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WHY LEGAL ETHICS RULES ARE RELEVANT TO LAWYER LIABILITY

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I. INTRODUCTION

The last two decades have witnessed the creation of a perilous liability environment for lawyers and law firms. During the 1980s and 1990s, the savings and loan scandal resulted in law firms and their professional liability insurers paying over $400 million in settlements to federal agencies.[1] The pace has not slackened since. As of February 2007, there were forty-three publicly reported verdicts against, or settlements by, law firms exceeding $20 million in a string of cases dating back to 1985; seventeen of these have occurred since 2000.[2] There have been a number of other verdicts against, or settlements by, law firms that, while less than $20 million, have still reached eight figures.[3] Seven-figure amounts like-

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1. Douglas R. Richmond, *Essential Principles for Law Firm General Counsel*, 53 U. KAN. L. REV. 805, 806 (2005).

2. This figure is derived from data compiled by the author and his colleagues in the Professional Services Group of Aon Risk Services.

3. *See, e.g.*, Kristen Hays, *An Enron Settlement*, HOUS. CHRON., Jan. 20, 2007, at D1, *available at* http://www.chron.com/disp/story.mpl/business/4484631.html (reporting an $18.5 million settlement by Andrews Kurth LLP); Will Kane, *Settlement Secured in Enron Lawsuits*, THE DAILY CALIFORNIAN, Sept. 25, 2006, at 1, *available at* http://www.dailycal.

wise dot the lawyer liability landscape.[4] Unfortunately, the environment is unlikely to improve anytime soon, as recent corporate scandals have exposed the legal profession to heightened scrutiny.[5]

Most discussions of lawyer liability begin with "legal malpractice," a term that typically describes professional negligence.[6] As in negligence cases generally, a plaintiff in a legal malpractice case must prove that the lawyer owed her a duty, the lawyer breached that duty, and the breach was a proximate cause of the plaintiff's actual damages.[7] The lawyer's duty flows from the attorney-client relationship.[8] The attorney-client relationship is also a fiduciary one,[9] and lawyers may be sued for breach of fiduciary duty.[10] Al-

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org/printable.php?id=21505 (reporting that Kirkland & Ellis settled a claim by University of California arising out of Enron Corporation's well-publicized failure for $13.5 million); John Ketzenberger, *Law Firm On Hook for $18 Million Judgment*, INDIANAPOLIS STAR, Sept. 3, 2006, at 1, *available at* http://nl.newsbank.com/nl-search/we/Archives?s_site=indystar&p_product=in&p_theme=gannett&p_action=keyword (subscription required) (reporting an $18 million malpractice verdict against Indiana labor law firm); Daniel Wise, *Malpractice Verdict Returned Against LeBoeuf Lamb*, N.Y.L.J., Sept. 24, 2003, at 1, *available at* http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1063212079299 (reporting a $17 million legal malpractice verdict that could reach $21 million with award of interest).

4. *See, e.g.*, Clary v. Lite Machs. Corp., 850 N.E.2d 423, 439 (Ind. App. 2006) (upholding $3.6 million malpractice verdict in Indiana); Michael Dayton, *The Evolution of a Legal Malpractice Dispute*, N.C. LAWYERS WEEKLY, June 5, 2006, at 1, *available at* http://www.findarticles.com/p/articles/mi_qn4185/is_20060611/ai_n16476241 (discussing a $5.5 million malpractice verdict in South Carolina).

5. *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY, at v (2006-07 ed.) (lamenting the corporate scandals and collapses of 2001 and 2002 that have led to greater public scrutiny of the legal profession).

6. *See* Edward F. Donohue III, *What Every Lawyer Should Know*, *in* A.B.A. STANDING COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY: THE LAWYER'S DESK GUIDE TO PREVENTING LEGAL MALPRACTICE 3 (2d ed. 1999) (stating that "[l]egal malpractice is most commonly used to describe professional negligence claims against attorneys").

7. Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 783 (Tex. 2006) (quoting Peeler v. Hughes & Luce, 909 S.W.2d 494, 496 (Tex. 1995)); *see* Governmental Interinsurance Exch. v. Judge, 850 N.E.2d 183, 186-87 (Ill. 2006) (outlining the elements of a legal malpractice cause of action); Cox v. Geary, 624 S.E.2d 16, 22 (Va. 2006) (quoting Rutter v. Jones, Blechman, Woltz & Kelly, P.C., 568 S.E.2d 693, 695 (Va. 2002)) (defining the factors constituting a claim for legal malpractice).

8. *See, e.g.*, Stoeckel v. Twp. of Knowlton, 902 A.2d 930, 938 (N.J. Super. Ct. App. Div. 2006) (requiring plaintiffs in a legal malpractice claim to demonstrate "the existence of an attorney-client relationship" (quoting Conklin v. Hannoch Weisman, 678 A.2d 1060, 1070 (N.J. 1996))).

9. *In re* Winthrop, 848 N.E.2d 961, 972 (Ill. 2006); Nesvig v. Nesvig, 2004 ND 37, ¶ 20, 676 N.W.2d 73, 80; Ellis v. Davidson, 595 S.E.2d 817, 823 (S.C. Ct. App. 2004).

though plaintiffs often allege both legal malpractice and breach of fiduciary duty in the same case, and although a lawyer's breach of a fiduciary duty will support a legal malpractice cause of action,[11] these two theories do not necessarily overlap.[12] For example, a lawyer may be negligent and thus liable for malpractice without incurring liability for breach of fiduciary duty, because competence and diligence are not fiduciary obligations.[13] Liability for breach of fiduciary duty requires that a lawyer breach her duties of confidentiality or loyalty.[14] As a Texas court explained:

> An attorney breaches his fiduciary duty when he benefits improperly from the attorney-client relationship by, among other things, subordinating his client's interest to his own, retaining the client's funds, engaging in self-dealing, improperly using client confidences, failing to disclose conflicts of interest, or making misrepresentations to achieve these ends.[15]

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10. *See* W. BRADLEY WENDEL, PROFESSIONAL RESPONSIBILITY: EXAMPLES AND EXPLANATIONS 98 (2004) (explaining that a client may bring a claim against his lawyer for breach of fiduciary duty under agency law).

11. *See, e.g.*, Spur Prods. Corp. v. Stoel Rives LLP, 122 P.3d 300, 303 (Idaho 2005) (premising legal malpractice claim on lawyer's alleged breach of duty of confidentiality).

12. In fact, some courts hold that where the two causes of action do overlap, the breach of fiduciary duty claim is redundant and should be dismissed. *See, e.g.*, Aller v. Law Office of Carole C. Schriefer, P.C., 140 P.3d 23, 27 (Colo. Ct. App. 2005) ("When a legal malpractice claim and a breach of fiduciary duty claim arise from the same material facts, the breach of fiduciary duty claim should be dismissed as duplicative."), *cert. denied*, 2006 WL 1530184 (Colo. 2006); Calhoun v. Rane, 599 N.E.2d 1318, 1321 (Ill. App. Ct. 1992) (dismissing a fiduciary duty claim that was "virtually identical" to the legal malpractice claim); Klemme v. Best, 941 S.W.2d 493, 496 (Mo. 1997) (stating that "[i]f the alleged breach can be characterized as both a breach of the standard of care (legal malpractice based on negligence) and a breach of a fiduciary obligation . . . then the sole claim is legal malpractice"); Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 780 N.Y.S.2d 593, 596 (N.Y. App. Div. 2004) (stating that a breach of fiduciary duty claim "premised on the same facts and seeking the identical relief sought in [a] legal malpractice cause of action[ ] is redundant and should be dismissed").

13. *See* Moguls of Aspen, Inc. v. Faegre & Benson, 956 P.2d 618, 620-21 (Colo. Ct. App. 1997) (holding that defendants' alleged negligence and lack of due diligence would not support breach of fiduciary duty claim).

14. *See* Behrens v. Wedmore, 2005 SD 79, ¶ 52, 698 N.W.2d 555, 576-77 (quoting 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 14.5, at 536-37 (5th ed. 2000)) (necessitating a breach of confidence or loyalty to sustain a claim for fiduciary breach); Shaw Res. Ltd. v. Pruitt, Gushee & Bachtell, P.C., 2006 UT App 313, ¶¶ 28-44, 142 P.3d 560, 567-69 (discussing the defendants' actions alleged to have breached the plaintiffs' "fiduciary duties of confidentiality and loyalty").

15. Gibson v. Ellis, 126 S.W.3d 324, 330 (Tex. App.—Dallas 2004, no pet.) (citing Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied)).

Much like in a legal malpractice cause of action, a plaintiff alleging a breach of fiduciary duty must establish the existence of an attorney-client relationship creating a duty, breach of that duty, proximate cause, and damages.[16]

Although courts have traditionally been reluctant to expand lawyers' malpractice liability beyond clients and intended beneficiaries of lawyers' services in trust and estate practice,[17] lawyers increasingly face liability to non-clients on other theories.[18] A lawyer may be liable to third parties for aiding and abetting a client's breach of fiduciary duty or fraud.[19] A lawyer who makes materially misleading statements concerning a public company may be liable to third parties under federal securities laws.[20] A lawyer may be sued for negligent misrepresentation in connection with an opinion letter she prepared in a commercial transaction.[21] A lawyer may be sued for fraud or various forms of misrepresentation arising out of his alleged misrepresentations or concealment of material facts in bus-

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16. Jones v. Blume, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied); *see also Klemme,* 941 S.W.2d at 496 (adding as a fifth element under Missouri law that "no other recognized tort encompasses the facts alleged").

17. Arthur D. Burger, *Swindlers, Cheats, and Other Fine Clients*, LEGAL TIMES, Apr. 17, 2006, at 24, *available at* http://www.jackscamp.com/publications/ADB_4-17-06.pdf.

18. *See* JAY M. FEINMAN, PROFESSIONAL LIABILITY TO THIRD PARTIES 76-77 (2000) (noting that lawyers can face liability to third parties and quasi-clients under negligence, intentional tort, and statutory causes of action).

19. *See, e.g.*, Thornwood, Inc. v. Jenner & Block, 799 N.E.2d 756, 767-69 (Ill. App. Ct. 2003) (detailing allegations that a law firm "aided and abetted by knowingly and substantially assisting" in the breaching of fiduciary duties); Exposition Partner, L.L.P. v. King, LeBlanc & Bland, L.L.P., 2003-0580, pp. 12-15 (La. App. 4 Cir. 3/10/04); 869 So. 2d 934, 942-44 (recognizing a third party's right of action for the defendant attorneys' aiding and abetting fraud); Chem-Age Indus., Inc. v. Glover, 2002 SD 122, 41-50, 652 N.W.2d 756, 773-76 (discussing a third party's right to bring a cause of action against a lawyer who aided and abetted in a fiduciary's breach of duty owed to the third-party). *But see* Reynolds v. Schrock, 142 P.3d 1062, 1065-71 (Or. 2006) (holding that lawyers have a qualified privilege for assisting in a client's breach of fiduciary duty to a third party so long as the lawyer is acting within the scope of the attorney-client relationship).

20. MARC I. STEINBERG, ATTORNEY LIABILITY AFTER SARBANES-OXLEY § 2.05[2][a] (2006) (discussing lawyer liability for primary violations of section 10(b) of the Securities Exchange Act).

21. *See, e.g.*, Dean Foods Co. v. Pappathanasi, No. Civ.A. 01-2595 BLS, 2004 WL 3019442, at *18-19 (Mass. Super. Ct. Dec. 3, 2004) (holding a law firm liable for negligently failing to conduct adequate research in preparing an opinion letter). *But cf.* Finova Capital Corp. v. Berger, 794 N.Y.S.2d 379, 381 (N.Y. App. Div. 2005) (finding that the plaintiff did not prove all elements of its claim that the defendant lawyer's opinion letter negligently misrepresented security interests).

iness deals, as well as in a variety of other contexts.[22] "A fraud claim against a lawyer is no different from a fraud claim against anyone else."[23] In the same vein, a lawyer who makes a fraudulent misrepresentation in a business transaction may be sued for indemnity by the lawyer on the other side of the transaction in the event the other lawyer's defrauded client sues her for malpractice.[24]

Lawyers' conduct may be litigated for reasons other than alleged malpractice to clients or unlawful behavior affecting third parties' rights. For example, motions are often pursued for opposing counsel disqualification in litigation.[25] These motions typically are premised on lawyers' alleged conflicts of interest, improper ex parte communications, breaches of confidentiality, or likely testimony as fact witnesses.[26]

Regardless of whether the plaintiff suing a lawyer or law firm is a client or third party, or whether the dispute is over a lawyer's disqualification in pending litigation, there is generally expert testimony on both sides about the lawyer's duties, the applicable standard of care, and related conduct. In most legal malpractice cases, expert testimony is required to ascertain the standard of care.[27] An expert is not required, however, where jurors' common knowledge and experience can adequately establish the standard of care,[28] as when a lawyer misses a statute of limitation or other criti-

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22. *See, e.g.*, First Nat'l Bank of Durant v. Trans Terra Corp. Int'l, 142 F.3d 802, 808-10 (5th Cir. 1998) (applying Texas law in describing a lawyer's negligent misrepresentation in issuing title opinions); Vega v. Jones, Day, Reavis & Pogue, 17 Cal. Rptr. 3d 26, 28 (Cal. Ct. App. 2004) (stating that the plaintiff alleged that the defendant law firm fraudulently concealed "toxic terms of a third party financing transaction"); Wright v. Sydow, 173 S.W.3d 534, 554-55 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (involving alleged fraudulent inducement and misrepresentation related to a firm hired in a qui tam action).

23. *Vega*, 17 Cal. Rptr. 3d at 31.

24. *See, e.g.*, Hansen v. Anderson, Wilmarth & Van Der Maaten, 630 N.W.2d 818, 824-27 (Iowa 2001) (recognizing an equitable indemnity claim by a lawyer for defrauded client against the defrauding lawyer for the opposing party).

25. Douglas R. Richmond, *The Rude Question of Standing in Attorney Disqualification Disputes*, 25 AM. J. TRIAL ADVOC. 17, 17 (2001).

26. *See id.* at 17-19 (identifying common bases for disqualification motions).

27. Noske v. Friedberg, 713 N.W.2d 866, 874 (Minn. Ct. App. 2006), *pet. denied*, 2006 Minn. LEXIS 488 (Minn. 2006); *see also* Luvene v. Waldrup, 903 So. 2d 745, 748 (Miss. 2005) (expressing that "[e]xpert testimony is ordinarily necessary to support an action for legal malpractice").

28. *See* Carbone v. Tierney, 864 A.2d 308, 314 (N.H. 2004) (explaining that expert opinion testimony is unnecessary "where the subject presented is within the realm of common knowledge and everyday experience"); Gayhart v. Goody, 2004 WY 112, ¶ 16, 98 P.3d

cal deadline,[29] or where a lawyer simply disobeys a client's lawful instructions.[30] Expert testimony is also required to establish that a lawyer's conduct fell below the standard of care,[31] and that it proximately caused the plaintiff's damages.[32] These same principles hold true in cases alleging a lawyer's breach of fiduciary duty, and courts may similarly require expert testimony for a plaintiff to prevail on other theories.[33]

When experts take the stand, what informs their judgment? On what do they base their opinions that lawyers have or have not conformed their conduct to the standard of care or have failed in their professional duties? Often it is ethics rules.[34] This is a controversial subject. Well-regarded advocates and scholars contend

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164, 169 (Wyo. 2004) (realizing a layperson's ability to determine the appropriate standard of care by his own common sense and experience).

29. *See, e.g.*, Byrd v. Bowie, 933 So. 2d 899, 904-05 (Miss. 2006) (citing Hickox v. Holleman, 502 So. 2d 626, 635-36 (Miss. 1987)) (noting that expert testimony is not required where a lawyer misses a statute of limitation). *Byrd* held that expert testimony was not required where the defendant lawyer inexplicably failed to timely designate an expert witness in the underlying case. *Id.* at 905. The court ruled that the defendant lawyer was negligent as a matter of law for failing to properly designate an expert witness. *Id.*

30. *See* Frullo v. Landenberger, 814 N.E.2d 1105, 1109 (Mass. App. Ct. 2004) (citing Pongonis v. Saab, 486 N.E.2d 28, 28 (Mass. 1985)) (negating the requirement for expert testimony where an attorney ignores her client's lawful instructions).

31. *See* Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd., 711 N.W.2d 811, 817 (Minn. 2006) (explaining the requirement for expert testimony to determine the applicable standard of care and to show that an attorney's "conduct deviated from that standard" (quoting Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan, 494 N.W.2d 261, 266 (Minn. 1993))); Stoeckel v. Twp. of Knowlton, 902 A.2d 930, 938 (N.J. Super. Ct. App. Div. 2006) (stating that an expert is usually required to explain a breach of duty).

32. *See* Dixon v. Bromson & Reiner, 898 A.2d 193, 197 (Conn. App. Ct. 2006) (clarifying "that in a legal malpractice case[,] . . . an expert witness is necessary to opine whether the defendant's alleged breach of care proximately caused the plaintiff's alleged loss or damages"); Hoover v. Larkin, 196 S.W.3d 227, 231 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (articulating that "[a] plaintiff in a legal malpractice case must demonstrate that any alleged damages, including attorney's fees, were proximately caused by the breach of a duty by the defendant").

33. *See, e.g.*, Aller v. Law Office of Carole C. Schriefer, P.C., 140 P.3d 23, 28 (Colo. Ct. App. 2005) ("To assert a claim for breach of fiduciary duty against an attorney, expert testimony is needed to establish the standard of care."), *cert. denied*, 2006 WL 1530184 (Colo. 2006); Alexander v. Turtur & Assocs., Inc., 146 S.W.3d 113, 120 (Tex. 2004) (requiring expert testimony on a Deceptive Trade Practices Act claim brought against an attorney).

34. *See* 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 19.7, at 1219 (2007 ed.) (articulating that some courts allow expert witnesses to base their opinions on ethics rules, while other courts do not).

that ethics rules have no place in civil litigation against lawyers.[35] This Article, however, suggests that ethics rules do have a rightful place in civil litigation against lawyers, and examines the terrain surrounding this divisive topic.

II. ETHICS RULES AND CIVIL LITIGATION: AN OVERVIEW

The American Bar Association ("ABA") adopted Canons of Professional Ethics in 1908,[36] but most lawyers likely consider the Model Code of Professional Responsibility,[37] which became effective in January 1970 and was adopted by almost all states shortly thereafter,[38] to be the first definitive statement of lawyers' professional responsibilities. The Model Code sought through mandatory disciplinary rules to "state the minimum level of conduct below which no lawyer [could] fall without being subject to disciplinary action," but it did not undertake to define standards for lawyers' civil liability for professional conduct.[39]

In 1983, the ABA replaced the Model Code with the Model Rules of Professional Conduct.[40] Like the Model Code, the Model Rules initially disclaimed any relation to lawyers' civil liability. The Scope provision of the Model Rules specifically stated:

> Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

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35. *See, e.g.*, Stephen E. Kalish, *How to Encourage Lawyers to Be Ethical: Do Not Use the Ethics Codes As a Basis for Regular Law Decisions*, 13 GEO. J. LEGAL ETHICS 649, 650 (2000) (arguing that ethics rules and "regular law" occupy separate domains).

36. *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1-1(c), at 2 (2006-07) (instructing that the ABA approved the first national ethics guidelines in 1908).

37. CODE OF PROF'L RESPONSIBILITY (Preliminary Draft 1969) (Model Code replaced Model Rules in 1983).

38. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 1.11, at 1-19 (3d ed. 2001). *See generally* CODE OF PROF'L RESPONSIBILITY (1970) (Model Code replaced Model Rules in 1983) (representing the ethics rules adopted by the ABA in 1969).

39. *Preamble* to CODE OF PROF'L RESPONSIBILITY 1-2 (Preliminary Draft 1969) (Model Code replaced Model Rules in 1983).

40. *See* Robert W. Meserve, *Chairperson's Introduction* to MODEL RULES OF PROF'L CONDUCT 2 (2001) (current version 2006) (explaining that the Model Rules of Professional Conduct were adopted in 1983).

> 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.[41]

The ABA reviewed and revised the Model Rules as part of its "Ethics 2000" initiative, including their "Scope" section.[42] The adopted revisions took effect in 2002.[43] The Model Rules now provide:

> 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 than 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.*[44]

While many of the Ethics 2000 changes to the Model Rules were vigorously debated in the ABA House of Delegates, the Scope revisions italicized here were not among them.[45] In fact, these

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41. MODEL RULES OF PROF'L CONDUCT Scope, at 8 (2001).

42. *See* PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 5-11 (John S. Dzienkowski ed., 2002-2003 abr. ed., 2002) (showing the redlined changes to the Model Rule's Scope section).

43. *Preface* to MODEL RULES OF PROF'L CONDUCT, at viii (2006).

44. MODEL RULES OF PROF'L CONDUCT SCOPE, at 4-5 (2006) (emphasis added).

45. *See* William Freivogel, Courts Embrace Ethical Violations as Evidence of Legal Malpractice 2 (2003) (unpublished paper, on file with the *St. Mary's Law Journal*) (recollecting the debate-free adoption of the Scope recommendation).

changes simply reflected the decisions of courts on the relationship between ethics rules and lawyers' civil liability.[46] The codification of these principles was well under way before the ABA amended the Model Rules. The American Law Institute's Restatement (Third) of the Law Governing Lawyers previously established that proof of a violation of a rule or statute regulating lawyers' conduct is relevant to the standard of care in legal malpractice and breach of fiduciary duty cases, so long as the rule or statute was designed to protect someone in the plaintiff's position and bears on the particular claim.[47]

A. *A Rule Violation Itself Is No Basis for Liability*

Consistent with the preliminary statements to both the Model Code and Model Rules, the clear weight of authority holds that a lawyer's violation of an ethics rule, in and of itself, is no basis for civil liability.[48] Plaintiffs cannot avoid this principle through crea-

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46. *See, e.g.*, Dardas v. Fleming, Hovenkamp & Grayson, P.C., 194 S.W.3d 603, 613 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (op. on rehearing) (positing that "[t]he Texas Disciplinary Rules of Professional Conduct do not define standards for civil liability and do not give rise to private claims").

47. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(2)(c), at 375 (2000) (allowing rule violations to be considered in determining if a lawyer has breached the standard of care, so long as the rule was designed to protect the person bringing the claim and is relevant to the claim).

48. Griffith v. Taylor, 937 P.2d 297, 301 n.7 (Alaska 1997); Allen v. Allison, 155 S.W.3d 682, 690 (Ark. 2004); BGJ Assocs. v. Wilson, 7 Cal. Rptr. 3d 140, 147 (Cal. Ct. App. 2003); Biller Assocs. v. Peterken, 849 A.2d 847, 851 (Conn. 2004); Television Capital Corp. of Mobile v. Paxson Commc'ns Corp., 894 A.2d 461, 469 (D.C. 2006) (quoting Griva v. Davison, 637 A.2d 830, 846-47 (D.C. 1994)); Beach Higher Power Corp. v. Rekant, 832 So. 2d 831, 834 n.2 (Fla. Dist. Ct. App. 2002); Threatt v. Rogers, 604 S.E.2d 269, 273 (Ga. Ct. App. 2004); *In re* Disciplinary Bd. of Haw. Supreme Court, 984 P.2d 688, 695 (Haw. 1999); Owens v. McDermott, Will & Emery, 736 N.E.2d 145, 157 (Ill. App. Ct. 2000); OMI Holdings, Inc. v. Howell, 918 P.2d 1274, 1288 (Kan. 1996); McLaughlin v. Amirsaleh, 844 N.E.2d 1105, 1112 n.14 (Mass. App. Ct. 2006), *pet. denied*, 2006 Mass. App. LEXIS 365; Wilbourn v. Stennett, Wilkinson & Ward, 687 So. 2d 1205, 1215-16 (Miss. 1997) (quoting Singleton v. Stegall, 580 So. 2d 1242, 1244 n.4 (Miss. 1991)); Greening v. Klamen, 652 S.W.2d 730, 734 (Mo. Ct. App. 1983); Mainor v. Nault, 101 P.3d 308, 321 (Nev. 2004) (en banc) (per curiam), *amended on other grounds by* 2005 Nev. LEXIS 10; Wong v. Ekberg, 807 A.2d 1266, 1271 (N.H. 2002) (quoting N.H. R. PROF. CONDUCT Scope (2002)); Baxt v. Liloia, 714 A.2d 271, 274-75 (N.J. 1998); Sanders, Bruin, Coll & Worley, P.A. v. McKay Oil Corp., 1997-NMSC-030, ¶ 16, 123 N.M. 457, 943 P.2d 104, 107; Schwartz v. Olshan Grundman Frome & Rosenzweig, 753 N.Y.S.2d 482, 487 (N.Y. App. Div. 2003); Baars v. Campbell Univ., Inc., 558 S.E.2d 871, 879 (N.C. Ct. App. 2002) (quoting Webster v. Powell, 391 S.E.2d 204, 208 (N.C. Ct. App. 1990)); Witzke v. City of Bismarck, 2006 ND 160, ¶ 13, 718 N.W.2d 586, 591 (citing Olson v. Fraase, 421 N.W.2d 820, 828 (N.D. 1988)); Watterson v.

tive reasoning, as illustrated in *Allen v. Allison*.[49] The plaintiff in that case, Clifford Allen, was unhappy with the settlement offer his lawyers obtained in a lawsuit arising out of his wife's death in a railroad crossing accident.[50] He sued the lawyers and their firm for civil conspiracy among other causes of action.[51] To support his civil conspiracy claim, Allen asserted that the law firm's personal solicitation of him shortly after his wife's death violated Arkansas Rule of Professional Conduct 7.3 and that the firm violated Arkansas Rule 7.1 by making false statements when soliciting him as a client.[52] The Arkansas Supreme Court had held in an earlier decision, *Orsini v. Larry Moyer Trucking, Inc.*,[53] that the Model Rules of Professional Conduct were inadmissible in legal malpractice actions.[54] Accordingly, the trial court granted the defendants' motion in limine to preclude any reference to the rules, and thereafter granted the defendants' motion for summary judgment.[55] Allen appealed to the Arkansas Supreme Court.[56]

Allen distinguished *Orsini* by arguing that it was a legal malpractice case in which the Arkansas ethics rules were offered to prove the standard of care, while he was "attempting to use the [r]ules to prove an element of the civil conspiracy, but . . . the violation of the [r]ules, in and of itself, [was] not being used to establish civil liability."[57] He conceded, however, that without showing a violation of the rules, he could not show that the lawyers combined to accom-

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King, 166 Ohio App. 3d 704, 2006-Ohio-2305, 852 N.E.2d 1278, at ¶ 19; Mahorney v. Waren, 2002 OK Civ. App. 111, ¶ 4, 60 P.3d 38, 40; Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1284 (Pa. 1992); DiLuglio v. Providence Auto Body, Inc., 755 A.2d 757, 772 n.16 (R.I. 2000); Behrens v. Wedmore, 2005 SD 79, ¶ 51, 698 N.W.2d 555, 575 (quoting Standish v. Sotavento Corp., 755 A.2d 910, 915 (Conn. App. Ct. 2000)); Winchester v. Little, 996 S.W.2d 818, 825-26 (Tenn. Ct. App. 1998); Dardas v. Fleming, Hovenkamp & Grayson, P.C., 194 S.W.3d 603, 613 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (op. on rehearing); Jones v. Blume, 196 S.W.3d. 440, 450 (Tex. App.—Dallas 2006, pet. denied); Archuleta v. Hughes, 969 P.2d 409, 414 (Utah 1998); Woodhouse v. RE/MAX Nw. Realtors, 878 P.2d 464, 466 (Wash. Ct. App. 1994).

49. 155 S.W.3d 682, 690, 694 (Ark. 2004) (rejecting appellant's creative use of ethics rules violations in establishing an element of a civil cause of action).

50. *Id.* at 688.

51. *Id.* at 686, 688.

52. *Id.* at 689.

53. 833 S.W.2d 366 (Ark. 1992).

54. Orsini v. Larry Moyer Trucking, Inc., 833 S.W.2d 366, 369 (Ark. 1992).

55. *Allen*, 155 S.W.3d at 688-89.

56. *Id.* at 686.

57. *Id.* at 690.

plish an unlawful purpose—and therefore could not establish the existence of a conspiracy.[58] In other words, he *was* attempting to argue that the defendants' violation of Arkansas ethics rules was a basis for imposing liability.[59] The court declined to retreat from its position in *Orsini* and affirmed the trial court's ruling.[60]

B. *The Proper Role of Ethics Rules in Civil Litigation*

Although courts uniformly hold that a lawyer's violation of ethics rules does not create a private right of action, most jurisdictions recognize the relevance of ethics rules in litigation against lawyers. Ethics rules may be used to establish a lawyer's fiduciary duties to a client.[61] Courts may treat ethics rules as expressing public policy, making a contract in violation of them unenforceable,[62] or simply hold that a lawyer's failure to comply with them makes a transaction voidable at the client's election without mention of public policy.[63] Most often, courts determine that ethics rules may be relevant to the standard of care in malpractice litigation.[64] Using

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58. *Id.*

59. *Id.*

60. *Allen*, 155 S.W.3d at 694.

61. *See, e.g.*, Am. Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton, 117 Cal. Rptr. 2d 685, 696 (Cal. Ct. App. 2002) (reiterating that ethics rules "help define the duty component of the fiduciary duty which an attorney owes to his client" (quoting Mirabito v. Liccardo, 5 Cal. Rptr. 2d 571, 573 (Cal. Ct. App. 1992))).

62. *See, e.g.*, Dardas v. Fleming, Hovenkamp & Grayson, P.C., 194 S.W.3d 603, 613 (Tex. App.—Houston [14th Dist] 2006, pet. denied) (recognizing that "a court may deem [ethics] rules to be an expression of public policy, so that a contract violating them is unenforceable as against public policy").

63. *See, e.g.*, DiLuglio v. Providence Auto Body, Inc., 755 A.2d 757, 771-72 (R.I. 2000) (explaining that a transaction can be voidable by the client when the attorney breaches certain ethical and fiduciary duties).

64. *See* Universal Mfg. Co. v. Gardner, Carton & Douglas, 207 F. Supp. 2d 830, 833 (N.D. Ill. 2002) (mem.) (applying Illinois law in ruling that professional conduct rules may aid "in determining that standard of care in a legal malpractice claim"); *accord* Hart v. Comerica Bank, 957 F. Supp. 958, 981 (E.D. Mich. 1997) (applying Michigan law); Griffith v. Taylor, 937 P.2d 297, 301 n.7 (Alaska 1997); Elliott v. Videan, 791 P.2d 639, 642 (Ariz. Ct. App. 1989); Ross v. Creel Printing & Publ'g Co., 122 Cal. Rptr. 2d 787, 794 (Cal. Ct. App. 2002); Griva v. Davison, 637 A.2d 830, 846-47 (D.C. 1994) (quoting Avianca, Inc. v. Corriea, 705 F. Supp. 666, 679 (D.D.C. 1989), *aff'd sub nom.* Avianca, Inc. v. Harrison, 70 F.3d 637 (D.C. Cir. 1995)); Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C., 453 S.E.2d 719, 721 (Ga. 1995); *In re* Disciplinary Bd. of Haw. Supreme Court, 984 P.2d 688, 695 (Haw. 1999); Crookham v. Riley, 584 N.W.2d 258, 266 (Iowa 1998); Coastal Orthopaedic Inst., P.C. v. Bongiorno, 807 N.E.2d 187, 193 n.11 (Mass. App. Ct. 2004) (quoting Fishman v. Brooks, 487 N.E.2d 1377, 1381 (Mass. 1986)); Mainor v. Nault, 101 P.3d 308, 320-21 (Nev. 2004) (en banc) (per curiam), *amended on other grounds by* 2005 Nev. LEXIS 10

an ethics rule in formulating the proper standard of care is not the same as basing liability on a rule violation.[65] Because ethics 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 [them] in establishing the standard of care."[66] At least one court has gone further and, rather than simply permitting evidence of ethics rules, has asserted that courts *should* look to them to determine the standard of care.[67]

Important though they may be to determining the standard of care for lawyers, ethics rules are not a substitute for expert testimony on the standard of care,[68] as *Wong v. Ekberg*[69] demonstrates. In *Wong,* the trial court dismissed the plaintiff's legal malpractice claim for lack of expert testimony.[70] On appeal to the New Hampshire Supreme Court, the plaintiff contended that he did not need to offer expert testimony "because the rules of professional conduct may be used to determine whether the defendant met the standard of conduct required of attorneys."[71] Skeptical about the use of ethics rules for any purpose in legal malpractice actions generally, the court rejected the plaintiff's contention "that he [could] establish the defendant's duty and breach solely through the rules of professional conduct."[72]

(Nev. 2005); Baxt v. Liloia, 714 A.2d 271, 277 (N.J. 1998); Sanders, Bruin, Coll & Worley, P.A. v. McKay Oil Corp., 1997-NMSC-030, ¶ 16, 123 N.M. 457, 943 P.2d 104, 107; Booher v. Frue, 394 S.E.2d 816, 821-22 (N.C. Ct. App. 1990); Krischbaum v. Dillon, 567 N.E.2d 1291, 1301 (Ohio 1991); Kidney Ass'n of Or., Inc. v. Ferguson, 843 P.2d 442, 447 (Or. 1992); Smith v. Haynsworth, Marion, McKay & Geurard, 472 S.E.2d 612, 614 (S.C. 1996); Roy v. Diamond, 16 S.W.3d 783, 790-91 (Tenn. Ct. App. 1999).

65. 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 19.7, at 1220 (2007 ed.).

66. *Mainor,* 101 P.3d at 321.

67. *Hart,* 957 F. Supp. at 981.

68. *See, e.g.*, Television Capital Corp. of Mobile v. Paxson Commc'ns Corp., 894 A.2d 461, 469-70 (D.C. 2006) (finding that the plaintiff needed to present expert testimony despite the trial court's "cognizan[ce] of the possible impact" of ethics rules on the relevant standard of care).

69. 807 A.2d 1266 (N.H. 2002).

70. Wong v. Ekberg, 807 A.2d 1266, 1270 (N.H. 2002).

71. *Id.* at 1271.

72. *Id.*

Courts occasionally allow the quotation of ethics rules in jury instructions in breach of fiduciary duty and legal malpractice cases.[73] As an Illinois court explained:

> Like most statutes and ordinances, attorney disciplinary rules establish minimum standards of conduct and are intended to protect the general public. For these reasons . . . jury instructions may quote attorney disciplinary rules in legal malpractice cases to the same extent as they may quote statutes and ordinances in instructions in other types of negligence cases.[74]

This is a debatable practice, however, and not all courts endorse it.[75]

Ethics rules also factor into courts' decisions in attorney disqualification proceedings.[76] Because most disqualification disputes center on alleged conflicts of interest, it is unremarkable that ethics rules governing conflicts of interest—such as Model Rules 1.7, 1.9, and 1.10—should significantly influence courts' decision-making. Even here, however, a rule violation does not compel a lawyer's

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73. *See, e.g.*, Elliott v. Videan, 791 P.2d 639, 642 (Ariz. Ct. App. 1989) (involving a legal malpractice claim in which the "the jury was instructed on the existence of certain rules of professional conduct"). The trial court also instructed that "[t]hese rules are rules of professional conduct only, and a violation of these rules does not establish an act of malpractice. They are merely evidence that you may consider in your determination . . . ." *Id.*; *see also* Mirabito v. Liccardo, 5 Cal. Rptr. 2d 571, 574 (Cal. Ct. App. 1992) (explaining that "[w]here . . . the rules provide the standard by which an attorney's breach of his fiduciary duty is measured, an instruction based on the rules is entirely proper"); Mayol v. Summers, Watson & Kimpel, 585 N.E.2d 1176, 1186 (Ill. App. Ct. 1992) (holding that a jury in a legal malpractice suit "may properly consider standards of professional ethics pertaining to attorneys because such suits involve allegations of conduct that does not conform to minimum professional standards").

74. *Mayol,* 585 N.E.2d at 1186.

75. *See* Byers v. Cummings, 2004 MT 69, ¶ 31, 320 Mont. 339, ¶ 31, 87 P.3d 465, ¶ 31 (branding it "improper to . . . instruct the jury by referring to the [ethics] rule in question"); *see also Ex parte* Toler, 710 So. 2d 415, 416 (Ala. 1998) (holding "that a violation of the Rules of Professional Conduct may not be used as evidence, regardless of whether the attorney has been charged with a violation of those Rules").

76. *See, e.g.*, Norman v. Norman, 970 S.W.2d 270, 273 (Ark. 1998) (demonstrating that "the Rules of Professional Conduct are applicable in disqualification proceedings"); Morse v. Clark, 890 So. 2d 496, 499 (Fla. Dist. Ct. App. 2004) (holding that trial court should have disqualified lawyer based on a violation of the Rules Regulating the Florida Bar); *In re* Robinson, 90 S.W.3d 921, 924-26 (Tex. App.—Fort Worth 2002, no pet.) (quoting the Texas Supreme Court on the role of ethics rules in disqualification disputes and discussing Texas Disciplinary Rule of Professional Conduct 1.06 governing conflicts of interest).

disqualification.[77] Rather, ethics rules provide courts with relevant considerations and a starting point in the analysis leading up to their exercise of discretion in deciding whether to disqualify lawyers.[78] A party seeking to disqualify a lawyer typically "must demonstrate that the violating attorney's conduct caused actual prejudice that requires disqualification," and a court "may disqualify an attorney even in the absence of any disciplinary rule violation."[79]

C. *Rejection of Rules in Legal Malpractice Cases*

A small minority of courts appear to reject any use of ethics rules in litigation involving lawyers' alleged malpractice or other misconduct.[80] Advocates of this approach often rely on the Washington Supreme Court's decision in *Hizey v. Carpenter*[81] for support.[82]

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77. *See Norman*, 970 S.W.2d at 273 (acknowledging that "[a] violation of the Model Rules of Professional Conduct . . . does not automatically compel disqualification"); Schuff v. A.T. Klemens & Son, 2000 MT 357, ¶ 37, 303 Mont. 274, ¶ 37, 16 P.3d 1002, ¶ 37 (declaring that "a proven or admitted rule violation is not prima facie grounds for disqualification").

78. *See In re* Skiles, 102 S.W.3d 323, 326 (Tex. App.—Beaumont 2003, orig. proceeding) (per curiam) (labeling the Texas Disciplinary Rules of Professional Conduct "a starting point for our [disqualification] analysis").

79. *In re* Dalco, 186 S.W.3d 660, 668 (Tex. App.—Beaumont 2006, orig. proceeding [mand. denied]) (per curiam).

80. *See, e.g.*, *Ex parte* Toler, 710 So. 2d 415, 416 (Ala. 1998) (holding "that a violation of the Rules of Professional Conduct may not be used as evidence, regardless of whether the attorney has been charged with a violation of those Rules"); *see also* Archuleta v. Hughes, 969 P.2d 409, 413-14 (Utah 1998) (concluding that the Utah Rules of Professional Conduct do not provide a basis for a legal malpractice claim and stating that "[t]he legal standards applicable to malpractice claims are entirely adequate to protect clients as plaintiffs"); *cf.* Nesvig v. Nesvig, 2004 ND 37, ¶¶ 22-23, 676 N.W.2d 73, 81-82 (refusing to recognize that lawyers can use a good faith defense derived from North Dakota Rule of Professional Conduct 1.15).

81. 830 P.2d 646 (Wash. 1992).

82. *See, e.g.*, Harrington v. Pailthorp, 841 P.2d 1258, 1262-63 (Wash. App. Ct. 1992) (relying on *Hizey* in explaining that the plaintiff does not have a claim based solely on ethics rules); *accord* Davis v. Findley, 422 S.E.2d 859, 861 (Ga. 1992); Tilton v. Trezza, 2006 N.Y. Slip Op. 50867 (U), 2006 WL 1320738, at *3-5 (N.Y. Sup. Ct. Mar. 27, 2006); Vallinoto v. DiSandro, 688 A.2d 830, 837-38 (R.I. 1997); *cf.* Baxt v. Liloia, 714 A.2d 271, 277-78 (N.J. 1998) (analyzing *Hizey*'s disapproval of claims rooted in ethical rules and overruling plaintiff's argument that causes of action must be founded upon ethics rules to coerce behavior).

Hizey arose out of a real estate deal gone sour.[83] The lawyer representing the plaintiffs in that transaction, Timothy Carpenter, allegedly labored under a conflict of interest.[84] The plaintiffs sued Carpenter for legal malpractice and attempted to call law professor David Boerner as an expert witness to "testify to the ethical obligations of an attorney."[85] Carpenter moved to exclude Boerner's testimony on the basis that ethics rules do not create civil liability standards.[86] The trial court ruled that Boerner could not refer to specific ethics rules, nor could he testify that ethics rules provided the standard of care in a legal malpractice action.[87] The trial court did allow Boerner to explain at trial that lawyers have ethical duties and what those duties were in this case, and he accordingly described a conflict of interest for the jury and what a lawyer's obligations are when conflict arises.[88] Boerner testified that Carpenter had a conflict of interest in the subject real estate transaction and that he did not fulfill his related professional obligations.[89] The jury decided in Carpenter's favor, and the plaintiffs appealed.[90]

On appeal, the plaintiffs argued that the trial court should have informed the jury of relevant ethics rules.[91] They contended that ethical standards imposed by professional conduct rules should be "relevant to the legal standard of care in a malpractice action."[92] According to the plaintiffs, a lawyer's violation of an ethics rule is evidence of a breach of duty and, therefore, the trial court should have allowed Boerner to refer to specific ethics rules in testifying as to the standard of care and Carpenter's related breach.[93]

During the time that Carpenter represented the plaintiffs, Washington's ethics rules transitioned from a structure based on the

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83. *See* Hizey v. Carpenter, 830 P.2d 646, 648 (Wash. 1992) (stating that the plaintiffs "sought legal advice . . . regarding the sale of an 11.5 acre parcel of commercially zoned property").

84. *Id.* at 649.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Hizey*, 830 P.2d at 649-50.

89. *Id.* at 650.

90. *Id.*

91. *Id.*

92. *Id.*

93. Hizey v. Carpenter, 830 P.2d 646, 650 (Wash. 1992).

Model Code to a regime based on the Model Rules.[94] The court observed that neither format purported to establish civil liability standards and, in fact, both disclaimed any intent to do so in their preliminary statements.[95] Based on that language and the approaches taken by other courts, the court in *Hizey* held that a violation of an ethics rule does not create a cause of action for legal malpractice.[96] Of course, this determination did not resolve the issue from the plaintiffs' perspective, because it was their contention that even if a lawyer's violation of an ethics rule does not establish a private cause of action, it nonetheless provides evidence of legal malpractice.[97] The court disagreed, again looking to the disclaimer language in the preliminary statements to Washington's versions of the Model Code and Model Rules.[98] The court additionally determined that there were "significant policy reasons" for barring plaintiffs' use of ethics rules as evidence of lawyers' malpractice.[99]

First, the court reasoned, ethics rules are not analogous to statutes or administrative regulations, the violation of which may support negligence or negligence per se allegations.[100] Ethics rules are different because they are adopted by state supreme courts rather than by legislatures.[101] Second, because they were not created to provide causes of action in civil liability, ethics rules "contain standards and phrases which, when relied upon to establish a breach of the legal standard of care, provide only vague guidelines."[102] Third, while ethics rules establish minimum levels of conduct for lawyers, malpractice liability is premised on the conduct of a reasonable lawyer.[103] Fourth, extending ethics rules into the malpractice arena is unnecessary because "plaintiffs already have available

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94. *Id.*

95. *Id.*

96. *Id.* at 650-51.

97. *Id.* at 651.

98. *Hizey*, 830 P.2d at 651.

99. *Id.*

100. *Id.* at 652.

101. *Id.*

102. *Id.*

103. Hizey v. Carpenter, 830 P.2d 646, 652 (Wash. 1992) (quoting Hansen v. Wightman 538 P.2d 1238, 1247 (Wash. App. 1975), *disapproved by* Bowman v. Two, 704 P.2d 140, 143 (Wash. 1985); WASHINGTON STATE COURT RULES: RULES OF PROF'L CONDUCT Preliminary Statement (1985) (amended 2006)).

adequate and recognized common law theories under which to bring malpractice actions."[104]

"To avoid confusion," the court continued, "experts on an attorney's duty of care may still properly base their opinion . . . on an attorney's failure to conform to an ethics rule."[105] The expert, however, must discuss the lawyer's breach of a legal duty rather than the violation of ethics rules.[106] The expert can accomplish this by using language taken from ethics rules without referring to the rules themselves.[107]

It is difficult, given this last portion of the opinion, to accept the oft-repeated suggestion that under *Hizey*, expert testimony regarding lawyers' ethical violations is not probative of legal malpractice.[108] To the contrary, the court in *Hizey* established that ethics rules may be relevant to the standard of care in legal malpractice actions—expert witnesses simply cannot refer to them by name or number.[109] All the *Hizey* court really did was eliminate the concern expressed by some observers that labeling a lawyer "unethical" attaches a stigma more serious than the violation of a common law principle and potentially biases jurors against the lawyer.[110] In addition, Washington courts hold that ethics rules are relevant in determining whether lawyers have breached fiduciary duties to cli-

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

105. *Id.* at 654.

106. *Id.*

107. *Id.*

108. *See* Pamela A. Bresnahan & Timothy H. Goodman, *Breach of Fiduciary Duty and Expert Testimony Regarding Attorney Ethics Rules*, 2003 PROF. LAW. 53, 59 (indicating that the *Hizey* court decided that ethics rules should not be used as a basis in determining civil liability).

109. *Hizey,* 830 P.2d at 654; *see also* Byers v. Cummings, 2004 MT 69, ¶ 31, 320 Mont. 339, ¶ 31, 87 P.3d 465, ¶ 31 (stating that "[w]e continue to believe that it is entirely appropriate to use the general language of ethical rules in describing one's ethical duty to a client, however, it is improper to explicitly refer to the specific rule"); Tilton v. Trezza, 2006 N.Y. Slip Op. 50867 (U), 2006 WL 1320738, at *5 (N.Y. Sup. Ct. Mar. 27, 2006) (adopting the *Hizey* philosophy of "allow[ing] the expert to testify as to what he or she considers correct ethical conduct . . . using the language of the rule without citing to specific sections").

110. *See* 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 19.7, at 1207 (2007 ed.) (expressing the concern that "[t]here is a risk that a jury might be biased against a lawyer who is found to be 'unethical'"). "The injection of the ethics standard creates a prejudicial, potentially inflammatory, collateral issue of whether the lawyer was 'unethical.'" *Id.* at 1224.

ents and in that context permit specific reference to them,[111] and *Hizey* has not altered that approach.[112]

III. ANALYSIS

Spirited debate continues over whether ethics rules should play any role in lawsuits against lawyers, but the tide overwhelmingly favors admitting them as relevant to lawyers' duties and the standard of care. It is easy to understand why a plaintiff suing a lawyer might want to offer evidence of the lawyer's ethical obligations. Consider a case in which a plaintiff alleges that a lawyer for the opposing party in a business transaction knowingly misrepresented material facts in their negotiations and that the plaintiff was defrauded as a result. Or, in a slightly different twist, the plaintiff alleges that the lawyer for the opposing party knowingly concealed material facts in the course of the transaction, thereby aiding and abetting his client's fraud. In the first case, the plaintiff will surely want to establish that under Rule 4.1(a), the offending lawyer was prohibited from knowingly making false statements of material fact or law in their negotiations.[113] In the second, the plaintiff will certainly want the jury to hear that the lawyer was ethically prohibited by Rule 4.1(b) from withholding material facts when disclosure was necessary to avoid assisting his client in committing fraud.[114] If the lawyer complains that mention of his alleged Rule 4.1 violations will have the effect of branding him unethical and will prejudice the jury against him, the plaintiff is right to be dismissive. If the defendant is prejudiced by the plaintiff's mention of Rule 4.1, he is not *unfairly* prejudiced—these are, after all, cases about "lyin',

111. *See* Eriks v. Denver, 824 P.2d 1207, 1210-13 (Wash. 1992) (holding that "whether an attorney's conduct violates the relevant rules of professional conduct is a question of law").

112. *See* Cotton v. Kronenberg, 44 P.3d 878, 881-82 (Wash. Ct. App. 2002) (interpreting *Hizey* narrowly as prohibiting the use of ethics rules to prove legal malpractice).

113. MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2006). For a discussion of lawyers' duty of truthfulness in negotiations and the difference between dishonesty and acceptable "puffery," see ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-439 (2006) (discussing lawyers' obligations to be truthful when representing clients in negotiations).

114. MODEL RULES OF PROF'L CONDUCT R. 4.1(b) (2006).

cheatin' and stealin' "—and it is only unfair prejudice that evidence law aims to prevent.[115]

There are also cases in which a lawyer might wish to elicit testimony about his ethical obligations in defending allegations of wrongdoing.[116] Assume, for example, that an elderly client alleges that her lawyer conspired with her family to take control of her assets against her will or forced her to surrender management of substantial investments. The lawyer would understandably want the jury to hear that in restructuring the client's affairs she acted ethically under Rule 1.14(b), which provides:

> When [a] lawyer reasonably believes that [a] client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.[117]

Allowing evidence of ethics rules in relation to the standard of care or a lawyer's duty in a case is a reasonable course.[118] Ethics rules establish a minimum standard of conduct,[119] and because lawyers must obey them, this standard is consistent.[120] In contrast, standards of care expressed by experts, whose opinions are not tethered to ethics rules, may be substantially higher and therefore easier for a lawyer's conduct to fall below; such standards of care

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115. *See* FED. R. EVID. 403 (allowing for the exclusion of unfairly prejudicial evidence).

116. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. f, at 380 (2000) (stating that "[t]he use of the rules in malpractice litigation can also protect lawyers, for example when showing that a lawyer was compelled by rule to act in the way challenged by the plaintiff").

117. MODEL RULES OF PROF'L CONDUCT R. 1.14(b) (2006).

118. *See, e.g.*, Mainor v. Nault, 101 P.3d 308, 321 (Nev. 2004) (en banc) (per curiam) (allowing ethical rules to serve as an indicator of the requisite standard of care), *amended on other grounds by* 2005 Nev. LEXIS 10 (Nev. 2005).

119. *See id.* (expressing that Nevada ethics rules "reflect a professional consensus of the standards of care below which an attorney's conduct should not fall").

120. *See* John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 118 (1995) (expounding that lawyers must obey professional ethics rules, noting "[a]ny other approach would threaten lawyers with inconsistent standards of conduct").

are also prone to inconsistency.[121] Consider a case in which a lawyer withdraws from a client's representation because she is required to do so by Rule 1.16(a).[122] It would be incongruous to find this lawyer liable for abandoning the client on a malpractice or breach of fiduciary duty theory based on expert testimony imposing a different standard of care.[123] On the other side of the coin, consider a case in which a lawyer terminates a representation without adhering to the court's rules concerning permission to withdraw or notice of withdrawal, thereby violating Rule 1.16(c).[124] If the lawyer's conduct harms the client, it would be difficult to see how the lawyer should be allowed to escape liability by claiming that her conduct met some other standard of care.[125]

Additionally, the organized bar and state supreme courts formulate ethics rules based on thorough consideration of desirable and practical conduct.[126] Both groups are generally understanding of lawyers' concerns, so any standard of care incorporating these rules is presumably reliable. State ethics rules guide most lawyers when representing clients.[127] Lawyers are aware of the rules, even if they do not regularly consult them, when settling on a course of con-

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121. *Cf. id.* at 120 (discussing the many sources experts base their opinions on, including ethical rules, case law, guides, scholarship, and their own legal experiences). Leubsdorf argues that because of the lack of knowledge about lawyer behavior, opinions based solely on an expert's experiences are insufficient. *Id.*

122. *See* MODEL RULES OF PROF'L CONDUCT R. 1.16(a) (2006) (specifying three circumstances in which a lawyer must withdraw from representing a client).

123. *See* John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 118 (1995) (discussing the dangers inherent in having differing standards of care for lawyers between disciplinary actions and malpractice liability).

124. MODEL RULES OF PROF'L CONDUCT R. 1.16(c) (2006) ("A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.").

125. John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 118-19 (1995) (asserting that "it is hard to imagine a situation in which the lawyer should be able to avoid malpractice liability by claiming that withdrawal was consistent with the duties a lawyer owes a client").

126. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. f, at 381 (2000) (summarizing the formulation process for ethics rules, "including consultation involving the bench and bar"); John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 106 (1995) (explaining that judges create ethics rules, with assistance from state bar proposals).

127. *See* 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 19.7, at 1218 (2007 ed.) (stressing the conformity of lawyers' conduct with adopted ethics rules).

duct.[128] In summary, the enactment of ethics rules and lawyers' awareness of them make the rules a stable platform for attempting to assess lawyers' conduct in civil litigation.

In contrast, there are no consistently valid reasons for excluding evidence of ethics rules in civil litigation insofar as they relate to the standard of care or lawyers' duties. Perhaps the weakest reason for exclusion is that the drafters of the Model Code and Model Rules failed to contemplate their use in civil litigation.[129] This lack of foresight by the drafters is said to have spawned three problems: (1) inconsistencies in procedure or outcomes because disciplinary proceedings and civil litigation have different burdens of proof; (2) unfairness, because "liability attaches more easily in a disciplinary proceeding"; and (3) hesitation by disciplinary authorities to enforce ethics rules if their actions may influence lawyers' civil liability.[130] None of these concerns is legitimate.

First, the fact that disciplinary proceedings and civil litigation have different burdens of proof is irrelevant. Ethics rules typically are used to establish the standard of care;[131] the fact that disciplinary authorities have to prove their cases by clear and convincing evidence, while plaintiffs must prove civil liability by a preponderance of the evidence, does not affect the standard of care—it is the same in either case. As for the second concern, it is simply wrong to argue that liability attaches more easily in a disciplinary proceedings given that the burden of proof is the higher clear and convincing evidence standard.[132] While it is true that disciplinary

128. *See* Leslie C. Levin, *The Ethical World of Solo and Small Firm Practitioners*, 41 HOUS. L. REV. 309, 368-69 (2004) (discussing the interviews of solo and small firm New York lawyers who were generally aware of formal ethics rules, although they rarely consulted them).

129. *See* 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 19.7, at 1214 (2007 ed.) (emphasizing that the authors of the Model Rules "did not discuss the ramifications of ethical principles in civil litigation, nor did the ABA design the ethical standards to achieve civil objectives").

130. *See* Douglas L. Christian & Michael Christian, *Twice Bitten: Violations of Ethical Rules As Evidence of Legal Malpractice*, THE BRIEF, Spring 1999, at 62, 62 (enumerating several arguments against using state ethical rules in the context of civil litigation).

131. *See* Mainor v. Nault, 101 P.3d 308, 321 (Nev. 2004) (en banc) (per curiam) (providing that the ethical rules of the state's supreme court should be used to establish lawyers' requisite standard of care), *amended on other grounds by* 2005 Nev. LEXIS 10 (Nev. 2005).

132. *See, e.g.*, *In re* Sumpter, 2006-0576, p. 6 (La. 6/2/06); 931 So. 2d 347, 350 (per curiam) (noting that disciplinary authorities must establish lawyers' professional miscon-

authorities need not establish that someone was harmed by the lawyer's conduct as a civil plaintiff must,[133] this fact hardly offsets the much higher burden of proof. Regardless, it is difficult to discern any unfairness given that ethics rules were created to set the bare minimum level of conduct expected of lawyers.[134] With respect to the third concern, there is no evidence that the use of ethics rules to establish the standard of care or explain lawyers' duties in civil cases has diminished disciplinary authorities' willingness to prosecute allegedly unethical lawyers or to urge courts' imposition of meaningful sanctions for serious misconduct.[135]

Regardless of whether the drafters of the Model Code and Model Rules contemplated their use in civil litigation, they should have, because courts typically hold other professional ethics codes to be relevant to the standard of care in civil litigation.[136] Statements in the ethics rules' preambles disclaiming any definition of civil liability standards[137] or any basis for civil liability[138] are likely

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duct by clear and convincing evidence); *accord* State *ex rel.* Counsel for Discipline of Neb. Supreme Court v. Hogan, 717 N.W.2d 470, 475 (Neb. 2006) (per curiam); *In re* Application for Disciplinary Action Against Chinquist, 2006 ND 107, ¶ 7, 714 N.W.2d 469, 472 (N.D. 2006) (per curiam); *see also In re* Merkel, 138 P.3d 847, 848 (Or. 2006) (per curiam) (defining "clear and convincing" as "evidence establishing that the truth of the facts asserted is highly probable" (quoting *In re* Cohen, 853 P.2d 286, 287 (Or. 1993) (per curiam))).

133. *See* 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 19.7, at 1215 (2007 ed.) (noting that while civil liability requires causation of injury, ethics rules can be invoked merely by their violation).

134. *See Mainor*, 101 P.3d at 321 (describing ethics rules as reflecting the minimum standard of conduct an attorney owes to his client); Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 GEO. J. LEGAL ETHICS 701, 718 (1993) (stating that Model Code preliminary statements describe the Disciplinary Rules as being mandatory minimums).

135. *See, e.g.*, Charles W. Wolfram, *The Code of Professional Responsibility As a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281, 297-300 (1979) (discussing the potential for disciplinary hesitation if ethics rules are used in civil liability and opining that "it is by no means clear that the perceived dampening effect will occur"). Wolfram analyzed the potential for prior disciplinary actions to be preclusive in civil litigation, but determined such concerns are likely unpersuasive. *Id.* (expressing that at the time, no case law directly addressed issue preclusion between disciplinary actions and civil litigation).

136. *See* Hugh K. Webster, *Relevance of the NAELA Aspirational Standards to Malpractice Liability*, 2 NAELA J. 143, 145 (2006) (declaring that "[c]ourts have almost universally held that such codes . . . may be admissible as evidence of the applicable standard of care").

137. *E.g.*, CODE OF PROF'L RESPONSIBILITY Preamble, at 2 (Preliminary Draft 1969) (Model Code replaced Model Rules in 1983) (negating a civil liability definition: "Neither the Canons, the Ethical Considerations, nor the Disciplinary Rules are intended to suggest

meaningless.[139] Nothing about the law, as compared to other professions, allows the bar to promulgate rules without assuming corresponding liabilities.[140] After all, "courts do not authorize the use of professional rules as evidence of professional standards because the rules themselves so provide, but because of the need for consistent, knowable principles for lawyers to follow."[141]

If these disclaimers have any meaning, they are properly construed as neutral on the use of ethics rules in civil litigation against lawyers, rather than hostile to the idea.[142] Such language does not foreclose the use of ethics rules in formulating standards of care or in explaining lawyers' duties.[143] Ethics rules plainly establish stan-

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or define standards of liability in civil actions against lawyers involving their professional conduct").

138. *E.g.*, MODEL RULES OF PROF'L CONDUCT Scope, at 8 (2001) (current version 2006) (expressing that the rules "are not designed to be a basis for civil liability").

139. *See* Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 GEO. J. LEGAL ETHICS 701, 718 (1993) (noting that attempts to disassociate the ethics rules from civil liability have been "predictably futile, . . . if not fatuous"); Gary A. Munneke & Anthony E. Davis, Esq., *The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?*, 22 J. LEGAL PROF. 33, 41 (1998) (calling such disclaimers "virtually meaningless").

140. *See* Charles W. Wolfram, *The Code of Professional Responsibility As a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281, 287 (1979) (opining that ethics rules should be more broadly used in civil litigation because "[j]ust as with legislative enactment of criminal statutes, business regulations, or safe driving requirements, promulgation of the Code within a state is meant to affect the conduct of persons subject to its terms"); *see also* Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 GEO. J. LEGAL ETHICS 701, 718-19 (1993) (maintaining that "[n]orms stated as obligatory standards of a vocation are generally held to be evidence of the legal standard of care in practicing that vocation") (citation omitted). Thus, regardless of the civil liability disclaimers, "the bar necessarily assumed certain unavoidable responsibilities." *Id.* at 719.

141. John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 119 (1995).

142. *See* Charles W. Wolfram, *The Code of Professional Responsibility As a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281, 287 (1979) (encouraging courts to view these disclaimers as expressing no opinion on the validity of using ethics rules in civil litigation).

143. For example, the Model Rules used to state in their Scope that "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." MODEL RULES OF PROF'L CONDUCT Scope, at 8 (2001) (current version 2006). "Augment" means to make greater or increase. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 118 (4th ed. 2006). Because ethics rules do not increase lawyers' legal duties when invoked as the standard of care or to explain lawyers' duties in civil litigation, this disclaimer and others like it do not prevent use of the rules in this context. Currently, the Scope to the 2006 Model Rules expressly notes that "a lawyer's violation of a Rule may be evidence of breach of the

dards of conduct for lawyers.[144] In any event, the 2002 amendments to the Model Rules surely eliminated any interpretation of these disclaimers barring use of the rules in civil litigation,[145] which was already rejected by many states and discredited by the position expressed in the Restatement.[146]

Equally flimsy is the contention that ethics rules are irrelevant in malpractice litigation because while they "set a minimum level of conduct . . . , malpractice liability is premised upon the conduct of the 'reasonable' lawyer."[147] This argument is flawed from the start because ethics rules repeatedly refer to reasonable conduct by lawyers, thus incorporating the objective standard critics seem to think they lack.[148] Moreover, if a lawyer's conduct damages a client, is it *not* malpractice if the lawyer's conduct falls below a *minimum* professional standard? How can it *not* be relevant that a lawyer's con-

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applicable standard of conduct" in civil litigation. MODEL RULES OF PROF'L CONDUCT Scope, at 5 (2006).

144. MODEL RULES OF PROF'L CONDUCT Scope, at 5 (2006) (stressing that the Model Rules "do establish standards of conduct by lawyers").

145. *See* PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 11 (John S. Dzienkowski ed. 2002-2003 abr. ed, 2002) (recognizing the 2002 change which now expressly provides that "a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct").

146. *See* Douglas L. Christian & Michael Christian, *Twice Bitten: Violations of Ethical Rules As Evidence of Legal Malpractice*, THE BRIEF, Spring 1999, at 62, 63 (noting that the overwhelming majority of courts have held that ethics rules were admissible in civil litigation); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(2)(c), at 375 (2000) (allowing for evidence of an ethics rule violation to be considered when the violated rule was designed to protect those in the plaintiff's position and where such evidence is relevant).

147. 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 19.7, at 1216 (2007 ed.).

148. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.0 (2006) ("'Reasonable' or 'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer."); *id.* R. 1.1 (requiring lawyers to provide the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"); *id.* R. 1.2(c) (2006) (allowing lawyers to reasonably limit scope of representation); *id.* R. 1.3 (2006) (obliging that lawyers "act with reasonable diligence"); *id.* R. 1.4 (2006) (requiring lawyers to consult with clients in a reasonable manner, comply with reasonable requests for information, and explain matters to the extent reasonably necessary); *id.* R. 1.5 (2006) (listing factors that determine reasonableness of legal fees); *id.* R. 1.7(b) (2006) (discussing the reasonableness of a lawyer's belief that representation of a current client can continue where a conflict of interest is involved).

duct falls below *minimum* standards?[149] Doesn't a reasonable lawyer perform at least well enough to meet the *minimum* standard of conduct for all practitioners established by ethics rules? If a lawyer's conduct falls below the standard of care without fouling an ethics rule, that does not make all ethics rules irrelevant—it only makes a particular rule irrelevant in that case. It is generally accepted that for a trier of fact to consider a lawyer's violation of an ethics rule, that rule must be relevant to the plaintiff's claim.[150]

Nor is it persuasive that in identifying disciplinary issues, ethics rules do "not necessarily include whether the conduct caused pecuniary damage to a client," making the rules inappropriate in "formulating a civil remedy to compensate for an injury."[151] The fact that ethics rules do not contemplate monetary consequences for their violation is meaningless because, insofar as they are relevant in malpractice litigation, they are relevant to establishing the standard of care or understanding the lawyer's duty—not to damages. It is no answer to say that branding a lawyer unethical will inflame the jury and therefore influence damages, first because that is not necessarily true, and second because that argument overlooks the court's role in applying the law, limiting evidence or testimony, and instructing the jury.

Consider the following example from a respected treatise of a situation in which the use of ethics rules in civil litigation would supposedly cause a serious problem given that malpractice liability requires actual damages:

> An ethics rule may require written consent. The failure to obtain a writing is a violation, though the client gave fully informed, oral consent. Yet, in a civil context, the consent to the consequences would be a defense. Ethics rules require disclosure and consent to potential conflicts that are . . . likely to occur. The failure to make the disclosure is a violation of such a rule. In a damage action, if the conflict

149. *See* Mainor v. Nault, 101 P.3d 308, 321 (Nev. 2004) (en banc) (per curiam) (stating that "it would be illogical to exclude evidence of the professional rules in establishing the standard of care"), *amended on other grounds by* 2005 Nev. LEXIS 10 (Nev. 2005).

150. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(2)(c), at 375 (2000) (allowing for evidence of an ethics rule violation to be considered when the violated rule was designed to protect those in the plaintiff's position and where such evidence is relevant).

151. 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 19.7, at 1214-15 (2007 ed.).

did occur and became actual, the violation of the rule may not have caused an injury.[152]

This example appears to conflate the violation of ethics rules as creating a private right of action, which no court accepts, with the use of ethics rules to establish the standard of care. If it does not, then it ignores the malpractice liability requirements of proximate cause (defeated by proven oral consent) and actual damages (which may or may not exist). Additionally, proof concerning an ethics rule "does not preclude other proof of the standard of care."[153] This might also be a situation in which a court would exclude evidence of the ethics rule because it is irrelevant or because its relevance is substantially outweighed by the danger of unfair prejudice or confusion of the issues. Regardless, the example proves nothing.

The fact that ethics rules are not "statute[s] designed to protect specific individuals from designated harm," but are instead intended "to maintain the integrity of the profession, and to provide for discipline and regulation of lawyers," is no basis to prevent their use in civil litigation.[154] Lawyers dominate the development and drafting of ethics rules; therefore, it cannot reasonably be argued that the rules ignore their special concerns or that they will somehow suffer a disadvantage if ethics rules play a limited role in litigation against them.[155] Though ethics rules may not be intended to protect specific individuals from harm, many are intended to protect classes of persons from harm, and for a rule to be relevant to the standard of care, it must be intended to protect someone in the plaintiff's position.[156] Furthermore, deterrence is a core pur-

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152. *Id.* at 1219.

153. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. f, at 382 (2000).

154. 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 19.7, at 1215 (2007 ed.).

155. *See* Charles W. Wolfram, *The Code of Professional Responsibility As a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281, 287-88 (1979) (stating that lawyers, through organized bars, are prominent in the development of ethics rules).

156. *See* Allen v. Lefkoff, Duncan, Grimes & Dermer, 453 S.E.2d 719, 721-22 (Ga. 1995) (recognizing that while ethics rules are not created to be relevant in every case of malpractice, to establish "the standard of care in a particular case," a rule must be designed "to protect a person in the plaintiff's position"); *accord* Coastal Orthopaedic Inst., P.C. v. Bongiorno, 807 N.E.2d 187, 194 n.11 (Mass. App. Ct. 2004) (quoting Fishman v. Brooks, 487 N.E.2d 1377, 1381 (Mass. 1986)); Baxt v. Liloia, 714 A.2d 271, 277-78 (N.J. 1998) (quot-

pose of tort law,[157] and to the extent liability imposed on one lawyer deters another, it serves to regulate the profession. Finally, when invoked in disqualification disputes legitimately premised on conflicts of interest, ex parte communications, or breaches of confidentiality, ethics rules clearly are being used to maintain the integrity of the profession and regulate lawyers.[158]

Before proceeding, let us pause on the subject of deterrence, because in some respects, civil liability deters lawyer misconduct more effectively than does the threat of professional discipline.[159] Think for a moment about lawyers' alleged incompetence, which, according to ABA statistics, is a common source of malpractice claims.[160] The appropriate disciplinary sanction for incompetence is a short suspension.[161] Courts routinely defer such suspensions for periods of probation.[162] And while a plaintiff in a civil case need only show a lawyer's incompetence by a preponderance of the evidence, disciplinary authorities typically must establish it by clear and convincing evidence.[163] In sum, the availability of potentially substantial damages—as opposed to relatively minor disci-

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ing *Allen*, 453 S.E.2d at 721-22); Smith v. Haynsworth, Marion, McKay & Geurard, 472 S.E.2d 612, 614 (S.C. 1996) (quoting *Allen*, 453 S.E.2d at 721-22).

157. *See* DAN B. DOBBS, THE LAW OF TORTS 19 (2001) (stating that tort law aims to deter wrongful conduct by the imposition of liability when such conduct occurs).

158. *See* RICHARD E. FLAMM, LAWYER DISQUALIFICATION § 1.5, at 10-13 (2003) (explaining that a judge is vested with the power to disqualify misbehaving lawyers in order to keep the integrity of their courtroom and, more broadly, "the legal profession as a whole").

159. *See* Manuel R. Ramos, *Legal and Law School Malpractice: Confessions of a Lawyer's Lawyer and Law Professor*, 57 OHIO ST. L.J. 863, 867 (1996) (asserting that "[l]egal malpractice [litigation] has become the predominant way in which the legal profession regulates itself").

160. *See* AMERICAN BAR ASSOCIATION, STANDING COMM. ON LAW. PROF. LIAB., PROFILE OF LEGAL MALPRACTICE CLAIMS 2000-2003, at 10 tbl. 5 (2005) (characterizing "Failure to Know/Properly Apply Law" as the most frequently brought legal malpractice claim in 2003).

161. *See, e.g.*, *In re* Downing, 2005-1553, p. 12 (La. 5/17/06); 930 So. 2d 897, 904 (finding a lawyer's three-month suspension not unreasonable in light of his incompetence in negligently causing the improper arrest of his client's ex-wife).

162. *See, e.g.*, *id.* at 905 (deferring three-month suspension for three-month period of unsupervised probation).

163. *See* State *ex rel.* Counsel for Discipline of Neb. Supreme Court v. Hogan, 717 N.W.2d 470, 475 (Neb. 2006) (stating that "[t]o sustain a charge in a disciplinary proceeding against an attorney, the charge must be established by clear and convincing evidence"); *accord In re* Sumpter, 2006-0576, p. 5 (La. 6/2/06); 931 So. 2d 347, 350; *In re* Disciplinary Action Against Chinquist, 2006 ND 107, ¶ 7, 714 N.W.2d 469, 472; *In re* Merkel, 138 P.3d 847, 848 (Or. 2006).

pline—and an easier burden of proof combine to make the prospect of tort liability a significant deterrent of lawyer misconduct.[164] The same reasoning applies with respect to all forms of lawyer misconduct except those likely to lead to significant suspensions from practice or disbarment.

Continuing now, just as it is irrelevant that ethics rules were not intended for use in civil litigation, it is similarly irrelevant that "ethics rules are not promulgated by the legislature, but by the state's highest court, with the only expressed purpose being the regulation of the profession."[165] Courts frequently develop "tort standards from penal or regulatory strictures."[166] Moreover, with respect to both ethics rules and tort law, "the standard-setting organ is frequently one and the same, namely the judiciary."[167]

The consideration that ethics rules are not suited for reference in malpractice litigation because "[u]nlike the common law, which constantly evolves, ethics rules usually are fixed in time," and therefore may be outdated or inaccurate in any given case,[168] is no consideration at all. It is true that lawyers' fiduciary duties predate the Model Code and Model Rules,[169] but nothing about that compels the conclusion that ethics rules are unsuited to influence standards of care or aid in understanding lawyers' duties by virtue of their potential obsolescence. First, the leading malpractice trea-

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164. *Cf.* Charles W. Wolfram, *The Code of Professional Responsibility As a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281, 290-91 (1979) (positing that the economic and institutional differences between civil liability adjudication and the attorney disciplinary process lead to greater deterrence in civil liability's adversarial forum).

165. 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 19.7, at 1215 (2007 ed.).

166. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 4.1, at 4-7 (3d ed. 2006).

167. *Id.*

168. 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 19.7, at 1216 (2007 ed.).

169. *See* Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1284-85 (Pa. 1992) (noting that before the advent of the Model Code and Model Rules, "the common law recognized that a lawyer could not undertake a representation adverse to a former client"); Bevan v. Fix, 2002 WY 43, ¶ 50, 42 P.3d 1013, 1050 (Wyo. 2002) (highlighting decisions realizing a fiduciary duty before the enactment of the Model Code); 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 19.7, at 1216 (2007 ed.) (elaborating "that attorneys' fiduciary obligations substantially pre-date the ethics codes").

tise reciting this argument cites not a single supporting case.[170] If this is a valid concern, how is it that it apparently hasn't surfaced once in the nearly forty years since the creation of the Model Code? If such cases do exist, are the decisions well-reasoned? Second, ethics rules are derived from lawyers' common law duties,[171] and the two generally are either identical or quite similar.[172] Presumably then, ethics rules' drafters contemplated the need for some flexibility going forward and considered the law's evolutionary nature. This would, in part, account for the general characteristics of many rules. Third, "[f]rom 1983 to 2000, the American Bar Association modified several provisions of the [Model] Rules" and formulated "the Ethics 2000 Commission to reevaluate the entire Model Rules," thus suggesting the availability of mechanisms for institutional change.[173] Fourth, it is not as though law practice is a topsy-turvy world with standards so fluid that the law of lawyering captured in ethics rules is in perpetual danger of becoming outdated. Ethics rules derive from agency law,[174] which in key respects has been settled for years.

Of course, ethics rules are not an infallible measure of lawyers' conduct.[175] Sometimes they are too vague to be of much help.[176] At times, a plaintiff may want to rely on a rule that obviously does not apply, such as when the plaintiff is the lawyer's client and the rule governs lawyers' conduct toward third parties, or vice versa.

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170. *See* 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 19.7, at 1216 (2007 ed.) (arguing that the ethics rules have not evolved over time, but providing no case support for this proposition).

171. *See Maritrans*, 602 A.2d at 1285 (giving various decisions dealing with lawyer-client duties which came before the Model Code was enacted).

172. *See, e.g.*, Damron v. Herzog, 67 F.3d 211, 213-16 (9th Cir. 1995) (discussing a client's current options against his former attorney under the ethics rules and concluding that causes of action at common law, which the ethics rules are based at least in part upon, are also available).

173. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1-2(a), at 11 (2006-2007 ed.).

174. *See* Gary A. Munneke & Anthony E. Davis, Esq., *The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?*, 22 J. LEGAL PROF. 33, 42 (1998) (emphasizing that agency concepts can be found "at the heart of the attorney-client relationship"); *see also* LAWRENCE J. FOX & SUSAN R. MARTYN, RED FLAGS: A LAWYER'S HANDBOOK ON LEGAL ETHICS 87, 132 (2005) (explaining that fiduciary duties stem from the roots of agency law).

175. John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 120 (1995).

176. *Id.*

In these cases, litigants and courts will have to look elsewhere for sources of lawyers' duties or measures of the standard of care. Again, the fact that such cases exist does not compel the conclusion that legal ethics rules are generally ill-suited for use in civil litigation.

There are clearly cases in which expert testimony on lawyers' duties under ethics rules is unnecessary. Consider a case in which a lawyer is sued for breach of fiduciary duty arising out of her failure to keep a client's key information confidential, or for damages caused by the lawyer's conflict of interest. The attorney-client relationship is an agency relationship.[177] Agents owe their principals duties of loyalty and confidentiality.[178] In discussing the defendant lawyer's obligations to her client, there is accordingly no need for an expert to refer to ethics rules—agency law establishes the standard of care. Likewise, consider a case in which a plaintiff sues a lawyer for malpractice, alleging simply that the lawyer incompetently performed the task for which he was engaged, or failed to perform that task on a timely basis. When an agent agrees to act for a principal, the law implies that the agent possesses the skill required for the job and that he will exercise his skill diligently.[179] There is no need for an expert testifying as to the standard of care or the lawyer's duties to refer to Rule 1.1, requiring competence on the lawyer's part,[180] or Rule 1.3, mandating the lawyer's diligence.[181] Settled agency law principles again suffice for these pur-

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177. *See* Seaboard Sur. Co. v. Boney, 761 A.2d 985, 992 (Md. Ct. Spec. App. 2000) (stating that the attorney-client relationship is both fiduciary and agent-principal); *accord* Wentland v. Wass, 25 Cal. Rptr. 3d 109, 117 (Cal. Ct. App. 2005) (quoting Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, 131 Cal. Rptr. 2d 777, 788 (Cal. Ct. App. 2003)); Multilist Serv. of Cape Girardeau, Mo., Inc. v. Wilson, 14 S.W.3d 110, 114 (Mo. Ct. App. 2000); Crane Creek Ranch, Inc. v. Cresap, 2004 MT 351, ¶ 12, 324 Mont. 366, ¶ 12, 103 P.3d 535, ¶ 12; Daniel v. Moore, 596 S.E.2d 465, 469 (N.C. Ct. App. 2004) (quoting Johnson v. Amethyst Corp., 463 S.E.2d 397, 400 (N.C. Ct. App. 1995)), *aff'd*, 606 S.E.2d 118 (N.C. 2004); State *ex rel.* Okla. Bar Ass'n v. Taylor, 2000 OK 35, ¶ 29, 4 P.3d 1242, 1253 n.39; McBurney v. Roszkowski, 875 A.2d 428, 437 (R.I. 2005) (quoting State v. Cline, 405 A.2d 1192, 1199 (R.I. 1979)); Hill & Griffith Co. v. Bryant, 139 S.W.3d 688, 696 (Tex. App.—Tyler 2004, pet. denied).

178. *Cf.* LAWRENCE J. FOX & SUSAN R. MARTYN, RED FLAGS: A LAWYER'S HANDBOOK ON LEGAL ETHICS 87, 132-33 (2005) (explaining that agency law principles mandate that lawyers act with loyalty in representing their clients).

179. WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP 139 (3d ed. 2001).

180. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2006).

181. *Id.* at R. 1.3.

poses. But cases such as these should not be interpreted to mean that ethics rules generally have no bearing on determining lawyers' alleged civil liability. Their meaning is not nearly so widespread. Rather, the existence of such cases indicates only that in some breach of fiduciary duty and legal malpractice disputes, evidence of lawyers' violations of ethics rules is properly excluded as irrelevant or redundant.

Ethics rules never completely answer questions about lawyers' alleged liability; they at most establish the standard of care or explain lawyers' duties. The heavy lifting in litigation against lawyers is done by the substantive law of the jurisdiction—often tort law, but not exclusively. Consider a recent case from Kansas City, Missouri, in which several companies controlled by local developer Ronald D. Jury sued the Cleveland firm of Squire, Sanders & Dempsey, LLP ("Squire Sanders") and one of its lawyers, Donald E. Longwell, Jr.[182] The case arose out of Jury's redevelopment of the historic President Hotel in downtown Kansas City.[183] Essentially, Jury alleged that Longwell, Squire Sanders, and their client, H & A Capital, defrauded him in connection with obtaining financing for the project.[184]

The case was tried in 2006 (but ultimately settled).[185] Assume that Jury's expert witness, retired University of Missouri–Kansas City law professor James W. Jeans, testified that Longwell violated the Missouri equivalent of Model Rule 4.1, which forbids lawyers from knowingly making false statements of material fact to third parties, when he allegedly misrepresented to Jury and his associates H & A Capital's ability to finance the President Hotel project.[186] Of course, Jeans's opinion that Longwell violated Rule

182. Plaintiffs' Third Amended Petition at 1-2, President Hotel, LC v. Squire, Sanders & Dempsey, LLP, No. 02-CV-234709 (Jackson County, Mo. Cir. Court) (on file with the *St. Mary's Law Journal*).

183. *Id.* at 1-11.

184. *See id.* at 11-18, 26-32 (discussing the plaintiffs' various fraud and misrepresentation claims).

185. *See* Chris Grenz, *Jury Got $43 Million for Settlement, Lawyer Says*, KANSAS CITY BUS. J., Sept. 8, 2006, at 3, *available at* http://www.bizjournals.com/kansascity/stories/2006/09/11/story5.html (noting that the case settled in July of 2006).

186. MODEL RULES OF PROF'L CONDUCT R. 4.1 (2006). I practiced law in Kansas City for many years before joining Aon. A veteran Kansas City trial lawyer who attended the trial shared some of his observations with me on the condition of anonymity. It is from him that I learned that the plaintiffs called Professor Jeans as an expert.

4.1—while helpful—does not perfect Jury's negligent misrepresentation and fraud claims. Why? Because to recover under either theory, Jury must establish that he justifiably relied on Longwell's alleged misrepresentations to his financial detriment.[187]

Key issues—Jury's reliance on Longwell's statements and the reasonableness thereof—depend on events or facts apart from Longwell's obligations under Rule 4.1. This does not mean that Longwell was entitled to misrepresent material facts in dealing with Jury, or that lawyers ought not to be expected to be truthful in transactional practice. Rather, other aspects of Missouri law were critical in deciding the case as a whole. Unfortunately from a learning perspective, Squire Sanders settled before closing argument for $43 million, so the validity of the plaintiffs' allegations and the alleged bases for the defendants' liability will never be tested on appeal.[188]

Again, cases such as this demonstrate only that in particular matters, courts must carefully scrutinize the bases for experts' testimony and weigh the importance of alleged violations of ethics rules. Neither this case nor others like it support the broader argument that ethics rules have no place in litigation against lawyers or law firms.

IV. CONCLUSION

A lawyer's alleged violation of an ethics rule does not create a private right of action. That is universal law and the principle is uncontroversial. What is controversial is whether ethics rules should have any role in civil litigation, either in fashioning the standard of care or explaining lawyers' duties when sued by clients or third parties, or in guiding courts' decisions in disqualification proceedings. The argument that ethics rules have no place in litigation against lawyers is counterintuitive. Ethics rules clearly do establish standards of conduct for lawyers, and it is logical that a lawyer's

187. *See* Dueker v. Gill, 175 S.W.3d 662, 667 (Mo. Ct. App. 2005) (identifying listener's reliance on truth of a defendant's statement as element of a fraudulent misrepresentation cause of action); Summer Chase Second Addition Subdivision Homeowners Ass'n v. Taylor-Morley, Inc., 146 S.W.3d 411, 419 (Mo. Ct. App. 2004) (listing justifiable reliance by listener as an element of a negligent misrepresentation cause of action).

188. *See* Chris Grenz, *Jury Got $43 Million for Settlement, Lawyer Says,* KANSAS CITY BUS. J., Sept. 8, 2006, at 3, *available at* http://www.bizjournals.com/kansascity/stories/2006/09/11/story5.html (reporting that the settlement came after five weeks in the courtroom).

violation of a rule is relevant to the standard of care or to the lawyer's fulfillment of her professional duties. Moreover, ethics rules establish only minimum standards of conduct and the process by which they are enacted makes any standard derived from them reliable. In any event, widespread resistance to the use of ethics rules in civil litigation against lawyers is futile. Most states consider ethics rules relevant to the standard of care for lawyers and to determinations or explanations of lawyers' professional duties,[189] and those states that have yet to consider the issue are likely to be pushed that way by the positions expressed in the Restatement (Third) of the Law Governing Lawyers and the Scope section of the new Model Rules of Professional Conduct. Of course, these remaining jurisdictions are also likely to join the majority because the reasons offered against the relevance of ethics rules to standard of care or duty analyses are simply unpersuasive.

189. *See* Douglas L. Christian & Michael Christian, *Twice Bitten: Violations of Ethical Rules as Evidence of Legal Malpractice*, THE BRIEF, Spring 1999, at 62, 63 (noting that "[o]f courts that have addressed the issue, the overwhelming majority hold that evidence of an ethical violation is admissible in a malpractice action").