiff to believe an attorney-client relationship existed.).

21. *See Abdulla v. Klosinski*, No. 12-15448, 2013 WL 3490728 (11th Cir. July 10, 2013) (affirming *Abdulla v. Klosinski*, 898 F. Supp. 2d 1348 (S.D. Ga. 2012)) (holding that although the attorney served as legal counsel to the corporate entity owned by plaintiff, no personal attorney-client relationship had been formed where plaintiff did not pay a fee for individual representation and did not seek legal advice regarding the personal guaranty at issue).

had primarily communicated with them, that he was paid by them, that he engaged in strategy discussions with them, and that he was ultimately terminated by them.[22] Plaintiffs claimed that they reasonably believed that the attorney was acting on their behalf, as well as their son's.

The Court concluded that the plaintiffs' belief that they shared in the relationship was not reasonable because all communications were made in pursuant to and in support of the attorney's representation of the plaintiffs' son:

> [W]hile it is certainly understandable that parents would be involved in and concerned with their child's defense against criminal prosecution, the person with the ultimate decision-making authority in such a proceeding—and the person whose liberty is actually at stake—is the one whose interests are represented by counsel.[23]

Thus, because the parent-plaintiffs could not demonstrate an existing attorney-client relationship and corresponding duty, their malpractice claim was dismissed.

Because a written contract often is evidence of an express attorney-client relationship, the existence of any quasi-contractual documents between attorney and "client" may weigh in favor of an implied attorney-client relationship. Indeed, in *Peters v. Hyatt Legal Services*,[24] the plaintiff-husband, Mr. Peters, consulted with an attorney at Hyatt regarding a divorce agreement proposed by his wife.[25] Specifically, the plaintiff discussed with the attorneys the terms on which he would agree to a divorce and signed a document entitled "fee statement." The "fee statement" provided that when half the total fees were paid, Hyatt would complete preparation of the pleadings. The fee statement further explained that "your signature allows us to represent you after payment is made."[26] The plaintiff paid half of the fee and was subsequently called out of the country on military duty. While the plaintiff was out of the

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22. *Estate of Nixon v. Barber*, 796 S.E.2d 489, 493 (Ga. Ct. App. 2017).
23. *Estate of Nixon v. Barber*, 796 S.E.2d 489, 495 (Ga. Ct. App. 2017).
24. *Peters v. Hyatt Legal Servs.*, 440 S.E.2d 222 (Ga. Ct. App. 1993).
25. *Peters v. Hyatt Legal Servs.*, 440 S.E.2d 222, 223-24 (Ga. Ct. App. 1993).
26. *Peters v. Hyatt Legal Servs.*, 440 S.E.2d 222, 226 (Ga. Ct. App. 1993).

country, his wife hired the same Hyatt attorney who then filed for, and obtained, a divorce on the wife's behalf. Upon discovering this, plaintiff brought an action for legal malpractice and moved for partial summary judgment on the issue of liability. The Court of Appeals found that there was an issue of fact as to whether Hyatt represented the plaintiff. Specifically, the court found the "fee statement" unclear as to whether the representation began at payment of half of the fee or all of the fee.[27]

Another chief factor in determining whether an attorney-client relationship is implied is whether the "client" requested and then received legal advice.[28] In *Huddleston v. State*,[29] a criminal defendant argued that the prosecutor should have been disqualified based upon the defendant's prior consultation with the prosecutor while he was in private practice.[30] Specifically, the defendant contacted the prosecutor regarding her potential divorce from the victim, but received only general information regarding the nature of contested and uncontested divorces and the fee that would be charged; there was no specific discussion of the facts.[31] The trial court refused to disqualify the prosecutor and the Supreme Court of Georgia affirmed, finding that no attorney-client relationship was formed between the prosecutor and the defendant. In so holding, the court expressly stated:

> [T]he 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.[32]

In *Richard v. David*,[33] the Court of Appeals applied this standard in the context of a closing. The buyer of a house brought a legal malpractice action against the closing attorney, alleging that the

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27. *Peters v. Hyatt Legal Servs.*, 440 S.E.2d 222, 226-27 (Ga. Ct. App. 1993).

28. *See, e.g., Oswell v. Nixon*, 620 S.E.2d 419, 421 (Ga. Ct. App. 2005) (declining to find an implied attorney-client relationship because plaintiff never sought legal advice from any of the attorney defendants and none of the attorney defendants ever offered any legal advice).

29. *Huddleston v. State*, 376 S.E.2d 683 (Ga. 1989).

30. *Huddleston v. State*, 376 S.E.2d 683, 684 (Ga. 1989).

31. *Huddleston v. State*, 376 S.E.2d 683, 684 (Ga. 1989).

32. *Huddleston v. State*, 376 S.E.2d 683, 684 (Ga. 1989); *see also In re Raynard*, 171 B.R. 699, 702 (Bankr. N.D. Ga. 1994).

33. *Richard v. David*, 442 S.E.2d 459 (Ga. Ct. App. 1994).

attorney was negligent in failing to warn him of the significance of certain findings in the termite report.[34] The trial court granted summary judgment to the attorney, finding that no attorney-client relationship existed despite the fact that the buyer picked the attorney, made the initial contact with the attorney, and paid the attorney's fee as part of the closing costs. The Court of Appeals affirmed, citing the fact that the buyer never sought the attorney's legal advice or told the attorney that such advice would be relied on. Indeed, no legal advice was offered.[35] In so holding, the court expressly found that the mere fact that the buyer selected and paid the attorney was not sufficient to raise a fact question regarding the existence of an attorney-client relationship.[36]

A closing presents a unique and complicated setting for determining the parties to an attorney client-relationship.[37] Typically, at a loan or real estate closing, the closing attorney acts only as a representative for the clients who retained the attorney.[38] Indeed:

> [W]here there is a lender and a borrower and the closing attorney was retained by the lender, the closing attorney represents only the lender. Even the selection of the attorney and payment of the attorney's fees under the terms of the sales contract does not create an attorney-client relationship when the attorney represents the lender, because professional standards regarding conflict of interest prohibit such conflicting multiple representations.[39]

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34. *Richard v. David*, 442 S.E.2d 459 (Ga. Ct. App. 1994).

35. *See also Legacy Homes, Inc. v. Cole*, 421 S.E.2d 127, 128-29 (Ga. Ct. App. 1992) (where attorney conducted closing in which buyer failed to present funds to builder, there was no attorney-client relationship between attorney and builder because builder never met or spoke to the attorney prior to closing, the builder never requested any legal advice, and the attorney never offered any).

36. *Legacy Homes, Inc. v. Cole*, 421 S.E.2d 127, 128-29 (Ga. Ct. App. 1992); *see also Carmichael v. Barham, Bennett, Miller & Stone*, 370 S.E.2d 639, 640 (Ga. Ct. App. 1988); *Guillebeau v. Jenkins*, 355 S.E.2d 453, 457 (Ga. Ct. App. 1987) ("the payment of a fee does not necessarily demonstrate the existence of the [attorney-client] relationship").

37. Notably, in 2014 the Supreme Court of Georgia executed an advisory opinion in which it held that a lawyer "who purports to handle a closing in the limited role of a witness violates the Georgia Rules of Professional Conduct." *In re Formal Advisory Opinion No. 13-1*, 763 S.E.2d 875 (Ga. 2014).

38. *Legacy Homes, Inc. v. Cole*, 421 S.E.2d 127 (Ga. Ct. App. 1992).

39. *Garrett v. Fleet Fin., Inc. of Ga.*, 556 S.E.2d 140, 145 (Ga. Ct. App. 2001) (internal citations omitted).

This standard regarding the creation of an implied attorney-client relationship also has been applied in the litigation context. In *Horn v. Smith & Meroney, P.C.*, the defendant-attorney represented the decedent's wife in a wrongful death action arising out of an airplane crash.[40] After the wrongful death claim was settled, the decedent's parents brought a malpractice action. The trial court granted the attorney's motion for summary judgment, and the Court of Appeals affirmed, finding that the parents never sought any legal advice from the attorney, never informed the attorney that they were relying on him for legal advice, and in fact were represented by their own counsel for most of the period at issue.[41] Thus, the decedent's parents did not share an attorney-client relationship with the attorney that would permit them to bring a malpractice claim.

In *Calhoun v. Tapley*,[42] however, the Court of Appeals found that a genuine issue of material fact existed as to whether the parties shared an implied attorney-client relationship.[43] In *Calhoun*, the plaintiff purchased a residence by taking out a mortgage and subsequently deeded the residence to a third party in a "wraparound" transaction in which the third party was to make the mortgage payments. When the residence was destroyed by fire, the third party hired the defendant-attorney to assist in making the insurance claim. When the attorney failed to timely make that claim, the original buyer sued the attorney for malpractice. The trial court granted the attorney's motion for summary judgment concluding that no attorney-client relationship existed, but the Court of Appeals reversed. In so holding, the court relied on testimony that the attorney openly discussed the case with the plaintiff without regard to the other client's confidentiality and failed to inform the insurance company's representatives that the plaintiff was not a client when they requested permission to contact her directly. The court found that this evidence raised a genuine issue of material fact.[44]

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40. *Horn v. Smith & Meroney, P.C.*, 390 S.E.2d 272 (Ga. Ct. App. 1990).
41. *Horn v. Smith & Meroney, P.C.*, 390 S.E.2d 272, 273 (Ga. Ct. App. 1990).
42. *Calhoun v. Tapley*, 395 S.E.2d 848, 850 (Ga. Ct. App. 1990).
43. *Calhoun v. Tapley*, 395 S.E.2d 848, 850 (Ga. Ct. App. 1990).
44. *Calhoun v. Tapley*, 395 S.E.2d 848, 850 (Ga. Ct. App. 1990).

1-2:2.4 Providing Legal Opinions to Clients for Use by Others

Imagine that the board of directors of a large corporation hires an attorney to conduct an "independent" investigation into conduct that implicates the officers or directors of the corporation. If the board contemplates that the results of the investigation will be shared outside the company, does privilege attach? Are the results truly "independent?" Those are some of the issues that arise when providing legal opinions.

A routine part of nearly every attorney-client relationship is the provision of legal opinions by the attorney to the client. This can occur in a wide variety of contexts including, for example, a legal opinion relating to a real estate transaction or regarding the client's likelihood of success in potential litigation. While providing a legal opinion may seem like a straightforward task, there are a number of ethical considerations that can arise, including most notably where the opinion is to be shared with third parties.

Rule 2.3 of the Georgia Rules of Professional Conduct, which provides that "[a] lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if: (1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and (2) the client gives informed consent." The Comments to Rule 2.3 provide a list of situations where this may become an issue, including an "opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender," an opinion regarding the legality of securities, or an opinion provided for a third person, such as the purchaser of a business.

There are other contexts in which this rule might be implicated. For example, corporations often retain attorneys to perform internal investigations that may serve the primary purpose of advising the corporation, but may also involve reporting the investigation results to shareholders or to regulatory agencies. In such circumstances, who exactly the client is (e.g., the corporation or only its board of directors) impacts whether Rule 2.3 may be implicated

When an attorney provides an evaluation or legal opinion that is to be solely relied upon by the client, there usually is no issue with the attorney being candid and forthright regarding the issues being evaluated, including with respect to any weaknesses in the client's position or potential liability. Indeed, in such circumstances, clients would expect that their attorneys provide an objective evaluation of the matter.

However, the same may not hold true where the evaluation is to be provided to others outside the attorney-client relationship. Thus, at the beginning of the representation, attorneys can find out whether the client intends for the attorney to share the opinion with others to determine whether the provisions of Rule 2.3 may be implicated.

The U.S. Supreme Court has recognized that "the private attorney's role" is to serve "as the client's confidential adviser and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light."[45] However, when an attorney is retained to provide an evaluation of a matter that will be shared with third parties, it represents a deviation from the normal attorney-client relationship. It may be that the attorney is caught between two potentially competing interests in the evaluation: to render an impartial opinion so that the client can benefit from candid advice but to also ensure that the evaluation does not contain any information that will harm the client if it is being shared with third parties.

Because of the tensions between the duties owed to the client and the purpose of the evaluation, the Comments to Rule 2.3 caution that "careful analysis of the situation is required." In addition, the requisite "informed consent" under Rule 2.3 may require that the attorney advise the client regarding the potential adverse effects of sharing an evaluation with a third party. Having this discussion before commencing the representation can help ensure that both the attorney and client understand the purpose of the representation (i.e., whether the attorney is to act an advocate or as an impartial evaluator) and avoid client relations problems later.

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45. *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984).

Rule 2.3 also addresses confidentiality concerns raised by evaluations or legal opinions as it provides that "[e]xcept as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6." Rule 1.6 concerns an attorney's duty to "maintain in confidence all information gained in the professional relationship with a client."

Thus, even though the attorney may not be acting strictly as the client's advocate when rendering a legal opinion, the same rules of confidentiality apply. In other words, while the attorney may be acting impartially in some respects, the client is still the client when it comes to protecting confidential information. Accordingly, when retained to provide an evaluation, attorneys can take the same precautions with respect to the client's confidential information and not disclose any such information unless it is necessary for the evaluation (or the client consents).

While there is nothing inherently improper in providing a legal opinion with the knowledge that the opinion will be shared with third parties, a review of Rule 2.3 will help attorneys meet the goals of the representation as well as their ethical obligations.

1-2:3 Duty to Non-Clients

1-2:3.1 Generally

Even in the absence of an express or implied contract, certain non-clients will have standing to sue professionals for negligence.[46] In *Badische Corp. v. Caylor*,[47] the Supreme Court of Georgia held that a professional could be liable to non-clients where those non-clients:

> 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*

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[46] *See Badische Corp. v. Caylor*, 356 S.E.2d 198 (Ga. 1987); *Robert & Co. Assocs. v. Rhodes-Haverty P'ship*, 300 S.E.2d 503 (Ga. 1983) (allowing partnership that purchased building to bring negligence action against engineering firm that prepared inspection report, where engineer who prepared report was aware that prospective purchasers could rely on report); *Travelers Indem. Co. v. A.M. Pullen & Co.*, 289 S.E.2d 792 (Ga. Ct. App. 1982).

[47] *Badische Corp. v. Caylor*, 356 S.E.2d 198 (Ga. 1987).

> *whom the information was intended, either directly or indirectly*.[48]

The Georgia Court of Appeals also has outlined some situations in which "an attorney may owe a duty to a third party." For example, the Georgia Court of Appeals has outlined some of the situations at Georgia law in which an attorney may owe a duty to a third party.[49] The Court of Appeals stated as follows:

> For example, a lawyer representing the guardian ad litem of a minor owes a duty to the minor also, who is the real party with the legal interest warranting representation and the intended beneficiary of the relationship between her guardian and the guardian's attorney. Additionally, a real property buyer who relied on an attorney's title certification of the property purchased has a cause of action against the attorney if the seller had no interest in the property. Finally, in a wrongful death case, the surviving spouse acts as the children's representative and owes them the duty to act prudently in asserting, prosecuting, and settling the claims and to act in the utmost good faith.[50]

These situations and others can be grouped into three categories, as discussed herein. Indeed, attorneys in Georgia may owe a duty to a third party where that party is a third-party beneficiary to an existing attorney-client relationship, where an attorney could foresee that a third party would rely on information shared by the attorney, and where the attorney voluntarily acts pursuant to a third party's legal interest.

1-2:3.2 Third-Party Beneficiaries

In general, a plaintiff cannot recover in a legal malpractice action unless there is an attorney-client relationship with the attorney-defendant. However, in certain circumstances, an attorney may owe a duty to a party who is not a client but who is a third-party

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48. *Badische Corp. v. Caylor*, 356 S.E.2d 198, 200 (Ga. 1987) (internal citations omitted) (emphasis in original).

49. *Rhone v. Bolden*, 608 S.E.2d 22, 29 (Ga. Ct. App. 2004).

50. *Rhone v. Bolden*, 608 S.E.2d 22, 29-30 (Ga. Ct. App. 2004) (internal citations omitted).

beneficiary to an agreement between the attorney and her or his client.[51] For that exception to apply, it must clearly appear from the agreement between the attorney and client that it was intended for the benefit of that third party.[52] "The mere fact that the third party would benefit from performance of the agreement is not alone sufficient."[53]

In *Young v. Williams*,[54] attorney Young represented decedent Mr. Williams in drafting his will.[55] After Mr. Williams died and the will failed to pass the marital residence on to Mr. Williams' wife, as he had requested, Mr. Williams' wife filed a malpractice claim against Young. Despite the fact that Young and Mr. Williams did not have a written contract governing the representation, Young admitted that Mr. Williams intended for the marital property to pass on to Mrs. Williams and that Young had failed to include an appropriate provision in the will for that purpose.[56] However, Young opposed the malpractice action on the grounds that there was no privity of contract between him and Mrs. Williams. The Court of Appeals disagreed, noting that "[i]t is clear from the record that James Williams hired Young to draft a will so that certain people [including Mrs. Williams] would inherit his property upon his death."[57] As such, summary judgment was appropriate in Mrs. Williams' favor as a third party beneficiary.[58]

1-2:3.3 Foreseeable Reliance

The doctrine of foreseeable reliance permits certain non-clients to maintain an action against a professional for misinformation or

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51. *Young v. Williams*, 645 S.E.2d 624, 626 (Ga. Ct. App. 2007). *But see Hazzard v. Jackson*, No. CV411-019, 2011 WL 1740352, at *1 (S.D. Ga. Apr. 13, 2011) (holding attorney serving as defense counsel in a criminal proceeding does not act on behalf of the state).

52. *Young v. Williams*, 645 S.E.2d 624, 626 (Ga. Ct. App. 2007).

53. *Young v. Williams*, 645 S.E.2d 624, 625 (Ga. Ct. App. 2007); *see also Legacy Homes, Inc. v. Cole*, 421 S.E.2d 127 (Ga. Ct. App. 1992).

54. *Young v. Williams*, 645 S.E.2d 624 (Ga. Ct. App. 2007).

55. *Young v. Williams*, 645 S.E.2d 624, 625 (Ga. Ct. App. 2007).

56. *Young v. Williams*, 645 S.E.2d 624, 625 (Ga. Ct. App. 2007).

57. *Young v. Williams*, 645 S.E.2d 624, 625-26 (Ga. Ct. App. 2007).

58. *Compare Young v. Williams*, 645 S.E.2d 624, 625-26 (Ga. Ct. App. 2007) *with Rhone v. Bolden*, 608 S.E.2d 22, 30 (Ga. Ct. App. 2004) (holding that a lawyer hired by an estate representative did not owe duty to decedent's two parents, where parents' interests were at odds with estate; thus, the heirs of the estate may not bring a malpractice claim against the lawyer because the heirs are not automatically "third-party beneficiaries of the attorney-client relationship.").

misrepresentations negligently made. If the professional willfully and intentionally made the misrepresentations to induce the non-client to rely on the misrepresentations to his detriment, then the non-client could assert the independent tort of fraud, regardless of the existence of any attorney-client relationship or obligations. However, if a professional is aware that his representations will be used to induce a non-client's reliance, the attorney's duty to use skill and diligence in making those representations extends to certain non-clients who would foreseeably rely on the representations. Those non-clients would then be able to bring a legal malpractice claim against the professional.

Importantly, as the Supreme Court of Georgia has made clear, a professional's duty does not extend to all non-clients just because their reliance is foreseeable.[59] Instead, the court has adopted the "middle ground" between an unlimited foreseeability rule and the narrow privity rule.[60] Specifically, the duty to a non-client exists under the doctrine of foreseeable reliance only when the following elements are met: (1) the professional was "manifestly aware" of the use to which the information was to be put and intended that it be so used; (2) the non-client recipient was a foreseeable person or a member of a "limited class" of persons for whom the information was intended; and (3) the non-client recipient reasonably relied on the false information, and the information was given for purposes of inducing that reliance.[61]

As a threshold matter, however, it should be noted that the doctrine typically applies only to representations or information and not generally to the negligent performance of professional services.[62] Moreover, the non-client must show that he reasonably

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59. *Badische Corp. v. Caylor*, 356 S.E.2d 198, 200 (Ga. 1987).

60. *Badische Corp. v. Caylor*, 356 S.E.2d 198, 200 n.2 (Ga. 1987).

61. *Bates & Assocs. v. Romei*, 426 S.E.2d 919, 923 (Ga. Ct. App. 1993).

62. *Wood Bros. Constr. Co. v. Simons-E. Co.*, 389 S.E.2d 382, 384 (Ga. Ct. App. 1989) ("no similar exception has been carved out for a professional's alleged negligent failure to supervise a project"); *Gulf Contracting v. Bibb Co.*, 795 F.2d 980, 982 n.2 (11th Cir. 1986) (negligent failure to supervise and approve change orders did not fall within foreseeable reliance exception); *Malta Constr. Co. v. Henningson, Durham & Richardson*, 694 F. Supp. 902, 906-07 (N.D. Ga. 1988) (engineer's negligent delay in approving design changes did not fall within foreseeable reliance exception).

relied on the information.[63] In *Driebe v. Cox*,[64] the seller of a parcel of real estate could not maintain a cause of action against the closing attorney who drafted the warranty deed to include more property than the seller owned.[65] As the Court of Appeals reasoned, the seller had superior knowledge of how much property he owned and, thus, any reliance on the attorney for determining that fact would not have been reasonable.[66]

Due to the inherently adversarial nature of the legal profession, attorneys seldom provide information intended for non-clients. Similarly, even when such information is provided, non-clients typically rely instead on their own counsel. Consequently, issues regarding a non-client's reliance on an attorney's negligent misrepresentations do not arise as frequently in the legal malpractice context as they do in the context of accountant or engineer malpractice. However, this doctrine has been applied to lawyers numerous times in the context of various business transactions.[67]

Specifically, in *Rogers v. Hurt, Richardson, Garner, Todd & Cadenhead*,[68] the Court of Appeals held that a fact question existed with respect to whether a law firm retained by a corporation had a duty to individual officers when it provided allegedly negligent advice to transfer assets from the corporation to the officers individually.[69] Similarly, in *Horizon Financial, F.A. v. Hansen*,[70] the attorneys were hired by the seller of certain accounts receivable to issue three opinion letters regarding the transaction.[71] The court held that the opinion letters were issued for the benefit of the purchasers, and thus the purchasers could maintain an action

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63. *Williams v. Fallaize Ins. Agency, Inc.*, 469 S.E.2d 752, 754-55 (Ga. Ct. App. 1996); *Home Ins. Co. v. N. River Ins. Co.*, 385 S.E.2d 736, 740 (Ga. Ct. App. 1989).

64. *Driebe v. Cox*, 416 S.E.2d 314 (Ga. Ct. App. 1992).

65. *Driebe v. Cox*, 416 S.E.2d 314, 316 (Ga. Ct. App. 1992).

66. *Driebe v. Cox*, 416 S.E.2d 314, 316 (Ga. Ct. App. 1992).

67. *See Rogers v. Hurt, Richardson, Garner, Todd & Cadenhead*, 417 S.E.2d 29, 33 (Ga. Ct. App. 1992); *Razete v. Preferred Research, Inc.*, 415 S.E.2d 25, 26 (Ga. Ct. App. 1992) (title examiner); *Kirby v. Chester*, 331 S.E.2d 915, 919 (Ga. Ct. App. 1985); *Horizon Fin., F.A. v. Hansen*, 791 F. Supp. 1561, 1573-74 (N.D. Ga. 1992); *First Fin. Sav. & Loan Ass'n v. Title Ins. Co. of Minn.*, 557 F. Supp. 654, 659-60 (N.D. Ga. 1982).

68. *Rogers v. Hurt, Richardson, Garner, Todd & Cadenhead*, 417 S.E.2d 29 (Ga. Ct. App. 1992).

69. *Rogers v. Hurt, Richardson, Garner, Todd & Cadenhead*, 417 S.E.2d 29, 33 (Ga. Ct. App. 1992).

70. *Horizon Fin., F.A. v. Hansen*, 791 F. Supp. 1561 (N.D. Ga. 1992).

71. *Horizon Fin., F.A. v. Hansen*, 791 F. Supp. 1561, 1563-64 (N.D. Ga. 1992).

against the attorneys for negligent misrepresentations made in the opinion letters.[72]

Additionally, as illustrated by the decision in *Kirby v. Chester*,[73] foreseeable reliance issues are common in the context of real estate closings.[74] Specifically, in *Kirby*, a landowner retained an attorney to certify title so that he could obtain a loan. While the attorney certified that the landowner held title with certain standard objections, the real estate records indicated that he had no recorded interest in the property at all. Upon discovering this fact, the lender sued the attorney for the negligent certification of the title.[75] On appeal, the Court of Appeals ultimately concluded that the lender had standing because the certification was made with the intent to invoke the lender's reliance and that the lender did in fact rely on the certification.[76]

1-2:3.4 Voluntary Agency

The doctrine of voluntary agency holds that when a professional gratuitously offers to perform a certain task and another reasonably relies on that offer, the professional owes a duty of care in completing that task.[77] Specifically, the Georgia courts have adopted the expression of this proposition in Section 378 of the Restatement of Agency.[78] The Restatement provides as follows:

> One who, by a gratuitous promise or other conduct which he should realize will cause another reasonably to rely upon the performance of definite acts of service by him as the other's agent, causes the other to refrain from having such acts

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72. *Horizon Fin., F.A. v. Hansen*, 791 F. Supp. 1561, 1573-74 (N.D. Ga. 1992); *see also First Fin. Sav. & Loan Ass'n v. Title Ins. Co. of Minn.*, 557 F. Supp. 654, 659-60 (N.D. Ga. 1982).

73. *Kirby v. Chester*, 331 S.E.2d 915 (Ga. Ct. App. 1985).

74. *Kirby v. Chester*, 331 S.E.2d 915, 918-19 (Ga. Ct. App. 1985).

75. *Kirby v. Chester*, 331 S.E.2d 915, 917 (Ga. Ct. App. 1985).

76. *Kirby v. Chester*, 331 S.E.2d 915, 919-20 (Ga. Ct. App. 1985).

77. *See Stelts v. Epperson*, 411 S.E.2d 281, 282 (Ga. Ct. App. 1991); *Mixon v. Dobbs Houses, Inc.*, 254 S.E.2d 864, 865-66 (Ga. Ct. App. 1979); *Kahn v. Britt*, 765 S.E.2d 446, 457-58 (Ga. Ct. App. 2014).

78. *See Moore v. Harris*, 372 S.E.2d 654, 655 (Ga. Ct. App. 1988); *Mixon v. Dobbs Houses, Inc.*, 254 S.E.2d 864, 865-66 (Ga. Ct. App. 1979); *Simmerson v. Blanks*, 254 S.E.2d 716, 718 (Ga. Ct. App. 1979).

> done by other available means is subject to a duty to use care to perform such service, or, while other means are available, to give notice that he will not perform.[79]

As with the doctrine of foreseeable reliance, reasonable reliance is the gravamen of this exception to the privity requirement.[80] Thus, even though non-clients in an adversarial position seldom rely on another party's attorney, the voluntary agency principal has been cited in the legal malpractice context numerous times.[81]

For example, in *Wright v. Swint*,[82] the plaintiff purchased a parcel of real estate in 1985 following a title search performed by the attorney for the lender, which later proved to be defective.[83] The plaintiff discovered this defect in 1993 when he attempted to refinance. At that time, the lender's attorney gave "assurances" to the plaintiff that the defect was being cured.[84] The Court of Appeals found that a jury could reasonably find that the lender's attorney owed the plaintiff a duty based on his attempt to fix the defective title.[85]

However, when the plaintiff's relationship with the attorney is not foreseeable, an attorney-client relationship is not created through voluntary agency. In *Graivier v. Dreger & McClelland*,[86] the plaintiff brought a legal malpractice suit against his former attorney.[87] The plaintiff alleged that the attorney failed to use ordinary care when setting up the plaintiff's limited liability corporation ("LLC"). In addition, the plaintiff's wife, who was

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79. Restatement (Second) of Agency, § 378 (1958).

80. *See, e.g., Moore v. Harris*, 372 S.E.2d 654, 655 (Ga. Ct. App. 1988) (refusing to apply the doctrine of voluntary agency where plaintiff was represented by his own attorney and the defendant attorney made clear that he represented only his own clients).

81. *Legacy Homes, Inc. v. Cole*, 421 S.E.2d 127, 129 (Ga. Ct. App. 1992); *Rogers v. Hurt, Richardson, Garner, Todd & Cadenhead*, 417 S.E.2d 29, 32-33 (Ga. Ct. App. 1992); *Simmerson v. Blanks*, 254 S.E.2d 716, 718 (Ga. Ct. App. 1979) (an attorney may be liable under a voluntary or gratuitous agency theory where that attorney, representing a party other than the plaintiff, gratuitously states that he will take care of filing papers that it is plaintiff's responsibility to file).

82. *Wright v. Swint*, 480 S.E.2d 878 (Ga. Ct. App. 1997).

83. *Wright v. Swint*, 480 S.E.2d 878, 879 (Ga. Ct. App. 1997).

84. *Wright v. Swint*, 480 S.E.2d 878, 879 (Ga. Ct. App. 1997).

85. *Wright v. Swint*, 480 S.E.2d 878, 880 (Ga. Ct. App. 1997).

86. *Graivier v. Dreger & McClelland*, 633 S.E.2d 406 (Ga. Ct. App. 2006).

87. *Graivier v. Dreger & McClelland*, 633 S.E.2d 406 (Ga. Ct. App. 2006).

also the LLC's corporate secretary, brought a malpractice suit against the attorney. Although she never hired the attorney to represent her or personally told the attorney that she thought that he was representing her, the plaintiff's wife claimed that an attorney-client relationship existed because she was present at the signing of the LLC agreement and she saw the attorney twice during depositions. The plaintiff's wife asserted that "any time an attorney represents a corporation, he or she owes a duty to the officers in their individual capacities."[88] The court did not agree. Instead, the court held that the plaintiff's wife and the attorney did not have an attorney-client relationship because the relationship was not foreseeable. In reaching that conclusion, the court noted that the plaintiff's wife did not hire the attorney and had very limited contact with the attorney.

Once a voluntary agency relationship has been established, even where there is no express attorney-client relationship, a voluntary agent owes the non-client a duty to perform the undertaking with the skill and care required by his profession.[89]

1-2:3.5 Use of Disclaimers

As both the foreseeable reliance doctrine and the voluntary agency doctrine require reasonable reliance on behalf of the non-client, an attorney may be able to defeat such claims by issuing appropriate disclaimers.[90] The Supreme Court of Georgia recognized the validity of disclaimers when it first began carving away at the privity requirement:

> The additional duty that this rule [of reliance] imposes may be, of course, limited by appropriate disclaimers which would alert those not in privity with the supplier of information that they may rely upon it only at their peril.[91]

Usually, the disclaimers are written documents signed by the non-client, along with many other documents, during the closing

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88. *Graivier v. Dreger & McClelland*, 633 S.E.2d 406, 412 (Ga. Ct. App. 2006).

89. *Simmerson v. Blanks*, 254 S.E.2d 716, 718-19 (Ga. Ct. App. 1979).

90. *First Nat'l Bank v. Sparkmon*, 442 S.E.2d 804, 805 (Ga. Ct. App. 1994); *Williams v. Fortson, Bentley & Griffin*, 441 S.E.2d 686, 688 (Ga. Ct. App. 1994); *Carmichael v. Barham, Bennett, Miller & Stone*, 370 S.E.2d 639, 640 (Ga. Ct. App. 1988).

91. *Robert & Co. Assocs. v. Rhodes-Haverty P'ship*, 300 S.E.2d 503, 504 (Ga. 1983).

of the transaction. Courts have been willing to accept arguments that attorneys do not owe duties to third parties who have signed disclaimers regarding the existence of any duty. For example, in *Williams v. Fortson, Bentley & Griffin*,[92] home buyers sued the closing attorney who represented the lender for her failure to procure a sufficient termite report before closing the sale.[93] The buyers signed a disclaimer stating that the legal services were performed for the lender and not the buyers, but the buyers argued that the disclaimer was signed midway through the closing and that the attorney told them it was not necessary to read everything in order to rush them through the closing. Additionally, the buyers alleged that the attorney stated she was their attorney and would take care of them.[94] Despite these arguments, the Court of Appeals affirmed summary judgment for the attorney because the disclaimer "precluded an actionable reliance on any promise" by the attorney.[95]

This rationale was apparently the basis for the Georgia Court of Appeals' decision in *Carmichael v. Barham, Bennett, Miller & Stone*.[96] There, the closing attorney provided the borrower in a real estate transaction with a document stating, in part, that: "This firm does not represent you as your attorney and you are entitled to obtain counsel of your choice if you so desire."[97] This document was signed by the plaintiff as well as a member of the law firm. The court held that it was sufficient to preclude an attorney-client relationship, and summary judgment was, therefore, entered for the law firm based on the lack of such a relationship.[98]

A similar decision was reached by the Georgia Court of Appeals in *Moore v. Harris*.[99] There, the attorney provided a document to the would-be client stating that the attorney had not acted as a tax advisor and, furthermore, that the plaintiffs had neither received

92. *Williams v. Fortson, Bentley & Griffin*, 441 S.E.2d 686 (Ga. Ct. App. 1994).
93. *Williams v. Fortson, Bentley & Griffin*, 441 S.E.2d 686, 687 (Ga. Ct. App. 1994).
94. *Williams v. Fortson, Bentley & Griffin*, 441 S.E.2d 686, 687 (Ga. Ct. App. 1994).
95. *Williams v. Fortson, Bentley & Griffin*, 441 S.E.2d 686, 688 (Ga. Ct. App. 1994).
96. *Carmichael v. Barham, Bennett, Miller & Stone*, 370 S.E.2d 639 (Ga. Ct. App. 1988).
97. *Carmichael v. Barham, Bennett, Miller & Stone*, 370 S.E.2d 639, 640 (Ga. Ct. App. 1988).
98. *Carmichael v. Barham, Bennett, Miller & Stone*, 370 S.E.2d 639 (Ga. Ct. App. 1988).
99. *Moore v. Harris*, 372 S.E.2d 654 (Ga. Ct. App. 1988).

nor relied upon any tax advice given by the attorneys. Based on this language, the Court of Appeals affirmed summary judgment in favor of the attorney.[100]

However, in the absence of clear communication by the attorney regarding who the attorney does and does not represent, there is the risk for misunderstanding regarding the scope of the attorney's representation. Although such circumstances alone may not constitute a viable basis for a recovery for legal malpractice, they nonetheless may be the basis for the assertion of a legal malpractice claim by a non-client.

An attorney can take minimal steps to avoid this possibility, or at least reduce the risk of such a possibility.

Initially, an attorney should determine whether there are interested parties not represented by counsel. If so, those parties should be advised, in writing, that the attorney does not represent their interests. Moreover, such disclosure should advise the parties that if they desire to have their interests protected, they will have to retain separate counsel to represent them.

1-3 BREACH

1-3:1 Breach of Duty Required

Once it becomes clear that the attorney owes a duty to a client or non-client, the plaintiff then must establish a deviation or breach from the applicable standard of care to recover for professional malpractice. The breach of duty in a legal malpractice case must relate directly to the duty of the attorney, that is, to the duty to perform the task for which the attorney was employed.[101] Whether an attorney violated the standard of care is an issue for the jury hearing the legal malpractice action.[102]

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100. *Moore v. Harris*, 372 S.E.2d 654, 655 (Ga. Ct. App. 1988).

101. *First Bancorp Mortg. Corp. v. Giddens*, 555 S.E.2d 53, 59 (Ga. Ct. App. 2001) (internal citations omitted).

102. *Johnson v. Leibel*, 703 S.E.2d 702 (Ga. Ct. App. 2010), *rev'd on other grounds*, 728 S.E.2d 554, 556-57 (Ga. 2012). In accordance with the Supreme Court of Georgia's ruling, the Court of Appeals of Georgia recently vacated in part and affirmed in part its 2010 ruling in this matter in *Johnson v. Leibel*, 738 S.E.2d 685, 685 (Ga. Ct. App. 2013); *Stewart v. McDonald*, 815 S.E.2d 665 (Ga. Ct. App. 2018).

1-3:2 Standard of Care

In *Kellos v. Sawilosky*,[103] the Supreme Court of Georgia described the standard of care to which attorneys practicing law in the State of Georgia are held when it stated:

> Our courts have held that an attorney's duty is to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake, and that an attorney is not bound to extraordinary diligence. He is bound to *reasonable* skill and diligence and the *skill* has reference to the character of the business he undertakes to do. Thus, *while the standard of care required of an attorney remains constant, its application may vary*.[104]

There are two important considerations in applying the standard of care and evaluating attorney conduct in a particular case. First, a court should consider the number of options available to the attorney at the time of breach.[105] Second, a court should consider the amount of time in which the attorney had to consider the available options.[106]

Generally, the conduct of lawyers in Georgia is analyzed in terms of what a reasonable Georgia lawyer would do. Indeed, "the applicable standard in Georgia is that of the practitioners in Georgia, there being no ascertainable standard of the legal . . . profession generally."[107] However, as a practical matter, "the local standard versus the standard of the legal profession generally may be a distinction without a difference."[108] Nonetheless, while the standard generally remains the same for all lawyers, the application

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103. *Kellos v. Sawilosky*, 325 S.E.2d 757 (Ga. 1985).

104. *Kellos v. Sawilosky*, 325 S.E.2d 757, 758 (Ga. 1985) (emphasis in original) (internal citations omitted).

105. *Kellos v. Sawilosky*, 325 S.E.2d 757, 758 (Ga. 1985) (internal citations omitted).

106. *Kellos v. Sawilosky*, 325 S.E.2d 757, 758 (Ga. 1985) (internal citations omitted); *see also Hughes v. Malone*, 247 S.E.2d 107, 112 (Ga. Ct. App. 1978) (the "effectiveness of representation may also be judged by the familiarity of counsel with the case including counsel's opportunity to investigate and diligence in doing so, in order to meaningfully advise the client of his options.").

107. *Kellos v. Sawilosky*, 325 S.E.2d 757, 758 (Ga. 1985).

108. *Kellos v. Sawilosky*, 325 S.E.2d 757, 758 (Ga. 1985).

of the standard of care may, according to the court, vary from jurisdiction to jurisdiction and from situation to situation.[109]

1-3:3 Factors Establishing Breach

1-3:3.1 Generally

As detailed above, the standard of care for lawyers practicing in Georgia is rather broadly written. Thus, there are several factors that a court will consider in determining whether that standard of care has been breached by an attorney's negligence.

1-3:3.2 Failing to Properly Advise Clients

A court may find that an attorney breached the standard of care by failing to properly advise her or his clients. In *Chatham Orthopaedic Surgery Center, LLC v. White*,[110] the defendant attorney represented the plaintiffs, a group of surgeons, in a claim for tortious interference with business relations against a hospital association.[111] Under O.C.G.A. § 9-11-11.1 or Georgia's Anti-Strategic Lawsuits Against Public Participation statute (the "anti-SLAPP statute"), the attorney must file the proper written verifications when filing this sort of claim. If the attorney fails to do so, the court may strike the claim if the proper verification is not made within a ten-day time period. Here, the attorney failed to file the verifications contemporaneously with the claim and failed to file the verifications within the ten-day time period. As a result, the court struck the claim. Subsequently, the plaintiffs filed a legal malpractice claim against the attorney.

The Court of Appeals concluded that the attorney may have breached the duty of care owed to his clients because the attorney failed to advise his clients about the potential risks of not verifying the claim, given the fact that there was conflicting case law on the issue.[112] Therefore, the court found that there was a genuine

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109. *Kellos v. Sawilosky*, 325 S.E.2d 757, 758 (Ga. 1985).

110. *Chatham Orthopaedic Surgery Ctr., LLC v. White*, 640 S.E.2d 633 (Ga. Ct. App. 2006).

111. *Chatham Orthopaedic Surgery Ctr., LLC v. White*, 640 S.E.2d 633, 635 (Ga. Ct. App. 2006).

112. *Chatham Orthopaedic Surgery Ctr., LLC v. White*, 640 S.E.2d 633, 637 (Ga. Ct. App. 2006).

issue of material fact regarding whether the attorney breached the applicable standard of care.

Whether the attorney breached the applicable standard of care may depend on what the scope of the attorney's duty was. For example, one court has rejected the notion that "every transactional attorney owes a duty to opine on the merits of the deal."[113] Indeed, "[e]ven in the context of an otherwise unlimited representation, a lawyer is not obligated to second-guess a client's business judgment or protect the client from his or her own limited business expertise."[114]

1-3:3.3 Adverse Results

Obviously, an adverse result in an underlying representation does not automatically mean that the attorney breached the applicable standard of care. For example, in *Thornton v. National American Insurance Co.*,[115] the Supreme Court of Georgia held that the defendant attorney's failure to appear at a calendar call did not fall below the standard of care, despite the fact that a default judgment was entered against his client, because the defendant attorney did not receive reasonable notice of the hearing from the trial court.[116]

On the other hand, in *Tante v. Herring*,[117] the Supreme Court of Georgia held that, without an adverse result in the course of the underlying litigation, a plaintiff cannot prove a breach of the standard of care.[118] The facts established that the attorney in *Tante* took advantage of his client's emotional and mental disability in becoming involved in an adulterous sexual relationship with her while successfully pursuing a claim for disability benefits on her behalf before the Social Security Administration.[119] The Supreme

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113. *Damian v. Nelson Mullins Riley & Scarborough, LLP*, No. 1:14-cv-3498-TCB, 2017 WL 4303916, at *10 (N.D. Ga. Sept. 28, 2017).

114. *Damian v. Nelson Mullins Riley & Scarborough, LLP*, No. 1:14-cv-3498-TCB, 2017 WL 4303916, at *10 (N.D. Ga. Sept. 28, 2017) (internal citation omitted).

115. *Thornton v. Nat'l Am. Ins. Co.*, 499 S.E.2d 894 (Ga. 1998).

116. *Thornton v. Nat'l Am. Ins. Co.*, 499 S.E.2d 894, 896 (Ga. 1998).

117. *Tante v. Herring*, 439 S.E.2d 5 (Ga. Ct. App. 1993), *aff'd in part, rev'd in part*, 264 Ga. 694, 453 S.E.2d 686 (1994); *see also Baker v. Huff*, 747 S.E.2d 1 (Ga. Ct. App. 2013).

118. *Tante v. Herring*, 439 S.E.2d 5 (Ga. Ct. App. 1993), *aff'd in part, rev'd in part*, 264 Ga. 694, 453 S.E.2d 686 (1994).

119. *Tante v. Herring*, 439 S.E.2d 5 (Ga. Ct. App. 1993), *aff'd in part, rev'd in part*, 264 Ga. 694, 453 S.E.2d 686 (1994).

Court found that this behavior, while reprehensible, did not constitute a breach of the standard of care:

> There is no evidence that Tante's conduct of which the Herrings complain had any effect on his performance of legal services under his agreement with the Herrings. Indeed, Tante obtained for Mrs. Herring precisely the results for which he was retained, the recovery of social security disability benefits. Contrary to the holding of the Court of Appeals, . . . a satisfactory result under an agreement for legal services by necessity precludes a claim for legal malpractice.[120]

Although the court found that Tante's actions were not a breach of his duty, they did allow the Herrings' breach of fiduciary duty claim to continue.[121]

There may be certain adverse results in an underlying representation that are considered to be *de facto* evidence of a departure from the standard of care. For example, in *Hightower v. Goldberg*,[122] the defendant attorneys failed to respond to a motion to compel filed against their client that sought dismissal of the client's claim with prejudice, resulting in the underlying case being dismissed. In the subsequent legal malpractice action, the defendant attorneys filed a motion for summary judgment arguing a lack of causation. The district court denied the defendants' motion on the grounds that the failure to respond to a motion that seeks dismissal of a client's claim with prejudice, without extenuating circumstances, supports a claim of malpractice.

1-3:3.4 Undertaking to Accomplish a Specific Result

Attorneys are not insurers of the results of their efforts on behalf of clients.[123] However, an attorney may breach her or his duty

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120. *Tante v. Herring*, 439 S.E.2d 5 (Ga. Ct. App. 1993), *aff'd in part, rev'd in part*, 264 Ga. 694, 453 S.E.2d 686 (1994).

121. *Tante v. Herring*, 439 S.E.2d 5 (Ga. Ct. App. 1993), *aff'd in part, rev'd in part*, 264 Ga. 694, 453 S.E.2d 686 (1994).

122. *Hightower v. Goldberg*, No. 4:17-CV-7 (CDL), 2018 WL 296955, at *4 (M.D. Ga. Jan. 4, 2018).

123. *Harrison v. Deming, Parker, Hoffman, Green & Campbell, P.C.*, 541 S.E.2d 407, 409 (Ga. Ct. App. 2000); *see also Littleton v. Stone*, 497 S.E.2d 684, 686 (Ga. Ct. App. 1998).

toward the client when, after undertaking to accomplish a specific result, the attorney then fails to effectuate the intent of the parties.[124] Indeed, in *Graivier v. Dreger & McClelland*,[125] two doctors hired an attorney to prepare an operating agreement for the formation of their new company.[126] The plaintiff claimed that he requested that the attorney draw up the agreement so that the profits were divided in a specific manner. When the agreement failed to incorporate this request, the plaintiff sued the attorney for legal malpractice. Although the court stated that the plaintiff read the agreement prior to signing it and the plaintiff could have instructed the attorney to change any of the provisions, this did not relieve the attorney of liability in light of the plaintiff's specific instructions:

> it is the lawyer's responsibility to his client to select and employ words in the construction of a contract that will accurately convey the meaning intended. And although he is not an insurer of the documents he drafts, the attorney may breach his duty towards his client when, after undertaking to accomplish a specific result, he then fails to effectuate the intent of the parties.[127]

As a result, the court concluded that the attorney was negligent in drafting the operating agreement and failed to exercise ordinary care.

Although courts recognize that this failure to reach a result may be a breach, Georgia law also recognizes that the practice of law is in many ways an art, rather than a science:

> [A]lthough an attorney is not an insurer of the results sought to be obtained by such representation, when, after undertaking to accomplish a specific result, he then wilfully or negligently fails to apply

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124. *Bonner v. Roofing & Sheet Metal Co., Inc. v. Karsman*, 646 S.E.2d 763 (Ga. Ct. App. 2007); *Young v. Williams*, 645 S.E.2d 624 (Ga. Ct. App. 2007); *Graivier v. Dreger & McClelland*, 633 S.E.2d 406 (Ga. Ct. App. 2006).

125. *Graivier v. Dreger & McClelland*, 633 S.E.2d 406 (Ga. Ct. App. 2006).

126. *Graivier v. Dreger & McClelland*, 633 S.E.2d 406, 410 (Ga. Ct. App. 2006).

127. *Graivier v. Dreger & McClelland*, 633 S.E.2d 406, 410 (Ga. Ct. App. 2006) (internal citations omitted). Indeed, as discussed in Chapter 4: Defenses to Legal Malpractice Claims, clients may be responsible for understanding factual aspects of documents they read and approve, but they usually cannot be expected to understand the legal significance of a document.

> commonly known and accepted legal principles and procedures through ignorance of basic, well-established and unambiguous principles of law or through a failure to act reasonably to protect his client's interests, then he has breached his duty toward the client. As the legal profession is at best an inexact science, a breach of duty arises only when the relevant, i.e., legal principles or procedures are well settled and their application clearly demanded, and the failure to apply them apparent; otherwise, an attorney acting in good faith and to the best of his knowledge will be insulated from liability for adverse results.[128]

1-3:3.5 Failing to Obtain Client Authority

An attorney may be found to have breached the applicable standard of care where the attorney fails to obtain client authority before taking certain acts. For example, in *Tucker v. Rogers*,[129] the Georgia Court of Appeals held that an attorney breached the applicable standard of care where he accepted a settlement on behalf of his client without obtaining his client's express permission.[130] Notably, a significant factor was that accepting the offer also violated the terms of the attorney-client contract.[131]

However, whether express authority from the client is required can be less clear under other circumstances. In *Tucker*, the attorney also failed to file his client's lawsuit prior to the expiration of the applicable statute of limitation.[132] The attorney claimed that he could not file the lawsuit without the client's permission and that the client had failed to respond to a letter from the attorney regarding whether the lawsuit should be filed, failed to inform the attorney that the client's home number had changed, and failed to answer his cell phone.[133] The attorney also claimed that he

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128. *Hughes v. Malone*, 247 S.E.2d 107, 111 (Ga. Ct. App. 1978).
129. *Tucker v. Rogers*, 778 S.E.2d 795 (Ga. Ct. App. 2015).
130. *Tucker v. Rogers*, 778 S.E.2d 795, 799 (Ga. Ct. App. 2015).
131. *Tucker v. Rogers*, 778 S.E.2d 795, 799 (Ga. Ct. App. 2015).
132. *Tucker v. Rogers*, 778 S.E.2d 795, 798-99 (Ga. Ct. App. 2015).
133. *Tucker v. Rogers*, 778 S.E.2d 795, 798-99 (Ga. Ct. App. 2015).

could not file the lawsuit without express permission because any filing of the lawsuit would have increased the attorney's fee and would have obligated the client to pay the costs of filing suit.[134] According to the client's expert, however, the attorney did not require client authority to file suit under the parties' fee contract and Rule of Professional Conduct 1.2(a).[135] Both parties agreed that an attorney should consult with a client before filing a lawsuit, but disagreed over the level of permission required.[136] The court remanded to the trial court, finding that there was a genuine issue of material fact with respect to whether the attorney's failure to file the lawsuit without obtaining direct client permission after the fee contract had been signed fell below the applicable standard of care.[137]

1-3:3.6 Ethical Rules

As discussed in Chapter 7: Identifying and Resolving Conflicts of Interest, a violation of the Georgia Rules of Professional Conduct, standing alone, cannot serve as a basis supporting a legal malpractice claim.[138] Indeed, while the ethical rules authorize "specific sanctions for the professional misconduct of attorneys whom it regulates, it does not establish civil liability of attorneys for their professional misconduct, nor does it create remedies in consequence thereof."[139]

However, violations of the ethical rules may be used in legal malpractice actions to assist in establishing the standard of care required of attorneys.[140] The Supreme Court of Georgia has

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134. *Tucker v. Rogers*, 778 S.E.2d 795, 798 (Ga. Ct. App. 2015).

135. *Tucker v. Rogers*, 778 S.E.2d 795, 799 (Ga. Ct. App. 2015).

136. *Tucker v. Rogers*, 778 S.E.2d 795, 798 (Ga. Ct. App. 2015).

137. *Tucker v. Rogers*, 778 S.E.2d 795, 799 (Ga. Ct. App. 2015).

138. *See, e.g., Davis v. Findley*, 422 S.E.2d 859 (Ga. 1992), *vacated in part*, 429 S.E.2d 174 (Ga. Ct. App. 1993); *Hays v. Page Perry, LLC*, 26 F. Supp. 3d 1311, 1317 (N.D. Ga. 2014) ("the Georgia Supreme Court has made clear that the GRPC rules do not independently constitute legal duties which give rise to malpractice claims").

139. *Davis v. Findley*, 422 S.E.2d 859, 861 (Ga. 1992), *vacated in part*, 429 S.E.2d 174 (Ga. Ct. App. 1993).

140. *Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.*, 453 S.E.2d 719 (Ga. 1995); *see also Tucker v. Rogers*, 778 S.E.2d 795, 799 (Ga. Ct. App. 2015) (holding that an attorney's failure to obtain client authority before accepting a settlement breached the applicable standard of care because it violated both the parties' contract and the Rules of Professional Conduct).

articulated the following standard for use in determining how ethical rules may establish a breach of the applicable standard of care:

> 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.[141]

1-3:3.7 Use of Expert Testimony

Valid legal malpractice actions require an expert affidavit, per O.C.G.A. § 9-11-9.1, as discussed in Chapter 2: Additional Requirements for a Malpractice Claim. Additionally, expert testimony often is required to establish a breach of the standard of care.[142] Indeed:

> the proof ordinarily required to overcome such presumption of care, skill and diligence [in medical malpractice actions] is that given by others qualified in the respective professional field as expert witnesses. We are satisfied that a similar presumption attaches to services rendered by an attorney and that presumption may be overcome only by competent, expert testimony showing that the services were not performed in an ordinarily skillful manner.[143]

Although, as discussed above, the issue of whether an attorney has breached the standard of care is for a jury to decide, expert testimony is admissible to assist the jury in determining whether

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[141] *Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.*, 453 S.E.2d 719, 721-22 (Ga. 1995) (internal citations omitted); *see also Watkins & Watkins, P.C. v. Williams*, 518 S.E.2d 704, 706 (Ga. Ct. App. 1999).

[142] For more on the differences between the 9.1 expert affidavit requirement and the requirement for expert testimony in support of a breach of the standard of care, *see* Chapter 2: Additional Requirements for a Malpractice Claim.

[143] *Hughes v. Malone*, 247 S.E.2d 107, 111 (Ga. Ct. App. 1978).

an attorney breached the standard of care.[144] Expert testimony is not required, however, where the violation of the standard of care is "clear and palpable," such as when an attorney failed to file an action within the applicable statute of limitations.[145]

1-4 PROXIMATE CAUSE

1-4:1 Generally

A cognizable claim of legal malpractice requires that the alleged breach of duty by the lawyer was the cause of damages suffered by the client.[146] In other words, the legal malpractice plaintiff must prove that "but for the attorney's error, the outcome would have been different; any lesser requirement would invite speculation and conjecture."[147] While previously expert testimony was admissible to prove proximate cause, in 2010 the Supreme Court of Georgia held that expert testimony regarding the ultimate issue of causation in a legal malpractice action is not admissible because the task of deciding a case on its merits "is solely for the jury, and that is not properly the subject of expert testimony."[148] In cases where no loss

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144. *Watkins & Watkins, P.C. v. Williams*, 518 S.E.2d 704 (Ga. Ct. App. 1999); *e.g. Rollins v. Smith*, 836 S.E.2d 585, 589 (Ga. Ct. App. 2019), *cert. denied*, No. S20C0604, 2020 Ga. LEXIS 561 (Ga. July 15, 2020).

145. *See, e.g., Graves v. Jones*, 361 S.E.2d 19, 20 (Ga. Ct. App. 1987); *Hughes v. Malone*, 247 S.E.2d 107, 111 (Ga. Ct. App. 1978); *see also* Chapter 2: Additional Requirements for a Malpractice Claim.

146. *Redwine v. Windham*, 513 S.E.2d 13, 14 (Ga. Ct. App. 1999); *see also Goodman v. Glover*, 544 S.E.2d 214, 215 (Ga. Ct. App. 2001).

147. *Kitchen v. Hart*, 704 S.E.2d 452, 457 (Ga. Ct. App. 2010) (internal citations omitted); *see also Duncan v. Klein*, 720 S.E.2d 341, 348 (Ga. Ct. App. 2011); *Howard v. Sellers & Warren, P.C.*, 709 S.E.2d 585 (Ga. Ct. App. 2011); *Paul v. Smith, Gambrell & Russell*, 642 S.E.2d 217, 220 (Ga. Ct. App. 2007) ("A claim for legal malpractice is sui generis insofar as the plaintiff's proof of damages effectively requires proof that he would have prevailed in the original litigation but for the act of the attorney charged with malpractice.") (internal citations omitted); *Graivier v. Dreger & McClelland*, 633 S.E.2d 406 (Ga. Ct. App. 2006).

148. *Johnson v. Leibel*, 728 S.E.2d 554, 556-57 (Ga. 2012), *rev'g* 703 S.E.2d 702 (Ga. Ct. App. 2010). In accordance with the Supreme Court of Georgia's ruling, the Court of Appeals of Georgia recently vacated in part and affirmed in part its 2010 ruling in this matter in *Johnson v. Leibel*, 738 S.E.2d 685, 685 (Ga. Ct. App. 2013); *see also Tidwell v. Hinton & Powell*, 315 Ga. App. 152, 726 S.E.2d 652, 653 (2012) (affirming partial grant of motion in limine to exclude expert testimony regarding proximate cause); *Stewart v. McDonald*, 815 S.E.2d 665, 672 (Ga. Ct. App. 2018) (reversing grant of judgment notwithstanding the verdict, holding that issues of causation and damages were properly submitted to the jury.).

was the result of the lawyer's action, a legal malpractice defendant will not be held liable.[149]

1-4:2 Client Would Have Prevailed, Absent the Alleged Malpractice

Although the standard for proximate cause is rather straightforward, in application, the issue of proximate cause can be quite complicated. Indeed, the issue of proximate cause is one of the most frequently litigated issues in Georgia legal malpractice cases. When evaluating the merits of a malpractice claim, Georgia courts focus on whether the client would have been able to obtain a favorable resolution had the attorney not been negligent.[150]

Thus, if there is no evidence that there would have been a different outcome absent the attorney's error, the court likely will find that there is no basis for a legal malpractice claim. In *Falanga v. Kirschner & Venker, P.C.*,[151] Falanga hired Andrew Kirschner and

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149. *See Mosera v. Davis*, 701 S.E.2d 864 (Ga. Ct. App. 2010) (finding lack of proximate cause where plaintiff could not show that alleged poor draftmanship of settlement documents by attorney harmed plaintiff in any way); *see also Freeman v. Eicholz*, 705 S.E.2d 919 (Ga. Ct. App. 2011) (finding lack of proximate cause where plaintiff could not prove as a matter of law that attorney's failure to timely file an ante litem notice caused plaintiff's alleged harm); *Howard v. Sellers & Warren, P.C.*, 709 S.E.2d 585, 589 (Ga. Ct. App. 2011); *Quarterman v. Cullum*, 717 S.E.2d 267, 271-72 (Ga. Ct. App. 2011) (explaining "mere speculation and conjecture cannot serve as the basis for establishing proximate cause" where plaintiff presented no evidence his injuries could have been avoided if defendant had acted differently).

150. *Waithe v. Arrowhead Clinic, Inc.*, No. 12-11913, 2012 WL 4465205 (11th Cir. Sept. 26, 2012) (in matters where clients claimed their lawyers committed malpractice based on conflicts of interest, the clients failed to show they would have received a better settlement or been charged lower fees if they had selected other counsel); *Abdualla v. Klosinski*, No. 12-15448, 2013 WL 3490728 (11th Cir. July 10, 2013); *Szurovy v. Olderman*, 530 S.E.2d 783, 785 (Ga. Ct. App. 2000) (in claim that lawyer committed malpractice by negotiating divorce settlement that waived client's right to alimony, client failed to prove essential element of proximate causation when she failed to show that she could have obtained alimony through settlement or trial); *Walker v. Burnett*, 526 S.E.2d 109, 112 (Ga. Ct. App. 1999) (client failed to establish proximate cause when he failed to present evidence that he would have prevailed in his underlying employment discrimination case but for the alleged negligence); *Houston v. Surrett*, 474 S.E.2d 39, 41-42 (Ga. Ct. App. 1996) (where attorney failed to object to venue in custody case, client must prove that result in custody case would have differed if it had been filed in the proper county); *Hightower v. Goldberg*, No. 4:17-CV-7 (CDL), 2018 WL 296955, at *5 (M.D. Ga. Jan. 4, 2018) (noting that a claim for legal malpractice is sui generis in so far as the plaintiff's proof of damages effectively requires proof that she would have prevailed in the original action); *Rollins v. Smith*, 836 S.E.2d 585, 590 (Ga. Ct. App. 2019) (attorney defendants were not entitled to judgment as a matter of law based on the evidence that but for the attorneys' failure to make sure that a separate stipulation was executed such that the client would receive the attorney fee credit in a divorce action, the outcome of the case would have been different).

151. *Falanga v. Kirschner & Venker, P.C.*, 648 S.E.2d 690 (Ga. Ct. App. 2007).

the firm of Kirschner & Venker, P.C. to defend him against a State Bar complaint.[152] Kirschner suggested that Falanga file a federal civil rights suit against the Georgia State Bar. Falanga agreed, and Kirschner filed suit and won. Kirschner then filed for attorneys' fees, but the State Bar appealed and won some of its arguments on appeal. After losing the appeal, Falanga ordered Kirschner not to do any work on the petition for certiorari because Falanga had some disagreements with Kirschner on his billing practices. Falanga then reached an agreement with the Georgia State Bar regarding the state bar complaint. However, after the Supreme Court of Georgia accepted Falanga's voluntary discipline petition, the State Bar "began a new investigation of [Falanga's] past conduct, notwithstanding representations made to him by the State Bar that he would be given a 'clean slate.'"[153] Kirchner hired another attorney to represent him in the new matter and incurred $25,000 in additional legal fees.

Falanga then filed a legal malpractice claim against Kirschner alleging that Kirschner committed legal malpractice by "abandoning Falanga in the disciplinary proceedings before the State Bar by refusing to help draft a competent plea agreement."[154] Falanga alleged that the plea agreement contained a "legal loophole" that allowed the State Bar to initiate another investigation into Falanga's past, costing him $25,000 in additional legal fees. However, the Georgia Court of Appeals held that no legal malpractice claim existed because Falanga failed to show how "Kirschner's involvement in drafting the plea agreement would have resulted in any different outcome."[155]

To recover in a malpractice case, the plaintiff must show that the link between the breach of the standard of care and the plaintiff's damages is more than merely speculative.[156] In *Dedon v. Orr*,[157] the plaintiff sued the defendant attorney alleging that her failure to properly serve the defendant in the underlying personal injury

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152. *Falanga v. Kirschner & Venker, P.C.*, 648 S.E.2d 690 (Ga. Ct. App. 2007).
153. *Falanga v. Kirschner & Venker, P.C.*, 648 S.E.2d 690, 692 (Ga. Ct. App. 2007).
154. *Falanga v. Kirschner & Venker, P.C.*, 648 S.E.2d 690, 692 (Ga. Ct. App. 2007).
155. *Falanga v. Kirschner & Venker, P.C.*, 648 S.E.2d 690, 695 (Ga. Ct. App. 2007).
156. *Anderson v. Jones*, 745 S.E.2d 787, 792-93 (Ga. Ct. App. 2013).
157. *Dedon v. Orr*, 508 S.E.2d 445 (Ga. Ct. App. 1998).

action caused the case to be dismissed.[158] The defendant attorney argued that her alleged malpractice was not a proximate cause of the plaintiff's loss because the time limit to perfect service had expired more than a year before she was retained in the case.[159]

The trial court and the Court of Appeals agreed with the defendant attorney. The Court of Appeals held that, to prevail in the legal malpractice action, the plaintiff would have to show that service of process on the defendant in the underlying case "would have prevented dismissal of [the underlying] . . . case—might have or could have is not enough."[160] Because any decision by the court to allow service a year after the expiration of the deadline would "have been subject to a very broad discretion," the court approved summary judgment in favor of the defendant attorney.[161]

Similarly, in cases where the relief sought in the underlying action is not a mandatory result, but only has the possibility of being awarded, the evidentiary burden is high to establish proximate cause. For example, in *Edwards v. Moore*, the client alleged malpractice, contending that the attorney should have amended an answer to assert a counterclaim for alimony and to reform the settlement agreement.[162] The Georgia Court of Appeals, setting aside the issue of reformation of the settlement agreement, found no evidence that the client would have succeeded on the counterclaim for alimony.[163] The court noted that the client had no inherent right to alimony—that it is authorized, but not required.[164] In light of the evidence that the former husband could no longer sustain child support and alimony payments and because there was no evidence of the former husband's financial status, income, or assets that would support an award of alimony, the court held that the client could not show that but for the attorney's alleged error, the outcome would have been different.[165] In *Rollins v. Smith*, the Georgia Court of Appeals held that summary judgment in favor of the defendant attorneys

158. *Dedon v. Orr*, 508 S.E.2d 445 (Ga. Ct. App. 1998).
159. *Dedon v. Orr*, 508 S.E.2d 445, 446 (Ga. Ct. App. 1998).
160. *Dedon v. Orr*, 508 S.E.2d 445, 446 (Ga. Ct. App. 1998) (internal citations omitted).
161. *Dedon v. Orr*, 508 S.E.2d 445, 446 (Ga. Ct. App. 1998).
162. *Edwards v. Moore*, 830 S.E.2d 494, 497 (Ga. Ct. App. 2019).
163. *Edwards v. Moore*, 830 S.E.2d 494, 497 (Ga. Ct. App. 2019).
164. *Edwards v. Moore*, 830 S.E.2d 494, 497 (Ga. Ct. App. 2019).
165. *Edwards v. Moore*, 830 S.E.2d 494, 497 (Ga. Ct. App. 2019).

was proper because the former client could not establish that but for the attorneys' conduct, her former husband would have been required to pay her legal fees in the underlying divorce action.[166] The court found the client's expert affidavit attesting to the fact that the client should not have been required to pay her own legal fees insufficient to establish proximate cause on the grounds that it was within the sound discretion of the court to award attorney fees.[167]

In *Guerrero v. McDonald*,[168] the Court of Appeals reiterated that a plaintiff cannot prevail on a professional negligence claim if the plaintiff fails to explain conclusively how the errors would have resulted in a different outcome. In response to the defendant CPA's motion for summary judgment, the plaintiff submitted an affidavit claiming the CPA—who was admitted to practice before the United States Tax Court[169]—was allegedly negligent in introducing evidence at trial without properly explaining its relevance, failing to adequately prepare witnesses, and failing to present each of the plaintiff's positions to the court.[170] The Court of Appeals found that the plaintiff's affidavit could not serve as the basis for establishing proximate cause because much of it was "based on mere speculation and conjecture" and lacked any analysis establishing causation.[171] As a result, the court upheld summary judgment in favor of the attorney.[172]

In *Studio X, Inc. v. Weener, Mason & Nathan, LLP*,[173] Studio X, Inc. and Interfinancial Properties, Inc. (collectively "Studio X") brought a malpractice action against the law firm of Weener, Mason, & Nathan, LLP.[174] Studio X claimed the firm negligently handled a commercial lease contract that Studio X entered into

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166. *Rollins v. Smith*, 836 S.E.2d 585, 594 (Ga. Ct. App. 2019), *cert. denied*, No. S20C0604, 2020 Ga. LEXIS 561 (Ga. July 15, 2020).

167. *Rollins v. Smith*, 836 S.E.2d 585, 594 (Ga. Ct. App. 2019), *cert. denied*, No. S20C0604, 2020 Ga. LEXIS 561 (Ga. July 15, 2020).

168. *Guerrero v. McDonald*, 690 S.E.2d 486 (Ga. Ct. App. 2010).

169. Based on this fact, the trial court and the Court of Appeals applied the legal malpractice standard to the plaintiff's allegations of negligence. *Guerrero v. McDonald*, 690 S.E.2d 486, 488 (Ga. Ct. App. 2010).

170. *Guerrero v. McDonald*, 690 S.E.2d 486, 488 (Ga. Ct. App. 2010).

171. *Guerrero v. McDonald*, 690 S.E.2d 486, 488 (Ga. Ct. App. 2010).

172. *Guerrero v. McDonald*, 690 S.E.2d 486, 488 (Ga. Ct. App. 2010).

173. *Studio X, Inc. v. Weener, Mason & Nathan, LLP*, 624 S.E.2d 157 (Ga. Ct. App. 2005).

174. *Studio X, Inc. v. Weener, Mason & Nathan, LLP*, 624 S.E.2d 157 (Ga. Ct. App. 2005).

with a trust. The lease included a "right of first refusal clause" which allowed Studio X the right to buy the property if the trust received an acceptable purchase offer from another party. If the trust did receive an acceptable offer, Studio X had fourteen days to enter into the same type of contract with the trust and to put down binding earnest money. However, a caveat to the "right of first refusal" existed—the property could only be sold with a written consent of the majority of the trust's beneficiaries.

When the trust received an offer from a third party, the trust appropriately contacted Studio X, which then hired the defendant law firm to review the right of first refusal and to prepare a purchase agreement. However, the majority of the trust beneficiaries could not agree on the acceptability of the format of the third party offer and decided instead to take the property off the market. Studio X then filed the malpractice claim alleging that the attorneys "failed to properly draft and execute the documents necessary to exercise its right of first refusal."[175]

The court held that the attorneys did not commit legal malpractice because they were not the proximate cause of Studio X's damages. Pursuant to the lease agreement, Studio X only had the right of first refusal when the trust received an acceptable offer. Because the majority of the beneficiaries never agreed that the proposed offer was acceptable, Studio X could not invoke its right of first refusal. The court held:

> [a] right of first refusal is a preemptive right; it sets a requirement that *when the owner decides to sell*, the person holding the right of first refusal must be offered the opportunity to buy.[176]

In this case, the trust properly withdrew the property from the market when the majority of the trust could not agree whether to sell the property. As a result, the attorneys' conduct was not the proximate cause of Studio X's damages.[177]

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175. *Studio X, Inc. v. Weener, Mason & Nathan, LLP*, 624 S.E.2d 157, 158 (Ga. Ct. App. 2005).

176. *Studio X, Inc. v. Weener, Mason & Nathan, LLP*, 624 S.E.2d 157, 159 (Ga. Ct. App. 2005) (emphasis in original).

177. *Studio X, Inc. v. Weener, Mason & Nathan, LLP*, 624 S.E.2d 157, 158 (Ga. Ct. App. 2005); *see also Travelers Indem. Co. v. Stengel et al.*, No. 12-1204, 2013 WL 323238 (3d Cir. Jan. 29, 2013) (holding that three attorneys that represented plaintiff at different times

In *Katz v. Crowell*,[178] a defendant attorney's negligence led to the dismissal of his client's employment discrimination suit.[179] The attorney defaulted on the issue of liability (thus admitting the charge) but challenged whether his actions had proximately caused the plaintiff's damages. The trial court awarded damages of previously paid attorneys' fees, punitive damages, and the back pay the client had sought in the underlying discrimination suit. The attorney objected to the award of back pay based on the fact that the client had been convicted of a felony twenty-five years prior. Because she had not disclosed this fact to her employer, the attorney argued that this fact would have barred his client from recovering back pay in the underlying suit and, as a result, the damages in the legal malpractice claims should be reduced. The Court of Appeals rejected this argument, finding first that the evidence only showed that the client had been charged with a felony and then that the client had never been asked by her employer regarding whether she had a criminal past (nor had she misrepresented any criminal history or lack thereof). Finally, the court found that the attorney failed to produce any evidence that the client's criminal incident would have impacted whether she was hired by her employer or that it would have led to her termination if the employer had learned about it after the fact. As such, not only did the Court require the attorney to pay the ordered damages, but also penalized the attorney in the amount of $2,500 for filing a frivolous appeal under Court of Appeals Rule 15(b).[180]

While a plaintiff cannot prevail on a professional negligence claim if the plaintiff fails to explain conclusively how the errors would have resulted in a different outcome, that determination "does not require that the jury in the malpractice action determine what the actual [factfinder] in the underlying action would have done; rather, the . . . jury [in the malpractice action] is to determine what a reasonable [factfinder] would have done if the case had

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could not be held liable as joint tortfeasors where the attorneys did not join to cause a single, unapportionable injury, but instead caused distinct harms to the plaintiffs).

178. *Katz v. Crowell*, 691 S.E.2d 657 (Ga. Ct. App. 2010).

179. *Katz v. Crowell*, 691 S.E.2d 657 (Ga. Ct. App. 2010).

180. *Katz v. Crowell*, 691 S.E.2d 657, 659-60 (Ga. Ct. App. 2010).

been tried differently."[181] Accordingly, "the jury in the malpractice action is permitted to substitute its own judgment for that of the [factfinder] in the underlying action."[182]

1-4:3 Collectability of Underlying Judgment

To meet the proximate causation requirement, not only must the malpractice plaintiff show that he would have prevailed absent the alleged malpractice, but the plaintiff must also show that the plaintiff could have collected a judgment on the underlying claim. In *McDow v. Dixon*,[183] the court summarized this requirement as follows:

> A client suing his attorney for malpractice not only must prove that his claim was valid and would have resulted in a judgment in his favor, but also that said judgment would have been collectible in some amount, for therein lies the measure of his damages.[184]

Thus, according to *McDow*, in a legal malpractice action, the client must prevail in two distinct claims. First, the client suing his attorney for malpractice must prove that the claim lost was valid and would have resulted in a judgment in his favor. Second, the client must prove that the judgment would have been collectible in some amount, i.e., that the defendant was solvent. Solvency of the underlying defendant is based upon the original defendant's ability to pay a judgment, had one been rendered against him.[185] The solvency requirement is an exception to the general rule that wealth has no relevance at the trial of a civil suit for damages.

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181. *Phillips v. Harris*, 848 S.E.2d 703, 707 (Ga. Ct. App. 2020) (quoting *Leibel v. Johnson*, 728 S.E.2d 554, 556 (Ga. Ct. App. 2012)) (affirming denial of direct verdict and of judgment notwithstanding the verdict where there was evidence to support a finding that attorney's failure to present former client's exemption from treble damages argument adequately in underlying landlord-tenant action was the proximate cause of his damages as element of legal malpractice claim).

182. *Phillips v. Harris*, 848 S.E.2d 703, 707 (Ga. Ct. App. 2020) (quoting *Leibel v. Johnson*, 728 S.E.2d 554, 556 (Ga. Ct. App. 2012)).

183. *McDow v. Dixon*, 226 S.E.2d 145 (Ga. Ct. App. 1976).

184. *McDow v. Dixon*, 226 S.E.2d 145, 147 (Ga. Ct. App. 1976); *e.g. Edwards v. Moore*, 830 S.E.2d 494, 497 (Ga. Ct. App. 2019).

185. *Allen Decorating, Inc. v. Oxendine*, 483 S.E.2d 298, 301 (Ga. Ct. App. 1997).

1-4:4 Viability of Underlying Action

In examining whether the client would have prevailed on an underlying claim absent the attorney's malpractice, a major issue arises when a client settles or refuses to pursue a claim after terminating the employment of the allegedly negligent attorney. An affirmative act by a client that may break the causal chain involves the termination of an otherwise-viable claim, for example, through the acceptance of a valid settlement of the otherwise-viable underlying claim.[186]

In *Lalonde v. Taylor English Duma, LLP*, Lalonde provided certain technology that he had developed and the related patents to a Delaware limited liability company in exchange for a one-third ownership interest in the LLC.[187] Lalonde retained Taylor English Duma, LLP to draft an operating agreement and related documents setting out the arrangement.[188] The other members of the LLC then fired Lalonde, dissolved the LLC, transferred the assets to a new LLC, and began marketing Lalonde's technology before then selling the company and the technology to another company.[189] Lalonde sued the other members of the LLC in the Delaware Chancery Court and then subsequently sued his attorneys for alleged malpractice in the drafting of the operating agreement.[190] Significantly, Lalonde filed his suit in the Delaware court after certain letters of dissolution were issued but before the LLC actually dissolved. In addition, he also sought dissolution of the company. Lalonde ultimately settled the lawsuit.[191] The Georgia Court of Appeals affirmed the grant of summary judgment in

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186. *Duncan v. Klein*, 720 S.E.2d 341, 347 (Ga. Ct. App. 2011) (explaining that plaintiff's settlement of the underlying action precluded dispositive adjudication of a constructive discharge claim, and therefore plaintiff could not show that but-for the attorney's alleged negligence, the outcome of the constructive discharge claim would be different); *Duke Galish, L.L.C. v. Arnall Golden Gregory, L.L.P.*, 653 S.E.2d 791, 793 n.3 (Ga. Ct. App. 2007) ("In a case where a plaintiff's pending claims remain viable despite the attorney's alleged negligence, the plaintiff severs proximate causation by settling the case, an act which makes it impossible for his lawsuit to terminate in his favor.") (internal citations omitted); *Jim Tidwell Ford, Inc. v. Bashuk*, 782 S.E.2d 721 (Ga. Ct. App. 2016) (holding that client's settlement of slip-and-fall action before appeal of case had been briefed precluded finding of proximate causation required to support legal malpractice action).

187. *Lalonde v. Taylor English Duma, LLP*, 825 S.E.2d 853, 853-54 (Ga. Ct. App. 2019).

188. *Lalonde v. Taylor English Duma, LLP*, 825 S.E.2d 853, 854 (Ga. Ct. App. 2019).

189. *Lalonde v. Taylor English Duma, LLP*, 825 S.E.2d 853, 854-55 (Ga. Ct. App. 2019).

190. *Lalonde v. Taylor English Duma, LLP*, 825 S.E.2d 853, 856 (Ga. Ct. App. 2019).

191. *Lalonde v. Taylor English Duma, LLP*, 825 S.E.2d 853, 856-57 (Ga. Ct. App. 2019).

favor of Taylor English, noting that "[b]y settling a claim that is viable, despite the attorney's alleged negligence, the client severs proximate cause because it is impossible for the claim, through an underling lawsuit, to terminate in the client's favor."[192]

In *Jim Tidwell Ford, Inc. v. Bashuk*, the client settled a slip-and-fall action prior to briefing the appeal of the decision that the client alleged had been impacted by the attorney's error.[193] The Georgia Court of Appeals held that settlement of the case prior to the appeal precluded a finding of proximate causation required to support a legal malpractice action.[194] Indeed, by settling the case after filing a notice of appeal but before the case was resolved on appeal, the client was unable to prove that any negligence by the attorney caused the adverse verdict.[195]

However, there are other situations in which the attorney may still be liable, post-termination. One example comes from *Rollins v. Smith*, where the client alleged the attorneys committed malpractice in a divorce case by (1) failing to comply with the trial court's temporary order in the divorce action that required the client to receive a credit for fees paid to the ex-husband's attorneys from the couple's joint account; (2) failing to advise the client of the tax consequences associated with settlement; (3) failing to secure an equitable division of the marital assets; and (4) failing to have the ex-husband pay for the client's legal fees.[196] The attorney defendants, relying on *Jim Tidwell Ford, Inc. v. Bashuk*, argued that the former client could not establish proximate cause because she entered into a settlement in the divorce case.[197] The Georgia Court of Appeals rejected the attorney defendants' argument, finding the facts distinguishable from those in *Jim Tidwell Ford, Inc. v. Bashuk*. Significantly, the client in *Rollins v. Smith* alleged that the attorney defendants committed malpractice in connection with the

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192. *Lalonde v. Taylor English Duma, LLP*, 825 S.E.2d 853, 857, 859-60, 863 (Ga. Ct. App. 2019).

193. *Jim Tidwell Ford, Inc. v. Bashuk*, 782 S.E.2d 721 (Ga. Ct. App. 2016).

194. *Jim Tidwell Ford, Inc. v. Bashuk*, 782 S.E.2d 721 (Ga. Ct. App. 2016).

195. *Jim Tidwell Ford, Inc. v. Bashuk*, 782 S.E.2d 721, 724 (Ga. Ct. App. 2016).

196. *Rollins v. Smith*, 836 S.E.2d 585, 589 (Ga. Ct. App. 2019), *cert. denied*, No. S20C0604, 2020 Ga. LEXIS 561 (Ga. July 15, 2020).

197. *Rollins v. Smith*, 836 S.E.2d 585, 591 (Ga. Ct. App. 2019), *cert. denied*, No. S20C0604, 2020 Ga. LEXIS 561 (Ga. July 15, 2020).

settlement agreement.[198] The court noted that under the attorney defendants' application of *Jim Tidwell Ford, Inc. v. Bashuk*, an attorney could never commit actionable malpractice for giving a client bad advice in connection with a settlement agreement, including in instances where the malpractice claim is based on the attorney's settlement of the case.[199] Thus, the court found that the settlement of the underlying case did not necessarily sever proximate cause and reversed the grant of summary judgment in favor of the attorney defendants, at least with respect to some of the malpractice claims.[200]

Another example of a situation in which the attorney may still be liable, post-termination comes from *Polsinelli PC v. Genesis Biosciences, Inc.*, where a former client alleged that an attorney's malpractice in a corporate deal caused additional litigation between the client and the client's adversary, which was eventually settled.[201] In that situation, settlement of the subsequent litigation did not break the causal connection because the former client's claim was that the subsequent litigation would not have ensued but for the attorney's mishandling of the corporate matter.[202]

Another situation where liability could still attach to the attorney is if he or she was terminated after an alleged act of malpractice rendered the underlying claim non-viable, as discussed herein.

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198. *Rollins v. Smith*, 836 S.E.2d 585, 591 (Ga. Ct. App. 2019), *cert. denied*, No. S20C0604, 2020 Ga. LEXIS 561 (Ga. July 15, 2020).

199. *Rollins v. Smith*, 836 S.E.2d 585, 591 (Ga. Ct. App. 2019), *cert. denied*, No. S20C0604, 2020 Ga. LEXIS 561 (Ga. July 15, 2020).

200. *Rollins v. Smith*, 836 S.E.2d 585, 591 (Ga. Ct. App. 2019), *cert. denied*, No. S20C0604, 2020 Ga. LEXIS 561 (Ga. July 15, 2020). The Court of Appeals found that there was no proximate cause with respect to the client's allegations that the attorney defendants did not advise her of the tax consequences of the proposed settlement, that the attorney defendants failed to secure equitable division of assets, and that the attorney defendants failed to have the ex-husband pay the client's legal fees. As to the former two claims of malpractice, the court found evidence that the client knew the terms and the tax consequences of the settlement, thus severing proximate cause. As to the legal fees, the court concluded that the client could not show that but for the attorneys' conduct, the ex-husband would have been required to pay her fees because an award of fees is within the sound discretion of the court. *Id*. at 593, 594.

201. *Polsinelli PC v. Genesis Biosciences, Inc*., No. 1:14-CV-00873-ELR, 2016 WL 7365200 (N.D. Ga. Jan. 26, 2016).

202. *Polsinelli PC v. Genesis Biosciences, Inc.*, No. 1:14-CV-00873-ELR, 2016 WL 7365200, at *4 (N.D. Ga. Jan. 26, 2016).

For example, in *Rogers v. Norvell*,[203] an attorney filed an untimely action on behalf of a client but argued that the action was proper because the statute of limitations had been tolled. The plaintiff discharged the attorney, settled the suit, and then instituted an action against the attorney for failing to timely file the action. In affirming summary judgment in favor of the defendant attorney, the Court of Appeals held that it was the plaintiff's own conduct in settling the action that "caused" the plaintiff's injury. Thus, the plaintiff could not recover against the attorney. According to the court, and as relied upon in *Lalonde*, discussed above, a plaintiff cannot discharge an attorney, settle a viable pending action, and then seek to recover for alleged negligence in connection with the action against the attorney who had been handling the action. In the words of the Court of Appeals, "[w]here the underlying action remains pending, plaintiff can prove no injury because the action may terminate favorably for the client."[204] Here, the action was still pending when the client settled.

In *Nix v. Crews*,[205] the Court of Appeals also addressed the causation element in a legal malpractice action, but appeared to reach a different result. The plaintiff employed the defendant attorney to sue a bank for the recovery of $5,000 she had been overcharged. According to the record, the defendant attorney failed to carry out the necessary pre-trial preparation, including discovery. When the case was called for trial, the defendant attorney settled the plaintiff's claims for $1,000. The plaintiff contended that this action was contrary to the plaintiff's express instructions that she wanted a jury trial and in violation of the attorney-client agreement that no settlement should be entered into without the plaintiff's written consent. Subsequent to the settlement, the plaintiff discharged the defendant attorney and engaged new counsel the next day. The bank then moved to enforce the settlement. Neither the plaintiff nor her newly employed attorney appeared for the hearing. The trial court granted the bank's motion without elaboration.

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203. *Rogers v. Norvell*, 330 S.E.2d 392 (Ga. Ct. App. 1985).

204. *Rogers v. Norvell*, 330 S.E.2d 392, 396 (Ga. Ct. App. 1985); *see also Cagle v. Davis*, 513 S.E.2d 16, 19 (Ga. Ct. App. 1999); *Mauldin v. Weinstock*, 411 S.E.2d 370, 373 (Ga. Ct. App. 1991).

205. *Nix v. Crews*, 406 S.E.2d 566 (Ga. Ct. App. 1991).

Based on an analysis similar to the *Rogers* case, the defendant attorney contended that, even if he was negligent, his negligence was not the proximate cause of any injury to the plaintiff because the plaintiff failed to contest the motion to enforce the settlement. As in *Rogers*, the defendant attorney argued that, because the motion to enforce the settlement could have been denied if opposed and thus "terminated favorably" to the plaintiff, the defendant attorney was entitled to summary judgment.

Acknowledging the necessity of causation in a legal malpractice action, the Court of Appeals focused on the evidentiary burden at summary judgment in evaluating the defendant attorney's argument. The Court of Appeals thus held that the defendant attorney had the burden to produce evidence that could "affirmatively establish" that the plaintiff could have prevailed had she appeared and defended against the bank's motion to enforce the settlement.[206] Since the defendant attorney failed to submit evidence establishing that the plaintiff could have abrogated the settlement if she had appeared, the Court of Appeals found that the lack of causation furnished no basis for sustaining the defendant attorney's motion for summary judgment. Thus, the Court of Appeals reversed the summary judgment in favor of the defendant attorney.[207]

The analysis by the Court in *Nix* appeared inconsistent with *Rogers*. Thus, in *Mauldin v. Weinstock*,[208] the Court of Appeals attempted to reconcile those two cases. In *Mauldin*, the appellant's employment with an airline was terminated and his appeal for investigation was ruled untimely by the airline. Although the attorney appellee advised the appellant to initiate suit to compel the airline to arbitrate the discharge action, the appellant never authorized the attorney to initiate such a suit, nor did the appellant retain another attorney to compel the arbitration. The trial court held that the subsequent malpractice action was barred due to the appellant's failure to authorize the appellee to bring an action to compel the arbitration. The trial court held that, since the underlying action had remained viable, the appellant suffered

206. *Nix v. Crews*, 406 S.E.2d 566, 567 (Ga. Ct. App. 1991).
207. *Nix v. Crews*, 406 S.E.2d 566, 567 (Ga. Ct. App. 1991).
208. *Mauldin v. Weinstock*, 411 S.E.2d 370 (Ga. Ct. App. 1991).

no proximate damage because the action could have terminated favorably for the client if pursued. It went on to hold that the appellee did not authorize the appellant to commence the suit to compel the arbitration and thus, the attorney's negligence did not proximately cause the client's damages.

On appeal, the Court of Appeals attempted to reconcile *Nix* and *Rogers* by focusing on whether the attorney met his or her burden of proving that the former clients' actions had terminated a viable claim of the former client. He explained:

> The facts in *Nix* are distinguishable from the facts of the case at bar and the facts in *Rogers*. In *Nix*, the court in essence held that the attorney failed to meet his burden of proving that the former client's actions had terminated a viable claim that the statement was invalid. In *Rogers*, however, we found that the attorney met his burden of showing that his former clients' actions prevented the adjudication of a viable claim.[209]

Of course, in *Nix*, the attorney was discharged before the hearing. Thus, the distinction rested on the viability of the claim at the time of discharge. As to this issue, the court held that, unlike *Nix*, the plaintiff in *Mauldin* had a viable claim because the methods of termination did not comply with the labor agreement. Because the appellant, by his conduct, effectively precluded the attorney from litigating the issue of the timeliness of the appeal, according to the court, the appellant, in effect, prevented the attorney from judicially establishing that he had filed a timely appeal.[210] Importantly, in determining whether the client's termination of the attorney broke the causal chain, the court must look at the viability of the plaintiff's claims at the time he or she fired the attorney.[211]

Subsequent court decisions have confirmed this requirement. In *Huntington v. Fishman*,[212] attorney Fishman represented the plaintiff in an action relating to an automobile collision.

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209. *Mauldin v. Weinstock*, 411 S.E.2d 370, 373 (Ga. Ct. App. 1991).
210. *Mauldin v. Weinstock*, 411 S.E.2d 370, 374-75 (Ga. Ct. App. 1991).
211. *White v. Rolley*, 484 S.E.2d 83 (Ga. Ct. App. 1997).
212. *Huntington v. Fishman*, 441 S.E.2d 444 (Ga. Ct. App. 1994).

Subsequently, there was a failure to perfect service upon the defendant within the two-year statute of limitations for actions based upon injury to the person. The attorney then informed the client that there was an offer of $2,500 to settle the claim. The client refused the offer. Attorney Fishman advised the client to accept the settlement and informed the client that, if the client refused to do so, attorney Fishman would no longer pursue the case. The client then agreed to settle the claim for $2,500. At the settlement closing, the client discovered for the first time that the $2,500 was dependent upon his wife foregoing any loss of consortium claim. The client refused to accept the settlement terms and terminated the representation of attorney Fishman. The client then retained attorney Warshaeur, who advised the client that he was bound by the previous settlement. Nonetheless, attorney Warshaeur negotiated a "final settlement" totaling $4,000, which reflected additional negotiations regarding the wife's loss of consortium claim.

Upon completion of the settlement, the client asserted a legal malpractice claim against attorney Fishman. Citing *Rogers*, Fishman noted that, at the time of his discharge, there was a pending action. He also argued that the fact that a second settlement had been reached reflected the lack of finality of the initial settlement. Thus, attorney Fishman argued, at the time of his discharge, the client had suffered no damage since there was a pending action, there was not a final settlement, and the actions of the subsequent attorney reflected the ability to negotiate an additional settlement.

The Court of Appeals declined to grant summary judgment in attorney Fishman's favor. The court noted the fact that the underlying action was filed outside the statute of limitations and concluded that the evidence before it did not establish that the initial $2,000 was invalid as a matter of law. According to the court, a question of fact remained as to whether the client's claims became non-viable at any time prior to attorney Fishman's dismissal and, if so, whether those claims became non-viable due to professional malpractice on attorney Fishman's part. The Court of Appeals distinguished this outcome from *Rogers* by noting that the attorney in *Rogers* "clearly demonstrated" that his former

client's claims remained viable at the time he was dismissed from the case.[213]

In a footnote, the court expounded somewhat on the concept of "viability," stating as follows:

> The 'viability' of a given claim in the present context refers only to the question of whether further litigation of that claim may lead to a favorable result as of the time prior counsel was dismissed from the case; it does not refer to the mere potential for continued litigation of a claim as a means of demonstrating conclusively the very futility of the effort.[214]

Thus, *Huntington* suggests that, to obtain summary judgment on similar facts, an attorney must sustain a level of proof indicating the viability or non-viability of the underlying action. Although *Huntington* has not had a major impact on subsequent malpractice cases, prudent litigators should be aware of its holding.

The Court of Appeals again examined the issue of the client's conduct in *Kitchen v. Hart*.[215] In that case, the plaintiffs alleged that the defendant attorney had negligently drafted collateralization and stock purchase agreements. The plaintiffs claimed that the documents were to be drafted so that each co-signer was responsible only for her or his share of the debt, approximately one-third. The plaintiffs alleged that because the documents were poorly drafted, the plaintiffs were jointly and severally liable for their debts with their co-signers, which caused them to pay out more money than they felt they should have owed.

The Court of Appeals rejected these arguments from the plaintiffs and upheld summary judgment in favor of the defendant. Namely, the court found that the plaintiffs had failed to show that the defendant proximately caused their damages because the plaintiffs voluntarily amended the documents to assume responsibility for the entire loan. The court found that because this act was voluntary and that the plaintiffs were trying to maximize their own profitability (rather than remedy their attorney's mistake,

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213. *Huntington v. Fishman*, 441 S.E.2d 444, 447 (Ga. Ct. App. 1994).
214. *Huntington v. Fishman*, 441 S.E.2d 444, 447 n.2 (Ga. Ct. App. 1994).
215. *Kitchen v. Hart*, 704 S.E.2d 452 (Ga. Ct. App. 2010).

as they later claimed), this "later conduct precludes [plaintiffs] from holding [attorney] responsible for the difference between one-third and full liability for the SunTrust loan."[216]

1-4:5 Negligence in Appeals

Where a plaintiff alleges that an attorney committed malpractice by failing to file or perfect an appeal, proximate cause is established by showing that the appellate court would have reversed and that, upon remand to the lower court, the client would have obtained a more favorable result.[217]

In *Fine & Block v. Evans*,[218] the defendant attorneys failed to timely file a transcript with the appellate court, resulting in the dismissal of their clients' appeal of an adverse trial court decision. The attorneys admitted that their failure to obtain an extension of time for filing of the transcript was not in accordance with the applicable standard of care. However, the attorneys moved for summary judgment, contending that their breach did not proximately cause any injury to the plaintiffs because the judgment in the underlying action would not have been reversed even if the error had not occurred on appeal. The Court of Appeals agreed.[219] A determination of whether an appeal would have been successful is a question of law, exclusively within the province of judges.[220] The Court of Appeals then concluded that the appeal would not have been successful because the trial judge had a sufficient statutory basis for the decision issued. As such, summary judgment in the attorneys' favor was appropriate.[221]

In *Hipple v. Brick*,[222] the Court of Appeals also addressed the loss of appellate rights. In *Hipple*, after a $39,000 judgment was entered

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216. *Kitchen v. Hart*, 704 S.E.2d 452, 457 (Ga. Ct. App. 2010); *see also Amstead v. McFarland*, 650 S.E.2d 737 (Ga. Ct. App. 2007) (attorney's failure to warn client of potential conflicts of representing client and client's ex-husband in wrongful death action arising from son's death did not proximately cause client's payment of a second attorney to pursue legal malpractice claim against attorney; client's payment of second attorney to pursue malpractice claim was solely her decision).

217. *Kidd v. Ga. Ass'n of Educators, Inc.*, 587 S.E.2d 289 (Ga. Ct. App. 2003).

218. *Fine & Block v. Evans*, 411 S.E.2d 73 (Ga. Ct. App. 1991).

219. *Fine & Block v. Evans*, 411 S.E.2d 73, 74 (Ga. Ct. App. 1991).

220. *Johnson v. Leibel*, 703 S.E.2d 702 (Ga. Ct. App. 2010), *rev'd on other grounds*, 728 S.E.2d 554, 556-57 (Ga. 2012). In accordance with the Supreme Court of Georgia's ruling, the Court of Appeals of Georgia recently vacated in part and affirmed in part its 2010 ruling in this matter in *Johnson v. Leibel*, 738 S.E.2d 685, 685 (Ga. Ct. App. 2013).

221. *Fine & Block v. Evans*, 411 S.E.2d 73, 75 (Ga. Ct. App. 1991).

222. *Hipple v. Brick*, 415 S.E.2d 182 (Ga. Ct. App. 1992).

against him, a client sued his attorney for failure to protect his right of appeal of that judgment. In the underlying action, the attorney, on behalf of the client, moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. When the court denied the motion 13 months later, the attorney did not receive notice of the entry of the order. By the time the attorney learned of the order in a telephone call from opposing counsel, the 30-day filing period for a notice of appeal had expired. The attorney took no action to resurrect the case.

On appeal to the Court of Appeals, the attorney argued that the trial court erred in failing to conclude that the judgment against his client would have been affirmed on appeal. However, the Court of Appeals determined that numerous grounds might exist for appeal, and because the attorney had not demonstrated that these grounds were meritless, the Court of Appeals affirmed the denial of summary judgment for the attorney.[223] Additionally, the attorney argued that he breached no duty to his client in relying on the court and the mail to provide notification to him of the entry of the court's order, as it is standard practice for attorneys to do so. The court determined, however, that the attorney has a separate and independent duty that arises from the contract with the client. Even if the court had failed to send the notice, according to the Court of Appeals, it would not have relieved the attorney of his obligation to check the status of his cases. Thus, because there was a question as to whether the attorney breached his duty to his client, the Court of Appeals held that summary judgment was properly denied to the attorney.[224] Additionally, the plaintiff was not entitled to summary judgment because the plaintiff did not prove that he would have prevailed on the appeal and would have been completely absolved of the total judgment.

In *Benson v. Ward*, the client, a husband in a divorce action, sued his attorney arguing that the attorney had failed to perfect his appeal to the Supreme Court regarding the property division awarded in a modified final divorce decree.[225] The Court of Appeals recognized that the determination of whether an appeal

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223. *Hipple v. Brick*, 415 S.E.2d 182, 184 (Ga. Ct. App. 1992).
224. *Hipple v. Brick*, 415 S.E.2d 182, 184 (Ga. Ct. App. 1992).
225. *Benson v. Ward*, 807 S.E.2d 471 (Ga. Ct. App. 2017).

would have been successful is "a question of law, exclusively within the province of judges."[226] The Court agreed that the plaintiff could not meet his burden of showing that the divorce decree would have been reversed on appeal in light of other evidence—including that the client willfully deserted his wife and that the court was not required to award equal property to each party—that did not support his relief.

In *Dow Chemical Co. v. Ogletree, Deakins, Nash, Smoak & Stewart*,[227] the client advanced a novel argument to circumvent the causation requirement in the context of failed appeals. In *Dow*, the Eleventh Circuit found that the appeal of the underlying personal injury action was untimely because the district court's order extending the time to file post-trial motions was improper. Dow then sued its trial counsel for malpractice. Dow maintained that it should not be forced to prove that its appeal would have been successful because, regardless of the outcome of the appeal, it lost an opportunity to settle the action while the appeal was pending. Specifically, Dow argued that the pending appeal would create uncertainty in the mind of the opposing party, thereby leading to a settlement for less than the judgment.[228] Although the Court of Appeals seemed intrigued by this argument, acknowledging the difficulty for a plaintiff to prove that he or she would have prevailed on appeal, the court denied Dow's claim and asserted that it is the client's burden to establish proximate cause.[229]

1-4:6 Criminal Representations

Malpractice cases arising out of criminal representations bring a unique host of issues to the causation analysis. In *Gomez v. Peters*,[230] the Court of Appeals held that a defendant who acknowledged guilt at trial could not, as a matter of law, satisfy the proximate cause element of a legal malpractice claim against his

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226. *Benson v. Ward*, 807 S.E.2d 471, 473 (Ga. Ct. App. 2017) (citing *Fine & Block v. Evans*, 411 S.E.2d 73 (Ga. Ct. App. 1991)).

227. *Dow Chem. Co. v. Ogletree, Deakins, Nash, Smoak & Stewart*, 514 S.E.2d 836 (Ga. Ct. App. 1999).

228. *Dow Chem. Co. v. Ogletree, Deakins, Nash, Smoak & Stewart*, 514 S.E.2d 836, 839-40 (Ga. Ct. App. 1999).

229. *Dow Chem. Co. v. Ogletree, Deakins, Nash, Smoak & Stewart*, 514 S.E.2d 836, 839-40 (Ga. Ct. App. 1999).

230. *Gomez v. Peters*, 470 S.E.2d 692 (Ga. Ct. App. 1996).

attorney because he could not show that he would have prevailed in the underlying litigation.[231] This is the rule

> even in a situation like this one where the plaintiff pled guilty to a lesser included offense, as long as his 'damage' (i.e., the time he already served on the initial conviction) is no greater than what he would have had to sustain for the offense to which he pled anyway.[232]

Accordingly, a criminal defendant who pleads guilty is then precluded in a subsequent malpractice claim against his attorney from showing that he would have prevailed but for the attorney's breach.[233]

Significantly, however, the court ruled that despite the trial court's determination upon a motion for new trial that the defendant attorney was "highly effective" in his representation, this did not collaterally estop the subsequent legal malpractice action.[234] Since the trial court in the criminal proceedings granted a new trial on other grounds, the court found that the determination that the attorney was effective "was not essential to the prior judgment, since the motion for new trial was granted despite the determination."[235]

In *Gammage v. Graham*,[236] the estate of a client brought a malpractice action against his criminal defense attorney, alleging that the attorney's advice that the client plead guilty led to him being beaten to death in prison.[237] The court held that the proximate cause of the client's death was the intervening criminal act of the other inmate, which the lawyer could not have predicted or foreseen, rather than his lawyer's advice to plead guilty.[238] According to the court, this was the kind of clear and palpable case that is properly decided as a matter of law, as opposed to by a jury.[239]

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231. *Gomez v. Peters*, 470 S.E.2d 692 (Ga. Ct. App. 1996).
232. *Gomez v. Peters*, 470 S.E.2d 692, 695 (Ga. Ct. App. 1996).
233. *Gomez v. Peters*, 470 S.E.2d 692, 695 (Ga. Ct. App. 1996).
234. *Gomez v. Peters*, 470 S.E.2d 692, 695 (Ga. Ct. App. 1996).
235. *Gomez v. Peters*, 470 S.E.2d 692, 695 (Ga. Ct. App. 1996).
236. *Gammage v. Graham*, 471 S.E.2d 237 (Ga. Ct. App. 1996).
237. *Gammage v. Graham*, 471 S.E.2d 237 (Ga. Ct. App. 1996).
238. *Gammage v. Graham*, 471 S.E.2d 237, 239 (Ga. Ct. App. 1996).
239. *Gammage v. Graham*, 471 S.E.2d 237, 239 (Ga. Ct. App. 1996). For more on the evidentiary requirements for clear and palpable negligence, *see* Chapter 2: Additional Requirements for a Malpractice Claim.

1-5 DAMAGES

1-5:1 Damages Required for Cause of Action

Just as no cause of action for legal malpractice is available where the plaintiff cannot prove causation, no cause of action will lie where no damages resulted from the alleged breach of duty.[240]

1-5:2 Damages Cannot be Speculative

The burden of proving damages prohibits a plaintiff from recovering damages that are merely speculative. In *Kitchen v. Hart*,[241] the plaintiffs alleged that their attorney's failure to properly draft collateralization and stock purchase agreements constituted legal malpractice.[242] The plaintiffs additionally sought damages in the form of lost profits, alleging that the attorney's malpractice directly caused their business to suffer and fail. The trial court in *Kitchen* concluded that the plaintiffs had failed to establish an issue of fact regarding lost profits that would survive summary judgment. The Court of Appeals affirmed this finding, concluding that the plaintiffs had failed to meet the threshold requirement for specificity in introducing damages.[243] Indeed, the court pointed to the plaintiffs' failure to offer expert testimony regarding the financial state of the company at issue, or any evidence (fact or otherwise) regarding their competitor, to whom plaintiffs compared their own business. The court confirmed that while anticipated profits often are too speculative to be recoverable as damages and require specific evidence of loss, in other situations, where

> the business has been established, has made profits and there are definite, certain and reasonable data for their ascertainment, and such profits were in the contemplation of the parties at the time of the contract, [lost profits] may be recovered even

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240. For a discussion on the difference between the existence of nominal damages required to trigger the attendant statute of limitations and the requirement of damages for the purposes of proving a claim, *see* Chapter 2: Additional Requirements for a Malpractice Claim.

241. *Kitchen v. Hart*, 704 S.E.2d 452 (Ga. Ct. App. 2010).

242. *Kitchen v. Hart*, 704 S.E.2d 452 (Ga. Ct. App. 2010).

243. *Kitchen v. Hart*, 704 S.E.2d 452, 458 (Ga. Ct. App. 2010).

> though they can not be computed with exact mathematical certainty.[244]

Notably, whether damages are too speculative relates to the issue of proximate cause. In *Edwards v. Moore*, the Georgia Court of Appeals found that there was no evidence that the former client would have succeeded on a counterclaim for alimony in the underlying divorce action and that there was no evidence of what the measure of damage would be.[245] The court, concluding that the former client's claim for damages was entirely speculative, noted that "in the absence of any showing of harm, there is no evidence that any alleged negligence was the proximate cause of damage to the plaintiff."[246]

But, if the existence of damages is known, but the amount of damages is unknown (or, arguably, speculative), the cause of action will survive. Indeed, in *Freeman v. Pittman*,[247] the Court of Appeals awarded damages based on a client's claimed lack of advantageous settlement position, as discussed below.[248] Regarding the alleged "speculative" nature of the damages, the court stated that "the rule against the recovery of speculative damages relates primarily to speculation regarding proximate cause rather than extent."[249] In the words of the court, once a "plaintiff establishes that damages proximately flow from the defendant's alleged conduct, mere difficulty in fixing their exact amount should not be a legal obstacle to recovery."[250]

1-5:3 Expenses of Litigation

As discussed above, it can be difficult for a plaintiff to establish that an attorney proximately caused the claimed damages where the attorney achieved a successful result during the

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244. *Kitchen v. Hart*, 704 S.E.2d 452, 458 (Ga. Ct. App. 2010) (internal citations omitted).

245. *Edwards v. Moore*, 830 S.E.2d 494, 497 (Ga. Ct. App. 2019).

246. *Edwards v. Moore*, 830 S.E.2d 494, 497 (Ga. Ct. App. 2019) (quoting *Szurovy v. Olderman*, 530 S.E.2d 783, 786 (Ga. Ct. App. 2000); *e.g. Smiley v. Blasingame, Burch, Garrard & Ashley, P.C.*, 835 S.E.2d 803, 808 (Ga. Ct. App. 2019) (finding plaintiffs failed to establish proximate cause where plaintiffs alleged damages (additional compensation in a settlement of a multi-district litigation) were merely speculative).

247. *Freeman v. Pittman*, 469 S.E.2d 543 (Ga. Ct. App. 1996).

248. *Freeman v. Pittman*, 469 S.E.2d 543 (Ga. Ct. App. 1996).

249. *Freeman v. Pittman*, 469 S.E.2d 543, 545 (Ga. Ct. App. 1996).

250. *Freeman v. Pittman*, 469 S.E.2d 543, 545 (Ga. Ct. App. 1996) (internal citations omitted).

representation. However, the costs of defending a lawsuit may be sufficient damages to succeed in a claim. In *Rogers v. Hurt, Richardson, Garner, Todd & Cadenhead*,[251] the plaintiffs were sued for fraud after acting in accordance with the attorney's advice. The attorney claimed that the plaintiffs were not damaged in the underlying fraud action involving the transfer of assets from the corporation to its partners (the plaintiffs). Although the plaintiffs successfully defended the action, they then sued the attorney for the costs of defending against the lawsuit. The court stated as follows:

> If plaintiffs can show, as they allege, that they were sued as a result of following defendants' legal advice, then the cost of defending the fraud suit would certainly be an element of their damages, whether or not the suit proceeded to trial and judgment.[252]

1-5:4 Loss of Settlement Position

The loss of a favorable settlement position is a cognizable form of damages in a legal malpractice case. In *Freeman v. Pittman*,[253] an attorney failed to inform his client of a secondary lien on her property, despite the client's questions regarding it. As such, because she was unaware of the existence of a secondary lienholder on her property, the client executed a favorable settlement with the two primary lienholders on her property.[254] Then, after the settlement with the primary lienholders, the secondary lienholder held the primary lien and foreclosed on the property.[255] The client alleged that, had she been aware of the security interest while it was a secondary interest, she could have settled for a smaller amount with the secondary lienholder; once the secondary lienholder became the primary lienholder, the client was forced to pay considerably more than the underlying

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[251] *Rogers v. Hurt, Richardson, Garner, Todd & Cadenhead*, 417 S.E.2d 29 (Ga. Ct. App. 1992).

[252] *Rogers v. Hurt, Richardson, Garner, Todd & Cadenhead*, 417 S.E.2d 29, 33 (Ga. Ct. App. 1992).

[253] *Freeman v. Pittman*, 469 S.E.2d 543 (Ga. Ct. App. 1996).

[254] *Freeman v. Pittman*, 469 S.E.2d 543, 544 (Ga. Ct. App. 1996).

[255] *Freeman v. Pittman*, 469 S.E.2d 543, 544 (Ga. Ct. App. 1996).

principal owed.[256] The Court of Appeals reasoned that, because the client had obtained favorable settlements from the primary lienholder, it was likely that she would have been able to achieve a similarly favorable settlement from the secondary lienholder and ruled in her favor.[257]

1-5:5 Punitive Damages

1-5:5.1 Grounds for Punitive Damages in Malpractice Actions

As discussed in Chapter 2: Additional Requirements for a Malpractice Action, Georgia courts have adopted a contract/tort dichotomy in reviewing legal malpractice claims. Indeed, although many malpractice cases sound in contract in alleging that an attorney breached a contractual duty, some malpractice cases may sound in tort. Where a malpractice claim sounds in tort, it involves a different breach of an attorney's duty (i.e., not a contractual duty) and can entitle the plaintiff to recover punitive damages against an attorney.

While punitive damages are permissible, they are also limited by statute. O.C.G.A. § 51-12-5.1 establishes that punitive damages are only available where

> it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.[258]

Indeed, punitive damages may not be issued "as compensation to a plaintiff but solely to punish, penalize, or deter a defendant."[259] Absent evidence of a "specific intent to cause harm," punitive damages arising from a legal malpractice action are limited to $250,000.[260]

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256. *Freeman v. Pittman*, 469 S.E.2d 543, 544-45 (Ga. Ct. App. 1996).
257. *Freeman v. Pittman*, 469 S.E.2d 543, 545 (Ga. Ct. App. 1996).
258. O.C.G.A. § 51-12-5.1(b).
259. O.C.G.A. § 51-12-5.1(c).
260. O.C.G.A. §§ 51-12-5.1(f), (g).

Georgia case law also defines the basis for and manner of punitive damages for a malpractice case. In *Read v. Benedict*,[261] the plaintiff alleged that the defendant attorney improperly structured a real estate loan closing against her express wishes, thereby causing her husband's tax liens to attach to her interest in the property.[262] At trial, the court granted the defendant attorney's motion for a directed verdict on the issue of punitive damages and refused to grant a new trial on that issue. The Court of Appeals reversed. Initially, the court noted that punitive damages were not recoverable in any ex contractual claim. However, the court held that, in causes of action grounded in tort, an award of punitive damages could lie. The court stated as follows:

> mere negligence, although gross, will not support an award of punitive damages . . . [However], as to causes of action . . . averred to arise by reason of legal malpractice, punitive damages can be awarded by the jury based upon the existence of aggravating circumstances, in either the act or the intention. It is well established that that language means such damages cannot be imposed in any case unless there is willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences. The latter expression (conscious indifference to consequences) relates to an intentional disregard of the rights of another, knowingly or willfully disregarding such rights.[263]

Under these parameters, the Court of Appeals concluded that there was "some evidence" which, if believed by the jury, would establish a basis for punitive damages. Although the Court of Appeals did not go so far as to say that punitive damages were warranted, the court found that several facts would support

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261. *Read v. Benedict*, 406 S.E.2d 488 (Ga. Ct. App. 1991).

262. *Read v. Benedict*, 406 S.E.2d 488 (Ga. Ct. App. 1991).

263. *Read v. Benedict*, 406 S.E.2d 488, 490-91 (Ga. Ct. App. 1991) (internal citations omitted).

allegations of the attorney's conscious indifference, including the existence of certain conflicts of interest[264] and other violations of the attorney's fiduciary duty.[265]

In *Hightower v. Goldberg*,[266] the defendant attorney failed to respond to a discovery motion in the underlying representation, resulting in the underlying case being dismissed with prejudice. In reviewing the malpractice action, the district court found that a better example of conscious indifference would be hard to find. The defendant attorney claimed that he had sought the plaintiff's assistance in responding to the underlying discovery requests, but that the plaintiff never responded and then directed him to take no further action as she was in the process of retaining new counsel. The plaintiff, however, contended that the defendant had never reached out to her and never responded to her numerous attempts to contact him. The plaintiff then retained new counsel, who sent a letter of termination and request for a copy of the file. The defendant claimed to have sent a letter that informed the new counsel of the pending discovery obligations and asked that the new counsel submit a notice of substitution of counsel. The new counsel testified that they never received such a letter and that they never received the client's file. The new counsel further testified that despite repeated phone calls and opportunity, the defendant failed to ever tell the new counsel of any pending lawsuit in the plaintiff's case.

The defendant in the underlying case filed a motion to compel. Though the defendant was still the counsel of record, he did not respond, seek an extension, or file a notice of substitution. The district court found that based on the circumstances, it was

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264. According to *Peters v. Hyatt Legal Services*, "evidence of even a potential conflict of interest is sufficient to raise a jury issue on punitive damages in a legal malpractice case." *Peters v. Hyatt Legal Servs.*, 469 S.E.2d 481, 484 (Ga. Ct. App. 1996). However, as a practical matter, the Georgia Rules of Professional Conduct authorize the existence of certain conflicts upon client consent, as discussed in Chapter 7: Identifying and Resolving Conflicts of Interest. Undoubtedly, therefore, the court intended to say "even the potential of an actual conflict of interest is sufficient to raise a jury issue on punitive damages in a legal malpractice case."

265. *Read v. Benedict*, 406 S.E.2d 488, 490-91 (Ga. Ct. App. 1991); *see also Stewart v. McDonald*, 815 S.E.2d 665, 672 (Ga. Ct. App. 2018) (noting that a breach of fiduciary duties is sufficient to support an award of punitive damages and recognizing that whether punitive damages should be awarded is ordinarily a jury question.).

266. *Hightower v. Goldberg*, No. 4:17-CV-7 (CDL), 2018 WL 296955 (M.D. Ga. Jan. 4, 2018).

reasonable for the jury to conclude that the defendant abandoned his professional obligations, choosing to ignore the pending discovery motion while knowing that the plaintiff's claim would be dismissed as a result. Based on the facts presented, the district court refused to grant defendant's summary judgment on the plaintiff's claim for punitive damages.

In *Tunsil v. Jackson*,[267] a legal malpractice action was brought against a Florida attorney and a Georgia attorney based on their handling of an underlying wrongful death action.[268] The attorneys failed to file suit until after the two-year statute of limitations had expired. Although the attorneys subsequently took action to reinstate the case, they were unsuccessful in their efforts. Shortly after the case was dismissed, attorney Tunsil wrote to client Jackson, the father of the decedent. Mr. Tunsil did not mention the dismissal or his efforts to get the dismissal overturned, but instead painted a dismal picture of the merits of the case. Jackson made several attempts to reach Tunsil to get the file and turn it over to another attorney. However, Jackson claimed that he got the "runaround" and eventually lost his job and his health from his wrangling with Tunsil. He finally resorted to contacting the local bar association for assistance, where he was referred to another attorney, who after investigation informed Jackson that his case had been dismissed, although there had been subsequent attempts to reinstate it. Jackson then sued the attorneys and was awarded $8,750 in actual damages and $200,000 in punitive damages from *each* attorney.

The attorneys appealed from the judgment entered on the verdict, and the Court of Appeals affirmed, finding that the evidence amply supported the verdict. The court stated:

> Appellants contend that there was no evidence that M. Tunsil's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care that would raise the presumption of conscious indifference to the consequences, as required under O.C.G.A. § 51-12-5.1(b). This contention is meritless. The expression 'conscious

267. *Tunsil v. Jackson*, 546 S.E.2d 875 (Ga. Ct. App. 2001).
268. *Tunsil v. Jackson*, 546 S.E.2d 875 (Ga. Ct. App. 2001).

> indifference to consequences' relates to an intentional disregard of the rights of another, knowingly or willfully disregarding such rights. The evidence authorized the jury to conclude that M. Tunsil's actions showed such indifference.[269]

Because the attorneys had concealed the dismissal of the wrongful death action and Mr. Jackson testified to the physical, emotional, and economic harm he suffered, the attorneys were liable for punitive damages.[270] Indeed, where there is evidence that an attorney intentionally concealed her or his mistakes or failures in a representation, the courts will be more likely to approve of punitive damages.[271]

Indeed, in *Thomas v. White*,[272] the Court of Appeals found that an attorney's failure to communicate with a client, in appropriate circumstances, may constitute fraud that would support an award of punitive damages.[273] In an underlying action, the client retained the defendant attorneys to represent her in a personal injury action. In arbitration, the arbitrators recommended a defense verdict in favor of the company that owned the vehicle with which the client collided. Despite being informed by the arbitrators of the deadline, the attorney failed to file a demand for jury trial within 30 days of the arbitration, as required by the local rules. As a result, the case was dismissed. Following dismissal, the attorney misrepresented to the client the status of her case, refused to communicate with her, blamed her for the failure to file the demand for trial in a timely manner, and ultimately told her that her case was not lost and that he was working on it. When the client learned of the dismissal, she filed suit seeking damages from the law firm for its professional negligence and punitive damages for fraud. The Court of Appeals noted that negligence alone—even gross negligence—will not

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269. *Tunsil v. Jackson*, 546 S.E.2d 875, 878 (Ga. Ct. App. 2001) (internal citations omitted).

270. *Tunsil v. Jackson*, 546 S.E.2d 875, 878 (Ga. Ct. App. 2001).

271. *See, e.g., Holmes v. Drucker*, 411 S.E.2d 728 (Ga. Ct. App. 1991) (approving punitive damages for concealment, misrepresentation, and breach of fiduciary duty as a result of attorney's failure to timely file a lawsuit while attorney communicated to client that suit was being prepared).

272. *Thomas v. White*, 438 S.E.2d 366 (Ga. Ct. App. 1993).

273. *Thomas v. White*, 438 S.E.2d 366 (Ga. Ct. App. 1993).

support an award of punitive damages.[274] However, the court stated that, even without evidence of the misstatements of fact, the attorney's failure to communicate with the client about the status of her case could constitute fraud and would support an award of punitive damages.[275]

In *Houston v. Surrett*,[276] the Court of Appeals took the opportunity to limit the circumstances in which punitive damages may be assessed against an attorney.[277] The court recognized that the alleged act of malpractice—a failure to raise a venue defense—resulted from the attorney's oversight.[278] Because there was no evidence contradicting the attorney's plea of inadvertence, the court concluded that the attorney's conduct could be nothing more than gross negligence. As such, according to the court, there was no "willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences" that might allow punitive damages.[279]

1-5:5.2 Punitive Damages from the Underlying Action

As a separate note, punitive damages that are awarded against a client in an underlying litigation may not be imputed to the attorney in a subsequent malpractice action. In *Paul v. Smith, Gambrell & Russell*,[280] the plaintiffs argued that the punitive damages awarded in the underlying case could be recovered from their attorneys in a subsequent malpractice action.[281] However, in the underlying commercial litigation action, the court

> found that the plaintiffs' own conduct and not legal malpractice was the sole cause of the award of punitive damages in the underlying case and

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274. *Thomas v. White*, 438 S.E.2d 366, 367 (Ga. Ct. App. 1993).

275. *Thomas v. White*, 438 S.E.2d 366, 367-68 (Ga. Ct. App. 1993).

276. *Houston v. Surrett*, 474 S.E.2d 39 (Ga. Ct. App. 1996).

277. *Houston v. Surrett*, 474 S.E.2d 39, 41 (Ga. Ct. App. 1996).

278. *Houston v. Surrett*, 474 S.E.2d 39, 41 (Ga. Ct. App. 1996).

279. *Houston v. Surrett*, 474 S.E.2d 39, 41 (Ga. Ct. App. 1996) (internal citations omitted); *see also Duncan v. Klein*, 720 S.E.2d 341, 346-47 (Ga. Ct. App. 2011) (affirming denial of punitive damages at the summary judgment stage where plaintiff provided no evidence of conduct exceeding gross negligence).

280. *Paul v. Smith, Gambrell & Russell*, 599 S.E.2d 206 (Ga. Ct. App. 2004).

281. *Paul v. Smith, Gambrell & Russell*, 599 S.E.2d 206 (Ga. Ct. App. 2004).

> that such sum for punitive damages could not be recovered as a matter of public policy from their lawyers in this subsequent legal malpractice action.[282]

Because, as discussed above, the purpose of punitive damages is to penalize the actor (not the conduct),

> to allow the plaintiffs to shift their tort liability for punitive damages that the plaintiffs were specifically found by clear and convincing evidence to have caused intentionally would be contrary to the public policy of Georgia, even if former counsel were found liable for legal malpractice in the action which punitive damages were awarded.[283]

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[282] *Paul v. Smith, Gambrell & Russell*, 599 S.E.2d 206, 208 (Ga. Ct. App. 2004).

[283] *Paul v. Smith, Gambrell & Russell*, 599 S.E.2d 206, 211 (Ga. Ct. App. 2004) (citing O.C.G.A. § 51-12-5.1(c)).