THE USE OF THE ILLINOIS RULES OF PROFESSIONAL CONDUCT TO ESTABLISH THE STANDARD OF CARE IN ATTORNEY MALPRACTICE LITIGATION: AN ILLOGICAL PRACTICE

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I. INTRODUCTION

Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have a higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable, and competent degree of skill. . . . [FN1]

The number of malpractice lawsuits filed against attorneys is rising. [FN2] During the 1970s, there were almost as many reported legal malpractice cases as throughout all the prior history of American jurisprudence. [FN3] To reduce this unfortunate statistic, every state has enacted a set of standards of professional behavior regulating the conduct of attorneys. [FN4] However, many argue that in addition to regulating attorney conduct, ethical rules should be used as evidence of the standard of care in attorney malpractice lawsuits. [FN5]

This article criticizes the use of the Illinois Rules of Professional Conduct in establishing the appropriate standard of care in attorney malpractice *66 actions and argues that the Rules should not be used at all in this context. First, this article describes the history of the inconsistent use of the Illinois Rules of Professional Conduct in Illinois attorney malpractice lawsuits. Second, it examines approaches taken by other jurisdictions on the issue of the admissibility of rules of professional conduct in legal malpractice suits. Third, the article explores arguments against the use of rules of professional conduct in malpractice actions and refutes arguments supporting their usage. The final focus is upon the peculiar use of the Rules within Illinois, distinguishing approaches taken by non-Illinois legal literature and case law on the subject.

A. Background

To establish a prima facie case of legal malpractice in Illinois, a plaintiff must prove the following: (1) the existence of an attorney-client relationship, (2) a duty arising from that relationship, (3) a breach of the duty, (4) proximate cause, and (5) damages. [FN6] Traditionally, in Illinois, an attorney can avoid malpractice liability by exercising a reasonable degree of care and skill. [FN7]

The Illinois Supreme Court has not provided a direct guide concerning the admissibility of the Illinois Rules of Professional Conduct to establish a breach of the standard of care for attorneys. However, Illinois appellate courts have held that the Illinois Rules of Professional

Conduct are relevant to the standard of care that a reasonably prudent attorney should exercise and, therefore, may be used as evidence in legal malpractice actions. [FN8] Nonetheless, Illinois courts have not gone so far as to say that a violation of the Illinois Rules of Professional Conduct is negligence per se. [FN9] To the contrary, the Illinois Supreme Court has stated that only the legislature has the authority to establish a new standard of care. [FN10]

Furthermore, Illinois courts have provided little justification for their conclusion that the Illinois Rules of Professional Conduct are admissible into evidence in attorney malpractice actions. [FN11] Courts have stated that it would be inconsistent to suggest that professional standards of behavior are relevant in legal disciplinary actions but not in tort liability cases. [FN12] However, that is the extent of the analysis and rationale that the Illinois judiciary has provided for this conclusion. This article argues that in attorney malpractice litigation, the Illinois Rules of Professional Conduct should not be known to the jury.

B. Illinois Case Law Is Unclear Regarding the Evidentiary Weight of the Illinois Rules of Professional Conduct Outside of Disciplinary Proceedings

The evidentiary weight of the Illinois Rules of Professional Conduct outside of disciplinary proceedings is unclear. [FN13] While Illinois courts have found that the Rules are relevant to ascertaining the standard of care, Illinois courts and the majority of legal commentators suggest that the Rules are not binding on courts in the same manner as are statutes. [FN14]

It is difficult to find the origin of Illinois appellate courts' reliance upon the Rules in legal malpractice suits because a limited rationale is given for such application of the Rules. The appellate court in Rogers v. Robson, Masters, Ryan, Brumund & Belom [FN15] purported to lay a basis for its reliance, but its language is merely dicta as the Illinois Supreme Court affirmed Rogers on different grounds.

Cases following Rogers likewise did not clarify the Illinois Supreme Court's position on the issue. As a result, parties bringing attorney malpractice actions in Illinois have been unsure of the Rules' probative value. For example, parties bringing lawsuits have been unable to predict whether proof of a breach of the Illinois Rules of Professional Conduct is sufficient alone to survive a motion for summary judgment. [FN16] Furthermore, federal courts interpreting Illinois law on the issue have similarly struggled. [FN17] While it is evident that Illinois appellate courts have not adopted the standard [FN18] that a breach of the Illinois Rules of Professional Conduct is negligence per se, the language in Rogers [FN19] and its progeny have left much confusion. [FN20]

C. Confusion Was Created By Illinois' Modification of the A.B.A. Model Rules of Professional Conduct

The confusion over the use of the Illinois Rules of Professional Conduct as evidence of the standard of care in attorney malpractice actions increased after 1991 when the new version of the Rules was enacted. In 1991, the relationship between the new Illinois Rules and civil liability was explained as follows:

There is a long tradition in matters of professional ethics and governance which seeks to separate the rules governing an attorney's conduct and the attorney's responsibility in terms of malpractice or the law of agency and contract. This tradition is enshrined in a sentence in the "Scope" Section f of the A.B.A. Model Rules (part of the prefatory material)

which reads as follows: 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.

In Illinois, this whole section was omitted and one of the reasons it was omitted was that this sentence was felt to be impractical if not totally absurd. In the Federal District Court Rules referred to above, the same section is omitted for somewhat the same reasons. In any event, the omission is deliberate and the choice was clearly made: the relationship of the Rules to a lawyer's civil liability will have to be worked out by the courts in litigation. I find it difficult to conceive of an argument that a lawyer can be subject to serious professional discipline, but both the events of discipline and the underlying facts are irrelevant when the aggrieved client goes into the courtroom. However, there are a large number of lawyers who differ on this issue.

The case law at this point is somewhat diverse, but the majority of such cases as exist hold clearly that the rules of conduct are intended to protect and a violation of those provisions is actionable. [FN21]

Interpretation of the new Illinois Rules as evidence of the standard of care in attorney malpractice suits is further complicated because unlike most other jurisdictions, the Illinois Supreme Court did not adopt either the A.B.A. Model Rules' preamble [FN22] or its official Comments. [FN23]

This article suggests that any referral to the Illinois Rules of Professional Conduct should be barred from admissibility in attorney malpractice actions. This is not to suggest that testifying experts may not rely upon the Rules, but they should not explicitly refer to them.

II. DIFFERENT APPROACHES FOR USING RULES OF PROFESSIONAL CONDUCT TO ESTABLISH

THE STANDARD OF CARE IN ATTORNEY MALPRACTICE LITIGATION

Courts of various jurisdictions have adopted four different approaches to introducing rules of legal ethics in attorney malpractice actions. [FN24] No court, however, has gone so far as to suggest that the failure to follow a rule of professional conduct provides a distinct cause of action for legal malpractice, [FN25] because courts have recognized that codes of legal ethics were not intended to create a private cause of action. [FN26] Alternatively, no court has forbidden experts from relying on codes of ethics in their testimony, so long as the rules are not referred to by name nor the only source for establishing the standard of care. [FN27]

Under the first approach adopted by some jurisdictions, courts forbid any reference to standards of professional ethics through either jury instruction or expert testimony. [FN28] The second approach allows some recognition of states' codes of professional conduct, but with significant restrictions placed upon their use. [FN29] Courts adhering to the second approach often recognize that an exclusive reliance upon codes to establish the standard of care is inappropriate. [FN30] The third approach is similar to the second because courts recognize the relevance of the rules of professional ethics, but they remove the restrictions of the earlier approach. [FN31] Illinois decisions most appropriately fit within this third category. [FN32] Finally, the fourth approach, used only in Michigan, [FN33] permits a

violation of a rule of professional conduct to create a rebuttable presumption of negligence in an attorney malpractice lawsuit. [FN34] This author considers the first approach, forbidding the reference to ethical standards to establish the standard of care in legal malpractice suits, to be the most well reasoned.

The majority of academic literature supports admitting rules of professional conduct to establish the standard of care in attorney malpractice actions. In fact, scholarly literature has suggested very interesting ways to incorporate rules into an attorney malpractice suit. [FN35] However, this article goes further than the current academic literature and offers a unique approach: never explicitly making the Illinois Rules of Professional Conduct known to a jury. [FN36]

III. ANALYSIS

A. Expanded Use of the Illinois Rules of Professional Conduct Does Not Deter Ethical Violations

Supporters of the use of professional codes of ethics in legal malpractice actions argue that their use provides a deterrent against unethical conduct. This conclusion is based on the belief that a monetary civil penalty may "be a more meaningful sanction than a private admonition or reprimand in the disciplinary system." [FN37] Additionally, supporters argue that codes of legal ethics are not enforced with regularity. [FN38] They suggest that disciplinary agencies are understaffed and dominated by members of the bar, and, thus, may not be expected to regulate efficiently. [FN39] Therefore, the right of private litigants to bring legal malpractice actions based on the rules of legal ethics *73 will provide an additional deterrence against unprofessional conduct. [FN40] Furthermore, supporters have analogized the deterrent effect of codes to the deterrent effect of criminal statutes. [FN41] Finally, supporters argue that within our adversary system, a private litigant represented by an attorney receiving a contingent fee will be more eager to enforce ethical rules against another attorney in civil litigation. [FN42]

Non-Illinois cases and law review articles frequently argue that rules of professional conduct will serve as a monetary deterrent if used to prove legal malpractice in civil litigation against attorneys. [FN43] In Illinois, however, the Rules of Professional Conduct were not intended to deter ethical violations through punishment. "The object of . . . [disciplinary proceedings based on the Rules] is to determine whether the attorney is a proper person to be permitted to practice his profession." [FN44]

In order to achieve deterrence, the Rules should be better enforced, rather than used inappropriately. This goal can be achieved by providing better funding to disciplinary commissions, encouraging more severe punishment for violations, responding more efficiently to complaints of violations, requiring extensive continuing legal education classes to explain the meaning of the Illinois Rules of Professional Conduct, and encouraging the American Bar Association to expand ethical requirements or malpractice avoidance training [FN45] in A.B.A. accredited law schools.

Furthermore, it is likely that an attempt to use the Illinois Rules of Professional Conduct as evidence of the standard of care in legal malpractice lawsuits will be unsuccessful as a deterrent. Courts are, and should be, reluctant to adopt new standards of care that are not enacted by the legislature because the existing methods of establishing attorney

malpractice are sufficient. [FN46] When plaintiffs file legal malpractice actions, they do so to recover financially, not to discipline attorneys or deter them from future misconduct. An attorney's past conduct gives rise for a cause of action, and *74 a plaintiff does not have any direct stake in seeing that an attorney's conduct will change in the future. [FN47] Furthermore, nearly every attorney now carries malpractice insurance. Therefore, having lost a malpractice suit, an attorney will not even have a direct financial punishment. Instead, members of the entire bar will be punished because their malpractice insurance premiums will rise.

Commentators have stereotyped the legal profession as incompetent and unethical for decades. [FN48] At the same time, nearly every state has a code of professional conduct which helps to establish a standard of care for attorneys. [FN49] Nonetheless, public perception of attorneys is still negative. Therefore, the expansive use of the codes certainly has not provided a panacea for the negative public opinion of the legal profession.

Attorney discipline is a sensitive matter because questioning a professional's competence is a threat to his or her professional dignity. [FN50] The Illinois Supreme Court has suggested that it has an exclusive right to discipline attorneys. [FN51] Therefore, it is repugnant to Illinois precedent to give the trial courts jurisdiction and discretion to discipline attorneys through legal malpractice lawsuits. It is especially inappropriate to suggest that this power should be shared with plaintiffs' malpractice attorneys because they will likely only focus on collecting a financial recovery. Therefore, disciplinary proceedings, based upon the Illinois Rules of Professional Conduct, should be handled separately from civil litigation based on negligence.

B. The Illinois Rules of Professional Conduct Are Vague and, Therefore, Ill-Equipped to Establish a Standard of Care in Legal Malpractice Lawsuits

It has been suggested that "the lawyer obtains as much precise direction from his guide to professional responsibility as a heart surgeon could usefully derive from examination of a valentine." [FN52] The Illinois Rules of Professional Conduct are too vague to be used as evidence of the standard of care in attorney malpractice suits. One might expect the Illinois Rules of Professional Conduct, written for attorneys and by attorneys, to be more concise. However, as Professor Rotunda [FN53] suggested in referring to the vagueness of the Rules, "when lawyers draft laws about the law of lawyering we should expect a bit more." [FN54]

The Illinois Rules of Professional Conduct are difficult to interpret for guidance as many of the Rules are not clearly defined. [FN55] For example, within the Terminology section of the Rules, [FN56] a "reasonable belief" [FN57] means "that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." In the preamble to the Rules it is even stated that the Rules may "be in some tension with each other." [FN58] The American Law Institute has realized the need for clarification of ethics rules and is drafting a new Restatement of the Law Governing Lawyers. This effort shows that there is a "hunger for clarity from judges." [FN59] The preamble to the A.B.A. Model Rules even recognizes that a set of rules cannot "exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules." [FN60]

1. The Illinois Rules of Professional Conduct Are Too Vague to Present to Juries in Legal Malpractice Suits

In malpractice trials, lay jurors must weigh the meaning of complicated and vague rules of professional conduct. [FN61] In reality, the meaning of the Illinois Rules of Professional Conduct has been a subject of academic debate [FN62] and varying interpretations by the Illinois Supreme Court. The unsettled meaning of the Rules may require an expert to explain to a jury both the majority and minority interpretations of a rule. If a jury becomes aware of written ethical guidelines, they will base their decision upon the Rules [FN63] rather then the established and proper general standard of negligence. [FN64] If a jury finds that an attorney violated a written rule of professional conduct, an attorney will be looked upon as "unethical," [FN65] regardless of whether he or she acted as a reasonable prudent attorney under the circumstances.

2. Vagueness of the Rules of Professional Conduct Is More Severe in Illinois than in Other Jurisdictions

Vagueness of the Illinois Rules of Professional Conduct is enhanced in comparison with similar rules of other jurisdictions because the Illinois Rules significantly deviate from the Model Rules of Professional Conduct. [FN66] To avoid ambiguity, Illinois courts could refer to the A.B.A. Model Rules' Comments. [FN67] However, the Comments were not adopted in Illinois and, therefore, raises questions about whether the framers of the Illinois Rules intended the A.B.A. Comments to apply. Similarly, Illinois courts could rely on other states' interpretations of similar rules. However, other state courts have also interpreted their rules based on the A.B.A. Comments. "The Illinois Committee could have given us comments that relate specifically to our rules; instead of giving us a tailor-made suit, they bought one off of the rack, and it doesn't fit very well." [FN68]

The Illinois Rules of Professional Conduct and cases interpreting them have left several issues unanswered. The following are only few of them: If an attorney pleads compliance with an ethical rule, will compliance be admissible? Will compliance act as a bar to future litigation? Will the judge or the jury ascertain whether a violation of the Illinois Rules of Professional Conduct occurred? Which burden of proof will be employed to ascertain the breach of an ethical rule? Because Illinois appellate courts have fashioned a piecemeal response to the issues presented here, these questions have remained unanswered.

C. Juries Will Be Prejudiced by the Use of the Illinois Rules of Professional Conduct

Evidence, which unduly distracts a jury from the main issues, may be inadmissible because of its prejudicial effect. [FN69] Jurors will inevitably be prejudiced if they are "tempted to rely on one type of evidence to the detriment of other important, but seemingly less revealing evidence." [FN70] If a jury is exposed to an expert's testimony, [FN71] which is either confusing or conflicting, it may be tempted to ignore the testimony and rely upon a rule. [FN72]

Lawrence Kohlberg, a noted psychologist, examined different stages of moral development of humans throughout the life span. [FN73] Kohlberg identified six different stages [FN74] of personal moral development. In each stage a person has a different appreciation of what the right thing to do is when one knows that act is against the law. [FN75] Kohlberg's findings suggest that the most important level of moral development of adults is during the fourth stage. [FN76] In stage four, an adult follows a rule of ethics because the conformity is appropriate for the mere reason that the rule exists. [FN77] Although the focus of Kohlberg's findings is on motivations of personal compliance with the rules of ethics, they are also relevant for evaluating how adult jurors would judge a "rule" breaking attorney. Because the majority of jurors will rely upon ethical rules to regulate and guide their own

conduct, it follows that they will also rely heavily upon the rules of professional ethics to judge an attorney's professional conduct.

According to the above algorithm, jurors will see that the Illinois Rules of Professional Conduct were available, and that an attorney chose not to follow them. In the example used by Kohlberg, where a group of test subjects had to answer a question about whether a husband should steal medicine for his dying wife because he could not afford to pay for it, [FN78] most adults did not look beyond the rule and recognized that stealing was against the law i.e., the rules. [FN79] Similarly, jurors will not be able to look beyond the fact that the Illinois Rules of Professional Conduct were violated. They will focus upon the rule and will likely dismiss expert testimony and other evidence which may explain factors relating to the proper standard of care. [FN80] Many jurors will be prejudiced because they will focus on the existence of a rule prescribing a certain professional behavior and on its subsequent violation. Therefore, admission of the Illinois Rules of Professional Conduct is inappropriate because they will cause juries to prejudicially ignore extrinsic factors that influenced an attorney's behavior.

D. The Illinois Rules of Professional Conduct Are Inappropriate as Evidence of the Standard of Care in Legal Malpractice Actions Because They (1) Are Distinguishable from Statutes and (2) Do Not Equate to the Traditional Negligence Standard of Care for Attorneys

Many courts that have allowed use of rules of professional conduct to help establish a standard of care have drawn analogies between rules and statutes. [FN81] The argument is that since the latter is admissible to offer evidence of the standard of care, so should the former. [FN82] Courts of many jurisdictions employ a two prong test to determine whether a statutory violation constitutes negligence per se. First, they ask whether the injured party is a member of the class that the legislature intended to protect. Second, they ask whether the harm which occurred is of the kind that the statute sought to prevent. [FN83] Under the traditional negligence analysis, if a statute does not fall within these categories, the statute may still be used as evidence of the standard of care. [FN84] Illinois appellate courts have applied similar logic in suggesting that the Illinois Rules of Professional Conduct may be admitted into evidence. [FN85] In Mayol v. Summers, Watson & Kimpel, [FN86] the court held that because jury *80 instructions [FN87] may quote portions of statutes and ordinances, and since attorney disciplinary rules, like statutes and ordinances, establish minimum standards of conduct with the purpose to protect the public, [FN88] disciplinary rules may also be quoted in jury instructions.

The rationale behind admitting statutes as evidence of the standard of care is to further a policy intended by the legislature. [FN89] However, it is important to realize that codes of professional conduct are not enacted by legislatures and, therefore, are distinguishable from statutes. [FN90] Moreover, the American Bar Association, in its Model Rules of Professional Conduct, has explicitly stated that:

A 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. [FN91] 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. [FN92] 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 *81 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. [FN93]

Next, disciplinary actions based on the Illinois Rules of Professional Conduct exist to protect public interests, but attorney malpractice actions vindicate private interests. [FN94] When enacted by the judiciary, the Illinois Rules of Professional Conduct were not intended to be used as the standard of care in attorney malpractice actions. [FN95] When the legislature enacts a statute, it knows that courts will use that statute as evidence of the standard of care. [FN96] Therefore, it seems natural that when attempting to fit the square shaped Illinois Rules of Professional Conduct into the round box of the standard of care exercised by a reasonably prudent attorney, conflicts and ambiguity make the fit inappropriate. There should be no surprise that the Illinois Rules of Professional Conduct are ill-suited to establish the standard of care in legal malpractice suits. [FN97]

Finally, the Illinois Rules of Professional Conduct are not penal laws. Traditional tort concepts, which allow an introduction of statutes to offer evidence of the standard of care, rely upon penal laws. However, courts have specifically rejected applicability of statutes that are not penal in nature. [FN98]

Effectively, the judiciaryhas stepped into the shoes of the Illinois legislature. The legislature can enact clear, coherent and researched laws. Illinois courts, however, have attempted to apply these rules of evidence in a piecemeal manner. As a result, the law is unclear. Furthermore, this judicial activism is inappropriate because the legislature is the appropriate decision-making body. Therefore, the Illinois judiciary should wait until the Illinois legislature ascertains a need to change the traditional method of establishing the standard of care in attorney malpractice suits.

The analogy between the Illinois Rules of Professional Conduct and the negligence standard of a reasonable degree of skill and knowledge is artificial. *82 Supporters of the expanded use of ethical codes have suggested that since members of the legal community create rules of professional conduct, they reflect the legal community's notion of reasonably prudent professional behavior. [FN99] This conclusion is based upon the belief that violating the rules of professional behavior is not customary or usual attorney conduct. [FN100] Therefore, a failure to abide by the rules can "theoretically" be sufficient for a cause of action for attorney malpractice. [FN101]

The problem with this analysis is that it relies upon an unsupported premise that when members of the legal profession enact codes of professional conduct, they do so with an intent to describe the behavior of a reasonable and prudent attorney. However, since the bar is very diverse, one set of ethical guidelines which establishes a universal standard of care is insufficient in today's legal society. For example, a solo-practitioner, who is struggling to pay his bills, certainly has a different manner [FN102] of dealing with clients than a prominent "Wall Street" attorney who is active in the Illinois Bar. [FN103] In fact, 80% of malpractice claims are brought against solo-practitioners or small law firms of five lawyers or less. [FN104] Generally, rules that seek to describe appropriate conduct by members of a particular profession are idealistic and inspirational. [FN105] Failure to act in an idealistic and inspirational manner is not the negligence standard. [FN106]

*83 Additionally, if Illinois courts are to consider whether a relevant rule of professional ethics should be introduced into evidence, decisions will be based on subjective views of different judges. As these decisions are made, rules will be interpreted in a manner in which they were never intended to be interpreted. [FN107]

If the Illinois Rules of Professional Conduct are used to establish the standard of care in attorney malpractice suits, their original purpose may be defeated because they will be used in the manner not originally intended. [FN108] As members of the Illinois Bar find that malpractice suits are rising due to the increased use of the Rules, they will become concerned about potential malpractice suits against themselves. Therefore, the bar, [FN109] theoretically, could lower the requirements of the Illinois Rules of Professional Conduct. This result will be beneficial to the legal community [FN110] because it will make it more difficult to establish a breach of the standard of care. In fact, some already argue that the Restatement of the Law Governing Lawyers is "tainted" by those involved in its drafting. [FN111]

*84 E. Using the Illinois Rules of Professional Conduct to Establish the Standard of Care in Legal Malpractice Lawsuits Will Increase Attorney Malpractice Litigation

The amount of successful malpractice lawsuits against attorneys will increase if plaintiffs use the Illinois Rules of Professional Conduct as a sword to establish the standard of care. "Plaintiffs' lawyers, however, are pressing the usage [of ethical rules]. As an offensive weapon, ethical rules provide a black letter formulation that usually is more inflexible than the standard of care, which depends on the particular circumstances." [FN112] Increased litigation against attorneys will have several obvious effects. First, malpractice insurance premiums are likely to increase. Second, attorneys will be deterred from taking cases which may require interpretations of ethical rules for fear that if their interpretations differ from those of jury they will be liable for malpractice. Because of that, many litigants will be denied their day in court. [FN113]

As argued throughout this article, there are numerous problems with using the Illinois Rules of Professional Conduct to help establish the standard of care in attorney malpractice lawsuits. Perhaps the use of the Rules would be warranted if the traditional manner of establishing the standard of care was inadequate. However, clients that have been harmed by negligent acts of their attorneys have other evidence to show their attorney was negligent. [FN114]

VI. CONCLUSION

The Illinois Supreme Court or the drafters of the Illinois Rules of Professional Conduct should explicitly indicate whether the Rules may be used as evidence of the standard of care in attorney malpractice actions. This article has argued that they should not be explicitly mentioned in attorney malpractice trials. In that context, the Rules are confusing, vague, prejudicial, and unnecessary. Therefore, plaintiffs should rely on the plethora of other evidence to prove that an attorney failed to act as a reasonably prudent lawyer under the circumstances. To employ any other standard will be repugnant to tradition and logic.

[FNa1]. J.D. Candidate (1999), Northern Illinois University College of Law. B.S. (1996) with Honors in Political Science, Illinois State University.

[FN1]. Lanphier v. Phipos, 173 Eng. Rep. 581, 583 (K.B. 1838).

[FN2]. Ann Peters, The Model Rules as a Guide for Legal Malpractice, 6 Geo. J. Legal Ethics 609, 610 (1993).

[FN3]. Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice §1.6 (3d ed. 1988).

[FN4]. See, e.g., Illinois Rules of Professional Conduct, Ill. S. Ct. R. art. VIII (West 1996 & Supp. 1998).

[FN5]. Many argue that civil liability through attorney malpractice should, in fact, be a method of lawyer regulation. See generally John Leubsdorf, Legal Malpractice and Professional Responsibility, 48 Rutgers L. Rev. 101, 102 03 (1995) (arguing that civil liability should become a part of attorney regulation because it will ensure "that lawyers fulfill their fiduciary duties to clients, restraining overly adversarial behavior which is harmful to non-clients, and promoting access to legal services.").

[FN6]. Skorek v. Przybylo, 628 N.E.2d 738, 739 40 (Ill. 1993).

[FN7]. See generally Smiley v. Manchester Ins. & Indem. Co., 375 N.E.2d 118 (Ill. 1974); Brown v. Gitlin, 313 N.E.2d 180 (Ill. App. Ct. 1974). See also James Sullivan, Impact of Ethical Rules and Other Quasi-Standards on Standard of Care, 61 Def. Couns. J. 100 (1994) ("The fundamental concept of a general standard of care is essentially an unchanging principle that proscribes negligent or other wrongful conduct on the part of an attorney. . . . Articulation of the general standard in legal malpractice cases, although lacking in complete uniformity, may be expressed thus: 'The attorney should exercise the skill and knowledge ordinarily possessed by attorneys under similar circumstances."' (internal citations omitted)).

[FN8]. See Nagy v. Beckley, 578 N.E.2d 1134, 1138 (Ill. App. Ct. 1991); Rogers v. Robson, Masters, Ryan, Brumund & Belom, 392 N.E.2d 1365, 1371 (Ill. App. Ct. 1979), aff'd on other grounds, 407 N.E.2d 47 (Ill. 1980).

[FN9]. Nagy, 578 N.E.2d at 1138 (refusing to recognize "ethical malpractice" as a distinct cause of action and suggesting that it is not an independent area of tort liability). See also Doe v. Roe, 681 N.E.2d 640, 649 (Ill. App. Ct. 1997).

[FN10]. Suppressed v. Suppressed, 565 N.E.2d 101, 106 (Ill. 1990) ("We do not disagree with plaintiff's suggestion that there should be a separate cause of action for a lawyer's breach of the ethical duty to conduct himself in accordance with the rules of professional responsibility. However, we feel that it should be left to the legislature to address this matter."). But see Daniel S. Reynolds, Survey of Illinois Law: Professional Responsibility 16 S. Ill. U. L.J. 975, 996 (1992) (arguing that the Suppressed decision is a deviation in Illinois jurisprudence: Suppressed is "a truly major departure from Illinois' traditional jealous guardianship of the prerogatives of the judiciary over the control of the profession.").

[FN11]. See Hizey v. Carpenter, 830 P.2d 646, 651 (Wash. 1992) (en banc). The court suggested that courts that have adopted the position that codes of professional ethics should be used as evidence of standard of care in legal malpractice cases have provided little supporting rationale. The court cites Rogers, 392 N.E.2d 1365, the leading Illinois case on the point, to demonstrate an example of its conclusion: "One court found it 'anomalous' to hold professional standards of ethics not relevant in a tort action." Hizey, 830 P.2d at 651.

[FN12]. Rogers, 392 N.E.2d at 1371; Nagy, 578 N.E.2d at 1137 (stating that because malpractice actions and disciplinary proceedings both involve conduct failing to adhere to certain minimum standards, ethical considerations are relevant in both).

[FN13]. See generally Willis R. Tribley & Michael J. Meyer, Annotation, Suing and Defending Professionals in Illinois, 1997 Ill. Inst. For Continuing Legal Educ. § 6.70, at 6 48 ("Several cases since Rogers have relied on the disciplinary rules in deciding actions against lawyers. They include Marvin N. Benn & Assoc., Ltd. v. Nelson Steel & Wire, Inc., 437 N.E.2d 900 (Ill. 1982), in which the court said that the Rules of Professional Conduct are part of the Supreme Court Rules and therefore have the same status as a statute as an appropriate source for defining Illinois public policy." (citations partially omitted)). But see Cross v. American Country Ins. Co., 875 F.2d 625, 628 (7th Cir. 1989) ("[T]he Code of Professional Responsibility is not binding on the courts. Instead, it provides guidelines for proper professional conduct and attorneys can be disciplined for failing to adhere to its requirements. While one Illinois Appellate Court has said that the Code has the function of law, subsequent Illinois Supreme Court decisions have held that the Code is not binding on the courts." In re Yamaguchi, 515 N.E.2d 1235, 1239 (Ill. 1987); In re Teichner, 470 N.E.2d 972 (Ill. 1984), cert. denied, 470 U.S. 1053 (1985) (citations partially omitted)).

[FN14]. See supra note 12 and accompanying text. See also Corti v. Fleisher, 417 N.E.2d 764, 776 (Ill. 1981).

[FN15]. 392 N.E.2d 1365 (Ill. App. Ct. 1979), aff'd on other grounds, 407 N.E.2d 47 (Ill. 1980).

[FN16]. Skorek, 628 N.E.2d at 738.

[FN17]. Sinclair v. Bloom, No. 94 C 4465, 1995 WL 348127 (N.D. Ill. Jun. 8, 1995).

[FN18]. Nagy, 578 N.E.2d at 1134.

[FN19]. Rogers, 392 N.E.2d at 1365.

[FN20]. Recognizing potential confusion based upon the language in the appellate court's decision in Rogers, the Illinois State Bar Association filed an amicus curiae brief for its appeal to the Illinois Supreme Court. The brief stated that:

[a] conclusion may conceivably be drawn from the majority opinion [in Rogers] that the Court has concluded that a violation of a Canon of Ethics can be a per se basis upon which to impose civil liability in a malpractice action. Even the most innocent construction of their statements creates uncertainty and confusion in the minds of all lawyers practicing in Illinois. Amicus respectfully suggests that its concern was recognized and shared by Justice Alloy in his dissent. After discussing the relationship of the Canons of Ethics to the right of an attorney to seek dismissal of a complaint, Justice Alloy recognized the ambiguity created by the majority and correctly and succinctly stated his understanding of the limited role of the canons, vis-a-vis actions sounding in tort. . . . The language of the majority opinion would appear to introduce a new role for Canons of Ethics. The Bar of Illinois looks to this Honorable Court for guidance as to the role of the Canons in malpractice actions against lawyers.

Illinois State Bar Association's Brief of Amicus Curiae at 4, Rogers v. Robson, Masters, Ryan, Brumund & Belom, 407 N.E.2d 47 (Ill. 1980) (No. 52548) (emphasis added) [hereinafter ISBA's Brief in Rogers].

[FN21]. Id. at iii.

[FN22]. The drafters of the Illinois Rules removed from the preamble the language that the Rules are not meant to be used to establish civil liability. However, the rest of the Rules are based upon the Model Rules. Thus, it is illogical to throw out the Model Rules framers' intent expressed in the preamble.

[FN23]. Ronald D. Rotunda, The New Illinois Rules of Professional Conduct: A Brief Introduction and Comment,78 Ill. B.J. 386 (1990).

[FN24]. Note, The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard, 109 Harv. L. Rev. 1102, 1104 (1996) [hereinafter Ethics Codes in Legal Malpractice].

[FN25]. Id. at 1105.

[FN26]. Nagy, 578 N.E.2d at 1138; Terry Cove N., Inc. v. Marr & Friedlander, P.C., 521 So. 2d 22, 23 (Ala. 1988) ("The Code of Professional Responsibility is designed not to create a private cause of action for infractions of disciplinary rules, but to establish a remedy solely disciplinary in nature."). See also Bob Godfrey Pontiac, Inc. v. Roloff, 630 P.2d 840, 847 48 (Or. 1981) ("All of the courts that have directly considered [[[the question of whether an attorney's violation of a statutory duty or the Code of Professional Responsibility gives rise to a private cause of action for damages] have held that it does not."). The Bob Godfrey Pontiac court enumerated some reasons why courts have found rules of professional conduct not to create a distinct cause of action:

(a) The statute or Code of Professional Responsibility was not intended to create a private cause of action. On the contrary, the sole intended remedy for a violation of such a statute or code is the imposition of discipline by disbarment, suspension or reprimand of the offending attorney. (b) Other remedies, such as malicious prosecution, adequately protect the public from harassment or abuse by unprofessional lawyers. (c) To expose attorneys to actions for damages for breach of ethical duties imposed by such statutes and codes would be contrary to the obvious public interest in affording every citizen the utmost freedom of access to the courts.

Id. (internal quotations and citations omitted).

[FN27]. Ethics Codes in Legal Malpractice, supra note 24, at 1105.

[FN28]. See id. See also Orsini v. Larry Moyer Trucking, Inc., 833 S.W.2d 366, 369 (Ark. 1992); Hizey, 830 P.2d at 654.

[FN29]. See Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C., 813 S.W.2d 400, 407 (Tenn. 1991) (recognizing that an expert's testimony that a lawyer violated a provision of the code is insufficient to present a factual issue to the jury, but not forbidding the use of a rule of professional conduct); Bross v. Denny, 791 S.W.2d 416, 420 (Mo. Ct. App. 1990)

(mentioning the applicable code, but finding no reversible error because the code was not introduced as evidence of the standard of care).

[FN30]. See Lazy Seven, 813 S.W.2d at 407.

[FN31]. Ethics Codes in Legal Malpractice, supra note 24, at 1105.

[FN32]. See supra notes 8 10 and accompanying text.

[FN33]. See generally Beattie v. Firnschild, 394 N.W.2d 107, 109 (Mich. Ct. App. 1986); Lipton v. Boesky, 313 N.W.2d 163, 166 67 (Mich. Ct. App. 1981) ("The Code of Professional Responsibility is a standard of practice for attorneys which expresses in general terms the standards of professional conduct expected of lawyers in their relationships with the public, the legal system, and the legal profession. Holding a specific client unable to rely on the same standards in his professional relations with his own attorney would be patently unfair. We hold that, as with statutes, a violation of the Code is rebuttable evidence of malpractice.").

[FN34]. Ethics Codes in Legal Malpractice, supra note 24, at 1104.

[FN35]. See generally Ethics Codes in Legal Malpractice, supra note 24, at 1104 (expanded use of the ethics code should assist plaintiff to establish a cause of action for malpractice); Peters, supra note 2 (legal profession should adopt provisions of ethical rules that would apply in legal malpractice actions); Mark R. Greenough, The Inadmissibility of Professional Ethical Standards in Legal Malpractice Actions after Hizey v. Carpenter, 68 Wash. L. Rev. 395 (1993) (standards of professional ethics should be admitted into evidence in legal malpractice actions on the same bases as statutes, ordinances, and administrative rules); David Luban, Symposium on Professional Malpractice, Ethics and Malpractice, 12 Miss. C. L. Rev. 151 (1991) (recovery based upon ethical codes should be permitted only when the judge decides, as a matter of law, that an attorney's misconduct is serious enough to warrant suspension or disbarment); Charles L. Wolfram, The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation, 30 S.C. L. Rev. 281 (1979) (arguing for an expanded use of the codes to enhance their enforcement); Laura K. Thomas, Professional Conduct-Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.: The Code of Professional Responsibility as a Basis for Attorney Liability, 22 Mem. St. U. L. Rev. 169, 185 (1991) (courts should consider relevant rules of conduct on a case by case basis rather than to create a cause of action for every provision).

[FN36]. The wording of a rule could, theoretically, be embraced by experts when they testify so long as the jury is not told of the existence of the Illinois Rules of Professional Conduct. See generally Harrington v. Pailthorp, 841 P.2d 1258, 1262 (Wash. Ct. App. 1992). The court in Harrington explained that experts "may still base their opinion on an attorney's failure to conform to an ethics rule. However, the expert must address the breach of the legal duty of care, and not simply the supposed breach of the ethics rules." Id. (internal quotation and citations omitted).

[FN37]. Brooks v. Zebre, 792 P.2d 196, 214 (Wyo. 1990) (Urbigkit, J., dissenting) (quoting from Michael J. Hoover, The Model Rules of Professional Conduct and Lawyer Malpractice Actions: The Gap Between Code and Common Law Narrows, 22 New Eng. L. Rev. 595, 616 (1988)).

[FN38]. Luban, supra note 35, at 152. Luban finds that attorneys are rarely disciplined for violations of rules of professional ethics and refers to them as "close to dead letter." The majority of disciplinary actions against attorneys are for stealing a client's money, being convicted of felonies, or grossly neglecting a client's case. Finally, Luban suggests that conflicts of interest rules are the only rigorously enforced ethical rules. However, Luban fails to explore, perhaps the simplest solution, that under-enforcement could be solved by just enforcing the rules more. Id.

[FN39]. Wolfram, supra note 35, at 291.

[FN40]. Ethics Code in Legal Malpractice, supra note 24, at 1114 (drawing an analogy to federal civil rights statutes and arguing that their under-enforcement was successfully remedied by allowing private litigants to establish causes of action for violation of these statutes).

[FN41]. Wolfram, supra note 35, at 286.

[FN42]. Id.

[FN43]. See Wolfram, supra note 35.

[FN44]. In re March, 276 N.E.2d 213, 218 (Ill. 1978) (quoting In re Andros, 356 N.E.2d 513, 514 (Ill. 1976)).

[FN45]. Manuel R. Ramos, Legal Malpractice: The Profession's Dirty Little Secret, 47 Vand. L. Rev. 1657 n.2 (1994). There is only one A.B.A. accredited law school which currently teaches a course on legal malpractice. However, all A.B.A. accredited law schools offer a class on professional responsibility. Id.

[FN46]. Thomas, supra note 35, at 183.

[FN47]. Lynn E. Stapleton, Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.: Use of the Code of Professional Responsibility in Georgia Legal Malpractice Cases, 13 Ga. St. U. L. Rev. 903 (1997) (disciplinary bodies are concerned with maintaining standards for their profession while civil courts are concerned with helping those that have been wronged by the profession).

[FN48]. Wolfram, supra note 35, at 289.

[FN49]. See discussion supra notes 24 31.

[FN50]. See generally Don Fowler, Attorney Malpractice: The Defense View, 19 No.2 Litig. 23, 23 24 (1993) (recognizing the emotional effect that occurs when an attorney is sued: "Recognize, too, that there is always more at stake than mere money. As with all suits against professionals, a legal malpractice action questions a professional's competence and smudges his reputation. . . . You must always weigh the lawyer's reputation in the community.").

[FN51]. See generally In re Marriage of Dall, 569 N.E.2d 1131 (1991).

[FN52]. Letter from Professor Anthony G. Amsterdam to the Grievance Committee of the District of Columbia, as appears in Wolfram, supra note 35, at 281.

[FN53]. Ronald Rotunda is a professor of law at the University of Illinois, College of Law, and a member of the Joint Committee on Professional Conduct.

[FN54]. Rotunda, supra note 23, at 387.

[FN55]. See generally Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975) (finding a disciplinary rule enacted by the A.B.A. unconstitutional in part because it was vague).

[FN56]. Illinois Rules of Professional Conduct, Ill. S. Ct. R. art. VIII (West 1996 & Supp. 1998).

[FN57]. Robert Dahlquist, The Code of Professional Responsibility and Civil Damage Actions Against Attorneys, 9 Ohio N.U. L. Rev. 1, 11 (1982) (the code relies upon a reasonable lawyer standard, and, thus, it must be explained by expert testimony). See also Thomas, supra note 35, at 184 (the Model Code and the Model Rules incorporate the standard of reasonableness and, thus, do not clearly define instances in which an attorney will be subject to a charge of malpractice liability).

[FN58]. Illinois Rules of Professional Conduct, Ill. S. Ct. R. art. VIII (West 1996 & Supp. 1998).

[FN59]. John Gibeaut, Doing the Right Thing: Lawyers May Have to Look Beyond Conduct Rules for Ethical Answers, A.B.A. J., July, 1997, at 105.

[FN60]. Model Rules of Professional Conduct, Preamble and Scope (1983). Interestingly, the statement within the preamble echoes to Aristotle's philosophical beliefs about rules of ethics. See infra note 61.

[FN61]. In the fourth century B.C., Aristotle, the great philosopher, wrestled with the difficulty of defining ethical guidelines. Aristotle never wrote about ethical rules governing lawyers, but his writings offer a valuable insight into such regulatory codes as the Illinois Rules of Professional Conduct.

But I think the main reason Aristotle avoids giving us rules of conduct is that rules look too absolute, too exceptionless. Giving out rules encourages people to overlook the sometimes subtle variations in circumstances that make the differences between good and bad action. Following a rule sometimes results in doing the wrong thing. You may protest that we need some guidance more specific than Aristotle gives us. I think he would agree, but he would say that what you want is already ready to hand in your own culture. The same social group that inculcated certain habits in you also taught you certain rules. Aristotle assumes that you come to the study of ethics with those as part of your baggage. Some of those rules are absolute prohibitions: Thou shalt not murder. But most of them take the form of proverbs or sayings that express the conventional wisdom about how to behave. These have the advantage that they don't look quite so much like absolutes.

Timothy Robinson, Aristotle in Outline 64 (Hackett Publ'g Co.) (1995).

[FN62]. The Illinois State Bar Association has a web page that helps to interpret the Illinois Rules of Professional Conduct. (visited Nov. 18, 1998) < http:// www.illinoisbar.org/CourtsBull/Ethics Opinions/advisory_index.html>.

[FN63]. The plaintiffs in Hizey, 830 P.2d 646, reported that jurors told them after the verdict that they were confused and were sorry for their verdict. Additionally, jurors felt the attorney did not treat them right, and that they really did not know what to do in terms of a verdict. Peter Lewis, Two Kinds of Justice? Whidbey Island Couple Think So-Lawyers' Ethics Code Can't Be Used in Suit, Seattle Times, July 29, 1992, at A1.

[FN64]. Hizey, 830 P.2d at 654 ("An expert's mention of [the Rules] or their use as the basis of jury instructions could mislead the jury into believing the CPR and RPC conclusively establish the standard of care-precisely the result we wish to avoid.").

[FN65]. Ronald E. Malle, Legal Malpractice in the 21st Century (Professional Negligence), Trial, May 1, 1995, at 20 (the stigma of being labeled unethical is more serious then that of violating a common law principle, even though violations are the same).

[FN66]. For a detailed examination of the ambiguities contained within the Illinois Rules of Professional Conduct, see Rotunda, supra note 23, at 387 91.

[FN67]. Rotunda, supra note 23, at 387.

[FN68]. Id.

[FN69]. John William Strong, McCormick on Evidence § 185, at 781 (4th ed. 1992); see also Melecosky v. McCarthy Bros. Co., 503 N.E.2d 355 (Ill. 1986).

[FN70]. Strong, supra note 69, at n.38.

[FN71]. In most instances, Illinois requires expert testimony to educate the fact finder of the appropriate standard of care in attorney malpractice litigations. See generally Michael A. DiSabatino, Annotation, Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney, 14 A.L.R.4th 170 (1981 & Supp. 1997). Illinois does not require expert testimony when there is obvious and explicit carelessness in the attorney's actions. See generally House v. Maddox, 360 N.E.2d 580 (Ill. App. Ct. 1977).

[FN72]. See generally Allen v. Lefkoff, Duncan, Grimer & Dermer, 453 S.E.2d 719, 724 (Ga. 1995) (Behman, J., concurring) ("Although the main opinion might contemplate that the Code of Professional Responsibility will make a cameo appearance in malpractice cases, I fear that experience will show that it will play a leading role and the cast of horrors that will attend the allowance of such evidence will be legion.").

[FN73]. Lawrence Kohlberg, Essays in Moral Development: The Psychology of Moral Development (1984).

[FN74]. Stage 1: obeying and avoiding punishment from a superior; stage 2: making a fair exchange or a good deal to avoid breaking the rule; stage 3: pleasing others and getting their approval; stage 4: doing your duty, following rules and social order; stage 5: respecting rules and laws, but recognizing that they may have limits; stages 6: following

universal ethical principles, such as justice, reciprocity, equality, and respect for human life and rights. Id.

[FN75]. See generally Douglas A. Berstein, Psychology 67, table 2.3 (2d ed. 1991).

[FN76]. Donald L. Beschle, You've Got to be Carefully Taught: Justifying Affirmative Action After Crosen and Adarand, 74 N.C. L. Rev. 1141, 1169 (1996).

[FN77]. Id. at 1171 n.166.

[FN78]. Id.

[FN79]. See discussion supra note 73 and accompanying text.

[FN80]. Kohlberg's subjects failed to rely upon 'extrinsic' factors such as a dying wife. The extrinsic factors dismissed are similar to what a reasonable attorney would do under the circumstances.

[FN81]. Ethics Codes in Legal Malpractice, supra note 24, at 1110.

[FN82]. Greenough, supra note 35, at 411.

[FN83]. See, e.g., Bob Godfrey Pontiac, 630 P.2d at 844.

[FN84]. W. Page Keeton Et. Al., Prosser and Keeton on the Law of Torts 222 (5th ed. 1985).

[FN85]. See discussion supra notes 14 20.

[FN86]. 585 N.E.2d 1176 (Ill. App. Ct. 1992).

[FN87]. The following is, in part, the jury instruction that was read in Mayol:

There was in force in the State of Illinois at the time of the occurrence in question a certain Supreme Court Rule which provided that: A lawyer shall not (1) handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it; (2) handle a legal matter without preparation adequate in the circumstances; or (3) neglect a legal matter entrusted to him.

Id. at 1186 (internal quotations omitted).

[FN88]. See generally Smith v. Haynsworth, Marion, McKay & Geurard, 472 S.E.2d 612, 614 (S.C. 1996) (quoting Allen v. Lefkoff, Duncan, Grimer & Dermer, 453 S.E.2d 719, 721 22 (Ga. 1995) ("'This is not to say, however, that all of the Bar Rules would necessarily be relevant in every legal malpractice action. In order to relate to the standard of care in a particular case, we hold that a Bar Rule must be intended to protect a person in the plaintiff's position or be addressed to the particular harm."').

[FN89]. W. Page Keeton Et al., supra note 84.

[FN90]. But see Wolfram, supra note 35, at 287 (comparing the code to criminal statutes, business regulations and safe driving requirements); see also Greenough, supra note 35, at 408 (analogizing between statutes and codes of professional conduct).

[FN91]. It is notable that Illinois has changed the preamble of the Model Rules of Professional Conduct. Specifically, Illinois omitted the statement that a violation of the Rules should not give rise to a cause of action. Instead, it has chosen to leave it up to courts. See infra note 22 and accompanying text.

[FN92]. But see Wolfram, supra note 35, at 287 88. Wolfram argues that the language of the code, which states that it does not "undertake to define standards for civil liability of lawyers for professional conduct," should be read as "code neutrality, not hostility." Wolfram later argues that a judicial interpretation of the code is appropriate under the "inherent powers" doctrine. Id.

[FN93]. Model Rules of Professional Conduct, Preamble (1992) (emphasis added).

[FN94]. Thomas, supra note 35, at 185.

[FN95]. Drafters of the Illinois Rules of Professional Conduct specifically chose not to establish whether they were to be used as evidence of the standard of care. See supra note 22.

[FN96]. See discussion supra notes 83 84.

[FN97]. But see, e.g., Darling, II v. Charleston Community Mem'l Hosp., 211 N.E.2d 253, 257 (Ill. 1965) ("'in negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in the light of the apparent risk. What the defendant must do, or must not do, is a question of the standard of conduct required to satisfy the duty. By the great weight of modern American authority a custom either to take or to omit a precaution is generally admissible as bearing on what is proper conduct under the circumstances, but is not conclusive. Custom is relevant in determining the standard of care because it illustrates what is feasible, it suggests a body of knowledge of which the defendant should be aware . . . ." (citations omitted) (emphasis added)).

[FN98]. Cowan v. Laughridge Constr. Co., 291 S.E.2d 287 (N.C. Ct. App. 1982) (OSHA regulations that only provide civil penalties are not penal in nature).

[FN99]. Comment, Violation of the Code of Professional Responsibility as Stating a Cause of Action in Legal Malpractice, 6 Ohio. N.U. L. Rev. 692, 696 (1979).

[FN100]. Id.

[FN101]. Id.

[FN102]. In comparing the American Law Institute's standards of professional competence to the A.B.A. Model Rules, it has been recognized that "[t]he Restatement's duty of care does not require that a lawyer employ the same means or select the same options as any other competent lawyer reasonably exercising his or her professional judgment. The implication is that the standard protects the less skillful lawyer. By contrast, the ABA Model Rules require all lawyers, regardless of skill, to exercise the legal knowledge, skill,

thoroughness and preparation reasonably necessary to carry out the representation." Nancy J. Marshall & Patricia A. Lynch, Lowering the Bar: New Restatement on Lawyer Competence May Protect Less Skillful Lawyers, A.B.A. J., Nov., 1997, at 78.

[FN103]. Most malpractice suits are brought against attorneys who practice personal injury and domestic relations laws. A. Craig Fleishman, Legal Malprtactice Forum: Legal Malpractice: A Brief History in Time, Colo. Law., June, 1997, at 157.

[FN104]. Ramos, supra note 45, at 1660.

[FN105]. Hizey, 830 P.2d at 650. The Hizey court recognized that rules of professional conduct are established to identify the minimum level of an appropriate conduct of an attorney. However, malpractice liability may result only if an attorney did not act as a reasonable lawyer under the circumstances. Hizey recognized that under the Rules particular circumstances will not be addressed. Id.

[FN106]. "The Canons are statements of axiomatic norms expressing in general terms the standards of professional conduct expected of lawyers . . . . [T]hey embody the general concepts from which Ethical Considerations and Disciplinary Rules are derived." See ISBA's Brief in Rogers, supra note 20, at 9 (quoting Illinois Code of Professional Responsibility 5 (1970)). But see Rotunda, supra note 23, at 387 ("However, the Illinois Rules of Professional Conduct have not adopted the ethical considerations of the ABA rules because the ethical considerations were intended to be inspirational, while the Illinois Rules were intended to be real law, not law-day aspirational." (internal quotations omitted)).

[FN107]. See generally Lefkoff, 453 S.E.2d at 723 ("The majority has begun the descent of the slippery slope of legislating civility and courtesy. In the future, this Court no doubt will have to classify some professionalism standards as more important than others, some transgressions as more unprofessional than others, and some standards as appropriate weapons in the litigation arena and others only as guides for regulating conduct through attorney disciplinary agencies." (citations omitted)). See also Son v. Margolius, Mallios, Davis, Rider & Tomar, 689 A.2d 645, 659 (Md. Ct. Spec. App. 1997) (arguing that the Rules of Professional Conduct are not a source of public policy that may be for other purposes because the court should not abuse the judiciary's "autonomy by extending the application of the rules it promulgates into areas not within its primary authority." (internal citations omitted)).

[FN108]. Hizey, 830 P.2d at 652 (finding that using rules of professional conduct in malpractice suits will remove the motivating force behind them). But see Harry Haynsworth, Business Lawyers under Fire-Potential Ethical Sanctions and Liabilities, Q246 ALI-ABA 23, 26 (Apr. 2 1996) (using the rules in malpractice suits will not lower ethical standards because those that draft the rules of conduct do so with the assumption that they will affect civil lawsuits).

[FN109]. It would be much easier to defeat malpractice claims by simply abolishing the Illinois Rules of Professional Conduct if they are used to establish liability. See generally Lefkoff, 453 S.W.2d at 724 (allowing rules of professional conduct to be used to establish a breach of the standard of care will "allow professions with little or no code of ethics to be treated better than professions that have adopted codes of ethics and professionalism.").

[FN110]. Critics of the Rules of Professional Conduct have actually suggested that the Rules are overly protective of attorneys' interests and, therefore, are detrimental to clients. See generally Wolfram, supra note 35, at 300.

[FN111]. Gibeaut, supra note 59, at 105.

[FN112]. Ronald E. Mallen, Legal Malpractice in the 21st Century (Professional Negligence), Trial, May 1, 1995, at 20. But see Ethics Codes in Legal Malpractice, supra note 24, at 1117 (rules of professional conduct will not help a litigant that lacks facts necessary to establish the standard of care because he will still need to show that an attorney failed to comply with the standard of care and to establish a duty. Nevertheless, the author concedes that the use of the Rules will make it easier to establish the standard of case.).

[FN113]. See generally Bob Godfrey Pontiac, 630 P.2d at 848 ("To expose attorneys to actions for damages for breach of ethical duties imposed by such statutes and codes would be contrary to the obvious public interest in affording every citizen the utmost freedom of access to the courts." (internal quotations omitted)).

[FN114]. Garcia v. Rodey, Dickason, Sloan, Akin & Robb, 750 P.2d 118 (N.M. 1988).