2-1-1997

Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.: Use of the Code of Professional Responsibility in Georgia Legal Malpractice Cases

Lynn E. Stapleton

Follow this and additional works at: https://readingroom.law.gsu.edu/gsulr

Part of the Law Commons

Recommended Citation


Available at: https://readingroom.law.gsu.edu/gsulr/vol13/iss3/2
ALLEN V. LEFKOFF, DUNCAN, GRIMES & DERMER, P.C.: USE OF THE CODE OF PROFESSIONAL RESPONSIBILITY IN GEORGIA LEGAL MALPRACTICE CASES

INTRODUCTION

Legal malpractice has been an unfortunate reality in the United States for over two hundred years.¹ As with other types of malpractice, one element to consider in determining liability is the standard of care required of the practitioner.² The relatively recent advent of professional responsibility codes and related standards in the legal field³ has generated questions about the relationship between these ethical guidelines and the appropriate standard of care to be used in legal malpractice cases.⁴

1. Judge Abraham J. Gafni, Foreword: The Model Rules—A Practitioner’s Guide to Avoiding Malpractice, 61 Temp. L. Rev. 1045, 1045 (1988). In 1796, attorney Alexander White was sued for malpractice after he allegedly failed to file a declaration, and a judgment in favor of his client was reversed. Id. (citing Stephen v. White, 2 Va. (2 Wash.) 203, 203 (1796)).


3. Gafni, supra note 1, at 1046. The American Bar Association (ABA) created its first Canon of Ethics in 1908. Id. Although the Canons were criticized for their limited scope and lack of practical relevance, the ABA did not adopt its Model Code of Professional Responsibility until 1968. Id. Following criticism of the Model Code’s content and structure, the ABA replaced it with the Model Rules of Professional Conduct in 1983. Id.

The purposes of a professional ethics code are: (1) “to exert influence both within and without . . . [the] profession[]”; (2) “to provide a structure for regulating conduct”; (3) to “establish moral guidelines”; (4) to provide a “public relations tool[]”; (5) “to instill loyalty within the profession”; and (6) “to establish a sense of fraternity.” Criton A. Constantinides, Note, Professional Ethics Codes in Court: Redefining the Social Contract Between the Public and the Professional, 25 Ga. L. Rev. 1327, 1339-41 (1991).

4. Sullivan, supra note 2. The American Law Institute (ALI) began work on a “Restatement on the Law Governing Lawyers” in 1988; although only four of the proposed restatement’s nine chapters are essentially complete to date, the latest schedule calls for the full document to be submitted for approval by ALI members in 1997. James Podgers, Critics Fear Impact of Ethics Restatement: ALI’s New Standards for Lawyer Behavior Could Be Basis for Malpractice Claims, A.B.A. J., Oct. 1995, at 34. The restatement will address “the full range of [attorney] conduct issues,” and there is concern about the impact of “adding another layer” to the “growing array of guidelines” attorneys currently face. Id.
The elements of a legal malpractice action in Georgia are as follows: “(1) employment of the defendant attorney, (2) failure of the attorney to exercise ordinary care, skill and diligence, and (3) . . . such negligence . . . [as] the proximate cause of damage to the plaintiff.”6 As alluded to in element (2), the general standard of care in legal malpractice cases is defined by “the skill and knowledge ordinarily possessed by attorneys under similar circumstances.”6

The presumption in a legal malpractice case is that “the legal services were performed in an ordinarily skillful manner.”7 This presumption may be rebutted by expert legal testimony.8 Expert testimony is used “to establish the parameters of acceptable professional conduct,” as a jury is not “to speculate about what the ‘professional custom’ may be.”9

The practice of law is acknowledged to be an inexact science; as a result, a breach of duty arises only “when the relevant . . . legal principles or procedures are well settled[,] . . . their application [is] clearly demanded, and the failure to apply them [is] apparent.”10 In all other situations, no liability for undesirable results will attach to an attorney “acting in good faith and to the best of his knowledge.”11

Attorney discipline is provided through the State Bar of Georgia, a self-governing administrative arm of the judiciary that was established in 1963.12 The Supreme Court of Georgia has

6. Sullivan, supra note 2, at 100 (quoting RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 15.2, at 887 (3d ed. 1989)).
8. Id.
9. Id. at 111, 146 Ga. App. at 345.
10. Id.
11. Id.
12. 1963 Ga. Laws 70 (codified at O.C.G.A. § 15-19-30 (1994)); Wallace v. Wallace, 166 S.E.2d 718, 721, 225 Ga. 102, 105 (1969). According to Rule 1-103 of the State Bar: “The purposes of the State Bar of Georgia shall be: (a) to foster among the members of the bar of this State the principles of duty and service to the public; (b) to improve the administration of justice; and (c) to advance the science of law.” STATE BAR OF GEORGIA HANDBOOK 4 (1995-96).

A controversy currently exists in Georgia as to whether the lawyer discipline function should be handled by the Bar. Emily Heller, Tough Going for Bar at Discipline Panel: Chief Argues Bar Should Keep Discipline Counsel, FULTON COUNTY DAILY REP., Oct. 23, 1995, at 1 [hereinafter Tough Going]. The Bar's Office of General Counsel has lawyer discipline as its main function, but also serves as the Bar's lawyer, raising questions about its ability to be truly objective. Id. at 2. The
authority to adopt rules and regulations for the organization and
to regulate and govern the practice of law in Georgia.\textsuperscript{13} The
State Bar Rules include the Code of Professional Responsibility,\textsuperscript{14} the Standards of Conduct,\textsuperscript{15} and
Professionalism Standards.\textsuperscript{16}

Bar controls the office's budget and makes employment decisions regarding the
General Counsel. \textit{Id.} The Commission on Evaluation of Disciplinary Enforcement
heard suggestions in mid-1995 from a former Bar prosecutor and the Bar president-
elect that the Supreme Court “take the lawyer prosecution function from the bar and
possibly give it to an independent commission.” \textit{Id.} Former State Bar President,
Robert W. Chasteen, Jr., argued that the Bar and its lawyer discipline functions are
so integrated as to be inseparable, and that taking away the disciplinary function
would eliminate the need for a mandatory bar. \textit{Id.} at 3. He also noted that “[f]unding
for the Office of General Counsel has increased fourfold in 10 years,” and added that
“[t]o me that does not say that the bar underfunds discipline.” \textit{Id.; see also} Emily
1; Emily Heller, \textit{Dissent Promised on Ethics}, \textit{FULTON COUNTY DAILY REP.}, July 1,
1996, at 1.

96). The Georgia Code of Professional Responsibility is similar to the Model Code of
Professional Responsibility. Roy M. Sobelson, \textit{Legal Ethics}, 45 \textit{MERCER L. REV.} 287,
288 n.4 (1993). The ABA’s Model Code and Model Rules differ from the Georgia Code
in at least one important respect, however. James J. Fason, III, \textit{The Georgia Code of
Professional Responsibility: A Catalyst for Successful Legal Malpractice Actions?}, 37
\textit{MERCER L. REV.} 817, 828 (1986). The Model Code includes the following statement:
“The [Model] 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.” MODEL CODE OF
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.

MODEL RULES OF PROFESSIONAL CONDUCT Scope (1994). Such limitations are
conspicuously absent in the Georgia Code of Professional Responsibility, which
provides in its Preamble:

No code or set of rules can be framed which will particularize all the
duties of the lawyers in varying phases of litigation or in all the
relations of the professional life. The following canons of ethics are
adopted by the State Bar of Georgia as a general guide, yet the
enumeration of particular duties should not be construed as a denial of
the existence of others equally imperative, though not specifically
mentioned.


Standards of Conduct were adopted by the State Bar of Georgia in 1977; they are
separate from the Code of Professional Responsibility and are analogous to the
American Bar Association (ABA) Disciplinary Rules. Fason, supra note 14, at 829.
Until 1995, Georgia case law held that an alleged violation of the Code of Professional Responsibility or the Standards of Conduct, standing alone, could not serve as the legal basis for a legal malpractice action.\textsuperscript{17} This was interpreted to require exclusion of any evidence of or reference to such a violation.\textsuperscript{18}

This Comment will review the Georgia Supreme Court's decision in \textit{Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.},\textsuperscript{19} which broke with precedent by allowing the introduction of evidence regarding the defendant attorneys' alleged violation of the Code of Professional Responsibility in a legal malpractice case.\textsuperscript{20} Section I will examine the evolution of Georgia case law on the subject and Section II will explore the philosophical shift that took place in \textit{Allen}. Sections III and IV will discuss the potential positive and negative impacts of the court's new direction.

I. HISTORY OF GEORGIA CASE LAW

Before addressing the judicial treatment of professional codes in actions against attorneys, it is helpful to examine the historical attitude of the courts in construing state statutes dealing with attorney conduct, which one would expect to be more decisive in determining appropriate standards. In \textit{Tingle v. Arnold, Cate & Allen},\textsuperscript{21} the Georgia Court of Appeals dealt with statutes governing attorney conduct, finding that the Georgia General Assembly intended "to provide ethical guidelines for attorneys in their capacity as officers of the court," not to provide a basis for civil suit.\textsuperscript{22} The defendant law firm had been appointed by the court to represent the guardian of an

\textsuperscript{17} \textit{E.g.}, \textit{Davis v. Findley}, 422 S.E.2d 859, 861, 262 Ga. 612, 613 (1992).
\textsuperscript{18} \textit{See Allen v. Lefkoff, Duncan, Grimes, & Dermer, P.C.}, 442 S.E.2d 466, 212 Ga. App. 560 (1994). \textit{But see Canberon v. Canal Ins. Co.}, 269 S.E.2d 426, 246 Ga. App. 147 (1980) (holding that rules are relevant "in cases in which directly or indirectly involve the conduct of attorneys licensed to practice law in this state").
\textsuperscript{20} Id. at 722, 265 Ga. at 377.
\textsuperscript{22} Id. at 263, 129 Ga. App. at 137.
incompetent in an action to set aside deeds given by the incompetent to the plaintiff. After the success of the action, the plaintiff brought this suit claiming violations of state statutes providing for disbarment of and criminal charges against an attorney who solicits legal employment. The court held that the statutes were irrelevant to the suit, as it was not an action for either disbarment or prosecution for barratry. "[T]he legislature did not intend to provide a private cause of action through the statutes, but intended to handle violations through contempt proceedings, an inherent power of the courts.

In some cases, however, Georgia courts have held that ethical standards do have the force of law. In 1980, the Georgia Supreme Court upheld the inclusion of a Code of Professional Responsibility disciplinary rule in a jury charge in Cambron v. Canal Insurance Co. The insurance company filed suit to set aside two default judgments against it, with one of its exceptions being to the inclusion of Directory Rule 7-104 (Communicating with One of Adverse Interest) in the charge to the jury. The charge was found to be appropriate, as "[t]hese rules do have the effect of law and are, therefore, proper charges in cases which directly or indirectly involve the conduct of attorneys licensed to practice law in this state." Subsequent malpractice cases questioning the use of ethical standards have distinguished Cambron on the basis that it was not a malpractice case.

The Georgia Supreme Court clarified the differences between unethical and criminal conduct in Marcus v. State, holding that "behavior which might be unethical and might even subject an attorney to discipline by the State Bar does not necessarily

23. Id. at 261, 129 Ga. App. at 135.
24. Id. at 262, 129 Ga. App. at 136.
25. Id. at 263, 129 Ga. App. at 137.
26. Id.
27. Id.
28. Fason, supra note 14, at 824.
29. 269 S.E.2d 426, 246 Ga. 147 (1980).
31. Cambron, 269 S.E.2d at 430, 246 Ga. at 151.
rise to the level of criminal conduct.\textsuperscript{34} There, an attorney was indicted for knowingly and wilfully concealing a material fact by presenting an order for an appearance bond for his client, which contained a typographical error reducing the bond requirement.\textsuperscript{35} The court held that the indictment should have been dismissed because there was no allegation that the order had been altered by the attorney or that it was invalid.\textsuperscript{36} Although the issues of the attorney's ethical conduct and potential disciplinary action were not before the court, it offered in dicta that it should not apply a standard to an attorney in a criminal action that is different from that applied to a layperson, as equal protection problems would result.\textsuperscript{37}

In \textit{East River Savings Bank v. Steele},\textsuperscript{38} an action for intentional infliction of emotional distress, the Georgia Court of Appeals held that a violation of a rule of professional conduct is not, per se, outrageous.\textsuperscript{39} The plaintiff claimed that the remarks of the bank's attorney during and after cross-examination, threatening the plaintiff with prosecution for perjury, constituted intentional infliction of emotional distress.\textsuperscript{40} His claim was based on the reasoning found in \textit{Kinnamon v. Staitman & Snyder},\textsuperscript{41} a California case in which the writing of a letter by the defendant attorneys to the plaintiff threatening criminal sanctions was held to constitute intentional infliction of emotional distress.\textsuperscript{42} The California Court of Appeals held that such conduct violated the California rules of professional conduct, and was therefore "of such an extreme nature as to be 'outrageous.'"\textsuperscript{43} Although the Georgia Court of Appeals acknowledged that the remarks made by the bank's attorney in \textit{East River Savings} were "discourteous and unprofessional,"\textsuperscript{44} it did not find them, in the context of litigation, to sustain such a

\textsuperscript{34} \textit{Id.} at 471-72, 249 Ga. at 346.
\textsuperscript{35} \textit{Id.} at 471, 249 Ga. at 345.
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.} at 472, 249 Ga. at 346.
\textsuperscript{39} \textit{Id.} at 191, 169 Ga. App. at 11.
\textsuperscript{40} \textit{Id.} at 190, 169 Ga. App. at 10.
\textsuperscript{41} 136 Cal. Rptr. 321 (Ct. App. 1977). This decision was later disapproved by the California Supreme Court on other grounds. Silberg v. Anderson, 786 P.2d 365, 374 (Cal. 1990).
\textsuperscript{42} \textit{East River Sav.}, 311 S.E.2d at 191, 169 Ga. App. at 11.
\textsuperscript{43} \textit{Id.}, 169 Ga. App. at 11 (quoting \textit{Kinnamon}, 136 Cal. Rptr. at 323).
\textsuperscript{44} \textit{Id.}
claim as intentional infliction of emotional distress. The court adopted language from the dissenting opinion in Kinnaman, stating that “an alleged violation [of a rule of the Code of Professional Responsibility], standing alone, cannot serve as a legal basis to support plaintiff’s civil action seeking money damages.”

The Georgia Court of Appeals again used the “standing alone” language in the legal malpractice case of Roberts v. Langdale. In Roberts, the plaintiff alleged that the defendant attorney failed to represent him as a guarantor under two promissory notes with the “requisite degree of care, skill and diligence.” The action became a battle of the experts, as the defendant produced affidavits from three attorneys stating that he had represented the plaintiff with the proper “skill, prudence and diligence” and that the plaintiff’s damages were not a result of any act or omission on his part. The plaintiff’s expert witness deposed that the defendant had “violated one or more provisions of the Georgia Code of Professional Responsibility.” The Georgia Court of Appeals analyzed the three elements of a legal malpractice action—attorney-client relationship, negligence, and proximate cause—and held that since the plaintiff failed to show that the defendant’s actions caused the plaintiff any damages, the trial court was correct in granting summary judgment to the defendant. Standing alone, the plaintiff’s evidence of a potential violation of Georgia’s Code of Professional Responsibility was insufficient for a malpractice action.

The Georgia Supreme Court reviewed the line of cases on this subject in Davis v. Findley, summarizing its position as follows: “[W]hile the Code of Professional Responsibility provides specific sanctions for the professional misconduct of the attorneys whom it regulates, it does not establish civil liability of attorneys for their professional misconduct, nor does it create remedies in

45. Id.
46. Id. (alteration in original).
48. Id. at 592, 185 Ga. App. at 122.
49. Id. at 593, 185 Ga. App. at 123.
50. Id.
51. Id.
52. Id. at 592-93, 185 Ga. App. at 122-23.
consequence thereof." In Davis, the plaintiff alleged that the defendant attorney had charged excessive fees for legal services—a violation of Directory Rule 2-106(A) of the Code of Professional Responsibility and Standard 31 of the Standards of Conduct. The court held that State Bar Rule 4-102(a) limits the remedy for a violation of the Standards of Conduct to "disciplinary action and/or punishment," and encouraged the use of arbitration offered by the State Bar to resolve fee disputes.

The Georgia Court of Appeals used the reasoning from cases such as these in the legal malpractice action of Allen v. Lefkoff, Duncan, Grimes & Dermer; P.C. and disallowed "any evidence of, reference to, or jury instruction on the defendant attorneys allegedly having violated certain provisions of the Code of Professional Responsibility." However, the Georgia Supreme Court was ready to make some changes.

II. THE PHILOSOPHICAL SHIFT IN ALLEN

Allen presented the ethical issue of conflict of interest. The plaintiff's husband had owned and operated a lithographic and color separating business, and following his death in 1987, the

---

54. Id. at 861, 262 Ga. at 613.
55. Id. at 860, 262 Ga. at 612.
56. Id. at 861, 262 Ga. at 613. The complete text of the Rule is as follows: "The Standards of Conduct to be observed by the members of the State Bar of Georgia and those authorized to practice law in Georgia are set forth herein and any violation thereof shall subject the offender to disciplinary action and/or punishment as hereinafter provided." State Bar Rule 4-102(a), STATE BAR OF GEORGIA HANDBOOK 40 (1995-96).
57. Davis, 422 S.E.2d at 861 n.3, 262 Ga. at 613.
59. Id. at 467, 212 Ga. App. at 561.
60. Id. The ABA Model Rules of Professional Conduct that are most likely to stand alone as the basis for a malpractice action in a jurisdiction which takes such violations into consideration are as follows:

   Rule 1.5 Fees (particularly Rule 1.5(c), requiring contingent fees be in writing);
   Rule 1.7 Conflict of Interest: General Rule;
   Rule 1.8 Conflict of Interest: Prohibited Transactions (particularly Rule 1.8(a), governing business relations with clients);
   Rule 1.9 Conflict of Interest: Former Client;
   Rule 1.13 Organization as Client; and
   Rule 1.15 Safekeeping [Client's] Property.

plaintiff retained the defendant attorneys to settle his estate.61 During this process, the plaintiff expressed a desire to sell the business, so the defendants introduced her to a potential buyer who ultimately purchased it.62 The defendants represented both parties in the transaction, with the parties’ consent, but the buyer later defaulted on his obligations to the plaintiff and liquidated the company.63 The plaintiff brought suit against the defendants for her losses in the transaction and for punitive damages.64

In reversing the court of appeals, the Georgia Supreme Court did not go so far as to overrule Davis, but did expand its approach to provide that professional standards for attorneys may be offered as evidence of the common law standard of care in legal malpractice cases.65 This evidence is not determinative, but may be included as a factor for consideration.66 The Bar Rule in question “must be intended to protect a person in the plaintiff’s position or be addressed to the particular harm suffered by the plaintiff”67 in order to be considered in determining the standard of care.68

After reviewing the “standing alone” precedent from Georgia cases, the court looked to emerging trends across the country regarding the admissibility of ethical standards in malpractice actions.69 Courts take four different approaches: (1) some find a violation of professional standards to be negligence per se; (2) a minority find that a violation establishes a rebuttable presumption of malpractice; (3) a large majority treat professional standards as evidence of the common law duty of care; and (4) one court finds such standards inadmissible.70 The court agreed with the majority rule that professional standards may be treated as evidence of the common law duty of care,

62. Id. at 467, 212 Ga. App. at 560.
63. Id.
64. Id.
66. Id. at 722, 265 Ga. at 377.
67. Id. at 721-22, 265 Ga. at 377.
68. Id.
69. Id. at 720-21, 265 Ga. at 375.
70. Id. at 721, 265 Ga. at 375 (citing Note, The Inadmissibility of Professional Ethical Standards in Legal Malpractice after Hisey v. Carpenter, 68 Wash. L. Rev. 395, 398-401 (1993)).
explaining that “[g]iven the potential consequences of their violation and the fundamental nature of their purpose, it would not be logical or reasonable to say that the Bar Rules, in general, do not play a role in shaping the ‘care and skill’ ordinarily exercised by attorneys practicing law in Georgia.”

A. The Court’s Emphasis on Professionalism

The roots of this philosophical shift may be found in the court’s increasing activism in the area of legal professionalism. In 1989, the court created the Chief Justice’s Commission on Professionalism and added aspirational ideals to the Bar Rules, emphasizing the importance of professionalism as “the ultimate hallmark of the practice of law.” In recent years, the court and the State Bar have implemented a professionalism continuing legal education (CLE) requirement, instituted law school orientations on professionalism, and held numerous town hall meetings and annual convocations devoted to the subject. Holding attorneys accountable to the standards of the profession in legal malpractice actions appears to be a logical extension of this movement.

B. The Precedential Impact of Green v. Green

The court’s interest in professionalism can be seen in other recent decisions. Although Justice Benham’s concurring opinion in Allen states that the case of Green v. Green was decided based on legal rather than ethical considerations, professionalism indeed appears to have played a central role in its outcome. The issue in the Green case was whether notice by publication was sufficient to maintain a divorce judgment and

71. Id.
72. STATE BAR OF GEORGIA HANDBOOK 110 (1995-96). The Commission’s mandate is “to promote professionalism among Georgia’s lawyers . . . [by providing] sustained attention and assistance to the task of ensuring that the practice of law remains a high calling, enlisted in the service of client and public good.” Id. at 112.
73. State Bar Rule 9-101, STATE BAR OF GEORGIA HANDBOOK 113 (1995-96). The aspirational ideals provide standards that are higher than those required by the Code of Professional Conduct. Id.
child custody award entered in the absence of the plaintiff, who filed the action while residing in the state and while represented by counsel, but whose counsel withdrew from the case when the plaintiff subsequently moved out of state. The defendant and his attorney appeared in court, although the case was only “on call.” When the court was unable to locate the case record and advised the defendant that the case would have to be continued, the defendant’s attorney went to the office of the judge who had previously been assigned the case and found the record in a law clerk’s desk drawer; the case was heard and child custody and child support were awarded to the defendant.

On review, the Georgia Supreme Court did not reach the issue of the sufficiency of notice by publication, but found that a trial court has discretion to set aside a judgment against a party who pleads lack of notice; here, the trial court should have done so. In reaching this conclusion, the Supreme Court focused on the role the defendant’s counsel had played in obtaining the judgment. Counsel was aware that the plaintiff was unrepresented and he knew the plaintiff’s new address. Yet, he made no effort to contact her, and went so far as to go through the desk of a law clerk to locate the missing record and ensure that the case was heard on a day when the plaintiff was not present.

Defendant’s counsel argued that the actions he took were not against the law and that he had no duty to contact the plaintiff. The court found it “disturbing . . . that many lawyers fail to realize that the law and the Code of Professional Responsibility set minimum levels of reasonable conduct.” Reiterating that “ethics is that which is required and professionalism is that which is expected,” the court advised that “[a]s members of an honorable profession, we must be willing to conduct our business in a manner consistent with

79. *Id.* at 458, 263 Ga. at 551.
80. *Id.*
81. *Id.* at 458-59, 263 Ga. at 553.
82. *Id.* at 459, 263 Ga. at 553-54.
83. *Id.*
84. *Id.*
86. *Id.*
higher standards embodied in the Ethical Considerations and aspirational goals embodied in the professionalism movement. 87

Given the sweeping use of professionalism ideals in Green, 88 in which the client was negatively impacted by the conduct of his attorney (having a favorable judgment overturned), 89 the court's decision in Allen to allow ethical and professional standards as evidence in legal malpractice actions, in which attorneys themselves are on the line, does not appear to be such a radical philosophical shift.

III. POSITIVE EFFECTS OF THE NEW RULE

The decision in Allen has the potential to benefit both the legal profession and its clients.

A. Clarification of the Existing Doctrine

Although the "standing alone" rule utilized prior to Allen may have appeared straightforward, its meaning was not truly clear. 90 Because the elements of malpractice include causation

---

87. Id. (quoting Evanoff v. Evanoff, 418 S.E.2d 62, 262 Ga. 303, 304-05 (1992) (Benham, J., concurring)). Justice Sears concurred specially, disagreeing with the use of a violation of professionalism standards to reverse the defendant's judgment. Id. at 460-62, 263 Ga. at 555-59. One of her concerns with this approach was the infringement upon the due process rights of both the defendant and the defendant's attorney. Id. at 461, 263 Ga. at 557. Neither had notice that a violation of professionalism standards was at issue (since professionalism standards are "non-mandatory" and "aspirational") and there was no hearing that would have provided them with an opportunity to address such an issue. Id. Justice Sears also noted that the decision in Green contradicts Stevens v. Thomas, 361 S.E.2d 800, 256 Ga. 645 (1987), in which it was held that "a client is not subject to sanctions for the infractions of disciplinary rules by the client's attorney." Id., 257 Ga. at 648. She summarized her "slippery slope" concerns by stating:

In the future, this Court no doubt will have to classify some professionalism standards as more important than others, some transgressions as more unprofessional than others, and some standards as appropriate weapons in the litigation arena and others only as guides for regulating conduct through our attorney disciplinary agencies. These problems illustrate why this Court should not permit its distaste for lawyers who may not be exercising common sense, maturity, and civility to blind it to the problems of legislating such conduct.

Id. at 462, 257 Ga. at 558.

88. See Sobelson, supra note 77. Judgment for the defendant was reversed because of his attorney's conduct, even though the attorney violated no law, Directory Rule or Ethical Consideration of the Code of Professional Responsibility, or Standard of Conduct. Id.

89. Green, 437 S.E.2d at 460, 263 Ga. at 555.

and damages in addition to negligence through professional misconduct, the "standing alone" rule could have been interpreted to mean either of the following: (1) a violation of an ethical rule constitutes negligence, but causation and damages must also be found, or (2) a violation of an ethical rule is not sufficient to constitute negligence. Allen clarifies the role of an ethical rule violation in the malpractice context.

B. Consistency with the Ideals of Professionalism

More importantly, the new rule is true to the spirit of the Code of Professional Responsibility. The Preamble to the Code states that "[t]he future of this State and of the Republic . . . depends upon our maintenance of justice pure and unsullied. It cannot be so maintained unless the conduct and motives of the members of our profession are such as to merit approval of all just men." Not using these ethical standards in legal malpractice actions creates the risk that they will be merely symbolic or will exist only to serve the profession's own interests, rather than to protect the public and other constituencies.

C. Increased Accountability

The legal profession is essentially self-regulating, which creates the need to avoid even the appearance of impropriety in disciplinary and civil actions. This aim is furthered if attorneys hold themselves to the same standards for both disciplinary and civil actions.

Although some other professions are also self-regulating, there is an especially strong link between the legal profession and the judiciary, as attorneys are considered "officers of the court," and the Georgia Supreme Court has authority over the profession. This suggests that an area of overlap between

91. Id. at 324-26.
94. Id. at 610.
95. Id.
96. Constantindes, supra note 3, at 1327-28. Self-regulation is manifested through: "(1) control of recruitment and certification; (2) creation of an ethics code; and (3) a professional review mechanism." Id. at 1333.
97. See id. at 1345; see also MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1994).
private causes of action and violations of legal professional standards should not be surprising.

D. Increased Enforcement of Professional Standards

One practical argument in favor of the new rule is that it will counter the current underenforcement of the professional standards. 98 Other than discipline for theft of client money, gross neglect of client affairs, substance abuse, or being convicted of a felony, the only rigorously enforced ethical rules are those related to conflict of interest. 99 Conflict of interest violations are rarely handled through the disciplinary process, but are more likely to be used as litigation weapons in motions to disqualify opposing counsel. 100 Even when such a motion is successful, implying that the conflict of interest rules have indeed been violated, the attorneys involved are never disciplined. 101 The lesson here appears to be that ethical rules will be underutilized unless a third party has the power to use such rules in court. 102

E. Consistency with Evidentiary Principles

Another factor that provides both practical and logical support for the new rule is the use of expert testimony in malpractice cases, as mentioned in the Introduction to this Comment. 103 Expert testimony regarding the standard of care in a legal malpractice action has always been allowed and is likely to be based on ethical standards. 104 It does not make sense for courts to allow such expert testimony, thus indirectly providing evidence of professional standards, when the same evidence cannot be offered directly. 105

If the law and the Code of Professional Responsibility do in fact provide the threshold for reasonable attorney conduct, as the court stated in Green, 106 then it seems logically consistent that

99. Id. at 152.
100. Id. at 152-53.
101. Id. at 153.
102. Id.
103. Peters, supra note 93, at 627.
104. Id.
105. Id.
1997 USE OF CODE OF PROFESSIONAL RESPONSIBILITY 917

a violation should at least be admissible as evidence in a legal malpractice action.\textsuperscript{107}

IV. THE POTENTIAL DOWNSIDE

Justice Benham's reluctant concurring opinion in \textit{Allen}\textsuperscript{108} sets forth several concerns regarding this expansion in the use of ethical standards in legal malpractice cases.\textsuperscript{109}

A. \textit{Encroachment Into the Disciplinary Process}

One fear is that the court's exclusive jurisdiction to regulate the practice of law will be usurped, as the court has put the disciplinary procedure in place to handle complaints against lawyers.\textsuperscript{110} The disciplinary process is based on the premise that members of the profession are best qualified to evaluate the conduct of other attorneys.\textsuperscript{111} Now, though, trial court proceedings may determine whether ethical violations have occurred.\textsuperscript{112} The increased use of ethical codes by the judiciary may be seen as essentially creating a type of "government domination" of the profession.\textsuperscript{113}

Disciplinary bodies and the courts have two very different goals when it comes to dealing with violations of ethical codes.\textsuperscript{114} Disciplinary bodies are concerned with "maintaining a

\begin{itemize}
\item[107.] Peters, supra note 93, at 634.
\item[109.] \textit{Id.} at 722-25, 265 Ga. at 377-82. Our entry into this arena may be premature. There is danger that it will create confusion, erode this court's authority in regulating the practice of law, result in unwarranted prejudice to legal malpractice defendants, foster an avalanche of malpractice complaints, hamper efforts to improve ethical standards and professionalism, and have far reaching adverse effects in other areas of professional malpractice. \textit{Id.} at 722, 265 Ga. at 378. It is interesting to note that Justice Benham wrote the majority opinion in \textit{Green}, 437 S.E.2d at 457, 863 Ga. at 551. \textit{See also} Sobelson, supra note 77.
\item[110.] Allen, 453 S.E.2d at 724, 265 Ga. at 381.
\item[111.] Constantinides, supra note 3, at 1346. Note, however, that the State Disciplinary Board does not consist exclusively of Bar members. The Board's Investigative Panel and Review Panel both include members of the public appointed by the Georgia Supreme Court. State Bar Rule 4-201, \textit{STATE BAR OF GEORGIA HANDBOOK} 48 (1995-96).
\item[112.] Allen, 453 S.E.2d at 722, 265 Ga. at 377.
\item[113.] Constantinides, supra note 3, at 1345.
\item[114.] \textit{Id.} at 1346-47.
\end{itemize}
level of competence, integrity and (perhaps above all) autonomy for their group through suspension or expulsion of substandard members." Civil courts, however, are more concerned with helping the innocent victims who have been wronged by the profession. Courts base judgments in malpractice actions on negligence, while disciplinary proceedings look to intent, that is, either conscious disregard or failure to understand the profession's standards. Burdens of proof also differ for malpractice and disciplinary actions ("preponderance of the evidence" and "beyond a reasonable doubt," respectively).

The coexistence of the disciplinary process and malpractice proceedings may create timing problems and the potential for preemption. Questions remain as to whether an ethical violation must be found through the disciplinary process before it may be admitted in a malpractice action, or whether the jury should make the determination during trial. If the finding of a violation will be binding in a subsequent malpractice action, those involved in the disciplinary process may be reluctant to make such a finding or may attempt to mitigate punishment in anticipation of further "discipline" by the courts.

115. Id. at 1347.
116. Id.
117. Fason, supra note 14, at 834.
118. Allen v. Leikoff, Duncan, Grimes & Dermer, P.C., 453 S.E.2d 719, 724, 265 Ga. 374, 380 (1995) (Benham, P.J., concurring). The State Bar of Georgia recently made a recommendation to the Commission on Evaluation of Disciplinary Enforcement that the burden of proof in discipline cases be lowered from "beyond a reasonable doubt" to "clear and convincing evidence." Tough Going, supra note 12. Georgia is currently the only state that uses "such a high burden of proof." Id. at 3.
119. Allen, 453 S.E.2d at 724-25, 265 Ga. at 381-82 (Benham, P.J., concurring). Must there be a determination by this court of an ethical violation before evidence is admissible in a malpractice action? If not, can the trier of fact in a malpractice determine the existence of a violation? If evidence of ethical violations is to be admissible for malpractice plaintiffs, will a lawyer be able to plead compliance with the Code of Professional Responsibility in defense of a malpractice action? If a lawyer does plead compliance, will a determination in his favor act as a bar to any future bar disciplinary action based on the same allegation?

Id.
120. Id. at 724, 265 Ga. at 381.
121. Fason, supra note 14, at 834. The Investigative Panel of the State Bar's Disciplinary Board may find probable cause; the case then goes to a Special Master, then to the Disciplinary Board's Review Panel, and then to the Georgia Supreme Court. See State Bar Rules 4-201 to -226, STATE BAR OF GEORGIA HANDBOOK 48-56 (1995-96).
B. Creation of a Two-Tiered Approach to Professionalism Standards

The concurrence in Allen also expressed the concern that attorneys may begin to subordinate certain ethical rules. The court limits the Bar Rules that may be used as evidence of the standard of care in a malpractice action to those intended to protect a person in the position of the plaintiff or addressed to the particular harm suffered by the plaintiff in such action. Thus, there is the potential for attorneys to subordinate ethical rules regarding their duties to the courts or the general public to those relating to client relations in order to avoid liability. This will not further the goals of professionalism.

C. Impact on Other Professions

Prior to Allen, the standard of care was the same for all professional malpractice actions, that is, "the degree of skill, prudence, and diligence which ordinary members of the particular profession commonly possess and exercise." By essentially heightening the standard of care for attorneys, this new direction may discourage the adoption or enhancement of formalized ethical standards in other professions. There is precedent for the judiciary applying a holding regarding one profession to all other professions, so others may begin to

122. Allen, 453 S.E.2d at 725, 265 Ga. at 381-82.
123. Id. at 721-22, 265 Ga. at 377.
124. Id. at 725, 265 Ga. at 381-82.
125. Id.
126. Id. at 724, 265 Ga. at 380 (quoting GA. LAW OF DAMAGES, p. 689 § 38-19). For example, the standard of care for a doctor is "that degree of care and skill exercised by the medical profession generally under similar conditions and like circumstances," Beauchamp v. Wallace, 349 S.E.2d 791, 792, 180 Ga. App. 554 (1986), and for an engineer is "reasonable performance of similar duties by design engineers engaged in the performance of their duties," Robert & Co. Assocs. v. Tigner, 351 S.E.2d 82, 88, 180 Ga. App. 836 (1986).
127. Allen, 453 S.E.2d at 725, 265 Ga. at 381-82.
"Profession" means the profession of certified public accountancy, architecture, chiropractic, dentistry, professional engineering, land surveying, law, psychology, medicine and surgery, optometry, osteopathy, podiatry, veterinary medicine, registered professional nursing, or harbor piloting.
128. Id. at 725 n.2, 265 Ga. at 382 n.2 (quoting O.C.G.A. § 14-7-2(2) (1994)).
129. Id. at 725, 265 Ga. at 382 (citing Housing Auth. v. Greene, 383 S.E.2d 867, 259 Ga. 435 (1989)). In Greene, "the expert affidavit requirement imposed by statute on medical malpractice cases [was] held to apply to all professional malpractice
take a more cautious approach to their professionalism efforts in light of this development.\textsuperscript{129}

D. \textit{Impact on Tort Reform Efforts}

Justice Benham also sounds a cautionary note regarding inconsistencies between this new direction and recent legislative efforts at tort reform, especially if this holding is expanded to other professions.\textsuperscript{130} One aim of the tort reform legislation was to control insurance premiums "by providing clearly defined methods of pursuing professional malpractice claims."\textsuperscript{131} Justice Benham sees \textit{Allen} as contrary to this goal, as it "may cause litigation to proliferate, insurance premiums to skyrocket, and the courts to become hopelessly embroiled in interpreting the meaning and applicability of hundreds of professional codes of ethics and rules of professionalism."\textsuperscript{132}

E. \textit{The Slippery Slope}

Although the court notes the difference between the Code of Professional Responsibility and the Standards of Conduct—ethical rules that "differ from law only in that their enforcement is relatively informal"\textsuperscript{133}—and the Professionalism standards, which are aspirational in nature,\textsuperscript{134} there is a danger that the new rule has "begun the descent of the slippery slope of legislating civility and courtesy."\textsuperscript{135} It seems ironic, however, that the "slippery slope" language Justice Benham uses in his concurrence to \textit{Allen} is taken from Justice Sears' special concurrence in \textit{Green}, as Justice Benham wrote the majority opinion in \textit{Green} and Justice Sears now sets forth the majority opinion in \textit{Allen}.\textsuperscript{136}

\begin{itemize}
  \item \textsuperscript{129} \textit{Id}.
  \item \textsuperscript{130} \textit{Id}.
  \item \textsuperscript{131} \textit{Id}.
  \item \textsuperscript{132} \textit{Id}.
  \item \textsuperscript{133} \textit{Id}. at 721 n.5, 265 Ga. at 376 n.5 (quoting G. HAZARD & S. KONIAC, \textit{THE LAW AND ETHICS OF LAWYERING} (1990)).
  \item \textsuperscript{134} \textit{Id}.
  \item \textsuperscript{135} \textit{Id}. at 723, 265 Ga. at 379-80 (quoting Green v. Green, 437 S.E.2d 457, 263 Ga. 551, 556-58 (1993)).
  \item \textsuperscript{136} \textit{Compare} \textit{Green}, 437 S.E.2d at 462, 263 Ga. at 559, \textit{with} \textit{Allen}, 453 S.E.2d at 723, 265 Ga. at 380-81.
\end{itemize}
Justice Benham notes that the court’s role in addressing this issue has been more legislative in nature than usual. The original reported version of his concurrence made reference to the recently appointed Commission on Evaluation of Disciplinary Enforcement and noted that the Commission was “better equipped to hold hearings, take testimony, consider competing interests, research such issues as the impact of the allowance of evidence of ethical standards and their violation in malpractice cases, and make recommendations to the court.” This language was omitted from the published opinion, perhaps in recognition of the important distinctions that exist, even after the decision in *Allen*, between malpractice and attorney discipline.

**CONCLUSION**

The Georgia Supreme Court’s decision to break with precedent by allowing evidence of a defendant attorney’s alleged violation of the Code of Professional Responsibility in a legal malpractice case is consistent with the national trend and signals a philosophical shift toward increased accountability within the legal profession. The new rule is not unduly harsh, given that other jurisdictions may consider such a violation to be negligence per se or a rebuttable presumption of malpractice. In any event, although this decision may offer benefits such as improving public perception of the profession’s credibility, many questions remain regarding its implementation and potential side effects.

*Lynn E. Stapleton*

---

137. *Allen*, 453 S.E.2d at 723, 265 Ga. at 378.
139. See *Allen*, 453 S.E.2d at 723, 265 Ga. at 379.
140. See Sobelson, *supra* note 77.
141. *Allen*, 453 S.E.2d at 721, 265 Ga. at 375.
142. *Id*.
143. Peters, *supra* note 93, at 610.