

What Judges Need to Know About Legal Malpractice

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Legal Malpractice Claims Not Assignable

"...a right of action is assignable if it involves, directly or indirectly, a right of property. A right of action for personal torts, for legal malpractice, or for injuries arising from fraud to the assignor may not be assigned."

O.C.G.A. § 44-12-24



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Georgia Code of Judicial Conduct, Canon 3

E. Disqualification

(1) Judges shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding....



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IN THE SUPERIOR COURT OF CHATTOOGA COUNTY
STATE OF GEORGIA

██████████, INDIVIDUALLY and as
Administrator of the Estate of ██████████
Plaintiff,

vs.

██████████, ██████████ &
d/b/a ██████████
Defendants.

CIVIL ACTION NO.:
2007CA31,860

Filed in Clerk's Office
Chattooga County, Georgia
MAR 05 2007
John A. Hill, Jr. Clerk

ORDER OF RECUSAL

The judges of the Lookout Mountain Judicial Circuit hereby recuse themselves in the
above matter.

This 5 day of March, 2007.

[Signature]
JON BOLING WOOD, CHIEF JUDGE
[Signature]
RALPH VAN PELT, JR., JUDGE
[Signature]
KRISTINA COOK CONNELLY, JUDGE
[Signature]
WM. RALPH HILL, JR., JUDGE



Basic Legal Malpractice

“The present standard of care in legal malpractice cases is the same for all other professional malpractice cases.

[M]embers of all professions must exercise the degree of skill, prudence, and diligence which ordinary members of the particular profession commonly possess and exercise....”

Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C., 265 Ga. 374, 380, 453 S.E.2d 719, 724 (1995), citing Ga. Law of Damages, p. 689, § 36-19.



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Breach of Fiduciary Duty

“It is well settled that a claim for breach of fiduciary duty requires proof of three elements: (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach.”

Nash v. Studdard, 294 Ga. App. 845, 849–50 (2008) (citation and footnote omitted).



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Alternative Theories of Recovery

A legal malpractice plaintiff has the right to plead alternative theories of professional negligence and breach of fiduciary duty.

Traub v. Washington, 264 Ga. App. 541, 544 (2003); O.C.G.A. § 9-11-8(e)(2). But see, In re Friedman's Inc., 385 B.R. 381 (S.D. Ga. 2008), vacated in part.



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Intentional Infliction of Emotional Distress

“A defendant’s knowledge of a plaintiff’s particular susceptibility to injury from emotional distress is often critical in weighing the extreme and outrageous character of conduct, i.e., ‘the conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know.’”

Williams v. Voljavec, 202 Ga. App. 580, 581 (1992) (reversing summary judgment on intentional infliction of emotional distress claim brought by a patient against his physician).



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Statute of Limitation

Legal malpractice claims are generally subject to a 4-year statute of limitation.

Tucker v. Smith, 249 Ga. App. 305, 308 (2001).



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6-Year Statute of Limitation?

“Where a complete written contract exists and an action for breach of contract is pursued, ...the six-year statute of limitation of OCGA § 9–3–24 applies, regardless of whether the alleged breach stems from the express terms of the agreement or duties that are implied in the agreement as a matter of law. Where the agreement is incomplete, such that the writing does not form a contract or the promise allegedly broken stems from a purely oral agreement, the four-year statute of limitation of OCGA § 9–3–25 applies.”

Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc., 288 Ga. 236, 238 (2010) (cits. omitted).



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Tolling for Fraudulent Concealment

“Where...fraudulent concealment ... is in breach of a confidential relation involving a duty to make full disclosure, the statute of limitation does not begin to run until the discovery of the fraud.”

Green v. White, 229 Ga. App. 776, 779 (1997).



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The Case within the Case

“In effect, the [legal malpractice plaintiff] must prevail in two distinct claims tried in the same lawsuit...the lost claim becomes part of the subsequent malpractice action.”

McDow v. Dixon, 138 Ga. App. 338, 339 (1976).



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Warning Against Bifurcation

1. Bifurcation would result in “backing into the case” by trying damages first.
2. The parties will be different than they would have been.
3. Witness testimony may differ because parties and witnesses no longer have an actual interest in case.
4. The evidence may be not as strong, without explanation.
5. Logistical hurdles have never been solved.



Job of a Jury in Legal Malpractice Case

“...the second jury in the malpractice case is not deciding what the first jury would have done in the underlying case had the attorney not been negligent, but only what a reasonable jury would have done had the underlying case been tried without the attorney negligence alleged by the plaintiff.”

Leibel v. Johnson, 291 Ga. 180, 182 (2012).



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Expert Affidavit Required

- (a) In any action for damages alleging professional malpractice against:
- (1) A professional licensed by the State of Georgia [including attorneys at law]....

the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

O.C.G.A. § 9-11-9.1.



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State Bar Rules are Evidence

“Our appellate courts have held that an alleged violation of the Code of Professional Responsibility..., standing alone, cannot serve as a legal basis for a legal malpractice action.... This is so because while the Code of Professional Responsibility provides specific sanctions for the professional misconduct of the attorneys whom it regulates, it does not establish civil liability of attorneys for their professional misconduct, nor does it create remedies in consequence thereof.

While a violation of the Professional Code does not per se establish legal malpractice liability... ‘pertinent Bar Rules are relevant to the standard of care in a legal malpractice action.’”

Tucker v. Rogers, 334 Ga. App. 58, 61–62 (2015) (cits omitted).



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SOL Runs from Date of Wrongful Act

“Whether sounding in contract or tort, a legal malpractice action accrues and the applicable statute of limitation commences to run from the date that the alleged wrongful act breached the attorney-client relationship.”

Gingold v. Allen, 272 Ga. App. 653, 655 (2005).



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Duty to Mitigate Damages Applies

"If it is shown... that a client could have avoided damages resulting from an attorney's mistake but did not do so, recovery for legal malpractice (as with any other tort) is limited to those losses the client would have suffered had damages been properly mitigated."

Crowley v. Trust Co. Bank of Middle Georgia, N.A., 219 Ga. App. 531, 532 (1995).



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Settlement Severs Proximate Cause

“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.”

Jim Tidwell Ford, Inc. v. Bashuk, 335 Ga. App. 668, 670 (2016).



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Doctrine of Judgmental Immunity

“[T]here can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment. This is a sound rule. Otherwise every losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight.”

Hudson v. Windholz, 202 Ga. App. 882, 886 (1992).



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Doctrine of Well-Settled Law

“As a matter of principle, ‘a breach of duty arises only when the relevant ... legal principles or procedures are well settled and their application clearly demanded, and the failure to apply them apparent.’”

Chatham Orthopaedic Surgery Ctr., LLC v. White, 283 Ga. App. 10, 12 (2006).



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Legal Mal Compensatory Damages

“The measure of damages in such a case, if the injured client was the plaintiff, is the value of the underlying case.”

Lewis v. Uselton, 224 Ga. App. 428, 430 (1997).



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Collectibility

“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....”

McDow v. Dixon, 138 Ga. App. 338, 339 (1976).



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Punitive Damages in Legal Malpractice Cases

“Professional negligence alone is not enough to support an award of punitive damages; there must be misconduct that is intentional, malicious, or fraudulent.”

Roseberry v. Brooks, 218 Ga. App. 202, 209 (1995).



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Punitive Damages in Underlying Case

When punitive damages have been awarded against the client in the underlying case, they are not recoverable from the defendant attorney in a legal malpractice case.

See, Paul v. Smith, Gambrell & Russell, 267 Ga. App. 107, 113 (2004).



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Attorney's Fees in Legal Malpractice Cases

A jury issue on attorney's fees exists where there is evidence that an attorney's "persistent failure to adequately represent the [clients] went beyond mere negligence and rose to the level of bad faith in dealing with the clients."

Brito v. Gomez, 289 Ga. App. 625, 629 (2001).



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