

***RESIDENTIAL REAL ESTATE  
CLOSING PROCEDURE RESOURCE GUIDE***

by

**Ethics Committee**

**&**

**Residential Committee**

**Real Property Law Section**

**State Bar of Georgia**

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**RESIDENTIAL REAL ESTATE**  
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**INTRODUCTION AND ACKNOWLEDGEMENTS**

The Ethics Committee and Residential Committee wish to express gratitude and great respect in recognizing Robert B. Brannen, Jr., Gayle Y. Camp, Vanessa E. Goggans, Dawn M. Lewallen, Peter Lawrence Lublin and Jeffrey H. Schneider. Each of these attorneys worked tirelessly in the drafting of the original Residential Real Estate Closing Procedure Handbook (hereinafter, the “Original Handbook”). The Original Handbook was first completed and adopted by the Executive Committee of the Real Property Law Section of the State Bar of Georgia in 2012.

The Original Handbook was updated as the Residential Real Estate Closing Procedure Resource Guide (hereinafter, the “Resource Guide”) in 2019 by members of both the Ethics Committee and Residential Committee<sup>1</sup> to include references to additional resources and updated Federal and State laws. The Resource Guide (including any amendments, supplements, modifications and restatements, from time to time) is designed and intended only to serve as a reference guide for the Georgia residential closing attorney as to those currently available resources which may be useful in the residential real estate closing practice.<sup>2</sup> It contains some references and information as to the practitioner’s ethical and professional responsibilities, but is not an exhaustive list, compilation or summary of Georgia law regarding residential real estate closings. No single resource can address all situations which might arise in residential real estate closings. The Resource Guide is also not intended to replace the Georgia Title Standards or an opinion or requirement from a title underwriter. Furthermore, the Resource Guide is not intended to be the basis of civil liability, to create a presumption that a legal duty has been breached or to give rise to a cause of action.

The tasks involved in handling residential closings in Georgia must be performed or supervised by a licensed Georgia attorney and completed in accordance with applicable law.

Throughout this Resource Guide, references are made to the following sources of guidance to attorneys and others seeking direction in handling residential real estate closings in Georgia:

- Georgia Rules of Professional Conduct (“Rules,” or, individually (“Rule”))
- Formal Advisory Opinions of the Formal Advisory Opinion Board, State Bar of Georgia (“Formal Advisory Opinions”)

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<sup>1</sup> Special thanks are extended to these attorneys for their contributions to the updating of this Resource Guide: Deborah S. Bailey, Wallace Bonner, Michael E. Fowler, Vanessa E. Goggans, Stuart S. Gordan, Cate Hoskins, Andrew Johnson, Beth Jones, Phillip D. Wilkins and Tiece Gignilliat Ziblut.

<sup>2</sup> Including, without limitation, primary and subordinate financing, refinances, HELOC loans and assumptions.

- Advisory Opinions of the Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (“UPL Advisory Opinions”)
- Opinions or Orders of the Supreme Court of Georgia rendered upon review of Advisory Opinions
- Official Code of Georgia Annotated (“O.C.G.A.”)
- Georgia case law

The closing of a real estate transaction in Georgia constitutes the practice of law.<sup>3</sup> This was the conclusion of the Supreme Court of Georgia in Formal Advisory Opinion No. 86-5, issued by the Supreme Court on May 12, 1989,<sup>4</sup> when considering whether an attorney may delegate the “closing” of a real estate transaction to a nonlawyer. In its decision, the Supreme Court noted that O.C.G.A. §15-19-50 defines the “practice of Law” to include “conveyancing,” “the giving of legal advice,” and “any action taken for others in any matter connected with the law, and went on to define “closing” to include “the entire series of events through which title to the land is conveyed from one party to another party...” “In Formal Advisory Opinion 00-3, the Supreme Court restated its view that the real estate closing is a continuous, interconnected series of events. The Court made it clear that ...[t]he lawyer must be in control of the closing process from beginning to end.”<sup>5</sup> Finally, in Formal Advisory Opinion 13-1, the Supreme Court confirmed that lawyers may not ethically conduct so called “Witness Only” closings.<sup>6</sup> While the Supreme Court had not previously explicitly enumerated what “series of events” comprise a closing, the Opinion indicated that these events may include, but are not limited to:

“(i) rendering an opinion as to title and the resolution of any defects in marketable title;

(ii) preparation of deeds of conveyance, including warranty deeds, quitclaim deeds, deeds to secure debt, and mortgage deeds; (iii) overseeing and participating in the execution of instruments conveying title; (iv) supervising the recordation of documents conveying title; and(v) in those situations where the Lawyer receives funds, depositing

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<sup>3</sup> The Unlicensed Practice of Law Department, State Bar of Ga, handles complaints regarding the conduct by non-lawyers of closings in Georgia, and can be reached at **(404) 527-8769 or (800) 334-6865**. A standard UPL complaint form is attached hereto at the end of Appendix 3, and is also available at the website of the State Bar of Ga under Committees, Programs & Sections (choose the Programs tab), as is further information regarding the unlicensed practice of law. Per the website of the State Bar of Ga, <http://www.gabar.org>, the Unlicensed Practice of Law Department addresses the investigation and prosecution of UPL in Georgia, and the Standing Committee on the Unlicensed Practice of law “investigates and diligently inquires into the unauthorized practice of law by law agencies and other unauthorized persons, specifically including any person not an active member in good standing of the State Bar, and the participation of lawyers therein, and proper methods for the prevention thereof.”

<sup>4</sup> Prior to 1986, advisory opinions were drafted and issued by the State (Bar) Disciplinary Board, and were not reviewed or issued by the Supreme Court. In 1986, the State Disciplinary Board was divided into three parts, the Investigative Panel, the Review Panel, and the Formal Advisory Opinion Board. Since 1986, advisory opinions have been drafted and promulgated by the Formal Advisory Opinion Board. From 1986 through 2002, every Formal Advisory opinion issued by the Formal Advisory Opinion Board went to the Supreme Court for review and either modification, ejection, or approval. Since 2002, opinions issued by this Board are only reviewed by the Supreme Court on a petition for discretionary review or *sua sponte*.

<sup>5</sup> State Bar of Ga. Formal Advisory Op 2003-2; State Bar of Ga. Formal Advisory Op 00-3 (2000).

<sup>6</sup> In re Formal Advisory Opinion No. 13-1, 295 Ga. 749, 763 S.E.2d 875 (2013).

and disbursing those funds in accordance with Rule 1.15(II). Even if some of these steps are performed elsewhere, the Lawyer maintains full professional and direct responsibility for the entire transaction and for the services rendered to the client.”<sup>7</sup>

Additional basic guidance as to the practice of real property law in Georgia can be found in the following resources:

- Pindar’s Georgia Real Estate Law and Procedure with forms, by Daniel F. Hinkel (6th ed. 2004) (“Pindar’s”).
- Georgia Title Standards (2018). A copy is available at the website for the Real Property Law Section of the State Bar of Georgia, <http://garealpropertylaw.com> at the Resource Library tab.
- Kaplan’s Nadler Georgia Corporations, Limited Partnerships and Limited Liability Companies, by James S. Rankin and Elizabeth G. Rankin.
- Collier on Bankruptcy, by Mark A. Broud, et al. (16th ed. 2009).
- Scott and Ascher on Trusts, by Mark L. Ascher, Austin Wakeman Scott & William Franklin Fratcher (5th ed. 2008).

The most important federal laws and regulations creating the legislative and regulatory framework of residential real estate transactions are as follows:

- The Real Estate Settlement Procedures Act of 1974 (“RESPA”) (12 U.S.C. 2601 et seq.), and its implementing regulation, Regulation X, commonly referred to as “Reg X.”
- The Truth in Lending Act of 1968, (“TILA”) (15 U.S.C. 1601 et seq.), and its implementing regulation, Regulation Z, commonly referred to as “Reg Z.”
- The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub.L. 111-203, H.R. 4173, (“Dodd-Frank”), and its resulting 2013 Integrated Mortgage Disclosure Rule Under the Real Estate Settlement Procedures Act (Reg X) and the Truth in Lending Act (“Reg Z”) as amended, (TILA-RESPA Integrated Disclosure Rule) (12 CFR 1024, 12 CFR 1026, 78 FR 79730), commonly referred to as “TRID.”<sup>8</sup>
- The Gramm-Leach-Bliley Financial Services Modernization Act of 1999, 15 U.S.C. 6801, 6809, 6821 and 6827 (“GLB Act”); and its implementing privacy rule, 16 C.F.R. part 313.
- The USA Patriot Act of 2001, Pub. L. 107-56, H.R. 3162, 115 Stat. 272 (“Patriot Act”).

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<sup>7</sup> In re Formal Advisory Opinion No. 13-1, 295 Ga. 749, 763 S.E.2d 875 (2013).

<sup>8</sup> Effective Oct. 3, 2015 by direction in the Dodd-Frank Act and combining the Reg X and Reg Z disclosure requirements (GFE, HUD-1, TIL) into the Loan Estimate and Closing Disclosure forms.

- The Bank Secrecy Act of 1970, 31 USC 5311 et. Seq (BSA), and its implementing regulations found at 12 CFR 21.11 and 12 CFR 21.21.

Additionally, The Office of Foreign Assets Control (OFAC) pursuant to Executive Order 13224,<sup>9</sup> is responsible for administering a series of laws and regulations that impose economic sanctions against hostile targets to further U.S. foreign policy and national security objectives.<sup>10</sup> Executive Order 13224 prohibits transactions with terrorist organization(s) and all closing attorneys are required to comply with these measures by searching the appropriate database for all parties involved in every real estate transaction.

## **A. SUPERVISION OF DELEGATED TASKS**

The Georgia attorney must supervise the closing process and any non-lawyers assisting in the performance of legal tasks related thereto. The closing attorney is responsible for the “supervision and control” of non-lawyers<sup>11</sup> to whom tasks are delegated.<sup>12</sup> “Supervision of the work of a non-lawyer by the attorney must be direct and constant to avoid any charges of aiding the unauthorized practice of law.”<sup>13</sup> “With respect to a non-lawyer employed or retained by or associated with a lawyer, a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.”<sup>14</sup> “Other persons may provide attorneys with paralegal and clerical services, so long as “at all times the attorney receiving the information or services shall maintain full professional and direct responsibility to his clients for the information and services received.”<sup>15</sup>

A closing attorney shall:

- 1. Maintain a direct relationship with the client.**<sup>16</sup>
- 2. Supervise and direct the work delegated.**<sup>17</sup>

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<sup>9</sup> Sanctions Actions Pursuant to Executive Order 13224. 81 FR 9200. This Executive Order was first published on September 27, 2001 (66 FR 49079) and have been renewed every year since first ordered.

<sup>10</sup> The Department of the Treasury Office of Foreign Assets Control (OFAC). *OFAC Regulations For The Financial Community*, Government Printing Office, January 24, 2012, United States Department of the Treasury.

<sup>11</sup> Rule 14-2.1(b) of the State Bar of Ga Rules Governing the Investigation and Prosecution of the Unauthorized Practice of Law, states that a nonlawyer or nonattorney “is an individual who is not an active member of the State Bar of Georgia. This includes, but is not limited to, lawyers admitted in other jurisdictions, law students, law graduates, applicants to the State Bar of Georgia, inactive lawyers, disbarred lawyers, and suspended lawyers during the period of suspension.”

<sup>12</sup> State Bar of Ga Formal Advisory Op. 86-5.

<sup>13</sup> State Bar of Ga. Advisory Op. 21; Ga. Rules of Prof’l Conduct R. 5.3(b)(c) (2001).

<sup>14</sup> Ga. Rules of Prof’l Conduct R. 5.3(b) (2001).

<sup>15</sup> In re Formal Advisory Opinion No. 13-1, 295 Ga. 749, 763 S.E.2d 875 (2013), citing (O.C.G.A. § 15-19-54; see also UPL Advisory Opinion No. 2003-2 and Rules 5.3 and 5.5, Georgia Rules of Professional Conduct).

<sup>16</sup> In Re Formal Advisory Opinion No. 86-5, \_\_\_\_\_ GA \_\_\_\_\_ (1989); and State Bar Advisory Opinion 21.

<sup>17</sup> Id.

### 3. Assume complete ultimate professional responsibility for the work product.<sup>18</sup>

**Practice Tip:** Establish office policies and procedures ensuring that questions which require the review of a licensed attorney are brought to the closing attorney's attention.<sup>19</sup>

## B. PRE-CLOSING

### 1. Jurisdiction

A closing attorney should determine the jurisdiction in which the closing attorney will be practicing law in connection with the particular transaction, and whether it is appropriate for the closing attorney to perform legal tasks, or to aid others in performing legal tasks, under the circumstances.<sup>20</sup> Not only must a Georgia attorney be careful not to practice law in another jurisdiction in violation of the laws of that jurisdiction, but a Georgia attorney must be careful not to aid a non-Georgia attorney, i.e. not licensed in Georgia, or a non-lawyer in the practice of law in Georgia in violation of Georgia's laws.<sup>21</sup>

Rule 5.5(a) prohibits an attorney from practicing law in a jurisdiction in violation of the laws regulating the practice of law in that jurisdiction, and from assisting another in doing so. "The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work."<sup>22</sup>

### 2. Attorney-Client and Other Relationships

A closing attorney should:

- a. Make a determination of whom the closing attorney represents in the transaction,<sup>23</sup> including multiple representations,<sup>24</sup> or circumstances in which the attorney is acting as a neutral third party.<sup>25</sup>
- b. Make a determination of scope of representation(s).<sup>26</sup>

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<sup>18</sup> Id.

<sup>19</sup> See also the American Land Title Association's *Best Practices*. While not binding as law in the State of Georgia, the *Best Practices* suggest practices and procedures which may be helpful in a Georgia closing attorney's practice.

<sup>20</sup> Ga. Rules of Prof'l Conduct R. 5.3(b)(c) (2001).

<sup>21</sup> Id. at R. 5.5; O.C.G.A. §15-19-56.

<sup>22</sup> Ga. Rules of Prof'l Conduct R. 5.5, Comment 2 (2001).

<sup>23</sup> Legacy Homes, Inc. v. Cole, 421 S.E.2d 127, 205 Ga.App. 34 (1992).

<sup>24</sup> Ga. Rules of Prof'l Conduct R. 1.7, R. 1.8 (2001).

<sup>25</sup> Id. at R. 2.4.

<sup>26</sup> Id. at R. 1.2.

- c. Make a determination of other parties to whom fiduciary duties are owed, short of representation, including the interests of the public.<sup>27</sup> Consider third party beneficiaries.<sup>28</sup>
- d. Identify potential conflicts of interests and significant risks of conflicts of interest; identify which conflicts need to be disclosed, consented to, and/or waived; and obtain the informed consent of appropriate parties in accordance with the Georgia Rules of Professional Conduct.<sup>29</sup>
- e. Inform parties whom the closing attorney represents, inform unrepresented parties of their right to obtain independent counsel, and confirm all parties acknowledge and agree to the representation and non-representation, as applicable.<sup>30</sup>

### **3. Purchase and Sale Agreement**

It is recommended that a closing attorney:

- a. Review the purchase and sale agreement (if applicable).
- b. Determine which terms and conditions contained within the purchase and sale agreement should be reflected on the settlement statement.
- c. Assume that other material terms and conditions have been satisfied prior to closing unless otherwise notified.

#### **Practice Tips:**

Typically, the buyer's real estate agent will coordinate with the buyer(s) on completing the material terms and conditions described in the purchase and sale agreement. While the closing attorney may not be responsible for assisting the buyer(s) or their agent in this process, verifying with the buyer's agent in advance of closing that all conditions have been met can help avoid delays or last minute disputes on the day of Closing.

In some cases, the buyer's lender may require confirmation of certain items like the termite inspection or the completion of repairs as a condition to closing or funding approval.

### **4. Title**

It is recommended that the closing attorney:

- a. Title search: Order, obtain or perform a current search of title and tax records for the

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<sup>27</sup> See, e.g. 12 U.S.C. 2601, et seq. (Real Estate Settlement Procedures Act); 15 U.S.C. 1601, et seq. (Truth in Lending Act); 12 C.F.R. 226.1, et seq. (Regulation Z); O.C.G.A. §15-19-50; Georgia Residential Mortgage Fraud Act of 2005, O.C.G.A. §§16-8-100, et seq.; Georgia Fair Lending Act, O.C.G.A. §7-6A; Pindar's §16-159.

<sup>28</sup> Kirby v. Chester, 331 S.E.2d 915, 174 Ga.App. 881 (1985).

<sup>29</sup> Ga. Rules of Prof'l Conduct R. 1.7 & 1.8 (2001).

<sup>30</sup> Id. at R. 4.3.

property being conveyed or encumbered unless requested otherwise.<sup>31</sup> If a conveyance deed is prepared without a title search at the request of the parties, then the recorded instrument should include a recital to that effect, e.g., “No title search performed at the request of grantor and grantee.”

- b. Title examination: Review the title report/abstract, binder, or preliminary certificate of title<sup>32</sup> and supporting instruments, to determine if the title is marketable, in accordance with Georgia law<sup>33</sup> and the Georgia Title Standards<sup>34</sup>, including, but not limited to, review of legal description, liens, easements and claims of parties in possession.
- c. Title opinion/certification: Determine if a written attorney’s opinion/certification of title is required or desired by any party to the transaction, and prepare or obtain if applicable.<sup>35</sup> Remember that the closing attorney, unless relying on the opinion/certificate of another Georgia attorney, is by virtue of the role of “conveyancer” (see Comments below), arguably opining/certifying that title is marketable or insurable.<sup>36</sup>
- d. Title insurance: Determine if any party requires or desires title insurance, and if applicable, prepare or obtain a commitment to issue title insurance.<sup>37</sup>
- e. Determine and prepare (or review and approve) any documents required by the applicable title insurance company and/or the Georgia Insurance Commission in connection with the issuance of a title insurance policy, including, without limitation, lien affidavits, owner’s/seller’s/purchaser’s affidavits, contractor affidavits, survey affidavit, privacy disclosures, insured closing letter, notice of availability of title insurance, etc.
- f. Alert client to the existence of non-standard title matters, corrective title work required or advisable, title defects that the title insurance underwriter agreed to “insure over,” and other problems noted on title report, title certification or commitment.<sup>38</sup>
- g. “Clear” the title; i.e., make determinations based on Georgia law and the Georgia Title Standards as to the appropriate waiver of title objections, and take whatever action is necessary to convey insurable title or marketable title (whichever the purchase and sale agreement requires), or notify the appropriate party or parties that corrective title

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<sup>31</sup> A nonattorney may examine the real property records, prepare title abstracts and certify to the correctness of such abstracts, but only an attorney may issue a legal opinion as to the status of title. O.C.G.A. §15-19-53. Most title insurance underwriters also require an attorney to certify title before a commitment or policy of title insurance may be issued.

<sup>32</sup> Pindar’s Ga Real Estate Law and Procedure at §26-138 (2004).

<sup>33</sup> *Id.* at §26-1 to §26-159.2.

<sup>34</sup> Ga. Title Standards (2016). A copy is available at the website for members of the Real Property Law Section of the State Bar of Georgia, <http://garealpropertylaw.com>, at the Forms and Documents Library tab.

<sup>35</sup> Per Ga Title Standard 24.3, knowledge of non-record title defects must be reflected.

<sup>36</sup> Ga Title Standard 24-1; Check/negotiate the closing attorney’s title agency agreement as to whether the closing attorney is providing a certification to the title company when the closing attorney issues a policy.

<sup>37</sup> Pindar’s §21-107, see heading “Title Defects” §26-161 to -164.

<sup>38</sup> Ga. Title Standard 24-2.

work beyond that which is usually included in the closing process, is required as to the subject property.<sup>39</sup> Determine and prepare (or review and approve) any documents required by the Georgia Title Standards or Georgia law (and/or the title insurance underwriter in the case of confirming insurable title) to address title matters revealed by the title examination, such as quitclaims, affidavits, and cancellations. Obtain these documents/clearances before closing if possible.<sup>40</sup>

- h. Make inquiry as to whether repairs or improvements have been performed on the property recently and assess if owner's affidavit, contractor's affidavit, lien waiver(s), indemnifications and/or subordinations are necessary.<sup>41</sup>
- i. Obtain or perform a title update of the title search within a reasonable amount of time prior to closing, i.e., title check-down.<sup>42</sup>

**Practice Tip:**

Most title insurance underwriters require the title to be updated within 30 days or less of the closing date.

- j. Inform client (if purchaser or lender and property is undeveloped) that title opinion/insurance will not reflect zoning restrictions.<sup>43</sup>

**Comments:** Pindar's Georgia Real Estate Law and Procedure states in § 26-2 that "[t]he function of a title attorney is defined by statute in this state as (a) the rendering of opinions as to the validity or invalidity of titles, (b) the preparation of legal instruments of all kinds whereby a legal right is secured, and (c) conveyancing, a term which includes both (a) and (b), but also title investigations generally." Footnote 2 to this statement explains further, "The problems of waiving defects involve judgments drawn from long experience and estimations of the probabilities of litigation rather than judicial or legislative authority; and each title attorney must make up his own mind what risks should be accepted or rejected... The work of a conveyancer may be defined as the amassing of sufficient title evidence to produce a marketable title, and in this respect it impinges into the field of evidence. Every title reaches its moment of truth when a landowner must appear in court and prove he is indeed the owner. In so doing he must conform to the rules for the proof of documents, the best evidence rule, the parol evidence rule, and cope with many other refinements of which he may have never been aware..." While the attorney handling a residential real estate closing may refer to himself or be referred to as a closing attorney, the statutory term is "conveyancing," i.e. "conveyancer." Black's Law Dictionary defines conveyancing as "A term including both the science and art of transferring titles to real estate from one man to another. Conveyancing is that part of the lawyer's business which relates to the alienation and transmission of property and other

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<sup>39</sup> Pindar's at §26-9, 26-10, 26-10.2 to 26-10.6, 26-10.8, 26-10.9, and 26-11.

<sup>40</sup> Id. at §26-138 at #2.

<sup>41</sup> Id. at §26-150.

<sup>42</sup> Id. at §26-138 at #8.

<sup>43</sup> Ga. Title Standard 34.1(b).

rights from one person to another, and to the framing of legal documents intended to create, define, transfer, or extinguish rights. It therefore includes the investigation of the title to land, and the preparation of agreements, wills, articles of association, private statutes operating as conveyances, and many other instruments in addition to conveyances properly so called. Sweet; Livermore v. Bagley, 3 Mass. 505. (4<sup>th</sup> ed. 1951).” Pindar’s Georgia Real Estate Law and Procedure with forms and Black’s Law Dictionary agree that “conveyancer” includes the role of “title attorney.” Therefore, consider that while no written opinion or certification of title may be provided, the closing attorney, by the act of closing, is impliedly giving an opinion that title is marketable. Section 26-2 continues, “A corporation may examine titles, prepare abstracts, and issue title policies, and furnish information and clerical services to lawyers, but the lawyer must maintain full and direct professional responsibility to his client for such information and services... Notice to the examining attorney of a defect in the title will be imputed to the purchaser or lender who employs him. A title attorney, like his brothers at the bar, must bring to the exercise of his profession a reasonable degree of care and skill, and may be liable in damages for failure to do so.” Per Georgia Title Standard 24.1 Opinion as a Duty of Title Attorney, under the laws of Georgia, “one of the functions of an attorney and one of the definitions of the “practice of law” is the rendering of opinions as to the validity or invalidity of titles to real or personal property derived and concluded from the examination of necessary records made, or caused to be made by the attorney. This does not necessitate the title attorney personally examining the record books, but does necessitate the attorney’s responsibility for all record searches authorized by or purchases by said attorney in the fulfillment of said attorney’s title opinion contract with the client. No person under the laws of Georgia, other than an attorney at law, may express, render or issue any legal opinion as to the status of the title to real or personal property.

**Comment:** See also, O.C.G.A. §§15-19-50, -53 and -54.”

### **Practice Tips:**

1. The closing attorney should consider utilizing a copy of Pindar’s Georgia Real Estate Law and Procedure, especially Chapter 26, Title Examinations & Closings and the Georgia Title Standards.
2. If a purchaser or lender does not choose to obtain title insurance, a notice of availability of title insurance (to record the choice not to obtain insurance and, in the case of a purchaser, to record notification that a lender’s title insurance policy does not insure the interests of the purchaser), and/or a waiver as to title matters, may be appropriate.
3. The closing attorney may wish to require that their title examiners have current professional liability, or “errors and omissions” coverage, or that they be licensed Georgia attorneys.
4. It is recommended that the closing attorney be aware that real property records vary from county to county and that an examiner with experience in a particular county offers additional value.

5. If the closing attorney is reviewing a title report that is presented to the closing attorney in the form of a commitment for title insurance, he or she should inquire as to whether or not they are reviewing an entire report of the status of title instead of an abbreviated list of title matters with some title objections already waived, and determine whether they are comfortable relying on decisions made by a Georgia licensed attorney preparing such commitment. It is recommended that the closing attorney remember that insurable title is not the same as marketable title. A title commitment reflects how title will be insured and may not contain all matters relevant to marketability, or other matters that the closing attorney may wish to review for him- or herself. (An example is an instrument executed by a person who is a stranger to title. See Ga. Title Standard 2.3 which provides that closing attorney has a duty to disclose such an instrument to their client. Such an instrument will not necessarily be reflected as an exception to title insurance.)
6. The closing attorney should be cognizant of the differences between their liability as an attorney, and their liability as an agent of a title insurance company.<sup>44</sup>
7. If acting as a title agent, the closing attorney should be familiar with the terms of their agency agreement with each title insurance underwriter for whom they issue policies of title insurance, as well as the underwriting guidelines, bulletins and requirements of such companies.

## 5. Land survey

- a. (1) There are different types of surveys, which may or may not be applicable in every situation. It is suggested that the closing attorney inquire with the parties as to whether 1) one of them will be providing a completed land survey; 2) one of them will be ordering a new land survey; or 3) none of the parties will be ordering a new land survey.  
  
(2) In addition, some lenders or title insurance companies require land surveys for financing or insurability, respectively. It is important to determine if either requirement is applicable.
- b. If a completed land survey is provided, items to review include but are not limited to: 1) age of the survey; 2) whether the survey has been recorded or certified by a licensed surveyor; 3) if the legal description from the chain of title matches the property's metes and bounds description from the survey; 4) whether the survey identifies title objections, problems or items of interest.
- c. (1) If a land survey is being provided, once completed items to review include but are not limited to: 1) if the legal description from the chain of title matches the property's metes and bounds description from the survey; and 2) whether the survey identifies title objections, problems or items of interest.

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<sup>44</sup> Pindar's §26-2 and §26-166.

(2) Determine if the land survey may or needs to be recorded with the plat records of the county clerk of court, or if the land survey may be recorded as an exhibit to a deed with the deed records of the county clerk of court.

- d. Alert the client of potential title objections, exceptions from coverage and necessary title curative work.<sup>45</sup>
- e. Review or add (as appropriate) any survey exceptions to any attorney title certification/opinion of title provided and/or commitment for title insurance.
- f. If owner's or lender's title insurance is being obtained as part of the transaction, determine if survey coverage is desired and whether title insurance underwriter requirements have been met or if any endorsements or exceptions are necessary given the nature of the property.<sup>46</sup>
- g. Be aware of local rules and regulations regarding subdivision of property, including but not limited to approval of any subdivision plats of survey or tax consequences.

### **Practice Tips:**

1. The closing attorney should be aware that an argument may be made that the closing attorney is guaranteeing the services of any third party provider of settlement services. It is suggested that the closing attorney, when asked, provide at least 3 referrals of surveyors, and instruct the party ordering the survey to determine where they want to place an order.
2. Most purchasers want a survey of the property completed during the "due diligence period" as defined by the purchase and sale agreement, which may be prior to lender's loan approval. In order to avoid liability for the cost of the survey, the closing attorney should consider making arrangements with the surveyor that they will not be held liable or otherwise responsible for the costs of surveys ordered by the closing attorney. Or, the closing attorney should allow one of the parties to the transaction to place the order for a new land survey, and become responsible for payment of the completed survey.
3. If an examiner won't certify the legal description and/or the parties are not obtaining a new land survey, it is suggested that the closing attorney obtain a waiver from the purchaser and insured.
4. The closing attorney should not rely on a land survey unless it is the work of a surveyor who is licensed and registered in Georgia, and certifies that the survey complies with Georgia statutes and the standards of the Georgia Association of Registered Land Surveyors.

## **6. Power of Attorney**

If any party to the closing will be executing documents pursuant to a power of attorney, the closing attorney should confirm that any power of attorney document that is provided

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<sup>45</sup> Id. at §26-10.1.

<sup>46</sup> Id. at §26-165.

or prepared complies with any lender's requirements, title insurer's underwriting guidelines, all applicable Georgia law,<sup>47</sup> the Georgia Title Standards, and all applicable federal law (including, but not limited to, the Servicemember's Civil Relief Act ("SCRA")<sup>48</sup> if the person giving the power of attorney is a member of the armed forces), including, but not limited to, proper execution, witnessing and notarization of the document.

### **Practice Tips:**

1. It is a good idea to inquire early as to whether a power of attorney will be utilized so as to provide adequate time to accomplish the above considerations.
2. Powers of attorney create serious risks. Pindar's contains a good list of questions to ask to determine the reason for the use of a power of attorney and to determine its sufficiency.<sup>49</sup>
3. A power of attorney specific to the transaction is preferred by most title insurance underwriters and lenders. If relying on a "general" power of attorney, then it is recommended that the closing attorney consult with their title insurance underwriter for proper procedures.
4. Whether or not the power of attorney contains durable language, the closing attorney should alert the principal that the closing attorney will contact him/her at the time of closing to confirm that (i) the principal is in life (sui juris)/"alive and well," (ii) the power of attorney has not been revoked, revised or amended in any way, and (iii) assuming there are no legal competency considerations, the principal still desires for the transaction to take place.
5. If there is a possible issue with the legal competency of the principal, then the closing attorney should evaluate additional considerations, such as the appointment of a guardian or conservator for the principal. It is recommended that the closing attorney consult with their title insurance underwriter for proper procedures.
6. Be cautious when using a power of attorney if the closing attorney suspects self-dealing.
7. The power of attorney is signing a recordable document, then the power of attorney should be recorded promptly along with the transaction documents.

## **7. Payoff/Assumption**

The closing attorney, if preparing the settlement statement and/or issuing a policy of title insurance, should:

- a. Make inquiry to the property owner as to possible unrecorded liens affecting the property.

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<sup>47</sup> Id. at §19-47 and §26-145.

<sup>48</sup> 50 U.S.C. App. § 501-597b.

<sup>49</sup> Pindar's at 26-163 (7<sup>th</sup> ed.).

- b. Obtain written payoff information directly from the lienholder for all known liens affecting the property which are to be paid at closing.<sup>50</sup>
- c. If an existing loan is to be assumed, obtain the loan balance and escrow balance as of the date of closing directly from the lienholder.<sup>51</sup>
- d. Obtain current tax information for payment and/or proration.<sup>52</sup> Confirm taxes have been paid by the property owner, and not by an investor or other third party who has the right to repayment.

**Practice Tips:**

- 1. Examine your tax statement closely to confirm that there are no pending appeals of current or prior year taxes.
- 2. Some jurisdictions post tax bill information online, but it may not contain all amounts that could be billed (such as weed-cutting, board-up fees, delinquent fees, interest on past-due amounts and late fees/penalties). It is important to verify that all online statements are complete before relying on them, and that any late fees or interest that will be due through closing and disbursement are collected at closing.
- 3. If a lien being paid-off at closing is a “line of credit” or other “open line,” then the closing attorney should review the lender’s payoff letter to confirm no additional draws have been made since the date of the payoff letter, and that the lender will close the account once paid in full.

**8. Hazard Insurance**

It is recommended that the closing attorney:

- a. Discuss advisability of hazard insurance (and, if applicable, flood insurance) for improved property being conveyed or encumbered, and in absence of declaration page or certificate of insurance, the risk involved with no insurance. In the alternative, disclaim any duty to advise as to insurance matters.
- b. Check that certificate or declaration provides coverage as of the date of closing and that the insured party matches borrower/purchaser information.
- c. If a loan is being closed, provide the certificate or declaration to the lender so it can confirm that the policy meets all lender requirement(s), including, without limitation, as to mortgagee clause information and amount of insurance.

**Practice Tip:** If a purchaser has not obtained hazard insurance (and, if applicable, flood insurance) by the time of closing, there is no lender requirement

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<sup>50</sup> Pindar’s §26-138 at #6.

<sup>51</sup> Id. at §26-138 at #4, and §26-152.

<sup>52</sup> Id. at §26-138 at #7.

to suspend closing until obtained and the purchaser wishes to proceed, the closing attorney may wish to obtain a waiver of liability as to hazard insurance.

For property on which flood insurance may be desirable, it is important to note that any policy issued to a new owner without a mortgage loan may not be effective for 30 days following the date of issuance.<sup>53</sup> To help the buyer avoid a lapse in coverage the closing attorney may suggest the buyer request to assume the seller's existing flood insurance policy. The parties' insurance agents would coordinate that process by having buyer and seller sign certain documents in advance of closing.

## 9. Owner's Association Dues and Fees

The closing attorney, if preparing the settlement statement and/or issuing a policy of title insurance, and if the property is subject to mandatory owner's association dues (which can include transfer fees and capital contributions upon conveyances), should request and obtain a statement from the association(s) as to any assessments owed.<sup>54</sup>

### **Practice Tip:**

Some properties are subject to assessments (including transfer fees and capital contributions) by more than one association. It is important to obtain clearance statements from each association.

## 10. Closing Documents

While a closing attorney may rely upon certain closing documents prepared by non-Georgia lawyers (i.e. lenders or lenders' document preparation service providers, the attorney's obligation to review, revise, approve and adopt documents used in a real estate closing applies to the entire series of events that comprise a closing.<sup>55</sup>

- a. Conveyance Documents. The closing attorney should prepare or review any document conveying title, whether a deed (including, but not limited to, a deed to secure debt), and any other document whereby a legal right is secured.<sup>56</sup> Consider if

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<sup>53</sup> See, Flood Insurance Manual, issued by the Federal Emergency Management Agency (2018).

<sup>54</sup> Ga. Title Standards 19-5 and 19-6 Comments.

<sup>55</sup> In re Formal Advisory Opinion No. 13-1, 295 Ga. 749, 763 S.E.2d 875 (2013).

<sup>56</sup> In re UPL Advisory Opinion No. 2003-2, approved by the Supreme Court on November 10, 2003, the Standing Committee on the Unlicensed Practice of Law considered whether "the preparation and execution of a deed of conveyance (including, but not limited to, a warranty deed, limited warranty deed, quitclaim deed, security deed, and deed to secure debt) considered the unlicensed practice of law if someone other than a duly licensed Georgia attorney prepares or facilitates the execution of said deed(s) for the benefit of the seller, borrower and lender..." "Conveyancing," "[t]he preparation of legal instruments of all kinds whereby a legal right is secured," ... is considered the practice of law in Georgia. O.C.G.A. §15-19-50... In addition to the acts of the Georgia legislature, the Supreme Court of Georgia has made it clear that the preparation of deeds constitutes the practice of law, and is to be undertaken on behalf of another only by a duly qualified and licensed Georgia attorney." The Committee also considered certain limited statutory exceptions permitting title insurance companies to prepare papers to be executed in connection with the issuance of title insurance, the preparation of abstracts of title by nonlawyers, and the performance of legal tasks by nonlawyers where an attorney maintains full professional and direct responsibility for the services received. See e.g., O.C.G.A. 15-19-52, 15-19-53, 15-19-54. The Committee concluded "that, with the

the transaction includes the conveyance of personal property or articles which may or may not be regarded as fixtures and require the preparation of other documents such as a bill of sale or financing statement.<sup>57</sup> Mobile homes may be personal or real property.<sup>58</sup>

**Comments:** Preparing deeds requires considerable thought and planning.<sup>59</sup> The closing attorney should be familiar with the elements of a deed (caption, preamble, granting clause, description of property, recitals, habendum, warranty, testimonium, signature and attestation). The closing attorney should take appropriate steps if the party taking title is not the purchaser named in the purchase and sale agreement.<sup>60</sup> The closing attorney should consider if recitals should contain title exceptions<sup>61</sup> and confirm that the warranty of title or lack thereof coincides with any requirement of the purchase and sale agreement. The closing attorney may need to explain the difference between a warranty and/or limited warranty if the closing attorney is asked to draft a sales agreement.<sup>62</sup> The closing attorney may be asked to include easements or restrictions in a deed.<sup>63</sup> The closing attorney may need to be familiar with the requirements for corporate deeds,<sup>64</sup> deeds from governmental agencies,<sup>65</sup> deeds of minors or incompetents,<sup>66</sup> trust deeds,<sup>67</sup> or deeds from a conservator, executor or administrator.<sup>68</sup> The closing attorney may be asked to prepare a second priority security deed.<sup>69</sup>

- b. Sale Documents. The closing attorney should review the purchase and sale documents for (1) compliance with applicable law, (2) agreement with the purchase and sale agreement, (3) accuracy, (4) completeness and (5) suitability to the transaction.
- c. Ownership involving Artificial person other than a natural person. If the ownership of the real estate involves an Artificial person or an entity created or recognized by law, the closing attorney should obtain proof that the Artificial person was formed, is in good standing, approved to conduct business in Georgia and/or its state of

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limited exception of those activities expressly permitted by the Georgia legislature or courts, the preparation of deeds of conveyance on behalf of another within the state of Georgia by anyone other than a duly licensed attorney constitutes the unlicensed practice of law.” In re UPL Advisory Opinion 2003-2, 277 Ga. 472, 588 S.E.2d 741 (2003).

<sup>57</sup> Ga Commercial Code Article 9, O.C.G.A. §11-9-101 et seq.; Pindar’s §26-156.

<sup>58</sup> Pindar’s §1-2.1; O.C.G.A. §8-2-181 and §8-2-183.

<sup>59</sup> Pindar’s §26-141 Preparation of deeds and security deeds.

<sup>60</sup> Id. at §18-26 and §26-141.

<sup>61</sup> Id. at §26-141; see heading “Recitals.”

<sup>62</sup> Id. at §19-168 to -176.

<sup>63</sup> Id. at §16-141.1.

<sup>64</sup> Id. at §16-142.

<sup>65</sup> Id. at §26-143.1.

<sup>66</sup> Id. at §26-144.

<sup>67</sup> Id. at §26-57 to -63.

<sup>68</sup> Id. at §26-48 and §-57.

<sup>69</sup> Id. at §26-157.

organization, and that it has authority to own, sell or encumber the real estate. The attorney should review its official registration documents, its governing documents, understand its structure and also verify the underlying ownership interests or the Beneficial Owners to confirm ownership of the entity. The following are forms of documents that should be reviewed and retained in the attorney’s closing file:

<b>Common Type of Legal Entity</b>	<b>Documents to Review</b>
Corporation	Articles of Incorporation Bylaws Resolution authorizing the purchase, sale and/or loan transaction Proof of Beneficial Owners Proof of “good standing” For Non-Profit   Tax Exempt - Certificate of Non-Profit IRS Section 501(c) Status
Limited Liability Company (LLC)	Articles and Certificate of Organization Operating Agreement Resolution authorizing the sale, purchase or loan transaction Proof of Beneficial Owners Proof of “good standing”
General Partnership (GP) Limited Partnership (LP) or Limited Liability Limited Partnership (LLLP)	Statement of Partnership (GP, LP or LLLP) and/or Certificate of Limited Partnership (LP) Partnership Agreement (GP, LP, LLLP) Resolution authorizing the purchase, sale and/or loan transaction (GP, LP, LLLP) Proof of Beneficial Owners (GP, LP, LLLP)
Estate	Death Certificate Probate Court Appointment Will or Petition identifying heirs
Trust (Created by an Agreement)	Copy of the Trust Agreement naming Trustee(s) Trustee Certification, if applicable (preferably in recordable form) Proof of the Beneficial Owners
Trust (Created under a Will)	Copy of Testator’s Death Certificate Copy of Will naming the Trustee(s) Trustee Certification, if applicable Proof of the Beneficial Owners
Minors and Persons lacking legal capacity	Guardianship Appointment Probate Court Order Authorizing Purchase/Sale/Finance

- d. Loan Documents. If the closing involves a loan and the closing attorney represents the lender, the closing attorney should review the loan documents for (1) compliance

with applicable law<sup>70</sup>, (2) agreement with the lender's closing instructions, any loan commitment, and, if applicable, the purchase and sale agreement, (3) accuracy, (4) completeness and (5) suitability to the transaction.

e. Settlement Statement. If requested by a lender client, the closing attorney should provide the information necessary for the lender to complete an accurate Closing Disclosure which complies with TRID.<sup>71</sup> If required under the purchase and sale agreement, and if the closing attorney is acting as the disbursement agent, the closing attorney should prepare a settlement statement which:

- i. prorates taxes and assessments appropriately.<sup>72</sup>
- ii. balances receipts and disbursements.
- iii. includes statutory fees such as intangibles tax<sup>73</sup>, transfer tax<sup>74</sup> and recording fees.
- iv. accurately includes interest due on any judgment being paid.<sup>75</sup>
- v. collects any owner's association or other assessments due.

**Comments:** Settlement Statements in residential transactions are subject to a variety of federal laws. The closing attorney should refer to RESPA, TILA and TRID. TRID requires a Closing Disclosure ("CD") form to be used for certain federally related loans, and includes instructions for proper disclosure of costs using this form. The USA Patriot Act prohibits closing attorneys from engaging in transactions with those individuals on the list of Specially Designated Nationals ("SDN") published by the Office of Foreign Assets Control ("OFAC").

## 11. Closing Instructions

The closing attorney should:

- a. If representing a lender, review and comply with any lender requirements or conditions of closing, or notify lender if any lender requirements cannot be met.
- b. Review and address any requirements of the closing attorney set forth in the purchase and sale agreement, and notify parties if any such requirements cannot be met.

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<sup>70</sup> Including but not limited to the Georgia Fair Lending Act, O.C.G.A. §7-6A; Pindar's §16-159.2.

<sup>71</sup> 12 CFR 1026.19, 78 FR 79730 ; Pindar's §26-159.1. Under TRID, the lender is responsible for preparing and delivering the borrower's CD, but the closing attorney should provide correct fees, review the lender's entries and calculations and balance the final CD for closing. The closing attorney may also prepare and provide the parties with an ALTA form Settlement Statement or similar type closing statement to itemize fees of both buyer and seller and comply with disclosure requirements.

<sup>72</sup> Pindar's §26-151.

<sup>73</sup> Id. at §26-154.

<sup>74</sup> Id. at §26-155.

<sup>75</sup> Id. at §21-32.

- c. Review the purchase and sale agreement for the correct names of parties, description of the property and terms of sale.<sup>76</sup> Close per the terms of the purchase and sale agreement.<sup>77</sup>
- d. Review any conditions of closing contained in the purchase and sale agreement, and address appropriately.

It is recommended that the closing attorney also confirm that any letters and/or reports required, including without limitation, any inspection reports; have been delivered to the appropriate party, or are provided to the appropriate party at closing.

**Practice Tip:** If instructions are inconsistent with the transaction, obtain revised instructions. (For example, when closing a first and second mortgage, if the instructions for the first mortgage prohibit a second mortgage, seek revised instructions from the lender.)

## **12. Parties to Closing**

It is recommended that the closing attorney or staff supervised by the closing attorney communicate with all parties to the closing, including attorneys and brokers/agents, to arrange the closing date and to inform any party required to bring funds to closing of the amount required and the acceptable form of funds.<sup>78</sup>

### **C. CLOSING**

#### **1. Presence**

The closing attorney should meet the requirements of Georgia law regarding attendance at the closing of the transaction. As of the date of publication of this Resource Guide, an attorney must be physically present at the closing of a transaction and may not telephonically supervise a nonlawyer officiating at the closing.<sup>79</sup>

#### **2. Parties to Closing**

It is recommended that the closing attorney:

- a. Keep a record of all persons present at the closing.<sup>80</sup>
- b. At the time of the closing, confirm that any party participating through a power of attorney is still in life and that the power of attorney has not been revoked, revised or amended in any way.
- c. Confirm authority for execution on behalf of an entity such as a corporation, limited liability company, partnership or trust, as previously referenced in Section 10 (c).

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<sup>76</sup> Pindar's §26-138, see #8; and Chapter 18 Sales Contracts.

<sup>77</sup> Tower Financial Services, Inc. v. Jarrett, 404 S.E.2d 622, 199 Ga.App. 248 (1991).

<sup>78</sup> Pindar's §26-138.

<sup>79</sup> Formal Advisory Opinion No. 00-3.

<sup>80</sup> Pindar's §26-139, see #1.

- d. Require proof that no bankruptcies are pending which could affect title to the property.<sup>81</sup>
- e. Confirm that any seller is not currently divorcing a spouse, or if a divorce is pending, obtain the signature of both spouses even if only one holds title.<sup>82</sup>

**Practice Tip:** Standard affidavits may address (d) and (e).

### 3. Legal Advice

It is recommended that the closing attorney:

- a. Explain disclosure and consent documents related to the scope of and limitations to the closing attorney's representation to all appropriate parties.
- b. Offer to explain any conveyance documents to grantor and grantee, and confirm nature of tenancy requested by the parties (Example: joint tenancy with the right of survivorship vs. tenancy in common).
- c. Offer to explain loan documents to borrower(s) and make any disclosures required by law.<sup>83</sup>
- d. If the closing attorney is asked to execute an Attorney's Affidavit as to Waiver of Borrower's Rights, he or she should be aware that it may contain the closing attorney's representation that they explained the waiver to the borrower.

#### **Practice Tips:**

1. If the closing attorney does undertake to explain documents, he or she should be sure not to unduly gloss over significant provisions.
2. As most states utilize mortgages, the closing attorney may need to explain the difference between a mortgage and a security deed.<sup>84</sup>
3. Suggested provisions to draw attention to in explaining loan documents:
  - A. Penalties, including without limitation, for prepayment, late payment, etc.;
  - B. Loan assumption terms;
  - C. Interest rate terms, including adjustable rate provisions;
  - D. Term of loan provisions, including maturity date and any balloon

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<sup>81</sup> Ga. Title Standard 21.1.

<sup>82</sup> Id. at 27.2(b).

<sup>83</sup> Truth in Lending Act ("TILA") of 1968, 15 U.S.C. §1601 et seq.; Reg Z, 12 CFR 226; RESPA; TRID, Pindar's §26-159.1; as to UCC financing statements, Barnes v. Turner, 278 Ga. 788, 606 S.E.2d 849 (2004).

<sup>84</sup> Pindar's §20-3.

provisions;

E. Due on sale clause;

F. Default terms;

G. Foreclosure terms;

H. Payment terms - date of first payment, payment location, etc.;

I. Terms as to transfer of loan servicing rights;

J. Key terms of Notice of Right to Cancel, if applicable;

K. Key terms of Closing Disclosure, if applicable; and

L. Key terms of escrow disclosure form, if applicable.

#### **4. Documents**

It is recommended that the closing attorney:

- a. Require and inspect valid, government issued picture identification of anyone signing any closing document as a party or representative of a party to the closing, and anyone receiving funds from the closing;<sup>85</sup>
- b. Supervise the execution of closing documents in compliance with applicable law,<sup>86</sup> client requirements, title insurance underwriting guidelines, and purchase and sale agreement (if any), including, but not limited to, proper witnessing and notarization of documents, where applicable;<sup>87</sup>
- c. Arrange/provide instruction for any documents to be executed outside of the closing attorney's law office to be executed with the same formality as they would be if executed in the closing attorney's law office:
  - i. The chain of custody of the documents must be preserved in such a manner as to avoid fraud (Example: Documents may be sent to another attorney who will supervise execution, not sent directly to the party executing document.);
  - ii. The documents should be executed as required under Georgia law (Example: Recordable instruments should be executed in the presence of two witnesses, one of whom is a notary public.); and
  - iii. Obtain proof that valid, government issued picture identification of any party whose signature was witnessed or notarized was provided to the parties who witnessed and/or notarized the documents.

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<sup>85</sup> Id. at §26-139, see #1 and footnote thereto.

<sup>86</sup> Including, but not limited to, Georgia's statutes regarding recording (See Pindar's §19-114 to §19-132.1), RESPA, TILA, TRID and the USA Patriot Act of 2011 §352.

<sup>87</sup> Pindar's §26-139, see #4 & 5 and footnotes thereto.

- d. Confirm that the settlement statement and/or Closing Disclosure, if applicable, contains all necessary items (such as lender fees, commissions, attorney's fees, title fee, costs of recording, intangibles tax, any survey charges, state and county taxes, association fees).<sup>88</sup>
- e. Retain those documents which the closing attorney will undertake to record (such as deeds, cancellations and affidavits).<sup>89</sup>
- f. Deliver appropriate documents (such as a note to its payee, recordable instruments to the title agent if not the closing attorney, etc.).<sup>90</sup>

## 5. Funds

If acting as disbursement agent, the closing attorney should:

- a. Collect all funds in accordance with the settlement statement and in conformity with state law.<sup>91</sup>
- b. Deposit all funds collected into the appropriate trust/escrow account.<sup>92</sup>

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<sup>88</sup> Id. at §26-139, see #3 and footnote thereto.

<sup>89</sup> Id. at §26-139, see #7 and footnote thereto.

<sup>90</sup> Id. at §26-139, see #5 and footnote thereto.

<sup>91</sup> O.C.G.A. §44-14-13; see also Formal Advisory Opinion No. 28, issued in 1981, which governed disbursements in general, whereas O.C.G.A. §44-14-13 governs only secured loans. FAO 28 was withdrawn by the Bar after passage of O.C.G.A. § 44-14-13 because it conflicts with O.C.G.A. § 44-14-13, however its reasoning is still valuable to practitioners.

<sup>92</sup> Formal Advisory Opinion No. 04-1, 280 Ga. 227,626 S.E.2d 480 (2006), the court held that a "lawyer directing the closing of a real estate transaction holds money which belongs to another (either a client or a third-party) as an incident to that practice, and must keep that money in an IOLTA account. We further add that if the proceeds are not subject to the rules of IOLTA subsection (c)(2), then the funds must be deposited in an interest-bearing account for the client's benefit. Rule 1.15(II)(c)(1). Under no circumstances may the closing proceeds be comingled with funds belonging to the lawyer, the law office, or any entity other than explicitly provided in the Rule...The closing of a real estate transaction in this state constitutes the practice of law, and, if performed by someone other than a duly licensed Georgia attorney, results in the prohibited unauthorized practice of law. In Re UPL Advisory Opinion 2003-2, 277 Ga. 472, 588 SE2d 741 (2003). The attorney participating in the closing is a fiduciary with respect to the closing proceeds, which must be handled in accordance with the trust account and IOLTA provisions in Rule 1.15(II). Specifically, when a lawyer holds client funds in trust, the lawyer must make an initial determination whether the funds are eligible for the IOLTA program. Closing proceeds from a real estate transaction which are nominal in amount or are to be held for a short period of time (i.e., funds that cannot otherwise generate net earnings for the client) must be deposited into an Interest on Lawyer's Trust Account (IOLTA Account). Funds that are not nominal in amount or funds, no matter what amount, that are not to be held for a short period of time, are ineligible for placement in an IOLTA account and must be placed in an interest-bearing account, with the net interest generated paid to the client. Rule 1.15(II)(c). See also Brown v. Legal Foundation of Washington, 538 U.S. 216, 155 LE2d 376, 123 S.Ct. 1406 (2003). Under either circumstance, Rule 1.15(II) instructs that a lawyer involved in a closing has a strict fiduciary duty to deposit a client's real estate closing proceeds in a separate IOLTA or non-IOLTA interest bearing trust account." In re Formal Advisory Opinion No. 13-1, 295 Ga. 749, 763 S.E.2d 875 (2013), the Court noted that "as in any transaction in which a Lawyer receives client funds, a Lawyer must comply with Georgia Rule of Professional Conduct 1.15(II) when handling a real estate closing. If the Lawyer receives funds on behalf of a client or in any other fiduciary capacity he/she must deposit the funds into, and administer them from, a trust account in accordance with Rule 1.15(II). (Formal Advisory Opinion No. 04-1).

- c. Disburse all funds in accordance with the settlement statement and/or Closing Disclosure,<sup>93</sup> with the following exceptions:
  - i. Lender fees and escrow deposits in connection with current loan may be deducted by lender prior to funding,<sup>94</sup>
  - ii. Payoff due to current lender may be deducted by lender prior to funding;<sup>95</sup> and
  - iii. Earnest money deposited with a real estate broker may be deducted from a real estate broker commission disbursement.
- d. Verify that the source of borrower's funds meet any lender requirements, and alert lender if funds are from a source other than as provided in the lender instructions.

### **Practice Tips:**

If representing the lender in a transaction, the closing attorney may be required to check the name of the remitter or originator of the funds to verify that the funds are from the borrower or another source approved by the lender. A funding number or other authorization may also be required from the lender before disbursing lender funds.

## **6. Escrow**

The closing attorney should not hold funds in escrow without a written escrow agreement signed by all parties.<sup>96</sup>

## **D. POST CLOSING**

### **1. Documents**

The closing attorney should:

- a. Promptly record or verify the recording of any and all closing documents which are required to perfect the interest of the parties to the closing and to comply with title company requirements, if any, in the correct order, in the real property records of the county where the real property is located (Example: deeds, security instruments, name affidavits, corporate resolutions, and powers of attorney).<sup>97</sup>

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It should be noted that Georgia law also allows the lender to disburse funds. (O.C.G.A. § 44-14-13(a)(10)). A Lawyer violates the Georgia Rules of Professional Conduct when he/she delivers closing proceeds to a title company or to a third party settlement company for disbursement instead of depositing them into and disbursing them from an attorney escrow account.”

<sup>93</sup> Pindar's §26-139 at #6.

<sup>94</sup> O.C.G.A. §44-14-13 defines the loan funds subject to such statute as the “gross or net proceeds of the loan to be disbursed by or on behalf of the lender at the loan closing.”

<sup>95</sup> Id.

<sup>96</sup> Pindar's §27-1 to -21; §19-96.

<sup>97</sup> Id. at §26-140.

- b. Promptly take appropriate steps to obtain and record release documentation for liens being paid by the closing attorney and other clearance documents and forward for recording.<sup>98</sup>
- c. Promptly transmit documents to appropriate parties promptly (including, if applicable, recorded conveyance documents, clearance documents, title policy).<sup>99</sup>
- d. Maintain records for required period(s).<sup>100</sup>

**Practice Tips:**

- 1. If not e-recording, it is a good idea to send a transmittal letter to the clerk of superior court with any recordable documents setting forth the correct order of recording.
- 2. If the closing attorney is recording a document along with an instrument that is meant to be subordinate to it, it is a good idea to type a notation in the body of the subordinate instrument to the effect that it is subordinate to another instrument.
- 3. Personal property is perfected in the state of organization of the borrower.<sup>101</sup>
- 4. Check with the title insurance underwriter and the closing attorney's professional liability insurance (errors and omissions) carrier to determine the recommended period of time to retain records.

**2. Funds**

After closing, the closing attorney should:

- a. Promptly make disbursements not completed at closing.<sup>102</sup>
- b. Balance escrow account(s) timely and routinely.<sup>103</sup>
- c. Audit escrow account(s) timely and routinely. It is recommended that escrow accounts be routinely audited by a qualified third party.
- d. Follow up on any outstanding or unreconciled deposits and/or disbursements greater than 30 days old timely and routinely.
- e. Remit funds remaining unclaimed in escrow account for an extended period of time according to the Georgia Disposition of Unclaimed Property Act, O.C.G.A. § 44-12-190.

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<sup>98</sup> Id.

<sup>99</sup> Id. at §26-140 at #4 & 5 and footnote thereto.

<sup>100</sup> Ga. Rules of Prof'l Conduct R. 1.15(1)(a) (2001).

<sup>101</sup> O.C.G.A. §11-9-301.

<sup>102</sup> Pindar's §26-140.

<sup>103</sup> Fidelity Nat. Bank v. Jeffrey M. Kneller, P.C., 390 S.E.2d 55, 194 Ga.App. 55 (Ga. App., 1989).

### **Practice Tips:**

1. See the Trust Accounting Handbook provided by the Real Property Law Section at its website at <http://garealpropertylaw.com> for tips on handling attorney escrow account(s).
2. The closing attorney may wish to keep records longer than required.<sup>104</sup>

### **3. Title**

If also acting as title agent, the closing attorney should:

- a. Timely perform or review a final title update, including but not limited to the following:
  - i. Verify that documents are recorded with the correct priority;
  - ii. Verify that documents are indexed properly; and
  - iii. Verify that all liens paid in connection with the closing are satisfied of record.
- b. Timely issue or confirm issuance of a final title opinion and/or title insurance policy (if not issued at closing), and deliver or confirm delivery of same to appropriate parties.

### **4. Other**

If acting as disbursement agent, the closing attorney should:

- a. Advise any secured lender being paid off at closing their duty to release their security deed in accordance with O.C.G.A. 44-14-3.
- b. File appropriate 1099s with IRS.<sup>105</sup>

### **GLOSSARY OF TERMS**

Within this Resource Guide, the following terms have the meaning stated below, unless the context indicates otherwise. This is not intended to be an exhaustive list of terms used in this Resource Guide.

1. Artificial person – “Persons created and devised by human laws for the purposes of society and government, as distinguished from natural persons.”<sup>106</sup> In the context of a real property transaction, examples include, corporations, co-ops, limited liability companies, partnerships, trusts, municipalities or other governmental agencies.
2. Closing attorney - Refers to the attorney who is primarily responsible for overseeing the closing of the transaction for the purchase and sale or refinancing of real or

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<sup>104</sup> Old Republic Nat'l Title Ins. Co. v. Darryl J. Panella, LLC, et al., 319 Ga.App. 274, 734 S.E.2d 523 (2012).

<sup>105</sup> Tax Reform Act of 1986, 26 U.S.C. Section 60445; Pindar's §26-140.

<sup>106</sup> Black's Law Dictionary 113 (6th ed. 1990).

personal property. The closing attorney may or may not also render title services associated with a title attorney or other legal services on behalf of the purchaser, seller or lender.

3. Closing Documents - Defined in Section B(10), herein.
4. Closing Instructions - Defined in Section B(11), herein.
5. Documents - Defined in Section C(4), herein.
6. Escrow - Defined in Section C(6), herein.
7. Funds - Defined in Section C(5), herein.
8. Georgia Title Standards – Refers to the current version of the Revised Title Standards published by the Title Standards Revisions Committee of the Real Property Law Section of the State Bar of Georgia, as may be amended, supplemented or restated from time to time.
9. Hazard Insurance - Defined in Section B(8), herein.
10. Legal Advice - Defined in Section C(3), herein.
11. Natural person - a human being, not an artificial person. A natural person may be an adult, a minor, legally competent or legally incompetent.
12. Owner’s Association Dues - Defined in Section B(9), herein.
13. Parties to Closing - Defined in Section B(12), herein.
14. Parties to Closing - Defined in Section C(2), herein.
15. Payoff/Assumption - Defined in Section B(7), herein.
16. Pindar’s – Refers to the current version of the Pindar’s Georgia Real Estate Law and Procedure with forms as may be amended, supplemented or restated from time to time.
17. Post Closing - Defined in Section D, herein.
18. Power of Attorney - Defined in Section B(6), herein.
19. Presence - Defined in Section C(1), herein.
20. Purchase and sale agreement - Defined in Section B(3), herein.
21. Purchaser – Refers to “one who acquires real property in any other mode than by descent.”<sup>107</sup> Note: This Resource Guide does not distinguish if a purchaser is a bona fide purchaser for value, but the closing attorney or title attorney should be aware of the impact if a purchaser is not bona fide purchaser for value.

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<sup>107</sup> Id. at 1235.

22. Resource Guide – Refers to this publication, as may be amended, supplemented or restated from time to time.
23. Seller – Refers to “vendor; one who has contracted to sell property.”<sup>108</sup>
24. Settlement statement – Refers to any compilation of settlement or closing fees and charges as may be allocated among the parties to a transaction, including, but not limited to purchaser, seller, lender, closing attorney and title attorney. Said term also includes these terms: Closing Disclosure, closing statement and HUD-1.
25. Survey - Defined in Section B(5), herein.
26. Title - Defined in Section B(4), herein.
27. Title attorney – Refers to the attorney who is expressing, rendering or issuing any legal opinion as to the validity or invalidity of titles to real or personal property, making decisions as to the requirements and/or insurability of real or personal property and performing such other activities as may be contained in a written agreement with the party receiving the title services or paying for the services rendered by the title attorney. The title attorney may or may not also render settlement services of a closing attorney or other legal services on behalf of the purchaser, seller or lender.
28. Title Standards – See definition of Georgia Title Standards.

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<sup>108</sup> Id. at 1360.

## APPENDIX 1

### Georgia Rules of Professional Conduct

The following are portions of selected Rules, and the Comments thereto, which have particular relevance to the closing of residential real estate transactions. For the complete Georgia Rules of Professional Conduct, go to <http://www.gabar.org>.

Rule 1.1	Competence
Rule 1.2	Scope of Representation and Allocation of Authority Between Client and Lawyer
Rule 1.7	Conflict of Interest: General Rule
Rule 1.8	Conflict of Interest: Prohibited Transactions
Rule 1.15(I)	Safekeeping Property - General
Rule 1.15(II)	Safekeeping Property- Trust Account and Iolita
Rule 1.15(III)	Record Keeping; Trust Account Overdraft Notification; Examination of Records
Rule 2.4	Lawyer Serving As Third Party Neutral
Rule 4.3	Dealing With Unrepresented Person
Rule 5.4	Professional Independence of a Lawyer

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### Georgia Rules of Professional Conduct

#### RULE 1.1 COMPETENCE

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

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

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#### Comment

##### Legal Knowledge and Skill

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

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

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person subject to Rule 6.2: Accepting Appointments.

##### Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

##### Maintaining Competence

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### Georgia Rules of Professional Conduct

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

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#### **RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER**

- a. Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the scope and objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. ...
- b. ...
- c. A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- d. A lawyer shall not counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent, nor knowingly assist a client in such conduct, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

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

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#### **Comment**

##### Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's

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behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering from diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

#### Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

#### Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and the client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

#### Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

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[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability.... The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

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#### **RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE**

- a. A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).
- b. If client informed consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected client or former client gives informed consent, confirmed in writing, to the representation after:
  1. consultation with the lawyer, pursuant to Rule 1.0(c);
  2. having received in writing reasonable and adequate information about the material risks of and reasonable available alternatives to the representation, and
  3. having been given the opportunity to consult with independent counsel.
- c. Client informed consent is not permissible if the representation:
  1. is prohibited by law or these Rules;
  2. includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding; or
  3. involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.

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

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#### **Comment**

##### Loyalty to a Client

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. If an

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impermissible conflict of interest exists before representation is undertaken the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[2] Loyalty to a client is impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other competing responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (a) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

[3] If an impermissible conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment 4 to Rule 1.3 and Scope.

[4] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's informed consent. Paragraphs (b) and (c) express that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require informed consent of the respective clients.

#### Consultation and Informed Consent

[5] A client may give informed consent to representation notwithstanding a conflict. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's informed consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain informed consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to give informed consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to give informed consent. If informed consent is withdrawn, the lawyer should consult Rule 1.9 and Rule 1.16.

[5A] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(s) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

#### Lawyer's Interests

[6] The lawyer's personal or economic interests should not be permitted to have an adverse effect on representation of a client. See Rules 1.1 and 1.5. If the propriety of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client objective advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to

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an enterprise in which the lawyer has an undisclosed interest.

#### Conflicts in Litigation

[7] Paragraph (c)(2) prohibits representation of opposing parties in the same or a similar proceeding including simultaneous representation of parties whose interests may conflict, such as co-plaintiffs or co-defendants. An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal, the requirements of paragraph (b) are met, and consent is not prohibited by paragraph (c).

[8] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients give informed consent as required by paragraph (b). By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government entity is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

[9] A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases while they are pending in different trial courts, but it may be improper to do so should one or more of the cases reach the appellate court.

#### Interest of Person Paying for a Lawyer's Service

[10] A lawyer may be paid from a source other than the client, if the client is informed of that fact and gives informed consent and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients give informed consent and the arrangement ensures the lawyer's professional independence.

#### Non-litigation Conflicts

[11] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for material and adverse effect include the duration and extent of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise.

[12] In a negotiation common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

[13] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the

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relationship to the parties involved.

[14] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

#### Conflict Charged by an Opposing Party

[15] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call into question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

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### **RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS**

- a. A lawyer shall neither enter into a business transaction with a client if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client, nor shall the lawyer knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
  1. the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
  2. the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
  3. the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
- b. A lawyer shall not use information gained in the professional relationship with a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
- c. A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, grandparent, child, grandchild, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.
- d. Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

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- e. A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
  - 1. a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; or
  - 2. a lawyer representing a client unable to pay court costs and expenses of litigation may pay those costs and expenses on behalf of the client.
- f. A lawyer shall not accept compensation for representing a client from one other than the client unless:
  - 1. the client gives informed consent;
  - 2. there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
  - 3. information relating to representation of a client is protected as required by Rule 1.6.
- g. A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims for or against the clients, nor in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyers disclosure shall include the existence and nature of all claims or pleas involved and of the participation of each person in the settlement.
- h. A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.
- i. A lawyer related to another lawyer as parent, grandparent, child, grandchild, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer has actual knowledge is represented by the other lawyer unless his or her client gives informed consent regarding the relationship. The disqualification stated in this paragraph is personal and is not imputed to members of firms with whom the lawyers are associated.
- j. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
  - 1. acquire a lien granted by law to secure the lawyer's fees or expenses as long as the exercise of the lien is not prejudicial to the client with respect to the subject of the representation; and
  - 2. contract with a client for a reasonable contingent fee in a civil case, except as prohibited by Rule 1.5.

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The maximum penalty for a violation of Rule 1.8(b) is disbarment. The maximum penalty for a violation of Rule 1.8(a) and 1.8(c)-(j) is a public reprimand.

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#### Comment

##### Transactions Between Client and Lawyer

[1A] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. The client should be fully informed of the true nature of the lawyer's interest or lack of interest in all aspects of the transaction. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's informed consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

##### Use of Information to the Disadvantage of the Client

[1B] It is a general rule that an attorney will not be permitted to make use of knowledge, or information, acquired by the attorney through the professional relationship with the client, or in the conduct of the client's business, to the disadvantage of the client. Paragraph (b) follows this general rule and provides that the client may waive this prohibition. However, if the waiver is conditional, the duty is on the attorney to comply with the condition.

##### Gifts from Clients

[2] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the objective advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

##### Literary Rights

[3] An agreement by which a lawyer acquires literary or media rights concerning the subject of the representation creates a conflict between the interest of the client and the personal interest of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j) of this Rule.

##### Financial Assistance to Clients

[4] Paragraph (e) eliminates the former requirement that the client remain ultimately liable for financial assistance provided by the lawyer. It further limits permitted assistance to court costs and expenses directly related to litigation. Accordingly, permitted expenses would include expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses would not include living expenses or medical expenses other than those listed above.

##### Payment for a Lawyer's Services from One Other Than The Client

[5] Lawyers are frequently asked to represent a client under circumstances in which a third person will

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compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

#### Settlement of Aggregated Claims

[6] Paragraph (g) requires informed consent. This requirement is not met by a blanket consent prior to settlement that the majority decision will rule.

#### Agreements to Limit Liability

[7] A lawyer may not condition an agreement to withdraw or the return of a client's documents on the client's release of claims. However, this paragraph is not intended to apply to customary qualifications and limitations in opinions and memoranda.

[8] A lawyer should not seek prospectively, by contract or other means, to limit the lawyer's individual liability to a client for the lawyer's malpractice. A lawyer who handles the affairs of a client properly has no need to attempt to limit liability for the lawyer's professional activities and one who does not handle the affairs of clients properly should not be permitted to do so. A lawyer may, however, practice law as a partner, member, or shareholder of a limited liability partnership, professional association, limited liability company, or professional corporation.

#### Family Relationships Between Lawyers

[9] Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10.

#### Acquisition of Interest in Litigation

[10] Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in the common law prohibition of champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for lawyer's fees and for certain advances of costs of litigation set forth in paragraph (e).

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### **RULE 1.15(I) SAFEKEEPING PROPERTY - GENERAL**

- a. A lawyer shall hold funds or other property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own funds or other property. Funds shall be kept in a separate account maintained in an approved institution as defined by Rule 1.15(III)(c)(1). Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation.
- b. For the purposes of this Rule, a lawyer may not disregard a third person's interest in funds or other property in the lawyer's possession if:

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1. the interest is known to the lawyer, and
2. the interest is based upon one of the following:
  - i. A statutory lien;
  - ii. A final judgment addressing disposition of those funds or property; or
  - iii. A written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property.

The lawyer may disregard the third person's claimed interest if the lawyer reasonably concludes that there is a valid defense to such lien, judgment, or agreement.

- c. Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
- d. When in the course of representation a lawyer is in possession of funds or other property in which both the lawyer and a client or a third person claim interest, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or property as to which the interests are not in dispute.

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

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#### Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration or interpleader. The undisputed portion of the funds shall be promptly distributed.

[3] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. The obligations of a lawyer under this Rule are independent of those arising from activity other than

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rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[3A] In those cases where it is not possible to ascertain who is entitled to disputed funds or other property held by the lawyer, the lawyer may hold such disputed funds for a reasonable period of time while the interested parties attempt to resolve the dispute. If a resolution cannot be reached, it would be appropriate for a lawyer to interplead such disputed funds or property.

[4] A “clients’ security fund” provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

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#### **RULE 1.15(II) SAFEKEEPING PROPERTY- TRUST ACCOUNT AND IOLTA**

- a. Every lawyer who practices law in Georgia, whether said lawyer practices as a sole practitioner, or as a member of a firm, association, or professional corporation, and who receives money or property on behalf of a client or in any other fiduciary capacity, shall maintain or have available a trust account as required by these Rules. All funds held by a lawyer for a client and all funds held by a lawyer in any other fiduciary capacity shall be deposited in and administered from such account.
- b. No personal funds shall ever be deposited in a lawyer’s trust account, except that unearned attorney’s fees may be so held until the same are earned. Sufficient personal funds of the lawyer may be kept in the trust account to cover maintenance fees such as service charges on the account. Records on such trust accounts shall be so kept and maintained as to reflect at all times the exact balance held for each client or third person. No funds shall be withdrawn from such trust accounts for the personal use of the lawyer maintaining the account except earned attorney’s fees debited against the account of a specific client and recorded as such.
- c. All client’s funds shall be placed in either an interest-bearing account with the interest being paid to the client or an interest-bearing (IOLTA) account with the interest being paid to the Georgia Bar Foundation as hereinafter provided.
  1. With respect to funds which are not nominal in amount, or are not to be held for a short period of time, a lawyer shall, with notice to the clients, create and maintain an interest-bearing trust account in an approved institution as defined in Rule 1.15(III)(c)(1), with the interest to be paid to the client. No earnings from such an account shall be made available to a lawyer or law firm.
  2. With respect to funds which are nominal in amount or are to be held for a short period of time, a lawyer shall, with or without notice to the client, create and maintain an interest-bearing, government insured trust account (IOLTA) in compliance with the following provisions:
    - i. No earnings from such an IOLTA account shall be made available to a lawyer or law firm.

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- ii. The account shall include all clients' funds which are nominal in amount or which are to be held for a short period of time.
  - iii. An interest-bearing trust account may be established with any approved institution as defined in Rule 1.15(III)(c)(1). Funds in each interest-bearing trust account shall be subject to withdrawal upon request and without delay.
  - iv. The rate of interest payable on any interest-bearing trust account shall not be less than the rate paid by the depositor institution to regular, non-lawyer depositors. Higher rates offered by the institution to customers whose deposits exceed certain time or quantity minimum, such as those offered in the form of certificates of deposit, may be obtained by a lawyer or law firm on some or all of the deposit funds so long as there is no impairment of the right to withdraw or transfer principal immediately.
  - v. Lawyers or law firms shall direct the depository institution:
    - A. to remit to the Georgia Bar Foundation interest or dividends, net of any charges or fees on that account, on the average monthly balance in that account, or as otherwise computed in accordance with a financial institution's standard accounting practice, at least quarterly. Any bank fees or charges in excess of the interest earned on that account for any month shall be paid by the lawyer or law firm in whose names such account appears, if required by the bank;
    - B. to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, the average monthly balance against which the interest rate is applied, the service charges or fees applied, and the net interest remittance;
    - C. to transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation, the rate of interest applied, the average account balance of the period for which the report is made, and such other information provided to non-lawyer customers with similar accounts.
3. No charge of ethical impropriety or other breach of professional conduct shall attend the determination that such funds are nominal in amount or to be held for a short period of time, or to the decision to invest clients' funds in a pooled interest-bearing account.

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4. Whether the funds are designated short-term or nominal or not, a lawyer or law firm may elect to remit all interest earned, or interest earned net of charges, to the client or clients.

The maximum penalty for a violation of Rule 1.15(II)(a) and Rule 1.15(II)(b) is disbarment. The maximum penalty for a violation of Rule 1.15(II)(c) is a public reprimand.

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#### Comment

[1] The personal money permitted to be kept in the lawyer's trust account by this Rule shall not be used for any purpose other than to cover the bank fees and if used for any other purpose the lawyer shall have violated this Rule. If the lawyer wishes to reduce the amount of personal money in the trust account, the change must be properly noted in the lawyer's financial records and the monies transferred to the lawyer's business account.

[2] Nothing in this Rule shall prohibit a lawyer from removing from the trust account fees which have been earned on a regular basis which coincides with the lawyer's billing cycles rather than removing the fees earned on an hour-by-hour basis.

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#### **RULE 1.15(III) RECORD KEEPING; TRUST ACCOUNT OVERDRAFT NOTIFICATION; EXAMINATION OF RECORDS**

a. **Required Bank Accounts:** Every lawyer who practices law in Georgia and who receives money or other property on behalf of a client or in any other fiduciary capacity shall maintain, in an approved financial institution as defined by this Rule, a trust account or accounts, separate from any business and personal accounts. Funds received by the lawyer on behalf of a client or in any other fiduciary capacity shall be deposited into this account. The financial institution shall be in Georgia or in the state where the lawyer's office is located, or elsewhere with the written consent and at the written request of the client or third person.

b. **Description of Accounts:**

1. A lawyer shall designate all trust accounts, whether general or specific, as well as all deposit slips and checks drawn thereon, as an "Attorney Trust Account," "Attorney Escrow Account" "IOLTA Account" or "Attorney Fiduciary Account." The name of the attorney or law firm responsible for the account shall also appear on all deposit slips and checks drawn thereon.

2. A lawyer shall designate all business accounts, as well as all deposit slips and all checks drawn thereon, as a "Business Account," a "Professional Account," an "Office Account," a "General Account," a "Payroll Account," "Operating Account" or a "Regular Account."

3. Nothing in this Rule shall prohibit a lawyer from using any additional description or designation for a specific business or trust account including fiduciary

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accounts maintained by the lawyer as executor, guardian, trustee, receiver, agent or in any other fiduciary capacity.

c. Procedure:

1. Approved Institutions:

- i. A lawyer shall maintain his or her trust account only in a financial institution approved by the State Bar, which shall annually publish a list of approved institutions. Such institutions shall be located within the State of Georgia, within the state where the lawyer's office is located, or elsewhere with the written consent and at the written request of the client or fiduciary. The institution shall be authorized by federal or state law to do business in the jurisdiction where located and shall be federally insured. A financial institution shall be approved as a depository for lawyer trust accounts if it abides by an agreement to report to the State Disciplinary Board whenever any properly payable instrument is presented against a lawyer trust account containing insufficient funds, and the instrument is not honored. The agreement shall apply to all branches of the financial institution and shall not be canceled except upon thirty days notice in writing to the State Disciplinary Board. The agreement shall be filed with the Office of General Counsel on a form approved by the State Disciplinary Board. The agreement shall provide that all reports made by the financial institution shall be in writing and shall include the same information customarily forwarded to the depositor when an instrument is presented against insufficient funds. If the financial institution is located outside of the State of Georgia, it shall also agree in writing to honor any properly issued State Bar of Georgia subpoena.
- ii. The State Disciplinary Board shall establish procedures for a lawyer or law firm to be excused from the requirements of this Rule if the lawyer or law firm has its principal office in a county where no bank, credit union, or savings and loan association will agree to comply with the provisions of this Rule.

2. Timing of Reports:

- i. The financial institution shall file a report with the Office of General Counsel of the State Bar of Georgia in every instance where a properly payable instrument is presented against a lawyer trust account containing insufficient funds and said instrument is not honored within three business days of presentation.
- ii. The report shall be filed with the Office of General Counsel within fifteen days of the date of the presentation of the instrument, even if the instrument is subsequently honored after the three business days provided in (2)(i) above.

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3. Nothing shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this Rule.
  4. Every lawyer and law firm maintaining a trust account as provided by these Rules is hereby and shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule and shall indemnify and hold harmless each financial institution for its compliance with the aforesaid reporting and production requirements.
- d. **Effect on Financial Institution of Compliance:** The agreement by a financial institution to offer accounts pursuant to this Rule shall be a procedure to advise the State Disciplinary Board of conduct by attorneys and shall not be deemed to create a duty to exercise a standard of care or a contract with third parties that may sustain a loss as a result of lawyers overdrawing attorney trust accounts.
- e. **Availability of Records:** A lawyer shall not fail to produce any of the records required to be maintained by these Standards at the request of the Investigative Panel of the State Disciplinary Board or the Supreme Court. This obligation shall be in addition to and not in lieu of the procedures contained in Part IV of these Rules for the production of documents and evidence.
- f. **Audit for Cause:** A lawyer shall not fail to submit to an Audit for Cause conducted by the State Disciplinary Board pursuant to Bar Rule 4-111.

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

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#### Comment

[1] Each financial institution wishing to be approved as a depository of client trust funds must file an overdraft notification agreement with the State Disciplinary Board of the State Bar of Georgia. The State Bar of Georgia will publish a list of approved institutions at least annually.

[2] The overdraft agreement requires that all overdrafts be reported to the Office of General Counsel of the State Bar of Georgia whether or not the instrument is honored. It is improper for a lawyer to accept “overdraft privileges” or any other arrangement for a personal loan on a client trust account, particularly in exchange for the institution’s promise to delay or not to report an overdraft. The institution must notify the Office of General Counsel of all overdrafts even where the institution is certain that its own error caused the overdraft or that the matter could have been resolved between the institution and the lawyer within a reasonable period of time.

[3] The overdraft notification provision is not intended to result in the discipline of every lawyer who overdraws a trust account. The lawyer or institution may explain occasional errors. The provision merely intends that the Office of General Counsel receive an early warning of improprieties so that corrective action, including audits for cause, may be taken.

#### Audits

[4] Every lawyer’s financial records and trust account records are required records and therefore are properly subject to audit for cause. The audit provisions are intended to uncover errors and omissions before the public is harmed, to deter those lawyers who may be tempted to misuse client’s funds and to educate and instruct lawyers as to proper trust accounting methods. Although the auditors will be employed

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by the Office of General Counsel of the State Bar of Georgia, it is intended that disciplinary proceedings will be brought only when the auditors have reasonable cause to believe discrepancies or irregularities exist. Otherwise, the auditors should only educate the lawyer and the lawyer's staff as to proper trust accounting methods.

[5] An audit for cause may be conducted at any time and without advance notice if the Office of General Counsel receives sufficient evidence that a lawyer poses a threat of harm to clients or the public. The Office of General Counsel must have the written approval of the Chairman of the Investigative Panel of the State Disciplinary Board and the President-elect of the State Bar of Georgia to conduct an audit for cause.

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#### RULE 2.4 LAWYER SERVING AS THIRD PARTY NEUTRAL

- a. A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- b. A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.
- c. When one or more of the parties in a mediation is a current or former client of the neutral lawyer or the neutral's law firm, a lawyer may serve as a neutral only if the matter in which the lawyer serves as a neutral is not the same matter in which the lawyer or law firm represents or represented the party and all parties give informed consent, confirmed in writing.

The maximum penalty for a violation of this Rule is a public reprimand.

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#### Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. . .

[3] Unlike non-lawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is

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**not representing them.** For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(r)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

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#### RULE 4.3 DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

- a. state or imply that the lawyer is disinterested; when the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding; and
- b. give advice other than the advice to secure counsel, if a lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of a client.

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

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#### Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented persons interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and

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explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

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#### **RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- a. a partner, and a lawyer who individually or together with other lawyers possesses managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- b. a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;
- c. a lawyer shall be responsible for conduct of such a person that would be a violation of the Georgia Rules of Professional Conduct if engaged in by a lawyer if:
  1. the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
  2. the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; and
- d. a lawyer shall not allow any person who has been suspended or disbarred and who maintains a presence in an office where the practice of law is conducted by the lawyer, to:
  1. represent himself or herself as a lawyer or person with similar status;
  2. have any contact with the clients of the lawyer either in person, by telephone or in writing; or
  3. have any contact with persons who have legal dealings with the office either in person, by telephone or in writing.

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

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#### **Comment**

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for

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their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Georgia Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Georgia Rules of Professional Conduct if engaged in by a lawyer.

[3] The prohibitions of paragraph (d) apply to professional conduct and not to social conversation unrelated to the representation of clients or legal dealings of the law office, or the gathering of general information in the course of working in a law office. The thrust of the restriction is to prevent the unauthorized practice of law in a law office by a person who has been suspended or disbarred.

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#### RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

- a. A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
1. an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
  2. a lawyer or law firm who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and
  3. a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
  4. a lawyer who undertakes to complete unfinished business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.
  5. a lawyer may pay a referral fee to a bar-operated non-profit lawyer referral service where such fee is calculated as a percentage of legal fees earned by the lawyer to whom the service has referred a matter pursuant to Rule 7.3. Direct Contact with Prospective Clients.
- b. A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
- c. A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

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- d. A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
1. a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
  2. a nonlawyer is a corporate director or officer thereof; or
  3. a nonlawyer has the right to direct or control the professional judgment of a lawyer.

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

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#### Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

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### **RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW**

Ethics & Discipline / Current Rules / Part IV (After January 1 / 2001) - Georgia Rules of Professional Conduct (also includes Disciplinary Proceedings and Advisory Opinion rules) / CHAPTER 1 GEORGIA RULES OF PROFESSIONAL CONDUCT AND ENFORCEMENT THEREOF

- a. A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- b. A Domestic Lawyer shall not:
1. except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
  2. hold out to the public or otherwise represent that the Domestic Lawyer is admitted to practice law in this jurisdiction.
- c. A Domestic Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
1. are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

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2. are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the Domestic Lawyer, or a person the Domestic Lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
  3. are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
  4. are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted to practice.
- d. A Domestic Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
1. are provided to the Domestic Lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
  2. are services that the Domestic Lawyer is authorized to provide by federal law or other law of this jurisdiction.
- e. A Foreign Lawyer shall not, except as authorized by this Rule or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law, or hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. Such a Foreign Lawyer does not engage in the unauthorized practice of law in this jurisdiction when on a temporary basis the Foreign Lawyer performs services in this jurisdiction that:
1. are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
  2. are in or reasonably related to a pending or potential proceeding before a tribunal held or to be held in a jurisdiction outside the United States if the Foreign Lawyer, or a person the Foreign Lawyer is assisting, is authorized by law or by order of the tribunal to appear in such proceeding or reasonably expects to be so authorized;
  3. are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceedings held or to be held in this or another jurisdiction, if the services arise out of or are reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice;
  4. are not within paragraphs (2) or (3) and

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- i. are performed for a client who resides or has an office in a jurisdiction in which the Foreign Lawyer is authorized to practice to the extent of that authorization; or
  - ii. arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization; or
  - iii. are governed primarily by international law or the law of a non-United States jurisdiction.
- f. A Foreign Lawyer who is not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction subject to the following conditions:
1. The services are provided to the Foreign Lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; and
  2. The Foreign Lawyer is and remains in this country in lawful immigration status and complies with all relevant provisions of United States immigration laws.
- g. For purposes of the grants of authority found in (e) and (f) above, the Foreign Lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority.

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

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#### Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a Domestic Lawyer violates paragraph (b) and a Foreign Lawyer violates paragraph (e) if the Domestic or Foreign Lawyer establishes an office or other systematic

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and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the Domestic or Foreign Lawyer is not physically present here. Such Domestic or Foreign Lawyer must not hold out to the public or otherwise represent that the Domestic or Foreign Lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a Domestic or Foreign Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances for the Domestic Lawyer. Paragraph (e) identifies four such circumstances for the Foreign Lawyer. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a Domestic Lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a Domestic or Foreign Lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c) or paragraph (e). Services may be "temporary" even though the Domestic or Foreign Lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the Domestic Lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to Domestic Lawyers. Paragraphs (e), (f) and (g) apply to Foreign Lawyers. Paragraphs (c) and (e) contemplate that the Domestic or Foreign Lawyer is authorized to practice in the jurisdiction in which the Domestic or Foreign Lawyer is admitted and excludes a Domestic or Foreign Lawyer who while technically admitted is not authorized to practice, because, for example, the Domestic or Foreign Lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a Domestic Lawyer associates with a lawyer licensed to practice in this jurisdiction. Paragraph (e)(1) recognizes that the interests of clients and the public are protected if a Foreign Lawyer associates with a lawyer licensed to practice in this jurisdiction. For these paragraphs to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Domestic Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a Domestic Lawyer does not violate this Rule when the Domestic Lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a Domestic Lawyer to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the Domestic Lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a Domestic Lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the Domestic Lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the Domestic Lawyer is authorized to practice law or in which the Domestic Lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a Domestic Lawyer may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the Domestic Lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a Domestic Lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate Domestic Lawyers may conduct research, review documents, and attend meetings with witnesses in support of the Domestic Lawyer responsible for the litigation.

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[12] Paragraph (c)(3) permits a Domestic Lawyer, and paragraph (e)(3) permits a Foreign Lawyer, to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the Domestic or Foreign Lawyer's practice in a jurisdiction in which the Domestic or Foreign Lawyer is admitted to practice. The Domestic Lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so requires.

[13] Paragraph (c)(4) permits a Domestic Lawyer to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers. Paragraph (e)(4)(i) permits a Foreign Lawyer to provide certain legal services in this jurisdiction on behalf of a client who resides or has an office in the jurisdiction in which the Foreign Lawyer is authorized to practice. Paragraph (e)(4)(ii) permits a Foreign Lawyer to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to a matter that has a substantial connection to the jurisdiction in which the Foreign Lawyer is authorized to practice. These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted. Paragraphs (e)(3) and (e)(4)(ii) require that the services arise out of or be reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice. A variety of factors may evidence such a relationship. These include but are not limited to the following:

- a. The Domestic or Foreign Lawyer's client may have been previously represented by the Domestic or Foreign Lawyer; or
- b. The Domestic or Foreign Lawyer's client may be resident in, have an office in, or have substantial contacts with the jurisdiction in which the Domestic or Foreign Lawyer is admitted; or
- c. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction in which the Domestic or Foreign Lawyer is admitted; or
- d. Significant aspects of the Domestic or Foreign Lawyer's work in a specific matter might be conducted in the jurisdiction in which the Domestic or Foreign Lawyer is admitted or another jurisdiction; or
- e. A significant aspect of a matter may involve the law of the jurisdiction in which the Domestic or Foreign Lawyer is admitted; or
- f. Some aspect of the matter may be governed by international law or the law of a non-United State jurisdiction; or
- g. The Lawyer's work on the specific matter in this jurisdiction is authorized by the jurisdiction in which the lawyer is admitted; or
- h. The client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their Domestic or Foreign Lawyer in assessing the relative merits of each; or
- i. The services may draw on the Domestic or Foreign Lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

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[15] Paragraph (d) identifies two circumstances in which a Domestic Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a Domestic Lawyer who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a Domestic Lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The Domestic Lawyer's ability to represent the employer outside the jurisdiction in which the Domestic Lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the Domestic Lawyer's qualifications and the quality of the Domestic Lawyer's work.

[17] If an employed Domestic Lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the Domestic Lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[18] Paragraph (d)(2) recognizes that a Domestic Lawyer may provide legal services in a jurisdiction in which the Domestic Lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. Paragraph (e)(4)(iii) recognizes that a Foreign Lawyer may provide legal services when the services provided are governed by international law or the law of a foreign jurisdiction.

[19] A Domestic or Foreign Lawyer who practices law in this jurisdiction pursuant to paragraphs (c), (d), (e) or (f) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a Domestic Lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the Domestic Lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4.

[21] Paragraphs (c), (d), (e) and (f) do not authorize communications advertising legal services to prospective clients in this jurisdiction by Domestic or Foreign Lawyers who are admitted to practice in other jurisdictions. Whether and how Domestic or Foreign Lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

(END OF APPENDIX 1)

**APPENDIX 2**  
**Formal Advisory Opinions of the**  
**Formal Advisory Opinion Board, State Bar of Georgia**

The following are selected Formal Advisory Opinions, included in this appendix because they have particular relevance to the closing of residential real estate transactions. For all of the Formal Advisory Opinions, go to <http://www.gabar.org>.

**Advisory Opinion 21.** Guidelines for attorneys utilizing paralegals and assistants.<sup>1</sup>

**Formal Advisory Opinion No. 86-5.** Lawyer cannot delegate to a nonlawyer responsibility of closing a real estate transaction without the participation of an attorney.

**Formal Advisory Opinion No. 99-2.** An in-house counsel for a real estate lending institution assists that entity in the unauthorized practice of law if he or she provides legal services to its customers which are in any way related to the existing relationship between the institution and its customer; and such conduct would also constitute an impermissible conflict of interest.

**Formal Advisory Opinion No. 00-3.** Ethical propriety of lawyers telephonically participating in real estate closings from remote sites.

**Formal Advisory Opinion No. 04-1.** If an attorney supervises the closing conducted by the non-lawyer entity, then the attorney is a fiduciary with respect to the closing proceeds and closing proceeds must be handled in accordance with Rule 1.15(II).

**Formal Advisory Opinion No. 13-1.** A Georgia attorney may NOT ethically conduct a “witness only” closing -- where the attorney acts in the limited role of a witness or notary, only presiding over the execution of closing documents, and fails to control the closing process from beginning to end.

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**<sup>1</sup> State Disciplinary Board Opinion History -**

This opinion is an Advisory Opinion issued by the State Disciplinary Board. Prior to 1986, the State Disciplinary Board was responsible for issuing Advisory Opinions. In 1986, when the ultimate responsibility for issuing Formal Advisory Opinions was entrusted to the Supreme Court of Georgia, the Formal Advisory Opinion Board was asked to review all of the Advisory Opinions issued by the State Disciplinary Board. As a result of that review, some of the pre-1986 Advisory Opinions issued by the State Disciplinary Board proved obsolete under the Standards, and were withdrawn. However, other Advisory Opinions, like this one, were determined to retain vitality under the Standards, and are published with the caution that they were not issued by, nor with the authority of the Supreme Court of Georgia. The State Bar of Georgia treats this opinion as persuasive authority only.

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**APPENDIX 2**  
**Formal Advisory Opinions of the**  
**Formal Advisory Opinion Board, State Bar of Georgia**

**Advisory Opinion 21<sup>1</sup>**

See footnote below for an explanation regarding the history and the binding authority of this opinion.

**State Disciplinary Board**  
**Advisory Opinion No. 21**  
**September 16, 1977**

**Guidelines for Attorneys Utilizing Paralegals.**

Pursuant to the provisions of Rule 4-217 of the Rules and Regulations for the Organization and Government of the State Bar of Georgia (219 Ga. 873, as amended), the State Disciplinary Board, after a proper request for such, renders its opinion concerning the proper interpretation of the Code of Professional Responsibility of the State Bar of Georgia.

**QUESTION PRESENTED:**

What are the ethical responsibilities of attorneys who employ legal assistants or paraprofessionals and permit them to deal with other lawyers, clients and the public?

The ethics authority applicable to this inquiry is Rule 3-103 (Canon III): EC 3-1, EC 3-2, ES 3-6, DR 3-101(A) and DR 3-103 are all included in that Rule. It is also noted that the provisions of Canon III appear as Disciplinary Standards 24, 25 and 26 in Part IV (discipline) of the Rules of the State Bar.

Canon III provides:

“A lawyer should assist in preventing the unauthorized practice of law.”

Ethical Considerations under this Canon relevant to the question propounded are:

“EC 3-1 The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession.”

“EC 3-2 The sensitive variations in the considerations that bear on legal determinations often make it difficult even for a lawyer to exercise appropriate professional judgment, and it is therefore essential that the personal nature of the relationship of client and lawyer be preserved. Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment.”

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### Formal Advisory Opinions of the Formal Advisory Opinion Board, State Bar of Georgia

“EC 3-6 A lawyer often delegates tasks to clerks, secretaries and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal service more economically and efficiently.”

“DR 3-101 Aiding Unauthorized Practice of Law.

(A) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.:

“DR 3-102 Dividing Legal Fees with a Nonlawyer.

(A) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) ...

(2) ...

(3) a lawyer or law firm may include nonlawyer employees in a retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement.”

“DR 3-103 Forming a Partnership with a Nonlawyer.

(A) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.”

For purposes of this opinion the terms “legal assistant”, “paraprofessional” and “paralegal” are defined as any lay person, not admitted to the practice of law in this State, who is an employee of, or an assistant to, an active member of the State, who is an employee of, or an assistant to, an active member of the State Bar of Georgia or to a partnership or professional corporation comprised of active members of the State Bar of Georgia and who renders services relating to the law to such member, partnership or professional corporation under the direct control, supervision and compensation of a member of the State Bar of Georgia.

The overriding consideration in this opinion will be that the definition of the practice of law is very wide in the State of Georgia and that strict adherence to a program of supervision and direction of a paralegal is required in order to avoid any charges that the attorney is aiding his paralegal in the unauthorized practice of law. Ga. Code Ann. 9-401, 9-402. Avoidance of charges that the paralegal is engaging in the unauthorized practice of law may be achieved only by strict observance of the direction found in EC 3-6, quoted above, indicating that delegation of activities which ordinarily comprise the practice of law is proper only if the lawyer maintains a direct relationship with the client involved, supervises and directs the work delegated to the paralegal and assumes complete ultimate professional responsibility for the work product produced by the paralegal. Supervision of the work of the paralegal by the attorney must be direct and constant to avoid any charges of aiding the unauthorized practice of law.

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It is the opinion of this Board that the following may be delegated to nonlawyer paralegals, provided that proper and effective supervision and control by the attorney exists:

- (1) The interview of clients, witnesses and other persons with information pertinent to any cause being handled by the attorney.
- (2) Legal research and drafting of pleadings, briefs of law and other legal documents for the attorney's review, approval and use.
- (3) Drafting and signing of routine correspondence with the clients of the attorney when such correspondence does not require the application of legal knowledge or the rendering of legal advice to the client.
- (4) Investigation of facts relating to the cause of a client of the attorney, including examinations of land records and reporting of his findings to the attorney.
- (5) Scheduling of the attorney's activities in the law office and scheduling of his appearance before courts, tribunals and administrative agencies.
- (6) Billing of clients and general management of the lawfirm's office and nonlegal staff.
- (7) Routine contacts with opposing counsel on topics not effecting the merits of the cause of action at issue between the attorneys or requiring the use or application of legal knowledge.
- (8) Rendering of specialized advice to the clients of the attorney on scientific and technical topics, provided that such advice does not require the application of legal judgment or knowledge to the facts or opinions to be discussed with the client.

It is the opinion of the Board that the following duties should not be delegated to paralegals:

- (1) Any contact with clients or opposite counsel requiring the rendering of legal advice of any type.
- (2) Any appearance as a lawyer at depositions, hearings, calendar calls or trials or before any administrative Tribunal unless otherwise preempted by Federal law or regulation.
- (3) Responsibility for making final decisions as to the ethics of activities of paralegal employees of an attorney.
- (4) Drafting, without review and approval by a member of the Bar, of any pleading or legal document.
- (5) Negotiation with opposing parties or their counsel on substantive issues in expected or pending litigation.

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(6) Contacting an opposite party or his counsel in a situation in which legal rights of the firm's client will be asserted or negotiated.

(7) Signature of pleadings, briefs or other legal documents for presentation to any court or explanation of legal documents to the client of the lawyer or to the opposite party in any negotiation or litigation.

It is the opinion of the State Disciplinary Board that there are other duties incumbent upon lawyers supervising the work of paralegals as follows:

(1) (a) In order to avoid any appearance that the lawyer is aiding the paralegal in the unauthorized practice of law, including unauthorized practice by way of "holding out as an attorney" (see Ga. Code Ann. 9-402), any letters or documents signed by the paralegal should clearly indicate the status of the paralegal and such status should be made clear by the nature of the typed signature or by express language in the text of the letter or document. See Advisory Opinion No. 19.

(b) The name of the paralegal should not appear on the letterhead or on the office door of any lawyer engaged in private practice. The paralegal may have a business card containing the name of the firm by which he or she is employed, but the card must contain the word "paralegal" to clearly convey that the paralegal is not a lawyer.

(c) In oral communications, either face-to-face or on the telephone, the paralegal should begin the conversation with a clear statement that he or she is speaking as a paralegal employee of the lawyer or the law firm. Such communication concerning the status of the paralegal should be given prior to all oral communications with clients, opposite parties, and other attorneys unless previous contacts with such persons would justify the paralegal in believing that their status was clearly known to such persons.

(2) A paralegal may not be a partner in a law firm nor have a financial interest that amounts to a partnership interest in such firm other than participation in a profit sharing plan allowed under Bar ethics rules. [DR 2-102 (A) ]

(3) As the paralegal is the agent of the attorney, the paralegal has a duty to protect and preserve the confidences and secrets of the firm's clients. [EC 4-2 and DR 4-102 ]

(4) As the paralegal is an agent of the lawyer or law firm, it is the duty of the supervising lawyer to carefully instruct the paralegal so that the paralegal will avoid taking any action which the attorney himself is prohibited from taking, including avoidance of solicitation of cases or clients for the lawyer or the law firm and avoiding any other activity which would be improper activity if performed by the supervising lawyer or his firm.

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#### <sup>1</sup> State Disciplinary Board Opinion History -

This opinion is an Advisory Opinion issued by the State Disciplinary Board. Prior to 1986, the State Disciplinary Board was responsible for issuing Advisory Opinions. In 1986, when the ultimate responsibility for issuing Formal Advisory Opinions was entrusted to the Supreme Court of Georgia, the

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### Formal Advisory Opinions of the Formal Advisory Opinion Board, State Bar of Georgia

Formal Advisory Opinion Board was asked to review all of the Advisory Opinions issued by the State Disciplinary Board. As a result of that review, some of the pre-1986 Advisory Opinions issued by the State Disciplinary Board proved obsolete under the Standards, and were withdrawn. However, other Advisory Opinions, like this one, were determined to retain vitality under the Standards, and are published with the caution that they were not issued by, nor with the authority of the Supreme Court of Georgia. The State Bar of Georgia treats this opinion as persuasive authority only.

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#### Formal Advisory Opinion No. 86-5

**State Bar of Georgia**  
**Issued by the Supreme Court of Georgia**  
**On May 12, 1989**  
**Formal Advisory Opinion No. 86-5**

For references to Standard of Conduct 24, please see Rule 5.5(a).

For references to Rule 3-103 (Canon III) please see Rule 5.5(a).

For references to EC 3-1, please see Comment 2 of Rule 5.5.

For references to EC 3-2, please see Rule 1.1 and Comment 5 of Rule 1.1.

For references to EC 3-6, please see Rule 5.3(b) and Comment 1 of Rule 5.3.

For references to DR 3-101(A), please see Rule 5.5(a).

For references to DR 3-102(A), please see Rule 5.4(a).

For references to DR 3-103, please see Rule 5.4(b).

For an explanation regarding the addition of headnotes to the opinion, see source for link

#### **Ethical Propriety of Lawyer's Delegating to Nonlawyers the Closing of Real Estate Transactions.**

The closing of real estate transaction constitutes the practice of law as defined by O.C.G.A § 15-19-50. Accordingly, it would be ethically improper for lawyers to permit nonlawyers to close real estate transactions. Certain tasks can be delegated to nonlawyers, subject to the type of supervision and control outlined in State Bar Advisory Opinion No. 21. The lawyer cannot, however, delegate to a nonlawyer the responsibility to "close" the real estate transaction without the participation of an attorney.

Correspondent asks whether it is ethically permissible for a lawyer to delegate to a nonlawyer the closing of real estate transactions. This question involves, among other things, an interpretation of Standard 24, Rule 3-103 (Canon III), EC 3-1, EC 3-2, EC 3-6,

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DR 3-101 (A), DR 3-102 (A), and DR 3-103. With the exception of Standard 24, all of the foregoing Ethical Considerations and Directory Rules are cited and quoted in State Bar Advisory Opinion No. 21 (attached hereto).

Standard 24 provides as follows:

A lawyer shall not aid a nonlawyer in the unauthorized practice of law. A violation of this Standard may be punished by a public reprimand.

As the role of nonlawyers (particularly paralegals and legal secretaries) in the closing of real estate transactions has expanded in recent years, questions have arisen as to the scope of duties which can be delegated to nonlawyers. A general discussion of duties which may ethically be delegated to nonlawyers can be found in State Bar Advisory Opinion Nos. 19 and 21. In short, those Advisory Opinions stress that

Avoidance of charges that the paralegal is engaging in the unauthorized practice of law may be achieved only by strict observance of the direction found in EC 3-6, quoted above, indicating that delegation of activities which ordinarily comprise the practice of law is proper only if the lawyer maintains a direct relationship with the client involved, supervises and directs the work delegated to the paralegal and assumes complete ultimate professional responsibility for the work product produced by the paralegal. Supervision of the work of the paralegal by the attorney must be direct and constant to avoid any charges of aiding the unauthorized practice of law. State Bar Advisory Opinion No. 21.

The question to be addressed in this opinion is whether the closing of a real estate transaction constitutes “the practice of law.” This in turn depends upon what it means to “close” a real estate transaction. If the “closing” is defined as the entire series of events through which title to the land is conveyed from one party to another party, it would be ethically improper for a nonlawyer to “close” a real estate transaction.

O.C.G.A. § 15-19-50 states that the “practice of law” includes “conveyancing,” “the giving of any legal advice,” and “any action taken for others in any matter connected with the law.” In Georgia Bar Association v. Lawyers Title Insurance Corporation, 222 Ga. 657 (1966), the Georgia Supreme Court characterizes the “closing of real estate transactions between applicants for title insurance and third persons” as the rendering of legal services and advice. Moreover, to the extent that any legal advice is given during any part of the closing, this would constitute “the practice of law” by definition and could not be ethically delegated to nonlawyers.

In light of all of the foregoing, it appears that the closing of real estate transactions constitutes the practice of law as defined by O.C.G.A. §15-19-50. Accordingly, pursuant to Standard 24, Canon III, and the Ethical Considerations and Disciplinary Rules cited above, it would be ethically improper for a lawyer to aid nonlawyers to “close” real estate transactions. This does not mean that certain tasks cannot be delegated to nonlawyers, subject to the type of supervision and control outlined in State Bar Advisory Opinion No.

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21. The lawyer cannot, however, delegate to a nonlawyer the responsibility to “close” the real estate transaction without the participation of an attorney.

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**Formal Advisory Opinion No. 99-2**

**STATE BAR OF GEORGIA**  
**ISSUED BY THE SUPREME COURT OF GEORGIA**  
**ON OCTOBER 18, 1999**  
**FORMAL ADVISORY OPINION NO. 99-2**

For references to Standard of Conduct 24, please see Rule 5.5.

For references to Standard of Conduct 35, please see Rule 1.7(a).

For references to Standard of Conduct 36, please see Rule 1.7(a).

For references to Canon 3, please see Rule 5.5.

For references to EC 3-1, please see Rule 5.5.

For references to EC 3-8, please see Rule 5.4(a), (b), and (d).

For references to DR 3-101, please see Rule 5.5.

For references to Canon 5, please see Rules 1.7 and 1.8.

For references to EC 5-14, please see Rule 1.7(a).

For references to EC 5-20, please see Rule 2.2.

For references to DR 5-105, please see Rule 1.7.

For an explanation regarding the addition of headnotes to the opinion, see source for link.

**QUESTION PRESENTED:**

In a transaction involving a real estate lending institution and its customer, may the in-house counsel for the institution provide legal services to the customer relative to the transaction? May the real estate lending institution charge the customer a fee for any legal services rendered relative to the transaction?

**SUMMARY ANSWER:**

The answer to both questions is “no.” An in-house counsel for a real estate lending

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institution assists that entity in the unauthorized practice of law in violation of Standard 24, if he or she provides legal services to its customers which are in any way related to the existing relationship between the institution and its customer. Such conduct would also constitute an impermissible conflict of interest under Standards 35 and 36. This prohibition does not, however, prevent in-house counsel from attending closings as attorney for the institution and preparing the documents necessary to effectuate the closing including those documents that must be signed by the customer and that may benefit both the institution and the customer. Nor does the prohibition prevent the institution from seeking reimbursement for the legal expenses incurred in the transaction by including them in the cost of doing business when determining its charge to its customer. The charge, however, may not be denominated as a legal or attorney fee but must be included in the charge being made by the institution. There is inherent risk of confusion on the part of the customer regarding the role of in-house counsel. Prudent lawyers will act on the assumption that courts will honor the customer's reasonable expectation of in-house counsel's duties created by the closing attorney's conduct at the closing.

#### **OPINION:**

Standard 24, proscribing assistance in the unauthorized practice of law, prohibits in-house counsel for a real estate lending institution from providing legal services to its customers. See also, Georgia Code of Professional Responsibility, Canon 3; Georgia Code of Professional Responsibility, Ethical Considerations 3-1 & 3-8; Georgia Code of Professional Responsibility, Directory Rule 3-101, and ABA Model Rules of Professional Conduct, Model Rule 5.4(d). Standards 35 and 36 prohibit such conduct if the ability to exercise independent professional judgment on behalf of one client will be or is likely to be adversely affected by the obligation to another client. See also, Georgia Code of Professional Responsibility, Canon 5; Georgia Code of Professional Responsibility, Ethical Consideration 5-14 - 5-20; Georgia Code of Professional Responsibility, Directory Rule 5-105, and ABA Model Rules of Professional Conduct, Model Rule 1.7. Specifically, in-house counsel may not provide legal services at a closing or elsewhere to a customer borrowing from the lending institution and arising out of the existing relationship between the customer and the institution. This is true whether or not the customer is charged for these services. The role of employee renders the actions of in-house counsel the action of the employer. The employer, not being a lawyer, is thus being assisted in and is engaging in the unauthorized practice of law. The in-house counsel by virtue of the existing employer/employee relationship and its accompanying obligation of loyalty to the employer cannot exercise independent professional judgment on behalf of the customer.

This prohibition does not, however, prevent in-house counsel from attending the closing as the institution's legal representative and preparing those documents necessary to effectuate the closing. This includes those documents that must be signed by the customer. In such a situation, in-house counsel is providing legal services directly to the institution even though others, including the customer, may benefit from them.

The prohibition on assisting in the unauthorized practice of law does not prevent the

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lending institution from including the expense of in-house counsel in the cost of doing business when determining the fee to charge its customer. The lending institution may, in other words, recoup the expenses of the transaction including the cost of legal services. This conduct does not in and of itself, create a duty to the customer on the part of the in-house counsel nor does it constitute a violation of the prohibition against the sharing of legal fees with a non-lawyer. On the other hand, charging the cost of legal services to the customer (1) is likely to create an unintended expectation in the mind of the customer, (2) constitutes a non-lawyer receiving the fee for legal services rather than an attorney, (3) constitutes a lawyer splitting a fee with a non-lawyer, or (4) directly invites the unauthorized practice of law. It is accordingly prohibited even if limited to actual costs. The customer cannot be made a part of the attorney/client, employer/employee relationship.

The situation in which in-house counsel attends closings as attorney for the lending institution and prepares the documents necessary to effectuate the closing is fraught with both legal and ethical risks beyond assistance in the unauthorized practice of law and conflict of interests. Even though the above analysis (1) requires that in-house counsel's lawyer-client relationship be restricted to the lending institution, and (2) prohibits the direct billing for legal services by the institution, the fact remains that the customer may benefit from the actions of in-house counsel. Thus the risk of confusion about the role of in-house counsel at the closing will be high. Prudent in-house counsel should anticipate that courts may treat the reasonable customer expectations regarding these legal services as creating duties even in the absence of a lawyer-client relationship. The Restatement (Second) of Torts reports that an attorney who represents only the lender may still be held liable in negligence to a borrower. See, e.g., Seigle v. Jasper, 867 S.W. 2d 476 (Ky. Ct. App. 1973). A similar result may obtain under traditional contract or agency principles regarding third party beneficiaries. This position is supported by the Restatement of the Law of Lawyering. While declaring the current state of Georgia law on this issue would be inappropriate and beyond the scope of this Formal Advisory Opinion, it is clear that prudent in-house counsel will not ignore these risks both in advising the lending institution and in his or her conduct toward the customer as a matter of good lawyering.

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#### Formal Advisory Opinion No. 00-3

**STATE BAR OF GEORGIA  
ISSUED BY THE SUPREME COURT OF GEORGIA  
ON FEBRUARY 11, 2000  
FORMAL ADVISORY OPINION NO. 00-3**

For references to Standard of Conduct 24, please see Rule 5.5(a).

For an explanation regarding the addition of headnotes to the opinion, see source for link.

**QUESTION PRESENTED:**

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Ethical propriety of lawyers telephonically participating in real estate closings from remote sites.

#### **SUMMARY ANSWER:**

Formal Advisory Opinion No. 86-5 explains that a lawyer cannot delegate to a nonlawyer the responsibility to “close” the real estate transaction without the participation of an attorney. Formal Advisory Opinion No. 86-5 also provides that “Supervision of the work of the paralegal by the attorney must be direct and constant to avoid any charges of aiding the unauthorized practice of law.” The lawyer’s physical presence at a closing will assure that there is supervision of the work of the paralegal which is direct and constant.

#### **OPINION:**

Formal Advisory Opinion No. 86-5 (86-R9) issued by the Supreme Court states that the closing of real estate transactions constitutes the practice of law as defined by O.C.G.A. §15-19-50. Therefore, it is ethically improper for lawyers to permit nonlawyers to close real estate transactions. Correspondent inquires whether it is ethically permissible to allow a paralegal to be physically present at a remote site for the purpose of witnessing signatures and assuring that documents are signed properly. The paralegal announces to the borrower that they are there to assist the attorney in the closing process. The lawyer is contacted by telephone by the paralegal during the closing to discuss the legal aspects of the closing.

The critical issue in this inquiry is what constitutes the participation of the attorney in the closing transaction. The lawyer must be in control of the closing process from beginning to end. The supervision of the paralegal must be direct and constant.

Formal Advisory Opinion No. 86-5 states that “If the ‘closing’ is defined as the entire series of events through which title to the land is conveyed from one party to another party, it would be ethically improper for a nonlawyer to ‘close’ a real estate transaction.” Under the circumstances described by the correspondent, the participation of the lawyer is less than meaningful. The lawyer is not in control of the actual closing processing from beginning to end. The lawyer is brought into the closing process after it has already begun. Even though the paralegal may state that they are not a lawyer and is not there for the purpose of giving legal advice, circumstances may arise where one involved in this process as a purchaser, seller or lender would look to the paralegal for advice and/or explanations normally provided by a lawyer. This is not permissible.

Formal Advisory Opinion No. 86-5 provides that “Supervision of the work of the paralegal by the attorney must be direct and constant to avoid any charges of aiding the unauthorized practice of law.” By allowing a paralegal to appear at closings at remote sites at which lawyers are present only by telephone conference will obviously increase the likelihood that the paralegal may be placed in circumstances where the paralegal is actually providing legal advice or explanations, or exercising independent judgement as to whether legal advice or explanation is required.

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Standard 24 is not met by the lawyer being called on the telephone during the course of the closing process for the purpose of responding to questions or reviewing documents. The lawyer's physical presence at a closing will assure that there is supervision of the work of the paralegal which is direct and constant.

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**Formal Advisory Opinion No. 04-1**

**Approved And Issued On February 13, 2006 Pursuant To Bar Rule 4-403  
By Order Of The Supreme Court Of Georgia With Comments  
Supreme Court Docket No. S05U1720**

**COMPLETE TEXT FROM THE ORDER OF THE SUPREME COURT OF GEORGIA**

We grant a petition for discretionary review brought by the State Bar of Georgia to consider the proposed opinion of the Formal Advisory Board<sup>1</sup> (hereinafter "Board") that, if an attorney supervises the closing of a real estate transaction conducted by a non-lawyer entity, the attorney is a fiduciary with respect to the closing proceeds and the closing proceeds must be handled in accordance with the trust account and IOLTA provisions of Rule 1.15(II) of Bar Rule 4-102(d) of the Georgia Rules of Professional Conduct. Formal Advisory Opinion No. 04-1 (August 6, 2004). See State Bar Rule 4-403(d) (authorizing this Court to grant a petition for discretionary review).<sup>2</sup> For the reasons set forth below, we agree with the Board that a lawyer directing the closing of a real estate transaction holds money which belongs to another (either a client or a third-party) as an incident to that practice, and must keep that money in an IOLTA account. We further add that if the proceeds are not subject to the rules of IOLTA subsection (c)(2), then the funds must be deposited in an interest-bearing account for the client's benefit. Rule 1.15(II)(c)(1). Under no circumstances may the closing proceeds be commingled with funds belonging to the lawyer, the law office, or any entity other than as explicitly provided in the Rule.

The matter came before the Board pursuant to a request for an advisory opinion on the following question:

May a lawyer participate in a non-lawyer entity created by the lawyer for the purpose of conducting residential real estate closings where the closing proceeds received by the entity are deposited in a non-IOLTA interest bearing bank trust account rather than an IOLTA account?

The opinion first appeared in the June 2004 issue of the Georgia Bar Journal. In response, the Board received comments both in support of and in opposition to the opinion. The modified opinion appeared in the October 2004 Georgia Bar Journal, and the State Bar thereafter sought discretionary review.

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The closing of a real estate transaction in this State constitutes the practice of law, and, if performed by someone other than a duly-licensed Georgia attorney, results in the prohibited unlicensed practice of law. In re UPL Advisory Opinion 2003-2, 277 Ga. 472 (588 SE2d 741) (2003). The attorney participating in the closing is a fiduciary with respect to the closing proceeds, which must be handled in accordance with the trust account and IOLTA provisions in Rule 1.15(II).<sup>3</sup> Specifically, when a lawyer holds client funds in trust, the lawyer must make an initial determination whether the funds are eligible for the IOLTA program. Closing proceeds from a real estate transaction which are nominal in amount or are to be held for a short period of time (i.e., funds that cannot otherwise generate net earnings for the client) must be deposited into an Interest on Lawyer's Trust Account (IOLTA Account). Funds that are not nominal in amount or funds, no matter what amount, that are not to be held for a short period of time, are ineligible for placement in an IOLTA account and must be placed in an interest-bearing account, with the net interest generated paid to the client. Rule 1.15(II)(c). See also Brown v. Legal Foundation of Washington, 538 U.S. 216 (155 LE2d 376, 123 SC 1406) (2003). Under either circumstance, Rule 1.15(II) instructs that a lawyer involved in a closing has a strict fiduciary duty to deposit a client's real estate closing proceeds in a separate IOLTA or non-IOLTA interest bearing trust account.

The Board's recognition that, under all circumstances, the interest generated on the client's closing funds is governed by Rule 1.15(II), ensures full compliance where real estate closings are involved. Accordingly, we adopt Formal Advisory Opinion 04-1 to the extent it is in accord with the rule that attorneys must place client closing proceeds that are nominal or held for a short period of time in an IOLTA account. We clarify that closing proceeds that are more than nominal in amount or that will be deposited for more than a short period of time must be placed in a non-IOLTA interest bearing account with interest payable to the client. Rule 1.15(II)(c)(1).

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1. State Bar Rule 4-403(a) authorizes the Formal Advisory Opinion Board to draft proposed Formal Advisory Opinions concerning the proper interpretation of the Rules of Professional Conduct.

2. Formal Advisory Opinion Board opinions, which are approved or modified by this Court, are "binding on all members of the State Bar." State Bar Rule 4-403(e).

3. The sole issue addressed in the proposed opinion is whether an attorney may participate in a non-lawyer entity which the attorney created for the purpose of conducting residential real estate closings without depositing the closing proceeds in an IOLTA account.

Formal Advisory Opinion approved, as modified. All the Justices concur.

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### FORMAL ADVISORY OPINION NO. 04-1

#### **Question Presented:**

May a lawyer participate in a non-lawyer entity created by the lawyer for the purpose of conducting residential real estate closings where the closing proceeds received by the

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entity are deposited in a non-IOLTA interest bearing bank trust account rather than an IOLTA account?

#### **Summary Answer:**

The closing of a real estate transaction constitutes the practice of law. If an attorney supervises the closing conducted by the non-lawyer entity, then the attorney is a fiduciary with respect to the closing proceeds and closing proceeds must be handled in accordance with Rule 1.15 (II). If the attorney does not supervise the closings, then, under the facts set forth above, the lawyer is assisting a non-lawyer in the unauthorized practice of law.

#### **Opinion:**

The closing of a real estate transaction in the state of Georgia constitutes the practice of law. *See, In re UPL Advisory Opinion 2003-2*, 277 Ga. 472, 588 S.E. 2d 741 (Nov. 10, 2003), O.C.G.A. §15-19-50 and Formal Advisory Opinions Nos. 86-5 and 00-3. Thus, to the extent that a non-lawyer entity is conducting residential real estate closings not under the supervision of a lawyer, the non-lawyer entity is engaged in the practice of law. If an attorney supervises the residential closing<sup>1</sup>, then that attorney is a fiduciary with respects to the closing proceeds. If the attorney participates in but does not supervise the closings, then the non-lawyer entity is engaged in the unauthorized practice of law. In such event, the attorney assisting the non-lawyer entity would be doing so in violation of Rule 5.5 of the Georgia Rules of Professional Conduct.<sup>2</sup>

When a lawyer is supervising a real estate closing, the lawyer is professionally responsible for such closings. Any closing funds received by the lawyer or by persons or entities supervised by the lawyer are held by the lawyer as a fiduciary. The lawyer's responsibility with regard to such funds is addressed by Rule 1.15 (II) of the Georgia Rules of Professional Conduct which states in relevant part:

#### **SAFEKEEPING PROPERTY - GENERAL**

(a) Every lawyer who practices law in Georgia, whether said lawyer practices as a sole practitioner, or as a member of a firm, association, or professional corporation, and who receives money or property on behalf of a client or in any other fiduciary capacity, shall maintain or have available a trust account as required by these Rules. All funds held by a lawyer for a client and all funds held by a lawyer in any other fiduciary capacity shall be deposited in and administered from such account.

\* \* \* \* \*

(c) All client's funds shall be placed in either an interest-bearing account with the interest being paid to the client or an interest-bearing (IOLTA) account with the interest being paid to the Georgia Bar Foundation as hereinafter provided.

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(1) With respect to funds which are not nominal in amount, or are not to be held for a short period of time, a lawyer shall, with notice to the clients, create and maintain an interest-bearing trust account in an approved institution as defined by Rule 1.15(III)(c)(1), with the interest to be paid to the client. No earnings from such an account shall be made available to a lawyer or law firm.

(2) With respect to funds which are nominal in amount or are to be held for a short period of time, a lawyer shall, with or without notice to the client, create and maintain an interest-bearing, government insured trust account (IOLTA) in compliance with the following provisions:

\* \* \* \* \*

As set out in Subsection (c)(2) above, this Rule applies to all client funds which are nominal or are to be held for a short period of time. As closing proceeds are not nominal in amount, but are to be held for only a short period of time, they are subject to the IOLTA provisions. Therefore, the funds received in connection with the real estate closing conducted by the lawyer or the non-lawyer entity in the circumstances described above must be deposited into an IOLTA compliant account.

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1. Adequate supervision would require the lawyer to be present at the closing. See FAO . . . etc.

2. Rule 5.5 states in relevant part that:

UNAUTHORIZED PRACTICE OF LAW

A lawyer shall not:

\* \* \* \* \*

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

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

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**FORMAL ADVISORY OPINION NO. 13-1**  
**Approved And Issued On September 22, 2014 Pursuant To Bar Rule 4-403**  
**By Order Of The Supreme Court Of Georgia**  
**Supreme Court Docket No. S14U0705**

#### **QUESTIONS PRESENTED:**

1. Does a Lawyer<sup>1</sup> violate the Georgia Rules of Professional Conduct when he/she conducts a “witness only” real estate closing?
2. Can a Lawyer who is closing a real estate transaction meet his/her obligations under the Georgia Rules of Professional Conduct by reviewing, revising as necessary, and

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adopting documents sent from a lender or from other sources?

3. Must all funds received by a Lawyer in a real estate closing be deposited into and disbursed from the Lawyer's trust account?

#### **SUMMARY ANSWER:**

1. A Lawyer may not ethically conduct a "witness only" closing. Unless parties to a transaction are handling it pursuant to Georgia's pro se exemption, Georgia law requires that a Lawyer handle a real estate closing (see O.C.G.A § 15-19-50, UPL Advisory Opinion No. 2003-2 and Formal Advisory Opinion No. 86-5).<sup>2</sup> When handling a real estate closing in Georgia a Lawyer does not absolve himself/herself from violations of the Georgia Rules of Professional Conduct by claiming that he/she has acted only as a witness and not as an attorney. (See UPL Advisory Opinion No. 2003-2 and Formal Advisory Opinion No. 04-1).

2. The closing Lawyer must review all documents to be used in the transaction, resolve any errors in the paperwork, detect and resolve ambiguities in title or title defects, and otherwise act with competence. A Lawyer conducting a real estate closing may use documents prepared by others after ensuring their accuracy, making necessary revisions, and adopting the work.

3. A Lawyer who receives funds in connection with a real estate closing must deposit them into and disburse them from his/her trust account or the trust account of another Lawyer. (See Georgia Rule of Professional Conduct 1.15(II) and Formal Advisory Opinion No. 04-1).

#### **OPINION:**

A "witness only" closing occurs when an individual presides over the execution of deeds of conveyance and other closing documents but purports to do so merely as a witness and notary, not as someone who is practicing law. (UPL Advisory Opinion No. 2003-2). In order to protect the public from those not properly trained or qualified to render these services, Lawyers are required to "be in control of the closing process from beginning to end." (Formal Advisory Opinion No. 00-3). A Lawyer who purports to handle a closing in the limited role of a witness violates the Georgia Rules of Professional Conduct.

In recent years many out-of-state lenders, including some of the largest banking institutions in the country, have changed the way they manage the real estate transactions they fund. The following practices of these lenders have been reported. These national lenders hire attorneys who agree to serve the limited role of presiding over the execution of the documents (i.e., "witness only" closings). In advance of a "witness only" closing an attorney typically receives "signing instructions" and a packet of documents prepared by the lender or at the lender's direction. The instructions specifically warn the attorney NOT to review the documents or give legal advice to any of

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the parties to the transaction. The “witness only” attorney obtains the appropriate signatures on the documents, notarizes them, and returns them by mail to the lender or to a third party entity.

The Lawyer’s failure to review closing documents can facilitate foreclosure fraud, problems with title, and other errors that may not be detected until years later when the owner of a property attempts to refinance, sell or convey it.

A Lawyer must provide competent representation and must exercise independent professional judgment in rendering advice. (Rules 1.1 and 2.1, Georgia Rules of Professional Conduct). When a Lawyer agrees to serve as a mere figurehead, so that it appears there is a Lawyer “handling” a closing, the Lawyer violates his/her obligations under the Georgia Rules of Professional Conduct (Rule 8.4). The Lawyer’s acceptance of the closing documents or signature on the closing statement is the imprimatur of a successful transaction. Because UPL Advisory Opinion No. 2003-2 and the Supreme Court Order adopting it require (subject to the pro se exception) that only a Lawyer can close a real estate transaction, the Lawyer signing the closing statement or accepting the closing documents would be found to be doing so in his or her capacity as a Lawyer. Therefore, when a closing Lawyer purports to act merely as a witness, this is a misrepresentation of the Lawyer’s role in the transaction. Georgia Rule of Professional Conduct 8.4(a)(4) provides that it is professional misconduct for an attorney to engage in “conduct involving . . . misrepresentation.”

The Georgia Rules of Professional Conduct allow Lawyers to outsource both legal and nonlegal work. (See ABA Formal Advisory Opinion 08-451.) A Lawyer does not violate the Georgia Rules of Professional Conduct by receiving documents from the client or elsewhere for use in a closing transaction, even though the Lawyer has not supervised the preparation of the documents. However, the Lawyer is responsible for utilizing these documents in compliance with the Georgia Rules of Professional Conduct, and must review and adopt work used in a closing. Georgia law allows a title insurance company or other persons to examine records of title to real property, prepare abstracts of title, and issue related insurance. (O.C.G.A. § 15-19-53). Other persons may provide attorneys with paralegal and clerical services, so long as “at all times the attorney receiving the information or services shall maintain full professional and direct responsibility to his clients for the information and services received.” (O.C.G.A. § 15-19-54; also see UPL Advisory Opinion No. 2003-2 and Rules 5.3 and 5.5, Georgia Rules of Professional Conduct).

The obligation to review, revise, approve and adopt documents used in a real estate closing applies to the entire series of events that comprise a closing. (Formal Advisory Opinions No. 86-5 and 00-3, and UPL Advisory Opinion No. 2003-2). While the Supreme Court has not explicitly enumerated what all of those events are, they may include, but not be limited to: (i) rendering an opinion as to title and the resolution of any defects in marketable title; (ii) preparation of deeds of conveyance, including warranty deeds, quitclaim deeds, deeds to secure debt, and mortgage deeds; (iii) overseeing and participating in the execution of instruments conveying title; (iv) supervising the

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recording of documents conveying title; and (v) in those situations where the Lawyer receives funds, depositing and disbursing those funds in accordance with Rule 1.15(II). Even if some of these steps are performed elsewhere, the Lawyer maintains full professional and direct responsibility for the entire transaction and for the services rendered to the client.

Finally, as in any transaction in which a Lawyer receives client funds, a Lawyer must comply with Georgia Rule of Professional Conduct 1.15(II) when handling a real estate closing. If the Lawyer receives funds on behalf of a client or in any other fiduciary capacity he/she must deposit the funds into, and administer them from, a trust account in accordance with Rule 1.15(II). (Formal Advisory Opinion No. 04-1). It should be noted that Georgia law also allows the lender to disburse funds. (O.C.G.A. § 44-14-13(a)(10)). A Lawyer violates the Georgia Rules of Professional Conduct when he/she delivers closing proceeds to a title company or to a third party settlement company for disbursement instead of depositing them into and disbursing them from an attorney escrow account.

<sup>1</sup> Bar Rule 1.0(j) provides that "Lawyer" denotes a person authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia, including persons admitted to practice in this state pro hac vice.

<sup>2</sup>The result is to exclude Nonlawyers as defined by Bar Rule 1.0(k), Domestic Lawyers as defined by Bar Rule 1.0(d), and Foreign Lawyers as defined by Bar Rule 1.0(f), from the real estate closing process.

(END OF APPENDIX 2)

## APPENDIX 3

### Advisory Opinions of the Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia

The following are selected UPL Advisory Opinions, included in this appendix because they have particular relevance to the closing of residential real estate transactions. For all of the UPL Advisory Opinions, go to <http://www.gabar.org>. Go to “Committees, Programs and Sections.” Then to “Programs.” Then “Unlicensed Practice of Law.” Then “UPL Advisory Opinions.”

**UPL Advisory Opinion No. 2003-2** The preparation of a deed of conveyance is the practice of law.

**UPL Advisory Opinion No. 2004-1** The preparation of a lien by a non-lawyer is the unauthorized practice of law.

**UPL Advisory Opinion No. 2012-1** Use of a preexisting contract by a registered forester does not constitute the unauthorized practice of law.

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### Advisory Opinions of the Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia

#### UPL Advisory Opinion No. 2003-2

Issued by the Standing Committee on the Unlicensed Practice of Law on April 22, 2003. Approved by the Supreme Court of Georgia on November 10, 2003. In re UPL Advisory Opinion 2003-2, **277 Ga. 472 (2003)**.

#### **QUESTION PRESENTED**

Is the preparation and execution of a deed of conveyance (including, but not limited to, a warranty deed, limited warranty deed, quitclaim deed, security deed, and deed to secure debt) considered the unlicensed practice of law if someone other than a duly licensed Georgia attorney prepares or facilitates the execution of said deed(s) for the benefit of the seller, borrower and lender?

#### **SUMMARY ANSWER**

Yes. Under Georgia law, the preparation of a document that serves to secure a legal right is considered the practice of law. The execution of a deed of conveyance, because it is an integral part of the real estate closing process, is also the practice of law. As a general rule it would, therefore, be the unlicensed practice of law for a nonlawyer to prepare or facilitate the execution of such deeds.

#### **OPINION**

In answering the above question, the Committee looks to the law as set out “by statute, court rule, and case law of the State of Georgia.” Bar Rule 14-2.1(a). “Conveyancing,” “[t]he preparation of legal instruments of all kinds whereby a legal right is secured,” “[t]he rendering of opinions as to the validity or invalidity of titles to real or personal property,” “[t]he giving of any legal advice” and “[a]ny action taken for others in any matter connected with the law” is considered the practice of law in Georgia. O.C.G.A. §15-19-50. Moreover, it is illegal for a nonlawyer “[t]o render or furnish legal services or advice.” O.C.G.A. §15-19-51.

There are certain exceptions to these statutory provisions. For example, “no bank shall be prohibited from giving any advice to its customers in matters incidental to banks or banking...” O.C.G.A. §15-19-52. A title insurance company “may prepare such papers as it thinks proper or necessary in connection with a title which it proposes to insure, in order, in its opinion, for it to be willing to insure the title, where no charge is made by it for the papers.” *Id.* Nonlawyers may examine records of title to real property, prepare abstracts of title, and issue related insurance. O.C.G.A. §15-19-53. O.C.G.A. §15-19-54 allows nonlawyers to provide attorneys with paralegal and clerical services, so long as “at all times the attorney receiving the information or services shall maintain full professional and direct responsibility to his clients for the information and services received.”

In addition to the acts of the Georgia legislature, the Supreme Court of Georgia has made it clear that the preparation of deeds constitutes the practice of law, and is to be undertaken on behalf of another only by a duly qualified and licensed Georgia attorney.

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### Advisory Opinions of the Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia

For example, the Court has issued the Rules Governing Admission to the Practice of Law in Georgia. Under Part E of those rules, an individual can be licensed as a “foreign law consultant,” and thereby be authorized to “render legal services and give professional legal advice on, and only on, the law of the foreign country in which the foreign law consultant is admitted to practice....” Since such an individual has not been regularly admitted to the State Bar of Georgia, the Court prohibits foreign law consultants from providing any other legal services to the public. For purposes of this discussion, it is noteworthy that Part E, §2(b) states that a foreign law consultant may not “prepare any deed, mortgage, assignment, discharge, lease, trust instrument, or any other instrument affecting title to real estate located in the United States of America.”

The Committee concludes that, with the limited exception of those activities expressly permitted by the Georgia legislature or courts, the preparation of deeds of conveyance on behalf of another within the state of Georgia by anyone other than a duly licensed attorney constitutes the unlicensed practice of law.

The Committee turns its attention to the execution of deeds of conveyance. Pro se handling of one’s own legal affairs is, of course, entirely permissible, and there is nothing in Georgia law to “prevent any corporation, voluntary association, or individual from doing any act or acts set out in Code Section 15-19-50 to which the persons are a party....” O.C.G.A. §15-19-52. The Committee instead focuses on “notary closers,” “signing agents,” and others who are not a party to the real estate closing, but nonetheless inject themselves into the closing process and conduct, for example, a “witness only closing.” A “witness only closing” is one in which an individual presides over the execution of deeds of conveyance and other closing documents, but purports to do so merely as a witness and notary, not as someone who is practicing law.

The Supreme Court of Georgia periodically issues advisory opinions relating to attorney conduct. Under Court rule, such opinions have “the same precedential authority given to the regularly published judicial opinions of the Court.” Bar Rule 4-403(e). It would be proper, then, for the Committee to turn to any relevant advisory opinions for guidance.

In Formal Advisory Opinion 86-5, the Supreme Court of Georgia interpreted the word “conveyancing” as set out in O.C.G.A. §15-19-50, and considered what the term meant in relation to the closing of a real estate transaction. The Court viewed a real estate closing “as the entire series of events through which title to the land is conveyed from one party to another party....” That being the case, the Court concluded “it would be ethically improper for a lawyer to aid nonlawyers to ‘close’ real estate transactions,” or for a lawyer to “delegate to a nonlawyer the responsibility to ‘close’ the real estate transaction without the participation of an attorney.”

In Formal Advisory Opinion 00-3, the Court restated its view that the real estate closing is a continuous, interconnected series of events. The Court made it clear that, in order for an attorney to avoid possible disciplinary sanctions for aiding a nonlawyer in the unauthorized practice of law, “[t]he lawyer must be in control of the closing process from beginning to end. The supervision of the paralegal must be direct and constant.” The Court held that “[e]ven though the paralegal may state that they are not a lawyer and is

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### Advisory Opinions of the Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia

not there for the purpose of giving legal advice, circumstances may arise where one involved in this process as a purchaser, seller or lender would look to the paralegal for advice and/or explanations normally provided by a lawyer. This is not permissible.” A lawyer who aids a nonlawyer in the unauthorized practice of law can be disbarred. Georgia Rule of Professional Conduct 5.5.

The Committee finds that those who conduct witness only closings or otherwise facilitate the execution of deeds of conveyance on behalf of others are engaged in the practice of law. As noted above, “conveyancing” is deemed to be the practice of law, and the very purpose of a deed is to effectuate a conveyance of real property. In reviewing the foregoing opinions of the Supreme Court of Georgia, the Committee concludes that the execution of a deed of conveyance is so intimately interwoven with the other elements of the closing process so as to be inseparable from the closing as a whole. It is one of “the entire series of events through which title to the land is conveyed from one party to another party.” To view the execution of a deed of conveyance as something separate and distinct from the other phases of the closing process--and thus as something other than the practice of law--would not only be forced and artificial, it would run counter to the opinions of the Court. Such an interpretation would mean that a nonlawyer could lawfully preside over the execution of deeds of conveyance, yet an attorney who allowed an unsupervised paralegal to engage in precisely the same activity could be disbarred. An interpretation of Court opinions that leads to such an incongruous result cannot be proper. Rather, the view consistent with those opinions is that one who facilitates the execution of deeds of conveyance is practicing law.

Accordingly, the Committee concludes that, subject to any relevant exceptions set out by the Georgia legislature or courts, one who facilitates the execution of a deed of conveyance on behalf of another within the state of Georgia is engaged in the practice of law. One does not become licensed to practice law simply by procuring a notary seal. A Georgia lawyer who conducts a witness only closing does not, of course, engage in the unlicensed practice of law. There may well exist, however, professional liability or disciplinary concerns that fall outside the scope of this opinion.

Refinance closings, second mortgages, home equity loans, construction loans and other secured real estate loan transactions may differ in certain particulars from purchase transactions. Nevertheless, the centerpiece of these transactions is the conveyance of real property. Such transactions are, therefore, subject to the same analysis as set out above.

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**APPENDIX 3**  
**Advisory Opinions of the Standing Committee on the**  
**Unlicensed Practice of Law, State Bar of Georgia**

**588 S.E.2d 741**  
**277 Ga. 472**

**In re UPL ADVISORY OPINION 2003-2.**

**No. S03U1451.**  
**Supreme Court of Georgia.**  
**November 10, 2003.**  
**Reconsideration Denied December 12, 2003.**

William P. Smith, III, Counsel, State Bar, Robert E. McCormack, III, Asst. Gen. Counsel, State Bar of GA; Holland & Knight, LLP, Harold T. Daniel, Jr., Atlanta; Dennis P. Helmreich, Lexington, for State Bar of Georgia.

Sutherland, Asbill & Brennan, Atlanta, Teresa W. Roseborough, Allegra L. Lawrence, Deborah M. Danzig, Dara L. Steele-Belkin, James M. Griffin, John P. Fonte, Richard H. Johnston, Edward F. Glynn, Jr., Ronald M. Jacobs, amici curiae.

PER CURIAM.

We granted the State Bar of Georgia's petition for discretionary review to consider the opinion of the Standing Committee on the Unlicensed Practice of Law that the preparation and execution of a deed of conveyance on behalf of another and facilitation of its execution by anyone other than a duly licensed Georgia attorney constitutes the unauthorized practice of law. UPL Advisory Opinion No. 2003-2 (April 22, 2003).<sup>1</sup> See State Bar Rule 14-9.1(g)(3) (authorizing [277 Ga. 473] this Court to grant petition for discretionary review or review an opinion on its own motion). Because we agree with the UPL Standing Committee that only a licensed Georgia attorney may prepare or facilitate the execution of a deed of conveyance, we approve UPL Advisory Opinion No. 2003-2. It is well established that this Court has the inherent and exclusive authority to govern the practice of law in Georgia, including jurisdiction over the unlicensed practice of law. Eckles v. Atlanta Tech. Group, 267 Ga. 801, 804(2), 485 S.E.2d 22 (1997). See also GRECAA Inc. v. Omni Title Svcs., 277 Ga. 312, 588 S.E.2d 709 (2003); Huber v. State, 234 Ga. 357, 359, 216 S.E.2d 73 (1975); State Bar Rule 14-1.1. In this regard, we have issued formal advisory opinions which confirmed that a lawyer cannot delegate responsibility for the closing of a real estate transaction to a non-lawyer and required the physical presence of an attorney for the preparation and execution of a deed of conveyance (including, but not limited to, a warranty deed, limited warranty deed, quitclaim deed, security deed, and deed to secure debt). In other words, we have consistently held that it is the unauthorized practice of law for someone other than a duly-licensed Georgia attorney to close a real estate transaction or to prepare or facilitate the execution of such deed(s) for the benefit of a seller, borrower, or lender. [588 S.E.2d 742] See, e.g., Formal Advisory Op. No. 86-5 (86-R9) (May 12, 1989); Formal Advisory Op. No. 00-3 (Feb. 11, 2000).

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### Advisory Opinions of the Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia

The proponents of lay conveyancing,<sup>2</sup> or witness-only closings,<sup>3</sup> urge this Court to overturn UPL Advisory Opinion No. 2003-2 because, they contend, requiring the services of Georgia lawyers for real estate closings and the execution of deeds of conveyances needlessly harms the public interest by increasing price and decreasing choice for consumers. Recognizing that adherence to the public interest is “the foremost obligation of the practitioner,” First Bank & Co. v. Zagoria, 250 Ga. 844, 845, 302 S.E.2d 674 (1983), as it distinguishes a professional service from a purely commercial enterprise, we continue to believe that the public interest is best protected when [277 Ga. 474] a licensed Georgia attorney, trained to recognize the rights at issue during a property conveyance, oversees the entire transaction. If the attorney fails in his or her responsibility in the closing, the attorney may be held accountable through a malpractice or bar disciplinary action. In contrast, the public has little or no recourse if a non-lawyer fails to close the transaction properly. It is thus clear that true protection of the public interest in Georgia requires that an attorney licensed in Georgia participate in the real estate transaction.

Although it is within this Court’s exclusive authority to determine the scope of the practice of law, we note that since at least 1932 it has been the statutory policy in the State of Georgia that only attorneys properly licensed in Georgia are authorized to close real estate transactions. See O.C.G.A. § 15-19-50 (practice of law includes conveyancing, preparation of legal instruments of all kinds whereby legal right is secured, rendering of opinions as to the validity or invalidity of titles to real or personal property, and giving of any legal advice). See also Ga. Bar Assn. v. Lawyers Title Ins. Corp., 222 Ga. 657, 151 S.E.2d 718 (1966). Although the language of this statute does not control the practice of law in Georgia, we find it is “in aid of the judiciary [in the performance of its] function[s],” Huber, 234 Ga. at 360, 216 S.E.2d 73, and is consistent with our holding that only an attorney duly licensed in this State can prepare and facilitate the execution of a deed of conveyance. This policy was enacted and continues to exist for the benefit of the public and we are unpersuaded that the time has come to change the policy with regard to lay conveyances or witness-only closings. Accordingly, we hereby approve UPL Advisory Opinion No. 2003-2.

UPL Advisory Opinion approved.

All the Justices concur.

Notes:

1. State Bar Rule 14-9.1(b) empowers the Standing Committee on the Unlicensed Practice of Law to address inquiries regarding the unauthorized practice of law.
2. “Lay conveyancing,” authorized by statute in some states, is generally defined as the practice by which non-lawyers close real estate transactions, provide settlement services, or select, prepare and complete certain real estate closing documents. See Va.Code Ann. § 6.1-2.19 (2003) (consumer protection statute authorizing lay settlement services); Colo.Rev.Stat. § 38-35-125 (2002) (recognizing authority of non-lawyers to close real estate transactions); Minn.Stat. § 481.02 (2002) (exempting non-lawyer real estate closings from statutory definition of unauthorized practice of law). In Georgia,

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### Advisory Opinions of the Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia

non-lawyers may conduct pro se those transactions set out in O.C.G.A. § 15-19-50 and to which they are a party.

3. “Witness-only closings” occur when notaries, signing agents and other individuals who are not a party to the real estate closing preside “over the execution of the deeds of conveyance and other closing documents, but purport to do so merely as a witness and notary, not as someone who is practicing law.” UPL Advisory Opinion No. 2003-2, p. 5.

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#### UPL Advisory Opinion No. 2004-1

Issued by the Standing Committee on the Unlicensed Practice of Law on August 6, 2004. Note: This opinion is only an interpretation of the law, and does not constitute final action by the Supreme Court of Georgia. Unless the Court grants review under Bar Rule 14-9.1(g), this opinion shall be binding only on the Standing Committee on the Unlicensed Practice of Law, the State Bar of Georgia, and the petitioner, and not on the Supreme Court of Georgia, which shall treat the opinion as persuasive authority only.

#### **QUESTION PRESENTED**

Is the preparation or filing of a lien considered the unlicensed practice of law if it is done by someone other than the lienholder or a licensed Georgia attorney?

#### **SUMMARY ANSWER**

A nonlawyer’s preparation of a lien for another in exchange for a fee is the unlicensed practice of law. The ministerial act of physically filing a lien with a court is not the practice of law.

#### **OPINION**

There are two components to the question presented above, viz., the preparation of a lien and the filing of a lien. With regard to the latter, the Committee is of the opinion that the mere ministerial act of physically filing a lien with a court does not in itself constitute the practice of law.

As far as the preparation of a lien, the Committee looks in part to O.C.G.A. §15-19-50(3), which states that the practice of law includes “[t]he preparation of legal instruments of all kinds whereby a legal right is secured.” The Supreme Court of Georgia has recently indicated that O.C.G.A. §15-19-50(3) continues to aid the judiciary in the performance of its functions with regard to defining the practice of law in this state. In re UPL Advisory Opinion 2003-2, 277 Ga. 472, 474 (2003). See also In re UPL Advisory Opinion 2002-1, 277 Ga. 521, 522 (2004).

A lien is “a hold or claim which one person has on the property of another as a security for some debt or charge.” Waldroup v. State, 198 Ga. 144, 149 (1944). See also Miller v. New Amsterdam Cas. Co., 105 Ga. App. 174, 176 (1961). With regard to real estate, a lien encumbers title. Lincoln Log Homes Mktg., Inc., v. Holbrook, 163 Ga. App. 592, 594

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(1982). There are a variety of liens available under Georgia law. See, e.g., O.C.G.A. §44-14-320. They may vary as to the particulars of their operation, but all assert the perceived rights of the lienholder. A lien affects the status of title as to the relevant property, and is an instrument designed to secure a legal right. It follows that under O.C.G.A. §15-19-50(3) the preparation of a lien constitutes the practice of law.

During the public hearing regarding this matter, the Committee heard a presentation made by a nonlawyer business entity that prepares mechanics' and materialmen's liens for others. The customer provides the company with relevant background information, and the company performs a title search, prepares a legal description of the property, and inserts the description into the lien document. The company then prints the lien, files it with the appropriate court, and provides notice to the property owner. According to the company, its employees do not provide legal advice to the customer. The company claims that this activity is not the practice of law, notwithstanding the existence of O.C.G.A. §15-19-50(3).

The company first asserts that its activity is essentially tantamount to performing a title search and preparing an abstract of title, an activity allowed by O.C.G.A. §15-19-53. An abstract of title "should be a complete showing in more or less abbreviated form of all instruments appearing of record in any way affecting the title, either adversely or beneficially...." 3 Hinkel, Pindar's Georgia Real Estate Law and Procedure, §26-7, p. 44 (6th ed. 2004). In the Committee's view, it is not proper to equate a title search or abstract of title with a lien. As noted above, an abstract identifies a lien; it is not itself a lien. Moreover, an abstract, being a history of the title to land, is at its core a neutral, informational document. A lien, on the other hand, asserts a legal claim. Given the foregoing, it would be unreasonable to read O.C.G.A. §15-19-53 as extending to the preparation of liens.

In the alternative, the company states that its activity is allowed under O.C.G.A. §15-19-52, which does not prohibit drafting a legal instrument for another "provided it is done without fee and solely at solicitation and the request and under the direction of the person, firm, or corporation desiring to execute the instrument." The company claims that it collects a fee from its customer solely for preparing an abstract of title or providing a legal description of the property, and that it then prepares the lien free of charge.

The Committee views the latter contention as being disingenuous. Accepting such a deconstruction of the transaction would effectively eviscerate O.C.G.A. §15-19-50(3), because the nonlawyer preparer of a legal document could always claim to be charging the fee for something other than the preparation of the instrument. An interpretation of O.C.G.A. §15-19-50(3) that leads to such a result cannot be a correct one. Rather, it seems more sensible to examine the reason the customer contacted the nonlawyer document preparer, the expectations of the customer, and the ultimate product of the transaction. In the situation described above, the goal of the customer is to procure a lien, not a mere abstract of title or legal description of property. The customer in fact obtains the lien, and pays the company for its services in this regard. Under the circumstances, the transaction involves the practice of law as set out in O.C.G.A.

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§15-19-50(3), and the consequent furnishing of legal services within the meaning of O.C.G.A. §15-19-51(a)(4).

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#### **UPL Advisory Opinion No. 2012-1**

Issued by the Standing Committee on the Unlicensed Practice of Law on August 13, 2012.

Note: This opinion is only an interpretation of the law, and does not constitute final action by the Supreme Court of Georgia. Unless the Court grants review under Bar Rule 14-9.1(g), this opinion shall be binding only on the Standing Committee on the Unlicensed Practice of Law, the State Bar of Georgia, and the petitioner, and not on the Supreme Court of Georgia, which shall treat the opinion as persuasive authority only.

#### **QUESTION PRESENTED**

A consulting forester represents a landowner in the sale of his timber. The consulting forester, in the past, had an attorney draft a timber contract for the sale of timber by a different landowner. The consulting forester wants to use the same timber contract for closing of the present timber sale, and not have an attorney involved in the sale and closing of the timber sale. He proposes to merely change name of landowner, name of timber company purchaser, sales price, timber being purchased and land description where the timber is located. All of this to be done so that the sale of timber can be accomplished without timber company employing an attorney to close the timber sale. Is the consulting forester engaging in the unauthorized practice of law?

#### **SUMMARY ANSWER**

To the extent any questioned activity involves the preparation or execution of a deed of conveyance, one should look to prior opinions of the Committee and the Supreme Court of Georgia. If, however, a consulting forester's actions do not extend beyond the use of a pre-existing contract, that activity would not by itself constitute the unlicensed practice of law.

#### **OPINION**

In UPL Advisory Opinion No. 2003-2, the Committee addressed issues surrounding the preparation and execution of deeds of conveyance. That opinion was approved by the Supreme Court of Georgia. In re UPL Advisory Opinion 2003-2, 277 Ga. 472 (2003). To the extent any questioned activity related to a timber sale involves the preparation or execution of a deed of conveyance, one should consult those two opinions for guidance.

In Georgia, the licensure of registered foresters is based upon statute. O.C.G.A. §12-6-40 et seq. Such licensees are regulated by the State Board of Registration for Foresters. O.C.G.A. §12-6-42. The Board issues licenses, has the authority to discipline licensees, and has the power to seek injunctive relief when it appears that an individual or other

## APPENDIX 3

### Advisory Opinions of the Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia

entity is falsely holding himself out as a registered forester. O.C.G.A. §§12-6-52, 12-6-57 and 12-6-60. It is illegal to engage in the unlicensed practice of professional forestry. O.C.G.A. §12-6-61. “‘Professional forestry’...means any professional service relating to forestry, such as investigation, evaluation, development of forest management plans or responsible supervision of forest management, forest protection, silviculture, forest utilization, forest economics, or other forestry activities in connection with any public or private lands....” O.C.G.A. §12-6-41(2).

Registered foresters are sometimes used in connection with timber sales. To the extent the forester’s activity is analogous to that of a licensed Georgia real estate broker, the Committee is unconcerned. It notes that real estate brokerage law allows a real estate transaction broker to assist any party by “[p]roviding pre-printed real estate form contracts, leases, and related exhibits and addenda” and by “[a]cting as a scribe in the preparation of real estate form contracts, leases, and related exhibits and addenda.” O.C.G.A. §§ 10-6A-14(a)(3) and 10-6A-14(a)(4). Real estate brokers engaged by sellers, landlords and purchasers have the authority to carry out the same acts. O.C.G.A. §§10-6A-5(c), 10-6A-6(c) and 10-6A-7(c). Furthermore, it is lawful for real estate brokers “to complete listing or sales contracts or leases whose form has been prepared by legal counsel and such conduct shall not constitute the unauthorized practice of law.” O.C.G.A. §43-40-25.1. A broker completing a written offer to buy, sell or lease real property “shall include a description of the property involved, a method of payment, any special stipulations or addenda the offer requires, and, such dates as may be necessary to determine whether the parties have acted timely in meeting their responsibilities under the lease, offer, or contract.” *Id.* The Committee finds that if a registered forester engages in similar activity in relation to a timber sale, that activity does not by itself amount to the unlicensed practice of law.

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(END OF APPENDIX 3)

# STATE BAR OF GEORGIA

## Unlicensed Practice of Law

### Inquiry/Complaint Form



**YOUR NAME:** \_\_\_\_\_

**MAILING ADDRESS:** \_\_\_\_\_

Street or P.O. Box \_\_\_\_\_ City \_\_\_\_\_

State \_\_\_\_\_ Zip \_\_\_\_\_

**YOUR PHONE NUMBERS:** (W) \_\_\_\_\_ (H) \_\_\_\_\_

**NONLAWYER'S NAME:** \_\_\_\_\_

**NONLAWYER'S ADDRESS:** \_\_\_\_\_

**State why you want to file this complaint against the nonlawyer.\* Provide facts and dates relating to the alleged misconduct, and attach copies of any relevant documents.**

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\*Under Bar Rule 14-2.1(b), a nonlawyer "is an individual who is not an active member of the State Bar of Georgia. This includes, but is not limited to, lawyers admitted in other jurisdictions, law students, law graduates, applicants to the State Bar of Georgia, inactive lawyers, disbarred lawyers, and suspended lawyers during the period of suspension."

If more space is needed, attach other pages. **Please do not write on the back of this form.**

"I affirm that the information I have provided is true to the best of my knowledge."

**SIGNATURE:** \_\_\_\_\_

**DATE:** \_\_\_\_\_

**Return to: State Bar of Georgia  
Unlicensed Practice of Law Department, Suite 100  
104 Marietta Street, NW Atlanta, Georgia 30303**

**IF YOU NEED ASSISTANCE IN COMPLETING THIS FORM, OR HAVE ANY QUESTIONS PERTAINING TO THE COMPLAINT PROCESS, PLEASE CONTACT THE UPL DEPARTMENT AT (404) 527-8769 OR (800) 334-6865.**

## APPENDIX 4

### Official Code of Georgia Annotated

The following are selected sections of the Official Code of Georgia Annotated (“O.C.G.A.”), included in this appendix because they have particular relevance to the closing of residential real estate transactions.

#### 1. Title 15, Chapter 19, Article 3 Unauthorized Practice of Law (Section 15-19-50 to Section 15-19-58)

- Section 15-19-50 Practice of law defined
- Section 15-19-51 Unlawful actions for other than duly licensed attorney
- Section 15-19-52 Actions lawful if done by party to case; exceptions; banks not prohibited to give advice to customers on matters incidental to banking
- Section 15-19-53 Allowable for people other than attorneys to examine title, to issue abstracts of title, and to issue policies of insurance on title; only attorney may give legal opinion as to status of title
- Section 15-19-54 Lawful for others to assist attorneys by providing information or clerical services
- Section 15-19-55 Unlawful for others to solicit legal employment for attorney if such solicitation by attorney himself would be unlawful
- Section 15-19-56 Prohibited acts under this article deemed misdemeanors
- Section 15-19-57 Authorization for bar associations to inquire into and investigate violations of article
- Section 15-19-58 Use of injunctive relief against violations

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#### 2. Title 44, Chapter 14, Article 1 (Section 44-14-13) “Good Funds Act”

##### 1. Unauthorized Practice of Law

##### Section 15-19-50 Practice of law defined

The practice of law in this state is defined as:

(1) Representing litigants in court and preparing pleadings and other papers incident to any action or special proceedings in any court or other judicial body;

(2) Conveyancing;

## APPENDIX 4

### Official Code of Georgia Annotated

- (3) The preparation of legal instruments of all kinds whereby a legal right is secured;
- (4) The rendering of opinions as to the validity or invalidity of titles to real or personal property;
- (5) The giving of any legal advice; and
- (6) Any action taken for others in any matter connected with the law.

**HISTORY:** Ga. L. 1931, p. 191, §2; Code 1933, §9-401; Ga. L. 1937, p. 753, §1; Ga. L. 1976, p. 1511, §1.

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#### **Section 15-19-51 Unlawful actions for other than duly licensed attorney**

- (a) It shall be unlawful for any person other than a duly licensed attorney at law:
  - (1) To practice or appear as an attorney at law for any person other than himself in any court of this state or before any judicial body;
  - (2) To make it a business to practice as an attorney at law for any person other than himself in any of such courts;
  - (3) To hold himself out to the public or otherwise to any person as being entitled to practice law;
  - (4) To render or furnish legal services or advice;
  - (5) To furnish attorneys or counsel;
  - (6) To render legal services of any kind in actions or proceedings of any nature;
  - (7) To assume or use or advertise the title of “lawyer,” “attorney,” “attorney at law,” or equivalent terms in any language in such manner as to convey the impression that he is entitled to practice law or is entitled to furnish legal advice, services, or counsel; or
  - (8) To advertise that either alone or together with, by, or through any person, whether a duly and regularly admitted attorney at law or not, he has, owns, conducts, or maintains an office for the practice of law or for furnishing legal advice, services, or counsel.
- (b) Unless otherwise provided by law or by rules promulgated by the Supreme Court, it shall be unlawful for any corporation, voluntary association, or company to do or perform any of the acts recited in subsection (a) of this Code section.

**HISTORY:** Ga. L. 1931, p. 191, §1; Code 1933, §§ 9-402, 9-403.

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## APPENDIX 4

### Official Code of Georgia Annotated

#### **Section 15-19-52 Actions lawful if done by party to case; exceptions; banks not prohibited to give advice to customers on matters incidental to banking**

Nothing contained in this article shall prevent any corporation, voluntary association, or individual from doing any act or acts set out in Code Section 15-19-50 to which the persons are a party; but, in preparing and filing affidavits in attachments and prosecuting such proceedings, it shall be unlawful for the plaintiffs to act through any agent or employee who is not a duly licensed attorney at law. Moreover, no bank shall be prohibited from giving any advice to its customers in matters incidental to banks or banking; nor shall any person, firm, or corporation be prohibited from drawing any legal instrument for another person, firm, or corporation, provided it is done without fee and solely at the solicitation and the request and under the direction of the person, firm, or corporation desiring to execute the instrument. Furthermore, a title insurance company may prepare such papers as it thinks proper or necessary in connection with a title which it proposes to insure, in order, in its opinion, for it to be willing to insure the title, where no charge is made by it for the papers.

**HISTORY:** Ga. L. 1931, p. 191, §1; Code 1933, §9-401; Ga. L. 1937, p. 753, §1; Ga. L. 1976, p. 1511, §1.

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#### **Section 15-19-53 Allowable for people other than attorneys to examine title, to issue abstracts of title, and to issue policies of insurance on title; only attorney may give legal opinion as to status of title**

This article shall not prohibit a person, corporation, or voluntary association from examining the record of titles to real property, nor shall it prohibit a person, corporation, or voluntary association from preparing and issuing abstracts of title from such examination of records and certifying to the correctness of the same, nor from issuing policies of insurance on titles to real or personal property, nor from employing an attorney or attorneys in and about their own immediate affairs or in any litigation to which they are or may be a party. However, nothing contained in this Code section shall authorize any person, corporation, or voluntary association other than an attorney at law to express, render, or issue any legal opinion as to the status of the title to real or personal property.

**HISTORY:** Ga. L. 1931, p. 191, §1; Code 1933, §9-403.

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#### **Section 15-19-54 Lawful for others to assist attorneys by providing information or clerical services**

Nothing contained in this article shall be construed to prevent a person, corporation, or voluntary association from furnishing to any person lawfully engaged in the practice of law such information or clerical services in and about his professional work as would be lawful except for Code Sections 15-19-51, 15-19-53, and 15-19-55, provided that at all times the

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### Official Code of Georgia Annotated

attorney receiving the information or services shall maintain full professional and direct responsibility to his clients for the information and services received. However, no person, corporation, or voluntary association not otherwise authorized to do so shall be permitted to render any services which cannot lawfully be rendered by a person not admitted to practice law nor to solicit directly or indirectly professional employment for an attorney.

**HISTORY:** Ga. L. 1931, p. 191, §1; Code 1933, §9-404.

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#### **Section 15-19-55 Unlawful for others to solicit legal employment for attorney if such solicitation by attorney himself would be unlawful**

It shall be unlawful for any person, corporation, or voluntary association to solicit legal employment on behalf of any attorney, firm, corporation, or organization where the attorney, firm, corporation, or organization would not himself or itself be authorized to engage in such solicitation. However, nothing in this article shall be construed to prohibit a person, association, or corporation lawfully engaged in the business of conducting a mercantile or collection agency or adjustment bureau from employing an attorney at law to give legal advice concerning, or to prosecute actions in court which relate to, the adjustment or collection of debts and accounts only.

**HISTORY:** Ga. L. 1931, p. 191, §1; Code 1933, §9-405.

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#### **Section 15-19-56 Prohibited acts under this article deemed misdemeanors**

(a) Any person, corporation, or voluntary association violating Code Section 15-19-51, 15-19-53, 15-19-54, or 15-19-55 shall be guilty of a misdemeanor.

(b) Every officer, trustee, director, agent, or employee of a corporation or voluntary association who directly or indirectly engages in any of the acts prohibited in Code Section 15-19-51, 15-19-53, 15-19-54, or 15-19-55 or assists a corporation or voluntary association in performing the prohibited acts shall be guilty of a misdemeanor. The fact that the person is a duly and regularly admitted attorney at law shall not be held to permit or allow the corporation or voluntary association to do the acts prohibited in such Code sections, nor shall the fact be a defense upon the trial of any person mentioned therein for a violation of those Code sections. Nothing in this subsection shall prevent any court having jurisdiction from punishing the corporation or its officers for contempt.

**HISTORY:** Ga. L. 1931, p. 191, §1; Code 1933, §9-9903; Ga. L. 1975, p. 755, §1.

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#### **Section 15-19-57 Authorization for bar associations to inquire into and investigate violations of article**

The State Bar of Georgia, the Judicial Council of the State of Georgia, and all organized bar associations of this state are each authorized to inquire into and investigate:

- (1) Any charges or complaints of unauthorized or unlawful practice of law;
- (2) Reserved;
- (3) Any charges or complaints that any person, in violation of Code Section 15-19-55 or rules promulgated by the Supreme Court, is orally or by writing, for a consideration then or afterwards to be charged or received by himself or another, offering or tendering to another person, without the solicitation of the person, the services of an attorney at law, resident or nonresident of this state, in order for the attorney to institute an action or represent the person in the courts of this or any other state or of the United States in the enforcement or collection by law of any claim, debt, or demand of the person against another or is suggesting or urging the bringing of such action; and
- (4) Any charge or complaints that any person is engaged in the practice of seeking out and proposing to other persons that they present and urge through any attorney at law the collection of any claim, debt, or demand of such person against another.

**HISTORY:** Ga. L. 1946, p. 171, §1; Ga. L. 2007, p. 47, §15/SB 103; Ga. L. 2008, p. 324, §15/SB 455.

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#### **Section 15-19-58 Use of injunctive relief against violations**

(a) Either the State Bar of Georgia, the Judicial Council of this state, or any organized bar association of this state is authorized to institute in the proper superior court of this state an action or actions seeking injunctive relief against any person, firm, or corporation, when it determines after investigation that such person, firm, or corporation:

- (1) Is engaged in the unauthorized or unlawful practice of law;
- (2) Reserved;
- (3) In violation of Code Section 15-19-55 or rules promulgated by the Supreme Court, is orally or by writing, for a consideration then or afterwards to be charged or received by himself or another, offering or tendering to another person, without the solicitation of such other person, the services of an attorney at law, resident or nonresident of this state, in order for the attorney to institute an action or represent the person in the courts of this or any other state or of the United States in the enforcement or collection by law of any claim, debt, or demand of any such person against another or is suggesting or urging the bringing of the action; or

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(4) Is engaged in the practice of seeking out and proposing to other persons that they present and urge through any attorney at law the collection of any claim, debt, or demand of such person against another.

(b) The venue of any action authorized by this Code section shall be determined by the constitutional and statutory provisions relating to cases in equity.

(c) The hearing, interlocutory or final, and the trial of actions authorized by this Code section shall be governed by the laws of this state relating to injunctions, as shall appeals from orders or judgments therein.

(d) In any action brought under this Code section, the final judgment, if in favor of the plaintiff, shall perpetually enjoin the defendant or defendants from the commission or continuance of the act or acts complained of. Restraining orders or temporary injunctions may be granted as in other cases in which injunctive relief is sought.

(e) This Code section and Code Section 15-19-57 shall not repeal or curtail any remedy provided in cases of unauthorized or unlawful practice of law, and nothing contained in these Code sections shall be construed as abridging the powers of the courts in such matters.

**HISTORY:** Ga. L. 1946, p. 171, §§ 2-6; Ga. L. 2007, p. 47, §15/SB 103; Ga. L. 2008, p. 324, §15/SB 455.

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## 2. Good Funds Act

### Section 44-14-13 Definitions; limitations

(a) As used in this Code section, the term:

(1) “Borrower” means the maker of the promissory note evidencing the loan to be delivered at the loan closing.

(2) “Collected funds” means funds deposited, finally settled, and credited to the settlement agent’s escrow account.

(3) “Disbursement of settlement proceeds” means the payment of all proceeds of the transaction by the settlement agent to the persons entitled thereto.

(4) “Lender” means any person or entity regularly engaged in making loans secured by mortgages or deeds to secure debt on real estate.

(5) “Loan closing” means the time agreed upon by the borrower and the lender when the execution and delivery of loan documents by the borrower occurs.

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(6) “Loan documents” means the note evidencing the debt due to the lender, the deed to secure debt or mortgage securing the debt due to the lender, and any other documents required by the lender to be executed by the borrower as part of the transaction.

(7) “Loan funds” means the gross or net proceeds of the loan to be disbursed by or on behalf of the lender at the loan closing.

(8) “Party” or “parties” means the seller, purchaser, borrower, lender, and settlement agent, as applicable to the subject transaction.

(9) “Settlement” means the time when the settlement agent has received the duly executed deed to secure debt and other loan documents and funds required to carry out the terms of the contracts between the parties.

(10) “Settlement agent” means the lender or an active member of the State Bar of Georgia responsible for conducting the settlement and disbursement of the settlement proceeds.

(b) This Code section shall apply only to transactions involving purchase money loans made by a lender, or refinance loans made by the current or a new lender, which loans will be secured by deeds to secure debt or mortgages on real estate within the State of Georgia containing not more than four residential dwelling units, whether or not such deeds to secure debt or mortgages have a first-priority status.

(c) Except as otherwise provided in this Code section, a settlement agent shall not cause a disbursement of settlement proceeds unless such settlement proceeds are collected funds. A settlement agent may disburse settlement proceeds from its escrow account after receipt of any of the following negotiable instruments even though the same are not collected funds:

(1) A cashier’s check, as defined in subsection (g) of Code Section 11-3-104, from a federally insured bank, savings bank, savings and loan association, or credit union and issued by a lender for a closing or loan transaction, provided that such funds are immediately available and cannot be dishonored or refused when negotiated or presented for payment;

(2) A check drawn on the escrow account of an attorney licensed to practice law in the State of Georgia or on the escrow account of a real estate broker licensed under Chapter 40 of Title 43, if the settlement agent has reasonable and prudent grounds to believe that the check will constitute collected funds in the settlement agent’s escrow account within a reasonable period;

(3) A check issued by the United States of America or any agency thereof or the State of Georgia or any agency or political subdivision, as such term is defined in Code Section 50-15-1, of the State of Georgia; or

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(4) A check or checks in an aggregate amount not exceeding \$5,000.00 per loan closing.

For purposes of this Code section, the instruments described in paragraphs (1) through (4) of this subsection are negotiable instruments if they are negotiable in accordance with the provisions of Code Section 11-3-104.

(d) The lender shall at or before the loan closing deliver loan funds to the settlement agent in the form of collected funds or in the form of a negotiable instrument described in subsection (c) of this Code section; provided, however, that in the case of refinancing, or any other loan where a right of rescission applies, the lender shall, prior to the disbursement of the settlement proceeds and no later than 11:00 A.M. eastern standard time or eastern daylight time, whichever is applicable, of the next business day following the expiration of the rescission period required under the federal Truth in Lending Act (15 U.S.C. Section 1601, et seq.), deliver loan funds to the settlement agent in one or more of the forms set forth in this Code section.

(e) Any party violating this Code section shall be liable to any other party suffering a loss due to such violation for such other party's actual damages plus reasonable attorneys' fees. In addition, any party violating this Code section shall pay to the party suffering the loss an amount of money equal to \$1,000.00 or double the amount of interest payable on the loan for the first 60 days after the loan closing, whichever is greater.

(f) Any individual, corporation, partnership, or other entity conducting the settlement and disbursement of loan funds, when he, she, or it is not the settlement agent, shall be guilty of a misdemeanor.

(g) Nothing contained in this Code section shall prevent a real estate broker or real estate salesperson from exercising the rights and providing the duties and services specified by Chapter 40 of Title 43.

**HISTORY:** Code 1981, §44-14-13, enacted by Ga. L. 1990, p. 1653, §1; Ga. L. 2008, p. 796, §1/SB 355; Ga. L. 2012, p. 1099, §15/SB 365.

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(END OF APPENDIX 4)

**APPENDIX 5**  
**Georgia Case Law**

The following are selected Georgia case reports, included in this appendix because they have particular relevance to the closing of residential real estate transactions.

1. Boykin, Solicitor General v. Hopkins et al., 174 Ga. 511, 162 S.E. 796 (1932).
2. Sharp-Boylston Co. et al. v. Haldane, 182 Ga. 833, 187 S.E. 68 (1936).
3. Georgia Bar Association v. Lawyers Title Insurance Corporation, 222 Ga. 657, 151 S.E.2d 718 (1966).

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174 Ga. 511  
162 S.E. 796

174 Ga. 511  
Supreme Court of Georgia.  
BOYKIN, Solicitor General,  
v.  
HOPKINS et al.  
No. 8430.

Feb. 25, 1932.

\*796 Syllabus by the Court.

“Practice of law” prior to 1931 included giving advice or rendition of any service requiring legal knowledge or skill (Civ. Code 1910, §§ 4932, 4940, 4941; Laws 1916, p. 76).

The scope of the “practice of law” before the enactment of Acts 1931, p. 191 et seq., defining practice of law, was not confined to practice in the courts, but included preparation of pleadings and other papers incident to action or special proceeding, conveyancing, preparation of legal instruments whereby legal right is secured, rendering of opinions as to validity or invalidity of title, the giving of legal advice, and any action taken for others in any matter connected with the law.

Courts cannot grant charters authorizing corporations to practice law whether within or outside courts (Civ. Code 1910, § 2823, as amended, and §§ 4930-4935, 4940, 4942, 4945; Laws 1916, p. 76).

Application for charter authorizing corporation to render legal advice, give opinions on titles, furnish briefs, act as attorney in fact, prepare pleadings, wills, etc., should be denied as authorizing “practice of law” (Civ. Code 1910, § 2823, as amended, and §§ 4930-4935, 4940, 4942, 4945; Laws 1916, p. 76).

1. The decision of this court in Atlanta Title & Trust Co. v. Boykin, 172 Ga. 437, 157 S. E. 455, is not authority for the proposition that the superior courts of this state, under the Civil Code 1910, § 2823, as amended, can grant a charter to a corporation authorizing it to practice law in this state.

2. Under the provisions of the Civil Code of 1910, the practice of law is not confined to practice in the courts of this state.

3. The practice of law, as that term is commonly used, embraces much more than the conduct of litigation. The greater, more responsible, and delicate part of a lawyer’s work is in other directions. Practicing law, according to the laws and customs of courts, is the giving of advice or rendition of any sort of service when the giving of such advice or rendition of such service requires the use of legal knowledge or skill.

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4. The superior courts of this state are not clothed with authority and jurisdiction, under the Civil Code of 1910, § 2823, as amended, to grant charters which authorize corporations to practice law in this state in any of its branches, whether the practice is confined to the courts or out of the courts.

5. The charter applied for, if granted, would confer upon the corporation the power to practice law.

6. The judge erred in refusing to grant the interlocutory injunction prayed for.

#### Synopsis

Error from Superior Court, Fulton County; Virlyn B. Moore, Judge.

Suit by John A. Boykin, Solicitor General of the Atlanta Judicial Circuit, against J. G. Hopkins and another to enjoin defendants from prosecuting application for charter. Petitioner's application for interlocutory injunction was denied, and petitioner brings error.

Reversed.

ATKINSON and HILL, JJ., dissenting.

#### Attorneys and Law Firms

Bond Almand, Elbert P. Tuttle, Henry A. Beaman, William G. Grant, Stephens Mitchell, and Madison Richardson, all of Atlanta, for plaintiff in error.

George G. Finch and F. L. Breen, both of Atlanta, for defendants in error.

#### Opinion

HINES, J.

Joseph G. Hopkins and Frank C. Crawley filed in Fulton superior court their petition in which they prayed to be incorporated as "Legal Services Incorporated." The application for charter was brought under the Civil Code of 1910, § 2823, as amended, which provides that "the superior courts of this State shall \*797 have power to create corporations, except for banking, insurance, railroad, trust, canal navigation, express, and telegraph companies, by compliance with" the provisions embraced in said section. Petitioners prayed that the right be granted to the corporation to "(a) Prepare abstracts of titles to real property. (b) Render legal advice on all matters on questions of law. (c) Render opinions as to the validity or invalidity of titles to real or personal property. (d) Prepare and furnish its customers, when requested by them, briefs on any and all questions of law. (e) Act as attorney in fact for the settlement or adjustment of any and all claims of any nature, including personal injury, property damage, and/or collection of accounts. (f) Act as attorney in fact for its customers in procuring competent attorneys at law to represent such customers in any court or before any judicial body in this State in

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any contested or uncontested case or matter pending before such court or judicial body, when an attorney at law is necessary. (g) Prepare or draw any petition, answer, demurrer, plea, or other pleadings, order, appearance, or response of any sort to be filed in court by such customer. (h) Prepare or draw any will, trust agreement, deed, conveyance, or other legal instrument whereby rights or property is conveyed or secured to the parties to such instrument. (i) Furnish legal advice or legal services in connection with matters pertaining to the law, or to render such services or give such advice as to the law, where such contract for said services does not require an appearance in court. (j) Acquire and dispose of real estate.” The Solicitor General of the Atlanta judicial circuit, acting for and on behalf of the state on relation of Bond Almand and others, instituted an action against the petitioners for charter, in which he alleged that they were causing the application for said charter to be advertised; that the state is interested in the allowance of the proposed charter; and that each of the acts, which it is sought to confer upon such corporation the right to do, constitutes the practice of law, which cannot lawfully be performed by a corporation. The Solicitor General prayed that the incorporators be enjoined from further prosecuting said application for charter, in so far as it relates to the powers designated above as paragraphs (a), (b), (c), (d), (e), (f), (g), (h), and (i).

The defendants filed an answer in which they denied that the acts enumerated in their application for charter constitute the practice of law. The judge denied the application for an interlocutory injunction, upon the ground that, under the decision in Atlanta Title & Trust Co. v. Boykin, 172 Ga. 437, 157 S. E. 455, 458, the restrictions as to the practice of law imposed under the various Code sections of this state refer to the practice of law in the courts. To this ruling and judgment the Solicitor General excepted.

[1] 1. The first question for our determination is whether the above decision of this court is authority for the proposition that the practice of law in this state is confined to practice in its courts. In other words, is that decision authority for the proposition that any person, natural or artificial, can perform acts which constitute the practice of law, if such acts are not done or performed in the courts of this state, but are done or performed outside of such courts? If the statement of the justice who wrote the opinion in that case, as to what constitutes the practice of law, was concurred in by a majority of the justices of this court, it would be authority therefor. This statement was not concurred in by a majority of the justices of this court. The Chief Justice dissented, and Justice Gilbert concurred specially, and the writer concurred only in the result. So there were only three justices who can be said to have concurred in the statement upon this subject expressed by Justice Atkinson that “the restrictions upon the right to practice law refer to practice in the courts,” and in effect do not extend to any legal matters performed outside of the courts. In that case the question was whether or not the charter of the Atlanta Title & Trust Company could be so amended as to confer upon that corporation the power “to prepare any and all papers in connection with conveyance of real and/or personal property that it may be requested to prepare by a customer.” The Solicitor General and counsel associated with him therein insisted that the amendment sought by the title company, if allowed, would confer upon that company the right to practice law. The Chief Justice was of the opinion that the amendment would confer upon the title company the right to practice law; and for this reason he did not agree to the opinion or the result reached in that case. Justice Gilbert

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(as the writer understood) and the writer were of the opinion that the power to prepare any and all papers connected with the conveyance of real and personal property, which the title company might be requested to prepare by a customer, referred to the performance of mere clerical work, and did not constitute the practice of law. So the Chief Justice, Justice Gilbert, and the writer did not agree to the narrow and limited definition of what constitutes the practice of law, as was announced by Justice Atkinson in the opinion he wrote in that case. At the time the court had under consideration the decision in that case, the writer vigorously protested against the definition of what constitutes the practice of law, as given by Justice Atkinson in his opinion. The writer's opinion was, and still is, that the definition of what constitutes the practice of law as announced by Justice Atkinson in that case was too limited and narrow. Besides, the decision in that case was by a majority only of the court, and therefore is not binding as a precedent. We are strongly \*798 and decidedly of the opinion that the practice of law is not confined to practice only in the courts of this state.

2. At the time the decision was rendered in the case to which we have referred, and at the time the judgment was rendered in the case which we now have under consideration, the Legislature of this state had never undertaken to define what constitutes the practice of law in this state. It is true that the Civil Code, § 4930, declares that persons who had been regularly licensed under the laws of this state before the adoption of the Code, and those who are thereafter licensed in the manner prescribed by law, are entitled to practice law in the courts of this state. It is likewise true that section 4931 declares that persons who are admitted to practice in the superior courts may practice in any other court of this state, except the Supreme Court, for which another and special license must be obtained. From these statutes Justice Atkinson drew the conclusion that the practice of law in this state is confined to practice alone in the courts of this state. The Legislature, in passing the statutes now embodied in these Code sections, was not dealing with the formulation of a definition of what then constituted the practice of law in this state. It was not the legislative purpose to define the practice of law in this state, but the Legislature only intended to declare who were entitled to practice in the courts of this state. The purpose of these statutes is simply to define who could practice law in the various courts of this state. This is shown by other statutes passed by the Legislature. The Civil Code, § 4932, declares that "any male citizen, of good moral character, who has read law and undergone a satisfactory examination as hereinafter prescribed, is entitled to plead and practice law in this State." This section does not limit the right to practice law to practice in the courts of this state alone; but confers the right to practice law generally in this state. So the act of 1916 (Acts 1916, p. 76), amending that section, provides that "female citizens shall be admitted to the practice of law in this State upon the same terms and qualifications as now apply to male citizens." Here the right to practice law in this state is not limited to practice in the courts. So section 4933 provides that "aliens who have been two years resident in the State \*\*\* are eligible to admission as attorneys at law." Each applicant for admission to practice law in this state is required to submit to an examination in writing, which must be prepared by the board of examiners, covering all the topics and subjects, a knowledge of which is, under existing laws, requisite to admission to the bar. This board is required to pass upon the merits of each examination, and is required to determine whether the applicant is qualified "to plead and practice in the several courts of this State other than

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the Supreme Court.” Civil Code 1910, § 4940. It may be said that the language, “to plead and practice in the several courts of this State,” by implication defines what constitutes the practice of law in this state; but, for the reasons hereinbefore given, this provision of the law was never intended by the Legislature to define what constitutes the practice of law in this state. This is shown by the provision of this law that all persons who have successfully passed the examination, and have obtained a certificate from the board of examiners to that effect, “may be duly licensed to practice law in this State upon taking the oath now provided by law, and may receive a license to practice.” Civil Code 1910, § 4941. Here the license is not confined to practice in the courts of this state; but the successful applicant is “licensed to practice law in this State.” So we reach the conclusion that there is nothing in the statutes of this state, relating to the admission of attorneys to the bar and providing for the grant of licenses to them to practice law, which limits the right to practice solely to proceedings had in the courts of this state.

3. We come now to consider and determine what constituted the practice of law in this state at the time the application was made for the grant of the charter involved in this case, and what constituted the practice of law in this state prior to the act of August 7, 1931 (Acts 1931, p. 191 et seq.), which now defines the practice of law in this state. We deem it necessary to determine what then constituted the practice of law, for the reason that the charter with which we are dealing was sought prior to the adoption of the above act. If this charter undertakes to authorize this corporation to practice law within the meaning of that term as it was understood at the date of the filing of the application for its grant, there was no authority of law for the grant thereof; and an order incorporating this company would be void so far as it undertook to confer upon it the power to practice law. As we have undertaken to show, no statute was passed in this state which undertook to define the practice of law, prior to the above Act of August 7, 1931; and to determine what constituted the practice of law prior to the passage of that act we must look to the general law of force in this state at that time. In Bird v. Breedlove, 24 Ga. 623, this court held that there was no law in this state which restricted to attorneys at law the business of attending to applications for pardons. No authority was cited by the court to sustain this proposition, which was based upon the fact that the court knew of no law so restricting this business. Giving full effect to this decision, there is nothing therein which would authorize the grant of this charter, which, as we shall undertake hereafter to show, expressly confers upon the corporation the right to practice law, if the same were \*799 granted. In that case this court did not undertake to define what constituted the practice of law. We shall now undertake to do so.

The practice of law is not limited to the conduct of cases in court. State v. Richardson, 125 La. 644, 51 So. 673. “In a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts, by which legal rights are secured, although such matter may or may not be depending in a court.” 49 C. J. 1313 (section 5) 4; Eley v. Miller, 7 Ind. App. 529, 34 N. E. 836. So, where the business of a solicitor was carried on under the name of a qualified person, but under an arrangement by which the solicitor was in fact the employee of another person who was unqualified to practice, and the latter attended summonses at chambers and did other professional work without the solicitor’s direct authority, it was held that he was acting as a solicitor without having been

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admitted or qualified. Abercrombie v. Jordan, 8 Q. B. D. (Eng.) 187, 30 W. R. 810. To the same effect is In re Simmons, 15 Q. B. D. (Eng.) 348, 33 W. R. 706. So in a case wherein it was shown that the proceedings in a suit, such as the suing out of the writ, declaration, etc., were taken under the name of Davis and Plasted, and that their names were on all the papers and notices in the cause, it was held that the defendant Davis had held himself out as an attorney in the cause, and was liable to the penalty for practicing as an attorney without having entered his certificate, although it was shown by the terms of the partnership that Plasted was to have to himself all the profits of the business arising from his own connection, that the action in question was prosecuted by him for his own benefit only, and that the defendant derived no advantage from it whatever. Edmondson v. Davis, 4 Esp. (Eng.) 14. A suspended attorney cannot procure the issuance of process on behalf of a principal. Cobb v. Judge, 43 Mich. 289, 5 N. W. 309; Paul v. Purcell, 1 Browne (Pa.) 348. Any advice given to clients, or action taken for them, in matters not connected with the law, is practicing law; and therefore it is practicing law to give advice as to the rights of a person admitted to the chain gang for a failure to pay a fine, and to undertake to procure the acceptance of the fine and the release of such person. In re Duncan, 83 S. C. 186, 65 S. E. 210, 211, 24 L. R. A. (N. S.) 750, 18 Ann. Cas. 657. In that case the Supreme Court of South Carolina said: "It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings, and other papers incident to actions and special proceedings \*\*\* on behalf of clients before judges and courts, and, in addition, conveyancing, the preparation of legal instruments of all kinds, and, in general, all advice to clients, and all action taken for them in matters connected with the law. An attorney at law is one who engages in any of these branches of the practice of law."

The decision in the case just cited was followed in Re Pace, 170 App. Div. 818, 824, 156 N. Y. S. 641. The New York court fully adopted and approved the definition of what constitutes the practice of law as laid down by the Supreme Court of South Carolina. "The practice of the law,' as the term is now commonly used, embraces much more than the conduct of litigation. The greater, more responsible, and delicate part of a lawyer's work is in other directions. Drafting instruments creating trusts, formulating contracts, drawing wills and negotiations, all require legal knowledge and power of adaptation of the highest order. Besides these employments, mere skill in trying lawsuits where ready wit and natural resources often prevail against profound knowledge of the law, is a relatively unimportant part of the lawyer's work." People v. Title Guarantee, etc., Co., 180 App. Div. 648, 168 N. Y. S. 278, 280.

It is common knowledge that a larger, if not the greater, part of the work of the bar to-day is out of court, or office work. People v. Alfani, 227 N. Y. 334, 125 N. E. 671. The drafting and supervising of the execution of wills has been held to constitute practicing law. People v. People's Trust Co., 180 App. Div. 494, 167 N. Y. S. 767. So it has been held that a collection agency which undertakes to furnish legal services where they may be necessary is engaged in the practice of law. In re Co-Operative Law Co., 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879. The practice of law involves, not only appearance in court in connection with litigation, but also

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services rendered out of court. "In litigated matters it involves not only the actual representation of the client in court, but also services rendered in advising a client as to his cause of action or defense. The practice of law also includes the giving of advice or rendering services requiring the use of legal skill or knowledge." People v. People's Stock Yards State Bank, 344 Ill. 462, 176 N. E. 901, 907. In the case just cited, the following definition of practicing law was approved: "Practicing as an attorney or counselor at law, according to the laws and customs of our courts, is the giving of advice or rendition of any sort of service by any person, firm, or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill." The practice of law is not limited to the conduct of cases in court, but embraces the preparation of pleadings and other legal papers \*800 and conveyances, and the giving of advice in matters connected with the law, and includes representing a creditor in bankruptcy proceedings, or in the collection of a claim against one who has made a general assignment for the benefit of creditors. Meisel & Co. v. National Jewelers' Board of Trade, 90 Misc. Rep. 19, 152 N. Y. S. 913. The definition of what constitutes the practice of law as laid down by the Supreme Court of South Carolina in Re Duncan, *supra*, was approved and followed in Barr v. Cardell, 173 Iowa, 18, 155 N. W. 312.

So we are of the opinion that the practice of law, at the time the application for charter in this case was made, was not confined to practice in the courts of this state, but was of larger scope, including the preparation of pleadings and other papers incident to any action or special proceeding in any court or other judicial body, conveyancing, the preparation of all legal instruments of all kinds whereby a legal right is secured, the rendering of opinions as to the validity or invalidity of the title to real or personal property, the giving of any legal advice, and any action taken for others in any matter connected with the law. The application for charter with which we are dealing was made under the Civil Code, § 2823, as amended, and under that section the court is without authority to grant the charter, unless it is "satisfied that the application is legitimately within the purview and intention of this Code." Clearly this application was not legitimately within the purview and intention of the Code, or of any other law which was of force at the time this charter was applied for. By no stretch of the imagination can it be held that it was the intent and purpose of the framers of the law embraced in this section to authorize thereunder the grant of charters to corporations to practice law.

[2] 4. Are the superior courts of this state clothed with authority and jurisdiction, under the Civil Code, § 2823, as amended, to grant charters which authorize corporations to practice law in this state? Those persons who were regularly licensed under the laws of this state before the adoption of the Code, and those who thereafter have been licensed in the manner prescribed by law, are entitled to practice law in the courts of this state. Civil Code 1910, § 4930. Any citizen, male or female, of good moral character, who has read law and undergone a satisfactory examination, as provided by law, is entitled to plead and practice law in this state. Section 4932; Acts 1916, p. 76. Aliens, who have been two years resident in this state, and declared their intention to become citizens, pursuant to the act of Congress, are eligible to admission as attorneys at law. Section 4933. Each person desiring to become a member of the bar of this state shall make a written application to a judge of any superior court, accompanying the application with a

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certificate from two practicing members of the bar of this state as to his moral character. Section 4934. The applicant must be examined touching his knowledge of the principles of the common and statute law in England of force in this state, of the law of pleadings and evidence, of the principles of equity and equity pleadings and practice, and of the Revised Code of this state, the Constitution of the United States and of this state, and of the rules of practice in superior courts. Section 4935. Every applicant, except as provided in section 4942, shall submit to examination in writing, which shall be prepared by the board of examiners, covering all the topics and subjects a knowledge of which is, under the laws, requisite to admission to the bar. This board shall pass upon the merits of each examination, and determine whether the applicant is or is not qualified to plead and practice in the several courts of this state, other than the Supreme Court. Section 4940. No person shall be admitted to the practice of law in this state except under the examination by the board of examiners as hereinbefore stated. Section 4942. Before admission to the bar, each applicant must take an oath that he will justly and uprightly demean himself according to the laws, as an attorney, counselor, and solicitor, and that he will support and defend the Constitution of the United States and the Constitution of this state. Section 4945.

Any person who does not comply with the foregoing requirements and does not take the oath required cannot be licensed to practice law in this state. It is manifest from these provisions of the law that no corporation can be licensed to practice law in this state. No corporation can comply with the requirements which are imposed upon applicants as prerequisites to enable them to obtain license to practice law. This proposition is sustained by the great weight, if not all, of the decisions of the courts of the other states in this country. These decisions deny the eligibility of corporations to practice law. Ruling Case Law states the proposition thus: "Since, as has been seen, the practice of law is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts, and as these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in." 2 R. C. L. 946, § 13. As a corporation cannot perform the conditions which are requisite to acquire a license to practice law, "it follows that the practice of law is not a lawful business for a corporation to engage in." 6 C. J. 569 (section 11)B; 14A. C. J. 296 (section 2145). In *Re Co-Operative Law Co.*, 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879, the New York \*801 Court of Appeals held that "a corporation for the practice of law is not authorized by a statute permitting the organization of a corporation for any lawful business, since the practice of the law is not a lawful business except for members of the bar, who have complied with all the conditions required by statute and the rules of the courts; and a corporation cannot perform the conditions." The court in that case said: "The right to practice law is in the nature of a franchise from the state, conferred only for merit. It cannot be assigned or inherited, but must be earned by hard study and good conduct. \*\*\* No one can practice law unless he has taken an oath of office and has become an officer of the court, subject to its discipline, liable to punishment for contempt for violating his duties as such, and to suspension or removal. It is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts. As these conditions cannot be performed by a corporation, it follows

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that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot indirectly, by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate.”

The court further said: “The bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest member became subject to the orders of a money-making corporation engaged not in conducting litigation for itself, but in the business of conducting litigation for others. The degradation of the bar is an injury to the state. A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it, any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it.” In Re Pace, *supra*, it was held that “it is unlawful for a corporation, whether domestic or foreign, to practice law in this State, and any member of our bar who assists a corporation in violating the law in this respect is himself guilty of wrongdoing.” It is true that in the case just cited there was a statute making it unlawful for a corporation to practice as an attorney at law; but the court said: “Quite apart from the statute it is, and was before the statute, against public policy and also *malum in se*” for a corporation to practice law.

Corporations, being artificial persons, cannot practice law. New Jersey Photo Eng. Co. v. Schonert, 95 N. J. Eq. 12, 122 A. 307; Black & White Operating Co., Inc., v. Grosbart, 107 N. J. Law, 63, 151 A. 630. In People v. Cal. Protective Corp., 76 Cal. App. 354, 244 P. 1089, it was held that a “corporation can neither practice law nor hire lawyers to carry on business of practicing law for it, notwithstanding members forming it are authorized to practice law, and although Civ. Code, § 286, permits formation of corporations for any purpose for which individuals may lawfully associate themselves.” In People v. Merchants’ Protective Corp., 189 Cal. 531, 209 P. 363, it was held that a statute of California, providing that private corporations may be formed for any purposes for which individuals may lawfully associate themselves, does not authorize the organization of a corporation to practice law, as individuals cannot so practice law without a special license. A corporation cannot itself practice law, nor can it lawfully do so by hiring an attorney to conduct a general law practice for others for pay, where the fees earned are to be and are received as income and profit by the corporation. In *re Otterness*, 181 Minn. 254, 232 N. W. 318, 73 A. L. R. 1319. In Re Eastern Idaho Loan & Trust Co., 49 Idaho, 280, 288 P. 157, 73 A. L. R. 1323, the Supreme Court of Idaho decided that a corporation could not perform any act which amounted to the practice of law, under a statute which prohibited any person from practicing law or holding himself out as qualified to practice law in that state without having been admitted to practice law therein by the Supreme Court and without having paid all license fees prescribed by law. In State v. Merchants’ Protective Corp., 105 Wash. 12, 177 P. 694, 696, it was held that “the right to practice law attaches to the individual and dies with him. It cannot be made a subject of business to be sheltered under the cloak of a corporation having marketable shares descendible under the laws of inheritance.”

[3] 5. The next question for decision is whether the applicants seek a charter which will confer upon the corporation thereby created the power to practice law. A most cursory inspection of this application for charter discloses that its purpose is to confer upon the

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corporation powers which constitute the practice of law. If granted, the charter will permit the corporation to render legal advice on all matters on questions of law; render opinions as to the validity or invalidity of titles to property; prepare and furnish its customers briefs on all and any questions of law; act as an attorney in fact for the settlement and adjustment of any and all claims; act as an attorney in fact for customers in procuring competent attorneys at law to represent such customers in any court or before any judicial body in this state in any contested or uncontested case or matter pending before such court or body, when an attorney at law is necessary; prepare pleadings; prepare any will, trust agreement, deed, conveyance, or other legal instrument whereby rights or property are conveyed or secured; and furnish legal advice or legal services in connection with matters pertaining to the law. All these powers are such as are exercised \*802 in the practice of law, and will authorize the corporation, if it is chartered, to practice law. There was, at the time this application was filed, no law in this state which authorized the grant of a charter which would confer these powers and the right to practice law upon a corporation. We more readily reach this conclusion in view of the momentous importance of the question. Permitting corporations to practice law, without any of the restraints imposed upon individuals, who would not be licensed to practice law in or out of the courts unless they possessed good moral character and the necessary legal learning, will tend to commercialize, degrade, and prostitute the noble profession of the law.

6. We are not called upon to determine whether the proviso and prohibitions in section 2 of the act of August 7, 1931 (Acts 1931, p. 194), which defines the practice of law, confer upon corporations, voluntary associations, or individuals the power to practice law in any of its branches, and, if they do, to determine whether so much of said act as authorizes them to practice law in the respects mentioned in said proviso and prohibitions is unconstitutional because violative of the provision of the Constitution of this state which confers upon the courts judicial power; for the reason that the application for the charter involved in this case as filed prior to the passage of that act. On this subject see In re Day, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519; Ex parte Secombe, 60 U. S. (19 How.) 9, 15 L. Ed. 565; People v. People's Stock Yards State Bank, *supra*; Brydonjack v. State Bar of California, 208 Cal. 439, 281 P. 1018, 66 A. L. R. 1507, note, and *cit.*; separation of the legislative, judicial, and executive powers, paragraph 23 of section 1 of article 1 of the Constitution of this state; judicial power of the courts, paragraph 1 of section 1 of article 6 of the Constitution of this state.

7. Applying the principles set out in the first five divisions of this opinion, we think that the trial judge erred in refusing to grant the interlocutory injunction prayed for.

Judgment reversed.

All the Justices concur, except ATKINSON and HILL, JJ., who dissent.

#### **BECK, P. J. (concurring specially).**

There are many broad rulings made in the opinion of the majority in which I cannot concur; but I concur in the judgment of the court which holds that the court below erred in refusing to grant the interlocutory injunction.

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**ATKINSON and HILL, JJ. (dissenting).**

This case arose before passage of the act approved August 7, 1931 (Ga. Laws 1931, p. 191). Under the principles announced in Atlanta Title & Trust Co. v. Boykin, 172 Ga. 437, 157 S. E. 455, the trial judge did not err in refusing an interlocutory injunction.

All Citations

174 Ga. 511, 162 S.E. 796

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182 Ga. 833  
Supreme Court of Georgia.

SHARP-BOYLSTON CO. et al.  
v.  
HALDANE.  
No. 10995.

July 11, 1936.

Judgment Adhered to after Rehearing July 28, 1936.

Synopsis

Error from Superior Court, Fulton County; Edgar E. Pomeroy, Judge.

Suit by Eldon Haldane against the Sharp-Boylston Company and others. To review an adverse judgment, the defendants bring error.

Reversed.

RUSSELL, C. J., and BELL, J., dissenting.

Attorneys and Law Firms

Marion Smith, Harold Hirsch, and Ellis & Bell, all of Atlanta, for plaintiffs in error.

S. H. Baynes and Eldon Haldane, both of Atlanta, for defendant in error.

Stephens Mitchell, Wm. K. Meadow, James D. Childs, Robt. S. Sams, and Madison Richardson, all of Atlanta, for Lawyers' Club of Atlanta.

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Alex W. Smith, Jr., Bond Almand, Granger Hansell, and Frank Carter, all of Atlanta, for parties at interest, not parties to record.

Opinion

PER CURIAM.

Assuming that the plaintiff, as an attorney at law, had such interest in the subject matter of the litigation as to authorize him to institute the action, the evidence (consisting of the pleadings and an agreed statement) was insufficient to show that the defendant corporation and its agent were engaged in the practice of law. For this reason the court erred in granting an injunction.

Judgment reversed.

All the Justices concur, except RUSSELL, C. J., and BELL, J., who dissent, and GILBERT, J., absent.

RUSSELL, Chief Justice (dissenting.)

Eldon Haldane, a practicing attorney of this state, brought a petition on behalf of himself and other attorneys similarly situated, against Sharp-Boylston Company, a corporation, and J. W. Teepel, to enjoin them from filing suits and engaging in such activities as constitute the practice of law. The defendants demurred on the grounds (1) that the petition set forth no cause of action; and (2) that the petitioner has no interest or right in the matters complained of, and the cause of action, if there be one, exists in the solicitor general on the relation of the party aggrieved. It was stipulated and admitted that J. W. Teepel, an employee of Sharp-Boylston Company, "had made affidavits for the issuance of distress warrants," in four stated cases in the municipal court of Atlanta, "and that in each of said cases the plaintiffs were customers or landlords represented by Sharp-Boylston Company as renting agents, and the defendants were tenants in arrears. (a) That Sharp-Boylston Company is a corporation engaged, among other things, in renting and collecting rents on properties for customers, and that Teepel is one of its employees through whom it conducts its business. (b) That when tenants of properties so rented by Sharp-Boylston Company for its customers refuse to pay rent to such an extent that it is necessary for the rental agents to retake possession of the properties, and the tenants refuse to vacate, Sharp-Boylston Company in behalf of its customers and through Teepel has on frequent occasions taken out dispossessory warrants, and, when the rent had been paid thereafter, dismissed the warrants. (c) That in those instances where the tenant paid his rent Teepel instructed the marshal to enter the warrant settled. (d) That Teepel is not an attorney at law and not admitted and licensed to practice law in the courts of this State. (e) That Teepel, in making the affidavits for dispossessory warrants in the municipal court, acted as employee of Sharp-Boylston, and there was no privity of contract between Teepel and the plaintiffs in dispossessory warrants, except that Teepel was the employee and agent of Sharp-Boylston Company, and the plaintiffs in said dispossessory warrants were the customers of Sharp-Boylston Company. (f) That Teepel, as servant or employee of Sharp-Boylston Company, instructed the marshal to

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dismiss the dispossessory warrants, or enter them as settled, and deposited the court costs in the municipal court in the dispossessory warrants filed by him for and on behalf of the customers of Sharp-Boylston Company.” After a hearing, the court granted an injunction, adjudging that Teepel was the agent, not of the customers of the defendant corporation, but of the corporation itself, and ordering that the defendants be temporarily enjoined from filing any dispossessory warrants or other proceedings in court, from the taking down of money and marking cases settled, dismissing cases, paying court costs, or the doing of any other acts for any of the customers or clients of the defendant corporation. Error was assigned on this judgment.

The issues presented by the writ of error in this case may be condensed into two \*70 questions: (1) Has the plaintiff, as a duly licensed attorney at law, suing for himself and others similarly situated, such an interest as to authorize and enable him to maintain this equitable petition? (2) Were the defendants illegally practicing law? The answer to both questions depends on a consideration of what is embraced in the meaning of the term “the practice of law” in this state. For a number of years the General Assembly has prescribed rules regulating the conduct of vocations of various kinds, and thus classified the nature of the franchise under which the law permits them to operate in their respective businesses. Each enactment defines with precision the particular profession, sets up the machinery for determining who may engage in the profession, and prescribes the mode by which one having been admitted may be excluded therefrom. The regulations are found in the Code of 1933: as to architects, chapter 84-3 (section 84-301 et seq.); dentists, chapter 84-7 (section 84-701 et seq.); physicians, chapter 84-9 (section 84-901 et seq.); pharmacists, chapter 84-13 (section 84-1301 et seq.); real-estate agents, chapter 84-14 (section 84-1401 et seq.). All of these enactments antedated our statutory provisions as to who are lawyers, and defining what constitutes the practice of law. The purpose of these and similar acts is obvious. The Legislature had in mind that in a complex civilization the general convenience and public safety would be best served by admitting to a particular pursuit only such persons as by prescribed procedure may be able to demonstrate their fitness with respect to training, skill, and character to engage therein, and by the same token to exclude others who have not made proof that they possess the essential requisites. As lawyers are sworn officers of the court, who come in contact with all classes of society in the performance of their high duties, and are thus enabled to help or hurt all classes of society, the action of the General Assembly in defining what is included in the practice of law is not only necessarily far-reaching, but very wise. As far back as State ex rel. Waring v. Georgia Medical Society, 38 Ga. 608, 95 Am.Dec. 408, this court held that the right of a physician to practice his profession in this state was a franchise in which he had a property right; and, so far as we are aware, this court has never deviated from the principle announced in this case.

The objection made by plaintiffs in error, that a duly licensed attorney, proceeding, as here, in behalf of himself and others similarly situated, has no such interest as to enable him to maintain an equitable action to enjoin those engaged in the unauthorized practice of law, has been before the appellate courts of several states in cases which we have examined. Fitchett v. Taylor, 191 Minn. 582, 254 N.W. 910, 912, 94 A.L.R. 356; Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 193 N.E. 650; Dworken v. Apartment

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House Owners Association, 38 Ohio App. 265, 176 N.E. 577; Unger v. Landlords' Management Corporation, 114 N.J. Eq. 68, 168 A. 229, 231; Paul v. Stanley, 168 Wash. 371, 12 P.(2d) 401. In the Fitchette Case, supra, it was said: "Attorneys, as officers of court, exercise a privilege peculiar to themselves and not enjoyed by those outside of the profession. Hence, it is in a very real sense a franchise and property right. \* \* \* That is enough to show that these plaintiffs, suing not for themselves alone but for the benefit of all the affected members of their profession, are entitled to injunction to prevent the unlawful intrusion into their office and professional field of defendant Taylor. In such a case, the extent of the damage to the property right is unimportant. The existence or threat of real damage is enough to warrant relief." It will be observed that the first statement made by the Minnesota Supreme Court coincides with the statement of this court in State ex rel. Waring v. Georgia Medical Soc., 38 Ga. 608, 95 Am.Dec. 408, that the right to practice the learned profession is "a franchise and property right." In Land Title Abstract & Trust Co. v. Dworken, supra, it was said: "The right to practice law conferred by the state is a special privilege in the nature of a franchise and a possessor thereof may be protected by injunction from the invasion of the right thus vested in him." In Sloan v. Mitchell, 113 W.Va. 506, 168 S.E. 800, it was held, as this court held in the Waring Case, supra, that a licensed physician has a franchise in the nature of a property right to practice his profession, and may sue in equity in behalf of himself and others similarly situated, to enjoin one without a license from engaging in the practice of medicine. Similarly it seems to us, especially in view of the fact that lawyers are officers of court, that one who \*71 has a franchise as a licensed practicing lawyer, in the nature of a property right, is entitled to enjoin one without a license from engaging in the practice of the legal profession. State Bar Association v. Retail Credit Association, 170 Okl. 246, 37 P.(2d) 954, where it was held that an incorporated bar association might maintain a bill to enjoin one, not licensed, from engaging in the practice of law; and this although the wrong was one for which the association could recover no damages. The right to maintain an injunction against one engaged in the unauthorized practice of law is also sustained in Depew v. Wichita Retail Credit Association, 141 Kan. 481, 42 P.(2d) 214. In Frost v. Corporation Commission of Oklahoma, 278 U.S. 515, 525, 49 S.Ct. 235, 237, 73 L.Ed. 483, it was held: "That the right to operate a gin and to collect tolls therefor, as provided by the Oklahoma statute, is not a mere license, but a franchise, granted by the state in consideration of the performance of a public service, and as such constitutes a property right within the protection of the Fourteenth Amendment."

The General Assembly has provided for tribunals for hearing complaints and trying and disciplining members after a hearing, in the various enactments as to architects, physicians, dentists, pharmacists, real estate agents, and lawyers, and other provisions from which it must be assumed that those legally authorized to pursue the particular business or profession have such a property right therein that they may not be excluded therefrom except by due process. Upon this point see Southeastern Electric Co. v. Atlanta, 179 Ga. 514 (1), 176 S.E. 400. In this connection it would seem not to be inappropriate to quote the language of Mr. Justice Bradley in the Slaughter-House Cases, 16 Wall. 36, 116, 21 L.Ed. 394, as follows: "The right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right." That an injunction is the appropriate remedy

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for any encroachment on a property right in the nature of a franchise is stated as a fixed principle in 5 Pomeroy's Eq. Jur. § 2016. The fact that the act of 1931 (Code 1933, § 9-401 et seq.), defining the practice of law, makes a crime an encroachment upon this property right in the nature of a franchise, does not in any wise affect the right sought to be asserted here. The violation of a public law which may authorize or require punishment for the offense against the public does not preclude the right of the holder of the franchise from protection of his property. The contention of the plaintiffs in error upon this point was rejected in the cases of Fitchett, Dworken, Unger, and Paul, cited supra. Those decisions are merely persuasive authority; but the exact point has been decided by this court in Jones v. Van Winkle Gin & Machine Works, 131 Ga. 336, 62 S.E. 236, 17 L.R.A.(N.S.) 848, 127 Am.St.Rep. 235, in which it was held: "An injunction may issue in a proper case to restrain persons from attempting by threats, violence, or intimidation, or other unlawful means, to prevent any person from engaging in, remaining in, or performing the business, labor, or duties of any lawful enterprise or occupation, although the acts sought to be restrained, if committed, constitute a crime." In delivering the unanimous opinion of the court Mr. Presiding Justice Evans said: "But a court of equity is not ousted from the exercise of its peculiar functions of preventing irreparable damage merely because, in exercising such functions, it may also prevent the commission of a crime. The court does not interfere to prevent the commission of crime, although that may incidentally result, but it exerts its force to prevent individual property from destruction, and ignores entirely the criminal feature of the act. [Italics ours.] And Mr. Pomeroy (6 Pom.Eq.Jur. 619) says that 'it is everywhere the rule, following the general principle in equity, that where there is ground for equitable interference, as where an irreparable injury is threatened to property, the fact that the act is also a crime is not a reason for refusing an injunction.' This principle was recognized and applied by this court in a case of an indictable nuisance. Mayor, etc., of Columbus v. Jaques, 30 Ga. 506. So it is no reply to the invocation of the equitable remedy to prevent irreparable injury to property that the acts which cause the damage may also be indictable." So I conclude that the plaintiff (defendant in error) was entitled to file this action.

The principal contention of the plaintiffs in error is that the acts performed by them are merely mechanical, and do not in any sense constitute the practice of law. Learned and astute counsel illustrate this proposition by comparison, by saying that, if he were to send his office boy to file a brief with the clerk of this court, it could \*72 hardly be said that the office boy was engaged in the practice of law. Agreeing with learned counsel in his conclusion, we must say that the illustration is not applicable to the facts admitted by the stipulation appearing in the bill of exceptions. The mere filing or handing of a dispossessory warrant to the clerk of the proper court in the cases to which the proceeding relates, if not preceded by anything done by the office boy, would certainly not subject him to the charge of practicing law; but, if the handing of the paper to the proper clerk was necessarily preceded by acts which are confined exclusively within the franchise given to members of the legal profession, and then were followed by a series of acts which admittedly occurred during the progress of the litigation begun by swearing out the dispossessory warrant, in my opinion this would be practicing law within the inhibition of the Code, § 9-401. The practice of law is representing litigants in court, and the preparation of pleadings and other papers incident to any action of special proceeding in

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any court or other judicial body; conveyancing; the preparation of legal instruments of all kinds where a legal right is secured; the rendering of opinions as to the validity or invalidity of titles to real or personal property; the giving of any legal advice; and any action taken for others in any matter connected with the law. The question in this particular case turns upon the determination of what is litigation, and upon what is the exclusive function of the licensed lawyers of this state in all litigation in the courts of this state. It seems to me that the proceeding started by dispossessory warrant would be litigation. It certainly would be if the process were attacked on any ground; and should it be less litigation because it might happen to be settled or dismissed? "The purpose of all litigation is to preserve and enforce rights and secure compliance with the law of the state, either statute or common." Missouri, etc., Ry. Co. v. Hickman (Missouri R. Comm.), 183 U.S. 53, 60, 22 S.Ct. 18, 21, 46 L.Ed. 78.

The Code, § 61-401, among other things provides that: "If the tenant shall fail to pay the rent due at any time, the landlord may reenter immediately and dispossess the tenant." In section 61-402 provision is made, in case the landlord does not himself re-enter, for the issuance of a warrant and the manner of its execution, as follows: "Any person who may have rent due may, by himself, his agent or attorney, make application to any justice of the peace within the county where his debtor may reside or where his property may be found, and obtain from such justice a distress warrant for the sum claimed to be due for the said rent, on the oath of the principal, his agent or attorney, in writing, which may be levied by any constable, duly qualified, on any property belonging to said debtor, whether found on the premises or elsewhere, who shall advertise and sell the same, as in case of levy and sale under execution: Provided, if the sum claimed to be due shall exceed \$100, \* \* \* it shall be his duty to deliver the warrant, with a return of the property levied upon, to the sheriff," etc. It is obvious that this speedy and drastic remedy is not granted except upon a written oath. Upon whose oath? The principal (the landlord), his agent or attorney. It is conceded that in the cases embraced in the stipulation the landlords were persons other than Sharp-Boylston Company. It is not claimed that any of the owners of the property made oaths in these cases. It is conceded that the defendant corporation is "his agent" referred to in the statute. It is not contended that in any of these transactions any one except Mr. Teepel made oath for the issuance of the distress warrants. The question then arises whether the agent, Sharp-Boylston Company, is authorized by law to delegate to Mr. Teepel the right of doing its swearing, so as to authorize the agent of an agent, as proxy of Sharp-Boylston, to swear out distress warrants. Mr. Teepel is not an attorney at law. The statute authorizes the principal, his agent or attorney, to make such oath. Perhaps the language used in the Code section may be properly construed to refer to an attorney of the real estate agent; but Mr. Teepel is not an attorney, and, as well set forth by the learned trial judge, the case is one of an agent of an agent making the oath required by law. In my opinion this is not permissible.

It was long ago decided by this court, in Howard v. Dill, 7 Ga. 52, that "one cannot delegate the right to swear; one cannot much more delegate the obligation to swear. The duty is one that refers to his mind and conscience. He may not swear by proxy." It is true that at the time of that decision the law did not contain a provision by which the oath in case \*73 of a distress warrant could be made by an agent, and for that reason, if the oaths

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in the cases now sub judice had been made by one of the officers of the corporation, Sharp-Boylston Company, upon whom had been placed the responsibility and the obligation to swear, the oath would have been a valid oath. This is recognized; for the corporation, being an artificial person, can act only through human instrumentalities, a director, president, secretary, treasurer, or any other officer charged with the conduct of its entire business. To say the most, Teepel was a mere collector of rents. Judge Nisbet, in the Howard Case, said: "The remedy given for the collection of rent, is rapid and summary. The Legislature, no doubt, felt the necessity of protecting it from abuse—of throwing around the tenant some safeguards—some guaranties against unfounded and vexatious suits for rent. Hence, they prescribe as a condition precedent, that the applicant for the warrant, the creditor [now 'or his agent'], should swear that the rent is due. Without this, the warrant cannot legally issue. The safety of the tenant is found in the oath \* \* \* and in the responsibilities which his oath imposes—in his liability to the pains and penalties of the law, if he swears falsely. This security is weakened—not to say lost—if the oath of an agent is held sufficient. His oath casts no responsibility upon his principal, and comparatively little upon himself. He may believe the rent is due, when in fact it is not. The allowance of the oath of an agent in these cases, would open a wide door to frauds and perjuries, and leave the tenant subject to oppression. This act, and all others which give peculiar and summary remedies, are to be construed strictly; and he who would avail himself of them, must bring himself strictly within their requirements. It is said, that what a man may lawfully himself do, he may do by his agent. This is a rule of the law; but it extends not to oaths—to acts which are strictly personal." This language is still applicable to the change in our multiform civilization which authorizes the direct agent of the landlord, who perhaps lives beyond the limits of the state or county where his property was situated, to swear in necessary cases instead of the landlord; but it did not contemplate that the only person in such instances qualified to assume the obligations of an oath, and the responsibility if he swore falsely, would shift from himself the responsibility to a subagent, perhaps entirely unknown to the owner of the property, but whom the agent may select as a rent gatherer, and permit him to delegate both the right and the obligation to swear.

The Code, § 9-402, declares that: "It shall be unlawful for any person other than a duly licensed attorney at law to practice or appear as an attorney at law, for any person other than himself, in any court of this State or before any judicial body, or make it a business to practice as an attorney at law, \* \* \* or to render or furnish legal services or advice, \* \* \* or to render legal services of any kind in actions or proceedings of any nature, \* \* \* or to furnish legal advice, services, or counsel. \* \* \* It shall also be unlawful for any corporation, voluntary association, or company to do or perform any of the acts above recited." These acts are not embraced within the things permitted to agents of the landlord in distress warrant proceedings under section 61-301. In the first division of this opinion I have attempted to point out the broad and necessary policy involved in keeping separate and distinct the prerogatives granted by the franchise to lawyers and to real estate agents respectively. The acts of the plaintiffs in error—filing affidavits, making deposits of court costs, dismissal of proceedings where defendants made settlement, and giving instructions to the officers to enter the warrants settled, and the withdrawal of money paid into court, are not the functions of real estate agents; and, treated all together, they

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constitute the practice of law, which has been exclusively reserved to those whom the courts have adjudged to be competent to deal with legal questions, and of such moral character as not to abuse their high position as officers of court. The admitted acts set out in the stipulation constitute representing litigants in court. The inhibitions of section 9-401 of the Code include the preparation of pleadings and other papers incident to any action or special proceeding. This section of the act would seem to have been complete had it merely said the “preparation of pleadings and other papers incident to any action”; but the Legislature seems to have had in mind that there were a number of special proceedings which in some respects differed from ordinary actions, and so they added “special proceedings” to take in such as distress and dispossessory warrants and attachments, and various other special proceedings that might be mentioned. The affidavit which \*74 the agent prepares in a distress warrant proceeding is in the nature of a pleading setting out facts which entitled the principal to the relief claimed. It is clear that the acts of the plaintiffs in error are within that portion of section 9-401, which includes within the definition of the term practice of law “any action taken for others in any matter connected with the law.” Certainly, under the record in this case, it is plain that the plaintiffs in error have furnished legal services and rendered legal services of “any kind in actions or proceedings of any character,” if the proceedings by distress warrant are authorized by law. “To distrain for rent involves the conduct of a highly technical proceeding under the Distress Act (2 Comp.St.1910, p. 1939, § 1 et seq.), and to bring dispossess proceedings up to the point of starting suit involves not only a proper construction of the lease, but also a knowledge of the Landlord and Tenant Law.” Unger v. Landlords’ Management Corporation, *supra*, where the court quoted the language of Mr. Justice Hines in Boykin v. Hopkins, 174 Ga. 511, 162 S.E. 796. This language was adopted almost verbatim in the Code, § 9-401.

The Code, § 61-301, provides that, where a tenant holds over after his term, or fails to pay the rent when due, and the owner desires possession of the premises, “such owner may, by himself, his agent, attorney in fact or attorney at law, demand the possession of the property so rented, leased, held, or occupied; and if the tenant shall refuse or omit to deliver possession when so demanded, the owner, his agent or attorney at law or attorney in fact may go before the judge of the superior court or any justice of the peace and make oath to the facts.” (Italics mine.) Section 61-302 provides that the officer before whom the affidavit is made shall issue a dispossessory warrant. The provisions quoted go only so far as to prescribe who may make oath to the facts, and before whom it may be made. It may be that the agent and not the landlord knows the facts. However, the permission that the agent may make the oath distinguishes distress warrants from others where the party only may make the prescribed oath. Sections 81-405, 81-406. The quoted provisions in terms permit the agent to “make oath to the facts.” They go no further. For an agent of the landlord to “make oath to the facts” is a wholly different thing from the agent forming a legal judgment that the facts verified by him entitle his principal as a matter of law to eject the tenant. When the agent files the affidavit and makes the required deposit to cover court cost, he represents that legal grounds exist for the issuance of the warrant. He further instructs the court officer to issue the warrant. Later, when payment is made, he instructs the officer not to execute this warrant. These acts, dependent upon the exercise of judgment as to legal rights and remedies, are not within

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the scope of the duties of a messenger or ministerial agent. Non constat that because the Code section authorizes an agent to make "oath to the facts" he is authorized to set in motion the machinery of the law and direct it to a conclusion. That an agent knowing the facts may swear to them does not rationally require the conclusion that such person may assert the legal rights of his principal in a judicial proceeding growing out of those facts. To make the affidavit is to act as a witness. To form a legal opinion upon the facts, instruct the court to issue the warrant, and thereafter to control the proceedings, is to furnish legal services as an attorney at law.

The questions involved in this case are of great importance, not only to the legal profession, but to all the people of the state, who are concerned in the proper administration of the law and the preservation of the rights of all, rich and poor alike, landlord and tenant alike. If the contention of the plaintiffs in error as to dispossessory warrants is correct, there would seem to be no reason why it would not be equally applicable to other proceedings which may be instituted upon affidavits made by agents. Included among those are attachments, garnishments, foreclosure of chattel mortgages, foreclosure of conditional sales contracts, foreclosure of other liens on personalty, and bail trover. These proceedings comprise a large part of the business of inferior courts; and, if agents may act for litigants in these classes of cases, the business of such courts may largely be in the hands of lay persons without professional training or responsibility. Not only so, but in my opinion it would certainly encroach upon the franchise and consequent property right which I think inheres in the license granted to proper applicants to practice law in the courts.

All Citations

182 Ga. 833, 187 S.E. 68

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222 Ga. 657  
Supreme Court of Georgia.

GEORGIA BAR ASSOCIATION  
v.  
LAWYERS TITLE INSURANCE CORPORATION.

LAWYERS TITLE INSURANCE CORPORATION  
v.  
GEORGIA BAR ASSOCIATION.  
Nos. 23613, 23614.  
|  
Oct. 6, 1966.

#### Synopsis

Action by title insurance corporation for declaratory judgment against the Georgia Bar Association wherein the association filed a cross-action. The Superior Court, Bibb County, Oscar L. Long, J., entered an order declaring the activities which violated the Georgia statutes, and an appeal was filed by the association and a cross-appeal by the corporation. The Supreme Court, Cook, J., held that the statute defining the practice of law is not a denial of the constitutional powers of the judicial branch of government, and that the evidence did not reveal any activities of the corporation prohibited by the statute except the so-called 'walk-in' business and advertisements encouraging it.

Affirmed.

Grice, J., dissented.

#### \*\*719 Syllabus by the Court

\*657 1. Throughout the history of this state the legislative branch of government has enacted legislation appropriate and essential in aiding the judiciary in the discharge of its duties in connection with the practice of law in the state, and the statute defining the practice of law does not offend the provision of our Constitution vesting the judicial powers of the state in named courts.

2. Under the evidence submitted, the trial judge made a correct determination as to those activities of the cross appellant title insurance corporation which violated the statute of this state defining the practice of law.

\*658 Lawyers Title Insurance Corporation, a corporation engaged in the business of writing(sic) title insurance, filed an action for declaratory judgment against the Georgia Bar Association, alleging that the association is contending that the petitioner is engaged in the unauthorized practice of law with respect to certain of its activities, and the association has sent the petitioner a copy of a resolution formulated by the Board of

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Governors of the Georgia Bar Association, which directed the executive secretary of the association to write a letter to each title insurance company doing business in Georgia requesting it to cease specified activities which the Committee on Unauthorized Practice of Law of the association deems to constitute the unlawful practice of law, and threatening to bring an action to restrain the practices specified unless it agrees (sic) to cease such practices. The petitioner asserted that its activities which the association claims constitute the unlawful practice of law are not violative of the applicable statutes of the State of Georgia.

The Georgia Bar Association by demurrer attacked the provisions of the Act of 1931 (Ga.L.1931, pp. 191-194), codified as ss 9-401, 9-402, 9-403, 9-404, and 9-405, as amended by Ga.L.1937, pp. 753-754, as being violative of stated provisions of the Constitution. It filed an answer in which it asserted the unconstitutionality of these statutes, and a cross action which specified the particulars in which it claimed that the petitioner is engaged in the unauthorized practice of law. It prayed that the justiciable issue between the parties be decided, and that the petitioner be permanently restrained from the acts enumerated. The trial judge upheld the validity of Chapter \*\*720 9-4 of the Code, as amended by Ga.L.1937, pp. 753-754.

A pre-trial order approved the stipulation of the parties that the issue in the case remaining for decision was 'whether or not the evidence shows any activity of the plaintiff, as alleged in the pleadings, if proven, is a violation of the Georgia statutes defining the practice of law as those statutes may have been construed by the Appellate Courts of Georgia.'

On November 16, 1965, the trial judge entered an order declaring the activities which, in his opinion, violated the Georgia statutes. An appeal was filed by the Georgia Bar Association, and a cross appeal by Lawyers Title Insurance Corporation.

#### Attorneys and Law Firms

\*659 H. H. Perry, Jr., Albany, Ed G. Barham, Valdosta, Mallory C. Atkinson, Macon, Stephens Mitchell, Atlanta, for plaintiff in error.

Charles J. Bloch, Bloch, Hall, Groover & Hawkins, Macon, William G. Grant, Grant, Spears & Duckworth, Atlanta, for defendant in error.

#### Opinion

COOK, Justice.

1. In the enumeration of errors of the Georgia Bar Association it is contended with reference to the constitutionality of the legislative Acts defining the practice of law as follows: 'It is the function and responsibility of the judiciary and not the legislature to define what constitutes the unauthorized practice of law. In these circumstances, the Acts of the General Assembly (Georgia Laws 1931, pages 191-194; Georgia Laws 1937, pages 753-754) defining the practice of law and particularly that part which authorized title

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companies to: 'prepare such papers as it thinks proper, or necessary, in connection with a title which it proposes to insure, in order, in its opinion, for it to be willing to insure such title, where no charge is made by it for such papers', is unconstitutional as being in violation of Article V (VI?), s 1, Paragraph 1 of the Constitution (Code s 2-3601).'

Art. VI, Sec. I, Par. I of the Constitution (Code Ann. s 2-3601) provides: 'The judicial powers of this State shall be vested in a Supreme Court, a Court of Appeals, Superior Courts, Courts of Ordinary, Justices of the Peace, Notaries Public who are ex-officio Justices of the Peace, and such other Courts as have been or may be established by law.'

[1] The appellants have cited numerous cases from other states dealing with the inherent powers of the judiciary to regulate the practice of law. We have read these cases with much interest, and we concur in the general view expressed in those cases that the judiciary can not be circumscribed or restricted in the performance of these duties.

Historically, in this state, the General Assembly has enacted legislation appropriate and essential in aiding the judiciary in the discharge of these duties, and this court has recognized the right of the General Assembly to enact these statutes. In *Ex Parte Hale*, 145 Ga. 350, 89 S.E. 216, it was said: 'The question of eligibility for admission to the bar has been the subject-matter of legislation in this state for more than a century. In \*660 sections 65 and 66 of the judiciary act approved December 23, 1789 (Watkins' Digest of Georgia Laws, p. 389), there were provisions on this subject, and earlier acts with reference thereto were mentioned and repealed.' As early as 1812 (Cobb, 578) legislation was enacted dealing with the disbarment of attorneys. In 1963 (Ga.L.1963, pp. 70-72) the General Assembly passed an Act authorizing this court to establish the State Bar of Georgia, and on December 6, 1963, this court entered an order creating the State Bar of Georgia pursuant to that act. Minutes of Supreme Court of Georgia, Vol. 34, p. 107 et seq.

The first statutory provision defining the practice of law in this state was enacted August 7, 1931 (Ga.L.1931, pp. 191, 194. \*\*721 Counsel have cited us no case by this court, and we have found none, deciding the question of whether the General Assembly was exercising a judicial function in thus defining the practice of law. The following cases, dealing with the definition of the practice of law, were all by a divided court: Atlanta Title & Trust Co. v. Boykin, 172 Ga. 437, 157 S.E. 455; Boykin v. Hopkins, 174 Ga. 511, 162 S.E. 796; Sharp-Boylston Co. v. Haldane, 182 Ga. 833, 187 S.E. 68; Gazan v. Heery, 183 Ga. 30, 187 S.E. 371, 106 A.L.R. 498).

[2] In view of the historical recognition by this court of the right of the legislative branch of government to enact legislation in aid of the judiciary in the performance of its functions, we hold that the statute under attack, defining the practice of law, is not a denial of the constitutional powers of the judicial branch of government, and the trial judge correctly so held.

2. The remaining assignments of error, on both the main appeal and the cross appeal, all relate to the question of whether the evidence showed any activities of Lawyers Title Insurance Corporation in violation of the Georgia statute defining the practice of law.

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The entire evidence in the case was given by a retired officer and present officers or employees of Lawyers Title Insurance Corporation. It appeared from the evidence that the policy of Lawyers Title Insurance Corporation from its incorporation had been to co-operate with lawyers and encourage the employment of lawyers by persons desiring title insurance through the corporation. \*661 Outside of the Atlanta area the corporation issues policies of title insurance only on certificates of title furnished by lawyers not in the regular employ of the corporation, who have either applied for title insurance for a client, or have been employed by the corporation to examine the title to property of a customer of the corporation seeking title insurance. In the Atlanta area the corporation maintains a title plant and can determine for itself, without the services of an independent lawyer, the risk involved in insuring a particular title. If a person in the Atlanta area does not wish to be represented by a lawyer, the corporation may determine the insurability of the title through its employees who are lawyers, and it is this type of business that is referred to as 'walk-in busienss.'(sic) The evidence showed that this business constituted (sic) a very small part of the business of the corporation. In these instances the corporation charges the customer the amount suggested by the Atlanta Bar Association as the minimum title fee to be charged by a lawyer in examining a title and having it insured.

The trial judge, the Honorable O. L. Long, held that the evidence adduced on the trial does not reveal any activities of the title corporation prohibited by the law of Georgia, or violative of the applicable statutes of the State of Georgia, except the so-called 'walk-in' business and the advertisements encouraging it. His order declared the activities of the corporation violating Georgia statutes to be as follows:

'1. That the plaintiff, by and through its advertisements, is holding itself out to the public as being authorized to render legal services and advice in the handling and closing of real estate transactions between applicants for title insurance and third persons;

'2. Advertising that the employment of an attorney is not necessary, thus leading the public to believe that the plaintiff is engaged in the business of conveyancing; preparation of legal instruments; and the rendering of opinions as to the validity or invalidity of titles to real and personal property, in addition to insuring titles to real property.

'3. Advertising that the fees and charges for such services are the same as would be charged by an attorney, and in pursuance \*662 of such advertisements, where no attorney is employed, handling and closing such real estate transactions and arranging its charges for title insurance and for the examination \*\*722 of records of titles to real property in such manner as to effectively include a charge for rendering opinions as to the validity or invalidity of titles to real property and for the preparation of legal instruments in such transactions. This result, under the evidence, being accomplished by charging, in accordance with an alleged agreement with the Atlanta Bar Association, the same total fee, including the title insurance premium, as would have been charged under Atlanta Bar Association rates had an attorney been employed in the handling and closing of such transaction.'

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The order further declared: 'With further reference to the so-called 'walk-in' business, and advertisements which encourage such business, the activities of the plaintiff, in order to comply with the statutes of Georgia, must be confined to:

'(a) Preparing such papers as it thinks proper, or necessary, in connection with a title which it proposes to insure in order for it to be willing to insure such title, making no charge for such papers as permitted by the last proviso in Code Sec. 9-401 of the Code of Georgia of 1933, and/or

'(b) Examining the record of titles to real property, preparing and issuing abstracts of title from such examination (sic) of records and certifying to the correctness of same, issuing policies of insurance on titles to real or personal property, employing an attorney or attorneys in and about their own immediate affairs or in any litigation to which it may be a party, as permitted by Code Sec. 9-403 of the Code of Georgia;

'(c) Construing the Act of 1931 (Code Secs. 9-401, et seq.) as a whole, even as to the so-called walk-in business, the plaintiff, being a title insurance company, may prepare such papers as it thinks proper or necessary in connection with a title which it proposes to insure if it makes no charge for such papers. (That part of the Act codified as Code Sec. 9-401). Under that same section, it may do any of the acts therein set out in a transaction to which it is a party. Under that part of the Act codified as Code Sec. 9-403, it may examine records, issue abstracts of title, certify to the correctness of them, and issue \*663 policies of insurance on titles to real or personal property. Under this section its right to charge for the services therein permitted is not limited to charges or premiums on the policies it issues. There is nothing in this section which forbids plaintiff (petitioner) to make charges for the examination of the records and the preparing, issuing and certifying of titles, which this section authorizes and permits.

'The General Assembly having by this section (Code Sec. 9-403) authorized plaintiff to examine the records of titles to real property, to prepare and issue abstracts of title from such examination of the records and to certify to the correctness of the same, it necessarily follows that the General Assembly has authorized the plaintiff to receive payment for these services.

'As to advertisements which encourage such 'walk-in' business, any advertising matter used by the plaintiff which intimates to the public or leads the public to believe that members of the public may obtain legal services, or the services of lawyers in the employ of the plaintiff, by going directly to its place of business and which encourages such walk-in business is in violation of Code Section 9-402 of the Code of Georgia unless such advertisements are strictly confined to (a) or (b) or (c) above.'

[3] We think the trial judge correctly determined the issues of law and fact in the case, and the declaratory judgment entered in the trial court is not subject to the assignments of error made in the enumeration of errors of either the appellant or the cross appellant.

Judgment affirmed on both the main appeal and the cross appeal. All the Justices concur, except GRICE, J., who dissents.

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\*\*723 DUCKWORTH, C.J., concurs specially.

CANDLER, P.J., disqualified.

DUCKWORTH, Chief Justice (concurring specially).

While I concur fully in the judgment (sic), I believe I do so for a different reason, or, for the same reason stated differently. I believe the decisions of this court, including McCutcheon v. Smith, 199 Ga. 685, 35 S.E.2d 144; Thompson v. Talmadge, 201 Ga. 867, 41 S.E.2d 883; Sirota v. Kay Homes, Inc., 208 Ga. 113, 65 S.E.2d 597; Northside Manor, Inc. v. Vann, 219 Ga. 298, 133 S.E.2d 32, have made it unmistakably clear that while the legislative \*664 department alone can enact laws, yet the judicial department alone can define and construe those laws. This means that the judiciary alone can define what constitutes 'practice of law.' But the legislative department can fix terms and conditions upon which 'practice of law' is permitted, and fix penalties for violations thereof. It means that the legislature can constitutionally authorize anyone to perform acts that clearly come within the judicial definition of practicing law without a license and without punishment.

Therefore, I believe the present case is soundly and comprehensively dealt with and decided when we hold, as we must, that despite the fact that the activities authorized by non-lawyers in the 1931 act, as amended (Ga.L.1931, pp. 191, 194; Code, Ch. 9-4; 1937, pp. 753, 754), may come within the judicial definition of 'practice of law,'-bearing in mind that one can charge for the use of his records, and can practice law in his own case even in courts-they can be lawfully engaged in, and courts have no right or power to prevent them or penalize them.

I do not agree with anything said or implied in the majority opinion to the effect that the legislative department can invade the constitutionally reserved exclusive jurisdiction of the judicial department to define, construe and fix the meaning of the practice of law either to aid or to hinder the courts in the free and full exercise of their exclusive jurisdiction. None of the legislation dealing with the learned profession of medicine can or does contradict what I have said. Of course, as pointed out above the legislature can constitutionally permit non-lawyers or non-doctors of medicine to engage in activities which courts hold to constitute the practice of law or medicine; but such permission in no degree affects or changes the definitions the courts give to those professions, which definitions are beyond the constitutional (sic) reach of the legislature. On the other hand, courts can not invade legislative jurisdiction to prevent what the legislature authorizes. Both departments of government must be kept within their own exclusive jurisdictions. In this case courts can not prevent what the legislature authorized by the 1931 law, as amended, supra, for to do so would be to violate the Constitution by invading the exclusive jurisdiction of that department. \*665 The legislature can constitutionally define what portion of the practice of law or medicine it will prohibit by those not qualifying as members of such professions as judicially defined, but it can likewise specify so much of such practice by non-members of the professions as it chooses to allow without penalty. That is precisely what we have in the law which is the basis of this complaint. For the courts to attempt to penalize or prevent what the legislature has authorized would be

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judicial invasion of legislative jurisdiction. Courts can enforce laws, lawfully enacted, and they must not violate them. Courts and lawyers must recognize that the practices authorized by non-lawyers by this law, supra, are not matters carried on before courts, hence are outside the court's authority to control and, hence, the court has no authority to control those acts not committed before them. I would affirm on both the appeal and the cross appeal.

**GRICE, Justice (dissenting).**

The more I consider this matter the firmer is my belief that the petition here was subject to general demurrer. The statute relied upon (Ga.L.1931, pp. 191, 194; Ga.L.1937, pp. 753, 754; Code Ann. s 9-401) attempts \*\*724 to define the practice of law and, in my view, is therefore unconstitutional. The constitution of this State declares that 'The judicial powers of this State shall be vested in a Supreme Court, a Court of Appeals, Superior Courts \* \* \* and such other Courts as have been or may be established by law.' Art. VI, Sec. I, Par. I; Code Ann. s 2-3601. Thus, the power to make this definition is vested exclusively in the judicial branch of our State government.

The statute cannot be sustained upon the ground that it is an effort by the legislature to aid the courts to perform their function. Our constitution provides that 'The legislative, judicial and executive powers shall forever remain separate and distinct \* \* \*.' Art. I, Sec. I, Par. XXIII; Code Ann. s 2-123.

I believe that we should decide the constitutional issue made here. Since the main portion of the Act is void for the reason given above, its proviso as to permitting certain acts by title insurance companies cannot be upheld. I would reverse on the main appeal.

All Citations

222 Ga. 657, 151 S.E.2d 718.

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(END OF APPENDIX 5)