Interface Between Professional Liability
Defense Work and Discipline Cases

National Conference on Professional Responsibility
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Materials By:

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While both legal malpractice actions and disciplinary proceedings serve to redress misconduct in the legal profession, there are several key differences that affect how they may (or may not) relate to each other. For example, a lawyer may be disciplined even if the misconduct does not cause any damage to the client, whereas damage is an essential element of a legal malpractice claim. This distinction reflects the different purposes served by each - i.e., a legal malpractice action serves to redress an injured client, whereas a disciplinary action serves to protect the public and the integrity of the profession. As such, the client is not a party to the disciplinary proceedings and the party injured by an ethics violation (i.e., legal system itself) is not a party to the civil lawsuit. See Hizey v. Carpenter, 830 P.2d 646, 652 (Wash. 1992) (citing Faure & Strong, The Modern Rules of Professional Conduct: No Standard for Malpractice, 47 Mont. L. Rev. 363, at p. 375 (1985-1986)) (“A legal malpractice suit neglects the party most involved in and affected by the professional standards of the Model Rules -- the legal system itself.”).

In addition, the procedural and substantive rules governing disciplinary proceedings are not always the same as those of a civil action. See, e.g., Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C., 813 S.W.2d 400 (Tenn. 1991) (“In a civil action charging malpractice, the standard of care is the particular duty owed the client under the circumstances of the representation, which may or may not be the standard contemplated by the code [of professional responsibility].”). Indeed, conduct amounting to an ethical violation may not constitute a civil wrong. For example, an attorney’s failure to obtain written consent might be an ethical violation, even though the client gave informed, oral consent. In a legal malpractice action, however, the client’s consent would likely be a defense. As stated by the Supreme Court of Washington:

[T]he Rules of Professional Conduct purport only to “state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.” Malpractice liability, on the other hand, is premised on the conduct of the “reasonable” lawyer.

Hizey v. Carpenter, 830 P.2d 646, 652 (Wash. 1992) (internal citations omitted). See also Disciplinary Board v. McKechnie, 656 N.W.2d 661, 666 (N.D. 2003) (“Whereas the rules of professional conduct set a minimum level of conduct with the consequence of disciplinary action, malpractice liability is premised upon the conduct of the reasonable lawyer under the particular circumstances.”). Thus, proof of one does not automatically equate with proof of the other.
A. The Effect of a Disciplinary Action on a Professional Liability Case.


Courts have taken four different approaches regarding the admission of disciplinary rules as evidence of an attorney’s duty of care.\(^2\) The first two approaches are followed in a small minority of jurisdictions. Under the first approach, the Rules of Professional Conduct conclusively establish the duty of care owed by the attorney and, therefore, any violation thereof constitutes negligence per se (although the plaintiff must still prove causation and damages). *Day v. Rosenthal*, 170 Cal. App. 3d 1125, 217 Cal. Rptr. 89 (1985). The second approach treats an ethical violation as establishing a rebuttable presumption of legal malpractice. See *Beattie v. Firnschild*, 394 N.W.2d 107 (Mich. App. 1986) (citing *Sawabini v Desenberg*, 372 N.W. 2d 559 (Mich. App. 1985)).


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\(^1\) Attorney disciplinary rules also do not provide a basis for criminal liability. See, e.g., *Marcus v. State*, 290 S.E.2d 470 (Ga. 1982).

\(^2\) All courts seem to allow the Rules of Professional Conduct to be introduced as evidence where the plaintiff has alleged a breach of fiduciary duty. See, e.g., *Mirabito v. Liccardo*, 4 Cal App 4th 41, 5 Cal Rptr 2d 571 (1992) (“[Disciplinary] rules, together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his client.”). The courts also may consider these rules in addressing motions to disqualify counsel, regardless of whether a disciplinary action has been initiated. See, e.g., *Slater v. Rimar, Inc.*, 338 A.2d 584, 589 (Pa. 1975) (“While the breach by a lawyer of his duty to keep the confidences of his client and to avoid representing conflicting interests may be the subject of appropriate disciplinary action, a court is not bound to await such development before acting to restrain improper conduct where it is disclosed in a case pending in that court.”); *Tydings v. Berk Enterprises*, 565 A.2d 390, 393 (Md. App. 1989) (“Once the probability of conflict is recognized by the court, the judge may restrain conduct which has the potential for evolving into a breach of ethics before such conduct becomes ripe for disciplinary action.”); but see *Wyeth v. Abbott Laboratories*, 692 F. Supp. 2d 453 (D. N.J. 2010) (finding that a breach of Rule 1.7 did not require disqualification).
In other words, the failure to comply with the Rules of Professional Conduct is “one circumstance that may be considered along with other facts and circumstances in determining whether an attorney acted with reasonable care.” Moore v. Weinberg, 644 S.E.2d 740, 747 (S.C. App. 2007). Courts following this approach acknowledge that “[t]he provisions of the code of professional responsibility and the disciplinary rules are useful guidelines for the understanding of a lawyer’s obligations.” In Re Dineen, 380 A.2d 603, 604 (Me. 1977). However, the disciplinary rule at issue “must be intended to protect a person in plaintiff’s position or be addressed to the particular harm suffered by the plaintiff.” Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C., 453 S.E.2d 719 (Ga. 1995); Fishman v. Brooks, 487 N.E.2d 1377 (Mass. 1986). In following this approach, some courts require expert testimony concerning the ethical rules, while others do not. Compare Carlson v. Morton, 745 P.2d 1133 (Mont. 1987) with Fishman v. Brooks, 487 N.E.2d 1377 (Mass. 1986). Some courts even allow attorney disciplinary rules to be quoted in the jury instructions. See Mayol v. Summers, Watson & Kimpel, 585 N.E.2d 1176, 1185 (Ill. App. 1992).

Finally, a few courts follow a fourth approach, under which the Rules of Professional Conduct are inadmissible as evidence of an attorney’s duty of care. 3 Hizey v. Carpenter, 830 P.2d 646 (Wash. 1992) (“We therefore hold in a legal malpractice action that the jury may not be informed of the CPR or RPC, either directly through jury instructions or through the testimony of an expert who refers to the CPR or RPC.”); accord Byers v. Cummings, 87 P.3d 465 (Mont. 2004) (“[I]t 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 or to instruct the jury by referring to the rule in question.”). Cf. Orsini v. Larry Moyer Trucking, 833 S.W.2d 366 (Ark. 1992) (affirming the trial court’s refusal regarding the introduction of the Model Rules of Professional Conduct); Tilton v. Trezza, 819 N.Y.S.2d 213 (2006) (“This court adopts the philosophy of . . . Hizey v. Carpenter and would allow the expert to testify as to what he or she considers correct ethical conduct under the circumstances of this case, even using the language of the rule without citing to specific sections.”). Under the this approach, the disciplinary rules are inadmissible, regardless of whether the attorney has been charged with a violation of those rules. See Ex parte Toler, 710 So. 2d 415, 416 (Ala. 1998).

**B. The Effect of a Professional Liability Case on a Disciplinary Action.**

Often, an attorney facing both a malpractice action and a bar complaint may be able to request a stay of the disciplinary proceeding. For example, D.C. Bar Rule XI, Section 19(d) provides that, where authorized by the Board on Professional Responsibility and for good cause shown, a disciplinary complaint may be deferred because of “substantial similarity to the material allegations of a pending criminal, civil or administrative proceeding.” Deferment may even be granted when the bar complaint involves serious allegations of fraud or dishonesty, perhaps because of the perception that such complaints may be instituted for improper purposes and may amount to nothing more than litigation tactics. For example, the bar complaint may

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3 However, even in these jurisdictions, disciplinary rules may be used to support a claim for breach of fiduciary duty and disgorgement of fees. Eriks v. Denver, 824 P.2d 1207, 1213 (Wash. 1992) (“The general principle that a breach of ethical duties may result in denial or disgorgement of fees is well recognized.”).
have been filed to undermine the attorney’s ability to practice law and, thus, force a settlement in the malpractice action.

Another example of an improper purpose is the filing of a bar complaint in order to obtain “free discovery” in the disciplinary proceeding for use in a legal malpractice action. This is a growing concern because more and more courts are finding that state attorney ethics confidentiality rules violate the First Amendment. See, e.g., Doe v. Supreme Court of Florida, 734 F. Supp. 981 (S.D. Fla. 1990); In re Warner, 21 So. 3d 218 (La. 2009); Petition of Brooks, 678 A.2d 140 (N.H. 1996); R.M. v. Supreme Court of New Jersey, 883 A.2d 369 (N.J. 2005); Doe v. Doe, 127 S.W.3d 728 (Tenn. 2004). To protect against the use of such information in a legal malpractice action, defense counsel should be mindful of the status of any disciplinary action against the defendant attorney and should request a stay of the disciplinary action at the earliest opportunity.

Once a stay is lifted, a judgment in the legal malpractice action may operate as collateral estoppel in the disciplinary case if the factual and legal issues decided in the malpractice action are the same as those at issue in the disciplinary case (and where the other elements of collateral estoppel are satisfied). For example, the Supreme Court of New York, Appellate Division applied collateral estoppel in a disciplinary proceeding, where: (i) the attorney had notice and a full and fair opportunity to be heard, since he was a defendant in the legal malpractice action; (ii) he had ample notice of the claims against him; (iii) he launched a vigorous defense, testified at trial, and was represented by counsel; (iv) he was afforded the opportunity to appeal any adverse decision and order, as well as the jury verdict; and, (v) the factual and legal issues decided in the malpractice action were identical to those at issue in the disciplinary proceeding. In re Harley, 746 N.Y.S.2d 137 (1st Dept. 2001).

However, at least one court has concluded that the outcome of a legal malpractice action should have no effect on the disciplinary proceeding, given their different natures. Committee on Professional Ethics & Conduct of Iowa State Bar Ass’n v. Kelly, 357 N.W.2d 315, 319 (Iowa 1984). In that case, the Supreme Court of Iowa concluded that the settlement of a malpractice action was not a defense to the disciplinary proceeding, stating that “[t]his proceeding has to do with enforcement of legal ethics, the other involves monetary damages for tort.” However, because the attorney had settled the legal malpractice action, there were no findings of fact or law. Therefore, this case probably cannot be used to argue that collateral estoppel should not apply in a disciplinary proceeding where there has been a judgment against the attorney in a legal malpractice action involving the same factual and legal issues.