**ETHICS IN QUIET TITLE ACTIONS[[1]](#footnote-1)**

**By: Stephen M. Parham**

1. **Duty to Make Meritorious Claims and Contentions**

In addition to an attorney’s responsibility to his or her client, an attorney also bears a responsibility to the legal system. Every lawyer must keep in mind both responsibilities, but a litigator, who spends most of his time balancing his client’s wishes and the constraints of the law, must be especially careful to remember the responsibility the lawyer owes the legal system. This responsibility is evident in Georgia’s rules regarding claims and candor.

Georgia’s Rules of Professional Conduct address “Meritorious Claims and Contentions” in Rule 3.1 which states:

In the representation of a client, a lawyer shall not:

1. File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another;
2. Knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law.

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

Georgia’s Rules of Professional Conduct address “Candor Toward the Tribunal” in Rule 3.3 which states:

1. A lawyer shall not knowingly:
2. Make a false statement of material fact or law to a tribunal;
3. Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
4. Fail to disclose to the tribunal legal authority in the controlling jurisdiction known too the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
5. Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
6. The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
7. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
8. In an ex parte proceeding, other than grand jury proceedings, a lawyer shall inform the tribunal of all material facts known to the lawyer that the lawyer reasonably believes are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse.

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

**II. Attorney’s Fees**

The Georgia Code addresses the granting of an attorney’s fees in situations involving improper use of the legal system and situations involving bad faith. Under O.C.G.A. § 9-15-14, a court may assess reasonable attorney’s fees and expenses of litigation against a party if it finds (1) that the party’s action lacked substantial justification *or* (2) that the party’s actions were interposed for delay or harassment *or* (3) that the party or its counsel unnecessarily expanded the proceedings by other improper conduct.[[2]](#endnote-1) It is not necessary to prove that the party acted in bad faith.[[3]](#endnote-2)

Attorney’s fees are also available under O.C.G.A. §13-6-11. The Georgia code provides: “[W]here the plaintiff has specially pleaded and has made prayer therefore and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.”[[4]](#endnote-3) A defendant who files a counterclaim against the plaintiff is also permitted to assert a claim for attorney’s fees.

With respect to attorney’s fees, real estate litigation, including quiet title actions, is similar to other types of litigation. A plaintiff’s attorney has a responsibility to advocate zealously for his client, but he must be careful not to abuse the system or manipulate it to advance a client’s interests. Clients come and go. The bench and bar, however, will always be there and they have very long memories. Being sanctioned by an award of attorney’s fees or defense costs is painful in the short run and can be fatal in the long run.

1. **Ethics in the Quiet Title Context**

The first duty a lawyer owes a client is competent representation, Rule l.l, Rules of Professional Conduct. This requires a thorough understanding of case law and statute and an understanding of survey principles. The last issue is important because there are two schools of surveying thought. In one school the description as contained in the deed is favored while in the other school, the existing monuments are favored.

1. **Thoroughness and preparation**. Knowing the law is not enough. A lawyer must also have a firm grasp of the land title record concerning the property in question. In the case of a boundary line issue, the lawyer also needs to understand the physical aspects of the property and the property’s historical use. It is also important to understand the source of the information you are relying on, with one example being private survey records. If private survey records are a key to your case, you need to review them with an experienced surveyor to make sure there are no defects in the survey. You should also have the same concern regarding private data sources. The veracity of those sources may be a key to your case.

**B. Maintaining competence.** The legal principles guiding quiet title actions have been established for decades if not centuries. However, they do change. For example, in at least one state, the principle of “practical location of a boundary line” now applies to Torrens property. This is a recent change in law which had been settled for more than a century. In addition, an attorney needs to stay up to date on changes in surveying technology. With the present use of GPS, surveying has become much more accurate. You need to be able to reconcile present surveys with surveys done using the older equipment.

**C. Lawyer/Client Relationship**

**Scope of Representation.** Rule I .2 of Rules of Professional Conduct govern the scope of representation and allocation of authority between client and lawyer. Your first step should be to establish the scope of representation. It is important that both the lawyer and the client understand exactly what tasks the lawyer intends to take on behalf of the client. The client has the authority to determine the purposes to be served by the legal representation and the lawyer as the duty to explain what can be accomplished within the limits imposed by the law as well as the limits imposed by professional responsibility.

While the client has the authority to set the parameters of the actions to be taken; expenses to be incurred; and experts to be retained, it is the lawyer's obligation to make sure the client has the necessary information to set those parameters intelligently.

**D. Retainer Agreements.**

Retainer Agreement should be entered into as soon as possible once a client decides to retain the lawyer. The Retainer Agreement should describe the scope of representation, the objective of the action and what limitations are placed on those objectives. All limitations must be reasonable both under applicable law and the factual circumstances. Fees and the retaining of experts should also be dealt with. It is important that the client understand that they are directly responsible for payment of experts. Sometimes the clients are simply seeking general information and are not requiring the lawyer to commence actions immediately. It is important that the lawyer and the client have a clear understanding of exactly what actions the attorney will be taking on the

client’s behalf.

**E. Diligence.**

Rule 1.3 of the Rules of Professional Conduct require the lawyer to act with reasonable diligence and promptness in representing a client. Once an action is commenced, the lawyer should immediately review the record if that is required and view the property. In addition, the lawyer needs to locate required experts and arrange for their retention by the client. Once the expert has been retained it is important the lawyer stays in touch with the expert and keep them on track. It is also important that the lawyer stay in touch with the Court representatives. In certain matters, time is of the essence and it is therefore important that the attorney understand how soon the matter can be heard.

**F. Communications**.

Communications between the lawyer and client are governed by Rule 1.4 of the Rules of Professional Responsibility. This communication begins with the Retainer Agreement which was discussed above. At the same time the Retainer Agreement is executed it is important that the lawyer explain the means and methods which the lawyer intends to follow in the matter. No matter how frustrating it may be, the lawyer needs to make sure the client has a clear grasp of all legal aspects of the action. During the action, it is important that the client be kept updated as to the status of the action, all decisions made by the lawyer regarding the action, and any changes in circumstances. All offers of settlement should be passed onto the client immediately. In addition, any discovery requests should also be forwarded to the client upon receipt. In some cases, the lawyer already has the information necessary to respond to the discovery requests. Even if that is the case, the proposed responses should be sent to the client well before the

discovery deadline is reached.

**G. Fees.**

Fees are governed by Rule 1.5 of the Rules of Professional Conduct. First it should be determined if fees to be charged are hourly or contingent. I have yet to see contingent fees used in a quiet title action; however, it may be possible. In determining fees, the lawyer should take into account the novelty or difficulty of the action, client demands, and the lawyer's experience and reputation. While it may appear on the face that all quiet actions run the same course, which is not always the case. Quiet title actions can sometimes require novel theories or be difficult to prove. There are also matters where the client demands the lawyer drop everything else and focus exclusively on the client's matter. It is important the lawyer discuss these factors with the client before commencing the action. Doing so will lead to a productive partnership between the lawyer and client.

Clients normally ask how much will this matter cost. In the past, I was able to give a client a fairly accurate estimate of what the expenses should be. Lately, the quiet title actions I have taken on have become more combative. As a result, the time spent and therefore the costs have been quite high. The lawyer needs to keep in mind that he/she is dealing with property that has a finite value. It is therefore important that the lawyer provide some estimate of the cost so the client can determine if it makes economic sense to fight the matter.

**H. Conflict of Interest in dealing with nonprofessionals.**

Before taking on a quiet title matter, a lawyer should make a quick review of the land records for both parcels to determine whether or not a past client may be a potential party or witness in the action. If there appears to be a direct conflict then the lawyer must

withdraw. However, if it appears that the conflict with a past or present client may be

simply tangential, then the lawyer should contact the prior or present client, explain the

situation to them and obtain a waiver of conflict. The lawyer should also be concerned as

to whether or not the present action would result in disclosure of confidential information

provided by another client. Confidential information is governed by Rule 1.6.

The information may be revealed if the client gives informed consent, the information is not protected by attorney client privilege, the client has not requested that the information be kept confidential, or the disclosure is necessary to prevent commission of a fraud. When dealing with confidential information, the lawyer should always err on the side of caution.

The lawyer should also keep in mind Rule 4.4 when dealing with third-parties. The lawyer should always respect the rights of the third-party making sure not to embarrass or burden that third-party during the proceedings. It is not uncommon for a lawyer in a quiet title action to be dealing with unrepresented defendants. Parties are hesitant to retain a lawyer if they can avoid it. It also is not uncommon for a third- party to ask the plaintiff s lawyer for advice regarding the action. In that situation, the lawyer should simply explain what relief the lawyer is requesting on behalf of their client and what will happen if the defendant does not respond to the action.

It has always been my practice that after explaining what relief I am seeking on behalf of my client to advise the defendant to seek their own legal counsel. I believe it is important that a lawyer explain to unrepresented defendants the steps the lawyer intends to take if the defendants do not respond to the complaint. I also believe it is important that the lawyer always recommend the defendant contact an attorney to verify everything I have told them.

**I. Declining or Terminating Representation.**

There is always the case when the lawyer's view of what the result of an action will be differs from what the client insists upon. Under Rule 1.16, there are a number of basis upon which a lawyer can withdraw. If the client becomes unreasonably difficult to deal with or insists upon taking an action which the lawyer considers unreasonable or unsupportable, the lawyer has the right to withdraw. The lawyer has the right to withdraw if the client fails to fill their obligations under the Retainer Agreement. Sometimes it is not the case of the client failing to pay the attorney's fees but rather the client refusing to retain the necessary expert. In that situation, if the lawyer believes the case cannot be properly presented without the use of an expert, the lawyer needs to make that fact clear to the client and if the client refuses to change their position, the lawyer should withdraw.

In the process of withdrawing, the lawyer needs to protect the client against any material adverse effects. If necessary, the lawyer should contact opposing counsel and the Court to extend any deadlines and continue any Court hearings until the client is able to obtain substitute counsel. There are also times when the client decides to fire his/her lawyers. In that situation, it is the responsibility of the lawyer to cooperate with the client and the client's new lawyer to properly transfer the file. It is also advisable that the lawyer prepare a written statement setting forth the circumstances of the termination and forwarding it to the soon to be ex-client.

1. The author wishes to acknowledge the NBI seminar paper of his colleagues F. Skip Sugarman and Adam D. Nugent from which some of this work was drawn. [↑](#footnote-ref-1)
2. See O.C.G.A. § 9-15-14 (2008); Gibson v. Decatur Fed. Savings & Loan Ass’n, 235 Ga.App. 160, 164 (1998). [↑](#endnote-ref-1)
3. Lamar Company, LLC v. State of Georgia, 256 Ga.App. 524, 526 (2002). [↑](#endnote-ref-2)
4. O.C.G.A. § 13-6-11 (2008). [↑](#endnote-ref-3)