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 “does 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 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.”); Gary A. Muneke & 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”).

An amendment to the Scope section in 2002 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]; 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). 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.” Scope [20].

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, 1982–2005, at 19 (2006).

NO PRIVATE CAUSE OF ACTION FOR VIOLATING ETHICS RULE
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 also appeared in early drafts of the original Model Rules but had been 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, 1982–2005, at 16 (2006). 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 (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 and instructive . . ., particularly as they relate to CenTra’s malpractice and fiduciary-duty claims”; applying Michigan law); Avianca, Inc. v. Harrison, 70 F.3d 637 (D.C. Cir. 1995) (evidence of Disciplinary Rule violation creates rebuttable presumption of violation of lawyer’s fiduciary duty to client; applying District of Columbia law); Jacobsen v. Oliver, 555 F. Supp. 2d 72 (D.D.C. 2008) (“certain kinds of violations of certain ethical rules may demonstrate that an attorney has breached his fiduciary duty of loyalty”); Sealed Party v. Sealed Party, No. CIV.A. H-04-2229, 2006 WL 1207732 (S.D. Tex. May 4, 2006) (Texas and federal courts “regularly” refer to Texas rules to help define standards of lawyer conduct in tort cases; citing cases involving fees, withdrawal, aggregate settlements, and delivery of client funds); RTC Mortgage Trust 1994 N-1 v. Fid. Nat. Title Ins. Co., 58 F. Supp. 2d 503 (D.N.J. 1999) (violation of Rule 1.7 was evidence of lawyer’s malpractice in action by third-party lender for whom lawyer, who represented both buyer and seller, had provided opinion letter); Griffith v. Taylor, 937 P.2d 297 (Alaska 1997) (rules are evidence of scope of lawyer’s duties to client); In re McQueen, 191 Cal. App. 4th 1162 (Ct. App. 2011) (in action for financial elder abuse, fraud, conversion, breach of fiduciary duty, and negligence, trial court properly instructed jury on ethics rules relating to conflicts and communication; both “helped to define” lawyer’s fiduciary duty); Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C., 453 S.E.2d 719 (Ga. 1995) (bar rule admissible regarding standard of care if rule intended to protect person in plaintiff’s position or addresses particular harm plaintiff suffered); Owens v. McDermott, Will & Emery, 736 N.E.2d 145 (Ill. App. Ct. 2000) (rules may be relevant to standard of care in malpractice case); Sargent v. Buckley, 697 A.2d 1272 (Me. 1997) (former clients’ allegation that lawyer violated Rule 1.9 stated cause of action for common-law breach of fiduciary duty, with bar rules providing “some evidence” of standard of care); Fishman v. Brooks, 487 N.E.2d 1377 (Mass. 1986) (rules are admissible evidence of negligence, on par with “liquor laws, workers’ compensation, and building codes”); Welsh v. Case, 43 P.3d 445 (Or. Ct. App. 2002) (“Disciplinary rules, together with statutes and common-law principles relating to fiduciary relationships, all help define the duty component of the fiduciary duty owed by a lawyer to his or her client.”); McNair v. Rainsford, 499 S.E.2d 488 (S.C. Ct. App. 1998) (failure to comply with ethics rules is relevant to lawyer’s alleged breach of duty of reasonable care). See generally 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 (Summer 2000); 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. 233 (1998) (concluding that certain ethics rules do articulate relevant standards of conduct and care that should be admissible as evidence in malpractice 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 the 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 that lawyer breached 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 was warranted in client’s breach-of-contract claim against lawyer given contract language specifying that 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).

The minority view is that ethics rules are not admissible. See Ex parte Toler, 710 So. 2d 415 (Ala. 1998) (violation of ethics rules may not be used as evidence in legal malpractice action); Orsini v. Larry Moyer Trucking, Inc., 833 S.W.2d 366 (Ark. 1992) (upholding trial court’s refusal to allow introduction of Model Rules), discussed in Mark A. Hagemeier, Note, Orsini v. Larry Moyer Trucking, Inc.: Approaching a Definitive Use of the Model Rules of Professional Conduct in the Legal Malpractice Context in Arkansas, 46 Ark. L. Rev. 607 (1993); Byers v. Cummings, 87 P.3d 465 (Mont. 2004) (plaintiff in legal malpractice action must prove breach of duty established through expert testimony, not breach of disciplinary rules; plaintiff not entitled to instruction based upon Rule 1.1 duty to explain matter to extent necessary to permit client to make informed decisions about representation); Harrington v. Pailthorp, 841 P.2d 1258 (Wash. Ct. App. 1992) (violation of rules may not be used as evidence of malpractice).

There is some authority for an approach that permits the ethics rules to be used but not identified. In Hizey v. Carpenter, 830 P.2d 646 (Wash. 1992), the court cited the disclaimer
language in the Model Code’s Preliminary Statement and barred testimony and jury instructions explicitly referring to the Code of Professional Responsibility or Rules of Professional Conduct. An expert witness would, however, be allowed to quote from the rules—without identifying the source of the language—if relevant to the expert’s opinion on the applicable standard of care and the lawyer’s conformity to it. See Tilton v. Trezza, 819 N.Y.S.2d 213 (Sup. Ct. 2006) (endorsing Hizey; expert may testify about ethical conduct under circumstances of case and may use language from Model Code but may not refer specifically to it). See generally Marc R. Greenough, Note, The Inadmissibility of Professional Ethical Standards in Legal Malpractice Actions after Hizey v. Carpenter, 68 Wash. L. Rev. 395 (Apr. 1993) (criticizing Hizey for overreading disclaimer to give it preclusive effect that drafters did not intend); Stephen E. Kalish, How to Encourage Lawyers to Be Ethical: Do Not Use the Ethics Code as a Basis for Regular Law Decisions, 13 Geo J. Legal Ethics 649 (Summer 2000) (endorsing Hizey for restricting ethics codes to “domain” separate from “regular law”; “[j]urors should be shielded from any explicit reference to an ethics code violation” lest they give it undue weight).