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## The Paragraph 20 Paradox: An Evaluation of the Enforcement of Ethical Rules As Substantive Law

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# ARTICLE

*Donald E. Campbell*

## The Paragraph 20 Paradox: An Evaluation of the Enforcement of Ethical Rules As Substantive Law

**Abstract.** This Article addresses an issue courts across the country continue to struggle with: When are ethics rules appropriately considered enforceable substantive obligations, and when should they only be enforceable through the disciplinary process? The question is complicated by the ethics rules themselves. Paragraph 20 of the Scope section of the Model Rules of Professional Conduct includes seemingly contradictory guidance; it states the Rules are not to be used to establish civil liability, but also that they can be “some evidence” of a violation of a lawyer’s standard of care. Most states have adopted this paradoxal Paragraph 20 language. Consequently, courts are left to determine when ethics rules should be excluded from consideration in substantive disputes, and when they should be admitted as “some evidence” of a substantive violation. This is the “paradox” this Article addresses—the Paragraph 20 paradox.

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## I. INTRODUCTION

Consider two cases. In the first, a lawyer enters into a fee-sharing agreement with a non-lawyer who assists in certain cases. Once the cases settle, the lawyer refuses to honor the agreement and the non-lawyer sues. The court holds that, because the agreement is unethical (sharing fees with non-lawyers), the agreement is void and unenforceable. In the second case—on very similar facts—the court holds that, even though such a fee-sharing agreement violates the ethical rules, it is not unenforceable.

These cases demonstrate a difficult issue courts across the country deal with: Are the rules of ethics also rules of substantive law?<sup>1</sup> In other words, when can a party put forward the prohibitions (or mandates) in the rules of ethics to bring or defeat a claim? Similar issues arise in other contexts as well, such as in legal malpractice claims, breach of fiduciary claims, and motions to disqualify counsel.

Paragraph 20 in the Scope section of the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules)—which most states have adopted—provides that a violation of the Model Rules “should not give rise to a cause of action against a lawyer[,] nor should it create any

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1. See *Stratagene v. Parsons Behle & Latimer*, 315 F. Supp. 2d 765, 774 (D. Md. 2004) (“Given the limitations on this court’s function to find and apply Maryland law, not to create it, the court must conclude that [the Maryland Rule of Professional Conduct] does not [have the force of law].”); see also *Karas v. Katten Muchin Rosenman L.L.P.*, No. 07–1545–CV, 2009 WL 38898, slip op. at \*2 (2d Cir. Jan. 8, 2009) (“[I]here is no private right of action for a violation of a New York Disciplinary Rule.” (citing *William Kaufman Org. v. Graham & James, L.L.P.*, 703 N.Y.S.2d 439, 442 (App. Div. 2000); *Mergler v. Crystal Props. Assocs., Ltd.*, 583 N.Y.S.2d 229, 233 (App. Div. 1992))). But see *Welsh v. Case*, 43 P.3d 445, 452 (Or. Ct. App. 2002) (“Disciplinary rules, together with statutes and common-law principles relating to fiduciary relationships, all help define the duty component of the fiduciary duty owed by a lawyer to a client.” (citing *Kidney Ass’n of Or., Inc. v. Ferguson*, 843 P.2d 442, 446 n.12 (Or. 1992))).

presumption in such a case that a legal duty has been breached.”<sup>2</sup> At the same time, Paragraph 20 provides that the Model Rules can be used as “evidence” of breach of a lawyer’s standard of conduct.<sup>3</sup> Thus, the Model Rules attempt to make it clear that ethical violations are distinct from substantive law while at the same time acknowledging that they do play some role in substantive disputes. As the cases mentioned above indicate, courts struggle with how to handle the interaction of ethical prohibitions and substantive law. This Article addresses this “Paragraph 20 paradox” faced by courts (and lawyers).

After providing a history of Paragraph 20’s adoption, this Article presents six takeaways derived from an evaluation of cases where courts struggle with the paradox. First, no courts find that ethics rules, standing alone, create an independent cause of action. In other words, there is no independent “professional responsibility tort” that exists which would allow a plaintiff to assert that the violation of an ethical rule in the course of representation establishes a viable claim. Second, in legal malpractice claims, courts adopt three different approaches to deciphering when a violation of an ethical rule can be used to establish the standard of care in the duty element of the claim. The third takeaway involves cases where ethics rules are utilized defensively to challenge enforcement of an unethical contract or transaction. Courts are inconsistent in how they use ethics rules in these contexts. Some cite to the ethical prohibition and allow the defense to stand (disregarding the language in Paragraph 20), while others hold ethics rules can establish a valid defense (and invalidate an agreement). Fourth, this Article addresses how some claimants attempt to incorporate the definitions and standards set out in ethical rules into other areas of substantive law. Courts have not been receptive to these attempts. The fifth takeaway, where Paragraph 20 is most often disregarded, involves using ethics rules to evaluate disqualification motions; courts, considering the limitations of Paragraph 20, impose a higher obligation on the party seeking disqualification than required. Sixth, and finally, this Article presents situations where opposing parties (or lawyers) attempt to sue a lawyer for violation of the ethics rules. Courts universally reject such third-party claims.

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2. MODEL RULES OF PROF’L CONDUCT Preamble and Scope ¶ 20 (AM. BAR ASS’N 2017).

3. *Id.*

## II. HISTORY OF THE PARAGRAPH 20 PARADOX

The current Paragraph 20 of the Scope section of the Model Rules reads:

Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. 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. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.<sup>4</sup>

Consider the paradox this creates. On one hand, the paragraph doubles down on the idea that violations of the ethical rules are to be confined to the world of enforcement through the disciplinary system: "Violation of a Rule should not itself give rise to a cause of action against a lawyer";<sup>5</sup> violations should not "create any presumption in such a case that a legal duty has been breached";<sup>6</sup> breaches should not "necessarily warrant any other nondisciplinary remedy";<sup>7</sup> and the Model Rules are "not designed to be a basis for civil liability."<sup>8</sup> If this was all Paragraph 20 said, there would be no paradox—the Model Rules (theoretically) would be barred from substantive disputes. But then, in the last sentence, Paragraph 20 complicates things: "Rules do establish standards of conduct by lawyers, [and therefore] a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."<sup>9</sup> This is the paradox: the Model Rules

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4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

are not to be used outside of the disciplinary realm except when they can be used there.<sup>10</sup>

It is reasonable to wonder, how did this paradox develop? How did we arrive at a situation where the ethics rules that establish the foundation of a lawyer's obligation to their client, as well as to the courts and third parties, are not to be relied upon in disputes outside the disciplinary process? To answer this puzzle requires a two-step analysis. We first need to consider how ethics rules initially came to be codified. Then we need to understand the evolution of the language in the current Paragraph 20 to understand how we arrived at the current state of affairs.

Before starting the journey to evaluate the Paragraph 20 paradox, it is fair to ask whether states have followed the ABA's lead and adopted the paragraph's language. After all, if no or very few states have adopted the language, this Article's task becomes merely a theoretical exercise. An analysis of state rules of professional conduct shows that a majority of states adopted Paragraph 20 verbatim or near-verbatim (twenty-seven states).<sup>11</sup>

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10. There are some states that have not adopted this last sentence. *See, e.g.*, ALA. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (2016) (asserting the last sentence as: "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."). However, even in these states the debate continues over the relevance of ethical rules in substantive disputes. *See, e.g.*, *Nuri v. PRC, Inc.*, 5 F. Supp. 2d 1299, 1302 (M.D. Ala. 1998) (discussing the applicability of ethical rules to the standard of conduct for attorneys involved in substantive disputes).

11. Such states include: Alaska, Arizona, Colorado, Connecticut, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Minnesota, Nebraska, Nevada, New Mexico, New Hampshire, New York, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia, Wisconsin, Wyoming. ALASKA RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (West 2017); ARIZ. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (2015); COLO. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (2014); CONN. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (2016); HAW. RULES OF PROF'L CONDUCT Scope ¶ 7 (West 2018); IDAHO RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (West 2018); ILL. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (2015); IOWA RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (2015); KY. RULES OF THE SUPREME COURT Preamble and Scope ¶ XXI (2015); ME. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (West 2017); MINN. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (West 2018); NEB. COURT RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (2016); NEV. RULES OF PROF'L CONDUCT r. 1.0A(d) (West 2018); N.M. RULES OF PROF'L CONDUCT Scope ¶ 7 (West 2017); N.H. RULES OF PROF'L CONDUCT Statement of Purpose ¶ 3 (2016); N.Y. RULES OF PROF'L CONDUCT Scope ¶ 12 (West 2018); N.D. RULES OF PROF'L CONDUCT Scope ¶ 4 (West 2018); OHIO PROF'L CONDUCT RULES Preamble and Scope ¶ 20 (2015); R.I. RULES OF PROF'L CONDUCT Scope ¶ 7 (2016); S.C. RULES OF PROF'L CONDUCT Scope ¶ 7 (2014); S.D. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (2016); TENN. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 21 (West 2018); UTAH RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (2015); WASH. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (West 2017); W. VA. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (2015); WIS. SUPREME COURT RULES Preamble and Scope ¶ 20 (West 2018);

Three states adopted Paragraph 20 but omitted the last sentence about use of ethics rules in substantive contexts.<sup>12</sup> Eleven states either replaced the last sentence with something like the following, or adopt the Paragraph 20 language and add this caveat: “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.”<sup>13</sup> California contains the most direct and unambiguous limiting language: “These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.”<sup>14</sup>

Instead of limiting the use of ethical rules outside the disciplinary process, some states go beyond the ABA in recognizing that ethics rules have a role in substantive disputes.<sup>15</sup> For example, Indiana includes the following: “[The rules] are not designed to be a basis for civil liability, but these [r]ules may be used as non-conclusive evidence that a lawyer has

WYO. RULES OF PROF'L CONDUCT FOR ATTORNEYS AT LAW Preamble and Scope ¶ 20 (2017). Four states, Louisiana, New Jersey, and Oregon, have not adopted the Scope provisions of the Model Rules. See *Links of Interest*, A.B.A., [https://www.americanbar.org/groups/professional\\_responsibility/resources/links\\_of\\_interest.html](https://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest.html) [<https://perma.cc/T9XM-E2R5>] (cataloging rules of professional conduct by state).

12. Those states include: Arkansas, Delaware, Kansas and Montana. ARK. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (West 2017); DEL. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (West 2018); KAN. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (West 2018); MONT. RULES OF PROF'L CONDUCT pmb. ¶ 21 (West 2017).

13. Ten of these states are Alabama, Georgia, Michigan, Mississippi, Missouri, North Carolina, Oklahoma, Pennsylvania, Texas, and Virginia. ALA. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 18 (2016); GA. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 18 (2015); MICH. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 21 (West 2018); MISS. RULES OF PROF'L CONDUCT Scope ¶ 6 (West 2017); MO. RULES OF PROF'L CONDUCT Scope ¶ 7 (West 2017); N.C. RULES OF PROF'L CONDUCT r. 0.2 Scope ¶ 7 (West 2017); OKLA. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (2015); PA. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 19 (2015); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT Preamble: Scope ¶ 15, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9) (West 2018); VA. RULES OF PROF'L CONDUCT Scope ¶ 7 (West 2017). Florida, as the eleventh state, adopted all the language of ABA Paragraph 20, but also included language substantially similar to that quoted above. See FLA. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 17 (2014) (changing “substantive legal duty” to “such a duty” in the second portion).

14. CAL. RULES OF PROF'L CONDUCT r. 1-100(A) (2015).

15. See, e.g., MD. ATTORNEYS' RULES OF PROF'L CONDUCT r. 19-3000.1 pmb. ¶ 20 (West 2018) (“[I]n some circumstances, an attorney’s violation of a Rule may be evidence of a breach of the applicable standard of conduct.”).



breached a duty owed to a client.”<sup>16</sup> Vermont takes the unique (and more paradoxical) approach of recognizing that the violation of an ethics rule could create a presumption that a legal duty has been breached. However, in the last sentence, the Vermont Rules of Professional Conduct Scope Paragraph 20, states that “nothing in the rules should be deemed to augment or diminish any substantive legal duty of lawyers or extradisiplinary consequences of violating such a duty.”<sup>17</sup>

In short, almost all states have adopted a version of Paragraph 20 of the Model Rules, and even the few that have not adopted the language have dealt with the Paragraph 20 paradox. Therefore, for simplicity and clarity, this Article refers to the Paragraph 20 paradox as a shorthand to reference the puzzle raised in Paragraph 20 of the Model Rules, even if a particular state’s ethics rule is not verbatim the ABA language.

#### A. *The Origin of the Model Rules*

Lawyers, of course, had ethical obligations before ethics rules were codified and adopted. A lawyer could be disciplined and even disbarred by the courts in states where the lawyer practiced.<sup>18</sup> This was seen as an inherent power of the judiciary.<sup>19</sup> Thus, when the first codification of the rules of ethics was undertaken by state and local bar associations and by the ABA, it was not because there were no legal duties or ethical obligations placed on lawyers.<sup>20</sup> In fact, the first bar associations—at both the ABA

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16. IND. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (2015); *see also* MASS. RULES OF PROF'L CONDUCT Scope ¶ 6 (West 2018) (equating rules with statutes and regulations and concluding: “[I]f a plaintiff can demonstrate that a disciplinary rule was intended to protect one in his position, a violation of that rule may be some evidence of the attorney’s negligence” (citing *Fishman v. Brooks*, 487 N.E.2d 1377, 1381 (Mass. 1986))).

17. VT. RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (2016).

18. *See* ORRIN N. CARTER, *ETHICS OF THE LEGAL PROFESSION* 79 (N.W.U. Press 1915) (explaining that the power of courts to discipline attorneys by suspension or disbarment has been long exercised).

19. *See Ex parte Secombe*, 60 U.S. 9, 13 (1856) (“[I]t has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed.”); *see also* CARTER, *supra* note 18, at 79 (“The right to discipline attorneys by suspension or disbarment, as well as by contempt proceedings, has been exercised from the earliest times by the courts. Because attorneys are officers of the court, this power has always been exercised, in the absence of constitutional or statutory restrictions, by all courts of general or superior jurisdiction.” (footnote omitted)).

20. The first official codification of ethical obligations was by the Alabama Bar Association in 1887. *See* Walter Burgwyn Jones, *Canons of Professional Ethics, Their Genesis and History*, 7 NOTRE DAME LAW. 483, 493 (1932) (“[T]he Alabama State Bar Association has the very distinguished honor and

and state level—were voluntary organizations, and the standards of conduct adopted by these groups did not have the force of law.<sup>21</sup> However, the codes were viewed as largely codifying the pre-existing obligations of lawyers and setting down the aspirational statements of what it means to be an ethical and professional lawyer.<sup>22</sup>

Throughout American history the Bar has faced times of extreme disfavor. Bar associations were “deemed undemocratic and un-American” because they were perceived as aristocratic guilds that ran counter to the American tradition of individualism.<sup>23</sup> The result was a loosening of the requirements for admission to practice law in the early years of the republic.<sup>24</sup> In fact, some states by statute or constitutional provision, adopted policies that any voter had the right to practice law.<sup>25</sup> After the Civil War, the bar reached a low on credibility and respect.<sup>26</sup> But beginning in approximately 1875, bar associations began to re-form and adopt standards for admission as well as mechanisms to discipline those lawyers that acted unethically after admission.<sup>27</sup>

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notable distinction of having adopted on December 14, 1887, the first Code of Legal Ethics ever adopted in this country.”)

21. *Cf. id.* at 494–96 (expanding on the processes and meetings of individual representatives from different states from 1887 to 1908 in order to codify existing legal duties of attorneys).

22. *See, e.g.,* *Herman v. Acheson*, 108 F. Supp. 723, 726 (D.D.C. 1952) (describing ethical codes as “indicative . . . of and reflect the attitude of the profession as a whole upon those courses of action which they frown upon and interdict, and they are commonly regarded by bench and bar alike as wholesome standards of professional ethics”).

23. *See* Philip J. Wickser, *Bar Associations*, 15 CORNELL L. Q. 390, 391–93 (1930) (“Why should [the legal] profession organize in an aristocratic British way, when everywhere else in the land of the free, unfettered individuals fought their own battles single-handed?”).

24. *Id.* at 393–94.

25. *See id.* at 391–92 (introducing the idea that the American public was to be the advocates for the public in post-revolution America).

26. *See id.* (finding economic interest post-war more important than standard control of the profession).

27. *Id.* at 396. At the same time the legal profession was being professionalized, legal education was undergoing a similar transformation. In 1870, Christopher Columbus Langdell was named dean of Harvard Law School. Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906–2000s*, 22 L. & HIST. REV. 277, 277 (2004) [hereinafter *The Langdell Problem*]. In that position he transformed legal education, increasing the requirements to both get into and graduate from law school. *Id.* In 1876, he extended law school education to three years. Bruce A. Kimball, *Students' Choices and Experience During the Transition to Competitive Academic Achievement at Harvard Law School, 1876–1882*, 55 J. LEGAL EDUC. 163, 166 (2005). He introduced the casebook and the case method of law school instruction. *Id.* at 191. Law schools around the country began to adopt this more expanded and formal approach to legal education. *The Langdell Problem, supra*, at 277.

Bar associations—including the ABA which formed in 1878<sup>28</sup>—were concerned with what was perceived as the lack of professionalism of lawyers.<sup>29</sup> The distinction was made between the noble legal profession (the aspiration) and the reality of money-hungry practitioners treating law practice as a business and not a calling.<sup>30</sup> Before going on, it is important to note that the attempt to professionalize admission to the Bar and the desire for professionalism had a number of motivations.<sup>31</sup> To get a taste of the varying motivations, here is a statement from the second President of the New York State Bar Association in 1879:

During the last thirty years, there have poured into the profession, through the doors thrown open by well-meaning, but in many respects, short-sighted reformers of 1846, large numbers of men, unfit by culture or training or character to become incorporated into any learned profession. Hundreds of men without a tincture of scholarship or letters, old pettifoggers in county or justices' courts, and others, still more rude, have found their way into our ranks. Men are seen in almost all our courts slovenly in dress, uncouth in manners and habits, ignorant even of the English language, jostling, crowding, vulgarizing the profession.<sup>32</sup>

In the first paragraph of his Introduction to *Ethics of the Legal Profession* in 1915, John Wigmore commented:

For lawyers, the most important truth about the Law is that it is a profession. That important truth has been more and more forgotten among us, of late years. . . .

Anyone who has to do with the young men nowadays preparing to enter the Law cannot help seeing that, in the dominant attitude, the Law is no more

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28. *About the American Bar Association*, A.B.A., [https://www.americanbar.org/about\\_the\\_aba.html](https://www.americanbar.org/about_the_aba.html) [<https://perma.cc/U6UL-DG6K>].

29. Wickser, *supra* note 23, at 397.

30. See HENRY S. DRINKER, *LEGAL ETHICS* 20 (Colum. U. Press 1953) (citing to a discontent with the “deplorable condition into which the[] profession was falling, as well as the imperative necessity of taking a firm stance against the rising tide of commercialism and the growing influence of those who would turn the profession . . . into a ‘mere money getting trade . . .’” as the reasons leaders of the bar began to reestablish bar associations).

31. Wickser, *supra* note 23, at 395–96.

32. *Id.* at 395 (quoting 3 N.Y. STATE BAR ASS'N, REPORTS 70 (1880)).

than a trade, an occupation, a business,—like any other worthy means of livelihood.<sup>33</sup>

Wigmore goes on to state the ultimate goal of the legal profession: “The Law as a pursuit is not a trade. It is a profession. It ought to signify for its followers a mental and moral setting apart from the multitude,—a priesthood of Justice.”<sup>34</sup>

For ethics scholars in the early twentieth-century, the degradation of the legal profession in the United States could be explained by the fact that the country did not have an aristocracy from which lawyers were drawn.<sup>35</sup> Instead, those coming into the legal profession came from all strata of society and could not rely on established wealth to sustain a practice.<sup>36</sup> Adding to the pressures of the traditional practice was the commercialization that arose after the Civil War and during the Industrial Revolution.<sup>37</sup> In this environment, lawyers were “drawn into the intimate relations as adviser of the business man.”<sup>38</sup> This association led lawyers to adopt a businessman’s philosophy and to treat their practice as a trade and not a profession.<sup>39</sup> The primary concern seemed to be that lawyers sought to make as much money as possible and viewed money as the primary measure of success.<sup>40</sup> This caused lawyers to place the interests of clients above the larger public good, undermining the tenets of the “priesthood of Justice.”<sup>41</sup>

33. John H. Wigmore, *Introduction* to ORRIN N. CARTER, *ETHICS OF THE LEGAL PROFESSION* xxi (N.W.U. Press 1915).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at xxi–xxii.

39. *Id.* at xxii. Of course, to the extent that lawyers were more unethical at this time, the story is undoubtedly more complicated than “commercialization made me do it”; however, the goal here is to understand the rationale for adoption of a standard set of ethical rules, and it was a common belief that the lawyers were treating their jobs like a business and not a profession.

40. *Id.*

41. *Id.* at xxi; see also Louis D. Brandeis, *The Opportunity in the Law*, 3 COMMONWEALTH L. REV. 22, 26 (1905) (“It is true that at the present time the lawyer does not hold that position with the people that he held seventy-five or indeed fifty years ago; but the reason is not lack of opportunity. It is this: Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected their obligation to use their powers for the protection of the people. We hear much of the ‘corporation lawyer,’ and far too little of the ‘people’s lawyer.’”).

Leaders of the burgeoning bar associations and professors at burgeoning law schools contemplated how to re-instill a professional mindset into lawyers.<sup>42</sup> While it was conceded that acting “ethically” involved more than following a set of rules—it required a “whole atmosphere of life’s behavior”<sup>43</sup>—setting down rules was seen as a way of codifying the guideposts for ethical conduct.<sup>44</sup> In essence, the early ethics codes were intended to be an educational tool for lawyers and law students, defining legal ethics as

traditions of behavior that mark off and emphasize the legal profession as a guild of public officers. And the apprentice must hope and expect to make full acquaintance with this body of traditions . . . without which he cannot do his part to keep the Law on the level of a profession.<sup>45</sup>

The rules were intended to “furnish an authoritative standard by which every lawyer, when in doubt, may be safely guided.”<sup>46</sup> In drafting the first set of ethical rules in Alabama, supporters noted that:

[It is important] to call these rules to the attention of the younger members of the Bar, “many of them not having the advantages that others have had—not having been trained in the law schools or courts—not having gone through or had those advantages of development that others and more experienced men have had.”<sup>47</sup>

In fact, after the first codification, the Alabama Bar had a copy printed, framed and presented to every courthouse in the state for display.<sup>48</sup>

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42. See Michael Ariens, *Lost and Found: David Hoffman and the History of American Legal Ethics*, 67 ARK. L. REV. 571, 612–13 (2014) (recounting the treaties, lectures, and printed articles based on the works of David Hoffman—said to be one of the first American lawyers to publicly push for legal ethics in the profession); see also AM. BAR ASS’N COMM. ON CODE OF PROF’L ETHICS, FINAL REPORT I no. 2 (1908) [hereinafter CODE, FINAL REPORT] (accounting for the material used in formulating the Canons of Ethics “including a reprint of the *Hoffman Resolutions* in regards to professional deportment”).

43. Wigmore, *supra* note 33, at xxiv.

44. *Herman v. Acheson*, 108 F. Supp. 723, 726 (D.D.C. 1952).

45. Wigmore, *supra* note 33, at xxiv.

46. CARTER, *supra* note 18, at 29.

47. Jones, *supra* note 20, at 490 (quoting Hon. Lewis M. Stone, of Carrolton, Alabama).

48. *Id.* at 493. The draft of the Alabama Bar Association was then used as guide for the ABA draft of the *Canons of Ethics*. See CODE, FINAL REPORT, *supra* note 42, at I no. 4 (“The foundation of the draft for canons of ethics, herewith submitted, is the code adopted by the Alabama State Bar Association in 1887 . . .”).

It was also the education-through-codification goal that motivated the drafters of the ABA's first set of ethics rules in 1908—the Canons.<sup>49</sup> The Preamble to the Canons defined them as a “general guide” to lawyer conduct, and recognized that there were other ethical obligations not included in the thirty-two Canons.<sup>50</sup>

Reading through the Canons, the first thing that stands out is how short and concise they are. The second thing is the general (perhaps vague) nature of the guidance. For example, Canon 21 is entitled “Punctuality and Expedition” and reads in its entirety: “It is the duty of the lawyer not only to his client, but also the courts and to the public, to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.”<sup>51</sup> This gives a sense of the educational and aspirational tenor of the Canons. In the Canons, there are no detailed standards and obligations like those found in the current Model Rules.<sup>52</sup> They might best be described as a set of best practices to be an ethical lawyer. As early as 1934, Justice Harlan Fiske Stone encouraged a reevaluation of the Canons to “pass beyond the petty details of form and manner which have been so largely the subject of our codes of ethics,”<sup>53</sup> and argued that the Canons are “for the most part . . . generalizations designed for an earlier era.”<sup>54</sup> By 1977, critics had become even more dismissive, describing the Canons as “little more than a collection of pious homilies” and “primitive,” and in the ABA Journal no less.<sup>55</sup>

These quotes make the important point that the early ethics rules were not intended to provide detailed instructions on how to meet minimum

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49. See James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 2008 J. PROF'L LAW. 235, 254 (“On the other hand, that same recommendation was an acknowledgement of a changed legal profession, a profession with far more lawyers, differing in class and educational background, and trained in the law through law school instead of apprenticeships.”).

50. *Id.* at 236. As adopted in 1908, there were only thirty-two Canons. CANONS OF PROF'L ETHICS Canons 1–32 (AM. BAR ASS'N 1908).

51. CANONS OF PROF'L ETHICS Canon 21 (AM. BAR ASS'N 1908).

52. Compare *id.* at Canons 1–32 (outlining the ideal performance of an ethical lawyer representing those accused of a crime), with MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2017) (proscribing in black letter terms the conduct of an ethical prosecutor).

53. Harlan F. Stone, *The Public Influence of the Bar*, 48 HARVARD L. REV. 1, 10 (1934).

54. *Id.*

55. L. Ray Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A. J., May 1977, at 639, 639 [hereinafter Patterson, *Wanted*]; see also L. Ray Patterson, *A Preliminary Rationalization of the Law of Legal Ethics*, 57 N.C. L. REV. 519, 521 (1979) (“The Canons of 1908 prescribed rules of propriety, largely reflecting, it seems, the naive notion that precatory rules can serve as effective guidelines to ensure moral conduct.”).

ethical standards—but instead to educate and guide lawyers on what it meant to work in a profession.<sup>56</sup> The generalities and broad aspirational statements were a feature—not a bug. Therefore, it is unsurprising that there is no equivalent to Paragraph 20's admonition against using the Canons outside of the disciplinary process. In fact, there were very few enforcement bodies to actually pursue claims of misconduct against lawyers.<sup>57</sup> It is not true, however, that the drafters of the Canons expected courts to ignore the mandates and prohibitions set out in the Canons; it was expected that courts would cite to the ethical standards set out in the Canons in sanctioning lawyers for misconduct under the courts' inherent power.<sup>58</sup> In fact in 1913, the Illinois Supreme Court recognized that while the Canons were not enforceable they “constitute a safe guide for professional conduct in the cases to which they apply.”<sup>59</sup>

As long as the Canons were viewed as reflecting the preexisting common law obligations of lawyers in circumstances where courts were charged with disciplinary responsibility, or as guidelines that courts could footnote when sanctioning lawyers appearing before them, the discipline/substantive law dichotomy lie dormant.<sup>60</sup> Problems arose, however, in those situations where ethical rules went beyond preexisting common law prohibitions or obligations.<sup>61</sup> In these situations, courts were confronted with the challenge of determining the significance of an ethical prohibition in substantive disputes.<sup>62</sup> It is one thing to say that an action is unethical and should be avoided by ethical (professional) lawyers. It is another to say that an

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56. See, e.g., Simeon E. Baldwin, *The New American Code of Legal Ethics*, 8 COLUM. L. REV. 541, 542 (1908) (“[The 1908 version] occupies a higher plane. Its canons are left to rest on principles of right and honor.”).

57. See CARTER, *supra* note 18, at 79 (discussing a court's inherent and infallible power to discipline attorneys).

58. See *id.* at 80 (“[T]he power to discipline attorneys who are officers of the court was an inherent and incidental power in courts of record, essential to an orderly discharge of judicial functions . . .”).

59. *Ringen v. Ranes*, 104 N.E. 1023, 1025 (Ill. 1914).

60. See *id.* (“[The attorney's actions] indicate an inferior standard of professional conduct and [they] are in direct violation of the canons of professional ethics adopted by the Illinois State Bar Association and the American Bar Association.”).

61. See, e.g., *Chreste v. Louisville Ry. Co.*, 180 S.W. 49, 53 (Ky. 1915) (“[T]here is a wide difference between what is undignified or unbecoming conduct on the part of an attorney and what is clearly contrary to public policy.”).

62. See, e.g., *id.* (“Such conduct may be disapproved of by the courts and by those representatives of the profession who are concerned in seeing that its standards are never lowered, and yet it may fall far short of being so injurious to the interest of the public as to invalidate a contract . . .”).

unethical action can have consequences beyond an impact on the lawyer's license. For example, the Kentucky Supreme Court faced this issue in 1915 regarding solicitation of clients that was prohibited by the Canons, but that was not a traditional basis for invalidating a contract.<sup>63</sup> The court stated:

[T]he fact that solicitation is not condemned at common law[,] or denounced by our Constitution or statutes, and the further fact that it is difficult to perceive upon what theory it can be said to be clearly injurious to the public good, we conclude that mere solicitation on the part of an attorney, unaccompanied by fraud, misrepresentation, undue influence or imposition of some kind, or other circumstances sufficient to invalidate the contract, is not of itself sufficient to render a contract between an attorney and client void on the ground that it is contrary to public policy.<sup>64</sup>

One last point needs to be made before moving on to discuss the adoption of the ABA Model Code of Professional Responsibility. The presumption until this point is that the Canons, and later the Model Code of Professional Responsibility and the Model Rules, actually represent standards that define what it means to be an ethical (professional) attorney. This should not be taken as a given. Those drafting and adopting the Canons were seeking to protect a particular vision of "professional" law practice and, unsurprisingly, included provisions (such as solicitation) which some argue had the effect of protecting established lawyers.<sup>65</sup> In 1964, the United States Supreme Court case *Brotherhood of Railroad Trainmen v. Virginia*<sup>66</sup> called into question the idea that the ABA and other bar associations were merely codifying preexisting cores of ethical norms.<sup>67</sup>

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63. *Id.*

64. *Id.*

65. See Philip Schuchman, *Ethics and Legal Ethics: The Propriety of the Canons As a Group Moral Code*, 37 GEO. WASH. L. REV. 244, 268 (1968) ("The principal aim of the more important canons is to perpetuate a form of protectionism, certainly against rank outsiders, but also against lesser guild members.").

66. Bhd. of R.R. Trainmen v. Virginia *ex rel.* Va. State Bar, 377 U.S. 1 (1964).

67. See *id.* at 7 n.10 (discussing the various sources of standards of legal ethics, including the common law, the Canons, and Virginia state statutes). Other cases in this time frame also call into question the idea that the Canons distilled the undisputed essence of what it means to be an ethical lawyer. See generally NAACP v. Button, 371 U.S. 415, 451 (1963) (observing important, long-standing legal principles have been incorporated into the Canons); United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n, 389 U.S. 217, 226 n.2 (1967) (Harland, J., dissenting) ("Even in the absence of applicable statutes, state courts have held themselves empowered to promulgate and enforce standards of professional conduct drawn from the common law and the closely related prohibitions of the Canons of Ethics." (citing *In re Maclub of Am., Inc.*, 3 N.E.2d 272 (Mass. 1936); DRINKER, *supra*



In the *Trainmen* case, the railroad worker union would retain a list of attorneys that were competent in the area of railroad injuries and, when a member was injured or killed, an attorney on the list would be recommended to the worker (or to his next of kin).<sup>68</sup> The Virginia Bar Association sought an injunction against this practice, citing, among other provisions, ABA Canon 27,<sup>69</sup> which made it “unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communication or interviews not warranted by personal relations.”<sup>70</sup> The Virginia Bar prevailed in the state courts and obtained an injunction.<sup>71</sup>

The union then alleged that the injunction violated its First Amendment rights of speech and association, and the Supreme Court agreed to hear the case.<sup>72</sup> The ABA filed an amicus brief describing itself as the definer of ethical conduct: “The American Bar Association, therefore, is concerned that the practice of law retain the characteristics which makes it a profession, namely, ethical standards of conduct with regard to the duty of a lawyer to the Court, to his client, to his fellow lawyers, and to the public.”<sup>73</sup> In defending Canon 27, the ABA justified the solicitation prohibition as follows:

Canon 27 prohibits the soliciting of law business by attorneys. This rule of conduct is based on the notion that it is of the essence of any true profession not only that the professional man be skilled, but also that he apply his skill in an objective manner as possible. Laymen seeking the professional advice of an attorney want, and are entitled to, the attorney’s detached judgment. The public is best served by the attorney who strives to give his best individual judgment and whose representation is based on that judgment. The public is not well served by attorneys who seek to attract clients by self-advertising and

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note 30, at 26–30, 35–48)). However, the *Trainmen* case is a particularly useful exemplar here because Virginia had adopted the Canons verbatim and because the ABA filed an amicus brief in the case. *Trainmen*, 377 U.S. at 6 n.10.

68. *Trainmen*, 377 U.S. at 2. The Court noted that the reason for the list was to ensure that injured members knew their rights to avoid overreaching by “persuasive claims adjusters eager to gain a quick and cheap settlement” and to avoid claims being taken on by lawyers who did not know how to prosecute railroad injury claims. *Id.* at 3.

69. The Virginia courts adopted the ABA Canons to apply in Virginia. *Id.* at 7.

70. CANONS OF PROF'L ETHICS Canon 27 (AM. BAR ASS'N 1908).

71. *Trainmen*, 377 U.S. at 2.

72. *Id.*

73. Brief for The American Bar Association as Amicus Curiae at 3, *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 5 (1964) (No. 34), 1963 WL 105695, at \*3.

soliciting, because these activities make it difficult, if not impossible for there to be any objective judgment. The public generally has wiser instincts in this regard than is usually supposed. Most lay persons instinctively prefer to seek the professional man rather than to be sought after by him. This is one of the basic notions inherent in any true profession.<sup>74</sup>

Remember, the Canons were designed to distill the core components of professionalism by an organization—the ABA—that deemed itself at the forefront of knowing what those core components were.<sup>75</sup> The Supreme Court rejected the broad prohibition of solicitation under Canon 27.<sup>76</sup> With regard to the idea that the prohibition is needed to protect “professionalism” the Court ruled it went too far:

Here what Virginia has sought to halt is not a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice. It is not “ambulance chasing.” . . .

. . . .

In the present case, the State again has failed to show any appreciable public interest in preventing the Brotherhood from carrying out its plan to recommend the lawyers it selects to represent injured workers.<sup>77</sup>

The *Trainmen* case provides an important lesson. The prohibition in the Canons could be used not just to distill uncontroversial aspects of professional practice, but also to impact substantive rights and to protect established interests.<sup>78</sup> The case demonstrates that, on a constitutional basis, the interest of the state, and the status of the ABA, in maintaining

74. *Id.* at 11–12.

75. Schuchman, *supra* note 65, at 268.

76. *See Trainmen*, 377 U.S. at 1–2, 8 (rejecting the lower court’s ruling that by recommending legal counsel to injured railroad workers and their families, the Brotherhood’s conduct “constituted the solicitation of legal business and the unauthorized practice of law in Virginia”).

77. *Id.* at 6, 8. In dissent, Justice Clark (with Justice Harlan joining) states that the majority:

[O]verthrows state regulation of the legal profession and relegates the practice of law to the level of a commercial enterprise. . . . This state of affairs degrades the profession, proselytes the approved attorneys to certain required attitudes and contravenes both the accepted ethics of the profession and the statutory and judicial rules of acceptable conduct.

*Id.* at 9 (Clark, J., dissenting).

78. *See id.* at 2 (majority opinion) (demonstrating how the Canons could potentially affect one’s substantive right to freedom of speech when a state court rules in favor of the prohibitions within the ethical rules).

“professionalism” was not sufficiently strong to overcome the constitutional rights of attorneys.<sup>79</sup>

Hence, what does the history and adoption of the Canons of Professional Ethics tell us about the current Paragraph 20 paradox? It provides an initial understanding of why there is an attempt to distinguish between ethical standards and liability in substantive disputes. The Canons were intended to establish how lawyers were expected to maintain the professional status of the legal profession (as opposed to devolving to nothing more than a business).<sup>80</sup> And, while the educational purpose of the Canons was well-meaning, it was natural for courts to look to the standards as a basis for determining whether a lawyer was acting inappropriately in dealings with the court and client.<sup>81</sup> It is also understandable that courts would begin to look to the Canons and ask whether they set out enforceable standards beyond the disciplinary context. In other words, if it is unethical to personally solicit a client, why would the contract that was obtained through solicitation be enforceable (even if it would be enforceable if the ethical standard did not exist)? And, on the flip side, why should a contract obtained by solicitation be invalid merely because an ethics rule prohibits it?

#### B. *The Model Rules Evolve*

In 1964, more than fifty years after adopting the Canons, too much had changed in society to pretend that the Canons were meeting the needs of the legal profession.<sup>82</sup> The requirements to obtain a license had become largely standardized—requiring sufficient education, good character and fitness, and passage of a bar exam.<sup>83</sup> There was a rise in integrated bar associations—which required all practitioners to be members of the state

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79. *See id.* at 8 (“[T]he First and Fourteenth Amendments protect the right of the members . . . to maintain and carry out their plan for advising workers . . . to obtain legal advice and for recommending specific lawyers. . . . [L]awyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge.”).

80. *See* Jean E. Faure & R. Keith Strong, *The Model Rules of Professional Conduct: No Standard for Malpractice*, 47 MONT. L. REV. 363, 368 (1986) (“The Canons . . . offer general statements of professional conduct expected of lawyers in their relationship with the public, the legal system, and the legal profession.”).

81. *See id.* at 372–73 (referring to one court’s holding that reference to the Canons is permissible not only in a disciplinary proceeding, but also in a tort action when one party has alleged that a law firm has breached a duty owed).

82. *See* Edward L. Wright, *Study of the Canons of Professional Ethics*, 11 CATH. LAW. 323, 326 (1965) (asserting dramatic changes in society and the practice of law occurred in the twentieth century).

83. *Id.* at 325.

bar association—giving bar associations the resources and power to sanction lawyers for violating ethical obligations.<sup>84</sup> Societal changes were also forcing a change: the move to a “predominantly urban, complex industrial economy” and a drastic increase in the regulatory reach of the governments at all levels—especially the federal government.<sup>85</sup> Therefore, Lewis F. Powell, Jr., during his term as president of the ABA, appointed a committee on August 14, 1964 to study revisions to the Canons.<sup>86</sup> The chair of that committee said that the revised ethical standards should have two goals:

First, the code (or Canons) should be fully stated to aid the lawyer in his search for appreciation and understanding of the ethics, high principles and dedicated aspirations of the legal profession. In this sense, it is truly a moral code, addressed primarily to the lawyer’s conscience. Secondly, it should be a statement of the commonly accepted minimum standards of professional responsibility, in which sense it is a binding legal code enforceable by disciplinary action of the courts.<sup>87</sup>

To accommodate these two competing approaches, the ABA changed how the provisions were presented. Gone were the individual “canons” with their aspirational statements. The new version—named the Model Code of Professional Responsibility (the “Code”)<sup>88</sup>—contained two different sections to address the two goals of aspiration and discipline: Ethical Considerations and Disciplinary Rules.<sup>89</sup> The Ethical Considerations were “aspirational in character and represent[ed] the objectives toward which every member of the profession should strive. They constitute[d] a body of principles upon which the lawyer can rely for guidance in many specific situations.”<sup>90</sup> The Disciplinary Rules were

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84. *See id.* (demonstrating the rise of bar associations by showing the dramatic increase in members of the ABA from 1905 to 1965).

85. *Id.* “Changes in the work of judges and lawyers are a reflection of the drastic changes in many aspects of our society and economy.” *Id.*

86. *Id.* at 323.

87. *Id.* at 325.

88. MODEL CODE OF PROF'L RESPONSIBILITY (AM. BAR ASS'N 1969).

89. *See id.* at Preliminary Statement (retaining the original Canons but adding in the “Ethical Considerations” and “Disciplinary Rules” sections).

90. *Id.*

“mandatory in character” and “state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.”<sup>91</sup>

The Code’s Preliminary Statement also included the following statement about the use of the Disciplinary Rules: “The Model Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct.”<sup>92</sup> This statement was likely a recognition of the evolution of the ethical rules. With the introduction of enforceable “disciplinary rules” the drafters became concerned that the ethical mandates would be used by courts as legal mandates.<sup>93</sup> The disclaimer was intended to make clear that the standards set out in the Code were meant to be used by disciplinary authorities and not by courts in substantive disputes.<sup>94</sup> Following this approach, the Nebraska Supreme Court refused to hold that a violation of the Code alone was sufficient to constitute an impeachable offense.<sup>95</sup> The court noted that “[t]he general purpose of the [C]ode is to encourage and develop the conscience and ethics of lawyers in their professional and private lives, to the end that the institution of the law merits and receives the trust and respect of the public.”<sup>96</sup> Here is how the court addressed the paradox we are examining here:

We do not intend to say that violations of a [C]ode disciplinary rule do not have substance. On the contrary, the [C]ode is viable, but it concerns only standards of conduct, discipline, and penalties relating to a lawyer’s professional life. Whether the defendant has violated the Code of Professional Responsibility is a matter to be determined in a disciplinary proceeding commenced for that purpose.

Although an act or omission by a lawyer may be both a violation of a disciplinary rule and an impeachable offense, it does not follow that a violation of a disciplinary rule, as such, is an impeachable offense.

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91. *Id.*

92. *Id.* (footnotes omitted).

93. *See id.* (specifically dispelling any thought that the Code could be used “to define standards of civil liability of lawyers”).

94. *See id.* (characterizing the Code as a standard for disciplinary action of attorneys whose conduct falls below the standards set forth).

95. *See State v. Douglas*, 349 N.W.2d 870, 896 (Neb. 1984) (“Although an act or omission by a lawyer may be both a violation of a disciplinary rule and an impeachable offense, it does not follow that a violation of a disciplinary rule, as such, is an impeachable offense.”).

96. *Id.* at 895–96.

It is further noted that in addition to possible disciplinary measures under the Code of Professional Responsibility, and dependent upon the nature of the circumstances of an alleged violation, a lawyer may be held liable in the civil courts and prosecuted in the criminal courts.<sup>97</sup>

Courts also cited to the limitation on civil liability when third-parties attempted to use the Code provisions against lawyers. For example, in *Bickel v. Mackie*,<sup>98</sup> a federal district court in Iowa dismissed a claim brought by a party against the opposing lawyer alleging that the lawsuit brought by the lawyer was not for a proper purpose—in violation of the Code.<sup>99</sup> The court rejected the argument and dismissed the claim, stating: “Violation of the Code of Professional Ethics is not tantamount to a tortious act, particularly with regard to liability to a non-client.”<sup>100</sup>

Professor Wolfram presents what might be the strongest arguments in favor of using the ethical standards (under the Code) as a basis for civil liability. It is worth setting out his arguments because the same claims are made for utilizing ethical standards today. Wolfram made two main points. First, courts use other criminal and civil regulations to establish that a defendant has violated a standard of care.<sup>101</sup> The regulations governing lawyer conduct are no different from regulations in these other contexts, and should be used in civil cases against lawyers in the same way as other regulations.<sup>102</sup> Wolfram dismisses the Code’s statement that the rules do not “undertake to define standards for civil liability of lawyers for professional conduct”<sup>103</sup> by saying that “this should be read as Code neutrality, not hostility.”<sup>104</sup> In addition, incorporating the ethics rules into

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97. *Id.* at 896.

98. *Bickel v. Mackie*, 447 F. Supp. 1376 (N.D. Iowa), *aff’d*, 590 F.2d 341 (8th Cir. 1978).

99. *See id.* at 1383 (disagreeing with plaintiff’s theory that defendant owed him a duty to comply with the Code and that the failure to do so was negligence per se); *see also* *Brody v. Ruby*, 267 N.W.2d 902, 907 (Iowa 1978) (“Nor are we persuaded provisions of the Code of Professional Responsibility for Lawyers create grounds for imposing liability to a third party for negligence.”).

100. *Bickel*, 447 F. Supp. at 1383.

101. *See* Charles W. Wolfram, *The Code of Professional Responsibility As a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281, 286 (1979) (“In civil suits, courts everywhere now receive as evidence of the violator’s failure to employ due care proof of a violation of a criminal statute if the injured party is within the statute’s intended area of protection.”).

102. *See id.* at 286–87 (maintaining use of the Code in civil suits would be analogous to use of criminal statutes, business regulations, or safe driving requirements in civil litigation).

103. *See id.* at 287 (quoting MODEL CODE OF PROF’L RESPONSIBILITY Preliminary Statement (AM. BAR ASS’N 1969)).

104. *Id.*

substantive claims provides incentives for lawyers to follow the ethical rules. Because disciplinary agencies are “typically understaffed, underfinanced, and too often so dominated by the group they regulate that they are incapable of significantly expanding disciplinary control[.]”<sup>105</sup> allowing clients to institute suits for violations of ethical violations will cause lawyers, unilaterally or at the insistence of their malpractice clients, to be more conscious of their ethical obligations.<sup>106</sup>

Second, Wolfram argues, that courts should recognize that the ethical standards establish the custom of the legal profession and set out the standard of care or legal obligations of lawyers.<sup>107</sup> Thus, an attorney expert could testify in a legal malpractice case about the customary manner of handling a particular case, and rely on the ethics rules as evidence of the custom.<sup>108</sup> Wolfram analyzed disputes in four exemplar contexts: conflict of interest, confidential information, frivolous litigation, fee disputes and fee splitting.<sup>109</sup> He argued that these scenarios indicate that the Code set a sufficient standard to use in civil actions to determine whether a lawyer has violated her standard of care or has breached a contractual duty.<sup>110</sup>

Only seven years after the adoption of the Code, it came under attack as inadequate and antiquated.<sup>111</sup> In addition to attacks on the sufficiency of the Code’s provisions by lawyers, certain provisions were being challenged in the courts.<sup>112</sup>

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105. *See id.* at 291 (highlighting the potential benefits of non-lawyers playing a role in attorney discipline).

106. *See id.* at 291–92 (“The resulting liberalization and increase in damage awards will itself supply a significant measure of deterrence and create incentives for improved office management and increased attention to governing standards such as the Code of Professional Responsibility.”).

107. *See id.* at 293 (“The second general argument in favor of increased resort to the Code for a definition of a lawyer’s civil responsibilities is the analogy to the doctrine that custom or work practices may be used in negligence litigation to define the relevant standard of care.”).

108. *See id.* at 294–95 (recognizing the insufficiency of relying solely on the Code in determining the standard of care but noting use of both expert testimony and the Code would be useful in helping the factfinder understand the required duty of care).

109. *See generally id.* at 303–19 (discussing potential uses of the Code in civil litigation).

110. *Id.* at 304–19.

111. *See Patterson, Wanted, supra* note 55, at 639 (writing, only seven years after the Code took effect, that it was insufficient and did not provide attorneys with adequate guidelines as it was “rigid and simplistic, complex and contradictory, and difficult to read”); *see also* Robert Dahlquist, *The Code of Professional Responsibility and Civil Damage Actions Against Attorneys*, 9 OHIO N.U. L. REV. 1, 3 (1982) (“The Code was adopted by the American Bar Association in 1969 and became effective in 1970.”).

112. *See generally* *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (challenging the Supreme Court of Arizona’s ruling allowing the State Bar of Arizona to restrict attorney advertising). *See also*

Perhaps most notable, in *Bates v. State Bar of Arizona*,<sup>113</sup> the United States Supreme Court invalidated an Arizona rule (identical to the provision in the Code) that provided:

A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.<sup>114</sup>

The Court held that the state did not have a sufficient interest to overcome the lawyer's First Amendment right to speak through truthful newspaper advertising.<sup>115</sup>

Justice Blackmun's opinion for the Court can be described as nothing short of dismissive of the position taken by Arizona—and the ABA as *amicus curiae*.<sup>116</sup> For our purposes, the Court's response to the argument that the state has a sufficient interest in maintaining the "professionalism" of lawyers was that it does not justify an absolute prohibition on advertising.<sup>117</sup> The state argued that advertising would undermine the "sense of pride" in the law as a profession and "bring about commercialization, which will undermine the attorney's sense of dignity and self-worth."<sup>118</sup> Furthermore "[t]he hustle of the marketplace will adversely affect the profession's service orientation, and irreparably damage the delicate balance between the

Goldfarb v. Va. State Bar, 421 U.S. 773, 775 (1975) ("We granted certiorari to decide whether a minimum fee schedule for lawyers published by the Fairfax County Bar Association and enforced by the Virginia State Bar violates § 1 of the Sherman Act . . .").

113. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

114. *Id.* at 355, 360 n.12 (quoting MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101(B) (AM. BAR ASS'N 1976)).

115. *See id.* at 384 ("We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment.").

116. *See id.* at 353 ("As part of its regulation of the Arizona Bar, the Supreme Court of that State has imposed and enforces a disciplinary rule that restricts advertising by attorneys."); *see also* Brief for the American Bar Association as Amicus Curiae, *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (No. 76-316), 1976 WL 178671, at \*4 ("States [h]ave [b]road [p]ower [t]o [r]egulate [a]dvertising [b]y [l]awyers.").

117. *See Bates*, 433 U.S. at 368 (describing the State Bar of Arizona's argument of "[t]he [a]dverse [e]ffect on [p]rofessionalism" that would occur by not allowing the state to regulate advertising by attorneys).

118. *Id.*



lawyer's need to earn and his obligation selflessly to serve."<sup>119</sup> Finally, that the relationship between the lawyer and the client would be undermined by the client viewing the lawyer as motivated by profit and not the client's best interest.<sup>120</sup>

The Court found the relationship between advertising and professionalism "severely strained."<sup>121</sup> It is unrealistic to believe that lawyers operate their businesses without a profit motivation—and it is naïve to believe that clients retain lawyers without believing that they will be charged for the services.<sup>122</sup> Adding salt to the wound, the Court noted that the Code provided that a lawyer should reach a fee agreement with a client as soon as possible after accepting representation.<sup>123</sup> In the Court's words: "If the commercial basis of the relationship is to be promptly disclosed on ethical grounds, once the client is in the office, it seems inconsistent to condemn the candid revelation of the same information before he arrives at that office."<sup>124</sup>

Perhaps more devastating to the idea that the critical function of ethical rules was to ensure a continuation of law as a profession set apart from the business world, the Court rejected the foundation of the prohibition on advertising. The Court notes:

It appears that the ban on advertising originated as a rule of etiquette and not as a rule of ethics. Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on "trade" as unseemly. Eventually, the attitude toward advertising fostered by this view evolved into an aspect of the ethics of the profession. But habit and tradition are not in themselves an adequate answer to a constitutional challenge. In this day, we do not belittle the person who earns his living by the strength of his arm or the force of his mind. Since the belief that lawyers are somehow "above" trade has become an anachronism, the historical foundation for advertising restraint has crumbled.<sup>125</sup>

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119. *Id.*

120. *Id.*

121. *See id.* (asserting the State Bar's argument was too tenuous).

122. *Id.* at 368–69.

123. *Id.* at 369 (citing MODEL CODE OF PROF'L RESPONSIBILITY EC 2–19 (AM. BAR ASS'N 1976)).

124. *Id.*

125. *Id.* at 371–72 (footnote omitted) (citations omitted) (citing DRINKER, *supra* note 30, at 5, 210–11).

Add to this the 1975 *Goldfarb v. Virginia State Bar*<sup>126</sup> case in which the Supreme Court struck down the enforcement of minimum-fee agreements as violating antitrust laws.<sup>127</sup> The ABA position on minimum-fee agreements had shifted over time.<sup>128</sup> In 1961, it issued an ethics opinion stating that the failure to abide by a fee schedule “may be evidence of unethical conduct.”<sup>129</sup> The Code provided in the Disciplinary Rules that, when evaluating a fee, one factor to consider was “the fee customarily charged in the locality for similar legal services.”<sup>130</sup> The Ethical Considerations provided this elaboration: “Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees.”<sup>131</sup> All reference to fee schedules were removed from the Code in amendments adopted in 1974.<sup>132</sup>

With criticisms from both the bench and the bar, the ABA tapped Robert Kutak to head a commission to study the Code.<sup>133</sup> In a speech before the Judicial Conference for the District of Columbia Circuit, Kutak identified two overarching reasons for adopting a new set of ethics rules.<sup>134</sup> First, that which was considered “ethical” had changed due to the reevaluation of ethical obligations by lawyers in modern practice or due to outside forces—

126. *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

127. *See id.* at 791–92 (“The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.” (citing *Gibson v. Berryhill*, 411 U.S. 564, 578–79 (1973))).

128. *See* Janet F. Bentley et al., Comment, *Bar Association Minimum Fee Schedules and the Antitrust Laws*, 1974 DUKE L.J. 1164, 1168 (1974) (recognizing the ABA’s different stance on minimum fee agreements from 1961 to 1970).

129. *Id.* (quoting ABA Comm’n on Prof’l Ethics, Op. No. 302 (1961)).

130. *Id.* (quoting MODEL CODE OF PROF’L RESPONSIBILITY DR 2–106(B)(3) (AM. BAR ASS’N 1969)).

131. *Id.* (quoting MODEL CODE OF PROF’L RESPONSIBILITY EC 2–18 (AM. BAR ASS’N 1969)).

132. *See id.* at 1168–69 (“During its 1974 meeting, the ABA amended the Code to omit all reference to fee schedules, but apparently left standing the earlier rulings that failure to follow fee schedules could be *evidence* of misconduct.”).

133. *See* AM. BAR ASS’N COMM’N ON EVALUATION OF PROF’L STANDARDS, Chair’s Introduction (1983) (“The Commission on Evaluation of Professional Standards was appointed in the summer of 1977 . . . . Chaired by Robert J. Kutak . . . the Commission was charged with evaluating whether existing standards of professional conduct provided comprehensive and consistent guidance for resolving the increasingly complex ethical problems in the practice of law.”).

134. *See* Proceedings of the Forty-First Annual Judicial Conference for the Dist. of Columbia Circuit, 89 F.R.D. 169, 233–34 (1980) [hereinafter *Forty-First Judicial Conference*] (“Thus, a revision of the Code is necessary, if for no other reason than to acknowledge the problems facing lawyers of the 1980s and to provide them with some guidance in resolving the questions of professional ethics which they must face daily.”).

such as the Supreme Court.<sup>135</sup> Second, because the Code was outdated and reflected practice as it existed in the 1880s and not the 1980s, a new approach was needed.<sup>136</sup> In discussing the shift in format, from “Disciplinary Rules” and “Ethical Considerations” to Rules and Comments, Kutak said that the change was a recognition that, over time, “there has been a steady evolution towards developing a systematic statement, not of etiquette, but of professional responsibility and legal duty.”<sup>137</sup> However, Kutak notes (referring specifically to the Comments): “this is not to say that the proposed Rules have abandoned the educational and socializing function that the present Code’s Ethical Considerations have served in our profession.”<sup>138</sup>

These statements were made in 1980, shortly after the first draft of the Model Rules were completed by Kutak’s commission.<sup>139</sup> The early drafts included drastic changes both to the format and substance of the Code.<sup>140</sup> The drafts resulted in “turmoil and controversy” inside the ABA and state bar associations.<sup>141</sup>

For purposes of this Article, the revisions to what became Paragraph 20 is informative. In May 1981, the Kutak Commission filed its proposed final

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135. *See id.* at 233–34 (“As a profession we are engaged in an extensive reexamination of the most fundamental questions in ethics; spurred, in part, by our own experiences, but impelled, as well, by the forces of public opinion.”).

136. *See id.* at 234 (“[W]hat does the Code say about the obligations of the advisor and the evaluator, the special problems of corporate counsel, and the implications of lawyers practicing together? Frankly, either nothing or very little.”). Professor Schneyer, in his examination of the adoption of the Model Rules argues that the ABA was also motivated to “shor[e] up among lawyers and regulators the ABA’s image as lawgiver for the practice of law.” THEODORE SCHNEYER, PROFESSIONALISM AS POLITICS: THE MAKING OF A MODERN LEGAL ETHICS CODE, *in* LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 95, 104 (Robert L. Nelson et al. eds., 1992). With the criticisms of the Code and the broadside attack by the Supreme Court, this credibility motivation theory is supported by the evidence. *See id.* (recognizing not only that the then President of the ABA wanted a new code but that Supreme Court decisions had also narrowed the reach of the Code).

137. *See* Forty-First Judicial Conference, *supra* note 134, at 235 (noting the proposed change to the Rules would be “restricted to statements of basic rights and duties, amplified and illustrated by accompanying commentary and references to authority”).

138. *Id.*

139. *See id.* at 231–41 (echoing the speech given by Kutak at the Judicial Conference in June 1980).

140. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 61 (1986) (“The Commission’s early work showed that it intended a bold reworking of the Code.”).

141. *Id.*

rules to the ABA House of Delegates.<sup>142</sup> As proposed, the relevant portion provided:

Violation of the Rules should not necessarily result in civil liability, which is a matter governed by general law. The Rules of Professional Conduct may have relevance in determining civil liability, but they should not be uncritically incorporated into that context. The purposes of compensatory redress through civil liability are different from the purposes of disciplinary process. Generally speaking, compensatory damages may be predicated on violation of a regulatory standard only if the standard is intended to protect against the specific harm that has ensued. Many of the Rules of Professional Conduct seek to protect a general public interest in the integrity of the legal process, and as regulatory devices are broader than required for determination of 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.<sup>143</sup>

The ABA House of Delegates rejected this proposal.<sup>144</sup> Instead, the House adopted this version in June 1982:

Violation of a Rule should not itself give rise to a cause of action nor should it create any presumption that an independent 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,

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142. *See id.* at 62 n.75 (referencing the Kutak Commission's Proposed Final Draft, dated May 30, 1981).

143. AM. BAR ASS'N COMM'N ON EVALUATION OF PROF'L STANDARDS, PROPOSED FINAL DRAFT MODEL RULES OF PROFESSIONAL CONDUCT (1981) [hereinafter AM. BAR ASS'N COMM'N, PROPOSED FINAL DRAFT (1981)].

144. AM. BAR ASS'N COMM'N ON EVALUATION OF PROF'L STANDARDS, REPORT TO THE HOUSE OF DELEGATES 400, app. A (1982).

does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.<sup>145</sup>

Further revisions to the paragraph were adopted in 1983, changing the first and last sentences to read:

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.

....

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.<sup>146</sup>

For comparison purposes, the current version reads:

Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. 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. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.<sup>147</sup>

This evolution demonstrates the difficulty faced by the drafters when attempting to evaluate the role the Model Rules should have beyond the disciplinary process. The first version of the Kutak commission expressly acknowledged the Model Rules "have relevance" beyond the disciplinary

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145. *Id.*

146. AM. BAR ASS'N COMM'N ON EVALUATION OF PROF'L STANDARDS, REPORT TO THE HOUSE OF DELEGATES 401, at 6–3 (1983); *accord* AM. BAR ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013, at 16 (Art Garwin, ed. 2013).

147. MODEL RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (AM. BAR ASS'N 2017).

process.<sup>148</sup> This was seen as an acknowledgement of how courts were viewing ethics rules in practice.<sup>149</sup> However, interests within the ABA pushed back on the idea that the Model Rules should contain such an explicit statement acknowledging the role of the Model Rules outside the disciplinary process.<sup>150</sup>

This evolution goes a long way to explaining the seeming paradoxical nature of the current Paragraph 20. It is no accident that Paragraph 20 seems schizophrenic—its history demonstrates it is the result of compromise and resistance.<sup>151</sup> With this background in place, it is time to turn to how courts have viewed and used ethical rules in substantive claims. By substantive claims, the Article means claims outside of the disciplinary process. This includes malpractice claims, breach of contract claims, and breach of fiduciary duty claims. It also applies to use of ethics rules as a defense to these claims.

### III. UNDERSTANDING THE PARAGRAPH 20 PARADOX

The reality is that some courts—despite Paragraph 20's direction that ethical rules have a limited role in determining substantive rights—simply disregard the approbation.<sup>152</sup> In these cases, courts cite to the Code and hold that the unethical conduct creates a substantively unenforceable obligation.<sup>153</sup> For example, in *Passante v. McWilliam*,<sup>154</sup> a California court refused to enforce a contract between a lawyer and her attorney where the attorney failed to advise the client to seek outside counsel as required by the

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148. See AM. BAR ASS'N COMM'N, PROPOSED FINAL DRAFT (1981), *supra* note 143 (demonstrating the original proposed version specifically said “[t]he Rules of Professional Conduct may have relevance in determining civil liability”).

149. See *id.* (“The organizational structure of the Model Rules reflects the actual experience of lawyers and contributes significantly to the utility of the Rules as working guides to the law of lawyering.”).

150. See *id.* (“No project of such fundamental concern as the Model Rules will be—or should be—free of controversy.”).

151. See *id.* (“Many questions of professional responsibility can be fairly argued on both sides and honorably resolved in many ways.”).

152. See Dahlquist, *supra* note 111, at 5 (“The Code has also been a handy tool in the hands of many judges who have used it as a type of persuasive authority to establish important points in judicial opinions.”).

153. See *id.* at 6 (“Courts frequently, and usually without discussing the applicability of the Code to the malpractice action, use the Code to address various issues in typical ‘client v. attorney’ malpractice-negligence actions.”).

154. *Passante v. McWilliam*, 62 Cal. Rptr. 2d 298 (Ct. App. 1997).

ethics rules.<sup>155</sup> There is no citation to the prohibition on using the rules in a dispute outside the disciplinary arena.<sup>156</sup>

These cases are important and provide one answer to the fundamental question this Article addresses. Courts may simply enforce ethical obligations as substantive obligations without considering why this use is problematic.<sup>157</sup> This lack of analysis could be because the parties do not raise the issue or the court does not feel it is necessary to address it. It could be that the court believes that the overlap between ethics and substance is so obvious no discussion is necessary. Regardless, these cases create some of the disparities related to the Paragraph 20 paradox that have been identified by other authors.<sup>158</sup>

In *Son v. Margolius, Mallios, Davis, Rider & Tomar*,<sup>159</sup> Justice Chasanow, on the Maryland Supreme Court (in concurrence), chastised the majority opinion for holding that the ethical rules establish the public policy of the state without taking into account the limitations set out in Paragraph 20:

What is most troubling about the majority opinion is that the court has concluded that it should enforce ethical rules by flagrantly violating the same rules. . . . [In recognizing that rules establish public policy and create a cause of action], this Court violates another provision of the rules that is expressly directed to the courts [referring to Maryland's equivalent to Paragraph 20] . . . .

This Court does not encourage respect for the rules by using part of the ethical rules to imply a cause of action that violates an express provision of the ethical rules.<sup>160</sup>

Next is an analysis of cases where courts addressed the issue of handling the Paragraph 20 paradox, which perplexes courts and lawyers for several

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155. *See id.* at 302 (holding there was no contract to enforce as there was no bargain for exchange).

156. *See id.* at 299 (suggesting the existence of a prohibition even though it was not explicitly stated by the court).

157. *See* Benjamin P. Cooper, *Taking Rules Seriously: The Rise of Lawyer Rules As Substantive Law and the Public Policy Exception in Contract Law*, 35 *CARDOZO L. REV.* 267, 283 (2013) (“Most courts simply say that the professional rules do or do not constitute public policy without providing any explanation.”).

158. *See id.* at 271 (observing a split amongst courts when deciding whether the violation of professional rules is tied to any substantive impacts).

159. *Son v. Margolius, Mallios, Davis, Rider & Tomar*, 709 A.2d 112 (Md. 1998).

160. *Id.* at 125 (Chasanow, J., concurring).

reasons. First, ethics rules typically establish legal obligations.<sup>161</sup> Most lay people (as well as law students and perhaps lawyers) certainly would assume that a lawyer who enters into an “unethical” contract has violated an obligation to a client and should be denied the right to enforce the contract.<sup>162</sup> The idea that a contract can be unethical and yet enforceable runs against common sense.<sup>163</sup> Second, disciplinary bodies will often hold complaints in abeyance until the underlying case is resolved.<sup>164</sup> The reason for this is justifiable—disciplinary agencies do not want to facilitate using ethics rules for tactical advantage in a case.<sup>165</sup> However, this, in practice, means that matters that might be better handled early in the litigation (perhaps by a court) are left until the substantive matter is resolved even though the resolution could have a direct impact on a case.<sup>166</sup> Third, some of the ethics rules themselves sound like they are substantive and meant to apply in the course of representation—not just in a disciplinary matter. For example, the conflict of interest rules are written in the required “shall” and “must”—and mere disciplinary actions will not fully vindicate the principles set out in the rules.<sup>167</sup> Finally, a number of ethics rules incorporate existing

161. See MODEL RULES OF PROF'L CONDUCT Preamble and Scope ¶ 15 (AM. BAR ASS'N 2017) (“The Rules presuppose a larger legal context shaping the lawyer’s role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general.”).

162. See *Son*, 709 A.2d at 114 (“[T]hat court relied on its decision in this case, raising the broader issue of whether agreements entered into by lawyers that were in contravention of applicable [professional conduct] rules could be declared void as against public policy.” (citing *Post v. Bregman*, 686 A.2d 665, 686 (Md. Ct. Spec. App. 1996))).

163. See *id.* (“[W]e took the unusual step of directing reargument in this case on the question of whether the alleged arrangement between Ms. Park and the lawyers was void against the public policy expressed in [Maryland Professional Conduct] Rules 5.4 and 7.2.” (citing MD. RULES OF PROF'L CONDUCT r. 5.4, 7.2 (adopted 1986))).

164. See MODEL RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (AM. BAR ASS'N 2017) (“[V]iolation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation.”).

165. See *id.* (cautioning that the Rules could be used in deciding a case to one party’s advantage).

166. See Dahlquist, *supra* note 111, at 6 (“Courts have recently taken pause, however and rejected civil claims against attorneys stated in terms of violations of the Code alone. These decisions evidence a need to review and evaluate the Code’s use in [substantive matters].” (footnote omitted)); Cooper, *supra* note 157, at 272 (questioning the impact and relevance of the “rules beyond the disciplinary process”).

167. For example, Rule 5.4(b) provides that a lawyer “shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.” MODEL RULES OF PROF'L CONDUCT r. 5.4(b) (AM. BAR ASS'N 2017). This would indicate that such a partnership would be substantively suspect (although there is likely nothing in the business association statutes prohibiting such a partnership). See *id.* (listing various standards by which lawyers should abide).



substantive law into the rules, making it at least ironic that ethics rules should be disregarded when examining a substantive claim.<sup>168</sup>

On the other side of the coin, there are several reasons why ethical statements should not be incorporated into substantive law in addition to the language in Paragraph 20. First, the Model Rules set out obligations that should result in lawyer discipline but not civil liability.<sup>169</sup> Expanding them to create substantive obligations can undermine a fundamental purpose of the rules—to provide guidance to lawyers in their practice.<sup>170</sup> Second, the purpose of the rules is not only to discipline the deviant lawyer but also to deter lawyers from engaging in such conduct in the future, and therefore, discipline may be imposed as a deterrent whereas the purpose of civil liability is to remedy past conduct through compensation.<sup>171</sup> In this sense, the rules are not intended to give standing to any individual to use them to pursue a cause of action, but instead are intended to be regulations to protect the public through disciplinary proceedings.<sup>172</sup> Third, the ethical rules contain a hodge-podge of mandatory and aspirational rules.<sup>173</sup> The aspirational rules are not appropriate for discipline and certainly would not be appropriate for civil liability.<sup>174</sup> Fourth, because the rules are intended to

168. To give a few examples of where the Model Rules specifically incorporate outside substantive law: Rule 3.4(a) prohibits “unlawfully” obstructing access to evidence. *Id.* r. 3.4(a). Rule 3.5(a) makes it unethical to influence a judge, juror, or prospective juror in a means “prohibited by law.” *Id.* r. 3.5(a). Rule 8.4(f) makes it misconduct for a lawyer to assist a judge in conduct that is a violation of “applicable rules of judicial conduct or other law.” *Id.* r. 8.4(f). Rule 8.4(g) defines misconduct as engaging in certain “harassment or discrimination” and Comment 3 provides that the “substantive law of antidiscrimination and anti-harassment statutes and case law may guide application . . .” of the provision. *Id.* r. 8.4(g) cmt. 3.

169. *See Baxt v. Liloia*, 714 A.2d 271, 277 (N.J. 1998) (“[T]here is general reliance on the ABA Model Code, and frequently a particular state’s code, for the principle that state disciplinary codes are not designed to establish standards for civil liability but, rather, to provide standards of professional conduct by which lawyers may be disciplined.” (citing *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400, 404 (Tenn. 1991); *Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 1988-NMSC-014, ¶ 16, 106 N.M. 757, 762, 750 P.2d 118, 123)).

170. *See id.* (explaining the rules do not sufficiently establish what constitutes civil liability and at best provide vague standards for the practice of law).

171. *See id.* (“[A] lawyer may be disciplined even if the misconduct does not cause any damage. The rationale is the need for protection of the public and the integrity of the profession.” (quoting *Hizey v. Carpenter*, 830 P.2d 646, 652 (Wash. 1992) (en banc))).

172. *See id.* (“[E]ven if the injured party initiates a disciplinary complaint, that individual is not a party to the proceeding.” (quoting *Hizey*, 830 P.2d at 652)).

173. *See id.* (“Many of the disciplinary rules are aspirational in nature . . .”).

174. *See id.* (noting a complaint against a lawyer for exhibiting a lack of professionalism would be unsuitable for civil action).

provide guidance to lawyers they are not written with the precision that one would expect of enforceable substantive obligations.<sup>175</sup>

Although this Article addresses situations in which courts have determined whether ethical standards should constitute a substantive obligation, there are areas where the Model Rules make it clear that they are not intended to provide the standard of analysis and expressly direct lawyers to look to sources of law outside of the Model Rules. For example, when determining whether an attorney-client relationship exists,<sup>176</sup> whether a provision requiring arbitration of legal malpractice claims is enforceable,<sup>177</sup> the impact of a lawyer receiving inadvertently disclosed information,<sup>178</sup> the definition of the unauthorized practice of law,<sup>179</sup> the imputation of criminal or civil liability onto lawyers in a firm,<sup>180</sup> and when a third party that relies on an evaluation prepared by a lawyer can sue the lawyer in malpractice,<sup>181</sup> the Model Rules themselves make it clear that the resolution of substantive disputes exist external to the Model Rules.<sup>182</sup>

In conclusion, this section sets the stage for the rest of this Article. The history of the Model Rules demonstrates that they were developed as educational and aspirational statements for lawyers to ensure that the practice of law remained a “profession.”<sup>183</sup> The Model Rules were based on a combination of accepted professional norms and established

175. Consider Rule 3.8(b) which provides that a prosecutor shall “make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel . . .” MODEL RULES OF PROF'L CONDUCT r. 3.8(b) (AM. BAR ASS'N 2017). Constitutionally, there are different times when the right to counsel attaches under the Fifth and Sixth Amendments. *See e.g.*, *United States v. Acosta*, 111 F. Supp. 2d 1082, 1089 (E.D. Wis. 2000) (“The Fifth Amendment requires law enforcement officials to advise suspects of their right to remain silent and to have a lawyer present before they begin custodial interrogations.” (citing *Miranda v. Arizona*, 384 U.S. 436 (1966))). What time is the rule referring to? This issue was presented to the court in *United States v. Acosta*. *See generally id.* at 1091 (showing the defendant sought to suppress evidence and the court held there was no Fifth Amendment violation).

176. MODEL RULES OF PROF'L CONDUCT Preamble and Scope ¶ 17 (AM. BAR ASS'N 2017).

177. *Id.* r. 1.8 cmt. 14.

178. *Id.* r. 4.4 cmt. 2.

179. *Id.* r. 5.5 cmt. 2.

180. *Id.* r. 5.1 cmt. 7.

181. *Id.* r. 2.3 cmt. 3.

182. *See id.* r. 5.1 cmt. 7 (“Whether a lawyer may be liable civilly or criminally for another lawyer’s conduct is a question of law beyond the scope of these Rules.”).

183. *See id.* Preamble and Scope ¶ 1 (stating the various roles a lawyer fulfills within the legal profession).

substantive obligations.<sup>184</sup> As courts began to look to the Model Rules to establish substantive rights and enforceable obligations of lawyers, lawyers—who drafted the Model Rules—sought to limit the scope of potential liability.<sup>185</sup> This led to the adoption of Paragraph 20 and helps explain its paradox which instructs that the Model Rules should not be used to establish a cause of action or create a presumption that a duty has been breached, but provides that the Model Rules can be used as “evidence of breach of the applicable standard of conduct.”<sup>186</sup> In the next section, we move beyond the position taken in the Model Rules and examine how courts have analyzed them in substantive disputes.

#### IV. ESTABLISHING THE LINE: ENFORCEMENT OF ETHICS RULES AS SUBSTANTIVE LAW

The use of ethical rules in substantive disputes has received a great deal of scholarly attention.<sup>187</sup> Most analysis has focused on the use of ethical rules in legal malpractice claims.<sup>188</sup> Others have analyzed the use of ethical

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184. *See id.* Preamble and Scope ¶ 4 (requiring lawyers to be competent in all professional functions).

185. *See* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 616 n.97 (1985) (“Bar commentators consistently invoked the threat of civil liability as a necessary and sufficient basis for deleting third party protections. Other commentators targeted particular rules as objectionable.” (citation omitted)).

186. MODEL RULES OF PROFESSIONAL CONDUCT Preamble and Scope ¶ 20 (AM. BAR ASS’N 2017).

187. *See* Cooper, *supra* note 157, at 270–71 (“While the Model Rules were being drafted, Professor Charles Wolfram wrote an influential Article arguing that the professional rules in general should play a greater role in the substantive law . . .”).

188. *See generally* Nicola A. Boothe-Perry, *No Laughing Matter: The Intersection of Legal Malpractice and Professionalism*, 21 AM. U. J. GENDER SOC. POL’Y & L. 1, 4–5 (2012) (“Examples of lawyers behaving badly—such as falling asleep in court, outrageous deposition behavior, disrespectful behavior in and out of court (even in their capacity as elected officials)—have garnered considerable amount of attention.”); Dahlquist, *supra* note 111, at 4–7 (addressing actions for damages resulting in malpractice claims particularly focusing on reasonable care and acknowledging there is no clear proper definition for legal malpractice); Daniel Engelman, *The Rules of Professional Conduct and Civil Liability of Attorneys*, 1993 DET. C. L. REV. 915, 916, 918–20 (“Recent developments in the definition of standard of care applicable to attorneys in the legal malpractice suits include new formulations of both judicially adopted and intra-professional guidelines promulgated by American Bar Association regarding ethical rules of professional conduct for attorneys.”); Kristy L. Gilliland, *Expand Use of the Code of Professional Responsibility and the Rules of Professional Conduct: A Basis for Civil Liability*, 15 J. LEGAL PROF. 355, 356–59 (1990) (“[E]xplore[s] the feasibility and the advantages as well as disadvantages in employment of the Code and the Rules beyond their current role.”); Faure & Strong, *supra* note 80, at 363–65 (reviewing the use of the Code in legal malpractice claims and distinguishing it from the Model Rules).

rules in claims other than malpractice—often contract disputes.<sup>189</sup> A consistent conclusion reached in these articles is that there is no continuity in how courts address the issue.<sup>190</sup> The authors propose a proper use (or nonuse) of the ethical rules in substantive disputes.<sup>191</sup>

This Article takes both a broader and narrower approach than prior articles; it analyzes *only* the cases in which courts address the limiting language in Paragraph 20. In that sense, this Article is narrower than prior works. However, instead of looking at a particular rule or a particular area of law (i.e., malpractice or contract), this Article analyzes every case that has cited to Paragraph 20.<sup>192</sup> In this way the Article takes a broader view by examining the paradox in various contexts.

Lawyers are governed by a number of different obligations of professional responsibility.<sup>193</sup> In addition substantive obligations such as legal malpractice and breach of fiduciary duty, a lawyer faces obligations pursuant to rules of procedure, contract law, and criminal law.<sup>194</sup> One of the core purposes of Paragraph 20 is to emphasize that the Model Rules, while they may reflect the same sentiments that exist in these other areas, are not meant to create new substantive law obligations.<sup>195</sup> Paragraph 20

189. *See, e.g.,* Cooper, *supra* note 157, at 269 (“[T]his Article examines a largely unexplored question: the enforceability of certain agreements (other than lawyer-client fee agreements) that are prohibited by the professional rules.”).

190. *See, e.g., id.* at 271 (observing the lack of uniformity amongst courts in using the professional rules to enforce substantive contract law).

191. *See, e.g., id.* at 296 (“This Part encourages the courts to take the rules seriously as a source of substantive law and articulates the legal and public policy justifications for that position.”).

192. This approach is, by definition, under-inclusive. As mentioned above, courts may view the ethics rules as setting out substantive obligations and never discuss the Paragraph 20 paradox. This Article does not capture those cases. However, what this analysis does capture are the circumstances in which courts address (or at least cite to) the Paragraph 20 limitations. Since the second objective of this paper is to develop an approach for courts to take, understanding how courts have addressed the Paragraph 20 language is a defensible limitation on the scope of the Article. To identify the relevant cases, the Author performed a Westlaw search in the “All States” and “All Federal” databases, and ran the following search: “violation” /p “rule” /p “cause of action” /p “presumption.” The search was through September 20, 2017.

193. *See* MODEL RULES OF PROF'L CONDUCT Preamble and Scope ¶ 13 (AM. BAR ASS'N 2017) (“Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.”).

194. *See id.* Preamble and Scope ¶ 7 (“Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law.”).

195. *See* Bodily v. Intermountain Health Care Corp., 649 F. Supp. 468, 472 n.4 (D. Utah 1986) (“Certain ethical mandates, such as lawyer competence, may reflect substantive law requirement such as

makes this clear by stating that it is designed to, “provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies.”<sup>196</sup> Disciplinary agencies then use the Model Rules to ensure that members of the Bar maintain the level of professionalism expressed in the Model Rules.<sup>197</sup> Sanctions for violations of the Model Rules serve three primary functions: (a) to sanction/remove unethical lawyers; (b) to deter other lawyers from engaging in similar misconduct; and (c) to maintain confidence of the public in the legal profession.<sup>198</sup> Substantive areas of law—tort law and contract law for example—are meant to redress the harm done to a private individual or to determine rights between contracting parties.<sup>199</sup> To allow the rules to be used to establish liability would, it is argued, “create unreasonable, unwarranted, and cumulative exposure to civil liability” of the lawyer.<sup>200</sup>

Thus, in cases where courts are faced with an unethical action the question is whether the conduct impacts substantive rights.<sup>201</sup> In these cases, courts following the Paragraph 20 prohibition should disregard the ethics rules and look to law outside the ethics rules to determine whether substantive rights have been violated. For example, in the criminal context, courts have refused to hold that an ethical violation alone constitutes the

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standard of care required of lawyers, but rules of ethics are said not to *create* the substantive law requirement.”).

196. MODEL RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (AM. BAR ASS'N 2017).

197. *See Bodily*, 649 F. Supp. at 472 n.4 (noting the Rules serve the purpose of guiding disciplinary agencies an addressing ethical issues).

198. *See generally* *Bangor v. Amato*, 25 N.E.3d 386, 399 (Ohio 2014) (“The purpose of disciplinary actions is to protect the public interest and to ensure that members of the bar are competent to practice a profession imbued with the public trust.” (quoting *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 707 N.E.2d 853, 859 (Ohio 1999))).

199. *See id.* (“These interest are different from the purposes underlying tort law, which provides a means of redress to individuals for damages suffered as a result of tortious conduct.” (quoting *Fred Siegel Co.*, 707 N.E.2d at 859)).

200. *Sanders v. Townsend*, 582 N.E.2d 355, 359 (Ind. 1991). In a couple of interesting cases, courts have looked to the language of the engagement agreement and held that a lawyer and client could contractually agree that the ethical standards should be incorporated by reference into the agreement. *See Waggoner v. Williamson*, 8 So. 3d 147, 154 (Miss. 2009) (“Under the AHP agreement, Williamson and Miller had a contractual duty to comply with Rule 1.8 of the ABA Model Rules of Professional Conduct or the state counterpart.”); *see also* *Garfinkel, P.A. v. Mager*, 57 So. 3d 221, 225–26 (Fla. Dist. Ct. App. 2010) (upholding a settlement agreement containing an unethical provision (violation of Rule 5.6) where the court found it significant that the parties had expressly contemplated the competing public interests of Rule 5.6 and expressed a conscious and reasoned agreement regarding the issue).

201. *See Waggoner*, 8 So. 3d at 153 (exploring if the unethical conduct displayed by a lawyer created tort and breach of contract claims).

violation of a constitutional right.<sup>202</sup> Consider the situation where a prosecutor, as part of a plea agreement, seeks to have the defendant waive the right to post-conviction relief.<sup>203</sup> Numerous ethics opinions are published on this issue and almost all have found that it is unethical for prosecutors to offer and defense counsel to advise their client to accept a plea that also waives these rights.<sup>204</sup> However, if a waiver is included in a plea agreement and the agreement is subsequently challenged, the fact that the lawyers acted unethically in negotiating the agreement is not relevant to its enforceability.<sup>205</sup> The constitutional question is whether the agreement was entered into “knowingly, voluntarily, and intelligently.”<sup>206</sup> The defendant must demonstrate that his defense was harmed constitutionally by the unethical conduct.<sup>207</sup> The key is that for the ethical obligation to

202. See *State v. Maloney*, 685 N.W.2d 620, 623 (Wis. Ct. App. 2004) (“Because suppression is not available for an ethical violation, counsel is not ineffective for failing to raise the argument.” (footnote omitted) (citing *State v. Reed*, 650 N.W.2d 885 (Wis. 2002))).

203. See, e.g., *Cooper v. State*, 356 S.W.3d 148, 150 (Mo. 2011) (“As part of the plea agreement, Cooper waived his right to file any further motion for post-conviction relief under Rule 24.305 . . .”).

204. See generally *Ariz. State Bar Ethics*, Op. 15-01 (2015) (“As a common example, a typical federal waiver required that the Defendant give up any right to raise any claim on appeal or in a habeas corpus petition.”); *Ala. Ethics*, Op. 2011-02 (2011) (“[A] lawyer may not seek an agreement with a client prospectively limiting his ability for malpractice unless the client is independently represented in making the agreement.”); *Fla. Ethics*, Op. 12-1 (2012) (asserting that conflict of interest and being prejudicial to the administration of justice are the two reasons why a prosecutor’s offer to waive ineffective assistance of counsel is prohibited); *Mo. Advisory Comm.*, Op. 126 (2009) (prohibiting defense counsel from advising waiver of ineffective assistance of counsel pursuant Rule 4.7(b)(1), which allows the defense counsel to provide competent and diligent representation); *N.C. Eth.*, Op. RPC 129 (1993) (asserting that attorneys must zealously represent their client by complying with their duties and advising their client about risks and consequences of a plea agreement); *Ohio Bd. of Comm’rs on Grievances & Discipline*, Op. 2001-6, at 2 (2001) (“[A waiver of claims of ineffective assistance] significantly limits and may even destroy the defendant’s ability to establish proximate cause, a necessary element of a legal malpractice claim.”); *Va. State Bar Legal Ethics*, Op. 1857 (2011) (“The Committee agrees with the majority of the states that . . . a defense lawyer may not ethically counsel his client to accept” a plea agreement that waives ineffective assistance of counsel); *Vt. Advisory Ethics*, Op. 95-04 (1995) (mentioning that counsel’s advise for a plea agreement would be a violation of DR-6-102 (A) even though the “execution of a lawful plea agreement” would not violate the Code).

205. See *Cooper*, 356 S.W.3d at 157 (explaining unethical conduct between lawyers in drafting a plea agreement has no bearing on whether the agreement can be enforced).

206. See *id.* (“Cooper has neither alleged nor proven the presence of an actual conflict of interest—that is to say, a claim of ineffective assistance of counsel that pertains to the knowing, voluntary, and intelligent waiver of postconviction rights.”).

207. See *United States v. Lopez*, 4 F.3d 1455, 1464 (9th Cir. 1993) (“[E]ven assuming that Lyons did act unethically, we question the prudence of remedying that misconduct through dismissal of a valid indictment. To justify such an extreme remedy, the government’s conduct must have caused substantial prejudice to the defendant and been flagrant in its disregard of the limits of appropriate professional conduct.” (citing *United States v. Barrera-Moreno*, 951 F.2d 1089, 1093 (9th Cir. 1991)));

apply in a substantive context, it must have existed at common law or satisfy a constitutional standard; the rules in these contexts are irrelevant.<sup>208</sup> Ethics rules alone are not meant to establish a cause of action or provide a defense, but if the rules reflect substantive obligations that exist outside of the rules, the rules may mirror that independent obligation.<sup>209</sup> After all, as noted above, the drafters of the Model Rules incorporated some preexisting substantive obligations.<sup>210</sup> Put simply, the rules do not establish a cause of action, and a party must rely on substantive obligations found outside the rules.<sup>211</sup>

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United States v. Thomas, 474 F.2d 110, 112 (10th Cir. 1973) (“A violation of the canon of ethics . . . need not be remedied by a reversal of the case wherein it is violated. This does not necessarily present a constitutional question, but this is an ethical and administrative one relating to attorneys practicing before the United States courts.”); *Clausell v. State*, 455 So. 2d 1050, 1052 (Fla. Dist. Ct. App. 1984) (“[W]ithout any showing that a prosecutor’s violation of the Code of Professional Responsibility will or has prejudiced him, a defendant has no right to enforce the Code and is not intended to be an incidental beneficiary of any violation of its provisions.” (citing *State v. Murray*, 443 So. 2d 955 (Fla. 1984))); *State v. Decker*, 641 A.2d 226, 230 (N.H. 1994) (“We need not determine whether an ethical violation occurred, because we hold that suppression of a confession is not warranted absent a violation of the defendant’s constitutional or statutory rights.”); *State v. Bryant*, 581 S.E.2d 157, 160 n.2 (S.C. 2003) (“[P]rosecutorial misconduct resulting from the failure to disclose information to the defense as required by the Constitution is not ‘necessarily synonymous’ with misconduct as defined in the RPC because the focus of the analysis is different, i.e., the fairness of the procedure against the defendant v. the attorney’s alleged misconduct.” (citing *Gibson v. State*, 514 S.E.2d 320 (S.C. 1999))); *Harlow v. State*, 70 P.3d 179, 192 (Wyo. 2003) (“In light of the language of paragraph six [the equivalent of Paragraph 20], we hold that a violation of the Rules of Professional Conduct on the part of the prosecutor does not render Harlow’s statement to the investigators involuntary or require its suppression.”).

208. See *Shapiro v. McNeill*, 699 N.E.2d 407, 409 (N.Y. 1998) (“[A]n ethical violation will not, in and of itself, create a duty that gives rise to a cause of action that would otherwise not exist at law[.]” (citing *Drago v. Buonagurio*, 46 N.Y.2d 778, 779–80 (1978))); *Noble v. Sears, Roebuck & Co.*, 109 Cal. Rptr. 269, 271 (Ct. App. 1973) (refusing to recognize a “new tort” for the violation of ethics rules).

209. See *Shapiro*, 699 N.E.2d at 409 (“Liability was premised not on a violation of DR 9–102 but, rather, on the fact that the attorneys had disregarded the assignment and, thus, were liable as any individual would be who knowingly facilitates the misappropriation of the property of another[.]” (citing *Leon v. Martinez*, 84 N.Y.2d 83, 89 (1994))).

210. See *Bodily v. Intermountain Health Care Corp.*, 649 F. Supp. 468, 472 (D. Utah 1986) (“The law governing lawyers consists of principles of substantive and procedural law as well as ethical rules.”).

211. See *OMI Holdings, Inc. v. Howell*, 918 P.2d 1274, 1288 (Kan. 1996) (“Occasionally, attorney conduct which violates an ethics rule may also violate an independent legal duty, and a cause of action may ensue. It is the violation of the independent legal duty, not the ethics rule, that gives rise to a cause of action.”); *In re Infotechnology, Inc.*, 582 A.2d 215, 220 (Del. 1990) (“Thus, it is clear that even though lawyers have substantive legal duties, which may be congruent with the requirements and objectives of the Rules, the latter provide no additional bases for the enforcement of such duties outside of the framework of disciplinary proceedings.”).

This is the “easy” approach to the interaction between the ethics rules and substantive law. In these cases, the ethics rules exist for a unique purpose that are not appropriate to use in collateral disputes.<sup>212</sup> However, the examples also demonstrate the head-scratching aspect of the interaction. The criminal defendant who faced admittedly unethical conduct by both his lawyer and the prosecutor is told the unethical conduct was irrelevant to the validity of his plea deal, and he should take his concerns to the state bar where the result will not impact his plea deal but could result in the lawyer being sanctioned.<sup>213</sup> The remainder of this Article systematically addresses how and when courts have kept the barrier between ethics rules and substantive law and when courts have decided that the ethics rules reflect substantive law and enforce them against a lawyer.

#### A. *Ethics Rules Do Not Create a Separate Cause of Action*

The first issue or area in which ethics rules could implicate substantive rights is to establish the duty that a lawyer owes to a client or a third-party in a legal malpractice or breach of fiduciary claim. This is one area where courts are in consensus.<sup>214</sup> No court has held that ethical rules create a new “professional responsibility tort”—where evidence of the violation of a rule during representation would establish a claim against a lawyer.<sup>215</sup>

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212. See *Infotechnology*, 582 A.2d at 221 (observing a litigant who was not the client may not have standing to sue a lawyer for an ethical violation).

213. See generally *State v. Decker*, 641 A.2d 226, 230 (N.H. 1994) (“Although it is true that the principal purpose of many provisions is the protection of the public, the remedy for a violation has traditionally been internal bar disciplinary actions against the offending attorney.” (quoting *People v. Green*, 274 N.W.2d 448, 454 (Mich. 1979))).

214. See *Stone v. Patis*, No. FSTCV095011515, 2010 WL 2106403, at \*6 (Conn. Super. Ct. Apr. 16, 2010) (“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.” (quoting *Gagne v. Vaccaro*, 766 A.2d 416, 424 (Conn. 2001))).

215. See *Atkinson, Haskins, Nellis, Brittingham, Gladd & Fiasco, P.C. v. Oceanus Ins. Co.*, No. 13–CV–762–JED–PJC, 2016 WL 5746210, at \*2 (N.D. Okla. Sept. 30, 2016) (“[C]laims based on alleged violations of the Oklahoma Rules of Professional Conduct [are] barred as a matter of law.” (quoting *Trinity Mort. Cos. v. Dryer*, 451 Fed. App’x 776, 779 (10th Cir. 2011))); *Bochenski v. M & T Bank*, No. ELH–14–1031, 2015 WL 1040281, at \*26 (D. Md. Mar. 10, 2015) (dismissing a claim for breaching ethical conduct); *Graven v. Sienicki*, No. 1 CA–CV 13–0253, 2014 WL 648208, at \*5 (Ariz. Ct. App. Feb. 18, 2014) (dismissing a count in the complaint alleging plaintiff violated “various [unspecified] Attorney Rules of Ethics” (alteration in original)); *Holton v. State*, No. 8:07-cv-43-T-24EAJ, 2007 WL 951726, at \*1 (N.D. Fla. Mar. 28, 2007) (dismissing for failure to state a claim where the complaint only cites ethical rules and breaches in the complaint); *Pollen v. Comer*, No. 05–1656 (JBS), 2007 WL 1876489, at \*10 (D.N.J. June 28, 2007) (dismissing the case where the plaintiff “attempts to bring a cause of action for violation of the rules themselves”);



There are three primary reasons for rejecting a claim based on the ethics rules. First, the ethics rules were not intended to establish a lawyer's substantive duty to a client and can place vague and sometimes contradictory obligations on a lawyer.<sup>216</sup> Second, the Model Rules acknowledge that they are written with the assumption that in many circumstances a lawyer will use their judgment and professional discretion to determine how to proceed—and imposing liability would undermine the purpose of the Model Rules which is to provide guidance to lawyers in making difficult ethical decisions.<sup>217</sup> Third, a jury cannot be expected to understand or appreciate how ethical obligations interact with other substantive and procedural obligations of a lawyer (in essence, a jury could not properly compartmentalize unethical conduct from legally inappropriate conduct).<sup>218</sup> Therefore, a plaintiff bringing a cause of action against a lawyer must, through expert testimony, establish duty and breach based on duties that exist outside of the ethical rules.<sup>219</sup> As a result, complaints that

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Wong v. Ekberg, 807 A.2d 1266, 1271 (N.H. 2002) (“[W]e reject the plaintiff’s contention that he can establish the defendant’s duty and breach solely through the rules of professional conduct.”); Archuleta v. Hughes, 969 P.2d 409, 414 (Utah 1998) (“[T]he Utah Rules of Professional Conduct are not designed to create a basis for civil liability.”); Baxt v. Liloia, 714 A.2d 271, 275 (N.J. 1998) (“Consonant with the intent of the ABA, no New Jersey case has allowed a cause of action based solely on a violation of the RPCs.” (citing *Sommers v. McKinney*, 670 A.2d 99, 105 (N.J. Sup. Ct. App. Div. 1996); *Ruberton v. Gabage*, 654 A.2d 1002, 1005 (N.J. Sup. Ct. App. Div. 1995), *certif. denied*, 663 A.2d 1358 (N.J. 1995); *Petrillo v. Bachenberg*, 623 A.2d 272, 278 (N.J. Sup. Ct. App. Div. 1993), *aff’d*, 655 A.2d 1354 (N.J. 1995); *Albright v. Burns*, 503 A.2d 386, 390 (N.J. Sup. Ct. App. Div. 1986))); *Zanders v. Jones*, 680 F. Supp. 1236, 1239 (N.D. Ill. 1988) (rejecting an argument that adoption of ethical rules justified a new cause of action for violation of the rules).

216. See *DeFoe v. Am. Family Mut. Ins. Co.*, 526 S.W.3d 236, 243 (Mo. Ct. App. 2017) (noting that the rules provide for a great deal of professional discretion and do not clearly set forward a statement of public policy); *Hooper v. Gill*, 557 A.2d 1349, 1352 (Md. Ct. App. 1989) (citing a general rule of not holding lawyers liable for damages occurring from breaches of ethical duties); *Carlson v. Morton*, 745 P.2d 1133, 1136 (Mont. 1987) (highlighting several cases where courts dismissed plaintiff claims based on ethical standards); *Noble v. Sears, Roebuck & Co.*, 109 Cal. Rptr. 269, 271 (Ct. App. 1973) (observing that there was no liability on behalf of the Sears attorneys for the conduct of the private investigators that were hired by the company).

217. See MODEL RULES OF PROF'L CONDUCT Preamble and Scope ¶ 9 (AM. BAR ASS'N 2017) (“Within the framework of these Rules . . . many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgement guided by the basic principles underlying the Rules.”).

218. See *Carlson*, 745 P.2d at 1137 (“[T]he evidence concerning the alleged improprieties involved in this case, while seemingly straightforward, might very easily confuse and befuddle lay jurors unacquainted with general notions of civil procedure, incorporation, and professional legal responsibility.”).

219. The *Carlson* court does recognize that there could be cases where the duty and the breach are so obvious that no expert testimony is needed. See *id.* (recognizing that cases in which an “attorney’s

merely cite the ethical rules likely will not satisfy the pleading requirement necessary to state a claim against the defendant.<sup>220</sup>

B. *Three Approaches As to Whether Ethics Rules May Be Cited in Legal Negligence (Malpractice) and Breach of Fiduciary Duty Claims*

Beginning with the presumption that the ethical rules do not, standing alone, establish a cause of action, the question is whether the rules play any role in disputes between lawyers and clients (or third parties). The two most common claims brought against a lawyer related to representation are legal malpractice (negligence) and breach of fiduciary duty.<sup>221</sup> The distinction between these two claims is not always clear, but has been described this way: “A breach of fiduciary duty claim considers whether an attorney obtained an improper benefit from representing the client, while a negligence claim focuses on whether the lawyer represented a client with the requisite level of skill.”<sup>222</sup> Although these two causes of action are distinct, both are based on the overarching obligations of a lawyer to her client.<sup>223</sup> Therefore, the discussion below does not emphasize the distinction between these two causes of action but instead focuses on the impact of Paragraph 20 on these claims generally.<sup>224</sup>

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misconduct is so obvious that no reasonable juror could not comprehend the lawyer’s breach of duty” can proceed without expert testimony). For example, where the lawyer misses the statute of limitations or fails to appear at a critical time in the proceedings. *Id.* (citing *George v. Caton*, 600 P.2d 822, 829 (N.M. Ct. App. 1979); *Bowman v. Doherty*, 686 P.2d 112, 120 (Kan. 1984)). These exceptions, however, establish the rule. *Id.* at 1138.

220. *See* *Foreman v. Hausman*, No. CV-91-03966988, 1991 WL 209647, at \*1 (Conn. Super. Ct. Oct. 2, 1991) (“The Rules and Code cannot form a basis to actions for civil liability.”).

221. *See* *Walker v. Morgan*, No. 09-08-00362-CV, 2009 WL 3763779, at \*4 (Tex. App.—Beaumont Nov. 28, 2009, no pet.) (mem. op.) (noting the plaintiff brought negligence and breach of fiduciary duty claims against his lawyer).

222. *Id.* at \*4 (citing *Duerr v. Brown*, 262 S.W.3d 63, 71 (Tex. App.—Houston [14th Dist.] 2008, no pet.)).

223. *See* *Stone v. Patis*, No. FSTCV095011515, 2010 WL 2106403, at \*5 (Conn. Super. Ct. Apr. 16, 2010) (“[N]ot every instance of professional negligence results in a breach of [a] fiduciary duty . . . . Professional negligence implicates a duty of care, while breach of a fiduciary duty implicates a duty of loyalty and honesty.” (quoting *Sherwood v. Danbury Hosp.*, 896 A.2d 777, 797 (Conn. 2006))); 2 RONALD E. MALLEEN, *LEGAL MALPRACTICE* § 15:3 (2018 ed.) (“An analytical approach recognizes that an attorney’s duties to a client include two obligations: (1) competent representation and (2) compliance with the fiduciary obligations.”).

224. *See* *Bronzich v. Persels & Assocs., L.L.C.*, No. CV-10-0364-EFS, 2011 WL 2119372, at \*10 (E.D. Wash. May 27, 2011) (noting claims against lawyers for breach of fiduciary duty should not be derived from the Rules of Professional Conduct).

Both legal malpractice claims and breach of fiduciary claims require the plaintiff to demonstrate that the lawyer violated an actionable standard of care or conduct.<sup>225</sup> When it comes to a lawyer's ethical obligations, the issue is whether the rules set out the standard of care, a breach of which can support a claim.<sup>226</sup> Traditionally, a plaintiff must put on evidence from a lawyer who practices in the area to establish how a competent lawyer would proceed under the circumstances.<sup>227</sup> So, for example, if a plaintiff alleges that her divorce lawyer committed malpractice, the plaintiff must bring forward an expert in the area of divorce to testify to the obligations owed by a divorce lawyer to his client and that the defendant lawyer failed to satisfy those duties.<sup>228</sup> If the ethical rules did not exist, the expert would be limited to discussing what a reasonable lawyer would do under the circumstances.<sup>229</sup> However, in a world where ethics rules do exist, courts take different approaches to the proper role of the rules.<sup>230</sup> The argument in favor of this approach is that the rules codify the common law obligations of a lawyer.<sup>231</sup> Courts take three divergent approaches to this

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There is no sound rationale for allowing a plaintiff bringing a breach-of-fiduciary-duty claim to rely on an RPC violation, while prohibiting a plaintiff bringing a legal-malpractice claim from relying on an RPC violation. The duty of loyalty owed to a client and breach thereof can be established without reliance on an RPC.

*Id.* at \*10.

225. *See id.* at \*9 (“[T]hese legal-malpractice elements mirror the elements for a breach-of-fiduciary-duty claim against an attorney.” (citing *Al-Ghezzi v. McCoy*, No. 56702-1-I, 2006 WL 2664460, at \*7 (Wash. Ct. App. Sept. 18, 2006))).

226. *See Pollen v. Comer*, No. CV-05-1656 (JBS), 2007 WL 1876489, at \*10 (D.N.J. June 27, 2007) (explaining an attorney's violation of a rule of professional conduct is evidence of malpractice).

227. *See Jacobson v. Lloyd*, No. 294929, 2011 WL 1376312, at \*4 (Mich. Ct. App. Apr. 12, 2011) (“As a general rule, expert testimony is required in a legal malpractice action in order to establish the applicable standard of conduct, the breach of that standard, and causation.” (citing *Law Offices of Lawrence J. Stockler, P.C. v. Rose*, 436 N.W.2d 70, 87 (Mich. Ct. App. 1989))).

228. *Hizey v. Carpenter*, 830 P.2d 646, 652 (Wash. 1992) (en banc) (“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.” (citing *Hansen v. Wightman*, 538 P.2d 1238, 1447 (Wash. Ct. App. 1975))).

229. *See id.* (explaining malpractice liability is “premised on the conduct of the ‘reasonable’ lawyer” (citing *Hansen*, 538 P.2d at 1447)).

230. *See id.* (discussing the complications that arise when a violation of an ethics rule is used as evidence of breach of a standard of care).

231. *See, e.g., Azzar v. Tolley*, No. 249879, 2004 WL 2451938, at \*6 (Mich. Ct. App. Nov. 2, 2004) (illustrating the Michigan approach, which finds that a violation of a professional rule creates a presumption of malpractice; thus, the rules in a sense are the codified duties of lawyers).

question: (1) the Michigan approach; (2) the Alabama approach; and (3) the Massachusetts (majority) approach.<sup>232</sup>

It is important to note that even in jurisdictions that allow the ethical rules to be admitted as evidence of a breach of a duty owed to the client, the client still must demonstrate the other elements of her claim.<sup>233</sup> The causation and damages elements can be difficult to establish.<sup>234</sup> Thus, while a lawyer can be disciplined for acting unethically even if there is no harm to the client, a client cannot recover unless she can demonstrate that the lawyer's misconduct actually caused her harm.<sup>235</sup>

#### 1. The Michigan Approach: Breach Creates a Rebuttable Presumption of a Violation of Standard of Care/Conduct

The Michigan approach takes the position that the ethics rules set out a lawyer's duties.<sup>236</sup> Therefore, in a malpractice or breach of fiduciary suit, the plaintiff need only present the jury (through an expert witness) with the ethical rules, that they were violated, and that they caused harm to the plaintiff.<sup>237</sup> The burden then moves to the lawyer to show that the ethical rules were not violated or that causation or damages is lacking.<sup>238</sup> Michigan

232. See *infra* Parts IV.B.1, IV.B.2, IV.B.3.

233. See *Pollen v. Comer*, No. CV-05-1656 (JBS), 2007 WL 1876489, at \*10 (D.N.J. June 27, 2007) ("Even if Plaintiff intended to use Comer's alleged violation as evidence of malpractice, Plaintiff would still be faced with the hurdle of proving causation."); see also *Liggett v. Young*, 877 N.E.2d 178, 183 (Ind. 2007) ("[W]hile civil liability in damages may not be predicated on a claimed violation of a specific professional conduct rule relating to fiduciary duties [(here, Rule 1.8(a)'s limitations on engaging in business transactions with a client)], a client nevertheless may seek damages if the attorney's conduct constitutes a breach of fiduciary duty at common law.").

234. See, e.g., *Lovett v. Estate of Lovett*, 593 A.2d 382, 393 (N.J. Super. Ct. Ch. Div. 1991) (dismissing a plaintiff's claim against her attorney for failure to satisfy all the required elements, including causation and damages).

235. See *Delmonte v. State Farm Fire & Cas. Co.*, 975 P.2d 1159, 1174 n.12 (Haw. 1999) ("Even in cases of plain violation of a disciplinary rule, a potential plaintiff mus[t] still negotiate the hurdles of standing, cognizable injury, proximate cause, duty, and breach[.]" (second alteration in original) (quoting GEOFFREY HAZARD & WILLIAM HODES, A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.1:201 (2d ed. 1997 Supp.))).

236. See *Azzar*, 2004 WL 2451938, at \*6.

237. See *Jacobson v. Lloyd*, No. 294929, 2011 WL 1376312, at \*5 (Mich. Ct. App. Apr. 12, 2011) (explaining that a plaintiff must put forward expert opinion regarding the breach of ethical rules).

238. See *id.* at \*5 ("[A]n adverse party . . . must . . . set forth specific facts showing that there is a genuine issue for trial." (quoting MICH. RULES OF PROF'L CONDUCT 2.116(C)(10) (adopted 1993))).

seems to be the only jurisdiction that uses this rebuttable presumption approach.<sup>239</sup>

The underlying justification for this approach is that the rules establish (or codify) a standard of conduct that clients can justifiably rely on lawyers to follow.<sup>240</sup> For example, there are often situations where an action that could be actionable in criminal law also establishes a civil claim in tort.<sup>241</sup> In the same way, the breach of an ethical obligation may constitute both an action before a disciplinary body and a tort action.<sup>242</sup> Under this approach it would be “patently unfair” to set a standard of lawyer conduct that could be enforced through a disciplinary action but inadmissible when a client cites to the same misconduct to recover in tort.<sup>243</sup> Thus, similar to violations of statutes, violations of ethical obligations create rebuttable evidence that a lawyer has violated an obligation to their client.<sup>244</sup>

## 2. The Alabama Approach: Ethics Rules Are Irrelevant to Establishing Lawyer’s Standard of Care/Conduct

The second approach—which is at the opposite end of the continuum from the Michigan approach—holds that the ethics rules should not be used in any way in a malpractice case, not even to be relied upon by experts or

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239. See *Azzar*, 2004 WL 2451938, at \*6 (“Although MRPC 1.0 provides that violations of the Michigan Rules of Professional Conduct do not give rise to a cause of action, this Court has found a rebuttable presumption that violations of the Code of Professional Conduct constitute actionable malpractice.” (citing *Beattie v. Finschild*, 394 N.W.2d 107, 109 (Mich. Ct. App. 1986)); see also *Lipton v. Boesky*, 313 N.W.2d 163, 167 (Mich. Ct. App. 1981) (holding a violation of the Code is “rebuttable evidence of malpractice” (citing *Zeni v. Anderson*, 243 N.W.2d 270, 276 (Mich. 1976))). In the 2007 *Deluca v. Jehle* decision, the Michigan Court of Appeals seemed to be moving away from the “rebuttable presumption” standard in favor of the “evidence of negligence” standard. *Deluca v. Jehle*, No. 266073, 2007 WL 914350, at \*3 (Mich. Ct. App. Mar. 27, 2007). In *Deluca*, the court affirmed where the trial court—although saying it was going to use the rebuttable presumption standard—used a jury instruction consistent with the evidence of the negligence standard. *Id.* In contrast, in *Burnett v. Sharpe*, a Texas Court of Appeals held that the ethical obligations to a client set out in Rule 1.15 (to timely return any unearned fee after termination), established a fiduciary duty that continued to exist after the attorney-client relationship terminated. *Burnett v. Sharp*, 328 S.W.3d 594, 602 (Tex. App.—Houston [14th Dist.] 2010, no pet.). In a separate opinion, Justice Boyce noted the uncertainty created by the recognition of this duty “untethered to a specific cause of action.” *Id.* at 609 (Boyce, J., concurring and dissenting).

240. See *Jacobson*, 2011 WL 1376312, at \*5 (“Violations of MRPC create a rebuttable presumption of actionable malpractice.” (citing *Beattie*, 394 N.W.2d at 109)).

241. See *Lipton*, 313 N.W.2d at 166 (drawing an analogy between the Code providing grounds for a malpractice action and criminal law and tort law).

242. *Id.*

243. *Id.* at 166–67.

244. *Id.* at 167.

admitted into evidence.<sup>245</sup> This approach is based on the proposition that the ethics rules only play a role in disciplinary actions and are irrelevant when addressing legal liability.<sup>246</sup> According to these jurisdictions, the mere introduction of a rule violation would create an improper presumption in the minds of the fact finder that a duty has been breached.<sup>247</sup> In essence, these courts determine that, as a matter of evidence, “[t]he probative value of reference to the Model Rules of Professional Conduct is outweighed by unfair prejudice.”<sup>248</sup>

### 3. Massachusetts Approach: Ethics Rules Provide “Some Evidence” of Standard of Care/Conduct

The third, and majority rule, is the Massachusetts approach, which allows the use of ethical violations as “some evidence” of duty and breach.<sup>249</sup> In

245. *See Ex parte Toler*, 710 So. 2d 415, 416 (Ala. 1998) (illustrating the statutory prohibition on utilizing rules); *see also* *Johnson v. Walker, P.A.*, No. 4:14-cv-04087, 2015 WL 11121363, at \*2 (W.D. Ark. June 10, 2015) (citing *Orsini v. Larry Moyer Trucking, Inc.*, 833 S.W.2d 366, 369 (Ark. 1992)) (“While Plaintiff might not intend to offer evidence of failure to comply with the Model Rules of Professional Conduct as a basis for civil liability, the evidence could create the presumption that a legal duty has been breached. The probative value of references to the Model Rules of Professional Conduct is outweighed by the unfair prejudice.”); *Hizey v. Carpenter*, 830 P.2d 646, 652 (Wash. 1992) (en banc) (stating the model rules “were never intended as a basis for civil liability”); *Webster v. Powell*, 391 S.E.2d 204, 208 (N.C. Ct. App. 1990), *aff’d*, 328 N.C. 88 (1991) (affirming the exclusion of evidence of the defendant’s violations of rules of professional conduct).

246. *See In re Adoption of M.M.H.*, 981 A.2d 261, 273 (Pa. Super. Ct. 2009) (“The Rules of Professional Conduct do not carry the force of substantive law, nor do they broaden an attorney’s duties in civil legal proceedings; instead, they are a basis upon which to sanction a lawyer through the disciplinary process.”).

247. *See id.* (utilizing the Pennsylvania Rules of Professional Conduct to reason that a violation of a professional rule should not be used to “create any presumption that a legal duty has been breached”).

248. *Johnson*, 2015 WL 11121363, at \*2.

249. *Fishman v. Brooks*, 487 N.E.2d 1377, 1381 (Mass. 1986); *see also* *Sealed Party v. Sealed Party*, No. Civ.A.H.-04-2229, 2006 WL 1207732, at \*8 (S.D. Tex. May 4, 2006) (“[A]lthough the Texas Rules are not dispositive, they may be considered evidence and significantly inform the analysis of the scope of fiduciary duties between attorneys and their clients, as well as between attorneys and their former clients.”); *S. Council of Indus. Workers v. Ford*, 400 F. Supp. 2d 1131, 1133 (E.D. Ark. 1997) (predicting the holding of the Arkansas Supreme Court: “[T]hat the violation *can* be introduced as some evidence of the standard of care” (citing *Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.*, 453 S.E.2d 719 (Ga. 1995); *Wilmington Sav. Fund Soc’y v. Dotey*, No. 91C-06-088, 1994 WL 146370 (Del. Super. Ct. Feb. 28, 1994); *Griva v. Davison*, 637 A.2d 830 (D.C. Ct. App. 1994))); *Pressley v. Farley*, 579 So. 2d 160, 161 (Fla. Dist. Ct. App. 1991) (“A violation of the Rules of Professional Conduct does not create a legal duty on the part of the lawyer nor constitute negligence per se, although it may be used as some evidence of negligence.” (citation omitted) (citing *Oberon Invs., N.V. v. Angel, Cohen, & Rogovin*, 492 So. 2d 1113, 114 n.2 (Fla. Dist. Ct. App. 1986), *quashed*

these jurisdictions, ethics rules may not be used to *establish* a duty, but can be used to *supplement* (one court describes it as bolstering) the standard of care.<sup>250</sup> In other words, the plaintiff must first establish a common law duty or standard of care, and then may cite to the rules as additional evidence of the duty.<sup>251</sup> To demonstrate this approach, consider *Lovett v. Estate of Lovett*<sup>252</sup> out of New Jersey. In that case, the plaintiff, a former client, filed a legal malpractice claim against her lawyer alleging that, under New Jersey law, the lawyer improperly acted as both a real estate broker and lawyer in a transaction.<sup>253</sup> The court rejected the idea that the plaintiff could merely cite to the ethical violation in her complaint to establish the standard of care.<sup>254</sup> Instead the client had to demonstrate that a legal duty had been breached.<sup>255</sup> However, “[a]lthough it is true that a violation of ethical standards does not *per se* give rise to tort claims, the standards do establish a minimum level of competency which must be displayed by all attorneys.”<sup>256</sup> Therefore, the ethical breach can be presented as *evidence* that a legal duty has been breached once a standard of care has been established.<sup>257</sup>

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*on other grounds*, 512 So. 2d 192 (Fla. 1987)); *Stender v. Blessum*, 897 N.W.2d 491, 504 (Iowa 2017) (adopting the “some evidence” approach); *Mainor v. Nault*, 101 P.3d 308, 320–31 (Nev. 2004) (adopting the majority rule); *Baxt v. Liloia*, 714 A.2d 271, 276 (N.J. 1998) (“Our courts have recognized that the existence of a duty owed by an attorney may be supported by reference to an attorney’s obligations under the RPCs, and that plaintiffs may present evidence that an attorney has violated the RPCs in cases claiming the attorney has breached his or her duty of care.”); *Smith v. Haynsworth, Marion, McKay & Geurard*, 472 S.E.2d 612, 614 (S.C. 1996) (“We concur with the majority of jurisdictions and hold that, in appropriate cases, the RPC may be relevant and admissible in assessing the legal duty of an attorney in a malpractice action.”).

250. *See In re IH 1, Inc.*, No. 09–10982 (LSS), Adv. Proc. No. 12–50713 (LSS), 2016 WL 6394296, at \*22 (Bankr. D. Del. Sept. 28, 2016) (“Evidence, however, is distinct from the standard of care, which must exist independently of the Rules. Thus, an expert may refer to the Rules to support a claim of negligence, but only to the extent the Rules are ‘expressive of the common law duty otherwise owed’ to the client. Put differently, the Rules may *bolster*, but do not establish, a breach of the standard of care.” (footnotes omitted) (first citing *Wilmington Sav. Fund Soc’y v. Dotey*, 1994 WL 146370, at \*2 (Del. Super. Ct. Feb. 28, 1994); then citing *Flaig v. Ferrara*, No. 90C-11-095 WTQ, 1996 WL 944860, at \*3 (Del. Super. Ct. Apr. 15, 1996); then quoting *id.*; and then citing *Gatz Props. L.L.C. v. Preston*, 2014 WL 1725822 (Del. Super. Ct. Apr. 15, 2014))).

251. *See id.* (requiring a common law duty to supplement the attorney’s violation of the Rules to find the attorney breached the standard of care).

252. *Lovett v. Estate of Lovett*, 593 A.2d 382 (N.J. Super. Ct. Ch. Div. 1991).

253. *Id.* at 385–86.

254. *See id.* at 388 (finding the plaintiff’s allegations and evidence is insufficient to establish legal malpractice).

255. *Id.* at 386.

256. *Id.* at 391.

257. *Id.* In *Lovett*, even though the ethical breach was clear and evidence of the ethical obligation could be presented to support the standard of care owed to the plaintiff, the court upheld dismissal of

In adopting the “some evidence” standard, the Supreme Court of Georgia noted that the stated purpose of the rules is to ensure that lawyers act in such a way as to maintain the integrity of the judicial branch by providing guidance as to how lawyers should act.<sup>258</sup> Then, citing to the standard for admitting evidence—that it “relate to the questions being tried by the jury”<sup>259</sup>—the court held: “Given the potential consequences of their violation and the fundamental nature of their purpose, it would not be logical or reasonable to say that the Bar Rules, in general, do not play a role in shaping the ‘care and skill’ ordinarily exercised by attorneys practicing law in Georgia.”<sup>260</sup> Of course, given the fact that admission of the ethics rules is ultimately a question of evidence, a court could determine that citation to a particular rule is outweighed by unfair prejudice to the other side even if evidence of the rule would otherwise be admissible.<sup>261</sup>

The key in jurisdictions that allow the rules to be used as *some evidence* is that the rule must be used as some evidence of a violation of another substantive duty found at common law: “[B]efore a violation of our rules of professional conduct can be used—even as some evidence of negligence—there must be an underlying actionable claim against the attorney arising out of how the attorney mishandled a legal matter.”<sup>262</sup> To the extent that the ethical rules overlap with common law obligations, the rules can be referenced as supplemental evidence of a breach of that duty by an expert.<sup>263</sup>

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the case because the plaintiff could not demonstrate that the violation of the legal duty caused her damages. *Id.* at 393.

258. *See* *Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.*, 453 S.E.2d 719, 721 (Ga. 1995) (leveraging the language in the preamble of the Code).

259. *Id.* (quoting OCGA § 24-2-1 (repealed 2011)) (citing *MacNerland v. Johnson*, 224 S.E.2d 431 (Ga. Ct. App. 1976)).

260. *Id.*; *see also* *Mainor v. Nault*, 101 P.3d 308, 321 (Nev. 2004) (“Supreme Court Rules reflect a professional consensus of the standards of care below which an attorney’s conduct should not fall, it would be illogical to exclude evidence of the professional rules in establishing the standard of care.”).

261. *Greenwald v. Eisinger, Brown, Lewis & Frankel, P.A.*, 118 So.3d 867, 871 (Fla. Dist. Ct. App. 2013).

262. *Stender v. Blessum*, 897 N.W.2d 491, 504 (Iowa 2017).

263. *See In re Mullen*, No. 03–11963–MWV, Adv. No. 05–1113–MWV, 2007 WL 2712957, at \*8 (Bankr. D.N.H. Sept. 14, 2007), *aff’d*, No. 07–cv–372–PB, 2008 WL 3200734 (D.N.H. Aug. 6, 2008) (mem. op.) (noting that the ethical rules “provide an ‘instructive backdrop’” to determine if an attorney violated a fiduciary duty to his client (quoting *Kalled v. Albee*, 712 A.2d 616, 617 (N.H. 1998))); *Meyers v. Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, 87 A.3d 534, 545 (Conn. 2014) (allowing citations to ethical rules where consistent with the underlying duty owed in a malpractice claim); *Wilmington Sav. Fund Soc’y v. Dotey*, No. 91C-06-088, 1994 WL 146370, at \*2 (Del. Super. Ct. Feb. 28, 1994) (finding that refusing to allow a party to cite to the ethical rules in this



Courts have not been consistent when applying the “some evidence” standard. For example, Hawaii has adopted what might be best called a modified version of the standard (although it could also be described as fairly close to the Michigan approach).<sup>264</sup> As noted above, in a “some evidence” jurisdiction, courts hold that the plaintiff must demonstrate that a common law duty exists before a plaintiff can reference an ethical rule that corresponds with that common law duty. The Hawaii Supreme Court, however, held that the ethical rules themselves are “at least relevant to a determination of the duty owed by an attorney to his or her client.”<sup>265</sup> Under this modified standard a plaintiff can use the standards set out in the ethical rules *to establish the duty owed* by the lawyer to the client.<sup>266</sup> This approach runs counter to the Paragraph 20 limitation, which indicates that the court should not use ethics rules to establish the standard of care, but should look to the rules only after the plaintiff has established that the standard of care exists outside the rules.<sup>267</sup> It may be that Hawaii, and states using this modified approach, are attempting to adopt the Massachusetts

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context would “subvert the purpose of the Rules”). The following is a jury instruction demonstrating the interaction between substantive law and the ethics rules: “[a] violation of a rule of professional conduct does not establish an act of legal malpractice. It is merely evidence that you may consider in your determination of whether the defendants committed legal malpractice.” *Mainor*, 101 P.3d at 321 (alteration in original).

264. See, e.g., *Delmonte v. State Farm Fire & Cas. Co.*, 975 P.2d 1159, 1174 n.12 (Haw. 1999) (“This implicates the relationship between violation of an ethical rule and potential tort liability. Violation of the HRPC does not, *per se*, equate to liability in tort.”).

265. *Miyashiro v. Roehrig, Roehrig, Wilson & Hara*, 228 P.3d 341, 360 (Haw. Ct. App. 2010) (quoting *Delmonte*, 975 P.2d at 1174 n.12).

266. See *Delmonte*, 975 P.2d at 1174 n.12 (“Given the potential consequences of their violation and the fundamental nature of their purpose, it would not be logical or reasonable to say that the Bar Rules, in general, do not play a role in shaping the ‘care and skill’ ordinarily exercised by attorneys practicing law[.]” (alteration in original) (quoting *Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.*, 453 S.E.2d 719, 721 (Ga. 1995))); see also *Fed. Deposit Ins. Corp. v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, No. 8:11-CV-2831-T-33MAP, 2013 WL 4402968, at \*10 (M.D. Fla. Aug. 15, 2013) (applying Florida law and finding ethics expert’s “testimony regarding the Florida Rules of Professional Conduct and ethical considerations was sufficient to establish the standard of care applicable to Defendants” (citing Transcript of Trial Proceedings held on May 16, 2013 at 215–230, *Fed. Deposit Ins. Corp. v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 2013 WL 4402968 (No. 8:11-CV-2831-T-33MAP); Transcript of Trial Proceedings held on May 17, 2013 at 14–121, *Fed. Deposit Ins. Corp. v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 2013 WL 4402968 (No. 8:11-CV-2831-T-33MAP))); *Moye White L.L.P. v. Beren*, 320 P.3d 373, 379–80 (Colo. App. 2013) (asserting rules relating to the obligation to communicate truthfully—Rules 1.4 and 7.1—can be used as evidence of the standard of care).

267. See MODEL RULES OF PROF'L CONDUCT Preamble and Scope ¶ 20 (AM. BAR ASS'N 2017) (instructing a violation of a Rule should not give rise to a cause of action).

approach, and the issue is simply one of semantics. If that is the case, it contributes to the already confused state of the law, and it would be better practice to more precisely define which of the three established categories the jurisdiction follows.

### C. *Use of Ethical Rules As a Defense to a Claim*

The sections above discussed the use of ethics rules offensively—to establish a lawyer's standard of care or conduct. This section analyzes reliance on ethical rules in a defensive manner. This situation arises most often when a party is challenging enforcement of an unethical contract or transaction.<sup>268</sup> Unsurprisingly, courts are not consistent in how they use ethics rules in these contexts.<sup>269</sup> Some courts will simply cite to the doctrine that ethics rules should not be used to establish substantive obligations and refuse to invalidate the challenged transaction—often citing the proposition that the rules should not be used as procedural weapons<sup>270</sup> and that they are not intended to create substantive rights.<sup>271</sup> Some courts have taken

268. *See, e.g.*, *Eakin v. United Tech. Corp.*, 998 F. Supp. 1422, 1428 (S.D. Fla. 1998) (seeking to use an ethical rule to void a contract).

269. *See Garcia v. Garza*, 311 S.W.3d 28, 43–44 (Tex. App.—San Antonio 2010, pet. denied) (recognizing, in certain situations, Texas courts have refused to enforce agreements that violate ethical rules, but refusing to invalidate a deed obtained in violation of ethics rules in this instance).

270. *See Trinity Mortg. Cos. v. Dreyer*, No. 09–CV–551–TCK–FHM, 2011 WL 61680, at \*4–5 (N.D. Okla. Jan. 7, 2011), *aff'd*, 451 Fed. Appx. 776 (10th Cir. 2011) (following precedent and barring, as a matter of law, a breach of contract claim based solely on the fact that it violated the ethical rules); *Eakin*, 998 F. Supp. at 1429 (“[T]he Court finds that Eakin has no basis for invoking the Rules [r]egulating the Florida Bar as a means to void an otherwise valid contract.”); *Poole v. Prince*, 61 So. 3d 258, 282 (Ala. 2010) (“We conclude that the trial court erred to the extent that it determined the parties’ agreement to be unenforceable as violative of Rule 1.5(e). . . . [T]he sole remedy for a violation of Rule 1.5(e) is disciplinary in nature; therefore, the trial court lacked the authority to declare the parties’ agreement unenforceable as violative of Rule 1.5(e).”); *Tilzer v. Davis*, 204 P.3d 617, 627 (Kan. 2009) (“[T]he rule governing aggregate settlements] is a rule of professional conduct defining an unethical conflict of interest for an attorney representing two or more clients . . . .”); *Gray v. Noteboom*, 159 S.W.3d 750, 752–53 (Tex. App.—Fort Worth 2005, pet. denied) (refusing to invalidate an agreement, reasoning that although the agreement unethically restricts the right of the lawyer to practice, “under the circumstances of this case, [it] is not contrary to public policy and should not be used as a procedural weapon”).

271. *Loeffler Thomas P.C. v. Fishman*, No. CV 15-5194, 2016 WL 1457895, at \*9 (E.D. Pa. Apr. 12, 2016) (“Defendants’ argument fails as a matter of law because compliance with the Pennsylvania Rules of Professional Conduct merely gives rise to disciplinary action against an attorney. It does not create separate claims or defenses to claims.”); *MH Inv’rs, L.L.C. v. CT Fin. Partners, L.L.C.*, No. KNLCV166028059S, 2017 WL 3881018, at \*5 (Conn. Super. Ct. July 20, 2017) (“[T]his court agrees . . . that such violations alone would not sufficiently serve as the basis for invalidating the agreement based on public policy.” (citing *Billar Assocs. v. Peterken*, 849 A.2d 847 (Conn. 2004);

the opposite approach and hold that the rules establish the substantive law of the state and invalidated the contract or transaction.<sup>272</sup>

It is a legitimate question whether Paragraph 20 should apply to the defensive use of ethics rules. After all, Paragraph 20 states that the Model Rules should not “give rise [itself] to a cause of action” or “create any presumption” in those cases that a duty has been breached.<sup>273</sup> Does this same prohibition apply when ethics rules are being used defensively to limit liability? Most courts assume Paragraph 20 applies to defensive actions.<sup>274</sup> One court, however, has held Paragraph 20 addresses only the establishment of liability and not defensive use of ethics rules, and therefore, a party is not prohibited from using such rules defensively.<sup>275</sup>

Courts do not systematically evaluate the defensive use of ethics rules.<sup>276</sup> Rarely do courts analyze the transactions under traditional contract

Ankerman v. Mancuso, 830 A.2d 388 (Conn. App. Ct. 2003); Noble v. Marshall, 579 A.2d 594 (Conn. App. Ct. 1990)).

272. See *In re Worldpoint Interactive, Inc.*, Nos. HI-04-1172-MoRB, HI-04-1181-MoRB, Bk. No. 02-00867, Adv. No. 03-90015, 2005 WL 6960239, slip op. at \*11 n.23 (B.A.P. 9th Cir. June 28, 2005) (mem. op.) (voiding lawyer’s interest in bankruptcy context: “we believe that when an attorney fails to comply with the requisites of Rule 1.8, the attorney’s self-interested and unethical transaction should be voidable”); *Sands v. Menard*, 887 N.W.2d 94, 106 (Wis. Ct. App. 2016), *aff’d*, 904 N.W.2d 789 (Wis. 2017) (holding a violation of Rule 1.8(a) created unclean hands on the part of the lawyer and defeated equitable claims against client). *But see Weaver v. Sch. Bd. of Leon Cty.*, 624 So. 2d 761, 765 (Fla. Dist. Ct. App. 1993) (“On the record before us we are unable to conclude that an abuse of discretion has been shown with respect to the Commission’s failure to compensate Weaver for any delay in receipt of attorney’s fees.”); *Harvard Farms, Inc. v. Nat’l Cas. Co.*, 617 So. 2d 400, 401 (Fla. Dist. Ct. App. 1993) (refusing to invalidate an oral fee agreement).

273. MODEL RULES OF PROF’L CONDUCT Preamble and Scope ¶ 20 (AM. BAR ASS’N 2017).

274. See, e.g., *Cunningham v. Selman*, 689 S.E.2d 517, 529 (N.C. Ct. App. 2009) (finding the defensive use of the Model Rules is permissible).

275. See *Law Offices of Peter H. Priest, P.L.L.C. v. Coch*, No. 12 CVS 3532, 2014 WL 5780815, at \*5 (N.C. Super. Ct. Nov. 5, 2014), *aff’d*, 780 S.E.2d 163 (N.C. Ct. App. 2015) (“The issue is whether the client can use the Rules defensively even though the client may not seek to impose civil liability based on a violation of the Rules.”).

276. Several cases hold that Rule 5.6(b) violations are not per se invalid. See *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*, 138 P.3d 723, 732 (Ariz. 2006) (Bales, J., concurring in part and dissenting in part) (holding agreements that violate Rule 5.6(b) will not be enforced, but citing to *Valley Medical Specialists v. Farber*, which analyzes restrictions on physician practice pursuant to Restatement section 188 (citing *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1282 (Ariz. 1999))); *Lee v. Fla. Dep’t of Ins. & Treasurer*, 586 So. 2d 1185, 1188–89 (Fla. Dist. Ct. App. 1991) (“Until [the restriction on representation] of the settlement agreement has been voided, canceled, or nullified by a court of competent jurisdiction, it must be treated as valid and binding on all parties legally affected by its terms.”); *Feldman v. Minars*, 658 N.Y.S.2d 614, 617 (App. Div. 1997) (“At the least failure to enforce a freely entered into agreement would appear unseemly . . . . Even if it is against the public policy of this State, the ‘violation’ can be addressed by the appropriate disciplinary

principles to determine whether they are unenforceable as a matter of substantive law.<sup>277</sup> Instead, courts that are willing to view ethics rules as enforceable standards hold that they pronounce the public policy of the state.<sup>278</sup> Courts that merely adopt the ethical standards as enforceable obligations, without doing the appropriate analysis, leave future courts without clear guidance and create the disparity in holdings that we see today, undermining the very purpose of the Model Rules, which is to provide consistent guidance to lawyers on how to act in their practice.<sup>279</sup>

A line of Florida cases demonstrates this problem. In *Chandris, S.A. v. Yanakakis*,<sup>280</sup> the Florida Supreme Court held that the prohibition on oral contingency fee agreements stated the public policy of the state and these agreements were unenforceable.<sup>281</sup> Because there was no analysis to guide future courts in determining whether *other* rules also stated the public policy of the state,<sup>282</sup> the results in future cases have been inconsistent. The confusion caused a Florida appellate court to seek guidance from the Florida Supreme Court as to whether unethical solicitation of clients would be actionable or whether *Chandris* was limited to the written contingency fee rule.<sup>283</sup>

authorities[.]” (citing *Shebay v. Davis*, 717 S.W.2d 678, 682 (Tex. App.—El Paso 1986, no writ); *Lee*, 586 So. 2d at 1188); *Shebay*, 717 S.W.2d at 682 (“[Even if the provision violates Rule 5.6(b)] its inclusion does not void the settlement agreement. . . . The ethics of the attorneys’ actions, if justifiably questioned, are for a state bar grievance committee to decide and not for this tribunal.” (citing *Borden, Inc. v. Wallace*, 570 S.W.2d 445, 450 (Tex. App.—El Paso 1978, writ dismissed))). In the alternative, a number of cases hold that a violation of Rule 5.6(b) invalidates the agreement. *See* *La. Mun. Police Emps.’ Ret. Sys. v. Black*, No. 9410–VCN, 2016 WL 790898, at \*5 (Del. Ch. Feb. 19, 2016) (asserting that a restriction on practice would be unenforceable—in its entirety); *Cardillo v. Bloomfield 206 Corp.*, 988 A.2d 136, 140 (N.J. Super. Ct. App. Div. 2010) (“Because the . . . Agreement violates RPC 5.6(b), it is not enforceable.”).

277. *See Chandris, S.A. v. Yanakakis*, 668 So. 2d 180, 185 (Fla. 1995) (holding a contingent fee contract must comply with the Code or the Rules of the Florida Bar to be enforceable).

278. *See id.* 185–86 (“[W]e hold that a contingent fee contract entered into by a member of [t]he Florida Bar must comply with the rule governing contingent fees in order to be enforceable. . . . [T]he requirements for contingent fee contracts are necessary to protect the public interest.”).

279. *See id.* at 188 (Anstead, J., dissenting) (explaining that the purpose of the Rules of Professional Conduct is to provide a framework for the practice of law).

280. *Chandris, S.A. v. Yanakakis*, 668 So. 2d 180 (Fla. 1995).

281. *See id.* at 185–86 (majority opinion) (holding a contingent fee contract “must comply with the rule governing contingent fees in order to be enforceable” because the requirements “are necessary to protect the public interest”).

282. *See generally id.* (remaining silent on whether other rules articulated the public policy of the state).

283. *See, e.g., Smith v. Bateman Graham, P.A.*, 680 So. 2d 497, 499 (Fla. Dist. Ct. App. 1996) (certifying the Florida Supreme Court the question of whether, under the *Chandris* rule, private parties have standing to seek injunctions based on alleged violations of Florida ethics rules).

The *Chandris* case demonstrates the problem with adopting, without discussion, the ethical standard as a statement of public policy.<sup>284</sup> A rule that a contract or action that violates an ethical rule violates public policy creates a bright line rule that courts would apply regardless of the equities.<sup>285</sup> Under traditional contract law analysis, when contracts are held to violate public policy, courts do not look behind the contract to see if it would be unfair *not* to enforce it.<sup>286</sup> If a contract violates public policy it is void *ab initio*.<sup>287</sup> Such a proposition is problematic in the context of the ethical rules for two reasons. First, invalidating certain contracts could be used by a lawyer to advance their own personal interests, contrary to the purpose of the rules, which is not to protect the interests of the lawyer.<sup>288</sup>

Second, and more significant, unethical agreements may have been fairly negotiated and, as a matter of substantive contract law, are not problematic.<sup>289</sup> This situation can arise because the ethics rules serve a different purpose than substantive doctrines.<sup>290</sup> Take for example Rule 5.6(b), which makes it unethical for a lawyer to enter into a settlement

284. See *id.* (discussing the confusion caused by *Chandris* and interpreting its reach).

285. See *Rich v. Simoni*, 772 S.E.2d 327, 335 (W. Va. 2015) (invalidating a fee sharing agreement between a lawyer and a non-lawyer, and denying a non-lawyer quantum meruit recovery). *But see* *Freeman v. Mayer*, 95 F.3d 569, 575 (7th Cir. 1996) (interpreting Indiana law and refusing to invalidate an unethical fee sharing agreement between lawyers, noting Indiana law makes a “distinction between contracts that may be illegal . . . and those that must be declared void and unenforceable”); *Polland & Cook v. Lehmann*, 832 S.W.2d 729, 736 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (explaining that while “a court may use the disciplinary rules to determine whether a contract is contrary to public policy[.]” in other situations Texas courts had invalidated unethical referral fee agreements; yet in this case, the contract is enforceable (citing *Lemond v. Jamail*, 763 S.W.2d 910, 914 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Kuhn, Collins & Rash v. Reynolds*, 614 S.W.2d 854 (Tex. App.—Texarkana 1981, writ ref’d n.r.e.); *Fleming v. Campbell*, 537 S.W.2d 118, 119 (Tex. App.—Houston [14th Dist.] 1976, writ ref’d n.r.e.))).

286. See *Rich*, 772 S.E.2d at 335 (finding a fee-sharing agreement that violates public policy “void . . . and wholly unenforceable”). *But see* *Mark Jay Kaufman, P.A. v. Howell, Milton & Liles, P.A.*, 127 B.R. 898, 902 (Bankr. N.D. Fla. 1991) (discussing the bankruptcy court’s equitable powers to evaluate the nature of the underlying unethical agreement and enforce it if it brings more money into the bankruptcy estate unless the agreement is “clearly a violation of public policy or is clearly illegal”).

287. See *Kaufman*, 127 B.R. at 900 (stating the general rule that for a contract to be valid and enforceable it must not violate public policy or be illegal).

288. See *Rich*, 772 S.E.2d at 335 (deciding a lawyer is not required to share fees with a non-lawyer despite their agreement because it was unethical and violated public policy).

289. See *id.* (rendering a bargained for agreement between a lawyer and non-lawyer to share fees unenforceable because it violates Rule 5.4 of the West Virginia Rules of Professional Conduct).

290. See MODEL RULES OF PROF’L CONDUCT Preamble and Scope ¶ 20 (AM. BAR ASS’N 2017) (outlining the purpose of the Model Rules).

agreement that “[restricts] the lawyer’s right to practice.”<sup>291</sup> The justification for this rule is that such agreements limit the professional autonomy of a lawyer in her practice and limits the ability of future clients to be represented by the lawyer of their choice.<sup>292</sup> From the standpoint of determining the validity of the contract, there is nothing in the common law that would impose these *per se* limits on these settlement agreements.<sup>293</sup> Therefore, when seeking to enforce the limitation, courts are faced with the option of either invalidating an otherwise valid provision by relying on the ethical rule or evaluating it under traditional contract principles and enforcing the unethical agreement unless there is an independent common law ground for invalidating the provision.<sup>294</sup>

Just as ethics rules may simply state the standard of care or conduct in a legal malpractice or breach of fiduciary duty claim, they can also be coexistent with a common law defense to a contract or transaction.<sup>295</sup> Nevertheless, courts should be especially careful to do a two-step analysis in these situations. First, the court should determine whether, as a matter of common law, the transaction is suspect.<sup>296</sup> Second, if the ethical standard is coextensive with the common law rule, then the rule is relevant in the transaction to supplement the common law defense (the same as the Massachusetts approach in the tort context).<sup>297</sup>

For example, in *Peck v. Meda-Care Ambulance*,<sup>298</sup> a lawyer violated the ethical rule on testifying as a witness.<sup>299</sup> Subsequently, the lawyer sued the client for an unpaid bill.<sup>300</sup> In defense, the client cited to the ethical prohibition on lawyer testimony and argued that the lawyer breached his

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291. *Id.* r. 5.6(b).

292. *Id.* r. 5.6 cmt. 1.

293. *See* Mark Jay Kaufman, P.A. v. Howell, Milton & Liles, P.A., 127 B.R. 898, 900 (Bankr. N.D. Fla. 1991) (“However, when the proposed reformation would result in an invalid or illegal contract, the court will not reform the instrument since equity cannot accomplish an illegal act.” (citing *Hedges v. Dixon Cty.*, 150 U.S. 182, 192 (1983))).

294. *See* Garfinkel, P.A. v. Mager, 57 So. 3d 221, 225 (Fla. Dist. Ct. App. 2010) (considering the public interest implications of enforcing or invalidating a settlement agreement in light of Rule 5.6).

295. *See, e.g.*, *Peck v. Meda-Care Ambulance Corp.*, 457 N.W.2d 538, 543 (Wis. 1990) (analyzing the standard of care as articulated in both the Code and common law).

296. *See, e.g., id.* (looking first to common law for the rationale of the rule and essence of the conduct at issue).

297. *See, e.g., id.* (evaluating the attorney’s actions in light of common law and the Code to determine if liability should be imposed).

298. *Peck v. Meda-Care Ambulance Corp.*, 457 N.W.2d 538 (Wis. Ct. App. 1990).

299. *Id.* at 540.

300. *Id.*

duty to the client and should not recover his fee.<sup>301</sup> The court first determined that the prohibition on lawyers testifying in cases in which they are an advocate goes back to at least 1846.<sup>302</sup> The court noted that the purpose of the prohibition is to ensure that the trial is fair—to prevent confusion created by the lawyer as both the advocate and witness.<sup>303</sup> Therefore, under the common law, the rule was not intended to protect the interests of the client.<sup>304</sup> This meant that, at common law, the client would not have a cause of action against the lawyer for violating the lawyer-witness rule.<sup>305</sup> Therefore,

[s]ince attorney-liability to a client based solely on a lawyer's testimony for the client was unknown at common law, and because Wisconsin's Code of Professional Responsibility is not only bereft of any indication that it was designed to impose such liability, but, as noted, reveals an explicit contrary intent, we may not impose such liability by decisional fiat.<sup>306</sup>

In *Potter v. Peirce*,<sup>307</sup> the Delaware Supreme Court addressed a lawyer attempting to utilize the rules in a defensive manner.<sup>308</sup> A Delaware lawyer entered into a fee sharing agreement with a Pennsylvania lawyer.<sup>309</sup> The agreement, while satisfying the Pennsylvania ethical rules for such an agreement, did not satisfy the Delaware obligations.<sup>310</sup> After the case settled, the Delaware lawyer argued that he could not share the agreed-to share of the fee with the Pennsylvania lawyer because the agreement violated the Delaware ethical rules and was therefore invalid as against public policy.<sup>311</sup> The court held that the agreement was not invalid merely because

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301. *Id.* at 541.

302. *Id.* at 542.

303. *Id.* at 542–43 (citing Arnold N. Enker, *The Rationale of the Rule that Forbids a Lawyer to Be Advocate and Witness in the Same Case*, 1977 AM. B. FOUND. RES. J. 455, 465).

304. *Id.* (citing Enker, *supra* note 303, at 465).

305. *Id.* at 543 (citing Walker v. Bignell, 301 N.W.2d 447, 454 (Wis. 1981); Wells v. Chicago & N.W. Transp. Co., 296 N.W.2d 559, 565 (Wis. 1980); Olson v. Ratzel, 278 N.W.2d 238, 246 (Wis. Ct. App. 1979)).

306. *Id.* (citing Grube v. Moths, 202 N.W.2d 261, 268 (Wis. 1972)).

307. *Potter v. Peirce*, 688 A.2d 894 (Del. 1997).

308. *Id.* at 896.

309. *Id.* at 895–96.

310. *Id.* at 896.

311. *Id.*

it violated the ethical rule.<sup>312</sup> As the court notes, allowing a lawyer to utilize the rules in this way would create the unacceptable incentive for lawyers to violate the ethical rules—knowing that later they can avoid obligations by relying on the rules.<sup>313</sup>

Both *Peck* and *Potter* appropriately utilized the rules and determined that ultimately, the proposed defensive use of the ethical rules was not appropriate in a substantive dispute.<sup>314</sup> To give an example of how a court can err in analyzing these claims, consider *Robert A. Shupack, P.A. v. Marcus*.<sup>315</sup> In *Shupack*, the court held that an unethical fee sharing agreement was unenforceable.<sup>316</sup> In that case, three lawyers entered into a valid and enforceable fee sharing arrangement.<sup>317</sup> Subsequently, one of the lawyers was terminated by the client and a new fee sharing agreement was entered into with the remaining two lawyers.<sup>318</sup> The case then settled and the terminated lawyer filed suit against the settling attorneys seeking his agreed-to amount of fees.<sup>319</sup> The court held that once the new contingency fee agreement was entered into, it violated the requirement for sharing fees between lawyers not in the same firm and was, therefore, invalid.<sup>320</sup> Therefore, the two remaining lawyers were not required to share any of the

312. *Id.* at 897; *see also* Okla. Turnpike Auth. v. Horn, 861 P.2d 304, 308 (Okla. 1993) (“Assuming that the fee agreement violated [the rule regulating fee splitting among lawyers] . . . [a lawyer] is not relieved of its responsibility to reimburse . . . attorney fees.”); Mark Jay Kaufman, P.A. v. Davis & Meadows, P.A., 600 So. 2d 1208, 1211 (Fla. Dist. Ct. App. 1992) (“We have interpreted [the Florida Rules of Professional Conduct Paragraph 20] language to mean that it is error to use an ethical rule as a basis to invalidate or render void a provision in a private contract between two parties.” (citing *Lee v. Fla. Dept. of Ins. & Treasurer*, 586 So. 2d 1185, 1188 (Fla. Dist. Ct. App. 1991))).

313. *Potter*, 688 A.2d at 897 (citing *Freeman v. Mayer*, 95 F.3d 569 (7th Cir. 1996)); *see also* Counsel Fin. Servs., L.L.C. v. Leibowitz, No. 13–12–00103–CV, 2013 WL 3895331, at \*9 (Tex. App.—Corpus Christi July 25, 2013, pet. denied) (mem. op.) (“It appears to this Court that the purpose of the rules can . . . be abused when an attorney enters into a contract with a non-lawyer and then seeks to avoid the contract on grounds it violates the Disciplinary Rules.”).

314. *Potter*, 688 A.2d at 897; *Peck v. Meda-Care Ambulance Corp.*, 457 N.W. 2d 538, 543 (Wis. Ct. App. 1990).

315. *Robert A. Shupack, P.A. v. Marcus*, 606 So. 2d 466 (Fla. Dist. Ct. App. 1992).

316. *Id.* at 467.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* (citing *Dade Cty. v. Goldstein*, 384 So. 2d 183, 189 (Fla. Dist. Ct. App. 1980); *Bell v. Cristol*, 373 So. 2d 42 (Fla. Dist. Ct. App. 1979); *Spence, Payne, Masington & Grossman, P.A. v. Phillip M. Gerson, P.A.*, 483 So. 2d 775 (Fla. Dist. Ct. App. 1986), *rev. denied*, 492 So. 2d 1334 (Fla. 1986)).



fees with the terminated lawyer.<sup>321</sup> Thus, the court, without explanation, incorporated into general contract law a defense that did not exist at common law.<sup>322</sup>

The *Shupack* approach runs counter to the limitations set out in Paragraph 20.<sup>323</sup> It is problematic because it validates (and encourages) lawyers to seek to avoid otherwise valid agreements by citing to ethical rules.<sup>324</sup> Courts should not allow lawyers or other parties to use ethical rules as a mechanism to reduce or avoid an otherwise valid debt. As one court put it: “The fact that the defendant has chosen to address [the] alleged rule violation in this wholly self-serving manner rather than through established channels for reporting attorney misconduct strongly suggests that it is invoking the rules for . . . improper reasons[.]”<sup>325</sup>

The dissent in *Shupack* had the correct approach to analyzing cases of this sort, stating that “this case is . . . properly approached as if it were a simple action for breach of contract.”<sup>326</sup> The dissent correctly noted the consequence of the majority’s holding: “[T]o convert what was meant as a client’s shield against the assertion of a claim for fees without services being rendered, into a sword to permit an unjustifiable breach of an otherwise binding obligation between two persons who happen to be lawyers. This is wrong.”<sup>327</sup> The dissent goes on to note that the irony of ethical rules, which are meant to establish and maintain a professional relationship between

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321. *Id.* (citing *Goldstein*, 384 So. 2d at 189; *Bell*, 373 So. 2d at 42; *Spence, Payne, Masington & Grossman, P.A.*, 483 So. 2d at 775).

322. *See id.* at 468 (“A broader principle of equity, applied in fee-splitting cases, would preclude the result reached by the majority.”); *see also* *Lemond v. Jamail*, 763 S.W.2d 910, 914 (Tex. App.—Houston [1st Dist.] 1989, writ. denied) (citing *Baron v. Mullinax, Wells, Mauzy & Baab, Inc.*, 623 S.W.2d 457, 462 (Tex. App.—Texarkana 1981, writ. ref’d n.r.e.)) (declaring an agreement brought by a lawyer against another lawyer to recover a referral fee when the client did not consent as required by the ethics rules, was held unenforceable).

323. *Compare Shupack*, 606 So. 2d at 467 (allowing the introduction of unethical conduct to be a defense for substantive disputes between lawyers), *with* MODEL CODE OF PROF’L CONDUCT Preamble and Scope ¶ 20 (AM. BAR ASS’N 2017) (defining the scope of the rules of professional conduct).

324. *See, e.g.*, *Potter v. Peirce*, 688 A.2d 894, 897 (Del. 1997) (“As a matter of public policy, this Court will not allow a Delaware lawyer to be rewarded for violating Delaware Lawyers’ Rule[s] of Conduct . . . by using it to avoid a contractual obligation. To hold otherwise would encourage non-compliance with the Rule[s] and create incentives for malfeasance . . .”).

325. *Odell v. Wallingford Mut. Fed. Credit Union*, No. CV106012228S, 2013 WL 4734783, at \*22 (Conn. Super. Ct. Aug. 8, 2013).

326. *Shupack*, 606 So. 2d at 469 (Schwartz, C.J., dissenting).

327. *Id.*

lawyers, is being utilized to “lower the responsibilities of attorneys toward each other below even the ‘morals of the marketplace.’”<sup>328</sup>

A systematic approach to analyzing defensive use of the ethics rules is important because litigants can be endlessly creative when it comes to using ethical rules. In *Noris v. Silver*,<sup>329</sup> two lawyers entered into an oral fee sharing agreement in a personal injury case.<sup>330</sup> One of the lawyers committed malpractice in handling the claim.<sup>331</sup> The other lawyer argued that he could not be held jointly liable in the malpractice action because the fee sharing agreement was unethical.<sup>332</sup> The court held that the ethical rule could not be used as a shield to avoid malpractice liability.<sup>333</sup> The court noted that adopting such a rule would encourage lawyers to intentionally disregard their obligations under the ethical rules to avoid potential liability.<sup>334</sup> In *Dur-A-Flex, Inc. v. Laticrete International*,<sup>335</sup> the court awarded attorney’s fees to the plaintiff and opposing counsel argued that the unwritten contingency fee agreement was unethical and therefore unenforceable.<sup>336</sup> The court rejected the claim, noting that the defendant did not have standing to challenge the fee agreement and that the ethical rules “[do] not afford Defendant the opportunity to use [the absence of a written fee agreement] as a sword to reduce a reasonable attorneys fee award.”<sup>337</sup>

Not only do lawyers seek to use ethical rules defensively, but so do clients. So in cases where a lawyer sues to recover a fee, clients cite to the ethical rules to invalidate contracts entered into with a lawyer—including fee agreements, business transactions with their lawyer,<sup>338</sup> and agreements

328. *Id.* at 470 (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928)).

329. *Noris v. Silver*, 701 So. 2d 1238 (Fla. Dist. Ct. App. 1997).

330. *Id.* at 1239. The *Noris* court noted that had there been recovery on the claim the lawyer would have been prohibited from recovering under the oral contingency fee agreement. *Id.* at 1240 (citing *Chandris v. Yanakakis*, 668 So. 2d 180, 185 (Fla. 1995)). Although, the author is unsure whether the *Noris* court conducted a correct reading of *Chandris*, in which the Florida Supreme Court held oral contingency fee agreements were unenforceable. *Chandris*, 668 So. 2d at 181.

331. *Noris*, 701 So. 2d at 1239–40.

332. *See id.* at 1240 (explaining the attorney’s argument that because “there was no written agreement with the client as required by [the Florida Rules of Professional Conduct] he cannot be held liable for any malpractice committed by [the other attorney]”).

333. *Id.*

334. *Id.*

335. *Dur-A-Flex, Inc. v. Laticrete Int’l, Inc.*, No. CV065014930S, 2010 WL 2574146 (Conn. Super. Ct. May 27, 2010).

336. *Id.* at \*6.

337. *Id.*

338. *See, e.g., Buffalo v. Blackmon*, No. CA 93-155, 1994 WL 14583, at \*3 (Ark. Ct. App. Jan. 12, 1994) (quoting *Orsini v. Larry Moyer Trucking, Inc.*, 833 S.W.2d 366, 392 (Ark. 1992))

allowing a lawyer to take an interest in the underlying litigation.<sup>339</sup> Often these agreements are clearly unethical.<sup>340</sup> These situations are a closer question than the situation addressed above where lawyers or third-parties are seeking to use the rules to avoid an otherwise valid debt.<sup>341</sup> Some courts have refused to invalidate such agreements, citing to the Paragraph 20 language.<sup>342</sup> Others have invalidated these agreements—holding that the requirements represent the substantive public policy of the state.<sup>343</sup>

In conclusion, when it comes to the defensive use of ethics rules, courts should analyze the contract or transaction under traditional contract principles and should only invalidate the agreement if the transaction would be invalid at common law. When courts fail to systematically approach these disputes, they not only disregard the limitation set out in Paragraph 20, but they also create confusion in the case law concerning the role of ethics rules in future cases.<sup>344</sup> If a court desires to incorporate a particular ethical obligation into the pantheon of traditional defenses, it should do so

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(rejecting the client's 1.8(a) offense and holding that "[a]n attorney does not lack the capacity to deal with his client; and although such transactions are carefully scrutinized, they will be upheld if fair and just" (citing *Blake v. Denman*, 236 S.W.2d 433, 434 (Ark. 1951))).

339. *Ankerman v. Mancuso*, 830 A.2d 388, 393 (Conn. App. Ct. 2003) (quoting *Statewide Grievance Comm. v. Botwick*, 627 A.2d 901, 906 (Conn. 1993)).

340. *See id.* at 390 (emphasizing the cloud of suspicion when an attorney records a promissory note creating a mortgage on the client's property the same day the client has terminated their professional dealings).

341. *Id.* at 391.

342. *See Estate of St. Martin v. Hixson*, 145 So. 3d 1124, 1133 (Miss. 2014) ("[A] violation of Rule 1.8(e), standing alone, is not a basis for voiding a contingency-fee agreement."); *Ankerman*, 830 A.2d at 393 ("Although we do not condone violations of the ethical rules governing attorneys . . . we hold that the violation of rule 1.8(j) [prohibiting lawyer from taking an interest in the underlying litigation] does not bar enforcement of the note."); *Pierce Couch Hendrickson Baysinger & Green v. Freede*, 936 P.2d 906, 912–13 (Okla. 1997) (announcing that clients cannot rely on lack of a written contingency fee agreement to avoid responsibility for expenses of litigation); *Kalish v. Smith*, 824 S.W.2d 35, 37 (Mo. Ct. App. 1991) (affirming what the trial court found as inappropriate to allow the client to buttress a case's underlying basis with a disciplinary rule).

343. *See Rich v. Simoni*, 772 S.E.2d 327, 335 (W. Va. 2015) (finding an unethical fee-sharing agreement "wholly unenforceable" and that the party is not entitled to quantum meruit recovery); *United States v. 36.06 Acres of Land*, 70 F. Supp. 2d 1272, 1275–76 (D.N.M. 1999) (citing *Fryar v. Johnsen*, 601 P.2d 718 (N.M. 1979); *Citizens Bank v. C & H Constr. & Paving Co.*, 600 P.2d 1212 (N.M. Ct. App. 1979); *In re Greenfield*, 916 P.2d 833 (N.M. 1996)) (interpreting New Mexico law to find an unethical contingency fee unenforceable, but finding the lawyer was entitled to quantum meruit recovery).

344. *See Ankerman*, 830 A.2d at 391 (overturning *Schulman v. Major Help Center* based on apparent confusion on the weight of rules of Professional Conduct in substantive disputes (citing *Schulman v. Major Help Ctr.*, No. CV 970569027S, 1997 WL 809909 (Conn. Super. Ct. Dec. 24, 1997))).

explicitly, adopting the ethical standard as the public policy of the jurisdiction.<sup>345</sup>

#### D. *Use of Ethical Rules in Other Substantive Contexts*

Although the use of ethics rules in establishing a lawyer's duty or standard of care or use of the ethics rules in defensive disputes divides courts, the appropriate use of ethics rules in other substantive contexts has not been as difficult.<sup>346</sup> This section analyzes the interaction of ethical rules with other substantive legal claims.

Courts have been consistent in holding that definitions and standards contained in the ethics rules are not intended to substitute or provide definitions outside the disciplinary context. For example, in *Stewart v. Coffman*,<sup>347</sup> a client brought a legal malpractice suit against several members of a Utah law firm.<sup>348</sup> The law firm was structured under Utah law as a corporation—which would shield the individual members from liability.<sup>349</sup> It was argued that ethical rules defined a *partner* as a member of the law firm, and therefore all members of the firm were in a partnership and therefore jointly liable.<sup>350</sup> The court refused to incorporate the ethical definition of *partner* into the state's business code, noting that the rules are meant to address disciplinary actions and not to displace corporate law.<sup>351</sup> Similarly, a lawyer disciplined for engaging in *fraudulent* conduct under the ethical rules has not necessarily engaged in "fraud" under the Bankruptcy Code.<sup>352</sup> Courts have also not been receptive to client attempts to use the

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345. See *infra* Part V.

346. See *B & O Mfg., Inc. v. Home Depot U.S.A., Inc.*, No. C 70-02864 JSW, 2007 WL 3232276, at \*4 (N.D. Cal. Nov. 1, 2007) ("[A]lleged violation of the professional rules of conduct is insufficient to void the contract at issue based on illegality.").

347. *Stewart v. Coffman*, 748 P.2d 579 (Utah Ct. App. 1988).

348. *Id.* at 580.

349. *Id.* at 581.

350. *Cf. id.* at 581–82 (analyzing an appeal from dismissal of a claim against an attorney that the trial court determined had no personal involvement in the alleged matters).

351. *Id.*; see also *In re Kane*, 470 B.R. 902, 938–39 (Bankr. S.D. Fla. 2012) (citing *In re Siddell*, 191 B.R. 544, 554 (Bankr. N.D.N.Y. 1996); *In re Lorenzo*, 434 B.R. 695, 709 (Bankr. M.D. Fla. 2010); *In re Daprizio*, 365 B.R. 268, 283 (Bankr. S.D. Fla. 2007)) (indicating ethical obligations related to trust funds do not create a property interest in a third-party sufficient to establish an embezzlement claim).

352. See *In re Wyant*, 236 B.R. 684, 695 (Bankr. D. Minn. 1999) ("Because the conduct violated professional and ethical rules does not necessarily mean that the conduct amounted to fraudulent conduct pursuant to the Bankruptcy Code."). But see *In re White*, Nos. KS-00-39, 97-42097, 97-7118, 271 B.R. 213, at \*4 (B.A.P. 10th Cir. 2001) (citing *In re Romero*, 535 F.2d 618, 621–22 (10th Cir. 1976)) (agreeing Rule 1.15 (Kansas Rules of Professional Conduct)—addressing lawyer handling of client

ethical rules to establish violations of state unfair trade practice laws.<sup>353</sup> Finally, in *Allen v. Allison*,<sup>354</sup> the client brought, *inter alia*, a civil conspiracy claim against their lawyer, arguing that the lawyer's in-person solicitation could be used to establish the "unlawful purpose" element of the civil conspiracy claim.<sup>355</sup> The Arkansas Supreme Court rejected the use of the ethics rules in this way, noting that using the rules to establish a necessary element of the claim meant that the client was using the rules to establish civil liability in violation of Paragraph 20.<sup>356</sup>

#### E. *Use of Ethics Rules in Disqualification Disputes*

The role of the ethics rules in questions of lawyer disqualification presents a particularly difficult issue.<sup>357</sup> The ethical rules set out when a lawyer is disqualified from representing a client.<sup>358</sup> They also set out when a lawyer's disqualification is to be imputed to a law firm.<sup>359</sup> It is legitimate to ask: If the disqualification rules are not intended to provide the substantive standard for disqualification, then what is their purpose? Rarely does a disciplinary body sanction a lawyer for failure to disqualify, leaving the decision to the courts.<sup>360</sup> However, Paragraph 20 expressly states that

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funds—did make the lawyer a “technical trustee” as defined under the Bankruptcy Code, and finding the lawyer's debt to a client non-dischargeable).

353. See *Brown v. Loomis*, No. CV 990088096, 2000 WL 1196425, at \*3 (Conn. Super. Ct. July 27, 2000) (stressing violations of ethical rules do not constitute “public policy” under the Connecticut Unfair Trade Practices Act); *Noble v. Marshall*, 579 A.2d 594, 596 (Conn. App. Ct. 1990) (“[T]he Rules of Professional Conduct do not of themselves give rise to a cause of action, even to an attorney's client.”); accord *Birdsall v. Haymond*, No. 33 88 80, 1993 WL 34371, at \*3 (Conn. Super. Ct. Feb. 4, 1993) (quoting *Noble*, 579 A.2d at 596) (citing *Noble*, 579 A.2d at 596) (dismissing a claim of conflict of interest and solicitation allegations under the Connecticut Rules of Professional Responsibility and Unfair Trade Practices Act for failure to state a claim for which relief can be granted).

354. *Allen v. Allison*, 155 S.W.3d 682 (Ark. 2004).

355. *Id.* at 690.

356. *Id.* (citing *Orsini v. Larry Moyer Trucking, Inc.*, 833 S.W.2d 366, 399 (Ark. 1992)).

357. See RICHARD E. FLAMM, *LAWYER DISQUALIFICATIONS: DISQUALIFICATION OF LAWYER'S AND LAW FIRMS* 3–6 (2d ed. 2014) (detailing the common issues that courts find when faced with motions to disqualify counsel).

358. See *id.* at 41 (“A disqualification motion is most likely to be predicated upon an alleged infraction of one of the rules that seek to prevent attorneys from engaging in conflicted representation, but such motions have sometimes been based on punitive violations of other ethical rules.”).

359. See *id.* at 685–92 (“A party often moves to disqualify not just an attorney, but those with whom she is affiliated in the practice of law.”).

360. See, e.g., *Gregori v. Bank of Am.*, 207 Cal. App. 3d 291, 301 n.6 (Ct. App. 1989) (“The increase in the use of motions to disqualify counsel, a remedy rarely heard of until fairly recently, may also reflect the failure of the legal profession to use bar disciplinary proceedings to effectively enforce

ethical rules should not be used outside the disciplinary process in the context of disqualification: “[V]iolation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation.”<sup>361</sup>

The reality is that courts often cite to the ethical standard when evaluating a motion to disqualify.<sup>362</sup> However, when courts consider the Paragraph 20 language, they are more likely to look beyond the rules for the historic common law standard of disqualification and not assume that the ethical standard is the same as the common law standard.<sup>363</sup>

In *In re Estate of Pendrick*,<sup>364</sup> the Pennsylvania Supreme Court addressed this issue.<sup>365</sup> The court held that the ethical rules would only be appropriate where the rules mirror the requirement that disqualification is required to ensure due process and a fair trial:

[W]hile it may be appropriate under certain circumstances for trial courts to enforce the Code of Professional Responsibility by disqualifying counsel or otherwise restraining his participation or conduct in litigation before them in

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the canons of ethics . . .” (footnote omitted) (citing *Kapelus v. State Bar*, 4 Cal. 3d 179, 203 (1987)); cf. Dan Crystal, *Diversion: Addressing Less Serious Lawyer Ethical Misconduct*, 68 N.W. LAW. 18, 18 (2014) (“Most grievances are dismissed following review or investigation by the Office of Disciplinary Counsel (OCD).”).

361. MODEL CODE OF PROF'L CONDUCT Preamble and Scope ¶ 20 (AM. BAR ASS'N 2017).

362. See *Pallon v. Roggio*, Nos. 04–3625(JAP), 06–1068(FLW), 2006 WL 2466854, at \*8 (D.N.J. Aug. 24, 2006) (disqualifying a law firm under Rules 1.6 and 1.9); see also *Lennartson v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 662 N.W.2d 125, 135 (Minn. 2003) (finding a law firm disqualified under the imputation of conflict rule 1.10).

363. See *Schuff v. A.T. Klemens & Son*, 16 P.3d 1002 (Mont. 2000) (“[T]he gravamen of a motion to disqualify is not that an attorney or firm violated one of the conflict of interest rules under our Rules of Professional Conduct . . .” (citation omitted) (citing MODEL CODE OF PROF'L CONDUCT r. 1.7, 1.8, 1.9, 1.10, 1.16 (AM. BAR ASS'N 2017))); *Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1284 (Pa. 1992) (“Long before the Code of Professional Responsibility was adopted . . . the common law recognized that a lawyer could not undertake a representation adverse to a former client in a matter ‘substantially related’ to that in which the lawyer previously had served the client.”); see also *Carlson v. Fredrickson & Byron, P.A.*, 475 N.W.2d 882, 889 (Minn. Ct. App. 1991) (“Evidence sufficient to establish a violation of [the conflict of interest rule] is not necessarily sufficient to establish a cause of action for legal malpractice.”), *overruled on unrelated grounds*, *Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406 (Minn. 1994). But see *Beale v. Edgemark Fin. Corp.*, 697 N.E.2d 820, 827 (Ill. App. Ct. 1998) (“Where what is sought is only to penalize the attorney for such misconduct, the only forum for exacting such punishment is the Illinois Supreme Court and its disciplinary arm, the Attorney Registration and Disciplinary Commission.” (citing *In re Mitran*, 518 N.E.2d 1000 (Ill. 1987); *In re Marriage of Dall*, 569 N.E.2d 1131 (Ill. App. Ct. 1991); *People v. Camden*, 569 N.E.2d 312 (Ill. App. Ct. 1991); *Freeman v. Myers*, 547 N.E.2d 586 (Ill. App. Ct. 1989))).

364. *In re Estate of Pendrick*, 482 A.2d 215 (Pa. 1984).

365. *Id.* at 217.

order to protect the rights of litigants to a fair trial, we are not inclined to extend that enforcement power and allow our trial courts themselves to use the Canons to alter substantive law or to punish attorney misconduct.<sup>366</sup>

In another often cited case, *In re Infotechnology, Inc.*,<sup>367</sup> the Delaware Supreme Court refused to allow a non-client to seek disqualification of the lawyer based on a conflict of interest under the ethical rules.<sup>368</sup> The court held that to allow a party to rely on the ethical rules would infringe on the sole authority of the Delaware Supreme Court in regulating the bar (discipline would be imposed by trial courts and not through the designated disciplinary process).<sup>369</sup> In addition, opponents could turn ethics rules from rules of guidance into procedural weapons.<sup>370</sup> Instead, disqualification is required only where the moving party can: “(1) [demonstrate] the existence of a conflict and (2) demonstrate how the conflict will prejudice the fairness of the proceedings.”<sup>371</sup> Absent a showing that the proceedings would be prejudiced, “there is no independent right of counsel to challenge another lawyer’s alleged breach of the Rules outside of a disciplinary proceeding.”<sup>372</sup>

One last case addressing the substantive use of the disqualification rules is *Bevan v. Fix*,<sup>373</sup> from the Wyoming Supreme Court. The *Bevan* case involved a legal malpractice case brought by a former client against a lawyer alleging the lawyer breached a duty to the former client by engaging in litigation against the former client.<sup>374</sup> The question the court addressed was whether the conflict standard created a common law duty for which a lawyer could be liable to the former client for breaching.<sup>375</sup> The court held that liability for violating the fiduciary obligations owed to former clients predated the adoption of the ethical rules.<sup>376</sup> The court then cites to the Third Restatement approach to disqualification, which is substantially

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366. *Id.* at 221.

367. *In re Infotechnology, Inc.*, 582 A.2d 215 (Del. 1990).

368. *Id.* at 221.

369. *Id.* at 220.

370. *Id.*

371. *Id.* at 221 (citation omitted).

372. *Id.*

373. *Bevan v. Fix*, 42 P.3d 1013 (Wyo. 2002).

374. *Id.* at 1027 (citing *Hiltz v. Robert W. Horn, P.C.*, 910 P.2d 566, 571 (Wyo. 1996)).

375. *Id.*

376. *Id.* at 1028. “[I]t is important to remember that attorneys’ fiduciary obligations substantially pre-date the ethical codes.” *Id.* (quoting RONALD E. MALLEEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 17.3 (5th ed. 2000)).

similar to the standard set out in the ethical rules.<sup>377</sup> The court concluded that the protections provided to former clients in the ethical rules reflect a “codification of the common law.”<sup>378</sup> Because the ethical standards are commensurate with the substantive standards, the court held that a breach of those standards could lead to liability.<sup>379</sup> The court goes on to note that whether a lawyer will ultimately be liable to a former client will depend both on whether the lawyer went adverse to a client in the same or substantially related matter, and *also* on whether the jury determines that confidential information was compromised in that second matter.<sup>380</sup> This creates an element of harm or prejudice that is not required to establish an ethical breach.<sup>381</sup> This follows the position set out in the cases cited above that merely showing a breach of the ethics rules is not sufficient (there is no irrebutable presumption of harm), but the client must establish a conflict and that the breach caused harm to the client.<sup>382</sup>

The *Infotechnology* approach provides, in this author’s opinion, the appropriate approach to evaluating motions to disqualify by courts. Merely citing to a violation of the rules is insufficient; the party moving for disqualification must “offer sufficient proof that the continued representation of one party by the attorney or firm will prejudice or adversely impact the rights of another party in the matter pending before the court.”<sup>383</sup> Once this showing is made, the court is not disqualifying the

377. *Id.* (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 33 (AM. LAW INST. 2000)).

378. *Id.* at 1029; *see also* *Greene v. Frost Brown Todd, L.L.C.*, No. 3:14-CV-00619-TBR, 2016 WL 6877746, at \*5 (W.D. Ky. Nov. 21, 2016) (asserting that the ethics rules provide evidence of standard of care for malpractice claim based on conflict of interest (citing *CenTra, Inc. v. Estrin*, 538 F.3d 402, 413 (6th Cir. 2008))).

379. *See Bevan*, 42 P.3d at 1029–30 (“[W]e think it is obvious that a breach of [Professional Rule] standards by the attorney gives rise to potential civil liability to the former client.”).

380. *Id.* at 1031 (citing *Chrysler Corp. v. Carey*, 5 F. Supp. 2d 1023, 1033–34 (E.D. Mo. 1998), *aff’d*, 186 F.3d 1016 (8th Cir. 1999)). The opinion reads:

The Court does not believe that under Missouri law a breach is presumed or somehow established as a matter of law if the matters are “substantially related” under Rule 1.9. Instead, the evidence of a relationship, or lack thereof, between the cases are facts that the jury may consider in determining whether it should draw an inference that confidential information was used.

*Id.* (quoting *Carey*, 5 F. Supp. 2d at 1033–34).

381. *Id.* at 1030 (citing *Carlson v. Langdon*, 751 P.2d 344, 349 (Wyo. 1988)).

382. *Id.* at 1030–31.

383. *Schuff v. A.T. Klemens & Son*, 16 P.3d 1002, 1011 (Mont. 2000). Similarly, when conflict of interest is asserted as a basis for attorney liability in a negligence or breach of fiduciary duty claim, the client must do more than cite to the ethics rules in her complaint—she must allege that the lawyer



lawyer because of the ethical violation, but because the action harms a party before the court.<sup>384</sup> The authority to disqualify when this standard is shown is based on the courts' inherent authority to regulate lawyers who appear before them.<sup>385</sup> Of course this means it is possible a lawyer can operate under an actual conflict of interest and continue to represent a client in the matter—with discipline left to the disciplinary body.<sup>386</sup> This is the inescapable Paragraph 20 paradox.

Occasionally, someone other than the client seeks disqualification based on conflict of interest.<sup>387</sup> These situations raise the concern that the rules are being used inappropriately for procedural advantage.<sup>388</sup> As one court put it:

To allow an unauthorized surrogate to champion the rights of the former client would allow that surrogate to use the conflict rules for his own purposes where a genuine conflict might not really exist. It would place in the hands of the unauthorized surrogate powerful presumptions which are inappropriate in his hands.<sup>389</sup>

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“breached a common law duty to the plaintiff” that caused her harm. Flaig v. Ferrara, No. 90C-11-095 WTQ, 1996 WL 944860, at \*3 (Del. Super. Ct. Apr. 15, 1996).

384. See *Schuff*, 16 P.3d at 1012 (“Thus, a proven or admitted rule violation is not *prima facie* grounds for disqualification—or any other relief sought from a district court, for that matter.”).

385. See *id.* at 1011 (“A district court’s discretion in this regard flows from its inherent authority to control trial administration in the interest of fairness and justice.” (citing *Anderson v. Werner Enters., Inc.*, 972 P.2d 806, 809 (Mont. 1998); MONT. CODE ANN. § 3–1–111)); see also *Cargould v. Manning*, No. 09-AP-194, 2009 WL 3674669, at \*2 (Ohio Ct. App. Nov. 5, 2009) (“A trial court has inherent authority to regulate the practice before it and to protect the integrity of its proceedings, including the authority and duty to ensure the ethical conduct of attorneys. This power includes the inherent authority to disqualify counsel if he or she cannot, or will not, comply with Ohio’s rules governing ethics and professionalism when representing a client.” (citation omitted) (citing *Mentor Lagoons, Inc. v. Rubin*, 510 N.E.2d 379, 382 (Ohio 1987))).

386. *Schuff*, 16 P.3d at 1012. In *Schuff*, the court refused to disqualify the lawyer because the opponent could not demonstrate the prejudice necessary to justify disqualification. *Id.* at 1015–16. However, in concluding its opinion, the court referred the actions to the disciplinary authority, both the lawyer moving for disqualification and the lawyer subject to the disqualification motion. *Id.* at 1016. The lawyer subject to disqualification was there for representing a client under a conflict of interest and the moving lawyer for failing to report the alleged unethical conflict of interest to the disciplinary body. *Id.* at 1015.

387. See, e.g., *id.* at 1013 (providing an example of a former client raising a conflict of interest).

388. See *Winchester v. Educ. Mgmt. Corp.*, No. 5:10–CV–00012–TBR, 2010 WL 2521465, at \*1 (W.D. Ky. June 18, 2010) (cautioning about the use of the rules as “procedural weapons” (quoting KY. RULES OF THE SUPREME COURT Preamble ¶ XXI (2009))).

389. *Id.* at \*2 (citing *In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83, 90 (5th Cir. 1976)).

In most of these cases the court will reject the claim for disqualification based on lack of standing (reserving standing to the client).<sup>390</sup> However, there are situations where the conflict of interest is so open and obvious or egregious that the court will act, relying on the inherent power to regulate the actions of lawyers appearing before the court, and disqualify counsel.<sup>391</sup>

F. *Use of Ethics Rules in Claims by an Opponent Against a Lawyer*

The traditional rule is that a third-party is not in privity with a lawyer and cannot sue the lawyer for violating a duty to that person.<sup>392</sup> Some states continue to follow the strict privity rule.<sup>393</sup> Most states, however, have relaxed the privity requirement in certain contexts.<sup>394</sup> The Restatement recognizes four limited situations where a non-client can sue a lawyer.<sup>395</sup>

With the loosening of privity, it is natural to ask whether it has any impact on the ability of third-parties to sue attorneys for violation of ethical obligations. A number of the Model Rules set out obligations of the lawyer to third parties.<sup>396</sup> Rules 4.1 through 4.4 are all included under the heading “Transactions With Persons Other Than Clients.”<sup>397</sup> These rules state that a lawyer shall not make a false statement of material fact to a third person (Rule 4.1),<sup>398</sup> shall not directly contact someone in a matter who is represented by counsel (Rule 4.2),<sup>399</sup> shall not imply disinterest when

390. *See, e.g.*, *Zerger & Mauer L.L.P. v. City of Greenwood*, 751 F.3d 928, 929 (8th Cir. 2014) (approving the intervention of the former client into a subsequent matter to assert a motion to disqualify their former lawyers).

391. *See* *FMC Techs, Inc. v. Edwards*, 420 F. Supp. 2d 1153, 1156 (W.D. Wash. 2006) (recognizing non-client standing where unethical representation is “manifest and glaring” or “open and obvious” such that the court has a duty to act (quoting *Yarn Processing*, 530 F.2d at 89)).

392. *See, e.g.*, *Baker v. Wood, Ris & Hames, Prof'l Corp.*, 364 P.3d 872, 877 (Colo. 2016) (citing *Nat'l Sav. Bank of D.C. v. Ward*, 100 U.S. 195, 200 (1879)) (indicating the lawyer's obligation is generally to clients and not third parties).

393. *See id.* at 874 (“We decline to abandon the strict privity rule, and we reaffirm that where non-clients . . . are concerned, an attorney's liability is generally limited to the narrow set of circumstances in which the attorney has committed fraud or a malicious or tortious act, including negligent misrepresentation.”).

394. *See, e.g., id.* at 877 (showing states like California have relaxed the traditional privity requirements).

395. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (AM. LAW INST. 2000).

396. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 4.1–4.4 (AM. BAR ASS'N 2017) (establishing rules of conduct between attorneys and third parties).

397. *Id.*

398. *Id.* r. 4.1.

399. *Id.* r. 4.2.

dealing with an unrepresented person (Rule 4.3),<sup>400</sup> and, as defined in Rule 4.4, must demonstrate respect for third persons.<sup>401</sup> It is a fair question to ask that if these ethical obligations (which are written in the mandatory “shall”<sup>402</sup>) impose obligations that are enforceable by non-clients impacted by a lawyer’s violation. In addition to those above, third parties attempt to use other Model Rules in opposing a lawyer’s conduct—such as the requirements in Rule 1.15 regarding lawyer trust accounts.<sup>403</sup>

Such third-party claims have universally been rejected.<sup>404</sup> First, the Model Rules themselves—even those that are directed at an adversary—are

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400. *Id.* r. 4.3.

401. *Id.* r. 4.4.

402. *See, e.g., id.* r. 4.1 (“In the course of representing a client a lawyer *shall* not knowingly . . .” (emphasis added)).

403. *See* *Caesars Entm’t Operating Co. v. Johnson*, No. 3:13-00620-CRS, 2015 WL 5020695, at \*7 (W.D. Ky. Aug. 24, 2015) (“Because this is not a Court of Ethics, Rule 1.15(a) and its comments are of no consequence here. Caesars must point the Court elsewhere if it seeks to establish that the ‘nature’ of an attorney’s IOLTA creates a fiduciary relationship between that attorney and anyone claiming a right to funds therein.”); *Accident & Injury Med. Specialists, P.C. v. Mintz*, 279 P.3d 658, 660 (Colo. 2012) (en banc) (finding no fiduciary relationship established between lawyer and third party based on Rule 1.15 trust fund obligations); *see also* *Chambers v. Weinstein*, No. 157781/2013, 2014 WL 4276910, slip op. at \*12 (N.Y. Sup. Ct. Aug. 22, 2014) (dismissing a claim of breach of fiduciary duty because ethics rules do not create a fiduciary relationship between the lawyer and claimants of money held by the lawyer in trust).

404. *See* *Rosenbaum v. White*, 692 F.3d 593, 605 (7th Cir. 2012) (disallowing a claim by an opponent against an attorney in the absence of a direct attorney-client relationship); *Bradley v. CVS Corp.*, No. PJM 07–2732, 2008 WL 7874768, at \*5 (D. Md. Aug. 28, 2008) (even assuming that the lawyer violated the duty of candor to tribunal under Rule 3.3, opposing counsel would have no claim, “it is the Court or professional disciplinary authorities, and not the opposing litigant, that has standing to act”); *Md. Nat’l Bank v. Resolution Tr. Corp.*, 895 F. Supp. 762, 771 (D. Md. 1995) (rejecting a claim for liability under Rule 3.3(a)); *Biller Assocs. v. Peterken*, 849 A.2d 847, 852–53 (Conn. 2004) (recognizing conflicts created by fiduciary relationships owed to opposing counsel); *Doctor’s Assocs., Inc. v. Windham*, 81 A.3d 230, 239, 243 (Conn. App. Ct. 2013) (affirming a lower court’s rejection of an argument that an arbitration award should be set aside where the opposing lawyer violated Rule 3.3); *Weaver v. Milard*, 819 P.2d 110, 121 (Idaho Ct. App. 1991) (denying a motion to disqualify based on a conflict of interest filed by opposing counsel); *see also* *Akins v. Edmondson*, 207 S.W.3d 300, 308 (Tenn. Ct. App. 2006) (rejecting the claim by a non-client against the lawyer); *accord* *Blankinship v. Brown*, 399 S.W.3d 303, 311 (Tex. App.—Dallas 2013, pet. denied) (rejecting an argument that a lawyer owed a duty to its opponent pursuant to Rule 4.1); *Jurek v. Kivell*, No. 01-10-00040-CV, 2011 WL 1587375, at \*4 (Tex. App.—Houston [1st Dist.] Apr. 21, 2011, no pet.) (mem. op.) (denying the extension of duties to third-parties in an attorney-client relationships); *Jones v. Blume*, 196 S.W.3d 440, 422 (Tex. App.—Dallas 2006, pet. denied) (declining to find that a fiduciary obligation is owed to an opponent when a firm fails to ethically handle proceeds it received); *Adams v. Reagan*, 791 S.W.2d 284, 291 (Tex. App.—Fort Worth 1990, no pet.) (“We hold that appellants have no standing to complain of a possible conflict as they are not represented by appellees’ counsel.” (citing *Pioneer Nat. Gas Co. v. Caraway*, 562 S.W.2d 284, 290 (Tex. App.—Eastland 1978, writ ref’d n.r.e.))).

“for the benefit of the public and to aid in the proper administration of justice”<sup>405</sup>—they are not intended to create duties to third parties.<sup>406</sup> The *Hurley v. Fuyat*<sup>407</sup> court stated the problem with using ethical rules to extend liability to opponents:

To allow plaintiff [to sue opposing counsel], under the guise of negligence, . . . would be to turn the rules of conduct on their head. [By using the rules] in the form of duties of care owed to private, adverse litigants rather than to the public at large, they begin to lose their character as ethical guideposts and the means by which lawyer misconduct can be remedied extra-judicially. Those rules exist not for the benefit of the unethical or corrupt lawyers, but for the benefit of the public, whose interest it is not only that lawyers practice law ethically but also that they remain free to counsel and litigate without fear of unwarranted professional attack. Attorneys should not have to fear that adverse litigants will haunt them with litigation charging violations of the rules of professional conduct. Imposing such a burden would do nothing to augment the ethical practice of law but could chill effective and zealous representation, undermine the civility of the profession and ultimately compromise the very public interest that the rules seek to protect.<sup>408</sup>

This is a well-stated basis for not extending substantive obligations to opponents.

A frequently cited case addressing the enforceability of ethical obligations by third parties is the Connecticut Supreme Court case *Mozzochi v. Beck*.<sup>409</sup> In *Mozzochi*, the opposing party sued a lawyer claiming malicious prosecution and legal malpractice, arguing that it was a “foreseeable beneficiary” of the obligations imposed by the ethical rules.<sup>410</sup> The court first noted that there are circumstances when a non-client can sue an opposing lawyer.<sup>411</sup> However, in each of those situations the non-client

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405. *Hurley v. Fuyat*, No. 92-5082, 1994 WL 930891, at \*9 (R.I. Super. Ct. Jan. 5, 1994) (citing *Tappen v. Ager*, 599 F.2d 376 (10th Cir. 1979); *Bickel v. Mackie*, 447 F. Supp. 1376, 1381 (N.D. Iowa), *aff'd*, 590 F.2d 341 (8th Cir. 1978); *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 380 (Minn. 1989); *Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 750 P.2d 118, 123 (N.M. 1988)).

406. *See id.* (indicating that the benefit of the duty is not intended to run to adversaries).

407. *Hurley v. Fuyat*, No. 92-5082, 1994 WL 930891 (R.I. Super. Ct. Jan. 5, 1994).

408. *Id.* at \*10.

409. *Mozzochi v. Beck*, 529 A.2d 171 (Conn. 1987).

410. *Id.* at 175.

411. *Id.*; *see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (AM. LAW INST. 2000) (“[T]he lawyer or (with the lawyer’s acquiescence) the lawyer’s client invites the [non-client]

reasonably relied on work performed by the lawyer and suffered injury as a result of that reliance.<sup>412</sup> The court refused to extend the existence of ethical obligations to create a new basis for a non-client to sue a lawyer.<sup>413</sup> This is a universally accepted position.<sup>414</sup> There are several reasons for prohibiting these suits. First, the disclaimer in Paragraph 20, makes it clear that the Model Rules are not intended to be used to establish liability.<sup>415</sup> Second, the suits would have a chilling effect on a lawyer's zealous representation of a client, creating a conflict of interest between lawyer and client:

[C]reation of a duty in favor of an adversary of the attorney's client would create an unacceptable conflict of interest which would seriously hamper an attorney's effectiveness as counsel for his client. Not only would the adversary's interests interfere with the client's interests, the attorney's

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to rely on the lawyer's opinion or provision of other legal services, and the [non-client] so relies; and . . . the [non-client] is not, under applicable tort law, too remote from the lawyer to be entitled to protection[.]"); *see also* *Garcia v. Rodey, Dickason, Sloan, Akin & Robb P.A.*, 750 P.2d 118, 122 (N.M. 1988) ("A duty of care toward non-clients has been found to exist *only* in those situations where the non-client was an intended beneficiary of attorney's services, or where it was reasonably foreseeable that negligent service or advice to or on behalf of the client could cause harm to others." (citing Annotation, *Attorneys-Liability to Third Parties*, 45 A.L.R.3d 1181 (1972))).

412. *Mozzuchi*, 529 A.2d at 176.

413. *Id.* at 176 n.8; *see also* *Tew v. Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A.*, 655 F. Supp. 1571, 1573 (S.D. Fla. 1987) (applying Florida law and dismissing a claim by a non-client for failure to disclose the client's fraudulent statements); *Bickel v. Mackie*, 447 F. Supp. 1376, 1381 (N.D. Iowa), *aff'd*, 590 F.2d 341 (8th Cir. 1978) ("While it is true that the attorney owes a general duty to the judicial system, it is not the type of duty which translates into liability for negligence to an opposing party where there is no foreseeable reliance by that party on the attorney's conduct.").

414. *See, e.g., Mozzuchi*, 529 A.2d at 176 ("Every court that has examined this question has concluded that the Code of Professional Responsibility does not, per se, give rise to a third party cause of action for damages." (citing *Bickel*, 447 F. Supp. at 1383; *Noble v. Sears Roebuck & Co.*, 109 Cal. Rptr. 269 (Ct. App. 1973); *Myers v. Cohen*, 687 P.2d 6, 16 (Haw.), *rev'd on other grounds*, 688 P.2d 1145 (Haw. 1984); *Brody v. Ruby* 267 N.W.2d 902, 907-08 (Iowa 1978); *Young v. Hecht*, 597 P.2d 682 (Kan. 1979); *Hill v. Willmott*, 561 S.W.2d 331, 333-35 (Ky. Ct. App. 1978); *Spencer v. Burglass*, 337 So. 2d 596, 600-01 (La. App. 1976), *writ of review denied*, 340 So. 2d 990 (La. 1977); *Robert L. Sullivan D.D.S., P.C. v. Birmingham*, 416 N.E.2d 528, 534 (Mass. App. Ct. 1981); *Friedman v. Dozor*, 312 N.W.2d 585 (Mich. 1981); *Drago v. Buonagurio*, 401 N.Y.S.2d 250, *rev'd on other grounds*, 386 N.E.2d 821 (1978); *Martin v. Trevino*, 578 S.W.2d 763, 770 (Tex. App.—Corpus Christi 1978, writ reFd n.r.e.); RONALD E. MALLEN & VICTOR B. LEVIT, *LEGAL MALPRACTICE* § 67 (2d ed. 1981); Wolfram, *supra* note 101, at 310-14).

415. *See id.* at 176 n.8 ("The Rules are designed to provide guidance to lawyers and to provide structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.").

justifiable concern with being sued for negligence would detrimentally interfere with the attorney-client relationship.<sup>416</sup>

Third, ethics rules are intended to protect and vindicate public rights and not to give aggrieved private individuals a cause of action.<sup>417</sup> Similarly, allowing such suits would undermine the American adversarial system<sup>418</sup> and cause lawyers to turn down valid claims, fail to put forward novel legal arguments, and refuse to sue defendants with a reputation of bringing retaliatory suits against lawyers that sue them.<sup>419</sup>

If there is a consistent message from courts in this area, it is that ethical rules—even if applicable to a lawyer's interaction with third parties—do not create a cause of action for the third party.<sup>420</sup> Except in very limited circumstances, the lawyer's legal duties run solely to the client and not to opposing counsel, the opposing party, or to another third person.<sup>421</sup> To hold otherwise would “create a duty in an attorney which flows both to the client and to the opposing party seems to be untenable and in diametric conflict.”<sup>422</sup> By interfering with a lawyer's obligations to their client, the

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416. *Friedman*, 312 N.W.2d at 591–92 (footnotes omitted) (citing *Goodman v. Kennedy*, 556 P.2d 737, 743 (Cal. 1976)); *see also* *Hurley v. Fuyat*, No. 92-5082, 1994 WL 930891, at \*14 (R.I. Jan. 5, 1994) (“Trying to limit this duty to situations where the client's interest would not be compromised would create an unworkable standard that could spawn litigation adverse to the client's interest.”).

417. *Hill*, 561 S.W.2d at 334; *Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 750 P.2d 118, 123 (N.M. 1988); *see also* *Martin*, 578 S.W.2d at 770 (“The duties set forth in the Code of Professional Responsibility establish the minimum level of competence required of attorneys for protection of the public. A violation thereof will not give rise to a private cause of action.” (citing *Merritt-Chapman & Scott Corp. v. Elgin Coal, Inc.*, 358 F. Supp. 17, 22 (E.D. Tenn. 1972); *Hill*, 561 S.W.2d at 334; *Spencer*, 337 So. 2d at 600)).

418. *See* *Friedman*, 312 N.W.2d at 592 (“[T]he public policy of maintaining a vigorous adversary system outweighs the asserted advantages of finding a duty of care to an attorney's legal opponent.”); *see also* *Jurek v. Kivell*, No. 01–10–00040–CV, 2011 WL 1587375, at \*5 (Tex. App.—Houston [1st Dist.] Apr. 21, 2011, no pet.) (mem. op.) (“[In the adversarial system,] a party cannot justifiably rely on the opposing party's lawyer representations or silence as a matter of law.” (citing *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 794 (Tex. 1999))).

419. *Brody*, 267 N.W.2d at 907; *Friedman*, 312 N.W.2d at 592–93.

420. *See* *Wiseman v. Batchelor*, 864 S.W.2d 248, 250 (Ark. 1993) (indicating that the general duty owed to the public under the Model Rules of Professional conduct does not satisfy the “duty prerequisite for constructive fraud”).

421. *See id.* (finding duties that flow both to the client and opposing counsel make little sense).

422. *Id.* (citing *Smith v. Hurd*, 699 F. Supp. 1433 (D. Haw. 1988)).

attorney “would be tentative in his actions out of fear of liability to the adversary.”<sup>423</sup>

This does not mean that an opponent is without a remedy for the misconduct of a lawyer.<sup>424</sup> First, there is the possibility of sanctions under procedural rules—such as Rule 11 of the Texas Rules of Civil Procedure.<sup>425</sup> An opponent can also file a complaint with the appropriate disciplinary body.<sup>426</sup> Third, the common law recognizes causes of action for malicious prosecution, abuse of process, and defamation against attorneys.<sup>427</sup> Some

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423. *Gaide v. Flanagan*, No. CV030521353S, 2004 WL 1966313, at \*5 (Conn. Super. Ct. Aug. 9, 2004) (citing *Krawczyk v. Stingle*, 543 A.2d 733 (Conn. 1988)).

424. *See* *Robert L. Sullivan, D.D.S., P.C. v. Birmingham*, 416 N.E.2d 528, 534 (Mass. App. Ct. 1981) (“While an attorney may be liable in damages to a person injured by his or her misconduct, that liability must be based on a recognized and independent cause of action and not on ethical violations.” (citing *Slotnick v. Pike*, 370 N.E.2d 1006 (Mass. 1977); *Rey v. Brown*, 357 N.E.2d 343 (Mass. App. Ct. 1976); *Bickel v. Mackie*, 447 F. Supp. 1376, 1381 (N.D. Iowa), *aff’d*, 590 F.2d (8th Cir. 1978); *Spencer v. Burglass*, 337 So. 2d 596, 600 (La. Ct. App. 1976); *Drago v. Buonagurio*, 386 N.E.2d 821, 822 (N.Y. 1978)); *Hurley v. Fuyat*, No. 92-5082, 1994 WL 930891, at \*14 (R.I. Jan. 5, 1994) (“Civil liability of lawyers to their adversaries is imposed not for negligent conduct but is reserved for intentional acts of malicious prosecution, fraud, collusion and criminal misconduct.” (citing *Dennis v. Sparks*, 449 U.S. 24, 28–29 (1980); *Nat’l Sav. Bank v. Ward*, 100 U.S. 195, 199–200 (1879); *L & H Airco, Inc. v. Rapistan*, 446 N.W.2d 372, 380 (Minn. 1989); *Berlin v. Nathan*, 381 N.E.2d 1367, 1376 (Ill. App. Ct. 1978))).

425. *See* *Unarco Material Handling, Inc. v. Liberato*, 317 S.W.3d 227, 239–40 (Tenn. Ct. App. 2010) (dismissing a claim brought by opposing lawyer based on the litigation privilege, but noting there are sanctions available when a lawyer violates ethical obligations, including Rule 11 sanctions and disciplinary actions, which the court says creates sufficient “risk of punishment for the errant lawyer . . . real enough to require that lawyer to beware” (alteration in original) (quoting *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 346 (D.D.C. 2001))); *Jurek v. Kivell*, No. 01–10–00040–CV, 2011 WL 1587375, at \*6 (Tex. App.—Houston [1st Dist.] Apr. 21, 2011, no pet.) (mem. op.) (stating, in rejecting opponent’s cause of action under the ethical rules, that: “the offending attorney can still be punished for wrongful litigation conduct by the court in which the conduct occurred under the Texas Rules of Civil Procedure” (citing *Bradt & Bradt, P.C. v. West*, 892 S.W.2d 56, 72 (Tex. App.—Houston [1st Dist.] 1994, writ denied))).

426. *Magness v. Magness*, 558 A.2d 807, 815 (Md. Ct. Spec. App. 1989); *see also* *Hurley v. Fuyat*, No. 92-5082, 1994 WL 930891, at \*15 (R.I. Jan. 5, 1994) (“It is difficult to imagine more powerful deterrents to professional misconduct than [disciplinary sanctions,] which carry the attendant risks of loss of one’s professional reputation and livelihood.”). The *Magness* court made it clear that the failure to report an opponent’s misconduct demonstrates that the misconduct must not have been egregious: “If appellant believes that failure to reveal [certain facts] constitutes a violation of the Rules of Professional Conduct, he should file a report [with the appropriate agency] . . . . We assume counsel’s failure to report these alleged violations is a concession either that they do not pose a violation or at worst do not raise a substantial question as to fitness.” *Magness*, 558 A.2d at 815.

427. *See* *Nelson v. Miller*, 607 P.2d 438, 451 (Kan. 1980) (“We believe that the public is adequately protected from harassment and abuse by an unprofessional member of the bar through means of the traditional cause of action for malicious prosecution. . . . We further hold that a violation of the Code of Professional Responsibility does not alone create a cause of action against an attorney

courts have also recognized a cause of action for intentional or negligent misrepresentation against lawyers for statements relied on by third parties.<sup>428</sup>

#### V. EVALUATING ETHICAL RULES AS STATING A JURISDICTION'S "PUBLIC POLICY"

Up until this point, this Article has stressed the difference between ethical and substantive obligations. This section discusses the situation when courts choose to incorporate ethical standards into substantive law. After all, ethics rules are traditionally adopted by a state's highest court and it is somewhat anomalous that courts should disregard the standards set out to govern lawyers in evaluating lawyer conduct.<sup>429</sup> This issue is analyzed in two sections. The first is where courts consider whether the ethical rules as a whole state the public policy of the state. The second analyzes situations where courts address individual rules to determine whether a particular rule states the public policy of the state. This is somewhat of an artificial dichotomy; courts that adopt wholesale the ethical rules as the "public policy" of the state, still consider on a case-by-case basis whether the unethical conduct has substantive consequences.<sup>430</sup>

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in favor of a third party."); *see also Gaide*, 2004 WL 1966313, at \*5 ("A plaintiff who has sustained injury as a result of an attorney's unauthorized use of the legal process may sue the attorney for abuse of process." (citing *Mozzochi v. Beck*, 529 A.2d 171, 173 (Conn. 1987))); *accord Chidnese v. Chidnese*, 708 S.E.2d 725, 731 (N.C. Ct. App. 2011) ("Protection against wrongful litigation is afforded by a cause of action for either abuse of process or malicious prosecution." (quoting *Stanback v. Stanback*, 254 S.E.2d 611, 624 (N.C. 1979))). Regarding defamation specifically, the litigation privilege protects a lawyer from most statements made during the course of representation. *Silberg v. Anderson*, 785 P.2d 365, 374 (Cal. 1990). However, some courts have recognized a defamation claim in certain circumstances—such as when the lawyer sends the content of a complaint (which is protected) to the press—which some courts hold is not protected. *See, e.g., Bochetto v. Gibson*, 860 A.2d 67, 70 (Pa. 2004) (reaching the conclusion that the attorney had faxed a copy of the complaint to the press).

428. *See In re Enron Corp. Sec., Derivatives & ERISA Litig.*, 235 F. Supp. 2d 549, 609 (S.D. Tex. 2002) ("[W]ith respect to both fraudulent misrepresentation and negligent misrepresentation, Texas recognizes that an attorney has an established duty to third parties not to make material misrepresentations on which the attorney 'knew or had reason-to-expect' that the parties would rely or the attorney intended to reach and influence a limited group that might reasonably be expected to have access to that information and act in reliance on it.").

429. *See, e.g., Smith v. Morrison*, 47 A.3d 131, 135 (Pa. Super. Ct. 2012) ("The Pennsylvania Supreme Court adopted the Rules of Professional Conduct and the Rules of Disciplinary Enforcement . . ." (citing *In re Adoption of M.M.H.*, 981 A.2d 261, 272 (Pa. Super. Ct. 2009))).

430. *See, e.g., id.* at 135 (recognizing liability does not come merely from adoption and violation of the Rules but rather the rules provide a basis for evaluating violations of fiduciary duties—a breach of common law).



The distinction is not unimportant; it impacts how courts approach the cases that are brought.

A. *Adopting the Ethics Rules As a Whole As the Public Policy of the Jurisdiction*

When courts are faced with an ethical violation in a substantive context, they take one of two approaches. The first is to determine whether the ethics rules as a whole reflect the public policy of the state.<sup>431</sup> The second—incorporating rules on a case by case basis—is discussed in the next section.<sup>432</sup> Some courts hold that they do not reflect the public policy of the state and should only be utilized in disciplinary proceedings.<sup>433</sup> Those jurisdictions willing to incorporate ethical obligations into substantive law take two approaches: wholesale adoption of the ethics rules as public policy and rule-by-rule adoption.<sup>434</sup>

The wholesale adoption approach is discussed in this section.<sup>435</sup> This approach essentially incorporates all ethical obligations into substantive law.<sup>436</sup> This approach has the benefit of simplicity—the ethical rules create

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431. See, e.g., *Kersten v. Van Grack, Axelson & Williamowsky, P.C.*, 608 A.2d 1270, 1275 (Md. Ct. Spec. App. 1992) (rejecting the argument that liability stems from the rules because the rules are not a reflection of the public policy of the state).

432. See *infra* Part V.B.

433. See *id.* (“[The Maryland Rules of Professional Conduct] are not a reflection of public policy nor do they provide a basis upon which to impose liability.”); see also *Smith*, 47 A.3d at 135 (affirming the rejection of a jury instructions which relied exclusively on ethical rules to establish a fiduciary duty); *State v. Ford*, 793 P.2d 397, 400 (Utah Ct. App. 1990) (indicating ethical rules are merely “self-imposed internal regulations prescribing the standards of conduct for members of the bar” and not as a reflection of public policy (quoting *People v. Green*, 274 N.W.2d 448, 454 (Mich. 1979))).

434. See *Rich v. Simoni*, 772 S.E.2d 327, 327 (W. Va. 2015) (“[W]e must now determine whether this state’s Rules of Professional Conduct constitute statements of public policy that carry the force and effect of legislative enactments.”).

435. See *Post v. Bregman*, 707 A.2d 806, 816 (Md. 1998) (“Unquestionably, so thorough a regulation of an occupation and professional calling, the integrity of which is vital to nearly every other institution and endeavor of our society, constitutes an expression of public policy having the force of law.”); *Rich*, 772 S.E.2d at 334 (“[W]e have no difficulty recognizing that the Rules of Professional Conduct may constitute statements of public policy which in turn may carry the equivalent force and effect as statutes enacted by this state’s legislature.”); see also *Turner v. Turner*, 73 So. 3d 576, 587 n.4 (Miss. Ct. App. 2011) (Griffis, J., dissenting) (“The Mississippi Rules of Professional Conduct are not simply limited to disciplinary matters. The rules govern the ‘ethical conduct’ of lawyers. If the rules determine what is ‘ethical conduct’ then certainly the rules can be considered to determine what is or is not the proper conduct of lawyers.”).

436. See *Post*, 707 A.2d at 816 (opining that the ethics rules have the “force of law”).

substantive obligations and limitations.<sup>437</sup> The problem with this approach is that no court actually intends to incorporate every ethics rule into the substantive pantheon—after all, that would mean that the ethical rules that run to individuals other than the client (e.g., opposing counsel) would have the force of law and could be enforced by an injured party.<sup>438</sup>

The way that courts avoid converting every ethics rule into actionable standards, is by holding that the ethical rules as a whole establish the public policy of the state, but then to determine whether, in *an individual set of facts*, the ethics rules provide a remedy.<sup>439</sup> These courts essentially adopt an equitable approach to analyzing disputes.<sup>440</sup> The Maryland Supreme Court, after stating that the rules set out the public policy of the state, adopted a seven factor test to determine whether a particular violation would justify court intervention or whether the matter should be left to disciplinary authorities:

[L]ook to all of the circumstances—whether the rule was, in fact, violated, and if violated[,] (1) the nature of the alleged violation, (2) how the violation came about, (3) the extent to which the parties acted in good faith, (4) whether the lawyer raising the defense is at least equally culpable as the lawyer against whom the defense is raised and whether the defense is being raised simply to escape an otherwise valid contractual obligation, (5) whether the violation has some particular public importance, such that there is a public interest in not enforcing the agreement, (6) whether the client, in particular, would be harmed by enforcing the agreement, and, in that regard, if the agreement is found to be so violative of the Rule as to be unenforceable, whether all or part of the disputed amount should be returned to the client on the ground that, to that extent, the fee is unreasonable, and (7) any other relevant considerations.<sup>441</sup>

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437. *See, e.g., Rich*, 772 S.E.2d at 336 (Benjamin, J., concurring) (adopting the ethical codes as a “prudent check on the public policy exception to employment at-will” (quoting *Rocky Mt. Hosp. & Medical Serv. v. Mariani*, 916 P.2d 519, 525 (Colo. 1996))).

438. *See Post*, 707 A.2d at 819 (addressing concerns that purpose of the rules might be “subverted” and used as “procedural weapons” by opposing parties (quoting MD. RULES OF PROF'L CONDUCT Scope (adopted 1986))).

439. *See id.* (requiring courts to look at “all of the circumstances” when a party is attempting to use a professional conduct rule as a defense).

440. *See id.* (“We view a violation of [the Rule] . . . as being in the nature of an equitable defense, and principles of equity ought to be applied.”).

441. *Id.* (footnote omitted).

The Maryland approach provides an answer to the difficult issue of what it means for the rules to be a statement of the state's "public policy."<sup>442</sup> The traditional meaning of this term is that a principle is so important that a violation will not be countenanced by the state.<sup>443</sup> Under this modified approach the question becomes whether, in the application of the ethical rules, the public policy of the state has been violated.<sup>444</sup>

A federal court in Florida, attempting to interpret Florida law and faced with contradictory opinions across the state (some interpreting the ethical rules as substantive policy and others refusing to invalidate unethical agreements) adopted what appears to be a similar equity-based approach.<sup>445</sup> The court held, that when evaluating an unethical fee agreement, in order for the agreement to be unenforceable under substantive law the ethical violation must be "material and substantial" and "not merely technical or insignificant."<sup>446</sup> It appears that no subsequent court to date in Florida has embraced this substantial versus technical standard or provided an explanation of what these terms mean.

Using equitable principles has the benefit of allowing courts arguably to reach the "right" result in individual cases.<sup>447</sup> The downsides to this approach, however, are significant. First, and foremost, it inserts a tremendous amount of uncertainty into every transaction that could be considered unethical but not unenforceable as a matter of substantive law.<sup>448</sup> Going into a transaction, lawyers cannot know whether a contract

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442. *See id.* at 816 (finding these rules have the force of law).

443. *See id.* at 815 ("It is established in Maryland that a contractual provision that is in violation of public policy, to the extent of the conflict, is invalid and unenforceable." (citing *State Farm Mut. v. Nationwide Mut.*, 516 A.2d 586 (Md. 1986); *Walsh v. Hibberd*, 89 A. 396 (Md. 1913))).

444. *See id.* at 819 (determining whether Rule 1.5 had been violated).

445. *State Contracting & Eng'g Corp. v. Condotte Am., Inc.*, No. 97-7014-CV, 2004 WL 5500705, at \*22 (S.D. Fla. Oct. 26, 2004).

446. *Id.*

447. The *Post* case involved a fee sharing agreement in which two attorneys agreed to share a fee 40% and 60%. *Post*, 707 A.2d at 807-08. Ultimately, it was determined that the fee sharing agreement was unethical because one of the attorneys, Bregman, did not perform that percentage of the work in the case (and no other exception applied). *Id.* at 828 (Chasanow, J., dissenting). The majority remands for the trial court to determine whether the agreement should be enforced or whether the "equitable defense" that the agreement was unethical should invalidate the agreement. *Id.* at 819 (majority opinion). Justice Chasanow notes that this could result in attorney *Post* ultimately receiving all of the fee (and hence more than the percentage of work he put into the case). *Id.* at 828 (Chasanow, J., dissenting). "Isn't allowing *Post* to keep more of the fee than he can prove he earned at least as unethical as allowing Bregman to recover more of the fee than he can prove he earned?" *Id.*

448. *See id.* ("This vague, amorphous 'equitable' test for contract enforcement is not the law anywhere else, and is at best problematic. For example, what variance between an ethical fee and the

is unenforceable because it is unethical and inequitable, or whether it is enforceable although unethical, because equities weigh in favor of enforcement. More important than lawyers, however, are clients. Clients will have no idea what it means for a lawyer's conduct to be unethical, much less understand that in *certain* situations unethical conduct will be condoned by the court so long as the equities weigh in the lawyer's favor.<sup>449</sup> This approach seems to undermine the very purpose of the ethical rules, which are to provide clear guidance to lawyers (and clients) as to what is proper and improper.<sup>450</sup> What could provide less guidance than one court enforcing an unethical contract because equity demands it while another court refusing to enforce that same contract because the equities weigh in favor of the lawyer?

In a subsequent case, the Maryland Supreme Court was faced with the question of whether a division of fees between a law firm and a non-lawyer should allow the client to "claw back" that portion of the fee paid to the non-lawyer.<sup>451</sup> The court, applying the *Post* standard, found that, even if the agreement was unethical the equities did not weigh in favor of invalidating the entire fee agreement—requiring the firm to disgorge the entire fee.<sup>452</sup> In concurrence, Justice Chasanow challenged the court's reliance on equitable principles in deciding the case.<sup>453</sup> Chasanow reasoned that the question the court should be focused on is whether the fee agreement could be invalidated under traditional common law contract defenses, such as whether the agreement was acquired in a fraudulent manner, and not based on ethical rules.<sup>454</sup>

Similar issues arise in the criminal context. In fact, there is an entire ethical rule dedicated to ensuring that a prosecutor acts ethically in relation

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actual contractual fee would constitute an "insubstantial" difference justifying enforcement of the unethical agreement?").

449. *See id.* (finding the lawyers fee appropriate based on the amount of legal work performed).

450. *See id.* at 819 (majority opinion) (citing MD. RULES OF PROF'L CONDUCT Scope (adopted 1986)).

451. *See* *Son v. Margolius, Mallios, Davis, Rider & Tomar*, 709 A.2d 112, 113 (Md. 1998) ("The issues now before us arise from the manner and circumstances under which the settlement proceeds were distributed . . .").

452. *See id.* at 123 ("On this record, we can find no equitable basis for requiring the firm to disgorge that fee, even if the payment to Ms. Park were found to be in violation of Rule 5.4 or Rule 7.2.").

453. *Id.* at 124 (Chasanow, J., concurring).

454. *See id.* ("The instant case is a contractual dispute. Traditional contract law should be applied. Neither court created 'public policy,' nor any vague 'equitable' balancing should be substituted for established contractual principles.").

to a criminal defendant.<sup>455</sup> When a prosecutor violates these rules, does it constitute a violation of the defendant's rights that justify suppression of evidence or reversal of a conviction? If the ethical obligations mirrored the constitutional standards, this question would be easy to answer. However, a prosecutor can violate ethical obligations without also violating a defendant's constitutional rights.<sup>456</sup> A Wisconsin federal district court seemed to add an equitable twist to the traditional analysis in *United States v. Acosta*.<sup>457</sup> The court noted that a court has two avenues for acting to suppress evidence.<sup>458</sup> The first is the constitutional standard that, if it is violated, would require action.<sup>459</sup> The second is the "supervisory powers" of courts "to protect their integrity" by refusing to condone unethical conduct that is "egregious, highly improper, or unconscionable."<sup>460</sup> Stated another way—using ethical obligations as a basis for determining substantive rights under the guise of the court's inherent powers.<sup>461</sup>

#### B. *Analyzing Individual Rules As Statements of Public Policy*

Most courts do not fully incorporate ethical obligations into the public policy of the jurisdiction (and then decide the cases on a case-by-case basis).<sup>462</sup> Most courts make the determination on a rule-by-rule basis.<sup>463</sup> When faced with a particular rule violation, the court determines whether

455. MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2017).

456. *See* *United States v. Acosta*, 111 F. Supp. 2d 1082, 1096 (E.D. Wis. 2000) (indicating the court may use its supervisory powers to suppress evidence instances where misconduct does not give way to constitutional violations).

457. *United States v. Acosta*, 111 F. Supp. 2d 1082 (E.D. Wis. 2000).

458. *See id.* at 1095 ("The supervisory power, like the exclusionary rule, has a twofold purpose of deterring misconduct and protecting judicial integrity . . .").

459. *Id.*

460. *Id.* at 1095, 1097.

461. *See id.* at 1096 ("[I]here is nothing in the nature of a court's supervisory powers that would allow a court to suppress evidence to enforce some but not all of its own procedures.").

462. *See* Cooper, *supra* note 157, at 277 ("[L]awyer code provisions *may* also be relevant as an expression of public policy of the jurisdiction with respect to . . . enforceability of transactions entered into[.]") (quoting Alex B. Long, *Attorney-Client Fee Agreements that Offend Public Policy*, 61 S.C. L. REV. 287, 300 (2009)).

463. *See* Gillespie v. Hernden, 516 S.W.3d 541, 546 (Tex. App.—San Antonio 2016, pet. denied) ("Although the Rules 'do not define standards of civil liability of lawyers,' the Texas Supreme Court and our sister courts have looked to the Rules for guidance in determining whether a specific situation violated the public polic[y] . . ." (citing Royston, Vickery, & Williams, L.L.P. v. Lopez, 467 S.W.3d 494, 503 (Tex. 2015))).

the individual rule defines the public policy of the state.<sup>464</sup> If it is determined that the ethical standard does state public policy, it is incorporated as a new substantive obligation—creating a claim or defense in tort or contract.<sup>465</sup>

In a sense, using the principles set out in ethical rules to impose new obligations onto lawyers makes sense. Such rules have been extensively vetted by states (and by the ABA if the new rule is based on the Model Rules).<sup>466</sup> They often arise because of new circumstances or situations that were not adequately addressed in the past.<sup>467</sup> Therefore, looking to ethical rules to determine the extent of new substantive obligations is both understandable and appropriate. From a lay person's standpoint, however, it is little solace to say that a lawyer's unethical conduct is not sufficiently significant to rise to the level of public policy of the state.<sup>468</sup> The problem, of course, is identifying those ethical obligations sufficiently important to state the public policy of the state.<sup>469</sup> In addition, courts should always be

464. *See id.* at 545–46 (analyzing the law and taking into consideration the particular situation in the context of the rule and the public policy).

465. *See id.* at 547 (“[T]he Rules do not create standards of civil liability for attorneys, but courts may examine the Rules to discern the policies and protections embodied in them as an aid in deciding questions of attorney civil liability.” (citing TEX. DISCIPLINARY RULES PROF'L CONDUCT Preamble, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9) (West 2016); Hoover Slovaček L.L.P. v. Walton, 206 S.W.3d 557, 563 (Tex. 2006); Enochs v. Brown, 872 S.W.2d 312, 317–19 (Tex. App.—Austin 1994, no writ)); Counsel Fin. Servs., L.L.C. v. Leibowitz, No. 13-12-00103-CV, 2013 WL 3895331, at \*7 (Tex. App.—Corpus Christi July 25, 2013, pet. denied) (mem. op.) (“[A] court may deem the disciplinary rules to be an expression of public policy, so that a contract violating them is unenforceable as against public policy.” (citing Garcia v. Garza, 311 S.W.3d 28, 43 (Tex. App.—San Antonio 2010, pet. denied); Cruse v. O'Quinn, 273 S.W.3d 766, 775 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); Dardas v. Flemming, Hovenkamp & Grayson, P.C., 194 S.W.3d 603, 613 (Tex. App.—Houston [14th Dist.] 2006, pet. denied))).

466. *See, e.g.,* Green v. Green, 437 S.E.2d 457, 461–62 (Ga. 1993) (Sears-Collins, J., concurring specially) (citing Stevens v. Thomas, 361 S.E.2d 800 (Ga. 1987)) (analyzing the meaning and applicability of a Georgia ethical rule in the context of the ABA Model Rules).

467. *See, e.g.,* Engelman, *supra* note 188, at 920 (“It is submitted, that in order to meet the rapid increase in legal malpractice actions, the standards by which attorney misconduct is measured must and are changing through an expanded use of the Model Code and the Model Rules in civil litigation.”).

468. *See Green*, 437 S.E.2d at 459 (majority opinion) (“[L]ay persons sincerely believe that when a justiciable issue arises, if they so desire they will be accorded their ‘day in court.’ . . . [W]hen these expectations are not fulfilled, there is understandable discontent with our system of justice.” (quoting Evanoff v. Evanoff, 418 S.E.2d 62, 63 (Ga. 1992) (per curiam))).

469. *See generally id.* at 459–60 (illustrating how a court overturns a judgment because a lawyer acts unethically). In *Green*, Justice Sears-Collins' concurrence expressed concern that the court is opening itself up to having to evaluate which professionalism standards are “more important than others, [with] some transgressions as more unprofessional than others” and stating that courts should leave discipline to disciplinary bodies. *Id.* at 462 (Sears-Collins, J., concurring specially).

conscious of the criticism that some ethical rules are intended to protect the interests of lawyers—and adopting them as a standard of public policy could provide less protection to a client than public policy would demand.<sup>470</sup>

In *Kaplan v. Pavalon & Gifford*,<sup>471</sup> the Seventh Circuit, applying Illinois law, was faced with the question of whether an oral fee sharing agreement was enforceable.<sup>472</sup> The court began with a test of whether the agreement would violate Illinois public policy.<sup>473</sup> The court then defines what is against public policy as an action that is

injurious to the interests of the public, contravenes some established interest in society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or is at war with the interests of society or is in conflict with the morals at the time.<sup>474</sup>

The court goes on to identify decisions by the Illinois Supreme Court in which the court held that oral fee sharing agreements are unenforceable—and therefore held that was the public policy in the state.<sup>475</sup> The Seventh Circuit was bound by the decision issued by the Illinois Supreme Court interpreting Illinois law.<sup>476</sup> However, state courts facing the issue of whether public policy should be incorporated into the substantive law should be especially diligent when analyzing whether the alleged violation actually violates the state's public policy.<sup>477</sup> The analysis should be the same as in other situations where courts use public policy to invalidate transactions or conduct.<sup>478</sup> This is because the consequence of such a finding is that future violations will also be found to violate public policy—

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470. See *id.* at 459 (majority opinion) (noting the expectation of non-lawyers that they will be afforded some remedy when they are wronged by their lawyers, and the discontent such an absence of remedy causes (citing *Evanoff*, 418 S.E.2d at 62–63 (Benham, J., concurring))).

471. *Kaplan v. Pavalon & Gifford*, 12 F.3d 87 (7th Cir. 1993).

472. *Id.* at 89.

473. *Id.*

474. *Id.* (quoting *Marvin N. Benn & Assocs. v. Nelsen Steel & Wire Inc.*, 437 N.E.2d 900, 903 (Ill. App. Ct. 1982)).

475. See *id.* at 91–92 (“According to the [Illinois Supreme] [C]ourt, the requirements set forth in that rule now represent the public policy of Illinois and require fee-sharing agreements between attorneys for referrals to be in writing . . .”).

476. *Id.* at 92.

477. See *Cooper*, *supra* note 157, at 299 (showing three examples why professional rules “should be considered ‘public policy’”).

478. See, e.g., *Rich v. Simoni*, 772 S.E.2d 327, 335 (W. Va. 2015) (holding conduct, such as splitting attorney's fees between an attorney and non-attorney, and which is in violation of a rule of professional conduct, violates public policy and is therefore void).

either invalidating contracts or leading to liability.<sup>479</sup> These decisions should not be made lightly.

In *Garfinkel, P.A. v. Mager*,<sup>480</sup> the Florida Court of Appeals addressed whether the prohibition on settlement agreements limiting a lawyer's future practice (Rule 5.6) was a statement of public policy that would invalidate those provisions of a settlement agreement as a matter of public policy.<sup>481</sup> Public policy is only implicated when the action is "clearly injurious to the public good or contravene[s] some established interest of society."<sup>482</sup> To make that determination, the court analyzed the underlying purpose of the rule.<sup>483</sup> The court concluded that the Rule 5.6 prohibition was not so fundamental to the public policy of the state that it would invalidate any agreement containing such a restriction.<sup>484</sup>

Courts faced with a claim that a rule contravenes public policy should be determined to set out the public policy of the jurisdiction. This should be a systematic analysis under traditional standards to evaluate whether an ethical rule rises to the level of sufficient importance that, to violate it, would violate the public policy of the state.<sup>485</sup> The Restatement (Second) of Contracts recommends a balancing test to evaluate a jurisdiction's public policy.<sup>486</sup> It encourages a consideration of whether the statement is necessary to protect some aspect of the public welfare, and a balancing of the interests impacted by enforcing and not enforcing the agreement.<sup>487</sup> Whether adopting the Restatement approach or following the jurisdiction's established standards,

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479. *See* Counsel Fin. Servs., L.L.C. v. Leibowitz, No. 13–12–00103–CV, 2013 WL 3895331, at \*7 (Tex. App.—Corpus Christi July 25, 2013, pet. denied) (mem. op.) (acknowledging several cases where a violation of disciplinary rules deemed the applicable contract unenforceable).

480. *Garfinkel v. Mager*, 57 So. 3d 221 (Fla. Dist. Ct. App. 2010).

481. *Id.* at 223–24.

482. *Id.* at 224 (quoting *Bituminous Cas. Corp. v. Williams*, 17 So. 2d 98, 101 (Fla. 1944)) (citing *Fla. Windstorm Underwriting v. Gajwani*, 934 So. 2d 501, 506–07 (Fla. Dist. Ct. App. 2005)).

483. *Id.*

484. *See id.* at 225–26 (identifying the competing interests involved in the case and noting that the parties, in their agreement, had contemplated these interests and the agreement "reflects a reasoned effort to balance the aforesaid competing public policy interests and would not be injurious to the public good or otherwise contrary to public policy"). The Florida Supreme Court is not hesitant to discipline a lawyer for this same conduct. *See, e.g., Fla. Bar v. St. Louis*, 967 So. 2d 108, 121 (Fla. 2007) (demonstrating how an attorney was disbarred for (among other things) entering into a settlement agreement that violated Rule 5.6).

485. *See, e.g., Rich v. Simoni*, 772 S.E.2d 327, 332 (W. Va. 2015) ("We begin our analysis by reviewing the authority which supports a finding that the Rules of Professional Conduct are statements of public policy.").

486. RESTATEMENT (SECOND) OF CONTRACTS § 178 cmt. b. (AM. LAW INST. 1981).

487. *Id.*



the key is to determine whether a particular ethical standard is so important that a court is willing to find that a violation makes the transaction void as against public policy and unenforceable.<sup>488</sup> In making this finding courts should be conscious of future cases that may come before the court.<sup>489</sup> A holding that an unethical action violates public policy in one case creates a precedent that should be followed in future cases where the equities are not as clear; for example, where a lawyer is benefited by a court's refusal to enforce an unethical agreement.<sup>490</sup>

In making the determination of which rules are and are not part of the public policy of the state, courts should also keep in mind the fact that a number of rules are set out in terms of “may” or “should” and not “must” or “shall.”<sup>491</sup> The mandatory rules are those in which the adopting body has viewed as requiring affirmative action on the part of a lawyer and have an increased likelihood of rising to the level of public policy.<sup>492</sup>

For example, in *Capozzi v. Latsba & Capozzi*,<sup>493</sup> the Pennsylvania court was faced with an agreement restricting a lawyer's right to practice after leaving a firm—an agreement which is unethical under Rule 5.6(b).<sup>494</sup> The court determined that the prohibition did not state the public policy of Pennsylvania and was enforceable.<sup>495</sup> In making this determination, the court analyzed the purpose of the ethical restriction—to ensure that clients are not limited in their ability to choose lawyers and to prevent the practice of law from becoming merely a business.<sup>496</sup> The court then analyzed the restriction in the context of current law practice, in which lawyers frequently change firms and take clients and the fact that today it is assumed that law

488. See *Rich*, 772 S.E.2d at 335 (finding the rule prohibiting fee sharing with non-lawyers is “void as against public policy and wholly unenforceable”).

489. See *id.* (emphasizing the need to continue diligent review and directing the court to submit a copy of the opinion to the Office of Disciplinary Counsel).

490. See, e.g., *id.* at 334 (“[B]y refusing in every case to assist the lay party, courts may deter lay persons as well as attorneys from attempting such agreements’ and ‘in this way, the public will be protected more effectively from the potential harms posed by fee-sharing agreements[.]” (quoting *O’Hara v. Ahlgren, Blumenfeld & Kempster*, 537 N.E.2d 730, 737–38 (Ill. 1989))).

491. *Id.* at 333 (quoting *Gaddy Eng’g Co. v. Bowles Rice McDavid*, 746 S.E.2d 568, 581 (W. Va. 2013) (Loughry, J., concurring)) (citing *Trotter v. Nelson*, 684 N.E.2d 1150 (Ind. 1997)); *Cooper*, *supra* note 157, at 287.

492. *Rich*, 772 S.E.2d at 334.

493. *Capozzi v. Latsba & Capozzi P.C.*, No. 99-3981, 2001 WL 34644543 (Pa. Ct. Com. Pl. Feb. 27, 2001).

494. *Id.* at \*502–03.

495. *Id.* at \*510–11.

496. *Id.* at \*507–08 (quoting *Howard v. Babcock*, 863 P.2d 150 (Cal. 1994)).

practices operate as businesses, and to create a *substantive* restriction on these type of freely entered into agreements would run counter to the current reality of practice in today's firm.<sup>497</sup> Therefore, the court held that such an ethical restriction *does not* establish the public policy of the state.<sup>498</sup> Instead, the court held that such non-compete agreements will be subject to the same substantive requirements/limitations as non-compete agreements in other contexts.<sup>499</sup>

## VI. CONCLUSION: A SUMMARY

This Article has attempted to provide an overview of the different approaches taken by courts in evaluating the interaction of ethical rules and substantive obligations. This concluding section will pull everything together and provide a summary of how courts have addressed these issues and provide some guidance on how, in the future, courts faced with these issues should respond.

First is the situation where the plaintiff relies solely on the ethical rules to establish the duty owed or to escape liability under a contract. Reliance solely on the ethics rules—without framing the complaint in traditional common law claims or defenses—should result in dismissal of the case.<sup>500</sup> In these cases, the parties are attempting to have courts determine that an ethical violation has occurred without first going through the established disciplinary process. For example, where a client merely cites to the rule addressing business transactions with a client (Rule 1.8(a)) and argues that a violation of that rule also invalidates the underlying transactions, the court

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497. *Id.*

498. *See id.* at \*510 (finding, “as a matter of public policy,” that attorneys in Pennsylvania could enter into agreements such as that at issue in the case).

499. *See id.* (presenting the standards set by the Supreme Court of Pennsylvania for non-compete agreements (citing *Piercing Pagoda Inc. v. Hoffner*, 351 A.2d 207 (Pa. 1976))). *But see* *Adams v. Bellsouth Telecomm., Inc.*, No. 96-2473-CIV, 2001 WL 34032759, at \*9 (S.D. Fla. 2001) (invalidating a settlement agreement that restricted a lawyer's representation of defendant's employees for a period of time).

500. *See* *Holton v. State*, No. 8:07-cv-43-T-24EAJ, 2007 WL 951726, at \*3–4 (N.D. Fla. Mar. 28, 2007) (“A motion to dismiss should be granted where ‘the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957))); *Gatz Props. L.L.C. v. Preston*, No. N13C–02–089 EMD, 2014 WL 1725822, at \*10 (Del. Super. Ct. Apr. 15, 2014) (“[T]he use of the Rules as a legal standard to show an independent breach of a duty would be directly contrary to . . . the Scope of the Rules.” (quoting *Flaig v. Ferrara*, No. 90C-11-095 WTQ, 1996 WL 944860, at \*3 (Del. Super. Ct. Apr. 15, 1996))).

correctly rejected the defense.<sup>501</sup> However, in that case if the client had made the required showing of how the transaction was invalid under the common law rules addressing agreements between fiduciaries,<sup>502</sup> or how the transaction violates public policy,<sup>503</sup> the outcome would have been different. Courts should be conscious however, that some of the ethics rules overlap with the substantive common law obligations of a lawyer. For example, a lawyer owes a client a duty of loyalty as a matter of substantive law.<sup>504</sup> This includes the obligation to avoid conflicts of interest and a duty to maintain client confidentiality.<sup>505</sup> A complaint that sufficiently states a breach of these fiduciary duties (even if it also cites to ethical obligations) should not be dismissed if the complaint would state a claim even without citation to the rules.<sup>506</sup> Furthermore, during litigation, the plaintiff's expert should be allowed to cite to the appropriate rule of professional conduct in

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501. *See, e.g.*, *Buffalo v. Blackmon*, No. CA 93-115, 1994 WL 14583, at \*2-3 (Ark. Ct. App. Jan. 12, 1994) (failing to find error in a chancery court decision declining to permit a cause of action under Rule 1.8(a)).

502. *Id.* at \*3. In *Buffalo* the client had previously conceded the fairness of the transaction and therefore could not argue that it was invalid solely because Rule 1.8(a) was violated. *Id.*; *see also* *Cost Saver Mgmt., L.L.C. v. Napolitano*, No. CV 10-2015-JST (CWx), 2011 WL 13119439, at \*5 (C.D. Cal. June 7, 2011) (dismissing a complaint that merely alleged that lawyer violated Rule 4.2 (prohibiting contact with represented persons)).

503. *See* *Kaplan v. Pavalon & Gifford*, 12 F.3d 87, 92 (7th Cir. 1993) (determining a fee-sharing agreement is unenforceable because it violated public policy).

504. *See* *Destefano & Assocs., Inc. v. Cohen*, No. 2775JUNETERM2000, 2001 WL 1807790 at \*5 (Pa. Ct. Com. Pl. Apr. 9, 2001) (suggesting a breach of fiduciary duty can be brought with a tort action in addition to breaching ethics rules); *Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1283 (Pa. 1992) (establishing that an attorney's failure to perform their fiduciary duty, such as loyalty, and refrain from getting involved in conflict of interest can be actionable).

505. *See, e.g.*, *Maritrans*, 602 A.2d at 1283 (stressing how the United States Supreme Court stated “[t]here are few of the business relations of life involving a higher trust and confidence than those of attorney and client” (quoting *Stockton v. Ford*, 52 U.S. 232, 247 (1850))).

506. *See* *Booth v. Davis*, No. 10-CV-4010-SAC, 2010 WL 4160116, at \*8 (D. Kan. Apr. 31, 2010) (“The court has reviewed the complaint and finds that it does not portend to state a separate claim for defendant’s violation of Rule 1.8(g) . . . , although it cites that rule in support of its claim of breach of common law fiduciary duty. Attorney conduct[,] which violates an ethics rule may also violate an independent legal duty and a cause of action may ensue. It is the violation of the independent legal duty, not the ethics rule, that gives rise to a tort cause of action.” (citation omitted) (citing *Wasserstrom v. Appelson*, No. 87-0277-CV-W-1, 1988 WL 878409, at \*1 (W.D. Mo. Nov. 15, 1988)); *Gatz Props. L.L.C. v. Preston*, No. N13C-02-089 EMD, 2014 WL 1725822, at \*10 (Del. Super. Ct. Apr. 15, 2014) (granting plaintiff the authority to replead its claim to assert a legal malpractice claim independent of a violation of ethical rules); *see also* *Elkind v. Bennett*, 958 So. 2d 1088, 1092 (Fla. Dist. Ct. App. 2007) (restating that a claim can survive regardless of it including an ethical rule); *Owen v. Pringle*, 621 So. 2d 668, 671 (Miss. 1993) (“[C]ase law establishes a civil cause of action independent of . . . the Professional Rules . . .”).

both their expert opinion and in their testimony so long as the rules correctly state the preexisting common law duty.<sup>507</sup> This is where courts often have difficulty and may tend to want to exclude expert citation to the rules all-together. While it may be true that some rules are properly *not* referred to, it is inappropriate to exclude reference to all rules because citation to some rules would be inappropriate.

Second, if the plaintiff relies on the ethics rules to supplement their claims, citation to the rules is appropriate so long as the plaintiff's claim rests upon an established common law foundation. In these situations, the citation to the rule is not to establish liability of the lawyer; if the rules were removed, the claim would stand on its own. The Pennsylvania case *Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz*<sup>508</sup> provides an appropriate analysis.<sup>509</sup> In *Maritrans* the trial court, relying on the prohibition in Paragraph 20, dismissed a breach of fiduciary claim where the plaintiff/client cited to the ethical rules in the complaint.<sup>510</sup> On appeal, the Pennsylvania Supreme Court held that the trial court erred in dismissing the complaint without analyzing whether the complaint cites a common law breach of fiduciary duty *independent* of the Model Rules.<sup>511</sup> As the court recognized, by simply dismissing the case because of the cite to ethical obligations, the trial court essentially made the lawyer immune from liability for his wrongful conduct:

At common law, an attorney owes a fiduciary duty to his client; such a duty demands undivided loyalty and prohibits the attorney from engaging in conflicts of interest, and breach of such duty is actionable. The Superior Court here emasculated these common law principles, in effect turning the

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507. *See* *Wilmington Sav. Fund Soc'y v. Dotey*, No. 91C-06-088, 1994 WL 146370, at \*2 (Del. Super. Ct. Feb. 28, 1994) (“To the extent that the Rules express substantive duties imposed on lawyers by the common law, there is no reason that the Rules may not be referred to by an expert witness to buttress his or her conclusion that a lawyer has violated such duty. Indeed, in my view, to deny an injured party such reference is to subvert the purpose of the Rules.”).

508. *Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277 (Pa. 1992).

509. *Id.* at 1283. The court also noted that disregarding the common law fiduciary obligations, the trial court “elevated attorneys above the law and granted to them greater rights and protection than are enjoyed by another fiduciaries in this Commonwealth.” *Id.*

510. *Id.* at 1282.

511. *Id.*

ethical or disciplinary rules governing lawyers into a grant of civil immunity for conduct which has been condemned from time immemorial.<sup>512</sup>

Courts should avoid the mistake of the trial court in *Maritrans*. Paragraph 20 is not meant to be used by lawyers to avoid obligations that existed prior to the enactment of the rules (or rules that are adopted as the substantive law of the jurisdiction). The rules also do not eliminate the notice pleading standard for complaints.<sup>513</sup> If a complaint alleges malpractice or breach of fiduciary duty, a court should analyze the complaint in light of background common law principles of those claims.<sup>514</sup> If the complaint does not sufficiently plead a common law claim, a citation to the rules of professional conduct will not save it.<sup>515</sup> However, if the elements of a claim are pled, then citation to the rules of professional conduct should not be used to defeat it.<sup>516</sup> The fact that a lawyer may *also* be subject to disciplinary action for the same conduct does not mean that the lawyer is not also civilly liable.<sup>517</sup>

To the extent that a claimant argues that the ethical rules state the substantive law of the jurisdiction, as a matter of public policy courts should address this claim head-on. It may be that a rule does establish the public policy of the jurisdiction and the court should explain why. This is an

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512. *Id.* at 1283 (citations omitted) (first citing *Stockton v. Ford*, 52 U.S. 232 (1850); then citing *Woods v. City Nat'l Bank & Trust Co.*, 312 U.S. 262 (1941); and then citing *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953)).

513. *See* FED. R. CIV. P. 8 (indicating pleadings should be “simple, concise, and direct”).

514. *See Maritrans*, 602 A.2d at 1284 (noting that the power of the court to address conflicts of interest dates back to the early 1900s—before the adoption of ethical rules in the state).

515. *See id.* at 1285 (discussing the flawed logic of the superior court in dismissing the claim where there were independent grounds in tort law to save the claim).

516. *See Bronzich v. Persels & Assocs., L.L.C.*, No. CV-10-0364-EFS, 2011 WL 2119372, at \*11 (E.D. Wash. May 27, 2011) (“[T]he court rules that Plaintiffs may not rely on an RPC violation to support their breach-of-fiduciary-duty claim. This prohibition, however, does not equate to dismissal of Plaintiff’s claim. The . . . Complaint alleges sufficient facts to plausibly show that the Attorney Defendants breached their duty of loyalty [to their client.]”); *Destefano & Assocs., Inc. v. Cohen*, No. 2775JUNETERM2000, 2001 WL 1807790, at \*5 (Pa. Ct. Com. Pl. Apr. 9, 2001) (acknowledging that a party may bring a cause of action for “breach of fiduciary duty and negligence” although the actions may also be a breach of ethical obligations).

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

While the breach by a lawyer of his duty to keep the confidences of his client and avoid representing conflicting interests may be the subject of appropriate disciplinary action, a court is not bound to await such a development before acting to restrain improper conduct where it is disclosed in a case pending in that court.

*Id.* (quoting *Slater v. Rimar, Inc.*, 338 A.2d 584, 589 (Pa. 1975)).

important determination and should not be taken lightly. Determining that a particular ethical obligation states the substantive law of the jurisdiction can have significant impacts on lawyer liability and practice. In determining whether a particular rule reflects a jurisdiction's public policy, courts should consider traditional common law principles and the present realities of law practice. Every state has a different formulation of what constitutes the public policy of the jurisdiction.<sup>518</sup> The Pennsylvania Supreme Court described the consideration this way:

Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest. As the term 'public policy' is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy . . . . Only dominant public policy would justify such action. In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, the Court should not assume to declare contracts . . . contrary to public policy.<sup>519</sup>

Once a court has completed this analysis to determine whether a substantive claim or defense lies, the court should then analyze whether the court has an ethical obligation to report the lawyer to the appropriate disciplinary body. The Code of Judicial Conduct requires judges to report lawyers when the judge "ha[s] knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects[.]"<sup>520</sup> To make the disciplinary process effective and efficient, judges should satisfy this obligation; as a self-governing body, the role of judges is critical.

In contract cases the court has three choices. The first choice is to reject any use of the rules. The second is to allow the rules to be used as some

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518. See *Bronzich*, 2011 WL 2119372, at \*10 (establishing that both breach of fiduciary duty and malpractice claims are not supported by the Model Rules); *Owen v. Pringle*, 621 So. 2d 668, 671 (Miss. 1993) (establishing a Mississippi court defines civil causes of action as separate from the Model Rules); *Douglas-Peters v. Cho, Choe & Holen P.C.*, No. 05-15-01538-CV, 2017 WL 836848, at \*20 (Tex. App.—Dallas Mar. 3, 2017, no pet.) (mem. op.) (discussing how public policy is examined under a specific situation and are not set standards).

519. *Heller v. Pa. League of Cities & Muns.*, 32 A.3d 1213, 1220–21 (Pa 2011) (quoting *Burstein v. Prudential Property & Casualty Ins. Co.*, 809 A.2d 204, 207 (Pa. 2002)).

520. MODEL CODE OF JUD. CONDUCT r. 2.15(B) (AM. BAR ASS'N 2011).

evidence to establish a defense to enforcement of a contract.<sup>521</sup> Third, the court can determine that the rules are significantly important because they state the public policy of the jurisdiction.<sup>522</sup> If a court adopts the first or second approach, the claimant bears the burden of demonstrating that a common law defense to the contract exists to invalidate it.<sup>523</sup>

The Paragraph 20 paradox exists and will continue to create challenges for courts attempting to determine the appropriate role of ethics rules in substantive disputes. This Article has attempted to draw out the various contexts where courts might face the paradox and to provide a systematic approach to addressing the thorny questions raised.

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521. *See Douglas-Peters*, 2017 WL 836848, at \*20–21 (noting that the court “may examine the Disciplinary Rules”).

522. *See id.* (“[C]ourts look to the Disciplinary Rules for guidance when determining whether a specific situation violated the public policy protections embodied in the Disciplinary Rules.”).

523. *See id.* at 20–24 (analyzing whether an allegedly unethical contingency fee agreement was unenforceable because the agreement was unconscionable).