FALL SEMINAR 2014

OCTOBER 9, 2014

COBB GALLERIA CENTRE

FALL 2014 AGENDA

October 9, 2014

8:15 Registration Opens

8:50 Welcome Remarks: Amanda Calloway, Esq.
Education Committee Chairperson

9:00-10:00 *Unique Issues that Arise in Busted Subdivisions*
Chad Henderson, Esq.
Henderson Legal LLC

10:00-11:00 *CFPB and ALTA Best Practices*
Monica K. Gilroy, Esq.
Dickenson Gilroy LLC
and
Missy K. Robinson, Esq.
Dickenson Gilroy, LLC

11:00 15 Minute Break

11:15-12:30 *Ethical Considerations from Courthouse to Commitment*
Kyle J. Levstek, Esq.
Calloway Title and Escrow, LLC

12:30 Lunch

1:30-2:45 *Private Covenants Encumbering Real Property and their Effect on Title Insurance*
Leonard R. Gray, Jr., Esq.
First American Title Insurance Company
and
Warren O. Wheeler, Esq.
Schreeder, Wheeler & Flint, LLP

2:45 15 Minute Break

3:00-3:30 *Georgia Advisory Opinion on Witness Only Closings*
Carol V. Clark, Esq.
Carol V. Clark Law

3:30-4:30 *Current Legislation on Real Estate Matters Being Worked on in the Georgia General Assembly*
Mo Thrash
Governmental Affairs Director, McCalla Raymer, LLC

SECTION ONE

Unique Issues that Arise in Busted Subdivisions

Chad Henderson, Esq.

Henderson Legal LLC

Chad Henderson

Chad was born in Thomasville, Georgia, and grew up in Orlando. He graduated from Florida State University in 1993 and moved to Atlanta to attend Emory. Chad graduated from Emory University's School of Law in 1997, and also earned his M.B.A. from Emory's Goizueta Business School.

Henderson Legal is Chad's second independent law firm. The first was a solo practice he managed from 2001 to 2004, in between positions at Weissman, Nowack, Curry & Wilco, P.C., and Ganek Wright Minsk PC. Chad focuses his practice on commercial real estate development, investment and transactions, small business representation, corporate and partnership formation, and advising homeowners and their condominium and homeowner associations.

In addition to practicing law, Chad teaches law, business and real estate courses as an adjunct professor in Georgia State University's Robinson College of Business. Chad also serves on several nonprofit boards and is a member of the Georgia Bar's Real Property Section, the Community Associations Institute (CAI), and the Urban Land Institute (ULI). He is licensed to practice law in Florida and Georgia.

Chad lives in Druid Hills with his wife and their four children. He enjoys cycling and tennis, and pretends to enjoy yard work and opera. Other hobbies include reading and writing fiction, home improvement and driving.

NOTES:

SECTION TWO

CFPB and ALTA Best Practices

Monica K. Gilroy, Esq.

Dickenson Gilroy LLC

and

Missy K. Robinson, Esq.

Dickenson Gilroy, LLC

Monica K. Gilroy, a founding principal of Dickenson Gilroy, is the firm managing partner with over 20 years of experience practicing law. She received her Bachelor of Arts in Political Science from the University of Wisconsin and a J.D. from the University of South Carolina School of Law. Monica leads the Litigation Department as the focus of her national litigation practice includes all aspects of real estate litigation, including foreclosure and title disputes, broker and agent liability defense, mortgage fraud-related litigation and civil and commercial contract disputes. She also leads the Default Department providing national foreclosure, bankruptcy, loss mitigation and eviction services.

Missy K. Robinson, is a partner at the law firm of Dickenson Gilroy, LLC where she focuses her practice on residential and commercial real estate closings. Missy received her Bachelor's degree from Kennesaw State University her J.D. from the Walter F. George School of Law at Mercer University.

In addition to many industry and community leadership roles, Monica and Missy both serve on the Real Property Law Section of the State Bar of Georgia. Monica is currently the chair-elect of the Committee and Missy is the chair of the pro bono committee.

NOTES:

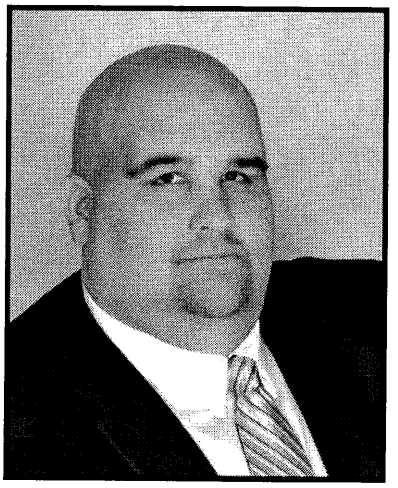
SECTION THREE

Ethical Considerations from Courthouse to Commitment

Kyle J. Levstek, Esq.

Calloway Title and Escrow, LLC

Calloway Title and Escrow, LLC



Kyle J. Levstek

Associate Counsel, Georgia

Contact Information:

4170 Ashford Dunwoody Road
2nd Floor, Suite 285
Atlanta, GA 30319

Office: (770) 698-7960
ext. 8915

Facsimile: (770) 698-7999

Direct Dial: (678) 406-8915
Direct Fax: (678) 406-8949
Mobile: (404) 216-6317

Email: KyleL@titlelaw.com

Martindale Hubbell PEER RATED

Kyle J. Levstek has spent his entire life in the Title Insurance Industry. Kyle was raised in a family that includes a title insurance company underwriter, title insurance company account manager, title examiners, and other assorted closing professionals. Having grown up at the closing table, Kyle started with Calloway Title and Escrow, LLC in May 2000 as a copy room assistant and has worked in nearly every aspect of the company as a title examiner, legal assistant, senior closer, and upon passing the bar in 2011, joined the firm as an associate attorney.

He attended Missouri Valley College on a football scholarship, and upon transferring to Kennesaw State University received a BA in English in 2007. Kyle received his Juris Doctor from Atlanta's John Marshall Law School in 2011, and became a member of the Georgia Bar Association in 2011. He is an active member of the Dixie Land Title Association.

Kyle currently resides in Dallas, GA with his wife, Crystal and his two children, Cloey and Carter.

www.titlelaw.com

Title Workshop: From Examination to Commitment

Ethical Considerations

Kyle J. Levstek, Associate Georgia Counsel for Calloway Title and Escrow, LLC

Black's Law Dictionary defines legal ethics as, "The minimum standards of appropriate conduct within the legal profession, involving the duties that its members owe one another, their clients, and the courts." This is often also termed the "etiquette of the profession." There are multiple sources which provide the Georgia attorney and real estate practitioner support with regard to ethical concerns. Most notable are The Georgia Rules of Professional Conduct (the "Rules" or the "GRPC") and the Georgia Title Standards (the "Standards") which assist in outlining a Georgia attorney's duties to clients, the courts, and to others as well. The Standards are often referred to as, "a crystallization of the practice of title attorneys." These standards delineate concerns and recurring scenarios with explanations and solutions regarding various title issues. Both resources supply a foundation for the real estate practitioner dealing with the ethical problems that often arise during the transaction. By utilizing these and other tools, a real estate practitioner can successfully navigate the often troublesome ethical situations that occur between the examination of title and the delivery of the title commitment.

Prior to 2001, Georgia attorneys were governed by the Canons of Ethics. These ethical tenets provide the basis for The GRPC and are often called upon for reference. The GRPC can be found at http://www.gabar.org/barrules/georgia-rules-of-professional-conduct.cfm. In the Preamble to the GRPC, the ethical boundaries are clearly defined:

> In the nature of law practice conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict among a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the

> framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

This "exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules" is what every real estate professional needs to practice regularly in their transactional dealings. This is the ethical professionalism for which every person in the real estate industry should strive, in order to not only better serve the client, but also the real estate community as a whole.

Like The GRPC, The Standards provide a safe harbor for professionals who encounter moral quandaries. The Standards may be found at http://garealpropertylaw.com/wp-content/uploads/2011/10/Title-Standards-Revised-2010.pdf. These standards outline situations which arise during the title search and closing processes to assist the real estate specialist in overcoming everything from title defects to closing procedures. As the comment to the opening title standard notes:

> Title Standards are primarily intended to eliminate technical objections which do not impair marketability and some common objections which are based upon misapprehension of the law. The examining attorney, by way of a test, may ask after examining the title, what defects and irregularities have been discovered by the examination, and as to which irregularity or defect, who, if anyone can take advantage of it as against the purported owner…Title Standards, if properly utilized, should reduce to a bare minimum, if not eliminate, "fly specking and overmeticulousness.

It is the examining attorney or real estate professional who receives the benefit of uniformity that the title standards provide, but the industry as a whole better serves the community at large based on the support provided by the Standards.

A. Rights of Redemption

Black's defines the equity of redemption as "the right of a mortgagor in default to recover property before a foreclosure sale by paying the principal, interest, and other costs that are due. A defaulting mortgagor with an equity of redemption has the right until the foreclosure sale, to reimburse the mortgagee and cure the default." The Standards support this as well, "a valid foreclosure sale terminates the debtor's interest in the property at the foreclosure sale and there is no right of redemption in favor of the debtor or junior lienholders, except for those of the United States…"

With regard to the period of time from examination to commitment, the ethical ramifications of rights of redemption are quite profound. Note that the Title Standards indicate that the foreclosure sale must be valid. The Title Standards also provide that:

> A deed under power of sale executed by the grantee of a security instrument or any subsequent assignee thereof pursuant to a valid power of attorney contained in the security instrument conveys marketable title (provided title was marketable at the time the security instrument was given) to the property described therein if the deed under power of sale contains recitals to the security instrument containing the power of sale, default, proper legal advertisement, the time, place and results of the sale and compliance with notice requirements of O.C.G.A. Section 44-14-162.2 or facts which render such notice inapplicable. All such recitals in a deed under power of sale may be relied on if there is no irregularity on its face and no other matters appear of record which would render any such recital questionable and necessitate further inquiry.

What if there is some latent irregularity that the closing attorney discovers with regard to the deed under power of sale while reviewing the completed title search which would have allowed the foreclosed debtor the opportunity to exercise the right of redemption? Disclosure of defects in property will be outlined in Section D below, but the right of redemption of the debtor should be considered when analyzing title from title search to commitment.

B. Formation of the Attorney-Client Relationship

Real estate transactions often involve many layers of relationships and purposes. Often attorneys serve many roles within a single deal, or multiple parties may handle each aspect unilaterally. When entering into a real estate matter, a well-defined grasp of who represents each of the parties and what obligations are owed to clients and non-clients is paramount. Disputes often arise when the arrangement between lawyer and client are not well documented in written form. There are some instances that exist where even when the attorney-client relationship does not exist, there may be duties owed to a non-client. Often the role and duties of an attorney change as the transaction evolves. This is likely why one of the most regular areas for litigation for a closing attorney is closing table representation.

"The basic question in regard to the formation of the attorney-client relationship is whether it has been sufficiently established that advice or assistance of the attorney is both sought and received in matters pertinent to his profession." Guillebeau v. Jenkins, 182 Ga. App. 225, 229, 355 S.E.2d 453, 457 (1987). In the real estate transaction of today, it is often difficult for parties to know whether they are being represented or not. While the general rule for legal employment is the tender of fees, the maker of the payment will not always be the party who has employed the attorney. Also, there are many exceptions to the general rule involving the payment of attorney's fees. Typically in transactions with a loan, the closing lawyer is retained by the lender and represents only the lender. However, this is often clouded by actions made by the closing attorney at closing, such as offering to file certain documents or affirming that the closing attorney will correct a defect in the title. Simmerson v. Blanks, 149 Ga. App 478 (1979) and Wright v. Cook, 252 Ga. App. 759 (2001).

It is fairly simple to confirm when the closing attorney is representing the lender, but it is slightly more difficult in all-cash transactions. "In a cash transaction, the closing attorney represents the party who contacted him to effect the conveyance." Cleveland Campers, Inc. v. R. Thad McCormack, P.C., 280 Ga. App. 900 (2006). But what is the

case when the broker is driving the transaction and the parties appear to be unrepresented? The impending setback is the legal counsel the buyer believes he is to receive. Furthermore, does the closing attorney take on legal representation for all parties when he answers legal questions, especially about surveys, title, documents, and other facets of closing?

The answer to most of these queries is the old law school answer, "It depends." However there are a few tried and true methods in order to limit exposure and to ensure that each party in the transaction understands the scope of your representation. Since this seminar is limited to the period of time from examination to commitment, the focus shall remain on that limited period. As noted above, often brokers facilitate the execution of the contract by buyer and seller and send that on to the closing attorney's office to have title searched and the commitment drafted. During that time it is common for the buyer or seller to reach out to the closing attorney for information regarding the title search and commitment. Most notably this contact is to "check on the commitment" or to "see what is holding up closing," but often, especially in commercial transactions, sophisticated buyers call in with focused questions that push the limits of general inquiry and move into representation. If the survey comes in prior to the delivery of the commitment and the survey is reviewed in conjunction with same, does your review except to all matters or limit to specific ones? Do you draft the initial commitment with affirmative coverage that a represented buyer would want? Do you draft the commitment to call for a General or Limited Warranty Deed when the contract is silent to same? The best advice that one could be provided is to make sure the parties know what your role is, and when you can, get it in writing. These forms should provide some assistance in managing the expectations of the parties. In some instances, it is best to take every opportunity to simply tell the parties how you fit into the transaction. In many commercial closings, the closing attorney may represent the insurance company as agent while lender, buyer and seller are all separately represented. This is often the case in commercial deals. When an unrepresented party or a party from another place in the country is a party to the transaction in Georgia, the closing attorney may appear to be representing the

unrepresented party based on the closing attorney's responsiveness and alertness with regard to the transaction. The best way to avoid a gaffe at closing is to affirm your role early on and to make sure the other party knows that the closing attorney is the agent for the Company. By making sure everyone "knows their role" the transaction will be much more successful.

C. Conflicts of Interest

Pursuant to Rule 4-101, the State Bar of Georgia is authorized to maintain and enforce rules of professional conduct. Included in the GRPC are rules governing what circumstances constitute conflicts of interest and what steps should be taken to waive a possible conflict.

Rule 1.7: General Rule.

Rule 1.7(a) states that:

> (a) A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).

Absent proper consent from the prospective client (discussed below), Rule 1.7 states that if representing a potential client will "adversely affect" the lawyer's duties to a current client, former client, or a third party, the lawyer cannot represent the potential client. Likewise, the Rules do not prohibit a lawyer from simultaneously representing two clients in unrelated matters where the client's interests are merely "generally adverse." See GRPC 1.7 cmt. 3.

Rule 1.7 (b-c): Conflict Waiver.

Notwithstanding a significant risk of material and adverse effect to a client, a lawyer is allowed to represent clients where a conflict of interest is present if the lawyer obtains proper consent under Rule 1.7(b):

> (b) If client consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected or

former client consents, preferably in writing, to the representation after:

(1) consultation with the lawyer,

(2) having received in writing reasonable and adequate information about the material risks of the representation, and

(3) having been given the opportunity to consult with independent counsel.

Rule 1.7(c) addresses certain circumstances that pose such an inherent risk that a client's interests will be adversely affected that a waiver is not permitted:

(c) Client consent is not permissible if the representation:

(1) is prohibited by law or these rules;

(2) includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding; or

(3) involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.

Rule 1.9: Former Clients.

In addition to Rule 1.7, the Rules also provide more specific instructions when a lawyer has formerly represented a client in the same or in a substantially related matter. Such instructions are set forth in Rule 1.9:

(b) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(c) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

> *(2)* about whom the lawyer had acquired information protected by Rules 1.6: Confidentiality and 1.9(c): Conflict of Interest: Former Client, that is material to the matter; unless the former client consents after consultation.

As shown by Rule 1.9(b)(2), of particular concern is a lawyer using confidential information obtained in a previous representation that is material to a current representation. Rule 1.9(c) provides further that:

> *(d)* A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > *(1)* use information relating to the representation to the disadvantage of the former client except as Rule 1.6: Confidentiality of Information or Rule 3.3: Candor Towards the Tribunal would permit or require with respect to a client, or when the information has become generally known; or
> >
> > *(2)* reveal information relating to the representation except as Rule 1.6: Confidentiality of Information or Rule 3.3: Candor Towards the Tribunal would permit or require with respect to a client.

(See also Rule 1.8(b), which provides that "[a] lawyer shall not use information gained in the professional relationship with a client to the disadvantage of the client unless the client consents after consultation, except as allowed in Rule 1.6").

Within the bounds of this seminar, conflicts of interest can occur from the examination period to commitment preparation when an attorney has represented both buyer and seller in the past. Very recently a closing occurred that had a seller and buyer who were consistently represented by the same real estate attorney. In this instance, the attorney represented the buyer but was very careful to make sure he had a waiver from the seller due to the consistent representation. The same can be true for a sophisticated commercial buyer who has participated in many transactions with many different attorneys. It is best to get a waiver to avoid the conflict.

D. Duties of Competence and Diligence

Rule 1.1 Competence

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

Comment

Legal Knowledge and Skill

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

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

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be

as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

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

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

Thoroughness and Preparation

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

Maintaining Competence

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

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client. Reasonable diligence as used in this Rule means that a lawyer shall not without just cause to the detriment of the client in effect willfully abandon or willfully disregard a legal matter entrusted to the lawyer. The maximum penalty for a violation of this Rule is disbarment.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyers duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load should be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of

conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable competence, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will serve on a continuing basis. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

The period from title search to commitment is especially profound when considering duties of competence and diligence. First of all, there is no body that governs who can search title. The State of Georgia licenses people to cut hair and fish, but no special license is required to search title. While the Georgia Bar outlines duties of competence and diligence as noted above, the title search, essentially the most important part of the real estate transaction is often treated as a procedural hump to quickly be overcome so the magic of closing can commence. This logic is folly and only leads to a dereliction of the duties of competence and diligence outlined above. The title search is the time to really dig into the essence of the property and confirm what it is all about.

Doing so thoroughly and promptly only adds to the value of your service, and the closing as a whole.

E. Disclosure of defects in property

Letting the client know the items which affect title is essential. The failure to disclose a defect in title is one of the chief errors a closing attorney can make with regard to the title search and commitment. This failure can expose the closing attorney to potential monetary sanctions, claims on the title policy, and perhaps even an ethical violation for failure to properly represent your client.

One area which the failure to disclose is often missed is with regard to deeds to secure debt which are removed from the title search pre-commitment based upon the twenty year rule (title standard 14.6 (c)) or more recently, the seven year rule (title standard 14.6 (f)). Removal of an un-cancelled security deed would seem to benefit all parties to the transaction and the deal as a whole, but same can cause issues for a subsequent buyer. Title is insurable based upon the seven or twenty year rule, but marketability problems may arise. The best course is to note the deed to secure debt as open of record but likely insurable based upon the twenty or seven year rule. Same can be denoted as a matter of information in the commitment.

In the same sense, missing interests, legal description issues, open liens, and other title defects are best disclosed in the initial commitment rather than underwritten before the parties have an opportunity to review. By doing so, the real estate professional has disclosed to the parties the existence of the defect, even if same is to be subsequently insured over. This is crucial during the phase between title search and commitment.

F. Special Responsibilities to Sellers and Borrowers

Rule 1.15 Safekeeping Property – Trust Account and IOLTA

Every lawyer who practices law in Georgia, whether said lawyer practices as a sole practitioner, or as a member of a firm, association, or professional corporation, and who receives money or property on behalf of a client or in any other fiduciary capacity, shall

maintain or have available a trust account as required by these Rules. All funds held by a lawyer for a client and all funds held by a lawyer in any other fiduciary capacity shall be deposited in and administered from such account.

No personal funds shall ever be deposited in a lawyer's trust account, except that unearned attorney's fees may be so held until the same are earned. Sufficient personal funds of the lawyer may be kept in the trust account to cover maintenance fees such as service charges on the account. Records on such trust accounts shall be so kept and maintained as to reflect at all times the exact balance held for each client or third person. No funds shall be withdrawn from such trust accounts for the personal use of the lawyer maintaining the account except earned attorney's fees debited against the account of a specific client and recorded as such.

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

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

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

No earnings from such an IOLTA account shall be made available to a lawyer or law firm.

The account shall include all clients' funds which are nominal in amount or which are to be held for a short period of time.

An interest-bearing trust account may be established with any approved institution as defined in Rule 1.15(III)(c)(1). Funds in each interest-bearing trust account shall be subject to withdrawal upon request and without delay.

The rate of interest payable on any interest-bearing trust account shall not be less than the rate paid by the depositor institution to regular, non-lawyer depositors. Higher rates offered by the institution to customers whose deposits exceed certain time or quantity minimum, such as those offered in the form of certificates of deposit, may be obtained by a lawyer or law firm on some or all of the deposit funds so long as there is no impairment of the right to withdraw or transfer principal immediately.

Lawyers or law firms shall direct the depository institution:

to remit to the Georgia Bar Foundation interest or dividends, net of any charges or fees on that account, on the average monthly balance in that account, or as otherwise computed in accordance with a financial institution's standard accounting practice, at least quarterly. Any bank fees or charges in excess of the interest earned on that account for any month shall be paid by the lawyer or law firm in whose names such account appears, if required by the bank;

to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, the average monthly balance against which the interest rate is applied, the service charges or fees applied, and the net interest remittance;

to transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation, the rate of interest applied, the average account balance of the period for which the report is made, and such other information provided to non-lawyer customers with similar accounts.

No charge of ethical impropriety or other breach of professional conduct shall attend the determination that such funds are nominal in amount or to be held for a short period of time, or to the decision to invest clients' funds in a pooled interest-bearing account.

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

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

Comment

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

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

G. <u>Attorney's Fees</u>

Rule 1.6 Fees

A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

the fee customarily charged in the locality for similar legal services;

the amount involved and the results obtained;

the time limitations imposed by the client or by the circumstances;

the nature and length of the professional relationship with the client;

the experience, reputation, and ability of the lawyer or lawyers performing the services; and

whether the fee is fixed or contingent.

The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.

Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the following:

the outcome of the matter; and,

if there is a recovery showing:

the remittance to the client;

the method of its determination;

the amount of the attorney fee; and

if the attorney's fee is divided with another lawyer who is not a partner in or an associate of the lawyer's firm or law office, the amount of fee received by each and the manner in which the division is determined.

A lawyer shall not enter into an arrangement for, charge, or collect:

any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

a contingent fee for representing a defendant in a criminal case.

A division of a fee between lawyers who are not in the same firm may be made only if:

the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

the client is advised of the share that each lawyer is to receive and does not object to the participation of all the lawyers involved; and

the total fee is reasonable.

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

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the

cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

[1A] A fee can also be unreasonable if it is illegal. Examples of illegal fees are those taken without required court approval, those that exceed the amount allowed by court order or statute, or those where acceptance of the fee would be unlawful, e.g., accepting controlled substances or sexual favors as payment.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made, the terms of which might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns. See Formal Advisory

Opinions 36 and 47.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. Joint responsibility for the representation entails financial and ethical responsibility for the representation.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the Bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

The best advice one can give as to fees, especially during the interval between title search and commitment, is to provide a thoughtful estimate of charges prior to the search, and when the search is more extensive than expected, to update the client as to the issues and to the additional charges which may become due.

Conclusion

The period between title search and commitment has many ethical issues which need to be considered and analyzed before providing the commitment or other legal services to the client. By exercising reasonable diligence during this period, the title attorney and real estate professional can avoid many hindrances which may prevent the closing, or worse, cause ethical sanctions or other punishment.

SECTION FOUR

Private Covenants Encumbering Real Property and their Effect on Title Insurance

Leonard R. Gray, Jr., Esq.

First American Title Insurance Company

and

Warren O. Wheeler, Esq.

Schreeder, Wheeler & Flint, LLP

Warren O. Wheeler

PRACTICE AREAS
Commercial Real Estate
Corporate Finance, Securities and Capital Markets
Business Formations, Expansions and Strategic Divestitures
Estates and Trust
Real Estate Litigation

OVERVIEW
One of the founding partners of the firm, Warren Wheeler has more than 36 years of legal professional experience. Warren was a founding director of an Atlanta area thrift institution, which later became a national bank. He is presently a director of another national bank. He has spoken at the Institute of Continuing Education in Georgia on real estate matters. Warren Wheeler was recognized for a second time by *Atlanta Magazine* as one of the state's "Super Lawyers" for 2009, a list of top attorneys determined by peer recognition and professional achievement.

EXPERIENCE
Represents real estate developers in connection with development of shopping center and retail properties varying in size, from large shopping centers anchored by supermarkets, discount stores and other national retailers to smaller retail developments and outparcel users. Represents mortgage lenders, including a recent $105,000,000 acquisition loan for the purchase of multiple industrial properties in five states. Represents owners of retail, industrial and office properties in connection with on-going ownership matters including tenant leasing and defaults, redevelopment, re-financings, sales, IRC Section 1031 exchanges, construction matters and ownership restructuring. Represented the borrower in connection with refinancing of mortgage loans on six separate multi-million dollar industrial developments.

Leonard R. Gray, Jr. is an attorney licensed in the State of Georgia and is currently Senior Underwriting Counsel in the Atlanta office of First American Title Insurance Company. Prior to rejoining First American, Mr. Gray served as Georgia State Counsel for Lawyers Title and Commonwealth Land Title Insurance Companies, and also as Commercial Underwriting Counsel for a two large national underwriters, including First American, in their National Commercial Services Divisions since 1998. Before joining the title insurance industry as counsel, he maintained a real estate closing and transactional practice in Atlanta with two large volume real estate law firms, and also has experience in bankruptcy and lender representation. Mr. Gray graduated from the University of Georgia, School of Law (JD 1983).

PRIVATE COVENANTS ENCUMBERING REAL PROPERTY AND THEIR EFFECT ON TITLE INSURANCE

Warren Wheeler, Esq.

Schreeder, Wheeler and Flint

Leonard R. Gray, Jr. Esq.

First American Title Insurance Company

FALL 2014

Georgia Land Title Association

October 9, 2014

PRIVATE COVENANTS ENCUMBERING REAL PROPERTY AND THEIR EFFECT ON TITLE INSURANCE

Copies of OCGA 44-5-59 and 44-5-60

I.	Introduction.	1
II.	Interpretation and Application of Covenants.	1
III.	Importance of Title Insurance for Dealing with Covenants.	4
IV	Duration of Covenants in the Light of OCGA 44-5-60(b)	6
V.	Exceptions to Allow Covenants to Run for More than 20 Years.	7
VI.	Enforcement of Covenants	9
VII.	Termination or Unenforceability of Covenants Due to Changed Conditions or Other Equitable Considerations.	10
VIII.	New Code Section OCGA 44-5-59. Effective 7/1/2013.	11.

§ 44-5-59. Determining when a covenant runs with the land; time limit

Except as provided in Code Section 44-5-60 and excluding covenants recorded on property solely by the property's owner, which shall run with the title to the land, a covenant runs with the land when, for consideration and as reflected in a duly recorded instrument found in the applicable chain of title, a property owner and a third party agree to such covenant, the property is adequately described in such covenant, and such covenant does not run for more than 20 years.

HISTORICAL STATUTORY NOTES
Laws 2013, Act 249, § 2, provides: "This Act shall become effective on July 1, 2013, and shall apply to covenants recorded on or after that date."

---

§ 44-5-60. Covenants running with land go to purchaser

(a) The purchaser of lands obtains with the title, whether conveyed to him at public or private sale, all the rights which any former owner of the land under whom he claims may have had by virtue of any covenants of warranty of title, of quiet enjoyment, or of freedom from encumbrances contained in the conveyance from any former grantor unless the transmission of such covenants with the land is expressly prohibited in the covenant itself.

(b) Notwithstanding subsection (a) of this Code section, covenants restricting lands to certain uses shall not run for more than 20 years in municipalities which have adopted zoning laws nor in those areas in counties for which zoning laws have been adopted; provided, however, that whenever a zoning ordinance, upon its initial enactment by a county or municipality, expressly acknowledges the continuing application of a covenant restricting lands to certain uses within that jurisdiction, any such covenant, if created prior to zoning laws being adopted by that county or municipality, shall continue to be effective in such jurisdiction until the expiration of such covenant in accordance with its terms.

(c) The limitation provided in subsection (b) of this Code section shall not apply with respect to any covenant or scenic easement in favor of or for the benefit of the United States or any department, bureau, or agency thereof; this state or any political subdivision thereof; or any corporation, trust, or other organization holding land for the use of the public, but only with respect to such covenants and scenic easements running in favor of or for the benefit of the land so held for the use of the public. Such covenants and scenic easements shall run in perpetuity.

(d)(1) Notwithstanding the limitation provided in subsection (b) of this Code section, covenants restricting lands to certain uses affecting planned subdivisions containing no fewer than 15 individual plots shall automatically be renewed beyond the period provided for in subsection (b) of this Code section unless terminated as provided in this subsection. Each such renewal shall be

for an additional 20 year period, and there shall be no limit on the number of times such covenants shall be renewed.

(2) To terminate a covenant as provided in paragraph (1) of this subsection, at least 51 percent of the persons owning plots affected by such covenant shall execute a document containing a legal description of the entire area affected by the covenant, a list of the names of all record owners of plots affected by the covenant, and a description of the covenant to be terminated, which may be incorporated by reference to another recorded document. By signing such document, each such person shall verify that he or she is a record owner of property affected by the covenant. Such document shall be recorded in the office of the clerk of the superior court of the county where the land is located no sooner than but within two years prior to the expiration of the initial 20 year period or any subsequent 20 year period. The clerk of the superior court shall index the document under the name of each record owner appearing in the document.

(3) No covenant that prohibits the use or ownership of property within the subdivision may discriminate based on race, creed, color, age, sex, or national origin.

(4) Notwithstanding any other provision of this Code section or of any covenants with respect to the land, no change in the covenants which imposes a greater restriction on the use or development of the land will be enforced unless agreed to in writing by the owner of the affected property at the time such change is made.

(e) To the extent provided in the covenants, the obligation for the payment of assessments and fees arising from covenants shall include the costs of collection, including reasonable attorney's fees actually incurred.

HISTORICAL STATUTORY NOTES

First enacted in 1935 and applicable only to property in municipalities. Amended in 1962 to apply to counties.

Subsection (d) providing for certain automatic renewals became effective on July 1, 1993

The 2008 amendment by Act 776 added subsection. (e).

The 2012 amendment by Act 663, in subsection. (b), added "provided, however, that whenever a zoning ordinance, upon its initial enactment by a county or municipality, expressly acknowledges the continuing application of a covenant restricting lands to certain uses within that jurisdiction, any such covenant, if created prior to zoning laws being adopted by that county or municipality, shall continue to be effective in such jurisdiction until the expiration of such covenant in accordance with its terms" following "have been adopted

PRIVATE COVENANTS ENCUMBERING REAL PROPERTY

AND THEIR EFFECT ON TITLE INSURANCE

I. **Introduction.** Private covenants are used to control land use and appear as encumbrances on a title report or commitment. They are somewhat similar to governmental land use controls such as zoning, but must be underwritten and dealt with by a title insurer differently. Relative to title insurance, covenants may arise in two situations: (i) The customer wants an exception for covenants removed from Schedule B or insured over with some affirmative insurance; or (ii) an insured may want affirmative insurance that identified covenants exist and are binding. The general need for relative certainty means that careful underwriting analysis may be required in order to avoid undue title insurance risks.

O.C.G.A. §44-5-59 and §44-5-60 are hopefully displayed on the screen and included at the start of the written materials. OCGA 44-5-59 is a recent enactment and has no judicial history. 44-5-60 has been the law for a long time, and it is the primary statutory reference in Georgia regarding these covenants. There has been considerable litigation over the interpretation and application of private covenants as the courts and legislature have sought to balance the often stated policy favoring the free use of real property against the need to control the use of real property and prevent or control undesirable uses and activities.

44-5-60(b) which renders some covenants unenforceable after 20 years in areas where zoning is adopted may be unique to Georgia. No similar statutes found in Alabama, Tennessee, North or South Carolina. The Florida Marketable Record Title Act is a general law which extinguishes an encumbrances not appearing of record after the root title document.

This topic will not consider personal covenants which are not binding upon a successor in title. It only addresses covenants which run with title to the property. The determinative consideration is whether the covenants "touch and concern the land" and whether the successor in title has notice of the covenants. To assure notice, get them recorded in a deed or declaration which is in the chain of title.

Some illustrative cases are cited below. For research assistance look at the annotations following 44-5-60, West Key # Covenants 108 and Pindar 19:190 – 207.

II. **Interpretation of Covenants**.

Real property covenants are contracts. In the Contracts Title, see OCGA 13-2-1 through 13-2-3.

Georgia appellate courts often recite a three step process used to interpret and apply written documents, and this process applies to real property covenants with one twist. Initially, construction of a covenant is a matter of law for the court.

First Rule, the court decides whether the language is clear and unambiguous. If it is, the court simply enforces the contract according to its terms. While the "intention of the parties" is often expressed as the objective, this does not mean someone's subjective intent; rather the contract alone is looked to for its meaning. Let's call this the "**Lodestar.**"

Second Rule, if the contract is ambiguous in some respect, the court applies rules of contract construction to resolve the ambiguity. See OCGA § 13–2–2 for various rules of contract construction.

Third Rule. If the ambiguity remains after applying the rules of construction, the issue of what the language means and what the parties intended must be resolved by a jury or other fact finder. *Godley Park HOA v Bowen,* 286 Ga. App 21 (2007). The existence or nonexistence of an ambiguity is a question of law for the court.

In construing real property covenants, the policy favoring free use of land gives rise to a presumption that the restriction is not applicable unless it clearly applies. This policy may override or provide a stronger rule than those in OCGA 13-2-2. See *C.H.E., LTD v Kent*, 262 Ga. 418 (1992) and *Bales v Duncan*, 231 Ga. 813(1) (1974) -- restrictive covenants on land construed to facilitate free use of land. In *Pritchett v Vickery*, 223 Ga. 490 (1967) it was not clear when covenants expired due to an inconsistency between a plat and a declaration, so court held that since the earlier expiration date had passed, the land was not restricted. "As a general rule, restrictions upon the use of private property are not favored, and any claim that there are restrictions upon such use must be clearly established." 223 Ga. at 494. *Prime Bank v Galler,* 263 Ga. 286, 289 (1993). *Douglas v Wages*, 271 Ga. 616 (1999).

Some other cases stating general rules of contract construction are: *Grave de Peralta v Blackberry Mountain HOA*, 315 Ga. App 315, 316 (2012). Restrictive covenants will be construed to carry out the intention of the parties, but when a covenant is clear and unambiguous, it is given its plain meaning. *Lake Arrowhead Property Owners Assn. v. Dalton,* 257 Ga. App. 655, 656 (2002). When the covenant is less clear, a court must attempt to ascertain its intent from an examination of the entire document in which the covenant is found. Jones v Morris, 325 Ga App 65 (2013); *Westpark Walk v. Stewart Holding,* 288 Ga. App. at 636(2). If the intent of the parties cannot be discerned from the document as a whole, any ambiguity must be strictly construed in favor of the property owner, *Douglas v. Wages,* 271 Ga. 616, 617(1) (1999). Restrictions on private property are generally not favored in Georgia. *Holbrook v. Davison,* 258 Ga. 844, 845(1) (1989). Thus, "[r]restrictions upon an owner's use of land must be clearly established," and covenants restricting the use of real property may not be enlarged or extended by judicial construction. *King v. Baker,* 214 Ga. App. 229, 235 (1994). In Dotson v Hannaford, 226 Ga 732 (1970) the covenant prohibited lot owner from erecting a dwelling with less than 1,150 square feet area, this did not prohibit an unattached mobile home of 500 square feet. Thus a covenant plainly expressed cannot be broadened by implication or parol proof.

But see *Yates v Dublin Sir Shop*, 260 Ga. App 369 (2003) where declaration of easements and covenants on a shopping center with two owners was held to restrict property to retail use solely due to recitals in WHEREAS clause and a reference to "retail" in a maintenance paragraph. There was no express restriction in the body of the instrument.

Real-life situations. Some other examples of cases construing covenants and applying them to various fact situations are:

Grave de Peralta v Blackberry Mountain HOA, 315 Ga. App 315 (2012). Covenants prohibited use of a lot by more than 12 people a time. Association contended that this prevented short term leasing. However, it was possible to abide by the 12 person limit regardless of leasing, and therefore the presumption the free use of land meant that and the covenant dis not prohibit short term leasing.

Glisson v IRHA of Loganville, Inc., 289 Ga. App 311 (2008). Homeowner built a dog pen with a concrete pad, chain link and a shed with a metal roof. The Association obtained an injunction as a violation of the subdivision covenants which prohibit any "temporary house, shack, tent or motor home". The shed was found to be prohibited.

Black Island HOA v Marra, 274 Ga. App 265 (2005). Restrictive covenants established certain areas to be left in natural state. Held: that this precludes HOA from mowing the grass in those areas.

Skylake POA v Powell, 281 Ga. App 715 (2006). Subdivision covenants did not define "structure." The court held that a retaining wall was not a structure for the purposes of the covenants. This seems to be a strained interpretation, but the facts indicated that there was little or no benefit enforcing the covenant in this situation.

Focus Entertainment Int'l v Partridge Green, 253 Ga. App 121 (2002). A covenant in a deed for an outlot at Gwinnett Mall prohibited sale or display of pornographic materials. A porno video store was enjoined by the superior court at suit of Mall owner. The Court of Appeals said that there was no need to find obscenity since no state action involved -- this is the interpretation and application of a contract between private parties. The Court also said that "pornographic" is not a vague term and that it had a well-established meaning.

Southland Development Corp. v Battle, 272 Ga. App 27411 (2005). Subdivision covenants used "single family detached home or cluster home" in defining "Dwelling." Court held that this prevented attached units.

Providence Const Co. v Bauer, 229 Ga. App 679 (1997). Subdivision covenants prohibiting owners from opposing re-zoning of another phase of the property held invalid as against public policy. Relied on the SLAPP suit law. OCGA 9-11-11.1. This shows that other public policies may vary a result

Sassafras Mountain Estates POA v Gould, 302 Ga. App 690 (2010). Subdivision covenants held not to provide for assessments and liens for road improvements nor did they provide for a POA. Therefore membership in the subsequent POA was voluntary. Property owners who were not members of POA held not to be subject to assessments or liens

Bottom line for title insurance underwriting. Look for the Lodestar (First Rule of covenant Interpretation) – clear and un-ambiguous. If you find yourself having to apply the Second rule and apply the judicial rules of interpretation, you may be moving toward a casualty insurance type of underwriting which title insurance are reluctant to approve. Never rely on the Third Rule unless you have a final judgment determining the question.

III. **Importance of Title Insurance for Development of Property.**

QUESTIONS PRESENTED:

A. When is title insurance available to protect an owner or lender against or to insure over a restrictive covenant appearing as an exception in the title? What is required to obtain such insurance?
B. Is title insurance available to insure a purchaser or lender that a covenant is duly adopted, recorded and has a certain title priority on the other property encumbered by the covenant? Will the covenant be cut off by foreclosure of a prior security deed? Do ALTA endorsements provide such coverage?
C. Are title insurance companies willing to assume an underwriting risk if it is unlikely to occur, or do they demand firm assurance that the covenant has either expired, become unenforceable or not applicable?

Availability of Title Insurance Coverage Regarding Restrictive Covenants, CCR's, REA's, etc.

Title insurance is always a risk analysis, as a title insurance policy insures against financial loss as result of defects in, or liens, or encumbrances on title. In underwriting policy coverage against loss due to violations of restrictive covenants, insurers make an analysis of the document, and an analysis of the applicable law, together with evaluating the likelihood of loss. Title insurance is not casualty insurance, and we cannot make otherwise valid restrictions merely "go away" by agreeing to offer some type of coverage against their violation.

Examples of Restrictions that we see as title insurers are: Use restrictions, Building Requirements, Architectural Approvals, Minimum Square Footage, Alcohol Sales, Food Sales, Non-Compete Clauses, Church Use, School Use, Radius Restrictions, Maintenance Obligations, etc. The restrictions may be contained in Deeds in the chain of title, separate recorded Declarations, and recorded Leases or Memos of Lease.

The Title Insurance Underwriter may consider some or all of the following matters before agreeing to any insurance coverage regarding Covenants and Restrictions:

- Is the language in the document clear and unambiguous?
- Does it "touch and concern" land or is it more contractual in nature?
- Have the restrictions expired by their own terms?

- Does the statute clearly apply –OCGA 44-5-60?
- Has title or ownership merged over time?
- Who may enforce the restrictions?
- Is a Release possible?
- Is an Amendment or other approval possible?
- Can you determine who would need to release it? All necessary parties available?
- Estoppel agreement available?
- Is there a change of conditions or change of use or other circumstances that make it likely that a Court would deny enforcement of the restrictions?
- Has a prior mortgage been foreclosed, terminating the restrictions?
- Acquisition by public agency, State or US government.

ALTA Title Insurance Endorsements are available that provide some coverage against loss as a result of violations of Covenants, Conditions, or Restrictions.

The ALTA 9 Series Endorsements are the most frequently issued endorsements which address violations of covenants and restrictions:

ALTA 9-06 insures a Lender against any loss of loan priority as a result of a violation of a covenant, condition, limitation, or restriction.

ALTA 9.2-06 insures an Owner against loss or damage as a result of a violation of an enforceable covenant and violation of building setback lines.

ALTA 9.6-06 insures a lender against enforcement of a "private right" in a Covenant, which results in any lack of priority of lenders mortgage. "Private Right" is defined in the document as a charge or assessment, option to purchase, right of first refusal, right of prior approval or purchaser or occupant.

ALTA 9.9-06 insures an Owner against loss of title as a result of a defined "private right" contained in a Covenant.

CLTA 124.1 insures an owner that existing covenants are binding and enforceable. This is most often requested by owners going into a Shopping Center Outparcel or Mall area, and they want some insurance that an REA encumbering remaining area is enforceable. It is commonly known as the "McDonalds" or "Shopping Center" endorsement.

Other Endorsements or more specific coverages may be able depending upon the circumstances presented.

SEE SAMPLE ENDORSEMENTS ATTACHED

IV Duration of Covenants in the Light of OCGA 44-5-60(b)

This statute was originally enacted in 1935 and applied only to incorporated areas (municipalities). It was amended in 1962 to make it applicable in unincorporated areas. The automatic covenant renewal provision for 15 unit planned subdivisions was added in 1993. The proviso at the end of 44-5-60(b) giving counties and municipalities to the authority to waive the twenty year rule in a zoning ordinance was added in 2012.

Below are some examples of application of 44-5-60(b) to extinguish covenants or not extinguish them.

Payne v Borkat, 244 Ga. 615 (1979). In *Payne* Landowners in residential subdivision sued for declaratory judgment that 1946 restrictive covenants in their deeds limiting lots to construction of one residential structure per lot were unenforceable. The Georgia Supreme Court, took an expansive view of the term ""restricting lands to certain uses" and held that the statute limiting operation of certain restrictive covenants to 20 years is applicable to both building and use restrictions, and that the application of statute to invalidate an alleged use restriction in one of the covenants was not unconstitutional. *Goddard v Irby*, 255 Ga. 47 (1986). A setback line becomes void after 20 years of zoning; it's a building restriction and therefore falls under the statute.

On the other hand, the 20 year rule does not apply to a covenant to pay an assessment. *Lowry v Norris Lake Shores*, 231 Ga. 549 (1974). Deed containing covenant to pay a maintenance covenant to the grantor is valid, enforceable and runs with the land. *Arbor Station v Dorman*, 255 Ga. App 866 (2001).

Is the 20 year duration limitation rule a good policy? What are some situations where its application may result in a good or bad outcome? Statute is often not considered in shopping center declarations.

A good result is that 44-5-60(b) may cause drafters of covenants in Georgia to consider and address their intended duration rather than simply stating a covenant and not providing for its termination or continuation.

V. **Exceptions to Allow Covenants to Run for More than 20 Years.** The 20 year durational limit for covenants is subject to a number of exceptions.

Conservation Easements. 44-5-60(c) and see the Uniform Environmental Covenants Act. OCGA 44-16-1.

15 Lot Planned Subdivisions. 1993 amendment to 44-5-60(b) provides for automatic 10 year extensions of covenants unless a majority of owners vote not to extend. This does not seem to be limited to residential subdivisions.

Condominium Developments. 44-3-116 expressly provides that 44-5-60(b) and part of (d) do not apply to condominiums.

Property submitted to the Georgia Property Owner Associations Act. 44-3-220 / 234 (1994). Same as for condominiums.

Easements may restrict land and are perpetual unless otherwise limited in time. Example of an easement to maintain land in natural state. *Davista Holdings v Capital Plaza*, 311 Ga. App 131 (2013). 44-5-60(b) does not apply to limit the duration of easements. Hendley v Overstreet, 253 Ga 136 (1984).

Provisions in covenants to extend them. Amendments to extend covenants. May the expiration provisions in 44-5-60(b) be varied by Agreement as long as there is no illegality or violation of public policy? Recent cases allow provisions to extend covenants where the extension provisions are initially in the covenants. Sweeney v The Landings, 277 Ga 762 (2004). Also covenants may be amended in some circumstances to provide for extensions, but may be subject to 44-5-60(d)(4) which does not allow an amendment to enhance restrictions unless the property owner in question agrees. *Licker v Harkleroad*, 252Ga App 872 (2002) was an interesting case. Developer aattempted to amend restrictions in a 100 lot residential subdivision where only 12 houses were built in 8 years. Amendment passed with the required 90% vote and was challenged in court by non-consenting owners. In a quiet title action, the Superior Court held that the amendment was proper. The Court of Appeals reversed holding that an amendment to exclude certain lots from residential restrictions was invalid because it was not uniform in application. The

developer secured votes to amended again and reduce the covenant term to 15 years. This was uniform in application and was affirmed in *Brockway v Harkleroad*, 273 Ga. App 339 (2005).

Regarding the limitation on amendments in 44-5-60(d), in *Charter Club on the River HOA v Walker*, 301 Ga. App 898 (2010), court held that an attempted amendment to the declaration in a townhouse subdivision, to impose restrictions on leasing could not be applied to a home owner who did not vote for the amendment. The leasing restriction fell under 44-5-60(d) as to that owner.

Restrictions in leases. While a covenant may expire under 44-5-60(b), a breach of covenant may constitute a default under a lease and lead to a lease termination. This can be especially important in long term ground leases which may substitute for purchase of the fee.

VI. Enforcement of Covenants

Distinguish between enforcement in equity where an injunction is available and suits at law for money. Georgia courts are willing to grant TROs and interlocutory and permanent injunctions to enforce valid restrictive covenants. Such orders seem to be routinely granted where the covenant and alleged violation are clear. This is usually not the case in other contract litigation.

Roberts v Lee, 289 Ga App 714 (2008). Enjoined parking a large dump truck routinely in driveway of the owner's home as a violation of subdivision covenants. See *Parker v Peaceful Valley POA*, 271 Ga 325 (1999). *Couch v Bent Tree*, 310 Ga App 319 2011) affirmed an injunction to prevent homeowner from parking a boat in a green space because such was clearly prohibited by the subdivision covenants. *Byrd v Wyly Island HOA*, 277 Ga app 220 (2006). Condo owner built a patio and border on the common areas of the condo without permission and was required to remove them.

However, injunctive relief will be subject to various principles and defenses of equity jurisprudence. Doctrines such as unclean hands, waiver and laches can defeat enforcement of a covenant. But the cases do not seem to require a showing of irreparable harm. Laches or estoppel by laches is an equitable principal that a delay in pursuing a right or claim by one having knowledge of the violation to the prejudice of the defendant may prevent enforcement. It is a recognized equitable defense in Georgia, and can bar enforcement of a covenant prior to the running of the applicable statute of limitations.

Burton v East Point Motors, 209 Ga. 872 (1953). Equitable defenses depend on the facts and the discretion of the court.

A suit at law for money damages will not be subject to equitable defenses. Suits for money will be barred by the statute of limitations, OCGA 9-3-29, which is applicable to breach of property covenants. OCGA 9-3-29 provides a two limitation period for suing over most violations but four year time limit for failure to pay assessments.

VII. **Termination or Unenforceability of Covenants Due to Changed Conditions and Other Equitable Defenses and Considerations.**

General law in the country recognizes that real property covenants can become unenforceable in the event of substantially changed conditions. This is a doctrine of equity jurisprudence as an equitable defense to an attempt to enforce a covenant by injunction. The usual criteria is whether the changed conditions are so substantial that the original, intent of the covenants cannot be fulfilled, or whether the relative burden on the party whose property is restricted is so great and the benefit of the party attempting to enforce the covenant is slight or non-existent. This doctrine may allow a title underwriter to insure over a restrictive covenant if the facts are clear. Sample cases from adjoining states:

Alabama. *AmSouth Bank v British West Florida, LLC*, 988 So.2d 545, (Ala App 2007). Drastic changes in use of other land within a one mile radius rendered residential restrictions on beachfront property unenforceable. But covenants are not impaired where changes were not so drastic. *Miller v Associated Gulf Land Corp.*, 941 So.2d 982 (Ala. App 2005). Alabama recognizes a relative hardship test under which a restrictive covenant will not be enforced if to do so would harm one landowner without substantially benefitting the landowner desiring to enforce the covenant. *Turner v. Sellers,* 878 So.2d 878 So.2d 300 (Ala. App. 2003)

Florida. Marketable Record Title Act, Fla. Stats 712.01, *et seq*. MRTA may extinguish any encumbrance not appearing of record after the recorded root of title. Root of title must be thirty or more years back. Building restrictions held extinguished in *Matisssek v Walker*, 51 So.2d 62 Fla App (2011). *Mizell v Deal*, 654 So.2d 112 (Fla App 1995). Florida also recognizes the doctrine of changed conditions. In order to invalidate a restrictive covenant due to subsequent changes in character of changes must materially affect restricted land and frustrate object of those restrictions.

North Carolina. *Medearis v. Trustees of Meyers Park Baptist Church*, 558 S.E.2d 199 (N.C.App.,2001) Covenants were terminated because changes within the covenanted area were so radical as practically to destroy the essential objects and purposes of the agreement *Fairfield Harbour Property Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 715 S.E.2d 273, (N.C.App. 2011), There is not a bright-line test for determining whether a radical change within the covenanted area has occurred so as to allow termination of restrictive covenant, and the inquiry depends upon the facts and circumstances presented in each case.

South Carolina. *Dunlap v. Beaty,* 122 S.E.2d 9 (SC 1961). In an action for declaratory judgment, relief may be granted against a restrictive covenant where there has been such change in character of neighborhood as to render enforcement of covenant valueless to covenantee and oppressive to the covenantor.

Tennessee. Changed conditions doctrine to terminate covenants does not seem to be well received. Evidence that the number of dwellings in a lakeshore subdivision had increased, boat traffic on lake had increased, and more property owners were living in subdivision year-round rather than on seasonal basis did not represent a material change justifying suspension of single-family dwelling restrictions in deeds *Jones v. Englund,* 870 S.W.2d 525 (Tenn. App., 1993)

The changed condition doctrine has been judicially recognized and discussed in some Georgia cases, but has not been well received. Often the doctrine is referred to in a case holding that no sufficient change has occurred to justify terminating the covenant. See *Dooley v Savannah Bank & Trust*, 199 Ga. 353 (1945). *Cawthon v. Anderson,* 211 Ga. 77 (1954). This is probably the result of the fact that we have the statutory provision regarding covenant termination in 44-5-60.

VIII. **New Code Section 44-5-59**. Effective as of 7/1/2013. Why was it enacted, and what is its effect on existing law. Seems to address two situations.

ENDORSEMENT

Attached to Policy No. _____

Issued by

FIRST AMERICAN TITLE INSURANCE COMPANY

1. The insurance provided by this endorsement is subject to the exclusions in Section 5 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For the purposes of this endorsement only:
   a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.
   b. "Improvement" means an improvement, including any lawn, shrubbery, or trees, affixed to either the Land or adjoining land at Date of Policy that by law constitutes real property.
3. The Company insures against loss or damage sustained by the Insured by reason of:
   a. A violation of a Covenant that:
      i. divests, subordinates, or extinguishes the lien of the Insured Mortgage,
      ii. results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage, or
      iii. causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the Indebtedness;
   b. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation;
   c. Enforced removal of an Improvement located on the Land as a result of a violation, at Date of Policy, of a building setback line shown on a plat of subdivision recorded or filed in the Public Records, unless an exception in Schedule B of the policy identifies the violation; or
   d. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.

AMERICAN LAND TITLE ASSOCIATION

4. The Company insures against loss or damage sustained by reason of:
   a. An encroachment of:
      i. an Improvement located on the Land, at Date of Policy, onto adjoining land or onto that portion of the Land subject to an easement; or
      ii. an Improvement located on adjoining land onto the Land at Date of Policy

      unless an exception in Schedule B of the policy identifies the encroachment otherwise insured against in Sections 4.a.i. or 4.a.ii.;
   b. A final court order or judgment requiring the removal from any land adjoining the Land of an encroachment identified in Schedule B; or
   c. Damage to an Improvement located on the Land, at Date of Policy:
      i. that is located on or encroaches onto that portion of the Land subject to an easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or
      ii. resulting from the future exercise of a right to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.
5. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:
   a. any Covenant contained in an instrument creating a lease;
   b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land;
   c. except as provided in Section 3.d, any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances;
   d. contamination, explosion, fire, fracturing, vibration, earthquake or subsidence; or
   e. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substances.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

FIRST AMERICAN TITLE INSURANCE COMPANY

By: _____

Authorized Signatory

AMERICAN LAND TITLE ASSOCIATION

ENDORSEMENT

Attached to Policy No. _____

Issued by

FIRST AMERICAN TITLE INSURANCE COMPANY

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For the purposes of this endorsement only,
   a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.
   b. "Improvement" means a building, structure located on the surface of the Land, road, walkway, driveway, or curb, affixed to the Land at Date of Policy and that by law constitutes real property, but excluding any crops, landscaping, lawn, shrubbery, or trees.
3. The Company insures against loss or damage sustained by the Insured by reason of:
   a. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation;
   b. Enforced removal of an Improvement as a result of a violation, at Date of Policy, of a building setback line shown on a plat of subdivision recorded or filed in the Public Records, unless an exception in Schedule B of the policy identifies the violation; or
   c. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.
4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:
   a. any Covenant contained in an instrument creating a lease;
   b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land; or
   c. except as provided in Section 3.c., any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: _____

Authorized Signatory

ENDORSEMENT

Attached to Policy No. _____

Issued by

FIRST AMERICAN TITLE INSURANCE COMPANY

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For purposes of this endorsement only:
   a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.
   b. "Private Right" means (i) a private charge or assessment; (ii) an option to purchase; (iii) a right of first refusal; or (iv) a right of prior approval of a future purchaser or occupant.
3. The Company insures against loss or damage sustained by the Insured under this Loan Policy if enforcement of a Private Right in a Covenant affecting the Title at Date of Policy (a) results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage, or (b) causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the Indebtedness.
4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from any covenant, condition, limitation or restriction:
   a. contained in an instrument creating a lease;
   b. relating to obligations of any type to perform maintenance, repair, or remediation on the Land; or
   c. relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: _____
Authorized Signatory

AMERICAN LAND TITLE ASSOCIATION

ENDORSEMENT

Attached to Policy No. _____

Issued by

FIRST AMERICAN TITLE INSURANCE COMPANY

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For the purposes of this endorsement only:
   a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument recorded in the Public Records at Date of Policy.
   b. "Private Right" means (i) an option to purchase; (ii) a right of first refusal; or (iii) a right of prior approval of a future purchaser or occupant.

3. The Company insures against loss or damage sustained by the Insured under this Owner's Policy if enforcement of a Private Right in a Covenant affecting the Title at Date of Policy based on a transfer of Title on or before Date of Policy causes a loss of the Insured's Title.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:
   a. any Covenant contained in an instrument creating a lease;
   b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land;
   c. any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances; or
   d. any Private Right in an instrument identified in Exception(s) _____ in Schedule B.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: _____
Authorized Signatory

AMERICAN LAND TITLE ASSOCIATION

CLTA Form 124.1 **Covenants are Binding**

ENDORSEMENT

Attached to Policy No. _____

Issued By

First American Title Insurance Company

The Company hereby insures the insured against loss or damage which the insured shall sustain by reason of, the failure of the covenants of the covenantor in favor of the covenantee set out in Section(s) _____ and _____ of the instrument recorded _____ to do or refrain from doing some act relating to the use, repair, maintenance or improvement of, or payment of taxes and assessments on the real property, or some part thereof, described as (description of burdened land of covenantor) to be binding upon the covenantor and each successive owner, during his ownership, of any portion of such real property, and upon each person having any interest therein derived from the covenantor or through any such successive owner thereof, except a mortgagee, or trustee or beneficiary of a deed of trust, while not in possession in such capacity.

Provided, however, that no assurance is hereby given should such covenants fail to bind a successive owner who derives title through: a) a tax deed; b) a foreclosure of a bond or assessment; c) enforcement of a federal tax lien; d) bankruptcy, as trustee or otherwise; e) a right or lien existing prior to the date of recording of the instrument containing said covenants.

This endorsement does not insure against loss or damage which the insured may sustain by reason of the nonperformance of any said covenants.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

First American Title Insurance Company

By: _____

Authorized Signatory

CLTA Form 124.1 (Rev. 6-14-96)
ALTA or CLTA - Owner or Lender

§ 44-5-59. Determining when a covenant runs with the land; time limit

Except as provided in Code Section 44-5-60 and excluding covenants recorded on property solely by the property's owner, which shall run with the title to the land, a covenant runs with the land when, for consideration and as reflected in a duly recorded instrument found in the applicable chain of title, a property owner and a third party agree to such covenant, the property is adequately described in such covenant, and such covenant does not run for more than 20 years.

§ 44-5-60. Covenants running with land go to purchaser

(a) The purchaser of lands obtains with the title, whether conveyed to him at public or private sale, all the rights which any former owner of the land under whom he claims may have had by virtue of any covenants of warranty of title, of quiet enjoyment, or of freedom from encumbrances contained in the conveyance from any former grantor unless the transmission of such covenants with the land is expressly prohibited in the covenant itself.

(b) Notwithstanding subsection (a) of this Code section, covenants restricting lands to certain uses shall not run for more than 20 years in municipalities which have adopted zoning laws nor in those areas in counties for which zoning laws have been adopted; provided, however, that whenever a zoning ordinance, upon its initial enactment by a county or municipality, expressly acknowledges the continuing application of a covenant restricting lands to certain uses within that jurisdiction, any such covenant, if created prior to zoning laws being adopted by that county or municipality, shall continue to be effective in such jurisdiction until the expiration of such covenant in accordance with its terms.

(c) The limitation provided in subsection (b) of this Code section shall not apply with respect to any covenant or scenic easement in favor of or for the benefit of the United States or any department, bureau, or agency thereof; this state or any political subdivision thereof; or any corporation, trust, or other organization holding land for the use of the public, but only with respect to such covenants and scenic easements running in favor of or for the benefit of the land so held for the use of the public. Such covenants and scenic easements shall run in perpetuity.

(d)(1) Notwithstanding the limitation provided in subsection (b) of this Code section, covenants restricting lands to certain uses affecting planned subdivisions containing no fewer than 15 individual plots shall automatically be renewed beyond the period provided for in subsection (b) of this Code section unless terminated as provided in this subsection. Each such renewal shall be for an additional 20 year period, and there shall be no limit on the number of times such covenants shall be renewed.

(2) To terminate a covenant as provided in paragraph (1) of this subsection, at least 51 percent of the persons owning plots affected by such covenant shall execute a document containing a legal description of the entire area affected by the covenant, a list of the names of all record owners of plots affected by the covenant, and a description of the covenant to be terminated, which may be incorporated by reference to another recorded document. By signing such document, each such person shall verify that he or she is a record owner of property affected by the covenant. Such document shall be recorded in the office of the clerk of the superior court of the county where the land is located no sooner than but within two years prior to the expiration of the initial 20 year period or any subsequent 20 year period. The clerk of the superior court shall index the document under the name of each record owner appearing in the document.

(3) No covenant that prohibits the use or ownership of property within the subdivision may discriminate based on race, creed, color, age, sex, or national origin.

(4) Notwithstanding any other provision of this Code section or of any covenants with respect to the land, no change in the covenants which imposes a greater restriction on the use or development of the land will be enforced unless agreed to in writing by the owner of the affected property at the time such change is made.

(e) To the extent provided in the covenants, the obligation for the payment of assessments and fees arising from covenants shall include the costs of collection, including reasonable attorney's fees actually incurred.

HISTORICAL STATUTORY NOTES

The 2008 amendment by Act 776 added subsec. (e).

The 2012 amendment by Act 663, in subsec. (b), added "provided, however, that whenever a zoning ordinance, upon its initial enactment by a county or municipality, expressly acknowledges the continuing application of a covenant restricting lands to certain uses within that jurisdiction, any such covenant, if created prior to zoning laws being adopted by that county or municipality, shall continue to be effective in such jurisdiction until the expiration of such covenant in accordance with its terms" following "have been adopted;".

SECTION FIVE

Georgia Advisory Opinion on Witness Only Closings

Carol V. Clark, Esq.

Carol V. Clark Law

Carol V. Clark

Practice Areas

Civil Practice; Trial Practice; Appellate Practice; General Practice; Residential Real Estate; Commercial Real Estate; Foreclosure; Landlord Tenant

Admitted: 1976, Georgia

Law School: University of Georgia, J.D.

Member: Atlanta and American Bar Associations; State Bar of Georgia (Member, Younger Lawyers Section, Executive Council, 1977-1980, 1983-1984; Director, 1983-1984); Lawyers Club of Atlanta; Leadership Atlanta.

Biography: Phi Beta Kappa; Phi Kappa Phi; Phi Delta Phi; Mortar Board. President, University Union. Moot Court International Team. Listed: One of Georgia's Super Lawyers 2006, 2007 and 2008; One of only five Women to be named to the Top 100 Super Lawyers, 2008. Recipient, George A. Pinder Award, Real Estate Section.

Born: Atlanta, Georgia, 1951

In the Supreme Court of Georgia

Decided: September 22, 2014

S14U0705. IN RE: FORMAL ADVISORY OPINION NO. 13-1.

PER CURIAM.

On October 23, 2013, the Formal Advisory Opinion Board issued Formal Advisory Opinion No. 13-1, which was filed in this Court on January 21, 2014. See State Bar Rule 4-403 (d). On May 19, 2014, we granted the State Bar of Georgia's petition for discretionary review. See id. After considering the record and the State Bar's brief, we hereby approve Formal Advisory Opinion No. 13-1, which is attached to this opinion as an appendix.

APPENDIX

STATE BAR OF GEORGIA
ISSUED BY THE FORMAL ADVISORY OPINION BOARD
PURSUANT TO RULE 4-403 ON OCTOBER 23, 2013
FORMAL ADVISORY OPINION NO. 13-1

QUESTIONS PRESENTED

1. Does a Lawyer[1] violate the Georgia Rules of Professional Conduct when he/she conducts a "witness only" real estate closing?

2. Can a Lawyer who is closing a real estate transaction meet his/her obligations under the Georgia Rules of Professional Conduct by reviewing, revising as necessary, and adopting documents sent from a lender or from other sources?

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

SUMMARY ANSWER

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

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

3. A Lawyer who receives funds in connection with a real estate closing must deposit them

---

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

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

into and disburse them from his/her trust account or the trust account of another Lawyer. (See Georgia Rule of Professional Conduct 1.15(II) and Formal Advisory Opinion No. 04-1).

OPINION

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

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

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

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

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

The obligation to review, revise, approve and adopt documents used in a real estate closing applies to the entire series of events that comprise a closing. (Formal Advisory Opinions No. 86-5 and 00-3, and UPL Advisory Opinion No. 2003-2). While the Supreme Court has not explicitly enumerated what all of those events are, they may include, but not be limited to: (i) rendering an opinion as to title and the resolution of any defects in marketable title; (ii) preparation of deeds of conveyance, including warranty deeds, quitclaim deeds, deeds to secure debt, and mortgage deeds; (iii) overseeing and participating in the execution of instruments conveying title; (iv) supervising the recordation of documents conveying title; and (v) in those situations where the Lawyer receives funds, depositing and disbursing those funds in accordance with Rule 1.15(II). Even if some of these steps are performed elsewhere, the Lawyer maintains full professional and direct responsibility for the entire transaction and for the services rendered to the client.

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

Rule 4-403. Formal Advisory Opinions

Ethics & Discipline / Current Rules / Part IV (After January 1 / 2001) - Georgia Rules of Professional Conduct (also includes Disciplinary Proceedings and Advisory Opinion rules) / CHAPTER 4 ADVISORY OPINIONS

(a) The Formal Advisory Opinion Board shall be authorized to draft Proposed Formal Advisory Opinions concerning a proper interpretation of the Rules of Professional Conduct or any of the grounds for disciplinary action as applied to a given state of facts. The Proposed Formal Advisory Opinion should address prospective conduct and may respond to a request for a review of an Informal Advisory Opinion or respond to a direct request for a Formal Advisory Opinion.

(b) When a Formal Advisory Opinion is requested, the Formal Advisory Opinion Board should review the request and make a preliminary determination whether a Proposed Formal Advisory Opinion should be drafted. Factors to be considered by the Formal Advisory Opinion Board include whether the issue is of general interest to the members of the Bar, whether a genuine ethical issue is presented, the existence of opinions on the subject from other jurisdictions, and the nature of the prospective conduct.

(c) When the Formal Advisory Opinion Board makes a preliminary determination that a Proposed Formal Advisory Opinion should be drafted, it shall publish the Proposed Formal Advisory Opinion in an official publication of the State Bar of Georgia and solicit comments from the members of the Bar. Following a reasonable period of time for receipt of comments from the members of the Bar, the Formal Advisory Opinion Board shall then make a final determination to either file the Proposed Formal Advisory Opinion as drafted or modified, or reconsider its decision and decline to draft and file the Proposed Formal Advisory Opinion.

(d) After the Formal Advisory Opinion Board makes a final determination that the Proposed Formal Advisory Opinion should be drafted and filed, the Formal Advisory Opinion shall then be filed with the Supreme Court of Georgia and republished in an official publication of the State Bar of Georgia. Unless the Supreme Court grants review as provided hereinafter, the opinion shall be binding only on the State Bar of Georgia and the person who requested the opinion, and not on the Supreme Court, which shall treat the opinion as persuasive authority only. Within 20 days of the filing of the Formal Advisory Opinion or the date the publication is mailed to the members of the Bar, whichever is later, the State Bar of Georgia or the person who requested the opinion may file a petition for discretionary review thereof with the Supreme Court of Georgia. The petition shall designate the Formal Advisory Opinion sought to be reviewed and shall concisely state the manner in which the petitioner is aggrieved. If the Supreme Court grants the petition for discretionary review or decides to review the opinion on its own motion, the record shall consist of the comments received by the Formal Advisory Opinion Board from members of the Bar. The State Bar of Georgia and the person requesting the opinion shall follow the briefing schedule set forth in Supreme Court Rule 10, counting from the date of the order granting review. The final determination may be either by written opinion or by order of the Supreme Court and shall state whether the Formal Advisory Opinion is approved, modified, or disapproved, or shall provide for such other final disposition as is appropriate.

(e) If the Supreme Court of Georgia declines to review the Formal Advisory Opinion, it shall be binding only on the State Bar of Georgia and the person who requested the opinion, and not on the Supreme Court, which shall treat the opinion as persuasive authority only. If the Supreme Court grants review and disapproves the opinion, it shall have absolutely no effect and shall not constitute either persuasive or binding authority. If the Supreme Court approves or modifies the opinion, it shall be binding on all members of the State Bar and shall be published in the official Georgia Court and Bar Rules manual. The Supreme Court shall accord such approved or modified opinion the same precedential authority given to the regularly published judicial opinions of the Court.

(f) The Formal Advisory Opinion Board may call upon the Office of the General Counsel for staff support in researching and drafting Proposed Formal Advisory Opinions.

(g) The name of a lawyer requesting an Informal Advisory Opinion or Formal Advisory Opinion will be held confidential unless the lawyer otherwise elects.

GO TO Rule 4-402. The Formal Advisory Opinion Board

GO TO Rule 4-404. Immunity

Return to handbook browser.

SECTION SIX

Current Legislation on Real Estate Matters Being Worked on in the Georgia General Assembly

Mo Thrash

Governmental Affairs Director

McCalla Raymer, LLC

Mo Thrash

6 CONCOURSE PARKWAY
SUITE 2800
ATLANTA, GA 30328
TELEPHONE: (404) 790-0958
FACSIMILE: (866) 635-3286
MO@MCCALLARAYMER.COM

Mo Thrash is the Governmental Affairs Director for the law firm of McCalla Raymer, LLC and is an Independent Contract Lobbyist. Mo began his lobbying activities in 1972 representing the interest of the Georgia Realtor Association and now represents numerous clients before the Georgia General Assembly. With 40 years experience dealing with the legislature, he has molded many close and personal relationships with leaders both on the State and Local levels. These leaders not only include the Governor, Lieutenant Governor, members of the House and Senate, mayors, council members, commissioners, and State agency heads, but members of their staff.

A graduate of the University of Georgia with a BBA degree in Management, Mo began his outstanding career as a residential realtor and home builder, receiving numerous accomplishments in the real estate industry. He is a past president of the DeKalb Board of Realtors, the Georgia Young Realtors, and The Georgia Realtor Institute. In 1978, Mo was named "Georgia Realtor of the Year". Mo has many civic involvements including being past chairman of the Georgia Residential Finance Authority and the First Appointee to the Georgia Homeless Trust Fund Commission. He also served on the Georgia Board of Corrections. Presently, he serves as chairman of Camp Sunshine, an organization for children with cancer, of which he helped establish.

NOTES: