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No Laughing Matter: The Intersection of Legal Malpractice and Professionalism

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NO LAUGHING MATTER: THE INTERSECTION OF LEGAL MALPRACTICE AND PROFESSIONALISM

NICOLA A. BOOTHE-PERRY*

I. Preface: The “Laughing Guy” Statement	2
II. Introduction	3
III. Professional Conduct, Disciplinary Conduct, and Legal Malpractice Defined	7
A. Professional Conduct/Professionalism Defined	8
B. Disciplinary Conduct Defined	9
C. Legal Malpractice Defined	10
IV. Current State of Malpractice	11
A. The Rise of Legal Malpractice Cases	11
B. Potential Limitations to Use of Legal Malpractice Claims	14
1. Limited Ability for Direct Effect on Lawyers	15
2. Courts Lack of Impartiality & Potential for Subjective Standards.....	15
3. Objection to Greater Lawyer Regulation	15
C. The History of the Legal Malpractice Case	17
V. Basis of a Legal Malpractice Case.....	19
A. Legal Malpractice—Tort or Contract?	19
B. Prima Facie Case Under Tort Theory	21
VI. Use of Expert Testimony to Establish Standard of Care	23
VII. Use of Ethical Rules in Legal Malpractice Claims	25
VIII. Professionalism as Evidence of the Standard of Conduct.....	33
IX. Conclusion.....	37

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*"Legal rules ensure fidelity to legal duties."*¹

I. PREFACE: THE "LAUGHING GUY" STATEMENT

On October 14, 2008, a Florida grand jury indicted Casey Marie Anthony for the death of her minor child, Caylee Marie Anthony.² In a seven count indictment, the grand jury charged Casey Anthony with capital murder, aggravated child abuse, and aggravated manslaughter, with additional charges relating to provision of false information to law enforcement personnel.³ During closing arguments in the high-profile murder trial, defense counsel, apparently agitated by the snickering and chuckling of the State's attorney, uttered the widely-broadcasted statement:

"We're talking about cold hard evidence. Evidence that points to one person, and one person only. And he can get up here and lie all he wants, and dance around the truth, but the truth is the truth and—and—depending on who's asking the questions, whether it's *this laughing guy right here* [pointing forcefully at Assistant State Attorney Ashton] or whether it's me."⁴

This "laughing guy" statement heard all across the country on July 3, 2011, is illustrative of the nexus between professionalism and legal malpractice.

Defense counsel Jose Baez's unprofessional reference and gesture towards Assistant State Attorney Jeff Ashton garnered an immediate objection from the State. Chief Judge Belvin Perry, presiding over the highly-televised matter, immediately sustained the objection and demanded both parties approach the bench. The Court subsequently chastised both parties for their inappropriate behavior: Attorney Ashton for acting in an unprofessional manner by chuckling and laughing during opposing counsel's closing arguments, and Attorney Baez for referencing the behavior in a similarly unprofessional manner. As the Court noted, both parties were not just unprofessional, but they each also violated a court order prohibiting emotional outbursts and gestures during the course of the trial.⁵ The attorneys' actions exposed them to both (1) potential court sanctions, and (2) disciplinary action by the Florida Bar.⁶

1. David L. Dranoff, Comment, *Attorney Professional Responsibility: Competence Through Malpractice Liability*, 77 NW. U. L. REV. 633, 642 (1982).

2. Indictment, State v. Anthony (Fla. Cir. Ct. Oct. 14, 2008), available at <http://i2.cdn.turner.com/cnn/2008/images/10/15/caylee.indictment.pdf>.

3. *Id.*

4. Transcript of Closing Arguments at 3-4, State v. Anthony, No. 48-2008-CF-015606-O (Fl. Cir. Ct. July 3, 2011) (emphasis added).

5. *Casey Anthony Trial: Tears and Laughter During Closing Arguments*, RADAR (July 3, 2011, 10:30 AM), <http://www.radaronline.com/print/48652>.

6. See *Threats of Sanctions, Punishment Against Lawyers for Both Sides in Casey*

The defendant in the case was subsequently acquitted of the first-degree murder charge.⁷ Had Casey Anthony been convicted of murder, she might have been able to bring claims against her attorney (already vulnerable to court-imposed sanctions and Bar discipline) for ineffective assistance of counsel, in part due to his outburst during closing arguments.⁸ As an attorney for the State, and pursuant to the immunity granted by the Federal Torts Claims Act, Attorney Ashton would have been immune from any tortious legal malpractice claim despite his display of a lack of professionalism during the course of the trial.⁹ Attorney Baez's display of a lack of professionalism, however, could have been the basis for a potential legal malpractice claim against him. "Laughing guy" or not, the issue of professionalism and its potential correlation to legal malpractice claims is no laughing matter.

II. INTRODUCTION

Over the years, competence and effectiveness have been important benchmarks of a "good" lawyer.¹⁰ Empirical data now suggests that a

Anthony Trial, JACKSONVILLE.COM (June 20, 2011), <http://m.jacksonville.com/news/crime/2011-06-20/story/threats-sanctions-punishment-against-lawyers-both-sides-casey-anthony> (reporting that lawyers on both sides of the Casey Anthony case were threatened with the potential for a sanction due to their poor courtroom behavior).

7. Michael Winter, *Casey Anthony Acquitted of Murder*, USA TODAY (July 5, 2011), http://content.usatoday.com/communities/ondeadline/post/2011/07/casey-anthony-jury-reaches-verdict/1#.T-dH_I4mHLg.

8. See, e.g., *Burdine v. Johnson*, 262 F.3d 336, 349 (5th Cir. 2001) (holding that defense counsel in fact prejudiced Burdine's case by sleeping during the sentencing phase of the trial); see also *Glenn v. Aiken*, 569 N.E.2d 783, 785 (Mass. 1991) (stating that if an appellate court did not reach the issue of ineffective assistance of counsel because it reversed the conviction on another ground, the defendant is not collaterally estopped or precluded from presenting the issue of the defense attorney's negligence in a malpractice claim). For further discussion of legal malpractice actions that arise out of prior criminal defense representation, see generally JOHN M. BURKOFF, *CRIMINAL DEFENSE ETHICS* 50-54 (2d ed. 2012) (describing the relationship between legal malpractice claims and ineffective assistance of counsel claims); Rebecca A. Copeland, *Toward a More Effective Standard of Review: The Potential Effect of Burdine v. Johnson on Legal Malpractice in Texas*, 33 ST. MARY'S L.J. 849, 863-64 (2002); David H. Potel, Comment, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542, 542-43 (1981).

9. Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(a) (2006). Under the FTCA, a State Attorney possesses absolute immunity from civil liability in tort actions brought in state courts and in 42 U.S.C. § 1983 actions in federal courts for conduct falling within the scope of his or her prosecutorial duties. *Id.*

10. The Preamble to the Model Rules of Professional Conduct states that "[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." MODEL RULES OF PROF'L CONDUCT, pmbl. & scope, §§ 7, 9 (2011). In addition, the Model Rules' Preamble specifically requires a lawyer to observe the Model Rules. *Id.* Rule 8.3 states that it is professional misconduct to violate the Rules, which includes Rule 1.1 on competence and Rule 1.3 on diligence. MODEL RULES OF PROF'L CONDUCT R. 8.3, 1.1, 1.3 (2011).

lawyer's success and effectiveness is inextricably linked to the lawyer's professionalism.¹¹ The public expectation of effective lawyering presumes a high degree of professionalism.¹² Meeting these expectations reflects positively on a lawyer's profitability. Other lawyers make referrals, and clients are more likely to consistently patronize more professional attorneys. Contrarily, lawyers who practice "close to or over the line of malpractice and ethical rule violations will make mistakes that lead to financial setbacks and lower profitability."¹³ Even setting aside economic concerns, the legal profession has increasingly voiced its discomfort with both the state of professionalism exhibited by lawyers and the perception of a lack of professionalism held by the general public.¹⁴ Examples of lawyers behaving badly—such as attorneys falling asleep in court,¹⁵ outrageous deposition behavior,¹⁶ disrespectful behavior in¹⁷ and out of¹⁸

11. See Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 GEO. J. LEGAL ETHICS 137, 143 (2011) (indicating that there is a positive empirical relationship between professionalism and effectiveness in the practice of law and that with "ethical professional formation occur[ing] throughout a career . . . [a] highly professional lawyer is substantially more likely to be an effective lawyer").

12. See *id.* at 140 (noting that clients and other lawyers perceive a lawyer who demonstrates a high degree of professionalism as an effective lawyer).

13. *Id.*

14. Richard Abel, Book Review, 57 J. LEGAL EDUC. 130, 140-42 (2007) (reviewing MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* (2005)); see also CONFERENCE OF CHIEF JUSTICES, A NATIONAL WORKING PLAN ON LAWYER CONDUCT AND PROFESSIONALISM 9 (1999), available at <http://ccj.ncsc.dni.us/natplan/natlactionplan.html> [hereinafter A NATIONAL WORKING PLAN] ("[T]he Court should continually assess the social factors that affect the legal profession and its various institutions to maximize resources, publicize its positive attributes, and address its shortcomings and liabilities.").

15. See, e.g., *Burdine v. Johnson*, 262 F.3d 336, 357 (5th Cir. 2001) (holding that an accused murder suspect's attorney, Joe Frank Cannon, prejudiced the defendant's case by falling asleep during the capital murder trial).

16. See, e.g., *Huggins v. Coatsville Area Sch. Dist.*, No. 07-4917, 2009 WL 2973044, at *1-3 (E.D. Pa. Sept. 16, 2009) (stating that counsel engaged in "incessant insult exchanges and aggressive questioning" during the deposition. The court characterized counsels' exchanges as "heated, personal, rude and pointless" statements that included a "few choice epithets" and "foul language." The court found that both lawyers acted highly improperly, stating, "[C]ounsel's behavior falls short of that which lawyers are to exhibit in the performance of their professional duties. Treating an adversary with discourtesy, let alone with calumny or derision, rends the fabric of the law."); *In re Golden*, 496 S.E.2d 619, 621 (S.C. 1998) (documenting an attorney's behavior after a deposition of his client's wife, the adverse party in a domestic proceeding. The grievance complaint alleged that after the deposition, the attorney stated to the estranged wife: "You are a mean-spirited, vicious witch and I don't like your face and I don't like your voice. What I'd like, is to be locked in a room with you naked with a very sharp knife." Thereafter, it is alleged that the attorney said: "What we need for her [pointing to estranged wife] is a big bag to put her in without the mouth cut out."); see also *Paramount Commc'n, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 53-55 (Del. 1994).

17. See John G. Browning, *Legally Speaking: Lawyers Behaving Badly Part Three*, SOUTHEAST TEX. REC. (Apr. 9, 2008, 9:32 AM), <http://www.setexasrecord.com/>

court (even in their capacity as elected officials¹⁹)—have garnered considerable attention.²⁰ Lawyers are not well-perceived by the public²¹ and the lack of civility among lawyers and their other forms of dubious professional conduct have led to lawyers themselves criticizing the lack of professionalism in their ranks.²²

As the public and legal arena's perception of professionalism has

arguments/210542-legally-speaking-lawyers-behaving-badly-part-three (providing one example in which, in response to a prosecutor's objection during trial, defense counsel made "a simulated masturbatory gesture with his hand while making eye contact with the Court").

18. See *id.* (describing the case of a recent scuffle between attorneys David Lawrence and Aaron Matusick of Portland, Oregon, after leaving a court hearing in Multnomah County on a landlord-tenant case. Allegedly, "one of the lawyers slapped the other, and the attorney retaliated with a punch to the head").

19. See, e.g., *In re Cammarano III*, 902 N.Y.S.2d 446, 446 (App. Div. 2010) (disbarring respondent, former mayor of the city of Hoboken, NJ, after he was convicted of conspiracy to obstruct commerce by extortion for taking bribes from an FBI informant); see also *Clark v. Conahan*, 737 F. Supp. 2d 239, 256-58 (M.D. Pa. 2010) (refusing to grant defendants, then-judges Mark A. Ciavarella and Michael T. Conahan, immunity from their actions in connection with a scheme to divert juvenile offenders to newly constructed, privately-owned juvenile detention facilities in return for kickbacks).

20. With the common use of the Internet, a quick search for badly behaving lawyers will produce pages of examples, including visual examples often found on YouTube. Aptly titled videos include: Ajxm, *Drunk Vegas Lawyer Causes Mistrial in Court*, YOUTUBE (Aug. 9, 2006), <http://www.youtube.com/watch?v=yV2qtvbIPFE>; Teddygramz2008, *Old Lawyer Fight*, YOUTUBE (Apr. 27, 2006), <http://www.youtube.com/watch?v=td-KKmcYtrM>; Nutcrushernigel, *This Lawyer Is the Best! Flip the Bird*, YOUTUBE (Aug. 4, 2008), <http://www.youtube.com/watch?v=fw7J53YhRvs>; SECTOR0013, *TV Judge Completely Ends Smartass Lawyer*, YOUTUBE (Aug. 7, 2008), <http://www.youtube.com/watch?v=DsirLliYBXk>; see also *Javor v. United States*, 724 F.2d 831, 832 (9th Cir. 1984); A NATIONAL WORKING PLAN, *supra* note 14, at 9; Jeffrey Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 147-48 (2001) (citing incidents of attorneys falling asleep during trials); Abel, *supra* note 14, at 140-42.

21. Paul W. Grimm & Michael Schwartz, *Professionalism: The Sedona Conference—Supplemental Material*, in CURRENT DEVELOPMENTS IN EMPLOYMENT LAW: THE OBAMA YEARS 1425 (ALI-ABA, Course Handbook CS006, 2010) ("Lawyers are not well perceived by the public. We are called 'shysters,' money grabbers, and a whole range of expletives."); see also Nicola A. Boothe-Perry, *Enforcement of Law Schools' Non-Academic Honor Codes: A Necessary Step Towards Professionalism?*, 89 NEB. L. REV. 634, 635 (2011).

22. See A NATIONAL WORKING PLAN, *supra* note 14, at 17 (noting how the unethical and unprofessional conduct of a small portion of lawyers has tainted the image of the legal community and diminished public confidence in legal and judicial institutions); see also Robert MacCrate et. al., *Legal Education and Professional Development—An Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR. The lack of professionalism has even been noted by law students. For example, law students in the clinical program at Florida A&M University College of Law are often shocked and surprised by the comments, behavior, and attire of some of the attorneys in court. While clerking for U.S. District Court Chief Magistrate Charles W. Grimm, Law Clerk W. James Denvil (then a law student at the University of Baltimore) aptly noted, "The skyrocketing costs of discovery and simple integrity demand that lawyers act like professionals, not spoiled children."

declined, the rate of legal malpractice has increased.²³ The new millennium saw a particularly notable increase in appellate legal malpractice decisions.²⁴ Although there was some evidence of stabilization by the end of 2009, there was no evidence of a *decline* in the number of legal malpractice cases,²⁵ with a “noticeable uptick in frequency” and severity of claims in 2010.²⁶ Scholars have extensively discussed the legal malpractice cause of action generally.²⁷ However, there has been little discussion regarding the opportunity to enhance professionalism through legal malpractice actions.

In an effort to increase professionalism among lawyers, an analysis of the relationship between lawyers’ professional behavior and legal malpractice claims is warranted. This Article will explore that relationship, and address the need to fuse the two components in an effort to enhance

23. Manuel Ramos, *Legal Malpractice: The Profession’s Dirty Little Secret*, 47 VAND. L. REV. 1657, 1681 (1994) [hereinafter Ramos, *Dirty Little Secret*].

24. 1 RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 1:6 (2012).

25. *Id.*

26. At a Feb. 17, 2011, panel discussion on “The Insurance Marketplace and Considerations,” moderator Victoria L. Orze of Hinshaw & Culbertson, Phoenix, and two insurance experts explored the current market concerning lawyers’ professional liability (LPL) coverage, along with changes in the legal industry that are affecting the insurance market. The panelists noted a “noticeable uptick in frequency” in claims in 2010. See Joan C. Roberts, *Experts on Insurance Marketplace See Low Prices, but High Costs, Cuts in Limits*, ABA/BNA LAW. MANUAL ON PROF. CONDUCT 147 (Mar. 2, 2011), available at http://news.bna.com/moln/display/story_list.adp?mode=mp&frag_id=19875782&item=E38322BAB94248C751AC0CE0F0B3C69E&prod=moln.

27. See, e.g., David J. Beck, *Legal Malpractice in Texas*, 50 BAYLOR L. REV. 761, 761 (1998); Martin D. Begleiter, *Attorney Malpractice in Estate Planning—You’ve Got to Know When to Hold Up, Know When to Fold Up*, 38 KAN. L. REV. 193, 194 (1990); Melissa Hutcheson Brown, *Estate Planning Malpractice: A Guide for the Alabama Practitioners*, 45 ALA. L. REV. 611, 611-15 (1994); James M. Fischer, *Representing Partnerships: Who Is/Are the Client(s)?*, 26 PAC. L.J. 961, 961 (1995); Todd A. Fuller, *Attorney Liability to Estate Beneficiaries: The Privity Passes Through*, 100 DICK. L. REV. 29, 30 (1995); Laura Calloway Hart et. al., *From Offense to Defense: Defending Legal Malpractice Claims*, 45 S.C. L. REV. 771, 772 (1994); Donald B. Hilliker, *Attorney Liability to Third Parties: A Look to the Future*, 36 DEPAUL L. REV. 41, 43 (1986); Gerald P. Johnson, *Legal Malpractice in Estate Planning—Perilous Times Ahead for the Practitioner*, 67 IOWA L. REV. 629, 630 (1982); George G. Mahaffey Jr., *Cause-in-Fact and the Plaintiff’s Burden of Proof with Regard to Causation and Damages in Transactional Legal Malpractice Matters: The Necessity of Demonstrating the Better Deal*, 37 SUFFOLK U. L. REV. 393, 397-408 (2004); Craig D. Martin, *Liability of Attorneys to Non-clients: When Does a Duty to Non-clients Arise?*, 23 J. LEGAL PROF. 273, 273-80 (1999); Nancy J. Moore, *Expanding Duties of Attorneys to “Non-clients”: Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. REV. 659, 659 (1994); Ramos, *Dirty Little Secret*, *supra* note 23, at 1681; Gary N. Schumann & Scott B. Herlihy, *The Impending Wave of Legal Malpractice Litigation—Predictions, Analysis, and Proposals for Change*, 30 ST. MARY’S L.J. 143, 143 (1998); Ronald R. Volkmer, *Attorney Liability to Nonclients: The Need to Reexamine Nebraska’s Privity Rule*, 29 CREIGHTON L. REV. 295, 295 (1995); Steven K. Ward, *Developments in Legal Malpractice*, 31 S. TEX. L. REV. 121, 121 (1990); Harris K. Weiner, *Defining an Attorney’s Duty of Care to Nonclients*, 39 B.B.J. 16, 16 (1995).

professionalism. The Article will specifically seek to address the questions: (1) Should professionalism be admissible, or even conclusive, evidence of the standard of care of the “reasonable attorney” in legal malpractice cases? and (2) Will a proper definition of the “reasonable attorney” in the context of legal malpractice cases encourage and ultimately enhance professionalism in legal society?

In order to form a nexus between professionalism and legal malpractice claims, it is necessary to have a clear and accepted definition of professionalism and the underpinnings of a legal malpractice case. Part III of this Article will address the distinct but interrelated definitions of “professional conduct/professionalism,” “disciplinary conduct,” and “legal malpractice” in order to provide a framework for incorporation.²⁸ Part IV will discuss the current state of legal malpractice cases generally in Section A, address possible objections such as courts’ greater regulation of attorney conduct and other limitations posed by legal malpractice cases in Section B, and outline the history of legal malpractice cases in Section C.²⁹ Part V will discuss the tort versus contract relationship of legal malpractice claims in Section A and outline the *prima facie* legal malpractice case under torts in Section B.³⁰ The use of expert testimony to establish the standard of care in legal malpractice claims is discussed in Part VI.³¹ Part VII will address the current trend of allowing evidence of violation of ethical rules as evidence of a violation of the standard of care.³² Part VIII will explore the correlation between professionalism and legal malpractice, and the need to secure a relationship between the two in an effort to increase professionalism in the legal profession.³³ Additionally, Part VIII will advance a scholarly and juristic proposal for methods to incorporate professionalism into the legal malpractice query grounded in tort by use of evidence of the standard of care and including the current definitions of “reasonable attorney” as interpreted by case law and the Model Rules of Professional Conduct.³⁴

III. PROFESSIONAL CONDUCT, DISCIPLINARY CONDUCT, AND LEGAL MALPRACTICE DEFINED

Often used interchangeably, professional conduct (professionalism), disciplinary conduct, and legal malpractice all include behaviors and

28. *See infra* Part III.

29. *See infra* Part IV.

30. *See infra* Part V.

31. *See infra* Part VI.

32. *See infra* Part VII.

33. *See infra* Part VIII.

34. *Id.*

conduct that are either expected and are beneficial to the legal profession, or, in the negative, are inappropriate and subject lawyers to potential disciplinary action or civil liability. Inappropriate conduct may be negligent (giving rise to a legal malpractice claim), or unprofessional, yet not subject the lawyer to disciplinary conduct. Similarly, disciplinary conduct that violates ethical rules may rise to a level of negligence and subject the attorney to a civil claim, but not necessarily have been carried out in an “unprofessional” manner. In order to fully explore the applicability of professional conduct in legal malpractice claims, the distinction among the three forms of “conduct” must be briefly analyzed.

A. Professional Conduct/Professionalism Defined

Professional conduct as it relates to lawyers is often described as “professionalism.” In its common meaning, “professionalism” is used to describe the aspirations, conduct and qualities that mark a professional person.³⁵ Professor Neil Hamilton, a renowned professionalism scholar, defined a tripartite model of professionalism consisting of (1) “Personal Conscience” (an awareness of the moral goodness or blameworthiness of one’s own intentions and conduct together with a feeling of obligation to be and do what is morally good); (2) the “Ethics of Duty” (the obligatory and disciplinary elements of the Model Rules of Professional Conduct) and (3) the “Ethics of Aspiration” (the core values and ideals of the profession).³⁶

Professor Hamilton lists elements such as personal conscience growth, compliance with the ethics of duty, internalization of the highest standards for the lawyer’s professional skills and ethical conduct, holding other lawyers accountable for the standards set forth in the Rules, and acting as a fiduciary to serving the client and the public good, a synthesis of which constitutes “professionalism.”³⁷

35. Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. ST. THOMAS L.J. 470, 472 (2008) [hereinafter Hamilton, *Assessing Professionalism*].

36. Neil Hamilton, *Professionalism Clearly Defined*, 18 PROF. LAW., no. 4, 2008, at 4, 8-11 (deriving his model through an analysis and synthesis of various ABA reports, Chief Justice Reports, and the Preamble to the Model Rules of Professional Conduct).

37. Hamilton, *Assessing Professionalism*, *supra* note 35, at 482-83. Professor Hamilton posits that professionalism means that each lawyer:

1. Continues to grow in personal conscience over his or her career;
2. Agrees to comply with the ethics of duty—the minimum standards for the lawyer’s professional skills and ethical conduct set by the Rules;
3. Strives to realize, over a career, the ethics of aspiration—the core values and ideals of the profession, including internalization of the highest standards for the lawyer’s professional skills and ethical conduct;
4. Agrees to both hold other lawyers accountable for meeting the minimum standards set forth in the Rules and encourage them to realize core values and ideals of the profession; and,

A more concise definition of lawyer professionalism has been stated as “attitudes and behaviors that supersede self-interest, serve to enhance public opinion and trust, adhere to high ethical and moral standards, and aspire daily to a commitment of excellence in one’s personal and professional life.”³⁸

In summary, the term professional conduct/professionalism broadly designates a lawyer’s comportment, demeanor, behavior, and conduct in his or her day-to-day activities, within and outside of the boundaries of legal practice, and above and beyond that which is required by ethical rules.

B. Disciplinary Conduct Defined

“Disciplinary conduct,” a narrower class than professional conduct, relates to attorney conduct that specifically violates state and national rules of ethics and professional responsibility, subjecting the attorney to disciplinary proceedings. For example, a lack of competent representation,³⁹ failure to act diligently or promptly in client representation⁴⁰ or maintain client confidentiality,⁴¹ or falsification of

-
5. Agrees to act as a fiduciary, where his or her self-interest is overbalanced by devotion to serving the client and the public good in the profession’s area of responsibility: justice. This includes:
 - a. Devoting professional time to serving the public good, particularly by representing pro bono clients; and,
 - b. Undertaking a continuing reflective engagement, over the course of a career, on the relative importance of income and wealth in light of the other principles of professionalism.

(footnotes omitted)

38. Nicola A. Boothe-Perry, *Standard Lawyer Behavior?: Professionalism as a Standard for ABA Accreditation*, 42 N.M. L. REV. 33 (2012) (enumerating a non-exclusive list of professionalism characteristics, including:

1. Respect for the practice of law;
2. Respect for the legal system and those persons involved;
3. Integrity;
4. Civility/courtesy; and the promotion of civility and mutual respect throughout the profession;
5. Cultivation of habits of personal living that enhance a moral core of responsibility to the profession;
6. Professional attitudes and behavior towards the court and colleagues;
7. Avoidance of personal attacks, rudeness, disrespectful or profane comments and aggressive behaviors that lead to unproductive or disruptive stress and conflict; and
8. Maintenance of a professional appearance to include appropriate attire).

39. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2011).

40. MODEL RULES OF PROF’L CONDUCT R. 1.3 (2011).

41. MODEL RULES OF PROF’L CONDUCT R. 1.6 (2011).

evidence,⁴² would all give rise to violations of the Model Rules of Professional Conduct and subject an attorney to disciplinary action by his or her state bar. State bar associations enforce the standards of ethics and professional responsibility dictated by Model Rules and Codes. Timely complaints⁴³ are investigated, and, if found to be substantiated, are generally referred to a grievance committee for further consideration and disciplinary action where appropriate. Disciplinary action can range from admonishment to suspension from the practice of law for a stated period of time, to complete disbarment.⁴⁴

In sum, disciplinary conduct is behavior that is a violation of a specific ethical rule of conduct or professional responsibility and subjects an attorney to state disciplinary proceedings. The losses a client may have incurred as a result of a lawyer's disciplinary conduct cannot be recovered through disciplinary conduct proceedings. The injured client would need to pursue his or her enforceable rights through normal civil processes.

C. Legal Malpractice Defined

Where disciplinary conduct does not afford monetary compensation for damages, a client may obtain compensation for losses arising from attorney misconduct by filing a legal malpractice claim. To establish a *prima facie* case, the injured client would have to prove that the attorney's conduct rose to the level of negligence.⁴⁵ Disciplinary conduct may form the basis for the *prima facie* case, but such proof is not necessary for the success of a legal malpractice claim, as other behaviors that have not been the subject of a disciplinary conduct proceeding can also give rise to a claim for damages.⁴⁶

The American judicial system, which allows for liability for proximately-caused injuries, provides incentive for all persons involved to emulate socially and professionally desired behavior. Just as the potential

42. MODEL RULES OF PROF'L CONDUCT R. 2.4(B) (2011).

43. State bar associations prescribe the applicable statutory time periods for filing disciplinary complaints against attorneys. For example, in the state of Florida, inquiries or complaints regarding disciplinary conduct must be commenced within six years from the time the matter giving rise to the inquiry or complaint is discovered or, with due diligence, should have been discovered. FLA. BAR R. 3-7.16 (West 2012). In other places, like Washington, D.C., no statute of limitations exists for bringing disciplinary proceedings against an attorney. See D.C. BAR R. XI, § 1(c) (2012).

44. FLA. BAR R. 3-5.1.

45. A more in-depth discussion of the *prima facie* case of a legal malpractice claim is detailed in Part V.B of this Article. See *infra* pp. 21-23.

46. See, e.g., Manuel R. Ramos, *Legal Malpractice: No Lawyer or Client Is Safe*, 47 FLA. L. REV. 1, 46 (1995) [hereinafter Ramos, *No Lawyer or Client*] ("[T]he typical causes of malpractice claims are not the same as those that lead to professional disciplinary actions." (quoting DUKE N. STERN, AN ATTORNEY'S GUIDE TO MALPRACTICE LIABILITY 36 (1997))).

for damages encourages plaintiffs to assert their rights in court, so can the potential for damages encourage attorneys to fulfill their legal duties and model acceptable behavior. Yet efforts to reform professional behavior among lawyers on various levels seem to have had little effect on courts' decisions in legal malpractice claims.⁴⁷

With a system that provides for liability for injuries, the bench holds a prime position to effectuate change and encourage professionalism among lawyers.⁴⁸ To understand the intersection of promoting professionalism and legal malpractice claims, the current status of such claims is instructive.

IV. CURRENT STATE OF MALPRACTICE

*"The idea that it is wrong to sue someone who tried to help you when you were in trouble is no longer influential."*⁴⁹

A. The Rise of Legal Malpractice Cases

Every year, insurance carriers providing legal malpractice coverage pay in excess of four billion dollars on claims.⁵⁰ Studies have shown that over half of malpractice claims are based not on allegations of substantive errors or lack of competency, but on allegations of intentional acts, careless administrative errors, client relations problems, or other reasons.⁵¹ Both those inside and outside the legal profession have expressed concern with legal malpractice, which has been described as a "crisis."⁵²

47. In an effort to encourage and improve professionalism amongst lawyers, various avenues have been proposed seeking participation from academia, the bar, and the bench. For example, analyses of legal academia's role has evidenced fertile ground for fostering professionalism beginning in law schools: from curriculum changes to administrative changes such as revision of Honor Codes. The American Bar Association's ability to effectuate an increase in form and practice of professionalism through the accreditation process has been similarly discussed.

48. See Dranoff, *supra* note 1, at 635 (arguing that courts could encourage competence if alterations were made to some elements comprising the tort of legal malpractice).

49. STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 612 (3d ed. 1992).

50. In the 1980s, estimated legal malpractice claim payouts ranged from \$3.8 to \$4 billion per year. See Manuel R. Ramos, *Legal Law School Malpractice: Confessions of a Lawyer's Lawyer and Law Professor*, 57 OHIO ST. L.J. 863, 866 (1996).

51. See Ramos, *No Lawyer or Client*, *supra* note 46, at 59-60 (discussing studies addressing the basis for legal malpractice claims); see also A.B.A. STANDING COMM. ON LAWYERS' PROF'L LIAB., PROFILE OF LEGAL MALPRACTICE: A STATISTICAL STUDY OF DETERMINATIVE CHARACTERISTICS OF CLAIMS ASSERTED AGAINST ATTORNEYS 3 (1986) (providing statistical data delineating percentiles of substantive errors, careless administrative errors, client relations problems, intentional acts, and other reasons).

52. See Nicole A. Cunitz, *Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion?*, 8 GEO. J. LEGAL ETHICS 637,

A statistical study of legal malpractice claims from the 1800s to 2011 evidenced three noteworthy “peaks.”⁵³ The first peak in the number of legal malpractice claims was noted at the middle of the nineteenth century, apparently coinciding with “major efforts to organize the profession, the corresponding formalization of the judicial system and the codification of the common law.”⁵⁴ The second, less significant peak was noted at the end of the nineteenth century, a time in which both ethical codes⁵⁵ and legislation addressing attorney abuse in the collecting of funds⁵⁶ were enacted. The third peak, beginning in the 1960s, corresponded with a “dramatic and steady increase in the frequency of legal malpractice litigation.”⁵⁷ This was particularly noticeable during the 1980s and generated much scholarly input.⁵⁸ Of present interest is the increase in appellate legal malpractice decisions noted in the new millennium.⁵⁹ Certain external factors may have contributed to the increase in legal malpractice actions, such as increases in other areas of litigation (specifically medical malpractice and product liability cases) and sociological factors⁶⁰ (such as heightened public awareness of legal malpractice).⁶¹ Also affecting the rates is an apparent correlation between the number of practicing lawyers in a given state and the number of reported malpractice decisions therein.⁶² It has been suggested that “changes in the nature of an attorney’s practice” have similarly contributed to malpractice suits, since lawyers expose themselves to greater risks when

639, 641 (1995) (noting that state bar associations have organized commissions to investigate “solutions to the crisis” of rising insurance rates resulting from increased legal malpractice claims).

53. See 1 MALLEN & SMITH, *supra* note 24, § 1:6 (including in the study only “those actions predicated on professional negligence or a breach of a fiduciary obligation, but not those solely concerning fraudulent conduct or a breach of an express promise”).

54. *Id.*

55. *Id.* § 20:7.

56. *Id.* § 1:6.

57. *Id.*

58. See, e.g., Dranoff, *supra* note 1, at 634 (noting a sharp increase in the 1980s in the number of malpractice suits and disciplinary actions brought against lawyers).

59. 1 MALLEN & SMITH, *supra* note 24, § 1:6.

60. *Id.* (“The increase of legal malpractice litigation does not mean that the attorneys are more error prone. The change in frequency of actions against attorneys must be viewed in the context of similar increases in other areas of litigation . . . [and] is similarly intertwined with numerous sociological factors that defy generalizations.”).

61. See Cunitz, *supra* note 52, at 641 (noting a “variety of irreversible social factors” that contributed to the increase in malpractice claims, including a “decrease in confidence in the legal profession arising out of the Watergate fiasco”).

62. For example, the District of Columbia ranks highest both in having the most practicing lawyers and the most reported legal malpractice decisions. However, Massachusetts has relatively few legal malpractice decisions, despite ranking third in practitioners per population. See 1 MALLEN & SMITH, *supra* note 24, § 1:6 n.11.

they become involved in clients' companies, such as by serving as directors and on boards.⁶³ With a paucity of identifiable data to pinpoint the causes of legal malpractice claims, this Article must couple the available hard data with some speculation. Competency per se (i.e., "substantive errors") accounts for less than half of all malpractice cases.⁶⁴ Administrative errors, client relations, and intentional acts account for a vast majority of legal malpractice claims.⁶⁵

In an effort to help lawyers reduce malpractice behavior, the American Bar Association Standing Committee on Lawyers' Professional Liability released data on a cross-section of legal malpractice claims from 2004 to 2007.⁶⁶ *Profile of Legal Malpractice Claims 2004-2007* provides a "snapshot" of malpractice claim activity.⁶⁷ Using data received from surveyed insurers that provide legal malpractice insurance, the committee provided a snapshot of the number and type of legal malpractice claims received.⁶⁸ The report noted that the number of claims with million-dollar payouts had been growing.⁶⁹ Between 2004 and 2007, forty-four claims resulted in indemnity payments of two million dollars or more, up from nineteen in the previous four years, according to the association's study.⁷⁰ The number of claimants winning payments between one million and two million dollars jumped to eighty, up from thirty-seven.⁷¹

A less articulated yet more glaring reason for the increase in legal malpractice claims has been the "growing hostility" of the public toward lawyers.⁷² This hostility, coupled with what has been identified as a lack of

63. Cunitz, *supra* note 52, at 642 ("[A] major problem is that too many of the ALAS lawyers are continuing to engage in various forms of entrepreneurial and other extracurricular activities, which in many cases make it more likely that they will be sued, and make it more difficult to defend the actions if they are sued. Among other things, entrepreneurial activities often provide the plaintiffs with a persuasive conflict of interest allegation." (quoting Robert E. O'Malley & William Freigvogel, *Lawyers' Entrepreneurial Activities: How to Maintain Professionalism, Avoid Malpractice Claims, and Not Get Rich While Practicing Law*, in AM. BAR ASS'N STANDING COMM. ON PROF'L RESPONSIBILITY, *THE LAWYER'S DESK GUIDE TO LEGAL MALPRACTICE* 149 (1992))).

64. See Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2619 (1996) (suggesting that teaching about legal malpractice will transform legal education by providing a "healthy dose of paranoia and respect" for claims caused by either substantive errors or other, more frequently occurring administrative errors, client relations, and intentional acts).

65. Ramos, *No Lawyer or Client*, *supra* note 46, at 59-60.

66. AM. BAR ASS'N, *PROFILE OF LEGAL MALPRACTICE CLAIMS 2004-2007*, at 1 (2008).

67. *Id.*

68. *Id.*

69. *Id.* at 14.

70. *Id.*

71. *Id.* at 13.

72. See Ramos, *Dirty Little Secret*, *supra* note 23, at 1681 (noting that two

professionalism, creates a "major problem" for the legal profession.⁷³ The hard data indisputably demonstrates that, regardless of the root cause, the increase in filings is evident and any issues of lack of professionalism that may have contributed to the increase of legal malpractice claims remain unresolved.

With no anticipated decline in the recurrence of legal malpractice filings, there exists a need for all aspects of the legal profession to make professional conduct norms more comprehensive. Historically, the courts have been reluctant to accept their position in regulating lawyer behavior.⁷⁴ Moreover, the courts have not willingly recognized the relationship between problems of professional responsibility and problems of legal malpractice law.⁷⁵ However, with an identified correlation between a lawyer's effectiveness and professionalism, coupled with the increase in legal malpractice cases, the need for the courts to invigorate lawyer accountability and compliance is evident. Undoubtedly, such intervention will be met with some resistance.

B. Potential Limitations to Use of Legal Malpractice Claims

Relying on legal malpractice claims as a catalyst for professionalism admittedly has its drawbacks. For example, there is limited ability to directly affect attorney behavior via legal malpractice claims. Moreover, courts may be hesitant to lose the reality or even appearance of impartiality and neutrality in such proceedings. The potential for individual judges to inject subjective notions, while present in all cases, may be heightened particularly where the judge is addressing an applicable standard of care. Finally, there is the general objection that the use of legal malpractice claims for a professionalism goal is merely a mask for additional lawyer regulation.

attention-deserving factors have led to the explosion of legal malpractice cases: "(1) the increase in the public's and jurors' hostility toward lawyers; and (2) the greater chance that a jury, not a judge, will decide issues of credibility, liability, damages, and defenses in legal malpractice lawsuits"); Randall Samborn, *Anti-Lawyer Attitude Up but NLJ/West Poll Also Shows More People Are Using Attorneys*, NAT'L L.J., Aug. 9, 1993, at 1 (reporting that, according to a National Law Journal/West Publishing Co. poll, "the widely held perception that resentment of lawyers—ranging from lawyer-bashing jokes to outright vilification—is running at a fever pitch. And it is especially high among better-educated, higher wage earners in society").

73. Ramos, *Dirty Little Secret*, *supra* note 23, at 1684.

74. See Susan P. Koniak, *When Courts Refuse to Frame the Law and Others Frame It to Their Will*, 66 S. CAL. L. REV. 1075, 1079-91 (1993) (criticizing courts for refusing to declare concrete standards for attorney behavior).

75. John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 157 (1995) ("Commentators and courts have not been sufficiently willing to recognize that the problems of legal malpractice law are substantially the same as the traditional problems of professional responsibility.").

1. Limited Ability for Direct Effect on Lawyers

Legal malpractice claims are generally initiated by clients. Because of the client-driven nature of these claims, the opportunities for attorney correction is concededly slim. In addition, legal malpractice claims will not address the behavior of counsel employed by and representing the state or federal government. Nevertheless, the implementation of professionalism as a factor to interpret the applicable standard of care in legal malpractice cases would have a decidedly noticeable impact on the attorneys involved in those cases, and could serve as a deterrent for other attorneys to affect a much larger percentage of the practicing bar.⁷⁶ Any policy or rules that will positively affect lawyer professionalism would be qualitatively beneficial regardless of the quantity of lawyers who will be initially affected. Good policy is built on preventative steps and should be implemented despite any alleged de minimus grounds.

2. Courts Lack of Impartiality & Potential for Subjective Standards

Litigants are entitled to “neutral and detached judge[s].”⁷⁷ Particularly in the context of a legal malpractice case, a judge’s possible bias for or against one of the litigants could lead to a fundamentally unfair outcome of any case. The objectivity and neutrality discussed in the *Village of Monroeville* case⁷⁸ could be threatened by any subjective determination of the standard of professionalism applied to legal malpractice cases. It is this concern that emphasizes the importance of a concise, clear, and accepted definition of what professionalism truly is. Adherence to an established professionalism standard—encompassing those “attitudes and behaviors that supersede self-interest [and] serve to enhance the public opinion and trust,”⁷⁹ as well as adherence to high ethical and moral standards and aspiration to daily commitments of excellence in a lawyer’s personal and professional life⁸⁰—would significantly decrease the likelihood of imposition of any judicial subjectivity, and maintain impartiality.

3. Objection to Greater Lawyer Regulation

Historically, proposals for courts to advance greater lawyer regulation have been met with objections that doing so will reduce public access to courts.⁸¹ One of the basic tenets of professional responsibility of lawyers is

76. See Leubsdorf, *supra* note 75, at 158.

77. Ward v. Monroeville, 409 U.S. 57, 61-62 (1972).

78. *Id.*

79. Boothe-Perry, *Standard Lawyer Behavior?*, *supra* note 38.

80. *Id.*

81. See Dranoff, *supra* note 1, at 635 (“Reforms that attempt to further the goal of increased attorney competence by making professional conduct standards more

that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence.⁸² This “free access policy” is grounded in the Fourteenth Amendment due process guarantees of the United States Constitution.⁸³ Objections to greater lawyer regulation rely on the theory that lawyers will respond to regulation by passing the risk of noncompliance to their clients via increased analysis and subsequent rejection of cases, and increased legal fees for those cases accepted.⁸⁴ An individual would then be stripped of the ability to retain the lawyer of his or her choice, and the unfettered access to quality legal services envisioned by the Supreme Court would disintegrate.

However, as noted by the Supreme Court in *Boddie v. Connecticut*,⁸⁵ the right of access to the judicial system afforded to all individuals is not an absolute guarantee,⁸⁶ but has boundaries “within the limits of practicality.”⁸⁷ Examples of interests that the courts have held do not rise to the level of *Boddie* access are bankruptcy filings,⁸⁸ welfare benefit determinations,⁸⁹ and prisoner requirement to pay filing fees.⁹⁰ In fact, the Third Circuit has noted that an “unconditional right of access exists for civil cases only when denial of a judicial forum would implicate a fundamental human interest—such as the termination of parental rights or the ability to obtain a divorce.”⁹¹

comprehensive may frustrate the goal of unhampered access.”).

82. See, e.g., AM. BAR ASS'N, ASSOCIATION GOALS (2012), available at http://www.americanbar.org/utility/about_the_aba/association_goals.html (stating as one of its objectives the assurance of “meaningful access to justice for all persons”). See generally MODEL RULES OF PROF'L CONDUCT pmbl. & scope (2011).

83. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

84. See Dranoff, *supra* note 1, at 643 (stating that in response to increased comprehension of competence standards, “rational lawyers” will respond “through higher legal fees and a reluctance to accept cases in which victory does not appear certain”).

85. See *Boddie*, 401 U.S. at 371.

86. See *id.* at 382-83.

87. *Id.* (“We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual.”); see also *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950).

88. *United States v. Kras*, 409 U.S. 434, 441, 443 (1973).

89. *Ortwein v. Schwab*, 410 U.S. 656, 659 (1973).

90. See *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 313-14 (3d Cir. 2001). But see *Burens v. Ohio*, 401 U.S. 371 (1971) (holding that a prisoner’s inability to appeal to the state’s supreme court because of his inability to pay court filing fees deprived him of his right to Due Process).

91. *Abdul-Akbar*, 239 F.3d at 314; see also *M.L.B. v. S.L.J.*, 519 U.S. 102, 113 (1996) (holding that Due Process prohibits a State from denying access to its courts to individuals seeking dissolution of marriage, solely because of an inability to pay, given

With no absolute guarantee, the criticism of increased lawyer regulation cannot be substantiated through concerns of limited access to courts. Moreover, a system that would allow greater access to courts while sacrificing lawyer regulation and subsequently lawyer professionalism is neither an acceptable nor a preferred system. The courts can exercise their ability to balance access objectives and professionalism requirements by articulating an ascertainable standard of care for lawyers as a minimal acceptable level of conduct. To date, no clearly articulated standard of care has been enunciated for legal malpractice cases. In an effort to understand the jurisprudential hesitation in this area, a brief review of the history of the legal malpractice case is warranted.

C. The History of the Legal Malpractice Case

Courts have struggled with the concept of legal malpractice as far back as the eighteenth century. In 1767, the Court of King's Bench in *Pitt v. Yalden* was faced with an attorney's alleged "mistake."⁹² The court, although recognizing that a client may have a claim against his or her attorney for damages "suffered,"⁹³ denied recovery on grounds that the attorney could be liable only for "gross negligence" and not for an "honest mistake."⁹⁴ Then, in 1796, the underpinnings of the duty element in a legal malpractice case became evident in one of the first recorded cases of legal malpractice in the United States.⁹⁵ In *Stephens v. White*, the Supreme Court of Virginia reviewed the appeal of a client who filed suit against his attorney for failure to file a declaration, resulting in loss to the client.⁹⁶ The court noted, "It is undoubtedly true, that an attorney is liable for neglect of duty, and that he is bound to make retribution to his client for the injury which he may thereby sustain."⁹⁷ As in *Pitt*, the Court in *Stephens* did not find the attorney liable for an honest mistake, premising liability for

the "basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship" (quoting *Boddie*, 401 U.S. at 371)).

92. *Pitt v. Yalden*, 4 Burr. 2060, 2061, 98 Eng. Rep. 74, 75 (K.B. 1767).

93. *Id.* at 75 ("[T]he remedy may be had by their clients against them, either in a summary way; or by way of reference to the Master, 'to see what damage the plaintiff has suffered,' or it may be sought by an action, if the plaintiff chooses that method." (quoting *Fowler v. Windsor* (Gr. Brit. July 3, 1788))).

94. *Id.* ("The attorneys [sic] are far from having been guilty of any gross misbehavior [sic]. It does not appear to me, that they were grossly negligent, or grossly ignorant, or intentionally blamable: they were country attorneys [sic]; and might not, and probably did not know that this point was settled here above. The words of the Act are not so explicit as to direct them clearly: and they might act innocently.").

95. *Stephens v. White*, 2 Va. 203 (1796).

96. *Id.* at 209.

97. *Id.* at 211 (Carrington, J., concurring).

malpractice only for gross negligence.⁹⁸

The “gross negligence” requirement for liability remained firmly grounded in American case law into the late 1800s.⁹⁹ Towards the late nineteenth century, courts began to reject the “gross negligence” standard and assessed liability for acts of “ordinary” negligence.¹⁰⁰ In subsequent years, the concept of the “reasonable man” began to emerge in general tort case law, with a parallel emergence in the standard of care for legal malpractice cases.¹⁰¹ As legal malpractice developed in the American courts, the prevailing concept of an affirmative duty to use “reasonable skill and diligence” evolved.¹⁰² To date, every American jurisdiction has recognized attorneys’ liability to aggrieved clients under a theory of legal malpractice.¹⁰³ Legal malpractice claims have therefore become an increasing reality for attorneys.¹⁰⁴

In defining “legal malpractice,” leading scholars in the field, Ronald E. Mallen and Jeffrey M. Smith, take two different approaches: (1) a theoretical approach which defines malpractice as it relates to bases of liability that are “unique” to the legal profession and concerns the quality of professional services provided;¹⁰⁵ and (2) a practical approach which

98. *Id.* at 209 (majority opinion).

99. *See, e.g.*, Pearson v. Darrington, 32 Ala. 227, 260 (1842) (finding liability only for gross negligence); Wilson v. Russ, 20 Me. 421, 424 (1841) (holding an attorney liable if the client is “injured by the gross fault, negligence, or ignorance of the attorney”); Fitch v. Scott, 4 Miss. 314, 317-18 (1839) (“The law implies a promise on the part of attorneys, that they will execute the business entrusted to their professional management, with a reasonable degree of care, skill and dispatch [sic], and they are liable to an action, if guilty of a default in either of these duties, whereby their clients are injured. There must, however, be gross negligence or ignorance, and if the attorney acts to the best of his skill, and with a *bona fide* degree of attention, he will not be responsible.” (citation omitted)); Morrill v. Graham, 27 Tex. 646, 651-52 (1864) (finding liability only for gross negligence); Isham v. Parker, 29 P. 835, 843 (Wash. 1892) (holding attorney liable only for gross negligence or gross ignorance).

100. *See, e.g.*, Babbitt v. Bumpus, 41 N.W. 331, 337 (Mich. 1889); Hill v. Mynatt, 59 S.W. 163, 166 (Tenn. Ct. App. 1900).

101. 1 MALLEN & SMITH, *supra* note 24, § 1:5 (holding that a solicitor should not lose his fee for an error such as “a cautious man” might make (quoting Montriou v. Jeffreys, 172 Eng. Rep. 51 (1825))); Godefrey v. Dalton, 130 Eng. Rep. 1359, 1359 (C.P. 1830); *see also* Fishman v. Brooks, 487 N.E.2d 1377, 1379 (Mass. 1986) (“An attorney who has not held himself out as a specialist owes his client a duty to exercise the degree of care and skill of the average qualified practitioner.”); Diane H. Dreyfus, Comment, Clark v. Rowe: *Should Comparative Negligence Be an Affirmative Defense to Legal Malpractice Claims in Massachusetts?*, 34 NEW ENG. L. REV. 907, 914 (2000) (recognizing the duty of an attorney to a client (citing McLellan v. Fuller, 115 N.E. 481, 481-82 (Mass. 1917))).

102. 1 MALLEN & SMITH, *supra* note 24, § 1:5; *see also* Pennington’s Ex’rs v. Yell, 11 Ark. 212, 231 (1850).

103. *See* 1 MALLEN & SMITH, *supra* note 24, § 1:1 (noting that all jurisdictions have reported appellate decisions involving damage actions against attorneys for negligence).

104. *See supra* Part IV.A; 1 MALLEN & SMITH, *supra* note 24, § 1:1.

105. 1 MALLEN & SMITH, *supra* note 24, § 1:1.

catalogs types of claims asserted against lawyers, e.g., claims brought by adversaries or non-clients, claims filed in response to an action for attorney's fees, negligence in the handling of the attorney-client relationship,¹⁰⁶ and negligence based on attorney error.¹⁰⁷ Both approaches entail the underlying principle of a duty owed to a client by his or her attorney. The analysis of this duty varies by court depending on whether the theory of the legal malpractice case is grounded in tort or contract.

V. BASIS OF A LEGAL MALPRACTICE CASE

A. Legal Malpractice—Tort or Contract?

In general terms, legal malpractice claims are grounded in either contract or tort law.¹⁰⁸ Some courts view the claims as a contract action arising from the attorney's breach of an implied promise to use a reasonable degree of skill and care in the exercise of his professional duties.¹⁰⁹ Other courts, however, view it as a tort action that results from the attorney's breach of duty to use reasonable care—a duty created by the attorney-client relationship.¹¹⁰ In some jurisdictions, the determination of whether a claim falls under tort or contract is oftentimes ambiguous.¹¹¹ Many courts do not recognize the distinctions between the causes of action, and instead treat it as a tort action regardless of how the claim is characterized.¹¹² Plaintiffs in

106. *See id.* (noting that approximately one-fourth of legal malpractice claims are based on alleged attorney error in handling the attorney-client relationship).

107. *Id.*

108. *See* AM. BAR ASS'N STANDING COMM. ON PROF'L RESPONSIBILITY, *supra* note 63, at 4 (stating that legal malpractice claims are generally based in either negligence or breach principles); *see also* Jonathan M. Albano, Note, *Contorts: Patrolling the Borderland of Contract and Tort in Legal Malpractice Actions*, 22 B.C. L. REV. 545, 546 (1981) (stating that legal malpractice claims actually fall somewhere in the "borderland" between contract and torts (citing William Prosser, *The Borderland of Tort and Contract*, in *SELECTED TOPICS IN THE LAW ON TORTS* (1953))).

109. 1 MALLEN & SMITH, *supra* note 24, § 8:6; *see also* MacLellan v. Throckmorton, 367 S.E.2d 720, 721 (Va. 1988).

110. *See, e.g.,* Jones v. Wadsworth, 791 P.2d 1013, 1015 (Alaska 1990); Funnell v. Jones, 737 P.2d 105, 109 (Okla. 1985).

111. In Massachusetts, for example, a plaintiff may elect to bring either a breach of contract action or an action in tort without having to choose between the two labels. *See* Hendrickson v. Sears, 310 N.E.2d 131, 132 (Mass. 1974) (citing Ashley v. Root, 4 Allen 504, 506 (1862)); *see also* Collins v. Reynard, 607 N.E.2d 1185, 1186 (Ill. 1992); Blanche M. Manning, *Legal Malpractice: Is It Tort or Contract?*, 21 LOY. U. CHI. L.J. 741, 742 (1990).

112. *See* Ray Ryden Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235, 235 (1994) (citing Chi. Title Ins. Co. v. Holt, 244 S.E.2d 177, 180 (N.C. Ct. App. 1978)); *see also* Woodburn v. Turley, 625 F.2d 589, 592 (5th Cir. 1980); Black v. Wills, 758 S.W.2d 809, 814 (Tex. App. 1988); Pham v. Nguyen, 763 S.W.2d 467, 469 (Tex. App. 1988); Gabel v. Sandoval, 648 S.W.2d 398, 399 (Tex. App. 1983); Citizens State Bank v. Shapiro, 575 S.W.2d 375, 386 (Tex. Civ. App. 1978).

legal malpractice cases are particularly concerned with the tort versus contract debate where the choice will impact any applicable statute of limitations or a statute providing a remedy or damage recovery.¹¹³ The plaintiff in a majority of jurisdictions is able to choose the more procedurally-friendly cause of action in bringing suit against the attorney-defendant.¹¹⁴ Notwithstanding the theory of recovery, the standard for the legal malpractice claim is the same regardless of whether the case is one of breach of contract or negligence,¹¹⁵ with the attorney being liable for all damages proximately caused by his or her wrongful act.¹¹⁶

Legal scholars have noted that the distinction between tort and contract in legal malpractice claims is "artificial" at best, and have proposed that courts should not be bound by such distinctions, but instead should "look behind form to the gist of the action."¹¹⁷ Many courts have heeded the admonition and, recognizing the similarity between actions of legal malpractice brought in tort and those brought in contract, have shown an inclination to overlook historical distinctions in doctrine and apply the principle that recurring fact situations deserve similar treatment.¹¹⁸ Appreciating the similarities between tort and contract legal malpractice

113. 1 MALLIN & SMITH, *supra* note 24, § 8:1.

114. *See* Denzer v. Rouse, 180 N.W.2d 521, 523 (Wis. 1970); *cf.* Flaherty v. Weinberg, 492 A.2d 618, 627 (Md. 1985); Hutchinson v. Smith, 417 So. 2d 926, 927 (Miss. 1982). *See generally* RONALD E. MALLIN & VICTOR B. LEVIT, LEGAL MALPRACTICE § 382 (2d ed. 1981) (stating that generally the court begins with the parties' pleadings, thereby allowing the plaintiff in the suit to direct the path of the court).

115. *See generally* [1984] Laws. Man. on Prof. Conduct (ABA/BNA) (indicating that negligence and breach of contract are common theories of malpractice liability, but intentional misconduct may also be a source of liability to clients). Whether a malpractice claim is fashioned under a tort or contract theory, the consideration becomes important as to the applicable statute of limitations. *See* Albano, *supra* note 108, at 545-46 ("Of particular importance to a plaintiff in a legal malpractice action are different rules of tort and contract regarding the length of the statute of limitations; accrual of the cause of action for statute of limitation purposes; survivability of the action; and types of damages recoverable." (footnote omitted)); Dreyfus, *supra* note 101, at 921.

116. 3 MALLIN & SMITH, *supra* note 24, § 21:4.

117. *See* Albano, *supra* note 108, at 546 (submitting that the original justifications for certain distinctions between tort and contract no longer exist, and that justice demands equal rules be applied to all plaintiffs in legal malpractice actions, regardless of the form in which the suit is brought).

118. *See id.* at 551, 554 (noting that the essential similarity between the suits militates in favor of applying similar rules regarding statute of limitations, accrual date, and survivability of the action); *see also* Lidner v. Eicher, 232 N.Y.S.2d 240, 245 (App. Div. 1962) (noting that although the negligence was not the gravamen of the complaint, it was still an integral part of the breach of contract claim where the attorney performed his task unskillfully); Registered Cnty. Homebuilders, Inc. v. Stebbins, 179 N.Y.S.2d 602, 604 (App. Div. 1958) (noting that damages for negligent errors is contractual not tort). *But see* Cherokee Rest., Inc. v. Pierson, 428 So. 2d 995, 998 (La. Ct. App. 1983) (stating that only when an attorney breaches an express warranty does an action for breach of contract arise).

claims, this Article will specifically analyze the legal malpractice claim premised on a tort theory in order to highlight the opportunity for the courts to use that cause of action to enhance professionalism in the legal arena.

B. Prima Facie Case Under Tort Theory

The elements of a legal malpractice¹¹⁹ claim arising from a civil action mirror those required for any civil tort claim rooted in negligence: a duty, a breach, causation, and damages.¹²⁰ From a technical standpoint, the courts have recognized five elements (or some combination thereof)¹²¹ as necessary to form a prima facie case of legal malpractice: (1) the existence of an attorney-client relationship;¹²² (2) a duty owed to the client as a result

119. Where the malpractice claim is brought by a client against an attorney who represented him or her in a criminal matter, it is often termed "criminal malpractice." See Rebecca A. Copeland, *Toward a More Effective Standard of Review: The Potential Effect of Burdine v. Johnson on Legal Malpractice in Texas*, 33 ST. MARY'S L.J. 849, 864 (2002) (analyzing and identifying "criminal malpractice"); David H. Potel, Comment, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542, 542-43 (1981) (stating that the elements of civil and criminal malpractice are identical).

120. Copeland, *supra* note 119, at 864.

121. See, e.g., WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 143 (4th ed. 1971) (indicating that cause-in-fact and proximate cause are often combined into a single element).

122. 1 MALLEN & SMITH, *supra* note 24, § 8:4. While the prevailing law is that an attorney owes a duty to his client, some court decisions have held lawyers liable to non-clients in legal malpractice claims, imposing a duty as a matter of public policy; see *Levin v. Gulf Ins. Grp.*, 82 Cal. Rptr. 2d 228, 229-30 (Ct. App. 1999) (holding that opposing party attorneys were liable for intentional interference with prospective economic advantage when, after receiving notice of a lien for attorney fees from the plaintiff, they paid the new counsel of the plaintiff's former client instead); *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999); *Murphy v. Cain*, 711 S.W.2d 302, 304 (Tex. Ct. App. 1986) (stating that an attorney can be liable as a principal for a contract if he expressly or impliedly assumed liability for a contract on behalf of the client); 1 MALLEN & SMITH, *supra* note 24, §§ 6:1-6:29. But see *Homeowners' Assistance Corp. v. Merrimack Mortg. Co.*, No. CV-99-132, 2000 WL 33679263, at *3 (Me. Super. Jan. 24, 2000) (stating that privity of contract need not be shown for a negligent representation but negligent misrepresentation is not equivalent to a professional malpractice claim as there is no duty owed to the non-client). However, the states remain split regarding whether privity between the attorney and the legal malpractice plaintiff is required to maintain the cause of action. The differing standards and allowance for non-clients to file legal malpractice claims is outside the scope of this Article; see H. Robert Fiebach, *Expanding the Plaintiff Pool*, 81 A.B.A. J. 76 (1995) (discussing the success of nonclients in malpractice claims against lawyers); see also David J. Beck & Geoff A. Gannaway, *The Vitality of Barcelo After Ten Years: When Can an Attorney Be Sued for Negligence by Someone Other than His Client?* 58 BAYLOR L. REV. 371, 373 (2006); Forest J. Bowman, *Lawyer Liability to Non-clients*, 97 DICK. L. REV. 267, 267 (1993); Edward S. Cheng, *An Attorney's Duty to Non-clients*, 37 NEW ENG. L. REV. 55, 55 (2002); Jay M. Feinman, *Attorney Liability to Nonclients*, 31 TORT & INS. L.J. 735, 735 (1996); Todd A. Fuller, *Attorney Liability to Estate Beneficiaries: The Privity Passes Through*, 100 DICK. L. REV. 29, 29 (1995); Ronald E. Mallen, *Duty to Nonclients: Exploring the Boundaries*, 37 S. TEX. L. REV. 1147, 1147-48 (1996); Orintha E. Karns, Note, *Professional Responsibility—Two's Company, Three's a Crowd? The Implications of Attorney Liability to Non-client Beneficiaries* *Connely v. McColloch* (In re Estate of Drwenski),

of the attorney-client relationship;¹²³ (3) breach of the attorney duty by failure to perform in accordance with established standards of care or conduct of a “reasonable attorney”; (4) establishment that the breach was the proximate cause of injury or loss;¹²⁴ and (5) the existence of damages.¹²⁵ The inception of the attorney-client relationship marks the point at which the attorney owes a duty to the client.¹²⁶ Once the plaintiff satisfies his or her burden of proof and establishes the existence of the attorney-client relationship,¹²⁷ the plaintiff must then provide evidence of a breach of the attorney’s fiduciary duty.¹²⁸ This element is satisfied where the plaintiff establishes that the attorney acted in a negligent manner.¹²⁹ The plaintiff must next prove causation, i.e., that the attorney’s negligence (or breach of contract) was in fact the cause of the harm.¹³⁰ The causation analysis requires both a determination of cause-in-fact, and proximate/legal cause.¹³¹ An attorney is subsequently liable for any foreseeable loss caused

83 P.3d 457 (Wyo. 2004), 5 WYO. L. REV. 525, 525 (2005); John M. Limbaugh, Note, *The Sacrificial Attorney: Assignment of Legal Malpractice Claims*, 65 MO. L. REV. 279, 283-84 (2000).

123. 1 MALLEN & SMITH, *supra* note 24, §§ 8:2, 8:3.

124. *Id.* § 8.4; *see also* Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537, 543 (2d Cir. 1994) (upholding a \$2 million verdict, finding that the traditional “but for” causation test was not required and that if the attorney’s conduct was a “substantial factor” in causing loss, the client should prevail); Resolution Trust Corp. v. Stroock & Stroock & Lavan, 853 F. Supp. 1422, 1425, 1427-28 (S.D. Fla. 1994) (stating that the “but for” relationship between the negligence and damages is not required to establish legal causation under Florida law).

125. 2 MALLEN & SMITH, *supra* note 24, § 19:1.

126. *See generally* BURKOFF, *supra* note 8.

127. *See* McGlone v. Lacey, 288 F. Supp. 662, 665-66 (D.S.D. 1968) (“[I]t is the general rule that an attorney’s liability for malpractice is limited to some duty owed to a client. . . . Where there is no attorney/client relationship there is no breach or dereliction of duty and therefore no liability.”); Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977); Dreyfus, *supra* note 101, at 913-14 (noting that in order to prove a duty exists, the client must prove the existence of an attorney-client relationship; whether the attorney-client relationship exists is a question of fact).

128. Scholars have suggested that a separate cause of action be allowed for breach of an attorney’s fiduciary standard to a client, defining the fiduciary standard as a “duty to exercise in all his relationships with this client-principal the most scrupulous honor, good faith, and fidelity to his client’s interest.” Anderson & Steele, *supra* note 112, at 236 (quoting Daugherty v. Runner, 581 S.W.2d 12, 16 (Ky. Ct. App. 1978)).

129. *See* 2 MALLEN & SMITH, *supra* note 24, § 15:2.

130. *Id.*

131. For a full discussion of the causation element of a legal malpractice claim, *see generally* Mahaffey, *supra* note 27 (arguing in favor of using the “but-for” test to determine cause-in-fact in the transactional legal malpractice context); Richard H. W. Maloy, *Proximate Cause: The Final Defense in Legal Malpractice Cases*, 36 U. MEM. L. REV. 655, 656 (2006) (discussing the defendant-attorney’s ability to defeat recovery by showing that the plaintiff has failed in her burden of establishing the attorney as the legal source of her damages); John B. Spitzer, *Legal Malpractice: A Recent Discussion of the “But-for” Causation Requirement*, 53 PRAC. LAW. 9 (2007).

by his negligent actions (i.e., his breach of the fiduciary duty).¹³² The plaintiff may recover for both tangible and intangible injuries, including emotional damages.¹³³

It is this notion of “negligent actions” (i.e., those actions that fall below the threshold of a reasonable attorney) that provides fertile ground for the applicability of professionalism. In most banal terms, in order for an attorney to comply with the necessary duty of care, the “degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law” must be exercised.¹³⁴ In order to determine the appropriate “degree of care, skill, diligence and knowledge,” the trier of fact employs the use of expert witnesses, i.e. testimony by other lawyers.¹³⁵

VI. USE OF EXPERT TESTIMONY TO ESTABLISH STANDARD OF CARE

All professionals are required to possess the “skill and knowledge normally possessed by members of that profession.”¹³⁶ As a professional, an attorney is recognized as possessing “knowledge and skill superior to that of the ordinary person,” and is therefore held to this higher standard of care.¹³⁷ As with other civil negligence claims against professionals, except in cases of gross negligence,¹³⁸ the trier of fact depends on testimony of

132. 2 MALLEN & SMITH, *supra* note 24, §19:1.

133. *Carlson v. Ill. Farmers Ins. Co.*, 520 N.W.2d 534, 536 (Minn. Ct. App. 1994); *Air Fla., Inc., v. Zondler*, 683 S.W.2d 769, 773 (Tex. App. 1985); Lawrence W. Kessler, *The Unchanging Face of Legal Malpractice: How the “Captured” Regulators of the Bar Protect Attorneys*, 86 MARQ. L. REV. 457, 481 (2002) (citing *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993)).

134. *Hansen v. Wightman*, 538 P.2d 1238, 1247 (Wash. Ct. App. 1975) (quoting *Cook, Flanagan & Berst v. Clausing*, 438 P.2d 865, 866 (Wash. 1968)).

135. 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, 74 (1998); Dranoff, *supra* note 1, at 645-46.

136. RESTATEMENT (SECOND) OF TORTS § 299A (1965).

137. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 185 (5th ed. 1984) (noting that a person with knowledge, skill, or intelligence superior to that of the ordinary person must employ those special skills in conducting himself with due care); 2 MALLEN & SMITH, *supra* note 24, § 20:1 (citing *Daugherty v. Runner*, 581 S.W.2d 12 (Ky. Ct. App. 1978)); *Theobald v. Byers*, 13 Cal. Rptr. 864, 866 (Dist. Ct. App. 1961).

138. In cases where breach of the standard of care is obvious, the finder of fact needs no further guidance. *See, e.g., Wagenmann v. Adams*, 829 F.2d 196, 219-20 (1st Cir. 1987) (holding that “gross or obvious” malpractice resulted when a lawyer did nothing to prevent an apparently sane client from being committed to a mental institution); *Lane v. Cold*, 882 So. 2d 436, 438 (Fla. Dist. Ct. App. 2004) (requiring no expert testimony in a suit against an attorney for malpractice in failing to prepare a buy-sell agreement); *Collins v. Greenstein*, 595 P.2d 275, 283, 286 (Haw. 1979) (holding that attorney’s negligence was sufficiently clear when he failed to raise affirmative defenses in answer); *Bernstein v. Glavin*, 725 N.E.2d 455, 458, 462 (Ind. Ct. App. 2000); *Bowman v. Doherty*, 686 P.2d 112, 112 (Kan. 1984) (failure to appear in court); *Cent. Cab Co. v. Clarke*, 270 A.2d 662, 662 (Md. 1970) (failure to notify

expert witnesses to establish the “reasonableness” of challenged conduct.¹³⁹ The same is true of the use of expert witnesses to establish liability in legal malpractice cases¹⁴⁰ by determining the “reasonableness” of an attorney’s actions. During the action for legal malpractice, the question of reasonableness ordinarily relates not so much to what was done as to whether the attorney’s acts were within the law’s standards for the due care, skills, and diligence required.¹⁴¹ In essence, the expert must testify as to whether or not the attorney acted as a “reasonable attorney” would, exercising the “skill and knowledge ordinarily¹⁴² possessed by attorneys” in the same jurisdiction.¹⁴³ To be credible, the testimony rendered by the expert should not be contrary to any applicable Rules of Professional Conduct.¹⁴⁴ The strength or weakness of the expert witness’ testimony

client of termination of representation); *Joos v. Auto-Owners Ins. Co.*, 288 N.W.2d 443, 443 (Mich. Ct. App. 1979) (failure to settle upon client’s request); *Carbone v. Tierney*, 864 A.2d 308, 314 (N.H. 2004) (noting that expert opinion testimony is unnecessary “where the subject presented is within the realm of common knowledge and everyday experience”); *Gayhart v. Goody*, 98 P.3d 164, 169 (Wyo. 2004) (recognizing a layperson’s ability to determine the appropriate standard of care by his own common sense and experience); *cf. Hooks v. Ciccolini*, No. 20745, 2002 WL 1023172, at *3 (Ohio Ct. App. May 15, 2002) (finding that allegations that the attorney breached his duty of care by advising legal malpractice plaintiff to plead guilty to burglary and gun specification, failing to test cocaine, and failing to timely provide plaintiff with his file were not so obvious that malpractice could be determined by trier of fact without expert testimony).

139. See *Noske v. Friedberg*, 713 N.W.2d 866, 871 (Minn. Ct. App. 2006); *Luvenc v. Waldrup*, 903 So. 2d 745, 748 (Miss. 2005) (“Expert testimony is ordinarily necessary to support an action for legal malpractice.”); *Stoeckel v. Twp. of Knowlton*, 902 A.2d 930, 938 (N.J. Super. Ct. App. Div. 2006) (stating that an expert is usually required to explain a breach of duty); 2 MALLEN & SMITH, *supra* note 24, § 20:7; *Munneke & Davis*, *supra* note 135, at 56 (“An essential aspect of the professional standard of care is the notion that the reasonableness of particular conduct engaged in by members of a group may be established by looking at the conduct of other members of the group in similar circumstances.”).

140. For a general discussion of use of expert witnesses in legal malpractice cases, see Michael P. Ambrosio & Denis F. McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases*, 61 TEMP. L. REV. 1351 (1988).

141. See 14 AM. JUR. *Trials* § 14 (1968).

142. The difference between “reasonable” and “ordinary” was noted by Mallen and Smith: “The ultimate test of competence is reasonable conduct, which is determined by the standard of care that requires the exercise of skill and knowledge ordinarily possessed by attorneys under similar circumstances. ‘Ordinary’ care . . . is not based on what some other lawyers do . . . the standard is objectively based on what lawyers should do.” 2 MALLEN & SMITH, *supra* note 24, § 20:3.

143. See *Lipton v. Boesky*, 313 N.W.2d 163, 165 (Mich. Ct. App. 1981); *Martinson Bros. v. Hjelsum*, 359 N.W.2d 865 (N.D. 1985); *Hizey v. Carpenter*, 830 P.2d 646 (Wash. 1992); see also 14 AM. JUR. *Trials* § 2 (1968).

144. See, e.g., *Miami Int’l Realty Co. v. Paynter*, 841 F.2d 348, 353 (10th Cir. 1998) (permitting expert testimony so long as expert did not testify that the ethical standards had the force and effect of a law); *Day v. Rosenthal*, 217 Cal. Rptr. 89 (Dist. Ct. App. 1985) (noting that expert testimony was not required because the standards governing an attorney’s ethical duties are conclusively established by the Rules of Professional Conduct and cannot be changed by expert testimony).

often determines the outcome of the case.¹⁴⁵ The courts rely on the testimony to analyze the following criteria: (1) requisite skill and knowledge; (2) the degree of skill and knowledge to be possessed and exercised; (3) the effect of local considerations and custom; and (4) any special abilities possessed by the lawyer.¹⁴⁶ The required skills and knowledge should encompass the lawyer's ability to reveal his or her competency in a manner befitting a legal professional. The tenets of professionalism, therefore, should be a vital consideration in the determination of whether or not a lawyer acted in a manner acceptable to the profession not just within the limits, but above the directives of any applicable ethical rules.

VII. USE OF ETHICAL RULES IN LEGAL MALPRACTICE CLAIMS

The use of legislatively-enacted statutes, administrative codes, and regulatory provisions is not foreign to tort law. For instance, federal, state, and legislatively-enacted provisions are often analyzed to elicit the appropriate standard of care in a given profession or industry;¹⁴⁷ and the doctrine of negligence *per se* is predicated on proof of a violation of a statute or code.¹⁴⁸ The professional responsibility of attorneys has long been governed by codes and regulatory provisions in the form of ethical standards and rules.¹⁴⁹ In 1908, the American Bar Association promulgated the Canons of Professional Ethics.¹⁵⁰ The subsequent Model Code of Professional Responsibility was adopted in 1969,¹⁵¹ and after a series of

145. See, e.g., *Lentino v. Fringe Emp. Plans, Inc.*, 611 F.2d 474, 480 (3d Cir. 1979) (requiring expert testimony to establish the relevant standard); *Bonhiver v. Rotenberg, Schwartzman & Richards*, 461 F.2d 925 (7th Cir. 1972) (reversing a finding of liability due to the lack of expert testimony); *Dorf v. Relles*, 355 F.2d 488, 492 (7th Cir. 1966) (reciting the requirement of expert witness testimony in medical and attorney malpractice cases); *Fitzgerald v. Walker*, 747 P.2d 752, 752, 757 (Idaho 1987) (ruling that a client's testimony is insufficient); *Kubik v. Burk*, 540 N.W.2d 60, 64 (Iowa Ct. App. 1995); *Sanders v. Smith*, 496 P.2d 1102, 1104-05 (N.M. Ct. App. 1972); *Roy v. Diamond*, 16 S.W.3d 783 (Tenn. Ct. App. 1999) (noting that the probative value of prior findings of fact and judgment from disciplinary proceeding was not substantially outweighed by the danger of unfair prejudice where there was also expert testimony that attorney violated the applicable standard of care); KEETON, *supra* note 137, at 188 n.49 (noting that, because juries are composed of laypersons, they "are normally incompetent to pass judgment on questions of [professional judgment and] the great majority of [professional negligence cases hold] that there can be no finding of negligence in the absence of expert testimony"); see also 14 AM. JUR. *Trials* § 14 (1968).

146. 2 MALLEN & SMITH, *supra* note 24, § 18:12.

147. Munneke & Davis, *supra* note 135, at 68.

148. *Id.*

149. See Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients and Professional Regulations*, 1 AM. B. FOUND. RES. J. 917 (1976).

150. MODEL RULES OF PROF'L CONDUCT preface (2011).

151. *Id.*

revisions, the widely used Model Rules of Professional Conduct was adopted in 1983.¹⁵² Currently, almost every state Bar has adopted a version of the Model Rules of Professional Conduct.¹⁵³ As the Scope of the Model Rules notes, the Rules are “partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer’s professional role”¹⁵⁴ by “provid[ing] a framework for the ethical practice of law.”¹⁵⁵ The cross-jurisdictional adoption of the Rules suggests a widely-accepted commonality of attorney behavior standards.¹⁵⁶

Failure to avoid prohibited actions, or to comply with obligations imposed by the Rules, “is a basis for invoking the disciplinary process.”¹⁵⁷ By allowing for disciplinary proceedings against lawyers who violate the Model Rules of Professional Conduct, both the profession and the public generally are protected from lawyer misconduct.¹⁵⁸ The interrelation between the ethical rules and malpractice becomes evident where the basis for a disciplinary complaint serves as a basis for a malpractice action.¹⁵⁹ A plaintiff injured by an attorney’s malpractice may have a valid disciplinary

152. *Id.*

153. *Id.* (noting that all but eight states have adopted some form of the Model Rules of Professional Conduct).

154. MODEL RULES OF PROF’L CONDUCT pmbl. & scope § 14 (2011) (“The Rules of Professional Conduct are rules of reason. They should be interpreted 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 lawyer 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 discretion. 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.”).

155. *Id.* § 16 (“Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement 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.”).

156. *See* Munneke & Davis, *supra* note 135, at 44 (“Widespread adoption of the Model Rules represents a growing consensus about how lawyers ought to act, because the Rules now establish a cross-jurisdictional commonality of behavioral standards.”).

157. MODEL RULES OF PROF’L CONDUCT pmbl. & scope § 19 (2011); *see also* Munneke & Davis, *supra* note 135, at 44 (stating the disciplinary system is designed to protect the interests of the public and the integrity of the legal profession from the misconduct of lawyers).

158. Munneke & Davis, *supra* note 135, at 45 (“The disciplinary system [was] . . . designed to protect the profession as a whole and the public generally.”).

159. *See id.* at 34.

complaint against the lawyer under the applicable ethical rules.¹⁶⁰ For example, violation of Model Rule 1.1 may subject a lawyer to disciplinary action, and also provide a basis for a legal malpractice case where the lawyer's negligence, in not "provid[ing] competent representation," causes damage to the client.¹⁶¹ As the *State v. Anthony* case illustrates, Attorney Jose Baez's "laughing guy" statement could have been included as a basis for both disciplinary action and a legal malpractice claim had the case outcome been different.¹⁶² The same is true where the lawyer fails to "diligently represent"¹⁶³ the client or "expedite"¹⁶⁴ litigation in keeping with the client's interests. In instances where the Model Rules are violated, the client may be able to proceed under either theory (disciplinary system or civil malpractice suit) or obtain dual recovery via both.¹⁶⁵

Two key differences set ethical rule violations apart from legal malpractice suits, however. First, even in instances where a client initiates a disciplinary complaint against her lawyer, the client is not subsequently involved in any disciplinary proceedings that flow therefrom.¹⁶⁶ Second, in order for a client to prevail on a legal malpractice claim, proximate damages must be proven.¹⁶⁷ Conversely, a lawyer may be disciplined for violation of the ethical rules regardless of any anticipated or proven damages.¹⁶⁸ These differences might provide support against the use of a disciplinary rule as a principle of law or standard for defining civil conduct.¹⁶⁹ Yet it has been aptly observed that where the rule involves conduct that would subject the lawyer to malpractice, "the ethical rule arguably has a bearing on the lawyer's duty to act with reasonable care toward the client."¹⁷⁰ As such, legal malpractice plaintiffs often cite the Model Rules of Professional Conduct when contending that a lawyer has

160. For example, a lawyer's failure to comply with Model Rule 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.") would subject the lawyer to disciplinary action. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2011).

161. *Id.*

162. *See supra* Part I.

163. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2011) ("Diligence: A lawyer shall act with reasonable diligence and promptness in representing a client.").

164. MODEL RULES OF PROF'L CONDUCT R. 3.2 (2011).

165. Munneke & Davis, *supra* note 135, at 44 (citing Harry J. Haynsworth, *Business Lawyers Under Fire—Potential Ethical Sanctions and Liability*, Q246 ALI-ABA 23).

166. *See, e.g.*, Slotnick v. Pike, 370 N.E.2d 1006 (Mass. 1977).

167. 3 MALLEN & SMITH, *supra* note 24, § 21:1.

168. Richard Klien, *Legal Malpractice, Professional Discipline, and Representation of the Individual Defendant*, 61 TEMP. L. REV. 1171, 1176 (1998).

169. 1 MALLEN & SMITH, *supra* note 24, § 1:9.

170. Munneke & Davis, *supra* note 135, at 45.

breached a professional duty.¹⁷¹

The applicability of ethical rules in the determination of legal malpractice cases has generated much spirited debate among legal scholars and in the courts. Some commentators have argued in favor of a position that rules of professional conduct have a rightful place in civil litigation¹⁷² and “create certain specific standards of lawyer behavior that constitute a minimum standard of conduct and a minimum standard of care for every individual attorney practicing in each jurisdiction.”¹⁷³ Others have criticized the use of ethical rules in legal malpractice cases,¹⁷⁴ stating that ethical rules and “regular law” occupy separate and distinct domains,¹⁷⁵ and that common law remedies are sufficient for legal malpractice cases.¹⁷⁶ The trend in the majority of courts is to admit evidence of ethical rules as relevant to the determination of the lawyer’s duty and standard of care.¹⁷⁷

171. Cunitz, *supra* note 52, at 638.

172. See, e.g., Daniel L. Draisen, *The Model Rules of Professional Conduct and Their Relationship to Legal Malpractice Actions: A Practical Approach to the Use of the Rules*, 21 J. LEGAL PROF. 67 (1996) (stating that courts should assist lawyers by firmly establishing the Rules as a gauge for measuring appropriate conduct); Ann Peters, *The Model Rules as a Guide for Legal Malpractice*, 6 GEO. J. LEGAL ETHICS 609 (1993).

173. Munneke & Davis, *supra* note 135, at 33 (concluding that ethical violations are relevant and admissible as to the professional standard of care in legal malpractice); see also Leubsdorf, *supra* note 75, at 101 (supporting use of the Model Rules to determine applicable lawyer behavior); Peters, *supra* note 172, at 633-34 (arguing that the use of the Rules as a basis of malpractice claims, or at least as evidence of minimum standard care, should be expanded); Lewis J. Ross, Commentary, *Violation of the Code of Professional Responsibility as Stating a Cause of Action in Legal Malpractice*, 6 OHIO N.U. L. REV. 692, 696-99 (1979); Charles W. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281, 286-95 (1979); Note, *The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard*, 109 HARV. L. REV. 1102 (1996) (arguing that courts should allow relevant provisions of the Model Rules or the Model Code to be introduced in a legal malpractice proceeding to help a plaintiff establish the proper standard of care).

174. See, e.g., Robert Dahlquist, *The Code of Professional Responsibility and Civil Damage Actions Against Attorneys*, 9 OHIO N.U. L. REV. 1, 29-30 (1982); Jean E. Faure & R. Keith Strong, *The Model Rules of Professional Conduct: No Standard for Malpractice*, 47 MONT. L. REV. 363, 374-78 (1986); David J. Fish, Note, *The Use of the Illinois Rules of Professional Conduct to Establish the Standard of Care in Attorney Malpractice Litigation: An Illegal Practice*, 23 S. ILL. U. L.J. 65 (1998) (specifically criticizing the use of the Illinois Rules of Professional Conduct in legal malpractice cases); Laura K. Thomas, Comment, *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).

175. 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, 650 (2000).

176. Faure & Strong, *supra* note 174, at 365 (concluding that common law remedies are sufficient and that use of the Model Rules as a practice standard is impractical).

177. Ronald C. Minkoff & Amelia K. Seewan, *Defending Legal Malpractice Actions Alleging Conflicts of Interest*, in 172 PRACTICING L. INST. N.Y. PRAC. SKILLS COURSE HANDBOOK SERIES 109, 117 (2007); Douglas R. Richmond, *Why Legal Ethics*

It is widely accepted that a violation of an ethical rule does not, in and of itself, give rise to a private cause of action against a lawyer,¹⁷⁸ nor should it

Rules Are Relevant to Lawyer Liability, 38 ST. MARY'S L.J. 929, 946 (2007); Kathleen J. McKee, Annotation, *Admissibility and Effect of Evidence of Professional Ethics Rules in Legal Malpractice Action*, 50 A.L.R. 5th 301 (1997) (providing a state by state analysis of the law).

178. See, e.g., *Davin, L.L.C. v. Daham*, 746 A.2d 1034, 1044 n.3 (N.J. Super. Ct. App. Div. 2000) (“[A] cause of action may not be based solely on a violation of the Rules of Professional Conduct. While the Rules of Professional Conduct may provide guidance to the court in determining whether a duty exists, they do not provide an independent cause of action.” (citation omitted)); see also *Bickel v. Mackie*, 447 F. Supp. 1376 (N.D. Iowa 1978), *aff’d*, 590 F.2d 341 (8th Cir. 1978); *Merritt-Chapman & Scott Corp. v. Elgin Coal, Inc.*, 358 F. Supp. 17, 22 (E.D. Tenn. 1972), *aff’d*, 477 F.2d 598 (5th Cir. 1973); *Terry Cove N., Inc. v. Marr & Friedlander, P.C.*, 521 So. 2d 22, 24 (Ala. 1988) (“[A]n alleged violation of a Disciplinary Rule of the Code of Professional Responsibility cannot, independently, serve as a legal basis for a civil action for money damages.”); *Allen v. Allison*, 155 S.W.3d 682, 690 (Ark. 2004) (“[T]he rules are not designed for a basis of civil liability, but are to provide guidance to lawyers and to provide a structure for regulatory conduct through disciplinary agencies.” (quoting *Orsini v. Larry Moyer Trucking, Inc.*, 833 S.W.2d 366 (1992))); *BGJ Assocs. v. Wilson*, 7 Cal. Rptr. 3d 140, 147 (Ct. App. 2003) (reiterating that the Professional Rules do not impose civil liability); *Biller Assocs. v. Peterken*, 849 A.2d 847, 851 (Conn. 2004) (recounting that a client must have more than merely a rules violation to have a private cause of action); *Mozzochi v. Beck*, 529 A.2d 171, 175 (Conn. 1987) (“[V]iolations of the Code of Professional Responsibility do not give rise to any private cause of action for legal malpractice by anyone, including an attorney’s client.”); *Television Capital Corp. of Mobile v. Paxson Commc’ns Corp.*, 894 A.2d 461, 469 (D.C. 2006) (stating that a violation of the Rules does not constitute a per se “breach of the attorney’s common law fiduciary duty to the client” (quoting *Griva v. Davison*, 637 A.2d 830, 846-47 (D.C. 1994))); *Beach Higher Power Corp. v. Rekant*, 832 So. 2d 831, 834 n.2 (Fla. Dist. Ct. App. 2002) (discussing the Florida Rules of Professional Conduct while acknowledging that they are not determinative in a private cause of action); *Fernandes v. Barrs*, 641 So. 2d 1371, 1374 (Fla. Dist. Ct. App. 1994) (stating that a client’s reliance on a rule to prove a legal duty had been breached was misplaced); *Threatt v. Rogers*, 604 S.E.2d 269, 273 (Ga. Ct. App. 2004) (reiterating that the Code of Professional Responsibility regulates merely conduct and cannot be the sole support for a client’s cause of action); *In re Disciplinary Bd. of Haw. Sup. Ct.*, 984 P.2d 688, 695 (Haw. 1999); *Owens v. McDermott, Will & Emery*, 736 N.E.2d 145, 157 (Ill. App. Ct. 2000); *Kizer v. Davis*, 369 N.E.2d 439, 444 (Ind. Ct. App. 1977); *OMI Holdings, Inc. v. Howell*, 918 P.2d 1274, 1288 (Kan. 1996); *Nelson v. Miller*, 607 P.2d 438, 451 (Kan. 1980); *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 380 (Minn. 1989) (“[A] violation of the Rules of Professional Conduct cannot give rise to a private action against an attorney. The Rules are intended to discipline attorneys, not provide a basis for civil liability.” (citation omitted)); *Baxt v. Liloia*, 714 A.2d 271, 274-75 (N.J. 1998); *Sanders, Bruin, Coll & Worley, P.A. v. McKay Oil Corp.*, 943 P.2d 104, 107 (N.M. 1997); *Schwartz v. Olshan Grundman Frome & Rosenzweig*, 753 N.Y.S.2d 482, 487 (App. Div. 2003); *Baars v. Campbell Univ., Inc.*, 558 S.E.2d 871, 879 (N.C. Ct. App. 2002) (reiterating that “a breach of a provision of the Code of Professional Responsibility is not ‘in and of itself . . . a basis for civil liability.’” (quoting *Webster v. Powell*, 391 S.E.2d 204, 208 (N.C. Ct. App. 1990))); *Witzke v. City of Bismarck*, 718 N.W.2d 586, 591 (N.D. 2006) (citing *Olson v. Fraase*, 421 N.W.2d 820, 828 (N.D. 1988)); *Bob Godfrey Pontiac, Inc. v. Roloff*, 630 P.2d 840 (Or. 1981); *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1284 (Pa. 1992); *DiLuglio v. Providence Auto Body, Inc.*, 755 A.2d 757, 772 n.16 (R.I. 2000); *Behrens v. Wedmore*, 698 N.W.2d 555, 575-76 (S.D. 2005) (quoting *Standish v. Sotavento Corp.*, 755 A.2d 910, 915 (Conn. App. Ct. 2000)); *Winchester v. Little*, 996 S.W.2d 818, 825-26 (Tenn. Ct. App. 1998); *Archuleta v. Hughes*, 969 P.2d 409, 414 (Utah 1998).

create any presumption of breach of a legal duty in a malpractice case.¹⁷⁹ Still, courts routinely elicit the Rules in legal malpractice decisions,¹⁸⁰ albeit with inconsistent application as a decision-making tool. The courts have taken different approaches to the applicability of the Rules, to wit: as “rebuttable evidence” of malpractice,¹⁸¹ as “some,”¹⁸² or “relevant”¹⁸³

179. MODEL RULES OF PROF’L CONDUCT pmbl. & scope (2011). Section 19 reads:

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.

Section 20 states as follows:

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.

180. *See, e.g.*, BCCI Holdings (Luxemborg), S.A. v. Clifford, 964 F. Supp. 468, 481 (D.D.C. 1997) (stating that a breach of the District of Columbia’s attorney ethical standards can constitute breach of a fiduciary duty owed to client); *cf.* Lysick v. Walcom, 65 Cal. Rptr. 406, 413 (Ct. App. 1968) (discussing the application of Legal Ethics rules as well as the Rules of Professional Conduct of California in a legal malpractice suit); *Beach Higher Power Corp. v. Rekant*, 832 So. 2d 831, 834 (Fla. Dist. Ct. App. 2002) (holding that a lawyer cannot hide behind his profession in legal malpractice claims); *Crest Inv. Trust, Inc. v. Comstock*, 327 A.2d 891, 902 (Md. Ct. Spec. App. 1974) (referring to multiple states’ rules on attorney-client relationships in a legal malpractice suit).

181. *E.g.*, *Hart v. Comerica Bank*, 957 F. Supp. 958, 981 (E.D. Mich. 1997) (holding that, under Michigan law, violations of Model Rules of Professional Conduct create a rebuttable presumption of legal malpractice); *Lipton v. Boesky*, 313 N.W.2d 163, 166-67 (Mich. 1981) (“The Code . . . 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.”); *Beattie v. Firmschild*, 394 N.W.2d 107, 109 (Mich. App. 1986). *But see* MODEL RULES OF PROFESSIONAL CONDUCT pmbl. & scope (2011) (“Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. . . . [The Rules] are not designed to be a basis of civil liability. . . . Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary

evidence of the duty owed, or as a breach of the professional standard of care.¹⁸⁴ Some courts however, hold that the Rules have no application in legal malpractice cases. Operating under the premise that ethical rules are designed to maintain the integrity of the profession, and to provide for discipline and regulation of lawyers,¹⁸⁵ courts have viewed the duties explicit in the Rules as a “public obligation” for which the appropriate remedy is a public one, such as a disciplinary hearing.¹⁸⁶ As such, the minority of courts taking a restrictive approach refuse to permit the use of ethical rules in establishing the standard of care in legal malpractice cases.¹⁸⁷ Others, however, use the rules as a means to deny liability.¹⁸⁸

consequences of violating such a duty.”).

182. *See dePape v. Trinity Health Sys., Inc.*, 242 F. Supp. 2d 585, 609 (N.D. Iowa 2003) (holding that violating the Iowa Code of Professional Responsibility constitutes some evidence of negligence); *Watkins & Watkins, P.C. v. Williams*, 518 S.E.2d 704, 706 (Ga. Ct. App. 1999) (noting that the rules of the State Bar of Georgia may be considered along with other facts and circumstances to determine whether an attorney treated his client with the requisite degree of skill and care); *Fanaras Enters, Inc. v. Doane*, 666 N.E.2d 1003, 1006 (Mass. 1996) (noting that violation of a disciplinary rule “may be some evidence of the attorney’s negligence”); *Mainor v. Nault*, 101 P.3d 308, 321 (Nev. 2004) (en banc) (per curiam) (allowing ethical rules to serve as an indicator of the requisite standard of care); *McNair v. Rainsford*, 499 S.E.2d 488, 494 (S.C. Ct. App. 1998) (holding that an attorney’s failure to comply with the Rules of Professional Conduct is “merely circumstance” that may be considered in determining whether the attorney acted with reasonable care in fulfilling his or her legal duties to the client); *see generally* 2 MALLEN & SMITH, *supra* note 24, § 18:7.

183. *Cummings v. Sea Lion Corp.*, 924 P.2d 1011, 1020 (Alaska 1996) (noting that while the rules do not constitute a basis for malpractice liability, they are relevant to what duty the attorney owes to the client); *Roy v. W.T. Diamond*, 16 S.W.3d 783, 791 (Tenn. Ct. App. 1999) (noting that a violation of the Code of Professional Responsibility may be relevant evidence in a subsequent civil case).

184. *Munneke and Davis*, *supra* note 135, at 33 (noting that although this practice is by no means universally accepted, the implications of the trend are noteworthy); *see also Day v. Rosenthal*, 217 Cal. Rptr. 89 (Dist. Ct. App. 1985) (holding that standards governing an attorney’s ethical duties are conclusively established by the Rules of Professional Conduct, and cannot be changed by expert testimony).

185. 2 MALLEN & SMITH, *supra* note 24, § 18:7.

186. *See, e.g., Standish v. Sotavento Corp.*, 755 A.2d 901, 915 (Conn. App. Ct. 2000) (stating that the rules of professional conduct are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies, and they are not designed to be a basis for civil liability); *Hill v. Willmott*, 561 S.W.2d 331, 333-34 (Ky. App. 1978); *see also Merritt-Chapman & Scott Corp. v. Elgin Coal*, 358 F. Supp. 17, 22 (E.D. Tenn. 1972), *aff’d*, 477 F.2d 598 (5th Cir. 1973); *Bob Godfrey Pontiac, Inc. v. Roloff*, 630 P.2d 840, 848 (Or. 1981); *Martin v. Trevino*, 578 S.W.2d 763, 770 (Tex. Civ. App. 1979).

187. *See, e.g., Boccone v. Eichen Levinson LLP*, 301 Fed. App’x. 162, 168 (3d Cir. 2008) (holding that an attorney’s violation of the New Jersey Rules of Professional Conduct does not give rise to a cause of action or create any presumption that a legal duty has been breached); *Toler v. Brackin*, 710 So. 2d 415, 416 (Ala. 1998) (“[A] violation of the Rules of Professional Conduct may not be used as evidence, regardless of whether the attorney has been charged with a violation of those Rules.”); *Lazy Seven Coal Sales, Inc. v. Stone & Hines, P.C.*, 813 S.W.2d 400, 405 (Tenn. 1991) (“[I]n 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.”); *Hizey v. Carpenter*, 830 P.2d 646, 648

The efficacy of using the Model Rules in legal malpractice cases has also been addressed by the American Law Institute in its 2000 edition of the Restatement (Third) of the Law Governing Lawyers.¹⁸⁹ The Restatement (Third) establishes that proof of a violation of a rule or statute regulating lawyers' conduct is relevant to the standard of care in legal malpractice cases, so long as the rule or statute was designed to protect the person bringing the claim and is relevant to the claim.¹⁹⁰

The Model Rules of Professional Conduct similarly provide boundaries to the use of the rules. In its Preamble to the Model Rules of Professional Conduct, the American Bar Association states:

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.¹⁹¹

The ABA's suggested restrictions on the use of the Model Rules in civil claims have been touted as "virtually meaningless" disclaimers,¹⁹² and deemed "predictably futile . . . if not fatuous."¹⁹³ As Professor Geoffrey Hazard noted:

Norms stated as obligatory standards of a vocation are generally held to be evidence of the legal standard of care in practicing that vocation, or at least as a predicate for expert testimony as to what that standard is. Thus, notwithstanding the bar's attempted disclaimer in writing black-letter rules, the bar necessarily assumed certain unavoidable

(Wash. 1992) (en banc) (holding that, in a legal malpractice action, the jury may not be informed of the Code of Professional Responsibility or Rules of Professional Conduct, either directly through jury instructions, or through the testimony of an expert who refers to the CPR or RPC); *see also* Archuleta v. Hughes, 969 P.2d 409, 413-14 (Utah 1998) (concluding that the Utah Rules of Professional Conduct do not provide a basis for a legal malpractice claim and stating that "[t]he legal standards applicable to malpractice claims are entirely adequate to protect clients as plaintiffs").

188. *See, e.g.*, Galu v. Attias, 923 F. Supp 590, 596 (S.D.N.Y. 1996); Flatt v. Super. Ct., 885 P.2d 950, 953 (Cal. 1994); Carlson v. Fredrikson & Byron, P.A., 475 N.W.2d 882, 888 (Minn. Ct. App. 1991).

189. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(2)(c).

190. *Id.*

191. MODEL RULES OF PROF'L CONDUCT pmb. & scope, § 20 (2011).

192. Munneke and Davis, *supra* note 135, at 41.

193. Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 GEO. J. LEGAL ETHICS 701, 718-19 (1993).

responsibilities.¹⁹⁴

Despite its “disclaimers,” the ABA has recognized that, at the very least, a lawyer’s violation of a Rule may be *evidence* of breach of the applicable standard of conduct.¹⁹⁵ Even though the Rules may not carry the same force as statutes or case law, they are indubitably considered to elicit generally accepted behavioral norms.¹⁹⁶ The Rules are, therefore, not elicited specifically for evidence of professional standards because the rules themselves so provide, “but because of the need for consistent, knowable principles for lawyers to follow.”¹⁹⁷ This need for consistency is even more glaring in light of the professionalism deficit in the legal profession.

VIII. PROFESSIONALISM AS EVIDENCE OF THE STANDARD OF CONDUCT

As noted above, the ABA’s attempted restriction on the use of the Rules in legal malpractice cases has generated much comment with valid arguments for and against use of the Rules. Little attention has, however, been paid to the legitimate use of an acceptably-defined notion of professionalism as evidence of the standard of conduct. Without actual applicability of the Rules to legal malpractice cases, guidance can be gleaned from the scope of the rules in assessing the propriety of professionalism in the legal malpractice analysis.

The first provision of the Preamble to Model Rules of Professional Conduct states that “[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.”¹⁹⁸ This responsibility is further clarified in section seven of the Preamble, which states:

Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct However, a lawyer is also guided by personal conscience and the approbation of professional peers [and] . . . 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.¹⁹⁹

The principles of the Rule are applicable “both in professional service to clients and in the lawyer’s business and personal affairs,”²⁰⁰ and are to be applied while maintaining a professional, courteous, and civil attitude

194. *Id.*

195. MODEL RULES OF PROF’L CONDUCT pmbl. & scope, § 20 (2011).

196. Dranoff, *supra* note 1, at 642, 659.

197. Leubsdorf, *supra* note 75, at 119.

198. MODEL RULES OF PROF’L CONDUCT pmble & scope, § 1 (2011).

199. *Id.* § 7.

200. *Id.*

toward all persons involved in the legal system.²⁰¹

The principles inherent in the Rules reflect the tenets of the lawyer's position as that of a fiduciary to her clients and the general public. As stated by one Texas court, "[T]he relationship between attorney and client has been described as one of *uberrima fides*, which means, 'most abundant good faith,' requiring absolute and perfect candor, openness and honesty, and the absence of any concealment or deception."²⁰² In operating under those qualities, lawyers must uphold the standards demanded of the reasonable lawyer.

In 1947, Judge Learned Hand espoused his famous "formula" for determining the duty of a "reasonable person."²⁰³ As stated in algebraic terms by Judge Hand, "[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL."²⁰⁴ The "formula" calls for a balancing of the probability of injury or loss against the cost or burden of preventing such injury/loss.²⁰⁵ The reasonable person would balance the probabilities, and act in accordance: forsake the burden of the action if it is outweighed by the probability of injury/loss.

When it comes to a determination of the duty of the "reasonable person" in the context of legal malpractice cases, in keeping with Judge Hand's theory of liability, courts make policy judgments in deciding whether the defendant should be thought of as being obligated to either act in a specific manner or take a "certain sort of care" in dealing with the client.²⁰⁶ The defendant-attorney's actions are therefore reviewed to determine if they

201. *Id.* § 9 ("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.").

202. *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App. 1991).

203. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (explaining that the Court had to determine whether the absence of a bargee or other attendant would make the owner of the barge liable for injuries to other vessels caused by the barge breaking away from her moorings). In assessing the duty of the barge owner, the court addressed three variables: (1) the probability that the barge would break away; (2) the gravity of the resulting injury if the break-away occurred; and (3) the burden of adequate precautions. *Id.*

204. *Id.*

205. *Id.*

206. See Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 *FORDHAM L. REV.* 649, 657 (1998) ("To be sure, courts are making a sort of policy judgment when they decide upon 'duty' or 'no duty,' but the word 'duty' is not merely a placeholder. Courts are primarily deciding whether it is plausible to think of the defendant as obligated to take a certain sort of care toward the plaintiff or the class of persons to which she belongs—whether it makes sense to think of the defendant as having a duty of care running to the plaintiff.").

conform to the standard skill, knowledge, and diligence brought to bear on similar matters by a lawyer of ordinary competence.²⁰⁷

Currently, there is no precise application of the standard of care in legal malpractice cases, but there is a majority consensus regarding the need for “reasonable”²⁰⁸ or “ordinary”²⁰⁹ care to be exercised. “The essence of a malpractice action is a violation of the standard of care.”²¹⁰ As one scholar noted, setting this standard “requires considering what lawyers *should* do, not merely looking to what they actually do.”²¹¹

At the most fundamental level, the legal malpractice action provides a remedy for negligent professional performance.²¹² A lawyer’s actions (both those he actually does, and those he should do) must be viewed in light of the totality of his standing as a member of the legal profession. Lawyers, as professionals, belong to what Dean Roscoe Pound coined in 1953 as a “traditionally dignified calling.”²¹³ Dean Pound noted that this group (lawyers) was pursuing a “learned art . . . in the spirit of a public service—no less a public service because it may incidentally be a means of

207. See GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 187 (2d ed. 1994) (“[S]tandard of care is determined by the skill, knowledge and diligence brought to bear on similar matters by a lawyer of ordinary competence.”).

208. See, e.g., *Bernard v. Las Americas Commc’ns, Inc.*, 84 F.3d 103, 109 (2d Cir. 1996) (holding that an attorney breaches her duty if she “fails to perform with reasonable skill,” which is the skill an attorney must display “to avoid tort liability” (citation omitted)); *Hart v. Comerica Bank*, 957 F. Supp. 958, 981 (E.D. Mich. 1997) (obligating an attorney to “use reasonable skills, discretion, and judgment in representing clients, thereby assuming a position of the highest trust and confidence” (citation omitted)); *McClung v. Smith*, 870 F. Supp. 1384, 1391 (E.D. Va. 1994) (charging the attorney with “the obligation to use a reasonable degree of care, skill and diligence in handling the matters entrusted to them”); *Baird v. Pace*, 752 P.2d 507, 509 (Ariz. Ct. App. 1987) (requiring an attorney to “act for his client in a reasonably careful and skilled manner in view of his special professional knowledge”); *Pugh v. Griggs*, 940 S.W.2d 445, 447 (Ark. 1997) (finding an attorney liable if she “fails to exercise reasonable diligence and skill on behalf of the client” (citation omitted)); *Kerschner v. Weiss & Co.*, 667 N.E.2d 1351, 1356 (Ill. App. Ct. 1996) (holding an attorney liable to his client when he “fails to exercise a reasonable degree of care and skill” (citation omitted)).

209. See, e.g., *Focus Inv. Assocs. v. Am. Title Ins. Co.*, 992 F.2d 1231, 1239 (1st Cir. 1993) (holding that a plaintiff in Rhode Island must prove “want of ordinary care and skill” by an attorney (citations omitted)); *Mylar v. Wilkinson*, 435 So. 2d 1237, 1239 (Ala. 1983) (requiring “an ordinary and reasonable level of skill, knowledge, care, attention and prudence common to members of the legal profession in the community” (citation omitted)); *Kubik v. Burk*, 540 N.W.2d 60, 64 (Iowa Ct. App. 1995) (obligating an attorney to use “knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances” (citation omitted)).

210. *Anderson & Steele*, *supra* note 112, at 249.

211. *Leubsdorf*, *supra* note 75, at 111 (emphasis added).

212. See *Mallen & Smith*, *supra* note 24, §§ 1:1, 3.

213. *ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953). Pound was Dean of Harvard Law School at the time of publication of his book.

livelihood.”²¹⁴ As such, Dean Pound suggested that this esteemed group should “aspire to exhibit behaviors consistent with the professional status,” behavior he described as “professionalism.”²¹⁵ With data evidencing no decline in the number of legal malpractice cases, coupled with empirical evidence of a relation between a lawyer’s competence and his behavior, the time is ripe for “professionalism” as envisioned by Dean Pound and defined *supra*²¹⁶ to shift from an aspirational goal to a place devoid of apathy regarding its application—a position where lawyers recognize the impact that is caused by failure to adhere to the stated professionalism standards. The general civil liability system, which allows for liability for proximately caused injuries, provides incentive for certain desired behavior. According probative value to evidence of actions reflecting professionalism, or a lack thereof, in the legal malpractice arena will provide a compelling incentive for professionally and socially acceptable lawyer behavior. Incorporating the professionalism element into the determination of the “reasonable attorney” standard in legal malpractice cases will encourage and ultimately enhance professionalism in legal society. It would underscore the daily necessity of moral discretion and behavior consistent with the obligation and calling, and promote good character through the “excellence of judgment.”²¹⁷ Lawyers would have a compelling reason to not simply hold the title of “lawyer,” but to obtain the status of one who declares his or her devotion to both the practice and the well-being of the law—a true “connoisseur of the law.”²¹⁸

To do otherwise would constitute neglect of duties owed legally and socially to clients and the public in general. This would, in turn, create an opportunity to move beyond the apathetic practice of toeing the line²¹⁹ and shift to a more formalized structure of accountability in the ethos of legal culture.

214. *Id.*

215. *Id.* at 29.

216. *See supra* Part III.A.

217. *See* Anthony V. Aliferi, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909, 1928 (2006) (“Good character depends on the qualities of intellectual skill and excellence of judgment.”).

218. ANTHONY KRONMAN, *THE LOST LAWYER* 11-52 (4th prtg. 1995) (identifying “connoisseurs” of the law as those who declare their devotion to the well-being of the law).

219. *See generally* Nicola A. Boothe-Perry, *Professionalism’s Triple E Query: Is Legal Academia Enhancing, Eluding, or Evading Professionalism?*, 55 LOY. L. REV. 517, 518 (2009) (discussing the “existing and growing population of attorneys that have yet to cross the line into ‘unethical hell[.]’ [who are simply toeing the line that would] cross into a realm where their unprofessional pattern of behavior threatens the perceived sanctity of the profession”).

IX. CONCLUSION

Lawyers play a vital role in the preservation of society.²²⁰ Legal academia, the bench, and the bar would all likely agree that one common goal of the legal community is to maintain professional standards and enhance quality—even going so far as to acknowledge the need for increased professionalism. Accomplishment of this goal, however, will not occur by simple exhortation. An objective review of the nexus between high numbers of legal malpractice cases and the lack of professionalism evidences that the time is proper to integrate professionalism in the determination of legal malpractice cases as part of the lawyer regulatory system as a whole. By admitting evidence of professionalism in legal malpractice cases, the edict will be clear to the legal community regarding the importance of acting in accordance with the true ideology of being a lawyer: an ideology grounded beyond competence in the attitudes, beliefs, spirit, and values of the legal profession. Short of proposing that professionalism or evidence of lack thereof creates a civil duty, or establishes the standard of care, it is evident that at the very least, the probative and persuasive evidentiary value should be a consideration in every legal malpractice case in determining the standard of care.

220. MODEL RULES OF PROF'L CONDUCT pmb. & scope (2011).

