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Texas Disciplinary Rules of Professional Conduct: Additional Liability for Texas Lawyers.

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TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT: ADDITIONAL LIABILITY FOR TEXAS LAWYERS?

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I. INTRODUCTION

The Texas Disciplinary Rules of Professional Conduct ("Rules") became effective January 1, 1990.[1] As a result, Texas lawyers no longer practice under guidelines which include both aspirational

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1. *See generally* SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. X, § 9 (Rules of Professional Conduct) (1989) [hereinafter TEXAS RULES OF PROFESSIONAL CONDUCT]. The Texas Rules became effective January 1, 1990. *Id.*

goals[2] and discretionary moral choices.[3] Instead, the newly adopted Rules are mandatory in nature and depict a minimum standard of professional conduct which, if violated, may subject the offending lawyer to disciplinary action.[4]

The scope of the Rules is narrowly limited in the preamble to be "proper conduct for purposes of professional discipline."[5] More specifically, the preamble states the Rules "do not undertake to define standards of civil liability of lawyers for professional conduct."[6] The disclaimer was not included in the Model Rules of Professional Responsibility (the basis for the Texas Rules) inadvertently. The drafters of the Model Rules in fact strengthened the disclaimer after concerns were raised that the statement regarding the intent of the

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2. *See* Sales, *The Texas Disciplinary Rules of Professional Conduct: A Model to Replace the Outdated Texas Code of Professional Responsibility*, 52 TEX. B.J. 388, 388 (1989)(ethical canons are aspirational in nature); Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C.L. REV. 281, 284 (1979)(canons are vague, axiomatic norms).

3. *See* Sales, *The Texas Disciplinary Roles of Professional Conduct: A Model to Replace the Outdated Texas Code of Professional Responsibility*, 52 TEX. B.J. 388, 388 (ethical considerations are discretionary moral choices not governed by disciplinary rules); Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C.L. REV. 291, 294 (1979)(ethical considerations serve to give moral advice concerning preferred rather than mandatory behavior).

4. *See* TEXAS RULES OF PROFESSIONAL CONDUCT preamble, Scope, at paragraph 10 (Rules are imperatives cast in terms of "shall" or "shall not"). Compliance with the Rules shall be enforced through disciplinary procedures when necessary. *Id.* at paragraph 11. *See generally* Sales, *The Texas Disciplinary Rules of Professional Conduct: A Model to Replace the Outdated Texas Code of Professional Responsibility*, 52 TEX. B.J. 388, 388 (1989)(discussion of difference between canons, ethical considerations, and disciplinary rules and need to adopt Rules). Disciplinary rules are mandatory, clearly delineating the minimum standard of conduct for lawyers. If a lawyer's conduct is below that prescribed by such rules, the lawyer is subject to disciplinary action. *Id.*

5. TEXAS RULES OF PROFESSIONAL CONDUCT preamble, Scope, at paragraph 10.

6. *Id.* at paragraph 15. The complete disclaimer providing that the Rules do not establish a standard for civil liability is as follows:

> These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached. Likewise, these rules are not designed to be standards for procedural decisions. Furthermore, the purpose of these rules can be abused when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Id.

Rules to be that of defining standards of professional conduct for disciplinary purposes only, was neither strong enough nor clear enough.[7] Therefore, although intended in a broad sense for the protection of the public,[8] neither the Rules nor their predecessor, the Texas Code of Professional Responsibility ("Code"), were designed to define standards of civil liability.[9] The purpose of the Rules, rather, is to define proper conduct within the scope of a lawyer's place as a guardian of the law, and his/her relationship with, and function in, the legal system.[10] A breach of a disciplinary rule, similar to a breach of a procedural rule, is intended to provide a public remedy only, not a private one.[11]

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7. *See* THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 21 (1987)(documentation of Rules as originally proposed and Rules as adopted along with discussion pertaining to changes made). The paragraph contained in the Scope which was the basis for Texas Rules, preamble: Scope, paragraph 15, was changed to more clearly show that the Model Rules were intended to regulate conduct through the disciplinary process only, not as a standard for civil liability. The original, with subsequent changes is as follows (original text, later deleted, is in all-caps; text added is italicized):

> 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, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. *Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.*

Id. at 21.

8. *See* C. WOLFRAM, MODERN LEGAL ETHICS § 3.4.2, at 101 (1986)(purpose of disciplining lawyer is to protect public and future clients). The legal disciplinary procedure is not intended to be a substitute for civil proceedings which resolve interpersonal disputes. *Id.*

9. *See* Martin v. Trevino, 578 S.W.2d 763, 770 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.)(violation of disciplinary rule does not in itself create private cause of action). *See generally* R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 6.27, at 355-56 (3d ed. 1989)(general discussion about purpose of ethical regulations).

10. TEXAS RULES OF PROFESSIONAL CONDUCT preamble, A Lawyer's Responsibilities, at paragraph 1.

11. *See Martin*, 578 S.W.2d at 770 (private cause of action not created when disciplinary rule violated); *accord* Miami Int'l Realty v. Paynter, 841 F.2d 348, 353 (10th Cir. 1988)(use of Code to establish violation as negligence per se improper); Terry Cove North v. Marr & Friedlander, 521 So. 2d 22, 23 (Ala. 1988)(Code is designed to establish remedy which is disciplinary in nature only); *see also* R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 15.7, at 880 (3d ed. 1989)(neither Code nor Rules intended to establish standard of civil liability for attorneys).

Despite the disclaimer, however, many Texas lawyers fear the Rules will be used either as an independent basis for liability, or as a standard of care in malpractice litigation. This article will address some specific areas where the Rules could arguably be used either as a standard of care or as an independent basis for liability. The topics discussed are merely examples and are not intended to be exhaustive or all-inclusive by any means. The article does not profess to provide conclusive answers because there are no conclusive answers. Instead, after raising questions as to how the Rules may affect liability for lawyers in Texas, the article will provide an overview of the role comparable versions of disciplinary rules have played in malpractice actions in other jurisdictions as well as Texas and predict how the Rules will be utilized in Texas.

II. POTENTIAL FOR ADDITIONAL LIABILITY?

Although the preamble to the Rules limits their scope to that of defining proper conduct for purposes of professional discipline only on its face,[12] some of the Code-to-Rule changes raise the question as to whether the newly adopted, mandated standard of behavior actually creates new types of, or defines standards for, professional liability.

A. *Rule 1.05: Confidentiality of Information*

Confidentiality of information[13] as described in the Rules includes both "privileged information" (that which is protected by the lawyer-

12. *See supra* notes 5-6 and accompanying text.

13. TEXAS RULES OF PROFESSIONAL CONDUCT Rule 1.05. Confidentiality of Information, provides:

> (a) 'Confidential information' includes both 'privileged information' and 'unprivileged client information.' 'Privileged information' refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates. 'Unprivileged client information' means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.
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> (b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and (h), a lawyer shall not knowingly:
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> (1) Reveal confidential information of a client or a former client to:
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> (i) a person that the client has instructed is not to receive the information; or
>
> (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

client privilege) and "unprivileged client information" (all other information relating to a client obtained as a result of the relationship).[14]

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(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.

(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

(3) To the client, client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.

(4) When the lawyer has reason to believe it is necessary to so in order to comply with a court order, a Texas Rule of Professional Conduct, or other law.

(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

(6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon the conduct involving the client or the representation of the client.

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

(d) A lawyer may also reveal unprivileged client information:

(1) When impliedly authorized to so in order to carry out the representation.

(2) When the lawyer has reason to believe it is necessary to do so in order to:

(i) carry out the representation effectively;

(ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;

(iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

(f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).

Id.

14. *Id.* Rule 1.05(a).

With a few limited exceptions,[15] the Rule prohibits a lawyer from revealing any confidential information, even unprivileged client information, without the client's or former client's consent. This prohibition is stronger than the provision in the Rule's predecessor, the Code, which limited a lawyer from revealing non-confidential information only when the client had requested the information not be revealed or when the disclosure would result in embarrassment to or be detrimental to the client.[16]

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15. *Id.* Rule 1.05(c)-(f). The Rule provides that confidential information may be disclosed as follows:

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

(3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.

(4) When the lawyer has reason to believe it is necessary to so in order to comply with a court order, a Texas Rule of Professional Conduct, or other law.

(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

(6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon the conduct involving the client or the representation of the client.

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

(d) A lawyer may also reveal unprivileged client information:

(1) When impliedly authorized to so in order to carry out the representation.

(2) When the lawyer has reason to believe it is necessary to do so in order to:

(i) carry out the representation effectively;

(ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;

(iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

(f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).

Id.

16. *Compare* TEXAS RULES OF PROFESSIONAL CONDUCT Rule 1.05(c)-(f) (confidential

In at least one area of practice—that of insurance defense—there is a fear that the increased restriction on disclosure will result in a comparable increase in civil liability. Mr. Victor Anderson, Jr.[17] uses the following example to illustrate how the change in the Rules could affect lawyers who practice insurance defense. Picture an insurance defense attorney investigating the accident scene at a client's factory or manufacturing plant. While touring the factory, the attorney notices that certain safety shields or switches have been removed from the equipment the injured worker was using at the time of the accident. This information will almost surely be developed by the plaintiff during the discovery process, yet the attorney for the insured is prevented from disclosing the same information because it was acquired during the representation. The client, for various reasons, refuses to consent to the disclosure of the information. While the information warrants a recommendation for settlement, the insurance company refuses to settle because the attorney is unable to disclose the information upon which the recommendation is based. As a result, the insurance company is held liable for a far larger amount in damages after the case has been litigated than it would have been had the parties settled. Read strictly, Anderson points out, Rule 1.05 prohibits the disclosure of public as well as non-public information acquired as a result of the representation.[18] Therefore, the information concerning the safety equipment in the above example could not be disclosed to the insurance company even if it were developed during depositions.

B. *Rule 5.01: Responsibilities of a Partner or Supervisory Lawyer*

Rule 5.01 specifically subjects a partner and/or supervisory lawyer

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information includes privileged and unprivileged client information) *with* SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. X, § 9 (Code of Professional Resposibility) DR-4-101 (1988) [hereinafter TEXAS CODE OF PROFESSIONAL RESPOSIBILITY] (confidential information means privileged information). DR-4-101 provides:

> 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship *that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.*

Id. (emphasis added).

17. Mr. Anderson is with Shannon, Gracey, Ratliff & Miller in Fort Worth, Texas, and is the Chairman of District 7A Grievance Committee. The authors thank Mr. Victor Anderson, Jr., for sharing his concern that the Rules may result in additional liability and for providing this hypothetical of how that liability might arise.

18. *See* TEXAS RULES OF PROFESSIONAL CONDUCT Rule 1.05 (nothing in rule distinguishes between public and private information).

to discipline under two circumstances.[19] First, the lawyer may be disciplined for ordering, encouraging, or knowingly allowing conduct of a subordinate lawyer which violates the Rules.[20] Second, the same partner or lawyer with direct supervisory responsibility may be subject to discipline if no remedial action is taken which avoids or mitigates the consequences of the violation, once the violation becomes known to the supervising lawyer.[21] This rule may sound like welcome relief to entering associates who find themselves with assignments which they feel, for some reason, would result in a violation of the Rules. A supervised lawyer, however, is still bound by the Rules, even when acting under the direct supervision of another lawyer.[22] The supervised lawyer is entitled to this defense in a disciplinary proceeding only when it appears that the lawyer acted according to the supervisory lawyer's reasonable resolution to "an arguable question of professional conduct."[23]

The rule is clear that the partner or supervisory lawyer must have knowledge of the supervised lawyer's violation in order to be subject to discipline.[24] Theoretically, this prevents the notion of "vicarious" disciplinary liability. As in the preamble to the Rules, the comments following Rule 5.01 state that it is not within the scope of the Rules to determine whether a partner or supervisory lawyer may be held civilly

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19. *Id.* Rule 5.01. The Rule reads as follows:

> A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if:
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> (a) The lawyer is a partner or supervising lawyer and orders, encourages, or knowingly permits the conduct involved; or
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> (b) The lawyer is a partner in the law firm in which the other lawyer practices, is the general counsel of a government agency's legal department in which the other lawyer is employed, or has direct supervisory authority over the other lawyer, and with knowledge of the other lawyer's violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation.

Id.

20. *Id.* Rule 5.01(a).

21. *Id.* 5.01(b).

22. *See* TEXAS RULES OF PROFESSIONAL CONDUCT Rule 5.02 (outlines responsibilities of supervised lawyer). The Rule provides: "A lawyer is bound by these rules notwithstanding that the lawyer acted under the supervision of another person, except that a supervised lawyer does not violate these rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional conduct." *Id.*

23. *Id.*; *see also* TEXAS RULES OF PROFESSIONAL CONDUCT Rule 5.02, comment 3 (limits its use of defense).

24. TEXAS RULES OF PROFESSIONAL CONDUCT Rule 5.01, comment 5 (supervisory attorney exposed to liability only for knowing actions or omissions).

or criminally liable for the conduct of a supervised lawyer.[25] It is difficult to imagine, however, that a finding by a grievance committee that Rule 5.01 was violated would not be considered in a civil or criminal action alleging a partner or supervisory lawyer to be vicariously liable for the conduct of the supervised lawyer.

C. *Rule 1.04: Fee Setting*

The factors listed in the Rules which may be considered in setting a fee[26] are not very different from the factors included in the Code.[27]

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25. *Id.* (supervisory attorney not vicariously liable under rule).

26. *Id.* Rule 1.04. The Rule, addressing legal fees, provides:

(a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.

(b) Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:

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

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

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

(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

(c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (e) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined. If there is to be a differentiation in the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, the percentage for each shall be stated. The agreement shall state the litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(e) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

(f) A division or agreement for division of a fee between lawyers who are not in the same firm shall not be made unless:

(1) the division is:

Utilization of these factors to determine whether a fee is appropriate, however, could have some far-reaching effects.

In some disciplinary districts,[28] lawyers involved in fee disputes with clients may elect to have the dispute resolved via arbitration by a fee dispute committee either before a formal grievance or as an alternative to a formal grievance. These committees, though recognized by the State Bar, are separate and distinct entities from the grievance committees themselves. As a result, their procedures are not governed by the Bar, nor are their decisions binding on the parties.

Similar to the grievance committees, the fee dispute committees look to disciplinary rules for guidance to determine whether the fees in question are appropriate. The liability question arises once a com-

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(i) in proportion to the professional services performed by each lawyer;
(ii) made with a forwarding lawyer; or
(iii) made, by written agreement with the client, with a lawyer who assumes joint responsibility for the representation;
(2) the client is advised of, and does not object to, the participation of all the lawyers involved; and
(3) the aggregate fee does not violate paragraph (a).
(g) Paragraph (f) of this Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

Id.

27. *Compare* TEXAS CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (factors to consider when setting fees) *with* TEXAS RULES OF PROFESSIONAL CONDUCT Rule 1.04 (factors to consider to determine if fee reasonable). The DR 2-106 provides:

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.
(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

TEXAS CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106.

28. District 9 in Austin, for example, utilizes a fee dispute committee.

mittee has determined a fee to be inappropriate or excessive based on the criteria included in the Rules. It is questionable whether this finding would be admissible in a subsequent action under the Deceptive Trade Practices Act as proof of unconscionability.[29]

D. *Rule 7.01: Communication Concerning a Lawyer's Services*

The liberalization of rules pertaining to lawyer advertising[30] is relatively new; therefore, the regulation of legal advertising is also new

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29. *See infra* notes 37-45 and accompanying text.

30. TEXAS RULES OF PROFESSIONAL CONDUCT Rule 7.01. The Rule provides:

(a) A lawyer shall not make a false or misleading communication about the qualifications or the services of any lawyer or law firm. A statement is false or misleading if it:

(1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading. Any statement about fees must include the amount of the fee, whether contingent or otherwise, and must state whether the client may be obligated for all or for some portion of the costs involved;

(2) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law;

(3) Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or

(4) States or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

(b) A lawyer shall not advertise publicly that the lawyer is a specialist, except as permitted under Rule 7.01(c) or as follows:

(1) A lawyer admitted to practice before the United States Patent Office may use the designation 'Patents,' 'Patent Attorney,' or 'Patent Lawyer', or any combination of those terms. A lawyer engaged in the trademark practice may use the designation 'Trademark,' 'Trademark Attorney,' or 'Trademark Lawyer,' or any combination of those terms. A lawyer engaged in patent and trademark practice may hold himself out as specializing in 'Intellectual Property Law,' 'Patents, or Trademarks and Related Matters,' or 'Patent, Trademark, Copyright Law and Unfair Competition' or any of those terms.

(2) A lawyer may permit his name to be listed in lawyer referral service offices according to the areas of law in which he will accept referrals.

(3) A lawyer available to practice in a particular area of law or legal service may distribute to other lawyers and publish in legal directories a dignified announcement of such availability, but the announcement shall not contain a representation of special competence or experience.

(c) A lawyer who advertises through public media with regard to any area of the law in which the lawyer practices shall:

(1) With respect to each area of law so advertised, publish or broadcast the name of the lawyer, licensed to practice in Texas, who shall be responsible for the performance of the legal service in the area of law so advertised.

(2) If the lawyer has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, state with respect to

and still developing. In fact, there are few, if any, guidelines available to Texas lawyers regarding advertising. As a result, legal advertising raises a great many questions which have not yet been answered.

The overall rule is simple enough: advertising can be neither false nor misleading.[31] The difficulty arises when interpreting the rule. For example: What is "misleading"? Misleading to whom—the con-

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each area, 'Board Certified, (area of specialization) — Texas Board of Legal Specialization.'

(3) If the lawyer has not been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, state with respect to each area, 'Not Certified by the Texas Board of Legal Specialization,' but if the area of law so advertised has not been designated as an area in which a lawyer may be awarded a certificate of special competence by the Texas Board of Legal Specialization, the lawyer may also state, 'No designation has been made by the Texas Board of Legal Specialization for a Certificate of Special Competence in this area.'

(d) The statements referred to in paragraph (c) shall be displayed conspicuously so as to be easily seen or understood by any consumer.

(e) Subject to the requirements of paragraphs (a), (b), (c), and (d), a lawyer may, either directly or through a public relations or advertising representative, advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor display, radio or television.

(f) A lawyer shall not send a written communication to a prospective client for the purpose of obtaining professional employment if:

(1) The lawyer knows or reasonably should know the person could not exercise reasonable judgment in employing a lawyer;

(2) The person has made known to the lawyer a desire not to receive communications from the lawyer;

(3) The communication involves coercion, duress or harassment;

(4) The communication contains information prohibited by paragraphs (a) or (b); or

(5) The communication fails to comply with the requirements of paragraphs (c) and (d).

(g) All advertisements for a lawyer or law firm and all written communications to a prospective client for the purpose of obtaining professional employment must be reviewed and approved in writing by the lawyer or a lawyer in the law firm.

(h) A copy or recording of each advertisement, written communication, and relevant approval referred to in paragraph (g), and a record of when and where the advertisement or communication was used, shall be kept by the lawyer or law firm for four years after its last dissemination.

(i) A lawyer shall not give or promise to give anything of value to a lay person for referring clients or potential clients to any lawyer or law firm; however, a lawyer may pay reasonable fees for advertising and public relations service rendered in accordance with this Rule and may pay the usual charges and otherwise cooperate with organizations that refer clients if the organization does not profit from the rendition of legal services by lawyers.

Id.

31. TEXAS RULES OF PROFESSIONAL CONDUCT Rule 7.01(a).

sumer or the grievance committee?[32] How prominent must the "Board Certified" or "Not Certified" be in an ad to be sufficiently "conspicuous"?[33] In TV ads, must the designation be aural as well as visual to satisfy the requirement that it be "easily seen or understood by any consumer"?[34] If a visual designation alone is sufficient, how long should the words remain on the screen?

Although a false advertisement for legal services may be sufficient to give rise to a malpractice claim, it is less likely that a misleading statement would do so. What will the result be, however, if a grievance committee finds a lawyer's advertising to be misleading to the public?

One purpose of advertising, of course, is to inform consumers about the availability of legal services. The consumer depending on the advertising to hire a lawyer however, has no personal remedy through the disciplinary process if the advertising is false or misleading.[35] Several commentators suggest that while disciplinary action is important to maintain the integrity of the profession, another, more appropriate avenue exists to deter false and misleading advertising—consumer protection statutes.[36]

E. *Deceptive Trade Practices Act*

As a rule, the Texas Deceptive Trade Practices-Consumer Protec-

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32. *See* Devine, *Letting the Market Control Advertising by Lawyers: A Suggested Remedy for the Misled Client*, 31 BUFFALO L. REV. 351, 357-58 (1982)(consumer protection laws are best means to deter false advertising). The commentator states that consumer protection statutes such as the DTPA are the most appropriate means of dealing with lawyer advertising in particular because "misleading" and "deceptive" should be determined from the perspective of the consumer (subjective standard) rather than the perspective of the reasonable attorney or grievance committee (objective standard). *Id.* at 370.

33. TEXAS RULES OF PROFESSIONAL CONDUCT Rule 7.01(c)-(d).

34. *Id.* Rule 7.01(d).

35. *See* Martin v. Trevino, 578 S.W.2d 763, 770 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.)(private cause of action not created as result of disciplinary rules being violated); *see also* R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 1.9, at 33 (3d ed. 1989)(client is not party to disciplinary proceeding although proceeding may be initiated by client); *Id.* § 6.27, at 355 (although disciplinary regulations designed to protect public they do not provide remedy for wrongdoing in themselves).

36. *Id.* § 4.11, at 259 n.8 (predicts attorneys will be held liable for implied promise made in advertising); *see also* Devine, *Letting the Market Control Advertising by Lawyers: A Suggested Remedy for the Misled Client* 31 BUFFALO L. REV. 351, 357-58 (1982)(consumer protection statutes are best deterrent to false and misleading legal advertising); Marcotte, *New Threat to Attorneys?*, 74 A.B.A. J. 17, 17-18 (Dec. 1988)(trend toward consumer protection threatens attorneys with consumer fraud lawsuits).

tion Act ("DTPA")[37] is a strict liability statute and does not require a showing of fault.[38] Although the statute exempts physicians and health care providers from DTPA claims which allege negligent conduct,[39] a similar amendment which proposed excluding professional services in general was tabled.[40] The extent to which the DTPA does apply to lawyers and legal services, however, is a relatively new and still developing topic.

In 1980, the Houston Court of Appeals ruled that the DTPA applied to the purchase of legal services in *DeBakey v. Staggs*.[41] In the per curium opinion, the Texas Supreme Court stated that while it agreed that the respondents were consumers under the DTPA, the question "as to the standard of care by which a legal malpractice claim is to be determined" was expressly reserved for future determination.[42] Subsequent decisions concerning DTPA allegations against attorneys have done little to provide insight as to whether or not the statute can be construed to alter the standard of care in a legal mal-

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37. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon 1989) (Texas Deceptive Trade Practices & Consumer Protection Act "DTPA"). It is beyond the scope and intent of this article to discuss the DTPA and DTPA actions in general.

38. *Id.* § 17.46(a). False, misleading, and deceptive acts and practices are prohibited in the conduct of any trade or commerce. The act includes no requirement that the acts or practices be intentionally false, misleading, or deceptive. *Id.*; *see also* Wagner v. Morris, 658 S.W.2d 230, 233 (Tex. App.—Houston [1st Dist.] 1983, no writ)(misrepresentation actionable under DTPA even without intent to deceive).

39. TEX. REV. CIV. STAT. ANN. art 4590i, § 12.01(a) (Vernon Supp. 1989). The section provides:

> Notwithstanding any other law, no provisions of Sections 17.41-17.63 Business & Commerce Code, [DTPA] shall apply to physicians or health care providers as defined in Section 1.03(3) of this Act, with respect to claims for damages for personal injury or death resulting, or alleged to have resulted, from negligence on the part of any physician or health care provider.

Id.

40. H.J. OF TEX., 63rd Leg., Reg. Sess. 2115, 2115 (1973)(proposed amendment to § 17.49). The amendment, as proposed, read: "(c) No provision of this Act shall apply to any individual practicing his or her profession only licensed by the State of Texas to practice a recognized profession in this state." *Id.*

41. 605 S.W.2d 631, 633 (Tex. Civ. App.—Houston [1st Dist.] 1980) *writ ref'd n.r.e. per curium*, 612 S.W.2d 924 (Tex. 1981). Attorney DeBakey was retained to perform the work required to change the name of Mrs. Staggs' daughter (Mr. Staggs' step-daughter). Although the original petition was filed and the cause was heard, the final order was never signed because of various insufficiencies and defects. As a result, the Staggs hired a second attorney to complete the proceeding. This suit was then filed against DeBakey, alleging damages in the amount of the retainer paid plus the additional costs incurred as a result of hiring the second attorney. *DeBakey*, 605 S.W.2d at 632.

42. *DeBakey*, 612 S.W.2d at 925.

practice claim. It is equally unclear whether an attorney can be found liable under the DTPA to third parties.[43] The cases, however, have indicated that lawyers can be found liable under the DTPA for unconscionable acts,[44] and for violations of the "laundry list."[45]

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43. *Compare* First Mun. Leasing Corp. v. Blankenship, 648 S.W.2d 410, 417 (Tex. App.—Dallas 1983, writ ref'd n.r.e.)(question of whether plaintiff a consumer within meaning of DTPA is based on whether plaintiff is client who purchased or leased legal services from attorney) *with* Parker v. Carnahan, 772 S.W.2d 151, 158 (Tex. App.—Texarkana 1989, writ requested)(purchase made for benefit of third party makes third party a consumer within meaning of DTPA). In *Blankenship*, the plaintiff secured financing for political subdivisions and municipal corporations by purchasing their installment and lease/purchase obligations. *Blankenship*, 648 S.W.2d at 412. Following the purchase, the plaintiff would then sell the obligation to third party investors. Pursuant to the negotiation of one such deal, the investor required the plaintiff to obtain a legal opinion concerning the legality of the contract obligation being purchased (which the plaintiff had purchased from System Works). The plaintiff requested System Works to obtain the requested opinion; System Works in turn hired Blankenship, et al to provide the opinion letter. Although the letter was subsequently provided to the plaintiff, System Works paid for the legal services and the opinion was addressed and submitted only to them. *Id.* The court concluded that the plaintiff was not a consumer within the meaning of DTPA because it neither purchased nor leased the legal services in question. *Id.* at 417. The court additionally concluded that even if the plaintiff had qualified as a consumer under the DTPA, it was not adversely affected by the letter because the plaintiff did not receive the letter until a week after it had entered into the assignment with System Works. *Id.* at 418. In *Parker*, a woman brought suit against her former husband's attorneys, alleging among other things that they had violated the DTPA by failing to tell her of the potential liability which could result from her signing a joint tax return. *Parker*, 772 S.W.2d at 153. The court cited *Blankenship* for the premise that "a non-client generally has no cause of action against an attorney for the negligent performance of legal work." *Id.* at 156. The court then stated that Mrs. Parker did not appear to qualify as a consumer under the DTPA because the legal services in question were provided solely for her former husband. *Id.* Citing *Kennedy v. Sale*, however, the court acknowledged that a third party may be a consumer within the meaning of the DTPA if the purchase in question was made for the benefit of the third party and that the goods or services so purchased form the basis of the complaint. *Id.* at 158. After finding that Mrs. Parker was not precluded from being a consumer within the meaning of the DTPA, the court ruled the evidence presented was nonetheless insufficient to establish such a violation. *Id.* at 159; *see also* Kennedy v. Sale, 689 S.W.2d 890, 892-93 (Tex. 1985)(plaintiff can be consumer within meaning of DTPA when goods or services acquired for plaintiff's benefit).

44. *DeBakey*, 612 S.W.2d at 925 (attorney's actions were unconscionable under DTPA); *see also* Barnard v. Mecom, 650 S.W.2d 123, 126 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.)(evidence sufficient to find attorney committed unconscionable act in violation of DTPA); TEX. BUS. & COM. CODE ANN. § 17.45(5) (Vernon 1987)(definition of unconscionable action). *But see* Lucas v. Nesbitt, 653 S.W.2d 883, 886 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.)(evidence insufficient to show attorney's actions unconscionable under DTPA).

45. *Cf.* Heath v. Herron, 732 S.W.2d 748, 754 (Tex. App.—Houston [14th Dist] 1987, writ denied)(announcement of "ready" in court insufficient to give rise to DTPA claim for misrepresentation). Although the court recognized that legal services could be found actionable under the DTPA, it was unwilling to find that an announcement of "ready" in court constituted a claim under the DTPA if the attorney was subsequently unsuccessful. *Id.*; *see also*

One particular area of DTPA liability which has not yet been specifically applied to legal services is a breach of implied warranty. While "warranty" is not defined in the statute, caselaw has clearly established that any DTPA liability for breach of warranty must be for a warranty established independently of the statute itself.[46] Although the question of implied warranty has not been expressly answered by the supreme court in connection with legal services per se, the court has addressed the issue in relation to other professional services.

In *Dennis v. Allison*, the supreme court addressed the issue of whether a psychiatrist could be found liable for breach of an implied warranty to follow the ethical commands of his profession.[47] The court declined to create such a cause of action, basing its decision on the fact that the plaintiff had other more appropriate remedies readily available to her.[48]

Two years later, in *Melody Home Manufacturing Co. v. Barnes*,[49] the court found that service providers who repair existing tangible goods or property impliedly warrant that the services "will be performed in a good and workmanlike manner"; and that a breach of such implied warranty was actionable under the DTPA.[50] Although the original opinion issued in *Melody Home* ruled that a similar implied warranty was applicable to professional services as well,[51] the

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TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon 1987)("laundry list" of false, misleading, or deceptive acts and practices prohibited under DTPA).

46. La Sara Grain Co. v. First Nat'l Bank of Mercedes, 673 S.W.2d 558, 565 (Tex. 1984)(because DTPA does not define "warranty" it must be established outside Act)).

47. 698 S.W.2d 94, 94 (Tex. 1985). The plaintiff had sued her psychiatrist after he beat her physically and sexually assaulted her during treatment. The only theory of recovery preserved for review was whether the defendant had breached an implied warranty to adhere to the ethical commandments of his profession. *Id.*

48. *Id.* at 96 (court ruled no need to find implied warranty because plaintiff had other equally adequate means available to redress wrongs committed). The remedies identified by the court which would be more appropriate for the plaintiff to use were those of assault and battery, and medical malpractice. *Id.* at 95-96.

49. 741 S.W.2d 349 (Tex. 1987).

50. *Id.* at 355. The Barneses purchased a pre-fabricated modular home from Melody Home in 1979. *Id.* at 351. Over the next several years, they noticed dampness and puddles in the home and eventually discovered a sink was not correctly connected to a drain. Although workers from Melody Home made two attempts to repair the problem, the repairs did not alleviate the problem, and in fact, added to the damage. *Id.*

51. Melody Home Mfg. v. Barnes, 30 Tex. Sup. Ct. J. 489, 491 (June 17, 1987), *opinion withdrawn and new opinion substituted*, 741 S.W.2d 349 (Tex. 1987). In the first *Melody Home* opinion, the Texas Supreme Court reasoned that "[t]he policies supporting the recognition of

court modified the breadth of its decision in its second opinion, stating that the "question [of] whether an implied warranty applies to services in which the essence of the transaction is the exercise of professional judgment by the service provider is not before us."[52]

While it is not certain that legal services include an implied warranty that the services will be performed in a good and workmanlike manner, it is equally uncertain that they *do not* include such a warranty. In *Willis v. Maverick*,[53] a client brought a malpractice and DTPA action against her divorce attorney.[54] The Texas Supreme Court ruled affirmatively on the ultimate issue, holding the discovery rule to be applicable in legal malpractice cases.[55] Recovery, however, was denied because error had not been properly preserved.[56] Finding there was no need to reach the DTPA cause of action, the court then concluded "[the] determination of whether a lawyer's professional conduct is actionable under the DTPA must await another day."[57]

Should the Texas Supreme Court eventually rule that legal services include an implied warranty, it is unclear what specific actions would give rise to creating an implied warranty: A violation of the Rules? An ad stating that the lawyer will "fight for you"? A collection of news clippings shown to a prospective client which highlight previous big-dollar jury awards?[58] What is certain is that if such a warranty is found, a breach of the warranty would be actionable under the DTPA.

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an implied warranty for services such as repairs apply equally to 'professional' services." *Id.* at 491. As a result, *Dennis v. Allison* was overruled in the first opinion. *Id.*

52. *Melody Home*, 741 S.W.2d at 354.

53. 760 S.W.2d 642 (Tex. 1988).

54. *See id.* at 643 (malpractice and DTPA action against divorce attorney). The ultimate issue in the malpractice/DTPA action was whether the discovery rule is applicable in malpractice actions for the purpose of determining when the statute of limitations begins to run. *Id.* at 646.

55. *Id.*

56. *Id.* at 647-48. The court ruled that because Mrs. Willis had failed to adequately plead and prove discovery of the action as a bar to the statute of limitations, it was unnecessary to decide whether the DTPA claim was applicable. Nonetheless, the court then proceeded to discuss the status of DTPA causes of actions relative to legal services. The court stated that while it had ruled an attorney may be held liable under the DTPA for unconscionable conduct, it as yet had declined to expand implied warranties to include all professional conduct. *Id.*

57. *Id.* at 647-48.

58. *See* R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 8.6, at 418 (3d ed. 1989)(risk of warranty liability to clients expected to increase because expansion of marketing of legal services increases likelihood of predicting results and overstating ability).

III. THE RULES AND MALPRACTICE: OTHER JURISDICTIONS

Courts in other jurisdictions have often cited ethical rules and standards, but they seldom make clear reference as to whether the rules define the standard of care, provide an independent basis for liability, or simply suggest appropriate conduct.[59] Generally, a violation of a rule of professional conduct has been insufficient to hold an attorney liable in a malpractice action.[60] One commentator has noted, however, that nothing prohibits the use of disciplinary rules as a guide when evaluating a lawyer's conduct in malpractice actions.[61]

Neither commentators nor courts agree as to the relationship of ethical violations and malpractice actions.[62] Some argue that violation of an ethical regulation is "some evidence" of negligence;[63] others that a violation is negligence per se.[64] Still others have ruled that

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59. *Id.* § 15.7, at 880-82 (3d ed. 1989)(use of ethical standards in actions against attorneys). *See generally* Podgor, *Criminal Misconduct: Ethical Rule Usage Leads to Regulation of the Legal Profession*, 61 TEMP. L.Q. 1323, 1333 (1988)(discussion of use of ethical regulations in civil proceedings).

60. *See* Martin v. Trevino, 578 S.W.2d 763, 770 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.)(violation of disciplinary rule insufficient in itself to create a private cause of action); *accord* Terry Cove North, Inc. v. Marr, 521 So. 2d 22, 24 (Ala. 1988)(Code does not define standards for civil liability). *See generally* R. MALLEN & J. SMITH, LEGAL MALPRACTICE §§ 1.9, 6.27, 15.7 (3d ed. 1989)(discussion of the relationship between ethical standards, disciplinary proceedings and civil liability); C. WOLFRAM, MODERN LEGAL ETHICS § 2.6.1, at 52-53 (1986)(discussion of how lawyer codes of professional conduct have been applied judicially).

61. C. WOLFRAM, MODERN LEGAL ETHICS § 2.6.1, at 52 (1986)(nothing in Code suggests it inappropriate for courts to use Code for guidance in determining measure of civil liability); *see also* Wolfram, *The Code of Professional Responsibility As A Measure of Attorney Liability In Civil Litigation*, 30 S.C.L. REV. 281, 286-95 (1979)(reasons Code should be used as basis for civil liability).

62. *Compare* Faure & Strong, *The Model Rules of Professional Conduct: No Standard for Malpractice*, 47 MONT. L. REV. 363 (1986)(discussion of reasons Rules are inappropriate as standards for civil liability) *and* Hoover, *The Model Rules of Professional Conduct and Lawyer Malpractice Actions: The Gap Between Code and Common Law Narrows*, 22 NEW ENG. L. REV. 595 (1988)(concern that, in effect, Rules are becoming standards for civil liability) *with* Wolfram, *The Code of Professional Responsiblity As A Measure of Attorney Liability in Civil Litigation*, 30 S.C.L. REV. 281, 284 (1979)(advocates Rules being used as standard for civil liability) *and* Note, *The Rules of Professional Conduct: Basis for Civil Liability of Attorneys*, 39 U. FLA. L. REV. 777 (1987)(discussion of pros and cons in utilizing Rules as standard for civil liability).

63. Woodruff v. Tomlin, 616 F.2d 924, 936 (6th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980)(Code provides some evidence of standard of care for attorneys).

64. Day v. Rosenthal, 217 Cal. Rptr. 89, 102 (Ct. App. 1985), *cert. denied*, 475 U.S. 1048 (1986)(standards for attorney's ethical duties conclusively defined by Rules). In instances where an attorney's performance is so obviously contrary to established standards, the court concluded that expert testimony is not required to find negligence on the part of the attorney.

ethical violations create a presumption that the malpractice standard of care has been breached.[65] Some courts, on the other hand, argue that ethical violations have no place whatsoever in malpractice actions.[66] In the majority of cases, the standard of care allegedly breached must be established with the use of an expert witness.[67]

IV. THE RULES AND MALPRACTICE: TEXAS

A. *Historical Relationship*

Texas courts have not agreed as to the exact role disciplinary rules play in legal malpractice actions. In 1978, the Corpus Christi Court of Appeals in *Martin v. Trevino*[68] ruled that a violation of a disciplinary rule did not, in itself, create a private cause of action for malpractice.[69] While the *Martin* ruling has often been followed, it must be noted the allegations in *Martin* were not made by a client, but rather by a doctor against whom the attorney had filed a medical malpractice suit on behalf of a client.[70]

Other courts have been less decisive when faced with the question of whether a violation of a disciplinary rule creates a private cause of

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Id. The court ruled that an attorney's duty to a client was not limited to the *skill* required of attorneys, but also included the obligation of protecting the client's best interest in all circumstances, including ethically. The requisite ethical duties are established in the Rules of Professional Conduct and such duties cannot be changed through the use of expert testimony. *Id.* (emphasis in original).

65. *See* Sawabini v. Desenberg, 372 N.W.2d 559, 566 (Mich. Ct. App. 1985)(violation of Code creates rebuttable presumption of actionable malpractice); Lipton v. Boesky, 313 N.W.2d 163, 167 (Mich. Ct. App. 1981)(rebuttable presumption of malpractice created when Code violated). The *Lipton* court reasoned that because the Code defined the standard of conduct expected of attorneys in relationships with their peers, the legal system, and the public in general; it would be "patently unfair" to hold that an individual client could not rely on the same standards in relationships with his/her own attorney. *Lipton*, 313 N.W.2d at 166-67.

66. *See* Helmbrecht v. St. Paul Ins. Co., 362 N.W.2d 118, 128 (Wis. 1985)(Code is helpful in defining attorney's ethical conduct but defines neither the obligations owed to client nor the standard of care for civil liability).

67. *See* Miami Int'l Realty Co. v. Paynter, 841 F.2d 348, 352-53 (10th Cir. 1988)(standard of care must be established by expert testimony, but expert may refer to Code as standard which is followed by state's attorneys); Carlson v. Morton, 745 P.2d 1133, 1137-38 (Mont. 1987)(expert testimony required to establish standard of care). *See generally* R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 15.7, at 881 (3d. ed. 1989)(use of ethical standards by expert witness to determine standard of care). The authors point out, however, that the expert who establishes the standard of care which has allegedly been breached often uses ethical standards to form his/her opinion of the relevant standard. *Id.*

68. 578 S.W.2d 763 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

69. Id. at 770.

70. *Id.* at 764.

action. In *Citizens State Bank of Dickinson v. Shapiro*,[71] the appellee attorneys questioned the existence of a cause of action which was allegedly based upon violations of various disciplinary rules.[72] The court avoided answering the question by "assum[ing], without deciding, that the allegations of appellant's petition state a cause of action for legal malpractice, whether it be stated in terms of intentional violations of disciplinary rules, negligence, or negligence per se."[73] A similar result was reached in *Avila v. Havana Painting Co.*,[74] where the court ruled that an alleged violation of a disciplinary rule actually gave rise to a cause of action in tort.[75] Use of the Code has not been limited to malpractice actions. Courts have also referred to the Code when determining whether multiple or subsequent representations present a conflict of interest.[76]

Perhaps the most common use of the Code in Texas, however, is by experts testifying in malpractice cases. Mr. Thomas Watkins,[77] who testifies regularly as an expert in legal malpractice cases, has routinely utilized the Code to establish the minimum standard of care for a "reasonable prudent attorney." As with other experts, his opinion of

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71. 575 S.W. 2d 375 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

72. Id. at 386.

73. *Id.* The court summarily concluded that the action was a tort action regardless of what it was named, and therefore the action was barred by the applicable two-year statute of limitations. The plaintiff in *Citizens State Bank* also alleged the defendant attorneys breached an implied warranty to comply with the attorney-client contract; to provide services and information which would be knowledgeable, accurate and truly reflect the current state of the law; and to honor and respect the obligations inherent in such a fiduciary relationship. *Id.* As with the question concerning the Code violations, the court reasoned that although the allegations were phrased in terms of a cause of action in contract, the plaintiff was basically alleging tortious conduct (fraud, misrepresentation, negligence). The allegations were therefore barred by the statute of limitations. *Id.* at 387.

74. 761 S.W.2d 398 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

75. *Id.* at 400. The defendant attorney was charged with violating DR 9-102(B) which requires an attorney to promptly pay a client all securities, funds or other property to which the client is entitled. *Id.*

76. *See* Petroleum Wholesale, Inc. v. Marshall, 751 S.W.2d 295, 301 (Tex. App.—Dallas 1988, no writ)(chinese wall insufficient when attorney in firm has actual knowledge of confidences in specific case). The firm was representing a client whose interests were in conflict with a former client of the individual attorney, whom he had represented in the same case while he was in private practice. *Id.*; *see also* Mallou v. Payne & Vendig, 750 S.W.2d 251, 258 (Tex. App.—Dallas 1988, writ denied)(disciplinary rules prohibit multiple representation if independent professional judgment jeopardized as result).

77. Explanation of expert witness' use of the Code was provided by Mr. Thomas H. Watkins, with Hilgers & Watkins, in Austin, Texas. Mr. Watkins, who regularly testifies as an expert in legal malpractice cases, is a member of the Professional Ethics Committee of the State Bar and a former Chairman of the District 9 Grievance Committee.

whether the attorney's conduct was negligent is then based upon whether or not the conduct in question violated the Code's disciplinary rules.

B. *Predictions for the Future*

What lies ahead? To date, only appellate courts have ruled on the role the Code should play in legal malpractice actions. There is no guarantee that the supreme court will follow the reasoning of lower courts that a violation of the Rules is not actionable in and of itself. Nor will the court necessarily find itself bound by the disclaimer in the preamble to the Rules.

At a minimum, the Rules, like their predecessor the Code, will continue to be utilized by expert witnesses as a means of establishing the standard of care in malpractice cases. Significantly, in *Cosgrove v. Grimes*,[78] the Texas Supreme Court recently clarified that the standard of care in legal malpractice cases is objective, not subjective: *there is no longer a good-faith exception to a malpractice claim*.[79] In effect, therefore, an attorney could be found civilly liable for a violation of the Rules if the Rules are the basis used to establish the reasonable prudent attorney standard.

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78. 774 S.W.2d 662 (Tex. 1989).

79. *Id.* at 664-65 (court clarified that standard is objective, not subjective). The attorney in *Grimes* filed suit on behalf of a car accident victim. Unfortunately, suit was filed against the passenger of the car instead of the driver, and the error was not discovered until after the statute of limitations had run. *Id.* at 663. The attorney's proposed issues included the good-faith defense that he'd relied on the information provided by the client. The court rejected the defense, reasoning that to permit an attorney to assert a good-faith exception to the reasonable prudent attorney standard once the attorney's action was found to be unreasonable under the standard, would create a burden so great that it could never be overcome by clients who had been wronged. *Id.* at 664-65; *see also* Bobbitt v. Weeks, 774 S.W.2d 638, 639 (Tex. 1989)(following *Grimes* rejection of good-faith defense in legal malpractice). Suit was filed in *Weeks* on behalf of a child who was the sole survivor when an airplane crashed into his family's home. Weeks recommended the settlement offer be accepted, which it was. Weeks then refused to file a subsequent administrative claim under the Federal Tort Claims Act with the FAA and the United States alleging negligence on the part of an air traffic controller, despite insistence from his client that he do so. The statute of limitations expired, and the client brought this action, alleging that Weeks had failed to adequately investigate the claim and had failed to file claims against all responsible parties. The client also charged that a "reasonable prudent attorney" would have negotiated a higher settlement and would have filed a claim under the Federal Tort Claims Act. *Id.* at 638. Citing *Grimes*, the court remanded the case, ruling that the trial court had committed error by submitting a jury issue which included a definition of negligence allowing that an attorney did not act negligently if "he acted in good faith and in an honest belief that his acts were in the best interests of his clients." *Id.* at 639.

What are the chances of an eventual supreme court ruling that the Rules establish the minimum standard of care in malpractice actions? Pretty good, according to Mr. Steve Peterson, former General Counsel for the State Bar.[80] Peterson notes that the trend of the supreme court over the past few years has been to create a "right" when necessary to correct a "wrong." The grievance procedure provides no remedy for persons "wronged" by conduct sufficient to warrant disbarring or disciplining an attorney. Peterson points out that the typical grievance involves the attorney-client relationship. He finds it distressing to see the anomaly created when the legal profession holds itself to a minimum standard of care in its relationship with other attorneys and the judicial system in general, yet it resists holding itself to that same minimum standard in its relationships with clients.

What about the disclaimer? Peterson sees it as being nothing more than a self-serving statement written by lawyers, reviewed by lawyers, and approved by lawyers. He doubts the supreme court will find the disclaimer to be a significant barrier should they choose to rule that a violation of the Rules is an independent basis for civil liability (although he notes that judges are also lawyers).

A determination that a violation of the Rules forms the basis of civil liability in and of itself could lead to a change in the grievance procedure as well. Because of the lack of due process in the initial stages of the grievance procedure, a committee may be less anxious to process a complaint filed against an attorney knowing that a Rule violation could be the basis for civil liability. As a result, the courts could replace the grievance process as the primary means of challenging questionable attorney behavior.

An equally far-reaching question is whether the supreme court will eventually find that implied warranties apply to services such as legal services, where the transaction is based upon the professional judgment of the service provider. Considering its attempt to make just such a ruling in the first opinion of *Melody Home* and subsequent references in later cases that the determination of whether such a warranty exists is still undetermined,[81] the question is certainly not moot.

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80. Mr. Steve Peterson served as General Counsel for the State Bar from September, 1985 through November, 1989; and as 1st Assistant and Chief of Litigation from July, 1979 through September, 1985. He is currently in private practice at 114 West 7th Street, Austin, Texas, practicing General Civil Litigation with special emphasis on Professional Responsibility, Professional Ethics and Professional Liability (no board certification implied).

81. *See supra* notes 49-57 and accompanying text.

The Rules would be the most logical place for the supreme court to "find" such a warranty, should it rule that a warranty exists.

V. CONCLUSION

At a minimum, the Rules will play a role comparable to the Code; that of establishing the reasonable prudent attorney standard in malpractice actions by way of expert witness testimony. Whether they are formally ruled to be the standard of care in and of themselves is irrelevant; the effect is the same, according to Peterson.[82]

It is less certain whether an implied warranty actionable under the DTPA will be found to apply to legal services. The Texas Supreme Court has clearly not closed the door on such a possibility, however.

Perhaps the more difficult question to answer is "Why *shouldn't* the Texas Disciplinary Rules of Professional Conduct establish the standard of care for civil liability?" The Rules establish the minimum standard lawyers must meet in relationships with each other, the legal system, and the public as a whole. Shouldn't the same minimum standard be applicable to the attorney-client relationship? Because it is subject to the Sunset Act, the State Bar will be abolished on September 1, 1991 unless its existence is continued pursuant to the Act. It may be difficult to convince the public that the legal profession should continue to be a self-governing entity and at the same time justify the double standard of care.

The Rules became effective January 1, 1990. The best and safest approach is for all Texas attorneys to simply read the rules and to assume that a violation will result in liability to a client as well as to the Bar.

82. *See supra* note 80. In Peterson's words, "[if] it looks like a duck, walks like a duck, and sounds like a duck, it IS a duck, even if everyone calls it a dog."

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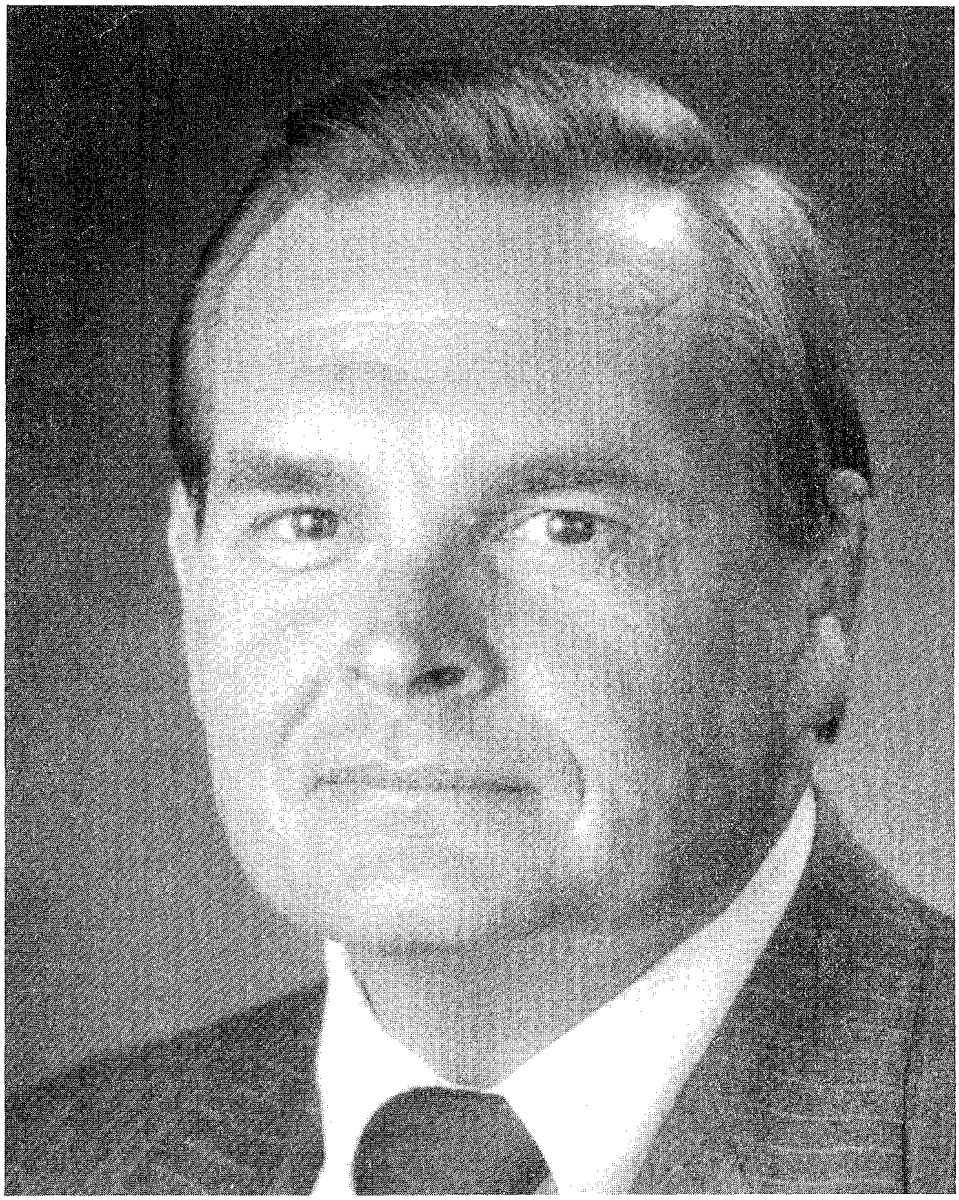

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