THE MODEL RULES OF PROFESSIONAL CONDUCT AND THEIR RELATIONSHIP TO LEGAL MALPRACTICE ACTIONS: A PRACTICAL APPROACH TO THE USE OF THE RULES

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I. INTRODUCTION

The purpose of this Article is to take a practical approach to the examination of the Model Rules of Professional Conduct and their relationship to legal malpractice actions. The focus will be on the Rules and legal malpractice actions as they relate to claims by clients against their lawyers. Both provide remedies for inadequate or substandard performance by members of the legal profession. The Model Rules of Professional Conduct establish guidelines for attorney conduct and provide for the intra-bar (i.e., non-judicial) discipline of attorneys found in breach of obligations to clients or to the legal profession. Punishments range from private reprimands to complete and total disbarment. Legal malpractice actions, broadly defined to include all areas of attorneys' civil liabilities, are judicial or legal proceedings most commonly premised on theories of negligence, breach of fiduciary duty, breach of contract, or fraud.1 Punishments imposed upon a lawyer found civilly liable to a client are in the form of money judgments.

The Article illustrates, via example, that the development of the Model Rules of Professional Conduct and the evolution of legal malpractice actions have resulted in the creation and existence of a complex system of proceedings, both judicial and non-judicial, under which law-

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yers may find themselves accountable to their clients and to society generally. Because both the Rules and legal malpractice actions define duties of the legal professional, inconsistencies exist which make it difficult for the practitioner to comprehend and comply with the professional standards and responsibilities that they impose. By "inconsistencies" it is meant that the standards that a court uses to determine whether there has been professional malpractice is different from the standards that bar associations and disciplinary agencies use to determine whether or not a lawyer is subject to discipline for Rule violations.

To simplify the system of lawyer accountability, courts should uniformly and consistently hold lawyers to the heightened duties and standards that lawyers themselves have set through the promulgation and adoption of a version of the Model Rules of Professional Conduct. Duties defined in an individual state’s adopted version of the Model Rules should be imposed and enforced consistently in civil actions for damages as well as in disciplinary proceedings. For example, courts might decide to adopt a rule which allows the presumption of a "per se" breach of professional duty when there is a finding of a violation of the Rules of Professional Conduct in a legal malpractice or civil liability action. This position would not only give more status and weight to the Rules, but it would potentially simplify the litigation process.

The trend in the law is clearly towards an expanded use of the Rules. Courts should assist lawyers by firmly establishing the Rules as a gauge for measuring appropriate conduct.

A. The Model Rules of Professional Conduct: Their Origin and Purpose

A discussion of the history and the stated purpose of the Model Rules, along with commentary about the modern trend towards expanded

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2. That is, lawyers may be held accountable through legal proceedings such as malpractice actions, as well as through non-judicial, noncompensatory disciplinary proceedings conducted by various disciplinary authorities.

3. Every state has adopted some form of either the ABA Model Rules of Professional Conduct or the Model Code of Professional Responsibility.

4. If the malpractice action is brought by a client, this would effectively remove her necessity of proving duty and breach of duty. The plaintiff would still have to prove causation and damages in a malpractice action where there was the violation of a rule of professional conduct.
use of the Rules, should prove useful to those practitioners unfamiliar with the Rules. Consider the following:

In 1908, the ABA adopted its first model enactment known as the Canons of Professional Ethics. By 1969, the ABA had promulgated the Model Code of Professional Responsibility (the "Code"), and in 1983 it updated those standards in the form of its Model Rules of Professional Conduct (the "Model Rules"). All states have adopted, either by legislative or judicial action, some version of the Model Code or Model Rules.

The Code and the Model Rules cover the expanse of ethical obligations traditionally applied to attorneys. Provisions of the Code and the Model Rules have been used with some success in a civil liability context despite the introductory material to the Code and the Model Rules which rejects their use except in disciplinary actions.

The "Preliminary Statement" section of the Code states that the Code "does not undertake to define standards for civil liability of lawyers for professional conduct." The ABA endeavored to strengthen the disclaimer in the "Scope" section of the Model Rules by stating:

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

Consistent with the view of the drafters of both the Model Code and the Model Rules, most states hold that violations of the Model Rules of Professional Conduct do not give rise to a cause of action nor do they create any presumption that a legal duty has been breached. The majority of the

6. Id. at 10.
courts that have decided the issue have held that the Rules are not intended to be a basis of civil liability; they are meant only to provide guidance to lawyers and to assist disciplinary agencies by creating a structure for the regulation of attorney conduct.\(^7\)

This does not mean, however, that states have completely refused to expand the use of the Rules beyond their stated purpose. In fact, a majority of states have chosen to ignore or at least severely limit the application of the Rules' inherent disclaimers by allowing an expanded use of the Rules. By an "expanded use of the Rules," it is meant that states allow the Rules to be used to a greater degree than one might expect in light of the strong statements (disclaimers) made in the "Preliminary Statement" and "Scope" sections of the Model Code and Model Rules. For example, one state, Michigan, has gone so far as to totally disregard these disclaimers by holding that "Violations of the Code of Professional Responsibility provide a basis for a legal malpractice claim."\(^8\) In Michigan, "Violations of the Code of Professional Responsibility create a rebuttable presumption of actionable legal malpractice and are not negligence per se."\(^9\)

Surveying trends in the law regarding the expanded use of the Rules, the Supreme Court of Georgia found the following:

Courts take four different approaches . . . . First, some courts hold that professional ethical standards conclusively establish the duty of care and that any violation constitutes negligence per se.\(^{10}\) Second, a minority of courts finds that a professional ethical violation establishes a rebuttable presumption of legal malpractice.\(^{11}\) Third, a

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10. These courts follow the proposition that the test for determining whether a violation of a statute (i.e., the Rules become statutory after adoption by the state legislature) constitutes negligence per se is whether the injured person is a member of the class intended by the legislature to be protected and whether the harm is of the kind which the statute was intended to prevent. See Bob Godfrey Pontiac, Inc. v. Roloff, 630 P.2d 840 (Or. 1981). The violation of the Rules constitutes a violation of an attorney's common law fiduciary duty to the client. See Griva v. Davison, 637 A.2d 830 (D.C. 1994).
11. See Beattie, 394 N.W.2d 107. Violations of Code of Professional Responsibility create a rebuttable presumption of actionable legal malpractice and are not negligence per se. See also Tante v. Herring, 439 S.E.2d 5 (Ga. Ct. App. 1993). Conduct which violates the Code of Professional Responsibility may, in appropriate
large majority of courts treat professional ethical standards as evidence of the common law duty of care.\textsuperscript{12} Finally, one court has found professional ethical standards inadmissible as evidence of an attorney's duty of care.\textsuperscript{13}

Of the four approaches, the first two above are obviously contrary to the intent of the drafters as expressed in the "Preliminary Statement" and the "Scope" sections of the Model Code and the Model Rules. The third approach, however, is not quite as clear-cut. The Rules do not specifically say anything which prohibits their use as "evidence" of an attorney's common law duty of care. Given the number of states which have accepted this proposition (i.e., that violations can be used as evidence that an attorney breached his common law duty of care), it is arguable that this position is not at all contrary to the intent of the drafters of the Rules. The fourth approach, taken by Washington state, is clearly consistent with the "Preliminary Statement" and the "Scope" sections of the Model Rules.

The second approach, as it is referred to by the Supreme Court of Georgia, is actually the most common of the uses (i.e., violations of professional ethical standards establish a rebuttable presumption of legal malpractice). It most clearly demonstrates an expanded use of the Rules. The third approach is possibly the result of the influence of the Bar Associations and lobbies who have dictated that any expanded use of the Rules should be a gradual process. Though not as harsh, it too is indicative of the general trend. States that have taken this approach have realized the need for an expanded use of the Rules; they have realized that expansion is necessary to give the Rules the force and impact that they were intended to have. Regardless of the reasons, it is evident that an expanded use of the Rules is the trend in the law.

In light of the above, it is clear that a significant number of states have decided that it would be in their best interest to limit, if not totally


disregard, the “Preliminary Statement” and “Scope” clauses of the Model Code and Model Rules and allow an expanded use of the Rules. Although a majority of the states have refused to go so far as to allow the Rules to be used as an independent source of liability, it is clear that the Rules are going to be used, at a minimum (in all states but Washington), as evidence in malpractice cases. It logically follows that the trend of expanded use will continue. More and more states will adopt expansive approaches similar to those mentioned above.

Due to the trend, lawyers should expect to see the Rules used to a greater degree to define the level of conduct they are to maintain in client representation. This should include an expectation that the Rules will be increasingly utilized in civil litigation. The Rules are becoming ever more important in the day-to-day operation of a legal practice. With the increased emphasis on the Rules, lawyers need to be aware that the Rules will likely be considered for purposes beyond the possibility of discipline.

B. Hypothetical

In an attempt to make this Article as useful as possible from a practitioner’s standpoint, the following hypothetical will be used to discuss the various arguments for and against an expanded use of the Rules. Consider the following:

John and Tom are old high school friends. John attended the University of South Carolina and later went on to receive his J.D. from the University of Tulsa College of Law. He is currently a sole practitioner specializing in corporate law and commercial litigation in the state of Legaltown, USA (“Legaltown”).

Tom also went to the University of South Carolina where he received his B.A. in Business Administration. He is now a local businessman in Legaltown and is involved in several ventures in the town. Since John’s return to Legaltown and passage of the bar exam, John has handled all legal matters relating to Tom’s business.

In 1992, Tom and two business associates, Dick and Harry, approached John about the formation of a new business organization. John advised the trio that he could assist them, but that it might be in the best interest of Dick and Harry for them to obtain independent legal counsel to represent them in the negotiation and formation process since he and Tom had a prior attorney-client relationship. John stated that otherwise he would have to be hired to represent the organization and to work in its
best interest, i.e., he would be unable to represent any of the individual owners.

Tom, Dick, and Harry acknowledged John’s recommendation, but decided against separate representation, stating, “It doesn’t make any sense for us to pay three separate attorneys to put this thing together.” John reduced the acknowledgment to writing and had all parties involved sign, stating that they understood and agreed to the arrangement. After collecting a $500 retainer, work on structuring of the organization commenced. A corporate format was chosen, and upon completion of the proper filings, Piedmont Music Company (“Piedmont”) was formed.

Piedmont’s organizational structure, as agreed upon by the parties, was as follows: (1) Tom, Dick and Harry would each invest 1/3 of the necessary capital to start the company; (2) Despite their equal initial financial contributions, Tom would own, due to his experience, business expertise and education, 500 shares (250 common voting shares and 250 preferred non-voting shares); Dick and Harry would each own 250 common voting shares; (3) After dividends were paid to preferred stockholders (which Tom would take in the place of a salary), dividends from profits would be distributed equally among the three co-owners; (4) Voting shares were to be distributed equally among the owners; since the shares have cumulative voting, this would effectively give each co-owner an equal say in the operation of the corporation, and (5) Disputes among Tom, Dick and Harry were to be submitted to an arbitrator whose decision would be final and binding on all parties.

John continued to represent Tom individually in Tom’s other business ventures, and for three years this arrangement worked without conflict. In January of 1996, however, some of Tom’s other business ventures began to fail and Tom found himself in desperate need of funds. Tom went to John and advised him of his financial problems and asked him what to do. John asked Tom if he had considered selling his interest in Piedmont in order to generate the needed funds. John told Tom that he had heard of a Mr. Smith who was an entrepreneur of sorts who might be interested in investing in such a corporation. Tom stated that he hated to do that to his “partners” (i.e., sell his interest), but that he saw no reasonable alternative and asked John to set up a meeting with Smith.

The next night, Tom was having dinner with some friends and happened to mention that he might be selling his interest in Piedmont. Tom told the group that he and John were to meet with Smith on Friday to discuss the sale. Tom’s friend, Robert, mentioned that he had heard of
Smith and that he knew that there had been some kind of "trouble" with Smith in Chicago a few years back. Robert was unsure of the exact nature of the problems with Smith. The next day, Tom told John what Robert had said, and John and Tom agreed that they should ask Smith about it on Friday.

That Friday, the meeting with Smith proceeded as planned. At the meeting, John and Tom asked Smith about the "trouble" in Chicago. Smith stated that a few of his old partners had been unhappy with some business deals he had made. He said, "Hey, that's business for 'ya. You can't always make everyone happy and still make money." Smith further stated, "If they had really been that upset with me, you'd think they would have tried to sue me or something, but they didn't." Satisfied with the response, Tom agreed to sell his interest in Piedmont to Smith. John and Tom never mentioned Smith's prior "troubles" to Dick and Harry, and never pursued the issue any further.

John proceeded to assist Tom with drafting documents necessary to sell Tom's interest in the organization to Smith. After meeting with Dick and Harry and explaining his situation, Tom told his partners that he had to get out but that he had found a buyer for his interest in Piedmont. Tom asked Dick and Harry to arrange to meet with Smith as soon as possible to approve the deal.

Later that week, John, Tom, Dick, Harry, and Smith met to discuss the sale of Tom's interest. At the meeting, Smith agreed to pay $25,000 for Tom's shares. Dick and Harry stated that they were sorry to see Tom get out, but agreed to the sale to Smith. Also, with the approval of Dick and Harry, Smith paid John a $2,500 finder's fee for his assistance with the transaction.

For the first few months after the sale of Tom's shares, the new arrangement with Smith seemed to be working out well. Nine months later, however, Piedmont suddenly ran into financial trouble. Dick and Harry found out that Smith had been embezzling corporate funds. As a result, Piedmont had to cease operations. Dick and Harry soon learned of Smith's past "troubles" (which included a prior embezzlement), and also learned that Tom and John had been warned about Smith but had failed to follow up or to inform Dick and Harry of potential problems. After filing for bankruptcy, Dick and Harry sued John for malpractice alleging failure to provide competent representation and a conflict of interest which resulted in John's breaching his duty owed to the organization.
C. The Problem

Like many states, Legaltown has not yet decided the issue as to whether the finding of a violation of the Model Rules of Professional Conduct in a legal malpractice action creates a presumption of breach of duty in that action, or if a violation can by itself be the basis for civil liability. The judge assigned to this case must decide what rule should be adopted in Legaltown. In the discussion which follows, this Article will use the above hypothetical as a catalyst for the identification and exploration of some of the major issues surrounding the debate about the scope and reach of the Model Rules in civil litigation.

D. Discussion

To analyze this problem, it is necessary to identify and consider the relevant Model Rules of Professional Conduct. Here, it must be decided whether John violated any of the provisions of the Model Rules adopted by Legaltown. After making this initial determination, it will then also be necessary to decide the extent to which the Rules will be applied.

1. A Case Study: Evaluation of the Hypothetical.--In the above hypothetical, a cursory examination of the Rules of Professional Conduct reveals that John may have violated several provisions of the Rules. Rule 1.1 on competence states that:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Comment 5 adds:

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.

14. This Article will assume that Legaltown has adopted the ABA Model Rules of Professional Conduct in their entirety.
16. Id. at cmt. 5.
When John and Tom met with Smith and questioned him about his "problems" in Chicago, John had a duty, in order to be in compliance with the provisions of the Rule, to disclose potential problems with Smith to Dick and Harry and/or a duty to conduct a more in-depth inquiry into the factual elements of Smith's contentions. Because John did not do so, he likely failed to meet the thoroughness requirement of Rule 1.1. (This is, of course, assuming that one instance is enough to constitute a violation of Rule 1.1.)

John's duty to advise Dick and Harry of potential problems with Mr. Smith arises out of Rule 1.4 on Communication, which says:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.17

John clearly failed to inform Dick and Harry fully about the potential problems with Smith. This prevented Dick and Harry from being able to make a fully informed decision regarding the transaction with Smith. Had they had full information, they might have taken more appropriate precautions and performed their own investigation into the allegations. Therefore, John violated Rule 1.4.

Rule 1.7, governing conflicts of interest, states in relevant part that:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.18

Comment 3 expands on this idea:

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand,

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Simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.\(^{19}\)

John arguably complied with the provisions of this Rule up to the point where he assisted Tom with the sale of his economic interest in Piedmont Music Company. The representation of Tom in the sale of his shares became directly adverse to the interest of the remaining owners, whom John also represented, when it became known to John that there was a potential problem with Smith and John allowed Dick and Harry to proceed without this knowledge. There may have been a conflict even if Dick and Harry had known about Smith, created simply by Tom’s desperate need to sell. Though it was beneficial to Tom to sell his shares, the sale proved to be adverse to the interests of Dick, Harry, and the corporation. Adequate research by John, done in the interest of the owners of Piedmont, might have prevented the eventual failure of the company. At the outset of the arrangement, John’s representation of the owners was well within the guidelines established by the Rules. Tom’s desperate need to sell created a conflict such that no single lawyer could really represent all three owners. His subsequent representation of Tom in the sale of Tom’s interest created the possible violation of Rule 1.7. John probably would not be found in violation of the Rule had he disclosed the potential problems with Smith to Dick and Harry. If he had disclosed the potential problem and the owners had then declined to delve further into Smith’s background, John would have fulfilled his duty to his clients and to the corporation. Because John knew of potential problems with Smith and failed to inform Dick and Harry, it is arguable that a conflict of interest arose which would have required John to decline to assist Tom in the sale of his shares, or would have required John to withdraw from the representation of the remaining owners of Piedmont. Even withdrawal at this point may not have relieved John of his duties and responsibilities to Dick, Harry, and Piedmont.

One additional Rule having potential application in this case is Rule 1.13, dealing with organizations as clients, which reads as follows:

\(^{19}\) Id. at cmt. 3.
(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.20

Comment 8 clarifies the above:

There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest he finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such a constituent, and that such a person may wish to obtain independent representation . . . the lawyer for the organization cannot provide representation for that constituent individual.21

Here, it would appear that John provided representation for a constituent individual of Piedmont, i.e., Tom. He assisted Tom in finding someone to purchase his interest, drafted the appropriate documents, attended meetings as Tom's lawyer concerning the sale, and worked in the interest of, and on behalf of, Tom. John's assistance in this matter seems to make Tom's interest in selling paramount to that of the corporation. John would argue, however, that the sale was, in fact, in the best interest of both the corporation and Tom, and that concurrent representation of both the individual and the corporation was therefore permissible under Rule 1.13. John would say that due to Tom's financial situation, it was in the best interest of the company to find a new investor with more available investment resources. Though not a bad argument, the better view is probably that John's actions are impermissible under Rule 1.13.

It is apparent that John violated several of the provisions of the Model Rules. The question now turns to whether those violations should

21. Id. at cmt. 8.
lead to the presumption that he breached his duty to Piedmont and to its owners, Dick and Harry (i.e., to what extent the Rules should be applied). In a state that adheres to the "Scope" clause of the Model Rules of Professional Conduct, Dick and Harry would, in a malpractice action, have to show that John breached a duty owed to them, despite the finding that these Rules had been violated. This is despite the fact that, in this instance, it should be adequately clear that John owed Piedmont a duty and that this duty was breached. Litigation here should only be necessary to the extent that causation and damages must be proven.

The sections which follow address the fundamental questions necessary to determine the extent to which the Rules should be applied. First, the term "duty" is defined. A discussion of whether the Rules impose "duties" follows. Then, the idea of the use of the Rules in legal malpractice actions is explored. Finally, consideration is given to the major arguments for and against an expanded use of the Rules.

2. Sense and Sensibility: The Scope of Application of the Rules.--Do the Rules impose "duties?" What are "duties?" Answering these questions will be beneficial to this discussion. According to Black's Law Dictionary, a "duty" is as follows:

A human action which is exactly conformable to the laws which require us to obey them. Legal or moral obligation. An obligation that one has by law or contract. Obligation to conform to the legal standard of reasonable conduct in light of apparent risk . . . . Obligatory conduct or service. Mandatory obligation to perform . . . . An obligation, recognized by the law, requiring actor to conform to certain standards of conduct for protection of others against unreasonable risks. See also Legal duty; Obligation.\(^2\)

The definition of "duty" is thus extremely broad. Admittedly, there are many duties imposed by the law. There are fiduciary duties, duties of good faith and fair dealing, duties to act in certain situations, duties to refrain from acting, duties to the profession, duties to society, and many others.

In relation to the Model Rules and legal malpractice actions, it is often argued that the difference in the duties imposed by the two are that the duties in malpractice actions are "common law" duties whereas duties

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created by the Model Code and Model Rules are statutory or regulatory. This simply means that malpractice duties were fashioned by judges long before the creation of the disciplinary codes. Model Rule duties are currently disciplinary duties in the sense that the violation of a Rule subjects a lawyer to discipline and not to civil liability. This is not to say that a single violation of the Model Rules will lead to discipline. Charles Wolfram, a leading ethics scholar, states in his treatise that, with respect to the duty of competence, only gross violations of the Rule will lead to lawyer discipline, and that “most decisions and ABA policy insist that a single instance of ‘ordinary negligence’ is usually not a disciplinary violation.”

Duties, however defined, describe things that you, as a lawyer, must or must not do. It should certainly be clear that the Rules do impose duties. The problem lies in choosing the context within which those duties are to be applied. The primary question is this: Should the duties imposed by the Rules be applicable in the civil liability context or should they merely be applicable in the disciplinary context?

In answering this question, consider the fact that other professionals in civil liability actions are held to the professional standards set for their practice. Arguing against the use of the Rules of Professional Conduct in legal malpractice actions would in essence be arguing for the disparate treatment of lawyers. Lawyers should be acutely aware that “the legal profession’s relative autonomy carries with it special responsibilities of self-regulation and, therefore, attorneys must avoid appearing to hold themselves to different standards during disciplinary proceedings and during civil actions.” Other like professions are not provided the luxury of being able to distance themselves from their professional standards in civil liability actions, and lawyers should not be either.

Turning to consideration of the hypothetical, if the judge were to adopt a rule which allowed the presumption of per se breach of duty for violations of the Rules of Professional Conduct in this case, he would be announcing that the Rules in Legaltown not only have disciplinary implications but liability implications as well (i.e., a view that is consistent with the treatment of rules in other professions). Not only might John be

disciplined for multiple Rule violations under Rules 1.1, 1.4, 1.7, and 1.13, but he would also be potentially civilly liable for those breaches.

Can not a doctor both have his medical license revoked and be subject to civil liability for clear violations of the Code of Medical Ethics and standards of medical practice? The idea of being both civilly liable and subject to discipline offends the sensibilities of some lawyers. Slapping them on the wrist, if you will, by the implementation of intra bar discipline is deemed sufficient punishment for violating the Rules. Hitting the lawyer in the pocketbook is offensive. This view is purely self-serving. The Model Rules should be viewed as imposing a framework for the minimum acceptable standards of attorney conduct. Lawyers should set the example rather than be the exception to the idea that professional standards are applicable in the liability context as well as the disciplinary context. The judge in Legaltown should define the duties of lawyers owed to their clients to include those imposed by the Rules of Professional Conduct.

3. What the Rules Add: Context.--The argument has been advanced that the addition of the use of the Rules in legal malpractice actions will not make any significant positive difference or contribution to decisions of these types of claims. Tales of arguments made to juries such as, "Not only did the defendant fail to research the current law but the defendant also violated Rule 1.1," resonate from those opposed to the adoption of the use of the Rules in the civil liability context. They argue that the use of the Rules only provides unnecessary ammunition to plaintiffs in legal malpractice actions, and that it is sufficient, in showing professional malfeasance, to point out what the attorney did or failed to do without adding that the attorney's action or inaction also violated a Rule of Professional Conduct. The fear is that a jury would somehow misuse or fail to understand this information and that this would therefore be a significant advantage to plaintiffs in legal malpractice actions against attorney defendants.

I disagree with this contention. It is likely that the addition of the use of the Rules in legal malpractice actions would lead to the development of a framework in which to place attorney behavior when considering whether certain behavior is actionable or not. Over time, a laundry list of permissible and impermissible behavior would be developed by the case law and it would be categorized under the appropriate applicable
Rule. This would assist attorneys in the future in evaluating plans of action or in choosing the appropriate action in a given situation.

This use of the Rules also gives them significantly more weight and importance. Right now, far too few lawyers know the Rules or think about them on a regular basis. This is despite the fact that a working knowledge of the Rules is required for bar admission in most if not all states. It is likely that utilization of the Rules in the civil liability context would cause an increase in attention paid to the Rules and even improve the quality of legal services rendered: "The lawyer's aim is to attain 'the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.' Therefore, an expanded use of the [Rules] in legal malpractice actions would help improve the profession's credibility in the public eye." 25 This should be an important goal of attorneys in today's hostile climate. Public perception of the profession is and always has been extremely vital to the credibility of the justice system in this country, and the lawyer's greater duty to the institution should be paramount in the consideration of the adoption of such a use of the Rules.

John, in the hypothetical, could have turned to research of the case law to determine if it was permissible for him to represent Tom in the sale of Tom's interest in Piedmont. Had the law in Legaltown been set up in such a way that it developed a framework, through precedent, by which attorneys could examine and understand the complex nature of the Rules by examining the decisions of past cases, John might have learned that he needed to disclose potential problems with Smith to Dick and Harry prior to assisting Tom with the sale. Legaltown might achieve this result by requiring the publication of the results of all disciplinary proceedings. This would be in addition to publication of the results of civil malpractice litigation. This is not to say that John, as a responsible attorney, should not have known that he had a duty to disclose, but if there was any doubt in his mind the case law might have aided him in choosing the proper course of action. Also, it is likely that the use of the Rules in the civil liability context would have made John more concerned about what the potential repercussions of his actions would be. He would have been more likely to think twice about his representation of Tom and about making the proper disclosures to Dick and Harry. This lawsuit might have been avoided completely if John had, if you will, a "financial

25. Id.
stake" in it (not in the sense of self-dealing, but in the sense that his chance of civil liability would be greater if he acted improperly). He probably would have acted more cautiously, better served his clients, and avoided liability.

4. Other Arguments for Expanded Use.--There have been several other arguments advanced for an expanded use of the Rules in the civil liability context. One commentary draws an analogy between the Rules and criminal statutes. It makes the argument that "[i]n many jurisdictions, courts invoke criminal statutes and quasi-criminal enactments as guides to liability in civil litigation; indeed, many such jurisdictions [go so far as to] treat the statutory violations as liability per se."26 The comparison makes the point that, if this is done in the criminal context, what is so wrong with doing the same with the Rules of Professional Conduct? Criminal statutes and procedure are thought to be some of the most protective of individual liberty and autonomy, yet the law allows a person to be held both criminally and civilly liable under certain situations.

Another commentary expands on some of the ideas briefly touched upon earlier which relate to the enforcement of Rule violations. It states the following:

Judicial expansion of the civil liability of attorneys may be necessary to achieve broad compliance with the ethics rules. Reliance upon the disciplinary process—understaffed, underfinanced, and dominated by the group it regulates—is misplaced. Civil plaintiffs, on the other hand, motivated by their damages, emotion, and desire for compensation, have a greater incentive to initiate and pursue an action.27

Finally, it is argued that because attorneys regulate themselves through the use of disciplinary proceedings, the proceedings may be deemed ineffective in "ferreting out" professional misconduct. Even if misconduct is found, the proceedings may not adequately address all cases: "If professional misconduct is left unchecked or if the public perceives that it is, the bar's self-governing principles are undermined."28

27. Id. at 623.
28. See Peters, supra note 24, at 621.
The result would be increased litigation brought by clients who feel that they have no other adequate form of redress.

It is quite possible that lawyers may have it too good at the present time. Arguably, the Rules are by nature self-serving to the legal profession. The broad phraseologies used and the self-enforcement envisioned by the drafters of the Rules are clearly to the lawyer's advantage. The current use, or disuse, of the Rules may be a disincentive for lawyers to know and follow them. Again, attaching the possibility of financial consequences to behavior may be the most effective way to encourage and promote more complete compliance with the Rules and to improve the quality of legal services.

5. **Arguments Against Expanded Use.**--Those opposed to an expanded use of the Rules cite some of the following reasons in support of their position:

i. Expanded use would open the floodgates of litigation. Overworked courts should not have to spend time policing lawyer misconduct. Adding to the problem would be unfounded misconduct claims filed maliciously by opposition counsel to gain strategic advantage.

ii. Expanded use would have a chilling effect on the disciplinary bodies. Disciplinary bodies will avoid finding violations under the Model Code or the Model Rules if their determinations become the basis for subsequent civil litigation (i.e., via the doctrine of collateral estoppel).

iii. There is an inherent bias in the Rules that should prevent their expanded use. Both the Model Code and the Model Rules are inherently biased in favor of lawyers. Hence, when used offensively in the civil arena, they would not adequately protect the interests of plaintiffs suing lawyers. In addition, when they are invoked defensively by lawyers to defend such suits, they would give too much protection to the lawyers.

iv. The Rules are vague. They are filled with vague standards and ambiguous phrases that would be of little help to courts.29

One final argument against an expanded use of the Rules is that it would result in "defensive" lawyering. The idea is that lawyers will become so preoccupied with Rule violations and their consequences that they will do one of two things: (1) As a precaution, run up the bill with possibly over-extensive record keeping, or (2) Tend to distance themselves more from their clients, not advocating for them as zealously as they once might have for fear of the consequences.

The arguments made against an expanded use of the Rules contend that the duties imposed by the Rules were not intended to be a source for civil liability and that such a use "flies in the face of the clear intent of their 'framers.'"\(^{30}\) Their purpose was to be strictly regulatory or disciplinary in nature. Juxtapose this idea with the idea of custom and practice:

Many courts routinely admit evidence of custom and habit in an industry in order to determine if a violation of a reasonable standard of care has taken place. In fact, courts often turn to business regulations to ascertain the proper standards of conduct (e.g., code of medical ethics; securities dealer rules; nursing home regulations; [accounting practice principles and standards]; and realtor ethics code).\(^{31}\)

Accountants, doctors, securities dealers, and realtors are held, in law, to the professional standards of conduct set by their respective fields in malpractice actions. The standard of care and duty is always that of the similarly situated, prudent, ordinary practitioner in the same area.\(^{32}\) Because judges cannot be expected to be experts in every professional area, these standards are used as guidelines, evidence of the level of performance that is to be attained. Should lawyers be treated differently?

If an expanded use of the Rules leads lawyers to do a bit of "defensive" lawyering, this may not necessarily be a bad thing. Keeping better records and being a bit more cautious might lead to improved client representation overall. It is unlikely, however, that an expanded use of the Rules would lead to any dramatic change in the way that most lawyers

\(^{30}\) Id. at 623.

\(^{31}\) Id. at 622-23.

\(^{32}\) It is generally held that violations of these standards or rules (i.e., ones promulgated by an individual or individuals with no official or governmental status), if they do not have the force and dignity of a statute, are only evidence of negligence and not negligence per se. See JOSEPH T. MIRABEL & HERBERT A. LEVY, THE LAW OF NEGLIGENCE § 46, at 58 (1962).
practice law. Those most worried by a change in the use of the Rules are probably only those who know that they have potential problems inherent in the way that they practice law. The threat of civil liability might be exactly what is needed to force these lawyers to conform to acceptable standards of professional conduct.

While several of these concerns may be valid, they are not, as one commentator has indicated, "of sufficient weight to cause rejection of the basic argument"33 for expanded use of the Rules. In support of using the ethics rules in legal malpractice actions, as has been noted before, Charles Wolfram writes that "claimants in other areas have been permitted to demonstrate that the defendant's conduct departed from an articulated and generally accepted standard, as with a criminal statute, business regulation or custom or habit within a group."34 Again, lawyers should not receive different treatment.

II. CONCLUSION

Times are changing, and so is the scope of the application of the Rules. Many states have abandoned the limited purpose statements contained in the "Scope" section of the Model Rules of Professional Conduct and in the "Preliminary Statement" section of the Model Code. By doing this, state courts are bringing the treatment of lawyers more in line with the treatment of other professionals. There is no justifiable reason why lawyers should be treated differently, and courts have recognized this.

Though the Rules may not be perfect and may in certain places appear vague and ambiguous and too pro-lawyer, they do provide a decent guideline for the minimum acceptable conduct of lawyers. As with other professions, these Rules should be used as a gauge for measuring appropriate conduct. Each state has adopted some version of the Model Code or the Model Rules, and in doing so has made a statement as to what it considers to be the professional standard to be attained by all attorneys in its jurisdiction. If the goal in adopting a version of the Rules is to insure some minimum level of conduct, it is inconceivable that the use of those Rules should be restricted such that an injured plaintiff's

33. Peters, supra note 24, at 623.
34. Id. at 624 (quoting Charles L. Wolfram, The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation, 30 S.C. L. REV. 281, 301 (1979)).
only redress for their violation is through disciplinary action (i.e., no civil liability results from the violation of the Rules). In civil liability actions, the Rules should be usable, at the very least, as evidence of the minimum standard of care attorneys must exercise to provide competent representation. The Rules’ use in the civil liability context logically flows from their conception and creation. Prohibiting this use makes the Rules frail and unimposing.

A plaintiff’s redress through the civil court system, by way of a legal malpractice action, is in no way aided by the existence of the Rules if the Rules cannot be utilized in this broader context (i.e., as at least evidence of the minimum standard). If there is a finding of a violation of the Rules of Professional Conduct in a legal malpractice action, the court should allow a presumption that there was a breach of duty in that action. What better way is there for a plaintiff to show the existence of a duty than to point to the Rules, written by lawyers themselves, which define the minimum acceptable conduct for legal professionals? Additionally, what better way is there for a lawyer to show that his or her conduct was reasonable?

With regard to the hypothetical, the Judge in Legaltown should allow the presumption of breach of duty in legal malpractice actions when there is a finding of a violation of the Rules. This ruling would be in line with the trend for expanded use of the Rules in the civil liability arena. John, just as if he were a doctor, should be potentially subject to both discipline and civil liability for his professional malfeasance, and the jury should be allowed to presume that violations of his profession’s ethical standards were also a violation of his civil duties to Dick and Harry.