PREAMBLE AND SCOPE

PREAMBLE: A LAWYER’S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client’s legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs. A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and some-
times persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive 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.

[8] A lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession’s independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance
by other lawyers. Neglect of these responsibilities compromises the independence of
the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of
this role requires an understanding by lawyers of their relationship to our legal sys-
tem. The Rules of Professional Conduct, when properly applied, serve to define that
relationship.

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be inter-
preted with reference to the purposes of legal representation and of the law itself.
Some of the Rules are imperatives, cast in the terms “shall” or “shall not.” These
define proper conduct for purposes of professional discipline. Others, generally cast
in the term “may,” are permissive and define areas under the Rules in which the law-
yer has discretion to exercise professional judgment. No disciplinary action should
be taken when the lawyer chooses not to act or acts within the bounds of such discre-
tion. Other Rules define the nature of relationships between the lawyer and others.
The Rules are thus partly obligatory and disciplinary and partly constitutive and
descriptive in that they define a lawyer’s professional role. Many of the Comments
use the term “should.” Comments do not add obligations to the Rules but provide
guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer’s role. That
context includes court rules and statutes relating to matters of licensure, laws defin-
ing specific obligations of lawyers and substantive and procedural law in general.
The Comments are sometimes used to alert lawyers to their responsibilities under
such other law.

[16] Compliance with the Rules, as with all law in an open society, depends pri-
marily upon understanding and voluntary compliance, secondarily upon reinforce-
ment by peer and public opinion and finally, when necessary, upon enforcement
through disciplinary proceedings. The Rules do not, however, exhaust the moral and
ethical considerations that should inform a lawyer, for no worthwhile human activity
can be completely defined by legal rules. The Rules simply provide a framework for
the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer’s authority and
responsibility, principles of substantive law external to these Rules determine wheth-
er a client-lawyer relationship exists. Most of the duties flowing from the client-law-
yer relationship attach only after the client has requested the lawyer to render legal
services and the lawyer has agreed to do so. But there are some duties, such as that
of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider
whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a
client-lawyer relationship exists for any specific purpose can depend on the circum-
stances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and com-
mon law, the responsibilities of government lawyers may include authority concern-
ing legal matters that ordinarily reposes in the client in private client-lawyer relation-
ships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state’s attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer’s conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

State Rules Comparison
http://ambar.org/MRPCStateCharts

ANNOTATION
EXTRADISCIPLINARY APPLICATION OF ETHICS RULES

The Scope section of the Model Rules emphatically disclaims any intent to regulate lawyer conduct outside the disciplinary context: the rules are “not designed to be a basis for civil liability,” violation of a rule “should [not] create any presumption . . . that a legal duty has been breached,” and an “antagonist in a collateral proceeding
or transaction” does not implicitly have standing to enforce a rule. Scope [20]. (The predecessor Model Code of Professional Responsibility (1969) provided simply that it “[did] not undertake to define standards for civil liability.”)

Nevertheless, courts have long looked to the ethics rules in nondisciplinary contexts, including malpractice, breach of fiduciary duty, disqualification, motions to suppress or preclude evidence, motions for sanctions, and disputes over fees. “[T]he reality is that lawyers can be disciplined, disbarred, disqualified or sued on the basis of these rules.” Lawrence K. Hellman, When “Ethics Rules” Don’t Mean What They Say: The Implications of Strained ABA Ethics Opinions, 10 Geo. J. Legal Ethics 317 (Winter 1997). See Gary A. Munneke & Anthony E. Davis, The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?, 22 J. Legal Prof. 33 (1998) (language admonishing against using rules as basis for civil liability “has been criticized as self-serving economic protectionism, drafted by the organized bar and ratified by the courts [that] consistently cite ethical rules to support decisions that modify the standards of civil liability”); Ted Schneyer, The ALI’s Restatement and the ABA’s Model Rules: Rivals or Complements?, 46 Okla. L. Rev. 25 (Spring 1993) (ABA’s “jurisdictional modesty” was “purely defensive”; when “Model Rules could be used to shape lawyers’ duties for nondisciplinary purposes without creating substantial new legal risks for lawyers, the drafters were not shy about trying to do so”).

A 2002 amendment made an important concession to the rules’ extradisciplinary functions: “[S]ince 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.” Scope [20]. Balancing this was a contemporaneous amendment noting that “violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation.” Id. Accord Restatement (Third) of the Law Governing Lawyers § 52(2) & cmt. f (2000) (rule violation “may be considered by a trier of fact as an aid in understanding and applying” duties of competence and diligence required to meet standard of care).

According to the legislative history, these changes “reflect the decisions of courts on the relationship between these Rules and causes of action against a lawyer, including the admissibility of evidence of violation of a Rule in appropriate cases.” American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2013, at 19 (2013). See Donald E. Campbell, The Paragraph 20 Paradox: An Evaluation of the Enforcement of Ethical Rules as Substantive Law, 8 St. Mary’s J. Legal Mal. & Ethics 252 (2018) (discussing how courts determine when ethics rules should be considered as evidence of a substantive violation and when they should be excluded from consideration); see also Mark A. Armitage, Professional Responsibility, 53 Wayne L. Rev. 541 (Spring 2007) (“Indeed, it may not even be possible in an area like conflicts or fees to disentangle MRPC-based analyses from existing law.”); John S. Dzienkowski, Ethical Decisionmaking and the Design of Rules of Ethics, 42 Hofstra L. Rev. 55 (Fall 2013) (ABA’s fear that any new ethics rule addressing a cutting-edge issue—such as alternative litigation funding—will have collateral extradisciplinary effects “has proven to be a major obstacle to fundamental reform of the Model Rules”). Compare Levine v. Haralson, Miller, Pitt, Feldman & McAnally, P.L.C., 418 P.3d 1007 (Ariz. 2018) (“The rules promulgated by our supreme court to regulate
the practice of law establish a portion of the public policy of the state, ‘have the same force and effect as state statutes,’ and are ‘equally binding.’” (cite omitted); without written fee agreement as required by ethics rules, lawyer not entitled to be paid under oral agreement or quantum meruit), with In re Mardigian Estate, 917 N.W.2d 325 (Mich. 2018) (“The rules of professional conduct promulgated by this Court should neither overrule nor give rise to substantive law.”; fact that lawyer drafted will for friend leaving substantial bequest to lawyer and his family, in violation of Rule 1.8(c), does not itself create basis for voiding will).

NO PRIVATE CAUSE OF ACTION FOR VIOLATING ETHICS RULE

Violation of an ethics rule does not give rise to a private cause of action. See Karas v. Katten Muchin Rosenman LLP, No. 07-1545-CV, 2009 WL 38898, 2009 BL 3320 (2d Cir. Jan. 8, 2009) (even if restrictive covenant violated New York’s disciplinary rule, lawyer did not have cause of action against law firm for restraint of trade); Schatz v. Rosenberg, 943 F.2d 485 (4th Cir. 1991) (“plaintiffs cannot base a securities fraud or other misrepresentation claim on a violation of an ethical rule”); Stahl v. Twp. of Montclair, Civ. No. 12-3244 (SRC), 2013 WL 1867036, 2013 BL 117152 (D.N.J. May 2, 2013) (lawyers defending municipal employees from arrestee's harassment suit allegedly offered to drop criminal charges if he would drop civil suit; alleged violation of New Jersey’s Rule 3.4(g) not actionable constitutional violation); Laws v. Priority Trustee Servs. of N.C., 610 F. Supp. 2d 528 (W.D.N.C. 2009) (law firm’s service as substitute trustee in foreclosure proceedings and also as counsel for lender did not give rise to causes of action for breach of contract, breach of fiduciary duty, constructive fraud, or unfair and deceptive trade practices; sole basis for all claims was ethics rules and ethics opinions); B & O Mfg., Inc. v. Home Depot U.S.A., Inc., No. C 07-02864 JSW, 2007 WL 3232276, 2007 BL 192276 (N.D. Cal. Nov. 1, 2007) (alleged violation of rule on business transactions with client does not give rise to action to rescind contract); Stratagene v. Parsons Behle & Latimer, 315 F. Supp. 2d 765 (D. Md. 2004) (rejecting malpractice claim based upon violation of Rule 1.9; rules as “expression of public policy having the force of law” do not provide basis for court, in applying state law, to create cause of action); Astarte, Inc. v. Pac. Indus. Sys., Inc., 865 F. Supp. 693 (D. Colo. 1994) (under Colorado law, lawyer ethics codes neither prescribe civil liability standards nor create private causes of action); Terry Cove N., Inc. v. Marr & Friedlander, P.C., 521 So. 2d 22 (Ala. 1988) (sole remedy for rule violation is imposition of discipline); Allen v. Allison, 155 S.W.3d 682 (Ark. 2004) (alleged violations of antisolicitation rules could not be basis for civil conspiracy claim by former client dissatisfied with settlement offer firm obtained for him); Biller Assoc's. v. Peterken, 849 A.2d 847 (Conn. 2004) (ethics rules do not give rise to cause of action); Judy v. Preferred Commc’n Sys., 29 A.3d 248 (Del. Ch. 2011) (lawyers’ substantive legal duties “may be congruent with the requirement and objectives of the Rules,” but “provide no additional bases for the enforcement of such duties outside of the framework of disciplinary proceedings”) (quoting In re Infotecknology, 582 A.2d 215 (Del. 1990)); Smith v. Bateman Graham, P.A., 680 So. 2d 497 (Fla. Dist. Ct. App. 1996) (lawyer's alleged unethical conduct in soliciting clients of firm from which he was resigning could not be basis for injunction against further solicitation); Coleman v. Hicks, 433 S.E.2d 621 (Ga. Ct. App. 1993) (cannot base legal mal-

ETHICS RULES AS EVIDENCE OF STANDARDS OF CONDUCT AND CARE

Violation of an ethics rule does not itself create a presumption that a legal duty has been breached, according to Scope [20]. The modifier “itself” was added by amendment in 2002; it had appeared in early drafts of the Model Rules but was dropped by the time the rules were adopted in 1983. American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2013, at 12, 16–21 (2013). Compare Elkind v. Bennett, 958 So. 2d 1088 (Fla. Dist. Ct. App. 2007) (confidentiality as legal duty long predates ethics codes, and is enforceable as such in legal malpractice action), with Lear Corp. v. Butzel Long, PC, No. 258669, 2006 WL 1360286, 2006 BL 174731 (Mich. Ct. App. May 18, 2006) (although complaint properly alleged breach of fiduciary duty, it did not state cause of action because it relied entirely upon Rules 1.7 and 1.16).

However, most courts do look to the ethics rules as evidence of standards of conduct and care, particularly in actions for legal malpractice or breach of fiduciary duty. See, e.g., CenTra, Inc. v. Estrin, 538 F.3d 402 (6th Cir. 2008) (ethics rules are “probative
actions); Douglas R. Richmond, *Why Legal Ethics Rules Are Relevant to Lawyer Liability*, 38 St. Mary’s L.J. 929 (2007); Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 Hofstra L. Rev. 689 (Spring 2006); Note, *The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard*, 109 Harv. L. Rev. 1102 (Spring 1996) (“At the very least, the provisions of a jurisdiction’s ethics code that relate to the facts of a malpractice suit should be admissible in helping to establish the proper standard of care.”).

• **Expert Testimony/Jury Instructions**

  Consistent with the premise that ethics rules are evidence of standards of care and conduct, most courts permit expert witnesses in malpractice and fiduciary duty cases to use the ethics rules in reaching their conclusions; many courts also permit the rules to be used in jury instructions. See, e.g., *Mirabito v. Liccardo*, 5 Cal. Rptr. 2d 571 (Ct. App. 1992) (California disciplinary rules may be used as evidence and incorporated into jury instructions in legal malpractice action; expert witnesses may use rules to establish lawyer’s breach of fiduciary duty to client); *Waldman v. Levine*, 544 A.2d 683 (D.C. 1988) (expert’s use of Model Code in determining standard of care in legal malpractice case is appropriate and not unlike use of practice codes in other negligence contexts); *Mayol v. Summers, Watson & Kimpel*, 585 N.E.2d 1176 (Ill. App. Ct. 1992) (jury instructions in legal malpractice case may quote lawyer discipline rules to same extent as statutes and ordinances in instructions in other types of negligence actions); *Abramson v. Wildman*, 964 A.2d 703 (Md. Ct. Spec. App. 2009) (jury instruction on competence based upon Rule 1.1 warranted in client’s breach-of-contract claim against lawyer; contract specified client “may expect our firm to be both sensitive and professionally responsible to your situation”); *Mainor v. Nault*, 101 P.3d 308 (Nev. 2004) (expert witnesses in legal malpractice action entitled to base their opinions upon ethics rules); cf. *Pierce v. Cook*, 992 So. 2d 612 (Miss. 2008) (even if former client’s suit based upon lawyer’s affair with wife sounded in legal malpractice rather than breach of contract, jury instruction on lawyer’s duties was not impermissible use of ethics rules without requisite expert testimony: “Ordinary jurors [can] determine if an adulterous affair between an attorney and his client’s wife is breach of a duty owed by an attorney to his client.”). Compare *Lazy Seven Coal Sales Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400 (Tenn. 1991) (expert may not testify that lawyer violated ethics rule, but may consider ethics rule violation in evaluating standard of care), with *Roy v. Diamond*, 16 S.W.3d 783 (Tenn. 1999) (trial court did not abuse discretion by admitting findings and judgment from disciplinary proceeding in subsequent legal malpractice action, in light of expert testimony in malpractice case that lawyer violated standard of care (as opposed to disciplinary rule)). See generally Pamela A. Bresnahan & Timothy H. Goodman, *Breach of Fiduciary Duty and Expert Testimony Regarding Attorney Ethics Rules*, 2003 Prof. Law. 53 (Symposium 2003); David S. Caudill, *The Roles of Attorneys as Courtroom Experts: Revisiting the Conventional Limitations and Their Exceptions*, 2 St. Mary’s J. Legal Mal. & Ethics 136 (2012) (even though expert testimony on ethics rules does not establish standard of care and should not give impression that breach of ethics rules is actionable, “there should be no blanket prohibition on expert legal testimony concerning the Model Rules”).