

## **The Interaction Between the Rules of Professional Conduct and Malpractice Actions in the District of Columbia, Maryland, and Virginia**

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The sanctioning of an attorney by a disciplinary authority does not mean that the attorney has committed malpractice. A finding of liability in a malpractice case does not mean that there has been a violation of the Rules of Professional Conduct. But what is the interplay between the Rules of Professional Conduct and malpractice actions? Section 20 of the Preamble of the ABA Model Rules of Professional Conduct, as amended through August 2007, states clearly that a “[v]iolation 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.”<sup>2</sup> However, the final sentence of Section 20 does state, “[n]evertheless, 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.”

The language makes it very clear that a violation of a Rule of Professional Conduct is not presumptive proof that malpractice has occurred. However, the plaintiff’s bar has attempted to use violations, perceived or actual, of the Rules of Professional Conduct, as proof of malpractice. A review of case law in the tri-state area shows that “many courts have determined that pertinent ethical standards are admissible as evidence

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<sup>1</sup> The Authors would like to acknowledge Patricia H. Beall’s research for this article.

<sup>2</sup> Section 20 of the Preamble of the ABA Model Rules of Professional Conduct, as amended through August 2007, 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.

relevant to the standard of care in legal malpractice actions along with other facts and circumstances.”<sup>3</sup> This article provides a review of the case law in the District of Columbia, Maryland, and Virginia.

## **DISTRICT OF COLUMBIA**

The District of Columbia did not adopt Section 20 when it adopted the Rules of Professional Conduct. Instead, the District included the following paragraph in its Scope section:

[4] Nothing in these Rules, the Comments associated with them, or this Scope section is intended to enlarge or restrict existing law regarding the liability of lawyers to others or the requirements that the testimony of expert witnesses or other modes of proof must be employed in determining the scope of a lawyer’s duty to others. Moreover, nothing in the Rules or associated Comments or this Scope section is intended to confer rights on an adversary of a lawyer to enforce the Rules in a proceeding other than a disciplinary proceeding. Some judicial decisions have considered the standard of conduct established in these Rules in determining the standard of care applicable in a proceeding other than a disciplinary proceeding. A tribunal presented with claims that the conduct of a lawyer appearing before that tribunal requires, for example, disqualification of the lawyer and/or the lawyer’s firm may take such action as seems appropriate in the circumstances, which may or may not involve disqualification.<sup>4</sup>

Section 4 acknowledges that “[s]ome judicial decisions have considered the standard of conduct established in these Rules in determining the standard of care applicable in a proceeding other than a disciplinary proceeding.” Thus, the District of Columbia Courts view violations of the Rules of Professional conduct as evidence relevant to the standard of care for attorneys.<sup>5</sup>

### *DISTRICT OF COLUMBIA COURT OF APPEALS*

In *Waldman v. Levine*, 544 A.2d 683 (D.C. 1988), a legal malpractice case, the District of Columbia Court of Appeals held that a legal expert’s testimony that he

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<sup>3</sup> Kathleen J. McKee, Annotation, *Admissibility And Effect Of Professional Ethics In Legal Malpractice Actions*, 50 A.L.R.5<sup>th</sup> 301 (2008).

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[http://www.dcbbar.org/for\\_lawyers/ethics/legal\\_ethics/rules\\_of\\_professional\\_conduct/amended\\_rules/scope.cfm](http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/rules_of_professional_conduct/ amended_rules/scope.cfm)

<sup>5</sup> *Id.* at §§ 3, 5.

considered portions of the Code of Professional Responsibility was admissible.

In the underlying medical malpractice matter, the attorneys failed to consult the proper expert witnesses. During the legal malpractice trial, the plaintiff's standard of care expert testified that failure to consult the required medical expert caused the attorneys' conduct to fall below the minimum standard of care for attorneys in medical malpractice cases. The expert testified that he considered certain provisions of the Code of Professional Responsibility for lawyers when deciding the whether the standard of care was met. The Court of Appeals stated, "[a] number of courts have held that although the Code does not attempt to delineate the boundaries of civil liability for the professional conduct of attorneys, its provisions constitute some evidence of the standards required of lawyers."<sup>6</sup>

In *Griva v. Davison*, 637 A.2d 830 (D.C. 1994), one partner, Griva, sued the other partners in a Maryland limited partnership and the law firm that represented the partners individually and represented the partnership, claiming breach of fiduciary duties. The Court of Appeals held that material issues of fact precluding summary judgment "existed as to whether [the] attorneys had breached Code of Professional Responsibility standards regarding dual representation,"<sup>7</sup> and "material issues of fact existed as to whether firm had violated conflict of interest principles under the Rules of Professional Conduct, by apparently discussing dissolution of [the] partnership with one partner."<sup>8, 9</sup>

The court remanded the case stating "... in the event such violations [of the Code of Professional Responsibility or Rules of Professional Conduct] are proved, there is a precedent for their serving as a basis for civil liability."<sup>10</sup> *Griva* quotes the "Scope" section of the Rules of Professional Conduct, beginning with "[v]iolation of a Rule does not necessarily give rise to a cause of action ...." But goes on to state "[d]espite these cautious statements in the 'Scope' section of the Rules and the absence of similar language in the Code, case law confirms that a violation of the Code of Professional Responsibility or of the Rules of Professional Conduct can constitute a breach of the attorney's common law fiduciary duty to the client."<sup>11</sup>

On January 1, 1991, the D.C. Rules of Professional Conduct were "adopted and promulgated as the standards governing the practice of law in the District of Columbia."<sup>12</sup>

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<sup>6</sup> *Waldman v. Levine*, 544 A.2d 683, 691 (D.C. 1988).

<sup>7</sup> *Griva v. Davison*, 637 A.2d 830, 830 (D.C. 1994).

<sup>8</sup> *Id.*

<sup>9</sup> "With respect to conduct occurring before January 1, 1991, the provisions of the Code of Professional Responsibility in effect on the date of the conduct in question are the governing rules of decision for the D.C. Court of Appeals, the Board of Professional Responsibility, its hearing committees, and the Bar Counsel." Administrative Order, No. M-165-88 (D.C. Court of Appeals, Dec. 18, 1989).

<sup>10</sup> *Griva v. Davison*, 637 A.2d 830, 848 (D.C. 1994).

<sup>11</sup> *Id.* at 846.

<sup>12</sup> Administrative Order, No. M-165-88 (D.C. Court of Appeals, Dec. 18, 1989)

Both *Waldman* and *Griva* looked to the D.C. Code of Professional Responsibility for direction. However, as stated above, in 1991 the D.C. Court of Appeals adopted the Rules of Professional Conduct. Scope Section 4 unequivocally states “[s]ome judicial decisions have considered the standard of conduct established in these Rules in determining the standard of care applicable in a proceeding other than a disciplinary proceeding.” While the Court of Appeals has not spoken directly on the matter, the D.C. Courts now view violations of the Rules of Professional conduct as evidence relevant to the standard of care for attorneys.<sup>13</sup>

#### *DISTRICT OF COLUMBIA FEDERAL COURTS*

In *Williams v. Mordkofsky*, 901 F.2d 158, 163 (D.C. Cir. 1990),<sup>14</sup> the United States District Court for the D.C. Circuit, citing *Waldman v. Levine*, stated “[w]hile the Model Code does not provide for a direct private malpractice action, violations of the Code certainly constitute evidence in an action at common law.”

The Williamses had a long-standing relationship with their attorney Mordkofsky. The Williamses, through one of their corporations, Intermountain, applied for a license to build a television station. In the application process, Intermountain included a statement that it would devote its full-time management to the station. While that application was pending, the Williamses, through another of their corporations, UTI, applied for an application to construct a cellular radio facility. At the suggestion of Mordkofsky, the Williamses included a similar statement of commitment, despite the fact that those two statements conflicted if they were granted both licenses. As a result of the conflicting statements, the Williamses did not obtain the television license they applied for.

The court stated, “[w]e observe in passing that, if Mordkofsky acted as alleged by appellants, his conduct raises serious concern, and likely violated provisions of the Model Code of Professional Responsibility. While the Model Code does not provide for a direct private malpractice action, violations of the Code certainly constitute evidence in an action at common law.”<sup>15</sup>

In *Hendry v. Pelland*, 73 F.3d 397 (D.C. Cir. 1996), the Hendry family - a mother, son, daughter, and the daughter’s children - owned land as tenants in common. All members of the family agreed to sell the land to a developer contingent upon approval from the county to build a retirement home. When the county did not approve the retirement home plans, the mother agreed to amend the sales contract’s contingency to “approval of a residential complex.” The son objected to this amendment and the mother agreed to the amendment when the son was on vacation. The son then consulted Pelland, an attorney in Washington, D.C. about rescinding the contract, arguing that the mental capacity of his mother was in question. Relying on the agreement’s “good faith” clause,

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<sup>13</sup> *Id.* at §§ 3, 5.

<sup>14</sup> Prior to the adoption of the Rules of Professional Conduct.

<sup>15</sup> *Williams v. Mordkofsky*, 901 F.2d 158, 163 (D.C. Cir. 1990).

Pelland advised his clients not to oppose the residential development.<sup>16</sup> When the county approved the residential plans, all the owners, including the mother, refused to sell to the developer. The developer sued for breach of contract and unjust enrichment for failure to sell the property. On the eve of trial, at the suggestion of the judge and Pelland's advice, the family paid the developer \$1.5M. While Pelland originally represented only the son and his wife, he represented all the owners of the property in defending the lawsuit. Then, the son and his wife and the mother sued Pelland for professional negligence and breach of fiduciary duty.

The Hendry family alleged that Pelland violated DR 5-105(b)<sup>17</sup>, Refusing to Accept or Continue Employment if the Interest of Another Client May Impair the Independent Professional Judgment of the Lawyer. The District Court, citing *Griva*, stated "... we agree with the Hendrys that their evidence that Pelland violated one of the rules of the District of Columbia Code of Professional Responsibility was sufficient to support their claim that he violated his common law fiduciary duty. While not holding that the ethical rules are co-extensive with the attorney's fiduciary duties, the District of Columbia Court of Appeals in *Griva* ... clearly rules that a violation of the Code of Professional Responsibility can constitute a breach of the attorney's common law fiduciary duty to the client."<sup>18</sup>

The Federal Court and the State Court agree that violations of the Rules of Professional Conduct are evidence of a breach of a standard of care.

## MARYLAND

The Maryland Rules of Professional Conduct<sup>19</sup> closely follow the ABA Model Rules, including the sentence "[n]evertheless, in some circumstances, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." The only major difference between the two is the addition of the last sentence of the paragraph

Nothing in this Preamble and Scope is intended to detract from the holdings of the Court of Appeals in *Post v. Bregman*, 349 Md. 142 (1998) and *Son v. Margolius, Mallios, Davis, Rider & Tomar*, 349 Md. 441 (1998).<sup>20</sup>

Two cases dealing with the topic in Maryland are *Ahan v. Grammas*, 2004 WL 2724111 (2004) and *Hooper v. Gill*, 557 A.2d 1349 (Md. App. 1988). In the *Hooper*

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<sup>16</sup> *Hendry v. Pelland*, 73 F.3d 397, 399 (D.C. Cir. 1996).

<sup>17</sup> Precursor to Rule of Professional Conduct 2.2, Intermediary.

<sup>18</sup> *Hendry v. Pelland*, 73 F.3d 397, 401 (D.C. Cir. 1996).

<sup>19</sup> <http://michie.lexisnexis.com/maryland/lpext.dll?f=templates&fn=main-h.htm&cp>

Click on <Maryland Rules>, then click on the folder <MARYLAND RULES>, then click on <Appendix: The Maryland Lawyers' Rules of Professional Conduct>.

<sup>20</sup> Both of these cases deal with the issue of fee contracts, and whether violations of the Maryland Rules of Professional Conduct on these issues made the contracts void for public policy.

case, the Court of Special Appeals of Maryland declined to decide which school of thought Maryland would follow: a violation of the Rules provides no cause of action, a violation of the Rules is rebuttable evidence of malpractice, or a violation of the Rules is evidence of malpractice. A short sixteen years later in *Ahan v. Grammas*, an unpublished opinion, a Maryland circuit court, citing District of Columbia case law, decided that a violation of the Rules is evidence of a breach of common law duties.

In *Ahan v. Grammas*, 2004 WL 2724111, plaintiff formed two businesses with Modanlo, and disagreements occurred between plaintiff and Modanlo. The law firm that Grammas worked for, GCD, was the general counsel for the businesses, although the businesses continued working with several other firms. Grammas was nominated and elected as corporate secretary for both businesses. Ahan brought a malpractice lawsuit against Grammas and GCD, asserting that as corporate counsel, Grammas “has a duty not to take instruction from Modanlo, one 50% shareholder, even though that shareholder was at the top of the corporate hierarchy, if those instructions were not in the interest of Ahan.”<sup>21</sup>

The Maryland court, citing *Avianca, Inc. v. Corriea*,<sup>22</sup> states, “while not strictly providing a basis for a civil action, [the Rules] nonetheless may be considered to define the minimum level of professional conduct required of an attorney, such that a violation of one of the [Rules] is conclusive evidence of a breach of the attorney’s common law fiduciary [duty].”<sup>23</sup>

The court also cites *Waldman v. Levine, supra*, where the District of Columbia Court of Appeals affirmed a “trial court judge’s decision to allow an expert witness to use the D.C. Rules of Professional Conduct as a guide to the relevant standard of care in a malpractice action.” *Id.*

Maryland, following D.C.’s lead, accepts violations of the Rules of Professional Conduct as evidence of a breach of a standard of care.

## **VIRGINIA**

Virginia has adopted Section 20 of the ABA Model Rules Preamble in this form

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 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

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<sup>21</sup> *Ahan v. Grammas*, 2004 WL 2724111, at 10.

<sup>22</sup> *Avianca, Inc. v. Corriea*, 705 F.Supp. 666, 679 (1989)

<sup>23</sup> *Id.* at 11.

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. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

The Virginia Preamble is definitive in its statement that the Rules do not enlarge the legal duties of attorneys. The Virginia Courts have not yet addressed this issue.

Despite attempts to use violations of the Rules of Professional Conduct as presumptive proof of violations of the standards of care in malpractice cases, the courts in the area have resisted.<sup>24</sup> The Courts of the District of Columbia Courts and Maryland follow the trend that violations of the Rules of Professional Conduct can be evidence of a breach of the standard of care. The Virginia Bar, on the other hand, has stated that the Rules do not have consequences outside of the disciplinary arena.

In the area the standard of care is what a reasonable and prudent lawyer would have done under the circumstances. The Rules of Professional Conduct acknowledge that every decision a lawyer faces is dependent upon the circumstances of the situation.<sup>25</sup> Use of violations of the Rules of Professional Conduct as presumptive proof would render useless the intent of the Rules to acknowledge that every decision is dependent upon the circumstances of the situation.

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<sup>24</sup> Michigan courts have ruled that a breach of the Rules of Professional Conduct is a rebuttable presumption of legal malpractice.

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[http://www.dcbar.org/for\\_lawyers/ethics/legal\\_ethics/rules\\_of\\_professional\\_conduct/amended\\_rules/scope.cfm](http://www.dcbar.org/for_lawyers/ethics/legal_ethics/rules_of_professional_conduct/ amended_rules/scope.cfm) § 3.