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The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?

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THE STANDARD OF CARE IN LEGAL MALPRACTICE: DO THE MODEL RULES OF PROFESSIONAL CONDUCT DEFINE IT?

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I. INTRODUCTION

The standard of care for legal malpractice is normally established by expert testimony as to the customary practice of lawyers in the jurisdiction. In recent years, an increasing number of courts have permitted evidence that an attorney has violated an ethical rule of professional conduct to show a breach of the professional standard of care. Although this practice is by no means universally accepted, the implications of this trend are noteworthy.

The plaintiff suing an attorney can utilize a fixed standard of conduct and avoid the somewhat fuzzy problem of identifying when deviance from customary practice constitutes professional failure. Whether stated explicitly or not, the inference is that a reasonably prudent lawyer would not violate an ethical rule defining appropriate professional behavior. By falling below the minimal level of conduct mandated by the ethics code, an attorney breaches the professional standard of care owed to clients, and therefore may be held legally responsible for harm caused by the breach.

The idea that courts can look to statutory enactments, administrative regulations, or other codes to find standards of conduct is well established in tort law. Consider the case of an individual who has been hit by a car. In a suit against the driver of the car, the attorney for the plaintiff may prove that the defendant's car was traveling at 55 m.p.h. when the accident occurred and that the speed limit at the accident site was only 25

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m.p.h. The fact that the driver was exceeding the legal speed limit would constitute negligence *per se*.[1] Yet some states and commentators fail to recognize the applicability of this analogy in legal malpractice cases, and expressly decline to permit jurors to know when the defendant lawyer's conduct violated a state rule of professional conduct. This article concludes that such a position is wrong.[2]

The outcome of this debate affects not only the mechanics of proving allegations of malpractice, but also the standards by which lawyers should be adjudged, both individually and collectively.[3] The issue is whether, to what extent, and in what manner state disciplinary rules[4] should be relevant in civil claims or allegations of legal malpractice.

As a practical matter, admission of expert testimony that an attorney has violated an ethical rule is likely to be highly persuasive to a jury considering whether an attorney has committed malpractice. Conversely, expert opinion that an attorney has abided by the rules of professional conduct may help to vindicate an attorney defendant. One of the reasons some commentators object to the admission of such testimony is that they fear that it may be prejudicial to attorney defendants,[5] although the rule can cut both ways.

The need to address the issue is made particularly pressing by recent decisions such as *Hizey v. Carpenter*, in which the Supreme Court of

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1. Although the weight attached to the violation of a statute may vary, there is little dispute that courts can and do utilize statutes to establish standards of conduct. *See* Transamerica Mortg. Advisors, Inc., (TAMA) v. Lewis, 444 U.S. 11, 100 S. Ct. 242 (1979); J. I. Case Co. v. Borak, 377 U.S. 426 (1964); Bob Godfrey Pontiac, Inc. v. Roloff, 291 Or. 318, 630 P.2d 840 (1981).

2. *See, e.g.*, Hizey v. Carpenter, 830 P. 2d 646 (Wash. 1992), Ronald E. Mallen & Jeffrey M. Smith (4th ed. 1996) Legal Malpractice § 18.7, at 576-585 [hereinafter Mallen & Smith].

3. The issue is of fundamental importance to every lawyer practicing in the United States, individually or in a firm, as well as to the profession as a whole. It goes to the heart of the current debate over the esteem—or lack thereof—with which lawyers are held in the eyes of the public.

4. Including those based on the ABA Model Rules of Professional Conduct (1983) [hereinafter Model Rules], the ABA Model Code of Professional Responsibility (1969) [hereinafter Model Code], or a system created independently from the ABA, *see, e.g.*, Cal. Rules of Professional Conduct. Collectively, these rules are referred to throughout this Article as disciplinary or ethical rules.

5. *See, e.g.*, ABA/BNA Lawyers' Manual on Professional Conduct, Vol. 13, No. 25 (Aug. 1997), reporting that San Francisco attorney and treatise author Ronald Mallen said "Once a lawyer is labeled 'unethical' it's as bad as being branded with a scarlet letter."

Washington refused to permit the use of ethical rules in establishing the standard of care in legal malpractice in that state.[6] Because of the growth of interstate practice, it is becoming increasingly important for attorneys who practice across jurisdictional lines and for their malpractice carriers to have predictable rules defining the standard of professional care, and for such rules to be grounded in a common body of law.[7]

A larger but related question is when, if ever, the rules of professional conduct should carry weight outside the disciplinary system. As this article demonstrates, courts regularly cite ethical rules in cases involving a variety of legal questions outside the fields of legal malpractice and attorney discipline. Some of these situations represent alternative remedies for attorney misconduct. Some involve litigation issues that go far beyond claims for damages against the attorney.

An example of an action where the result hinged upon the ethics code, but did not involve either allegations of malpractice or attorney discipline, is a 1992 Pennsylvania Supreme Court case, *Maritrans Group, Inc. v. Pepper Hamilton & Sheetz*.[8] In 1987, Maritrans, a tugboat operator in New York harbor and the Delaware River, learned that its regular law firm, Pepper, Hamilton & Sheetz, of Philadelphia, intended to represent certain competitors of Maritrans in contract negotiations with labor unions.[9] When Maritrans objected to Pepper's representation of its competitors, Pepper withdrew from representing Maritrans and proceeded with the labor negotiations.[10] In an unusual move, Maritrans sued Pepper to enjoin the representation of the economic competitors, and for damages, claiming that the law firm's actions amounted to a conflict of interest.[11] The Court of Common Pleas issued an injunction against the rep-

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6. *Hizey*, 830 P.2d at 648.

7. The problem of common standards goes far beyond the scope of this article, and parallels the demise of the locality rule in medical malpractice; but generally, as society has moved from local, to state, to regional, to national orientation, professional practices have come to be defined more by national standards than local ones. The standard in legal malpractice has always been a reasonably prudent lawyer in the jurisdiction, *see infra* note 206 and accompanying text, a standard often localized through expert testimony. Jurisdictional differences, however, are rapidly disappearing as to what constitutes ordinary prudent conduct.

8. Maritrans Group, Inc. v. Pepper, Hamilton & Sheetz, 602 A.2d 1277 (Pa. 1992).

9. *Id.* at 1280.

10. *Id.* at 1281.

11. *Id.* (citing No. 238 Feb. T. 1988, Gafni, J. (Philadelphia County)).

resentation on the ground that Pepper's conduct represented a conflict of interest contrary to Rule 1.7 and 1.9 of the Pennsylvania Rules of Professional Conduct.[12]

The Superior Court reversed, holding that violations of the ethical code could not provide an independent basis for a cause of action.[13] On appeal to the Supreme Court of Pennsylvania, counsel for Maritrans argued that "the Code and Rules . . . condemn violations of common law duties which have an independent existence,"[14] in this case a breach of fiduciary duty.[15] The Supreme Court reversed the Superior Court's decision staying the preliminary injunction order,[16] but noted that Maritrans failed to "establish an independent cause of action encompassing the asserted duty."[17] The decision, however, left open the possibility that such an independent basis could be shown, and, significantly, did not reject Maritrans' contention that the ethical rules could embody civil standards.[18]

The Pennsylvania courts' uneasiness with the issue of how to treat

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12. *Id.* at 1281-282 citing No. 238 Feb. T. 1988, Gafani, J. (Philadelphia County).

13. Maritrans Group Inc. v. Pepper, Hamilton & Scheetz, 572 A.2d 737, 742-743 (Pa. Super. Ct. 1990).

14. Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz, 573 A.2d 1001 (Pa. 1990).

15. *Id.* at 1003.

16. *Maritrans*, 602 A.2d at 1288.

17. *Maritrans*, 573 A.2d at 1004.

18. *Maritrans*, 602 A.2d at 1284.

> The Superior Court correctly recognized that simply because a lawyer's conduct may violate the rules of ethics does not mean that the conduct is actionable, in damages or for injunctive relief. The court was also correct in saying that the trial court's finding of violation of the ethical rules concerning misuse of a client's confidences is not as such a basis for issuing an injunction. These propositions are correct under either the Code of Professional Responsibility or the Rules of Professional Conduct. However, the Superior Court then stood this correct analysis on its head. That court held that the trial judge's reference to violations of the rules of ethics somehow negated or precluded the existence of a breach of legal duty by the Pepper firm to its former client. The court also held that the presumption of misuse of a former client's confidences, developed in the law of disqualification, is inapplicable because the present case involves an injunction. Both of these propositions involve serious confusion in the law governing lawyers. *Id.*

ethical violations illustrates how troublesome such cases can be. Because the decided cases in this area are both inconsistent and confusing, further analysis is needed in order to articulate appropriate standards for courts to apply in situations where a lawyer's ethical misconduct ostensibly harms the interests of their clients.

This Article will review existing case law and commentary, and propose a new formula for application of rules of professional conduct in determining the standard of care to which attorneys should be held in malpractice cases. The authors will argue in favor of establishing a position that state rules of professional conduct create certain specific standards of lawyer behavior that constitute a minimum standard of conduct and a minimum standard of care for every individual attorney practicing in each jurisdiction.

Although there is room for debate as to how much weight should be given to evidence of ethics violations, there is little room for argument as to whether such evidence should be admissible. Furthermore, certain ethics rules clearly purport to create standards of conduct relating to lawyers' duties to their clients, while other rules do not. As such, it follows that the question should not be whether the rules of professional conduct as a whole define the standard of care, but whether specific rules governing attorney conduct actually do so. The authors will show how this approach to analyzing the problem helps to synthesize some of the seemingly inconsistent cases.

The key to determining whether a rule is susceptible to application in a civil action ought to be whether the specific rule was intended to protect a class of persons of which the plaintiff is a member against the type of harm that eventuated.[19] Thus, it will be argued that courts should apply this test to determine whether a specific rule of conduct should establish the standard of care.

This Article tackles the question of the proper role of the ethics codes in malpractice cases in the following sequence. Section II reviews the legal background of both ethical rules and literature on the question of applying ethical standards in legal malpractice cases, including a discussion of the disclaimers contained in the model ethics codes: Section III discusses the role of the disciplinary system and demonstrates that the functions already served by the ethics codes clearly go beyond the context of discipline. Section IV examines the basic elements of the tort of

19. *See infra* note 111 and accompanying text.

legal malpractice. Section V takes a look at the developing trend to admit evidence of ethical violations to prove a breach of the standard of care. Section VI analyzes these various systems and the decided cases from the perspective of custom and statutory violation, presenting four possible general rules of application, and attempts to synthesize the different positions into a coherent approach to the problem. Section VII summarizes the authors' analysis, concluding that ethical violations are relevant and admissible as to the professional standard of care in legal malpractice.

II. BACKGROUND

The leading article on ethical behavior and the standard of care in legal malpractice was written by Professor Charles Wolfram in 1979 Professor Wolfram concluded:

> [T]he judicial response to opportunities for . . . enhanced enforcement of the Code [of Professional Responsibility] has been, frankly, too grudging. And the Code itself could be made much more explicit in defining and in some instances making more rigorous the responsibilities of the attorney in several areas that may result in civil litigation. The potential use of more specific standards in civil litigation will doubtless create pressures against their adoption because of the narrow, pocketbook concerns of attorneys.

Many commentators have agreed with Wolfram's approach and concluded that violations of the code of legal ethics should be relevant to the standard of care in legal malpractice. There are, however, a number of writers on the subject who do not embrace Wolfram's ideas.[20] Although the tide is turning, many courts traditionally were unwilling to allow ethics code violations to intrude into the separate world of civil liability for malpractice.[21]

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20. *See, e.g.*, Robert Dahlquist, *The Code of Professional Responsibility and Civil Damage Actions Against Attorneys*, 9 OHIO L. REV. 1 (1982); Jean E. Raure and R. Keith Strong, *The Model Rules of Professional Conduct: No Standard For Malpractice*, 47 MONT. L. REV. 363 (1986); Laura K. Thomas, *Professional Conduct—Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.: The Code of Professional Responsibility as a Basis for Attorney Liability*, 22 MEM. ST. U. LE. REV. 169 (1991).

21. *See, e.g.*, Terry Cove, Inc. v. Marr & Friedlander, P.C., 521 So. 2d 22, 24 (Ala. 1988) ("[A]n alleged violation of a Disciplinary Rule of the Code of Professional Responsibility cannot, independently, serve as a legal basis for a civil action for money damages."); Mozzochi v. Beck, 529 A.2d 171, 175 (Conn. 1987)

One factor that has had an impact on this question is the widespread discontent within the profession with the ethical rules themselves, unrelated to issues of civil liability. Until 1969, lawyers in every state were governed by the Canons of Professional Ethics, an amorphous collection of standards, originally passed by the American Bar Association (ABA) in 1908.[22] In 1969, the ABA adopted the Model Code of Professional Responsibility, which was subsequently promulgated almost universally, although with certain variations, throughout the United States.[23]

By 1983, dissatisfaction with the Code led to the passage of the Model Rules of Professional Conduct. Unlike the Code, the new Rules were not instantly accepted by the states, and many states modified the "model" rules in a variety of ways. By 1997, however, thirty-nine jurisdictions had adopted some form of the Model Rules.[24]

Significantly, during the period between 1983 and the mid-1990s,

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("[V]iolations of the Code of Professional Responsibility does not give rise to any private cause of action for legal malpractice by anyone, including an attorney's client."); L & H Airco, Inc. v. Rapistan Corp., 446 N.W.2d 372, 380 (Minn. 1989) ("A violation of the Rules of Professional Conduct cannot give rise to a private action against an attorney. The Rules are intended to discipline attorneys, not provide a basis for civil liability."); Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C., 813 S.W.2d 400, 404 (Tenn. 1991) ("It is clear that the purpose of the Code is to state when a lawyer will be subject to disciplinary action and not to define standards whereby he may be held civilly liable for damages.").

22. CANONS OF PROFESSIONAL ETHICS (1908).

23. California has promulgated its own Code that, while similar to the Model Code, contains none of the ABA's Ethical Considerations. Cal. Bus. & Prof. Code § X (West 1994); *See also* Wolfram, *supra* note 21.

24. The thirty-nine states are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming. ABA/NBA Lawyers' Manual on Professional Conduct 1:3-4 (1997). North Carolina, and Virginia have incorporated some of the substance of the Model Rules, while California follows neither the Model Rules nor the Model Code. *Id.* Some states, like New York, purported to amend the Model Code to incorporate the substance of the Model Rules. *See* Gary L. Casella, *Amendments to the Code of Professional Responsibility*, 17 WESTCHESTER BAR J. 261, 268. These efforts produced a beast that was neither fish nor fowl, that retained many of the failings of the code, that ignored many of the improvements in the Rules, such as the format itself, and that confused more lawyers than it enlightened.

many states were vigorously debating adoption of the Model Rules, a process which did not proceed at the same pace in every jurisdiction. As a result, there was no clear national consensus regarding the ethical codes, and standards remained in a state of flux.[25] In jurisdictions that adopted the Rules, courts were forced to rely upon case law decided under the Code,[26] and may have done so less critically than they should have.

The starting point of the debate, as the framers of both the Code and Rules intended, should focus on the disclaimers of civil liability contained in their respective preambles.[27] The last paragraph of the Preliminary Statement at the beginning of the Model Code, first adopted in 1969, states:

> The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state *the minimum level of conduct below which no lawyer can fall* without being subject to disciplinary action. Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities. The Model Code makes no attempt to prescribe either disciplinary procedures or the penalties for violation of a Disciplinary Rule, *nor does it undertake to define standards for civil liability of lawyers for professional conduct.* The severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances. . . . [Footnotes omitted; emphasis added].

The inherent contradiction within this passage, exemplified by the

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25. Although any given jurisdiction applies one code or the other, and although the differences between the Code and Rules are not significant in many cases, the overall sense of uncertainty may have slowed the trend toward utilizing ethical standards in malpractice cases. *Cf.* Gary A Munneke, *Dances with Nonlawyers: New Perspectives on Law Firm Diversification*, 61 FORDHAM L. REV. 559, 579 (1992).

26. *See* Robert J. Kutak, *Evaluating the Proposed Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RES. J. 1016, 1018, n.9.

27. "The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct." Model Code, Preliminary Statement; "Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability." Model Code, Preliminary Statement.

two italicized clauses, was carried forward with a vengeance into the Model Rules, when these were adopted in 1983. While the Model Rules omit the clear statement that they are intended to constitute a minimum standard, the Preamble does state, at paragraph 11, that "[e]very lawyer is responsible for observance of the Rules of Professional Conduct."[28] Thus, it is appropriate to conclude that the Model Rules are intended to stand in the same relationship to lawyers' ethical and professional standards in this regard as their predecessors in the Model Code. However, no such restraint is reflected in the passage dealing with civil liability. Following the Preamble of the Rules, in a section called "Scope," the following language appears, at paragraph 6:

> Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.[29]

Underlying much of the discussion in this article is the belief that these disclaimers are virtually meaningless. Professor Geoffrey Hazard has put this proposition more artfully, as follows:

> These efforts [to exclude the application of the ethics codes from malpractice cases] were predictably futile, however, if not fatuous. Norms stated as obligatory standards of a vocation are generally held to be *evidence of the legal standard of care* in practicing that vocation, or at least as a predicate for expert testimony as to what that standard is. Thus, notwithstanding the bar's attempted disclaimer in writing black-letter rules, the bar necessarily assumed certain unavoidable responsibilities. (Emphasis added; footnotes omitted).[30]

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28. Model Rules, Preamble.
29. Model Rules, Scope.
30. Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get it,*

In this context, it is notable that, in adopting their own versions of the ethics codes, not every state has incorporated the disclaimer language. Referring again to the analogy of the car accident case with which this article began, the fact that speed limits were established for criminal law purposes does not prevent their use or limit their utility in determining civil negligence liability. In this light, the disclaimer language in the ethics codes purporting to preclude the parallel use of the ethics rules in legal malpractice cases as well as in disciplinary proceedings, and the decisions giving the disclaimers effect, appear to be purely self-serving on the part of the bar in seeking to have its members treated differently from other tortfeasors.

Additionally, the Model Code and Model Rules may have different relevance in ascertaining the appropriate civil standard of liability, notwithstanding that each contains disclaimer statements. For a number of reasons, despite the stronger disclaimer language, the Model Rules provide a more solid basis for a nexus between ethical and civil standards of conduct.

First, the Rules are firmly rooted in positive law.[31] The Rules were carefully crafted to track generally accepted principles of agency law.[32] Agency concepts are at the heart of the attorney-client relationship, and the duty of care owed by lawyers to clients frequently can be described in terms of the responsibilities of agents to principals. Viewed in this light, the Rules and malpractice law have common roots. If ethics codes and substantive law reflect common standards, then it follows that the codified rules would be germane to the question of professional standards in civil actions.[33]

The Rules also conform to court-made rules of law. The ABA commission that drafted the Rules incorporated civil standards into the proposed rules whenever they were relevant.[34] For example, in the area of conflicts of interest, Model Rule 1.9 reflects the substantive standard for successive conflicts of interest in substantially related matters.[35] Rules

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6 GEO. J. LEGAL ETHICS 701, 718 (1993).

31. *See* Robert J. Kutak, *Model Rules of Professional Conduct: Ethical Standards for the '80s and Beyond*, 67 A.B.A. J. 1116, 1116-1117 (1981).

32. *See id.* at 1117-1120; *See also* RESTATEMENT (SECOND) OF AGENCY §§ 394 (a), (c), (d) and cmt.; 381 (e) and cmt.; 396 (d) and cmt., (j); 281 (a) and cmt. covering principal/agent relationship.

33. *See* Maritrans 573 A.2d at 1001.

34. MODEL RULES OF PROFESSIONAL CONDUCT, Scope.

35. *See* MODEL RULES Rule 1.9(a). The history section of the rules consistently

7.1 through 7.4 attempt to codify standards for advertising and solicitation declared by the U.S. Supreme Court.[36] This reliance on substantive law throughout the Rules tends to produce common ethical and civil standards.

Finally, the Rules recognize the role of customary usage in setting standards of behavior for lawyers. It was, and is, customary for lawyers to refer cases to other lawyers in return for a share of the ultimate fee in the case even if they handle none of the work.[37] Rule 1.5(e) revised the requirements of the Code with respect to division of fees with other lawyers.[38] It allows lawyers to divide fees without regard to the proportion of work done by each if the lawyers agree in writing to assume full responsibility for the matter.[39] This practice gives an incentive to lawyers who are not competent, or are too busy to undertake a particular case, to associate with another lawyer better positioned to assume the representation.[40] The proportional work/proportional pay provisions of the Code were widely disregarded by practitioners, thereby subjecting them to discipline for acting according to the custom of the profession.[41] The

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demonstrates the recognition of case law as supporting the positions adopted by the commission.

36. "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." MODEL RULES, Rule 7.1; ". . .[A] lawyer may advertise services through public media, such as a telephone, legal directory, newspaper or other periodical. . . . A lawyer may not give anything of value to a person for recommending the lawyer's services. . . . " MODEL RULES, Rule 7.2; "A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client. . . . " MODEL RULES, Rule 7.4.

37. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.2.4 p. 510 (West 1986).

38. The MODEL CODE, in DR 2-107 dictated proportionality. "A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless: . . . (2) [t]he division is made in proportion to the services performed and responsibility assumed by each.

39. MODEL RULE 1.5 (e), "a division of fee between lawyers who are not in the same firm may be made only if: (1) 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; (2) the client is advised of and does not object to the participation of all the lawyers involved: and (3) the total fee is reasonable."

40. The comments to Rule 1.5 state, "[a] division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well . . . ." Model Rule 1.5 Comment.

41. Hall & Levy, *Intra Attorney Fee-Sharing Arrangements*, 11 VAL. U. L. REV.

Rules acknowledged the reality of the practice of forwarding fees, and created a standard consistent with that practice.[42]

Taken together, these approaches to the drafting of the Model Rules produced a document reflecting standards closer to those of civil law than the standards articulated in the Code.[43] This conceptual convergence is clearly documented in the background sections of the Rules, so that the nexus between these two systems of standards can be identified easily.[44]

Widespread adoption of the Model Rules represents a growing consensus about how lawyers ought to act, because the Rules now establish a cross-jurisdictional commonality of behavioral standards. Whether this can be translated into a duty to act in conformance to the standards articulated in the rules is another question. In order to assess this question, it is necessary to look more closely at the purposes of the disciplinary system and evolving case law.

III. THE DISCIPLINARY SYSTEM AND OTHER USES OF THE RULES OUTSIDE MALPRACTICE

A. Discipline

In contrast to malpractice, the disciplinary system is designed to protect the interests of the public and the integrity of the legal profession from the misconduct of lawyers.[45] Because law is a self-regulating profession, the integrity and credibility of all lawyers is impugned by the unsanctioned misconduct of any.[46] Ethical rules spell out the individual lawyer's responsibilities to multiple groups, including clients, the pro-

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1 (1976); Note, *Attorneys: The Referral Fee: A Split Opinion*, 33 OKL. L. REV. 628 (1980).

42. MODEL RULES, Rule 1.5(e), Other Model Rules codified customary usage in similar ways. *See* Mallen & Smith, *supra* note 3, § 16.3, at 410.

43. *See* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1249 (1991).

44. The extent to which the Model Code reflected agency, case law and custom is absent from its legislative history. That the disciplinary system and the court system might reach the same result for the same reasons reflected a degree of parallelism, but not necessarily conformity.

45. *See* MODEL RULES, Scope; *see also* Wolfram, *supra* note 21.

46. WOLFRAM, *supra* note 21.

fession, the courts, clients, and adversaries, among others.[47]

Although the duties enumerated in the ethics codes serve to protect broader societal interests, the standards clearly address the quality of lawyers' conduct towards their clients. Thus, while it may be said to undermine the legal system if a lawyer misappropriates client funds, such misconduct obviously harms the client as well, and a rule prohibiting misappropriation of funds is equally relevant to both concerns.[48]

The disciplinary system may have been designed to protect the profession as a whole and the public generally, but certain provisions of the ethical rules focus specifically on the duties of lawyers towards clients who look for their individual protection to the civil justice system. An individual injured by an attorney's malpractice may have a tort action, as well as a valid disciplinary complaint against the lawyer under the applicable ethical rules, providing a dual remedy for the same misconduct.[49] The client can proceed under either system or both.[50]

An adjudication under one system will not foreclose action under the other for the same act of misconduct.[51] A successful prosecution under the disciplinary system requires a finding that the lawyer violated one or more rules prohibiting the lawyer's conduct.[52] If the rule involves conduct which also subjects the lawyer to malpractice, the ethical rule arguably has a bearing on the lawyer's duty to act with reasonable care toward the client.

B. Other Uses of the Rules Outside Malpractice

Although courts continue to recite the disclaimers, discussed in Section II, that ethical rules were not intended to be used as a basis for civil liability, the application of these disclaimers has been restricted largely to

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47. *See* MODEL RULES, Scope.

48. *See* MODEL RULE 1.15; *See also* Model Code DR 9-102.

49. Rogers v. Robson, Masters, Ryan, Brumund & Belom, 392 N.E.2d 1365 (Ill. App. Ct. 1979) *aff'd* 407 N.E.2d 47 (Ill. 1980).

50. *See generally* Harry J. Haynsworth, *Business Lawyers Under Fire — Potential Ethical Sanctions and Liability*, Q246 ALI-ABA 23.

51. Insurance Management Associates, Inc. v. Miller, No. 91-c-931, 1994 WL 362206. (The fact that a rule of professional conduct is involved is not dispositive of the issue of civil negligence.).

52. *In re* Taylor, 363 N.E.2d 845 (Ill. 1977).

legal malpractice cases, and almost always as a justification for denying liability.[53] In fact, examination of judicial decisions in a number of areas confirms that courts regularly cite ethical rules to support propositions that augment or modify the civil law.[54] This suggests that the courts' reliance on the Preamble language is at best selective, which raises serious questions about the merit of such logic. The following is a non-exhaustive review of some of the other situations in which the ethical codes have been applied.

1. Conflicts.—Many of the rules that govern legal conflicts of interest had their origin in judicial decisions. In fact, the relationship between the substantive law as expressed in the case law has evolved in tandem with the ethical rules. Where the legal representation involves a former and a present client of a lawyer, courts have developed a rule that the lawyer cannot represent the present client against the former if the two matters are substantially related.[55] Although this concept did not appear in either the Canons or the Code, it was incorporated in the Rules of Professional Conduct as Rule 1.9.[56]

An examination of the cases involving the substantial relationship test demonstrates another aspect of this interrelationship: the courts cite the ethical rules with regularity to support their decisions applying the substantial relationship test.[57] These decisions frequently undertake ex-

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53. *See, e.g.,* Flatt v. Superior Court, 885 P.2d 950, 953 (Cal. 1994); Galu v. Attias, 923 F. Supp 590, 596 (S.D.N.Y. 1996); Carlson v. Fredrikson & Byron, 475 N.W.2d 882, 888 (Minn. Ct. App. 1991).

54. *See infra* notes 61, 65, 66, 68, and accompanying text.

55. T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953). In this case, Judge Weinfield first articulated the substantial relationship test: "the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client." *Id.* at 268. Compare Model Rules, Rule 1.9: "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." Model Rule 1.9(a).

56. CANONS OF PROFESSIONAL ETHICS, Scope; MODEL CODE RESPONSIBILITY, Scope; MODEL RULES, Rule 1.9.

57. *See, e.g.,* Straub Clinic & Hospital v. Kochi, 917 P.2d 1284, 1288 (Haw. 1996); Islander East Rental Program v. Ferguson, 917 F. Supp 504, 509 (S.D. Tex. 1996).

tended discussions of the ethical rules in order to support their decisions.[58]

For example, when confronted with the issue of whether the trial court abused its discretion in granting an attorney's motion to withdraw as counsel shortly before trial, the Supreme Court of the Northern Marina Islands in *Hwang Jae Corp. v. Marianas Trading and Development Corp*,[59] relied heavily on Model Rules 1.7 and 1.9 as the basis for affirming the trial court's decision.

In one of the most widely cited conflicts decisions, *Cinema 5, Ltd. v. Cinerama Inc.*,[60] the court discussed at length the interrelationship between Canons 4, 5, and 9 of the Code of Professional Responsibility, as they relate to the limits of the substantial relationship test.[61] In turning to the Code in this way, the court effectively utilized the ethics rules to define a fundamental rule of substantive law.

For yet another example, *United States v. Stalks*[62] was a criminal case where there was a relationship between the defendant's attorney and the attorney of a co-indictee. The court based its entire determination of the attorney's duty on Model Rules 1.7 and 1.10, and the Comments.[63]

While couched in terms of breach of fiduciary duty and not malpractice, the Second Circuit Court of Appeals, in *Milbank, Tweed, Hadley & McCloy v. Chan*,[64] held that liability for breach of basic ethics standards (in this case, conflicts of interest arising from changing clients in the

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58. *See, e.g.*, Callas v. Pappas, 907 F. Supp. 1257 (E.D. Wis. 1995); Crispens v. Casal Refining & Marketing, Inc., 897 P.2d 104 (Kan. 1995); Bagdan v. Beck, 140 F.R.D. 660 (D.N.J. 1991).

59. No. Civ. A. 88-889, 1994 WL 413190 (S. Ct. N. Mariana Islands, July 19, 1994).

60. 528 F.2d 1384 (2d Cir. 1976).

61. The issue was whether the substantial relationship test articulated in *T.C. Theaters* should be applied in cases involving concurrent conflicts of interest. After reviewing the ethical standards, the court concluded that it was not appropriate to extend the application of this rule to concurrent conflicts. *T.C. Theaters*, 113 F. Supp. at 268.

62. Crim. No. 94-195 1994 WL 606060 (D.N.J. Nov. 1, 1994).

63. *Id.* at *1-5.

64. 13 F.3d 537 (2d Cir. 1994). It should be noted that although the breach alleged was clearly founded in the ethical rules regulating conflicts of interest, the court did not expressly refer to the ethics code, instead founding its decision on general principles of fiduciary obligations. Precisely the same result would follow if the breaches had been expressed in terms of the ethics code.

middle of a commercial transaction without the consent of the original client), may be imposed without proof of "but for" causation of injury.[65]

It is clear from these conflicts decisions that courts are willing to apply ethical rules in conflicts cases, even though an explicit discussion of whether ethical rules can provide a basis for substantive decisions does not appear in the opinions. It is also apparent that the civil law and the disciplinary rules have evolved synergistically over an extended period of time. This interactive growth is strong support for the argument that the ethical rules governing conflicts have relevance in the civil arena generally, and in legal malpractice cases specifically.[66]

2. Confidences.—An attorney's obligation to maintain a client's confidences is deeply rooted and broadly recognized as an essential part of the attorney-client relationship. Every state and the federal system, recognizes the attorney-client privilege in its rules of evidence,[67] and an ethical duty to protect client confidences appears in the various rules of attorney conduct of all jurisdictions.[68] What is the role of the courts in ensuring that attorneys protect their clients' confidences, and what standard do these courts employ in doing so?

Smart Industries Corp. v. Superior Court et al.[69] was a civil case where defendant's counsel moved to disqualify the plaintiff's attorney because a former employee of defendant's attorney had worked on the case before leaving to take employment with plaintiff's attorney. The attorney's motion was not based upon statutory or common law, but on the Arizona rules governing attorney conduct.[70] In rendering its decision, the Court of Appeals was careful to establish a relationship between ethical rules and motions made in court. The court staed that the ethical rules are adopted to provide attorneys with guidance in their actions and to provide a standard for disciplinary proceedings, although the rules do

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65. *Id.* at 543.

66. In Simpson v. James, 903 F.2d 372 (5th Cir. 1990), the court found that attorneys' conflict of interest in a corporate transfer could provide a basis for legal malpractice if the malpractice proximately caused the plaintiffs' harm. Although the court did not rely upon the Texas Rules of Professional Conduct to reach its decision, it is significant that identical conduct is involved in conflict situations regardless of what remedy is sought.

67. *See, e.g.*, MCCORMICK ON EVIDENCE § 87 at 120 (4th ed., 1992).

68. *Id.*

69. 876 P.2d 1176 (Ariz. 1994).

70. *Id.* at 1179.

not imply standing to use the rules in judicial applications.[71] The court then went on to point out that a trial court derives authority to apply an ethical rule to govern a disqualification motion in a litigation setting from the inherent power of the court to control judicial officers in the proceedings before it, thus creating a body of common law based upon these rules.[72] Such a convoluted argument appears to put form over substance. What the court is saying, in effect, is that courts may utilize the ethical rules when they choose, but that they may be compelled to choose to do so. Cases such as *Smart* make it clear that the courts are willing to employ state standards of attorney conduct as well as the Model Rules as a tool in finding the correct substantive rule of law.

3. Duty to Tribunal.—The courts have also utilized various ethical rules in establishing the attorney's duty to the tribunal. In *Keith v. Jackson, et. al.*,[73] the court raised the issue of an attorney's candor towards the tribunal, *sua sponte*, and found that he had violated Rule 3.3(d) of the Pennsylvania Rules of Professional Conduct. The Court concluded that the most appropriate action for it to take under the circumstances was to revoke the attorney's *pro hac vice* admission.

4. Legal Fees.—Courts are often faced with the question of whether the fees charged by an attorney are appropriate or excessive. This issue can arise in virtually all areas of legal practice. Model Rule 1.5 addresses not only the reasonableness of fees charged by attorneys, but also the division of fees between firms.[74] Courts have not been shy to utilize this Rule to guide them in their resolution of issues surrounding attorney fees.[75]

5. Marketing Legal Services.—Perhaps no area of legal ethics has produced more judicial controversy than that of legal advertising and solicitation. Since 1977, when the Supreme Court decided *Bates v. State*

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71. *Id.* at 1180.

72. *Id.*

73. 855 F. Supp. 765 (E.D. Pa. 1994).

74. MODEL RULES, Rule 1.5.

75. *See* Ryder v. Farmland Mutual Ins. Co., 248 Kan. 352, 807 P.2d 109 (Kan. 1991); *In re* Estate of Schuldt, 428 N.W.2d 251 (S.D. 1988); Village of Shorewood v. Steinberg, et al., 496 N.W.2d 57 (Wis. 1993).

Bar of Arizona,[76] the Supreme Court and various state courts have been called upon to apply constitutional doctrines of commercial speech to state ethical rules.[77] Although most of these cases involve disciplinary actions, some decisions involve civil remedies for alleged attorney misconduct.

In one such case, *Adler, Barish, Daniels, Levin and Creskoff v. Epstein*,[78] the Pennsylvania Supreme Court found that lawyers leaving a law firm to open their own practice interfered with the existing contractual advantage between their old firm and its clients. Epstein, one of the departing lawyers who were associates at Adler Barish, actively "advised Adler Barish clients that he was leaving the firm and advised them that they could choose to be represented by him, Adler Barish, or any other firm or attorney."[79] Citing DR 2-103 of the applicable Pennsylvania Code of Professional Responsibility,[80] the court goes on to say:

> We find nothing in the "'rules of the game' which society has adopted" which sanctions appellees' conduct. Indeed, the rules which apply to those who enjoy the privilege of practicing law in the Commonwealth expressly disapprove appellees' method of obtaining clients. . . . We find such a departure from "[r]ecognized ethical codes" "significant in evaluating the nature of [appellees'] conduct." Restatement (Second) of Torts, . . . at §767 comment c. All the reasons underlying our Disciplinary Rules' proscription . . . are relevant here."[81]

The opinion is thus clear in stating that the ethical rules governing the legal profession are relevant in assessing a lawyer's conduct

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76. 433 U.S. 350 (1977).

77. Although a full discussion of the legal advertising cases is beyond the scope of this article, a sampling of the decisions confirms that there are many of them. *See, e.g.*, Bates v. State Bar of Ariz, 433 U.S. 350, (1977); *In re* Primus, 436 U.S. 412 (1978); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); *In re* R.M.J., 455 U.S. 191 (1982).

78. 393 A.2d 1175 (Pa. 1978).

79. *Id.* at 1178.

80. "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding the employment of a lawyer." DR 2-103(A) Pennsylvania Code of Professional Responsibility (as adopted 1974). The court went on to discuss the constitutional legal advertising and solicitation decisions of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), which subsequently provided the foundation for Model Rules 7.1-7.3.

81. *Adler*, 393 A.2d at 1184.

in a tort action based on a theory of interference with contractual advantage.

For purposes of the discussion in this article, it is not necessary to establish that courts invariably turn to the ethical codes in civil actions, but rather to recognize that they do so, which leads inexorably to the conclusion that they can.

IV. LEGAL MALPRACTICE

The elements of the tort of legal malpractice needs to be reviewed, since this provides the framework for the entire discussion of the relevance of the ethics codes to this form of civil liability. There are *five* elements which must be established in order to prove a malpractice case against an attorney:

1. *Existence of a Professional Relationship*: In the case of attorney malpractice, this requirement simply means that the plaintiff must show the existence of an *attorney-client* relationship. If a plaintiff cannot show that the relationship existed, then the matter usually can go no further.

2. *The Standard of Care*: An attorney must act as a reasonable lawyer of ordinary prudence would in similar circumstances. Except in cases of egregious conduct, expert testimony as to custom and usage in the profession is required to establish professional negligence. This is the element which is at issue in this article. The question is whether the ethical rules in force in each jurisdiction should themselves establish the standard whenever they apply to allegations of malpractice.[82]

3. *Breach of the Standard of Care*: It must be established, typically by expert testimony, that the attorney's conduct fell short of the standard of care. These two elements are related, but distinct. Having proved whatever standard of conduct the attorney's actions should be measured against, the plaintiff must then demonstrate that a reasonable lawyer would not have acted as the defendant did in some identifiable way.[83]

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82. *See infra* notes 95, 127, 129, 132, 133, 143 and accompanying text.

83. Typically, both the standard of care and its breach are established by expert testimony; in this sense, the question might be recast to inquire whether an expert should be permitted to use ethical standards in order to demonstrate reasonable care or the breach of it.

4. *Proximate Cause*: Next, the plaintiff must prove that the breach was the proximate cause of injury or loss,[84] sometimes stated that the defendant was a substantial factor in bringing about the plaintiff's harm.[85] In order to establish proximate cause, the plaintiff must show that she would have prevailed in the underlying action upon which the malpractice case is based.

5. *Damages*: Finally, the plaintiff must prove that she suffered actual injury or loss, compensable in the form of damages.[86] It is not enough that the lawyer was careless in general,[87] or negligent toward the public at large,[88] or to the interests of the legal profession.[89] The plaintiff in a civil lawsuit for malpractice against his lawyer must suffer an injury represented by actual damages.[90]

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84. In Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537 (2d Cir. 1994), an action arising out of a claim of conflict of interest, but framed as a breach of fiduciary duty, rather than malpractice, the Court found that the traditional "but for" causation test was not required. Instead, the Court held that if the firm's conduct was a "substantial factor" in causing her loss, she could prevail. Accordingly, her $2 million verdict was upheld. *See* note *supra*, note 70.

85. Prosser, *supra* note 1, § 41, at 267.

86. *See* Hooper v. Gill, 557 A.2d 1349 (Md. Ct. Spec. App. 1989), *cert. denied*, 564 A.2d 1182 (Md. 1989).

87. Mayol v. Summers, Watson & Kimpel, 585 N.E.2d 1176 (Ill. App. Ct. 1992) (An attorney's error in judgment does not necessarily establish liability for malpractice).

88. Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C., 813 S.W.2d 400 (Tenn. 1991) (The mere appearance of impropriety may give rise to a disciplinary action but not suffice for a civil remedy).

89. Ann Peters *The Model Rules as a Guide for Legal Malpractice*, 6 GEO. J. LEGAL ETHICS 609 (1993) Peters discusses the role of ethical rules in legal malpractice actions. She articulates the reluctance of courts to utilize the violation of an ethical rule as negligence *per se*, a rebuttable presumption of malpractice, or even evidence of the standard of care. She opines that the courts should utilize the rules to a much greater extent than they do. *Id.*

90. Mallen & Smith, *supra* note 2, at 889-890.

V. ANALYSIS

A. The Plaintiff

A tort action for legal malpractice represents a mechanism for compensating individuals injured by a lawyer acting in a professional capacity.[91] Most often the victim/plaintiff is a client or former client whose cause of action arises during the course of the professional relationship.[92]

There are, however, a number of cases where the existence of the relationship has been disputed. The issue in these cases arises most frequently when the attorney alleges that he declined the representation at the outset, and should bear no liability for the subsequent consequences. The cases on this issue generally hold that if the individual subjectively and reasonably believes that the attorney represents him or her, that belief establishes the fiduciary element of the attorney-client relationship. In turn, even though no contractual engagement may have been established, the attorney thereby owes the client the obligations of an attorney sufficient to establish the existence of the duty of care.[93]

The courts have demonstrated varying degrees of reluctance to find liability in favor of persons who are not clients of the lawyer.[94] The privity requirement in professional liability has proved more durable than in other areas such as products liability.[95]

In *Greycas v. Proud*,[96] Judge Posner held that a lawyer who misrepresented the net worth of the lawyer's brother-in-law was liable to a

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91. Mallen & Smith, *supra* note 2, at 2.

92. *Id.* at 3.

93. *See, e.g.*, Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980) (A smaller number of cases have held attorneys liable to third party beneficiaries of attorney-client relationships where the agreed purposes of the transaction or relationship was to benefit the plaintiff). *See, e.g.*, Flaherty v. Weinberg, 492 A.2d 618 (Md. 1985).

94. *See* Claggett v. Lacey, *cert. denied*, 484 U.S. 1043 (1988). *But see* Greycas v. Proud, 826 F.2d 1560 (7th Cir. 1987).

95. *See* MacPherson v. Buick Motor Co., 11 N.E. 1050 (N.Y. 1916); Brooks v. Zebre, 792 P.2d 196 (Wyo. 1990).

96. 826 F.2d 1560 (7th Cir. 1987).

prospective lender who relied on the lawyer's representations. Judge Posner stated that "[w]here as in this case the defendant makes the negligent misrepresentation directly to the plaintiff in the course of the defendant's business or profession, the courts have little difficulty in finding a duty of care."[97] *Greycas* was argued on a theory of misrepresentation rather than legal malpractice.[98] While *Greycas* does represent a willingness on the part of at least one court to find liability to one other than the client, it does not necessarily extend the pure malpractice theory beyond injured clients.

In another significant case, the New York Court of Appeals in *Prudential Insurance Co. v. Dewey, Ballantine, Bushby, Palmer & Wood*,[99] relying on *Credit Alliance Corp. v. Arthur Anderson*,[100] held that an attorney could be held liable for a negligent misrepresentation to an insurer for whom the law firm produced documents that incorrectly stated the amount of a security interest in ships of the firm's client.[101] Although the defendant was relieved of liability on other grounds, the court expressly stated that attorneys could be liable to third parties who specifi-

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97. *Greycas*, 826 F.2d at 1565 (quoting PROSSER & KEETON ON THE LAW OF TORTS § 107, at 747 (5th ed. 1984)).

98. Judge Posner notes, however, that the analysis and result would be virtually the same if the case were argued under a theory of legal malpractice. *Id.* at 1563. The willingness to ignore the traditional privity requirement where the relationship between the attorney and the beneficiary of information is close may portend further erosion in the future. There is certainly no theoretical impediment to professional liability law going the same way as the law of products liability.

99. Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood, 605 N.E.2d 318 (N.Y. 1992).

100. Credit Alliance Corp. v. Arthur Anderson & Co., 483 N.E.2d 110 (N.Y. 1985).

> Before accountants may be held liable in negligence to noncontractual parties who rely to their detriment on inaccurate financial reports, certain prerequisites must be satisfied: (1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evidences accountants' understanding of that party or parties' reliance.

Id. at 118.

101. *Prudential*, N.E.2d at 322. The decision ultimately found for the attorney on the ground that the facts did not prove a breach of duty. *Id.* at 323. At the same time, the court recognized the Credit Alliance test, and reaffirmed Ultramares v. Touche, 174 N.E. 441, decided by the same court in 1931.

cally rely on negligent misrepresentations in certain circumstances.[102]

These cases and others represent a growing tendency for courts to find liability against legal professionals for conduct outside the traditional lawyer-client relationship. When there is a relationship between the attorney and a non-client, in which the lawyer gives advice that is relied on by the non-client, it is not a big leap to say that the attorney should exercise ordinary professional care in giving the advice.

On the other hand, in other cases, courts generally have refused to find lawyers liable when sued on grounds of malicious prosecution, where the lawyer represented a client unsuccessfully in a lawsuit against another. Typical of this sort of case are malicious prosecution actions by doctors who have successfully defended medical malpractice suits.[103] Since the attorney's primary responsibility is to represent her client zealously, there is no general duty with regard to an adverse party, and absent a specific intent to harm the other party through the litigation, the attorney will not be civilly responsible for prosecuting the action.[104]

The reason that these actions fail is that there has been no direct harm to someone for whom the law provides a remedy.[105] It is in these cases that courts often state that ethical rules cannot independently create a cause of action: a finding of liability to non-clients would create a new class of plaintiffs.

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102. *Id.* at 322.

103. *See* Friedman v. Dozorc, 312 N.W.2d 585 (Mich. 1981).

104. Whether frivolous litigation, harassing tactics, unnecessary delay, and other hardball practices should be actionable is beyond the scope of this article. One could make the argument that such insupportable conduct breaches a duty of care to foreseeable persons, and that if the conduct proximately causes injury to such a person, the lawyer should be civilly liable. The courts have been willing to put aside the privity requirement in other areas such as products liability; *see* McPherson v. Buick Motor Co., *supra* note 101, Prosser, "The Assault Upon the Citadel." And the distinction between products and services is easily strained. Presently, Rule 11 and disciplinary sanctions represent the first line of defense against abusive tactics. Federal Rules of Civil Procedure, Rule 11; Model Rules, Rules 3.1, 4.1, 4.2. These sanctions do not, however, provide a remedy for an individual who is actually harmed by the attorney's use of improper tactics.

105. These situations can be distinguished from those in which a non-client adverse party is actually harmed by the lawyer's conduct. Thus, where an ethical rule protects the integrity of the legal system, *e.g.*, Model Rule 3.3 "Candor to the Tribunal," it may be said that the rule was not intended to protect the class of persons comprised of non-client adverse parties.

B. Custom and Expert Testimony

An essential aspect of the professional standard of care is the notion that the reasonableness of particular conduct engaged in by members of a group may be established by looking at the conduct of other members of the group in similar circumstances. A lawyer of ordinary and reasonable prudence must exercise at least the degree of care customary in the jurisdiction for the legal service involved.[106] Except in cases of gross negligence where the breach of the standard of care is so obvious that jurors do not need further guidance,[107] customary practice must be established by expert testimony with reference to the conduct of lawyers in the state.[108] Although the standard may shift from time to time and place to place, it is well settled that both duty and breach are defined by custom as articulated through the eyes of an expert. If plaintiff and defendant introduce competing experts, the jury will have to weigh the testimony of each.[109]

Increasingly, expert witnesses are pointing to ethics rules as evidence of what the standard of care ought to be, in addition to anecdotal evidence about common practices, whether such practices establish a duty, and whether the defendant lawyer breached that duty.[110] This tendency has forced courts to decide whether to admit such testimony, and if admitted, how to treat the ethical rules implicated in the testimony.

An intriguing question is how a custom becomes a duty. The example of confidentiality illustrates the point. Although there is an evidentiary privilege covering communications between lawyer and client, the customary practice is that lawyers, in the course of representing clients, maintain confidentiality as to matters that extend beyond the privilege to other matters relating to the representation.[111] This broader concept of confidentiality is articulated in the Model Code as client "secrets,"[112]

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106. *See* Lipton v. Boesky, 313 N.W.2d 163, 165; Martinson Bros. v. Hjellum, 359 N.W.2d 865 (N.D. 1985).

107. *See, e.g*, Bowman v. Doherty, 686 P.2d 112 (Kan. 1984) (failure to appear in court); Central Cab Co. v. Clarke, 270 A.2d 662 (Md. 1970) (failure to notify client of termination of representation); Joos v. Auto-Owners Ins. Co., 288 N.W.2d 443 (Mich. Ct. App. 1979) (failure to settle upon client's request).

108. Richmond v. Nodland, 501 N.W.2d 759 (N.D. 1993).

109. Mallen & Smith, *supra* note 2, at § 27.18 p.684.

110. Brewer, Wilburn, *Expert Witness Testimony in Legal Malpractice Cases,* 45 S.C. L. REV. 727 (Summer 1994).

111. *See* Bayes v. Theran, 639 N.E.2d 720 (Mass. 1994).

112. In DR 4-101, the Model Code distinguishes between "client confidences" and

and in the Model Rules as "information relating to the representation."[113] In the case of a lawyer whose breach of unprivileged but confidential information causing arguable harm to a client, an expert would have to testify that the customary practice of lawyers is to protect such confidences, that the custom amounted to a duty, and that the lawyer breached the duty by revealing the confidence. The act of revealing client confidences in this example would also violate Model Rule 1.6,[114] or DR 4-101 under the Code.[115] Testimony that the custom of confidentiality was codified as an ethical rule in all likelihood would bolster the argument that the custom established a duty of care.[116]

Accepting, arguendo, that civil actions for malpractice and the disciplinary system have very different aims, it is still very likely that the two systems rely on many of the same customs as a basis for their standards of conduct. If the standards are based on common customs, then it follows that the codified expression of such customs would be relevant in an action where the custom is required to establish a duty of professional care.

C. The Search for Standards

The concept of negligence *per se* for violation of a statutory enactment is a doctrine of longstanding application in the law of torts, wherein a court adopts a standard of conduct articulated in a legislative statute as the standard of care for tort liability.[117] Such standards are frequently

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"client secrets" by stating that a "confidence" is "information protected by the attorney-client privilege under applicable law" while a "secret" is "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

113. Model Rule 1.6 on confidentiality of information does away with the Model Code's distinction between "confidences" and "secrets" by referring only to "information relating to representation."

114. *See* MODEL RULES, Rule 1.6.

115. *See* MODEL CODE, DR 4-101.

116. Arguments against allowing such testimony are frequently grounded in the belief that the duty can be articulated without reference to ethical standards, the use of which is inevitably prejudicial. Proponents of allowing the testimony recognize that while it may be highly persuasive, persuasiveness is not tantamount to prejudice. *See* note 78 *supra*, and accompanying text.

117. Prosser, *supra* note 1, §36.

but not always drawn from criminal statutes.[118] For the tort plaintiff seeking to show breach of a duty, or the defendant trying to prove the plaintiff's lack of care, negligence *per se* obviates the need to produce other more problematic evidence of duty and breach of the duty of reasonable care.[119]

Practically, proof that another party violated a statute may prove to be very persuasive to a jury regardless of the legal weight assigned to it by the court. Although different jurisdictions attach different weight to proof of a statutory violation, the three common positions are that the violation amounts to negligence *per se* in the absence of excuse, that it creates a rebuttable presumption of negligence, and that it is evidence of negligence to be considered by the jury with all the other evidence.[120]

A significant number of jurisdictions already allow the violation of an ethical rule to be introduced as evidence of negligence in a legal malpractice case.[121] In these jurisdictions, ethical violations are viewed as relevant to the question of civil liability, and considered with all the other evidence by the jury. Among the other evidence considered by the jury in most cases is expert testimony as to customary practice.[122] Although the fact that an attorney has violated the Rules of Professional Conduct of the profession may prove to be highly persuasive to a lay jury, in most jurisdictions an ethical violation does not create either a presumption of negligence or negligence *per se* in a legal malpractice case.

A few courts have held that violation of an ethical rule raises a presumption of malpractice.[123] In these states, in order to avoid a directed

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118. *Id.* at 220.

119. *Id.* at 230.

120. *Id.*

121. *See, e.g.*, Elliot v. Videan. 791 P.2d 639, 641 (Ariz. Ct. App. 1989) (allowed jury instruction which mentioned Rules of Professional Conduct since jury was advised that violation of the Rules "are merely evidence that [the jury] may consider"); Pressley v. Farley, 579 So. 2d 160, 161 (Fla. Dist. Ct. App. 1991) ("A violation of the Rules of Professional Conduct . . . may be used as some evidence of negligence."); Fishman v. Brooks. 487 N.E.2d 1377. 1381 (Mass. 1986) ("A violation of a canon of ethics or a disciplinary rule . . . may be some evidence of the attorney's negligence."); Lipton v. Boesky, 313 N.W.2d. 163, 167 (Mich. Ct. App. 1981) ("[A] violation of the Code is rebuttable evidence of malpractice."); Albright v. Burns, 503 A.2d 386, 390 (N.J. Super. Ct. App. Div. 1986) ("Where an attorney fails to meet the minimum standard of competence governing the profession, such failure can be considered evidence of malpractice.").

122. *See* Waldman v. Levine, 544 A.2d 683 (D.C. 1988).

123. *See* Lipton, *supra* note 127; Martinson Bros. v. Hjellum, 359 N.W.2d 865

verdict, the party against whom the presumption is raised is required to come forward with evidence tending to show: 1) that there was no violation, or 2) justification.[124] If such rebuttal evidence is proffered, the jury must weigh the totality of the evidence, but if the party fails to come forward with evidence to rebut the presumption, an adverse verdict will result.[125]

Only one jurisdiction has gone as far as to say that violation of an ethical rule is negligence *per se*.[126] *Day v. Rosenthal*[127] argues that the applicable ethics code actually establishes a civil right giving rise to an automatic remedy. A number of courts nevertheless adhere to the position preferred by many in the organized bar, that evidence of an ethical violation is inadmissible in a civil case against an attorney.[128] One of the most frequently cited reasons for the prohibition is that mention of the Rules and the disciplinary system is likely to be prejudicial to a jury.[129] Some courts will permit an expert to describe an attorney's misconduct with the language of the ethical rules while precluding mention of the Rules by name.[130]

Frequently, courts have used language to the effect that the violation of an ethical rule does not create an independent cause of action.[131] Often citing language in the Preamble of the Code and Rules that the ethical rules are not intended to provide a basis for civil liability, or give

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(N.D. 1985).

124. *See* Prosser, *supra* note 1.

125. *See, e.g.*, FED. R. EVID. 301; Dooley v. Darling 324 N.E.2d 684, 693 (Ill. App. Ct. 1975); Cockrill v. Smith, 1993 WL 392061 (Ohio. App. 9 Dist.); JOHN WILLIAM STRONG ET AL., MCCORMICK ON EVIDENCE § 344 at 582 (4th ed. 1992).

126. *See infra* note 143 and accompanying text.

127. *Id.*

128. *See* Hizey v. Carpenter, 830 P.2d 646 (Wash. 1992).

129. Jury instructions "may not refer to the CPR of RPC" because "an expert's mention of them or their use as the basis of jury instructions could mislead the jury into believing the CPR and RPC conclusively establish the standard of care—precisely the result we wish to avoid." *Id.* at 654. This position seems to hold not only that the Rules are relevant, but that they are too relevant.

130. Hizey, 830 P.2d 646.

131. Webster v. Powell, 391 S.E.2d 204 (N.C. Ct. App. 1990), *rev. denied*, 394 S.E.2d 188 (N.C. 1990), *aff'd* 399 S.E.2d 113 (N.C. 1991) (breach of Code of Professional Responsibility not a basis for civil liability); Rios v. McDermott, Will and Emery, 613 So. 2d 544 (Fla. Dist. Ct. App. 1993).

rise to a cause of action,[132] these courts articulate a fear that some new theory of liability could spring from the pages of the Rules to the substantive law governing the liability of lawyers. As this Article demonstrates, the ethical rules do not support the concept of an independent cause of action, but rather point to the existence of a standard of care within the framework of existing law.

Discussion about whether ethical rules give rise to an independent cause of action diverts attention from the real questions: (1) When is consideration of ethical violations appropriate, i.e., in what situations does the violation reflect the standard in the civil action? (2) How much weight should courts give to such evidence? Courts have addressed the second question, but not the first, avoiding the issue by reciting the shibboleth about the Rules not creating an independent cause of action. What is needed is a formula to determine when rule violations are relevant.

The American Law Institute Draft of the Restatement of the Law Governing Lawyers represents a novel approach to the problem.[133] The Restatement purports to define a set of legal principles and standards from a variety of sources that govern lawyers' conduct. Like other Restatements, such as Torts or Contracts, the Restatement of the Law Governing Lawyers could be introduced into evidence in a malpractice action free from the baggage of the Model Rules or Code.[134] On the other hand, the Restatement would not carry with it whatever force of law the ethical codes might imply. The Restatement, however, represents another basis to support using ethical standards in civil cases if it supports conformity between the Rules and extrinsic law. In any event, until the Restatement is formally adopted by the A.L.I., its potential effect is speculative at best.[135]

The attempt to codify the law governing lawyers, if it is being done in order to give courts an alternative basis for finding a standard of care,

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132. *See supra* note 5, 31, 32 and accompanying text.

133. Restatement (Third) of the Law Governing Lawyers (Discussion Draft 1992).

134. Charles W. Wolfram, *The Concept of Restatement of the Law Governing Lawyers*, 1 GEO. J. LEGAL ETHICS 195, 211.

135. The American Law Institute is presently bogged down in the drafting of the Resstatement of the Law Governing Lawyers. A draft was presented to the body in May 1994, debated extensively, and sent back to committee for more work. The debate illustrates the difficulty of reaching consensus on professional standards of conduct, if not in all areas, at least in some, e.g., limits on the lawyer's duty of confidentiality. It is likely that the continuing discussion of a few controversial issues will delay passage of the entire package for some time.

is misguided. A restatement may be persuasive at best, but it lacks the authority of true statutory enactments. Ethical codes, based upon the Model Code or Model Rules carry with them a legal imperative: in a fundamental way, a lawyer of ordinary prudence would not violate an ethical rule that sets a standard protecting his client from harm.

Given the three basic approaches courts give to evidence of statutory violations, there are essentially four clearly identifiable *possible* alternative rules for dealing with the use or admission of ethics codes within malpractice litigation: the three approaches described above, and a fourth, excluding evidence of ethical violations to establish the standard of care. These alternatives are described below with reference to a single case where each position was adopted. The section which follows contains a full analysis, on a state-by-state basis, of how widely each alternative is currently accepted or adopted.

Under the first alternative, proof of a violation of an ethical standard[136] is negligence *per se.*[137] Following the second approach, proof

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136. Throughout this section, reference to an ethical standard refers to a mandatory or disciplinary provision of a state's version of the Model Code or Model Rules in force in the jurisdiction. Although most of the discussion in this article refers to the ABA's Model Code and Model Rules, whatever force of law attaches to the ethical codes is derived from their adoption as standards of professional conduct in a particular jurisdiction. Under all three basic formulations, the plaintiff must still establish all the elements of the tort of legal malpractice—relationship, duty, breach, causation, and damages. Evidence as to violation of the ethical rules is germane to the elements of duty and breach only.

137. The case which comes closest to stating this proposition is *Day v. Rosenthal*, 217 Cal. Rptr. 89 (Ct. App. 1985), *cert. denied*, 475 U.S. 1048 (1986).

> The standards governing an attorney's ethical duties are conclusively established by the Rules of Professional Conduct. They cannot be changed by expert testimony. If an expert testifies contrary to the Rules of Professional Conduct, the standards established by the rules govern and the expert testimony is disregarded.
>
> Of course, a judge may resort to expert testimony to establish the standard of care when that standard is not a matter of common knowledge, or where the attorney is practicing in a specialized field. However, Rosenthal's numerous, blatant and egregious violations of attorney responsibility were not breaches of legal technicalities for which expert testimony is required. They were violations of professional standards of which the trial court was compelled to take notice.

Id. at 102-03

> However, it should be noted that this California case probably goes further-

of a violation of an ethical rule will raise a rebuttable presumption that the applicable standard of care has been breached.[138] Utilizing alternative three, the violation of an ethical rule may be used as evidence of the applicable standard of care, but the trier of fact must determine the applicable standard of care.[139] Under the final alternative, the fact that an ethical rule has been violated may *not* be introduced as evidence of the applicable standard of care, and it is for the trier of fact to determine the applicable standard of care without reference to the rule.[140] The balance of this article is devoted to demonstrating the degree to which each of the alternatives either has been or should be adopted as the appropriate standard.

1. Negligence Per Se.—The standard proposed by the negligence *per se* alternative argues that the applicable ethics code actually establishes a standard of conduct giving rise to an automatic remedy if it is violated. Apart from the *Day v. Rosenthal* case,[141] no other court has clearly enunciated this particular position.[142] It clearly goes too far, not because of the disclaimers in the ethics codes, but because it does not give the defendant a reasonable opportunity to establish a valid excuse for violating the rule.[143]

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perhaps because of its particular facts-than the rule elsewhere expressed by California courts, as exemplified by the Mirabito case. *See also* Mayol v. Summers, Watson & Kimpel, 585 N.E.2d 1176 (Ill. App. Ct. 1992); Fishman v. Brooks, 487 N.E.2d 1377 (Mass. 1986).

138. Mirabito v. Liccardo, 5 Cal. Rptr. 2d 571 (Ct. App. 1992).

139. Fishman v. Brooks, 487 N.E.2d 1377 (1986).

140. Hizey, note 3 *supra.*

141. *See supra* note 133.

142. A New Jersey Court has recently explicitly rejected the Alternative 1 rule, at least in the context of claims against *opposing* counsel. Baxt v. Liloia, N.J. Super. Ct. App. Div. No. A-1101-93T2, 3/13/95; reported in 11 Law. Man. Prof. Conduct 144.

143. Even though the plaintiff in an action based on negligence *per se* must prove all the elements of the tort, the danger for the defendant is that the jury may be so influenced by the statutory violation establishing duty and breach that they will give short shrift the elements of causation and damages, that is, that there must be a nexus between the violation by the defendant and the plaintiff's actual harm. For instance, although couched in terms of breach of fiduciary duty and not malpractice, the Second Circuit Court of Appeals, in its recent decision of *Milbank, Tweed, Hadley & McCloy v. Chan*, 13 F.3d 537 (2d Cir. 1994), held that liability for breach of basic ethics standards (in this case, conflicts of interest arising from changing clients in the middle of a commercial transaction without the consent of

2. Rebuttable Presumption.—The standard suggested in second alternative that proof of the existence of an applicable ethical rule creates a rebuttable presumption that the defendant has violated the relevant standard of care avoids the harshness of a pure negligence *per se* rule, but it is notable that only three states have adopted it.[144] In the *Mirabito* decision, the California Court of Appeal expressly held that "[i]t is well established that an attorney's duties to his client are governed by the rules of professional conduct. Those rules, together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his client."[145]

3. Evidence of Negligence.—The third alternative position is that the violation of an ethical rule may be used as evidence of the requisite standard of care in establishing malpractice liability. This rule provides for the admission of the same evidence as under the second alternative, but gives to the finder of fact the ultimate decision as to the actual standard to be applied, and, therefore, the power to disregard the standard of care embodied in the ethics code. It is notable that of the jurisdictions considering the issue, a plurality of twenty states and the District of Columbia, have adopted this evidence of negligence standard.[146] *Obiter*

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the original client), may be imposed without proof of "but for" causation of injury. Notwithstanding cases such as *Milbank*, which may be viewed as particular to its own unusual facts, the proposition contained in the negligence *per se* alternative is too extreme a position for these authors' comfort.

144. *See, e.g., Mirabito*, 5 Cal. Rptr.2d 571 (involving a breach of fiduciary duty claim); Cornell v. Wunschel, 408 N.W.2d 369 (Iowa 1987) (involving a claim of fraudulent misrepresentation); Beattie v. Firnschild, 394 N.W.2d 107 (Mich. Ct. App. 1986) (holding that violation of an ethical rule creates a rebuttable presumption of malpractice); and Lipton v. Boesky, 313 N.W.2d 163 (Mich. Ct. App. 1981).

145. 5 Cal. Rptr.2d. 571 (citing Day v. Rosenthal 217 Cal. Rptr. 89).

146. See the following: Arizona-Elliott v. Videan, 791 P.2d 639 (Ariz. Ct. App. 1989), *review denied*, 801 P.2d 426 (Ariz. 1990); Colorado-Miami Int'l Realty Co. v. Paynter, 841 F.2d 348 (10th Cir.1988); District of Columbia-Waldman v. Levine, 544 A.2d 683 (D.C. 1988); Florida-Gomez v. Hawkins Concrete Constr. Co., 623 F. Supp. 194 (N.D. Fla. 1985) (involving a breach of fiduciary duty claim); Pressley v. Farley, 579 So. 2d 160 (Fla. App. 1991); Georgia-Allen v. Lekoff, Duncan, Grimes & Dermer, P.C., Ga. Sup. Ct, No. S94G1071, 2/27/95, reported at ABA/BNA Lawyers Manual on Professional Conduct, Vol. 11, p.77; *see also* Findley v. Davis, 414 S.E.2d 317 (Ga. Ct. App. 1991); Roberts v. Langdale, 363 S.E.2d 591 (Ga. Ct. App.

dicta in a recent case whose actual holding was a rejection of the negligence *per se* alternative, suggests that New Jersey may also be added to the list.[147]

It is important here to point out the distinction between the rules contained in the second and third alternatives. In the case of a rebuttable presumption, once it is established that there is an ethical rule governing the conduct in issue, no other evidence on the issue of the standard of care is required; all that remains is to prove breach (that the standard was violated) and that the breach caused the resulting injury.[148] This approach clearly applies the standards articulated in the ethics codes as the basis for the establishment of the standard of care requisite for malpractice liability. Since the ethics codes themselves create minimum standards of attorney conduct, it may be argued that they should equally be deemed to constitute statements of the standard against which "reasonable" or "normal" attorneys are to be judged.[149]

Thus, the rebuttable presumption approach is theoretically the most

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1987); Idaho-Johnson v. Jones, 652 P.2d 650 (Idaho 1982); Illinois-Nagy v. Beckley, 578 N.E.2d 1134 (Ill. App. Ct. 1991); Indiana-Sanders v. Townsend, 582 N.E.2d 355 (Ind. 1991), *cert. denied, sub nom.*, Benirschke v. Indiana, 577 N.E.2d 576 (1991), *cert. denied*, 505 U.S. 1224 (1992); Kansas-Nelson v. Miller, 607 P.2d 438 (Kan. 1980); Massachusetts-Fishman v. Brooks, 487 N.E.2d 1377 (Mass. 1986); Minnesota-Carlson v. Fredrickson & Byron, P.A., 475 N.W.2d 882 (Minn. Ct. App. 1991); Missouri-Greening v. Klamen, 652 S.W.2d 730 (Mo. Ct. App. 1983); Montana-Carlson v. Morton, 745 P.2d 1133 (Mont. 1987); New York-Kleeman v. Rheingold, 614 N.E.2d 712 (N.Y. 1993); North Carolina-Booher v. Frue, 394 S.E.2d 816 (N.C. Ct. App. 1990), *review denied,* 395 S.E.2d 674 (N.C. 1990) (involving a breach of fiduciary duty); North Dakota-Martinson Bros. v. Hjellum, 359 N.W.2d 865 (N.D. 1985); Ohio-David v. Schwarzwald, Robiner, Wolf & Rock Co., 605 N.E.2d 1259 (Ohio 1993); Oregon-Kidney Ass'n of Oregon Inc. v. Ferguson, 843 P.2d 442 (Or. 1992) (involving a breach of fiduciary duty claim); Pennsylvania-Rizzo v. Haines, 555 A.2d 58 (Pa. 1989); South Carolina-Smith v. Haynsworth, Marion, McKay & Geurard, 472 S.E.2d 612 (S.C. 1996); Tennessee-Woodruff v. Tomlin, 616 F.2d 924 (6th Cir. 1980), *cert. denied,* 449 U.S. 888 (1980); Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C., 813 S.W.2d 400 (Tenn. 1991).

147. Baxt v. Liloia, 664 A.2d 948 (N.J. Super. Ct. App. Div. 1995).

148. The defendant, of course, may introduce evidence or justification or excuse in order to rebut the presumption of negligence. *See* Prosser, *supra* note 1, at 36, 226.

149. "Normal" is the strange term used in the latest draft of the American Law Institute's Restatement on the Law Governing Lawyers would have it, Tentative Draft No. 7 (Apr. 7, 1994), Chapter 4. "[A] lawyer who owes a duty of care must exercise the competence and diligence *normally* exercised by lawyers in similar circumstances, . . . " Lawyer Civil Liability, § 74 (1) (emphasis added).

accurate possible definition of the relationship between the provisions of the ethics codes and the standard of care in malpractice—the provisions of the ethics codes define the standard of care in all instances where, and to the extent that the codes state the minimum standard of conduct for attorneys in dealing with their clients. This alternative, however, tends to substitute the ethics codes for the decision-making responsibilities of the finder-of-fact, and this may produce rigid decisions with slavish adherence to the codified ethical standards to the exclusion of other considerations.[150]

4. No Evidence.—Five states take a position that evidence of the applicable ethical rules may not be introduced into evidence to establish the requisite standard of care in malpractice cases, including the State of Washington in *Hizey.*[151] This alternative is the least appealing of the four because it does not give any weight to standards that are obviously related to the reasonableness of lawyers' conduct with respect to their clients. It takes away from the trier of fact an important tool to help understand and apply the professional standard of care.

Ronald R. Mallen, the author of the leading text on the subject,[152] is clearly in the camp of those who would prefer to exclude all reference to the ethics codes from malpractice cases. The Supreme Court of Washington in *Hizey*[153] represents the most recent and thorough exposition of judicial reluctance towards the use of ethics codes in malpractice cases.

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150. For example, suppose a lawyer revealed a client's confidential information that the client was infected with the HIV virus and had possibly infected one or more individuals who were unaware of the risk of infection. It would be a breach of confidentiality and a clear violation of Model Rule 1.6 to reveal this information to the potential victims. It is more likely, however, that a jury would apply the ethics rule as the standard of care in a suit by the client against the lawyer where the presumption standard is utilized than in one where an evidence standard is applied because as a presumption, violation of the rule would lay down the standard of care, whereas mere evidence would point in the direction of the standard.

151. *See* Hizey v. Carpenter, 830 P.2d 646 (Wash 1992); *see also* the following: Arkansas-Orsini v. Larry Moyer Trucking, Inc., 833 S.W.2d 366 (Ark. 1992), *reh'g denied*, 839 S.W.2d 180 (Ark. 1992); Alabama-Terry Cove North, Inc. v. Marr & Friedlander, P.C., 521 So. 2d 22 (Ala. 1988); Kentucky-Hill v. Willmott, 561 S.W.2d 331 (Ky. Ct. App. 1978); Wisconsin-Peck v. Meda-Care Ambulance Corp., 457 N.W.2d 538 (Wis. Ct. App. 1990).

152. Mallen & Smith, *supra* 2 note, § 18.7, at 576-585.

153. *See* Hizay, 830 P.2d 646.

Mallen's objections fall within three groups: (a) those which support the disclaimers from the ethics codes—the "legislative intent" argument;[154] (b) those drawn from the difference in the underlying purpose of ethics rules from civil standards—the "different purposes" argument; and (c) those based on the procedural and substantive law differences between malpractice actions and professional discipline hearings—the "substantive legal differences" argument.

a. The "Legislative Intent" Argument

This is the line of arguments that the disclaimers should be given express effect because "the use of ethical standards in civil litigation was not contemplated by the drafters."[155] This argument postulates that the disclaimers were designed for the regulation of lawyers, with a disciplinary remedy in mind; and because the objectives of discipline—punishment, exemplary (to warn the profession), and prophylactic—are distinct from the objectives of civil litigation, such standards are inappropriate for use in the civil arena. Mallen sums up this objection as follows: "[T]he drafting of ethical codes did not involve consideration of the principles appropriate for deciding civil liability."[156]

For precisely the reason stated by Professor Hazard, that the standards of a vocation are generally held to be evidence of the legal standard of care in practicing that vocation,[157] this argument simply is not persuasive. It is perfectly appropriate to agree with the propositions stated by Mallen; unfortunately, they do not justify his conclusion. The fact that the drafters intended the ethics codes to be codes of discipline does not avoid or detract from the fact that by creating standards of conduct in the disciplinary context, they were defining standards that could be applied in the civil context as well, provided that the codified standards actually articulated the customary practice in the jurisdiction. By creating minimum standards of conduct, the ethics codes inevitably establish one measure (and not necessarily the exclusive or sole measure) of the minimum standard of care. Again, the speed limit analogy from automobile accident cases provides the determinative repudiation of the "legislative intent"

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154. *See infra* notes 163, 164 and accompanying text.
155. Mallen & Smith, *supra* note 2, § 18.7.
156. *Id.* at 580.
157. *See supra* note 35.

argument.[158]

b. The "Different Purposes" Argument

The second group of objections relates to the source of the regulations contained in the ethics codes is that since the ethics codes are, in almost all jurisdictions, promulgated as court rules rather than as legislation, and their purpose is regulatory, they cannot form the basis for the assertion of civil liability.

A less obvious issue is whether the ethical rules are statutory, which in turn raises the question what is a statute? It is clear that laws promulgated by Congress and other constitutionally established legislatures are statutory in nature.[159] A substantial body of case law recognizes municipal ordinances,[160] administrative regulations,[161] executive orders,[162] and treaties[163] as having the same properties as purely legislative enactments, although some courts treat some of these provisions less deferentially.[164]

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158. A criminal or safety statute may not have been intended by the legislature to create a civil standard, but where the court concludes that the statute was intended to protect a class of persons of which the plaintiff is a member against the type of harm the statute was intended to protect against, the statute is an appropriate one for application in the civil setting. *See supra* note 142, *infra* note 225 and accompanying text.

159. Federal Trust Co. v. East Hartford Fire Dist., 283 F.95, 98 (Conn 1899); *In re* Van Tassell's Will, 119 Misc. 478, 196, 194 N.Y.S. 491, 494 (1922); Washington v. Dowling, 109 So. 588, 591 (Fla. 1926).

160. District of Columbia v. White, 442 A.2d 159 (D.C. 1982); Ray v. Goldsmith, 400 N.E.2d 176 (Ind. Ct. App. 1980); Crago v. Lurie, 273 S.E.2d 344 (W. Va. 1980).

161. Davis v. Marathon Oil, 356 N.E.2d 93 (Ill. 1976) (from Prosser *supra* note 1 at 220).

162. Board of Educ. of Erie County v. Rhodes, 477 N.E.2d 1171, 1175 (Governor's order had effect of a legislative enactment); 13 M.J. 501, 529 (procedures by which court-martial imposes death sentence are prescribed in part by executive order which has the force and effect of law).

163. Whitney v. Robertson, 124 U.S. 190, 194 (1888) (treaties containing stipulations that are self-executing have the force of a legislative enactment); Stoffel v. W.J. McCahan Sugar Refining & Molasses Co., 35 F.2d 602, 603 (E.D. Penn. 1929) (law of the United States is found in the Constitution, acts of Congress and treaties as interpreted by courts).

164. Prosser *supra* note 1, at 220. *See, e.g.*, Shuttlesworth v. City of Birmingham,

The question of whether administrative orders of the courts, in contrast to judicial decisions, should be treated as statutory for purposes of tort law, is an open one. For example, courts, exercising their inherent powers[165] promulgate a number of different sets of rules for the purpose of administering the judicial system.[166]

The codes of ethics, as discussed in this Article, have been established by the courts to govern the conduct of attorneys, not only in the courtroom, but also in their non-litigation legal work and personal lives.[167] As a licensing mechanism, related to attorney discipline, rules governing the admission of lawyers to practice in a jurisdiction or before a particular court have been adopted by the courts in every jurisdiction.[168] Courts have also created regulations governing the conduct of the judiciary through codes of judicial conduct.[169] Finally, rules of civil and criminal procedure in most jurisdictions are court-made. Thus, the rulemaking authority of the courts has a firm foundation in our constitutional system.

The party asserting the statutory violation by another party must show: 1) that he is among the class of persons that the statute was intended to protect, and 2) that his injury was within the scope of the harm the statute was intended to protect against.[170] Most of the reported cases address this aspect of the doctrine.[171]

The more complex and perplexing question is whether the ethical rules are statutes. A statute may be defined as a rule promulgated by a legislative body and implemented by the executive authority of the state. Regulations are similar to statutes, except that they do not carry the force

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394 U.S. 147 (1969) (holding that an Alabama ordinance prohibiting public demonstrations without a permit was too broad, as it was written, and was unconstitutional); Distad v. Cubin, 633 P.2d 167 (Wyo. 1981) (holding that the regulation was "overbroad and inflexible").

165. *See infra* note 183 and accompanying text.

166. For an interesting discussion of the origin of the inherent powers doctrine and its current status, see WOLFRAM *supra* note 21.

167. Florida Bd. of Bar Examiners v. GWL, 364 So. 2d 454 (Fla. 1978); *In re* Gahan, 279 N.W.2d 826 (Minn. 1976); Application of Taylor, 647 P.2d 462 (Or. 1982); *but see* Matter of Anonymous, 549 N.E.2d 472 (N.Y. 1989).

168. WOLFRAM, *supra* note 21.

169. *See generally* ABA MODEL CODE OF JUDICIAL CONDUCT (1990).

170. Prosser, *supra* note 1, § 36 at 229-230.

171. Osborne v. McMasters, 41 N.W. 543, (Minn 1889); Stachniewcz v. Mar-Cam Corp., 488 P.2d 436 (Or. 1971). *See also* Thomas v. Baltimore & O.R. Co., 310 A.2d 186 (Md. 1973), Gorris v. Scott, L.R. 9 Ex. 125 (1874).

of law, although an officer or agency may be empowered by the authority of a statute to enforce regulations. Laws, by their very nature, create duties and establish standards of conduct. Some statutes incorporate a sanction, either civil or criminal, to be imposed upon their violation. Where the statute does not specify a particular civil penalty, the question often arises whether the standard of conduct defined in the statute should be applied as the standard of care in a civil action. The widely accepted test for applying statutory standards to civil actions is whether the legislature intended to protect the class of persons of whom the plaintiff is a member from the type of harm that occurred.[172] If this two-pronged test is met, the statute may be introduced as evidence of negligence in a civil action.

Administrative regulations and municipal ordinances carry less weight than pure legislative enactments, but they are generally admissible as evidence of negligence if they meet the same test required for statutes.[173] Municipal ordinances also have been held to be relevant to civil liability only when the governing body acts in its legislative as opposed to proprietary capacity.[174]

All of these rules have certain common elements: They create new or codify existing standards of conduct; they are promulgated and enforced by civil authority; they represent an action of the state; they are subject to procedural and constitutional review. In one sense, the question of whether the rule is a legislative statute begs the question.

Is it the quality of the statute itself that makes it subject to adoption as a standard for civil liability, or is it a question of convenience for the courts? The answer is that it is both. The court looks for standards of conduct within enactments, but it is the court's authority that permits it to utilize the statute in a different context. Judicially created rules can serve the same purposes as other statutory enactments, and are therefore appropriate for adoption as civil standards. The court, in the final analysis, as a matter of convenience, must decide whether particular provisions are appropriate civil standards.

The inherent powers doctrine recognizes that the principle of judicial authority implies a power to establish rules necessary to carry out the constitutional mandate of administering justice.[175] Arguably, ceding the

172. Prosser, *supra* note 1, at 220.

173. Prosser, *supra* note 1, § 36, at 220.

174. *See supra* note 168 and accompanying text.

175. *See* Woodruff v. Tomlin, 616 F.2d 923, 936 (6th Cir. 1980); Pichon v. Ben-

power to establish ancillary procedural rules to the legislative or executive branch would both fatally undermine judicial power and destroy the separation of powers among the branches of government.[176]

A further examination of the state action analysis applied by the Supreme Court to municipal ordinances may shed light on how to analyze judicially created rules such as a code of legal ethics. In *Lafayette*[177] and *Boulder,*[178] the Supreme Court recognized that municipalities could engage in state action for purposes of the Sherman Antitrust Act if their actions involved governmental as opposed to corporate or proprietary functions.[179] The Court recognized that local governments possessed a dual nature, to act in a legislative capacity and to do what could otherwise be done by private enterprise.[180] Thus, if a city holds a Fourth of July celebration, with fireworks and hot dogs, it is engaging in a corporate function, but if it passes a law limiting the speed limit to 25 miles per hour within the city limits, it acts in its legislative capacity. The former but not the latter activity would be subject to the Sherman Act. Arguably, the latter but not the former action, creates a standard of conduct that could be introduced as evidence of negligence.

Judicial rules, supported by the inherent powers doctrine, are different from both ordinances/regulations and legislative enactments. They are not, strictly speaking, statutes, but they normally carry the force of state action through the power of the courts. Since judicial rules are not truly legislative, it is arguable that some court actions are not state actions, and should not be looked to as standards for civil conduct.

Ethical codes are promulgated by state courts, although typically drafted by lawyers and based upon the Model Code or Rules adopted by the American Bar Association. In *Goldfarb v. Virginia State Bar,*[181] the

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jamin, 702 P.2d 890, 892 (Idaho Ct. App. 1985); Parker v. Volkswagenwerk Aktiengesellschaft, 781 P.2d 1099, 1101 (Kan. 1989); *In re* Daly, 189 N.W.2d 176, 179 n.5 (Minn. 1971); *In Re* Conduct of Tonkon, 642 P.2d 660, 661-62 (Or. 1982); *In re* Axelrod, 549 A.2d 653, (Vt. 1988).

176. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (holding that the executive branch cannot make laws and Congress cannot delegate such power); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (holding that Congress cannot make laws that interfere with the judgments of the federal courts).

177. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

178. Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982).

179. *Lafayette*, 435 U.S. at 413-415; *Boulder*, 455 U.S. at 48-51.

180. *Boulder*, 455 U.S. at 40-41 (citing Parker v. Brown, 317 U.S. 341, 351 (1943)).

181. 421 U.S. 773 (1975).

Supreme Court held a minimum fee schedule violated the Sherman Act because the state bar association that adopted the schedule was not acting as the sovereign, and therefore was not exempt from the Sherman act under the doctrine of *Parker v. Brown*.[182] The Virginia Bar would have disciplined a lawyer under the state's code of professional responsibility for not charging the fee prescribed in the minimum fee schedule. In *Bates v. State Bar of Arizona*,[183] the Court held that regulation of lawyer advertising was state action within the meaning of *Parker v. Brown*, but that the state was constitutionally limited by the commercial speech doctrine in the way it could exercise its authority.[184] These cases, while not dispositive of the question of whether violation of an ethical rule is relevant to the standard of care in a professional negligence case, do illustrate the fact that the Supreme Court has recognized that ethical rules, promulgated by the highest court in a jurisdiction, can represent state action.

It follows that rules created and enforced through such state action are sufficiently like legislative enactments, ordinances and administrative regulations to be treated in the same way for purposes of the civil law. If the ethical rule was intended by the court to create a standard of conduct which protects a particular class of persons from a particular type of harm, then the standard should be relevant to the standard of care expected of lawyers regulated by the rule.

Following this line of reasoning, Mallen's different purposes objection cannot withstand scrutiny. If the ethics codes have the characteristics of statutes insofar as they purport to define standards of conduct for lawyers, there is absolutely no reason why a court as a matter of convenience may not adopt the codified standard as a calculus for defining the standard of care in a legal malpractice action. The breach of an externally defined minimum standard of conduct is simply used to establish a *component* of liability, *not* to create any new remedy for a wrong which would have otherwise gone unremedied. Thus, this objection, based as it is on a false assumption, is simply wrong.

182. 317 U.S. 341 (1943).
183. 433 U.S. 350 (1977).
184. *Id.* at 359.

c. The "Substantive Legal Differences" Argument

This third objection is based on the procedural and substantive law differences between malpractice actions and professional discipline hearings. In propounding this line of reasoning, Mallen correctly states that a lawyer can be disciplined even if the misconduct causes no damage.[185] He notes that even where the complainant alleges harm, that complainant is not a party to disciplinary proceedings.[186] He notes further that a violation of a discipline standard "may not be negligence."[187] As to each of these "objections" we can agree with the propositions without accepting at all that they lead to the conclusion suggested by Mallen. There are, in fact two different systems, but the fact that a standard has been created in one of those systems does not really say whether the standard ought to be used in the other system. The issue of whether a standard is appropriate for the other system depends upon whether it meets the test for establishing a standard of care in that system.

Mallen states that "whereas, the [ethics codes] *set a minimum level of conduct* with the consequence of disciplinary action, malpractice liability is premised upon the conduct of the 'reasonable' lawyer."[188] In fact, the Model Rules refer repeatedly to the reasonableness of conduct in defining their standards. The "Terminology" section of the Model Rules states that "'Reasonable' or 'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer."[189] Clearly, the objective standards in the Model Rules and the civil standard of care are identical. Mallen's attempted distinction, it seems, is misplaced, inasmuch as the minimum level of conduct is that of the reasonable lawyer.

We can turn, therefore, to look at the *Hizey*[190] decision. In a mal-

185. Mallen & Smith, *supra* note 2, at 581.

186. *Id.*

187. *Id.*

188. *Id.* (emphasis added).

189. MODEL RULES, Terminology. The Model Code is not as precise in its syntax, which raises questions about how easily its standards translate into civil standards. Since the vast majority of jurisdictions have adopted a version of the Model Rules, this is less of a problem than it may seem. Even in the absence of clear language establishing an objective standard that tracks the civil definition, the Model Code still articulates a number of clear duties of lawyers towards their clients.

190. *Hizey*, 830 P.2d 646 (Wash. 1992).

practice case alleging that the attorney had failed to disclose or obtain the necessary consents with respect to conflicts of interest arising from his representation of multiple clients in the same real estate transaction, the trial court excluded expert testimony and jury instructions proffered by the plaintiff to show the defendant's breaches of the provisions of the applicable ethics codes in Washington State. On appeal, the Supreme Court of Washington expressly held that "an expert witness may neither explicitly refer to the [ethics codes] nor may their existence be revealed to the jury via instructions."[191] The court's reasoning process in reaching this decision is instructive.

The first reason advanced is based on the disclaimers contained in the ethics codes, discussed at Section IV above. In this context, the court derives its authority from earlier cases whose actual holdings state only that a violation of an ethics code does not "in itself, generate a separate cause of action."[192] As already demonstrated,[193] this quoted statement is at the same time both accurate and irrelevant; the proposition being advanced is not that a separate ground of civil liability is based upon a breach of the ethics code. The court is setting up, in order to demolish, the proposition that the ethics codes can be used to establish *per se* civil liability. As already explained, this is a paper tiger.[194] An element of the civil tort known as malpractice is the duty, based upon a standard of care,

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191. *Id.* at 648.

192. *Id.* at 651 (citing Brown v. Samalin & Bock, P.C., 408, 547 N.Y.S.2d 80 (1989)).

193. *See supra* part II.

194. *See supra* part III. The Hizey court has been criticized elsewhere for its over reliance on the Preliminary Statement of the Model Code.

> The Hizey court misread the language of the Preliminary Statement as precluding the admissibility of professional ethical standards as relevant evidence of an attorney's common law duty of care. The language of the Preliminary Statement does not compel this result. The Preliminary Statement asserts that the [Code] does not 'undertake to define standards for civil liability of lawyers for professional conduct.' The word 'undertake' connotes more than the meaning of 'attempt' or 'engage in.' It implies a greater burden amounting to a guarantee or an obligation. In the Preliminary Statement, the drafters of the [Code] merely refused to guarantee that the [Code] would define conclusively any standards of civil liability.

Marc. R. Greenough, *The Inadmissibility of Professional Ethical Standards in Legal Malpractice Actions After Hizey v. Carpenter*, 68 WASH. L. REV. 395, 405 (1993).

which may properly be proved by reference to the ethics codes. The court has thus swallowed the same red herring proffered by Mallen,[195] whom, indeed, the court goes on to cite with approval.[196]

The court next acknowledges that other authorities, and other courts, have held that the ethics codes provide "evidence" of the applicable standard of care. The court notes that it disagrees, both for the reasons already discussed and for additional "significant policy reasons."[197] Before exploring these, the court echoes the definition of the tort of malpractice. Although not clearly expressing the standard of care as an element in its own definition, it does state the following: "To comply with the duty of care, an attorney must exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in this jurisdiction."[198] This is an entirely appropriate statement of the standard of care.

Instead of building on this proper foundation, however, the court again strays into muddy waters. It proceeds to review the arguments in Mallen's third procedural group of objections reviewed above, and then argues that because the ethics codes are intended as disciplinary, or administrative regulations, they cannot amount to evidence of negligence. Again, this reasoning is flawed. The disciplinary (and other) purposes of the ethics code cannot hide the unassailable fact that, in reaching those purposes, the ethics codes establish minimum standards of conduct for those same "reasonable, careful, and prudent lawyer[s] in the practice of law in this jurisdiction."[199]

The fallacy within the court's reasoning in this regard can be seen from its misunderstanding of a passage quoted from a Tennessee case: "[I]n a civil action charging malpractice, the standard of care is the particular duty owed the client under the circumstances of the representation, which may or may not be the standard contemplated by the Code."[200]

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195. *Hizey*, 830 P.2d at 653.

196. *Id.* at 651.

197. *Id.*

198. *Id.* at 652 (citing Hansen v. Wightman, 538 P.2d 1238 (Wash Ct. App. 1975)).

199. *Id.*

200. *Id.* at 652 (citing Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C., 813 S.W.2d 400 (Tenn. 1991). It is remarkable that the Court should refer to this decision, since it falls squarely in the Alternative 2 category, as the following extract demonstrates:

> Even though . . . the Code does not define standards for civil liability,

Now this may be a perfectly unexceptionable statement. It is true that there are some breaches of the standard of care that have no reference to the code whatever, except perhaps in the general sense of services that were not competent within the meaning of the ethics code. In those instances the issue will be what is "competence" in the particular practice area for a "reasonable, careful, and prudent lawyer in the practice of law in this jurisdiction". In other instances, the ethics code itself may itself define the minimum standard of care, as, for instance, in cases involving conflicts of interest, where the code provides for disclosure and consent; in such a case, the requirement of disclosure and consent constitutes the minimum conduct acceptable for *every* lawyer bound by that code, such that no lawyer should be able to argue that he or she was not bound to comply with the requirement. In such event, the quoted statement is still true, and applies because the two standards coincide. In still other situations, particular provisions of the ethics codes may not speak to the standard of care at all.[201]

The court goes on to state that "[u]nderlying our decision not to extend [the ethics codes] into the malpractice arena is the conviction that plaintiffs already have available adequate and recognized common law theories under which to bring malpractice actions."[202] The objection to this reasoning is that neither plaintiffs nor these authors are seeking to create a "new common law theory" or cause of action. Rather, they are seeking to demonstrate the standard of care by reference to one of the possible sources of that standard, namely the applicable ethics code.

Next, the court acknowledges the reference by courts, including the courts of Washington State, to the ethics codes in connection with other non-disciplinary proceedings, such as issues relating to attorneys' fees. This is correct and is another reason why the procedural objections advanced by Mallen and the *Hizey* court are of dubious merit. The court even acknowledges precedent in Washington in which courts have "as-

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> the standards stated in the Code are not irrelevant in determining the standard of care in certain actions for malpractice. The Code may provide guidance in ascertaining lawyers' obligations to their clients under various circumstances, *and conduct which violates the code may also constitute a breach of the standard of care due a client.*

Lazy Seven Coal Sales, 813 S.W.2d at 405 (emphasis added).

201. *See supra* notes 19 and 25 and accompanying text.

202. *Id.* at 653 (citations ommitted).

sumed, without squarely addressing,"[203] the relevance of the ethics code in malpractice cases. Indeed, and in the light of these precedents, the court then makes the following statement, which, standing alone, is entirely acceptable:

> To avoid confusion in practice, we point out experts on an attorney's duty of care may still properly base their opinion, as Professor Boerner did in this case, on an attorney's failure to conform to an ethics rule. In so testifying, however, the expert must address the breach of the legal duty of care *and not simply the supposed breach of the ethics rules.*[204] (emphasis added).

Had the court left the matter there, its decision would be unremarkable; unfortunately it did not. Instead it continued:

> Such testimony may not be presented in such a way that the jury could conclude it was the ethical violations that were actionable, rather than the breach of the legal duty of care. In practice, this can be achieved by allowing the expert to use language from the [ethical codes], but prohibiting explicit reference to them. The expert must testify generally as to ethical requirements, concluding the attorney's violations of the ethical rules constituted a deviation from the legal standard of care. Without this evidentiary link, the plaintiff risks dismissal of the malpractice case for failure properly to establish the breach of the duty of care. Ambrosio & McLaughlin, at 1363.[205]

Following this passage, the court goes on to rule that jury instructions *may not* refer to the ethical codes, and that the jury *may not* be informed of the ethical codes "either directly or through jury instructions or through the testimony of an expert who refers to [them]."[206]

The fundamental illogic of the court's position is apparent from analysis of these quotations. On the one hand, the court starts out from the (correct) proposition that "experts on an attorney's duty of care may still properly base their opinion, as Professor Boerner did in this case, on an attorney's failure to conform to an ethics rule."[207] Yet the court ends by *excluding* from jury consideration in any form precisely the fact of that failure.

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203. *Id.* at 654.
204. *Id.* (emphasis added).
205. *Id.*
206. *Id.* (emphasis added).
207. *Id.*

The fundamental reason why the latter conclusion and holding are wrong derives from the court's failure to perceive, or to address, the significance of the ethics codes. Even though we may agree with every proposition advanced by the court, and by Mallen, as to the purposes of the ethics codes; and even though we may agree with every proposition as to the procedural distinctions between professional discipline and civil liability, these propositions do no more than avoid the real significance of the ethics rules in the context of civil disputes: to create minimum standards of attorney conduct. Indeed, some courts have expressly allowed the use of disciplinary rules as evidence of minimum standards. In *Mayol v. Summers, Watson & Kimpel*,[208] the following jury instructions were given:

> There was in force in the State of Illinois at the time of the occurrence in question a certain Supreme Court Rule which provided that:
> A lawyer shall not violate a disciplinary rule; or engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . .
> A lawyer shall not:
>
> (1) handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it;
>
> (2) handle a legal matter without preparation adequate in the circumstances; or
>
> (3) neglect a legal matter entrusted to him
>
> If you decide that a defendant violated the Supreme Court Rule on the occasion in question, then you may consider that fact together with all other facts and circumstances in evidence in determining whether and to what extent, if any, the defendant was negligent or wilful, wanton or reckless at the time of the occurrence.[209]

In affirming the use of these instructions, the Appellate Court stated:

> Like most statutes and ordinances, attorney disciplinary rules establish minimum standards of conduct and are intended to protect the general public. For these reasons, we hold that jury instructions may quote attorney disciplinary rules in legal malpractice cases to the same extent as they may quote statutes and ordinances in instructions in other types of negligence cases.[210]

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208. 585 N.E.2d 1176 (1992).
209. Id. at 1186.
210. *Id.*

There is another way to look at the holding in *Hizey*, which further points up the problematic logic on which it rests. The court would apparently permit the expert to testify on the standard of care by using the exact words contained in the ethics code; the preclusion goes to the reference to the source of the words. Referring back to the car accident analogy, this is exactly akin to a determination that an expert could testify that reasonably prudent driving would require a speed of 25 m.p.h. without permitting testimony that such was the actual speed limit in effect.

By definition, an attorney whose conduct has fallen below the minimum standards set forth in the governing ethics code has failed to behave as a "reasonable" attorney in that jurisdiction. No amount of discussion of the purposes, or disciplinary procedures associated with ethics codes can avoid that fundamental conclusion, and efforts, including the "disclaimers" inserted into the codes themselves, are, as Hazard has rightly stated, "fatuous, if not futile."[211] It follows, from the statement that violation of the ethics codes constitutes a failure to behave in accordance with the standards of a "reasonable" attorney, that such failure constitutes a breach of the applicable standard of care. It follows, necessarily and ineluctably, that the plaintiff is entitled to present, and the jury to hear, proof of the two elements of the tort, namely the standard of care and its breach through proof that the defendant lawyer has violated an ethical rule. Indeed it is notable that in the cited passage the court comes very close to admitting this logic,[212] even as it is about to rule to the opposite effect.

At least twenty-two states appear not to have yet taken a formal position on this question.[213] While there are obviously malpractice cases in all of these jurisdictions, the closest that the courts in many of them appear to have come is expressly to permit the use of expert testimony; in none, however, did the authors find cases specifying to what exactly the experts were permitted to testify. This dearth of reported cases indicates that since the issue has not been clearly resolved in so many states,

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211. *See supra* note 35.

212. As when it states that "[t]he expert must testify generally as to ethical requirements, concluding the attorney's violations of the ethical rules constituted a deviation from the legal standard of care." *Hizey*, 830 P.2d at 654.

213. In none of the following states did the authors find pertinent cases that would be dispositive to this issue: Alaska, Connecticut, Delaware, Hawaii, Louisiana, Maryland, Maine, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Vermont, West Virginia, Wyoming.

the analysis and conclusions in this article are so important at this juncture.

D. Which Rules?

There is one other argument that neither Mallen nor the *Hizey* court address that some standards should not form the basis of liability because they are too vague.[214] For example, Canon 9 of the Model Code is entitled "A Lawyer Should Avoid Even The Appearance of Professional Impropriety."[215] The fact that some rules are inappropriate to use as standards of care in legal malpractice does not mean that all of them are. In fact, the central thesis of this article is that only the rules that are intended to protect a class of persons that includes the plaintiff against the type of harm against which the rule was intended to protect are applicable as standards. The authors agree with Robbins that not all ethical rules are appropriate as malpractice standards. But which ones?

There is an obvious danger in enunciating a rule that any reference to the ethical code in a malpractice suit should lead inexorably to liability. Certain standards may be violated, but the violation may lead to no damage, an essential element in any negligence action. The Code contains the Disciplinary Rules, formal standards by which professional conduct is measured, along with Ethical Considerations, which are "aspirational in character and represent the objectives toward which every member of the profession should strive."[216] The Model Rules set forth standards in terms of "may" or "shall" or "shall not." Thus, under either the Model Code or the Rules, some provisions are merely precatory or provided as a guide, while others clearly either mandate or prohibit specific conduct. The existence of general provisions that do not themselves speak to a standard of care in no way militates against the use of other specific provisions in establishing the appropriate standard.

For purposes of this discussion, it may make more sense to look at particular rules than the Rules as a whole, because it is specific rules which incorporate standards of conduct. Assuming that judicial rules are more like ordinances than true statutes, it is not enough to say that they were enacted; it is necessary to say, rather, that the rule in question repre-

214. *See supra* note 172.
215. MODEL CODE, Canon 9.
216. MODEL CODE, Preliminary Statement.

sents the action of the state in defining a standard of conduct, and that the rule protects the plaintiff from an identifiable harm.[217]

Where the conduct involved represents the adoption of existing standards of behavior such as common law rules, customary practices in the profession or conduct supported by other legislative or constitutional doctrine, there is a rational basis for saying that the court has defined a standard of conduct. Where the standard of conduct represents new duties, such as the duty to provide *pro bono* legal assistance,[218] it is more difficult to establish a nexus between the rule and a standard of conduct, and in the absence of clear evidence of the court's intention to create a civil standard of care, such rules should not be introduced in civil actions for that purpose. Where the judicial pronouncement represents a general, non-directive statement, such as the Preamble disclaimer to create civil liability, it should not be relevant to the standard of care. Where the rule is purely economic in nature, such that it promotes the interests of lawyers rather than defines standards for their conduct, it should not be relevant to the standard of care.

Applying these principles to the Model Rules, it is possible to define a number of specific rules that were intended to create standards of conduct protecting a class of persons from a certain type of harm. Generally, those rules defining the responsibilities of lawyers to their clients may be said to fall within this definition. The rules which protect the courts, judges, the general public, the profession, and opposing counsel do not. Rules which define standards of conduct toward non-client third parties would arguably apply, but application of these rules would in some cases extend the scope of liability beyond what has been traditionally recognized in legal malpractice law.[219]

The following rules fall clearly within the definition articulated above: competence (1.1), informed consent (1.2,1.4), neglect (1.3), reasonable fees (1.5), confidences (1.6), conflicts of interest (1.7-1.11), and protecting the rights of the client upon withdrawal (1.16c).[220] It should always be relevant in a civil action for malpractice that a lawyer has violated one of these rules that protect clients from identifiable wrongs by the lawyer. These standards are clearly recognized standards of conduct. They protect clients as a class and they identify the particular harm pro-

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217. *See supra* notes 144, 166 and accompanying text.
218. MODEL RULES, Rule 6.1
219. *See supra* Notes 110, 111 and accompanying text.
220. MODEL RULES, Rules 1.1-1.11, 1.16(c).

tected. A violation of any of these rules may be viewed as at least some evidence of violation of the standard of professional care. This approach explains some of the conflicting case law on the subject. Although some courts summarily exclude rule violations as evidence of negligence, an examination of the cases shows that often the issues presented involve rules that are not really appropriate for establishing a standard because they do not meet the threshold test of applicability.

The framers of the Model Rules grouped all the rules defining lawyers' duties to clients in one subdivision, Rule 1.[221] The classification scheme in the Model Rules actually helps to clarify the scope of protections defined therein. The historical record and background materials also provide support for determinations of when the rules codify customary practice and duties of lawyers, especially toward their clients. These provisions are relevant to the standard of conduct to which lawyers should be held, and their violation should be admissible as evidence of the breach of the standard of care.

VII. CONCLUSION

This article has attempted to demonstrate the relevance of ethical rules to the standard of care in legal malpractice. The Model Rules of Professional Conduct, which are in effect in approximately forty jurisdictions, provide a clear statement of many of the duties inherent in the lawyer-client relationship. The breach of such a duty is actionable as legal malpractice, and the standard articulated in certain rules should be admissible as evidence in such an action.

There are several reasons that the Rules are valid indicia of the standard of care. Foremost among these is the fact that ethical codes, from the early Canons of Ethics to the modern Model Rules, essentially codify the customary practice upon which the professional standard of care is based. The ethical codes are amended periodically, and the codes themselves have been replaced as professional standards have evolved. To the extent that an ethical rule is the codification of a standard of conduct, its violation or adherence raises at least an inference of professional negligence. Additionally, the current Model Rules were carefully drafted to conform to the substantive law governing lawyers, and many of the argu-

221. MODEL RULES, Rule 1 The Lawyer-Client Relationship.

ments that were levied against the Canons and the Model Code, to the effect that they did not reflect the substantive law, are not persuasive.

A second factor supporting the use of ethical codes in legal malpractice is the attempt by the drafters of the Model Rules, as reflected in the history of the rules themselves, to produce a document whose principles were based upon and consistent with the substantive law. From the careful application of agency principles, to the strained attempt to reduce shifting constitutional rules governing commercial speech, to the mundane application of the court-made substantial relationship test in conflicts of interest, the framers of the Model Rules sought to produce a document that would not require one behavior in the disciplinary setting and another in the courtroom.

The third consideration is the statutory nature of the Rules of Professional Conduct. This article concludes that the Rules are statutory in nature, because in promulgating the ethics codes, the court is acting in a sovereign and rulemaking capacity. The question of whether they are legislative is a different one going to the issue of how much weight should be accorded to evidence of violation of a rule. For any statutory provision to be admissible as evidence of the standard of care, it must be shown to protect the class of persons of which the plaintiff is a member against the type of harm against which the plaintiff is protected.

Cast in this light, it is not the Rules themselves that are relevant, but specific rules that meet the test of class and harm. Applying the test, many of the standards in Rule 1 (the Lawyer-Client Relationship) are clearly aimed at protecting a class of persons (clients) from specific evils such as those articulated in the substantive rules. Other sections of the Model Rules lack the obvious nexus of Rule 1, but client-plaintiffs should be allowed to attempt to meet the applicability test in any event. More problematic are rules protecting the interests of non-clients, because the civil law is more reluctant to provide a remedy to persons not in privity with the lawyer. As the privity requirement erodes, the relevance of the ethics rules in protecting third parties will become more significant. Inapplicable to the standard of care under this formulation would be rules enacted to protect the courts, the public in general, or the administration of justice.

As to the weight that courts should attach to ethical violations, this article takes the position that violations should raise an inference of negligence, rather than a presumption of negligence or negligence *per se*. Although there is some merit in arguing that courts, in promulgating ethical rules, are acting in a legislative capacity, a better approach is to recognize

ethical codes as court rules established under the courts' inherent power to regulate the judicial administration process. As such, ethical rules are statutory but not necessarily legislative. Courts frequently adopt administrative regulations as standards, with often lesser weight than true statutes, and it follows that violations of codes of legal ethics should be accorded similar weight.

A final problem for many courts in applying ethical rules in legal malpractice is the admonition in the Preamble of the Model Code and Rules that the rules should not be used as a basis of civil liability. A number of courts have quoted this language in decisions refusing to apply ethical rules in civil actions. This superficial approach loses force when it is examined more carefully. The Preamble language has been criticized as self-serving economic protectionism, drafted by the organized bar and ratified by the courts. In fact, an examination of the case law outside the field of legal malpractice demonstrates that courts consistently cite ethical rules to support decisions that modify the standards of civil liability.

The only cases where the Preamble disclaimer is applied negatively involve the professional liability of lawyers. Significantly, the Preamble, like the commentary in the Model Rules, is not included within the body of rules that give rise to standards of conduct. It is stated in precatory language, which leaves to the tribunal the decision whether or not to adopt the ethical standard in a specific case. Given the suspect history of the Preamble, the rational nexus between specific rules and customary practice or substantive law, and the willingness of courts to strike down or ignore ethical rules when it suits them, the admonition not to apply ethical rules in civil settings carries very little persuasive force.

Even following the Preamble's admonition, however, it is argued here that courts are not using the rules to create substantive law but to apply existing law. Seen in this light, different treatment is appropriate for ethical rules that establish new standards of conduct than rules that codify customary practice or existing law. Because ethical standards will almost always be introduced through expert testimony, the expert is in the best position to say whether the ethical rule conforms to customary practice. Thus, the plaintiff should be able to introduce an ethical rule as evidence of the professional standard of care, and violation as its breach, where the rule protects the class of persons of which she is a member against the harm which befell her. The defendant may rebut such evidence with competent evidence including the fact that her conduct conformed to the letter of the rule.

The application of ethical rules, particularly as articulated in the Model Rules, would have the effect of making the plaintiff's case easier to prove by establishing a clear, widely accepted standard of conduct. It would also make the task of conforming to professional standards easier for the practitioner who would have identifiable benchmarks of professional care to follow.