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THE MODEL RULES OF PROFESSIONAL CONDUCT: NO STANDARD FOR MALPRACTICE

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I. INTRODUCTION

Legal malpractice claims are occuring with increasing frequency. Nationwide, there have been "more reported appellate decisions [pertaining to attorney malpractice] in the last fifteen years than in the preceding seventy years."[1] A similiar situation exists in Montana. In the first eight months of 1985, seventy individuals filed professional malpractice claims.[2] Concomitantly, in the past two years, legal malpractice insurance companies have increased by 300 percent the premiums charged lawyers.[3] Montana's problem is particularly alarming because the state reputedly has one of the worst loss ratios in the nation.[4] Montana's courts can expect to face more questions about the nature and extent of an attorney's duty to a client. One question certain to arise is the new Model Rules' effect on that duty.

Montana case law defines the nature of an attorney's duty to his client as one of reasonable care or skill.[5] In defining this duty, the Montana Supreme Court has never considered whether a violation of the Code of Professional Responsibility[6] or the new Model Rules of Professional Conduct[7] indicates a failure to meet that standard of care. Montana courts have not discussed the Code or Model Rules as a measure of an attorney's duty to his client. Montana's Code has been used exclusively in disclipinary actions.[8]

In cases unrelated to malpractice, courts have consistently

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1. R. MALLEN & V. LEVIT, LEGAL MALPRACTICE 18 (2d ed. 1981).

2. State Bar Insurance Committee, State Bar Of Montana, Professional Liability Claim Data (August 31, 1985) (available from George Bousliman, Executive Director of the State Bar).

3. Tirrell, *Malpractice Insurance: An Overview*, 2 MONT. LAW. 6-7 (January 1986).

4. *Id.*

5. Clinton v. Miller, 124 Mont. 463, 226 P.2d 487 (1951).

6. AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969) [hereinafter CODE].

7. AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES].

8. *See* Petition of Gillham, ___ Mont. ___, 704 P.2d 1019 (1985); Matter of Keller, ___ Mont. ___, 693 P.2d 1211 (1984); Matter of Wyse, ___ Mont. ___, 688 P.2d 758 (1984); Matter of McKeon, ___ Mont. ___, 656 P.2d 179 (1982).

used the Code.[9] For example, courts routinely take into account Code provision DR 2-106 in determining the reasonableness of attorney's fees.[10] Suits involving attorney's fees, however, are not based on negligence. This is also true in cases involving false or misleading advertising.[11] An attorney's representations may create a warranty upon which a client may base a cause of action; but a lawsuit arising out of those representations would be strictly a contract action.[12] Thus, judicial references to the Code in these instances have no bearing on the negligence concepts involved in legal malpractice suits.

Historically, the Code has failed to provide significant assistance in negligence actions.[13] A number of courts have resoundingly rejected the use of the Code in legal malpractice litigation and concluded that a violation of the Code does not create a private cause of action.[14]

More recently, however, a few courts have held that a proven violation of the Code is rebuttable evidence of malpractice.[15] While recognizing that the Code fails to define standards for civil liability, these courts have found that a violation of the Code "certainly constitutes some evidence of the standards required of attorneys."[16]

This article examines the historical use of the Code in legal malpractice cases and analyzes the Model Rules to determine their distinctions from the Code in terms of format, focus, and substance. In this light, the article tests the Model Rules as a prescribed standard of conduct similar to that of a penal statute. Fi-

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9. Cherney v. Moody, 413 So. 2d 866 (Fla. Dist. Ct. App. 1982) (formulation of procedural rules); In re E. Sugar Antitrust Litig., 697 F.2d 524 (3d Cir. 1982) (disgorgement of fees); Rode v. Branca, 481 F. Supp. 808 (E.D.N.Y. 1979) (recission of contract); O'Dowd v. Johnson, 666 S.W.2d 619 (Tex. Ct. App. 1984) (recovery of debt); United States v. Jamil, 546 F. Supp. 646 (E.D.N.Y. 1982), *rev'd*, 707 F.2d 639 (2d Cir. 1983) (suppression of evidence).

10. Nolan v. Foreman, 665 F.2d 738 (5th Cir. 1982).

11. People v. Roehl, 655 P.2d 1381 (Colo. 1983) (en banc).

12. MALLEN, *supra* note 1, at 182.

13. Bickel v. Mackie, 447 F. Supp 1376 (N.D. Iowa 1978), *aff'd*, 590 F.2d 341 (8th Cir. 1983); Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978); Nelson v. Miller, 227 Kan. 271, 607 P.2d 438 (1980); Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App. 1978); Ayyildiz v. Kidd, 220 Va. 1080, 266 S.E.2d 108 (1980).

14. *Id.*

15. Woodruff v. Tomlin, 616 F.2d 924 (6th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 888 (1980); Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966); Lipton v. Boesky, 110 Mich. App. 589, 313 N.W.2d 163 (1981); Hansen v. Wightman, 14 Wash. App. 78, 538 P.2d 1238 (1975).

16. *Woodruff*, 616 F.2d at 936; *See also* Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968); Crest Inv. Trust, Inc. v. Comstock, 23 Md. App. 280, 327 A.2d 891 (1974).

nally, the article concludes that the Model Rules act best as a complement to common law negligence. By their very nature impractical as a concrete standard of care, the Model Rules regulate a delicate tripartite balance between the court, the attorney, and the client. Using the Model Rules to create a private cause of action destroys that balance.

II. An Overview of Legal Malpractice

In simplest terms, legal malpractice is negligence. "It is the failure to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of tasks they undertake."[17] As with any negligence action, a plaintiff must prove that the attorney owed him a duty of care, that the attorney breached his duty by failing to use reasonable care and skill, that the breach of the duty proximately caused the plaintiff's injury, and that the breach resulted in damages.[18]

When attorney negligence lies in the breach of a duty of professional care, the quality of conduct "customarily" provided by the members of that profession defines the attorney's duty.[19] Thus, the degree of departure from customary professional conduct determines the breach rather than a reference to the traditional reasonable man standard. In *George v. Caton*,[20] the court provided a concise statement of the standard of care applicable in legal malpractice actions:

> When a lawyer contracts to prosecute actions on behalf of his client, he impliedly represents that he possesses the requisite degree of learning, skill and ability necessary to practice his profession which others similarly situated ordinarily possess, that he will exert his best judgment in prosecution of litigation entrusted to him, and that he will exercise reasonable and ordinary care and diligence in the use and application of his knowledge to his client's cause.[21]

The standard of conduct is premised upon the skill and care ordinarily exercised by attorneys, criteria rarely within the common knowledge of jurors. Even a plaintiff who proves a violation of an ethical rule must still prove a violation of the standard of con-

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17. 7A C.J.S. *Attorney-Client* § 255 (1980). Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971).

18. Scott v. Robson, 182 Mont. 528, 535-36, 597 P.2d 1150, 1154 (1979).

19. Bowman v. Doherty, 235 Kan. 870, 878, 686 P.2d 112, 120 (1984); First Nat'l Bank of Clovis v. Diane, Inc., 102 N.M. 548, 553, 698 P.2d 5, 9 (1985).

20. 93 N.M. 370, 600 P.2d 822 (1979).

21. *Id.* at 376, 600 P.2d at 828.

duct.[22] Obviously, proof of the standard of conduct necessitates expert testimony.[23] Without expert testimony, there is no basis upon which to fault the attorney's conduct.

A legislative enactment may prescribe the standard of conduct required of a reasonable, prudent individual.[24] Such a statute would establish a standard for determining negligence by dictating a course of action under a given set of circumstances, and indicating that a deviation from the standard would be negligence.[25] Although the drafters of such statutes rarely intend to affect tort liability, the statutory standard is adopted as the standard of care.[26]

Some statutes fail to create a duty of conduct toward the person injured.[27] Since a negligence action does not exist unless the defendant owes a duty to the plaintiff, these statutes fail to afford protection.[28] Other statutes only protect the interests of the state, or the community as a whole.[29] In *Nehring v. LaCounte*,[30] for instance, the Montana Supreme Court held that the legislature intended that the alcoholic beverage control statutes "protect the people of the state generally and the interests of the state rather than . . . against any particular kind of injury or provide a civil remedy."[31] Moreover, statutory protection may extend only to a limited class in which the plaintiff must fall to maintain an action based on the statute.[32]

Once a court determines that an applicable statute has been violated, it will generally find negligence conclusively established.[33] In *Azure v. City of Billings*,[34] the plaintiff sued the Billings Police Department for failing to take him to an emergency medical ser-

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22. ABC Trans Nat'l Transp., Inc. v. Aeronautic Forwarders, Inc., 90 Ill. App. 3d 817, 830-31, 413 N.E.2d 1299, 1310-11 (1980).

23. MALLEN, *supra* note 1, at 843-47. *Cf.* House v. Maddox, 46 Ill. App. 3d 68, 360 N.E.2d 580 (1977) (allowing statute of limitations to run indicates such "obvious and explicit carelessness" that expert testimony is not needed to prove "that which is already abundantly clear"). *See also* Breslin & McMonigle, *The Use of Expert Testimony in Actions Against Attorneys*, 47 INS. COUNSEL J. 119 (1980).

24. RESTATEMENT (SECOND) OF TORTS § 285 (1965). Konow v. Southern Pac. Co., 105 Ariz. 386, 465 P.2d 366 (1970).

25. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 36 at 220 (5th ed. 1984).

26. *Id.*

27. RESTATEMENT (SECOND) OF TORTS § 285 comment c, § 286.

28. W. KEETON, *supra* note 25, at 222. *See* RESTATEMENT (SECOND) OF TORTS § 288 (1965).

29. RESTATEMENT (SECOND) OF TORTS § 288.

30. ___ Mont. ___, 712 P.2d 1329 (1986).

31. *Id.* at ___, 712 P.2d at 1333.

32. RESTATEMENT (SECOND) OF TORTS § 286 comment f.

33. W. KEETON, *supra* note 25, at 230. In such cases, a breach of a statutory duty constitutes negligence *per se*.

34. 182 Mont. 234, 596 P.2d 460 (1979).

vice, as required by Montana statute. The court in *Azure* held the City negligent as a matter of law.[35] Noting the effect of a statutory violation, the court stated:

> [I]t is the general rule that where a statute makes a requirement or prohibits a thing for the benefit of a person or class of persons, one injured by reason of a violation of it is entitled to maintain an action against him by whose disobedience he has suffered injury; and this is true whether the statute is penal or not.[36]

To avail himself of this rule, the plaintiff must demonstrate "(1) that he is a member of the class in whose favor the statute imposes a duty; and (2) that the defendant is a member of the class upon whom the legislature imposed the duty."[37] If a plaintiff fails to demonstrate the existence of these factors, courts generally interpret a violation of a statute as mere evidence of negligence.[38] In *Barmeyer v. Montana Power Co.*,[39] the court held that the National Electric Safety Code creates only evidence of a standard of care to be considered in determining negligence. In *Nehring*,[40] the court held that because the legislature intended alcoholic beverage control statutes to protect the people of the state generally, a violation "may be relevant in determining whether a defendant's conduct was negligent."[41]

Courts treat a violation of a statute or ordinance differently than a violation of a standard specified in an administrative regulation.[42] In *Stepanek v. Kober Construction*,[43] the court held that violations of administrative regulations should be considered as evidence of negligence.

Unlike statutes or administrative regulations, the Model Rules are promulgated by the ABA, *not* representative bodies. Enforcement is based on a procedure unique to the legal profession.[44] Intended to do more than protect the general welfare of the public, the Model Rules establish a balance between the court, attorneys,

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35. *Id.* at 241, 596 P.2d at 465.

36. *Id.* at 240, 596 P.2d at 464 (citing Conway v. Monidah Trust, 47 Mont. 269, 132 P. 26 (1913)).

37. *Id.* at 240-41, 596 P.2d at 464.

38. W. KEETON, *supra* note 25, at 222-24.

39. ___ Mont.___, 657 P.2d 594 (1983).

40. ___ Mont.___, 712 P.2d 1329 (1986).

41. *Id.* at ___, 712 P.2d at 1333.

42. "The general rule has been to consider the violation as merely evidence of negligence." Stepanek v. Kober Construction, ___ Mont. ___, ___, 625 P.2d 51, 56 (1981). *See also* Cash v. Otis Elevator, ___ Mont. ___, 684 P.2d 1041 (1984).

43. ___ Mont.___, 625 P.2d 51 (1981).

44. *See* RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, MONTANA LAWYERS DESKBOOK 129 (1985).

and clients. The Montana Supreme Court adopted the Model Rules by court order, pursuant to its authority to make rules governing procedure and practice before the courts.[45] Examining this constitutional authority, the Montana Supreme Court stated in *Matter of McCabe*:[46] "As to rules which might be promulgated by the Court relative to practice, admission to the Bar, and conduct of members of the Bar, the legislature is given no veto authority."[47] Thus, the Model Rules must even be distinguished from the Montana Rules of Civil Procedure and the Montana Rules of Evidence, which are subject to legislative disproval.[48]

The nature of the Model Rules remains unclear. It is easier to determine what they are not. Because they lack a legislative base, the Model Rules are not statutes, ordinances, or municipal regulations. A product of the judiciary, they are not administrative regulations. Hence, courts cannot easily define the role of the Model Rules in legal malpractice actions. Because of the Model Rules' unique character, courts encounter difficulty analogizing a violation of the Model Rules to a violation of a safety statute.

III. The Code of Professional Responsibility

Promulgated by the American Bar Association in 1969, the Model Code of Professional Responsibility provides three types of standards: the Canons, the Ethical Considerations, and the Disciplinary Rules.[49] The Canons, "axiomatic norms," offer general statements of professional conduct expected of lawyers in their relationship with the public, the legal system, and the legal profession.[50] The Ethical Considerations, more concrete but still "aspirational in character, . . . represent the objectives toward which every member of the profession should strive."[51] The Disciplinary Rules, "mandatory in character, . . . state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[52]

The Montana Supreme Court adopted the Code, but not the

45. Mont. Const. art. VII, § 2(3).

46. 168 Mont. 334, 544 P.2d 825 (1975).

47. *Id.* at 339, 544 P.2d at 828.

48. *Id.* The Rules of Evidence and Civil Procedure are subject to disapproval by the legislature; the Code and Model Rules are not.

49. ABA Model Code of Professional Responsibility.

50. Preamble and Preliminary Statement, ABA Model Code of Professional Responsibility.

51. *Id.*

52. *Id.*

Ethical Considerations, in 1975.[53] Until the summer of 1985, Montana courts exclusively used the Code in disciplinary proceedings.[54] The inherent power of the judiciary gives the Montana Supreme Court the jursidiction to enforce the Code.[55] To this end, the court established the Commission on Practice in 1965.[56]

The Code has been innovatively suggested as a standard of liability in legal malpractice actions but almost universally rejected.[57] In *Bickel v. Mackie*,[58] a physician, a successful defendant in a prior medical malpractice suit, sued his former patient and her attorney for malicious prosecution, abuse of process, negligent practice of law, and failure to comply with the Code. Analogizing the Code to drivers' rules of the road which, if violated, constitute negligence *per se*, the plaintiff argued that the attorney owed him a duty to comply with the Code.[59] The court disagreed, stating:

> Violation of the Code of Professional Ethics is not tantamount to a tortious act, particularly with regard to liability to a non-client. Though Canon 7 does speak of a duty 'to the legal system' to stay within the bounds of the law when representing clients, it does not create a private cause of action.[60]

Many courts cite the preliminary statement of the Code which explicitly states that the Code does not "undertake to define standards for civil liability of lawyers for professional conduct."[61] In *Bob Godfrey Pontiac, Inc. v. Roloff*,[62] the plaintiff, a used car dealer and successful defendant in a previous action, sued two attorneys for misleading the court with false statement of facts. The

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53. Supreme Court Order No. 12500, Code of Professional Responsibility (April 25, 1973) (available from Ethel Harrison, Clerk of Supreme Court, State of Montana).

54. On June 6, 1985, the Montana Supreme Court adopted the Model Rules of Professional Conduct. The court substantially adopted the ABA's Model Rules, but modified Rule 1.5(a), Rule 3.6, Rule 7.3, and Rule 7.4. The court adopted neither the Preamble nor the Comments to the ABA Model Rules. *See* Patterson, *Supreme Court Adopts Model Rules*, 11 MONT. LAW. 18 (Sept. 1985). RULES OF PROFESSIONAL CONDUCT, MONTANA LAWYERS DESKBOOK 136 (1985).

55. MONT. CONST. art. VII, § 2(3).

56. The Montana Supreme Court appoints eleven members—eight lawyers and three non-lawyers—to serve on the commission. RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, *supra* note 44, at 129, for an outline of the commission's powers and duties.

57. Dahlquist, *The Code of Professional Responsibility and Civil Damage Actions Against Attorneys*, 9 OHIO N.U.L. REV. 1, 2 (1982); Portuondo, *Ethical Standards and Tax Law*, 22 TRIAL 48, 51 (1986).

58. 447 F. Supp 1376 (N.D. Iowa 1978), *aff'd* 590 F.2d 341 (8th Cir. 1983).

59. *Id.* at 1383.

60. *Id.*

61. PREAMBLE AND PRELIMINARY STATEMENT, ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY.

62. 291 Or. 318, 630 P.2d 840 (1981).

court in *Roloff* held that an attorney's violation of the Code does not give rise to a private cause of action for damages.[63] The court noted the principal reasons for this ruling:

(a) The statute or Code of Professional Responsibility was not intended to create a private cause of action. On the contrary, the sole intended remedy for a violation of such a statute or code is the imposition of discipline by disbarment, suspension, or reprimand of the offending attorney.

(b) Other remedies, such as malicious prosecution, adequately protect the public from harassment or abuse by unprofessional lawyers.

(c) To expose attorneys to actions for damages for breach of ethical duties imposed by such statutes and codes would be contrary to the "obvious public interest" in affording every citizen "the utmost freedom of access to the courts."[64]

Most cases which reject the use of the Code to expand liability arise in the context of malicious prosecution.[65] Because these suits potentially expand a lawyer's duty beyond his client, courts may be reluctant to impose liability based on the Code. As the court in *Brody v. Ruby*[66] stated:

> The Code of Professional Responsibility for Lawyers addresses the various concerns which confront a lawyer in his or her relationship with a client, the justice system, and the public in general . . . . The lawyer's obligation to represent his or her client zealously within the bounds of the law . . . coupled with the basic adversary nature of the legal profession . . . must be accompanied by immunity from liability for negligence in an action by a successful adverse litigant.[67]

These limited circumstances may preclude the use of the Code as a basis for negligence. In a malicious prosecution action, the Virginia Supreme Court rejected plaintiff's argument that "negligence might be founded upon a duty owed to the opposing party under the Code of Professional Responsibility."[68] Obviously, liability based on the Code would pit its provisions against one another: the duty of zealous representation could become unduly tempered by

63. *Id.* at 334, 630 P.2d at 850.

64. *Id.* at 331-32, 630 P.2d at 848 (citations omitted).

65. *See* Tappen v. Ager, 599 F.2d 376 (10th Cir. 1979); *Bickel*, 447 F. Supp. 1376; *Brody*, 267 N.W.2d 902; *Nelson*, 227 Kan. 271, 607 P.2d 438; *Ayyildiz*, 220 Va. 1080, 266 S.E.2d 108.

66. 267 N.W.2d 902 (Iowa 1978).

67. *Id.* at 907.

68. *Ayyildiz*, 220 Va. at 1085, 266 S.E.2d at 112.

the specter of countersuits based on this expanded duty. Moreover, rejection of the Code does not leave the third party without a remedy.[69] His remedy is through an action for malicious prosecution.[70]

Some courts base their refusal to use the Code on the remedy issue. In *Nelson v. Miller*,[71] a physician brought a retaliatory suit against attorneys who had unsuccessfully represented plaintiffs in an action against him, alleging that the attorneys negligently failed to investigate the medical malpractice claim. While the court seemed to equate a violation of the Code with "professional negligence," it stated:

> We believe that the public is adequately protected from harassment and abuse by an unprofessional member of the bar through the means of the traditional cause of action for malicious prosecution. . . . The remedy provided a third-party adversary is solely through an action for malicious prosecution of a civil action.[72]

Courts view the remedy for a violation of the Code as a "public" one. In *Martin v. Trevino*,[73] the Texas Court of Appeals held that a breach of the standard of professional responsibility does not create a private cause of action. Instead, an injured party may attain redress through imposition of disciplinary measures.[74] "The remedy provided . . . for the professional misconduct of an attorney is a public one, not a private one."[75] The court reasoned that because the Code provides protection for the public, a violation cannot result in a private cause of action.[76]

Some courts recently have abandoned their traditional reticence in using the Code as a source of professional standards for malpractice.[77] In *Woodruff v. Tomlin*,[78] the plaintiff retained Tomlin to represent the plaintiff's daughters in a personal injury suit arising from an automobile accident. After losing the personal injury suit, plaintiff-Woodruff contended that Tomlin negligently handled the case and breached his fiduciary duties arising from the

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69. *See, e.g., Nelson*, 227 Kan. 271, 607 P.2d 438.
70. *See Id.*
71. 227 Kan. 271, 607 P.2d 438 (1980).
72. *Id.* at 288-89, 607 P.2d at 451.
73. 578 S.W.2d 763 (Tex. Civ. App. 1978).
74. *Id.* at 770.
75. *Id.*
76. *Id.*
77. *Woodruff*, 616 F.2d 924; Kinnamon v. Staitman & Synder, 66 Cal. App. 3d 893, 136 Cal. Rptr. 321 (1977); *Lysick*, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406; *Ishmael*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592; Rogers v. Robson, Masters, Ryan, Brumund & Belom, 74 Ill. App. 3d 467, 392 N.E.2d 1365 (1979), *aff'd* 81 Ill. 2d 201, 407 N.E.2d 47 (1980); *Hansen*, 14 Wash. App. 78, 538 P.2d 1238.
78. 616 F.2d 924 (6th Cir. 1980) (en banc).

attorney-client relationship. Specifically, plaintiffs alleged a conflict of interest in the fact that Tomlin represented (1) the insurance company; (2) the plaintiff himself; (3) the driver-Patricia Woodruff; and (4) the passenger-Joan Woodruff. Because Joan, as passenger, had a potential claim against her sister Patricia, plaintiffs argued "it was malpractice for Tomlin to continue to represent Joan."[79]

While acknowledging that the Code fails to define standards for civil liability, the court in *Woodrufff* held that the Code "certainly constitutes some evidence of the standards required of attorneys."[80] The court allowed the plaintiffs to present expert testimony as to "whether Joan suffered any injury in fact as a result of Tomlin's failure to advise her father of the potential conflict of interest inherent in his representation of all three plaintiffs."[81]

In contrast, some courts analogize the Code to criminal statutes and hold that a violation of the Code is rebuttable evidence of malpractice. In *Lipton v. Boesky*,[82] former clients based their suits on several violations of the Code, including misconduct and failure to represent competently and zealously. Finding the situation analogous to that in criminal law and the law of torts, the court stated:

> The Code of Professional Responsibility is a standard . . . 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.[83]

Suits based on conflicts of interest comprise an increasing area of malpractice, and one in which courts increasingly rely on the Code.[84] In *Rogers v. Robson, Masters, Ryan, Brumund and Belom*,[85] the defendant law firm settled a medical malpractice action without the consent or knowledge of its client Rogers. Rogers sued, arguing that the law firm breached its duty of representation. Refering specifically to Canon 5 of the Code, the court found "it would be anomalous indeed to hold that professional standards of

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79. *Id.* at 935.
80. *Id.* at 936.
81. *Id.* at 936-37.
82. 110 Mich. App. 589, 313 N.W.2d 163 (1981).
83. *Id.* at 597-98, 313 N.W.2d at 166-67.
84. *See Woodruff*, 616 F.2d 924; *Ishmael*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592; *Lysick*, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406; Crest Inv. Trust, Inc. v. Comstock, 23 Md. App. 280, 327 A.2d 891 (1974); Annot., 28 A.L.R.3d 389 (1969).
85. 74 Ill. App. 3d 467, 392 N.E.2d 1365 (1979), *aff'd* 81 Ill. 2d 201, 407 N.E.2d 47 (1980). In *Rogers*, the interests of the insurer and insured were discordant. The insurance company preferred settlement but, Rogers, the insured, did not.

ethics are not relevant considerations in a tort action, but are in a disciplinary proceeding."[86] Since malpractice suits and disciplinary proceedings involve conduct which falls below minimum standards, the court found the Code to be equally relevant in each.[87]

IV. The Model Rules of Professional Conduct

Since the American Bar Association adopted the Model Rules of Professional Conduct in 1983, no court has addressed their role in legal malpractice. The ABA drafted the Model Rules to remedy the inherent problems of the Code which had become unresponsive to the complexities of legal practice.[88] The three-tiered structure posed problems as legal commentary interpreting the Code frequently blurred the distinctions.

The Code's ethical considerations, though only "aspirational," substantively comment on the disciplinary rules and their rationale.[89] Courts refer to the Canons' precepts to find mandatory duties not expressly stated in the Disciplinary Rules.[90] The standards do not address conflicts of interest with regard to former clients nor do they consider nonlitigative situations. As commentators note, "the standards of conduct reflected in the Canons . . . are rooted in the 19th Century era of the individualized practitioner."[91] The Model Rules functionally approach the problems of legal practice and separately treat the many different roles of a lawyer. Beyond organization and format, the Model Rules evince substantive changes. The drafters broadened the scope of mandatory and permissive disclosure; they addressed the unique ethical requirements involved in representing a corporation; they particularized the rule of imputed disqualification; and they supplanted the Code with affirmative responsibilities of competence, diligence, and communication.[92]

Like the Code, the Model Rules "define proper conduct for purposes of professional discipline."[93] Similarly, the drafters stated

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86. *Id.* at 473, 392 N.E.2d at 1371.

87. *Id.*

88. G. Hazard, Jr. & W. Hoades, The Law of Lawyering: A Handbook On The Model Rules of Professional Conduct xxix-xxxi (1985).

89. ABA Model Code of Professional Responsibility EC 4-6, EC 7-21, EC 7-24, EC 7-33.

90. Walter, *An Overview of the Model Rules of Professional Conduct*, 24 Washburn L.J. 443, 452 (1985).

91. *Id.* at 451.

92. *See* ABA Model Rules of Professional Conduct, Rule 1.3, Rule 1.7 (organization as client), Rule 3.1 (broadening disclosure); Rule 1.10, Rule 1.11, Rule 1.12 (imputed disqualification), Rule 1.13; Rule 1.1, Rule 1.3, Rule 1.4 (affirmative duties).

93. Preamble, ABA Model Rules of Professional Conduct.

explicitly that a "[v]iolation 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 for civil liability."[94]

V. The Model Rules as a Standard of Civil Liability

In a nutshell, the issue facing courts in recent decisions asks: "If a lawyer can be disciplined under the standards of the Model Rules, why should the Model Rules not be relevant in a civil case protecting the client?"[95] Applying disciplinary standards in civil cases ignores the reasoning of their drafters.[96] Application of the Model Rules fails to deal with the unique nature of the disciplinary rules for lawyers; it risks distortion of the effect of the Model Rules. These risks become clearer when comparing the disciplinary use of the Model Rules with their use in a civil malpractice suit.

As a code of professional conduct, the Model Rules are unique:

> The Supreme Court of the State of Montana . . . declares that it possesses original and exclusive jurisdiction and responsibility under Art. VII, § 2(3), 1972 Montana Constitution and the provisions of Chapter 6, Title 37, Montana Code Annotated, in addition to its inherent jurisdiction, in all matters involving admission of persons to practice law in the State of Montana, and the conduct of disciplining of such persons.[97]

No other profession has its disciplinary rules both adopted and enforced by the highest judicial authority in the state.[98]

The enforcement procedure is unique as well.[99] The Montana Supreme Court appoints the enforcing body from among lawyers and lay people.[100] This Commission acts in the name of the Supreme Court.[101] It appoints representatives for people who have filed complaints.[102] The proceedings are *sui generis* by definition;

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94. *Id.* at 73.

95. *Rogers*, 74 Ill. App. 3d 467, 392 N.E.2d 1365.

96. Preamble, ABA Model Rules of Professional Conduct.

97. Preamble, Rules for Lawyer Disciplinary Enforcement, supra note 44, at 129.

98. For instance, accountants rely on ethical rules promulgated by the American Institute of Certified Public Accountants. The Montana Board of Public Accountants adopts rules of professional conduct. By statute, a violation of these rules is a misdemeanor. *See* Mont. Code Ann. § 37-50-101 to -342 (1985).

99. Rules 7-27, Rules for Lawyer Disciplinary Enforcement, *supra* note 44, at 130-35.

100. Rule 1, Rules for Lawyer Disciplinary Enforcement, supra note 44, at 129.

101. *Id.*

102. Rule 4 and 9C, Rules for Lawyer Disciplinary Enforcement, *supra* note 44, at 130-31.

they are expressly neither civil nor criminal.[103] Carefully designed to ensure consideration of the interests of the courts, the complainant, and the lawyer, the proceedings are privileged and inadmissible in any civil lawsuit.[104] The Supreme Court reviews the results of the hearings and determines discipline.[105] No other profession is singled out constitutionally for such close judicial scrutiny.

The Montana Supreme Court adopted the Model Rules to aid the legal system.[106] The Model Rules exist to ensure the integrity of the legal system as a whole by forcefully reminding attorneys that their first loyalty is to the court. Taking the Model Rules out of this context removes the motivating force behind them. A legal malpractice suit neglects the party most involved in and affected by the professional standards of the Model Rules—the legal system itself. In a legal malpractice suit, however, the court reverts to its accustomed role as arbiter. The suit focuses on the relationship between the attorney *and* the client. Using the Model Rules in this context renders two harms. First, their use would emphasize only one aspect of the Model Rules—the attorney/client—to the exclusion of the Model Rules' impact on the legal system. Second, their use would encourage attorneys to elevate those Model Rules which relate to the attorney-client relationship. Attorneys would thereby distance themselves from the court system and consider more important their relationship with clients than their relationship with the legal system.

Significantly, a number of the Model Rules require conduct by an attorney which a client could perceive as harmful to his own interest.[107] The Model Rules are designed, in many instances, to temper an attorney's zeal in representing his clients.[108] To the extent that the Model Rules temper zeal, they foreseeably harm those clients. For example, Rule 1.6(b) provides in part that "A lawyer may reveal [information relating to representation of a client] to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or susbstantial bodily

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103. Rule 15A, RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, *supra* note 44, at 132.

104. Rule 13, RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, *supra* note 44, at 132.

105. Rule 9E, RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, *supra* note 44, at 131.

106. Supreme Court Order No. 84-303, Rules of Professional Conduct (1985), *reprinted in* MONTANA LAWYERS DESKBOOK 136 (1985).

107. Rule 3.3, for instance, emphasizes the lawyer's duty to prevent perjury over any obligation as an advocate. *See* Strickland v. Washington, 466 U.S. 688 (1984).

108. Rule 1.6, Rule 1.16, Rule 3.2, Rule 3.3, Rule 3.4, Rule 3.5, Rule 4.1 of the RULES OF PROFESSIONAL CONDUCT.

harm . . . ."[109] Rule 3.3 requires disclosure of adverse authority.[110] Disclosure in these instances could conceiveably harm the client. But, implicit in these rules is an attorney's overriding duty to the court system.[111] The standards of Rule 1.6 and Rule 3.3 interpose a higher duty: the duty of the attorney to a system of laws and the duty of a lawyer to the courts which administer those laws.

In determining negligence in a legal malpractice action, jurors must ask what is reasonable under the circumstances.[112] Thus, plaintiffs introduce expert testimony to indicate that under these particular circumstances the attorney acted unreasonably.[113] The Model Rules provide little guidance in a legal malpractice action precisely because they do not apply to specific circumstances. Indeed, the Model Rules fail to relate to specific instances of conduct at all.[114]

One example is conflicts of interest. The Model Rules restrict representation of clients with actual or apparent conflicts.[115] When attorneys represent a client's fundamental rights, conflicts of interest detract from the appearance of fairness.[116] A client's faith in his attorney's loyalty remains essential to confidence in the integrity of the system.

Proof of a conflict, by itself, does not prove damage to the client in terms of a negligence cause of action. The test still is whether the attorney appropriately managed the matter at hand. While attorneys seek to avoid conflicts of interest, the Rule which proscribes them does not necessarily result in harm to a client. The rule recognizes the likelihood of misconduct toward one client when the attorney represents both sides of an issue. But, to establish negligence, a litigant still must prove a specific instance of action or inaction which damages him.[117] He must demonstrate that the task for which the lawyer was engaged was not accomplished

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109. Rule 1.6 of the RULES OF PROFESSIONAL CONDUCT, *supra* note 54, at 138-39.

110. Rule 3.3, RULES OF PROFESSIONAL CONDUCT, *supra* note 54, at 142.

111. *Strickland*, 466 U.S. 668.

112. *Scott*, 182 Mont. 528, 597 P.2d 1150.

113. MALLEN, *supra* note 1, at 843-47.

114. *See, e.g.*, Rule 1.1, 1.3, 1.4 of the RULES OF PROFESSIONAL CONDUCT, *supra* note 54, at 138.

115. Rules 1.7, 1.8, and 1.9 of the RULES OF PROFESSIONAL CONDUCT, *supra* note 54, at 139.

116. In the context of conflicting interests, courts express concern that lawyers should avoid the "appearance of professional impropriety." Alexander v. Superior Court, 141 Ariz. 157, 685 P.2d 1309 (1984).

117. Brosie v. Stockton, 105 Ariz. 574, 577, 468 P.2d 933, 936 (1970). In *Woodruff*, the court recognized the attorney's conflict of interest. Nonetheless, the plaintiff had to present expert testimony on the issue of injury and damage. 616 F.2d at 936-37.

appropriately. Proof of a conflict of interest merely begs the question of competent representation; it does not address the substance of whether a lawyer acted competently in the task assigned.

Introducing the rule prohibiting conflicts of interest in a malpractice action shifts the focus from the actual misconduct.[118] Use of the rule adds nothing to a jury's understanding of whether the attorney exercised reasonable care under the circumstances of handling a matter for a client.

Nonetheless, it is in this area of representing conflicting interests that courts have applied provisions of the Code as a standard for liability.[119] It was not necessary for them to do so. Courts ask rhetorically why these disciplinary standards cannot also be used to protect individual plaintiffs. The answer: individual plaintiffs already have specific standards to protect them.

The Model Rule pertaining to conflicts of interest is not an isolated example. Other Model Rules are also one step removed from measuring specific incidents of negligence.[120] Rule 1.1 states that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[121] Inherently vague, the Rule provides no guidance for determining whether particular representation was incompetent. Rule 1.3 states that "A lawyer shall act with reasonable diligence and promptness in representing a client."[122] Again, the Rule necessitates expert testimony to explain the reasonableness of the attorney's representation. The Model Rules act as platitudes rather than standards of conduct in proving negligence.

The Montana Supreme Court intended the Model Rules to be read together with the Rules Governing the Commission on Practice.[123] Designed to be used in this context, the Model Rules pro-

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118. Focusing on an alleged conflict of interest ignores the critical issue of competent representation. *See* Lange v. Marshall, 622 S.W.2d 237 (Mo. App. 1981).

119. *Brosie*, 105 Ariz. 574, 468 P.2d 933; Weiner v. Mitchell, Silberberg & Knupp, 114 Cal. App. 3d 39, 170 Cal. Rptr. 533 (1980); *Ishmael*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592; *Rogers*, 74 Ill. App. 3d 467, 392 N.E.2d 1365.

120. *See, e.g.*, Rules 1.1, 1.3, 1.4, 1.14, 2.1, 3.1, and 4.4 of the PROFESSIONAL RULES OF CONDUCT, *supra* note 54, at 138-44.

121. Rule 1.1, RULES OF PROFESSIONAL CONDUCT, supra note 54, at 138.

122. Rule 1.3, RULES OF PROFESSIONAL CONDUCT, supra note 54, at 138.

123. Supreme Court Order No. 84-303, RULES OF PROFESSIONAL CONDUCT, *supra* note 106, at 137. The Montana Supreme Court ordered "By and under the authority vested in the Supreme Court of the State of Montana in Article VII, § 2(3), we do hereby promulgate and adopt the RULES OF PROFESSIONAL CONDUCT, Rule 1.1 to Rule 8.5 inclusive, attached hereto as *rules governing the conduct of persons admitted to practice law before this Court and all state courts in the State of Montana.*" (emphasis added).

tect the legal system—attorney, client, and the court. The Model Rules neither add nor detract from the ability of a private litigant to bring a suit for legal malpractice.

VI. CONCLUSION

There is a compelling reason why the drafters designed neither the Code nor the Model Rules to create a private cause of action. The Code and Model Rules are blueprints for the complicated scheme of the attorney's interlocking duties toward client and court. Focusing on one end of this interrelationship blurs the view of the scheme as a whole.

When courts reject the warning of the Model Rules' drafters, they risk changing the substance of the rules. Plaintiffs, through the flexible remedies of the common law, already have the tools necessary to gain their legitimate ends. They need not rely on the Model Rules as a measure of liability.

The courts and our system of laws, however, have no other detailed set of rules to protect them. Changing the focus of the Model Rules deprives all who depend on the courts the integrity of the judicial system. The Model Rules insure that integrity; they should be enforced vigorously and exclusively toward that end.