

LEGAL MALPRACTICE AND THE
RESIDENTIAL REAL PROPERTY PRACTITIONER

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I. INTRODUCTION

This manuscript looks at malpractice as it relates to ethics and also looks at the ways an attorney may avoid malpractice by satisfying the attorney's standard of care. The author apologizes for an unavoidable bias in favor of the defense of attorneys due to the nature of the author's experience in defending legal malpractice actions. (This manuscript is a revision of the November 2002 manuscript by the author entitled "Legal Malpractice and the Residential Real Property Practitioner" published by the North Carolina Bar Association Foundation.)

II. UNDERSTANDING THE RELATIONSHIP BETWEEN ETHICS AND MALPRACTICE

Unfortunately, a mistake by a lawyer often triggers both allegations of an ethical violation and allegations of negligence, although one does not constitute the other. Sometimes, an ethics violation has far more serious ramifications than negligence. Other times, the opposite is true. Sometimes a disgruntled (former) client uses the threat of an ethics inquiry to bring about a settlement of a malpractice claim. How an attorney responds to such a threat may itself cause an ethics violation, since there is an ethics opinion regarding the propriety of conditioning a settlement on an agreement of a client not to report an ethics violation. Another ethics provision prohibits an attorney from prospectively obtaining a waiver of a malpractice claim or settling a claim without advising the client about the advisability of independent representation. One growing area where ethics violations and malpractice have overlapped is in conflicts of interest. Even without an allegation of malpractice, there is strict interpretation of the ethics rules.

A. Using an ethics violation to establish negligence

Evidence that an attorney violated an ethics rule cannot, in and of itself, be the basis for a negligence claim. McGee v. Eubanks, 77 N.C. App. 369, 335 S.E.2d 178 (1985); accord Webster v. Powell, 98 N.C. App. 432, 391 S.E.2d 204 (1990), aff'd per curiam, 328 N.C. 88, 399 S.E.2d 113 (1991).

In McGee, the plaintiff attempted to establish negligence as a matter of law by virtue of the defendant attorney's violation of a trust account rule. The court cited the introductory comment to the Code of Professional Responsibility ("CPR") then in effect:

[t]he Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct.

77 N.C. App. at 374, 335 S.E.2d at 181 (emphasis in original). Note that the Rules of Professional Conduct ("RPC"), which replaced the CPR in 1985, similarly provide:

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are 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. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers, or the extra-disciplinary consequences of violating such a duty.

The Revised Rules of Professional Conduct ("RRPC") which became effective July 24, 1997 contain this exact same provision, save changes in punctuation and capitalization. See RRPC, 0.2[22], Scope.

In Webster, the court cited McGee to uphold the trial court's exclusion of evidence regarding alleged violations of disciplinary rules, apparently related to disputes concerning attorney fees. The court noted that the plaintiff failed to show how the alleged violations of the disciplinary rules would have been relevant to a claim of malpractice in performing legal services.

Notwithstanding the holding of McGee, another court refused to bar evidence of a disciplinary violation that would support claims of constructive fraud, unjust enrichment and constructive trust. See Booher v. Frue, 86 N.C. App. 390, 358 S.E.2d 127 (1987), aff'd per curiam, 321 N.C. 590, 364 S.E.2d 141 (1988). In that case, involving an undisclosed fee splitting arrangement for a referral, the court held:

The McGee decision does not insulate attorneys from civil actions based on principles of common or statutory law . . . To hold that defendants have no civil liability when a violation of a disciplinary rule is involved would fly against sound judgment and would ignore certain basic and well-established principles of law.

Id. at 394, 358 S.E.2d at 130. Presumably, the majority in Booher would still find it improper to permit evidence of the actual disciplinary rules allegedly violated, as opposed to evidence of the underlying facts. The dissent in Booher concluded that the underlying facts only established a violation of a disciplinary rule and did not state a cause of action.

B. Agreements not to report an ethics violation

An ethics inquiry was submitted to the North Carolina State Bar regarding a situation in which a professional (mental health professional) was charged with malpractice and the professional sought a settlement with the client in which the client would agree not to report the misconduct (sexual involvement with a patient) to the professional's licensing authority. The inquiry concerned the propriety of such a condition in a settlement agreement.

In April of 1993, Proposed RPC 159 concluded that it would be unethical to participate in an agreement not to report. The proposed opinion cited Rule 1.2(D), "Misconduct", which provides:

It is professional misconduct for a lawyer to . . .

(D) Engage in conduct that is prejudicial to the administration of justice . . .

This exact same provision is found in the RRPC, Rule 8.4(d).

In July of 1993 the first revision was made, reversing the earlier opinion, allowing such an agreement so long as the agreement was not otherwise prohibited by law.

In October of 1993, the second revision reversed again and concluded that such an agreement would be unethical. Revised Proposed RPC 159 (Second Revision) has now been finally adopted.

While the underlying facts of RPC 159 (Second Revision) do not involve attorney misconduct, it is hard to imagine why a different result would be reached for attorneys. The effect of this opinion is that attorneys threatened with both a malpractice claim and an ethics inquiry cannot hope to avoid the State Bar by settling with the former client if the former client chooses to pursue both avenues.

C. Agreements waiving an attorney's malpractice liability

A related issue that overlaps ethics with malpractice claims is an agreement which purports to waive or otherwise limit an attorney's liability. Rule 5.8, "Malpractice Liability," provides:

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 disputed claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation may be appropriate in connection therewith.

The new RRPC contains nearly the same provision:

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.

See RRPC, Rule 1.8(h).

Therefore, an attorney cannot ask a client to waive, prospectively, an attorney's liability for malpractice, "unless permitted by law" and the client is represented. It is difficult to envision a situation where an exception to former Rule 5.8 or new Rule 1.8(h) would exist. Rule 5.8, and its new counterpart, Rule 1.8(h), of course, do not prevent an attorney from disclosing risks to a client so that a client cannot later claim malpractice based on an alleged failure to disclose certain risks.

Likewise, an attorney cannot settle an existing malpractice claim without advising the client, in writing, that independent counsel "is appropriate" (note that one change from the former rule to the new rule is to change "may be appropriate" to "is appropriate").

D. Conflicts of interest and malpractice

A growing area of malpractice claims involves an allegation by a party, not necessarily the "client", that the attorney had a conflict of interest. Not only do the former RPC and the new RRPC address conflicts of interest (and when and how to obtain a waiver), there are several ethics opinions in this area. Compare CPR 100, which was once considered a safe harbor for the practice of representing more than one party in a closing, with two controversial opinions, RPC 210 ("finally" adopted on April 4, 1997) and proposed RPC 211 ("finally" adopted as 97 Formal Ethics Opinion 8). RPC 210 (Substitute Opinion for

Prior Withdrawn Opinion) re-examines the circumstances when multiple representation is appropriate and the disclosures required. 97 FEO 8 similarly re-examines multiple representation when the seller is the developer. See also 2004 FEO 3, "Common Representation of Lender and Trustee on a Deed of Trust."); Proposed 04 FEO 10 (regarding preparation of deeds by buyer's attorney in residential real estate transactions).

Two typical fact situations exist: 1) the client believes the attorney was only representing the client and the client later learns that the attorney also represented another party; 2) a party other than the client, usually thought by the attorney to be unrepresented, later claims that he/she understood the attorney also was representing him/her. A frequent target of either such claim is a lawyer who closes a business or real estate transaction "for the buyer" and the seller is "unrepresented." Sometimes the lawyer anticipates such a situation and discloses in writing, maybe even in one of the transactional documents, that the lawyer only represents "the buyer." While this helps protect the lawyer, litigation may still result if the disclosure was buried in "boiler plate" or the risks were not explained/understood.

An example of such a situation is Broyhill v. Aycock & Spence, 102 N.C. App. 382, 402 S.E.2d 167, aff'd per curiam, 330 N.C. 438, 410 S.E.2d 392 (1991). In Broyhill, the plaintiff was the seller of certain real estate and alleged that the defendant attorney had previously represented the plaintiff, that the plaintiff employed the defendant attorney to represent his interests in the sale, that the defendant attorney prepared a purchase money note and deed of trust (for which the defendant attorney served as trustee), that plaintiff wrote to and telephoned defendant attorney and that plaintiff "paid" the defendant attorney by reimbursing the buyer. The defendant attorney denied the allegations, and alleged that the defendant attorney's duty was to the buyer (who indeed paid the lawyer's legal fees at closing). The court held that these facts raised a genuine issue of material fact as to whether or not an attorney-client relationship existed. The court was not persuaded by the defendant attorney's argument that plaintiff was trying to create unilaterally an attorney-client relationship. The court stated:

This Court has held that an express verbal agreement is not necessary to establish an attorney-client relationship, but such may be implied from the conduct of the parties even in the absence of the payment of fees or the lack of a formal contract.

Id. at 390, 402 S.E.2d at 172 (citing N.C. State Bar v. Sheffield, 73 N.C. App. 349, 358, 326 S.E.2d 320, 325 (1985)).

Another example is Cornelius v. Helms, 120 N.C. App. 172, 461 S.E.2d 338 (1995). There, the buyer's attorney was also sued in a purchase money transaction. The Court was influenced that the sellers "relied" upon the buyer's attorney to prepare the note and deed of trust. The Court was also influenced by expert witness testimony that an attorney-client relationship existed. The opinion did not indicate whether there were also experts testifying that there was no attorney-client relationship.

For another case involving a conflict of interest, see North Carolina State Bar v. Maggiolo, 124 N.C.App. 22, 475 S.E.2d 727 (1996) (allegations arise from attorney's involvement as 50% shareholder in a series of real property transactions).

For another example of a disclosed conflict of interest arising out of the sale of a business, see MacKenzie v. Colombo, 9310 SC 1107 (N.C. App. Jan. 3, 1995) (unpublished).

E. Ethics violations without malpractice

There is no better illustration of an attorney's liability for strict ethical compliance than a review of RPC 191 (Second Revision - revised to confirm to Good Funds Settlement Act). This opinion sets forth

detailed guidelines for disbursements from a lawyer's trust account. The critical point of RPC 191 not to overlook is that failure to comply will be an ethical violation--whether it was inadvertent, whether it constituted malpractice or not, and whether it caused any damage or not.

III. MEETING THE STANDARD OF CARE

Meeting the standard of care is the obvious key to avoiding malpractice. Knowing what is the standard of care is a little less obvious. Attorneys have been sued under a variety of theories - negligence, breach of contract, actual fraud, constructive fraud, and breach of fiduciary duty to name a few of the typical claims. Within a claim, there may be one standard for a general practitioner and another for a "specialist." When is expert testimony required? If the mistake is one that requires expert testimony, is there an expert willing to testify that what the attorney did was negligent, not just that the expert would have handled the matter differently? If the mistake is one that involves a disputed fact (i.e., did the attorney disclose the conflict; did the attorney agree to handle something; did the attorney explain the risk), the matter becomes one of credibility. In these situations, the presence or absence of a paper trail is often dispositive. One of the most important ways to prevent these types of disputes is to have a detailed representation agreement.

A. Negligence

There are two major North Carolina Supreme Court cases which establish an attorney's standard of care. The first case to be handed down was Hodges v. Carter, 239 N.C. 517, 519, 80 S.E.2d 144, 146 (1954). In that case, the court held:

Ordinarily, when an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.

On the other hand, the court recognized that:

[a]n attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers.

Id. at 520, 329 S.E.2d at 147.

Subsequently, the Hodges v. Carter standard was reiterated in Rorrer v. Cooke, 313 N.C. 338, 329 S.E.2d 355 (1985). The Rorrer court went on to outline the burden of proof as follows: "(1) that the attorney breached the duties owed to his client, as set forth by Hodges . . . and that this negligence (2) proximately caused (3) damage to the plaintiff." Id. at 355, 329 S.E.2d at 342

The Rorrer court, after a lengthy review of the facts, found a problem with the plaintiff's attempts to satisfy both the second and third prong of the Hodges test, although it devoted more of its analysis to the third prong and the expert opinion offered by the plaintiff. The key to understanding the Rorrer decision is an understanding of the deficiency the court found with plaintiff's expert witness affidavit. The affidavit

stated “merely an opinion”--indicating that the expert would have acted differently. The court did not believe that evidence to be the equivalent of stating that what the defendant attorney did was negligent.

In addition to the negligence issue, the Rorror court reviewed the burden of proof for proximate causation. For a negligence case based upon an attorney’s alleged mishandling of litigation, the burden of proof was described as follows:

- (1) The original claim was valid;
- (2) It would have resulted in a judgment in his favor; and
- (3) The judgment would have been collectible.

Id. at 361, 329 S.E.2d at 370. The Court found that plaintiff’s evidence failed to show that had the defendant attorney handled the litigation differently that plaintiff would have been successful. Id. This has been called proving the case within the case--such that the burden of proof includes the standard elements of negligence for the alleged malpractice as well as the standard elements of negligence for the underlying litigation that was allegedly conducted in a negligent manner. This is obviously a difficult standard to meet and certainly benefits litigators. See also Hummer v. Pullen, Watson, King and Lischer, P.A., 157 N.C. App. 60 577 S.E.2d 918 (2003) (holding the court properly excluded expert’s testimony regarding what conclusion administrative body would have reached had attorney perfected appeal).

One awkward element of a legal malpractice case based on alleged negligence in the underlying case is that while the attorney was handling the underlying action, the attorney was trying to establish what a meritorious case the plaintiff had, consistent with the attorney’s duties under the former RPC, the RRPC, and Rule 11. Once the attorney has been sued, the attorney shifts to the opposite posture--challenging the former client’s case. One case considered this dilemma in light of the affirmative defenses that would have been available to defeat the plaintiff’s “meritorious” claim. The Court of Appeals concluded that an attorney could not take advantage of his former client in such a way. The Supreme Court reversed, adopting the dissenting opinion. See Bamberger v. Bernholz, 326 N.C. 589, 391 S.E.2d 192 (1990) (*per curiam*), adopting dissenting opinion, 96 N.C. App. 555, 386 S.E.2d 450 (1989) (dissent notes that while the description of defendant’s legal services was unflattering, the former client could not have won the underlying case as a matter of law due to limited duty owed to a “licensee”). See also Byrd v. Arrowood, 118 N.C. App. 418, 455 S.E.2d 672 (1995) (defendant attorney’s certification of complaint under Rule 11 does not constitute evidence that plaintiff would have prevailed on underlying claim).

In the author’s experience, which is strictly as defense counsel, no defense to date has hinged on whether the plaintiff’s expert was “similarly situated.” In Rorror, the “similarly situated” standard was defined to mean “the same or similar locality under similar circumstances.” 313 N.C. at 356, 329 S.E.2d at 367. Typically, the plaintiff will find experts in the “same” field—e.g., real estate, domestic, etc. At least one case has explored the “locality” aspect. In Haas v. Warren, 341 N.C. 148, 459 S.E.2d 254 (1995), the Supreme Court held that plaintiff’s evidence was sufficient to withstand defendants’ motion for directed verdict on the issue that the defendant law firm violated the standards of the Franklin County legal community by publishing a foreclosure notice in the wrong newspaper.

One interesting twist in medical malpractice cases is the issue of whether or not a “national” standard of care exists. See Baynor v. Cook, 125 N.C. App. 274, 480 S.E.2d 419 (1997). In the context of legal malpractice, such an argument could conceivably be made in issues of federal law where you are not dealing with state law or a local standard of state law. See also Tucker v. Meis, 127 N.C. App. 197, 487 S.E.2d 827 (1997) (legislature rejected national or regional standard of care, opting for a community standard in medical malpractice cases).

One issue that might be raised is whether or not expert testimony is required to establish the standard of care and breach thereof. The Rorrer court was not faced with this issue, although it included a statement that “[e]xpert testimony is helpful to establish what the standard of care . . . requires and to establish whether the defendant-attorney’s performance lived up to such a standard.” 313 N.C. at 356, 329 S.E.2d at 367. Several recent cases have explored when an expert is needed. See Little v. Matthewson, 114 N.C. App. 562, 568, 442 S.E.2d 567, 563 (1994) (expert testimony not required where “common knowledge of laypersons is sufficient to find the standard of care required, a departure therefrom, or proximate causation”), aff’d per curiam, 340 N.C. 102, 455 S.E.2d 160 (1995); Progressive Sales, Inc. v. Williams, Willeford, Boger, Grady & Davis, 86 N.C. App. 51, 356 S.E.2d 372 (1987) (plaintiff’s failure to present any expert testimony to show standard of care failed to satisfy Rorrer test). For a case in which plaintiffs used defendant’s testimony to establish the standard of care, see Haas v. Warren, 341 N.C. 148, 459 S.E.2d 254 (1995). See also Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993) (when expert testimony is required, expert cannot testify to legal conclusions). When experts are used and contradict each other, the issue of breach of the standard of care will likely go to the jury. See Lawyers Title Ins. Corp. v. Bagwell, 1:92CV00707 (M.D.N.C. Oct. 20, 1994) (unpublished).

Another issue that might be raised is whether or not the expert is a “specialist.” If the defendant attorney is, the expert might need to be, too. If the defendant attorney is not, it may be inappropriate to use a “specialist.” The author is not aware of a North Carolina case on this point. But see Goebel v. Lauderdale, 263 Cal. Repr. 275, 214 Cal. App. 3d 1502 (1989) (if defendant-attorney holds himself/herself out as a specialist, a similar specialist is required to be the expert witness).

Note that one recent case used experts in an effort to establish that the defendant attorney followed the local custom in the community regarding reliance on verbal payoffs from a lender. The court held that this did not mean the community standard was satisfactory. See Security Union Title Ins. Co. v. Ledgett, 91-84-CIV-7-F (E.D.N.C. May 18, 1992) (unpublished).

B. Contract

Usually, the gravamen of a plaintiff’s malpractice complaint is negligence, although sometimes the complaint, or one of the grounds, is breach of contract. Whether pled as a negligence or contract action, much will depend upon what exactly the representation agreement provided, particularly if the “contract” was reduced to writing.

One North Carolina Supreme Court case hinged on the nature of the contract. In Hargett v. Holland, 337 N.C. 651, 447 S.E.2d 784 (1994), the North Carolina Supreme Court was faced with a statute of limitations defense which raised the issue of whether the defendant attorney had a “continuing duty” to the client. If so, the statute of limitations would not begin to run, saving what might otherwise be a very stale case. If not, the three year statute of limitations would bar the claim. Although the Hargett complaint was apparently pled as a “negligence” claim, the case turned on the precise nature of the contractual agreement between the client and the attorney. (The defense is actually more technical than is necessary for purposes of this manuscript. The opinion turns on the four year statute of repose found in N.C. Gen. Stat. §1-15(c), which has to be read with the three year statute of limitations for negligence.)

The complaint alleged that the attorney was hired to prepare a will with certain provisions regarding a farm and that the attorney negligently drafted the will to provide otherwise. The complaint was filed 13 years after the will had been prepared, but within three years of the testator’s death. The plaintiff alleged that the attorney had a continuing duty to correct the will, up until that was impossible due to death of the testator. The Supreme Court, reversing the Court of Appeals, held:

Under the circumstances here we conclude defendant had no such continuing duty. We hold that under the arrangement alleged in the

complaint, which was a contract to prepare a will after which defendant was an attesting witness to the will, defendant's duty was simply to prepare and supervise the execution of the will. This arrangement did not impose on defendant a continuing duty thereafter to review or correct the will or to prepare another will. Absent allegations of an ongoing attorney-client relationship between testator and defendant with regard to the will from which such a continuing duty might arise, or allegations of facts from which such a relationship may be inferred, the allegations which are contained in the complaint are insufficient to place any continuing duty on defendant to review or correct the prepared will, or to draft another will.

337 N.C. at 655-56, 447 S.E.2d at 788. See also McGahren v. Saenger, 118 N.C. App. 649, 456 S.E.2d 852 ("last act" of defendant was preparation of allegedly defective deed; at this time, plaintiff had at least "constructive knowledge" of all the elements of a cause of action) (1995); Jordan v. Crew, 125 N.C.App. 712, 482 S.E.2d 735 (1997) (same).

The Hargett case is a landmark case for ascertaining the time frame of an attorney's duty to a client. As such, the case determines when an attorney's liability for alleged malpractice will be cut off. The lesson for attorneys is to draft representation agreements that provide closure to the services the attorney agrees to undertake. Otherwise, an attorney may be faced with a claim many years after a service has been performed, such as an improperly drafted deed or lease, for which the attorney may no longer have saved the file. This also raises the question of when it is safe for an attorney to purge portions of a file or destroy an entire file rather than to archive all files in perpetuity. Apart from litigation concerns, the ethical aspect of maintaining client files is set forth in Revised RPC 209 (generally at least six years).

Another reason to have a well drafted representation agreement is that it will avoid a claim later by the then disgruntled client that the attorney agreed to do some additional task than what was performed. See, e.g., Ives v. Real-Venture, Inc., 97 N.C. App. 391, 388 S.E.2d 573 (1990) (genuine issue of material fact as to whether attorneys had a duty to conduct a title search and obtain title insurance), see also Clouse v. Gordon, 115 N.C. App. 500, 445 S.E.2d 428 (1994). In Clouse, the plaintiff, an unhappy home buyer, sued the seller, the seller's agent and real estate firm, the surveyor and surveyor's firm for damages related to the house being located in a flood zone. The buyer's attorney was not sued--at least not at first. But, the buyer might have tried to sue the attorney after this suggestion from the court:

an attorney representing the buyer at a closing is normally expected to have conducted a title search of the property, which search would have presumably uncovered the fact that the property was located in a flood plain.

Id. at 509, 445 S.E.2d at 433(emphasis added). This is a surprising remark about a real estate attorney's duty since the author's real estate practice does not include checking flood plain maps as part of a routine title examination.

Another reason to have a well drafted representation agreement is to define to whom your duty is owed. A frequently litigated issue in malpractice cases involves privity. May a third party who relied upon or who was a beneficiary of the legal services sue the lawyer? See Title Insurance Co. of Minn. v. Smith, Debnam, Hibbert & Pahl, 119 N.C. App. 608, 459 S.E.2d 801 (1995), aff'd in part per curiam, rev. improvidently granted in part, 342 N.C. 887, 467 S.E.2d 241 (1996) (citing United Leasing Corp. v. Miller, 45 N.C. App. 400, 263 S.E.2d 313 (1980)); Leary v. N.C. Forest Products, Inc., 157 N.C. App. 396, 580 S.E.2d 1 (reviewing elements of third-party beneficiary claim, and affirming dismissal), aff'd per curiam, 357 N.C. 567, 597 S.E.2d 673 (2003), see also Commonwealth Land Title Ins. Co. v. Walker & Romm, 883 F. Supp. 25 (E.D.N.C. 1994), aff'd, 43 F.3d 1465 (4th Cir. 1994).

C. Fraud

Fraud cases fall into several categories. The most egregious is actual fraud. If the plaintiff has a meritorious claim for actual fraud, there will necessarily be an ethics violation, too. A lesser standard is constructive fraud. It sounds as bad, being a derivative of "fraud," but it amounts to a breach of fiduciary duty--more akin to negligence. Related to these two causes of action are two different fraud statutes. One statute, § 84-13, provides for double damages in the event of fraud by an attorney. The other statute is § 75-1.1, unfair trade practices. That statute was designed to exempt "professionals," but there is at least one published case involving an attorney.

1. Actual Fraud

The elements of actual fraud are as follows:

- (a) that the defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that when he made it defendant knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (d) that the defendant made the false representation with the intention that it should be acted on by the plaintiff; (e) that the plaintiff reasonably relied upon the representation and acted upon it; and (f) that the plaintiff suffered injury.

Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 568, 374 S.E.2d 385, 392 (1988) (emphasis deleted). The same rules apply in the context of legal malpractice, including the requirement of Rule 9(b) that fraud be pled with particularity. See McGahren v. Saenger, 118 N.C. App. 649, 456 S.E.2d 852 (1995); Sharp v. Teague, 113 N.C. App. 589, 439 S.E.2d 792 (1995).

One warning about fraud and legal malpractice: do not expect your professional malpractice policy to cover it.

2. Constructive Fraud

Constructive fraud cases usually involve egregious fact situations in which the attorney's conduct violates a fiduciary duty owed to the client by virtue of the attorney-client relationship. The typical facts allege an attorney somehow taking advantage of a client or otherwise violating the "golden rule".

The elements of a constructive fraud case are simple and seemingly easy to prove:

- (1) a relation of trust and confidence, and
- (2) consummation of a transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.

Lowry v. Lowry, 99 N.C. App. 246, 254, 393 S.E.2d 141, 146 (1990) (case finding no constructive fraud; indeed, opposite true: evidence showed attorney was more than "open, fair and honest," attorney was a "zealous advocate"). In addition, the defendant must have taken advantage of the plaintiff to benefit himself. See, e.g., Fender v. Deaton, 153 N.C. App. 187, 571 S.E.2d 1 (2002) (plaintiff failed to allege defendant sought to benefit himself, and claims are no more than negligence). See also Baars v. Campbell University, Inc., 148 N.C. App. 408, 558 S.E.2d 871 (2002) (plaintiff's Complaint did not satisfy elements of constructive fraud and sounded in ordinary legal malpractice).

Constructive fraud is based upon a confidential relationship, as opposed to an actual misrepresentation. Booher v. Frue, 86 N.C. App. 390, 358 S.E.2d 127 (1987), aff'd per curiam, 321 N.C. 590, 364 S.E.2d 141 (1988).

For examples of cases finding constructive fraud, see Booher v. Frue, 98 N.C. App. 570, 394 S.E.2d 816 (1990) (no error in trial resulting in verdict against defendant for constructive fraud and constructive trust based on secret fee for referral of case); Booher v. Frue, 98 N.C. App. 585, 392 S.E.2d 105 (1990) (same case, different defendant; summary judgment improperly granted for defendant); Bumgarner v. Tomblin, 92 N.C. App. 571, 375 S.E.2d 520 (1989) (constructive fraud upheld where attorney abused business relationship with client by blocking the client's efforts to sell certain property, failing to pay fair share of proceeds to the client, and using the proceeds for personal debts); Fox v. Wilson, 85 N.C. App. 292, 354 S.E.2d 737 (1987) (constructive fraud upheld where attorney induced client to transfer ownership of newspaper to a corporation set up by the attorney under circumstances beneficial to the corporation).

3. Section 84-13

N.C. General Statute §84-13 provides:

If any attorney commits any fraudulent practice, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages.

For a long time, the only annotations involved cases in 1824 and 1879, though there are now many more. The 1824 case, Ex parte Thompson, 10 N.C. 355 (1824), involved "alien" attorneys. The 1879 case, Edgerton v. Logan, 81 N.C. 172 (1879), was disposed of on statute of limitations. Notwithstanding its rare use historically, it has recently been brought back to life. See Booher v. Frue 98 N.C. App. 570, 394 S.E.2d 816 (1990) (statute applies to constructive fraud as well as actual fraud). See also Ehlenbeck v. Patton, 58 Bankr. Rptr. 149 (W.D.N.C. 1986) (mishandling of client funds subjected attorney to actual damages).

4. Section 75-1.1

N.C. General Statute §75-1.1 provides:

For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

Although the exemption for attorneys as members of a learned profession seems clear enough, one borderline legal malpractice case has the dubious distinction of being a Chapter 75 case. In Concrete Service Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755 (1986), the pleadings did not allege unfair trade practices against the defendant attorney; plaintiff moved to amend pleadings at the close of evidence to include those allegations also against the attorney. The court concluded that the defendant attorney allowed evidence of unfair trade practices by implied consent. There is no discussion in the opinion about the inconsistency of the result reached and the exemption in the statute. However, the defendant attorney was also a shareholder in the corporate defendant and was acting as a consumer of building supplies as opposed to providing legal services.

The author is unaware of any other reported decisions involving Chapter 75 against an attorney, although the author has seen it pled in complaints.

D. Fiduciary Duty

Many “legal malpractice” cases also plead “breach of fiduciary duty” as the sole claim for relief or as one of the alternative claims for relief. See, e.g., Beckwith v. Llewellyn, 326 N.C. 569, 391 S.E.2d 189 (1990) (prior settlement did not preclude claim against attorney for breach of fiduciary duty); Sharp v. Teague, 113 N.C. App. 589, 439 S.E.2d 792 (1994) (plaintiff pled claims of negligence, breach of contract, fraud and breach of fiduciary duty). However, this claim is really a hybrid of either a negligence style breach of duty or a type of constructive fraud. See, e.g., Lowry v. Lowry, 99 N.C. App. 246, 393 S.E.2d 141 (1990) (court disposed of breach of fiduciary duty and constructive fraud claims together, citing only elements of constructive fraud); Booher v. Frue, 98 N.C. App. 570, 394 S.E.2d 816 (constructive fraud based upon breach of fiduciary duty); Bumgarner v. Tomblin, 92 N.C. App. 571, 375 S.E.2d 520 (1989) (same) Baars v. Campbell University, Inc., 148 N.C. App. 408, 558 S.E.2d 871 (2002) (same). If it is not treated by the court as a hybrid of constructive fraud, the plaintiff may not be able to recover the double damages provided for in §84-13.

IV. DAMAGES

For a general discussion of damages in a legal malpractice case, see Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993). For a discussion of nominal damages versus actual damages, see Title Insurance Co. of Minn. v. Smith, Debnam, Hibbert & Pahl, 119 N.C. App. 608, 459 S.E.2d 801, aff'd in part per curiam, rev. improvidently granted in part, 342 N.C. 887, 467 S.E.2d 241 (1996). A few noteworthy specifics related to legal malpractice cases are pointed out below.

First, as stated above, there is the potential for double damages under §84-13 and there is a remote possibility for triple damages under §75-1.1.

Second, there is the potential for punitive damages. In Patrick v. Ronald Williams, P.A., 102 N.C. App. 355, 402 S.E.2d 452 (1991), the court was faced with the issue for the first time. The court held:

Our review of plaintiffs' evidence below leads us to the conclusion that the successive failures of the defendants constituted gross negligence. Plaintiffs' forecast of evidence showed that defendants failed to determine the assets of the original alleged tort-feasor, failed to estimate the value of plaintiffs' claim, accepted a binding settlement offer without consulting plaintiffs, did not perfect an appeal of the trial court's denial of his motion to set aside the judgment reflecting the settlement, and failed to disclose the entry of judgment for more than six months, which prohibited plaintiffs from being able to make a claim for any other available insurance proceeds. We thus hold the plaintiffs are entitled to submit to the jury an issue as to punitive damages. This is not to say that every claim involving the breach of a fiduciary duty nor every action involving legal malpractice supports a claim for punitive damages. But where, as here, plaintiffs offer evidence that defendants engaged in a repeated course of conduct which constituted a callous or intentional indifference to the plaintiffs' rights, the plaintiffs have made out a claim for punitive damages.

Id. at 368-69, 402 S.E.2d at 460.

Third, there is the potential for emotional distress damages. See Hummer v. Pulley, Watson, King and Lischer, P.A., 157 N.C. App. 60, 577 S.E.2d 918, rev. denied, 357 N.C. 459, 585 S.E.2d 758 (2003) (holding testimony regarding emotional impact of attorney's actions was admissible to support claim for negligent infliction of emotional distress). It has been a volatile area of the law since Johnson v. Ruark

Obstetrics and Gynecology Associates, P.A., 327 N.C. 283, 395 S.E.2d 85 (1990), although subsequent cases have limited its scope somewhat. For an example of a legal malpractice case where plaintiff prayed for “emotional and mental damages,” see Sharp v. Teague, 113 N.C. App. 589, 439 S.E.2d 792 (1995). See also Burton v. NCNB, 85 N.C. App. 702, 355 S.E.2d 800 (1987) (insufficient evidence of “extreme and outrageous” conduct by attorney pertaining to terms of collection letter); Ross v. Yelton, 39 N.C. App. 677, 251 S.E.2d 666 (1979) (no claim for emotional distress without expert testimony); Carroll v. Rountree, 34 N.C. App. 167, 237 S.E.2d 566 (1977) (“mental anguish” damages not usually available for breach of contract), aff’d on reh., 36 N.C. App. 156, 243 S.E.2d 821 (1978). See also Timms v. Rosenblum, No. 89-1485, 1990 WL 48915 (4th Cir. April 4, 1990) (unpublished).

Fourth, an issue that typically arises is whether a successful plaintiff is entitled to recover attorney fees—not the fees for bringing the legal malpractice action, but the fees paid to the former attorney for the negligent legal services. See McCabe v. Dawkins, 97 N.C. App. 447, 449, 388 S.E.2d 571, 473 (1990) (attorney fees may be part of damages “if the damages result from a tortious act of the present defendant-attorney”); Harris v. Maready, 84 N.C.App. 607, 614, 353 S.E.2d 656, 661 (1987) (no evidence that legal fees sought to be recovered were related to the alleged negligence).

Fifth, one unusual aspect of damages in a legal malpractice action involving a case within a case is whether there were any set-offs or counterclaims alleged by the defendant in the underlying action that would have reduced plaintiff’s recovery.

Finally, as with other areas of litigation, lawyers are subject to Rule 11 sanctions. See, e.g., Mack v. Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992) (Rule 11 sanctions upheld where discharged attorney sought a “charging lien” for legal services rendered prior to attorney withdrawing as counsel and before litigation resulted in a judgment); but see Pugh v. Pugh, 111 N.C. App. 118, 431 S.E.2d 873 (1993) (Rule 11 sanctions against attorney inappropriate when attorney made “reasonable inquiry” into the facts). Punitive damages are not generally available for breach of contract cases. See Carroll v. Rountree, 34 N.C. App. 167, 237 S.E.2d 566 (1977), aff’d on reh., 36 N.C. App. 156, 243 S.E.2d 821 (1978). As with punitive damages, do not expect this type of damages to be covered by your professional malpractice policy.

V. DEFENSES

Although it is not possible to thoroughly cover affirmative defenses in this manuscript, a few notes are warranted. First, as with other areas of negligence, a client’s contributory negligence may defeat a claim. See MacKenzie v. Colombo, *supra*. Second, there are many cases interpreting the statute of limitations/repose for professional malpractice actions found in N.C. Gen. Stat. § 1-15(c). Two cases explored the issue of an alleged mistake by an attorney which is barred by the statute of limitations, followed by an alleged second mistake in attempting to correct the first mistake. See Garrett v. Winfree, 120 N.C. App. 689, 463 S.E.2d 411 (1995); McGahren v. Saenger, 118 N.C. App. 649, 456 S.E.2d 852 (1995). In both cases, the Court considered the two events as separate acts and applied the statute of limitations to each event. This raises a policy question of whether an attorney will be discouraged from attempting to correct an alleged mistake when the earlier alleged negligence would be barred by statute of limitations. If the second act does not revive the first, this concern is moot. Another issue raised by the statute of limitations is whether there are circumstances under which an attorney will be found to have a “continuing duty” to the client, such that the statute of limitations does not begin running until the representation ceases, the client is informed of the negligence, or the client otherwise discovers the negligence. See Hargett v. Holland, 337 N.C. 651, 447 S.E.2d 784 (1994); State v. Petree Stockton LLP, 129 N.C. App. 432, 499 S.E.2d 790 (1998); Sharp v. Teague, 113 N.C. App. 589, 439 S.E.2d 792 (1994), Teague v. Isenhower, 157 N.C. App. 333, 579 S.E.2d 600, rev. denied, 357 N.C. 470, 587 S.E.2d 347 (2003).

VI. REAL PROPERTY ISSUES IN PARTICULAR

A. Relationship of title insurance to malpractice insurance

Frequently, when a real estate error occurs, there is a clash of two, and sometimes three, insurance companies. There may be title insurance for the lender, and, hopefully, the owner. There may be malpractice insurance for the attorney. There may even be a policy protecting the title abstractor in the case of an independent paralegal. And, then again, sometimes when a real estate error occurs, there is no insurance involved, such as when the owner (in a cash closing, assumption or seller financing) opted to forego title insurance, or the attorney who closed the loan did not have malpractice insurance. When there are multiple insurance policies in effect, the rub is which policy covers which type of error, a "hot" topic beyond the course of this manuscript. To answer this question, you need to be able to determine whether the problem was a risk that a title company insured (such as a "pure" title defect) or whether the problem was a risk that the malpractice company insured (such as "pure" negligence by the title abstractor). It is not usually a simple question to answer, since a title defect and negligence may overlap. Also, there may be defenses to the alleged negligence. Suffice it to say that if you find yourself facing a claim, you may need to promptly notify the title company and your malpractice carrier to ensure that you do not miss a "notice" deadline under either policy. It is not advisable for you to try to resolve "the problem" on your own as you may inadvertently waive defenses or, worse, increase the damages.

A related question is the relationship of the attorney's alleged negligence to an independent paralegal's negligence. Although the use of independent paralegals is another "hot" topic beyond the scope of this manuscript, it is not advisable to use an independent paralegal unless the independent paralegal has malpractice coverage. Of course, whether or not the independent paralegal has coverage, the attorney who signed the title opinion is responsible for the acts of the paralegal. This is true whether the paralegal is in house or independent. The issue of coverage is more likely to affect the right of the attorney to indemnification.

In addition to the above issues, be aware that the title insurance policy does not cover every conceivable defect. For example, there is an exclusion for a loss "suffered, assumed or agreed" to by the insured. Also, a title policy does not cover physical condition of the property, it does not insure the tax value or acreage of the property, and it does not insure compliance with zoning (e.g., setbacks) or subdivision ordinances. Make sure both you and your client know what the title insurance policy covers and excludes.

On a final note, besides an unhappy client, you may have an unhappy lender on your hands. Some lenders obtain an "insured closing letter" or "closing protection letter" from a title insurance company to ensure compliance by the closing attorney with the lender's written closing instructions. This is when you will see a request from a lender to furnish it with evidence that you are an "approved attorney" -- a condition of its insured closing. In essence, this means a lender wants to be able to complain to the title company if the attorney does not follow its instructions. If the title company has to "fix" a problem itself to satisfy the lender or, worse, has to buy the loan from the lender, the attorney may expect to hear from the title company.

B. Real Estate Errors

The following "errors" may or may not constitute malpractice. They are listed as areas where errors have or are likely to be made. If errors are made, you can be sure the attorney will be blamed. To avoid these errors, see the "10 Commandments of Real Estate Closings" written by Wayne Stephenson attached hereto as Exhibit A. See also "The Seven Holy Virtues For Real Estate Lawyers" attached hereto as Exhibit B.

1. Title search errors

- not supervising paralegal (independent or in-house)
- not using checklists
- not understanding indexing system/abbreviations/punctuation oddities
- not abstracting actual document (relying on index)
- missing a release of a portion of the property
- not reading entire document
- missing that property was/was not entireties property
- missing a deed of trust, etc. in the chain
- missing a life estate
- not checking everything you need to check (i.e., failing to check assessments and, sometimes, water bill)
- not checking all versions of a name (this may even include a duty to check a name that is frequently misspelled or a name that has well known variations)
- neglecting to check outs on assumed names, prior names, or other aliases
- not studying authority granted by Power of Attorney (especially a deed by POA to himself/herself)
- not carrying forward something in title notes to the title opinion
- not understanding significance of something of record
- not giving copies of everything to client and not explaining them to client
- not checking access (for road and utilities); type of access (public/private) and maintenance responsibility
- not conducting title search for access to property over easement
- not searching title for other appurtenant easements
- not drawing out all legals
- not checking plat carefully (all marginal notes, etc.)
- not checking tax map
- not checking legal description against plat, tax map and survey
- not updating title before recording (or only partially updating title)
- not checking temporary index
- not checking judgments for correct time period (especially federal)
- not using a title opinion with the "standard exceptions" (see back page of NCBA Form 1-P)
- not knowing classification of a mobile home (real/personal) and whether DMV title exists with a lien
- not checking title in all applicable counties
- not checking on different procedures when outside your home county
- not checking the law in effect at the time of a particular conveyance (i.e., dower vs. statutory marital interest, repeal of privy exam)

2. Title insurance errors

- update from wrong "back" policy
- update from lender's policy instead of owner's policy
- not buying an owner's policy
- not buying owner full coverage
- not studying prior policy
- gap in title between prior policy and update
- not limiting opinion to exact date and time of search

- not completing forms properly
- not obtaining correct lien affidavit
- reporting that a prior deed of trust has been "canceled" when it has only been "paid"
- not explaining "tacking" to client and not getting client's authorization
- not obtaining necessary/appropriate endorsements
- not satisfying all "requirements" in binder
- in some circumstances, not obtaining a binder prior to closing (i.e., to know that title company will provide coverage for a particular problem)

3. Closing errors

- failing to attend/conduct it yourself
- not getting documents recorded in correct order
- not recording documents a "minute" apart when appropriate (first and second deeds of trust)
- failing to attach "Exhibit A" legal description
- failing to prepare proper legal description (i.e., good beginning point)
- failing to convey appurtenant easements with the lot
- recording a "dry" closing before contingencies satisfied
- not freezing a Seller's line of credit
- not getting payoff or release terms in writing
- not getting payoff right (i.e., closing delayed and figures not corrected)
- not documenting the understanding of the seller and buyer regarding the proration of the current year's taxes (especially when the current year's rates are not yet available)
- not following lender's closing instructions (contingency items, funding number, etc.)
- not getting changes to closing instructions in writing
- not checking restrictions against survey
- not verifying current marital status
- not checking dues (association) and assessments
- not following Notary Statute (allowing someone to notarize a document which that person did not see executed)
- not getting check endorsed!

4. Conflict of interest errors

- certifying title when you are an interested party
- not having clear understanding of which party(ies) you represent
- not explaining to all other parties that you do not represent them
- allowing yourself to be talked into dual representation when you think it isn't prudent
- Seller financing conflicts (not explaining "non-recourse"; not explaining "subordination" issues/risks; not having separate counsel for buyer and seller where actual/potential conflict exists)

5. Disbursement errors

- not updating title before disbursement
- not having "collected" funds (RPC 191, as revised, and Good Funds Act)
- not understanding a credit, etc. on HUD-1

6. Due diligence errors

- not knowing what you are to do besides title, especially if cash closing, assumption or seller financing, such as:
 - zoning
 - subdivision
 - watershed
 - wetlands
 - environmental
 - well/septic
 - availability and location of other utilities
 - termite
 - survey with flood certification
 - access (i.e., failure to advise purchaser that subdivision lot could not serve as access for acreage tract under restrictive covenants).
 - planned roads, road widenings, other condemnation
 - soil (suitability, fill)
 - riparian rights
 - drainage
 - other inspections (structural, roof, HVAC, etc.)
 - possession
 - checking local ordinances
 - other due diligence items as appropriate
- not checking with Secretary of State regarding status of entities involved and otherwise verifying authority of entities

7. Typographical errors

- document not executed right (right party does not sign; spouse doesn't sign, etc.)
- document not notarized right (and defect in notary stamp itself such as whether or not it is permissible to include the "expiration" of the commission on the stamp)
- document not "sealed" (see N.C. Gen. Stat. § 39-6.5 regarding the elimination of the seal requirement in certain circumstances)
- document not proofed (i.e., typo in legal description)
- documents not dated consistently

8. UCC errors

- not checking UCCs and not knowing distinctions between personal property filing and fixture filing
- not checking in right name
- not checking all owners in five year chain (just checking current owner)
- not filling out right
- not filing in all the right places

9. Contract errors

- not checking to see if all contingencies satisfied

- representing both parties (conflict of interest error)
 - failure to document all contract terms/amendments in writing
10. Escrow errors (duty of attorney as escrow agent) (note: see 98 Formal Ethics Opinion 11)
- not having a written escrow agreement
 - not having a provision regarding attorney's obligation (or lack thereof) to conduct due diligence prior to disbursing
 - agreeing to release escrow to one party without obtaining consent of other party
 - agreeing to release funds to seller without paying portion to realtor
 - not having a termination provision
 - not having a provision for the attorney to interplead escrowed funds to clerk of court
 - not having a provision for escrow agent to be reimbursed for attorney fees
11. Realtor related errors
- not understanding dual agency, etc.
 - not checking to see if statutory disclosures made
 - keeping in mind who you represent vs. who realtor represents
12. New subdivision development issues:
- restrictions not recorded
 - annexation issues for subsequent phases
 - no conveyance of common areas to association
 - amenities not constructed yet
13. Landlord/Tenant Errors
- failure to record a Memorandum of Lease when appropriate
 - failure to address subordination/nondisturbance/attornment
 - failure to verify landlord's title
 - failure to verify the zoning/restrictions affecting tenant's proposed use

C. Miscellaneous Statutes:

1. Probate Statutes

Chapter 47 addresses probate and registration. Malpractice traps in this area include execution mistakes and notary mistakes. Execution mistakes run the gamut from not having the proper entity sign (e.g., a general partner executing a deed of trust in only his individual capacity, with no reference on the instrument to the status of the signer being a general partner), to not having the proper officers sign (e.g., a president signs, but no secretary attests, or the same individual signs as president and secretary). Execution errors would also include failure to "seal" the instrument, whether as an individual or as a corporation. See N.C. Gen. Stat. § 39-6.5 regarding the elimination of the seal requirement in certain circumstances. Notary issues also run the gamut. Be sure to follow both Chapter 47 and Chapter 10A. The risk of both execution and notary mistakes are greatly increased with out-of-state transactions.

2. Curative Statutes

The best summary the author has ever seen of curative statutes is one entitled "Rx for Title Ailments--Curative and Other Statutes" by Chris Burti, Regional Vice President and Legal Counsel for Statewide Title. See Exhibit C attached hereto. The important thing to know about curative statutes is that they are limited to curing only certain types of defects and they are limited to defects occurring in only certain time periods.

3. Cancellation Statutes

Article 4 of Chapter 45 addresses the discharge and release of deeds of trust. These statutes are technical and need to be followed literally. Malpractice may result if you report a deed of trust is canceled and it is not. For example, you pay off a note at closing, but fail to obtain the canceled documents so it is still of record. Worse, the note is for a line of credit which you "pay down" to zero, but if it has not been "frozen", the unscrupulous borrower runs the line back up after closing. Worse yet, you allow a client to pay off the debt "after closing."

If you come across an "old" deed of trust in a title examination that there is little hope of having properly canceled of record, this is an area where you can probably get a title insurance company to "insure over" the defect. It is not a risk that you should assume.

D. Real Property Cases:

Bolton v. Crone, 162 N.C. App. 171, 589 S.E.2d 915 (2004) (plaintiff alleged attorney failed to inform him of restrictive covenants that prevented intended development; dismissed on statute of limitations grounds).

Broyhill v. Aycock & Spence, 102 N.C. App. 382, 402 S.E.2d 167 (genuine issue of material fact existed as to whether attorney-client relationship existed when plaintiff alleged, inter alia, that the defendant attorney served as the plaintiff's trustee under the deed of trust, helped plaintiff straighten out a payoff problem related to the sale, and said he would take care of correcting the deed of trust), rev. den., 329 N.C. 266, 407 S.E.2d 831, aff'd., 330 N.C. 438, 410 S.E.2d 392 (1991).

Carroll v. Rountree, 36 N.C. App. 156, 243 S.E.2d 821 (1978) (presumption of fraud rebutted by defendant attorney and summary judgment proper when attorney presented affidavit that he followed the customary practice of attorneys by forwarding a check to former client's wife's attorney who disbursed before obtaining execution of separation agreement and stipulation of dismissal).

Chicago Title Insurance Co. v. Holt, 36 N.C. App. 284, 244 S.E.2d 177 (1978) (general rule is that attorneys are liable for errors in title opinion only to those to whom opinion is issued and thereby in privity of contract), but see United Leasing Corp. v. Miller.

Clouse v. Gordon, 115 N.C. App. 500, 445 S.E.2d 428 (1994).

Commonwealth Land Title Ins. Co. v. Stephenson, 101 N.C. App. 379, 399 S.E.2d 380 (1991) (mislocated septic tank system did not create an "encumbrance" against fee conveyed by general warranty deed).

Commonwealth Land Title Ins. Co. v. Walker & Romm, 883 F.Supp 25 (M.D.N.C.), aff'd, 43 F.3d 1465 (4th Cir. 1994) (liability not contested; court holds plaintiff did not fail to mitigate its damages as a matter of law; defendant's proposed means of mitigation in context of negligent title examination were unreasonable r unavoidable).

Cornelius v. Helms, 120 N.C. App. 172, 461 S.E.2d 338 (1995) (purchase money transaction).

Fidelity National Title Insurance Co. of Tennessee v. Kidd, 99 N.C. App. 737, 394 S.E.2d 225 (1990) (summary judgment upheld for defendants, the title abstractor and his company and the closing attorney, where claim by plaintiff, the title company, was based on a promissory note which was conditioned upon clear title, thereby preventing an actual loss).

Gram v. Davis, 128 N.C. App. 484, 495 S.E.2d 384 (1998) (failure to advise purchaser that subdivision tract could not serve as access to acreage tract due to restrictive covenants).

Greene v. Carpenter, Wilson, Cannon & Blair, P.A., 119 N.C. App. 415, 458 S.E.2d 507 (1995) (purchase money transaction).

Haas v. Warren, 341 N.C. 148, 459 S.E.2d 254 (1995) (advertisement for foreclosure sale).

Hewes v. Wolfe, 74 N.C. App. 610, 330 S.E.2d 16 (1985) (abuse of process claim against attorney and client for improper lis pendens).

Investors Title Insurance Co. v. Herzig, 320 N.C. 770, 360 S.E.2d 786 (1987) (issue of material fact existed as to whether partner, in executing title opinion for his own property, acted on behalf of the partnership). See also Investors Title Insurance Co. v. Herzig, 101 N.C. App. 127, 398 S.E.2d 659 (1990) (law partnership could be held liable on theory of apparent authority), rev'd, 330 N.C. 681, 413 S.E.2d 268 (1992).

Ives v. Real Venture, Inc., 97 N.C. App. 391, 388 S.E.2d 573 (1990) (deeds reserving mineral rights, covenanting grantees right to convey in fee simple and warranting title = fee simple in surface of land AND seller's conveyance of fee simple breached covenant of seisin).

Jordan v. Crew, 125 N.C. App. 712, 482 S.E.2d 735 (1997).

McGahren v. Saenger, 118 N.C. App. 649, 456 S.E.2d 852 (1995) (deed).

Miller v. Ferree, 84 N.C. App. 135, 351 S.E.2d 845 (1987) (plaintiff's violation of Rule 8(a)(2) regarding ad damnum clause of Complaint alleging negligence in real estate transactions did not warrant dismissal with prejudice).

NationsBank of North Carolina, N.A. v. Parker, 140 N.C. App. 106, 535 S.E.2d 597 (2000).

North Carolina Federal Savings & Loan Association v. Ray, 95 N.C. App. 317, 382 S.E.2d 851(1989)(attorney negligent in construction loan closing by failing to apply land draw to obtain release of deed of trust).

North Carolina State Bar v. Combs, 44 N.C. App. 447, 261 S.E. 2d 207 (1980) (disbarment of attorney upheld where attorney contracted to sell land and failed to advise buyers of known liens).

North Carolina State Bar v. Maggiolo, 124 N.C. App. 22, 475 S.E.2d 727 (1996) (affirming Disciplinary Hearing Commission in disbaring attorney for misconduct stemming from a conflict of interest in a real estate transaction that resulted from attorney preparing deed for seller).

Quality Inns International, Inc. v. Booth, Fish, Simpson, Harrison and Hall, 58 N.C. App. 1, 292 S.E.2d 755 (1982) (no malpractice where alleged negligence involved uncertain and unsettled area of law regarding wrap-around mortgages).

Raintree Realty & Construction Co. v. Kasey, 341 N.C. 195, 459 S.E.2d 273 (1995) (per curiam) (affirming court of appeals decision that allowed foreclosure by lender when "payoff" tendered by closing attorney was short \$24.34 such that lender had no obligation to cancel its deed of trust and seller subsequently drew against line of credit).

Schuman v. Investors Title Insurance Co., 78 N.C. App. 783, 338 S.E.2d 611 (1986) (no proximate cause where negligence in closing did not make client's position any worse than if there had been no negligence).

Security Union Title Insurance Co. v. Ledgett, 91-84-Civ-7-F (E.D.N.C. May 18, 1992) (unpublished) (defendant attorney contended that he complied with local custom in relying on telephone conversation by his secretary to lender that no release fee would be required to release Deed of Trust; court found this negligence per se, notwithstanding absence of expert testimony).

Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993) (legal malpractice action in context of advice concerning a purchase money deed of trust; on issue of mitigation, Court held plaintiffs were not required to attempt to sue on the note or guaranty; on issue of damages, Court held trial judge should submit mutually exclusive theories of negligence independently).

Smith v. Martin, 124 N.C. App. 592, 478 S.E.2d 228 (1996) (negligence by trustee canceling deed of trust without proper verification of authority).

Sunbow Industries, Inc. v. London, 58 N.C. App. 751, 294 S.E.2d 409 (defendant attorney's duty to file a financing statement continues until attorney can no longer do so; statute of limitations does not begin to run until the date on which perfection of financing statement is barred by bankruptcy), rev. den., 307 N.C. 272, 299 S.E.2d 219 (1982).

Swaim v. Simpson, 120 N.C. App. 863, 463 S.E.2d 785 (1995) (access limited to road not extended to utilities), aff'd. per curiam, 343 N.C. 298, 469 S.E.2d 553 (1996).

Title Insurance Co. of Minn. v. Smith Debnam Hibbert & Pahl, 119 N.C. App. 608, 459 S.E.2d 801 (1995), aff'd in part per curiam. rev. improvidently granted in part, 342 N.C. 887, 467 S.E.2d 241 (1996) (damages issues regarding superior deeds of trust not canceled; duty of borrower's counsel to lender's title company).

United Leasing Corp. v. Miller, 45 N.C. App. 400, 263 S.E.2d 313 (1980) (no privity required where allegation is negligent failure to discover a lien on real estate used as collateral), but see Chicago Title, supra. See also United Leasing Corp. v. Miller, 60 N.C. App. 40, 298 S.E.2d 409 (appeal after remand)(no error in trial court's dismissal of plaintiff's claim against attorney for alleged negligence in failing to discover a lien when plaintiff had notice and failed to pursue the discrepancy with the defendants prior to closing).

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C. CLE Manuscripts

Fouts, Daniel F. and [Burnham] Shea, Margaret E., Litigation Strategies in the Defense of Legal Malpractice Claims (North Carolina Bar Foundation 1990)

North Carolina Bar Foundation, Litigation Section Seminar: Professional Liability (1990)

Wake Forest University, North Carolina Professional Malpractice (1983)

EXHIBIT A

10 COMMANDMENTS OF REAL ESTATE CLOSINGS

By Wayne Stephenson

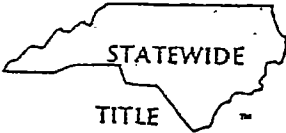
1. Thou shalt not walk into the deed vault nor close a real estate transaction unless thou knowest what thou art doing or thou has learned brethren or sistren to lend a helping hand. The days when "anyone can close a loan" are gone.
2. Thou art not a title insurance company nor is thy malpractice carrier. Many are those, both owners and lenders, who are using the attorney as their title insurance company.
3. Thou shalt document the substance of every telephone conversation involved in the transaction. Thou shalt cover thine hind parts.
4. Thou shalt have a working knowledge of environmental law. And lo, there shall one day be pestilence upon the entire face of the earth and environmental law will touch every transaction.
5. Verily, verily I say unto you that the closing attorney is as the hub of a wheel and each party to the transaction a spoke. If in the future any of the spokes is broken economically, ye whose name was blessed at closing shall be called "Oh cursed one." Beware of the potential conflicts of interest that could be alleged in the future and proceed cautiously.
6. Thou shalt not disburse loan proceeds before updating and recording title. "Tis better to suffer the wrath of an angry realtor or property owner than to bury thy law license in the sand."
7. Thou shalt uncover thine eyes and proofread carefully the work of those thou superviseth. If thy support staff has erred and thou has not reviewed their work, then two errors have occurred. Many is the attorney who has suffered a claim because of a typo the size of a mustard seed.
8. Thou shalt say "Get thee behind me Satan" if thou art pressured to perform a transaction in a way that thou thinks is improper. Do not succumb to the almighty dollar. Tis better to lose a closing fee that to suffer the slings of multiple claims resulting from a system breakdown because one has worshiped at the altar of the "Cash Cow" client.
9. Thou shalt always review each instrument within the title search in its entirety. Beware the deed of trust that encumbers the property in the hidden "Attached Schedule A."
10. Thou shalt never forget this real estate transaction is the biggest transaction of thy client's life. Communicate, communicate, communicate.

EXHIBIT B

The Seven Holy Virtues For Real Estate Lawyers

By Margaret Shea Burnham

1. *Understand the contract and the closing instructions, even the minute detail.*
2. *Verify who is responsible for conducting the due diligence and probe your client's rationale for any due diligence being waived.*
3. *Oversee the execution and acknowledgement of the closing documents (there is a reason for the pending re-write of the Notary Public statute).*
4. *Treat "other people's money" as your own.*
5. *Make abundantly clear to all parties which party you represent (and which party(ies) you don't).*
6. *Look at the "big picture" - what would matter to you if it were your personal closing?*
7. *Document every single thing you do.*



STATEWIDE
TITLE

NEWSLETTER

AND LEGAL MEMORANDUM

CORPORATE OFFICE
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REGIONAL OFFICE
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Vol. 2, No. 32

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Rx for Title Ailments – Curative and Other Statutes

By Chris Burti, Regional Vice President And Legal Counsel

TAX DEFERRED EXCHANGES
Statewide Title, Inc. recently established Statewide Title Exchange Corporation ("STEC"). STEC is authorized to act as a "qualified intermediary" to facilitate tax deferred exchanges of real property. We have complete sets of STEC tax deferred forms available in hard copy and diskette, both free of charge. Please feel free to call Jeanette Lassiter, Ginnie Whittington or Ed Urban for forms and further information.

*HELP US MAKE STATEWIDE TITLE BETTER!

We are always appreciative at Statewide Title for any ideas or suggestions that make us far more efficient, more effective and to deliver a better product. Effective December 1, 1995 we began our year long contest to try to determine the best suggestions submitted to us at Statewide Title. The contest is open to all attorneys and legal secretaries in North Carolina and the officers of Statewide will pick the top three suggestions. The winners will be awarded \$500.00 for the first place suggestions, \$250.00 for the second place suggestions, and \$100.00 for the third place suggestion. The awards will be made at our annual Christmas Banquet at the Country Club of Salisbury in December of 1996. To enter our contest, mail or FAX your suggestions to Carol Furr at Statewide Title's corporate office. Good luck, and THANKS FOR CHOOSING STATEWIDE TITLE!

UPCOMING FUNCTIONS FOR MARCH, APRIL AND MAY

1. March 5, 1996 –
Attorney Title Insurance Seminar,
Statesville - Country Club
2. March 27, 1996 –
Ladies Night - Salisbury, Meroney
Theater "Little Foxes"
3. April 3, 1996 –
Attorney Title Insurance Seminar,
Kinston
4. April 18, 1996 –
Legal Secretary Seminar, Statesville
- Country Club
5. May 2, 1996 –
Statewide Title Pig Pickin',
Salisbury - Statewide Title, Inc.
6. May 9, 1996 –
Legal Secretary Seminar, Lexington
- Dutch Club
7. May 14, 1996 –
Attorney Title Insurance Seminar,
Rocky Mount

For generations title examiners have had to deal with problems discovered in the search of the title records title for real property. Quite often the problems have been technical in nature, ancient or both. Until the early part of this century it was common practice to search titles going back to original grants. This could require travel to adjoining counties to examine records predating the origin of the search county. As an alternative to expensive and protracted litigation, to clear up such problems and to reduce the need for extensive grant searches, the Legislature has passed literally hundreds of statutes providing relief. It is beyond the space limitations of this newsletter to address so many statutes individually, in addition many are drafted so narrowly as to apply to very few cases or are themselves so old as to be no longer relevant (see NCGS 47-74 which provides "Wherever any deed of conveyance registered prior to January 1, 1886, purports to have been attested by two witnesses and in the certificate of probate and acknowledgment it is stated that the execution of such deed was proven by the oath and examination of one of the grantors in said deed instead of either of the witnesses named, all such probates and certificates are hereby validated and confirmed, and any such deed shall be taken and considered as duly acknowledged and probated."). This article will attempt to address some of the statutes most frequently used to cure modern title problems. Title examiners will be familiar with most of these but we hope that having a handy reference will prove helpful.

TYPOGRAPHICAL ERRORS

NCGS 47-36.1 is probably one of the most indispensable statutes available to correct relatively current problems. This statute provides that an obvious typographical error may be corrected on the instrument, initiated by the signatories or the drafting attorney and rerecorded with an explanation attached signed by the party making the correction. Reexecution and reacknowledgement is not required. The statute does not give guidance as to what constitutes an "obvious" error, however *Green v. Crane*, 96 N.C.App. 464 (1990) has shown us that an omitted description is not within the purview of the statute.

NCGS 47-108.20 provides validity to older corrected deeds recorded prior to June 30, 1986, which were not reexecuted

and reacknowledged and contains similar limitations as NCGS 47-36.1.

SEALS OMITTED

Case law in this State holds that a deed which does not contain the seal of all grantors is not sufficient to convey property. NCGS 47-108.11 validates such deeds where they were executed prior to January 1, 1991 and which contain language evidencing intent to affix a seal.

There are numerous statutes that validate instruments with omitted seals. The following are often helpful and apply to instruments executed prior to January 1, 1991:

NCGS 47-71.1-Corporate deeds with seals omitted.

NCGS 47-53-Clerks of Superior Court and Notaries taking acknowledgments omitting seal, name or signature.

NCGS 47-53.1-Notaries omitting seals
NCGS 47-51-Deeds of sheriff, commissioner, receiver, executor, administrator, and other officials omitting seals

NCGS 45-20.3-Deeds by attorney-in-fact where the principal omitted the seal in the power of attorney.

UNCANCELLED MORTGAGES

NCGS 45-37(b) provides a conclusive presumption as against creditors and purchasers for value, of satisfaction of Mortgages and Deeds of Trust which remain uncanceled of record more than 15 years after the due date of the last installment of the debt secured. There are provisions for the beneficiary to extend this limit once. This is done by the filing of an affidavit or "separate instrument" by the holder of the indebtedness. This filing is with the register of deeds. Before relying on this statute where the last due date is less than 30 years past it would be prudent to check the indices for the beneficiary in counties where the Register of Deeds either does not make marginal entries or is inconsistent about making them.

ANCIENT MINERAL CLAIMS

Where an instrument of record severs mineral rights from the fee title and the mineral rights are not listed for taxes between 1981 and 1988, notice has been published by the County Commissioners, pursuant to NCGS 1-42.9 and drilling or mining has not occurred, the record owner of the surface rights with an unbroken chain of title of more than 30 years is presumed to own a fee simple estate assum-

Rx for Title Ailments – Curative and Other Statutes

By Chris Burti, Regional Vice President And Legal Counsel

(Continued from page 1)

ing no adverse possession. The statute is lengthy and complex and should be consulted for other requirements and limitations.

LOST DEEDS

NCGS 8-21 provides that if in any judicial proceeding it is shown that a recorded conveyance of real estate is lost, and the record destroyed, it shall be presumed to be made upon sufficient consideration and to be an estate in fee simple if the grantor was possessed of such estate unless the contents be shown to be otherwise.

NO PRIVY EXAMINATION

NCGS 39-13.1 provides that deeds executed without a privity examination are valid and NCGS 52-8 validates contracts executed between January 1, 1930 and January 1, 1978, when the requirement for a finding that the contract was not unreasonable or injurious to the wife has not been complied with. In *Dunn v. Pate*, 334 N.C. 115 (1993) our Supreme Court overturned a controversial Court of Appeals decision (which had held that the legislature could not validate invalid deeds) by



Ginnie N. Whittington

Commercial/Referral Services Manager

Ginnie attended the University of North Carolina at Chapel Hill and moved to Salisbury, North Carolina in 1987 where she began her career in the title insurance industry. She joined Statewide Title in 1991 to assist in extending coverage from a regional area to one inclusive of the entire state of North Carolina. With Statewide Title's expansion and increasing involvement in the referral business, Ginnie was appointed Manager of the Commercial/Referral Services Department, dedicated solely to servicing commercial/referral transactions in all 100 counties. Ginnie works directly with the national referral clients, coordinating attorney/client relationships, and establishing and developing new referral accounts. She also handles Statewide Title's non-referral commercial transactions and provides Statewide Title Exchange Corporation ("STEC") with assistance on tax deferred exchanges dealing with real property. She and her husband, Jeff, reside in Salisbury and are expecting their first child in June.

ruling that such examinations were unconstitutional.

MARKETABLE TITLE ACT

Passed in 1973, Chapter 47B of the North Carolina General Statutes is a legislative attempt to extinguish ancient claims and title defects. Due to the numerous exceptions in the statute it does not provide the title examiner with a means to shorten the length of the search but rather establishes a prima facie case in litigation if complied with. There are 13 exceptions to the Act including certain easements, restrictive covenants, access and utility easements as well as enforceable secured liens and parallel chains of title. Interestingly enough, the act does not except vested non-possessory interests and the Court of Appeals has ruled in *Kirkman v. Wilson* 98 N.C. App. 242 (1990) that vested remainders can be cut off.

LIMITATIONS

Article 4 of Chapter 1 of the North Carolina General Statutes deals with limitations affecting real property. Since limitations are defenses they are not truly corrective or remedial. Their existence, when the facts are well established and/or documented, often provides a mechanism to insure the marketability of a land title without the necessity of bringing an action in order to clear the defect.

NCGS 1-30(3) is a six year limitation on actions for injury to an incorporeal hereditament. This has been held to apply to the enforceability of a restrictive covenant. *Allen v. Sea Gate Ass'n, Inc.* 119 N.C. App. 761 (1992).

DISSOLVED CORPORATIONS

When a corporation has been out of existence for more than ten years and the grantee or those claiming under the grantee have been in uninterrupted possession since the execution of the instrument by the corporation in its corporate name by its president, such instrument may be registered upon order of the superior court on proof of a subscribing witness, without further requirement of acknowledgment. NCGS 47-16.

FORECLOSURES

NCGS 45-39, et seq., set forth numerous validating and limiting provisions for correcting inadequate notice, improper party and other defects in foreclosures. However must involve older problems and technical defects of statutes that have been amended often.

OFFICIAL CAPACITY NOT DESIGNATED

NCGS 47-108.17 provides that, where an executor, executrix, administrator, administratrix, guardian or commissioner has executed a deed or other instrument and the granting clause of the instrument sets forth the official capacity of the grantor, neither the failure to redesignate the grantor's official capacity following his or her signature nor the failure to designate the official capacity of the grantor in the acknowledgment of the instrument

the instrument is otherwise properly executed.

We hope that you find this article useful and will include it in your title search "first aid kit". If there are other statutes, which we have not addressed, that you have found helpful in curing title defects please fax them to us at 1-800-522-8563 and we may include them in future materials.

SOME CONCLUSIONS ABOUT USE OF CURATIVE STATUTES

If a deed (or other instrument) to A is invalid and then the grantor makes a subsequent transfer to B which is for value and is valid and is recorded it is doubtful that a subsequently passed curative statute can validate the grantor's transfer to A to the detriment of B. That is one reason why new curative statutes or amended curative statutes must be used prudently. See, generally, *Herrick and McLaughlin, Webster's Real Estate Law in North Carolina*, Sec. 23-2 (Fourth Ed. 1994).

RERECORDING DOCUMENTS FOR PRIORITY PURPOSES

By Ed Urban, Vice President and State Legal Counsel

On occasion, a deed and deed of trust will be recorded in the wrong order. For example, A is in title and gives a deed (for value) to B and B gives a deed of trust securing M. If the deed of trust from B securing M is recorded before the deed from A to B is recorded, the deed of trust will be out of the chain of title for priority purposes. For example, a judgment docketed against A will have priority over the deed of trust. So, the deed and deed of trust must be rerecorded and reindexed in the correct order before that happens! See *Door Co. v. Jovner*, 182 N.C. 518, 109 S.E. 259 (1909). It is noted that G.S. 47-31 allows the use of a certified copy of an instrument.

Regarding two deeds of trust that are recorded at the same time it should be noted that, nothing else appearing, the two instruments would appear to have equal priority, notwithstanding that one has an earlier book and page number. See *Hood v. Landreth*, 207 N.C. 621 (1934). Recitals in the instruments regarding priority are helpful, otherwise, rerecording or a subordination agreement subordinating one interest to the other would be required.

AFFIDAVIT OF LOST NOTE-REVISITED

By Chris Burti, Regional Vice President and Counsel and Ed Urban, Vice President and State Legal Counsel
New G.S. 45-37(a)(6) and new G.S. 47-46.3 (form affidavit of lost note) were discussed in our August, 1995 newsletter. We have noticed that while G.S. 45-37(a)(6) requires an affidavit of lost note to include "(i) the date of satisfaction" of the note, the form in G.S. 47-46.3 does not expressly have a line for that date, although it could be argued that the form's "sworn to and subscribed" date is implicitly that date. It would be advisable to add an item 4 to the